

**BUILDING A WALL AGAINST PRIVATE ACTIONS FOR  
OVERSEAS INJURIES: THE IMPACT OF *RJR NABISCO* v.  
*EUROPEAN COMMUNITY***

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**ABSTRACT**

*The Supreme Court's June decision in RJR Nabisco dropped a hidden bombshell. While nominally only a decision about the extraterritorial reach of RICO, the reasoning behind the Court's denying recovery under RICO's private cause of action provision for injuries incurred outside the United States might be equally applicable to virtually any federal statute. Doctrinally questionable, the Court's decision nevertheless appears to implement an initially sensible policy distinction. The specific line the Court drew, however, misses the mark in implementing this policy and carries implications that the Court may not have fully recognized.*

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## INTRODUCTION

In perhaps another skirmish between the forces of globalization and those who want to fence the world out, Justice Alito in *RJR Nabisco v. European Community (RJR Nabisco)*<sup>1</sup> raised the presumption against extraterritoriality into a substantially greater barrier against those seeking relief under federal law for injuries suffered abroad. On one level, *RJR Nabisco* is only the latest in a series of Supreme Court decisions<sup>2</sup> using the presumption against extraterritoriality—in other words, the presumption that U.S. laws normally do not apply outside the United States—to cut off claims involving events occurring abroad. Previous use of the doctrine, however, ended when the federal statute in question indicated that Congress intended to apply the statute to overseas events<sup>3</sup> or when the particular event corresponding to the statute’s “focus” occurred in the United States even if other elements of the claim occurred abroad.<sup>4</sup> Justice Alito’s opinion in *RJR Nabisco* circumvented such limitations by separately applying the presumption against extraterritoriality to the specific provision in the Racketeering Influenced and Corrupt Organizations Act (RICO)<sup>5</sup> which established a private cause of action for RICO violations. As a result, the Supreme Court held that RICO does not provide relief for those injured outside the United States, despite Congressional intent for RICO to prohibit the conduct causing the injury wherever the conduct occurred.

While seemingly just a decision about the reach of RICO’s private cause of action provision, the impact of *RJR Nabisco* is not so easily

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

<sup>2</sup> See generally, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (holding that the Alien Tort Statute does not reach conduct inside other nations); *Morrison v. Nat’l Austl. Bank*, 561 U.S. 247 (2010) (holding that Section 10(b) of the Securities Exchange Act does not reach fraudulent conduct impacting sales of securities outside the United States); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176-77 (1993) (holding that a provision in the Immigration and Nationality Act dealing with deportation of asylum seekers does not apply to refugees interdicted on the high seas); *Smith v. United States*, 507 U.S. 197, 203-204 (1993) (holding the Federal Torts Claim Act does not apply to torts in Antarctica); *EEOC v. Arabian Am. Oil Co. (ARAMCO)*, 499 U.S. 244, 248 (1991) (holding that the Equal Employment Opportunity Act does not apply to discriminatory firings outside of the United States).

<sup>3</sup> See notes 27 through 33 and accompanying text *infra*.

<sup>4</sup> See notes 34 through 43 and accompanying text *infra*.

<sup>5</sup> 18 U.S.C. §§1961–1968 (2012).

cabined. Every private claim brought for violation of any federal statute relies upon either an express provision in the federal statute creating a private cause of action or judicial decisions implying the existence of a private cause of action.<sup>6</sup> If the presumption against extraterritoriality separately applies to the express private right of action provision of RICO, by the same logic it could separately apply to the provisions in other federal statutes expressly creating private rights of action or to judicially implied private rights of action. As a result, private claims for injuries incurred outside the United States from violating all types of federal statutes may soon be barred, even when the location of the conduct would not preclude application of the statute in a prosecution of the defendant by the U.S. government.

As in every crime story, motive matters. To the cynic, *RJR Nabisco* is simply another exhibit evidencing the Supreme Court's results-oriented campaign to protect businesses from private actions in federal courts.<sup>7</sup> A more charitable interpretation is that *RJR Nabisco* marks a focusing of the presumption against extraterritoriality into a doctrine designed to ensure Congress really intended the application of U.S. law in situations in which such application might cause negative foreign relations impacts—a position I urged in a recent article.<sup>8</sup> Under this interpretation, the distinction between private claims and government prosecutions makes some sense. Government prosecutors will presumably take into account possible negative international relations impacts in deciding whether to bring the action, whereas private plaintiffs will not. Still, this may be an example of taking a hacksaw to a problem where a scalpel would have done better.

This article will explore these points in two parts. The first sets the stage beginning with a brief background on the presumption against extraterritoriality and the two means by which a plaintiff can overcome the presumption. This part then turn to the application of the presumption against extraterritoriality to RICO by first examining the conflicting approaches of the lower courts in numerous cases brought under RICO. Then we examine *RJR Nabisco* and the Supreme Court's decision in this case. Having set the stage, the second part of this article examines the implications of *RJR Nabisco* for private claims under other federal statutes when the injury occurs overseas. After conducting a futile search for any principled basis upon which to confine *RJR Nabisco* to RICO, we turn to a critique of both the doctrinal and policy basis for the death knell that the

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<sup>6</sup> See note 83 *infra*.

<sup>7</sup> See, e.g., Adam Liptac, *Friend of the Corporation* New York Times, (May 5, 2013), at BU1.

<sup>8</sup> Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341 (2014).

Court's decision sounds for private claims to recover under various federal laws for overseas injuries. This article demonstrates that the Court's approach lacks support in precedent, requires arbitrary distinctions in the treatment of different statutory provisions, and is too superficial in identifying the focus of statutes or court decisions creating private causes of action for those injured by wrongful conduct. While the Court's approach provides a welcome viewing of the presumption against extraterritoriality as a tool to avoid international friction, the Court's application of this view is insufficiently sensitive to specific context in assuming that private actions for overseas injury necessarily risk such friction without regard to the location of the conduct, the nationality of the parties, or other factors. Finally, we will ask whether cutting off U.S. law based claims against U.S. corporations, which engage in conduct causing harm to parties overseas, means that U.S. courts must accept foreign law based claims in such situations.

## I. SETTING THE STAGE

### A. *The Presumption against Extraterritoriality*

#### 1. Overview

In a simpler time, issues of applying United States law beyond the young nation's borders arose on ships and involved pirates,<sup>9</sup> murder at sea,<sup>10</sup> and customs duties.<sup>11</sup> By the twentieth century, an industrialized and powerful United States was dealing with those who used subtler means to enrich themselves at the expense of others. Congress responded with statutes to protect consumers, competitors, workers, investors, and the like.<sup>12</sup> As economic transactions increasingly crossed national boundaries, issues arose regarding the degree to which such statutes applied to events that occurred in other nations. Courts responded with decisions applying or refusing to apply U.S. antitrust laws,<sup>13</sup> employment laws,<sup>14</sup> securities laws,<sup>15</sup> and trademark

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<sup>9</sup> *E.g.*, *United States v. Klintock*, 18 U.S. 144 (1820).

<sup>10</sup> *E.g.*, *United States v. Furlong*, 18 U.S. 184 (1820).

<sup>11</sup> *The Apollon*, 22 U.S. 362, 368-69 (1824).

<sup>12</sup> *E.g.*, Sherman Antitrust Act, 15 U.S.C. §§ 1, 2 (2012) (protecting consumers and competitors from combinations in restraint of trade and monopolization); Securities Exchange Act, 15 U.S.C. §§ 78a-78pp (2012) (protecting investors); Eight Hour Law, 40 U.S.C. §§ 324-25 (1940) (repealed 1962) (protecting workers through wage and hour regulation).

<sup>13</sup> *See F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004); *infra* notes 20-22 and accompanying text.

<sup>14</sup> *See* Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 617-27 (1990) (discussing

laws,<sup>16</sup> as well as a variety of other laws,<sup>17</sup> to activities abroad.

In the course of deciding these cases, the Supreme Court often referred to rules of construction or presumptions regarding Congress's intent with respect to applying U.S. laws to events beyond our borders. In its early decisions dealing with murder at sea and enforcing customs duties, the Supreme Court explained that even though a statute used broad, general language regarding its reach, the Court presumed that Congress only intended to legislate within Congress's "authority and jurisdiction."<sup>18</sup> It is debatable whether this referred to legislating only with respect to events within the territory of the United States or legislating only within the limits imposed by international law on the permissible reach of a nation's statutes.<sup>19</sup> Justice Holmes' opinion in *American Banana Co. v. United Fruit Co.* (*American Banana*)<sup>20</sup> marked an important point in the evolution of the law regarding this question when he stated that the presumed limit is one of territory. Specifically, Justice Holmes asserted that the legality of an act nearly universally depends upon the law of the nation in which the act takes place. This, in turn, according to Holmes, this leads courts to construe statutes only to apply within the nation's territorial limits.<sup>21</sup>

Justice Holmes's strict notions of territoriality subsequently fell out of favor in the very field in which *American Banana* arose, as courts increasingly applied U.S. antitrust laws to overseas conduct that had an effect in the United States.<sup>22</sup> In employment law, however, the Supreme Court continued to invoke a presumption against applying U.S. laws to events beyond our territory—extraterritoriality—to construe U.S. law as not reaching labor practices outside the United States.<sup>23</sup> This hit an important milestone in the Court's 1991 decision in *EEOC v. Arabian American Oil*

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cases dealing with extraterritorial application of U.S. employment law); *infra* notes 23-24 and accompanying text.

<sup>15</sup> *E.g.*, *Morrison*, 561 U.S. 247 (2010).

<sup>16</sup> *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952).

<sup>17</sup> *E.g.*, *Smith v. United States*, 507 U.S. 197 (1993) (involving the Federal Torts Claim Act); Turley, *supra* note 14, at 627-34 (discussing cases dealing with extraterritorial application of U.S. environmental protection laws).

<sup>18</sup> *The Apollon*, 22 U.S. at 370.

<sup>19</sup> *E.g.*, John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 363-66 (2010).

<sup>20</sup> *American Banana Company v. United Fruit Company*, 13 U.S. 347, 356-57 (1909).

<sup>21</sup> *Id.* at 359.

<sup>22</sup> *E.g.*, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993); *United States v. Sisal Sales Corp.*, 274 U.S. 268 (1927); *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 443 (2d Cir. 1945).

<sup>23</sup> *E.g.*, *Foley Bros. v. Filardo*, 336 U.S. 281, 282 (1949) (holding that the Eight Hour Law did not apply to employment overseas).

*Co. (ARAMCO)*,<sup>24</sup> in which the Supreme Court invoked the presumption against extraterritoriality and held that the Equal Employment Opportunity Act did not apply to the discriminatory firing of an American citizen by an American company when the firing took place in Saudi Arabia. *ARAMCO* marked a turning point in the frequency with which the Supreme Court invoked the presumption against extraterritoriality. Whereas the eight decades between *American Banana* and *ARAMCO* saw the Supreme Court decreasingly invoke the presumption to restrict the application of U.S. statutes,<sup>25</sup> in the two and one-half decades since *ARAMCO* the presumption has found much greater favor in the Supreme Court's eyes.<sup>26</sup>

## 2. Rebutting the Presumption

The presumption against extraterritoriality does not mean that U.S. statutes cannot have an extraterritorial application; rather it means that courts start with the assumption that Congress does not intend U.S. statutes to have such an application and require some showing that Congress had a different intent for the particular statute involved in the case before the court.<sup>27</sup> This creates two impacts.

The first, and underappreciated impact, is to legitimate an inquiry into whether the statute at hand covers the case despite some elements of the claim having occurred outside the United States. Such a hook is not needed for most issues of statutory interpretation because the statute's language triggers the inquiry. For example, it is obvious why a court might need to address whether investing in a limited liability company involves the sale of a "security" when facing a claim that a defendant, who sold an interest in an LLC, violated a statute prohibiting fraud in connection with the purchase or sale of a "security."<sup>28</sup> By contrast, a claim that the statute does not reach the defendant's conduct because it occurred on a Tuesday would be dismissed as frivolous in the absence of anything in the statute to indicate why this is relevant. The presumption against extraterritoriality allows the court to say

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<sup>24</sup> *AMARCO*, 499 U.S. 244 (1991).

<sup>25</sup> William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *BERKELEY J. INT'L L.* 85, 91 (1998) (explaining how the Supreme Court did not invoke the presumption against extraterritoriality in the four decades after applying it to the Eight Hour Law in 1949, even though it had opportunities to do so).

<sup>26</sup> *Id.* at 87 (listing Supreme Court opinions invoking the presumption against extraterritoriality in the decade following *ARAMCO*); *see also supra* note 2 and accompanying text.

<sup>27</sup> *E.g.*, *Morrison*, 561 U.S. at 255; *ARAMCO*, 499 U.S. at 248.

<sup>28</sup> *See, e.g.*, *Robinson v. Glenn*, 349 F.3d 166 (4th Cir. 2003) (addressing whether an interest in an LLC was a security in a case in which the plaintiff claimed that the defendant violated a section of the Securities Exchange Act and an associated rule prohibiting fraud in connection with the purchase or sale of a security).

that the fact that some events in the case took place outside the United States might matter despite the lack of any language in the statute saying it should.

To the majority of the Supreme Court, however, the presumption against extraterritoriality does more than this. Specifically, the presumption puts a thumb on the scale in favor of a finding that the statute does not apply extraterritorially. Accordingly, it imposes an obligation upon the plaintiff to demonstrate some indication that Congress had a different intent for this particular statute.<sup>29</sup> Unfortunately, Supreme Court opinions are not entirely clear or consistent on the evidence of legislative intent necessary to overcome the presumption.<sup>30</sup> Recent opinions talk of the need for “clear” evidence.<sup>31</sup> These opinions, however, explain that the requirement for clear evidence does not impose a so-called “clear statement rule” under which the statute would need language explicitly stating that it applies outside the United States in order to overcome the presumption against extraterritoriality.<sup>32</sup> Instead, as the Court repeated in *RJR Nabisco*, the context of less explicit statutory language might establish Congress’ intent to have extraterritorial reach.<sup>33</sup> Be this as it may, it is difficult to escape the suspicion that how strict the Court is in its demands for clear evidence depends upon how much the Court desires to confine the particular statute before the Court to domestic events.

### 3. Is There Really Extraterritoriality?

An often more difficult issue presented by the presumption against extraterritoriality is determining when a proposed application of a statute actually involves extraterritoriality so as to trigger the presumption.<sup>34</sup> To use the classic illustration,<sup>35</sup> if a person standing within the United States shoots a rifle and kills a victim standing across the border in Mexico, or a person in Mexico shoots a rifle and kills a victim standing within the United States, would prosecuting the shooter under domestic law in the United States for murder involve, in either case, extraterritorial application of domestic U.S. law? A court might say there is extraterritoriality in these examples and

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<sup>29</sup> *E.g.*, *Morrison*, 561 U.S. at 255; *ARAMCO*, 499 U.S. at 248.

<sup>30</sup> *E.g.*, Dodge, *supra* note 25, at 96-97 (discussing statements by the Supreme Court in *ARAMCO*, *Smith*, 507 U.S. at 201-04, and *Sale*, 509 U.S. at 176-77, with different formulations for the amount of evidence necessary to overcome the presumption).

<sup>31</sup> *E.g.*, *Kiobel*, 133 S. Ct. at 1665; *Morrison*, 561 U.S. at 255.

<sup>32</sup> *E.g.*, *ARAMCO*, 499 U.S. at 262-3 (Marshall, J., dissenting) (explaining clear statement rule).

<sup>33</sup> *RJR Nabisco* 136 S. Ct. at 2102 (quoting *Morrison*).

<sup>34</sup> For an extended treatment of this issue, see Gevurtz, *supra* note 8.

<sup>35</sup> *See, e.g.*, RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 illus. 2 (1965).

invoke the presumption because it would be applying domestic U.S. law to conduct, effects of the conduct, or elements of the prohibited act that occurred beyond our border. On the other hand, the court might say there is no extraterritoriality and the presumption is irrelevant because it is applying domestic law to conduct, effects, or elements of the prohibited act that took place within the United States. Or, a court might state that whether the situation involves extraterritoriality depends upon the statute and the specific circumstances.

The Supreme Court established the test for addressing this issue in its 2010 decision in *Morrison v. National Australia Bank (Morrison)*.<sup>36</sup> This test looks to the location of whatever constitutes the “focus” of the statute: if whatever constitutes the focus of the statute occurred outside the United States, the situation involves extraterritoriality; if whatever constitutes the focus of the statute occurred inside the United States, the situation does not involve extraterritoriality.<sup>37</sup> Yet, if statutory focus provides the test for determining if the situation involves extraterritoriality, what is the test for determining the statutory focus? For example, is the statutory focus of the law against murder the act of pulling the trigger with intent to kill, or is it the fatal impact of the bullet striking the victim?<sup>38</sup>

In *Morrison*, the Court decided that the focus of Section 10(b) of the Securities Exchange Act,<sup>39</sup> which, in effect, prohibits fraud in connection with the purchase or sale of a security,<sup>40</sup> was the purchase or sale, not the fraud.<sup>41</sup> Unfortunately, the approach the Court used to reach this conclusion was entirely circular because the Court concluded that the focus was the sale, not the fraud, based upon traditional statutory interpretation arguments purporting to show that Congress did not intend to regulate overseas sales.<sup>42</sup> Finding, even before applying the presumption against extraterritoriality, that Congress did not intend to regulate overseas sales, renders the

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<sup>36</sup> *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

<sup>37</sup> *Id.* at 266.

<sup>38</sup> Or perhaps one might say that either or both are the focus, meaning perhaps there is no extraterritoriality if either occurs in the United States or perhaps there is extraterritoriality if either occurs outside the United States; but perhaps we have now become rather unfocused.

<sup>39</sup> 15 U.S.C.A. § 78j(b) (2016).

<sup>40</sup> More precisely, this is the effect of Section 10(b) and Rule 10B-5 (17 C.F.R. § 240.10b-5) promulgated by the Securities and Exchange Commission pursuant to Section 10(b).

<sup>41</sup> *Morrison*, 561 U.S. at 266.

<sup>42</sup> For a more extended discussion of these arguments, see Franklin A. Gevurtz, *Symposium: Transnational Securities and Regulatory Litigation in the Aftermath of Morrison v. Australia National Bank: An Introduction to the Symposium and an Examination of Morrison's Impact on the Presumption Against Extraterritoriality*, 27 PAC. MCGEORGE GLOB. BUS. & DEVEL. L.J. 173, 191-94 (2014).

presumption superfluous.<sup>43</sup> After *Morrison*, we are bereft of further guidance from the Supreme Court on how to determine the focus of a statute for purposes of the presumption against extraterritoriality.

*B. The Presumption and RICO before RJR Nabisco*

In recent years, lower federal courts have struggled with applying the presumption against extraterritoriality to RICO. Broadly speaking, RICO prohibits the combination of a pattern of racketeering activities and certain conduct involving an enterprise. Racketeering activities under RICO are criminal violations of certain specified federal and state laws, including money laundering, securities and mail fraud, support of terrorism, etc.<sup>44</sup>—commonly referred to as predicate crimes or acts (or sometimes just predicates). A pattern of racketeering activities involves undertaking a number of such predicate crimes showing the existence or threat of continued criminal activity.<sup>45</sup> A RICO violation occurs if the pattern of racketeering activities is used in certain ways to infiltrate, control or operate an enterprise engaged in or affecting interstate or foreign commerce—specifically by investing money obtained from the pattern of racketeering activities in the enterprise,<sup>46</sup> or using a pattern of racketeering activities to acquire or maintain control of the enterprise,<sup>47</sup> or by conducting the enterprise’s affairs through a pattern of racketeering activities.<sup>48</sup> RICO subjects violators to criminal penalties,<sup>49</sup> as well as to paying treble damages to persons injured in their business or property by the violation.<sup>50</sup> The government and private plaintiffs have attempted to apply RICO to events occurring both inside and outside the United States. These cases have ranged from Chinese nationals accused of illegal money transfers and immigration fraud in the United States as part of their scheme to steal money from the Bank of China,<sup>51</sup> to a primarily foreign group accused of engaging in money laundering and other acts in the United States in furtherance of a conspiracy

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<sup>43</sup> If, before applying the presumption against extraterritoriality, a court can figure out based upon the language and purpose of a statute that Congress did not intend the statute to cover a situation in which a particular element, event or circumstance was outside the United States, the court does not need to invoke a presumption regarding Congress’ intent.

<sup>44</sup> 18 U.S.C. § 1961(1)(A)-(G) (2016).

<sup>45</sup> *E.g., H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U. S. 229, 239 (1989).

<sup>46</sup> 18 U.S.C. § 1962(a).

<sup>47</sup> *Id.* at (b).

<sup>48</sup> *Id.* at (c).

<sup>49</sup> 18 U.S.C. § 1963(a).

<sup>50</sup> 18 U.S.C. § 1964(c).

<sup>51</sup> *United States v. Chao Fan Xu*, 706 F.3d 965, 974, 979 (9th Cir. 2013) (holding RICO applied).

to take over the Russian oil industry.<sup>52</sup>

Prior to *Morrison*, federal courts addressing the application of RICO in these sorts of situations had borrowed the so-called conduct and effects test devised by the Second Circuit to determine the reach of the prohibition on securities fraud established by Section 10(b) of the Securities Exchange Act.<sup>53</sup> Under this approach, courts applied Section 10(b) to cases involving events outside the United States so long as enough conduct or effects also occurred within the United States to convince the court that Congress, had it thought about the situation, would have wanted the statute to apply.<sup>54</sup> After the Supreme Court rejected this approach to Section 10(b) in *Morrison*, federal courts had to adjust how they dealt with RICO.

To begin with, federal courts had to ask whether RICO's statutory language provided clear evidence to show Congress intended to apply the statute extraterritorially, thereby rebutting the presumption against such application. In *Norex Petroleum Ltd. v. Access Industries, Inc.*,<sup>55</sup> the Second Circuit held that neither the reference in RICO to enterprises engaged in foreign commerce, nor the fact that the statutes establishing some of the predicate crimes showed an intent to apply those statutes extraterritorially, rebutted the presumption against extraterritoriality for RICO.

Having found the presumption against extraterritoriality not rebutted for RICO, federal courts had to decide when particular cases before them involved extraterritorial application of RICO. As discussed earlier,<sup>56</sup> under *Morrison* this requires an inquiry into whether the thing corresponding to RICO's statutory focus was inside the United States in the case (in which event there was no extraterritoriality to trigger the presumption) or whether the thing corresponding to RICO's focus was outside the United States in the case (in which event the presumption against extraterritoriality blocks application of RICO). Of course, to answer this question, federal courts must determine RICO's statutory focus. Specifically, federal courts began asking whether the focus of RICO's prohibition on infiltrating, controlling or operating an enterprise through a pattern of racketeering activities is the enterprise (in which event RICO only reaches cases involving enterprises in the United States) or the pattern of racketeering activities (in which event RICO only reaches cases involving racketeering activities in the United

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<sup>52</sup> *Norex Petroleum Ltd. v. Access Indus. Inc.*, 631 F.3d 29, 32-33 (2d Cir. 2010) (holding RICO did not apply).

<sup>53</sup> See, e.g., *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 663 (9th Cir. 2004).

<sup>54</sup> E.g., *Europe and Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 129-31 (2d Cir. 1998).

<sup>55</sup> *Norex*, 631 F.3d 29, 32-33 (2d Cir. 2010).

<sup>56</sup> See notes 36 through 38 and accompanying text *supra*.

States).<sup>57</sup>

Perhaps not surprisingly, lower federal courts were split between those finding RICO's focus is the enterprise,<sup>58</sup> those finding RICO's focus is the pattern of racketeering activities,<sup>59</sup> and at least one court seemingly suggesting it could be either.<sup>60</sup> Interestingly, with a few exceptions,<sup>61</sup> neither side followed *Morrison*'s circular approach to determining the statutory focus by asking which events Congress intended must occur in the United States and working backwards to treat that as the statutory focus. Instead, federal courts invoked a number of also ultimately unsatisfactory rationales for holding that the statutory focus of RICO is either the enterprise or the pattern of racketeering activities.

For example, courts holding that the focus is the enterprise pointed out that RICO does not prohibit a pattern of racketeering activities. Rather it prohibits a pattern of racketeering activities only when this pattern involves certain actions to infiltrate, control or conduct an enterprise.<sup>62</sup> At the same time, the courts holding that the pattern of racketeering activities is RICO's focus pointed out that RICO only prohibits certain actions toward an enterprise when these involve a pattern of racketeering activities.<sup>63</sup> In either case, this simply shows why we need to figure out which is the focus and which is not. Similarly, courts asserting that the enterprise is the focus pointed out that RICO's name (which includes the term "organization") and Congress's concerns with illegal activities involving enterprises show that the enterprise is the focus of RICO.<sup>64</sup> This conveniently ignores the facts that the first word in RICO's title is "racketeer" and that Congress was concerned, in enacting RICO, with racketeering (not bad management)

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<sup>57</sup> *E.g.*, *Chao Fan Xu*, 706 F.3d at 975-979.

<sup>58</sup> *E.g.*, *Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 938-40 (N.D. Cal. 2012); *Sorota v. Sosa*, 842 F. Supp. 2d 1345, 1350 (S.D. Fla. 2012); *European Cmty. v. RJR Nabisco, Inc.*, 2011 WL 843957, at \*5 (E.D.N.Y. Mar. 8, 2011); *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 914 (C.D. Cal. 2011); *Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 473 (S.D.N.Y. 2010).

<sup>59</sup> *E.g.*, *Chao Fan Xu*, 706 F.3d at 977-78; *Hourani v. Mirtchev*, 943 F. Supp. 2d 159, 166 (D.D.C. 2013); *CGC Holding Co. v. Hutchens*, 824 F. Supp. 2d 1193, 1209 (D. Colo. 2011); *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012).

<sup>60</sup> *In re Le-Nature's, Inc.*, 2011 WL 2112533, at \*3 n.7.

<sup>61</sup> *See, e.g.*, *Donziger*, 871 F. Supp. 2d at 242 (rejecting the enterprise as the focus of RICO, the court used the example of Sicilian Mafia activities in the United States to illustrate that foreign enterprises have been at the heart of precisely the sort of activities committed in the United States that Congress enacted RICO to eradicate).

<sup>62</sup> *E.g.*, *Sorota*, 842 F. Supp. 2d at 1350.

<sup>63</sup> *E.g.*, *Chao Fan Xu*, 706 F.3d at 977-78.

<sup>64</sup> *E.g.*, *RJR Nabisco, Inc.*, 2011 WL 843957, at \*4.

involving enterprises.<sup>65</sup> Again, in neither case, does this tell us which is the focus. Some opinions argued that the enterprise is RICO's focus because other statutes already prohibit the predicate crimes defined as racketeering activities under RICO,<sup>66</sup> conveniently ignoring the fact that RICO requires, not only an enterprise, but also a pattern of racketeering activities, which is not a required element under the statutes prohibiting the individual predicate crimes.<sup>67</sup> Some courts in holding that the pattern of racketeering activities is RICO's focus have pointed to potentially poor results from treating the enterprise as RICO's focus, as well as administrative inconvenience presented by the difficulties of locating the enterprise<sup>68</sup>—neither of which, however, concerns RICO's focus. In the end, the difficulty of figuring out RICO's focus led one district court to lament:

Reflexive reference to the term “focus” is unhelpful, as a statute could be described as concentrated on the activities it criminalizes—here, racketeering activities—or on the entity or person it seeks to protect, or on a blend of both, and all three options may be accurate depending on context.<sup>69</sup>

This conflict among the lower courts is where things stood with regard to applying the presumption against extraterritoriality to RICO when the European Commission's lawsuit against RJR Nabisco for damages resulting from RJR Nabisco's alleged violation of RICO reached the Supreme Court.

### C. *RJR Nabisco*

While the facts alleged by the European Community (EC)<sup>70</sup> are

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<sup>65</sup> *E.g.*, *Chao Fan Xu*, 706 F.3d at 977-78.

<sup>66</sup> *E.g.*, *Sorota*, 842 F. Supp. 2d at 1350.

<sup>67</sup> This problem is not unique to RICO, but would confound efforts to equate the statutory focus with the additional element distinguishing the statute at issue from lesser crimes also committed. For example, since death distinguishes murder from criminal battery (*see* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 498 (6th ed. 2012)), one may argue that death is the focus of a statute prohibiting murder, and only the nation in which the victim actually dies can prosecute for murder without extraterritoriality. Yet, malice aforethought distinguishes murder from manslaughter (*id.*), suggesting that specific intent is the focus of the statute against murder, and that only the nation in which the defendant formed the intent can prosecute without acting extraterritorially.

<sup>68</sup> *E.g.*, *Chao Fan Xu*, 706 F.3d at 976. On the other hand, locating the pattern of racketeering activities raises its own difficulties. For example, if some of the racketeering activities involve events both inside and outside the U.S., a court might need to identify the “focus” of various statutes prohibiting the predicate crimes in order to determine which events are the relevant ones as far as deciding if the pattern of racketeering activities occurred in the United States.

<sup>69</sup> *Le-Nature's, Inc.*, 2011 WL 2112533, at \*2 n.3.

<sup>70</sup> Roughly speaking, the collective of European nations from which the English just voted to exit. At the time this lawsuit commenced, the EC was one of the components of the European Union, a distinction that ended when the EC merged into the EU under the Lisbon

somewhat complex, in a nutshell, the EC claimed that RJR Nabisco was an eager participant in a money-laundering scheme. The essence of the scheme was that Columbian and Russian drug traffickers used the euros they received from the sale of illegal drugs in Europe to buy cigarettes from RJR Nabisco and affiliated firms, which could then be resold (thereby masking the drug-money's origins).<sup>71</sup> The EC alleged that the money laundering, as well as mail and wire fraud and support for terrorist organizations also alleged to have occurred, constituted the pattern of racketeering activities. The EC further alleged that collaboration of RJR Nabisco and various affiliated companies to engage in the money laundering constituted the enterprise operating through this pattern of racketeering activities. The EC claimed injuries from this violation of RICO through loss of cigarette sales by European state-owned sellers, as well as loss of tax revenue on cigarette sales, by virtue of the sale of black market cigarettes as part of the scheme; not to mention currency instability and law enforcement costs.<sup>72</sup>

The federal district court dismissed the EC's complaint based upon the argument that the enterprise alleged by the EC was outside the United States and therefore RICO did not apply.<sup>73</sup> Preferring to focus on the pattern of racketeering activities, the Second Circuit Court of Appeals reversed.<sup>74</sup> The Second Circuit, in something of a departure from any prior RICO case dealing with the extraterritoriality issue, held that predicate crimes (such as money laundering and support of terrorism) prohibited by statutes clearly intended by Congress to reach outside the United States are covered by RICO wherever they occur.<sup>75</sup> The Second Circuit further found that the predicate crimes not intended by Congress to apply extraterritorially had occurred in the United States, because the EC alleged that every element of the crimes occurred in this country. On rehearing, the Second Circuit rejected RJR Nabisco's additional argument that private claims under RICO do not reach situations in which the injury occurs abroad.<sup>76</sup>

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Treaty.

<sup>71</sup> *RJR Nabisco*, 136 S. Ct. at 2098.

<sup>72</sup> *Id.*

<sup>73</sup> *RJR Nabisco, Inc.*, 2011 WL 843957, at \*4. While RJR Nabisco is in the United States, the alleged "enterprise" consisted of the collaboration of RJR Nabisco and various other firms, which was in Europe. *Id.* at \*7.

<sup>74</sup> *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129 (2d Cir. 2014).

<sup>75</sup> *Id.* at 133-140. The Second Circuit had to reconcile this holding with its earlier holding in *Norex*, which rejected the argument that the presence of these predicate crimes in RICO rebutted the presumption against extraterritoriality for RICO. The Second Circuit pointed out that the issue in *Norex* was whether the presence of these predicate crimes rebutted the presumption as to the entire RICO statute, not simply whether these specific crimes could still constitute a pattern of racketeering activities even when they occurred abroad.

<sup>76</sup> *RJR Nabisco*, 764 F. 3d 149.

On appeal, the Supreme Court unanimously agreed with the Second Circuit's approach to the predicate crimes prohibited by statutes clearly intended by Congress to have extraterritorial reach.<sup>77</sup> While conceding that RICO does not contain any language explicitly stating that it reaches beyond the United States, the Court concluded that this was a case in which context rendered such a reading unavoidable. This was not a tough call. Among the predicate crimes is one (killing an American while he or she is outside the United States<sup>78</sup>) that can only occur abroad. It is nonsensical to include such an action as a predicate crime under RICO if RICO only covers racketeering activities that occur in the United States.

Having held that RICO applies to predicate crimes committed abroad when the statute prohibiting the predicate crime clearly evidences Congress' intent to have an extraterritorial reach, the next big issue facing the Court was RJR Nabisco's assertion that RICO's focus is the enterprise, not the pattern of racketeering activities, and hence RICO does not reach cases in which, as the case here, the enterprise is outside the United States. The Court also unanimously rejected this argument for reasons we shall explore in more detail later.<sup>79</sup>

The most important holding, where unanimity broke down among the Justices, involves the reach of the section in RICO that empowers persons injured in their business or property by a violation of the Act to sue the violator(s) for treble damages. The majority held that the Court must apply the presumption against extraterritoriality separately to this section.<sup>80</sup> Since this section contained no indication that Congress intended the private remedy to have extraterritorial reach, the presumption against extraterritoriality stood without rebuttal for the section. Implicitly assuming without any discussion that the focus of the private remedy provision is the injury, the majority held that RICO does not provide a private remedy for those, like the EC, who suffered injury outside the United States from the RICO violation.<sup>81</sup> Interestingly, an amicus brief from the United States Solicitor General<sup>82</sup> recommended this approach to the Court—perhaps, the cynic might suspect, to ensure government prosecutions under RICO for extraterritorial activities could continue, while giving the Justices wishing to curb private RICO actions with a transnational dimension an out to do so.

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<sup>77</sup> *RJR Nabisco*, 136 S. Ct. at 2102.

<sup>78</sup> 18 U.S.C. § 2332(a) (2016).

<sup>79</sup> See notes 121 through 127 and accompanying text *infra*.

<sup>80</sup> *RJR Nabisco*, 136 S. Ct. at 2106.

<sup>81</sup> *Id.* at 2111.

<sup>82</sup> Brief for United States as Amicus Curiae Supporting Vacatur, *RJR Nabisco, Inc., v. European Cmty*, 136 S. Ct. 2090 (2016) (No. 15-138), 2015 WL 9268185 at \*9-10.

## II. *RJR NABISCO'S IMPACT*

### A. *The Death Knell for Private Actions for Overseas Injuries*

In order to bring a private action to recover for damages suffered by virtue of a violation of a federal statute, the plaintiff must be able to point to a provision in the statute expressly establishing such a private cause of action or to a judicial decision (or convince the court to make a new decision) establishing an implied right of action for those injured by the violation.<sup>83</sup> Following *RJR Nabisco*, defendants might argue that the presumption against extraterritoriality applies separately to every one of these express or implied private causes of action. This means that the plaintiff would need to demonstrate that Congress intended not just the substantive prohibition that the plaintiff claimed the defendant violated, but also the private remedy, to apply to claims arising outside the United States. Or else the plaintiff needs to show that whatever constitutes the focus not just of the substantive prohibition, but also of the private remedy provision (which the Court in *RJR Nabisco* assumed to be the injury), occurred in the United States. The only way to avoid this conclusion would be to find something unique in the structure or language of RICO's private cause of action section that justified application of the presumption against extraterritoriality to this section, but not to private remedy provisions in other federal statutes.

Structurally, one might note that RICO's private cause of action is in a separate section from RICO's substantive prohibitions,<sup>84</sup> from which one might argue that both Congress' intent to apply the section extraterritorially, as well as the focus of the section, can be different for the substantive prohibition and private remedy sections. It is common, however, for federal statutes to have the private cause of action in a separate section or sections from the substantive or criminal prohibitions,<sup>85</sup> and, of course, a judicially implied private cause of action exists in a separate source from the substantive prohibition. Besides, it is difficult to imagine a court

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<sup>83</sup> *E.g.*, *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) ("the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person").

<sup>84</sup> 18 U.S.C. §§ 1962, 1964(c).

<sup>85</sup> *E.g.*, Clayton Act § 4, 15 U.S.C. § 15; Securities Act of 1933 §§ 11, 12, 15 U.S.C. §§ 77k, 77l; Securities Exchange Act of 1934 § 18, 15 U.S.C. § 78r; Truth in Lending Act of 1968, 15 U.S.C. § 1640(a); Fair Credit Reporting Act, 15 U.S.C. § 1681n; Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d); Copyright Act of 1976, 17 U.S.C. § 504; Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412; Title VII of the Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 2000e-5(a), (f)(1); Resource Conservation and Recovery Act, 42 U.S.C. § 6972.

distinguishing *RJR Nabisco* on this sort of thin stylistic reed in a case in which Congress chose to put the entire statute into one long section, and thus placed the private remedy into a subsection rather than a section.<sup>86</sup>

One structural feature of RICO outside of the private cause of action provision might be relevant. RICO's reference to various other statutes in order to define predicate crimes seems to have triggered the "aha moment" in which it occurred to attorneys and jurists involved in this case that the presumption against extraterritoriality might apply separately to the provision creating a private remedy. This does not mean that the same logic would not apply to other statutes whose simpler structure did not trigger this insight.

Turning from structure to language, RICO's private cause of action provision refers to injury to business or property.<sup>87</sup> The Court points to this language—and specifically how the specification of injury renders the private cause of action not coextensive with RICO's substantive prohibition—as part of its rationale for holding that the presumption against extraterritoriality was not rebutted for the private remedy just because it was for the statutory prohibition.<sup>88</sup> This language also presumably provides the justification for the Court's implicit conclusion in *RJR Nabisco* that the focus of the private cause of action provision is on the injury, thereby making the location of the injury the determinant of whether there is extraterritoriality.

RICO, however, is not unique in its requirement that the plaintiff suffer injury. On the contrary, to recover under the express or implied private causes of action for many federal statutes, the plaintiff must suffer an injury beyond that necessary for the government to establish a violation of the statute's substantive prohibitions.<sup>89</sup> True, there are other federal statutes providing a private cause of action, which do not require a showing of injury;<sup>90</sup> albeit, a recent Supreme Court decision<sup>91</sup> raises doubts as to the

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<sup>86</sup> *E.g.*, Federal Computer Fraud and Abuse Act, 18 U.S.C. § 1030(g) (2016); Telephone Consumer Protection Act, 47 U.S.C. § 227(b)(3), (c)(5) (2016).

<sup>87</sup> 18 U.S.C. § 1964(c) (2016).

<sup>88</sup> *RJR Nabisco*, 136 S. Ct. at 2108.

<sup>89</sup> *E.g.*, Clayton Act § 4, 15 U.S.C. § 15 (injury to business or property); Securities Act of 1933 § 11, 15 U.S.C. § 77k (purchaser of securities issued under inaccurate registration statement can recover damages); Securities Act of 1933 § 12, 15 U.S.C. § 77l (allowing loss causation defense); Securities Exchange Act of 1934 § 18, 15 U.S.C. § 78r (reliance causing damage); Truth in Lending Act of 1968, 15 U.S.C. § 1640(a) (actual damages or return of finance charges); Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d) (consumer who is damaged); *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005) (must prove loss causation to recover under the implied private cause of action for violation of Rule 10b-5).

<sup>90</sup> *E.g.*, Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2016)(allowing citizen suits to enforce statute with no showing of particular injury).

<sup>91</sup> *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

constitutionality of granting private parties, who did not at least arguably suffer any sort of injury, standing to sue in federal court.

Of course, in considering statutes that provide recovery without injury, we have started to wonder away from the subject matter of this article, which is how *RJR Nabisco* cuts off claims for injuries suffered abroad. In any event, it is highly doubtful that courts will confine the impact of *RJR Nabisco* to express or implied private causes of action based solely on injuries to business or property.

For one thing, it is difficult to argue that the injury to business or property language in RICO provides a particularly compelling basis to reject claims for overseas injuries. Indeed, this language comes from the antitrust law,<sup>92</sup> where the Supreme Court had allowed recovery for overseas injuries.<sup>93</sup> Perhaps a reference to injury to real property might imply a stronger territorial disposition by Congress in drafting the remedy provision, but injuries to business or personal property carry no more territorial notions than injuries to person or reputation or anything else. In fact, the Court does not draw any significance from the business or property language in itself. Rather, it simply uses the narrowing of recovery established by this language in an effort to rebut the dissent's literalist argument that RICO provides recovery for injuries resulting from whatever it prohibits and therefore the territorial range of the prohibition dictates the territorial range of the private remedy. Yet, even without this language, the very fact that any private plaintiff must establish why he or she can recover, renders the private cause of action inherently not coextensive with the substantive prohibition and so provides the same sort of rebuttal to the literalist argument.

Most critically, the injury to business or property language in RICO has nothing to do with the policy rationale behind the Court's decision. As we shall soon discuss in detail, it is not as if the unambiguous language of RICO's private cause of action provision dragged the Court kicking and screaming to its holding. On the contrary, the decision is doctrinally weak. Instead, as quickly becomes evident in the Court's discussion, the Court bases its decision upon policy and specifically the potentially negative impact of private claims on foreign relations.<sup>94</sup> The goal of curbing private claims more than government prosecutions, in order to prevent foreign relations problems that are more likely with private claims, applies without regard to the injury to business or property language.

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<sup>92</sup> 15 U.S.C. § 15 (2016).

<sup>93</sup> *Pfizer Inc. v. Government of India*, 434 U. S. 308, 313-14 (1978) ("Congress did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country."); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 707-8 (1962) (allowing recovery in Clayton Act § 4 suit for injuries in Canada).

<sup>94</sup> *RJR Nabisco*, 136 S. Ct. at 2106-108.

Turning from the injury language, Justice Alito's majority opinion (unlike Justice Ginsburg's concurring and dissenting opinion<sup>95</sup>) did not attach much significance to the language in RICO's private cause of action provision identifying the conduct that triggers the private claim. The private cause of action provision in RICO,<sup>96</sup> like those in many other statutes,<sup>97</sup> cross-references prohibitions found in other portions of the statute to identify the conduct that creates a claim. This is also implicit in judicially created private causes of action, such as for violations of Section 10(b) of the Securities Exchange Act.<sup>98</sup> Other express private cause of action provisions in broad regulatory statutes sometimes contain their own description of the conduct that creates the claim, thereby allowing the private remedy to reach only a narrower category of misconduct than that prohibited by the statute. An example is Section 11 of the Securities Act,<sup>99</sup> which creates a private cause of action, not for all false or misleading statements prohibited by the Act,<sup>100</sup> but only for false or misleading statements in a registration statement. The case for applying the presumption against extraterritoriality separately to a provision, like Section 11, which is self-contained in its specification of all the elements necessary for recovery, is actually stronger than it is for provisions, like RICO's private cause of action provision, which look to a violation of other sections of the statute.<sup>101</sup>

On the other hand, looking at a single statutory provision, which both states the conduct creating the claim and provides a cause of action for those injured by the conduct, flags the question of whether the conduct, rather than the injury, is the focus of the provision and so the determinant of

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<sup>95</sup> *Id.* at 2113.

<sup>96</sup> 18 U.S.C. § 1964(c) (2016).

<sup>97</sup> *E.g.*, Clayton Act § 4, 15 U.S.C. § 15 (anything forbidden in the antitrust laws); Securities Act of 1933 § 12(a)(1), 15 U.S.C. § 77l(a)(1)(selling a security in violation of Section 77e); Truth in Lending Act of 1968, 15 U.S.C. § 1640(a) (fails to comply with any requirement imposed under this part); Fair Credit Reporting Act, 15 U.S.C. § 1681n (failing to comply with any requirement imposed under this subchapter); Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(d) (failing to comply with any obligation under this chapter); Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412 (infringing rights by violation of subchapter); Title VII of the Civil Rights Act of 1964 § 706(f)(1), 42 U.S.C. § 200e-5(f)(1) (unlawfully set employment practices in statute); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (violating any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter).

<sup>98</sup> *Kardon v. Nat'l Gypsum Co.*, 73 F. Supp. 798, 802 (E.D. Pa. 1947).

<sup>99</sup> 15 U.S.C. § 77k (2016).

<sup>100</sup> *Id.* at § 77q(a)(2) (2016) (prohibiting false or misleading statements in connection with the offer or sale of a security).

<sup>101</sup> Indeed, the majority notes that RICO's private cause of action provision excludes certain securities fraud from forming the basis for a private claim and argues that this also undercuts the link between the extraterritorial reach of the substantive prohibition and the extraterritorial reach of private cause of action. *RJR Nabisco*, 136 S. Ct. at 2108.

extraterritoriality. As discussed later,<sup>102</sup> however, this same underlying question exists in a statute like RICO in which the provision creating a private cause of action refers to injuries resulting from conduct violating the statute.

The question of whether the focus of a self-contained private cause of action provision is the conduct or the injury, in turn, shows an anomaly created by *RJR Nabisco*. The Court's opinion effectively gives defendants in private RICO cases two bites at hiding behind the presumption against extraterritoriality; one if the pattern of racketeering activities occurs outside the United States (and does not involve predicate crimes having extraterritorial reach) and a second if the injury occurs outside the United States. By contrast, one assumes that defendants facing claims under a self-contained private cause of action provision, such as Section 11 of the Securities Act, get only one bite at hiding behind the presumption against extraterritoriality. Under the Court's assumption that the focus of a private cause of action provision is the injury, this one bite will depend upon the location of the injury. This means that plaintiffs injured in the United States could recover under such a provision even if the government could not prosecute the defendant because the defendant acted outside the United States and the Court reads the prohibition of the conduct contained in the same overall statute as focused on the conduct. Such an outcome is contrary to the underlying policy of *RJR Nabisco* that the presumption against extraterritoriality should curb private actions more than public prosecutions.<sup>103</sup>

So far, the focus of the present discussion, and, indeed of this article, is on express or implied causes of action under which a private plaintiff can recover for injuries suffered as a result of the defendant's engaging in conduct that violates a statutory prohibition. There are express or implied private causes of action under a number of federal statutes, which provide recovery for injuries resulting from things that do not violate the statute. The Alien Tort Statute (ATS),<sup>104</sup> the extraterritorial application of which the Supreme Court addressed in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>105</sup> is an example. The ATS does not prohibit anything. Rather, it extends the jurisdiction of federal courts to a certain class of cases and the Supreme Court recognized the existence of an implied private cause of action for cases for which the ATS establishes jurisdiction.<sup>106</sup> Obviously, a court

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<sup>102</sup> See text before and accompanying notes 137 through 138 *infra*.

<sup>103</sup> See text accompanying notes 146 through 149 *infra*.

<sup>104</sup> 28 U.S.C. § 1350 (2016).

<sup>105</sup> See notes 112 through 117 and accompanying text *infra*.

<sup>106</sup> See note 112 and accompanying text *infra*.

cannot apply the presumption against extraterritoriality both to a statutory prohibition and to an express private cause of action) in a statute, like the ATS, which creates a private remedy for those injured by conduct that the statute does not prohibit.

This, however, still leaves the question of whether the rationale behind *RJR Nabisco* indicates that federal statutes merely providing private recovery will only reach injuries suffered in the United States (unless there is clear evidence that Congress meant the statute to apply extraterritorially.) *RJR Nabisco*'s implicit holding that the focus of a statute allowing recovery for injuries is the injury—which the Court seemed to feel was so obvious that it did not call for discussion—suggests that the answer to this question is yes, thereby barring recovery under an even wider set of federal statutes for injuries suffered outside the United States. As we will discuss below,<sup>107</sup> this is contrary to dicta in *Kiobel*. Indeed, it clashes with Justice Alito's concurring opinion in that case. Resolution of this inconsistency must await a future Supreme Court decision.

### B. Doctrinal Infirmities

There are several doctrinal problems with the Court's opinion in *RJR Nabisco*.

#### 1. That Was Different

What is immediately striking about *RJR Nabisco* is what a departure it represents from the approach federal courts, including the Supreme Court, had used previously in applying the presumption against extraterritoriality. No prior decision ever suggested that the presumption separately applied both to the substantive prohibitions of a statute and any remedy provision the statute contained. Indeed, reflecting the roots of the presumption in criminal law and in notions regarding the regulation of events outside a nation's borders,<sup>108</sup> in the case of statutes both proscribing conduct and providing a private remedy for those injured by the proscribed conduct, the focus of the presumption has been on the scope of a statute's proscriptive reach. So, for example, in *ARAMCO* and in *Morrison*—both private actions to recover for injuries incurred from violations of a statute—the Supreme Court applied the presumption against extraterritoriality to limit the reach of the statute's prohibition, rather than simply limit the private action.<sup>109</sup>

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<sup>107</sup> See notes 114 through 117 and accompanying text *infra*.

<sup>108</sup> See notes 18 through 21 and accompanying text *supra*.

<sup>109</sup> *ARAMCO*, 499 U.S. at 259; *Morrison*, 561 U.S. at 273. Indeed, Congress responded to *Morrison* by seeking to overturn the holding for purposes of government prosecutions. *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. No. 111-203, § 929(P)(a)(2),

Justice Alito's opinion for the majority in *RJR Nabisco* relied upon the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>110</sup> as its authority for the proposition that the presumption against extraterritoriality can apply separately to a private cause of action provision.<sup>111</sup> This is not only a questionable reading of *Kiobel*, but, at least insofar as *RJR Nabisco* assumes this cuts off suits for injuries incurred outside the United States, contradicts Justice Alito's own concurring opinion in *Kiobel*.

In *Kiobel*, the Supreme Court applied the presumption against extraterritoriality to claims under the ATS. By its terms, the ATS neither prohibits conduct nor creates a private cause of action; rather it simply gives federal courts jurisdiction to hear cases brought by aliens (foreigners, not extraterrestrials) injured through a violation of international law. The Supreme Court, however, found within the ATS the implied existence of a private cause of action for aliens injured by a violation of at least some international laws.<sup>112</sup> This is based upon the rather common sense observation that it makes no sense for Congress to give the federal courts jurisdiction to hear cases for which there is no legal remedy. Hence, in applying the presumption against extraterritoriality to the ATS, or, more correctly, to the implied cause of action available under the ATS, *Kiobel* seemingly supports the application of the presumption specifically to RICO's express private right of action provision.

There are several problems, however, with this line of reasoning. To begin with, unlike RICO and numerous other federal statutes, which both prohibit conduct and expressly or by judicially discovered implication provide a cause of action for those injured by the prohibited conduct, the ATS with its implied cause of action only serves to provide a private cause of action (and give the federal courts jurisdiction to hear such actions) but does not contain any substantive prohibition. Hence, *Kiobel* provides limited support for the proposition that the presumption against extraterritoriality applies separately to define the reach of a statute's substantive prohibition and to create a different additional limitation for any private remedy provision within the statute. The same can be said of other cases applying the presumption to statutes that do not prohibit conduct, but simply create private claims.<sup>113</sup>

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124 Stat. 1376 (2010) (granting jurisdiction to U.S. courts over government prosecutions of securities frauds in which conduct constituting a significant step in the furtherance of the fraud occurs in the United States or conduct outside the United States has a foreseeable substantial effect in the United States).

<sup>110</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>111</sup> *RJR Nabisco*, 136 S. Ct. at 2106.

<sup>112</sup> *E.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-14 (2004).

<sup>113</sup> *E.g.*, *Smith*, 507 U.S. 197 (dealing with the Federal Tort Claims Act).

Moreover, the Court was being rather selective in its use of *Kiobel* as its authority—using the decision as authority for applying the presumption against extraterritoriality separately to statutory or judicially created private causes of action, but not following the decision when it came time to identifying the focus of such provisions. *Kiobel* involved a claim in which neither the injury, the conduct causing the injury, or anything else of any possible relevance, occurred within the United States. Still, Chief Justice Roberts closed his opinion for the Court in *Kiobel* by considering when claims under the ATS would and would not trigger the presumption against extraterritoriality. Specifically, he wrote: “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.”<sup>114</sup> Such an obscure statement would hardly have been necessary if application of the presumption against extraterritoriality to statutes or court decisions creating a private cause of action for injured parties depends simply upon the place of injury, which seems to be the operating assumption of *RJR Nabisco*.

Indeed, this same problem exists in reconciling Justice Alito’s concurring opinion in *Kiobel* with his opinion in *RJR Nabisco*. Specifically, Justice Alito (joined by Justice Thomas) concurred separately in *Kiobel* to remind the Court that it had adopted the “focus” test, rather than a “touch and concern with sufficient force” test, in *Morrison* for deciding whether a case involved extraterritorial application of U.S. law.<sup>115</sup> Significantly, Justice Alito’s concurrence did not describe the focus of the ATS’s implied remedy as the injury. Rather, the concurrence equated the statutory focus of the ATS with the sort of conduct that the Supreme Court, in its earlier *Sosa* opinion,<sup>116</sup> concluded Congress meant to reach in the ATS—specifically, conduct “sufficient to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”<sup>117</sup>

Of course, to say that a judicial decision lacks support in precedent is not to condemn it; some of the finest Supreme Court decisions departed from precedent.<sup>118</sup> Still, departing from precedent increases the burden on the court to justify the road now taken. This is especially true for a ruling like *RJR Nabisco*, which changes the approach to an interpretative presumption in a way equally applicable to a large number of statutes beyond the one before the court. After all, one of the purposes behind interpretative presumptions like the presumption against extraterritoriality is to provide a stable set of interpretations against which Congress can legislate

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<sup>114</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>115</sup> *Id.* at 1669-70.

<sup>116</sup> See note 112 *supra*.

<sup>117</sup> *Kiobel*, 133 S. Ct. at 1670.

<sup>118</sup> *E.g.*, *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

when it wants a particular statute to have a different meaning.<sup>119</sup> If a judicial change in approach to an interpretative presumption deprives Congress of the opportunity to make Congress' intent clear when drafting one statute, this is unfortunate; but Congress can go back and amend the statute. The burden on Congress, however, is far greater if the change in approach affects numerous statutes and Congress must go back and find and change them all.<sup>120</sup>

## 2. Selective Separation

A second doctrinal problem with the Court's opinion in *RJR Nabisco* lies in the very different way in which it deals with the extraterritoriality issues regarding the location of the enterprise and the location of the injury. Essentially, a private plaintiff's claim under RICO involves three broad elements: the pattern of racketeering activities; the prohibited relationship of these activities to an enterprise; and the injury to business or property resulting to the plaintiff.<sup>121</sup> After dealing with the extraterritoriality issue regarding the pattern of racketeering activities, the Court had to deal with *RJR Nabisco*'s extraterritoriality arguments based upon the location of the enterprise and the location of the injury. The Court rejected the former but accepted the latter.<sup>122</sup> In doing so, the Court exposed an inconsistency in whether it will apply the presumption separately to individual elements of the plaintiff's claim—separate application for the injury element, but not for the different elements of the substantive violation.

Interestingly, it was in dealing with the location of the enterprise issue that the Court addressed the split among the lower federal courts regarding extraterritoriality and RICO, which, as explained earlier,<sup>123</sup> involved the question of whether RICO's focus is the enterprise or the pattern of racketeering activities.<sup>124</sup> The Court seems to think it mooted this issue by finding that RICO's inclusion of predicate crimes, which can take place

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<sup>119</sup> *E.g.*, *Morrison*, 561 U.S. at 261.

<sup>120</sup> *See, e.g.*, Brian G. Slocum, *Overlooked Temporal Issues in Statutory Interpretation*, 81 TEMP. L. REV. 635, (2008) (discussing problem of retroaction application of changed rules of statutory interpretation).

<sup>121</sup> See notes 44 through 50 and accompanying text *supra*.

<sup>122</sup> See notes 79 through 81 and accompanying text *supra*.

<sup>123</sup> See notes 58 through 60 and accompanying text *supra*.

<sup>124</sup> The Court pretends otherwise when it suggests that the split was over whether RICO applied extraterritorially. *RJR Nabisco*, 136 S. Ct. at 2099. The lower courts were in general agreement that RICO did not. *E.g.*, *Chao Fan Xu*, 706 F.3d at 974, 979 (9<sup>th</sup> Cir. 2013); *Norex*, 631 F.3d at 32-33 (2d Cir. 2010). True, the Second Circuit in *RJR Nabisco* had created an exception for predicate crimes when the statutes prohibiting those crimes evidenced clear intent to apply extraterritorially, but no other circuit said this was wrong.

outside of the United States, rebutted the presumption against extraterritoriality. Indeed, the Court reminds readers in this part of its opinion<sup>125</sup> of its earlier instruction to ask first whether the presumption against extraterritoriality is rebutted and, only if there is no rebuttal to the presumption, to ask what is the statute's focus.

The Court's finding that Congress intended RICO to reach beyond the United States in terms of where some of the predicate crimes occurred, however, did not logically render the focus question moot. It could be that the pattern of racketeering activities is RICO's focus and that the inclusion of some predicate crimes intended to have extraterritorial reach among the list of racketeering activities rebuts the presumption against extraterritoriality for a pattern of racketeering involving those predicate crimes. Alternately, it is equally plausible that the enterprise is RICO's focus and Congress felt at liberty to include among the predicate crimes ones that could occur abroad, because, so long as the enterprise was in the United States, there is no extraterritoriality for RICO as a whole even when the pattern of racketeering activities occurs abroad.

The Court backstops its argument that it was unnecessary to decide if the enterprise is RICO's focus with two arguments on why it would be poor policy to limit RICO to domestic enterprises: one being the undesirable outcome resulting from saying that RICO cannot apply if a foreign enterprise engages in racketeering in the United States and the other being the difficulty of locating the enterprise in many cases.<sup>126</sup> These sorts of policy arguments would seem to offend *Morrison's* rejection of such considerations in applying the presumption against extraterritoriality.<sup>127</sup> They also have nothing to do with what is RICO's focus. This, however, may show that *Morrison* was misguided.

In any event, the critical question for present purposes is why the Court in *RJR Nabisco* applied the presumption against extraterritoriality separately to the private cause of action provision with its injury element, but did not apply the presumption separately to the enterprise element of the substantive prohibition. One reason would exist if applying the presumption separately to the enterprise element rendered the inclusion of certain predicate crimes in RICO meaningless (as would have been the case for the predicate crime of killing an American abroad if the Court read RICO to require all the predicate crimes to occur in the United States). If this were the case, then the Court would need to read the pattern of racketeering activities and enterprise

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<sup>125</sup> *RJR Nabisco*, 136 S. Ct. at 2103-4.

<sup>126</sup> *Id.* at 2104-5.

<sup>127</sup> *Morrison*, 561 U.S. at 270 ("It is our function to give the statute the effect its language suggests, however modest that may be; not to extend it to admirable purposes it might be used to achieve.").

elements together as a package in applying the presumption against extraterritoriality, but the same imperative would not exist for the injury element. Limiting RICO to domestic enterprises, however, would not render RICO's inclusion of this sort of predicate crime meaningless. U.S. enterprises, or mobsters trying to take over U.S. enterprises, could, for example, murder an American overseas—indeed they do so all the time in the movies.

One suspects that the real reason the Court did not want to apply the presumption against extraterritoriality separately to both the pattern of racketeering and the enterprise elements of a RICO violation lies in an inherent problem with the application of the presumption against extraterritoriality to transnational activities. The classic cross-border shooting example presented earlier<sup>128</sup> illustrates the problem. If each nation's courts apply a presumption against extraterritoriality when any element of the crime occurs in another nation, then neither nation will prosecute the cross border shooter.<sup>129</sup> Not only is this a poor result as a policy matter, but also it is difficult to imagine that legislatures intended this result.<sup>130</sup> Applying the presumption against extraterritoriality separately to each element of a criminal statute leads to such a result. Since each element of a statutory prohibition is seemingly its own focus, if courts apply the presumption separately to each element, every element of the prohibition must occur in the United States (except for any elements for which there is clear evidence of Congressional intent that the particular element apply extraterritorially). If other nations follow the same approach, then no one prosecutes cross border wrongdoing. Avoiding such a result is probably why *Morrison* adopted the statutory focus test, rather than simply holding that both the fraud and the sale must occur in the United States in order for Section 10(b) to apply.

We can now see why the Court in *RJR Nabisco* would not have wanted to establish an approach to the presumption against extraterritoriality that entailed the separate application of the presumption to each element of a statutory crime—an approach that would logically be as applicable to every

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<sup>128</sup> See text accompanying note 35 *supra*.

<sup>129</sup> See, e.g., *United States v. Pacific & Arctic Ry.*, 228 U.S. 87, 98 (1913) (pointing out that the logic of the defendants' argument that the Sherman Act did not reach price fixing involving a railroad between the U.S. and Canada because there was conduct outside the United States would mean that neither the U.S. nor Canada would prohibit the cross border price fixing).

<sup>130</sup> Indeed, after an English court once held that neither nation could prosecute when a blow was struck in one country and death ensued in another country, the English Parliament passed legislation to overturn this rule. E.g., *S.S. Lotus*, (Fr. v. Turk), 1927 P.C.I.J. (ser. A) No. 10, at 65, 73 (Sept. 7) (Moore, J., dissenting).

federal statutory crime as it is to RICO. Yet, is there any principled basis for taking a different approach when it comes to applying the presumption against extraterritoriality to the added injury element for the private cause of action?

Before answering that the Court's inconsistent approach, even if not supported by dry logic, gets a sensible result, it is useful to note that the Court's approach still leaves the same sort of poor outcomes in cross-border cases for private claims, even if not for government prosecutions. To understand why, notice that under *RJR Nabisco*, RICO substantive violations only occur when the racketeering activities happen in the United States (unless those violations consist of predicate crimes whose statutory prohibitions are intended by Congress to have extraterritorial reach).<sup>131</sup> Under *RJR Nabisco*'s separate application of the presumption against extraterritoriality to RICO's private cause of action provision, the plaintiff's injury must also occur in the United States. Hence, for a private plaintiff to recover under RICO, both the racketeering activities (with limited exceptions) and the injury must occur in the United States—the former because there is no violation of RICO otherwise, the latter because the private remedy for those injured by a RICO violation lacks extraterritorial reach. If courts apply this approach to other statutes containing prohibitions and private remedies for those injured by the prohibited conduct, the statutory prohibition only reaches conduct in the nation and the private remedy provision only provides recovery for those injured in the nation, meaning that recovery only occurs when prohibited conduct and injury are in the same nation. The obvious problem with this result is again illustrated by the classic cross-border shooting example. If a statute prohibits shooting another person and provides a private cause of action for the victim, and a court applied *RJR Nabisco*'s approach to extraterritoriality, the victim in the cross border shooting can never recover from the shooter because the statute does not prohibit the shooting if the shooter is across the border and only provides recovery when victim was in the nation when shot—an obviously poor result if every nation follows the same approach.

Other than a desire to allow government prosecutions and disfavor private actions, is there anything else to justify the distinction the Court drew between the enterprise and injury elements? One possibility, suggested earlier,<sup>132</sup> is that the private cause of action is in a separate section from the criminal prohibition (which is all in one section<sup>133</sup> except for definitions and the specific penalties). To suggest, however, that whether the presumption against extraterritoriality applies separately or not depends upon whether the

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<sup>131</sup> *RJR Nabisco*, 136 S. Ct. at 2102.

<sup>132</sup> See text accompanying note 84 *supra*.

<sup>133</sup> 18 U.S.C. § 1962 (2016).

provisions are in one section or separated into different sections is to give stylistic aspects of a statute a significance that there is no evidence Congress ever intended and ignores the normal rule that statutes are to be construed as a whole.<sup>134</sup>

A second possible rationale is that the private remedy section imposes an added element (injury) in order to achieve a different impact (personal recovery), as opposed to the enterprise element, which is necessary to create any impact under the statute at all. Still, while this is a difference, it is unclear why this difference should create a second separate application of the presumption against extraterritoriality.

Moreover, if this is the rationale, then *RJR Nabisco* has an additional unrecognized impact. Many federal regulatory statutes, such as the securities laws, contain various requirements and prohibitions, but only impose criminal (as opposed to civil) sanctions on those who violate the requirements and prohibitions when the violation entails some added element of wrongdoing, such as being willful.<sup>135</sup> If the basis for the separate application of the presumption against extraterritoriality in *RJR Nabisco* comes from the added element necessary to create private recovery beyond those elements required to create other consequences under the statute, then, by the same logic, courts should separately apply the presumption to the added element necessary for a criminal prosecution under a statute in which criminal sanctions require an additional element of wrongdoing. Put in terms of a concrete example, this would suggest that the government could only criminally prosecute defendants for securities fraud when the defendant's willful action happened in this country (regardless of where the sale, which *Morrison* treats as the focus of the prohibition on false statements in connection with the sale of securities, occurred).<sup>136</sup>

### 3. Focusing on the Injury

Finally, the Court in *RJR Nabisco* is altogether too quick to assume that application of the presumption against extraterritoriality to RICO's private action provision necessarily means that the injury must occur in the United States. Had the Court bothered to discuss the question, it should have pointed out that under *Morrison* this depends upon what is the focus of the

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<sup>134</sup> E.g., Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 368 (2010) (listing whole act rule among rules of construction that are often codified).

<sup>135</sup> 15 U.S.C. §§ 77x, 78ff(a) (2016).

<sup>136</sup> Even if Congress' effort to overturn the *Morrison* decision for government actions (see note 110 *supra*) removes this danger for securities fraud prosecutions, similar problems could occur for other statutes.

private remedy provision. Presumably, the Court figured it was a no-brainer that the injury is the focus of this section; after all, the section provides recovery for someone injured in his or her business or property. But wait a minute: This provision only provides recovery for injuries resulting from a violation of RICO. So, is the injury the focus or is the violation the focus?

As a good student of tort law should be able to recognize,<sup>137</sup> this seems to depend upon whether the goal of the provision is compensation (in which case the injury is the focus<sup>138</sup>) or deterrence (in which case one might argue that the prohibited conduct is the focus). To answer this question for RICO, it is useful to note that RICO's private cause of action provision provides for treble damages<sup>139</sup>—meaning that this provision is twice as much about deterrence as it is about compensation.

### C. Policy Over-breath

Of course, *RJR Nabisco* is a Supreme Court decision and so, if it provides the appropriate result as a matter of policy, doctrinal lapses may be forgiven. Indeed, on first examination, *RJR Nabisco* seems to be a very strong decision as a matter of policy. On further reflection, however, the Court's approach is overly simplistic in the line it draws regarding what claims to cut off. Moreover, there are important policy corollaries to the Court's approach, which the Justices supporting the majority opinion should have asked themselves if they were prepared to accept.

#### 1. Getting it Right

Let's start on a positive note: The Court focuses on the most relevant goal for the presumption against extraterritoriality and drew a sensible distinction, at least in broad strokes, in applying the presumption in a manner to advance this goal.

##### a. The right goal

Although scholars have suggested at least half a dozen reasons for the presumption against extraterritoriality,<sup>140</sup> examining Supreme Court

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<sup>137</sup> E.g., Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 559-60, 591 (1985) (discussing compensation and deterrent goals of tort recovery).

<sup>138</sup> Even if the goal is compensation, this still raises the question about whether Congress' focus is on where the injury occurs as opposed to whom (American or not) was injured.

<sup>139</sup> See note 50 *supra*.

<sup>140</sup> E.g., Dodge, *supra* note 25, at 112-13 (identifying six ostensible purposes asserted on behalf of the presumption against extraterritoriality: (1) avoiding violation of international law; (2) promoting consistency with a territorial view in choice of law; (3) avoiding conflicts with foreign laws; (4) reflecting Congressional concern with domestic rather than foreign

opinions reduces this number to essentially three. In *Morrison*, the Court explained that the presumption against extraterritoriality “rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.”<sup>141</sup> One interpretation of this phrase is what I will label the observational rationale for the presumption—the Court has observed that Congress, whether based upon tradition or for whatever reason, intends most statutes to apply only within the United States, and so, in the absence of evidence of contrary intent, one can assume that Congress intends any given statute to apply only within the United States. In *ARAMCO*, the Court identified two other more policy-oriented purposes behind the presumption. First, it “serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”<sup>142</sup> The essential idea behind this foreign relations rationale is that applying U.S. law to events outside the United States can upset other countries, which is a risk courts should interpret statutes to avoid absent evidence that Congress really wants to take this risk. *ARAMCO* also explained that the presumption reflects the notion that Congress, when enacting legislation, “is primarily concerned with domestic conditions”<sup>143</sup>—or, put differently, that Congress, when carrying out its legislative function, does not care about what goes on outside the United States and therefore does not intend statutes to address what goes on outside the United States. I will label this the legislative purpose (or “not our problem”) rationale.

In an earlier article,<sup>144</sup> I argued that the observational and legislative purpose rationales for the presumption against extraterritoriality, while helping justify the presumption in easy cases, fail to provide guidance for the more difficult ones (in that article, dealing with the question of whether the case before the court involved extraterritoriality). The problem with the observational rationale is that courts lack sufficient observational experience to know how much contact within this country Congress would view as sufficient to say that a case does not entail extraterritoriality. The problem with the legislative purpose rationale is that examining whether application of a statute in a particular situation advances Congress’ purpose for the

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conditions; (5) keeping courts out of matters impacting foreign affairs; and (6) providing a rule against which Congress can legislate). As suggested by an earlier discussion (see notes 120 through 121 and accompanying text *supra*), the goal of providing a rule against which Congress can legislate is a goal that the presumption against extraterritoriality shares with every other presumption used in legislative interpretation and does not explain why courts should presume that statutes do not apply extraterritorially as opposed to presuming that they do.

<sup>141</sup> *Morrison*, 561 U.S. at 255.

<sup>142</sup> *AMARCO*, 499 U.S. at 248.

<sup>143</sup> *Id.*

<sup>144</sup> Gevurtz, *supra* note 8 at 378-386.

statute is part of all statutory interpretation and so the presumption becomes irrelevant. The goal of making sure Congress intended the application of a statute to a situation in which such application could cause foreign relations problems, however, introduces a new factor that can help a court to determine when to apply the presumption in difficult cases where some events occurred inside the United States and some occurred outside.

This same division between the goals for the presumption might be apropos as well to the question of whether the court should apply the presumption separately to each section of a statute or element of a claim. The observational rationale does not help, because courts lack sufficient observations to know whether Congress normally intends courts to separately evaluate the extraterritoriality of different sections of a statute or elements of a claim. The legislative purpose inquiry is one that the court should always make as a matter of course and the presumption becomes a distraction. So, for example, the argument that excluding foreign enterprises (the Mafia) from the reach of RICO would frustrate Congress' purpose when such enterprises engage in racketeering in the United States largely answers the question of whether RICO should apply, without going through the rabbit warren of trying to decide when the presumption against extraterritoriality applies separately to elements of a claim. The impact on foreign relations, however, introduces a factor that courts might not otherwise consider, which can provide guidance on the question of whether to separately apply the presumption against extraterritoriality to any given element of a claim. In this light, the Court in *RJR Nabisco* gets it right in relying on the foreign relations rationale as its sole policy for deciding to apply the presumption against extraterritoriality separately to RICO's private cause of action provision.<sup>145</sup>

*b. International friction and the private action/public prosecution dichotomy*

The Court in *RJR Nabisco* is also on reasonable ground in drawing a distinction, at least as a first approximation, between private actions and public prosecutions in terms of their potential for negative foreign relations consequences. Actually, there are two separate reasons for this, which the Court blurs together.

One reason that private actions might have more potential for negative foreign relations consequences lies in foreign antipathy to certain aspects of private litigation in the United States. In part, this reflects objections to the practice of private parties, acting as a sort of private attorney general, bringing actions based upon the violation of criminal or regulatory

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<sup>145</sup> *RJR Nabisco*, 136 S. Ct. at 2106-8.

statutes.<sup>146</sup> In part, it reflects objections to certain atypical aspects of U.S. civil procedure—contingency fees, discovery, class actions—that commonly provoke whining among defendants.<sup>147</sup> Hence, even in cases in which there is widespread agreement among countries to prohibit certain conduct—such as money laundering, fraud, support of terrorism, murder, non-government cartels—there is disagreement about the appropriateness of private litigation under a U.S. style of civil procedure as a way to enforce the prohibition.<sup>148</sup>

A second reason that private litigation may provoke greater foreign relations problems than public prosecutions involves the decision to initiate such legal actions. Government prosecutors presumably will take into account potential foreign relations problems when exercising their discretion about bringing an action involving events outside the United States, whereas there is little incentive for private parties to do so. Indeed, this rationale picks up on the separation of powers rationale sometimes asserted in support of the presumption against extraterritoriality,<sup>149</sup> specifically, that foreign relations issues are for the executive branch.

## 2. Going too Far

While there is much to be said for *RJR Nabisco* as a policy matter, there are some important caveats.

### a. *Do all private actions for overseas injuries threaten international friction?*

As just discussed, the Court in *RJR Nabisco* got off on the right foot by using the impact on foreign relations as its policy basis for deciding to apply the presumption against extraterritoriality separately to RICO's private cause of action provision, thereby potentially restricting private actions more than public prosecutions. The problem is that the Court then fails to apply the same policy analysis in deciding when private actions involve the extraterritorial application of a statute. Specifically, the Court does not ask when a private claim with some overseas aspect will, by virtue of that aspect, potentially cause friction with other governments. Instead, the Court

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<sup>146</sup> E.g., Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 VA. J. INT'L L. 251, 295 (2006).

<sup>147</sup> E.g., Marco Ventoruzzo, *Like Moths to a Flame? International Securities Litigation After Morrison: Correcting the Supreme Court's "Transactional Test"*, 52 VA. J. INT'L L. 405, 411-13 (2012).

<sup>148</sup> E.g., *Empagran*, 542 U. S. at 167.

<sup>149</sup> E.g., Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 552 (1997).

employs a completely unthinking application of *Morrison*'s poorly conceived focus test by declaring without discussion that the place of injury determines extraterritoriality.

The EC tries to make this point by using the very fact that it brought the action as an illustration that not all private actions based upon injuries outside of the United States risk negative foreign relations consequences.<sup>150</sup> This was a tactical mistake, as it struck the Court's majority as hypocritical and opportunistic. Unfortunately, this visceral reaction caused the Court to miss the broader point. We need to ask what causes foreign governments to make principled—rather than opportunistic efforts to influence a particular case—objections to the application of U.S. law.

The Court in *RJR Nabisco* makes much of foreign antipathy toward various aspects of U.S. private litigation.<sup>151</sup> It is true that one variable in determining the potential of litigation to trigger negative foreign government reaction is actual conflict between the U.S. and foreign laws—if the laws are identical, there is less potential for complaint about applying U.S. law.<sup>152</sup> Moreover, as Justice Breyer explained in *F. Hoffmann-La Roche Ltd. v. Empagran*,<sup>153</sup> differences in mechanisms for enforcement and procedures can be as important as the difference in the substantive law. Still, conflict of laws and procedures, in itself, does not tell a court when a case involves extraterritoriality. Otherwise, we would need to say that foreign parties should not be subject to suit in the United States under United States laws, even when the all the relevant events in the case occurred in the United States, if the nations of which those parties are nationals disagree with any of the U.S. substantive law or procedure.

The foreign relations concern addressed by the presumption against extraterritoriality involves the opposition by other nations to application of U.S. laws in situations in which enough of the relevant events occurred outside the United States so that other nations find the application of U.S. law presumptuous<sup>154</sup>—a problem which is more likely, although not restricted to, situations in which the laws and procedures relevant to the action are in conflict between the different nations. Hence, the key question

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<sup>150</sup> *RJR Nabisco*, 136 S. Ct. at 2107-8.

<sup>151</sup> *Id.* at 2106-7.

<sup>152</sup> *E.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 403(2)(h)(1987) (identifying a conflict between U.S. and foreign law is a factor in deciding if application of U.S. law to events outside the United States is reasonable).

<sup>153</sup> *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 167-68 (2004) (addressing whether foreign parties, who bought vitamins in overseas markets, could bring a class action under the Foreign Trade Antitrust Improvement Act (FTAIA) against foreign companies participating in a worldwide price fixing cartel).

<sup>154</sup> *See, e.g.*, RESTATEMENT (THIRD), *supra* note 152 at § 403 Reporters' Notes 1; Gevurtz, *supra* note 8 at 387-397.

is not whether foreign governments dislike U.S. private litigation, but rather whether foreign governments base their acceptance or objection to the application of U.S. law creating a private cause of action solely on the place of injury, as opposed to, say, the nationality of the parties, the place of the defendant's conduct, or other factors.

The only evidence regarding objections by foreign governments mentioned in the Court's opinion is the amicus briefs filed by various foreign governments in the *Empagran* and *Morrison* cases.<sup>155</sup> Interestingly, not one of these amicus briefs argues that the Court should adopt a simple test for extraterritoriality based solely upon the place of injury.<sup>156</sup> In addition, it is worth recalling what triggered perhaps historically the most substantial foreign government opposition to the application of U.S. law to events beyond our borders. This was the effort, beginning in the (some

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<sup>155</sup> *RJR Nabisco*, 136 S. Ct. at 2106-7.

<sup>156</sup> *Morrison v. Australia Nat'l Bk*, Brief of the Government of the Commonwealth of Australia as Amicus Curiae in Support of the Defendants-Appellees, 2010 WL 723006 (advocating looking to where disclosure (or non-disclosure) occurred that induced a foreign investor to engage in a purchase or sale transaction involving securities on a foreign exchange as the test for whether to apply Section 10(b)); *Morrison v. Australia Nat'l Bk*, Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Respondents, 2010 WL 723009 (advocating that foreign purchasers of securities on a foreign exchange who are injured by misleading statements or omissions made outside of the United States by a foreign issuer have no private right of action under Section 10(b)); *Morrison v. Australia Nat'l Bk*, Brief of the Republic of France as Amicus Curiae in Support of Respondents, 2010 WL 723010 (advocating that foreign cubed—in other words, a foreign defendant, foreign plaintiff and foreign transaction—securities litigation be categorically precluded); *F. Hoffmann-La Roche Ltd v. Empagran S. A.*, Brief of the Government of Japan as Amicus Curiae in Support of Petitioners, 2004 WL 226390 (arguing that the FTAIA should not be interpreted to allow foreign purchasers of goods from foreign corporations in foreign markets to bring suits in United States courts); *F. Hoffmann-La Roche Ltd v. Empagran S. A.*, Brief of the Government of United Kingdom of Great Britain and Northern Ireland, Ireland and the Kingdom of the Netherlands as Amici Curiae in Support of Petitioners, 2004 WL 226597 (arguing that the Court should apply principles of reasonableness and comity to deny recovery under FTAIA for claims against foreign sellers by purchasers in foreign markets, who had no contacts or relationships with other plaintiffs suing for purchases in the United States); *F. Hoffmann-La Roche Ltd v. Empagran S. A.*, Brief of the Governments the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners, 2004 WL 226388 (arguing against exercising U.S. jurisdiction, based on consideration of other nations' interests, including, the locus of the conduct, the locus of the conduct's effects, and the strength of the foreign state's policies that bear on the problem); *F. Hoffmann-La Roche Ltd v. Empagran S. A.*, Brief of the Government of Canada as Amicus Curiae Supporting Reversal, 2004 WL 226389 (arguing that principles of reasonableness and comity militate against extraterritorial application of the Sherman Act to a case in which the respondents are foreign nationals and the transactions on which they base their claims occurred solely in foreign commerce and had no effects in the United States or on its commerce).

would say infamous) *Alcoa* decision,<sup>157</sup> in which U.S. courts applied U.S. antitrust law to conduct outside the United States based upon the effect (the injury if you will) the conduct caused inside the United States. In other words, it was U.S. efforts to regulate overseas conduct leading to domestic injury, rather than allowing domestic recovery for overseas injury, which triggered the worst foreign government opposition—including the adoption by foreign legislatures of laws designed to block enforcement of U.S. judgments—to the application of U.S. laws.<sup>158</sup>

Seen in this light, the irony of *RJR Nabisco* is that had a U.S. party sued a European company under RICO for injuries suffered in the United States as a result of money laundering in Europe, the Court would have allowed the action to proceed. By contrast, *RJR Nabisco* says that if a U.S. company injures a party in Europe as a result of money laundering in the United States, U.S. law will not provide a remedy. And somehow this is supposed to make European or other countries feel better about U.S. law.

*b. What's the alternative?*

The bottom line in *RJR Nabisco* was that a foreign party had sued a U.S. company for injuries suffered as a result of the U.S. company engaging in conduct (money laundering for drug dealers) that is considered criminal throughout the world.<sup>159</sup> Had the case been entirely domestic, RICO would have provided a remedy. As just mentioned, if a U.S. party sued a European company for injuries incurred in the United States as a result of this conduct, the action could have proceeded. Hence, the policy underlying *RJR Nabisco* cannot be to shield U.S. companies, such as RJR Nabisco, from liability when they engage in such misconduct just because the injury did not happen here. Rather, the policy must be that U.S. law (RICO) should not be the law to govern this liability.

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<sup>157</sup> *Alcoa*, 148 F.2d at 443.

<sup>158</sup> Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 *LAW & POL'Y INT'L BUS.* 1, 32-33 (1993) ("Following the *Alcoa* decision, and the Supreme Court's endorsement of the Second Circuit's effects doctrine, the lower courts and federal regulatory agencies applied the antitrust laws extraterritorially to a wide range of international industries. . . . The broad extraterritorial application of the U.S. antitrust laws to conduct occurring on foreign territory did not win ready international acceptance. . . . Foreign governments lodged numerous diplomatic protests charging that the extraterritorial application of U.S. antitrust laws violated principles of public international law and reflected a lack of comity and respect for foreign sovereignty. A number of the United States' major trading partners enacted blocking statutes and other laws designed to prevent the extraterritorial application of the U.S. antitrust (and other) laws.").

<sup>159</sup> See, e.g., Financial Action Task Force, *International Standards on Combatting Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations 12* (2016) (recommending countries criminalize money laundering on the basis of the Vienna Convention and the Palermo Convention).

Yet, if U.S. law is not to govern liability, than some other nation's law must. Presumably, the EC brought the action under RICO because RICO (or U.S. civil procedure triggered by getting into federal court) was more favorable to plaintiffs than European law. But that is this case. In some future case, foreign law may be more favorable on substance or procedure. Perhaps Europeans will enact "EURICO" with ten-fold instead of treble damage recovery for any party injured by racketeering activities involving an enterprise, and with pro-plaintiff or otherwise "foreign" procedures, such as placing the burden of proof on the defendants or denying defendants the right to cross examine the plaintiff's witnesses. In such cases, the application of foreign substantive laws and procedures might not seem so fair to a U.S. court called upon to apply the foreign substantive laws in a U.S. proceeding<sup>160</sup> or to enforce a foreign judgment obtained under the foreign procedures;<sup>161</sup> but, as the Court pointed out in *RJR Nabisco*, "what is sauce for the goose normally is sauce for the gander."<sup>162</sup> If U.S. courts are going to say that foreign laws must apply when they are more favorable to U.S. defendants, then U.S. courts must be prepared to accept the consequences of applying such laws when they are more favorable to plaintiffs suing U.S. defendants.

## CONCLUSION

While nominally just a decision about the scope of RICO, *RJR Nabisco* casts a shadow over future lawsuits to recover damages under the express or implied private causes of action for violation of numerous federal statutes when the injury occurs outside of the United States. This decision stands on a shaky doctrinal foundation. From a policy standpoint, the Court's decision identifies a sensible goal and draws a sensible distinction between the treatment of government prosecutions and private actions to achieve this goal. The specific line the court draws in determining extraterritoriality for private actions, however, is too crude to achieve this objective. Moreover, the Court's decision may have a "be careful what you wish for" quality if the

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<sup>160</sup> In fact, the Court in *RJR Nabisco* seems to invite the application of foreign law if the EC had sued RJR Nabisco using diversity jurisdiction as its entree into federal court. *RJR Nabisco*, 136 S. Ct. at 2109.

<sup>161</sup> See, e.g., Paul Berrett, *Chevron's Pollution Victory Opens Door for Companies to Shirk Foreign Verdicts* BLOOMBERGBUSINESSWEEK (August 9, 2016, 7:25 AM PDT), <http://www.bloomberg.com/news/articles/2016-08-09/chevron-s-pollution-victory-opens-door-for-companies-to-shirk-foreign-verdicts?bcomANews=true> (an appellate court just upheld an injunction against the enforcement of a \$9 billion judgment granted by an Ecuador court against Chevron, based upon Chevron's claim that the plaintiffs' attorney violated RICO by using bribery to obtain the judgment).

<sup>162</sup> *RJR Nabisco*, 136 S. Ct. at 2108.

real agenda is to favor businesses facing private litigation by forcing such litigation to follow foreign laws and procedures. Overall, I'll give *RJR Nabisco* a Yelp rating of two stars.