

AGORA: REFLECTIONS ON *RJR NABISCO V. EUROPEAN COMMUNITY*

THE SCOPE AND LIMITATIONS OF THE PRESUMPTION AGAINST EXTRATERRITORIALITY

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Introduction

In *RJR Nabisco v. European Community*¹, the Supreme Court addressed the extraterritorial application of U.S. law for the third time in six years—in this case examining the geographic scope of the Racketeer Influenced and Corrupt Organizations Act (RICO).² The decision consolidates and in certain respects expands upon the test for analyzing extraterritoriality issues that the Court had introduced in *Morrison v. National Australia Bank*³ and refined in *Kiobel v. Royal Dutch Petroleum*.⁴ It also provides further evidence of the Court's continuing quest to identify categorical, territory-based rules governing the application of U.S. statutes in cases involving significant foreign elements. As I will argue, however, like other recent decisions, *RJR* raises doubt as to the sufficiency of such rules to address the messy and often unpredictable patterns of transnational economic activity.

The case involved a lawsuit initiated in 2000 by the European Community, on behalf of itself and twenty-six member states. In brief, the complaint alleged that RJR, acting in concert with other participants including Colombian and Russian drug traffickers, participated in a scheme to smuggle narcotics into Europe and use the resulting proceeds to pay for shipments of RJR cigarettes.⁵ The RICO claim was based on a number of predicate offenses including money laundering and support to foreign terrorist organizations. The alleged injuries to the European Community included “competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs.”⁶ RJR moved to dismiss the complaint on the basis that RICO has no extraterritorial effect, arguing that the statute did not apply to racketeering activity occurring outside the borders of the United States. (Alternatively, it argued that the statute did not apply to the activity of foreign enterprises.)

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¹ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

² 18 U.S.C. ch. 96.

³ *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010).

⁴ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

⁵ *RJR*, 136 S. Ct. at 2098, slip op. at 4.

⁶ *Id.* at 2098, slip op. at 5. In an earlier opinion, the Second Circuit had barred the claims for lost tax revenue on the basis of the so-called “revenue rule,” under which the courts of one country will not enforce the tax laws of another. *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d. Cir. 2005).

In the first part of its opinion, the Supreme Court considered whether RICO's substantive provisions apply to foreign conduct. Following the approach it had outlined in *Morrison*, it asked whether the statute gives a clear, affirmative indication that it applies extraterritorially. While RICO does not contain an explicit statement to that effect, it defines "racketeering activity" to include a number of predicate offenses, some of which *do* apply explicitly to foreign conduct. The Court concluded that this was sufficient evidence that Congress intended RICO to apply extraterritorially in claims based on those predicate offenses.⁷ In the second part of the opinion, the Court applies the presumption against extraterritoriality to the section of RICO creating a private right of action. This comment focuses on that part of the opinion.

Private Enforcement and the Threat of International Discord

The civil remedies section of RICO, 18 U.S.C. Section 1964(c), creates a private right of action allowing "[a]ny person injured in his business or property by reason of a violation of section 1962" to recover treble damages for the resulting harm. In addressing this provision, the Court expressed its concern that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."⁸ In describing the extent of this potential friction, the Court hoists the European states with their own petard. In previous lawsuits involving the extraterritorial application of U.S. antitrust and securities laws, many had filed amicus briefs arguing that certain aspects of the U.S. remedial scheme (particularly treble damages) were incompatible with their local justice systems. In *RJR*, the Court quotes from several of these opinions, reading back to the European states the objections they had previously raised.⁹

Of course, as the European Community pointed out, those concerns had been raised in the context of litigation initiated by private plaintiffs—who would be unlikely to "exercise the type of self-restraint or demonstrate the requisite sensitivity to the concerns of foreign governments" expected in actions initiated by public regulators.¹⁰ Thus, many of the arguments in the amicus briefs focused on preventing a state's own citizens (as investors in a securities claim, for instance, or as purchasers in an antitrust claim) from "bypassing" the remedial scheme of their home jurisdiction in favor of a more attractive U.S. forum. In this case, the European Community argued, there was no such risk, since the plaintiffs were the foreign countries themselves. The Court rejected this argument as an invitation to create a "double standard."¹¹ Because the rule it adopted would henceforth govern suits by private as well as governmental plaintiffs, the Court concluded, it could not overlook the potential for friction created by private actions under RICO.

Expanding the Scope of the Presumption Against Extraterritoriality

Having identified the particular form of international discord that private enforcement may create, the Court turned once again to the presumption against extraterritoriality, stating that where the risk of friction is evident, the need to "enforce" the presumption is particularly strong.¹² It concluded that although the presumption had been overcome with respect to RICO's substantive provisions, it must nevertheless be applied *separately* to the provision creating a private cause of action. It framed the question as whether that provision creates a cause

⁷ *RJR*, 136 S. Ct. 2102, slip op. at 11.

⁸ *Id.* at 2106, slip op. at 19.

⁹ *Id.* at 2106-2108, slip op. at 20-21.

¹⁰ *Id.* at 2117, n. 9, slip op. at 20 n. 9 (quoting one of the amicus briefs).

¹¹ *Id.* at 2108, slip op. at 22.

¹² *Id.* at 2107, slip op. at 21.

of action for “injury suffered overseas.”¹³ (The harms alleged by the European Community were suffered there, not in the United States.) Section 1964(c) provides simply that “any person injured in his business or property” by a violation of the substantive provisions of RICO may assert a cause of action. Although it recognized “any” as a term that “ordinarily connotes breadth,” the Court held that use of that term failed to rebut the presumption against extraterritoriality.¹⁴ Similarly, it concluded, the unqualified reference to “business or property” failed to communicate Congressional intent that business or property interests located outside the United States would be protected by the private cause of action. Thus, although the geographic scope of the *substantive* provisions of RICO was held commensurate with the scope of the predicate offenses, the scope of the private cause of action was not. Private litigants can bring claims only for injuries suffered within the territory of the United States.

This holding rests on a startling expansion of the doctrine’s application. The presumption against extraterritoriality has traditionally been understood to concern the conduct to which federal statutes apply; its own sphere of application, accordingly, was limited to conduct-regulating rules. *Kiobel* already represented a significant departure from this approach in that it applied the presumption to a jurisdictional statute. As commentators at the time pointed out, the Court’s rationale in this regard was incompatible with its own distinction in *Morrison* between subject-matter jurisdiction and legislative jurisdiction under the securities laws.¹⁵ *RJR* goes much further, stating that the presumption must be applied to any statute “regardless of whether [it] regulates conduct, affords relief, or merely confers jurisdiction.”¹⁶

This is a dubious proposition. As William Dodge has pointed out, the Court can’t possibly mean what it says regarding jurisdictional statutes, since applying the presumption against extraterritoriality to general jurisdictional statutes would deprive federal courts of subject-matter jurisdiction Congress clearly intends them to enjoy.¹⁷ And to apply the presumption separately to subprovisions of substantive statutes with extraterritorial effect—as in *RJR* itself—is likely to frustrate congressional intent. Many statutes contain sections creating private rights of action. Consider, for example, the laws on employment discrimination. Following the Supreme Court’s holding in *EEOC v. Arabian American Oil Co.*¹⁸ that Title VII lacked extraterritorial effect, Congress amended that law to include the “clear statement” the Court sought: in the portion of the law defining covered employment relationships, Congress clarified that the law protected U.S. citizens employed abroad.¹⁹ Yet the provisions that allow the victims of intentional employment discrimination to sue for compensatory and punitive damages (contained in other sections of Title VII as well as in the Civil Rights Act of 1991) do not contain a separate statement that they apply extraterritorially. But surely Congress intended that remedy to be available to any covered employee harmed by intentional discrimination, not just those whose injury is suffered within the United States.

The threat of international discord created by private enforcement could have been addressed by other means. The presumption against extraterritoriality is just one of many tools traditionally used to deal with jurisdictional conflict in cross-border regulation—others being, for example, the *Charming Betsy* presumption that ambiguous statutes should be interpreted in accordance with international law, the doctrine of *forum non*

¹³ *Id.* at 2109, slip op. at 24.

¹⁴ *Id.* at 2108, slip op. at 22.

¹⁵ See, e.g., Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT’L L. 65 (2013).

¹⁶ *RJR*, 136 S. Ct. 2101, slip op. at 9.

¹⁷ William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM).

¹⁸ *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991).

¹⁹ 42 U.S.C. § 2000e(f).

conveniens, and comity. Standing alone, the presumption is not well suited to deal with all instances of conflict. Indeed, in both *Kiobel* and *RJR*, some of the Justices sketched out an alternative path. In his concurring opinion in *Kiobel*, Justice Breyer points out that the Alien Tort Statute (ATS) “was enacted with ‘foreign matters’ in mind.”²⁰ As a result, in his view, the presumption—which reflects the understanding that Congress ordinarily legislates with domestic matters in mind—“does not work well.”²¹ He sets out an alternative approach under which the jurisdictional scope of the ATS would be determined by international jurisdictional norms (citing Sections 402-404 of the Restatement (Third) of Foreign Relations Law), and any international friction would be minimized by recourse to “limiting principles such as exhaustion, *forum non conveniens*, and comity,” as well as judicial deference to the views of the executive.²² Justice Ginsburg’s dissent in *RJR* takes a similar approach. She notes that “[t]o the extent extraterritorial application of RICO [in private litigation] could give rise to comity concerns not present in this case, those concerns can be met through doctrines that serve to block litigation in U.S. courts of cases more appropriately brought elsewhere.”²³

The New Territorialism

Why then the majority’s exclusive reliance on the presumption, which required a significant expansion of its scope? It seems to be driven by the desire to arrive at categorical rules, anchored in territorialism, to delimit the geographic scope of particular laws. The ultimate effect of this approach—and perhaps its aim—is to cut back on the private enforcement of U.S. regulatory law.²⁴

In *RJR*, the Court holds that only an injury suffered within the United States can support a private cause of action under RICO—regardless of whether other factors in a particular case might trigger a U.S. regulatory interest.²⁵ This approach echoes that taken in several previous decisions, each of which establishes a particular connecting factor to determine a statute’s legislative scope. In *Morrison*, after concluding that the focus of the Exchange Act was not on the location of fraudulent conduct but rather on purchases and sales of securities in the United States, the Court defined the scope of Section 10(b) by reference to the location of the underlying securities transaction.²⁶ In *Hoffmann-LaRoche v. Empagran*,²⁷ the Court held that U.S. antitrust law applies to foreign conduct only if that conduct causes domestic injury.²⁸ In *Kiobel*, the Court did not reach the point of articulating a fixed rule, but indicated a similar inclination to territorialize based on the location of the conduct in question, stating that it must “touch and concern” the United States.²⁹

²⁰ *Kiobel*, 133 S. Ct. 1659, 1672 (2013) (Breyer, J., concurring).

²¹ *Id.*

²² *Id.* at 1673-74.

²³ *RJR*, 136 S. Ct. at 2115, slip op. at 8 (Ginsburg, J., dissenting).

²⁴ Justice Stevens makes this point in his concurrence in *Morrison*, characterizing the majority’s opinion as part of “the Court’s continuing campaign to render the private cause of action under § 10(b) toothless.” *Morrison*, 561 U.S. at 286 (quoting *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 175 (Stevens, J., dissenting)).

²⁵ In *RJR* itself, “[a]ll defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct occurring in the United States. . . . In short, this case has the United States written all over it.” *RJR*, 136 S. Ct. at 2115, slip op. at 7 (Ginsburg, J., dissenting).

²⁶ “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.” *Morrison*, 561 U.S. at 273.

²⁷ *Hoffmann-LaRoche v. Empagran*, 542 U.S. 155 (2004).

²⁸ *Id.* at 158.

²⁹ *Kiobel*, 133 S. Ct. at 1669.

As I have argued elsewhere in the context of securities regulation, this form of territorialism is simply incompatible with the effective operation of regulatory statutes in today's economy, and fails to capture the ways in which domestic and foreign regulatory interests coincide and overlap with each other.³⁰ More prosaically, such categorical rules also create difficult line-drawing problems, as the Court recognized in *RJR* itself: It noted that the application of the “domestic injury” requirement “will not always be self-evident, as disputes may arise as to whether a particular alleged injury is ‘foreign’ or ‘domestic.’”³¹ Similar difficulties have emerged under the Court's other territorial tests—in securities regulation, for instance, lower courts have struggled to identify the location of non-exchange-based transactions. In *Kiobel*, the Court simply ducked the issue by leaving for another day a statement of when activity would “touch and concern” U.S. territory sufficiently to rebut the presumption against extraterritoriality, also leading to uncertainty in the lower courts.

Finally, there may be situations in which a permissible application of U.S. law to foreign conduct might nevertheless create jurisdictional conflict. The Court's recent extraterritoriality jurisprudence has not confronted this question. In *Kiobel*, the ATS was held to lack extraterritorial reach, and no U.S.-based conduct was present that would have supported the law's domestic application. In *Morrison*, Section 10(b) was likewise held to lack extraterritorial reach, and the plaintiff's claim was based on a foreign transaction and therefore lay outside the statute's reach despite the presence of some conduct in the United States. And in *RJR* itself, the plaintiffs had waived any claim for domestic injuries, thus removing their claim from the possible purview of RICO as interpreted.

Such situations might arise, however—either because a law is found to have extraterritorial reach, or because a particular event is deemed to fall within the “focus” of the statute in question, triggering a permissible domestic application of the law. In 2014, the Second Circuit addressed exactly such a situation in a securities lawsuit against Porsche Automobile Holdings.³² The lawsuit arose from swap agreements that had been entered into in the United States, and thus clearly fell within the scope of Section 10(b) under the *Morrison* test. However, the swaps referenced securities of a foreign issuer traded exclusively on foreign exchanges; in addition, the deceptive conduct alleged by the plaintiff had occurred primarily overseas. Just as clearly, then, the application of U.S. law would likely have created conflict with a foreign regulatory system. As the court recognized, “a rule making [Section 10(b)] applicable whenever the plaintiff's suit is predicated on a domestic transaction, regardless of the foreignness of the facts constituting the defendant's alleged violation, would seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application.”³³ It held that *Morrison* had established no such rule: “while a domestic transaction or listing is *necessary* to state a claim under § 10(b), a finding that these transactions were domestic would not *suffice* to compel the conclusion that the plaintiffs' invocation of § 10(b) was appropriately domestic.”³⁴ Rather, it concluded, courts would need to consider the facts of each case to determine whether the application of U.S. law would be impermissibly extraterritorial.

³⁰ Hannah L. Buxbaum, *Morrison v. National Australia Bank: Defining the Domestic Interest in International Securities Legislation*, 105 ASIL PROCEEDINGS 402 (2011).

³¹ *RJR*, 136 S. Ct. at 2111, slip op. at 27. Interestingly, though, the Court did not draw from this observation the same conclusion it had in the first part of its opinion. *RJR* had argued that even if RICO applies to foreign racketeering activity, it does not apply to the activity of foreign enterprises. The Court rejected this argument, and noted that

[i]t is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results . . . These difficulties are largely avoided if, as we conclude today, RICO's extraterritorial effect is pegged to the extraterritoriality judgments Congress has made in the predicate statutes . . .

Id. at 2104-2105, slip op. at 15-16.

³² *Parkcentral Global Hub Limited v. Porsche Automobile Holdings S.E.*, 763 F.3d 198 (2d. Cir. 2014).

³³ *Id.* at 215.

³⁴ *Id.* at 216.

Conclusion: Beyond the Presumption

The Court's recent jurisprudence in the area of legislative jurisdiction exhibits a clear tendency to address international conflict through expansive application of the presumption against extraterritoriality. Nevertheless, one must ask whether *RJR* leaves room for lower courts to employ tools other than the presumption to limit the application of U.S. law in circumstances of jurisdictional conflict. In my view, this question must be answered affirmatively. On the one hand, there are passages in the opinion suggesting that no analysis beyond the presumption should be undertaken. At two points, for instance, the Court quotes *Morrison's* statement that "If § 10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)."³⁵ Applying this to RICO, it states that "RICO . . . applies abroad, and so we do not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them . . ."³⁶ On the other hand, neither *RJR* nor the other extraterritoriality decisions—which, again, did not confront this particular question—expressly preclude such additional analysis. Moreover, the "other limitation" referred to in the passage above might include limitations imposed by doctrines such as comity, not merely additional limitations imposed legislatively.

In addition, it is worth emphasizing that at the moment there are only four Justices supporting such dependence on the presumption, and the concomitant move toward fixed rules defining legislative scope. Justice Sotomayor (along with Justices Ginsburg and Kagan) joined Justice Breyer's concurring opinion in *Kiobel*. Had she not recused herself in *RJR*, she would presumably have joined Justice Ginsburg's dissent there, which rests on similar arguments. The Court's jurisprudence on the question of extraterritoriality may still be a work in progress.

³⁵ *RJR*, 136 S. Ct. at 2101, 2103, slip op. at 10, 14.

³⁶ *Id.* at 2104, slip op. at 14.