

---

---

## RECENT CASES

FOREIGN RELATIONS LAW — LANHAM ACT EXTRATERRITORIALITY — NINTH CIRCUIT APPLIES LANHAM ACT TO WHOLLY FOREIGN SALES. — *Trader Joe's Co. v. Hallatt*, 835 F.3d 960 (9th Cir. 2016).

American courts interpret statutes with a strong presumption that they do not apply extraterritorially,<sup>1</sup> based on the belief “that Congress ordinarily legislates with respect to domestic, not foreign, matters.”<sup>2</sup> Extraterritoriality arises, then, only when “the affirmative intention of the Congress” to reach beyond U.S. borders is “clearly expressed.”<sup>3</sup> The federal trademark statute, the Lanham Act,<sup>4</sup> carries a broad jurisdictional grant: the Act is intended “to regulate commerce within the control of Congress.”<sup>5</sup> The Supreme Court concluded six decades ago in *Steele v. Bulova Watch Co.*<sup>6</sup> that this grant included a limited extraterritorial application.<sup>7</sup> Yet the Court has not addressed the issue since, leaving the exact contours of the Act’s reach to the determination of lower courts.<sup>8</sup> Recently, in *Trader Joe's Co. v. Hallatt*,<sup>9</sup> the Ninth Circuit extended the Act’s reach to wholly foreign sales for the first time. At first glance, the decision breaks with recent Supreme Court extraterritoriality jurisprudence, which has tended toward restricting the reach of U.S. law.<sup>10</sup> However, this apparent divergence in fact reflects extraterritoriality doctrine’s central trade-off between allowing judicial flexibility in the face of new factual scenarios and precluding judicial resolution of questions better left to Congress. *Trader Joe's* highlights the challenges of basing a doctrine on such a compromise.

Michael Norman Hallatt began drawing the attention of Trader Joe’s employees in October 2011.<sup>11</sup> Hallatt, a Canadian national with

---

<sup>1</sup> See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (identifying this presumption as “a longstanding principle of American law”); see also *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

<sup>2</sup> *Morrison*, 561 U.S. at 255.

<sup>3</sup> *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957).

<sup>4</sup> Ch. 540, 60 Stat. 427 (1946) (codified as amended in scattered sections of 15 U.S.C.).

<sup>5</sup> 15 U.S.C. § 1127 (2012).

<sup>6</sup> 344 U.S. 280 (1952).

<sup>7</sup> *Id.* at 286–87.

<sup>8</sup> See Erika M. Brown, Essay, *The Extraterritorial Reach of United States Trademark Law: A Review of Recent Decisions Under the Lanham Act*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 863, 867–81 (1999) (discussing Second, Fifth, and Ninth Circuit case law interpreting *Steele*).

<sup>9</sup> 835 F.3d 960 (9th Cir. 2016).

<sup>10</sup> See, e.g., *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2108 (2016); see also *The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 487, 492 (2016) (identifying *RJR Nabisco* as the latest in a series of cases limiting extraterritorial jurisdiction).

<sup>11</sup> *Trader Joe's*, 835 F.3d at 964.

U.S. lawful permanent resident status, visited the Bellingham, Washington, Trader Joe's store "several times per week,"<sup>12</sup> buying unusually large amounts of goods each visit.<sup>13</sup> Hallatt was distributing these goods in Canada, operating a store named "Pirate Joe's" where he resold the Trader Joe's items at "substantially inflated prices."<sup>14</sup> Hallatt allegedly advertised his goods using Trader Joe's intellectual property, including a store marquee that mimicked the company's font and an interior design similar to the company's distinctive trade dress.<sup>15</sup> Hallatt also operated a U.S.-accessible website and transported perishable goods in a manner that did not meet Trader Joe's quality control standards, leading to "at least one complaint from a consumer who became sick after eating" goods purchased at Hallatt's store.<sup>16</sup> After Hallatt refused to stop reselling the goods, Trader Joe's banned him from its stores.<sup>17</sup> However, Hallatt was "undeterred," attempting to evade detection first by disguising himself and traveling to stores all over the West Coast, and later by paying third parties to buy goods and deliver them to his store.<sup>18</sup> Trader Joe's claimed that in total, Hallatt "spent more than \$350,000" to stock his store.<sup>19</sup>

Trader Joe's filed suit against Hallatt in the Western District of Washington, alleging violations of both federal and state trademark and unfair competition law.<sup>20</sup> Specifically, the complaint alleged four federal claims under the Lanham Act: (1) trademark infringement; (2) unfair competition, false endorsement, and false designation of origin; (3) false advertising; and (4) trademark dilution.<sup>21</sup> Judge Pechman, however, granted Hallatt's motion to dismiss for lack of subject matter jurisdiction, holding that the Lanham Act did not apply to Hallatt's conduct in Canada.<sup>22</sup>

In dismissing the federal claims, Judge Pechman relied on an extra-territoriality analysis first set out by the Ninth Circuit in the antitrust

---

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 964–65.

<sup>14</sup> *Id.* at 964.

<sup>15</sup> *Id.* at 964 & figs.1 & 2.

<sup>16</sup> *Id.* at 964.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 964–65.

<sup>19</sup> *Id.* at 965.

<sup>20</sup> *Id.*

<sup>21</sup> Complaint at 9–12, *Trader Joe's Co. v. Hallatt*, 981 F. Supp. 2d 972 (W.D. Wash. 2013) (No. C13-768). Trader Joe's also brought two state law claims: (1) trademark dilution and (2) deceptive business practices violating the Washington Consumer Protection Act. *Id.* at 12–13.

<sup>22</sup> *Trader Joe's*, 981 F. Supp. 2d at 981. Judge Pechman did allow Trader Joe's to amend its complaint to factually support diversity jurisdiction over the state law claims. *Id.* at 980–81. In a later opinion, Judge Pechman also dismissed the state law causes of action for failing to state a claim under Washington law. *Trader Joe's Co. v. Hallatt*, No. C13-768, 2013 WL 12073234, at \*5 (W.D. Wash. Dec. 18, 2013).

context in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*<sup>23</sup> Under the *Timberlane* test, jurisdiction is properly exercised if three factors are demonstrated: the alleged conduct has “some effect on American foreign commerce”; that effect is sufficient to cause a cognizable injury under the Lanham Act; and the American commercial interests and links are “sufficiently strong in relation to those of other nations.”<sup>24</sup> Judge Pechman found that the alleged conduct did not fulfill the first two *Timberlane* requirements: extraterritorial jurisdiction had previously been deemed appropriate only when either the commercial activity occurred at least in part in the United States or the plaintiff “conducted business internationally.”<sup>25</sup> Both conditions were absent here.<sup>26</sup> Judge Pechman then turned to the third *Timberlane* prong, which itself requires balancing seven factors:

The degree of conflict with foreign law or policy, the nationality or allegiance of the parties and the locations or principal places of business of corporations, the extent to which enforcement by either state can be expected to achieve compliance, the relative significance of effects on the United States as compared with those elsewhere, the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect, and the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.<sup>27</sup>

Judge Pechman found that five of the seven factors tipped against extraterritoriality, and, combined with her finding on the first two *Timberlane* prongs, held that the court had no jurisdiction under the Lanham Act and granted the motion to dismiss.<sup>28</sup>

The Ninth Circuit reversed.<sup>29</sup> Writing for the panel, Judge Christen<sup>30</sup> held that the Lanham Act applied extraterritorially to Hallatt’s alleged conduct. Citing a recent Ninth Circuit case that had found a similar element within the Lanham Act was not jurisdictional,<sup>31</sup> the court held that the extraterritoriality determination too was

---

<sup>23</sup> 549 F.2d 597 (9th Cir. 1976); see also *Trader Joe’s*, 981 F. Supp. 2d at 976–77 (describing the *Timberlane* test). The Ninth Circuit transposed the *Timberlane* test to the Lanham Act in *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406 (9th Cir. 1977). See *Trader Joe’s*, 981 F. Supp. 2d at 976–77.

<sup>24</sup> *Trader Joe’s*, 981 F. Supp. 2d at 976 (quoting *Reebok Int’l, Ltd. v. Marnatech Enters., Inc.*, 970 F.2d 552, 554 (9th Cir. 1992)).

<sup>25</sup> *Id.* at 977.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 978 (quoting *Reebok*, 970 F.2d at 555).

<sup>28</sup> *Id.* at 978–80. Judge Pechman found only the second factor (geographic considerations) weighed in favor of extraterritoriality, citing Hallatt’s permanent resident status and frequent trips to the United States alongside Trader Joe’s American incorporation. *Id.* at 979. In addition, she found the fifth factor, “purpose to harm or affect,” to be likely neutral. *Id.* at 979–80.

<sup>29</sup> *Trader Joe’s*, 835 F.3d 960, 963 (9th Cir. 2016).

<sup>30</sup> Judge Christen was joined by Judges Paez and Bybee.

<sup>31</sup> See *La Quinta Worldwide LLC v. Q.R.T.M., S.A. de C.V.*, 762 F.3d 867 (9th Cir. 2014). The analysis in *La Quinta* relied on *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), which distinguished

properly treated as a merits question.<sup>32</sup> Proceeding to the extraterritoriality analysis itself, Judge Christen applied the two-step framework recently announced by the Supreme Court in *RJR Nabisco, Inc. v. European Community*,<sup>33</sup> which requires first finding a “clear, affirmative indication” of extraterritoriality in the statute before next considering any congressionally imposed limits on that reach.<sup>34</sup> A clear statement of extraterritorial intent has long been found in the Lanham Act.<sup>35</sup> Thus the court’s analysis turned on the second step — whether, under the *Timberlane* test, the alleged conduct fit within the Act’s scope of “all commerce which may lawfully be regulated by Congress.”<sup>36</sup>

Judge Christen, however, reached a different conclusion than did Judge Pechman under *Timberlane*. Analyzing the first two prongs together, she found the alleged conduct, though of a different nature than most foreign conduct regulated by the Lanham Act, had an effect on American commerce that caused Trader Joe’s a cognizable injury.<sup>37</sup> Specifically, she pointed to the allegations of lower quality control and potential reputational harm; the potential confusion of Canadian consumers who frequented both stores; and the fact that Hallatt engaged in some commercial activity in the United States — traveling, purchasing the goods, and paying third parties to purchase goods — as sufficient bases for a finding of “some effect” satisfying the first two *Timberlane* prongs.<sup>38</sup>

Turning then to *Timberlane*’s third prong, Judge Christen balanced the same seven factors as the district court but found only the final factor, the relative importance of domestic and foreign conduct, to counsel against extraterritorial application.<sup>39</sup> While acknowledging under that factor that “most of Hallatt’s infringing activity occurs abroad,”<sup>40</sup> Judge Christen nonetheless found that the Supreme Court’s admonition to “avoid unreasonable interference with other nations’ sovereign authority where possible” would not be contravened through extraterritorial application of the Lanham Act.<sup>41</sup> Her analysis pointed

---

factual elements specifically within a statute’s jurisdictional grant from those elsewhere, the latter of which must be treated as merits questions, *id.* at 513–14. In *La Quinta*, the court determined the statute’s “use in commerce” requirement, which does not appear in its jurisdictional grant, was a merits question. *La Quinta*, 762 F.3d at 872–73. Judge Christen found the Lanham Act’s territorial reach likewise was separate from the jurisdictional grant. *Trader Joe’s*, 835 F.3d at 967.

<sup>32</sup> *Trader Joe’s*, 835 F.3d at 967–68.

<sup>33</sup> 136 S. Ct. 2090 (2016).

<sup>34</sup> *Trader Joe’s*, 835 F.3d at 966 (quoting *RJR Nabisco*, 136 S. Ct. at 2102).

<sup>35</sup> *See id.* (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286 (1952)).

<sup>36</sup> *Id.* (quoting 15 U.S.C. § 1127 (2012)).

<sup>37</sup> *Id.* at 969–72.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 972–75.

<sup>40</sup> *Id.* at 975.

<sup>41</sup> *Id.* at 972 (quoting *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2107 n.9 (2016)).

to a lack of ongoing adversarial trademark proceedings in Canada, Hallatt's permanent resident status, the availability of injunctive relief, the significance of potential reputational harm to Trader Joe's, and Hallatt's intent to "tread[] on Trader Joe's' goodwill and pirate[] Trader Joe's' intellectual property"<sup>42</sup> as facts outweighing the foreign location of the conduct itself.<sup>43</sup> Combining both parts of her analysis, then, Judge Christen found Trader Joe's had stated a cognizable Lanham Act claim and reversed the district court's dismissal.<sup>44</sup>

The broad precedential value of Judge Christen's decision is at best unclear: while it may open the door to a new set of claims based on wholly foreign sales, the countervailing domestic nature of Hallatt's purchases and his permanent resident status suggest that the applicability of the Lanham Act in this case may well be limited to its facts. Nonetheless, the decision is noteworthy because it highlights the trade-off in judicial competencies at the center of modern extraterritoriality doctrine. Specifically, the strong presumption against extraterritoriality reflects a reasonable concern over the relative expertises of the judiciary and Congress in determining the merits of extraterritorial application. At the same time, however, extraterritorial applications like that allowed in *Trader Joe's* are based on complex balancing tests that promote judicial flexibility in the face of changing fact patterns. The stark difference between the two *Trader Joe's* opinions illustrates the difficulty of applying a doctrine based on such a compromise.

The Supreme Court's recent extraterritoriality jurisprudence has been defined by a trilogy of cases, culminating with its 2016 decision in *RJR Nabisco*. There, the Supreme Court reaffirmed the strength of the presumption against extraterritoriality by barring application of the civil cause of action created by the Racketeer Influenced and Corrupt Organizations Act<sup>45</sup> (RICO) to foreign conduct.<sup>46</sup> *RJR Nabisco* built on a trend of limiting extraterritoriality begun in two earlier cases: *Morrison v. National Australia Bank Ltd.*<sup>47</sup> and *Kiobel v. Royal Dutch Petroleum Co.*,<sup>48</sup> which limited the extraterritorial reach

<sup>42</sup> *Id.* at 974.

<sup>43</sup> *Id.* at 972–74.

<sup>44</sup> *Id.* at 975. Judge Christen did, however, affirm the district court's dismissal of the state law claims. *Id.* at 975–78.

<sup>45</sup> 18 U.S.C. §§ 1961–1968 (2012).

<sup>46</sup> *RJR Nabisco*, 136 S. Ct. at 2095.

<sup>47</sup> 561 U.S. 247 (2010) (holding the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012), did not apply to foreign transactions, *Morrison*, 561 U.S. at 265, even if the claim was based on domestic misrepresentations, *id.* at 270).

<sup>48</sup> 133 S. Ct. 1659 (2013) (holding the Alien Tort Statute, 28 U.S.C. § 1350 (2012), did not create a cause of action for foreign plaintiffs over wholly foreign harm, *Kiobel*, 133 S. Ct. at 1669).

of securities and human rights statutes, respectively.<sup>49</sup> In all three cases, however, the Supreme Court's analysis dealt with only the first step of the extraterritoriality inquiry, the determination of "whether the presumption against extraterritoriality has been rebutted."<sup>50</sup> The Supreme Court has looked with increasing scrutiny for "the affirmative intention of the Congress"<sup>51</sup> and found it lacking even in statutes that carry a clear foreign orientation<sup>52</sup> or contain some provisions that *do* meet the extraterritoriality threshold.<sup>53</sup>

This narrowing of extraterritoriality by the Supreme Court has not, to date, affected the second step of *RJR Nabisco*, the inquiry into "the limits Congress has (or has not) imposed on the statute's foreign application."<sup>54</sup> Federal courts have developed a variety of balancing tests to give meaning to this second step. For example, in the Lanham Act context, the Supreme Court in *Steele* confirmed that foreign conduct could fall within the Act's scope of "commerce within the control of Congress."<sup>55</sup> And the lower courts have been left to determine the extent of this reach using the type of balancing exemplified by the *Timberlane* test.<sup>56</sup> Such tests are highly fact specific and seek to account for a multitude of competing considerations. And, as some commentators have noted, reliance on such "effects tests," which tend to allow extraterritorial application when there are sufficient effects on U.S. commerce, is a likely "doctrinal culprit" for increasing comfort with extraterritoriality.<sup>57</sup> The flexibility inherent in such tests has provided the lower courts a means of adjudicating factual situations that reflect the lessening relevance of borders to the existence of a sufficient jurisdictional nexus.

This judicial flexibility may well be a powerful tool. Allowing for recognition of new types of rights — and harms arising from infringe-

---

<sup>49</sup> See Timothy G. Nelson et al., *RJR Nabisco and the Future of Extraterritoriality*, NAT'L L.J. (July 4, 2016), <http://www.nationallawjournal.com/id=1202761590365/RJR-Nabisco-and-the-Future-of-Extraterritoriality> [<https://perma.cc/Q7KP-TPWR>].

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

<sup>51</sup> *Kiobel*, 133 S. Ct. at 1664 (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

<sup>52</sup> See *id.* at 1667 (noting that even the intended use of the Alien Tort Statute to counter piracy on the high seas, an international jurisdiction, did not overcome the presumption).

<sup>53</sup> See *RJR Nabisco*, 136 S. Ct. at 2102–03 (distinguishing RICO's criminal provisions as exhibiting clear congressional intent for extraterritorial effect).

<sup>54</sup> *Id.* at 2101.

<sup>55</sup> 15 U.S.C. § 1127 (2012); see *Steele v. Bulova Watch Co.*, 344 U.S. 280, 285 (1952).

<sup>56</sup> See Elizabeth A. Rowe & Daniel M. Mahfood, *Trade Secrets, Trade, and Extraterritoriality*, 66 ALA. L. REV. 63, 77–78 (2014) (arguing this determination has been "inconsistent and at times unpredictable," *id.* at 77).

<sup>57</sup> Austen L. Parrish, *The Effects Test: Extraterritoriality's Fifth Business*, 61 VAND. L. REV. 1455, 1457 (2008); see also Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1021, 1045 (2011).

ment of those rights — under a given statute could be an important means of regulating an increasingly globalized world. And when Congress has potentially underregulated a given field, or left the extent of its regulation unclear, judicial discretion to apply U.S. law in the face of compelling facts may be valuable.<sup>58</sup> This need for flexibility certainly has been identified in the Lanham Act context, as the prospect of cognizable harm from foreign conduct continues to grow, whether via the increasing ubiquity of online commerce or the ongoing proliferation of multinational corporations.<sup>59</sup> Judge Christen’s determination that the Lanham Act protected Trader Joe’s intellectual property from the potential reputational harm from cross-border flows of information and people,<sup>60</sup> for example, can be seen as addressing exactly this need. And such a determination, in departing from the limited scope of previously recognized harms, was possible only due to the capacious and flexible nature of the balancing test deployed.

Yet there is also a strong set of countervailing costs to be weighed against the flexibility of such “effects tests” here. As in areas of the law beyond extraterritoriality, flexibility can be a mask for ambiguity, allowing the contours of legal rights to vary case-by-case.<sup>61</sup> More specific to the extraterritoriality context, moreover, is the danger of such ambiguity when “international friction,” or the possibility of foreign relations fallout, is an interest at stake.<sup>62</sup> The third *Timberlane* prong deals exclusively with this issue of “international comity”; Judge Pechman and Judge Christen, however, arrived at opposing conclusions regarding five out of the seven factors within this prong.<sup>63</sup> Though it has been argued that courts may in fact be best suited to making these determinations,<sup>64</sup> the dueling opinions in *Trader Joe’s*

---

<sup>58</sup> Cf. William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT’L L.J. 101, 104–05 (1998) (arguing for a “unilateral” approach to extraterritoriality determinations, by which courts may apply domestic law “whenever doing so appears to advance the purposes of the statute,” *id.* at 104, to correct legislative shortcomings and incentivize international negotiations toward harmonizing the regulation in question, *id.* at 105).

<sup>59</sup> See, e.g., Brendan J. Witherell, *The Extraterritorial Application of the Lanham Act in an Expanding Global Economy*, 97 TRADEMARK REP. 1090, 1124–25 (2007); Anna R. Popov, Note, *Watering Down Steele v. Bulova Watch Co. to Reach E-Commerce Overseas: Analyzing the Lanham Act’s Extraterritorial Reach Under International Law*, 77 S. CAL. L. REV. 705, 706 (2004).

<sup>60</sup> *Trader Joe’s*, 835 F.3d at 971.

<sup>61</sup> Cf. generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987) (describing the limitations of balancing tests in defining constitutional rights).

<sup>62</sup> *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2106 (2016).

<sup>63</sup> Compare *Trader Joe’s Co. v. Hallatt*, 981 F. Supp. 2d 972, 978–80 (W.D. Wash. 2013) (district court finding five factors tilt against extraterritoriality and one to be neutral), with *Trader Joe’s*, 835 F.3d at 972–75 (circuit court finding six factors tilt toward extraterritoriality).

<sup>64</sup> See Jonathan Turley, *Dualistic Values in the Age of International Legispudence*, 44 HASTINGS L.J. 185, 271 (1993) (“[C]ourts are now the best — and perhaps only — institution for reconciling conflicts between municipal and international values.”).

suggest that perhaps this calculus pushes judicial expertise too far, and thus the balancing should be left to political actors more capable of accounting for foreign affairs considerations. In fact, the Supreme Court's recent reaffirmation of the presumption at step one may well have been driven largely by a recognition of the dangers of "the international discord that can result when U.S. law is applied to conduct in foreign countries"<sup>65</sup> and an acknowledgment that courts are ill suited to evaluate this risk.<sup>66</sup> Moreover, deference to the political branches may also explain why courts are more comfortable with extraterritoriality in the criminal context, where the executive has already undertaken this interest balancing in a way no civil plaintiff (or even, perhaps, a judge) could.<sup>67</sup>

This trade-off between preserving judicial flexibility to ensure U.S. law is applied where the facts demand it and acknowledging the limitations of judicial expertise in making such determinations is at the heart of modern extraterritoriality doctrine. The resulting "messiness" has prompted calls for changes to the doctrine to better reflect the source of congressional power to regulate<sup>68</sup> or, more radically, to do away with territoriality as a basis for jurisdiction altogether.<sup>69</sup> However, the Court's clarification of the two-step extraterritoriality test in *RJR Nabisco* has entrenched the existing uneasy compromise: the strengthened presumption at step one emphasizes the judiciary's unwillingness to overstep its institutional competency, while the continuing use of balancing at the second step allows for judicial flexibility where Congress has been clear in its extraterritorial intent, if not in its limits. *Trader Joe's*, meanwhile, highlights the unpredictable nature of a doctrine resting on such a compromise, as the two opinions came to almost uniformly opposite conclusions about the applicability of U.S. law to the same set of facts. Such piecemeal and inconsistent applications, punctuated by occasional sweeping repudiations of extraterritoriality such as those seen in the recent Supreme Court trilogy, will likely continue to be the norm as a result.

---

<sup>65</sup> *RJR Nabisco*, 136 S. Ct. at 2100.

<sup>66</sup> *E.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1661 (2013).

<sup>67</sup> *RJR Nabisco's* comfort with RICO's extraterritorial criminal provisions is one example of this distinction. 136 S. Ct. at 2102-03; *see also, e.g.*, *United States v. Schmidt*, 845 F.3d 153, 156-57 (4th Cir. 2017) (upholding guilty plea under sex offense statute relying on an expansive view of Congress's ability to regulate "foreign commerce"); Robert J. Anello & Richard F. Albert, *Questionable Extraterritorial Extension of Foreign Corrupt Practices Act*, N.Y. L.J. (Oct. 3, 2016), <http://www.newyorklawjournal.com/home/id=1202769112983/Questionable-Extraterritorial-Extension-of-Foreign-Corrupt-Practices-Act> [<https://perma.cc/NZ8X-Z48Q>] (identifying the trend toward extraterritoriality as especially "significant" in the Foreign Corrupt Practices Act context).

<sup>68</sup> *See Colangelo, supra* note 57, at 1021-25.

<sup>69</sup> *See Paul Schiff Berman, The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311 (2002).