Racketeer Influenced and Corrupt Organizations Act — Extraterritoriality — RJR Nabisco, Inc. v. European Community

U.S. law, the Supreme Court tells us, "governs domestically but does not rule the world."[1] To respect that principle, the Court applies a presumption against extraterritoriality, a principle of statutory construction that directs courts to presume that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[2] After a decades-long increase in the volume of cases brought under statutes with potentially extraterritorial effects,[3] the Supreme Court has more recently reasserted the limits of the extraterritorial reach of U.S. statutes. The Court has addressed the presumption against extraterritoriality twice in recent years.[4] Last Term, in *RJR Nabisco, Inc. v. European Community*,[5] the Supreme Court clarified the two-step analysis for courts applying the presumption against extraterritoriality. In requiring domestic injury for private cases under the Racketeer Influenced and Corrupt Organizations Act[6] (RICO), the Court explained that certain applications of RICO's substantive law rebutted the presumption even as its private right of action did not.[7] Building on a wider trend limiting the extraterritorial application of U.S. law, the Court wielded the presumption as an unnecessarily blunt tool to curb concerns about international comity that are better addressed with narrower doctrines.

The petitioners in the case, RJR Nabisco and several related corporate entities, were accused of participating in a "global money-laundering scheme" whereby Colombian and Russian drug traffickers smuggled drugs into Europe, exchanged them for euros, and then, through a number of black-market transactions, used those euros to pay for shipments of RJR cigarettes into Europe.[8] In addition, RJR Nabisco was accused of acquiring another company, Brown & Williamson Tobacco Corporation, to expand its illegal scheme.[9] In doing so, RJR Nabisco allegedly committed a number of federal crimes, including "money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act,"[10]

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[1] Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007).

[2] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

[3] *See* Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 818 (2009).

[4] *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013); *Morrison*, 561 U.S. 247.

[5] 136 S. Ct. 2090 (2016).

[6] 18 U.S.C. §§ 1961–1968 (2012).

[7] *RJR Nabisco*, 136 S. Ct. at 2101, 2111.

[8] *Id.* at 2098.

[9] *Id.*

[10] *Id.*

thereby exposing itself to RICO liability.[11] This liability is triggered once a pattern of racketeering activity is used to "infiltrate, control, or operate" an enterprise that engages in, or affects, interstate or foreign commerce.[12]

The respondents, the European Community and twenty-six of its member states, initially brought suit in the Eastern District of New York in 2000.[13] Over the years, settlement agreements had been reached with other foreign-domiciled companies; RJR Nabisco, an American company, was alone in its refusal to end what the then–European Community termed "continued unlawful conduct that harms [the Community]."[14] The European Community saw the imposition of RICO liability as a means to get the corporation "to adopt reforms to eliminate illegal cigarette trafficking and money laundering."[15] In addition, U.S. courts provided the opportunity to litigate in a unified forum, a possibility then unavailable in European courts.[16]

Securing liability, however, would prove complicated. The litigation was protracted, involving several rounds of dismissal and refiling.[17] In the present case, the only action to survive across three separate rounds of litigation,[18] the district court granted RJR Nabisco's motion to dismiss on the basis that the RICO claims were "impermissibly extraterritorial."[19] The respondents appealed.

The Second Circuit reversed.[20] Writing for a unanimous panel,[21] Judge Leval held that RICO could have extraterritorial application for the predicate crimes of money laundering and material support of terrorism.[22] He concluded that the presumption against extraterritoriality

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[11] *Id.* at 2098. RICO, originally passed in 1970, contains no independent offenses; it enhances sanctions associated with breaking other laws "to eliminate the infiltration of organized crime into legitimate economic enterprises operating in interstate commerce." *White-Collar Crime: A Survey of Law*, 18 AM. CRIM. L. REV. 169, 308 (1980). These other crimes serve as "predicates" under RICO, and a violation of more than one crime results in a "pattern of racketeering activity," which the Court defined as "a series of related predicates that together demonstrate the existence or threat of continued criminal activity." *RJR Nabisco*, 136 S. Ct. at 2096–97.

[12] *RJR Nabisco*, 136 S. Ct. at 2097.

[13] *Id.* at 2098.

[14] Brief for Respondents at 9, *RJR Nabisco*, 136 S. Ct. 2090 (No. 15-138).

[15] *Id.* at 8.

[16] *See* Stephanie Francq, *A European Story*, 110 AJIL UNBOUND 74, 74–77 (2016).

[17] *RJR Nabisco*, 136 S. Ct. at 2098 (citing European Cmty. v. RJR Nabisco, Inc., No. 02-CV-5771, 2011 WL 843957, at *1–2 (E.D.N.Y. Mar. 8, 2011)). The initial claims were dismissed, both on their own merits and for lack of subject matter jurisdiction; subsequent filings saw other European countries added as plaintiffs and motions to dismiss granted and appealed. *European Cmty.*, 2011 WL 843957, at *1–2.

[18] *RJR Nabisco*, 136 S. Ct. at 2098.

[19] *European Cmty.*, 2011 WL 843957, at *3. The district court based its conclusion on the grounds that RICO was "silen[t]" on its exterritorial application. *Id.* at *4.

[20] European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129 (2d Cir. 2014).

[21] Judge Leval was joined by Judges Hall and Sack.

[22] *European Cmty.*, 764 F.3d at 139.

had been overcome where Congress manifested an intention for extraterritoriality to attach to the underlying predicate act.[23] Regarding the remaining claims, Judge Leval determined that they alleged sufficient domestic activity to qualify under RICO even where their predicate offenses did not overcome the presumption.[24] RJR Nabisco sought a rehearing, which the panel denied; a request for a rehearing was then denied en banc, with five judges dissenting.[25] RJR Nabisco then appealed to the Supreme Court.

The Supreme Court reversed and remanded.[26] Writing for the Court, Justice Alito[27] concluded that RICO's substantive provisions, found in § 1962, can apply extraterritorially, but that its § 1964(c) private right of action, which enables private entities to initiate RICO suits, does not.[28] Unlike the RICO sections that enable the Attorney General to seek criminal and civil penalties, § 1964(c) allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to bring a suit against a RICO enterprise and recover treble damages.[29]

Justice Alito began by clarifying the appropriate analytical framework for the extraterritoriality inquiry, which he derived from earlier reasoning in *Kiobel v. Royal Dutch Petroleum Co.*[30] and *Morrison v. National Australia Bank Ltd.*[31] First, a court must inquire whether clear indication exists that Congress intended for the statute to have extraterritorial effect.[32] If no such indication is found, a court then proceeds to the second step: determining whether the case involves a domestic application of the statute — that is, whether the "conduct relevant to the statute's focus occurred in the United States."[33] Referencing a number of "textual clue[s]" in RICO's drafting, including the

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[23] *Id.* at 136.

[24] *Id.* at 133.

[25] *RJR Nabisco*, 136 S. Ct. at 2099. The five judges dissented largely on three grounds: First, that the decision triggered a disagreement on a question of controlling law within the circuit that merited a rehearing and resolution. European Cmty. v. RJR Nabisco, Inc., 783 F.3d 123, 128 (2d Cir. 2015) (Jacobs, J., dissenting from the denial of rehearing en banc). Second, that the panel's original decision was unsupported by precedent or statutory text. *Id.* at 129 (Cabranes, J., dissenting from the denial of rehearing en banc). Third, that the question of RICO extraterritoriality "[would] have significant and long-term adverse impact on activities abroad." *Id.* at 128.

[26] *RJR Nabisco*, 136 S. Ct. at 2111.

[27] Justice Alito wrote for a unanimous Court in Parts I, II, and III, and was joined by Chief Justice Roberts and Justices Kennedy and Thomas in Part IV. Justice Sotomayor took no part in the consideration or decision of the case.

[28] *RJR Nabisco*, 136 S. Ct. at 2106.

[29] *Id.* at 2097 (alteration in original) (quoting 18 U.S.C. § 1964(c) (2012)) (comparing § 1963(a) and § 1964(a)–(b) with § 1964(c)).

[30] 135 S. Ct. 1659 (2013).

[31] 561 U.S. 247 (2010).

[32] *RJR Nabisco*, 136 S. Ct. at 2101.

[33] *Id.* The Court was unanimous on definitive adoption of the two-step inquiry. *Id.*

explicit extraterritoriality of predicates prohibiting monetary transactions in criminally derived property and the assassination of governmental officials,[34] Justice Alito found that several of the contested RICO provisions satisfied step one, thereby rendering unnecessary the inquiry's second step.[35]

Justice Alito was careful to emphasize that extraterritoriality applied to a RICO provision only insofar as it applied to the underlying predicate.[36] For § 1962(b) and (c), which directly outlaw a pattern of racketeering, extraterritorial effect was clearly intended.[37] For § 1962(a), which targets the use of income derived from racketeering, Justice Alito noted the possibility that the provision implicates only domestic uses of income, though he declined to resolve the question.[38]

Justice Alito then rejected the argument that RICO required a domestic enterprise.[39] Reiterating that consideration of a statute's focus is only appropriate at step two of the extraterritoriality inquiry, Justice Alito confirmed the irrelevance of the enterprise's location — what mattered was whether the statute targeted extraterritorial conduct.[40] Such a finding also made sense on policy grounds, Justice Alito reasoned, for "[a] domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results," as well as "strange gaps in RICO's coverage."[41]

The private right of action in § 1964(c), however, failed to overcome the presumption against extraterritoriality.[42] Justice Alito confirmed the distinction between private and public enforcement; the former, which permits treble damages without the safeguard of prosecutorial discretion, "creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."[43] Although the presumption against extraterritoriality exists independently of the risk of international friction, "where such a risk is

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[34] *Id.* at 2101–02. Another predicate, criminalizing the killing of U.S. nationals outside of the United States, notably had *only* extraterritorial application. *Id.* at 2102.

[35] *Id.* at 2101. While the inquiry will normally go from step one to step two, the Court left open the possibility of "starting at step two in appropriate cases." *Id.* at 2101 n.5.

[36] *Id.* at 2102.

[37] *Id.* at 2102–03.

[38] *Id.* at 2103. Because the issue would make no difference to the outcome of the case, Justice Alito assumed that the pleadings only involved domestic investment. *Id.*

[39] *Id.*

[40] *Id.* at 2103–04. Such conduct would, however, still need to affect commerce directly involving the United States. *Id.* at 2105.

[41] *Id.* at 2104. Justice Alito was particularly concerned about the possibility of exempting foreign enterprises operating in the United States from RICO liability. *Id.*

[42] *Id.* at 2106. In applying the two-step analysis separately for § 1964(c), Justice Alito seemed to have found that the section's focus was on the *injury* caused by a RICO violation. *See id.* at 2108.

[43] *Id.* at 2106.

evident, the need to enforce the presumption is at its apex."[44] Nothing in § 1964(c)'s language displaced the presumption, Justice Alito concluded, with some of the provision's features even indicating narrower application than § 1962.[45]

Last, Justice Alito relied on developments in antitrust for support, contrasting RICO with section 4 of the Clayton Act[46] and pointing to Congress's decision to "exclude . . . most conduct that 'causes only foreign injury'" from the reach of American antitrust law.[47]

Justice Ginsburg concurred in part, dissented in part, and dissented from the judgment.[48] Justice Ginsburg objected to the majority's decision to "read[] into § 1964(c) a domestic-injury requirement . . . nowhere indicated in the statute's text."[49] Turning to RICO's text, she highlighted § 1964(c)'s incorporation of § 1962;[50] discussing the statute's legislative history, she noted that RICO was deliberately modeled on the Clayton Act.[51] Last, she dismissed the majority's argument about international friction, positing that denying foreign plaintiffs fora available to domestic ones "is hardly solicitous of international comity or respectful of foreign interests."[52] To Justice Ginsburg, concerns about comity could, and should, be left to other doctrines, notably forum non conveniens.[53]

Justice Breyer wrote separately to emphasize that *RJR Nabisco* did not involve "purely foreign facts"[54] and to criticize the Court for accepting the contention that private RICO recovery would lead to "international friction" when the U.S. government had failed to support the claim with examples or consultation with foreign governments.[55]

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[44] *Id.* at 2107. The majority also rejected the possibility of treating private and sovereign plaintiffs differently, calling the idea a "double standard" and refusing to engage in such a "case-by-case inquiry." *Id.* at 2107–08.

[45] *Id.* at 2108. The Court cited, for example, the provision's exclusion of liability for personal injury, and the limits placed on reliance on securities fraud. *Id.*

[46] 15 U.S.C. § 15 (2012). Unlike RICO, the Clayton Act explicitly allows certain entities existing under *foreign* law to bring private suits. *See RJR Nabisco*, 136 S. Ct. at 2109–10.

[47] *RJR Nabisco*, 136 S. Ct. at 2110 (quoting F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004)).

[48] Justice Ginsburg joined Parts I, II, and III of the majority's decision and dissented from Part IV and the judgment. She was joined by Justices Breyer and Kagan.

[49] *RJR Nabisco*, 136 S. Ct. at 2112 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment).

[50] "[I]ncorporating one statute . . . into another . . . serves to bring into the latter all that is fairly covered by the reference." *Id.* at 2113 (quoting Panama R.R. Co. v. Johnson, 264 U.S. 375, 392 (1924) (alteration and first omission in original)).

[51] *Id.* at 2113–14.

[52] *Id.* at 2115.

[53] *Id.*

[54] *Id.* at 2116 (Breyer, J., concurring in part, dissenting in part, and dissenting from the judgment).

[55] *Id.* (quoting *id.* at 2107 (majority opinion)).

Viewed in light of cases like *Morrison* and *Kiobel*, the *RJR Nabisco* Court appeared to double down on the presumption against extraterritoriality, confirming its bite after decades of extraterritorial creep. While good reasons exist to limit the accessibility of U.S. courts to foreign litigants alleging conduct occurring beyond U.S. shores, the Court's approach is overbroad. The Court brandished extraterritoriality as a bludgeon, whereas more tailored doctrines would do a better job of safeguarding concerns like international comity while still affording remedial access to a greater number of meritorious claims.

RJR Nabisco can be seen, first, as the latest marker in a wider trend against giving U.S. statutes extraterritorial effect. The trend has occurred, most notably, in human rights and securities law, and reflects an increasing judicial wariness toward opening American courts to non-U.S. litigants. In *Morrison*, the Court applied the presumption against extraterritoriality to the Securities Exchange Act of 1934[56] (1934 Act), a distinct reversal in course. Starting in the 1960s, federal courts began applying tests relatively unmoored from territoriality concerns — allowing recovery for fraudulent transactions occurring abroad, for example, so long as they implicated U.S.-listed stock, or allowing the application of U.S. securities laws to situations where foreign losses were "directly caused" by domestic "acts or culpable failures to act."[57] In *Morrison*, however, the Court engaged in the "focus" analysis discussed in *RJR Nabisco*, finding that the focus of the 1934 Act "[was] not upon the place where the deception originated, but upon purchases and sales of securities in the United States."[58] In an increasingly globalized world where securities are traded nearly seamlessly across borders, suddenly traders would be protected by American laws only to the extent that they engaged in domestic exchanges.

In the context of human rights, the Court's 2013 *Kiobel* decision reversed over three decades of expanded Alien Tort Statute[59] (ATS) litigation that followed *Filartiga v. Pena-Irala*,[60] a case that "transformed the ATS into the epitome of 'extraterritoriality' in U.S. law."[61]

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56 15 U.S.C. §§ 78a–78pp (2012).

57 Genevieve Beyea, Morrison v. National Australia Bank *and the Future of Extraterritorial Application of the U.S. Securities Laws*, 72 OHIO ST. L.J. 537, 544 (2011); *see also id.* at 542–44 (discussing the "effects test," *id.* at 542–43, and "conduct test," *id.* at 543–44).

58 Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

59 28 U.S.C. § 1350 (2012).

60 630 F.2d 876 (2d Cir. 1980).

61 *Developments in the Law — Extraterritoriality*, 124 HARV. L. REV. 1226, 1234 (2011). While the reach of the ATS was first curbed in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), that decision "generated uncertainty" and left "a thickening jungle of unresolved ATS issues." Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.*: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 602 (2013).

In *Kiobel*, the Court rejected a claim brought against Royal Dutch Petroleum for allegedly facilitating government-sponsored abuse of protesters in Nigeria, applying the presumption against extraterritoriality to the ATS and finding that the ATS's structure and history insufficiently rebutted the presumption.[62] In dicta, Chief Justice Roberts's majority opinion noted that "even where . . . claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial[ity]."[63] While the precise scope of "sufficient force" remains unclear, *Kiobel* has led American courts to greatly restrict the set of facts on which they are willing to hear claims involving foreign human rights abuses.[64]

RJR Nabisco was largely cut from the same cloth. The case hived off RICO's substantive provisions from its private right of action for purposes of extraterritoriality, requiring an even clearer statement from Congress to give extraterritorial effect to the latter.[65] It confirmed, too, the Court's overriding preoccupation with potential international friction.[66] The end result is that foreign RICO plaintiffs, like ATS or securities law litigants, will see their access to U.S. courts decrease, leaving more injuries without remedy.

Extraterritoriality offers important benefits. U.S. courts can be valuable fora for meritorious claims, affording remedies to victims of wrongdoing where none might be otherwise available. Laws with extraterritorial effect can spur legal developments in other countries, leading to harmonization across jurisdictions where such harmonization is politically palatable.[67] Similarly, extraterritoriality can "advance values central to the international state system,"[68] whether through enhanced respect for international human rights through ATS litigation, or through incentivizing greater compliance with anticorruption treaties, as with the Foreign Corrupt Practices Act of 1977.[69]

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[62] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665–69 (2013).

[63] *Id.* at 1669.

[64] At least one scholar has concluded that "[t]he old *Filartiga* paradigm of using the [Alien Tort Statute] to redress human rights violations . . . is dead." Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1754 (2014).

[65] *See RJR Nabisco*, 136 S. Ct. at 2108 ("It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent.").

[66] *See id.* at 2107 (noting that where a risk of conflict exists between American and foreign law, "the need to enforce the presumption is at its apex").

[67] *See Developments in the Law — Extraterritoriality*, *supra* note 61, at 1229–30 (observing that the European Union eventually changed its laws to accord with U.S. law prohibiting economic engagement with Iran). Where harmonization is deemed undesirable, it can be resisted through political will. *See id.* at 1232 ("[W]here extraterritorial statutes push too hard on jurisdictional limits in order to supplement other norms, outrage has undermined the statutes' aims.").

[68] *Id.* at 1231.

[69] *Id.* at 1231–32.

Skeptics would counter, rightly, that there are plenty of good reasons to limit the extraterritorial reach of U.S. law, even if doing so leaves otherwise deserving claims without remedy. Opening U.S. courts to foreign litigation can pose significant costs, increasing the strain on already busy federal dockets. American courts can be ill-suited to adjudicate claims whose facts occurred in faraway locales, where evidence and witnesses may be difficult or impossible to reach. Stricter territoriality also accords with the foundations of the Westphalian order, under which "the tenets of state sovereignty and territorial integrity have largely defined the international legal system."[70] Unease also arises when considering the potential implications for reciprocal extraterritoriality; in *Kiobel*, for example, the Court warned that "other nations . . . could hale [American] citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[71]

The presumption against extraterritoriality also responds to a concern with upsetting the balance of powers outside of the United States — what the *RJR Nabisco* Court called "international friction."[72] In *Morrison*, the focus was on "incompatibility with the applicable laws of other countries."[73] The Court concluded that a high probability of legal divergences existed, citing amicus briefs submitted by countries like the United Kingdom and private entities like the International Chamber of Commerce.[74]

This aversion to offending other nations, and desire to safeguard each sovereign's ability to regulate conduct within its own borders, is central to the presumption against extraterritoriality.[75] In *Kiobel*, the Court looked to "foreign policy consequences" as a rationale for the presumption against extraterritoriality.[76] In a notable shift, the Court failed to point to any concrete conflict of laws that might arise, focusing instead on a larger concern over "the danger of unwarranted judicial interference in the conduct of foreign policy."[77] In *RJR Nabisco*,

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[70] *Id.* at 1228.

[71] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013). The disquiet increases when one imagines nations lacking an independent, impartial judiciary in the scenario.

[72] *RJR Nabisco*, 136 S. Ct. at 2106.

[73] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 269 (2010).

[74] *Id.* at 269–70 (noting differing regulations "as to what constitutes fraud, what disclosures must be made, what damages are recoverable, what discovery is available in litigation . . . and many other matters," *id.* at 269).

[75] For a more extended explanation of how the presumption against extraterritoriality operates to avoid conflicts of laws in a way that creates net benefits, see Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1186–88 (2007).

[76] *Kiobel*, 133 S. Ct. at 1664.

[77] *Id.* For a broader argument on how the *Kiobel* Court's use of the presumption against extraterritoriality ran against Supreme Court precedent, see *The Supreme Court, 2012 Term — Leading Cases*, 127 HARV. L. REV. 308, 312–17 (2013).

the Court recalled earlier complaints regarding securities fraud enforcement from France, which had submitted an amicus brief in *Morrison* arguing that "[a]llowing foreign investors to pursue private suits in the United States . . . 'would upset that delicate balance and offend the sovereign interests of foreign nations.'"[78]

Regardless of the validity of the Court's concerns, *RJR Nabisco*'s application of the presumption against extraterritoriality is an unnecessarily blunt tool to safeguard policy interests where other, more tailored doctrines would do. As Justice Ginsburg pointed out, forum non conveniens already allows a U.S. court to refuse jurisdiction where an alternative, more appropriate forum is available.[79] Moreover, foreign policy concerns in particular can enter the forum non conveniens inquiry through judicial consideration of the public interest.[80] Likewise, due process requirements for general jurisdiction already exclude foreign corporations except where the corporation's "affiliations with the [forum] in which suit is brought are so constant and pervasive 'as to render it essentially at home [there].'"[81] And RICO itself provides a textual safeguard, with the Court reading the requirement that an implicated enterprise engage in "activities . . . affect[ing] interstate or foreign commerce" to only refer to "commerce directly involving the United States,"[82] thereby limiting the possibility that a foreign company will be brought into U.S. courts for commerce occurring entirely abroad.

Comity, too — that most amorphous of doctrines[83] — can be adapted to encourage jurisdictional restraint where the risk of international discord is unacceptably high. To some degree, this calculus is already undertaken by courts applying comity; it is also a consideration underlying the application of the political question doctrine.[84] Such a context-sensitive analysis can identify instances where allowing foreign litigants access to U.S. courts would enhance comity, as when would-be plaintiffs are foreign sovereigns,[85] or when judicial inaction

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[78] *RJR Nabisco*, 136 S. Ct. at 2107 (quoting Brief for the Republic of France as Amicus Curiae in Support of Respondents at 26, *Morrison*, 561 U.S. 247 (No. 08-1991)).

[79] *Id.* at 2115 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981)).

[80] *See The Supreme Court, 2012 Term — Leading Cases*, *supra* note 77, at 317 n.80.

[81] *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., concurring in part, dissenting in part, and dissenting from the judgment) (alterations in original) (quoting Daimler AG v. Bauman, 134 S. Ct. 746, 751 (2014)).

[82] 18 U.S.C. § 1962(a)–(c) (2012); *RJR Nabisco*, 136 S. Ct. at 2105.

[83] *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2072 (2015) ("For a principle that plays such a central role in U.S. foreign relations law, international comity is surrounded by a surprising amount of confusion.").

[84] *Id.* at 2136.

[85] It might be argued that, when a foreign sovereign loses a case, any possible comity enhancement would be lost. Yet to litigate is, after all, to countenance the possibility of loss.

would risk offending other nations by leaving misconduct unpunished.[86] Moreover, despite the Court's reticence to adopt a "double standard,"[87] sovereigns and private entities already receive different treatment in many areas of the law, including in comity more broadly.[88] A consistent distinction between sovereigns and private entities would not require a "case-by-case inquiry,"[89] as consent would be presumed from the sovereign's participation in the litigation.

The courts are not, of course, the only agents that can promote such values — the Executive and Congress can do so as well. But in an age of political deadlock and increasing isolationism, the judiciary serves as a valuable complementary institution, with the adjudicative process providing the considerable benefit of gradual, context-sensitive expansion or contraction.[90] A blanket, de facto restriction on private rights of action through a blunt application of the presumption against extraterritoriality needlessly forgoes these advantages.

The Supreme Court's decision in *RJR Nabisco* entrenches the reach of the presumption against extraterritoriality, building on a trend away from the openness to extraterritorial application that had characterized previous decades. In doing so, the Court brought a hammer into an area of the law that calls for a chisel: it further restricted access to U.S. courts for foreign litigants based on comity concerns that would have been better addressed through other doctrines, making it less likely that meritorious claims that pose no threat of "international friction" will get their day in U.S. courts. After all, *RJR Nabisco* presented precisely one of these claims — acting as a foreign sovereign, the European Community sought to sue a U.S. corporation for its allegedly harmful behavior. U.S. law may not rule the world, but for future litigants that turn to American courts for any number of worthy reasons, the Court has made it all the likelier that lawlessness will rule instead.

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[86] Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 401–03 (2014) ("[T]he failure to police misconduct within a nation that produces a negative impact for those beyond its borders can produce international discord." *Id.* at 403.).

[87] *RJR Nabisco*, 136 S. Ct. at 2108.

[88] For example, sovereigns can benefit from the immunity doctrine and the act of state doctrine. Dodge, *supra* note 83, at 2090, 2092.

[89] *RJR Nabsico*, 136 S. Ct. at 2108.

[90] *See, e.g.*, Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, LAW & CONTEMP. PROBS., Autumn 2004, at 169, 173–78 (describing developments in case law as "a breakthrough for the U.S. judiciary belatedly participating in the 'internationalization of the law,'" *id.* at 176); *see also* Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT'L L. 19, 32 (2003) ("[T]here are morally attractive features about the ideal of the international rule of law that provide *prima facie* support for the claim that courts have a role to play in the enforcement of international law, even absent specific endorsement from the political branches.").