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

OUT-BEALE-ING BEALE

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In response to the 1991 Supreme Court decision resuscitating the presumption against extraterritoriality [hereinafter "PAE" or "presumption"], *EEOC v. Arabian American Oil Co.* (*Aramco*),[1] Larry Kramer described the presumption as an anachronism—a throwback to the strict territorialist approach to choice of law that prevailed before the mid-Twentieth Century but has been mostly abandoned since then.[2] The title of his scathing article, *Vestiges of Beale*, referred to Joseph Beale, the Harvard Law professor and reporter of the First Restatement of Conflict of Laws, whose since-discredited theories underlay that Restatement's approach to choice of law. In the cases since *Aramco*, the Court has strengthened and expanded the presumption. With its decision in *RJR Nabisco v. European Community*, it is fair to say, the Court has out-Beale'd Beale.[3]

The PAE as Our Choice-of-Law Rule for Federal Statutes

The presumption against extraterritoriality functions as a choice-of-law rule. Like other choice-of-law rules, it determines the geographic scope of a statute (or other law) when the legislature hasn't specified its territorial scope. As a choice-of-law rule, however, the PAE is a distinctly old-fashioned one. It closely resembles the rigidly territorialist and now largely discarded choice-of-law rules embodied in the First Restatement, under which a state's law was deemed applicable when a particular event occurred on its territory. For example, the First Restatement's choice-of-law rule for tort cases was *lex loci delicti*, under which the applicable law was that of the state in which the injury occurred. Thus, a statute regulating issues that arise in tort cases would be deemed applicable only if the injury occurred in the state's territory.

The First Restatement's rules were thought to follow from then-prevailing theories about the nature of sovereignty and rights. Beale singled out the place of injury as the state whose law applied in tort cases because, under his "vested rights" theory, a tort arises at the time when, and in the place where, the last event necessary to give rise to a claim occurs, and an injury is the last event necessary to give rise to a tort claim. Blistering scholarly critiques of the vested rights theory made clear that there was nothing magical about the last event, and the Supreme Court eventually recognized that a state's tort law could just as validly extend to disputes having other connections to the state.[4] Most U.S. states have abandoned the First Restatement approach in

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[1] EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991)

[2] Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (1991).

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

[4] *See, e.g.,* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

favor of one of a number of "modern" approaches.[5] Many states have adopted the approach of the Second Restatement of Conflicts,[6] which rejects the First Restatement approach in favor of a more open-ended search for the state with the "most significant relationship" to the matter at hand. Other states have adopted some version of governmental interest analysis.[7]

The Supreme Court followed a similar trajectory for federal statutes. At first, the Court adhered to the First Restatement-like presumption against extraterritoriality.[8] Later, it applied a more case-specific choice-of-law approach closer to that of the Second Restatement in some cases,[9] while in others it adopted an approach resembling governmental interest analysis.[10] In *Aramco*, the Court ignored these intervening cases and reverted to the presumption against extraterritoriality.

The Court no longer defends its First Restatement-like approach to extraterritoriality on the ground that it is inherent in the nature of sovereignty or rights. The Court has provided two other rationales for the presumption, but neither fully explains its choice of the PAE as our federal choice-of-law rule. First, the Court has explained that the PAE is based on the assumption that Congress legislates with domestic situations in mind. This, however, is the same assumption that underlies all choice-of-law rules. This assumption merely poses the question of whether and how far the statute should be construed to apply extraterritorially; it does not answer the question. In states that follow the Second Restatement's approach, this assumption leads the courts to construe statutes to apply if the forum is the state with the most significant relationship to the dispute. The second rationale for the presumption is that it avoids unintended clashes with the laws and policies of other states. But this, too, fails to explain the Court's choice of the PAE over other choice-of-law approaches. The Second Restatement's approach, too, is designed to avoid clashes with the laws and policies of other nations, as are some versions of governmental interest analysis. As Larry Kramer persuasively argued, the PAE significantly overprotects the interest in international comity, as it results in non-application of U.S. law in many cases in which the law's purposes would be advanced and no significant clashes with the laws and policies of other states would result.[11]

There are, nevertheless, plausible reasons for rejecting an approach like that of the Second Restatement. That approach has been criticized for its indeterminacy and complexity. That this is the part of the reason the Court has rejected this approach is suggested by the Court's opinion in *Hoffman-La Roche Ltd. v. Empagran S.A*, which rejected such an approach in the antitrust context because it was "too complex to prove workable."[12] *Empagran* suggests that the Court has opted to overprotect the interest in international comity in order to simplify the judicial task and provide more certainty and predictability to regulated parties. But, since the Court in *Empagran* did not adopt the PAE for antitrust cases, this too is an incomplete explanation for the Court's adoption of the PAE.

[5] *See* Symeon Symeonides, *Choice of Law in American Courts in 2015: Twenty-Ninth Annual Survey*, 64 AM. J. COMP. L. 221, 291 (2016) (only 10 states adhere to First Restatement approach in tort cases and 12 in contracts cases).

[6] *See id.* (24 states adhere to Second Restatement approach in tort cases and 23 in contracts cases).

[7] *Id.*

[8] *See* American Banana Co. v. United Fruit Co., 213 U.S. 247 (1909).

[9] *See, e.g.,* Lauritzen v. Larsen, 345 U.S. 571 (1953).

[10] *See* Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).

[11] *See* Kramer, *supra* note 2, at 215-217.

[12] Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 168 (2004). As the Court explained, "[t]he legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings to the point where procedural costs and delays could themselves threaten interference with a foreign nations' ability to maintain the integrity of its own antitrust enforcement system."

Some state courts have sought to develop an intermediate choice-of- law approach, less indeterminate than that of the Second Restatement yet less arbitrary and potentially overbroad in avoiding international or interstate friction as that of the First Restatement.[13] The Court in *Morrison* seemed to take a small step in this direction by linking the PAE to the "focus" of congressional concern and recognizing that context can be consulted in ascertaining congressional intent.[14] As explained below, the Court in *RJR* has taken a giant step in the opposite direction.

Perhaps the Court sees the PAE as a penalty default rule, one that chooses a rule that Congress is unlikely to have wanted in order to prompt Congress to address the issue of extraterritorial scope itself. If so, the rule has been remarkably successful: Congress quickly revisited the extraterritorial scope of the statutes involved in *Aramco* and *Morrison*. Whether we can expect similar congressional correction of undesirable outcomes in today's era of congressional deadlock is questionable. In any event, if that is among the rule's purposes, the *RJR* decision significantly increases the penalty.

RJR's *Dramatic Expansion of the PAE*

The most significant holding of *RJR* is that the PAE applies separately to a statute's substantive and remedial provisions.[15] The plaintiffs in *RJR* brought suit pursuant to Section 1964(c), which gives injured parties a treble damages remedy if they were injured in their business or property by a violation of RICO's substantive provisions. The Court held that, even though Congress made clear that the substantive provisions of RICO apply extraterritorially, Section 1964(c) does not apply extraterritorially unless Congress also clearly enough evinced its intent that this remedial provision was to have extraterritorial effect.[16]

In examining whether Congress had expressed a clear enough intent that this provision apply extraterritorially, the Court framed the question as whether Congress had indicated its intent that the remedy extended to *injuries* occurring outside the United States. Finding no such intent, the Court held that the remedy provided in Section 1964(c) was available only for injuries occurring within U.S. territory. The Court did not explain why the issue turned on congressional intent regarding the place of injury, or why, in the absence of such intent,

[13] *See, e.g.*, Neumeier v. Kuehner, 31 N.Y.2d 121, 286 N.E.2d 454, 335 N.Y.S.2d 64 (1972).

[14] The Court nevertheless made clear that the question under the PAE is not what Congress "would have wanted," Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 261 (2010), which is the lodestar under governmental interest analysis.

[15] The Court maintained that it had already established this point in *Kiobel*, in which it had inquired into whether a federal common law cause of action to enforce certain norms of customary international law norms applied extraterritorially "even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders." RJR, 136 S. Ct. at 2106, slip op. at 19. This seems to be an implicit endorsement of the "modern position" that customary international law has the status of federal law. If customary international law had no status as federal law in the absence of federal incorporation into our legal system, as revisionists maintain, then *Kiobel* would have involved a single federal law that simultaneously incorporated and created a private right of action for certain substantive rules of customary international law. Under the revisionist view, *Kiobel* would not have established the need for a separate showing of the extraterritorial effect of a federal law's substantive and remedial provisions. On the revisionist view, there was no federal law imposing the substantive obligations involved in *Kiobel* apart from the law creating the remedy.

[16] One of the ambiguities in the *RJR* opinion is whether a separate showing is also necessary for Sections 1964(a) and (b), which provide for criminal enforcement and civil penalties. Most commentators have assumed that the Court did not contemplate a separate showing of congressional intent for these provisions. But the Court seemed to be drawing a broader distinction between substantive provisions and enforcement provisions. The majority did not say that a separate showing of congressional intent is unnecessary for these governmental enforcement provisions. On the other hand, Justice Ginsburg's dissenting opinion took the majority to be holding that the no separate showing of extraterritoriality was necessary for those provisions, and the majority did not challenge her reading of its opinion. I will therefore assume that the majority was not contemplating a separate showing of congressional intent for these provisions. The Court did not explain why the PAE permits a distinction between proceedings brought by the U.S. government and others but not between proceedings brought by foreign governmental plaintiffs and those brought by private plaintiffs. *See* Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AJIL UNBOUND 51, 55 (2016). For a possible basis for the first distinction, see Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AJIL Unbound 40 (2016).

the statute created a right of action only for domestic injuries. Scholars have argued that the Court focused on the place of injury because Section 1964(c) authorizes recovery only for injuries, thus suggesting that injury is the "focus" of this section.[17] But an injury is only one of several elements of a right of action under Section 1964(c).[18] The Court did not explain why it singled out the place of injury instead of these other elements of the cause of action.

If the Court's holding extends to all cases in which injury is an essential element of the cause of action, then it applies to all private rights of action. Injury is equally essential to recovery under the private rights of action involved in *Aramco*, *Morrison*, and *Kiobel*. Indeed, the Court this term made clear that "actual injury" is a constitutional requirement of maintaining a suit for injunctive relief or damages in federal court.[19] Yet the Court's prior PAE cases did not single out the place of injury. In *Morrison*, the Court held instead that, if the statute does not have extraterritorial effect, the private right of action extends to cases in which the substantive "focus" of congressional concern occurred in the United States. The Court's holding in *RJR* that private rights of action under federal statutes extend only to domestic *injuries* (in the absence of congressional intent to authorize recovery for foreign injuries) thus represents a novel and dramatic extension of the PAE.

Perhaps the difference between this case and the previous ones is that only this case involved a statute that used the term "injury."[20] If the new requirement applies only to statutes creating a right of action that use the word "injury," then presumably it would apply to all private rights of action created by statute. Under this theory, the reason for the inapplicability of this new requirement to the rights of action involved in *Aramco*, *Morrison*, and *Kiobel*, would be (ironically) that those rights of action were not created by Congress at all but were instead implied by the courts. The Court is usually more *stringent* rather than more lenient in such circumstances. Even if the injury requirement does not appear in statutory text, a showing of injury is no less (and no more) a "focus" of implied rights of action than of express ones.

Whatever the basis for this new limitation, the effect of the majority's holding, where it applies, is to narrow significantly the scope of U.S. statutes that do not evince any congressional intent on the question of geographic scope. At first blush, this new requirement might be thought to be one more vestige of Beale. As discussed above, the First Restatement rule for torts was that forum law applies only if the injury occurred in the forum state. The Court in *RJR* did not cite the First Restatement, but its holding might be thought to be a resurrection of this ancient rule.

On closer analysis, however, the majority's holding narrows the scope of U.S. law to a much greater extent than would adoption of the *lex loci delicti* rule. Under the First Restatement's rule for torts, a law applies when the injury occurred within the state even if all the other events relevant to the claim occurred outside the state. Under the *RJR* holding, the requirement that the injury have occurred on U.S. soil applies *in addition to* the

[17] *See* William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 48 (2016).

[18] Recovery under that section also requires a showing that the defendant committed the predicate acts, engaged in a "pattern" of racketeering activity, etc. If the Court had focused on the place of the conduct causing the injury rather than the injury itself, its holding would have been different. As Justice Ginsburg noted in her dissent, Section 1964(c) incorporated by reference the very same provisions that were incorporated by reference into the substantive provisions of RICO, which the Court found sufficient in that context to rebut the PAE.

[19] Spokeo, Inc. v. Robins, 135 S. Ct. 1829 (2015).

[20] Such a limitation does not appear to be supported by the majority's opinion, which discussed the text of Section 1964(c) only to show that it did not reveal a congressional intent that the Section apply extraterritorially. The majority did say that, "if anything," the fact that Section 1964(c) permits recovery only for injury to "business or property" shows that Congress did not intend this section to be coextensive with the substantive provisions of RICO. *See* RJR, 136 S. Ct. at 2108, slip op. at 22-23. It is true that Section 1964(c) permits recovery only for a subset of injuries suffered. It is not clear what, if any, relevance this limitation bears on whether the statute further limits recovery to *domestic* injuries. Nevertheless, the Court's reliance on this aspect of the RICO right of action might support limiting *RJR*'s requirement of domestic injury to statutes that authorize recovery for only a subset of injuries suffered.

requirements articulated in prior PAE cases. The Court in *RJR* found that Congress had clearly enough expressed its intent that the substantive provisions of RICO apply extraterritorially. On the Court's analysis, however, the outcome for statutes that do not specifically address the extraterritoriality issue (which choice-of-law theory regards as the usual case) is that recovery is limited to cases in which *both* the substantive "focus" of congressional concern *and* the injury occurred on U.S. soil.

Consider how the Court's prior PAE cases would have come out under this approach. In *Morrison*, the Court held that the substantive provisions of the Securities Exchange Act apply when the sale of the security occurred on U.S. territory or if the security was listed on a U.S. exchange. Under the analysis in *RJR*, recovery would be further limited to injuries suffered on U.S. soil. In *Kiobel*, the Court concluded that, because the PAE had not been rebutted, ATS claims must "touch and concern" the territory of the United States. Here, too, *RJR*'s analysis would further limit the plaintiffs' recovery to injuries that occurred on U.S. soil. In *Aramco*, the Court held that the statute applied if the plaintiff was employed in the United States. Congress amended the statute in response to *Aramco*, specifying that it applies to some cases in which the plaintiff was employed outside the United States. As others have noted, however, since Congress did not specify that the right of action extends to foreign injuries, the amended statute under *RJR* would authorize recovery only for *domestic* injuries.[21]

The majority's approach in *RJR* might reflect the Court's broader hostility to private rights of action. In a series of closely-divided decisions, the Court has progressively tightened the requirements for recognizing a private right of action under a statute that does not expressly provide one.[22] *RJR* might be regarded as extending this line of cases by insisting that, even when Congress expressly creates a private right of action, it must additionally make clear its intent that the right of action applies extraterritorially. The Court's citation of *Sosa*'s discussion of these cases suggests that the majority regards the two lines of cases as related. Still, *RJR* takes this hostility to new lengths. Congress in RICO not only expressly created a private right of action, it also made clear that the right of action extends to foreign conduct. The Court's additional requirement that the injury must occur in the United States appears to have come out of whole cloth.

RJR's addition of this requirement garnered only four votes. It was the opinion of a "majority" only because of Justice Scalia's passing and Justice Sotomayor's recusal. The dissenting opinion was forceful and persuasive. The dissenting Justices might nevertheless feel constrained to adhere to the decision for reasons of stare decisis.[23] Stare decisis, after all, operates most strongly in statutory cases. But *RJR* is a statutory case only insofar as it construed RICO. To the extent it seeks to alter the PAE as our generally applicable choice- of-law rule for federal statutes, *RJR* articulates a broader rule of federal common law. Because of the radical nature of the Court's extension of the PAE, and the retroactive revision of prior PAE holdings and congressional responses

[21] *See* Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AJIL UNBOUND 62, 64 (2016); Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, AJIL UNBOUND 57, 59 (2016).

[22] Indeed, *RJR* is reminiscent of the 5-4 decision in Alexander v. Sandoval, 532 U.S. 275 (2001), in which the Court sliced up Title VI for purposes of inferring a private right of action in manner comparable to *RJR*'s slicing up of RICO for purposes of applying the PAE. Congress had expressly created a private right of action for damages under Section 601 of Title VI. Section 602 authorized the Department of Justice to promulgate regulations in furtherance of Section 601, but the Court found insufficient legislative intent to authorize private rights of action for violation of Section 602 and the regulations promulgated thereunder.

[23] *But cf.* Shuette v. Coalition to Defend Affirmative Action and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN), 134 S. Ct. 1623, 1644-1645 (2014) (Scalia, J., concurring in the judgment) (citing the fact that *Carolene Products* was decided by a four-Justice majority as a reason not to follow it); North Georgia Finishing, Inc. v. Di-Chem Inc., 419 U.S. 601, 615-19 (1975) (Blackmun, J., dissenting) (similar argument regarding 4-3 decision in *Fuentes v. Shevin*).

thereto that would result if this extension were broadly applied, the Justices should seriously consider not applying the new "injury" requirement beyond RICO. The unexplained nature of the new "domestic injury" limitation would, indeed, support a decision abandoning this new limitation altogether.[24]

[24] *Cf.* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 63 (1996) (overruling prior decision because it "reached a result without a rationale agreed upon by a majority of the Court").

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