Presumptions Against Extraterritoriality in State Law

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For the past three decades, the federal presumption against extraterritoriality has been the principal tool that the U.S. Supreme Court has used to determine the geographic scope of federal statutes. But the federal presumption does not apply to state statutes, the scope of which is a question of state law.

Descriptively, this Article surveys the presumptions against extraterritoriality found in state law. Twenty states currently apply such presumptions to state statutes, and those presumptions sometimes differ from their federal counterpart. Nearly as many states have rejected a presumption against extraterritoriality and determine geographic scope using ordinary tools of statutory interpretation. In other states, the status of a state presumption is unclear.

Normatively, this Article argues that states do not need presumptions against extraterritoriality because every state has conflicts rules to determine questions of priority when a case falls within the laws of more than one jurisdiction. State presumptions can also create confusion about how they fit with other conflicts rules and create inconsistency among state statutes and with state common law. Finally, this Article argues that state presumptions are not necessary to avoid conflict with foreign law in international cases.

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INTRODUCTION

In 2010, the U.S. Supreme Court applied the federal presumption against extraterritoriality to determine the geographic scope of Section 10(b), the antifraud provision of the federal Securities Exchange Act. The Court held that Section 10(b) does not apply to transactions that occur outside the United States, even when fraudulent conduct occurs inside the United States.[1] A decade earlier, the California Supreme Court determined the geographic scope of the antifraud provisions of California's Corporations Code. Relying in part on California's presumption against extraterritoriality, the court held that these provisions apply to fraudulent conduct in California, even when the transactions occur outside California.[2]

The federal presumption against extraterritoriality applies only to federal statutes, and the geographic scope of state statutes is a question of state law.[3] Some states have adopted presumptions against extraterritoriality that are generally consistent with the federal presumption, others have presumptions against extraterritoriality that differ from the federal presumption in important respects, and still others have no presumption against extraterritoriality at all.[4]

State rules on extraterritoriality not only differ from the federal presumption but also operate within the context of constraints that do

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[1] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010) ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.").

[2] *See* Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539, 557 (Cal. 1999) ("The remedy is not limited to transactions made in California."). For further discussion of *Diamond*, see *infra* notes 229–239 and accompanying text.

As these examples suggest, the word "extraterritorial" has a range of meanings. *See* Anthony J. Colangelo, *What Is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1323 (2014) (noting that "'territorial' and 'extraterritorial' are fluid constructs subject to conceptual manipulation"). At one end of that range, application of a statute might be considered extraterritorial only if there is *no* territorial connection to the regulating state. At the other end, application of a statute might be considered extraterritorial whenever there is *any* territorial connection to another state. Because "extraterritorial" is both hard to define and generally pejorative, the word is best avoided. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 reporters' note 1 (AM. LAW INST. 2018) ("To prevent confusion, this Restatement avoids the word 'extraterritorial' when possible in favor of more neutral phrases like 'geographic scope.'"). The phrase "presumption against extraterritoriality" is too widely used, however, for this Article to avoid.

[3] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (AM. LAW INST. 2018).

[4] *See infra* Part II.

not apply at the federal level. Some of these constraints are constitutional, like the limitations imposed by the dormant Commerce Clause and the Fourteenth Amendment's Due Process Clause.[5] International law may also limit the extraterritorial application of state law in a way that is not true of federal law.[6] But as a practical matter, the most significant constraints on the extraterritorial application of state law are state conflict-of-laws rules.[7]

In determining whether a state statute applies to a cross-border case, analyzing the scope of the statute is often just the first step. If the law of another jurisdiction is also applicable, the second step will be to determine which law should be given priority by applying the conflicts rules of the forum.[8] By contrast, when determining whether a federal statute applies to a cross-border case, there is no second step. The federal presumption against extraterritoriality and a few other principles of statutory interpretation must do all of the work in determining when federal statutes apply.

Because the context in which state presumptions against extraterritoriality operate is so different from the context for the federal presumption, it seems appropriate to ask whether state presumptions should differ from their federal counterpart — and even whether states should have presumptions against extraterritoriality at all. The current draft of the *Restatement (Third) of Conflicts* takes the position that states should not have presumptions against extraterritoriality.[9]

State presumptions against extraterritoriality have received relatively little scholarly attention.[10] In the wake of recent federal decisions, Professor Katherine Florey has expressed concern that state law rather than federal law will often apply in international cases, because federal

[5] *See infra* notes 247–248, 250–252, and accompanying text.

[6] *See infra* note 249 and accompanying text.

[7] *See infra* notes 184–225, 240–246, and accompanying text.

[8] *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. b (AM. LAW INST., Council Draft No. 2, 2017) (on file with the author) (describing two-step model). Properly speaking, rules used to determine the scope of a statute (including presumptions against extraterritoriality) and rules used to determine the priority of conflicting laws are both conflict-of-laws rules. For the sake of brevity, however, this Article will sometimes use "conflicts rules" to refer only to priority rules.

[9] *See id.* § 5.01 cmt. c ("This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so.").

[10] *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1755 (2010) ("Thinking about statutory interpretation in the world beyond the U.S. Supreme Court is long overdue.").

law will be constrained by a presumption against extraterritoriality while state law may not be.[11] She sees state conflicts rules and federal constitutional constraints as only "modest" limits on a state's ability to apply its own law extraterritorially.[12] And she fears that the extraterritorial application of state law in international cases "could have potentially serious consequences for U.S. foreign relations."[13] For Florey, the solution is not for states to follow the U.S. Supreme Court in applying a presumption against extraterritoriality but rather for states to strengthen their conflicts rules, particularly in international cases.[14]

Professor Hannah Buxbaum also sees a need to "differentiate between interstate and international conflicts."[15] Like Florey, Buxbaum emphasizes that the application of state law in international cases "create[s] the possibility of international discord."[16] In contrast to Florey, Buxbaum sees state conflicts rules as real limits on the application of state law.[17] This Article agrees with Buxbaum that the existence of state conflicts rules makes the analysis of state extraterritoriality fundamentally different from the analysis of federal

[11] *See* Katherine Florey, *State Law, U.S. Power, Foreign Disputes: Understanding the Extraterritorial Effects of State Law in the Wake of* Morrison v. National Australia Bank, 92 B.U. L. REV. 535, 536 (2012) [hereinafter *Understanding the Extraterritorial Effects*] ("Already, it is frequently the case — and as a result of the *Morrison* decision will likely be the case more often in future — that state law applies to such disputes where federal law does not.").

[12] *Id.* at 537 (characterizing state conflicts rules as "modest" limits); *id.* at 553 (characterizing federal constitutional constraints as "modest" limits).

[13] Katherine Florey, *Bridging the Divide: The Case for Harmonizing State and Federal Extraterritoriality Principles After* Morrison *and* Kiobel, 27 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 197, 214 (2014) [hereinafter *Bridging the Divide*].

[14] *See* Florey, *Understanding the Extraterritorial Effects*, *supra* note 11, at 574 (arguing that states should not "apply the presumption against extraterritoriality as the Supreme Court has applied it in recent years" but that they should "be cognizant of the fact that typical choice-of-law principles may be inadequate to address interjurisdictional conflicts involving other nations").

[15] Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381, 384 (2017).

[16] *Id.* at 388.

[17] *See id.* at 396 (noting that the applicability of state law is typically resolved through a "multilateral" analysis that "consider[s] multiple potentially applicable laws and ultimately . . . select[s] one to resolve the case"). Professor John Coyle has written more specifically about the interaction of choice-of-law clauses and presumptions against extraterritoriality, arguing with respect to state law that courts "should disregard the presumption and . . . enforce choice-of-law clauses." John F. Coyle, *Party Autonomy and the Presumption Against Extraterritoriality*, 55 WILLAMETTE L. REV. (forthcoming 2020) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3319849.

extraterritoriality. But the Article concludes that no additional limits on the geographic scope of state statutes in international cases are needed to avoid foreign relations difficulties.

This Article proceeds in three parts. Part I describes the federal presumption against extraterritoriality and other principles of interpretation relevant to determining the geographic scope of federal statutes. Part I also explains the absence of federal conflict-of-laws rules — specifically, priority rules — as a limit on the applicability of federal statutes. Part II describes the presumptions against extraterritoriality that are found in state law today and how they relate to state conflict-of-laws rules. Part III argues that states should abandon their presumptions against extraterritoriality. Although state presumptions have little practical effect, they often confuse the analysis and sometimes defeat the intentions of state legislatures. Instead, states should determine the scope of state statutes by using ordinary rules of statutory interpretation. When a case falls within the laws of more than one jurisdiction, states should use conflicts rules to decide which jurisdiction's laws should be given priority.

I. THE FEDERAL PRESUMPTION AGAINST EXTRATERRITORIALITY

For the past three decades, the federal presumption against extraterritoriality has been the principal tool that the U.S. Supreme Court has used to determine the geographic scope of federal statutes.[18] The current version of the federal presumption is significantly more flexible than at least some versions that the Supreme Court used in the past.[19] Courts may also rely on other principles of interpretation in determining the geographic scope of federal statutes, including a principle of reasonableness in interpretation, deference to administrative agencies, and the *Charming Betsy* canon of avoiding

[18] *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016) (Racketeer Influenced and Corrupt Organizations Act ("RICO")); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115-17 (2013) (federal-common-law cause of action under the Alien Tort Statute); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (Securities Exchange Act); Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454-456 (2007) (Patent Act); EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (Title VII of 1964 Civil Rights Act).

[19] *See* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. (forthcoming 2020) (manuscript at 62-65) [hereinafter *New Presumption*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3429336. Specifically, the current version does not operate as a clear statement rule and considers the application of a federal statute domestic whenever the focus of the statute is found in the United States. *See infra* notes 36–45 and accompanying text.

violations of international law.[20] At the outer margins, the Due Process Clause of the Fifth Amendment may also constrain the extraterritorial application of federal statutes.[21] But in contrast to state law, there are no conflict-of-laws rules at the federal level that give priority to foreign law in cases of conflicting regulation.[22]

A. An Overview of the Federal Presumption

In 1909, the U.S. Supreme Court 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."[23] Consistent with this general rule, the Court articulated a presumption that "in case of doubt," a federal statute should be construed "as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[24] The Supreme Court applied this presumption inconsistently between 1909 and 1949 and then abandoned it for four decades.[25] In 1991, however, the Supreme Court resurrected a strong version of the federal presumption against extraterritoriality in *EEOC v. Arabian American Oil Co. (Aramco)*,[26] suggesting that the presumption should be applied as a clear statement rule and (like the traditional presumption) should turn on the location of the regulated conduct.[27]

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[20] *See infra* notes 52–54 and accompanying text.

[21] *See infra* notes 55–56 and accompanying text.

[22] *See infra* notes 57–68 and accompanying text.

[23] Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

[24] *Id.* at 357. An even earlier version of the presumption against extraterritoriality construed federal statutes to avoid violations of the international law governing jurisdiction. *See, e.g.*, The Apollon, 22 U.S. (9 Wheat.) 362, 370-71 (1824). The international law governing jurisdiction in the nineteenth century tended to be territorial, but with exceptions for laws governing the conduct of citizens abroad and for punishing piracy. *See generally* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 362-66 (2010).

[25] *See* Dodge, *New Presumption*, *supra* note 19 (manuscript at 13-21).

[26] 499 U.S. 244 (1991).

[27] *See id.* at 258 (referring to Congress's "need to make a clear statement that a statute applies overseas"). The *Aramco* presumption's dependence on the location of the conduct is best seen in later cases holding that the presumption did not apply because the conduct has occurred in the United States. *See* Pasquantino v. United States, 544 U.S. 349, 371 (2005) (concluding that application of wire fraud statute was not extraterritorial because defendants had used wires in the United States); Small v. United States, 544 U.S. 385, 389 (2005) (noting that the presumption did not apply when gun possession occurred in the United States but would apply "were we to consider whether this statute prohibits unlawful gun possession abroad as well as domestically").

In 2010, the Supreme Court substantially changed the federal presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.*,[28] rejecting the proposition that it operates as a clear statement rule and abandoning the traditional view that application of the presumption turns on the location of the conduct.[29] In 2016, the Court formalized the new presumption in *RJR Nabisco, Inc. v. European Community*,[30] unanimously adopting "a two-step framework for analyzing extraterritoriality issues."[31] At step one, the question is "whether the presumption against extraterritoriality has been rebutted — that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially."[32] If the presumption has been rebutted at *RJR* step one, then the Court applies the provision extraterritorially according to its terms, without considering the statute's focus.[33] If the presumption has not been rebutted, then at step two, the question is "whether the case involves a domestic application of the statute," which depends on the statute's "focus."[34] If whatever is the focus of the provision is found in the United States, then application of the provision is considered domestic. If whatever is the focus of the provision is found abroad, then application of the provision is considered extraterritorial.[35]

The current version of the federal presumption against extraterritoriality is significantly more flexible than prior versions at both steps of the analysis. At *RJR* step one, the federal presumption does

[28] 561 U.S. 247 (2010).

[29] *See id.* at 265 (stating that the presumption is not a "clear statement rule"); *id.* at 266 (stating that whether application is extraterritorial depends on the "focus" of the provision, which might be something other than conduct).

[30] 136 S. Ct. 2090 (2016).

[31] *Id.* at 2101; *see also* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 2018) (restating the federal presumption against extraterritoriality).

[32] *RJR*, 136 S. Ct. at 2101.

[33] *See id.* ("The scope of an extraterritorial statute . . . turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's 'focus.'").

[34] *Id.*

[35] *See id.* There is language in *RJR* suggesting that at least some conduct relating to the focus of the provision must also occur in the United States. *See id.* ("If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad . . . ."). I have argued elsewhere that requiring conduct in the United States when the focus is something other than conduct would be inconsistent with what the Supreme Court has done in *RJR* and other cases. *See* William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AM. J. INT'L L. UNBOUND 45, 49-50 (2016).

not operate as a clear statement rule.[36] To find a "clear indication" of geographic scope,[37] the Supreme Court has examined the "context,"[38] the "historical background,"[39] and the "structure"[40] of federal statutory provisions. As the *Restatement (Fourth) of Foreign Relations Law* summarizes, "a court will examine all evidence of congressional intent to determine if the presumption has been overcome."[41]

At step two, application of the federal presumption no longer turns mechanically on the location of the conduct. The application of a federal statute will be considered domestic and permissible if whatever is the focus of the provision is found in the United States.[42] Sometimes, the Supreme Court has found conduct to be the focus of a provision.[43] But the Court has found that other provisions have other focuses. In *Morrison*, the Court held that the focus of Securities Exchange Act § 10(b) was the transaction, so that the provision did not apply to purchases of securities outside the United States, even when misrepresentations occurred inside the United States.[44] In *RJR*, the Court held that the focus of RICO's private right of action was the injury, and that the provision therefore "requires a civil RICO plaintiff to allege and prove a domestic injury to business or property."[45]

Applying the federal presumption against extraterritoriality, the Supreme Court has developed different tests for the geographic scope of different statutory provisions. Section 10(b) of the Securities Exchange Act, prohibiting fraud in connection with the purchase or sale of securities, applies when the transaction occurs in the United States no matter where the fraud occurs.[46] The criminal provisions of RICO

[36] *See RJR*, 136 S. Ct. at 2102 ("[A]n express statement of extraterritoriality is not essential.").

[37] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

[38] *Id.* at 265.

[39] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 119 (2013).

[40] *RJR*, 136 S. Ct. at 2103.

[41] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. b (AM. LAW INST. 2018).

[42] *Id.* § 404 cmt. c.

[43] *See, e.g.*, Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 455 (2007) (noting the "traditional understanding" that the Patent Act does "not extend to foreign activities").

[44] *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010) ("[W]e think that the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States.").

[45] *RJR*, 136 S. Ct. at 2111.

[46] *See Morrison*, 561 U.S. at 273 ("Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States.").

apply extraterritorially to the same extent as RICO's predicate acts.[47] RICO's private right of action, on the other hand, applies only when there is injury to business or property in the United States.[48] The Supreme Court has held that federal antitrust law applies to conduct abroad that causes substantial, intended effects in the United States.[49] Sometimes Congress has changed the test that the Court has developed. After *Aramco* held that Title VII of the 1964 Civil Rights Act did not apply to employment in other countries,[50] Congress amended the statute to specify that the statute applies to the employment of U.S. citizens abroad by U.S. companies and by foreign companies controlled by U.S. companies, so long as the discrimination is not required by foreign law.[51] The federal presumption has produced a set of relatively predictable tests for geographic scope based on the language and purpose of each provision and provides an approach for developing new tests when the geographic scope of a provision has not yet been determined.

B. The Federal Presumption in Context

The federal presumption against extraterritoriality does not operate in isolation. It may be supplemented by a principle of reasonableness in interpretation that permits courts to put additional limitations on the geographic scope of a provision as a matter of international comity,[52] and by the *Charming Betsy* canon of construing federal statutes to avoid

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[47] *See RJR*, 136 S. Ct. at 2104 ("RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial.").

[48] *See id.* at 2111 ("[RICO private right of action] requires a civil RICO plaintiff to allege and prove a domestic injury to business or property . . . .").

[49] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("[T]he Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."). The Supreme Court did not apply the federal presumption against extraterritoriality in *Hartford*, but its effects test is consistent with the current version of the presumption if one assumes, as the Court has, that the focus of federal antitrust laws is on anticompetitive effects. *See* F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 165 (2004) (noting that federal antitrust laws "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused").

[50] *See* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 259 (1991).

[51] *See* 42 U.S.C. § 2000e (2019) ("With respect to employment in a foreign country, such term ["employee"] includes an individual who is a citizen of the United States."); *id.* § 2000e-1 (creating exemptions).

[52] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 405 (AM. LAW INST. 2018) ("As a matter of prescriptive comity, courts in the United States may interpret federal statutory provisions to include other limitations on their applicability.").

violations of international law.[53] The federal presumption may also be superseded by the principle of deference to administrative agencies when a federal agency has interpreted the geographic scope of a provision.[54]

The Due Process Clause of the Fifth Amendment may also impose constitutional limits on the extraterritorial application of federal law in extreme cases. Federal courts have held that due process requires "a sufficient nexus between the defendant and the United States, so that such application [of the statute] would not be arbitrary or fundamentally unfair."[55] This test appears to have been met, however, in every case in which it has been applied.[56]

There are no federal conflict-of-laws rules that limit the application of federal statutes by giving priority to foreign law.[57] This is in sharp contrast to state statutes, to which state conflicts rules are often applied after the scope of a state provision has been determined.[58] To be clear, courts do sometimes apply federal conflicts rules to choose among competing laws in the course of applying various federal statutory schemes.[59] But courts do not apply federal conflicts rules to give priority

[53] *See id.* § 406 ("Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe.").

[54] *See id.* § 404 cmt. e ("If Congress has not spoken directly to the geographic scope of a statutory provision, courts in the United States must defer to a reasonable construction of the statute by an administering agency exercising delegated lawmaking authority." (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837 (1984))). *See generally* William S. Dodge, Chevron *Deference and Extraterritorial Regulation*, 95 N.C. L. REV. 911 (2017) (discussing deference to agency determinations of geographic scope).

[55] United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990) (citing United States v. Peterson, 812 F.2d 486, 493 (9th Cir. 1987)); *see also* United States v. Brehm, 691 F.3d 547, 552 (4th Cir. 2012); United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378 (11th Cir. 2011); United States v. Yousef, 327 F.3d 56, 111 (2d Cir. 2003).

[56] *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporters' note 4 (AM. LAW INST. 2018) (discussing cases and noting that all of them "rejected the due-process claim on its merits").

[57] In earlier work, I have shown that federal approaches to extraterritoriality have been influenced by various approaches to the conflict of laws. *See* William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 104 (1998) [hereinafter *Extraterritoriality and Conflict-of-Laws Theory*].

[58] As discussed below, states have taken different positions on how state rules for determining geographic scope — including state presumptions against extraterritoriality — relate to state conflicts rules. *See infra* Part II.E.

[59] *See, e.g.*, Chau Kieu Nguyen v. JP Morgan Chase Bank, NA, 709 F.3d 1342, 1345 (11th Cir. 2013) (per curiam) (applying federal conflicts rules to determine applicable statute of limitations for claims under the Edge Act); DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden, 448 F.3d 918, 922 (6th Cir. 2006) (applying federal conflicts

to foreign law in cases that fall within the scope of both a federal statute and foreign law.

Several factors appear to have contributed to the different treatment of federal and state statutes in the conflict of laws. First, as Professor Caleb Nelson has described, the Supreme Court's holding in *Erie Railroad Co. v. Tompkins*[60] that federal courts must generally apply state rather than federal common law[61] was soon extended to conflicts.[62] In *Klaxon Co. v. Stentor Electric Manufacturing Co.*,[63] the Court held that federal courts exercising diversity jurisdiction must apply the conflicts rules of the states in which they sit.[64] Although *Klaxon* did not technically preclude federal courts from developing federal conflicts rules for federal law, *Erie*'s abolition of federal common law[65] left only federal statutes for such conflicts rules to work on. Rather than develop federal common law rules for federal statutes, the Supreme Court chose to treat the applicability of federal statutes as questions of statutory interpretation.[66] Second, limits on the subject matter jurisdiction of federal courts may require that a case be dismissed if a federal statute is held not to be applicable, unless some other basis for federal jurisdiction exists, leaving no opportunity for the federal court to apply foreign law. Third, in a regulatory context, the potentially applicable foreign law will often be considered "public" law, which courts in the United States have traditionally been reluctant to apply.[67] Whatever the reasons, federal

rules to determine law governing validity of marriages under ERISA). The Courts of Appeals are divided on whether to apply federal or state conflicts rules in cases brought under the Foreign Sovereign Immunities Act ("FSIA"). *Compare* Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 961 (9th Cir. 2017) (holding that federal conflicts rules apply to choice-of-law determinations under the FSIA), *with* Oveissi v. Islamic Republic of Iran, 573 F.3d 835, 841 (D.C. Cir. 2009) (holding that state conflicts rules apply to choice-of-law determinations under the FSIA), *and* Barkanic v. Gen. Admin. of Civil Aviation of China, 923 F.2d 957, 959-60 (2d Cir. 1991) (same).

60 304 U.S. 64 (1938).

61 *See id.* at 78 ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

62 *See* Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 724-28 (2013).

63 313 U.S. 487 (1941).

64 *Id.* at 496 ("The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts.").

65 *See Erie*, 304 U.S. at 78 ("There is no federal general common law.").

66 As Nelson has noted, the move to statutory interpretation also avoided the "odd" result that state law might "determine the applicability of a federal statute." Nelson, *supra* note 62, at 727 (emphasis omitted).

67 *See* William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 DUKE J. COMP. & INT'L L. 371, 387-93 (2008) (discussing "public law taboo").

courts have failed to develop federal conflicts rules to give priority to foreign law in appropriate cases.[68]

This means that the federal presumption against extraterritoriality (supplemented by the other rules of statutory interpretation discussed above) must do essentially all of the work in determining when federal statutory provisions apply extraterritorially. Courts applying state law, by contrast, may rely on state conflicts rules to supplement — or even to replace — rules of statutory interpretation in determining when state law applies extraterritorially. Part III will argue that this fundamental difference in context affects what state presumptions against extraterritoriality should look like and even whether states should have presumptions against extraterritoriality at all. But first it is necessary to look at the presumptions against extraterritoriality that exist in state law today.

II. PRESUMPTIONS AGAINST EXTRATERRITORIALITY IN STATE LAW

States have many of the same kinds of statutes that the federal government does. States have antitrust statutes,[69] securities (or "Blue Sky") statutes,[70] employment discrimination statutes,[71] and RICO statutes.[72] States also have unfair trade practices statutes,[73] insurance

[68] Today, even when federal courts apply federal conflicts rules to decide choice-of-law questions under federal statutes, they typically look to the *Restatement (Second) of Conflicts*, which is based largely on state decisions. *See, e.g.*, Cassirer v. Thyssen-Bornemisza Collection Found., 862 F.3d 951, 961 (9th Cir. 2017); Chau Kieu Nguyen v. JP Morgan Chase Bank, NA, 709 F.3d 1342, 1345 (11th Cir. 2013) (per curiam); DaimlerChrysler Corp. Healthcare Benefits Plan v. Durden, 448 F.3d 918, 922 (6th Cir. 2006).

[69] *See* AM. BAR ASS'N, STATE ANTITRUST PRACTICE AND STATUTES (5th ed. 2014) (summarizing state antitrust laws).

[70] *See* 3-4 ROBERT N. RAPP, BLUE SKY REGULATION (2019); *see also* Paul G. Mahoney, *The Origins of the Blue-Sky Laws: A Test of Competing Hypotheses*, 46 J.L. & ECON. 229, 229 (2003) ("Between 1911 and 1931, 47 of the 48 states adopted state securities, or 'blue-sky,' laws.").

[71] *See* Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545, 557 n.109 (2013) (listing state employment discrimination statutes).

[72] *See* G. Robert Blakey, *Time-Bars: RICO — Criminal and Civil — Federal and State*, 88 NOTRE DAME L. REV. 1581, 1592 n.13 (2013) (listing state RICO statutes).

[73] *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW (2018) (summarizing state unfair and deceptive trade practices statutes).

statutes,[74] dealer bond statutes,[75] *lis pendens* statutes,[76] wage and hours statutes,[77] and workers' compensation statutes.[78] Courts have had to decide when to apply many of these statutes to cases that cross borders, both interstate and international.

Sometimes such cases end up in federal court, often because the parties are from different states or different countries.[79] Federal courts sometimes assume that all states have presumptions against extraterritoriality,[80] or that state presumptions mirror the federal presumption.[81] Sometimes judges even assume that a presumption against extraterritoriality applies to state common law.[82] Many federal courts properly look to state interpretive rules to construe the geographic scope of state statutes.[83] But even then they sometimes rely

[74] *See* JEFFREY E. THOMAS ET AL., NEW APPLEMAN ON INSURANCE LAW (2014) (summarizing state insurance laws).

[75] *See* AM. BAR ASS'N, THE LAW OF MOTOR VEHICLE DEALER BONDS (William A. Downing et al. eds., 2006) (discussing state dealer bond statutes).

[76] *See* Tracy M. Miller, Note, *A Due Process Analysis of the Alabama Lis Pendens Statutes*, 26 AM. J. TRIAL ADVOC. 185, 209 n.135 (2002) (listing state *lis pendens* statutes).

[77] *See* Daniel V. Dorris, Comment, *Fair Labor Standards Act Preemption of State Wage-and-Hour Law Claims*, 76 U. CHI. L. REV. 1251, 1257-60 (2009) (discussing state wage and hour statutes).

[78] *See* JACK B. HOOD, BENJAMIN A. HARDY, JR. & LAUREN A. SIMPSON, WORKERS' COMPENSATION AND EMPLOYEE PROTECTION LAWS IN A NUTSHELL (6th ed. 2017) (discussing state workers' compensation laws).

[79] *See* 28 U.S.C. § 1332 (2019) (granting federal courts subject matter jurisdiction when the citizenship of the parties is diverse).

[80] *See* IMS Health, Inc. v. Mills, 616 F.3d 7, 26 (1st Cir. 2010) ("Maine, like other states, generally presumes its statutes do not apply extraterritorially in the absence of contrary indications of legislative intent."), *vacated on other grounds sub nom.*, IMS Health, Inc. v. Schneider, 564 U.S. 1051 (2011); Longaker v. Boston Sci. Corp., 872 F. Supp. 2d 816, 819 (D. Minn. 2012) ("A general presumption exists against the extra-territorial application of a state's statutes."), *aff'd*, 715 F.3d 658 (8th Cir. 2013).

[81] *See, e.g.*, Blackman v. Lincoln Nat'l Corp., No. 10-6946, 2012 WL 6151732, at *4 (E.D. Pa. Dec. 10, 2012) (applying federal presumption to Pennsylvania employment discrimination statute); Judkins v. Saint Joseph's Coll. of Me., 483 F. Supp. 2d 60, 65 (D. Me. 2007) (applying federal presumption to determine geographic scope of Maine employment discrimination).

[82] *See* Al Shimari v. CACI Int'l, Inc., 679 F.3d 205, 231 (4th Cir. 2012) (Wilkinson, J., dissenting) ("[T]he presumption against extraterritorial application is even stronger in the context of state tort law.").

[83] *See, e.g.*, Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98, 111 (2d Cir. 2012) (applying California presumption to California statute); Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc., 492 F.3d 484, 489 (4th Cir. 2007) (applying South Carolina presumption to South Carolina statute); O'Connor v. Uber Techs., Inc., 58 F. Supp. 3d 989, 1005 n.8 (N.D. Cal. 2014) (distinguishing Massachusetts cases as irrelevant to interpreting California statute).

on old cases articulating state presumptions against extraterritoriality that no longer reflect current state law.[84]

Not all states have presumptions against extraterritoriality. By my count, twenty states today apply a presumption against extraterritoriality to determine the geographic scope of state laws, sometimes in ways that depart from the federal presumption. Another seventeen states do not apply a presumption against extraterritoriality. In the remaining thirteen states, the status is unclear — one can find old cases articulating a presumption against extraterritoriality, but the highest court in each of these states has not applied such a presumption for at least fifty years. The states that have adopted presumptions do not distinguish between interstate and international cases when applying those presumptions. And no state applies its presumption against extraterritoriality to state common law.

Table 1. List of States With and Without Presumptions[85]

States	With Presumption	Without Presumption	Status Unclear
Alabama	X		
Alaska		X	
Arizona	X		
Arkansas	X		
California	X		
Colorado		X	
Connecticut	X		
Delaware	X		
Florida		X	
Georgia		X	
Hawaii		X	
Idaho	X		

[84] *See, e.g.*, Harris v. CVS Pharmacy, Inc., No. ED CV 13-02329-AB(AGRx), 2015 WL 4694047, at *4 (C.D. Cal. Aug. 6, 2015) ("To the contrary, Rhode Island law is clear that, absent some indication to the contrary 'extraterritorial force cannot be given to a [Rhode Island] statute.'" (quoting Farrell v. Emp'r's Liab. Assur. Corp., 168 A. 911, 912 (R.I. 1933))); Boehner v. McDermott, 332 F. Supp. 2d 149, 155 (D.D.C. 2004) ("Florida's strong presumption against extraterritorial application of its law prohibits its application in this case. Florida courts have consistently declined to apply Florida law outside territorial boundaries unless a statute contains an 'express intention that its provisions are to be given extraterritorial effect.'" (quoting Burns v. Rozen, 201 So. 2d 629, 630 (Fla. Dist. Ct. App. 1967))). Both Florida and Rhode Island have rejected a presumption against extraterritoriality. *See infra* notes 141–145 and accompanying text.

[85] For supporting cases, see the Appendix *infra*, listing leading cases.

Illinois	X		
Indiana		X	
Iowa	X		
Kansas			X
Kentucky	X		
Louisiana			X
Maine	X		
Maryland	X		
Massachusetts		X	
Michigan			X
Minnesota			X
Mississippi	X		
Missouri			X
Montana		X	
Nebraska	X		
Nevada		X	
New Hampshire			X
New Jersey		X	
New Mexico			X
New York	X		
North Carolina			X
North Dakota			X
Ohio		X	
Oklahoma			X
Oregon			X
Pennsylvania		X	
Rhode Island		X	
South Carolina	X		
South Dakota			X
Tennessee		X	
Texas	X		
Utah	X		
Vermont	X		
Virginia			X
Washington		X	
West Virginia		X	
Wisconsin	X		
Wyoming		X	

A. States Adopting a Presumption Against Extraterritoriality

Twenty states currently apply a presumption against extraterritoriality to determine the geographic scope of state statutes: Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Mississippi, Nebraska, New York, South Carolina, Texas, Utah, Vermont, and Wisconsin.[86]

States are not always consistent in applying their presumptions against extraterritoriality. The New York Court of Appeals applied a presumption against extraterritoriality to limit the reach of the state antitrust statute in *Global Reinsurance Corp.-U.S. Branch v. Equitas Ltd.*[87] The Appellate Division also applied a presumption against extraterritoriality to limit the reach of New York's deceptive trade practices statute in *Goshen v. Mutual Life Insurance Co.*[88] Although *Goshen* has often been cited for the proposition that New York has a presumption,[89] the New York Court of Appeals affirmed the decision in *Goshen* by applying ordinary rules of statutory interpretation, without relying on a presumption against extraterritoriality.[90] In other cases, the Court of Appeals has similarly ignored the state presumption against extraterritoriality. In *Padula v. Lilarn Properties Corp.*,[91] the court held that state labor statutes did not apply to a suit between two New York parties arising from a construction accident in Massachusetts by applying state conflicts rules, rather than the state presumption against extraterritoriality as a concurring judge would have done.[92] In *Griffen v. Sirva, Inc.*,[93] the court held that a state employment discrimination statute applies to out-of-state defendants who discriminate against New York residents outside the state without invoking the state presumption

[86] The Appendix cites the leading cases for each of these states.

[87] 969 N.E.2d 187, 195 (N.Y. 2012) ("The established presumption is, of course, against the extraterritorial operation of New York law . . . .").

[88] 730 N.Y.S.2d 46, 47 (N.Y. App. Div. 2001) ("[W]e recognize the settled rule of statutory interpretation, that unless expressly stated otherwise, 'no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state . . . enacting it.'" (quoting 73 AM. JUR. 2D *Statutes* § 359)).

[89] *See, e.g.*, Kassman v. KPMG LLP, 925 F. Supp. 2d 453, 469 (S.D.N.Y. 2013) (holding that New York equal pay statute does not apply to persons who do not live or work in the state).

[90] Goshen v. Mut. Life Ins. Co. of New York, 774 N.E.2d 1190, 1195-96 (N.Y. 2002) (examining text, legislative history, and legislative intent).

[91] 644 N.E.2d 1001 (N.Y. 1994).

[92] *Id.* at 1002-03; *see also id.* at 1003 (Titone, J., concurring) (invoking state presumption against extraterritoriality).

[93] 76 N.E.3d 1063 (N.Y. 2017).

against extraterritoriality.[94] The highest courts in other states have also ignored their presumptions against extraterritoriality in cases decided after the leading cases that adopted their state presumptions.[95]

Some modern state presumptions reflect the persistence of older cases,[96] decided in an era when territorial limits on state law were presumed and had even been constitutionalized.[97] To some extent, state presumptions seem to have been perpetuated by statements in various editions of *American Jurisprudence* that "[u]nless the intention to have a statute operate beyond the limits of the state or country is clearly

[94] *Id.* at 1070. The court relied on an extraterritoriality provision in the law providing that it applied to acts outside the state against residents of the state. Although such a statement would be sufficient to rebut New York's presumption against extraterritoriality, the point for present purposes is that the court did not invoke the presumption as something that it was necessary to rebut.

New York's intermediate courts have likewise been inconsistent in applying the state's presumption. *Compare* Rodriguez v. KGA Inc., 64 N.Y.S.3d 11, 12-13 (N.Y. App. Div. 2017) (relying on state presumption to hold that state wage and hour statute did not apply to work in other states), *with* People *ex rel.* Cuomo v. Coventry First LLC, 861 N.Y.S.2d 9, 10-11 (N.Y. App. Div. 2008) (holding that New York securities law does not apply to conduct that is not within or from New York without relying on presumption), *aff'd on other grounds,* 915 N.E.2d 616 (N.Y. 2009).

[95] *See* Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 901 A.2d 106, 117 (Del. 2006) (holding that state consumer fraud statute did not apply to conduct in other states without relying on presumption); Graves v. State, 772 A.2d 1225, 1235-39 (Md. 2001) (holding that state criminal registration statute did not apply to convictions in other states without relying on presumption); Health Consultants, Inc. v. Precision Instruments, Inc., 527 N.W.2d 596, 606 (Neb. 1995) (holding that state antitrust law applied to out-of-state conduct causing effects in state without mentioning presumption).

[96] *See, e.g.*, Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) (quoting Diamond Multimedia Sys., Inc. v. Superior Court., 968 P.2d 539, 553 (Cal. 1999), in turn quoting N. Alaska Salmon Co. v. Pillsbury, 162 P. 93, 94 (Cal. 1916)).

[97] *See, e.g.*, Mut. Life Ins. Co. v. Liebing, 259 U.S. 209, 214 (1922) ("[T]he Constitution and the first principles of legal thinking allow the law of the place where a contract is made to determine the validity and the consequences of the act."); W. Union Telegraph Co. v. Brown, 234 U.S. 542, 547 (1914) (imposing tort liability for conduct outside the state violates the Commerce Clause). *See generally* G.W.C. Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?*, 15 MINN. L. REV. 161, 165-78 (1931) (discussing the Full Faith and Credit Clause and Due Process Clause). The U.S. Supreme Court began to abandon these territorial limitations in the 1930s. *See* Pac. Emp'rs.' Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 504-505 (1939); Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 549-550 (1935). *See generally* Dodge, *Extraterritoriality and Conflict-of-Laws Theory*, *supra* note 57, at 115-16 (discussing cases that abandoned territorial limitations on conflict of laws). Today, the Fourteenth Amendment simply requires "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)).

expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it."[98] Finally, state presumptions against extraterritoriality seem to have been given a boost by the U.S. Supreme Court's resurrection of the federal presumption in *Aramco* and its application to federal statutes over the past three decades.[99] State courts have sometimes cited federal cases in articulating their own presumptions against extraterritoriality.[100]

1. Differences from the Federal Presumption

As explained in Part I, the federal presumption currently applied by the U.S. Supreme Court has two defining characteristics. First, the federal presumption does not operate as a clear statement rule but rather permits courts to find a clear indication of geographic scope in the text, history, or structure of a statutory provision.[101] Second, the federal presumption does not turn mechanically on the location of the conduct but rather looks to see if whatever is the focus of the provision is located in the United States.[102] Many state presumptions against extraterritoriality are consistent with the federal presumption on both points. But some depart from the federal presumption on one or the other.

Like the federal presumption against extraterritoriality, most state presumptions do not operate as clear statement rules. As the California

[98] 73 AM. JUR. 2D *Statutes* § 243 (2012). For examples of cases relying on *American Jurisprudence* for the presumption, see Jahnke v. Deere & Co., 912 N.W.2d 136, 141-42 (Iowa 2018) (quoting State Sur. Co. v. Lensing, 249 N.W.2d 608, 612 (Iowa 1977), in turn quoting 73 AM. JUR. 2D *Statutes* § 359); Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 190 (Ky. 2001) (citing 73 AM. JUR. 2D *Statutes* § 359); Harper v. Silva, 399 N.W.2d 826, 829 (Neb. 1987) (citing 73 AM. JUR. 2D *Statutes* § 356).

[99] *See supra* notes 26–27 and accompanying text.

[100] *See, e.g.*, Abel v. Planning and Zoning Comm'n, 998 A.2d 1149, 1157 (Conn. 2010) (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)); Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 852 (Ill. 2005) (citing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993)); *Jahnke*, 912 N.W.2d at 142 (observing that the "same presumption applies to federal statutes as well" and citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)); *Union Underwear Co.*, 50 S.W.3d 188 at 191-92 (relying on EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248, 253 (1991)); Nevares v. M.L.S., 345 P.3d 719, 727 (Utah 2015) (quoting Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010)). Although state courts are free to fashion state presumptions against extraterritoriality after the federal presumption, they are not bound to do so. Federal courts and courts in other states should not assume that a state presumption mirrors its federal counterpart.

[101] *See supra* notes 36–41 and accompanying text.

[102] *See supra* notes 42–45 and accompanying text.

Supreme Court has put it, state statutes are presumed to operate only within the state "unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history."[103] In applying their own presumptions, state courts routinely examine legislative history.[104] Two states, however, seem to have departed from this trend. The Utah Supreme Court considers its presumption as "operating under a 'clear statement' rule."[105] The South Carolina Supreme Court appears to go further, denying that the legislature has authority to regulate extraterritorially even if it speaks clearly.[106]

Again like the federal presumption against extraterritoriality, most state presumptions do not turn mechanically on the location of the conduct. The Texas Supreme Court has applied its presumption against extraterritoriality to hold that the application of the state antitrust statute depends on the place of the injury,[107] whereas the application of the state securities statute depends on the place of the transaction.[108] The New York Court of Appeals has applied its presumption against

[103] Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) (quotation marks and alterations omitted); *see also Jahnke*, 912 N.W.2d at 142 (court may find a clear indication of extraterritoriality "through the statute's 'language, purpose, subject matter, or history'" (quoting State Sur. Co. v. Lensing, 249 N.W.2d 608, 611 (Iowa 1977))); Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 446 (Tex. 2007) (considering "the language, purpose, subject matter, and history" of a statute).

[104] *See, e.g.*, *Abel*, 998 A.2d at 1160 (relying on legislative history); *Avery*, 835 N.E.2d at 852 (same); Harper v. Silva, 399 N.W.2d 826, 829-30 (Neb. 1987) (same).

[105] *Nevares*, 345 P.3d at 727. Ironically, *Nevares* cited the Supreme Court's decision in *Morrison* in support of this proposition, despite *Morrison*'s express statement that the federal presumption is not a "clear statement rule." Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010).

[106] *See* Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Comp. Tr. Fund, 636 S.E.2d 862, 863 (S.C. 2006) ("[T]he jurisdiction of a state is restricted to its own territorial limits." (quoting *Ex parte* First Pa. Banking & Tr. Co., 148 S.E.2d 373, 374 (S.C. 1966))). In the 1966 decision on which *Doctors Hospital* relied, the court said: "Thus, the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. *A statute which purports to have such operation is invalid.*" *Ex parte* First Pa. Banking & Tr. Co., 148 S.E.2d 373, 374 (S.C. 1966) (quoting 50 AM. JUR. *Statutes* § 485) (emphasis added).

[107] *See* Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 682 (Tex. 2006) (concluding that state antitrust statute does not apply to "injury that occurred in other states").

[108] *Daccach*, 217 S.W.3d at 446 (concluding that state securities statute "prohibit[s] the unregistered sale of securities from Texas, even when the purchasers are nonresidents"); *see also* Kubbernus v. Ecal Partners, Ltd., 574 S.W.3d 444, 476 (Tex. Ct. App. 2018) (holding that the antifraud provision of state securities statute "is intended to apply to transactions emanating from Texas, even when they involve non-Texas residents").

extraterritoriality to conclude that state antitrust law applies to foreign conduct only when there is "injury to competition in this state."[109] The Illinois Supreme Court has applied its presumption against extraterritoriality to conclude that the state consumer protection statute does not apply "to fraudulent transactions which take place outside Illinois."[110]

Courts applying similar statutes do not always agree on what the critical connecting factor should be. Iowa applies its automobile dealer bond statute only when the insured transaction occurs within the state,[111] whereas Alabama applies its statute if the bond was issued in the state regardless of where the insured transaction occurs.[112] In the employment discrimination context, the Iowa Supreme Court has held that the application of its state statute depends on the place of employment,[113] whereas the Kentucky Supreme Court has held that the application of its corresponding statute depends on the place of injury.[114] It is worth noting that in many of these cases, the result has been to give state statutes a geographic scope similar to that of their federal counterparts.[115]

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[109] Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 196 (N.Y. 2012).

[110] Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 853 (Ill. 2005).

[111] *See* State Sur. Co. v. Lensing, 249 N.W.2d 608, 612 (Iowa 1977) (holding that state automobile dealer bond statute does not apply to "out-of-state transactions").

[112] *See Ex parte* Old Republic Sur. Co., 733 So. 2d 881, 885 (Ala. 1999) ("Thus, the statute operates as to an in-state dealer bond, the payment of which depends on the dealer's compliance with a contract that is executed either in or out of state.").

[113] *See* Jahnke v. Deere & Co., 912 N.W.2d 136, 145 (Iowa 2018) ("A complainant bringing such a claim must show a discrete discriminatory employment action that took place *within* the scope of employment in Iowa.") (emphasis added).

[114] *See* Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 192 n.1 (Ky. 2001) (noting "that there is liberal policy for protecting workers who suffer injury *within* the territorial boundaries of the Commonwealth"); *see also* Ferrer v. MedaSTAT USA, LLC, 145 F. App'x 116, 120 (6th Cir. 2005) (reading *Barnhart* as holding that state employment discrimination statute "is inapplicable to *injuries* that occur outside of Kentucky's borders, regardless of whether the action causing the relevant injury takes place within Kentucky").

[115] On employment discrimination, compare *Jahnke*, 912 N.W.2d at 150 (holding that Iowa employment discrimination statute does not apply to employment outside Iowa), with EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 247 (1991) (holding that Title VII does not apply to employment outside the United States). On antitrust law, compare Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 196 (N.Y. 2012) (holding that New York antitrust statute applies only when there is injury to competition in New York), with Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) (holding that Sherman Act applies when foreign conduct causes substantial effects in the United States). On securities law, compare Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 446 (Tex. 2007) (holding that Texas securities statute applies to transactions in Texas), with Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273

But not all states apply their presumptions with the same flexibility. The California Supreme Court has indicated that its presumption against extraterritoriality turns solely on the location of the conduct.[116] Thus, California courts have held that state securities law applies to false statements made in California even if the transaction occurs outside the state,[117] but that state unfair competition law does not apply to conduct[118] or employment[119] in other states. The emphasis on the location of the conduct in California's presumption against extraterritoriality appears to be the result of the California Supreme Court's continued reliance on *North Alaska Salmon Co. v. Pillsbury*,[120] a case decided more than a century ago, holding that California's workers' compensation statute did not apply to injuries in other states.[121] Occasionally, this emphasis on conduct has created difficulty for the court. In *Kearney v. Salomon Smith Barney, Inc.*,[122] the California Supreme Court had to decide whether the state invasion-of-privacy statute, which prohibits the recording of phone conversations without the consent of all parties, applied to a Georgia company that recorded conversations with customers in California. The court rejected the

(2010) (holding that Securities Exchange Act applies to transactions in the United States).

116 *See* Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539, 554 n.20 (Cal. 1999) ("The presumption against extraterritoriality is one against an intent to encompass *conduct* occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute."). Connecticut has followed California in making its presumption turn on the location of the conduct. *See* Abel v. Planning & Zoning Comm'n, 998 A.2d 1149, 1160 (Conn. 2010) (citing Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539, 554); *see also id.* at 1157 ("[T]he primary reason for the presumption against the extraterritorial application of statutes is that states have limited *authority* to regulate conduct beyond their territorial jurisdiction.").

117 *See Diamond*, 968 P.2d at 557 (concluding "that out-of-state purchasers and sellers of securities whose price has been affected by the unlawful market manipulation" may bring suit and that "[t]he remedy is not limited to transactions made in California").

118 *See* Norwest Mortg., Inc. v. Superior Court, 85 Cal. Rptr. 2d 18, 23 (Cal. Ct. App. 1999) (noting that state unfair competition law "contains no express declaration that it was designed or intended to regulate claims of non-residents arising from conduct occurring entirely outside of California").

119 *See* Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) (concluding that state unfair competition law does not apply to "claims for overtime worked in other states").

120 162 P. 93 (Cal. 1916).

121 *See id.* at 94. Ironically, *Pillsbury* emphasized not the place of the conduct but the place of the injury. *See id.* (finding "nothing to indicate that the compensation provisions were intended to apply to injuries occurring in foreign jurisdictions").

122 137 P.3d 914 (Cal. 2006).

argument that applying the statute would be "an unauthorized *extraterritorial* application."[123] The court explained:

> The privacy interest protected by the statute is no less directly and immediately invaded when a communication *within California* is secretly and contemporaneously recorded from outside the state than when this action occurs within the state. A person who secretly and intentionally records such a conversation from outside the state effectively acts within California in the same way a person effectively acts within the state by, for example, intentionally shooting a person in California from across the California-Nevada border.[124]

Although the court was clearly correct that the privacy interests protected by the statute were equally invaded no matter where the recording occurred, the court's argument that the defendant had acted within California — analogizing to a person who shoots across a border — was unconvincing. The physical recording of the conversation in *Kearney* clearly occurred in Georgia, although its effects on privacy were felt in California. It would have been better for the court to have acknowledged that extraterritoriality may be defined by reference to factors other than conduct, as the U.S. Supreme Court and many other state supreme courts have done.[125] In fairness to the California Supreme Court, it is worth noting that *Morrison* and many of the cases from other states were decided after *Kearney*. But there will be little reason for the California Supreme Court to adhere to a conduct-focused presumption when the question arises again.

2. State Presumptions Do Not Apply to State Common Law

Although state presumptions against extraterritoriality vary in some of their details, none of them applies to common law claims. Then-Professor Jeffrey Meyer has explained:

> Because the presumption against extraterritoriality is wholly a creature of statutory interpretation, the presumption — like any other rule of statutory application — has no application to the common law. Rather than being subject to a statutory presumption, the geographical range of state common law is

[123] *Id.* at 931.

[124] *Id.*

[125] *See supra* notes 42–45, 107–110, and accompanying text.

> subject to limit only by background principles of choice of law.[126]

My research revealed no cases in which a state court applied a presumption against extraterritoriality to common law claims. By contrast, there are a number of cases in which state courts have expressly distinguished statutory and common law claims, applying a presumption to the former but not to the latter.

For example, in *Powell v. Khodari-Intergreen Co.*,[127] the Iowa Supreme Court recognized the principle "that a statute of one state has no extraterritorial effect beyond its borders," but the court concluded that this principle did not justify dismissal of a common law tort claim for extortion based on conduct in Saudi Arabia.[128] The viability of the common law claim depended instead on conflict-of-laws rules — specifically, on whether "the law of another state or nation applies to this claim" and whether the content of that law differed from Iowa law.[129] Similarly, in *Bernhard v. Harrah's Club*,[130] the California Supreme Court noted that the state's dram shop law, as a criminal statute, "had no extraterritorial effect."[131] But the court went on to conclude that the statute's non-applicability "does not preclude recovery on the basis of negligence apart from the statute."[132] And in *Sexton v. Ryder Truck Rental, Inc.*,[133] a plurality of the Michigan Supreme Court distinguished common law tort claims arising from accidents in other jurisdictions from statutory liability claims. The plurality held that the common law claims should be governed by the *lex fori* in suits between Michigan

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[126] Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301, 304 (2014).

[127] 334 N.W.2d 127 (Iowa 1983).

[128] *Id.* at 131.

[129] *Id.* A Louisiana intermediate court similarly applied a presumption against extraterritoriality to dismiss claims under the state employment discrimination and whistleblower statutes arising from the plaintiff's termination of employment in the United Arab Emirates, but the court allowed plaintiff's common law tort claims to proceed. Mendonca v. Tidewater Inc., 862 So. 2d 505, 509-10 (La. Ct. App. 2003). The status of the presumption against extraterritoriality in Louisiana in unclear because the state supreme court has not applied a presumption for at least fifty years. But for present purposes, the key point is the Louisiana court's recognition that any presumption against extraterritoriality would not apply to common law claims.

[130] 546 P.2d 719 (Cal. 1976).

[131] *Id.* at 726.

[132] *Id.* at 727.

[133] 320 N.W.2d 843 (Mich. 1982).

parties,[134] whereas the statutory liability claims were subject to a presumption against extraterritoriality.[135]

B. States Rejecting a Presumption Against Extraterritoriality

Seventeen states have rejected a presumption against extraterritoriality — Alaska, Colorado, Florida, Georgia, Hawaii, Indiana, Massachusetts, Montana, Nevada, New Jersey, Ohio, Pennsylvania, Rhode Island, Tennessee, Washington, West Virginia, and Wyoming — which is nearly as many states as have adopted a presumption. Of these seventeen states, one has rejected a presumption against extraterritoriality explicitly. More commonly, states have done so implicitly by repeatedly determining the geographic scope of state statutes using ordinary rules of statutory interpretation, with no reliance on a presumption against extraterritoriality.

Massachusetts expressly rejected a presumption against extraterritoriality in *Taylor v. Eastern Connection Operating, Inc.*[136] In *Taylor*, the Supreme Judicial Court stated that "where no explicit limitation is placed on a statute's geographic reach, there is no presumption against its extraterritorial application in appropriate circumstances."[137] Instead, a court should look to conflicts rules to decide whether to apply a state statute, just as it would with rules of common law.[138] In *Taylor*, the court did just that, applying the state independent contractor statute to work by non-residents outside the state based on the contract's choice of Massachusetts law.[139] The

[134] *Id.* at 854 (plurality opinion).

[135] *Id.* at 854-55. The plurality concluded that applying the state's owner liability statute would not be extraterritorial because "[t]he Legislature is not regulating the tortious conduct of the operators of the vehicles, but rather the relationship between the owner and the operator." *Id.* at 855. On the status the presumption against extraterritoriality in Michigan, see *infra* note 164.

[136] 988 N.E.2d 408 (Mass. 2013).

[137] *Id.* at 413. The court technically reserved the question whether "there is a presumption against the application of Massachusetts statutes outside the United States," *id.* at 413 n.9, although it cited with approval a prior case applying state employment discrimination law to conduct in South America, *see id.* (citing O'Connell v. Chasdi, 511 N.E.2d 349 (Mass. 1987)). The possible distinction between interstate and international cases is considered below. *See infra* notes 172–183, 268–283, and accompanying text.

[138] *Taylor*, 988 N.E.2d at 413 ("[W]hen a statute is silent as to its extrastate applicability, as is usually the case, a court may and should as appropriately look to all the relevant choice of law considerations as if it were choosing between common-law rules." (quoting Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 306 (1966))).

[139] *Id.* at 410-13.

Montana Supreme Court has similarly concluded that Montana's wrongful discharge statute should be applied based on state conflicts rules, "regardless of the fact that it does not expressly provide for extraterritorial application."[140] And Rhode Island has applied conflicts rules, rather than a presumption against extraterritoriality to its dram shop act and wrongful death statute.[141]

Florida and Georgia have not been as express as Massachusetts in rejecting a presumption against extraterritoriality, but in each state, the supreme court has remarked on the application of a presumption by lower courts and then gone on to decide questions of geographic scope without applying any such presumption. In Florida, an old court of appeals case had articulated a presumption against extraterritoriality.[142] But in a case involving the reach of the state's fishtrap statute, the Florida Supreme Court approvingly noted the lower court's subsequent retreat from that position.[143] Rather than apply a presumption against extraterritoriality, the Florida Supreme Court construed the statute to avoid a question of federal preemption,[144] and in a subsequent case involving no question of preemption the court applied a different statute extraterritorially without mentioning any presumption.[145] The

[140] Burchett v. MasTec N. Am., Inc., 93 P.3d 1247, 1252 (Mont. 2004).

[141] *See* Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986) (applying conflicts rules to state dram shop act); Woodward v. Stewart, 243 A.2d 917, 922 (R.I. 1968) (applying conflicts rules to wrongful death statute).

[142] Burns v. Rozen, 201 So. 2d 629, 631 (Fla. Dist. Ct. App. 1967) ("Extraterritorial effect of an enactment is not to be found by implication.").

[143] Se. Fisheries Ass'n v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984) ("In so holding, the district court receded from the principle it enunciated in *Burns v. Rozen*, that 'extraterritorial effect of an enactment is not to be found by implication.'" (citations omitted)).

[144] *See id.* at 1355 ("We find that if there is to be a confrontation between the state and the federal government, then the legislature should expressly declare that it is its intent that the statute apply in extra-territorial waters . . . .").

[145] State v. Stepansky, 761 So. 2d 1027, 1029, 1037 (Fla. 2000) ("[I]ndividual states have been accorded wide latitude, by the United States Constitution, the Supreme Court and pertinent federal legislation, to assert concurrent jurisdiction over maritime criminal matters extending beyond the State's territorial limits."). Intermediate courts in Florida have also determined the geographic scope of state statutes without relying on a presumption. *See, e.g.*, Millennium Comm'ns. & Fulfillment, Inc. v. Office of Attorney Gen., 761 So. 2d 1256, 1262 (Fla. Dist. Ct. App. 2000) (holding that state unfair trade practices statute applies to "unfair, deceptive and/or unconscionable practices which have transpired within the territorial boundaries of this state . . . even where those persons affected by the conduct reside outside of the state"); OCE Printing Sys. USA, Inc. v. Mailers Data Servs., Inc., 760 So. 2d 1037, 1041 (Fla. Dist. Ct. App. 2000) (holding that under state antitrust act, "[i]t is the effect on trade that must occur in Florida, not the actions giving rise to the effect on trade"); Allen v. Oakbrook Sec.

Georgia Supreme Court, in a case involving the geographic scope of a state insurance law, noted that lower courts in Georgia had differed on whether to apply a presumption against extraterritoriality.[146] The court went on to decide the question based on the purpose of the statute, without applying a presumption.[147]

Other states have similarly determined questions of geographic scope by relying on ordinary principles of statutory interpretation rather than a presumption against extraterritoriality. The supreme courts in New Jersey,[148] Pennsylvania,[149] Washington,[150] and West Virginia[151] have begun their analyses of geographic scope by restating the rules of

Corp., 763 So. 2d 1099, 1101 (Fla. Dist. Ct. App. 1999) (holding that state securities statute does not apply "where the sale of the security occurred entirely in another state").

[146] *See* DeHart v. Liberty Mut. Ins. Co., 509 S.E.2d 913, 916 (Ga. 1998) ("[W]hile the court in *Marty* would not assume that the legislature intended to enact laws applying outside the state, the court in *Johnson* assumed the opposite.").

[147] *See id.* ("Based on the purpose of the motor carrier act and PSC regulations, we conclude that the continuous coverage provision applies to motor vehicle collisions that occur outside the state of Georgia."); *see also* Boca Petroco, Inc. v. Petroleum Reality II, 678 S.E.2d 330, 334 (Ga. 2009) (holding that state *lis pendens* statute did not apply to litigation in other states based not on a presumption against extraterritoriality but on a presumption against changing the common law).

[148] *See* Real v. Radir Wheels, Inc., 969 A.2d 1069, 1077 (N.J. 2009) (holding that state consumer fraud act applies to out-of-state plaintiffs) ("First, a court should not resort to extrinsic interpretative aids when the statutory language is clear and unambiguous, and susceptible to only one interpretation. That said, if there is ambiguity in the statutory language that leads to more than one plausible interpretation, we may turn to extrinsic evidence, including legislative history, committee reports, and contemporaneous construction." (quoting Daidone v. Buterick Bulkheading, 924 A.2d 1193, 1198 (N.J. 2007))).

[149] *See* Danganan v. Guardian Prot. Servs., 179 A.3d 9, 16 (Pa. 2018) (citing state Statutory Construction Act) (holding that state unfair trade practices statute applies to out-of-state plaintiffs); Cash Am. Net of Nev., LLC v. Pa. Dep't of Banking, 8 A.3d 282, 289 (Pa. 2010) (holding that state consumer discount company act applies to out-of-state lenders) ("In resolving the issues presented, we are guided by the settled principles set forth in the Statutory Construction Act, including the primary maxim that the object of statutory construction is to ascertain and effectuate legislative intent.").

[150] *See* Thornell v. Seattle Serv. Bureau, Inc., 363 P.3d 587, 590 (Wash. 2015) (citing prior cases on statutory interpretation) (holding that state consumer protection statute applies to out-of-state plaintiffs); Bostain v. Food Exp., Inc., 153 P.3d 846, 850 (Wash. 2007) (citing State v. Jacobs, 115 P.3d 281 (Wash. 2005), a leading case on statutory interpretation) (holding that state wage statute requires overtime pay for work outside the state).

[151] *See* Chevy Chase Bank v. McCamant, 512 S.E.2d 217, 224 (W. Va. 1998) (citing prior cases on statutory interpretation) (holding that state consumer credit and protection statute did not prohibit out-of-state attorney from mailing collection letter to in-state credit card holder).

interpretation normally applied to state statutes. In these states and others, state courts have frequently resolved questions of geographic scope by relying on the language of the statute.[152] State supreme courts have also invoked the purpose of the statute to determine its geographic scope.[153] In some states, courts have relied on a legislative directive that a particular statute be liberally construed or have invoked a more general principle that remedial statutes should be liberally construed.[154] It is worth noting that a large number of states have codified a principle

[152] *See, e.g.*, Tulips Invs., LLC v. State *ex rel.* Suthers, 340 P.3d 1126, 1135 (Colo. 2015) (looking to "plain language" to hold that state consumer protection statute authorized subpoena for documents outside state); State v. Bridges, 925 P.2d 357, 367 (Haw. 1996) (relying on language and legislative history to hold that state eavesdropping statute was not intended to have extraterritorial effect), *overruled on other grounds by* State v. Torres, 262 P.3d 1006 (Haw. 2011); State *ex rel.* Natalina Food Co. v. Ohio Civil Rights Comm'n, 562 N.E.2d 1383, 1385 (Ohio 1990) (relying on "plain meaning" to hold that state employment discrimination statute applies to out-of-state discrimination by in-state employer); *Cash Am. Net*, 8 A.3d at 294 (relying on "plain language" to hold that state consumer discount company act applies to out-of-state lenders); *Bostain*, 153 P.3d at 851 ("The plain language of [the state wage statute] requires overtime compensation for hours worked over 40 per week for interstate driving, with no suggestion in the statute that there is a requirement that only hours worked within this state may be considered." (alteration in original)); Ludvik v. James S. Jackson Co., Inc., 635 P.2d 1135, 1141 (Wyo. 1981) (relying on procedural provision of same statute to hold that the state *lis pendens* statute did not apply to litigation outside the state).

[153] *See, e.g.*, Mehlman v. Mobil Oil Corp., 707 A.2d 1000, 1016 (N.J. 1998) (relying on "the purposes" of the statute to hold that state whistleblower statute applies to retaliations for objecting to violations of other countries' policies); Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 522 (Tenn. 2005) (relying on "the purpose" of state antitrust law "to protect the state's trade or commerce affected by the anticompetitive conduct" to hold that state antitrust law applies to conduct outside state that causes substantial effects inside state); *Bostain*, 153 P.3d at 852 (looking to "[t]he act's purpose" to hold that state wage statute requires overtime pay for work outside the state); *Chevy Chase Bank*, 512 S.E.2d at 224 (relying on "purpose" of statute to hold that state consumer credit and protection statute did not prohibit out-of-state attorney from mailing collection letter to in-state credit card holder).

[154] *See, e.g.*, Federated Mgmt. Co. v. Coopers & Lybrand, 738 N.E.2d 842, 857 (Ohio Dist. Ct. App. 2000) ("Ohio blue sky law anti-fraud provisions must be liberally construed."); *Danganan*, 179 A.3d at 16 (relying on "the notion of [state consumer protection law] as remedial legislation" and "its corollary liberal interpretation" to support application to out-of-state plaintiffs); Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986) (relying on "legislative mandate" that statute "shall be construed liberally" to hold that state dram shop statute applies to accidents outside state); *Bostain*, 153 P.3d at 852 ("Additionally, the rule of liberal construction means that the coverage provisions of the [state wage statute] must be liberally construed in favor of the employee."); *Thornell*, 363 P.3d at 590 (relying on statutory directive that consumer protection statute "shall be liberally construed" to hold that state consumer protection statute applies to out-of-state plaintiffs).

of liberal construction, while apparently none has codified a presumption against extraterritoriality.[155] In a couple of states, the supreme court has not specified the methods that it has used to interpret the geographic scope of state statutes, but has nevertheless done so without relying on a presumption against extraterritoriality.[156]

Of the states that have rejected a presumption against extraterritoriality, Alaska has done so only in the context of interpreting criminal statutes. In *State v. Jack*,[157] the Alaska Supreme Court held that an Alaska law could be applied to a person committing sexual assault on an Alaska state ferry in Canadian waters.[158] The court viewed provisions in the Alaska Code that define the sovereignty of the state as "indicating that the state's jurisdiction should be broadly construed."[159] Significantly, those Alaska Code provisions apply equally to all exercises of jurisdiction,[160] suggesting that the Alaska Supreme Court would reject a presumption against extraterritoriality with respect to civil statutes as well.

In concluding that seventeen states have rejected a presumption against extraterritoriality, this Section has relied on cases decided over the past fifty years. Those decided since 1991, when the U.S. Supreme Court revived the federal presumption against extraterritoriality in *Aramco*, are particularly significant because the revived federal presumption provided a model that these states could have followed but chose not to. In many of these states, there are older cases articulating

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155 Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 403 tbl.11 (2010) (identifying nineteen states that have codified the principle that remedial statutes shall be liberally construed, seventeen of which provide that all statutes shall be liberally construed).

156 *See* Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157, 1166 (Ind. 2002) (holding that state crime victims relief act allowed out-of-state plaintiffs to bring damages claims based on fraudulent conduct in state without showing pecuniary loss in state); Ditech Fin. LLC v. Buckles, 401 P.3d 215, 217-18 (Nev. 2017) (holding that state statute prohibiting recording of phone calls without consent does not apply when recording are made by a person located outside the state).

157 State v. Jack, 125 P.3d 311 (Alaska 2005).

158 *See id.* at 322; *see also* State v. Sieminski, 556 P.2d 929, 933 (Alaska 1976) (holding that extraterritorial regulation of scallop fishing was a valid exercise of the police power); State v. Bundrant, 546 P.2d 530, 554-56 (Alaska 1976) (holding that state crabbing regulations could be applied extraterritorially to non-citizens).

159 *Jack*, 125 P.3d at 314.

160 ALASKA STAT. § 44.03.030(1) (2019) ("This chapter does not limit or restrict . . . the jurisdiction of the state over a person or subject inside or outside the state that is exercisable by reason of citizenship, residence, or another reason recognized by law.")

a presumption against extraterritoriality.[161] But the more recent cases show that the presumption has fallen into disuse in these states and no longer represents current state law.

C. Other States

In the remaining thirteen states — Kansas, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, and Virginia — it is unclear whether state courts apply a presumption against extraterritoriality. In many of these states, there are older cases articulating a presumption.[162] In a few, there are intermediate court

[161] *See, e.g.*, Sabini v. Sabini, 38 Haw. 394, 403 (1949) ("It is a general rule of construction that 'legislation is presumptively territorial and confined to limits over which the law-making power has jurisdiction.'" (quoting Sandberg v. McDonald, 248 U.S. 185, 195 (1918)); Wabash R.R. v. Hassett, 83 N.E. 705, 709 (Ind. 1908) ("The statutes of a state have no extraterritorial force."); *In re* Am. Mut. Liab. Ins. Co., 102 N.E. 693, 694 (Mass. 1913) ("In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the state."); Stetson v. City Bank of New Orleans, 2 Ohio St. 167, 174 (1853) ("The legislature having no extraterritorial power, must be presumed to intend to confine their operation to institutions within its jurisdiction."); *In re* Application of Peter Schoenhofen Brewing Co., 8 Pa. Super. 141, 143 (1898) ("[State laws] have no extraterritorial force, and the legal presumption is that they were intended to operate within the limits of the state."); Farrell v. Emp'rs Liab. Assurance Corp., 168 A. 911, 912 (R.I. 1933) ("We have held that extraterritorial force cannot be given to a statute of this State."); Snyder v. Yates, 79 S.W. 796, 796 (Tenn. 1904) ("The statute laws of a State have of themselves no extraterritorial force . . . ."); State *ex rel.* Mackintosh v. Superior Court of King Cty., 88 P. 207, 211 (Wash. 1907) ("[O]ur statutes can have no extra-territorial force."); Grover Irrigation & Land Co. v. Lovella Ditch, Reservoir & Irrigation Co., 131 P. 43, 61 (Wyo. 1913) ("It is a familiar elementary principle that the laws of a state have no extra-territorial effect. And it is not necessary for a state statute to contain words expressly confining its operation within the state. That it is so confined is generally understood.").

[162] *See, e.g.*, Thompkins v. Adams, 20 P. 530, 536 (Kan. 1889) ("That the legislation of a state can have no extra-territorial force is fundamental, and in the very nature of things incapable of modification, and unproductive of exceptions."); *In re* St. Paul & Kan. City Grain Co., 94 N.W. 218, 225 (Minn. 1903) ("It is an elementary rule that statutory law has no extraterritorial effect."); Stanley v. Wabash, St. L & P. Ry. Co., 13 S.W. 709, 710 (Mo. 1890) ("It will not be contended that this statute was to have any extra-territorial force, since this would be beyond the power of the legislature of this state. General presumptions of this sort always attend legislative acts."); McCullough v. Scott, 109 S.E. 789, 796 (N.C. 1921) ("The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." (quoting Black on Interpretation of Laws 91)); State v. McGlone, 78 A.2d 528, 530 (N.H. 1951) ("It is a general rule of statutory construction that statutes are not intended to have any extraterritorial effect."); Sheehan Pipe Line Constr. Co. v. State Indus. Comm'n, 3 P.2d 199, 201 (Okla. 1931) ("In the absence of an express provision in the act, making the

decisions that have addressed the geographic scope of state statutes more recently.[163] But in each of these states, the highest court has not applied a presumption against extraterritoriality for at least fifty years.[164] Since old cases articulating a presumption against

same extraterritorial in its effect, he must show a positive legislative intent that the act should operate in cases where the injury arose outside of the territorial limits of the state of Oklahoma."); Swift & Co. v. Peterson, 233 P.2d 216, 228 (Or. 1951) ("No legislation is presumed to be intended to operate outside of the jurisdiction of the state enacting it. In fact, a contrary presumption prevails and statutes are generally so construed."); Veigel v. Dakota Tr. & Sav. Bank, 225 N.W. 657, 659 (S.D. 1929) (noting that state statute "can only apply to banks within this state; it has no extraterritorial force").

[163] Some of these intermediate courts have applied a presumption against extraterritoriality. *See, e.g.*, Mendonca v. Tidewater Inc., 862 So. 2d 505, 509 (La. App. 2003) (applying federal presumption against extraterritoriality to state employment discrimination and whistleblower statutes); Sawyer v. Mkt. Am., Inc., 661 S.E.2d 750, 754 (N.C. App. 2008) ("The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." (quoting McCullough v. Scott, 109 S.E. 789, 796 (N.C. 1921))); State *ex rel.* Juv. Dep't v. Casteel, 523 P.2d 1039, 1041 (Or. Ct. App. 1974) ("It is axiomatic that the laws of a state have no extraterritorial effect."). Others have determined the geographic scope of state law without applying a presumption. *See, e.g.*, State v. Lundberg, 391 P.3d 49, 54 (Kan. Ct. App. 2017), ("As indicated above, courts are to liberally construe the Kansas Securities Act to protect investors and members of the public."); State *ex rel.* Nixon v. Estes, 108 S.W.3d 795, 799-801 (Mo. Ct. App. 2003) (holding that state merchandising practices act applied to out-of-state customers without relying on presumption).

[164] In *Sexton v. Ryder Truck Rental, Inc.*, 320 N.W.2d 843 (Mich. 1982), a plurality of the Michigan Supreme Court articulated a presumption against extraterritoriality. *See id.* at 854 (plurality opinion) ("In order for a statute to have extraterritorial application, there must be clear legislative intent."). *Sexton* is sometimes read as having adopted a presumption against the extraterritorial application of Michigan law. *See In re* Cousino, 364 B.R. 289, 294-95 (Bankr. N.D. Ohio 2006) ("[T]here exists a presumption against applying a Michigan statute extraterritorially, a position taken from the Michigan Supreme Court decision in *Sexton v. Ryder Truck Rental, Inc*. . . . ."). But a concurring opinion would not have applied any presumption, while the dissenting opinion did not address the question. *See Sexton*, 320 N.W.2d at 857 (Kavanagh, J., concurring in the result); *id.* at 858 (Ryan, J., dissenting). In *Dakota Industries, Inc. v. Cabela's.com, Inc.*, 766 N.W.2d 510 (S.D. 2009), the South Dakota Supreme Court seemed to endorse a federal district court decision holding that state trademark law did not apply extraterritorially. *See id.* at 513 (citing Pinnacle Pizza Co. v. Little Caesar Enter., 560 F. Supp. 2d 786, 802 (D.S.D. 2008)). But the district court decision was based on the Commerce Clause rather than on any presumption against extraterritoriality. *See* Pinnacle Pizza Co. v. Little Caesar Enters., 560 F. Supp. 2d 786, 802 (D.S.D. 2008). In *Thoring v. Bottonsek*, 350 N.W.2d 586 (N.D. 1984), the North Dakota Supreme Court held that the state dram shop statute did not apply to out-of-state sellers without relying on presumption against extraterritoriality. *See id.* at 590-91. But it seems better to err on the side of caution and conclude that the status of a presumption in North Dakota is unclear. Finally, the Virginia Supreme Court has addressed the geographic scope of other states' statutes, *see, e.g.*, Dreher v. Budget Rent-A-Car Sys., Inc., 634 S.E.2d 324,

extraterritoriality can also be found in states that have rejected a presumption against extraterritoriality,[165] it is impossible to say with confidence what the highest court in each of these states would do if faced with the question today.

It is tempting to seek guidance about the unclear states from their approaches to the conflict of laws more generally. During the middle of the twentieth century, a large majority of states abandoned the strictly territorial approach of the first *Restatement of Conflicts* and adopted more modern approaches.[166] Today, only thirteen states still follow the traditional conflicts approach for torts, contracts, or both.[167] The fact that only twenty states today have a presumption against extraterritoriality — and the fact that many of these presumptions show the same flexibility as the current federal presumption — is certainly part of the same general movement away from strict territoriality in the conflict of laws.[168] But a state's approach to conflicts (which in this instance means its approach to determining priority when a case falls within the scope of more than one jurisdiction's laws) is not a good predictor of whether that state has a presumption against extraterritoriality. Of the thirty-seven states that have rejected the traditional conflicts approach for both contracts and torts, seventeen still have a presumption against extraterritoriality.[169] And of the thirteen states that still follow the traditional approach to conflicts, five have

330 (Va. 2006) (following New York interpretation of the geographic scope of New York statute); Mawyer v. Lumbermens Mut. Cas. Co., 377 S.E.2d 401, 403 (Va. 1989) (interpreting North Carolina bond statute to apply outside the state), but does not appear to have articulated a presumption with respect to its own law.

165 *See supra* note 161.

166 For an excellent account, see SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 63-87 (2006).

167 *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2018: Thirty-Second Annual Survey*, 67 AM. J. COMP. L. 1, 36 tbl.2 (2019) (listing states and their approaches to conflicts).

168 *See supra* Part II.A (discussing states that have adopted a presumption against extraterritoriality). It is also worth remembering that the number of states with presumptions used to be much larger. *See supra* notes 161–162 (citing old cases articulating a presumption from states that have rejected a presumption and states where the status is unclear).

169 The seventeen states are Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Mississippi, Nebraska, New York, Texas, Utah, Vermont, and Wisconsin. Three states — Alabama, Maryland, and South Carolina — have a presumption against extraterritoriality and adhere to the traditional approach to conflicts for both torts and contracts. *Compare* Symeonides, *supra* note 167, at 36 tbl.2 (listing states that have rejected the traditional approach to conflicts for torts and contracts), *with supra* Table 1 (listing states that have adopted a presumption against extraterritoriality).

rejected a presumption against extraterritoriality.[170] Whether or not this shows inconsistency,[171] it makes it difficult to predict what a state in the unclear category will decide with respect to a presumption from its approach to conflicts.

D. Treating Interstate and International Cases the Same

Most of the cases discussed above were interstate cases rather than international cases — that is, the question raised was whether a state statute should apply extraterritorially to another state rather than to another nation. But some of the state cases were international. Courts do not distinguish between these two contexts, applying the same rules regardless of whether another state or another nation is involved.

A good example is *Jahnke v. Deere & Co.*,[172] in which the Iowa Supreme Court applied its presumption against extraterritoriality to hold that the state employment discrimination statute did not apply to a U.S. citizen employed by an American company in China.[173] In the course of its opinion, the court relied heavily on its earlier decision in an interstate case, quoting that decision at length.[174] Similarly, in *Global Reinsurance*, the New York Court of Appeals made nothing of the fact that the conspiracy alleged to have violated state antitrust law was based in London rather than in another state.[175]

Defendants in international cases have sometimes argued that a stronger indication should be required to rebut a state presumption against extraterritoriality when the case involves another country as opposed to another state. But state courts have uniformly rejected that argument, treating evidence sufficient to rebut a state presumption with

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[170] The five are Florida, Georgia, Rhode Island, Tennessee, and West Virginia. *Compare* Symeonides, *supra* note 167, at 36 tbl.2 (listing states that follow the traditional approach to conflicts for torts and contracts), *with supra* Table 1 (listing states that have rejected a presumption against extraterritoriality).

[171] For states that follow a traditional approach to conflicts, a presumption against extraterritoriality is arguably unnecessary. For states that have rejected a traditional approach to conflicts, a presumption against extraterritoriality may not be inconsistent with their approaches to conflicts if the presumption is a flexible one. The charge of inconsistency is most appropriate in the cases of California and Connecticut, which have rejected a traditional approach to conflicts, but maintain a presumption that turns on the location of the conduct.

[172] 912 N.W.2d 136 (Iowa 2018).

[173] *See id.* at 141-50.

[174] *See id.* at 141-42 (quoting State Sur. Co. v. Lensing, 249 N.W.2d 608, 611 (Iowa 1977)).

[175] *See* Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012).

respect to other states as equally sufficient to rebut the same presumption with respect to other nations.[176]

States rejecting a presumption against extraterritoriality also seem to have drawn no distinction between interstate and international cases.[177] The possible exception is Massachusetts. In *Taylor*, the Supreme Judicial Court expressly rejected a presumption against extraterritoriality in the interstate context.[178] But in a footnote, the court left open the possibility "that there is a presumption against the application of Massachusetts statutes outside the United States."[179] The court raised this possibility in the course of distinguishing cases that had relied on the federal presumption against extraterritoriality, which the court said was "grounded in the assumption that Congress would indicate expressly that a statute applies extraterritorially before intruding on the 'delicate field of international relations.'"[180] The court found these decisions unpersuasive because "such concern is inapposite in the interstate context."[181] To be clear, the Supreme Judicial Court did *not* hold that a state presumption against extraterritoriality applies in international cases, and the court's positive citation of an earlier decision applying a Massachusetts statute extraterritorially in an international case might be taken as an indication of how the court would decide the question.[182] Part III will argue that states should draw no distinction between interstate and international cases.[183]

E. The Relationship to Conflicts Rules

Every state in the United States has conflict-of-laws rules to determine which law to apply when the laws of two or more jurisdictions are

[176] *See* State v. Willoughby, 892 P.2d 1319, 1331 (Ariz. 1995) ("Had the intent been to apply the statute only to other states of the United States, appropriate limiting words could have easily been used."); Griffen v. State, 767 N.W.2d 633, 636 (Iowa 2009) ("Contrary to the State's assertion, it is not necessary for a statute to contain express language indicating applicability to foreign countries specifically if the statute clearly indicates it should apply 'outside of Iowa.'").

[177] *See* State v. Jack, 125 P.3d 311 (Alaska 2005) (applying state criminal law to ferry in Canadian waters).

[178] *See* Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 413 (Mass. 2013) ("[W]here no explicit limitation is placed on a statute's geographic reach, there is no presumption against its extraterritorial application in appropriate circumstances.").

[179] *Id.* at 413 n.9.

[180] *Id.* (quoting McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963)).

[181] *Id.*

[182] *See id.* at 413 (citing O'Connell v. Chasdi, 511 N.E.2d 349, 351 n.3 (1987)).

[183] *See infra* Part III.

potentially applicable.[184] Conflicts rules are generally rules of state common law, although two states have codified their conflicts rules, and some statutes covering particular substantive areas give directions about choice of law.[185] State court decisions adopting a presumption against extraterritoriality — and state court decisions rejecting a presumption against extraterritoriality — have taken varying positions on how the process of statutory interpretation interacts with state conflicts rules.

Choice of law can be thought of as a two-step process: (1) determining the *scope* of the potentially applicable laws to see if more than one law applies; and (2) determining which law should be given *priority* if more than one law applies.[186] Some states adopting a presumption against extraterritoriality think about choice of law in precisely this way and consider the presumption at the first step of the process. In *Sullivan v. Oracle Corp.*,[187] the California Supreme Court described the process this way:

> The question whether California's overtime law applies to work performed here by nonresidents entails two distinct inquiries: first, whether the relevant provisions of the Labor Code apply as a matter of statutory construction, and second, whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate work performed here.[188]

At the first step, *Sullivan* determined the scope of the state overtime provisions without relying on the presumption against extraterritoriality, because the work at issue occurred in California and the only question was whether nonresidents were covered by the provisions.[189] At the

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[184] *See generally* Symeonides, *supra* note 167, at 36 tbl.2 (listing states and their approaches to conflicts).

[185] *See* LA. CIV. CODE ANN. arts. 3515-3549 (2019) (codifying Louisiana conflicts rules); OR. REV. STAT. §§ 15.300-.380 (2019) (codifying Oregon conflicts rules for contracts); *id.* §§ 15.400-.460 (codifying Oregon conflicts rules for torts).

[186] The draft *Restatement (Third) of Conflict of Laws* adopts this two-step approach explicitly. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. b (AM. LAW INST., Council Draft No. 2, 2017) ("Resolving a choice-of-law question requires two analytically distinct steps. First it must be decided which states' laws are relevant, in that they might be used as a rule of decision. This is typically a matter of discerning the scope of the various states' internal laws: deciding to which people, in which places, under what circumstances, they extend rights or obligations. Second, if state internal laws conflict, it must be decided which law shall be given priority.").

[187] 254 P.3d 237 (Cal. 2011).

[188] *Id.* at 240.

[189] *See id.* at 241-44. Recall that California's presumption turns on the location of the conduct. *See supra* notes 116–125 and accompanying text.

second step, *Sullivan* determined that California law should be given priority under California's conflicts rules.[190] *Sullivan* turned to the presumption against extraterritoriality to decide a different question of statutory interpretation: whether the state unfair competition law applied to the failure to pay overtime for work by nonresidents in other states.[191] Having concluded that the statute did not apply to overtime work by nonresidents in other states,[192] the court did not need to reach the second step and decide which state's law should be given priority.[193]

Some states that have rejected a presumption against extraterritoriality also think of choice of law as a two-step process, determining questions of priority after questions of scope. In *Burnside v. Simpson Paper Co.*,[194] the Washington Supreme Court held that the state's employment discrimination statute applied to nonresidents working for Washington companies outside the state based on the statute's purpose and a statutory declaration that the law should be liberally construed.[195] The court went on to apply Washington's conflicts rules, holding that because California law did not conflict, it was proper for the lower court to apply Washington law.[196] In short, states that view choice of law as a two-step process may adopt a presumption against extraterritoriality or not. But if they do adopt a presumption against extraterritoriality, the presumption is properly

190 *See Sullivan*, 254 P.3d at 244-47.

191 *See id.* at 247.

192 *See id.* at 248.

193 California Court of Appeals cases have similarly applied the presumption against extraterritoriality first and then either applied conflicts rules second if the case fell within the scope of the statute, *see* People *ex rel.* DuFauchard v. U.S. Fin. Mgmt., Inc., 87 Cal. Rptr. 3d 615, 628 (Cal. Ct. App. 2009) (applying conflicts rules after determining scope), or concluded the analysis if the case did not fall within the scope of the statute, *see* Norwest Mortg., Inc. v. Superior Court, 85 Cal. Rptr. 2d 18, 27 (Cal. Ct. App. 1999) ("[W]hen California law cannot be applied to the claims held by nonresident members of the nationwide class, there is no occasion for applying the choice of law rules to decide whether California's or another jurisdiction's law should govern.").

194 864 P.2d 937 (Wash. 1994).

195 *See id.* at 940.

196 *See id.* at 942 ("Because this is a false conflict case, the trial court's application of Washington law does not constitute error."); *see also* Bostain v. Food Exp., Inc., 153 P.3d 846, 856 (Wash. 2007) (determining scope of state overtime statute before noting that "potentially inconsistent state laws respecting overtime . . . implicate[] choice of law questions that routinely arise").

applied at the first step of the analysis when the court determines the scope of the statute.[197]

There are a few decisions in which courts appear to have reversed the order of these two steps, applying the presumption against extraterritoriality after having already performed a conflicts analysis. In *Harper v. Silva*,[198] the question was whether the state medical liability act, which established an excess liability fund for malpractice, applied to a doctor licensed in both Nebraska and Kansas who committed malpractice in Kansas. The Nebraska Supreme Court first applied state conflicts rules, concluding that Kansas law should apply because "Kansas here has a far more significant interest in this case in view of the relationship it has to the parties involved."[199] The court went on to apply the state presumption against extraterritoriality, concluding "that the act was intended to cover only those qualified health care providers practicing within the boundaries of this state."[200]

In *Harper*, both analyses pointed in the same direction — against the application of Nebraska law. But reversing the order of analysis may cause problems when the two analyses point in different directions. In *Banks v. Ribco, Inc.*,[201] a person injured in Iowa by an intoxicated patron of an Illinois tavern brought suit in Illinois under Iowa's dram shop act.[202] The Illinois Supreme Court had previously applied the state presumption against extraterritoriality to hold that Illinois's dram shop

[197] The draft *Restatement (Third) of Conflicts* discusses the possibility of state presumptions against extraterritoriality in a comment addressing determinations of scope. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. c (AM. LAW INST., Council Draft No. 2, 2017). The draft *Restatement* rejects presumptions against extraterritorial application of state law, while noting that some states have adopted them. *See id.* ("This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so.").

[198] 399 N.W.2d 826 (Neb. 1987).

[199] *Id.* at 828.

[200] *Id.* at 830. States rejecting a presumption against extraterritoriality have also sometimes addressed the question of scope after the question of priority. *See, e.g.*, Instructional Sys., Inc. v. Comput. Curriculum Corp., 614 A.2d 124 (N.J. 1992) (holding that New Jersey law applied to franchise agreement despite contractual choice of California law before determining that state franchise statute applied to franchise activities in other states); Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986) (holding that Rhode Island law applied to accident in Massachusetts before construing state dram shop act to apply to accidents outside the state).

[201] Banks v. Ribco, Inc., 933 N.E.2d 867 (Ill. App. Ct. 2010).

[202] *See id.* at 868-69.

act did not apply to injuries in other states.[203] The state court of appeals in *Banks* first applied state conflicts rules, concluding that Illinois law should govern,[204] and then ordered the suit dismissed because the Illinois dram shop act did not provide liability for injuries outside the state. The problem with this analysis is that if the Illinois statute did not reach the case, there was in fact no conflict with Iowa law to resolve. In that case, under Illinois conflicts rules, the Iowa dram shop act should have been applied. By considering priority before scope, the court ironically applied Illinois's policy of non-liability extraterritorially in Iowa, leaving the injured party without a remedy.

Not every state has considered questions of scope and priority separately. In several states that have rejected a presumption against extraterritoriality, courts appear to skip the question of scope and rely entirely on conflicts rules to determine the applicable law. When the Massachusetts Supreme Judicial Court rejected a presumption against extraterritoriality in *Taylor*, it held that state courts should look instead to state conflicts rules.[205] In *Taylor*, that meant that the Massachusetts independent contractor statute applied because the parties had chosen Massachusetts law to govern their contract.[206] Similarly, in *Burchett v. MasTec North America Inc.*,[207] the Montana Supreme Court determined the applicability of the state's wrongful discharge statute relying entirely on state conflicts rules, without any determination of the statute's scope.[208]

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[203] *See* Graham v. General U.S. Grant Post No. 2665, 248 N.E.2d 657, 661 (Ill. 1969) ("[T]he Illinois Dram Shop Act may not be applied extraterritorially to permit recovery for injuries inflicted outside Illinois."). In a later case, the court held that the act applies only when the tavern is also in Illinois, but the Illinois legislature amended the statute to require only that the injury had occurred in Illinois. *See* Dunaway v. Fellous, 610 N.E.2d 1245, 1247 (Ill. 1993) (noting amendment).

[204] *See Banks*, 933 N.E.2d at 873 ("Considering all of the above, we have come to the conclusion that the state where the conduct occurred, rather than the state where the injury occurred, is the state with the most significant relationship.").

[205] *See* Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 413 (Mass. 2013) ("[W]hen a statute is silent as to its extrastate applicability, as is usually the case, a court may and should as appropriately look to all the relevant choice of law considerations as if it were choosing between common-law rules." (quoting Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 306 (1966))).

[206] *See id.* at 414 ("Given that the parties agreed to construe the contract in accordance with Massachusetts law, that there is no express limitation on the territorial reach of the Massachusetts independent contractor statute, and that there is no apparent reason to disregard the parties' choice of law, we conclude that the Massachusetts independent contractor statute applies to the plaintiffs' misclassification claim.").

[207] 93 P.3d 1247 (Mont. 2004).

[208] *See id.* at 1252 ("[W]e hold that under the Restatement (Second) of Conflict of Laws (1971), Montana law should be applied to this case."); *see also* Woodward v.

In other states, courts appear to perform a separate scope analysis for some statutes but not for others. For example, New York has applied a presumption against extraterritoriality to limit the geographic scope of its antitrust statute,[209] but has determined the applicability of its wrongful death statute by relying entirely on state conflicts rules.[210] Although Washington has rejected a presumption against extraterritoriality, it generally addresses questions of scope before turning to questions of priority.[211] But Washington appears to depend entirely on state conflicts rules to decide when the state securities statute applies.[212]

Whereas some states substitute conflicts rules for a presumption against extraterritoriality (or other principles for determining scope), other states seem to view their presumptions as substitutes for a conflicts analysis. In *Coca-Cola Co. v. Harmar Bottling Co.*,[213] the Texas Supreme Court applied its presumption against extraterritoriality to hold that state antitrust law did not apply to injuries that occurred in other states.[214] Although the court acknowledged that the next step would normally be to consider applying the statutes of the states in which the injury did occur,[215] it refused to do so in this case. "Because

Stewart, 243 A.2d 917, 922 (R.I. 1968) ("Once a forum has established sufficient interests to warrant applying its own substantive laws to a given issue, without violating the full faith, due process, or equal protection clauses of the federal constitution, it follows that the forum is warranted in applying its own substantive laws whether those laws are based on common-law rights, or whether they depend totally upon statutory enactment for their existence.").

209 *See* Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012) ("The established presumption is, of course, against the extraterritorial operation of New York law . . . .").

210 *See* Farber v. Smolack, 229 N.E.2d 36, 40 (N.Y. 1967) (citation omitted) ("Accordingly, when a fatal accident occurs out of State and New York is, as here, the jurisdiction having 'the most significant relationship' with the issue presented, our wrongful death statute determines the rights of the victim's survivors.").

211 *See supra* notes 194–196 and accompanying text.

212 *See* FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc., 331 P.3d 29, 37-38 (Wash. 2014) (applying state conflicts rules); *see also* Haberman v. Wash. Pub. Power Supply Sys., 744 P.2d 1032, 1053 (Wash. 1987) ("Initially, we note that this issue involves the choice of law to be applied in this case rather than whether the [state securities act] can be applied extraterritorially to regulate out-of-state transactions.").

213 218 S.W.3d 671 (Tex. 2006).

214 *See id.* at 682.

215 *See id.* at 684 ("Long ago we observed that in '[c]ases in which a right given by the statute of one state is sought to be enforced in the court of another, in which laws exist giving a like right under the same facts . . . it seems to be generally held that courts

of the importance of policy in determining and enforcing antitrust laws," the court reasoned, "we think a state's antitrust laws should be applied by its own courts."[216] To recover for injuries outside Texas, plaintiffs would have to bring suit in the courts of the states where those injuries occurred or, alternatively, in federal court under federal antitrust law.[217]

In *Citizens Insurance Co. of America v. Daccach*,[218] the Texas Supreme Court applied its presumption against extraterritoriality to hold that state securities law did apply to the sale of unregistered securities from Texas,[219] but the court again refused to engage in a conflicts analysis. Noting that "[m]ultiple registration requirements of multiple states may govern the dealer's conduct and give rise to several statutory violations," the court suggested that the applicability of state securities laws "does not present a classic conflict of laws problem."[220] Although the court went on to discuss conflicts rules at some length, it concluded that "[c]hoice of law in this area of the Blue Sky laws is now primarily a matter of statutory interpretation," and it refused to consider the applicability of securities statutes from other states.[221]

The Kentucky Supreme Court also seems to see the state presumption against extraterritoriality as a substitute for conflicts analysis. In *Union Underwear Co. v. Barnhart*,[222] the court applied its presumption against extraterritoriality to the state employment discrimination statute, holding that it applies only to injuries in Kentucky.[223] As a justification for applying the presumption, the court noted that doing so would avoid conflicts questions. "The extraterritorial application of one state's legislation to prevent age-based discrimination upon the employment practices of another state could result in competing jurisdictions and difficult choice of law questions," the court noted, "all of which would delay rather than expedite the disposition of age-based discrimination

of the latter state will recognize and enforce the right given by the statutes of another state.'" (quoting Tex. & Pac. Ry. Co. v. Richards, 4 S.W. 627, 628 (Tex. 1887))).

216 *Id.* at 688.

217 *See id.*

218 217 S.W.3d 430 (Tex. 2007).

219 *See id.* at 446 ("[W]e conclude the Texas Legislature intended section 12 of the Texas Securities Act to prohibit the unregistered sale of securities from Texas, even when the purchasers are nonresidents.").

220 *Id.* at 441.

221 *Id.* at 445.

222 50 S.W.3d 188 (Ky. 2001).

223 *See id.* at 193 ("[W]e hold that the Kentucky Civil Rights Act does not have extraterritorial application . . . .").

cases."[224] By holding that Kentucky's employment discrimination statute did not apply to alleged discrimination by a Kentucky company against a person employed in another state, the court avoided the need to consider whether Kentucky should apply its own law or that of another state.[225]

In summary, some courts see choice of law as a two-step process and apply a presumption against extraterritoriality in determining the scope of a statute before considering which state's law should be given priority under a conflicts analysis. Some courts bizarrely reverse the order of these steps, applying a presumption against extraterritoriality after the conflicts analysis. Some courts view conflicts rules as a substitute for the presumption against extraterritoriality and other principles that might determine questions of scope. And some courts view the presumption against extraterritoriality as a substitute for conflicts rules, making it unnecessary to consider whether another state's law should be applied.

But the variety of approaches that one finds in the relationship between principles of statutory interpretation and state conflicts rules should not obscure a more fundamental fact — states *have* conflicts rules that can substitute for principles of interpretation or determine questions of priority after the scope of a statute has been construed. This makes the extraterritorial application of state law fundamentally different from the extraterritorial application of federal law. There are no corresponding federal conflicts rules to decide questions of priority once a court has determined that a case falls within the scope of a federal statute.[226] With respect to federal statutes, the federal presumption against extraterritoriality (and to a limited extent other rules of statutory interpretation) must do all the work. Part III will argue that this fundamental difference should affect the content of state presumptions against extraterritoriality and, indeed, whether states should have such presumptions at all.

III. REEVALUATING STATE PRESUMPTIONS AGAINST EXTRATERRITORIALITY

This Part reevaluates whether states need presumptions against extraterritoriality. Section A looks at state presumptions in the context of other limitations on the applicability of state law. It notes that many

[224] *Id.*

[225] The court ordered the case to be dismissed without considering whether a Kentucky court should apply the employment discrimination law of another state. *See id.*

[226] *See supra* notes 57–68 and accompanying text.

states have been able to get along quite well without a presumption against extraterritoriality. Indeed, even in states that have adopted a presumption, the rule often seems to do little work. This Section also shows that state conflicts rules and federal constitutional limits can guard against overreaching state law.

Section B looks at some of the pitfalls of having a presumption. State presumptions against extraterritoriality can be unduly rigid. They can also create confusion about how they fit with conflicts rules. Courts sometimes apply state presumptions inconsistently. And even if they are applied consistently to statutes, state presumptions create inconsistency between the treatment of state statutes and the treatment of state common law.

Section C addresses the concern that a presumption against extraterritoriality might be necessary at least in international cases to prevent friction with other nations. First, I note that civil litigation in general — and civil litigation involving state law in particular — almost never generates significant foreign relations difficulties. Second, I note that other doctrines are available to handle the occasional difficult case. Even in the international context, there is no need for an extraterritoriality trump card.

A. State Presumptions in Context

State presumptions against extraterritoriality fit into a larger framework for determining the applicability of state statutes, a framework that includes not only state conflicts rules but also federal constitutional limits on the application of state law. State presumptions are rules for determining the scope of state statutes, which is typically the first step in the process of determining the applicable law.[227]

But states are perfectly capable of determining the geographic scope of state laws without relying on any presumption against extraterritoriality. Part II.B showed that a large number of states are already doing this. From Washington to New Jersey, and from Colorado to Georgia, state courts are deciding questions of geographic scope by employing ordinary tools of statutory interpretation, typically beginning with the language of the statute, often analyzing its purpose,

[227] *See* Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011) (describing first step as "whether the relevant provisions . . . apply as a matter of statutory construction . . . ."); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. b (AM. LAW INST., Council Draft No. 2, 2017) ("First it must be decided which states' laws are relevant, in that they might be used as a rule of decision. This is typically a matter of discerning the scope of the various states' internal laws . . . ."); *see also supra* notes 186–197 and accompanying text (discussing two-step process in conflict of laws).

and sometimes relying on general principles like the principle that remedial statutes should be liberally construed.[228]

Even in states that have adopted a presumption against extraterritoriality, the presumption often seems superfluous. The California Supreme Court's decision in *Diamond Multimedia Systems, Inc. v. Superior Court*,[229] holding that parties to out-of-state transactions may bring claims under California's securities statute based on in-state misrepresentations, is a good example. For seven pages in the Pacific Reporter, the court treated this as an ordinary question of statutory interpretation.[230] The court began with the language of the statute,[231] noting that the phrase "in this state" described where the prohibited conduct had to occur, rather than where the transaction had to occur.[232] The court considered the consequences of limiting the prohibition of fraud to cases affecting transactions in California.[233] And the court observed that limiting the prohibition to fraud affecting transactions in the state would render another provision of the statute superfluous.[234] Turning to the cause of action, the court noted that it did "not limit a violator's liability to persons who purchase or sell stock in California,"[235] and the court compared this provision to others that contained such limitations.[236] Because the court found the text of the statute clear, it saw no need to consult the legislative history,[237] but went on to note that "the materials cited by defendants are not inconsistent with our conclusion."[238] It was only after this exhaustive analysis under ordinary rules of statutory interpretation that the California Supreme

[228] *See supra* notes 148–156 and accompanying text (discussing state approaches to determining geographic scope of statutes).

[229] 968 P.2d 539 (Cal. 1999).

[230] *See id.* at 546-52.

[231] *See id.* at 546 ("As with any statutory construction inquiry, we must look first to the language of the statute.").

[232] *See id.* ("[Section 25400] regulates market manipulation, not third party transactions affected by market manipulation.").

[233] *See id.* at 547-48.

[234] *See id.* at 548 ("That reading of section 25400 would render the section 25008 definition of sale 'in this state' superfluous as it would deny a remedy to the purchaser even if the offer to sell had been made in this state.").

[235] *Id.* at 549.

[236] *See id.* ("When the Legislature intended that a purchase or sale of a stock must occur in California if the buyer or seller is to be subject to civil, criminal, or administrative penalties, it said so . . . .").

[237] *See id.* at 551 ("Only when the language of a statute is susceptible to more than one reasonable construction is it appropriate to turn to extrinsic aids, including the legislative history of the measure, to ascertain its meaning.").

[238] *Id.*

Court turned to the argument, raised in an *amicus* brief, that a presumption against extraterritoriality should be applied, dismissing that argument on the ground that "the conduct which gives rise to liability under section 25400 occurs in California."[239] *Diamond* illustrates that California courts, like those in other states, are capable of determining the geographic scope of state statutes without relying on a presumption against extraterritoriality.

Determining the scope of a state statute is just the first step in the analysis, however. Most states will go on to apply their conflicts rules to decide whether to give priority to the laws of another state.[240] Conflicts rules vary from state to state, but they typically provide that courts should apply the law of another state if the other state has a greater interest in applying its law or if the critical connecting factor occurred in the other state. Such conflicts rules provide an additional check on the application of state statutes to cases involving other jurisdictions that is lacking with respect to federal statutes.[241]

Professor Katherine Florey has argued that state conflicts rules impose only "modest" limits on the extraterritorial application of state law and that "in many state choice-of-law systems, bias toward the application of forum law is common."[242] She has particularly criticized California law on these grounds.[243] But in cases involving California statutes, California courts have regularly applied state conflict rules to hold that the law of another jurisdiction should be given priority.[244]

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[239] *Id.* at 553-54.

[240] *See* Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011) (describing second step as "whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate" the situation); RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. b (AM. LAW INST., Council Draft No. 2, 2017) ("Second, if state internal laws conflict, it must be decided which law shall be given priority."); *see also supra* notes 186–197 and accompanying text (discussing two-step process in conflict of laws).

[241] *See supra* notes 57–68 and accompanying text (discussing lack of priority rules for federal statutes).

[242] Florey, *Understanding the Extraterritorial Effects*, *supra* note 11, at 537. *But see* Christopher A. Whytock, *The Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 764-69 (2009) (analyzing federal district court decisions in tort conflict cases and finding no bias in favor of domestic law).

[243] *See* Florey, *Bridging the Divide*, *supra* note 13, at 208-13.

[244] *See, e.g.*, McCann v. Foster Wheeler LLC, 225 P.3d 516, 537 (Cal. 2010) (holding that Oklahoma's statute of limitations should be applied because its interests would be more greatly impaired if its law were not applied); Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721, 729 (Cal. 1978) (concluding "that Louisiana's interests would be the more impaired if its law were not applied, and consequently that Louisiana law governs the present case").

The cases in which state courts have determined that state statutes should be applied extraterritorially after applying state conflicts rules seem generally unobjectionable. In *Burnside*, the Washington Supreme Court held that Washington's employment discrimination statute should be applied to alleged discrimination by a Washington employer in California because Washington law did not conflict with California law.[245] In *Taylor*, the Massachusetts Supreme Judicial Court held that Massachusetts's independent contractor statute should be applied to work performed outside the state because the parties had chosen Massachusetts law to govern their contract.[246] These are familiar analytical moves in the conflict of laws, and there seems little reason to object to them just because it is a state statute rather than state common law that is being applied.

It is also worth noting that the extraterritorial application of state law is subject to federal constitutional limits, most of which do not apply to federal statutes. Under the Due Process Clause of the Fourteenth Amendment, a state may not apply its law unless it has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[247] Under the dormant Commerce Clause, a state may not apply a state statute "to commerce that takes place wholly outside of the State's borders."[248] There is also a good argument that the Constitution

[245] *See* Burnside v. Simpson Paper Co., 864 P.2d 937, 942 (Wash. 1994) ("Because this is a false conflict case, the trial court's application of Washington law does not constitute error.").

[246] *See* Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 414 (Mass. 2013) ("Given that the parties agreed to construe the contract in accordance with Massachusetts law, that there is no express limitation on the territorial reach of the Massachusetts independent contractor statute, and that there is no apparent reason to disregard the parties' choice of law, we conclude that the Massachusetts independent contractor statute applies to the plaintiffs' misclassification claim."). Professor John Coyle has argued more generally that choice-of-law clauses should take priority over state presumptions against extraterritoriality. *See* Coyle, *supra* note 17 (manuscript at 10).

[247] Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 818 (1985) (quoting Allstate Ins. Co. v. Hague, 449 U.S. 302, 312-13 (1981) (plurality opinion)). Lower federal courts have interpreted the Due Process Clause of the Fifth Amendment to impose similar limits on the extraterritorial application of federal statutes. *See, e.g.*, United States v. Davis, 905 F.2d 245, 248-49 (9th Cir. 1990) ("[T]here must be a sufficient nexus between the defendant and the United States, so that such application [of the statute] would not be arbitrary or fundamentally unfair." (citation omitted)); *see also supra* notes 55–56 and accompanying text.

[248] Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642-43 (1982) (plurality opinion)). No similar limitation applies to the extraterritorial reach of federal law because the Commerce Clause is a grant of power to Congress and its negative aspect "prohibits *state* laws that unduly restrict interstate

prohibits states from regulating extraterritorially in a way that violates customary international law limits on jurisdiction to prescribe.[249] Florey characterizes the constitutional limits on applying state statutes extraterritorially as "modest,"[250] and so they are. But it is nevertheless true that courts sometimes find the extraterritorial application of state law to violate either the Due Process Clause[251] or the dormant Commerce Clause.[252]

In summary, states do not need presumptions against extraterritoriality. State courts have been able to determine the geographic scope of their laws by applying ordinary rules of interpretation. The extraterritorial application of state statutes is also subject to other limitations that do not apply to federal statutes. Most

commerce." Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019) (emphasis added).

[249] *See* William S. Dodge, *After* Sosa*: The Future of Customary International Law in the United States*, 17 WILLAMETTE J. INT'L L. & DISP. RESOL. 21, 42-46 (2009) (arguing that the U.S. Constitution prohibits states from violating customary international law). Arizona has held that the extraterritorial application of its statutes is limited by international law, but it is not clear that its courts view this limit as constitutionally required. *See* State v. Willoughby, 892 P.2d 1319, 1331 (Ariz. 1995) ("[C]riminal jurisdiction should reach the extent permitted under federal and international law."); *see also* State v. Miller, 755 P.2d 434, 436 (Ariz. Ct. App. 1988) ("We look to international law to determine whether the state may assert jurisdiction based upon a statute that attempts to punish extraterritorial conduct."). Although courts interpret federal statutes to avoid conflict with customary international law rules governing jurisdiction to prescribe, it is well established that Congress has constitutional authority to exceed the limits imposed by international law. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 406 (AM. LAW INST. 2018) ("Where fairly possible, courts in the United States construe federal statutes to avoid conflict with international law governing jurisdiction to prescribe. If a federal statute cannot be so construed, the federal statute is controlling as a matter of federal law.").

[250] Florey, *Understanding the Extraterritorial Effects*, *supra* note 11, at 553.

[251] *See, e.g.*, Norwest Mortg., Inc. v. Superior Court, 85 Cal. Rptr. 2d 18, 26-27 (Cal. Ct. App. 1999) (holding that application of state unfair competition statute to out-of-state conduct causing out-of-state injuries on the basis that the defendant was incorporated under California law violated Due Process Clause); *see also* Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 868-69 (Ill. 2005) (Freeman, J., concurring in part and dissenting in part) (concluding that application of state consumer fraud act based solely on corporate citizenship of the defendant would have violated Due Process Clause).

[252] *See, e.g.*, Esmark, Inc. v. Strode, 639 S.W.2d 768, 774 (Ky. 1982) (holding that state takeover statute violated dormant Commerce Clause); *see also* Bruce Church, Inc. v. United Farm Workers of Am., AFL-CIO, 816 P.2d 919, 928 (Ariz. Ct. App. 1991) (interpreting state employment relations act to avoid constitutional difficulties under dormant Commerce Clause); Campbell v. Arco Marine, Inc., 50 Cal. Rptr. 2d 626, 632 (Cal. Ct. App. 1996) (interpreting state employment statute to avoid constitutional difficulties under dormant Commerce Clause).

significantly, they are subject to state conflicts rules that give priority to the laws of other jurisdictions in appropriate cases. And in extreme cases, the Constitution limits the extraterritorial application of state law as well.

B. The Pitfalls of State Presumptions

State presumptions against extraterritoriality may not be necessary, but are they harmful? This Section argues that state presumptions create a number of pitfalls that are worth avoiding: they may be unduly rigid; they may create confusion about how they fit with state conflicts rules; they may be applied inconsistently to state statutes; and they may create inconsistencies between state statutes and state common law.

First, while many state presumptions against extraterritoriality show the same flexibility as the current federal presumption, a few are unduly rigid.[253] California's presumption, for example, turns entirely on where the conduct occurs.[254] In *Kearney*, this created an analytical straight jacket from which the court could escape only by pretending that a Georgia company's recording of calls with California clients had effectively taken place in California, notwithstanding the location of the recording equipment in Georgia.[255] A presumption like the federal presumption that allows for a focus on something other than conduct would have solved this problem, but so too would an approach to determining geographic scope that did not rely on any presumption against extraterritoriality.

Second, even when state presumptions are more flexible, they can create confusion about how they interact with state conflicts rules. Because state presumptions are rules for determining the geographic scope of state statutes, they fit most naturally in the first step of a two-step process that considers first scope and then priority. As noted above, this is how the California Supreme Court seems to view its

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[253] *See supra* Part II.A.1 (discussing state presumptions that differ from the federal presumption).

[254] *See* Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539, 554 n.20 (Cal. 1999) ("The presumption against extraterritoriality is one against an intent to encompass *conduct* occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute."); *see also supra* notes 116–121 and accompanying text (discussing California presumption).

[255] *See* Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914, 931 (Cal. 2006) ("A person who secretly and intentionally records such a conversation from outside the state effectively acts within California in the same way a person effectively acts within the state by, for example, intentionally shooting a person in California from across the California-Nevada border."); *see also supra* notes 122–125.

presumption.[256] But Nebraska's Supreme Court has applied its presumption as a second step that *follows* the application of state conflicts rules.[257] In cases of false conflict, this ordering runs the risk of denying relief if a court concludes at the first step that state conflicts rules require the application of forum law and at the second step that the statute does not apply extraterritorially.[258] Texas and Kentucky, on the other hand, seem to view their presumptions against extraterritoriality as substitutes for a traditional conflicts analysis, eliminating the need to consider whether the law of another jurisdiction should be given priority.[259] The existence of a separate presumption against extraterritoriality seems to have facilitated these analytical moves by providing a principle that might stand apart from normal conflicts analysis and be applied either after or instead of state conflicts rules. Without a presumption against extraterritoriality, it seems more likely that the supreme courts of Nebraska, Texas, and Kentucky would have treated the cases discussed above as normal conflicts cases.

Third, state presumptions are sometimes applied inconsistently, limiting the geographic scope of some statutes but not others. As previously discussed, this seems to be particularly true in New York, which has applied a state presumption against extraterritoriality to determine the scope of state antitrust law,[260] but not to determine the scope of state labor law and employment discrimination law.[261] But Delaware, Maryland, and Nebraska also appear to have applied their

[256] *See* Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011) (describing steps of statutory construction and application of conflicts principles); *see supra* notes 187–193 and accompanying text.

[257] *See* Harper v. Silva, 399 N.W.2d 826, 829-30 (Neb. 1987) (applying presumption against extraterritoriality after state conflicts rules).

[258] *See, e.g.*, Banks v. Ribco, Inc., 933 N.E.2d 867 (Ill. App. Ct. 2010) (holding that Illinois law applied and denying relief because Illinois dram shop statute did not apply to injuries in other states); *see also supra* notes 201–204 and accompanying text.

[259] *See, e.g.*, Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 193 (Ky. 2001) (employing a presumption to avoid "difficult choice of law questions"); Citizens Ins. Co. of Am. v. Daccach, 217 S.W.3d 430, 445 (Tex. 2007) (refusing to consider application of other states' securities laws); Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 686-88 (Tex. 2006) (refusing to consider application of other states' antitrust laws); *see also supra* notes 213–225.

[260] *See* Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012) ("The established presumption is, of course, against the extraterritorial operation of New York law . . . .").

[261] *See* Griffin v. Sirva, Inc., 76 N.E.3d 1063, 1070 (N.Y. 2017) (holding that state statute applied to discrimination in other states without invoking presumption); Padula v. Lilarn Properties Corp., 644 N.E.2d 1001, 1002-03 (N.Y. 1994) (holding that state labor statutes did not apply to accident in another state without invoking presumption); *see also supra* notes 87–94 and accompanying text (discussing New York cases).

presumptions against extraterritoriality inconsistently.[262] Without consistency in application, state presumptions cannot provide predictable guidance for legislators who draft statutes, lower courts who interpret them, or citizens who plan their conduct and litigate their disputes under them. Of course, no interpretive methodology will ever be applied perfectly consistently. But Professor Abbe Gluck has found a good deal of consistency in states that have agreed on an approach to statutory interpretation in general.[263] In states that have adopted such general rules of interpretation, state presumptions against extraterritoriality may introduce an element of inconsistency.

Finally, state presumptions against extraterritoriality create inconsistency between the treatment of state statutes and the treatment of state common law. Although twenty states have adopted a presumption against extraterritoriality, none of them appears to apply that presumption to state common law.[264] In states that have adopted a two-step approach to choice of law, courts must determine the scope of common law rules just as they must determine the scope of statutes. But a presumption against extraterritoriality places a thumb on the scale against the application of statutory rules that does not weigh similarly against the application of common law rules. Indeed California and Iowa have expressly permitted common law tort claims to proceed in cases where statutory claims were barred by a presumption against extraterritoriality.[265] In *Sexton*, the plurality of the Michigan Supreme Court that favored a presumption against extraterritoriality noted that it would be "anomalous" to apply Michigan common law to an accident in another state but not Michigan's owner liability statute.[266] The plurality avoided that anomaly by holding that the application of the statute was not extraterritorial.[267] But it could have avoided the problem altogether by rejecting a presumption against extraterritoriality for state statutes.

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[262] *See supra* note 95 and accompanying text.

[263] *See* Gluck, *supra* note 10, at 1853-54 (discussing Oregon, Connecticut, Texas, Michigan, and Wisconsin).

[264] *See supra* Part II.A.2.

[265] *See* Bernhard v. Harrah's Club, 546 P.2d 719, 726-27 (Cal. 1976) (applying presumption to state dram shop statute but allowing negligence claim to proceed); Powell v. Khodari-Intergreen Co., 334 N.W.2d 127, 131 (Iowa 1983) (allowing common law tort claim to proceed despite presumption against extraterritoriality applied to state statute).

[266] Sexton v. Ryder Truck Rental, Inc., 320 N.W.2d 843, 856 (Mich. 1982) (plurality opinion).

[267] *See id.* ("[W]e hold that the owners' liability statutes are not given extraterritorial application where the owner and operator relationship arises in Michigan.").

C. State Presumptions for International Cases?

As discussed in Part II.D, cases applying state presumptions against extraterritoriality have tended to treat international cases the same as interstate cases.[268] Commentators, on the other hand, have emphasized the special need for restraint in international cases. Professor Hannah Buxbaum argues that it is "critical[]" for courts to "differentiate between interstate and international conflicts."[269] She notes that "[t]he application of state law in international cases creates the potential for conflict between that law and the law of a foreign nation" and thus "the possibility of international discord."[270] Professor Florey similarly argues that the extraterritorial application of state law "could have potentially serious consequences for U.S. foreign relations."[271]

These concerns echo one of the rationales that the U.S. Supreme Court has given for the federal presumption against extraterritoriality — that "it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries."[272] Yet it is hard to think of actual cases in which the application of federal law to conduct in foreign countries has resulted in international discord.[273] To be sure, foreign governments sometimes have an interest in whether U.S. law is applied in international cases, and they frequently file *amicus* briefs

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[268] *See supra* Part II.D.

[269] Buxbaum, *supra* note 15, at 384.

[270] *Id.* at 388.

[271] Florey, *Bridging the Divide*, *supra* note 13, at 214.

[272] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016); *see also* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (noting that the federal presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord"). The other main rationale for the federal presumption is the "commonsense notion that Congress generally legislates with domestic concerns in mind." *RJR*, 136 S. Ct. at 2100 (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)). *See generally* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 reporters' note 2 (AM. LAW INST. 2018) (discussing rationales for the federal presumption).

[273] The best recent example may be *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), in which Jordan's leading financial institution was sued in the United States under the Alien Tort Statute ("ATS") for allegedly providing support for terrorist attacks. *See* Brief for the United States as Amici Curiae Supporting Neither Party at 30, *Jesner*, 138 S. Ct. 1386 (No. 16-499) (stating that claims "have already caused significant diplomatic tensions"). The Supreme Court resolved the case not by applying a presumption against extraterritoriality (probably because the bank transfers at issue occurred in the United States) but rather by holding that the ATS cause of action did not extend to foreign corporations. *Jesner*, 138 S. Ct. at 1403 ("[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.").

expressing those interests.[274] But differences over the extraterritorial application of U.S. law almost never have negative impacts on diplomatic relations.[275] It is even harder to think of actual cases in which the extraterritorial application of state law has resulted in international discord. Indeed, Florey concedes that "it is difficult to find examples of states overreaching dramatically in applying state law to foreign events."[276]

To the extent that international cases involving state law do raise comity concerns, American law contains a range of comity doctrines to address those concerns without relying on state presumptions against extraterritoriality.[277] Foremost among these are state conflict-of-laws rules, which give priority to foreign law in appropriate cases.[278] But there are also limits on personal jurisdiction,[279] doctrines of *forum non conveniens*,[280] the act of state doctrine,[281] doctrines of foreign state

[274] *See, e.g.*, Brief for the Republic of France as Amicus Curiae in Support of Respondents at 3, Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247 (2010) (No. 08-1191) (arguing that "international comity counsels against expansive extraterritorial application of the Exchange Act"). *See generally* Kristen E. Eichensehr, *Foreign Sovereigns as Friends of the Court*, 102 VA. L. REV. 289 (2016) (discussing foreign government amicus briefs).

[275] *Cf.* William S. Dodge, *Customary International Law, Change, and the Constitution*, 106 GEO. L.J. 1559, 1587-88 (2018) (observing that foreign governments today respond to alleged violations of customary international law not by threating war but by filing *amicus* briefs).

[276] Florey, *Understanding the Extraterritorial Effects*, *supra* note 11, at 562-63.

[277] *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2099-120 (2015) (surveying international comity doctrines).

[278] There is a longstanding debate whether the same conflicts rules should be applied in international and interstate cases. *See* Albert A. Ehrenzweig, *Interstate and International Conflicts Law: A Plea for Segregation*, 41 MINN. L. REV. 717, 717 (1957); Eugene F. Scoles, *Interstate and International Distinctions in Conflict of Laws in the United States*, 54 CALIF. L. REV. 1599, 1599 (1966). That is a debate worth having. But there seems little reason to subject state statutory law to limits that are not imposed on state common law.

[279] *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 127 (2014) (holding that courts in the United States may exercise general jurisdiction only over defendants who are essentially at home in the forum state).

[280] Federal courts apply the federal doctrine of *forum non conveniens* even when deciding cases brought under state law, whereas state courts apply state doctrines of *forum non conveniens* even when deciding cases brought under federal law. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 424 cmt. b (AM. LAW INST. 2018). Most states have adopted doctrines that mirror the federal doctrine, but some state doctrines differ in significant respects. *See id.* § 424 reporters' note 2 (giving examples).

[281] The federal act of state doctrine requires that courts in the United States "assume the validity of an official act of a foreign sovereign performed within its own territory."

compulsion,[282] and rules of sovereign immunity[283] to name just a few. Because the extraterritorial application of state law in international cases does not appear to cause conflicts with foreign nations, and because multiple doctrines exist to manage any conflicts that do arise, there seems little reason to develop special state presumptions against extraterritoriality for international cases.

CONCLUSION

It is far too easy for courts to analogize cases involving the extraterritorial application of state law to cases involving the extraterritorial application of federal law. But the geographic scope of state law is a question of state law, and that question arises in a very different context than similar questions of federal law. Because of the absence of federal conflicts rules, the applicability of federal law must be decided entirely by the federal presumption against extraterritoriality and related doctrines of statutory interpretation. States, on the other hand, have conflicts rules that allow them to give priority to the laws of other jurisdictions in appropriate cases.

Today, twenty states apply a presumption against extraterritoriality to determine the geographic scope of state statutes.[284] But it is not clear that these states need their presumptions. Other states have shown that it is possible to determine questions of geographic scope without relying on a presumption.[285] Some state presumptions are unduly rigid, others

Id. § 441. The federal doctrine is binding on state courts. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (holding that act of state doctrine "must be treated exclusively as an aspect of federal law").

[282] The doctrine of foreign-state compulsion may excuse compliance with U.S. law when the conduct violating U.S. law is compelled by foreign law and the person in question has acted in good faith to avoid the conflict. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 (AM. LAW INST. 2018) (restating the doctrine). As a rule of statutory interpretation, the federal doctrine applies only to federal law. Whether a similar defense is available under state law is a question of state law. *See id.* § 442 reporters' note 8 ("Whether foreign-state compulsion is a defense to violations of State law is a question of State rather than federal law.").

[283] Congress has codified the immunity of foreign states and their agencies or instrumentalities in the Foreign Sovereign Immunities Act, which applies to both state and federal courts. *See* 28 U.S.C. § 1604 (2019) ("[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."). The immunity of foreign officials is governed by federal common law. *See* Samantar v. Yousuf, 560 U.S. 305, 325 (2010) (holding that the immunity of foreign official "is properly governed by the common law because it is not a claim against a foreign state as the Act defines that term").

[284] *See supra* Part II.A.

[285] *See supra* Part II.B.

are applied inconsistently, and all of them create potential inconsistencies between the treatment of state statutory law and state common law.[286] In light of these problems, the decision of the *Restatement (Third) of Conflicts* to reject a presumption against extraterritorial application of state law seems sensible.[287]

For federal courts, it is important to recognize that the federal presumption against extraterritoriality does not apply to state statutes, and to determine the geographic scope of such statutes by applying whatever interpretive rules the state supreme court would apply. For state courts, it is important to take another look at whether state presumptions against extraterritoriality make sense, to recognize that the extraterritorial application of federal statutes presents a different question in a different context, and not to follow blindly wherever the U.S. Supreme Court leads.

[286] *See supra* Part III.B.

[287] *See* RESTATEMENT (THIRD) OF CONFLICT OF LAWS § 5.01 cmt. c (AM. LAW INST., Council Draft No. 2, 2017) ("This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so.").

APPENDIX: LEADING CASES

Alabama

- Has adopted a presumption against extraterritoriality. *See Ex parte* Old Republic Sur. Co., 733 So. 2d 881, 884 (Ala. 1999) ("[T]his Court appears to follow the general rule of statutory construction that, in order to have extraterritorial effect, a statute must explicitly provide for that effect.").

Alaska

- Has rejected a presumption against extraterritoriality. *See* State v. Jack, 125 P.3d 311, 314 (Alaska 2005) (interpreting state code provisions on sovereignty as "indicating that the state's jurisdiction should be broadly construed").

Arizona

- Has adopted a presumption against extraterritoriality. *See* State v. Willoughby, 892 P.2d 1319, 1331 (Ariz. 1995) ("[W]e ordinarily assume the substantive reach of a law is contained within the territorial borders of the enacting jurisdiction to avoid conflicts with other jurisdictions.").

Arkansas

- Has adopted a presumption against extraterritoriality. *See* Hetman v. Schwade, 317 S.W.3d 559, 564 (Ark. 2009) (noting "the general rule that statutes have no effect except within the state's own territorial limits").

California

- Has adopted a presumption against extraterritoriality. *See* Sullivan v. Oracle Corp., 254 P.3d 237, 248 (Cal. 2011) ("[W]e presume the Legislature did not intend a statute to be operative, with respect to occurrences outside the state, unless such intention is clearly expressed or reasonably to be inferred from the language of the act or from its purpose, subject matter or history." (quotation marks and alterations omitted)).
- Unlike many state presumptions, California's presumption turns solely on the location of the conduct. *See* Diamond Multimedia Sys., Inc. v. Superior Court, 968 P.2d 539, 554 n.20 (Cal. 1999) ("The presumption against extraterritoriality is one against an intent to encompass *conduct* occurring in a foreign jurisdiction in the prohibitions and remedies of a domestic statute.").

Colorado

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Tulips Invs., LLC v. State *ex rel*. Suthers, 340 P.3d 1126, 1135 (Colo. 2015) (determining geographic scope of state consumer protection statute by relying on ordinary principles of statutory interpretation).

Connecticut

- Has adopted a presumption against extraterritoriality. *See* Abel v. Planning & Zoning Comm'n of New Canaan, 998 A.2d 1149, 1159 (Conn. 2010) ("[W]e presume that the legislature is aware of the constraints on its power to regulate conduct extraterritorially.").
- Unlike many state presumptions, Connecticut's presumption turns solely on the location of the conduct. *See id.* at 1157 ("[T]he primary reason for the presumption against the extraterritorial application of statutes is that states have limited *authority* to regulate conduct beyond their territorial jurisdiction.").

Delaware

- Has adopted a presumption against extraterritoriality. *See* Singer v. Magnavox Co., 380 A.2d 969, 981 (Del. 1977) ("There is, of course, a presumption that a law is not intended to apply outside the territorial jurisdiction of the State in which it is enacted."), *overruled on other grounds by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).
- Delaware applies its presumption inconsistently. *See, e.g.*, Wal-Mart Stores, Inc. v. AIG Life Ins. Co., 901 A.2d 106, 117 (Del. 2006) (holding that state consumer fraud statute did not apply to conduct in other states without relying on presumption).

Florida

- Has rejected a presumption against extraterritoriality. *See* Se. Fisheries Ass'n v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984) (noting with approval lower court's rejection of presumption against extraterritoriality); *see also* State v. Stepansky, 761 So. 2d 1027, 1029, 1037 (Fla. 2000) (applying state statute extraterritorially without applying a presumption).

Georgia

- Has rejected a presumption against extraterritoriality. *See* DeHart v. Liberty Mut. Ins. Co., 509 S.E.2d 913, 916 (Ga. 1998)

(noting lower court's use of presumption and determining geographic scope of state insurance statute without applying a presumption).

Hawaii

- Has rejected a presumption against extraterritoriality. *See, e.g.*, State v. Bridges, 925 P.2d 357, 367 (Haw. 1996) (determining geographic scope of state eavesdropping statute without applying a presumption), *overruled on other grounds by* State v. Torres, 262 P.3d 1006 (Haw. 2011).

Idaho

- Has adopted a presumption against extraterritoriality. *See* Phillips v. Consol. Supply Co., 895 P.2d 574, 577 (Idaho 1995) ("Absent a statute granting extraterritorial rights, '[s]tatutes are intended to apply and be confined in their operation to persons, property and rights which are within the territorial jurisdiction of the law-making power.'" (quoting Ore-Ida Potato Prod., Inc. v. United Pac. Ins. Co., 392 P.2d 191, 195 (Idaho 1964))).

Illinois

- Has adopted a presumption against extraterritoriality. *See* Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 852 (Ill. 2005) (noting "the long-standing rule of construction in Illinois which holds that a 'statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute'" (quoting Dur-Ite Co. v. Indus. Comm'n, 68 N.E.2d 717, 722 (Ill. 1946))).

Indiana

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Allen v. Great Am. Reserve Ins. Co., 766 N.E.2d 1157, 1166 (Ind. 2002) (determining geographic scope of state crime victims relief act without relying on a presumption).

Iowa

- Has adopted a presumption against extraterritoriality. *See* Jahnke v. Deere & Co., 912 N.W.2d 136, 141 (Iowa 2018) ("It is a well-settled presumption that state statutes lack extraterritorial reach unless the legislature clearly expresses otherwise.").

Kansas

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years.

For older cases stating a presumption, see for example, Thompkins v. Adams, 20 P. 530, 536 (Kan. 1889) ("That the legislation of a state can have no extraterritorial force is fundamental, and in the very nature of things incapable of modification, and unproductive of exceptions.").

Kentucky

- Has adopted a presumption against extraterritoriality. *See* Union Underwear Co. v. Barnhart, 50 S.W.3d 188, 190 (Ky. 2001) (noting the "well-established presumption against extraterritorial operation of statutes" that "unless a contrary intent appears within the language of the statute, we presume that the statute is meant to apply only within the territorial boundaries of the Commonwealth").

Louisiana

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. *Cf.* Mendonca v. Tidewater Inc., 862 So. 2d 505, 509 (La. Ct. App. 2003) (applying federal presumption against extraterritoriality to state employment discrimination and whistleblower statutes).

Maine

- Has adopted a presumption against extraterritoriality. *See* Stavis Ipswich Clam Co. v. Green, 236 A.2d 708, 712 (Me. 1968) ("The statutory licensing authority 'can only operate, *proprio vigore*, upon persons and things within the territorial jurisdictions' of the licensing power, and no license has any effect, of its own force, 'beyond the territorial limits of the sovereignty from which its authority is derived.'" (emphasis added) (quoting 50 AM. JUR. *Statutes* § 485)).

Maryland

- Has adopted a presumption against extraterritoriality. *See* Chairman of Bd. of Trs. of Emps.' Ret. Sys. v. Waldron, 401 A.2d 172, 177 (Md. 1979) ("[U]nless an intent to the contrary is expressly stated, acts of the legislature will be presumed not to have any extraterritorial effect.").
- Maryland applies its presumption inconsistently. *See, e.g.*, Graves v. State, 772 A.2d 1225, 1235-39 (Md. 2001) (holding that state criminal registration statute did not apply to convictions in other states without relying on presumption).

Massachusetts

- Has rejected a presumption against extraterritoriality. *See* Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 413 (Mass. 2013) ("[W]here no explicit limitation is placed on a statute's geographic reach, there is no presumption against its extraterritorial application in appropriate circumstances.").

Michigan

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. In *Sexton v. Ryder Truck Rental, Inc.*, a plurality of the Michigan Supreme Court articulated a presumption against extraterritoriality. *See* 320 N.W.2d 843, 854 (Mich. 1982) (plurality opinion) ("In order for a statute to have extraterritorial application, there must be clear legislative intent.").

Minnesota

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, *In re* St. Paul & K.C. Grain Co., 94 N.W. 218, 225 (Minn. 1903) ("It is an elementary rule that statutory law has no extraterritorial effect.").

Mississippi

- Has adopted a presumption against extraterritoriality. *See* Tattis v. Karthans, 215 So. 2d 685, 689 (Miss. 1968) ("Unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it." (quoting 50 AM. JUR. *Statutes* § 487)).

Missouri

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, Stanley v. Wabash, St. L. & P. Ry. Co., 13 S.W. 709, 710 (Mo. 1890) ("It will not be intended that this statute was to have any extraterritorial force, since this would be beyond the power of the legislature of this state. General presumptions of this sort always attend legislative acts.").

Montana

- Has rejected a presumption against extraterritoriality and applies conflicts rules instead. *See* Burchett v. MasTec N. Am., Inc., 93 P.3d 1247, 1252 (Mont. 2004) (holding that state wrongful discharge statute should be applied based on state conflicts rules, "regardless of the fact that it does not expressly provide for extraterritorial application").

Nebraska

- Has adopted a presumption against extraterritoriality. *See* Harper v. Silva, 399 N.W.2d 826, 829 (Neb. 1987) ("The general rule governing the issue of extraterritorial application is that statutes enacted by a state legislature apply to all rights which, and all persons who, come within the limits of the state.").
- Nebraska applies its presumption inconsistently. *See, e.g.*, Health Consultants, Inc. v. Precision Instruments, Inc., 527 N.W.2d 596, 606 (Neb. 1995) (holding that state antitrust law applied to out-of-state conduct causing effects in state without mentioning presumption).

Nevada

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Ditech Fin. LLC v. Buckles, 401 P.3d 215, 217-18 (Nev. 2017) (determining geographic scope of state statute prohibiting recording of phone calls without relying on a presumption).

New Hampshire

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, State v. McGlone, 78 A.2d 528, 530 (N.H. 1951) ("It is a general rule of statutory construction that statutes are not intended to have any extraterritorial effect.").

New Jersey

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Real v. Radir Wheels, Inc., 969 A.2d 1069, 1077 (N.J. 2009) (determining geographic scope of state consumer fraud act by relying on ordinary principles of statutory interpretation).

New Mexico

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years.

New York

- Has adopted a presumption against extraterritoriality. *See* Glob. Reins. Corp.-U.S. Branch v. Equitas Ltd., 969 N.E.2d 187, 195 (N.Y. 2012) ("The established presumption is, of course, against the extraterritorial operation of New York law.").
- New York applies its presumption inconsistently. *See, e.g.*, Griffin v. Sirva, Inc., 76 N.E.3d 1063, 1070 (N.Y. 2017) (determining geographic scope of state employment discrimination statute without relying on presumption).

North Carolina

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, McCullough v. Scott, 109 S.E. 789, 796 (N.C. 1921) ("The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect.").

North Dakota

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. *Cf.* Thoring v. Bottonsek, 350 N.W.2d 586 (N.D. 1984) (determining the scope of state dram shop statute without applying a presumption).

Ohio

- Has rejected a presumption against extraterritoriality. *See, e.g.*, State *ex rel.* Natalina Food Co. v. Ohio Civil Rights Comm'n, 562 N.E.2d 1383, 1385 (Ohio 1990) (determining geographic scope of state employment discrimination statute by relying on ordinary principles of statutory interpretation).

Oklahoma

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases articulating a presumption, see for example, Sheehan Pipe Line Constr. Co. v. State Indus. Comm'n, 3 P.2d 199, 201 (Okla. 1931) ("In the absence of an express provision in the act making the same extraterritorial in its effect, he must show a positive legislative intent that the act should operate in cases where the injury arose outside of the territorial limits of the state of Oklahoma.").

Oregon

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, Swift & Co. v. Peterson, 233 P.2d 216 (Or. 1951) ("No legislation is presumed to be intended to operate outside of the jurisdiction of the state enacting it. In fact, a contrary presumption prevails and statutes are generally so construed.").

Pennsylvania

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Danganan v. Guardian Prot. Servs. 179 A.3d 9, 16 (Pa. 2018) (determining geographic scope of state unfair trade practices statute by relying on ordinary principles of statutory interpretation).

Rhode Island

- Has rejected a presumption against extraterritoriality and applies state conflicts rules instead. *See* Pardey v. Boulevard Billiard Club, 518 A.2d 1349, 1352 (R.I. 1986) (applying conflicts rules to state dram shop act); Woodward v. Stewart, 243 A.2d 917, 922 (R.I. 1968) (applying conflicts rules to wrongful death statute).

South Carolina

- Has adopted a presumption against extraterritoriality. *See* Doctors Hosp. of Augusta, LLC v. CompTrust AGC Workers' Compen. Tr. Fund, 636 S.E.2d 862, 863 (S.C. 2006) ("[T]he jurisdiction of a state is restricted to its own territorial limits." (quoting *Ex parte* First Pa. Banking & Tr. Co., 148 S.E.2d 373, 374 (S.C. 1966))).
- South Carolina appears to deny that the legislature has authority to regulate extraterritorially even if it speaks clearly. *See Ex parte* First Pa. Banking & Tr. Co., 148 S.E.2d 373, 374 (S.C. 1966) ("Thus, the general rule is that no state or nation can, by its laws, directly affect, bind, or operate upon property or persons beyond its territorial jurisdiction. A statute which purports to have such operation is invalid.").

South Dakota

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. For older cases stating a presumption, see for example, Veigel v. Dakota Tr. & Sav. Bank, 225 N.W. 657, 659 (S.D. 1929)

(noting that state statute "can only apply to banks within this state; it has no extraterritorial force").

Tennessee

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Freeman Indus., LLC v. Eastman Chem. Co., 172 S.W.3d 512, 522 (Tenn. 2005) (determining the geographic scope of state antitrust law by relying on ordinary principles of statutory interpretation).

Texas

- Has adopted a presumption against extraterritoriality. *See* Coca-Cola Co. v. Harmar Bottling Co., 218 S.W.3d 671, 682 (Tex. 2006) ("We start with the principle that a statute will not be given extraterritorial effect by implication but only when such intent is clear.").

Utah

- Has adopted a presumption against extraterritoriality. *See* Nevares v. M.L.S., 345 P.3d 719, 727 (Utah 2015) ("Under a deeply rooted and longstanding canon of construction, statutes are presumed not to have extraterritorial effect.").
- In contrast to most states, Utah treats its presumption as a "'clear statement' rule." *Id.*

Vermont

- Has adopted a presumption against extraterritoriality. *See* R & G Props., Inc. v. Column Fin., Inc., 968 A.2d 286, 299-300 (Vt. 2008) ("[A] statute which uses general words is to be construed as having no extraterritorial effect, unless it clearly indicates a different intention." (quoting Arthur A. Bishop & Co. v. Thompson, 130 A. 701, 703 (Vt. 1925))).

Virginia

- Status unclear. State supreme court has not applied a presumption against extraterritoriality for at least fifty years. *Cf.* Dreher v. Budget Rent-A-Car Sys., Inc., 634 S.E.2d 324, 330 (Va. 2006) (following New York interpretation geographic scope of New York statute).

Washington

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Thornell v. Seattle Serv. Bureau, Inc., 363 P.3d 587, 591 (Wash. 2015) (determining geographic scope of state consumer

protection statute by relying on ordinary principles of statutory interpretation).

West Virginia

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Chevy Chase Bank v. McCamant, 512 S.E.2d 217, 224 (W. Va. 1998) (determining geographic scope of state consumer credit and protection statute by relying on ordinary principles of statutory interpretation).

Wisconsin

- Has adopted a presumption against extraterritoriality. *See* Wis. Indus. Energy Grp., Inc. v. Pub. Serv. Comm'n, 819 N.W.2d 240, 252 (Wis. 2012) ("[T]he general rule, unquestionably, is that laws of a state have no extraterritorial effect" (quoting State v. Mueller, 171 N.W.2d 414, 416 (Wis. 1969))).

Wyoming

- Has rejected a presumption against extraterritoriality. *See, e.g.*, Ludvik v. James S. Jackson Co., 635 P.2d 1135, 1141 (Wyo. 1981) (determining geographic scope of state *lis pendens* statute by relying on ordinary principles of statutory interpretation).