

Bennett on the Presumption against Extra-Territoriality

Thomas B. Bennett has posted an article on the presumption against extraterritoriality: *The Canon at the Water's Edge*.

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

This is a student note, forthcoming in the *New York University Law Review*, but legal theorist Larry Solum has characterized the piece as impressive and illuminating from the perspective of legal interpretation.