NOTE

STATUTORY INTERPRETATION IN A CHOICE OF LAW CONTEXT

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A court's method of decisionmaking regarding interstate choice of law affects forum shopping and class action strategy. Rather than read vaguely worded state statutes with the expectation of discovering a legislative intent with respect to extraterritorial application, as the Restatement (Second) of Conflict of Laws suggests, courts should employ a rebuttable presumption that the legislature has not considered the choice of law issue. When a court is faced with an interstate choice of law question in which one potentially applicable law is a statute of the forum state, in the absence of explicit statutory language regarding how a choice of law analysis should be conducted for the forum statute in question, the court should decide which law to apply not by attempting to divine some nonexistent legislative intent but by resorting to the general choice of law principles utilized in the forum state.

INTRODUCTION

Choice of law in the interstate arena bedevils courts, benefits strategic plaintiffs, makes or breaks class actions—and yet legislatures rarely give it any thought. This Note argues that, contrary to the position advanced in the Restatement (Second) of Conflict of Laws (Second Restatement),[1] the lack of legislative attention generally paid to choice of law calls for the conclusion that courts, when interpreting a statute, should employ a rebuttable presumption[2] that the legislature has not considered the choice of law issue. When a court is faced with

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[1] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b (1971) (instructing that in absence of statutory text regarding extraterritorial application, court should look to intent of legislature regarding extraterritorial application).

[2] Throughout this Note, "presumption" is used in the common parlance meaning, not as an evidentiary term of art. I use "presumption" because this is the term that the United States Supreme Court uses to describe its similar rule regarding federal choice of law. *See infra* Part IV.B.

an interstate choice of law question in which one potentially applicable law is a statute of the forum state, in the absence of explicit statutory language regarding how a choice of law analysis should be conducted for the forum statute in question, the court should decide which law to apply not by attempting to divine some nonexistent legislative intent but by resorting to the general choice of law principles utilized in the forum state.

Choice of law and statutory interpretation intersect when, for example, a class of injured litigants hailing from all fifty states sues a Minnesota company in a Minnesota federal district court. In order to make class certification more likely, this multi-state class will want the law of one jurisdiction to apply. The class consequently brings suit under a Minnesota consumer protection statute.[3] The Minnesota defendant challenges the suit on the basis that the laws of all fifty states must be applied to the class's claims, and thus the class should not be certified because the suit will be unmanageable.[4] Under the Second Restatement's recommended approach, a judge's first step will be to examine the Minnesota statute for evidence that the Minnesota legislature intended for its statute to apply to extraterritorial litigants whose only connection to Minnesota is that they were injured by a product manufactured in Minnesota.

But how does the judge determine whether the Minnesota legislature intended this application of Minnesota law? What evidence is the judge looking for? First, the judge will look at the text of the statute, hoping to find an explicit section on "extraterritorial application" that offers direction from the legislature as to how to apply this law in disputes not wholly domestic. Suppose this consumer protection statute does not have an extraterritorial application directive. If this were a federal statute, the judge might then review legislative history, searching for clues that the legislature considered this issue and came to a consensus. With a state statute, however, legislative history is often limited and difficult to obtain.[5] This brings us to the question that is the subject of this Note: What *should* the judge's next move be in interpreting this consumer protection statute for choice of law purposes?

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[3] *See infra* Part II.D.

[4] *See infra* Part II.D.

[5] *See* ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 796–97 (1995) ("More problematic in the search for legislative intent through legislative history is the scarcity and inaccessibility of its documentation in many states. . . . While the maturation of state legislatures has resulted in better and more accessible documentation in many states, no state legislature rivals this aspect of the congressional process.").

Two avenues are available: Consistent with the Second Restatement, the judge could look at the substantive language of the statute, using conventional tools of statutory interpretation in an effort to divine legislative intent.[6] Alternatively, the judge could determine that in the absence of a clear extraterritorial application directive,[7] she should apply the forum state's common law method of choice of law analysis to choose among the laws. Each state has developed through the common law a method of making choice of law determinations, which judges employ in all cases involving a choice between the forum state's common law and the law of another state. Common law methods of choice of law analysis typically focus on which state has the most significant relationship with the cause of action, or on which state has the greatest interest in having its law applied.[8] This Note argues that a court, rightly sensible to its general incapacity to discover any meaningful indicia of legislative intent from the statutory text, should reject the Second Restatement's approach and take the latter tack.

Part I of this Note addresses the antecedent question of whether state legislators routinely consider choice of law when enacting state laws and, concluding that they do not, discusses how this lack of attention to choice of law affects the interpretation of state statutes for choice of law purposes. Part II establishes the relevance of the choice of law issue in modern litigation. Part III presents a case study on choice of law in a class action context, critiquing the court's statutory analysis and proposing a better intellectual framework for the problems presented in the case study. Part IV fleshes out the intellectual framework proposed in Part III, addressing its applicability to class actions and comparing and contrasting federal choice of law standards to the proposed presumption against ill-considered investigations into legislative intent.

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[6] The Restatement is quite explicit on this point:

> Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all citizens of a state including those who are living abroad. When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b.

[7] For a discussion of different ways of rebutting the presumption against legislative intent, see *infra* Part IV.D.

[8] *See generally* DAVID P. CURRIE ET AL., CONFLICT OF LAWS 115–222 (6th ed. 2001).

I

DO STATE LEGISLATORS ROUTINELY CONSIDER CHOICE OF LAW WHEN DRAFTING AND PASSING LEGISLATION?

While difficult to prove empirically, it is my contention that state legislators do not routinely consider choice of law when drafting, debating, and passing legislation. Far from thinking about extraterritorial effects, a state legislator will have strong incentives to work for her constituents in order to accomplish particular policy goals and to benefit herself in the next election cycle. A state legislator will not be similarly motivated to aggrandize the power of the state legislature as an institution by having that institution's law apply as widely as possible.[9] Because state legislators, therefore, generally consider the effects of the laws they pass only on the state in which they have constituents, choice of law is rarely high on their legislative agenda.[10] Not surprisingly, given their institutional incentives, the overwhelming weight of academic authority strongly supports the conclusion that state legislators rarely consider choice of law.[11] Consequently, choice of law has traditionally been an area in which judges are the primary creators of the law.[12]

The conclusion that state legislators do not generally consider choice of law when enacting statutes is buttressed by the political reality that when a state legislator sponsors a bill, debates a bill, or votes for a bill, she is focused on two questions: (i) Is this good policy; and (ii) how will this affect my reelection prospects?[13] The likelihood

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[9] *See* Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 920 (2005) (suggesting that legislators act in their own self-interest, which includes pleasing constituents in order to be reelected, and not out of interest in building power of governmental institution with which they are associated).

[10] CURRIE ET AL., *supra* note 8, at 89 (commenting that state legislatures could attach specific choice of law schemes to individual statutes, but "such provisions are rare, and most [state] legislation is enacted without any consideration of multistate situations").

[11] *See, e.g.*, *id.*; Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1170 (2000) ("Since legislators rarely contemplate this issue, courts must resort to an exploration of constructive intent: What would the legislature have preferred if it had thought about the problem? Unfortunately, however, constructive intent proves no more fruitful than actual intent because it is not clear what principles should guide the construction."); Harold P. Southerland & Jerry J. Waxman, *Florida's Approach to Choice-of-Law Problems in Tort*, 12 FLA. ST. U. L. REV. 447, 447 n.2 (1984) ("Legislators rarely give any thought to the extraterritorial consequences of the laws they enact, nor do they ordinarily intend their laws to have effect beyond the borders of their own states.").

[12] Robert A. Leflar, *Choice-of-Law Statutes*, 44 TENN. L. REV. 951, 951 (1977) ("The bulk of American conflicts law in the choice-of-law area is and always has been judge-made law."); Southerland & Waxman, *supra* note 11, at 447 n.2 ("Conflict of laws remains one of the last great preserves of the common law. It is almost entirely judge-made.").

[13] *Cf.* Levinson, *supra* note 9, at 920 ("Government officials will have a predictable array of interests . . . including effectuating their preferred policies, contributing to the

that a state legislator would consider how and whether the law would apply to out-of-state events or nonresidents of the state is extremely low. The likelihood that a state legislator would consider those issues and then refrain from explicitly adding a section to the statute on "extraterritorial application" is still less. When a law is written and discussed, those doing the writing and discussing are assuming that the residents of that state will be affected by it. None of this is to say that, therefore, a law cannot be applied to events that happen outside the state or to people who do not live in the state. Rather, it is only to say that the authority and the judgment for so doing are not to be found in a mechanical reading of the statute but through the usual choice of law principles applied by courts in all other cases that require choice of law analyses.

II
WHY IT MATTERS

While statutory interpretation in the choice of law context may not be the most pressing legal question of our day, the combination of a choice of law question and a vaguely worded statute presents a real opportunity for mischief. Three factors suggest that the potential for mischief may be quite prevalent and consequential: (i) the high incidence of vaguely worded state statutes, (ii) the enormous incentives for plaintiffs to forum shop, and (iii) the multiplying effect of the class action.

A. Wording of State Statutes and Interpretation of State Statutes

Statutes are accorded a special status in American law because they are born of a legislative process that reflects the people's election-day will. Statutes thus supersede common law, and when a state law case is brought to a court in State *X* and State *X*'s legislature has spoken definitively on the issue through statute, the court is bound to apply the statute. However, state statutes rarely include explicit "extraterritorial application" provisions that tell courts to which nondomestic disputes the statute is designed to apply.[14]

Consequently, judges need a method of statutory interpretation to guide their investigations into legislative intent with respect to extraterritorial application. The usual rules of statutory interpretation will not suffice in this area for two reasons: first, because extraterrito-

success of their political party, seeking greater personal influence within their institution, and angling for higher office. . . . Another universal and particularly pressing interest of government officials is keeping their jobs.").

[14] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b.

rial directives are rare;[15] and second, because judges cannot rationally assume that legislators thought about or discussed choice of law matters when enacting the statute in question, thereby rendering any inquiry into "legislative intent" a judicial fiction.

If judges were to ignore this second point, they could rely on the very general language found in many state statutes to divine a legislative "intent" where there was none. Examples of general wording in state statutes are: "Any person who knowingly and willfully commits an unlawful practice under this chapter shall be guilty of a Class A misdemeanor,"[16] where "'[p]erson' means an individual, organization, group, association, partnership, corporation, or any combination of them;"[17] and "It shall be unlawful for any person to refuse to rent or sell property or services to any individual for the reason that the individual does not possess a credit card."[18] If the language in these statutes were read literally, such that "any person" or the equivalent were assumed to indicate the enacting legislature's *affirmative intent* that the statute be applied to absolutely anyone and everyone, regardless of that person's or the relevant incident's relationship to the enacting state, few limits would cabin their application.[19] But it can hardly be said that this was the legislature's "intent."

Furthermore, the typical move in statutory interpretation is to go from the text to the legislative history in order to divine legislative intent. In most circumstances with respect to state statutes, however, the text is the only guidance available, as most states do not keep complete records of floor or committee debates regarding legislation.[20]

B. Federal Law Silence

Intuitively, it might seem that the Full Faith and Credit (FFC) Clause of the Constitution should play a role in limiting the application of one state's laws to the citizens of another state. While the FFC

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[15] See supra notes 10–12 and accompanying text (discussing legislative intent with respect to choice of law). The Restatement also notes that

> [a] court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6, cmt. b.

[16] ARK. CODE ANN. § 4-88-103 (Michie 2001).

[17] *Id.* at § 4-88-102(4).

[18] PA. STAT. ANN. tit. 73, § 204-3 (West 1993).

[19] The Constitution would continue to place limits on the law's applications. *See infra* Part II.B.

[20] *See* MIKVA & LANE, *supra* note 5, at 796–97.

Clause may have been designed in part to play that role, courts have declined to be its enforcer. The FFC Clause is designed to decrease friction among the states by insisting that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."[21] Thus, each state must respect and enforce the laws of other states, thereby creating a union of these separately governed states.

The question in the choice of law context is how far this respect goes. It would be absurd to say that in a case implicating the interests and laws of two states, the forum state must always apply the law of the other state as a demonstration of the "full faith and credit" it accords the laws of that other state.[22] So when may a forum state disregard the laws and interests of a sister state and instead apply its own law?

Almost always, as the case law shows: While FFC jurisprudence started on a course requiring a forum state to balance its interests against the interests of other interested states,[23] modern constitutional jurisprudence allows (though does not require) a forum state to apply its law when it has *any* interest in the case.[24]

Allstate Insurance Co. v. Hague[25] confirms the Court's determination to give FFC a wide berth—some might argue too wide. In a case in which all of the real contacts had occurred in Wisconsin (Wisconsin was the deceased's state of residency, the state of contracting with the insurance company, and the state in which the accident occurred[26]), the Court held that "for a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair"[27]—and yet further held that Minnesota law could *still* apply in the case.[28] Despite Wisconsin's extensive contacts, Minnesota had a state interest because the insured's widow (the beneficiary of the policy) resided in Minnesota at the time of the litigation. Thus, the

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21 U.S. CONST. art. IV, § 1.

22 Alaska Packers Ass'n v. Indus. Accident Comm'n, 294 U.S. 532, 547 (1935); *see* LARRY KRAMER, TEACHER'S MANUAL TO ACCOMPANY CONFLICT OF LAWS 122, 123 (6th ed. 2001).

23 KRAMER, *supra* note 22, at 125.

24 *See* Pac. Employers Ins. Co. v. Indus. Accident Comm'n, 306 U.S. 493, 497, 501 (1939) (holding that FFC did not restrict California court from applying California law, rather than Massachusetts law, to matter that arose when employee of Massachusetts company was in California on business); *see also* KRAMER, *supra* note 22, at 125.

25 449 U.S. 302 (1981).

26 *Id.* at 306.

27 *Id.* at 312–13.

28 *Id.* at 320.

requisite "significant contact or significant aggregation of contacts" need not be the most significant or the most voluminous of the relevant contacts.

Legislators may write laws which give more respect to sister states' interests than is constitutionally mandated, but in the absence of such legislative action, courts often require only the barest of interests to satisfy application of one state's laws to another state's citizen. Consequently, the Constitution is not a powerful tool for reining in a state's application of its own laws.

C. *Forum Shopping*

Forum shopping is essentially one party's attempt to attain a strategic advantage in the litigation through any number of angles—location (related to the relative convenience of the other party), judge, jury (juries in certain districts of certain states are thought to be particularly pro-plaintiff, for example), or law, to name a few.[29] The "shopping" aspect of forum shopping exists because the interactions between subject matter jurisdiction, personal jurisdiction, and choice of law are such that there are often multiple systems, multiple districts, and multiple states in which a case may be heard. Since cases often involve either parties or events in different states, choice of law is often up for grabs.

Law shopping is the relevant aspect of forum shopping for this Note. Normally, forum shopping for law occurs because litigants suing outside their own jurisdiction believe that the law of another jurisdiction is more favorable to their case than their own jurisdiction's law.[30] Alternatively, if the suit is a class action, the plaintiffs may hope to have a uniform law applied to the class. Forum shopping for law "poses difficult doctrinal problems since evaluating law shopping forces us to balance important values of party fairness against possibly competing values of federalism."[31]

Values of fairness with respect to forum shopping can cut multiple ways. The traditional way of thinking about fairness and forum shopping is that it is unfair for the plaintiff to subject the defendant to an unexpected body of law (for example, California's law rather than Texas's law) because not knowing what law will apply in future litiga-

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[29] George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 653–54 (1993).

[30] Walter W. Heiser, *Toward Reasonable Limitations on the Exercise of General Jurisdiction*, 41 SAN DIEGO L. REV. 1035, 1037 (2004).

[31] Brown, *supra* note 29, at 654.

tion makes it difficult for a defendant to structure his affairs so as to comply with the law.[32]

> [T]he system frustrates rational planning. Parties cannot know when they act what law governs their behavior, for that depends upon post-act events such as the plaintiff's choice of forum. Granted, not every act that gives rise to a lawsuit is planned in advance, but some are. Institutional actors, for example, must decide how much to invest in making their activities safer, and what activities to avoid because the liability risks exceed the benefits. And even acts that are not planned are often insured against in advance. There are significant costs when actors—especially risk-averse actors—are forced to make decisions without knowing what law governs their actions.[33]

Forum shopping can make it almost impossible for a potential defendant to conform his behavior to the law because the applicable law is unknown.

On the other hand, many defendants who are subjected to the vagaries of forum shopping are corporations that operate in multiple states (and often across all fifty states). The possibility of forum shopping theoretically provides incentives for these corporations to conform their standards of behavior to the most stringent laws out there. Doing so, however, could be very burdensome if states have wildly diverging laws.[34] Also, it is a characteristic of the American system that the plaintiff is the master of the lawsuit, so perhaps it is not as troubling as it seems at first that a plaintiff can shape the suit on this front as well.[35] One commentator has noted that shifting the power over choice of law from the plaintiff to the defendant, far from neutralizing the choice of law, could actually just tilt the balance in favor of the defendant, thereby disadvantaging the plaintiff—a result that does not seem any more "fair" than giving the plaintiff the advantage.[36] What this Note is advocating, however, is not a true shift of

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[32] *Id.* at 666.

[33] Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 12–13 (1991).

[34] Brown, *supra* note 29, at 669. Note, however, that while from a planning perspective conforming behavior to the most stringent state law works, the necessity of companies making this calculation to comply with the most stringent law does not necessarily serve the policies of states with less stringent policies (who may be trying to attract business, for example), nor is it fair to companies who do business in different states to be unable to take full advantage of whatever favorable law exists in each state.

[35] *Cf.* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 313 n.117 (1990) (pointing out that choice of forum is left to plaintiffs and this is not seen as unfair; questioning whether plaintiff-driven law choice is any more objectionable than plaintiff-driven forum choice).

[36] Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53, 64 (1991). Another aspect of federalism recently implicated in the class action context is the relationship between the

power over choice law from plaintiff to defendant. Rather, it is a shift in the *source* of the power—from the arguably irrelevant (for these purposes) text of the statute to judicially administered common law choice of law principles.

Forum shopping also implicates federalism principles, since by definition a litigant is looking to states outside the most obvious one for a more advantageous law. For a California plaintiff to sue in Maryland under Maryland law in order to remove herself from unfavorable California law is to allow a Maryland court to supplant California's policies with respect to this resident and substitute its own. From a comity point of view, and also in terms of a state being able to effectuate its policies, forum shopping is a systemic problem. The easier it is for plaintiffs to choose among different states' laws when initiating litigation, the more this systemic problem is exacerbated.

D. Class Actions

The final factor that demonstrates the potential consequences of statutory interpretation for choice of law purposes is the multiplying effect of the class action, since hundreds or thousands of people's claims could be knocked down or, instead, left to soldier on to face another day in court, all depending on the choice of law determination.

Federal Rule of Civil Procedure 23 (Rule 23) governs class actions brought in federal court. Most states have rules that largely mirror Rule 23.[37] Thus, the discussion regarding class action requirements will be in reference to Federal Rule 23, with the understanding that the analysis is unlikely to be significantly different if applied to most states' rules.

The first challenge of any class action is certification, the point in a class action lawsuit at which a district court judge declares whether

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federal government and the states. The recently enacted Class Action Fairness Act of 2005 severely restricts the ability to bring a class action in state court. *See* Class Action Fairness Act of 2005, 119 Stat. 4 (2005) (to be codified at 28 U.S.C. §§ 1711–15). Thus, class actions will likely be redirected into federal courts, despite the fact that most class action questions of law derive from state law. Stephen Labaton, *Senate Approves Measure to Curb Class Actions*, N.Y. TIMES, Feb. 11, 2005, at A1.

[37] *See generally Survey of State Class Action Law—2003*, 2003 A.B.A. SEC. LITIG. (Thomas R. Grande et al. eds.) (analyzing each state's class action statute and comparing it to Federal Rule 23). For example, the class action statutes of Arizona, Indiana, Kansas, Maine, Missouri, New York, Ohio, Texas, and Washington are all substantively similar to Federal Rule 23. *Id.* at 30, 200, 236, 278, 345, 408, 441, 560, 606. And even when the statute differs somewhat from Federal Rule 23, in practice Federal Rule 23 is often persuasive at the state level. *Id.* at 183 (discussing Illinois's class action statute). *But see id.* at 522 (South Carolina class action statute "differs significantly from its federal counterpart").

the lawsuit complies with the prerequisites of Rule 23 and can go forward on the merits (or, more likely, settle[38]). Different types of class actions exist, and the one most relevant to this Note is the Rule 23(b)(3) class action, which, for certification purposes, requires that a class action be the preferred method of litigation (as opposed to litigating each class member's claim separately).[39] This is known as the predominance prong. One aspect of the predominance inquiry is manageability,[40] which includes the question of whether one body of law can be applied to the entire class, or if the laws of multiple states must be applied.[41] The easier it is for one state's law to be applied to the class, the more likely it will be for the class to be certified.

Phillips Petroleum Co. v. Shutts is the most important Supreme Court case at the intersection of class actions and choice of law, and speaks directly to the question of the malleability of the choice of law inquiry.[42] *Shutts* essentially reaffirmed the Court's holding in *Allstate*,[43] though this time the context was a class action and the stakes were higher, as the question was not only *which* law would be applied but *whether any single body of law* could constitutionally be applied to a class action in which plaintiffs hailed from different states and had differing levels of contacts with the forum state.[44] The Court held that the "significant contacts" requirement for choice of law purposes cannot be relaxed in a nationwide class action:

> [W]hile a State may . . . assume jurisdiction over the claims of plaintiffs whose principal contacts are with other States, it may not use this assumption of jurisdiction as an added weight in the scale when considering the permissible constitutional limits on choice of sub-

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[38] According to a study by the Federal Judicial Center, between 62% and 100% of certified class actions end in settlement. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1399 (2003).

[39] FED. R. CIV. P. 23. The Rule 23(b)(3) class action is most relevant because the often small nature of individual claims almost mandates that the class be large (to make the case financially rational), and therefore also raises the likelihood of a case with plaintiffs from various states, thus creating choice of law challenges. A Rule 23(b)(3) class action is known as the "poor man's" class action because it is set up to allow numerous small claims to be brought together, claims which otherwise would not be worth the litigation costs. Stephen R. Bough & Andrea G. Bough, *Conflict of Laws and Multi-State Class Actions*, 68 UMKC L. REV. 1, 10 (1999).

[40] FED. R. CIV. P. 23.

[41] Bough & Bough, *supra* note 39, at 10 ("[V]ariations in state law is [sic] one of the largest barriers to the predominance requirement.").

[42] 472 U.S. 797 (1985).

[43] *See supra* notes 25–28 and accompanying text.

[44] *See Shutts*, 472 U.S. at 814–15 ("The Kansas courts applied Kansas contract and Kansas equity law to every claim in this case, notwithstanding that over 99% of the gas leases and some 97% of the plaintiffs in the case had no apparent connection to the State of Kansas except for this lawsuit.").

> stantive law. It may not take a transaction with little or no relationship to the forum and apply the law of the forum in order to satisfy the procedural requirement that there be "a common question of law." The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.[45]

Thus, the choice of law analysis for class actions is not fundamentally different from that in a non-class action setting. The main difference is that if the same law cannot constitutionally be applied to all of the litigants, the class may not be certified because of manageability concerns.[46] Furthermore, if a court manipulates the law so that one law applies,[47] thus keeping the class action alive, the law that it chooses will affect the substantive rights of the litigants even if the parties go straight from certification to settlement: A settlement is a product of both sides' calculations about likelihood of success and level of damages if successful,[48] which means that the settlement achieved will be significantly affected by the substantive law governing the dispute. The necessity of class certification in order to achieve the goals of a class action (even settlement), and the intersection of certification and choice of law (through manageability), mean that the fate of multi-state class actions is closely tied to whether one law can be applied to the entire class.[49]

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[45] *Id.* at 821.

[46] Courts will often allow classes to be subdivided for purposes of law application, so some variation typically will not kill a class. *See* FED. R. CIV. P. 23(c)(4); ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 301–08 (2000).

[47] *See, e.g., In re* Agent Orange Litig., 580 F. Supp. 690, 713 (E.D.N.Y. 1984) (applying "national consensus law" to class action); Larry Kramer, *Class Actions and Jurisdictional Boundaries: Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 552–65 (1996).

[48] *See* KLONOFF & BILICH, *supra* note 46, at 592 ("[A]n essential step in designing a negotiating strategy [for settlement purposes] is to assess the strength of the client's case and the probable outcome of continuing to pursue litigation.").

[49] *Shutts* makes class certification more difficult. It can therefore be criticized as leading to inefficient outcomes because the forum state's law cannot be applied without engaging in a "contacts" analysis, making it less likely that a large, multi-state class can have its claims adjudicated under one law because the manageability part of the predominance prong is less attainable. The end result is that fewer class actions can be certified, and those that are certified will have smaller classes. From a strict legal process perspective, this may not seem troubling—indeed, it may be a good result—because the *Shutts* decision serves as a backstop to require that the law applied has a connection to the claim and that the litigant is not simply "gaming the system" to find the most favorable law. On the other hand, it is fair to question the utility of forcing these claims through the choice of

III
STATES AND CHOICE OF LAW

States are the main players in domestic choice of law, though state choice of law intersects with federal law because, at a minimum, the states cannot reach beyond the bounds allowed by the U.S. Constitution.[50] This Part will focus on the role of the states, providing a case study of what courts have done with respect to interpreting statutes that do not have explicit choice of law directives. It will then propose an alternative method of statutory interpretation for statutes in the choice of law context, followed by suggestions for why courts are taking different tacks than the one suggested.

A. Exemplary Case

A recently decided consumer class action lawsuit illustrates how courts sometimes take a simplistic legislative interpretation route when faced with potential choice of law challenges—a route that this Note submits is detrimental to basic principles of the choice of law process. Class actions are a particularly useful conduit for viewing choice of law challenges, as the stakes are much higher for both plaintiffs and defendants—for plaintiffs, overcoming the choice of law hurdle may be their only chance at a multi-state (and certainly nationwide) class action;[51] while for defendants, choice of law can be a deft defense at the often-determinative certification stage.[52]

A Minnesota case wonderfully juxtaposes two different choice of law inquiries for the same class of plaintiffs against the same defendant. In *In re St. Jude Medical, Inc. Silzone Heart Valves Products Liability Litigation*,[53] a U.S. District Court treated the choice of law

law sieve, which will make class actions more expensive because litigations will have to be conducted in multiple states. This will undoubtedly leave some people out of the resolution because it is unlikely that there will be enough people with claims under the same *law* to make litigation cost-effective—even though a real wrong may have been done to these potential plaintiffs. An example of large-scale litigation that has chosen to value efficiency over process is bankruptcy. Federal bankruptcy courts have jurisdiction to consolidate all claims against the debtor, regardless of the claims' origins, and thus are able to efficiently manage all of the proceedings against the debtor. *See* KLONOFF & BILICH, *supra* note 46, at 1156–57. The efficiency trade-off in taking a strict stance on choice of law matters in class actions is a tough one, and it is beyond the scope of this Note.

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

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

[52] *See* George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 521 (1997) ("The single most salient feature of the modern mass tort class action is the extraordinary power that derives from certification of a class alone."). *But see* Silver, *supra* note 38, at 1357 (arguing that settlement pressure in class actions is overstated).

[53] *In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., No. MDL 01-1396 JRTFLN, 2003 WL 1589527 (D. Minn. Mar. 27, 2003).

analysis for the common law claim of negligence completely differently from the statutory claims for, among other things, fraud and false advertising.[54] The judge first engaged in a thoughtful analysis of the plaintiffs' common law negligence claims, concluding that

> [g]iven the potential diversity of state laws that apply to [the claims], the Court cannot find . . . that Minnesota's governmental interests are more important than those of other states. . . . [T]he Court determines that it will apply the law of the state in which each class member's claim arose to the members of the class.[55]

Immediately following this disposition of the common law claims, the court proceeded to look a Minnesota consumer protection statute right in the eye and, without blinking, perfunctorily agreed with plaintiffs that the Minnesota statute should be applied to the entire class, without regard to the interests of the states in which the claims arose.

What explains the puzzling result that the common law claims were *not* to be adjudicated under Minnesota law, but that the statutory claims *were*? It all came down to statutory interpretation, and to the court's precipitous assumption that the Minnesota legislature specifically considered the extraterritorial application of its statute when it was enacted.

Generally, Minnesota employs a "significant contacts analysis" for determining choice of law questions.[56] Thus, for the common law negligence claim, the court looked at "(1) predictability of results; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; [and] (5) application of the better rule of law."[57] In discussing whether Minnesota's common law of negligence could be applied to plaintiffs in all fifty states, the court focused on the "advancement of the forum's governmental interest" factor:

> Although Minnesota clearly has significant interests in applying its own law to this case, the Court cannot ignore the interests of states in which class members were implanted with Silzone valves. These states' interests go beyond ensuring that their citizens are compensated for alleged damages; the states also have strong interests in applying their relevant laws to the marketing, sale, and implantation of medical devices within their borders.[58]

By looking not only at the interests of the forum (Minnesota), but also at the interests of the states from which the plaintiffs hailed, the

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[54] *Id.* at *9–10, *17–18.
[55] *Id.* at *10.
[56] *Id.* at *9.
[57] *Id.*
[58] *Id.* at *9–10 (emphasis added).

court concluded that other states had interests in regulating commerce within their borders and of compensating their injured citizens.

The differences between the above common law analysis and the statutory analysis are striking. In determining that the three Minnesota statutes in question—the Uniform Deceptive Trade Practices Act (UDTPA),[59] Prevention of Consumer Fraud Act,[60] and False Statement in Advertisement Act[61]—could be applied to all plaintiffs from all fifty states, the court explained that

> these statutes explicitly permit "any person" injured by violations of the statutes to bring suit. . . . The fact that individual plaintiffs hail from other states is immaterial. Plaintiffs seek relief under particular Minnesota statutes. In the absence of evidence that plaintiffs do not have standing to sue . . . the Court finds no reason to deny plaintiffs their chosen claim of action. Minnesota law may therefore apply to the classes' consumer protection and deceptive trade practices allegations.[62]

It is true that all three of these statutes have the general language quoted above. The UDTPA says "*[a] person* engages in a deceptive trade practice when, in the course of business, vocation, or occupation, *the person* [engages in the prohibited acts]."[63] The Prevention of Consumer Fraud Act states that "[t]he act, use, or employment by *any person* of any fraud . . . is enjoinable as provided [herein]."[64] The False Statement in Advertising statute says that "*[a]ny person* . . . who, with intent to sell or in anywise dispose of merchandise . . . shall . . . be guilty of a misdemeanor."[65] Thus, the district court in *St. Jude* did not mischaracterize the wording of the statutes.[66] The dis-

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[59] MINN. STAT. ANN. §§ 325D.43–48 (West 2004). This statute originated as a uniform law and was drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL). *See generally* Fred H. Miller, *The Significance of the Uniform Laws Process: Why Both Politics and Uniform Laws Should Be Local*, 27 OKLA. CITY U. L. REV. 507 (2002) (explaining process of drafting uniform laws). One could argue that because the statute originated from the NCCUSL, a national body, the Minnesota legislature assumed the statute would be applicable nationally. However, a study of the practice of drafting uniform laws indicates that drafters are always thinking about the ultimate enactors of the laws, the state legislators; when state legislators decide whether to adopt the proposed uniform law, their main consideration is how the law will play with that state's constituents and political forces. *Id.* at 515–16.

[60] MINN. STAT. ANN. §§ 325F.68–70 (West 2004 & Supp. 2005).

[61] MINN. STAT. ANN. § 325F.67 (West 2004).

[62] *In re* St. Jude Med., Inc. Silzone Heart Valves Prods. Liab. Litig., No. MDL 01-1396 JRTFLN, 2003 WL 1589527, at *17–18 (D. Minn. Mar. 27, 2003).

[63] MINN. STAT. ANN. § 325D.44(1) (West 2004) (emphasis added).

[64] MINN. STAT. ANN. § 325F.69(1) (West 2004 & Supp. 2005) (emphasis added).

[65] MINN. STAT. ANN. § 325F.67 (West 2004) (emphasis added).

[66] In fact, the court in *St. Jude* was relying on nonbinding precedent by another Minnesota district court in its interpretation of the statutes. *See In re* Lutheran Bhd. Variable Ins. Prod. Co. Sales Practice, 201 F.R.D. 456 (D. Minn. 2001).

trict court did, however, make a surprising statutory interpretation move by essentially stating that these words ("any person" and the like) clearly evidenced the intent of the Minnesota legislature to apply these statutes to the same claims to which, because of choice of law principles, Minnesota common law could not be applied.

If the Minnesota statutes had contained formal choice of law directives to apply the statutes to the constitutional maximum, there is little question that the court would have been compelled to apply the statutes to the plaintiffs—regardless of its determination that, under Minnesota's fallback choice of law principles, Minnesota common law should not apply to the plaintiffs. What is key in this case, however, is that "any person" is *not* a choice of law directive. Rather, it is a term indicating that a person need not have special characteristics (for example, being female or having a disability) to come under the protection of the statute. As many commentators have noted,[67] it is the exception rather than the rule that a statute will include a choice of law directive. It thus seems highly unlikely that a state legislature would choose to break from tradition and include a choice of law directive, but do it in a subtle way, rather than simply including a section entitled "extraterritorial application" or something similar.

B. Possible Explanations for the St. Jude-Type Analysis

In *St. Jude*, the Minnesota district court construed the statutes' "any person" language to be an instruction to the court to apply the statutes to the constitutional maximum. As has been discussed above, this is a significant departure from typical assumptions regarding a state legislature's lack of concern for choice of law matters.[68]

What precisely is the form of statutory interpretation being employed here? It does not involve an investigation into the legislative purpose because no inquiry was made into the "evil" that the legislature sought to cure. It would be a strangely strict version of textualism to myopically read the text, take it at absolute face value, and refuse to draw reasonable inferences about the legislative process and the manifest lack of consideration the lawmakers give to the arcane matter of extraterritorial application. The court instead seems to focus on evidence of legislative intent—but not legislative intent based on floor debates or committee hearings, only legislative intent drawn from the text itself.[69]

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[67] *See supra* note 12 and accompanying text.

[68] *See supra* Part I.

[69] Most states do not keep comprehensive legislative histories. *See* MIKVA & LANE, *supra* note 5, at 796–97. Furthermore, the use of legislative history as an interpretive tool has been roundly criticized by members of the United States Supreme Court. *See, e.g.*,

Legislative intent based on the text is an entirely permissible tool of statutory interpretation, but context should matter. That is, *using text to infer intent is nonsensical if the legislature had no intent on the relevant issue when drafting or approving the text*. Because choice of law is rarely considered by state legislators, in the absence of contrary evidence courts should assume that the legislature did not consider choice of law when drafting text.

A partial explanation for the use of the text of the statute to get to legislative intent (though not one the *St. Jude* court mentions) may be the background role that the Restatement (Second) of Conflict of Laws (Second Restatement) plays in choice of law jurisprudence. The Second Restatement, like all restatements of law, is not binding on courts but simply instructive. The Second Restatement has been widely criticized by academics but is fairly influential on courts.[70]

With respect to legislative intent, the Second Restatement instructs courts to apply the statute of the state in which it sits if that state's legislature so intended (assuming that the application thereof would not violate constitutional constraints).[71] Such an instruction seems facially neutral and even laudatory given the basic ideas regarding legislative supremacy already discussed.[72] The problem is that the Second Restatement explicitly instructs courts that, "[w]hen the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction."[73] Arguably, the Second Restatement is endorsing precisely what the Minnesota court did in *St. Jude*.

One illustration of the way courts have interpreted the Second Restatement's directive can be seen in *Busse v. Pacific Cattle Feeding Fund #1*,[74] in which a Texas court, interpreting a statute without an explicit choice of law section,[75] relied on the Second Restatement to completely avoid comparison of Texas's interest with that of any other interested state: "If construction of the Texas statute justifies the application of Texas rather than Iowa law, and that does not offend the [federal] constitution, it is not necessary to engage in the choice of law analysis based on the significant relationships set out in [the

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ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997).

[70] *See* Symeon C. Symeonides, *Choice of Law in the American Courts in 2000: As the Century Turns*, 49 AM. J. COMP. L. 1, 15 (Winter 2001).

[71] *See supra* note 6.

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

[73] RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. b.

[74] 896 S.W.2d 807 (Tex. App. 1995).

[75] *Id.* at 814; TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 2002).

Second Restatement]."[76] Because the relevant Texas statute stated that it should be "liberally construed,"[77] the Texas court found an intent to apply the statute to the constitutional maximum for choice of law purposes.

A directive such as this, however, which instructs courts to construe a statute broadly, could have been intended by the legislature to apply to myriad other aspects of litigation that are wholly separate from choice of law—for example, a determination of reliance for the purposes of contract claims, or of whether an implied warranty existed between buyer and seller. Though in the present case—given the facts and the wording of the statute—a "fallback" common law choice of law analysis might have compelled the application of the Texas statute, the Second Restatement and the Texas court short-circuited that analysis by making an inappropriate assumption about legislative intent on the question of which law to apply. Certainly, if a legislature evinces a specific intent to have a law apply extraterritorially to the constitutional maximum, the court must follow this intent. However, because choice of law is an arcane area that legislators are unlikely to contemplate when drafting laws, the lack of an explicit provision almost certainly indicates a lack of specific intent with respect to choice of law. If a legislature does not, in fact, have such an intent, but just wants its laws "liberally construed," that is insufficient to warrant a blind application of the law to the controversy without first looking to the interests of other states.

In sum, in the absence of explicit provisions regarding extraterritorial application, quite likely no such intent existed. Thus, an attempt to extract a legislative intent regarding choice of law from anything—other than the explicit directive of the text—is insincere at worst and misguided at best.[78]

IV
A PROPOSAL OF THE APPROPRIATE METHOD OF INTERPRETATION

In the absence of a clear statement regarding extraterritorial application, courts should not try to divine a legislative intent from the text. When interpreting statutes in the choice of law context, there should be a rebuttable presumption that, in the absence of a clear choice of law directive, the legislature has not considered the choice of

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[76] *Busse*, 896 S.W.2d at 814.

[77] TEX. BUS. & COM. CODE ANN. § 17.44 (Vernon 2002).

[78] *See generally* Leflar, *supra* note 12, at 974 (arguing that any statute regarding choice of law should be flexible and "give[ ] due weight to all the relevant considerations").

law issue. This presumption could be rebutted by extra-textual evidence of legislative intent regarding choice of law analysis, such as legislative history that shows the legislature specifically discussing choice of law.

A. The Presumption's Effect on Generally Worded Statutes, Forum Shopping, and Class Actions

This presumption against implicit legislative intent regarding choice of law will address the three problems identified in the choice of law context: generally worded statutes, forum shopping, and class actions.

1. Generally Worded Statutes

Creating a presumption against legislative intent will not make vaguely worded statutes more precise (for example, the Minnesota statutes' "any person" language).[79] The presumption will, however, minimize the harm that this wording causes. If legislators do not think about those outside their own state when passing laws, the law would be presumed to be applicable to citizens of that state and those from outside the state who fall within the statute based on common law choice of law principles (such as "most significant relationship" or "interest analysis").[80]

State legislatures could respond by inserting boilerplate language on extraterritoriality into each statute, instructing courts that the legislature intended for the statute to be applied to the constitutional maximum. If the presumption had this effect, it would completely undermine the purpose of the presumption. Legislators still would not be thinking about the issue (it would be an automatic addition to any statute, not part of the debate), but the resulting laws would then be irretrievably applicable to anyone in the world who could assert enough contact with the state to be within the (broad) constitutional boundaries.

However, this is an unlikely consequence as legislators will presumably not even be aware that a judicial presumption is at play. If the choice of law principles employed by courts in the absence of a clear choice of law directive in the statute are working well, the choice of law outcome of the cases should be what the legislators would have expected when passing the law in the first place. In exactly the same way as before the presumption, if legislators care about a particular law being applied widely, they will say so in the text of the statute.

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[79] *Supra* notes 59–65 and accompanying text.

[80] *See generally* CURRIE ET AL., *supra* note 8.

Otherwise, the decision will be better made by courts who can weigh the facts of a particular case. Furthermore, states might be discouraged from inserting boilerplate language in their statutes for fear of resentment (and perhaps retaliation) from sister states.

2. *Forum Shopping*

Forum shopping could be mitigated and made less abusive by a presumption against recourse to legislative intent. Forum shopping will continue in the face of the presumption against legislative intent simply because the very existence of choice of law doctrine will always allow litigants to shop for law. The presumption against legislative intent, however, will make a marginal difference because choice of law decisions will be made either on the basis of explicit choice of law directives in the statute or on the basis of the choice of law principles that have developed in the forum state, and *not* on the basis of a manufactured legislative intent.[81]

Without examining each state's common law choice of law principles, it is difficult to predict whether the presumption would lead to more or less frequent application of the forum state's law than under the status quo. In the latter scenario, however, concerns regarding a court's competence to correctly apply the laws of other states may be raised.[82] While it would be a mistake to dismiss this concern too lightly, this application of another jurisdiction's law is part and parcel of the federal system and a challenge with which federal judges are frequently confronted when sitting in diversity on cases based on state law. The inappropriate application of forum law leads to strategic behavior and comity problems between states; the imperfect application of another state's law is unfortunate but may systematically lead to less forum shopping in the first place, as many litigants will prefer increased predictability through better application of known law.[83]

While possibly making forum shopping a less profitable enterprise, the presumption might encourage *judge* shopping. A choice of law decision unguided by the substantive statute is a highly discre-

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[81] *See supra* Part III.A.

[82] Illustrating these concerns, Georgia's choice of law statute does not allow Georgia courts to apply the common law of another state—if Georgia's choice of law analysis points to another state but that state does not have a statute on point, then Georgia common law applies (presumably subject to a due process analysis). *In re* Tri-State Crematory Litig., 215 F.R.D. 660, 677 (D. Ga. 2003) ("Georgia's choice of law system, however, has an unusual characteristic: the application of another jurisdiction's laws is limited to statutes and decisions construing those statutes.") (internal citations omitted).

[83] Or, if the "imperfect" application of another state's law is just a veiled attempt at applying the principles of the forum state's law, this imperfect application could have the opposite effect and result in more forum shopping.

tionary judicial act. If certain judges were known to have expansive views regarding the level of contacts with the forum state necessary to merit the application of forum law, lawyers might try to have their cases assigned to those judges.

Judge shopping in this context is nevertheless unlikely to be a rampant problem. Even if judge shopping is *practically* possible in the given jurisdiction, the complexity of a litigation strategy makes a plan that turns on assignment to a particular judge a risky endeavor. Also, to the extent that a case involving choice of law results in an actual decision rather than settlement, the appeals process could make the applicable standards more uniform.

3. *Class Actions*

The effect of the presumption on class actions arises from the interaction of the general wording of statutes with the class certification requirement of Rule 23. Simply put, the presumption against legislative intent with respect to choice of law will make it harder for Rule 23(b)(3) multi-state classes to be certified. Such a result is bittersweet—the Rule 23(b)(3) class action is, after all, the "poor man's" class action,[84] and it is tempting to choose rough justice over proper process. This temptation should be resisted. Class actions are useful tools for judicial efficiency, but allowing this quest for conservation of scarce resources to exert too heavy a weight on the scale would sacrifice a well-crafted, system-wide neutral process for the benefit of specific litigants.[85] While the short-term view might bend one toward class certification despite the "technicalities" of choice of law problems, systemic, long-term concerns militate toward saving the process.[86] Furthermore, the presumption against legislative intent

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[84] Bough & Bough, *supra* note 39,.at 10.

[85] In *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1301 (7th Cir. 1995), the court of appeals refused to certify a nationwide tort class action—with full knowledge that the denial might preclude justice for many of the plaintiffs—in part because it could not allow the district court to merge fifty different standards of negligence for the purposes of a jury trial, even though the differences in these standards were merely nuanced:

> [N]uance can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of the meaning of negligence and the subordinate concepts. . . . The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.

Id. at 1300–01.

[86] That said, the net value of trading efficiency for optimal process in the class action sphere might quite reasonably be questioned. *See supra* note 49. Since this presumption puts a thumb on the scale of process, at the expense of efficiency, a judgment that efficient litigation is more important than perfect litigation would challenge the propriety of this presumption.

would primarily affect multi-state class actions, not class actions involving litigants from the same state. Therefore, the likely result of the application of the presumption would be more *statewide* class actions, rather than a significant curbing of class actions generally.[87]

B. The Presumption and Its Relationship with Federal Choice of Law Canons

A presumption against turning to state legislative intent with respect to choice of law is different from, though not inconsistent with, a canon of statutory interpretation endorsed by the Supreme Court when deciding how to apply United States law to cases arising out of contacts in other countries. A comparison of the two approaches validates the proposed state presumption against legislative intent: On the one hand, a comparison illustrates that the proposed state presumption and the federal presumption stem from many of the same intuitions regarding legislative intent and choice of law; on the other hand, the comparison demonstrates that many of the criticisms of the federal presumption are inapposite in the state context.

While framed slightly differently in two of the Supreme Court cases which have dealt with choice of law in a foreign context, the canon of statutory interpretation used by the Supreme Court in these cases essentially assumes that when the U.S. Congress enacts a law lacking an extraterritorial extension, it does so intending that the law will apply only to matters arising in the United States.[88] This pre-

[87] Note, however, that one consequence of moving from the multi-state to the statewide class action is that injured parties in small states (or in any state that does not, for whatever reason, have many similarly situated people) will be less likely to have their claims adjudicated. The smaller the number of people in the class, the less economically attractive the class action is to plaintiffs' lawyers working on a contingent basis. *See* KLONOFF & BILICH, *supra* note 46, at 421, 425–26, 676, 687 (acknowledging both efficiency of nationwide class action and potential hardships to plaintiffs in mandating smaller, state-based class actions; discussing practical problems of small classes or individual suits; acknowledging importance of "attorneys' fees . . . in shaping the dynamics of class-action litigation").

[88] *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004) ("This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws."); EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' . . . We assume that Congress legislates against the backdrop of the presumption against extraterritoriality.") (internal citations omitted). Canada's courts employ a similar presumption regarding its Parliament, as recently stated by Canada's Supreme Court: "While the Parliament of Canada, unlike the legislatures of the Provinces, has the legislative competence to enact laws having extraterritorial effect, it is presumed not to intend to do so, in the absence of clear words or necessary implication to the contrary." Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Ass'n of Internet Providers, [2004] S.C.R. 427, 454.

sumption that, unless otherwise indicated, Congress does not intend to encroach on other countries' policies is the inverse of the presumption advocated in this Note. Both the federal law presumption and this Note's state law presumption reach the same initial result, which is that at first blush the law in question is limited to the territorial boundaries of the enacting legislative body. Unlike the federal presumption, however, the state presumption does not stop at these territorial boundaries. Instead, the court conducts a choice of law analysis based on the forum state's choice of law method, which may result in the application of either the forum state's law or that of another interested state. In contrast, if the federal presumption is not rebutted by evidence that Congress intended the law to extend to extraterritorial activity, the court's analysis is finished and United States law will not apply.[89]

Good reasons exist for the federal law and state law presumptions to differ in this manner. First, the United States Congress is more likely than a state legislature to have some intent with respect to extraterritoriality. Not only is Congress constitutionally tasked to think about foreign affairs[90] and routinely involved in matters regarding other nations,[91] but Congress also is likely to eschew interfering with the executive's acknowledged preeminence in the area of foreign affairs.[92] Therefore, it is not inconsistent to say that the question of extraterritorial application may be assumed to be in the minds of Congresspersons when enacting laws, while *not* in the minds of state legislators when enacting laws.

Second, U.S. law should not be lightly extended to causes of action primarily associated with a foreign nation, as other countries have relatively greater sovereignty interests vis-à-vis the United States than two states both within the United States have vis-à-vis each other.[93] Consequently, the risk of mucking up foreign relations by

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[89] *See, e.g.*, *Empagran*, 124 S. Ct. at 2359.

[90] U.S. CONST. art. I, § 8 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations . . . .").

[91] For examples, see the website of the U.S. Senate Committee on Foreign Relations, *at* http://foreign.senate.gov/ (explaining international issues on which Senate concentrates). *See also* James Brooke, *Seoul Tries Hard to Keep Its "Sunshine Policy" Free of Clouds*, N.Y. TIMES, Sept. 6, 2004, at A4 (referencing U.S. Senate committee's efforts to interview North Korean defector); *U.S. Senators Find Growing Rift Between North Korea and Army*, N.Y. TIMES, Mar. 30, 1997, at 10 (reporting differences in approach of Senate and U.S. Army with respect to peace talks in South Korea).

[92] *Cf.* Levinson, *supra* note 9, at 955 (arguing that members of Congress have deferred to Executive on foreign policy due to high political risks).

[93] *See* James E. Ward, Comment, *"Is That Your Final Answer?" The Patchwork Jurisprudence Surrounding the Presumption Against Extraterritoriality*, 70 U. CIN. L. REV. 715 (2002).

applying U.S. law extraterritorially outweighs the risk of interstate resentment caused by applying one state's law extraterritorially to citizens or causes of action of another state. A presumption against Congressional intent to give U.S. laws extraterritorial application in the absence of an affirmative statement pays homage to this concern.

The state presumption, which allows a court to continue with a normal choice of law analysis, is insulated from some of the criticism that has been leveled at the federal presumption. The federal presumption against extraterritorial application of laws, as exemplified in *EEOC v. Arabian American Oil Co. (Aramco)*[94] and, more recently, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,[95] has been criticized by one scholar as "anachron[istic]," [96] "disappointing[,] and unsatisfactory."[97] This criticism argues that the concept of territoriality is outdated. While in centuries past it might have been acceptable to posit that anything happening within one's borders was subject to one's control (the "territoriality principle"), in today's interconnected world, extraterritorial effects are routine.[98] Actions do reverberate outside the territory in which they take place and narrow territorial analyses can seem anachronistic.

This argument does not, however, undermine the wisdom of the presumption against state legislative intent with respect to choice of law in the interstate context. In the situation discussed in this Note, if a court concluded that the statute did not speak to the issue of extraterritorial application, the court would then engage in a normal choice of law analysis—comparing, for example, the relevant contacts of the parties to the relevant states to determine which state has the most significant relationship to the case. Then, regardless of whether the court decided to apply the forum's law or another state's law, the court would continue to adjudicate the case under the applicable law. Therefore, the interstate presumption against legislative intent with respect to choice of law does not create the same anachronistic, disap-

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> A cursory examination of the *Aramco*, *Lujan*, and *Smith* decisions lends itself to a rather accurate and uniform picture of the presumption. First, the primary purpose of the presumption is the effectuation of the principle that Congress legislates with domestic concerns in mind. Second, the presumption prevents unintended clashes between the laws of the United States and foreign countries. Third, absent "clear evidence" of congressional intent, the presumption remains a valid bar to the application of U.S. law abroad.

Id. at 725.

94 499 U.S. 244, 248 (1991).

95 124 S. Ct. 2359, 2366 (2004).

96 Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (1992).

97 *Id.* at 201.

98 *Id.* at 207–09.

pointing, and unsatisfactory results as does the Supreme Court's hidebound fidelity to the territoriality principle in the international choice of law context.

C. *The Presumption and Predictability*

"Case-by-case balancing" has been criticized as sacrificing predictability and embracing the vagaries of judicial idiosyncrasies.[99] Arguably, case-by-case balancing is precisely what is being advocated with an interstate presumption against extraterritorial intent: The court must first determine if the statute plainly speaks to extraterritorial application and then, assuming it does not, must engage in a choice of law analysis which, under modern choice of law theories, invariably involves balancing based on the facts of the case. It may be true that "these problems are exacerbated by the incommensurable nature of the factors being balanced . . . and by the fact that an effective choice-of-law system depends partly on being able to anticipate results."[100] However, at least in the interstate context, it is hard to see how the Second Restatement's approach is an improvement in terms of predictability. One of the challenges of interstate choice of law is that a transaction might have enough contacts with numerous states such that the laws of any of those states could constitutionally be applied—and would be applied under a *St. Jude*-type analysis. Presumably, however, both parties would not expect the laws of all of those states to apply to their controversy. While choice of law analysis is imperfect at best, parties are more likely to anticipate correctly which state's law will apply if a common law choice of law analysis is invoked than if there is the possibility that a judge might read "any person," or a similar phrase, more broadly than justified.

On a slightly different note, it remains true that fallible humans must make these decisions and thus there exists some danger that judges will allow their own preferences to cloud their decisions. When combined with the presumption against extraterritoriality, these predilections may result in a court's refusal to apply the forum's law extraterritorially even when the legislature has evinced an intent for extraterritorial application on the face of the statute. For example, the court in *Dreisel v. Metropolitan Property and Casualty Insurance Co.*[101] interpreted a state statute on uninsured motorist insurance cov-

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[99] Larry Kramer, *Extraterritorial Application of American Law After the* Insurance Antitrust Case*: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 755 (1995); *see* Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1508–19 (1985).

[100] Kramer, *supra* note 99, at 755.

[101] 836 So. 2d 347 (La. App. 1 Cir. 12/20/02).

erage which arguably *did* include a choice of law directive. Looking at the statute as a whole, however, the court declined to read the statutory language as such and instead conducted a traditional choice of law analysis.[102]

Dreisel is a Louisiana case in which a Massachusetts resident was injured in a car wreck in Louisiana while in the passenger seat of a car insured in Massachusetts driven by a Louisiana resident. The victim sued in a Louisiana state court under Louisiana's Uninsured Motorist statute, which included a clause instructing that "this subparagraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state."[103] This statutory direction probably should have been viewed as an instance in which the presumption against extraterritoriality has been rebutted by the legislature's manifest intent.

A number of circuits in Louisiana, however, took a different view: Reading the statute as a whole, these circuits concluded that the intent of the legislature was limited to Louisiana insurance policies, and a traditional choice of law analysis should be employed to determine whether to apply the statute to a non-Louisiana resident.

In *Dreisel*, the court engaged in a traditional choice of law analysis and found that Massachusetts had a stronger interest than Louisiana in having its law applied. While Louisiana had evinced an interest in ensuring that accident victims recover for their injuries, Massachusetts had an interest in managing its insurance industry.[104] Because the victim was not a Louisiana resident, and because applying Louisiana law would interfere with a Massachusetts insurance contract and the cost-benefit equilibrium established in Massachusetts, the court decided that Massachusetts had the more substantial interest in the uniform application of its laws governing insurance contracts than Louisiana had in providing an insurance remedy to an out-of-state resident who happened to have sustained an injury while transitorily within its borders.[105]

The *Dreisel* case is not an easy one. Normatively, the result seems correct—Massachusetts law should have applied in this case. However, while the provision in question was not labeled an "extraterritorial provision," it nevertheless seemed to address directly the statute's range of applicability and rebut the presumption that the legislature had not considered choice of law. Perhaps the only way to

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102 *Id.* at 350.
103 *Id.* at 349.
104 *Id.* at 350–51.
105 *Id.* at 352.

reconcile a case such as this is to accept that the act of judging involves a series of decisions that cannot be distilled into a science. While the opportunity for different interpretations is omnipresent in choice of law, the best defense is a principled process for decisionmaking.

D. What Can Rebut the Presumption?

Now that the need for a presumption against legislative intent with respect to choice of law has been established, it is necessary to explore the bounds of this presumption—what statutory language is sufficient to evince a clear intent on the part of the legislature with respect to choice of law (and thus rebut the presumption), and what sources outside the text could rebut the presumption?

1. Statutory Text Rebuts Presumption

In order for the text of a statute to rebut the presumption against legislative intent with respect to choice of law, the text must clearly undermine the bedrock assumption of the presumption: that choice of law implications were not considered when drafting the statute, and that any language that might weigh on a choice of law determination is accidental, not intentional. While an attempt to catalogue every different way in which this assumption could be undermined would be a futile effort, two examples illustrate the type of drafting that would appropriately rebut the presumption: a statute that contains a specific section entitled "extraterritorial application" (or something synonymous), or one that deals specifically with in-state and out-of-state relationships.

First, in the case of a legislature inserting a section entitled "extraterritorial application," the primacy of the legislature as a law-making body requires that a court respect the legislature's fairly obvious intent with respect to the choice of law scheme for the particular statute. In this case, the presumption against legislative intent with respect to choice of law would be explicitly rebutted and the court would follow the choice of law scheme articulated in the statute (within constitutional boundaries[106]).

Second, a statute that specifically deals with the manner in which the law applies to in-staters and out-of-staters, though not within a specific "extraterritorial application" section, would also probably rebut the presumption, as such language strongly implies that the legislature was aware of the fact that the statute might affect those from outside the state's territorial borders and considered what that effect

106 *See supra* notes 25–28 and accompanying text.

should be. However, more room for interpretation exists in this realm than where there is a clearly labeled "extraterritorial application" section of the statute. Courts will have to use their judgment and place the relevant language in context.

For example, in the *Dreisel* case, the statute in question read: "[T]his subparagraph and its requirement for uninsured motorist coverage shall apply to any liability insurance covering any accident which occurs in this state and involves a resident of this state."[107] A strong argument can be made that specifying that the accident must occur "in this state" and that at least one affected person must be "of this state" meets the criteria laid out above. On the other hand, the statute does not definitively address the issue of out-of-staters, and the introduction of the statute arguably indicates that the statute is only intended to apply to Louisiana insurance policies.[108] Louisiana courts were divided as to whether this statute rose to the level of evincing a legislative intent with respect to choice of law[109]—and indeed, the case is a close one.

2. *Outside Materials Rebut Presumption*

In states in which complete legislative histories are kept and are accessible, floor debates regarding choice of law with respect to the language of the statute *could* rebut the presumption against legislative intent. Again, the assumption that must be undermined in order to rebut the presumption is that legislators did not think about the extraterritorial ramifications of the statute. For instance, discussion on the legislative floor regarding choice of law would effectively undermine this assumption.

Legislative history's value in any context, however, is a controversial issue, and therefore the presumption would only be rebutted through this avenue if the judge hearing the case subscribes to the theory of using legislative history to inform statutory interpretation.[110]

CONCLUSION

A presumption against legislative intent in the choice of law context mitigates the problems encountered with generally worded state statutes, forum shopping, and Rule 23(b)(3) class actions. State legislators rarely consider extraterritorial application of their laws. This

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[107] *See Dreisel*, 836 So. 2d at 349 n.4. *See also supra* notes 101–05 and accompanying text.

[108] *See Dreisel*, 836 So. 2d at 350.

[109] *Id.* at 349.

[110] *See generally* SCALIA, *supra* note 69.

presumption insures that if the legislators do consider choice of law to be an important part of the bill (and therefore include it explicitly in the bill), this legislative intent will be respected. In the absence of this legislative intent, normal choice of law analysis should not be usurped by a myopic textual interpretation that assumes too much.