

# VIRGINIA LAW REVIEW ONLINE

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VOLUME 102

OCTOBER 2016

134–150

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## *ESSAY*

### *RJR NABISCO AND THE RUNAWAY CANON*

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IN last term's *RJR Nabisco, Inc. v. European Community*,<sup>1</sup> the U.S. Supreme Court held that the private remedy in the Racketeer Influenced and Corrupt Organizations Act ("RICO")<sup>2</sup> does not extend to foreign injuries, even if those injuries were caused by a U.S. company operating within the United States.<sup>3</sup> In doing so, the Court finished transforming the presumption against extraterritoriality from a tool meant to effectuate congressional intent into a tool for keeping Congress in check. The presumption against extraterritoriality has become a means for judges (particularly Justices) to override Congress in defining the proper scope of litigation in U.S. courts.

The *RJR Nabisco* case, like many transnational cases, was both global and local in scope. The European Community and twenty-six of its member states had been investigating major tobacco companies for their role in cigarette trafficking and money laundering into and through Europe.<sup>4</sup> While other tobacco companies eventually reached settlements with the European Commission, RJR Nabisco did not and continued—according to the European Community's complaint—to engage in illegal activity,<sup>5</sup> specifically by scheming "to sell cigarettes to and through

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<sup>1</sup> 136 S. Ct. 2090 (2016).

<sup>2</sup> 18 U.S.C. §§ 1961–68 (2012).

<sup>3</sup> *RJR Nabisco*, 136 S. Ct. at 2111.

<sup>4</sup> Brief for Respondents at 6, *RJR Nabisco*, 136 S. Ct. 2090 (No. 15-138), 2016 WL 447643, at \*6.

<sup>5</sup> *Id.* at 7–8.

criminal organizations and to accept criminal proceeds in payment for cigarettes.”<sup>6</sup> This conduct was causing harm in Europe, but the European Community believed it was “directed and controlled” by “[h]igh-level managers and employees” from RJR Nabisco’s headquarters in the United States.<sup>7</sup>

The Supreme Court threw out the lawsuit after invoking the presumption against extraterritoriality. That canon of statutory interpretation instructs judges to assume “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.”<sup>8</sup> In applying the presumption in *RJR Nabisco*, however, a majority of four Justices<sup>9</sup> rejected multiple indications that Congress intended RICO’s private right of action to extend abroad<sup>10</sup> while raising the bar on what Congress must do to make its extraterritorial expectations clear.<sup>11</sup>

Besides the worrisome implications for separation of powers, the majority’s opinion was also disappointing on practical grounds. By applying the presumption too aggressively, the Court missed an opportunity to provide much-needed guidance to judges on how to interpret statutes that rebut the presumption. For despite the Court’s recent wariness of extraterritorial laws,<sup>12</sup> Congress does sometimes intend its statutes to apply abroad.<sup>13</sup> Those extraterritorial statutes nonetheless have limits—but

<sup>6</sup> *Id.* at 9 (internal quotation marks and citation omitted). For example, the European Community alleged that RJR Nabisco was “knowingly sell[ing] their products to organized crime, arrang[ing] for secret payments from organized crime, and launder[ing] such proceeds in the United States or offshore venues known for bank secrecy.” *Id.* (alterations in original) (citation omitted).

<sup>7</sup> *Id.* at 9–11.

<sup>8</sup> *Equal Emp’t Opportunity Comm’n v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>9</sup> Justice Sotomayor took no part in the consideration or decision of the case. *RJR Nabisco*, 136 S. Ct. at 2096. With a seat vacant following the death of Justice Scalia, a Court of seven decided the case.

<sup>10</sup> See *infra* Section II.A.

<sup>11</sup> See *RJR Nabisco*, 136 S. Ct. at 2090, 2101, 2106, 2108; see also *infra* Section II.B.

<sup>12</sup> In addition to *RJR Nabisco*, see, for example, *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>13</sup> The Court has recognized that some statutes, like the Sherman Act, 15 U.S.C. §§ 1–7, and the Clayton Act, 15 U.S.C. §§ 12–27, apply extraterritorially. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 173 (2004) (Sherman Act); *Pfizer Inc. v. Gov’t of India*, 434 U.S. 308, 312 (1978) (Sherman and Clayton Acts); *id.* at 320 (Burger, C.J., dissenting) (Sherman and Clayton Acts). On other occasions, when the Court has interpreted statutes not to apply extraterritorially, Congress has amended those statutes to make its extraterritorial intent clear. See, e.g., Zachary D. Clopton, *Replacing the Presumption Against Ex-*

the Court has not clearly explained how judges are to identify them.<sup>14</sup> Without such guidance, judges may be tempted to cling too tightly to the presumption in order to avoid the doctrinal black hole on the other side.

This Essay thus concludes with advice to judges about how to interpret statutes that *do* indicate Congress's extraterritorial intent: First, while judges are bound by *RJR Nabisco*'s holding, they should not feel obligated to repeat its problematic modes of reasoning.<sup>15</sup> Second, judges should not be wary of finding the presumption rebutted for fear of what comes next. On the one hand, there are other doctrines that can help judges navigate jurisdictional conflict; on the other, extraterritorial statutes on their own terms have outer limits, and the Court has provided clues elsewhere for how judges might identify them.<sup>16</sup>

### I. THE MODERN PRESUMPTION AGAINST EXTRATERRITORIALITY

Though considered a "longstanding principle of American law,"<sup>17</sup> the presumption against extraterritoriality fell into disuse after the 1940s.<sup>18</sup> The Restatement (Third) of Foreign Relations Law, published in 1987, did not even bother to include it.<sup>19</sup> But starting in the 1990s, the Rehnquist and Roberts Courts turned back to the presumption as a means for curbing the scope of transnational litigation in U.S. courts.<sup>20</sup>

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tratorritoriality, 94 B.U. L. Rev. 1, 13–15 (2014) (discussing Congress's response to *Aramco* and *Morrison*, among other examples).

<sup>14</sup> The closest direction might be *Empagran*, discussed below in Section III.B, but the discussion in *Empagran* was not explicitly tied to the presumption against extraterritoriality.

<sup>15</sup> See *infra* Section III.A.

<sup>16</sup> See *infra* Section III.B.

<sup>17</sup> *Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991).

<sup>18</sup> See William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 *Am. J. Int'l L. Unbound* 45, 45 n.1 (2016).

<sup>19</sup> See Restatement (Fourth) of Foreign Relations Law 27 (Am. Law Inst., Tentative Draft No. 2, 2016); Restatement (Third) of Foreign Relations Law 27 (Am. Law Inst. 1987).

<sup>20</sup> In addition to *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and *Aramco*, 499 U.S. 244, these cases include *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007), and *Smith v. United States*, 507 U.S. 197, 203–04 (1993), among others. See also Pamela K. Bookman, *Litigation Isolationism*, 67 *Stan. L. Rev.* 1081, 1098–99 (2015) (framing the renewed focus on extraterritoriality as a transnational litigation avoidance strategy). For a more sympathetic view of the Court's efforts to rein in transnational litigation, see Paul B. Stephan, *Response Essay – Empagran: Empire Building or Judicial Modesty?*, in *International Law in the U.S. Supreme Court: Continuity and Change* 553, 553 (David L. Sloss et al. eds., 2011); Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 *Am. J. Int'l L. Unbound* 40 (2016) [hereinafter Stephan, *Private Litigation as a Foreign Relations Problem*].

When the Court in 1991 breathed new life into the presumption in *Equal Employment Opportunity Commission v. Arabian American Oil Co. (Aramco)*,<sup>21</sup> however, it also transformed it.<sup>22</sup> On the one hand, *Aramco* invoked the old presumption as it had last been defined half a century earlier: It is a tool, the Court explained, “whereby *unexpressed* congressional intent may be ascertained,”<sup>23</sup> with judges looking for “language in the [relevant Act] [that] gives *any indication* of a congressional purpose to extend its coverage” beyond U.S. territory.<sup>24</sup> But on the other hand, and in the same breath, *Aramco* required an “affirmative intention of the Congress *clearly expressed*” before a statute could be construed to apply extraterritorially.<sup>25</sup>

This language came from a separate line of cases applying the *Charming Betsy*<sup>26</sup> canon. As Professor John Knox has explained, that canon assumes Congress does not intend to violate international law and thus requires Congress to indicate clearly when it is doing so.<sup>27</sup> This conflation of the traditional presumption with *Charming Betsy*’s stricter requirement has predictably led to the presumption increasingly resembling a clear statement rule—even while the Court continues to insist that it is not.<sup>28</sup> In 1993, the Court required “clear evidence of congressional intent” to overcome the presumption.<sup>29</sup> By 2010, the Court could state more bluntly, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>30</sup> And in *RJR Nabisco*, the Court phrased the inquiry as how far Congress “has affirmatively and unmistakably instructed” the statute to reach.<sup>31</sup>

<sup>21</sup> 499 U.S. 244 (1991).

<sup>22</sup> For a thorough account of the presumption’s history and this modern turn towards a stricter doctrine, see John H. Knox, A Presumption Against Extrajurisdictionality, 104 Am. J. Int’l L. 351, 361–76 (2010).

<sup>23</sup> *Aramco*, 499 U.S. at 248 (emphasis added) (internal quotation marks omitted) (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)).

<sup>24</sup> *Id.* (first alteration in original) (emphasis added) (quoting *Foley Bros.*, 336 U.S. at 285).

<sup>25</sup> *Id.* (emphasis added) (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

<sup>26</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

<sup>27</sup> See Knox, *supra* note 22, at 365–66, 374–75. In fact, *Benz* (the case quoted by *Aramco* for this proposition) did not entail the extraterritorial application of a statute.

<sup>28</sup> See *RJR Nabisco*, 136 S. Ct. at 2102; *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

<sup>29</sup> *Smith v. United States*, 507 U.S. 197, 204 (1993).

<sup>30</sup> *Morrison*, 561 U.S. at 255.

<sup>31</sup> *RJR Nabisco*, 136 S. Ct. at 2100.

Along the way, the Court has formalized the modern presumption into a two-step inquiry.<sup>32</sup> At step one, a judge must look for this “clear indication” of extraterritorial effect.<sup>33</sup> If the judge does not find such an indication—that is, if the presumption is not rebutted—then the judge continues to step two, in which she determines the “focus” of the statute.<sup>34</sup> For a case to fall under the statute’s ambit, its connections to the United States must match the statute’s “focus.”<sup>35</sup>

Like the ratcheting up of the language required to overcome the presumption, this two-step framework moves the presumption further away from the purported search for congressional intent.<sup>36</sup> As Professor Lea Brilmayer has explained, step one requires Congress to be emphatic when it wishes its statutes to apply abroad, while at step two, judges get to decide what domestic contacts count in which cases (determining the “focus” of a statute, after all, is a rather mushy directive).<sup>37</sup> And while it is helpful to give judges such a clear structure for thinking about how to handle transnational cases, that guidance has been lopsided: The Court has not provided similar guidance on what to do when the presumption *is* rebutted.<sup>38</sup>

*RJR Nabisco* presented such an opportunity, as the Justices unanimously agreed that RICO’s substantive provisions do extend extraterritorially.<sup>39</sup> RICO targets “racketeering activity,” which is comprised of certain state or federal criminal offenses that the RICO statute terms “predicate acts.”<sup>40</sup> These predicate acts, listed in 18 U.S.C. § 1961, include some crimes that explicitly reach conduct beyond U.S. borders.<sup>41</sup>

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<sup>32</sup> For further discussion of this two-step framework, see Dodge, *supra* note 18.

<sup>33</sup> *RJR Nabisco*, 136 S. Ct. at 2101.

<sup>34</sup> *Id.*

<sup>35</sup> *Morrison*, 561 U.S. at 266.

<sup>36</sup> See Lea Brilmayer, *New Extraterritoriality: Morrison v. National Australia Bank*, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law, 40 Sw. U. L. Rev. 655, 664 (2011) (“[W]hile citing the principle of legislative supremacy, Justice Scalia’s opinion [in *Morrison*] has actually increased the opportunity for judicial policy making and diminished the importance of congressional preferences.”).

<sup>37</sup> See *id.* at 667–68.

<sup>38</sup> See *RJR Nabisco*, 136 S. Ct. at 2101 (noting that *Morrison* and *Kiobel v. Royal Dutch Petroleum Co.* left this question unaddressed).

<sup>39</sup> *Id.*

<sup>40</sup> 18 U.S.C. § 1961 (2012).

<sup>41</sup> Some of these cross-referenced statutes, for example, explicitly reach conduct that occurred “outside the United States.” *RJR Nabisco*, 136 S. Ct. at 2101–02 (internal quotation marks omitted) (quoting 18 U.S.C. § 1203(b) (2012) (hostage taking) and 18 U.S.C. § 1957(d)(2) (2012) (money laundering)).

Section 1962—the heart of RICO—prohibits four different ways by which a “pattern of racketeering activity” may be used to infiltrate, control, or operate an “enterprise.”<sup>42</sup> Because § 1962 incorporates § 1961’s definition of racketeering activity, which in turn incorporates other explicitly extraterritorial statutes, the Court had no trouble concluding that § 1962 reaches foreign racketeering activity, at least in some cases.<sup>43</sup>

The next step should have been to consider whether this extraterritorial statute was nonetheless subject to other limits, whether on its own terms or due to other comity-based doctrines.<sup>44</sup> Instead, the Court announced a new requirement that the presumption be applied separately to every statutory provision, whether substantive, remedial, or jurisdictional.<sup>45</sup> Based on that requirement, the four-Justice majority applied the presumption separately to RICO’s private right of action, found in § 1964(c),<sup>46</sup> and concluded that it did not independently overcome the presumption.<sup>47</sup> Thus a “private RICO plaintiff . . . must allege and prove a *domestic* injury to its business or property.”<sup>48</sup> That second application of the presumption was ill considered and provides a problematic model for the lower courts.

## II. THE RUNAWAY CANON

The majority’s application of the presumption to RICO’s private right of action was ill considered along at least two dimensions. First, the majority rejected two standard legislative methods by which Congress could efficiently signal its extraterritorial intent. Second, the new requirement that Congress express its extraterritorial intent in every provision of a statute reflects an unrealistic understanding of how Congress works. In the hands of the *RJR Nabisco* majority, the presumption has

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<sup>42</sup> See *id.* at 2097 (summarizing § 1962).

<sup>43</sup> *Id.* at 2102.

<sup>44</sup> For my thoughts on what such inquiry might look like, see *infra* Part III.

<sup>45</sup> See *RJR Nabisco*, 136 S. Ct. at 2101, 2106. Though this requirement was initially stated in the portion of the opinion joined by the dissenters, it is not clear that the dissenters fully embraced it. See *id.* at 2113 n.2 (Ginsburg, J., dissenting). For a critique of this new requirement, see *infra* Section II.B.

<sup>46</sup> The majority did not explain how RICO’s criminal provision, § 1963, or the civil remedies available to the government, § 1964(a) and (b), would rebut the presumption, though it seemed to assume they would. See Anthony J. Colangelo, *The Frankenstein’s Monster of Extraterritoriality Law*, 110 *Am. J. Int’l L. Unbound* 51, 55 (2016).

<sup>47</sup> *RJR Nabisco*, 136 S. Ct. at 2106.

<sup>48</sup> *Id.*

become less a method for interpreting statutes than a pronouncement on the proper scope of access to U.S. courts, a pronouncement that Congress must labor to displace.<sup>49</sup>

### A. Ignoring Congressional Intent

One common way that Congress indicates its geographic intent is to incorporate by reference another statute that is more explicitly extraterritorial. Indeed, that was the basis on which the Court determined that RICO's substantive provisions reach abroad: "The most obvious textual clue" to § 1962's extraterritorial scope, the Justices agreed, was its incorporation of § 1961, which in turn incorporated statutes that "plainly apply to at least some foreign conduct."<sup>50</sup> "Short of an explicit declaration," Justice Alito reasoned, "it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect."<sup>51</sup> Yet when it came to RICO's private right of action, the majority had no trouble imagining a very different congressional intent behind § 1964(c)'s incorporation of § 1962.<sup>52</sup> Even though § 1964(c) provides a remedy for "[a]ny person injured in his business or property by reason of a violation of section 1962,"<sup>53</sup> the majority refused to treat that incorporation of § 1962 as rebutting the presumption against extraterritoriality.<sup>54</sup>

Alternatively, the Court might have looked to Congress's decision to model RICO's private right of action after that of the Clayton Act, which the Supreme Court had previously held does allow recovery for injuries suffered abroad.<sup>55</sup> As Justice Ginsburg noted in dissent, "[t]he similarity of language in [the two statutes] is, of course, a strong indication that [they] should be interpreted *pari passu*."<sup>56</sup> But that, too, the majority determined, is not sufficient to indicate Congress's intent for

<sup>49</sup> Cf. Colangelo, *supra* note 46, at 51, 55 (raising similar concerns).

<sup>50</sup> *RJR Nabisco*, 136 S. Ct. at 2101.

<sup>51</sup> *Id.* at 2102–03.

<sup>52</sup> See *id.* at 2113 (Ginsburg, J., dissenting) (critiquing the majority's reasoning for this inconsistency); see also Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 *Am. J. Int'l L. Unbound* 57, 58 (2016) (same); Colangelo, *supra* note 46, at 54 (same).

<sup>53</sup> 18 U.S.C. § 1964(c) (2012) (emphasis added).

<sup>54</sup> *RJR Nabisco*, 136 S. Ct. at 2108.

<sup>55</sup> See *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 313–20 (1978).

<sup>56</sup> *RJR Nabisco*, 136 S. Ct. at 2114 (Ginsburg, J., dissenting) (second and third alterations in original) (quoting *Northcross v. Bd. of Educ.* 412 U.S. 427, 428 (1973)).

RICO's § 1964(c) to similarly apply to foreign harms.<sup>57</sup> In rejecting the statutory analogy to the Clayton Act, the majority pointed to the different definition of "person" under the Clayton Act, which explicitly extends to foreign business organizations—even though that difference had not prevented the Court from interpreting RICO's private right of action to align with the Clayton Act's private right of action in the past.<sup>58</sup>

To add insult to injury, the majority seized on the Clayton Act-like language in § 1964(c) to *bolster* its conclusion that § 1964(c) does not extend extraterritorially. To model RICO's private right of action after that of the Clayton Act (which, again, the Supreme Court had previously found extended to foreign injuries), Congress limited § 1964(c) to injuries to "business or property."<sup>59</sup> Rather than treat this language as an indication of Congress's intention that the two Acts should be interpreted similarly, the majority reasoned that this language "signaled" Congress's intent that RICO's "civil remedy is not coextensive with [its] substantive provisions," and thus that the remedy's geographic scope presumably differed from that of the rest of the statute.<sup>60</sup> It seems that Congress cannot win.

### B. Raising the Bar

In rejecting both statutory incorporation and statutory modeling as indications of congressional intent, the *RJR Nabisco* majority made it harder for Congress to efficiently rebut the presumption against extraterritoriality. Nor did the majority indicate any preferable alternative, short of a clear statement of extraterritoriality. At the same time, it introduced a new requirement that Congress reiterate its extraterritorial intent in every provision of a statute, whether jurisdictional, substantive, or remedial.<sup>61</sup> Even if the Court's view of congressional intent (and ability) were realistic, it keeps moving the goal further down the field. The result is

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<sup>57</sup> *Id.* at 2109–11 (majority opinion).

<sup>58</sup> Justice Ginsburg identified three other occasions on which the Court had interpreted RICO's § 1964(c) to align with § 4 of the Clayton Act. See *id.* at 2114 (Ginsburg, J., dissenting). As a further irony, the majority's focus on the definition of "person" suggests that § 4 of the Clayton Act extends extraterritorially because it incorporates another extraterritorial provision (the definition of "person"), even though the majority had just rejected a similar interpretive move for § 1964(c).

<sup>59</sup> 18 U.S.C. 1964(c) (2012).

<sup>60</sup> *RJR Nabisco*, 136 S. Ct. at 2108–09 (majority opinion).

<sup>61</sup> *Id.* at 2101, 2106.



not a search for congressional intent, but an effort to put the brakes on what Congress can do.<sup>62</sup>

The Court seems to presume that it is not difficult for Congress to state its extraterritorial intent, but that ignores several realities. First there is the difficulty of the drafting process itself (and the inertia for amending misinterpreted statutes).<sup>63</sup> Professors Abbe Gluck and Lisa Bressman have also shown that congressional staffers are simply not aware of such judicially required clear-statement rules.<sup>64</sup> And then there is the possibility of introducing more unintended errors the more that Congress does say explicitly. For example, Congress tried to overturn in part the Court's narrowly territorial interpretation of the Securities Exchange Act in *Morrison v. National Australia Bank, Ltd.*,<sup>65</sup> but there is some question whether its amendment to the Securities Exchange Act was phrased and framed correctly to achieve this purpose.<sup>66</sup> After all, providing the clear statement that the Court seems to want is not as simple as stating "this provision applies extraterritorially." Drafters have to account for the limits on U.S. extraterritorial jurisdiction under international law, limits that courts may sometimes be better situated to interpret and apply through the *Charming Betsy* canon.

Further, the Court's new insistence that judges seek such clear extraterritorial intent in every provision is ill-advised (and one is to hope short-lived). As Professor Bill Dodge has cogently argued, applying the presumption to jurisdictional provisions would be deeply disruptive, as well as irreconcilable with the Court's reasoning in other recent cases—including other portions of *RJR Nabisco* itself.<sup>67</sup> It also cannot possibly reflect existing congressional intent, as Congress has not been in the habit of writing extraterritoriality into the separate jurisdictional and remedial provisions of statutory schemes that are unarguably intended to

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<sup>62</sup> As Professor Pam Bookman puts it, "[i]t is . . . hard to argue that the presumption tracks congressional intent when it keeps raising the hurdle that Congress must clear in order to rebut it." Bookman, *supra* note 52, at 61.

<sup>63</sup> See, e.g., Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan. L. Rev.* 901, 912 (2013).

<sup>64</sup> See *id.* at 945.

<sup>65</sup> 561 U.S. 247 (2010).

<sup>66</sup> See Stephan, *Private Litigation as a Foreign Relations Problem*, *supra* note 20, at 42 n.9 (citing *SEC v. Chi. Convention Ctr., LLC*, 961 F. Supp. 2d 905, 909–17 (N.D. Ill. 2013)).

<sup>67</sup> William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, *Opinio Juris* (July 1, 2016), <http://opiniojuris.org/2016/07/01/32658/> [<https://perma.cc/T59G-BC3U>].

be extraterritorial in scope. As Professors Hannah Buxbaum and Pam Bookman have noted, for example, when Congress overrode the Supreme Court's narrow interpretation of Title VII in *Aramco* by revising the law to clarify its extraterritorial reach, it did not separately clarify the extraterritorial reach of the law's remedial provisions.<sup>68</sup> If *RJR Nabisco* were applied strictly, then, that clear congressional intent behind the Civil Rights Act of 1991 would be nullified.

In short, the presumption has run away from its stated purpose of effectuating congressional intent. Instead it is generating an ever-growing series of hoops through which Congress must jump if it wants its laws to extend beyond U.S. borders.<sup>69</sup> In applying this transformed presumption, the Supreme Court poses as a faithful agent of congressional intent, but it is in fact a disciplinarian of Congress's global aspirations.

### III. WHAT COMES NEXT

In overextending the presumption against extraterritoriality in *RJR Nabisco*, the Court missed an opportunity to give judges better guidance on what *can* rebut the presumption, and if it is rebutted, what happens next. This final Part offers some suggestions about what judges might do to help bring this runaway canon back home.

#### A. Applying the Presumption

When applying the presumption to other statutes in the future, the best option for judges is to do what the Court says in *RJR Nabisco*, not what it does. The majority's rhetoric does not constrain the lower courts, and the modes of reasoning the majority used or discounted do not dictate the modes of reasoning lower courts must use when analyzing other statutes.<sup>70</sup>

First, *RJR Nabisco* should not be read as casting doubt on the relevance of incorporated statutes or analogous statutes in determining congressional intent. Indeed, judges need only look to the Court's analysis

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<sup>68</sup> See Bookman, *supra* note 52, at 59; Hannah L. Buxbaum, The Scope and Limitations of the Presumption Against Extraterritoriality, 110 Am. J. Int'l L. Unbound 62, 64 (2016).

<sup>69</sup> For a similar view, see Colangelo, *supra* note 46, at 55 ("[T]he 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.").

<sup>70</sup> See generally Richard M. Re, Narrowing Supreme Court Precedent from Below, 104 Geo. L.J. 921, 925–27 (2016) (arguing that lower courts can legitimately narrow Supreme Court precedent through reasonable application of its directives).

of § 1962 to confirm the continued viability of statutory incorporation as a means for Congress to indicate the extraterritorial scope of a statute.

Second, judges should be wary of repeating the majority's vague functional concerns about foreign relations. At the outset of its analysis of § 1964(c), the *RJR Nabisco* majority seemed to suggest that the presumption should be applied more rigorously when there is a danger of "international friction" or "risk of conflict" with foreign law.<sup>71</sup> This passage was largely rhetorical—a calling out of the seemingly inconsistent positions of European governments in this and other cases involving the presumption against extraterritoriality<sup>72</sup> (a point to which we will return<sup>73</sup>). Whatever its purpose, that language risks a dangerous ratcheting up of an already strict presumption. To the extent the general concern is legitimate—that courts should try to promote international comity by avoiding controversy—that concern is already embodied in the presumption itself, which is meant to help prevent unintentional discord with other nations.<sup>74</sup> There is no need to apply the presumption more rigorously when comity is at stake, as the presumption assumes comity is always at stake when U.S. law applies outside of U.S. territory.

Besides which, friction and comity cut both ways: Worse international discord might be caused by denying foreign plaintiffs remedies for the wrongdoing of U.S. nationals, including on U.S. territory, while at the same time allowing U.S. plaintiffs to sue foreign defendants for comparable conduct.<sup>75</sup> As Justice Ginsburg explained in dissent, "[m]aking such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests."<sup>76</sup> Rather, the better place to address specific comity concerns is in the post-presumption analysis.

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<sup>71</sup> See *RJR Nabisco*, 136 S. Ct. at 2107 ("[W]here such a risk is evident, the need to enforce the presumption is at its apex.").

<sup>72</sup> See *id.* at 2106–08.

<sup>73</sup> See *infra* Section III.B.

<sup>74</sup> See, e.g., *Aramco*, 499 U.S. at 248.

<sup>75</sup> See *RJR Nabisco*, 136 S. Ct. at 2115–16 (Ginsburg, J., dissenting); see also, e.g., Cassandra Burke Robertson, Foreign Plaintiffs and the Presumption Against Extraterritoriality, *PrawfsBlawg* (June 20, 2016), <http://prawfsblawg.blogs.com/prawfsblawg/2016/06/foreign-plaintiffs-and-the-presumption-against-extraterritoriality.html> [https://perma.cc/9M2X-FV DY] (raising a similar point in response to *RJR Nabisco*); Ralf Michaels, Main Essay—*Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in *International Law in the U.S. Supreme Court: Continuity and Change*, *supra* note 20, at 533, 544 (raising the concern more generally).

<sup>76</sup> *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., dissenting).

*B. What Happens Next*

In applying the presumption, then, judges should not be afraid to find it is rebutted. While the Supreme Court has not clarified what the post-presumption analysis should look like,<sup>77</sup> the landscape on the other side of the presumption is not quite as messy as it might at first appear. Here are four guideposts for managing that analysis.

First, a point about semantics. The Court suggested in *Microsoft Corp. v. AT&T Corp.* that the presumption against extraterritoriality continues to apply even when a statute is explicitly extraterritorial; in that instance, the Court said, the presumption “remains instructive in determining the *extent* of the statutory exception.”<sup>78</sup> This is a question of labels, and saying a presumption applies after it has been rebutted will only sow confusion. Rather, the Court’s analysis in *Microsoft* turned on *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*,<sup>79</sup> a case that did not discuss the presumption against extraterritoriality as such. Both *Microsoft* and *Empagran* are really cases about how to interpret statutes that rebut the presumption, and the language used to identify that analysis should signal as much.

Which brings us to a second point: The post-presumption analysis is still a question of statutory interpretation.<sup>80</sup> The Court in *RJR Nabisco* helpfully clarified that a statute’s “focus,” invoked at step two of the *Morrison* framework, is irrelevant to interpreting the scope of an extraterritorial law.<sup>81</sup> Instead, the relevant canon post-presumption is the *Charming Betsy* canon,<sup>82</sup> or the assumption that Congress does not legislate beyond the bounds of international law. Under international law, there are generally accepted limits on a nation’s prescriptive (or law-making) power. Most traditionally, countries can assert prescriptive jurisdiction over their nationals, their territory, and ships flying their flag;

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<sup>77</sup> See *id.* at 2101 (majority opinion) (noting that *Morrison* and *Kiobel* did not address this question).

<sup>78</sup> 550 U.S. 437, 455–56 (2007).

<sup>79</sup> 542 U.S. 155 (2004).

<sup>80</sup> See, e.g., *RJR Nabisco*, 136 S. Ct. at 2101 (“The scope of an extraterritorial statute thus turns on the limits Congress has (or has not) imposed on the statute’s foreign application . . .”).

<sup>81</sup> *Id.*

<sup>82</sup> See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting); cf. Clopton, *supra* note 13, at 22–29 (arguing that the presumption against extraterritoriality should be replaced in civil litigation with an emphasis on the *Charming Betsy* canon).

countries may also legislate regarding harm to their nationals or threats to their security; and all countries can legislate regarding a set of universal crimes.<sup>83</sup> When a particular interpretation of an extraterritorial statute would exceed these bases of jurisdiction under international law, judges should presume that was not Congress's intent absent a clear statement.

The third point is that this rather clear outer limit from *Charming Betsy*—when combined with other doctrines like personal jurisdiction that help define the scope of transnational litigation in U.S. courts—will adequately help judges resolve most cases. Cases involving the extraterritorial application of federal statutes will often fall comfortably within the core jurisdictional zones of U.S. power. When cases stretch those limits, *Charming Betsy* provides a hard stop. Meanwhile, other doctrines can also help address comity concerns;<sup>84</sup> indeed, some of these doctrines have themselves been refined in recent years to better account for international comity.<sup>85</sup> As emphasized by Justice Ginsburg in her *RJR Nabisco* dissent, for example, the recent contraction of general jurisdiction will limit the risk that foreign defendants with thin ties to the United States can be hauled before U.S. courts.<sup>86</sup> Between those constitutional due process limits and international limits on prescriptive jurisdiction (as filtered through the *Charming Betsy* canon), there should be few cases that raise otherwise unaddressed comity concerns.

But what should judges do if confronted with one of those few remaining cases? This brings us to the fourth point, which is also the most speculative. One could read the Court's opinions in *Empagran* and *Microsoft* as suggesting that an additional, *Charming Betsy*-inflected inquiry might apply to these zones of jurisdictional conflict.<sup>87</sup> The limits

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<sup>83</sup> For a standard account, see Restatement (Third) of Foreign Relations Law § 402 (Am. Law Inst. 1987).

<sup>84</sup> Cf. Buxbaum, *supra* note 68, at 65 (noting the relevance of other comity doctrines).

<sup>85</sup> For discussions of these doctrinal developments, see Bookman, *supra* note 20; Stephen B. Burbank, *International Civil Litigation in U.S. Courts: Becoming a Paper Tiger?*, 33 U. Pa. J. Int'l L. 663 (2012); Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. Rev. (forthcoming 2017).

<sup>86</sup> *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., dissenting). A clearer doctrine for evaluating the import of parallel foreign litigation would help as well. See Gardner, *supra* note 85. Justice Ginsburg also invoked in her dissent the doctrine of *forum non conveniens*, *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., dissenting), but as I argue elsewhere, that doctrine is outdated, unhelpful, and only obfuscates the comity analysis, see Gardner, *supra* note 85.

<sup>87</sup> The following approach has much in common with that proposed by the draft Restatement (Fourth) of Foreign Relations Law. See Restatement (Fourth) of Foreign Relations Law § 204 (Am. Law Inst., Tentative Draft No. 2, 2016) (proposing that "U.S. courts may inter-

under international law are not always clear-cut, and the closer one approaches to those limits, the more likely one will cause consternation among nations whose core jurisdictional prerogatives—such as their own territorial jurisdiction—are affected.<sup>88</sup> This gray zone at the edge of permissible exercises of jurisdiction was the source of the Court’s unease in *Empagran* and *Microsoft*.

In *Empagran*, for example, the Court had to determine whether a provision of the Sherman Act (which is explicitly extraterritorial) extended to foreign injuries caused primarily by the foreign conduct of foreign actors that also (but separately) caused domestic injuries.<sup>89</sup> In holding that it did not, the Court asserted that it “ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,” and it suggested there is a “rule of statutory construction” that “cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.”<sup>90</sup> Though this formulation is unhelpfully vague, the Court was groping for a way to put some softer outer limits on U.S. law (as its reference to the *Charming Betsy* canon suggests).<sup>91</sup> The idea is that, even without a direct conflict with international law (which could only be overcome by a clear statement of Congress), judges should still be wary of interpreting statutes as reaching right up to those outer limits because doing so can infringe on the widely recognized sovereign interests of other states.

When it comes to effectuating this idea, however, *Empagran* did not provide a workable framework. As the *Empagran* Court seemed to recognize, this should not be an open-ended balancing or a vague standard that allows functional concerns (like the risk of “international friction”) to balloon over time.<sup>92</sup> Indeed, the malleability of such generalized func-

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pret federal statutory provisions to include other limitations on their applicability as a matter of prescriptive comity” in order “[t]o avoid unreasonable interference with the legitimate sovereign authority of other states”).

<sup>88</sup> For a discussion of these controversial margins, see Maggie Gardner, Channeling Unilateralism, 56 Harv. Int’l L.J. 297, 303–06 (2015).

<sup>89</sup> See *Empagran*, 542 U.S. at 159–60. For a critique of the Court’s characterization of the dispute in *Empagran*, see Michaels, *supra* note 75, at 539–40.

<sup>90</sup> *Empagran*, 542 U.S. at 164.

<sup>91</sup> See *id.*; see also *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–18 (1992) (Scalia, J., dissenting) (similarly groping).

<sup>92</sup> See William S. Dodge, Response Essay – Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century, in *International Law in the U.S. Supreme Court: Continuity and Change*, *supra* note 20, at 547, 549 n.18 (noting that *Empagran* reject-

tional concerns has led the Court to curtail their relevance in other foreign relations doctrines, like the act of state doctrine<sup>93</sup> and the political question doctrine.<sup>94</sup> Under those doctrines, judges' protestations about their incompetence in foreign affairs had led not to greater deference to the political branches, but to the growth of judicial power as judges too readily decided not to decide cases.<sup>95</sup> Similarly here, broadly phrased concerns about "unreasonable interference with the sovereign authority of other nations"<sup>96</sup> could encourage judges to back too quickly away from cases that Congress (and those other nations) would really rather they keep.

Rather, the inquiry should still be tied to methods of statutory interpretation: When the case for the exercise of U.S. prescriptive jurisdiction under international law becomes attenuated, then judges should look more searchingly for clues that Congress did, indeed, mean to legislate that far.<sup>97</sup> That is, functional concerns justify the inquiry but do not themselves resolve it. And if congressional intent for a statute to apply in a particular context is clear, functional concerns should not override

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ed case-by-case balancing); see also Michaels, *supra* note 75, at 535 (critiquing *Empagran* for nonetheless replacing international law concerns about actual conflicts with international relations concerns about potential conflicts). This was the problem with the Restatement (Third) of Foreign Relations Law's reasonableness inquiry, see Restatement (Third) of Foreign Relations Law § 403 (Am. Law Inst. 1987).

<sup>93</sup> See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990) ("The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.").

<sup>94</sup> See *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (holding a dispute was not a political question without applying the functional factors listed in *Baker v. Carr*, 369 U.S. 186, 217 (1962), which include concerns about "expressing lack of the respect due coordinate branches of government" and "the potentiality of embarrassment" from many voices addressing one question); see also *id.* at 1432 (Sotomayor, J., concurring in part and concurring in the judgment) (noting the omission of these more prudential concerns from the traditional political question analysis).

<sup>95</sup> See Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 *U. Colo. L. Rev.* 1395, 1396 (1999); Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 *N.Y.U. L. Rev.* 1908 (2015); cf. Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 *Geo. Wash. L. Rev.* 380, 436 (2015) (describing the Court's apparent worry that "[f]oreign affairs functionalism . . . like the keys to the family car or no curfew, might just be too much of a temptation").

<sup>96</sup> *Empagran*, 542 U.S. at 164.

<sup>97</sup> Cf. *Knox*, *supra* note 22 (suggesting a similar approach pre-*Morrison*, though *Knox* would interweave this inquiry with the presumption against extraterritoriality, a route *Morrison* may not have left open).

that application.<sup>98</sup> In addition, this inquiry should be treated as a rare exception to an otherwise strong default. Once a judge has determined that Congress intended a statute to apply extraterritorially, she should assume it does apply extraterritorially, at least up to the limits of international law. Many cases will fall squarely in this zone, without implicating the gray space at the edges where the thinness of U.S. jurisdictional ties in fact generate friction and controversy.<sup>99</sup>

This is the difference between *Morrison*, *Empagran*, and *Kiobel v. Royal Dutch Petroleum Co.*, where foreign allies intervened to voice concerns about the reach of U.S. laws, and *RJR Nabisco*, where they themselves invoked the U.S. law. The former cases were “foreign-cubed,” involving foreign plaintiffs, foreign defendants, and foreign harms; the reach of U.S. prescriptive jurisdiction under international law in those cases was at its lowest ebb. In *RJR Nabisco*, in contrast, “[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.”<sup>100</sup> As Justice Ginsburg summed up, “this case has the United States written all over it.”<sup>101</sup> The difference in foreign reaction across these cases was not hypocritical, as the majority delighted in suggesting.<sup>102</sup> Rather, the reason why *RJR Nabisco* did not raise international comity concerns was not because the plaintiffs were the foreign governments themselves, but because the defendants were U.S. citizens operating on U.S. territory.<sup>103</sup> In such a case involving traditional and strong bases for exercising prescriptive jurisdiction under international law, judges should not shy away from applying extraterritorial laws as Congress has written them.

The precise contours of this task of statutory interpretation in the gray zone of jurisdictional conflict, however, still requires refinement. Courts and commentators have tried and largely discarded the Restatement (Third) of Foreign Relations Law’s reasonableness balancing test, and *Empagran* has rarely been invoked outside the antitrust context. Besides

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<sup>98</sup> See Restatement (Fourth) of Foreign Relations Law § 204 cmt. c, at 36 (Am. Law Inst., Tentative Draft No. 2, 2016).

<sup>99</sup> Further, the identification of that gray space can be aided by the interventions of the U.S. government and foreign governments.

<sup>100</sup> *RJR Nabisco*, 136 S. Ct. at 2114 (Ginsburg, J., dissenting).

<sup>101</sup> *Id.* at 2115.

<sup>102</sup> See *id.* at 2107–08 (majority opinion).

<sup>103</sup> See Bookman, *supra* note 52, at 60–61 (raising a similar observation).



which, the search for congressional intent regarding jurisdictional conflict might be quixotic, as Congress may well never have thought about the jurisdictional configurations at issue. The solution to that remaining uncertainty, however, is not avoidance, but engagement and reasoned elaboration.<sup>104</sup>

#### CONCLUSION

The real challenge in *RJR Nabisco* was not the hunt for congressional intent—which was not that hard to find—but the fact that RICO itself is overbroad. I am not unsympathetic to the majority’s concern that extra-territorial application of RICO, just like territorial application of RICO, could sweep too broadly. But unilateral judicial corrections for unwise legislation raises more concerns than it resolves. What Congress needs, if not a faithful agent, is a faithful partner in managing jurisdictional conflict in a globalized economy. It may now fall to the lower courts to step into that partnership and nudge the presumption back towards home.

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<sup>104</sup> For example, in the context of specific statutes like the Lanham Act and the Bankruptcy Code that do apply extraterritorially, lower courts have developed “a variety of tests” to limit those laws’ geographic reach. Restatement (Fourth) of Foreign Relations Law at 38–40 (Am. Law Inst., Tentative Draft No. 2, 2016)) (gathering cases).