

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

THE FRANKENSTEIN'S MONSTER OF EXTRATERRITORIALITY LAW

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The judge-made presumption against extraterritoriality has recently become a motley patchwork of eccentric and sometimes contradictory doctrines seemingly stitched together for one, and only one, mission: to deprive plaintiffs the right to sue in U.S. courts for harms suffered abroad. It lumbers along, blithely squashing precedent, principle, statutory text, and legislative intent—all to heed its abiding and single-minded obsession. The Supreme Court has so far mangled the scope of the Securities Exchange Act¹ and the Alien Tort Statute (ATS),² and, in *RJR Nabisco v. European Community*, has placed another statute—the Racketeer Influenced and Corrupt Organizations Act (RICO)—on the chopping block.³ The major surgery performed was amputating RICO's private right of action for extraterritorial offenses and replacing it with a much stubbier appendage limited to injuries suffered on U.S. territory.

This contribution makes several observations. The first focuses on the Court's loose but potentially loaded language that the presumption applies to jurisdictional statutes.⁴ This is of course an outgrowth of the Court's 2013 decision in *Kiobel v. Royal Dutch Petroleum*, which applied the presumption to the cause of action authorized by the ATS—a statute that *Kiobel* itself acknowledged is “strictly jurisdictional.” I am less sure than others that *Kiobel* avoided applying the presumption to the ATS proper (as opposed to merely the cause of action the ATS authorized), especially in light of the post-*Kiobel* lower-court trend, which treats challenges to the ATS's geographic scope as going to subject-matter jurisdiction, not the merits. My concern is that *RJR* may now swing wide open the door for courts to deploy the presumption to dismiss suits on subject-matter jurisdiction grounds more generally.

My second observation is that, despite its lip service to the contrary, *RJR*'s application of the presumption frustrates Congress and damages international relations. Herein lies a deep irony, for deference to Congress and reduction of international friction are precisely the considerations that originated the presumption and supposedly motivate it today. Yet rather than stay faithful to its origins as essentially a separation-of-powers canon designed to effectuate legislative supremacy and judicial modesty, it has paradoxically become a thoroughly judge-directed creature that carelessly neglects the real stakes in particular cases for needlessly formalistic

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¹ See *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

² See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

³ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016).

⁴ *Id.* at 2099-2100, slip op. at 7-8.

elaborations that, in practice, defeat its intended purpose and allow the Court complete discretion to ignore congressional directives.

The Presumption and Subject-Matter Jurisdiction

Kiobel did something new with the presumption by applying it to the cause of action authorized by a jurisdictional statute. Up until that point, as the Court noted, the presumption had “typically appl[ie]d . . . to discern whether an Act of Congress regulating conduct applies abroad.”⁵ That is, the presumption applied to statutes that contained what are usually referred to as “conduct-regulating” rules. Prior precedents had therefore placed the presumption’s work squarely in the realm of U.S. prescriptive jurisdiction, as opposed to U.S. adjudicative jurisdiction regarding whether and when courts may entertain suit—a category to which subject-matter jurisdiction statutes and rules pertain. Indeed, *Kiobel* acknowledged that the Court had, just three years earlier in *Morrison v. National Australia Bank*, explicitly recognized that the presumption bears upon the merits rather than subject-matter jurisdiction.⁶

The problem was that the statute *Kiobel* addressed, the ATS, was—according to the Court itself—“strictly jurisdictional.”⁷ The Court’s solution was to apply the presumption to the cause of action the ATS authorized. This alone was odd, or at least novel. The presumption had always been a canon of *statutory* construction—but here, the Court was purporting to apply it not to the statute itself (since that would have directly contradicted *Morrison*), but to the cause of action the statute authorized. I don’t find this necessarily illogical, but I also don’t find it convincing. While purporting not to be construing the ATS itself in light of the presumption, the Court nevertheless wound up construing the ATS through the lens of the presumption to determine whether and how it applied to the cause of action the ATS authorized.⁸

These concerns have been vindicated post-*Kiobel*. The overwhelming lower-court trend treats challenges to the ATS’s ambit as challenges to the court’s subject-matter jurisdiction.⁹ A multitude of courts have even raised the issue *sua sponte* precisely because they view the presumption as pertaining to subject-matter jurisdiction rather than the merits.¹⁰ If the presumption’s work were really limited only to the cause of action—that is to say, “[a] group of operative facts giving rise to one or more bases for suing”¹¹—these dispositions should have been merits-based. That is, because the facts in question occurred outside the reach of the law, there was no legally cognizable cause of action. This whole line of cases thus appears inconsistent with *Morrison*. Perhaps it will be reversed someday. But it certainly doesn’t endorse a charitable reading of *Kiobel*’s attempt to avoid applying the presumption to a subject-matter jurisdiction statute.

⁵ *Kiobel*, 133 S. Ct. at 1664.

⁶ *Id.* (citing and quoting *Morrison*, 561 U.S. at 253-254).

⁷ *Id.*

⁸ As I’ve explained elsewhere,

although the Court strained to cabin the presumption’s work “to claims under the ATS,” it invariably had to ask about the statute itself, concluding that “nothing in the [ATS] rebuts that presumption.” And once that inevitable statutory inquiry is made, it becomes pellucid that no principled distinction exists between gauging the presumption’s applicability to the ATS on the one hand, and its applicability to [the subject matter jurisdiction statute in *Morrison*] on the other, and that *Kiobel* renders the law incoherent.

Anthony J. Colangelo, *What is Extraterritorial Jurisdiction?*, 99 CORNELL L. REV. 1303, 1339 (2014).

⁹ See, e.g., *Warfaa v. Ali*, 811 F.3d 653 (4th Cir. Feb. 1, 2016); *Doe v. Drummond*, 782 F.3d 576 (11th Cir. 2015); see also Anthony J. Colangelo & Christopher R. Knight, *Post-Kiobel Procedure: Subject Matter Jurisdiction or Prescriptive Jurisdiction*, 19 UCLA J. INT’L L. & FOR. AFF. 49, 56 & n.35 (2015).

¹⁰ Colangelo and Knight, *supra* note 9 at 56 & n.33.

¹¹ *Cause of Action*, BLACK’S LAW DICTIONARY (10th ed. 2014).

And now in *RJR* the Court has explicitly stated that it “must” evaluate statutes according to the presumption “regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction [read: subject matter jurisdiction].”¹² William Dodge insightfully and correctly notes that this makes no sense in light of the rest of the opinion.¹³ But given *Kiobel*'s application in the lower courts, I am worried that this loose language will be read to extend the presumption to subject-matter jurisdiction statutes more generally.

The Private Right of Action

RJR's most significant holding is that RICO creates a private right of action only for injuries suffered on U.S. territory. This isn't unexpected news—courts have been diluting RICO's private enforcement provisions for some time now, for example, by imposing the old judge-made revenue rule to override what seemed like fairly straightforward statutory directives.¹⁴ It was also presaged by *Morrison*'s and *Kiobel*'s powerful invigoration of the presumption against extraterritoriality.

I want to suggest, however, that the presumption's application to RICO's private right of action contradicts the canon's own origins as a separation-of-powers and foreign relations doctrine. Far from safeguarding legislative supremacy, *RJR* reflects the Court's use of the presumption to transform the statute that Congress enacted into one the Court would have preferred.

The presumption against extraterritoriality is based on two rationales. One is the assumption that Congress legislates with only domestic concerns in mind; the other is avoiding international friction that could result from unintended U.S. jurisdictional overreach. As to this second rationale, the operative qualification is *unintended*, which translates to “unintended by the political branches.” The foreign relations worry is that, absent the presumption, courts might extend U.S. law abroad in ways the political branches never intended, sparking unintended international discord. But if the political branches intended U.S. law to apply abroad, a judicial refusal to effectuate that directive would be tantamount to courts overriding the political branches. The Supreme Court invented the presumption in 1818 in *United States v. Palmer*,¹⁵ with both of these rationales playing a part to limit the reach of a U.S. statute outlawing piracy. And the Court has repeated these rationales in its most recent presumption against extraterritoriality opinions, including *RJR*.¹⁶

Congress legislates with only domestic concerns in mind

Let's begin with rationale one: the assumption that Congress legislates with domestic concerns in mind. *RJR* presents a couple of interesting twists here. The first goes to the statutory structure of RICO, which proscribes certain patterns of racketeering activity. Notably, RICO itself says nothing about extraterritoriality. Rather, it defines racketeering activity by reference to various federal and state offenses, or what are called “predicates.” The Court nevertheless concluded (correctly) that, because some of the predicate offenses clearly have extraterritorial reach, so too do RICO's racketeering provisions. Hence, its “unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”¹⁷

¹² *RJR*, 136 S. Ct. at 2101, slip op. at 9.

¹³ William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM).

¹⁴ *Attorney Gen. of Canada v. R.J. Reynolds*, 268 F.3d 103, 105 (2d Cir. 2001); cf. *id.* at 137 (Calabresi, J., dissenting), cert. denied, 537 U.S. 1000 (2002).

¹⁵ *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

¹⁶ *RJR*, 136 S. Ct. at 2100, slip op. at 8.

¹⁷ *Id.* at 2103, slip op. at 10.

The Court thus “looked through” the RICO statute to the underlying predicate statutes to discern RICO’s geographic coverage as to certain racketeering activities, specifically money laundering and material support to foreign terrorist organizations. Thus, unlike in *Morrison* and *Kiobel*, the Court found that Congress *did not* have only domestic concerns in mind. Instead, because Congress had affirmatively indicated that the predicate offenses applied to these foreign activities, so too did RICO’s substantive provisions and, accordingly, the government could enforce both criminal and civil penalties.

But as to the private right of action, the Court was not willing to look through RICO to the predicates in order to discern the statute’s geographic scope. As the Dissent observed, this seems incongruous.¹⁸ The reason the Court gave is unpersuasive and unsettling, at least if the point of the presumption is to protect legislative supremacy against judicial interference. To defend limiting RICO’s statutory private right of action, the Court drew from *Kiobel*’s holding and reasoning that the presumption applied to a *judicially*-crafted private right of action under the ATS and extended that holding and reasoning to a *legislatively*-crafted private right of action. Indeed, the Court defended the presumption’s application to RICO’s private right of action by quoting *Sosa v. Alvarez-Machain*’s statement that “[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion.”¹⁹

The Court’s reliance on this aspect of *Sosa* is unpersuasive. In *RJR* the Court was emphatically not asked to “creat[e] a private right of action.” The political branches had already done that when they enacted RICO’s explicit private right of action in the statute. Moreover, placed in its broader context, the import of the *Sosa* quotation becomes even clearer, and *RJR*’s reliance on it more troubling. Immediately preceding the quoted text, *Sosa* explained, “this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”²⁰ And in support, *Sosa* cited—unsurprisingly—other Supreme Court cases that dealt with judicially inferred or created private rights of action in the absence of a legislatively enacted right.²¹ But again, in RICO there *is* a legislatively enacted right. To the extent the political branches were worried about a lack of prosecutorial discretion, presumably that worry had already been (democratically) taken into account and overcome, because Congress in fact enacted the right. Far from crafting rights that the legislature didn’t, the Court refused to enforce legislatively created rights through an incongruous and selective application of the presumption against extraterritoriality.

Furthermore, the Court trimmed away not just any private right of action. RICO’s structure and provision for treble damages places this right in the category of private enforcement of public law, or what has been referred to as deputizing “private attorneys general responsible for enforcing the nation’s . . . laws.”²² Accordingly, while there is good reason to believe that Congress was concerned with broad access to relief under RICO,²³ including by foreign governments,²⁴ there is also good reason to believe that Congress intended the private enforcement right to be largely coextensive with the government’s public enforcement right.²⁵ The statute’s solicitude comprises not only injury but also wrongdoing. Limiting RICO’s private right of action to

¹⁸ *Id.* at 2116, slip op. at 8 (Ginsburg, J., dissenting).

¹⁹ *Id.* at 2106, slip op. at 15 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

²⁰ *Sosa*, 542 U.S. 692, 727.

²¹ *Id.*

²² *Weiss v. Nat’l Westminster Bank, PLC*, 242 F.R.D. 33, 49 (E.D.N.Y. 2007).

²³ *Sedima, S.P.R.L. v. Imrex Co. Inc.*, 473 U.S. 479, 498 (1985).

²⁴ *RJR*, 136 S.Ct. at 2116, slip op. at 8 (Ginsburg, J., dissenting).

²⁵ See e.g., *Sedima*, 473 U.S. at 483, 488.

domestic injuries is not only incongruous in terms of statutory text and unpersuasive in terms of precedent, but also contrary to the statutory scheme Congress in fact enacted.²⁶

Preventing International Friction

The second rationale behind the presumption is avoiding unintended international discord. The curious wrinkle in *RJR* when it comes to the foreign relations rationale is that judicial application of the presumption was far more likely to *cause* foreign relations friction than to avoid it. The plaintiff was comprised of precisely those nations into whose territories U.S. law would have extended.²⁷ But instead of potentially resenting the application of U.S. law, they explicitly and repeatedly requested it. Thus we have affirmative evidence that the relevant foreign nations wanted RICO's private right of action to extend into their territories.²⁸ Indeed, the Court's refusal to provide foreign governments the same access to justice as the U.S. government—and with no textual basis whatsoever for that distinction—smacks of unequal treatment and itself risks foreign resentment and international friction.

The Court's response to this concern was highly formalistic. According to the Court, “even assuming that” the foreign nations in *RJR* wanted U.S. law to apply and saw no interference with their sovereignty, “our interpretation of §1964(c)'s [private right of action] injury requirement will necessarily govern suits by non-governmental plaintiffs that are not so sensitive to foreign sovereigns' dignity.”²⁹ But *RJR* clearly illustrates that the presumption empowers judicial line drawing; in this case, a line between public and private enforcement. The Court failed to explain why it was willing to draw that line and not others. Here it is important to recall that the presumption is merely a judicial invention, devised in part to help courts avoid international discord. If the Court is willing to take into consideration the identity of the suitor in evaluating the presumption's interaction with foreign relations when that suitor is the U.S. government, why not also when the suitors are the very foreign nations whose sovereignty would supposedly be infringed? When the reality is that applying the presumption would enhance, not diminish, foreign relations frictions, the courts should deem the presumption inapplicable.

Nothing requires layering onto the presumption a formalistic gloss that prevents courts from considering the real-world implications of their decisions so as to avoid paradoxically frustrating the presumption's very own objectives. Just as the presumption is a judicial creation, so too is the formalistic (as opposed to, say, functional) gloss the Court has recently painted it with. By removing the presumption from the actual context and circumstances of cases like *RJR*, the canon has taken on a life of its own, and now seems simply to run roughshod over anything that stands in the way of its myopic quest to quash the private right of action in transnational cases.

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²⁶ On top of all this is that RICO's private right of action was modeled after the Clayton Act's private right of action, and courts had interpreted that to extend to causes of action arising abroad.

²⁷ See *RJR Nabisco v. European Community*, No. 15-138, Brief for Petitioners, ii (Dec. 2015) (listing parties to the proceeding).

²⁸ This seems to fit perfectly within Hannah Buxbaum's consent-based approach to the use of domestic litigation to address transnational regulatory problems, see Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 1 (2006).

²⁹ *RJR*, 136 S. Ct. at 2108, slip op. at 16.

Herein lies a supreme irony in *RJR*'s application of the presumption against extraterritoriality. As the Court observed, RICO's "unique structure" makes it "the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality."³⁰ The Court reached this conclusion by invoking *Morrison*'s statement that "[a]ssuredly context can be consulted as well" in discerning extraterritoriality, and, "[c]ontext is dispositive here."³¹ Yet the Court ignored major contextual cues that RICO's private right of action does extend extraterritorially, namely: (1) RICO's text, which creates an explicit private right, enacted by Congress to enhance enforcement of the statute's underlying substantive norms; (2) RICO's structure, which includes no mention of extraterritoriality as to either public or private enforcement, suggesting that the enforcement mechanisms ought to be viewed coextensively as to the underlying substantive norms; and (3) the parties to the suit, with the relevant foreign nations *seeking* the application of U.S. law. Recognizing the extraterritorial scope of RICO's private right of action would not only have comported with the statute's text and structure, but also would have effectuated one of the presumption's key purposes.

³⁰ *Id.* at 2103, slip op. at 10.

³¹ *Id.* (quoting in part *Morrison*, 561 U.S. at 265).