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It has been said that congressional silence is an invitation for other branches of government to exercise policymaking authority.[1] If that aphorism holds true with respect to the judiciary, the current Supreme Court appears to have categorically declined that invitation, at least for cases involving extraterritorial activity.

In addressing extraterritorial cases, courts are confronted with a question that has profound consequences for structural norms and plaintiffs bringing claims under U.S. statutes: when should the laws of the United States apply to activity occurring primarily in another country? The Supreme Court has answered this question with the presumption against extraterritoriality, a canon of statutory interpretation that presumes, absent a clear congressional indication to the contrary, that U.S. laws do not apply abroad. In the past six years, the Court has applied the canon in a wide variety of cases—from foreign securities suits and human rights claims to racketeering and money laundering allegations brought by foreign countries. Through these cases—which have critical repercussions for transnational economic activity—the Court has established the presumption against extraterritoriality as a strong categorical rule that bars large swaths of suits by foreign plaintiffs.

Unsurprisingly, the Court's use of the presumption against extraterritoriality has attracted significant criticism from the academy. Scholars have challenged the presumption as an unnecessarily blunt instrument for managing conflict with foreign nations and a poor proxy for congressional intent.[2] More importantly, the presumption's critics argue that it fails to preserve separation-of-powers interests, or that by applying the presumption the Supreme Court engages in judicial activism, supplanting its territorial vision for that of Congress.[3] Criticisms of this variety have increased following *RJR*

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1. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (discussing the interplay between congressional silence and executive power).

2. *See infra* Section III.A.

3. *See infra* Section III.B.

Nabisco, Inc. v. European Community, where the Court applied the presumption against extraterritoriality separately to the Racketeer Influenced and Corrupt Organizations Act's (RICO) substantive provisions and private cause of action.[4] In the hands of the current Supreme Court, critics allege, the presumption "has paradoxically become a thoroughly judge-directed creature"[5] used to "override Congress in defining the proper scope of litigation in U.S. courts."[6]

This Comment challenges the idea that the presumption against extraterritoriality has departed from its separation-of-powers moorings. Instead, it argues that the Supreme Court's recent extraterritoriality jurisprudence makes sense when understood as nondelegation. Specifically, the Court's assumption that Congress does not intend statutes to apply extraterritorially unless it clearly states otherwise is, in fact, an assumption that Congress does not delegate the enormous, policy-laden power of deciding whether to extend the laws of the United States abroad to the judiciary. This nondelegation assumption is grounded in a notion long associated with the presumption against extraterritoriality—that the Constitution assigns responsibility for both policy-making and foreign affairs to the political branches, not the courts.

Viewing the presumption against extraterritoriality as nondelegation sheds light on outstanding puzzles surrounding its application. Not only does the characterization reconcile the rationales the Supreme Court has used to justify the presumption, it also refutes critiques that the presumption is merely territoriality-oriented judicial activism. This nondelegation paradigm makes clear that the Court's use of the presumption is a request for congressional guidance, rather than a policy decision by the Court. By shifting the question of extraterritoriality back to Congress, the Court cedes policy-laden decisions regarding the reach of U.S. statutes to the political process and prevents lower courts from embarking on expeditions in foreign policy-making without the compass of clear congressional approval. Moreover, when understood as nondelegation, it becomes apparent that the Court's

4. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016).

5. Anthony J. Colangelo, *The Frankenstein's Monster of Extraterritoriality Law*, 110 AM. J. INT'L L. UNBOUND 51, 51 (2016).

6. Maggie Gardner, RJR Nabisco *and the Runaway Canon*, 102 VA. L. REV. ONLINE 134, 134 (2016).

insistence on applying the presumption against extraterritoriality separately to private causes of action and in cases where there are no apparent foreign affairs concerns reflects a coherent interpretative approach.

The nondelegation characterization of the Supreme Court's extraterritoriality jurisprudence also explains the Supreme Court's commitment to the presumption against extraterritoriality to the exclusion of other, more flexible approaches. Unlike these discretionary inquiries, the presumption ensures that courts do not wander into the fraught mists of foreign policy. By directing lower courts to shift extraterritoriality inquiries to Congress, the Court helps avert the problems that have resulted from previous judicial attempts to provide answers to questions of foreign policy. While ambiguities persist, they are ambiguities that call upon courts to make interpretative determinations, rather than pure foreign policy ones. In this sense, the presumption against extraterritoriality shifts the interpretive game to the judiciary's home court.

This Comment proceeds as follows: Part I lays out the history, current status of, and common justifications for the presumption against extraterritoriality. Part II argues that the presumption is an application of the nondelegation doctrine to a congressional delegation to the judiciary. Part III explains how understanding the presumption against extraterritoriality as nondelegation helps solve extant puzzles associated with the presumption against extraterritoriality, such as why it applies in cases where there is no potential for foreign conflict, separately to a statute's substantive provision and private right of action, and to jurisdictional statutes. It also discusses the institutional competence and other considerations underlying the Supreme Court's apparent preference for the presumption over other interpretive tools. Part IV concludes.

I. LEGAL BACKGROUND

This Part outlines the legal landscape with respect to the presumption against extraterritoriality. Section A describes the presumption in general terms and discusses its history and evolution, with an emphasis on the Court's three most recent extraterritoriality cases, *Morrison, Kiobel,* and *RJR Nabisco.* Section B sets out the rationales commonly associated with the presumption.

A. Development of the Presumption Against Extraterritoriality

The presumption against the extraterritorial application of statutes is a canon of statutory construction that assumes Congress does not intend statutes to apply outside of the borders of the United States unless the statutes clearly specify otherwise. The presumption is not a limit on Congress' legislative power—it does not impede congressional directives clearly intended to apply extraterritorially—but an assumption that "[w]hen a statute gives no clear indication of an extraterritorial application, it has none."[7]

The first judicial articulation of the presumption against extraterritoriality was distinctly territorial. According to Justice Oliver Wendell Holmes, fundamental principles of territoriality demanded "in case of doubt . . . a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power."[8] Over time, however, this stringent territorial view of the presumption against extraterritoriality gave way to variety of context-specific factor tests.[9] Though nominally acknowledged, the presumption against extraterritorially was rarely employed.[10]

In 1991, however, the Supreme Court breathed new life into the presumption in *EEOC v. Arabian American Oil Co.* (*Aramco*).[11] The *Aramco* Court considered whether an American citizen fired in Saudi Arabia[12] could bring a Title VII discrimination suit against Aramco, a U.S. corporation, given that the conduct and injury occurred outside of the United States.[13] The Court held that absent clear congressional intent to the contrary, it would construe statutes to

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

8. Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909) (holding that the Sherman Act applies only to conduct occurring within the territorial borders of the United States).

9. *See infra* note 173 and accompanying text.

10. *See* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

11. 499 U.S. 244 (1991).

12. The plaintiff in the case filed suit against Aramco and Aramco Services Company (ASC), both of which were incorporated in Delaware. *Id.* at 247. While Aramco's principal place of business was Saudi Arabia, ASC's was in Houston, Texas, which is where the plaintiff-employee was hired. *Id.*

13. *Id.* at 248.

apply only to activity occurring within the United States.[14] Because there was no clear evidence that Congress intended Title VII to apply overseas, the presumption against extraterritoriality barred the plaintiff's claims.[15]

Nearly twenty years after *Aramco*, the Court clarified the outlines of the presumption against extraterritoriality in *Morrison v. National Australia Bank Ltd.*[16] In *Morrison*, the Court considered whether foreign investors could sue for fraud under section 10(b) of the Securities Exchange Act of 1934 against National Australia Bank with respect to securities listed on foreign stock exchanges.[17] The alleged fraud arose when National Bank officials made public statements that HomeSide, its Florida-based subsidiary, was performing well but wrote down over two billion dollars of HomeSide's assets just one month later.[18] The Court's analysis considered both whether Congress had clearly indicated that section 10(b) applied extraterritorially and whether the domestic conduct (the deceptive statements) rendered the presumption against extraterritoriality inapplicable altogether. Writing for the Court, Justice Scalia answered the first question by noting that neither the statutory text nor context indicated that Congress intended section 10(b) to apply abroad.[19] With respect to the second inquiry—whether the plaintiffs had alleged sufficient domestic activity—the Court held that the presumption against extraterritoriality is overcome only when the domestic conduct is the "focus" of the statutory scheme.[20] Because the focus of the Exchange Act was deception *in connection with the sale* of securities, and only the deception—not the sale—occurred in the United States, the domestic conduct was not sufficient to displace the presumption.[21]

The Court continued to expand the presumption against

14. *Id.* at 253 ("If we were to permit possible, or even plausible, interpretations of language such as that involved here to override the presumption against extraterritorial application, there would be little left of the presumption.").

15. *Id.*

16. 561 U.S. 247 (2010).

17. *Id.*

18. *Id.* at 252.

19. *Id.* at 264–65.

20. *Id.* at 266.

21. *Id.* at 268–69.

extraterritoriality in *Kiobel v. Royal Dutch Petroleum Co.*, which involved Alien Tort Statute (ATS) claims by Nigerian refugees against British, Dutch, and Nigerian corporations for aiding and abetting the Nigerian government in human rights abuses.[22] Although the ATS is a jurisdictional statute and the presumption against extraterritoriality is a merits doctrine,[23] Chief Justice Roberts's majority opinion stated that the principles underlying the presumption against extraterritoriality "similarly constrain courts considering causes of action that may be brought under the ATS."[24]

One of these underlying principles apparently was the need to avoid the international contention that might result when courts apply American law to activity occurring outside the borders of the United States. The presumption against extraterritoriality, the Court indicated, "ensure[s] that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[25] The Court suggested that "the danger of unwarranted judicial inference in the conduct of foreign policy is magnified in the context of the ATS," since courts—not Congress—create the cause of action.[26] "Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[27] The Court went on to hold that because the ATS itself provides no indication of extraterritoriality, all of the actors were foreign, and all of the relevant conduct took place in Nigeria, the claims did not displace the presumption against extraterritoriality.[28]

Kiobel seemed to signal that the Court would apply the

22. 133 S. Ct. 1659 (2013).

23. Sosa v. Alvarez-Machain, 542 U.S. 692, 728 (2004). *Sosa* held that the ATS gives U.S. courts jurisdiction to hear claims based on certain violations of the law of nations, but does not provide a cause of action. *Id.* Nonetheless, it may recognize a federal common law cause of action to provide redress for those violations of norms of customary international law that are as definite as the violations originally actionable at the passage of the ATS, in 1789. *Id.*

24. *Kiobel*, 133 S. Ct. at 1664.

25. *Id.* (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991)).

26. *Id.*

27. *Id.* (quoting *Sosa*, 542 U.S. at 727).

28. *Id.* at 1662, 1669. The Court stated that in future ATS cases, only those claims that "touch and concern the territory of the United States . . . with sufficient force to displace the presumption" would be successful. *Id.* at 1669.

presumption against extraterritoriality to a wide range of federal statutes—even those to which it might not obviously pertain. *RJR Nabisco, Inc. v. European Community*,[29] which considered whether RICO applied to offenses perpetrated outside the United States, further extended the presumption.

RICO establishes four criminal offenses aimed at illegal enterprises "engaged in . . . interstate or foreign commerce"[30] and a civil cause of action for "any person injured in his business or property by reason of a violation" of one of the criminal provisions.[31] Specifically, RICO prohibits the investment of income derived through a pattern of racketeering in an enterprise,[32] the acquisition or maintenance of an enterprise through a pattern of racketeering,[33] conducting an enterprise through a pattern of racketeering,[34] or conspiring to do any of the foregoing.[35] A pattern of racketeering activity is a series of related predicate offenses that demonstrate the existence or threat of continued criminal activity and involves the commission of at least two predicate offenses within a ten-year span.[36] Predicate offenses consist of various state and federal crimes, including wire fraud, mail fraud, money laundering, and supporting foreign terrorist organizations, among many others.[37] To summarize, a RICO violation occurs when a pattern of predicate crimes fits within one of the four RICO criminal offenses. RICO's civil cause of action is more restrictive—it allows private plaintiffs to sue only when a RICO violation results in an injury to their business or property.[38]

In *RJR Nabisco*, twenty-six European countries sought to sue RJR Nabisco under RICO's civil cause of action for its role in a foreign drug trafficking and money laundering enterprise in which the proceeds from the sale of drugs smuggled into Europe were used

29. 136 S. Ct. 2090 (2016).
30. 18 U.S.C. § 1962 (2012).
31. § 1964(c).
32. § 1962(a).
33. § 1962(b).
34. § 1962(c).
35. § 1962(d).
36. § 1961(5).
37. § 1961(1).
38. § 1964(c).

to pay for RJR Nabisco cigarettes.[39] Again invoking the presumption against extraterritoriality, the Court articulated a two-step framework based on *Morrison* and *Kiobel*:

> At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.[40]

Applying this test, the Court held that Congress did intend RICO's criminal provisions to apply extraterritorially, but only to the extent the underlying predicates overcame the presumption.[41] In other words, the extraterritoriality of RICO predicates flows through to RICO offenses—if none of the predicate statutes at issue in a given case overcome the presumption against extraterritoriality, RICO does not apply abroad by its own terms. Because the predicates at issue in *RJR Nabisco*—money laundering, wire fraud, mail fraud, material support of foreign terrorist organizations, and Travel Act violations—were extraterritorial, RICO's substantive criminal provisions applied abroad in that case.[42]

To the dismay of the European petitioners and many legal commentators, however, the Court did not stop there. Citing *Kiobel*'s holding that "the presumption . . . 'constrain[s] courts

39. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2098 (2016).

40. *Id.* at 2101.

41. This unique structure, the Court observed, "ma[de] RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality." *Id.* at 2103.

42. *Id.* at 2102 ("We emphasize the important limitation that foreign conduct must violate a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially." (internal quotations omitted)). As a result, U.S. authorities were free to prosecute RJR Nabisco under RICO in a criminal case.

considering causes of action,'" the Court held that the presumption against extraterritoriality applies not only to a statute's substantive provisions, but also to the provisions that establish private rights of action.[43] This separate extraterritoriality review, the Court reasoned, is required by the principles informing *Kiobel*—namely, the potential that "providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct."[44] These principles mandate additional scrutiny, even in cases where there is no risk of international discord.[45] For that reason, it was immaterial that the petitioners—the countries where the cases against RJR Nabisco would otherwise be heard—expressly stipulated that application of U.S. law would not result in controversy.[46] By rejecting this stipulation, the Court eschewed extraterritoriality review "based on a case-by-case inquiry that turns on or looks to the affected sovereign's consent,"[47] in favor of a categorical rule applicable in every case of extraterritorial flavor.

In this second, separate extraterritoriality inquiry, the Court found no clear indication from Congress that RICO's private cause of action ought to apply to injuries occurring outside of the United States.[48] That the provision containing the civil cause of action applied only where a plaintiff suffered injury to "business or property" in connection with a RICO violation suggested that it was not coextensive with RICO's more inclusive substantive provisions.[49] Because RICO's private cause of action did not apply extraterritorially, when the petitioners were unable to prove a domestic injury, they failed to overcome the presumption against extraterritoriality.[50]

43. *Id.* at 2106 (quoting Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013)).

44. *Id.*

45. *Id.* at 2100.

46. *Id.* at 2107–08.

47. *Id.* at 2095.

48. *Id.* at 2108.

49. *Id.*

50. *Id.* at 2111.

B. Rationales for the Presumption Against Extraterritoriality

RJR Nabisco reinvigorated debate about the presumption against extraterritoriality that had been simmering since *Aramco*. Central to this debate are the Supreme Court's justifications for the presumption. First, the Court has stated that the presumption is a tool for managing conduct in foreign affairs because it "serves to avoid the international discord that can result when United States law is applied to conduct in foreign countries."[51] Second, the Court has justified the presumption as a "commonsense notion that Congress generally legislates with domestic concerns in mind."[52] Third, the Court has hinted,[53] the presumption preserves separation of powers and protects against judicial activism in foreign affairs.[54]

Opponents of the presumption against extraterritoriality contend that the justifications advanced by the Supreme Court to defend it are invalid or that the presumption fails to fulfill its stated goals.[55] These critics argue that the presumption should be removed from the Court's interpretative toolkit or at least diluted to better reflect international norms and other policy interests.[56] The idea that the presumption efficiently reduces the risk of foreign conflict, they say, is flawed because international law recognizes other bases of jurisdiction besides territoriality, and the Court applies the presumption even in cases where there is obviously no possibility of foreign discord.[57]

Critics have also lambasted the "commonsense notion" that Congress generally does not intend to apply extraterritorially, arguing that an uptick in internationally-oriented statutes and congressional responses to cases invoking the presumption belie this

51. *Id*. at 2100.

52. *Id*. As I argue in Part III, this assumption is rooted mainly in normative, structural values, though it does align with empirical realities in some instances. *See infra* note 232 and accompanying text.

53. Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1, 16 (2014) (noting that "courts do not typically rely on separation of powers to justify the presumption against extraterritoriality").

54. *See generally* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505 (1997).

55. *See, e.g.*, Clopton, *supra* note 53, at 3; Colangelo, *supra* note 5, at 51.

56. Clopton, *supra* note 53, at 3.

57. *Id*. at 11.

justification.[58] The separation-of-powers account of the presumption, too, has come under fire: scholars suggest that the Court has used the presumption to override congressional intent and ignore the executive "rather than stay faithful to its origins as essentially a separation-of-powers canon."[59] These attacks came with particular intensity and volume after *RJR Nabisco*; many felt the Court overstepped its bounds by applying the presumption separately to RICO's private right of action.[60] By adopting a default territorial rule, such critics have argued, the Court is merely exercising a territorial brand of judicial activism.[61]

These criticisms raise important questions. Why does the Court apply the presumption against extraterritoriality even when there is no obvious potential for foreign conflict? Is the presumption valid if Congress passes statutes overriding the decisions in which it is invoked? Is the Court merely supplanting its own territorial preferences for the intent of Congress? And, in the wake of *RJR Nabisco*, why does the Court insist on applying the presumption against extraterritoriality separately to private rights of action when the related substantive statute is extraterritorial? Parts II and III argue that understanding the presumption against extraterritoriality as nondelegation resolves these and other outstanding questions about why the Court insists on applying the presumption against extraterritoriality.

II. THE PRESUMPTION AGAINST EXTRATERRITORIALITY AS JUDICIAL NONDELEGATION

This Part argues that the presumption against extraterritoriality should be understood as an application of the nondelegation doctrine to a delegation of foreign policymaking authority from Congress to the judiciary. Section A provides an overview of the nondelegation doctrine, including its more recent manifestation in the narrow construction of statutory texts and describes how the doctrine applies to courts. Section B supports the claim that the

58. Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185, 236 (1993).

59. Colangelo, *supra* note 5, at 55; *see also* Gardner, *supra* note 6, at 134–35.

60. Colangelo, *supra* note 5, at 55–56.

61. *See* Gardner, *supra* note 6, at 143.

presumption against extraterritoriality should be viewed as nondelegation with respect to the judiciary by showing that two doctrines are based on similar rationales and make similar demands of Congress. It also highlights examples of nondelegation in the Supreme Court's most recent extraterritoriality cases, responds to potential challenges to viewing the presumption as nondelegation, and discusses how the presumption may fit within the major questions doctrine.

A. Nondelegation: Basic Principles

The nondelegation doctrine rests on the recognition that the Constitution allocates distinct powers to each of the three branches of federal government: "The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law . . . ."[62] The Constitution allocates the legislative power to Congress,[63] and the Supreme Court has held that "[t]he Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[64] However, it is well accepted that Congress is empowered to delegate *some* matters to its coordinate branches, though "the precise boundary of this power is a subject of delicate and difficult inquiry."[65] The nondelegation doctrine, then, deals with "the standards for determining when Congress has crossed the constitutional line between delegating legislative authority and simply allowing executive and judicial actors to carry out their constitutionally prescribed functions."[66]

62. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

63. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ").

64. Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); *see also* Mistretta v. United States, 488 U.S. 361, 371–72 (1989) ("'[T]he integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." (quoting Field v. Clark, 143 U.S. 649, 692 (1892))).

65. *Wayman*, 23 U.S. (10 Wheat.) at 43 ("But Congress may certainly delegate to others, power which the legislature may rightfully exercise itself.").

66. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 99 (7th ed. 2016).

1. Nondelegation as statutory interpretation

Although the nondelegation doctrine was at one time robust,[67] its conventional application is now largely obsolete. The doctrine typically arises with respect to congressional delegations to administrative agencies; in that context, the Supreme Court allows delegations that have an "intelligible principle"[68] and has taken a very broad view of what counts as such.[69] The nondelegation doctrine lives on, however, in narrowing statutory construction: "In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."[70] Recognizing this trend, Professor Cass Sunstein has argued that nondelegation's continued vitality lies in "a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own."[71] The Court's use of nondelegation canons shows that the Court "has not surrendered the *principles* that underlie the nondelegation doctrine."[72] And, as previously noted, those principles are fundamentally rooted in separation of powers concerns.

One of the nondelegation canons that Professor Sunstein identifies, albeit in the context of delegations to administrative

67. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); *Panama Ref.*, 293 U.S. 388.

68. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

69. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

70. Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989). For example, in *The Benzene Case*, the Court declined to follow the Government's expansive interpretation of agency power under the Occupational Health and Safety Act because it "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional under the Court's reasoning in [*Schechter Poultry* and *Panama Refining*]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored." Indus. Union Dep't v. Am. Petroleum Inst. (The Benzene Case), 448 U.S. 607, 646 (1980).

71. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315 (2000); *see also* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 355 (observing that there are few limits on congressional delegations to the judiciary, but that "a series of . . . 'strict construction' or 'clear statement' rules . . . tend to operate as nondelegation doctrines within their respective fields of operation.").

72. Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 57 (2010) (emphasis added).

agencies, is the presumption against extraterritoriality.[73] As the Court established in *Aramco*, when it prevented the EEOC from unilaterally deciding that Title VII applied abroad, agencies generally may not decide the question of extraterritoriality.[74] The presumption, Professor Sunstein posits, is a structurally inspired nondelegation canon based on the "notion . . . that extraterritorial application calls for extremely sensitive judgments involving international relations [and] such judgments must be made via the ordinary lawmaking process."[75] The presumption against extraterritoriality thus ensures that the executive branch does not make the decision of extraterritoriality on its own.[76]

2. Nondelegation and the judiciary

While nondelegation, including its most recent expression as an interpretative device, is typically applied to delegations from Congress to executive agencies, it applies equally to congressional delegations to the judiciary. As Chief Justice John Marshall recognized: "It will not be contended that Congress can delegate to the Court, or to any other tribunals, powers which are strictly and exclusively legislative."[77] Despite this prohibition, delegations to the judiciary have largely escaped the attention of both the judiciary and the academy.[78] This inattention is understandable, since Congress almost never expressly delegates its power to the judiciary. Instead of transferring legislative power outright, Congress typically shifts power to courts by passing broad statutes—the type that impliedly "call on courts to interpret vague statutory language or fill in statutory gaps in the course of case-by-case adjudication."[79]

73. Sunstein, *supra* note 71.

74. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

75. Sunstein, *supra* note 71, at 333, 338 ("If . . . an agency is attempting on its own to apply domestic law extraterritorially, we might believe that whatever its expertise, it is inappropriate, as a matter of democratic theory and international relations, for this to happen unless Congress has decided that it should.").

76. *Id*. at 333.

77. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

78. Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 407–08 (2008); *see also* Aaron Nielson, Erie *as Nondelegation*, 72 OHIO ST. L.J. 239, 266 (2011).

79. Lemos, *supra* note 78, at 438.

Nonetheless, the same separation of powers considerations that drive nondelegation concerns with respect to the executive branch also apply to delegations from Congress to the judiciary. When Congress passes large blocks of power to the courts, "[a]t some point the judicial power . . . must 'run out' because the delegated authority is just too great for the power exercised to be anything but purely legislative."[80] Concerns that Congress, with its superior political accountability, should be responsible for policymaking apply with even greater force where judicial delegations are concerned. "By constitutional design, courts are *less* politically accountable than both Congress *and* administrative agencies."[81] That courts lack access to the institutional resources necessary for making policy further weighs in favor of applying nondelegation principles when Congress delegates power to the courts.[82]

This Comment connects the intuition that nondelegation concerns apply to delegations from Congress to the courts to the idea that judges enforce nondelegation through narrowing statutory constructions. The following sections argue that the same nondelegation principles served by the presumption against extraterritoriality in the executive agency context apply when the Court uses the canon to constrain the discretion of the judiciary. Just as traditional nondelegation cases focus on upholding Congress' constitutional designation as the nation's policymaking body, decisions invoking the presumption seek to preserve Congress' policy-making role. When invoking the presumption against extraterritoriality, the Court effectively rejects a broad delegation (intended or otherwise) of foreign relations power by declining to make the inherently policy-laden choice of whether to apply U.S. statutes abroad. By refusing to seize upon congressional silence as a grant of broad power that would allow the judiciary to unilaterally determine the extraterritorial effect of U.S. statutes, the Court speaks volumes about its structural role.

80. Nielson, *supra* note 78, at 241.

81. *Id.* at 267.

82. Lemos, *supra* note 78, at 445 ("If anything, [courts' lack of policy expertise as compared to administrative agencies] suggest[s] that delegations to courts should be especially disfavored.").

B. Judicial Nondelegation and Extraterritoriality

This Section argues that by applying the presumption against extraterritoriality, the Supreme Court rejects a broad delegation of foreign relations power from Congress to the judiciary—the power to determine whether statutes apply extraterritorially. This characterization makes sense on several levels. First, the rationales for the presumption against extraterritoriality align with the purposes of the nondelegation doctrine. Second, both the presumption and nondelegation doctrine place similar demands on Congress, requesting guidance rather than restricting congressional power. Third, Supreme Court cases invoking the presumption against extraterritoriality are replete with evidence of nondelegation principles. Fourth, the presumption against extraterritoriality also fits the mold of a less conventional form of nondelegation—the major questions doctrine. These similarities provide solid evidence that the presumption against extraterritoriality embodies nondelegation principles.

1. Shared rationales

The presumption against extraterritoriality should be understood as nondelegation because the two seemingly distinct doctrines are based on nearly identical rationales. Both doctrines are grounded in the notion that some policy decisions simply must be made by Congress.

On one hand, the nondelegation doctrine is a recognition that "the basic policy decisions governing society are to be made by the Legislature."[83] While Congress may delegate certain powers to other branches, which have their own constitutional powers, it alone can make "strictly and exclusively legislative" decisions.[84] When Congress makes large delegations of power to administrative agencies, the modern Supreme Court uses narrowing statutory constructions to shift complicated policy questions back to the legislative branch.[85]

Just as it uses narrowing interpretations to blunt statutory delegations that would transfer too much power to administrative

83. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

84. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

85. *See supra* Section I.A.

agencies, the Court utilizes the presumption against extraterritoriality to shift the policymaking power to determine whether to apply U.S. law extraterritorially back to Congress. That is, in cases where large foreign policy consequences might result, the Court uses the presumption against extraterritoriality to "defer[] such decisions, quite appropriately, to the political branches."[86] Indeed, the Court invokes the presumption precisely because policymaking by the courts poses a "danger of unwarranted judicial interference in the conduct of foreign policy."[87] By preventing courts from unilaterally deciding the statute's geographic scope, the presumption ensures Congress makes that important policy choice. Thus, both the nondelegation doctrine and the presumption against extraterritoriality protect structural values by routing policy decisions through the legislative process rather than the courts.

The institutional competence considerations undergirding the presumption against extraterritoriality provide further evidence of its fit as a nondelegation principle. The Court applies the presumption because "[Congress] alone has the facilities necessary to make fairly such an important policy decision" as whether to apply a statute extraterritorially.[88] Extending a statute outside of U.S. borders is one decision that requires extensive information-gathering and comprehensive decision-making capacities that courts simply do not have. The conventional nondelegation doctrine involves similar concerns.[89] In the words of Professor Aaron Nielson: "Congress alone is entrusted with legislative powers because Congress alone is institutionally designed to use them well, and, equally significant, because Congress is uniquely restrained in its ability to abuse them."[90]

86. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

87. *Id.* at 1661.

88. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957). The Court has routinely quoted this language in extraterritoriality decisions, indicating that it considers the decision of a statute's extraterritorial application a highly sensitive policy choice. *See, e.g.*, *Kiobel*, 133 S. Ct. at 1664 (quoting EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991)).

89. *See infra* note 186.

90. Nielson, *supra* note 78, at 244.

2. Effect on Congress

The requirements that the presumption against extraterritoriality imposes on Congress closely resemble those required by the Court's traditional nondelegation cases. The nondelegation doctrine requires only that Congress articulate an "intelligible principle" when it is delegating power, meaning that it broadly "delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."[91] The presumption against extraterritoriality, meanwhile, is overcome only by "the affirmative intention of the Congress clearly expressed."[92] In both instances, the judiciary's demands on Congress are modest—supply a broad principle directing the use of legislative power to executive agencies or, in the case of the presumption, specify that a statutory provision should apply to foreign activity. While the two requirements are not identical, the differences are due largely to the differences between congressional delegations to agencies and courts, respectively. When Congress delegates to an agency, it typically indicates by statute that the agency has power to regulate in accordance with a specified standard. By contrast, delegations to the judiciary are rare,[93] and *explicit* delegations are almost nonexistent. But whether the Court requests an intelligible principle or an indication of extraterritorial intent, it is doing the same thing in both cases—requesting that Congress supply more direction. In this sense, the presumption against extraterritoriality and the nondelegation doctrine impose similar requirements on Congress.

3. Judicial nondelegation in the Court's extraterritoriality jurisprudence

Supreme Court cases invoking the presumption against extraterritoriality should be understood as nondelegation cases because they typically involve the type of broad statutes that raise nondelegation concerns. The following paragraphs demonstrate how the Court applies the presumption against extraterritoriality to statutes that are natural targets for nondelegation challenges. These

91. Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).
92. *Benz*, 353 U.S. at 147.
93. Lemos, *supra* note 78, at 444.

statutes are not only silent on the question of extraterritoriality, but frequently contain large delegations of power to the judiciary.

a. Aramco. The first such example is *Aramco*, where the Court held that Title VII, an employment discrimination statute, did not apply to discriminatory conduct occurring in Saudi Arabia.[94] In vague, sweeping language, Title VII mandates that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[95] The responsibility for filling the many gaps left by the statute's broad terms has fallen to the courts.[96] Confronted with the question of whether Title VII applied to overseas activity, the Court invoked the presumption against extraterritoriality because "[w]ithout clearer evidence of congressional intent" it was "unwilling to ascribe to [Congress] a policy which would raise difficult issues of international law."[97] Viewed through the lens of nondelegation, the Court determined that the decision of whether to apply a statute abroad was so policy-heavy that its judicial interpretative powers were maxed out; to unilaterally extend U.S. law abroad would be to exercise policymaking power that the Constitution vests in Congress rather than courts.[98]

b. Morrison v. National Australia Bank Ltd. The Court's next major extraterritoriality case, *Morrison v. National Australia Bank Ltd*., also fits the nondelegation mold. Recall that *Morrison* considered whether the judicially created cause of action under section 10(b) of the Securities Exchange Act of 1934 applied to

94. EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244 (1991).

95. 42 U.S.C. § 2000e-2(a) (2012).

96. *See* Lemos, *supra* note 78, at 429 n.122 and accompanying text.

97. *Aramco*, 499 U.S. at 255; *see also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (invoking the presumption to "ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches" (citations omitted)).

98. Note that *Aramco* is typically understood as applying the presumption against extraterritoriality to restrict the *executive* branch's ability to make the decision of extraterritoriality unilaterally. *See, e.g.*, Sunstein, *supra* note 71, at 316. Still, the case can also be understood as restricting a delegation to the judiciary; given Title VII's broad terms, the lack of direction on the question of extraterritoriality might be viewed as a congressional invitation for judicial policy making—in other words, a delegation.

extraterritorial conduct.[99] Once again, section 10(b) involves broad, vague language.[100] A major reason that the Court applied the presumption against extraterritoriality was to avoid the shortfalls of the open-ended tests lower courts had used in evaluating the extraterritoriality of 10(b). These tests—"complex in formulation and unpredictable in application"—focused largely on divining what Congress would have wanted if it had considered the question of extraterritoriality.[101] By guessing at Congress' intent, *Morrison* suggests, lower courts were merely making foreign policy choices under the guise of interpreting congressional intent. According to the majority, the confusion and unpredictability that resulted from this judicial lawmaking "demonstrate[d] the wisdom of the presumption against extraterritoriality."[102]

Morrison's concern with the indeterminacy of lower court extraterritoriality tests evinces the Court's preoccupation with the same structural considerations that motivate the nondelegation doctrine. The Court was not so much concerned with whether section 10(b) should apply extraterritorially, but whether Congress had in fact designated it as an extraterritorial statute. Just as in nondelegation cases, where the Court ensures that Congress does not delegate pure policymaking authority to another branch, *Morrison* shows a profound concern with lower-court tests under which judges were "essentially resolving matters of policy."[103] That the Court focused less on the policy choice itself and more on the *body* making the policy choice suggests that the presumption is an expression of nondelegation.

c. Kiobel v. Royal Dutch Petroleum Co. In *Kiobel*, too, the Court's use of the presumption against extraterritoriality comports with nondelegation principles. The *Kiobel* Court was tasked with

99. *See supra* note 17 and accompanying text.

100. 15 U.S.C. § 78j ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange— . . . (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

101. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 248 (2010).

102. *Id.* at 261.

103. *Id.* at 259.

determining whether the ATS applies to torts occurring outside the United States.[104] The ATS, enacted by the first Congress in 1789, states: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."[105] The statute is jurisdictional only and does not create a cause of action;[106] its brevity leaves many details in question.[107] Like Congress' short, sweeping directions in Title VII and section 10(b) of the Exchange Act, the ATS is a fitting example of a broad delegation from Congress to the judiciary. And, again, it is a statute to which the Court has applied the presumption against extraterritoriality.

In *Kiobel*, the Court held that although the ATS has no substantive provisions, "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS."[108] The "principles" to which the Court refers are the need for courts to avoid the "danger of unwarranted judicial interference in the conduct of foreign policy"[109] and the risk of "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[110] As authority for these principles, *Kiobel* cited *Sosa v. Alvarez-Machain*, which has been highlighted as an example of the Court adopting narrowing statutory construction to avoid nondelegation issues.[111] In *Sosa*, the Court declined to afford courts free reign to recognize causes of action under the ATS and instead cabined such causes of action to norms of international law "defined with a specificity comparable to

104. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

105. 28 U.S.C. § 1350 (2012).

106. The ATS "does not directly regulate conduct or afford relief. It instead allows federal courts to recognize certain causes of action based on sufficiently definite norms of international law." *Kiobel*, 133 S. Ct. at 1664.

107. Though used several times in the United States' early history, the statute fell into disuse to such a degree that Judge Friendly called it a "legal Lohengrin" because "no one seem[ed] to know whence it came." *See* IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975).

108. *Kiobel*, 133 S. Ct. at 1664.

109. *Id*.

110. *Id*. (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)); *see also* Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AM. J. INT'L L. UNBOUND 40, 43 (2016).

111. Nielson, *supra* note 78, at 289.

the features" of those that existed when the ATS was passed.[112] It did so, at least partly, because courts "have no congressional mandate to seek out and define new and debatable violations of the law of nations."[113]

By invoking these same concerns about the role of courts vis-à-vis the political branches in *Kiobel*, the Court signals that the principles underlying the presumption against extraterritoriality are the same nondelegation concerns it expresses in *Sosa*. Both *Sosa* and *Kiobel* involve "a common nondelegation move"—giving a statute a narrow construction in order to avoid nondelegation issues.[114] In *Sosa*, which involved significant domestic conduct, the Court used a narrowing construction based on historical evidence to confine judicial discretion.[115] In *Kiobel*, it used the presumption against extraterritoriality. But both cases ultimately reflect judicial preoccupation with the same structural principle—nondelegation.

d. RJR Nabisco, Inc. v. European Community. The breadth of the statutes at issue in *Aramco*, *Morrison*, and *Kiobel* provide a useful and dramatic illustration of the nondelegation concerns motivating the Court in extraterritoriality cases. But the statute as a whole need not be broad or ambiguous for nondelegation concerns to apply. So long as Congress, by silence or otherwise, has effectively delegated a momentous policy choice to the judiciary, the same structural concerns are present. The Court's opinion in *RJR Nabisco* implicitly suggests that the Court considers the question of extraterritoriality alone a large enough policy choice to warrant a narrowing construction of the statute by way of the presumption. Because the decision to allow private parties to sue is effectively a separate policy choice that carries separate foreign affairs consequences, the Court's nondelegation concerns do not dissipate when Congress has expressed an intent to apply a statute's substantive provisions abroad. Thus, even though RICO's provisions are quite detailed when compared to statutes in other presumption-against-extraterritoriality

112. *Sosa*, 542 U.S. at 727.

113. *Id*. at 728.

114. Nielson, *supra* note 78, at 289.

115. *Sosa*, 542 U.S. at 725 ("[W]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").

cases,[116] Congress' silence regarding the extraterritorial application of RICO's private right of action still delegates a significant policy decision to the courts. By applying the presumption against extraterritoriality, the Supreme Court adopts a narrowing statutory construction to rebuff that delegation.

e. Apparent inconsistencies. It may be argued that these examples cut *against* considering the presumption against extraterritoriality as nondelegation since courts have previously accepted the invitation to fill gaps in the substantive provisions of several of these statutes when applied to domestic parties and conduct. For example, Title VII's broad language has left room for significant judicial innovation.[117] Similarly, several justices have described the cause of action implied from section 10(b) as "a judicial oak which has grown from little more than a legislative acorn."[118] If the Supreme Court is willing to fill in substantive provisions—which undoubtedly involve at least some policy choices—in the domestic context, why would it shy away from making the policy choice of whether to apply the statute extraterritorially? This was essentially the argument of Justice Stevens' *Morrison* concurrence, which challenged the Court's reluctance to engage in case-by-case reasoning on the question of extraterritorial application when the "entire area of law [surrounding section 10(b)] is replete with judge-made rules, which give concrete meaning to Congress' general commands."[119] In light of the apparent discrepancy between the Supreme Court's interpretive approach for foreign and domestic applications of the same statutes, it might seem that the presumption against extraterritoriality does not embody nondelegation principles.

There are at least two possible explanations for this apparent inconsistency. First, the Supreme Court may treat the question of whether to apply a law extraterritorially differently because of its

116. *See supra* notes 30–38 and accompanying text.

117. *See, e.g.*, Lemos, *supra* note 78, at 430, 433; Laura P. Moyer & Holley Tankersley, *Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals*, 65 POL. RES. Q. 784, 784 (2012) (noting that "lack of legislative guidance" in Title VII led to judicial policy-making).

118. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 276 (2010) (Stevens, J., concurring in the judgment) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 737 (1975) (Rehnquist, J.)).

119. *Id.*

impact on foreign affairs. As previously argued, the Court has signaled that the question of extraterritoriality is a sufficiently momentous foreign policy decision that it triggers nondelegation concerns by itself.[120] Even if the question of extraterritoriality alone were not sufficient to warrant nondelegation scrutiny, the Court has historically been reticent to resolve matters of foreign affairs, preferring to leave such matters to the political branches.[121] Indeed, concern about the judiciary "run[ning] interference in . . . a delicate field of international relations"[122] is one of the Court's primary justifications for the presumption against extraterritoriality. When there is a broad grant of policymaking authority to the judiciary and the interpretive question involves foreign affairs, the combination of these factors may bump the issue over the nondelegation threshold.

In other words, even if no nondelegation concerns arise when courts fill gaps with respect to a particular statute's *domestic* application, there may still be nondelegation problems when courts are asked both to fill gaps and make sensitive foreign policy decisions. Under this understanding, the presumption against extraterritoriality reflects nondelegation principles because it protects the division of power established by the Constitution, which "assigns principal policymaking authority, as well as principal authority over foreign affairs, to the legislative and executive branches rather than to the judicial branch."[123]

The second explanation is that the Court has pivoted away from the type of broad, judicial gap-filling that was previously the norm. In other words, the apparent inconsistency in viewing the presumption against extraterritoriality as judicial nondelegation when the Court has previously filled gaps in domestic applications of the same statutes may boil down to a shift in the Court's view about judicial gap-filling,[124] especially where extraterritoriality is concerned.

120. *See supra* note 86 and accompanying text.

121. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 211 (1962).

122. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957).

123. Bradley, *supra* note 54, at 516.

124. See, for example, *Alexander v. Sandoval*, 532 U.S. 275 (2001), where the Court declined to imply a private cause of action for section 602 of Title VI because "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Id.* at 286. The Court had previously implied a cause of action to the adjacent section 601 of Title VI, Cannon v. Univ. of Chi., 441 U.S. 677 (1979), but "[h]aving sworn off the habit of venturing beyond Congress's intent, [it would] not accept [the] invitation to

For example, the majority in *Morrison* countered Justice Stevens's observations about judge-made rules[125] by pointing out that court rulings in section 10(b) cases had resulted in widespread confusion: "The results of judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court—demonstrate the wisdom of the presumption against extraterritoriality."[126]

In addition to its reluctance to undertake extraterritoriality inquiries with little statutory guidance in other contexts, the Supreme Court may also be rethinking whether the presumption against extraterritoriality should not apply to antitrust cases. The Sherman Act is arguably the best example of a broad delegation of policymaking power from Congress to courts,[127] a delegation courts have accepted wholeheartedly. And unlike Title VII and section 10(b), the presumption against extraterritoriality apparently does not apply to antitrust suits under the Sherman Act.[128] This, however, may be changing. Justice Alito's opinion in *RJR Nabisco* casts doubt on the rationales articulated in antitrust cases decided "before we honed our extraterritoriality jurisprudence in *Morrison* and *Kiobel*."[129] Although Justice Alito was discussing cases interpreting the Clayton Act rather than the Sherman Act, his opinion suggests that recent developments in the Court's extraterritoriality jurisprudence may

have one last drink." *Alexander*, 532 U.S. at 287; *see also Cannon*, 441 U.S. at 718 (Rehnquist, J., concurring) ("Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but . . . this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.").

125. *See supra* note 119 and accompanying text.

126. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

127. Lemos, *supra* note 78, at 461. Professor Lemos notes that the Sherman Act's legislative history suggests that Congress intended courts to fill in the contours of the statute in the common law tradition.

128. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814 (1993) (Scalia, J., dissenting).

129. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2110 (2016). Justice Alito's response to an argument that RICO should be interpreted similarly to the Clayton Act, since Congress modeled RICO after the Clayton Act, suggests that the modern presumption may conflict with past interpretations of antitrust statutes. In *Pfizer Inc. v. Government of India*, 434 U.S. 308, 314–15 (1978), the Court had allowed India to sue under the Clayton Act for extraterritorial conduct. Justice Alito observed that *Pfizer* was decided before the Court had "honed" its presumption against extraterritorially jurisprudence, implying that analogy to *Pfizer* was unpersuasive.

have altered the playing field for future antitrust cases. This is especially true given that Justice Alito cites private antitrust suits as a source of "considerable controversy in other nations."[130] Justice Scalia's dissenting opinion in *Hartford Fire* also seemed to hint at this possibility; if not for the Supreme Court precedent on point, which he begrudgingly followed, Scalia would have applied the presumption against extraterritoriality.[131] These indications suggest the Court may not have had its final say on the presumption in relation to antitrust cases.[132] This in turn provides further evidence that the Supreme Court's willingness to accept congressional invitations to fill large gaps in broad statutes may be decreasing, at least where questions of extraterritoriality are implicated.

4. The presumption against extraterritoriality and "major questions"

The presumption against extraterritoriality might also be considered nondelegation through the "major questions" doctrine. The basic idea of the major questions doctrine—a species of nondelegation—is that some questions are simply too important for Congress to delegate to another branch, particularly when the delegation is purportedly accomplished through inauspicious statutory language. Put differently, the Court gives narrowing constructions in cases that "both (1) involve a 'fundamental' or 'extraordinary' expansion of regulatory authority and (2) are based on a 'vague or ancillary' statutory provision."[133] The Supreme Court has invoked this doctrine to give a narrowing construction to congressional delegations to executive agencies in a variety of famous cases,[134] including *Whitman v. American Trucking*,[135] *FDA v. Brown & Williams Tobacco Corp.*,[136] *Gonzales v. Oregon*,[137] and *King v.*

130. *RJR Nabisco*, 136 S. Ct. at 2016 (internal quotations omitted).

131. *Hartford Fire*, 509 U.S. at 814 (Scalia, J., dissenting).

132. Of course, any reconsideration of whether the presumption against extraterritoriality applies to the Sherman Act would necessarily involve interpreting Congress' extraterritorial intent as expressed in the Foreign Trade and Antitrust Improvements Act, 15 U.S.C. § 6a (2012).

133. Loshin & Nielson, *supra* note 72, at 22.

134. *Id.* at 10, 37.

135. 531 U.S. 457 (2001).

136. 529 U.S. 120 (2000).

137. 546 U.S. 243 (2006).

Burwell.[138] In essence, the Court avoids an expansive interpretation of statutory text that does not clearly contemplate the expansive result. For example, the Supreme Court did not give *Chevron* deference to the FDA's interpretation of the term "drug" as including nicotine because the power to regulate the entire tobacco industry was so large that Congress could not have intended to delegate it to the FDA through a single word.[139]

The presumption against extraterritoriality might be viewed as an application of the major questions doctrine to congressional delegations to the judiciary. When it employs the presumption, the Court could be seen as holding that the question of extraterritorial application is simply too large a policy decision to be delegated to courts through congressional silence. Congress, the Court might assume, simply would not hide the "elephant" of extraterritoriality in the "mousehole" of silence or ambiguous text.

Of course, the major questions doctrine has been criticized for its indeterminacy and amenability to judicial manipulation: "One judge's mouse is another judge's elephant, and it ever will be so."[140] Although this assessment is a valid critique of the major questions doctrine as applied to executive agencies, the problem of indeterminacy is less acute in the narrow context of extraterritoriality.[141] Most cases invoking the major questions doctrine do so on an ad hoc and idiosyncratic basis—courts use the doctrine to narrow the language of a single statute in a way unlikely to be replicated for other statutes. The extraterritoriality inquiry, on the other hand, is an overarching question that recurs across a number of different statutes. In essence, the Supreme Court has categorically indicated that the question of extraterritoriality, either for a statute's substantive provisions or private cause of action, is always a major question. While the decision to label extraterritoriality

138. 135 S. Ct. 2480 (2015)

139. *Brown & Williamson Tobacco*, 529 U.S. at 133 ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.").

140. Loshin & Nielson, *supra* note 72, at 23.

141. *See* Sunstein, *supra* note 71, at 341 (noting that nondelegation canons like the presumption against extraterritoriality "do not require judges to resolve a hard issue about degree (how much discretion is too much discretion?) and allow judges instead to draw clear lines (for example, if the statute is ambiguous, it may not be applied extraterritorially)").

as a major question in the first place may be subject to scrutiny, the doctrine can be consistently applied after that threshold decision. In this sense, the presumption-against-extraterritoriality brand of the major questions doctrine results not in unpredictable judicial cherry picking, but a "stable background against which Congress can legislate with predictable effects."[142]

In sum, the presumption against extraterritoriality should be understood as an incarnation of nondelegation principles. Both interpretive tools are based on the fundamental premise that Congress cannot delegate certain legislative authority to other branches of government for structural and institutional competence reasons. Both place minimal demands on Congress—requesting a modicum of guidance rather than limiting congressional power per se. Moreover, the Supreme Court's recent presumption-against-extraterritoriality cases bear the hallmarks of nondelegation and fit comfortably within alternative formulations of the nondelegation doctrine.

III. EXTANT EXTRATERRITORIALITY PUZZLES AND NONDELEGATION

Unsurprisingly, the Court's use of the presumption against extraterritoriality has sparked significant discussion in academic circles. The vast majority of the commentary, especially regarding recent cases, has been negative. Critics have challenged the presumption as a crude tool for managing foreign affairs and understanding congressional intent. They also dispute the canon's efficacy as a separation-of-powers tool, suggesting that the Court overrides legislative intent, cuts the executive out of the extraterritorial equation, and demands too much of Congress when it applies the presumption separately to a statute's substantive provisions and private cause of action. These alleged deficiencies can ultimately be explained by viewing the presumption against extraterritoriality as a principle of nondelegation. Specifically, the nondelegation understanding makes sense of why the Court (A) applies the presumption in cases devoid of foreign controversy, (B) describes the presumption as a "commonsense" view of congressional intent, (C) is not exercising judicial activism, (D)

142. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010).

applies the presumption to causes of action underlying jurisdictional statutes, and (E) has not adopted alternatives to the presumption.

A. Nondelegation and Foreign Conflict

The need to avoid unintended foreign conflicts is a recurring theme in presumption-against-extraterritoriality cases. The Supreme Court has stated that it invokes the presumption in cases where congressional intent is ambiguous to "protect against unintended clashes between [U.S.] laws and those of other nations."[143] "Risk of conflict," the Court has said, brings "the need to enforce the presumption [to] its apex," especially with respect to private suits. But as the Court itself acknowledges, "risk of conflict between [an] American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality."[144]

1. Overinclusivity and nondelegation

Seizing on this apparent anomaly, a number of scholars have questioned why a canon used to prevent foreign conflict applies where such conflict is clearly impossible. Professor Zachary Clopton, for example, argues the presumption is overinclusive and therefore poorly tailored to the role of preventing conflict with foreign laws.[145] For this proposition, he cites *Smith v. United States*, where the Supreme Court applied the presumption against extraterritoriality to a tort claim based on conduct occurring on a scientific expedition in Antarctica, which has no law and is governed by no foreign sovereign.[146] The result in *Smith*, Clopton implies, demonstrates the absurdity of the presumption as a means for managing foreign

143. EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); *see also* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (stating that the presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries"). Note that this rationale emphasizes the potential for conflicts with *foreign* law (the laws of foreign states), rather than international law, which, in the context of extraterritoriality, typically means customary international law. *See* Clopton, *supra* note 53, at 11.

144. *RJR Nabisco*, 136 S. Ct. at 2107 (internal quotations omitted).

145. Clopton, *supra* note 53, at 5, 11, 16 (arguing that "the cases to which courts have applied the presumption demand more than a one-size-fits-all response").

146. *Id.* at 11 (citing Smith v. United States, 507 U.S. 197, 199 (1993)).

conflict.[147] He further argues that because international law principles of prescriptive jurisdiction allow jurisdiction on bases besides territoriality, the presumption is unduly restrictive.[148] Echoing these sentiments, Professor Carlos Vasquez claims that the current vision of extraterritoriality "significantly overprotects the interest in international comity,"[149] while Professor Larry Kramer contends that "before restricting American law to avoid conflicts with foreign law, [the Court] should make sure that there is a conflict."[150] In short, these scholars protest that the presumption is needlessly conciliatory to foreign interests.

It is undoubtedly true that the strict presumption against extraterritoriality is overbroad in its aversion to foreign conflict. This result, however, is not merely an unintended consequence of a haphazardly drawn bright line rule. Rather, it is the result required by the nondelegation doctrine. Adopting an interpretation that would extend the force of U.S. law to the territory of another sovereign is unquestionably a policy choice, regardless of whether international law allows the result. As the Court has expressly recognized, questions of foreign policy "should be directed to the Congress rather than to us."[151] Although the Supreme Court's decision to draw the default line of statutory application at the United States' territorial borders may seem arbitrary, it is the only decision that effectively minimizes the Court's policymaking role. Ad hoc approaches,[152] a presumption in favor of extraterritoriality,[153] and even the *Charming Betsy* canon (considered alone)[154] would all require the Court to decide by itself whether an ambiguous statute should apply abroad. That choice oozes policy in a field—foreign

147. *Id*.

148. *Id*. at 11, 24.

149. Carlos M. Vasquez, *Out-Beale-ing Beale*, 110 AM. J. INT'L L. UNBOUND 68, 69 (2016).

150. Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 217 (1991).

151. McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 22 (1963).

152. *See infra* Section III.E.2.

153. *See* Jonathan Turley, *"When in Rome": Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598, 659–70 (1990) (proposing a presumption in favor of extraterritoriality).

154. *See infra* Section III.E.1.

relations—the Court has described as "committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government."[155]

While the Court often does frame its justifications for the presumption in terms of foreign affairs, it is quick to recognize that it is guarding against unintended consequences that courts simply do not have the institutional capacity to foresee. In *Benz v. Compania Naviera Hidalgo, S.A.*, for example, the Supreme Court refused to apply a U.S. labor statute to a dispute between a foreign ship and its foreign crew because, when it came to the question of extraterritoriality, "[Congress] alone ha[d] the facilities necessary to make fairly such an important policy decision."[156] This is a nondelegation argument. That the Court applies the presumption in all cases, even those where no foreign conflict appears, shows that the focus is on the decision-making body. Thus, the presumption does not reflect concern about the foreign policy outcome in a particular case, but rather the Court's structural judgment that the Constitution assigns policy choices of this type to the political branches. In turn, it reflects the intuition that following that structural allocation is likely to produce desirable, or at least democratically sustainable, foreign policy results as a byproduct.

The nondelegation paradigm thus provides an explanation for the presumption's supposed foreign affairs problem. The Court applies the presumption in all cases, even those where foreign conflict is not a bona fide issue because the decision of extraterritorial application is, categorically, a policy decision Congress should make. Of course, labeling the extraterritoriality question as a policy choice in cases that do not involve foreign conflict may, on the surface, seem to beg the question. After all, the policy element would seem to disappear where no ostensible foreign conflict is immediately salient. But cases occurring in the territory of another sovereign inevitably involve foreign *relations* even if they do not involve foreign *conflict*. Even if a court concludes that applying a statute abroad would raise no foreign relations problems, that conclusion is itself a foreign policy decision that judges should not make. On a practical level, courts' inability to make holistic decisions

155. Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

156. Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 138–39, 146–47 (1957).

may prevent them from foreseeing all of the consequences of foreign policy decisions.[157] In other words, the problem is not that each case is necessarily sensitive per se, but that foreign affairs cases *as a category* involve sensitive choices.

Thus, even where practical obstacles dissipate, the structural prohibition on judicial lawmaking remains to prevent lower courts from getting too close to the foreign-affairs abyss. Because the Supreme Court cannot decide which cases come before lower courts or review every extraterritoriality decision, it enforces nondelegation principles the only way it can—by erecting territorial boundaries that fence out judicial policymaking "across the board."[158] The line the court draws is a strict one, but it helps discourage ad hoc judicial diplomacy.

Of course, one might argue that courts can simply use traditional judicial tools to decide whether a statue applies extraterritorially so that the question of geographic scope is not a policy question at all, but an interpretative one. Under this view, the Court would not be exercising legislative power, but would be determining what Congress would have wanted had it considered the issue. (Recall that the presumption applies only to ambiguous statutes, so if Congress had provided indicia of extraterritorial intent, the presumption would be inapposite.) The problem with this approach is that when courts are asked to divine congressional intent from silence or ambiguous statutory language, they inevitably default to "resolving matters of policy."[159] This is precisely the issue the Court seeks to remedy with the presumption—"Rather than guess anew in each case, we apply the presumption in all cases."[160]

2. Underinclusivity and nondelegation

Critics also suggest that the underinclusivity of the presumption against extraterritoriality makes it inadequate as a foreign relations tool. Writing in dissent in *RJR Nabisco*, Justice Ginsburg argued that

157. *See infra* Section III.E.4.

158. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) ("We therefore apply the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law.") (internal quotations and citations omitted).

159. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 259 (2010).

160. *Id.* at 261.

barring foreign claims may increase international friction because making causes of action "available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests."[161] In accord with Justice Ginsburg's views, Professor John Knox argues that failure to enforce U.S. law may create "underregulated zones," and thereby anger foreign powers.[162] The risk of offending other nations by failing to enforce laws is particularly acute in cases where the United States has prescriptive jurisdiction to adjudicate norms of international law.[163] What's more, the presumption may fail to prevent conflicts with foreign powers that claim the right to apply their law based on notions of prescriptive jurisdiction other than territoriality, such as nationality.[164] Indeed, "there may be situations in which a permissible application of U.S. law to foreign conduct might nevertheless create jurisdictional conflict."[165]

As with concerns about an overbroad canon, however, these arguments are ultimately unavailing. Even if the presumption against extraterritoriality may result in foreign conflict, the policy decision to extend U.S. law to events occurring in a foreign country involves a policy choice that courts are not well-suited to make. In any given case, a foreign nation may argue for or against the application of U.S. law. The immense difficulty of assessing the gravity of the situation based on litigation briefs shows why courts are best served by declining to venture into the labyrinth of foreign policymaking.[166] Although the result may offend foreign nations, the situation is better left to the political branches.

In addition, because the question of extraterritoriality is one of nondelegation, consent of a foreign sovereign does not mitigate the concerns underlying the presumption. The choice still is not the

161. *RJR Nabisco*, 136 S. Ct. at 2115 (Ginsburg, J., dissenting); *see also Kiobel*, 133 S. Ct. at 1674 (Breyer, J., dissenting) ("[W]e should treat this Nation's interest in not becoming a safe harbor for violators of the most fundamental international norms as an important jurisdiction-related interest justifying application of [U.S. law].").

162. John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 380 (2010).

163. *See* Clopton, *supra* note 53, at 12, 25.

164. *Id*. at 12.

165. Hannah L. Buxbaum, *The Scope and Limitations of the Presumption Against Extraterritoriality*, 110 AM. J. INT'L L. UNBOUND 62, 66 (2016).

166. *See infra* note 273 and accompanying discussion.

judiciary's to make. The political branches might wish to avoid extraterritorial application of U.S. law in a foreign country—even when welcomed by the foreign nation—for diplomatic reasons unknown to the judiciary and unamenable to publication in an amicus brief. Or, as the Court suggested in *Kiobel*, foreign nations might respond by "haul[ing] our citizens into their courts" for conduct occurring in the United States or other foreign countries.[167] The point here is not the exact type of foreign affairs consequences that might result, but that courts are not the body the Constitution designates to evaluate such consequences.

3. The presumption and domestic connections

Of course, the question of extraterritoriality does not arise only in purely foreign cases, "[f]or it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States."[168] The Court has affirmed that the presumption is implicated even in cases where some of the relevant conduct or effects occur in the United States. In the inimitable words of Justice Scalia, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever some domestic activity is involved in the case."[169] One might claim that this approach is too restrictive because the United States likely has grounds for jurisdiction under international law; the domestic connection, it would seem, should avert foreign conflict.[170]

Again, understanding the presumption as nondelegation sheds light on this question. While scholars have typically assumed Justice Scalia's watchdog is on the lookout for foreign affairs conflicts,[171] this seems unlikely given that *Morrison* mentions international conflict only as an afterthought.[172] Indeed, Justice Scalia justifies the

167. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (emphasis omitted).

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

169. *Id*. (emphasis omitted).

170. *See id*. at 285 (Stevens, J., concurring in the judgment) (providing examples of domestic conduct that would not satisfy the *Morrison* Court's test, but have a substantial connection to the United States).

171. *See, e.g*., Clopton, *supra* note 53, at 7.

172. *See Morrison*, 561 U.S. at 269 (pointing to the "probability of incompatibility with the applicable laws of other countries").

presumption primarily in terms of its superiority to the indeterminate, policy-oriented tests used by lower courts to assess the extraterritoriality of section 10(b) of the Exchange Act.[173] This suggests that the watchdog to which Justice Scalia refers is charged not merely with standing guard against foreign conflict but also with protecting the balance of structural powers mandated by the Constitution. Because the decision to apply a statute extraterritorially involves enormous foreign policy power, even when the case involves domestic elements (as most foreign affairs cases do), the Court must apply the presumption. In doing so, it appropriately refuses a large delegation of power to determine whether to enforce a statute outside the borders of the United States.

B. Nondelegation, the Presumption, and Congressional Intent

Another common justification for the presumption against extraterritoriality is the "commonsense notion that Congress generally legislates with domestic concerns in mind."[174] This basic rationale is the essence of the presumption against extraterritoriality—the Court assumes that all statutes begin from a domestic baseline. Although some call this the only legitimate rationale for the presumption,[175] many academics contend the presumption is not, in reality, a good proxy for congressional intent.[176]

As evidence of this view, some point to congressional responses to cases that invoke the presumption against extraterritoriality. For example, one year after *Aramco*, where the Supreme Court held that Title VII's employment discrimination protections did not apply to conduct occurring in Saudi Arabia, Congress amended the statute to apply abroad in certain cases.[177] The congressional response to

173. *Id*. at 258–59 ("There is no more damning indictment of the conduct and effects test than the Second Circuit's own declaration that the presence or absence of any single factor which was considered in other cases . . . is not necessarily dispositive in future cases.") (internal quotations omitted).

174. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (internal quotations and citations omitted).

175. Dodge, *supra* note 10, at 123.

176. *See, e.g.*, Clopton, *supra* note 53, at 17 ("[I]f the presumption is intended to respect the decisions of the political branches—legislative and executive—it needs work.").

177. Act of Nov. 21, 1991, Pub. L. No. 102-166, sec. 109, 105 Stat. 1071, 1077–78;

Morrison came even faster—only one month after the Court applied the presumption against extraterritoriality to 10(b) actions, Congress specified that the government (but not private plaintiffs) had power to prosecute foreign securities fraud.[178] In the eyes of the presumption's detractors, these legislative responses show that the canon "does not always hit Congress's mark."[179] Critics also argue that when Congress does consider whether to apply U.S. law abroad, it does not adopt the avenue that would avoid conflict with foreign law. As Professor Dodge explains, "avoiding conflict with foreign law does not seem to rank very high on Congress's list of priorities."[180] Others, such as Professor Lea Brilmayer, observe that in most cases Congress does not consider questions of extraterritoriality and "ha[s] no actual intent on territorial reach."[181]

Understanding the presumption against extraterritoriality as an application of the nondelegation doctrine harmonizes the seeming mismatch between the presumption and congressional intent. The nondelegation paradigm suggests that the presumption's "commonsense" assumption about congressional intent is normative, not descriptive. That is, because of the nondelegation concerns that would arise if courts were tasked with making policy decisions about the geographic scope of the seemingly numberless federal statutes that are silent as to extraterritoriality, the Supreme Court assumes Congress legislates domestically. Just as in recent conventional nondelegation cases, the Court, in effect, assumes that Congress does not intend this result because "such a 'sweeping delegation of legislative power' . . . might be unconstitutional" under the nondelegation doctrine.[182] In this sense, the "commonsense notion" is grounded more in the Court's views about its own role in deciding

Clopton, *supra* note 53, at 14.

178. Dodd-Frank Act, Pub. L. No. 111-203, sec. 929P(b), 124 Stat. 1376, 1864–65 (2010); Clopton, *supra* note 53, at 14.

179. Clopton, *supra* note 53, at 15.

180. Dodge, *supra* note 10, at 116.

181. Lea Brilmayer, *Interest Analysis and the Myth of Legislative Intent*, 78 MICH. L. REV. 392, 393 (1980); *see also* Pamela K. Bookman, *Doubling Down on Litigation Isolationism*, 110 AM. J. INT'L L. UNBOUND 57, 61 (2016) (arguing that the presumption does not "track[] congressional intent . . . [because] it keeps raising the hurdle that Congress must clear in order to rebut it").

182. *See* Indus. Union Dep't v. Am. Petroleum. Inst. (The Benzene Case), 448 U.S. 607, 646 (1980).

cases than in attempting to empirically estimate a purely hypothetical congressional intent.[183]

Moreover, congressional reaction to cases invoking the presumption against extraterritoriality is not troubling when considered in terms of nondelegation. Congressional responses show only that Congress knows how to express extraterritorial intent[184] and does so in a much more detailed fashion than would courts faced with the same question.[185] In this sense, these legislative rebuttals merely demonstrate that the presumption against extraterritoriality is fulfilling its function as a nondelegation canon by forcing democratic action.[186] Courts invoking the presumption engage in an institutional dialogue with Congress, brokered by the nondelegation principles that the presumption embodies. A court applying the presumption essentially requests that Congress provide more detail about the terms of a statute, rather than attempting to divine those details from whole cloth. When Congress responds, it may apply the statute abroad, but it supplies the details necessary for extraterritorial application.

When Congress does supply these details, the statutes it passes tend to provide more specific guidance than the open-ended, multi-factor balancing tests courts seem to favor.[187] For example, when Congress amended Title VII in response to *Aramco*, it specified that Title VII did not apply to foreign conduct by companies not

183. This view is corroborated by defenses of interpretive canons generally. *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 509 (1998) ("[T]he contemporary defense of [interpretive canons] has shifted from empirical claims regarding legislative intent to a focus on substantive and institutional values. Under this framework, statutory interpretation ceases to be solely a problem of discovering meaning, [and instead] becomes an issue of institutional competence and authority." (internal quotations and citations omitted)).

184. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010) (noting that congressional action to clarify the extraterritorial reach of Title VII after *Aramco* only "shows . . . that Congress knows how to give a statute explicit extraterritorial effect—and how to limit that effect to particular applications").

185. This difference in detail reflects the differing institutional competencies of Congress and the judiciary.

186. *See* Sunstein, *supra* note 71, at 317 (noting that nondelegation canons like the presumption against extraterritoriality "represent a salutary kind of democracy-forcing minimalism, designed to ensure that certain choices are made by an institution with a superior democratic pedigree").

187. Bradley, *supra* note 54, at 554.

controlled by U.S. shareholders.[188] As Professor Bradley observes, this succinct answer to a complicated extraterritoriality question is much different from the approach courts would likely supply.[189] By enforcing nondelegation principles in a way that compels Congress to act, the presumption against extraterritoriality ultimately results in the best approximation of congressional intent—the one Congress itself provides.[190]

The presumption's detractors argue that its ability to inspire congressional action is significantly dulled by the impediments of the legislative process. Because legislative inertia and veto-gates prevent Congress from easily amending statutes in response to judicial application of the presumption against extraterritoriality,[191] the argument goes, the Court expects too much of Congress when it requires a clear indication of extraterritorial intent.[192] But as critics of the presumption themselves point out, Congress *has* responded to two of the Court's four major recent extraterritoriality cases.[193] At a minimum, this suggests Congress can respond to some applications of the presumption.

Even assuming the legislative process poses insurmountable difficulties, however, this means only that extraterritorial application of the statute is not sufficiently important to warrant congressional action. In the words of Professor Sunstein, "there is nothing to lament about a situation in which . . . statutes may not be applied

188. *Id*. at 552–53.

189. *Id*. at 555.

190. It is worth noting that because the Court only applies the presumption when Congress is silent as to a statute's extraterritoriality and has declined to divine congressional intent in such circumstance, *see, e.g.*, *Morrison*, 561 U.S. 247, 248 (2010), the question of empirical accuracy is all but irrelevant. Even so, the presumption may provide a better account of political branch intent than other approaches. *See infra* note 232 and accompanying text.

191. *See* Gardner, *supra* note 6, at 142 (arguing that courts that assume that Congress can respond to an application of the presumption against extraterritoriality oversimplify the issue and citing evidence that the staffers who draft statutes are unaware of the Court's interpretative canons) (citing Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 912 (2013)); *see also* Lemos, *supra* note 78, at 460 (discussing legislative inertia in the context of the conventional nondelegation doctrine).

192. Note that these critiques are not unique to the presumption against extraterritoriality, but are criticisms of interpretive canons generally. *See* Bradley, *supra* note 183, at 505–07.

193. *See supra* note 178 and accompanying discussion.

. . . extraterritorially, without congressional authorization, and in which Congress is unable to muster the will to give that authorization."[194] And while Congress may not, as a practical matter, respond perfectly to every extraterritoriality question,[195] it is certainly better equipped to make the complex policy decision than courts deciding issues on an ad hoc basis.

In sum, arguments that the presumption against extraterritoriality is a poor barometer of congressional intent are significantly less problematic when one considers the presumption in nondelegation terms. Not only do the normative nondelegation values at the heart of the presumption against extraterritoriality explain the "commonsense notion" that Congress legislates with domestic issues in mind, they are also likely to prompt Congress to clarify its intent with respect to extraterritoriality in important cases.

C. The Presumption and Accusations of Judicial Activism

Closely related to the aforementioned arguments that the presumption against extraterritoriality is a bad proxy for congressional intent are allegations that the Supreme Court employs the presumption in order to override the intent of the political branches. These accusations challenge the presumption's viability as a separation-of-powers canon,[196] alleging that it enables the judiciary to flout the views of Congress and the executive in favor of judicially-preferred ends, such as enforcing territorialism and limiting private rights of action. Viewing the presumption against

194. Sunstein, *supra* note 71, at 339; *see also* Nielson, *supra* note 78, at 264–65 ("[W]hile 'the nondelegation principle seems to raise the burdens and costs associated with the enactment of federal law,' and so 'may create a "status quo bias" . . ., these "burdens and costs" can also be seen as "an important guarantor of individual liberty, because they ensure that national governmental power may not be brought to bear against individuals without a consensus, established by legislative agreement . . . ."'" (footnotes omitted) (quoting Loshin & Nielson, *supra* note 72, at 55)).

195. *See* Gardner, *supra* note 6, at 142 (arguing that Congress may have introduced unintended error with the poorly drafted statutory response to *Morrison*).

196. Colangelo, *supra* note 5, at 51–52 (contending that the presumption, as presently constituted, "allow[s] the Court complete discretion to ignore congressional directives" and is not "faithful to its origins as essentially a separation-of-powers canon designed to effectuate legislative supremacy and judicial modesty"); *see also* Gardner, *supra* note 6, at 143 (arguing that "the presumption has run away from its stated purpose" and that "the Supreme Court poses as a faithful agent of congressional intent, but it is in fact a disciplinarian of Congress's global aspirations").

extraterritoriality through the lens of nondelegation reveals that the Court is not bent on territorialism nor biased against private litigants, but determined to ensure that—to the maximum extent possible—policy decisions are left to the political branches.

1. Overriding legislative intent?

A recurring criticism of the presumption against extraterritoriality is that courts use it to supplant, rather than interpret, congressional intent. Justice Stevens, for example, suggests that by applying the bright-line presumption against extraterritoriality, courts may abdicate their judicial duty "to give statutes the most faithful reading possible."[197] Professor Brilmayer takes this critique a step further, arguing the Supreme Court has not only abandoned its role as interpreter, but impermissibly assumed the role of lawmaker, "marginaliz[ing] Congress" at the expense of "judicial creativity."[198] Elaborating on this view, Professor Clopton contends that judges engage in activism whenever they restrict the extraterritorial application of a law that Congress meant to apply abroad.[199] From this perspective, because the presumption obtains only when a statute's extraterritorial application is unclear, there is always a chance that a court applying the presumption is engaging in activism.[200]

Admittedly, application of the presumption against extraterritoriality suffers from the same drawback that plagues conventional applications of the nondelegation doctrine—although the presumption attempts to say "this matter is for Congress to resolve," it may instead establish a default rule of territoriality, a result that Congress may or may not have intended for any given statute.[201] As critics of the presumption have pointed out, territoriality, too, is a policy choice.

These arguments, though superficially appealing, ignore the

197. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 280 (2010) (Stevens, J., concurring in the judgment).

198. Lea Brilmayer, *The New Extraterritoriality:* Morrison v. National Australia Bank, *Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 656 (2011).

199. Clopton, *supra* note 53, at 16.

200. *Id.*

201. Lemos, *supra* note at 78, at 459.

realities of the adjudicative process. Unfortunately, the judiciary does not have the luxury of tabling an issue for future consideration or referring the question to another body.[202] In extraterritoriality cases, this leaves lower courts with a Hobson's choice between actively making policy decisions about whether to extend U.S. law abroad or enforcing the territorial status quo until Congress decides otherwise.

When the presumption against extraterritoriality is understood as nondelegation it becomes clear that courts applying the presumption are not merely entrenching a preferred territorial default, but protecting structural values.[203] That these structural decisions have practical impacts is inescapable, but it does not mean that courts applying the presumption against extraterritoriality are engaging in activism. Even if invoking the presumption against extraterritoriality involves decisions with practical effects, "[a] certain degree of discretion, and thus of lawmaking inheres in most . . . judicial action."[204]

By applying the presumption against extraterritoriality, the Supreme Court thus provides lower courts with the means to avoid the nondelegation issues that would arise if judges were required to decide whether Congress would have wanted a statute to apply abroad. While the presumption directs courts to make a clear, circumscribed inquiry, many alternatives would have judges navigating the treacherous straits of international diplomacy to determine when extraterritoriality is advisable. In other words, at least in the context of deciding whether U.S. law should apply abroad, the Court is choosing the structural option that results in the least judicial policymaking.

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202. Although courts might instead invoke the political question or other justiciability doctrines to avoid considering politically-charged extraterritoriality cases altogether, use of these doctrines would do little to satisfy critics of the presumption against extraterritoriality, since judicial examination of extraterritorial cases would only decrease.

203. In this sense, when the Supreme Court applies the presumption against extraterritoriality, it engages in what Professor Bradley calls "structural activism"—"designed to protect the separation of powers between the judiciary and the political branches . . . and . . . more comfortably within the competence and authority of the judiciary than activism in applying statutes extraterritorially." Bradley, *supra* note 54, at 551–52 n.231. Of course, the term "structural *activism*" is somewhat of a misnomer, since the Court seems to be exercising *judicial* power to fulfill, quite appropriately, its responsibility to police the structural boundaries put in place by the Constitution.

204. Mistretta v. United States, 488 U.S. 361, 384–85 (1989).

Those who oppose the presumption against extraterritoriality also point out the potential for judicial abuse associated with identifying precisely when an activity is excessively extraterritorial.[205] The Supreme Court's test for this inquiry is whether the extraterritorial activity in question relates to the "focus" of Congress' statutory concern; if it does, and Congress is silent regarding foreign application, the presumption applies.[206] Not only is it difficult to pinpoint Congress' regulatory objective, these critics argue, the broad nature of the "focus" inquiry is susceptible to judicial cherry-picking.

While determining the "focus" of statutory text may be difficult[207]—and the Court has admittedly not afforded lower courts much guidance on this issue[208]—the question becomes one of construing the existing text, rather than divining the meaning of congressional silence. The requirement that the domestic conduct pertain to the "focus" of the statute ensures that Congress has truly made the choice regarding the policy at issue. If the presumption were overcome merely because a case has minor ties to the United States, but the activity Congress was seeking to regulate occurred outside the United States, courts would still be left making the policy-wrought decision of extraterritoriality for statutes silent on that point. Though demanding and potentially open to abuse, the task is one for which courts are constitutionally charged and institutionally capable.

2. Lack of deference to the executive branch

The presumption has also come under fire for giving insufficient weight to the views of the executive branch.[209] Although courts have often consulted the views of the executive in foreign affairs matters,[210] the Court has sometimes applied the presumption against

205. *See* Clopton, *supra* note 53, at 7 ("[N]othing in the canonical statement of the presumption tells courts what qualifies as an extraterritorial case.").

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

207. Brilmayer, *supra* note 181, at 393.

208. Gardner, *supra* note 6, at 135–36.

209. *See, e.g.*, Clopton, *supra* note 53, at 17.

210. The Supreme Court previously went so far as to call the executive branch the "one voice" for the nation in foreign affairs. *See* David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 954 (2014); *see also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304,

extraterritoriality over objections by the executive branch. This was the case in both *Morrison*, which declined to follow the Solicitor General's view that private securities suits could be based on foreign conduct,[211] and *Aramco*, which did not accept the EEOC's arguments that Title VII should apply abroad.[212]

Although the presumption's seeming disregard for the views of the executive is at first perplexing, this result makes sense under the nondelegation paradigm. The Court often considers the executive's views in matters of foreign affairs,[213] but the question of extraterritoriality is a question of constitutional structure. Such questions belong to the judiciary.[214] This does not mean the Supreme Court ignores the institutional role of the executive branch as a leading voice in foreign affairs. Indeed, the check of prosecutorial discretion may mitigate some of the concerns of the presumption against extraterritoriality.[215] But while the executive's views may be helpful to provide context or to explain potential policy implications, it is the responsibility of courts to determine whether there is sufficient congressional intent to displace the nondelegation concerns that would inhere if Congress had delegated the task of discerning a statute's geographic scope to the courts. In other words, even if the Court adopted the executive's position, the decision would still be the product of judicial policymaking—an outcome contrary to the nondelegation principles underlying the presumption against extraterritoriality.

3. Scrutiny of private rights of action

The Supreme Court's decision in *RJR Nabisco* spurred new separation-of-powers attacks on the Court's presumption against

320 (1936).

211. *Morrison*, 561 U.S. at 270.

212. EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991).

213. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 761 (2004) (Breyer, J., concurring).

214. Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (calling determination of whether a statute impinged on the President's constitutional recognition power a "familiar judicial exercise"); INS v. Chadha, 462 U.S. 919, 943 (1983) (holding that "[r]esolution of litigation challenging the constitutional authority of one of the three branches" was a decision for the courts).

215. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016) (citing Sosa v. Alvarez–Machain, 542 U.S. 692, 727 (2004)).

extraterritoriality doctrine. Commentators took particular issue[216] with the Court's decision to apply the presumption against extraterritoriality separately to RICO's private cause of action rather than ending its inquiry after finding that the substantive provisions of the statute applied extraterritorially.[217] Just as Justice Ginsburg argued in dissent in *RJR Nabisco*, these commentators suggest that the Court ought to adopt a statutory interpretation "linking, not separating, prohibited activities and authorized remedies."[218] Professor Anthony Colangelo, for example, argues that because Congress provided a clear indication that RICO's substantive prohibitions applied abroad, applying the presumption to RICO's private action "transform[ed] the statute that Congress enacted into one the Court would have preferred."[219] This, he claims, is the latest leg of a "myopic quest to quash the private right of action in transnational cases."[220] In line with Colangelo's views, Maggie Gardner asserts that by applying the presumption separately to private remedies, the Court was moving the goalposts—imposing a "series of hoops" to make it so "Congress cannot win."[221]

a. Private rights and nondelegation generally. Contrary to these arguments, there is a principled, structural explanation for the Court's use of the presumption against extraterritoriality. In *RJR Nabisco*, the Court explains why it applies the presumption against extraterritoriality separately to RICO's private right of action: "'Each of th[e] decisions' involved in defining a cause of action based on 'conduct within the territory of another sovereign' 'carries with it significant foreign policy implications.'"[222] The Court applies the presumption because of the distinct policy decisions involved with authorizing private causes of action to conduct occurring

216. *See, e.g.*, Gardner, *supra* note 6, at 135 (warning of "worrisome implications for separation of powers").

217. *RJR Nabisco*, 136 S. Ct. at 2106 ("[W]e separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions.").

218. *Id.* at 2113 (Ginsburg, J., dissenting).

219. Colangelo, *supra* note 5, at 53.

220. *Id.* at 55.

221. Gardner, *supra* note 6, at 141, 143.

222. *RJR Nabisco*, 136 S. Ct. at 2106 (quoting Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013)).

outside U.S. borders. In other words, the Court is concerned about nondelegation.

When Congress creates a private cause of action but fails to specify whether it applies extraterritorially, it leaves outstanding "a decision to permit enforcement without the check of prosecutorial discretion."[223] Because that decision—whether to "provid[e] a private civil remedy for foreign conduct"—involves a "potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct,"[224] it is a foreign policy choice independent of the decision to recognize a cause of action in the first place.

By applying the presumption against extraterritoriality, the Court recognizes that both of these choices belong to Congress. Just as implying a right of action for domestic litigants "allows the Judicial Branch to assume policymaking authority vested by the Constitution in the Legislative Branch,"[225] extending such a right to foreign plaintiffs without clear intent from Congress would impermissibly exercise lawmaking power.

Hence, where Congress fails to speak on the extraterritoriality issue, the Court applies the presumption to reject a delegation of policymaking authority and avoid enlisting courts in unilaterally extending the power and protections of U.S. law abroad.[226]

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223. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

224. *Id*.

225. Cannon v. Univ. of Chi., 441 U.S. 677, 743, 747 (1979) (Powell, J., dissenting) ("T]he implication of a right of action not authorized by Congress denigrates the democratic process . . . . [I]t is the constitutional function of the Legislative Branch, subject as it is to the checks of the political process, to make this judgment."); *see also* Alexander v. Sandoval, 532 U.S. 275, 286 (2001).

226. Commentators have also questioned why the Supreme Court seems to scrutinize the extraterritoriality of private causes of action more intensely than it does the substantive provisions administered by the government. The Court provided some explanation when it stated, "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Id*. (quoting *Sosa*, 542 U.S. at 727). From a nondelegation vantage point, this result may appear somewhat puzzling. If courts should not make the policy decision regarding extraterritoriality, why can they do so when the executive branch is bringing the case? One possible answer is that considered together, the executive and judicial branches have enough residual legislative power to allow extraterritorial suits to go forward without implicating separation-of-powers concerns. But the simpler answer is that, in the cases that find the presumption against extraterritoriality rebutted as to substantive provisions of the statute, there has been a clear indication of

b. Comparing statutory and judicially-implied causes of action. Critics have contended that the Court's concern with the private cause of action is misplaced because Congress itself created the cause of action. In particular, these commentators criticize the *RJR Nabisco* majority's reliance on *Kiobel* and *Sosa*. In those cases, decided under the ATS, the cause of action had to be implied by courts, whereas in *RJR Nabisco*, Congress had already provided the cause of action by statute.[227] Because the political branches intended RICO to apply to criminal activity abroad and also enacted a private right of action, the argument goes, any concerns about the extraterritorial application of the private right "had already been (democratically) taken into account and overcome," making the Court's application of the presumption "incongruous and selective."[228]

Assuming that Congress has considered the extraterritoriality question with respect to private actions, however, begs the question. The argument that statutory text showing Congress intends a statute's criminal provisions to apply extraterritorially is evidence that Congress also intends the statute's separate private right of action to extend to extraterritorial conduct requires an inferential step. This is particularly true of RICO, which does not expressly address the extraterritoriality of the statute's criminal provisions at all, but leaves that question to the statutes that specify predicate offenses.[229] Thus, the Court's application of the presumption against extraterritoriality to private rights of action is based on the equally permissible notion that Congress does not intend such actions to apply abroad.[230] Considered in light of the nondelegation concerns that drive the presumption against extraterritoriality, it is not difficult to see why the Court errs on the side of applying the presumption.

c. Private claims and political branch intent. Not only is applying the presumption against extraterritoriality separately to criminal and private rights of action at least an equally acceptable statutory

congressional intent to that effect. Thus, while the Court sometimes seems to treat executive prosecutorial discretion as a thumb on the scale, it has not yet proven to be a decisive factor.

227. Colangelo, *supra* note 5, at 54.

228. *Id.*

229. *See supra* notes 30–38 and accompanying text.

230. Under this view, the Court does not flout the democratic process at all because Congress never considered whether the private right should apply abroad in the first place.

construction, there is evidence that both political branches prefer this interpretation. Congress, as noted above, responded to the *Morrison* Court's call to clarify the extraterritorial scope of the Exchange Act of 1934 by specifying that the criminal provisions of section 10(b) apply to fraudulent activity and sales occurring abroad.[231] Notably, however, Congress declined to provide for the extraterritorial application of private 10(b) actions.[232] The executive branch, for its part, has argued in several contexts that courts should interpret ambiguous statutes to allow federal prosecutors to penalize foreign wrongdoing but limit private actions to conduct with a close domestic connection.[233] This was the case in both *RJR Nabisco* and *F. Hoffman-La Roche Ltd v. Empagran S.A.*,[234] as well as in various antitrust cases heard by circuit courts.[235] These anecdotes suggest that not only does the Court's application of the presumption against extraterritoriality not disregard the democratic process, but may also result in outcomes that the political branches approve.[236]

Ultimately, allegations that the Court's use of the presumption is motivated by anti-litigant activism fail to address why an activist judiciary bent on restricting private suits would adopt such a restrictive interpretative tool. If the Court's goal is to decimate private actions,[237] the presumption against extraterritoriality is a strange choice of armament.[238] In a war on private actions, surely the

231. *See supra* note 178 and accompanying discussion.

232. Stephan, *supra* note 110, at 42 ("Significantly, however, [Congress] left the rules for private litigation where *Morrison* had determined them.").

233. Note, however, that the Solicitor General would have allowed the *Morrison* litigants's claim to go forward. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 264 (2010).

234. 542 US 155 (2004); Brief for the United States as Amicus Curiae Supporting Vacatur at 30, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090 (2016) (No. 15-138); Brief for the United States as Amicus Curiae Supporting Petitioners at 20–21, F. Hoffmann-La Roche Ltd v. Empagran S.A., 124 S. Ct. 2359 (2004) (No. 03-724), 2004 WL 234125, at *20–21.

235. *See, e.g.*, United States v. Hui Hsiung, 778 F.3d 738 (9th Cir. 2015); Motorola Mobility, LLC v. AU Optronics Corp., 775 F.3d 816 (7th Cir. 2015).

236. Of course, the presumption would be necessary even if Congress wanted courts to decide whether causes of action apply extraterritorially. Judicial acceptance of such a delegation would inappropriately "invite[] Congress to avoid resolution of the often controversial question whether a new regulatory statute should be enforced through private litigation." Cannon v. Univ. of Chi., 441 U.S. 677, 743 (1979) (Powell, J., dissenting).

237. *See* Colangelo, *supra* note 5, at 55.

238. After all, nondelegation canons like the presumption against extraterritoriality "must rest on something other than judicial policy preferences" in order to be accepted as interpretive

Court would have chosen a weapon that would allow it the discretion to strike down private cases with impunity. The Court's restrained approach suggests that it uses the presumption to further structural rather than policy goals.

To summarize, criticism of the presumption against extra-territoriality on the grounds of judicial activism and separation of powers ultimately does not bear out. When understood in nondelegation terms, it is clear that the presumption is not *carte blanche* for activist judges with territorial sympathies, but a check on delegations of policymaking power to the judiciary. Viewed in this light, the Supreme Court's treatment of executive-branch positions and private rights of action show that it is fulfilling its constitutional role of ensuring that the political branches make major policy decisions.

D. The Presumption's Application to Jurisdictional Statutes

Another question that has vexed foreign relations scholars after both *Kiobel* and *RJR Nabisco* involves the Supreme Court's declaration that courts must apply the presumption against extraterritoriality "regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction."[239] This pronouncement troubles scholars because the presumption against extraterritoriality is a merits determination—they worry that lower courts would (and have) incorrectly applied the presumption as a limit on subject matter jurisdiction,[240] contrary to the Supreme Court's clarification on the subject in *Morrison*.[241] As Professor William Dodge argues, the presumption, correctly understood, should apply only to implied causes of action underlying purely jurisdictional statutes, such as the federal common law causes of action under the Alien Tort Statute to which the Court applied the presumption in *Kiobel*.[242]

canons. Sunstein, *supra* note 71, at 339.

239. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016).

240. Colangelo, *supra* note 5, at 52–53.

241. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (clarifying that the question of extraterritorial reach is a merits determination, not a potential limit on subject matter jurisdiction).

242. William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS, (July 1, 2016, 4:57 PM), http://opinio

Dodge's analysis rings true, but there is a broader point here. The Court applies the presumption against extraterritoriality to the causes of action underlying jurisdictional statutes because the presumption is a nondelegation canon. Specifically, application of nondelegation principles, of which the presumption against extraterritoriality is an example, seems to turn on whether there are separation concerns as a de facto matter. The Supreme Court's discussion of the separation-of-powers principles that underlie the nondelegation doctrine in *Mistretta* is instructive on this score.

In *Mistretta*, the Court considered a challenge to the constitutionality of the U.S. Sentencing Commission, a unique body located within the judicial branch but not endowed with judicial power.[243] In analyzing whether the placement of the Commission violated separation of powers principles, the Court turned to Justice John Marshall's nondelegation discussion in *Wayman* for the proposition that the judicial branch may assume certain administrative and rulemaking duties to the extent "necessary and proper . . . for carrying into execution all the judgments which the judicial department has power to pronounce."[244]

When the petitioners in *Mistretta* argued that the Commission's power was impermissible because it was substantive, rather than merely procedural, the Court stated: "Our separation-of-powers analysis does not turn on the labeling of an activity as 'substantive' as opposed to 'procedural,' or 'political' as opposed to 'judicial.'"[245] Instead, the Court focused on the practical consequences of the congressional delegation—namely, whether it threatened to "expand[] the powers of the Judiciary beyond constitutional bounds by uniting within the Branch the political or quasi-legislative power of the Commission with the judicial power of the courts."[246] In other words, the relevant question was not the nature of the grant of power, but the separation-of-powers consequences it would produce. The same applies in cases with questions of extraterritoriality—the relevant question is not the nature of the statute, but whether it calls

juris.org/2016/07/01/32658/.

243. Mistretta v. United States, 488 U.S. 361, 384–85 (1989).

244. *Id.* at 387–88 (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 22 (1825)).

245. *Id.* at 393.

246. *Id.*

upon courts to make policy choices in the sensitive area of foreign affairs. Because those policy choices arise whenever there is an extraterritoriality gap, and such gaps arise in connection with both substantive statutes and the implied rights of action underlying jurisdictional statutes, the Court applies the presumption in both instances. Thus, the nondelegation understanding of the presumption against extraterritoriality sheds light on why the Court speaks of applying the presumption to jurisdictional statutes.

E. Nondelegation Deficiencies of Alternatives to the Presumption

Another major theme of the criticisms leveled against the presumption against extraterritoriality is that its blunt, categorical approach is not nimble enough to address the complexities involved in international cases.[247] These scholars argue that even if the Court's justifications for the presumption are valid, the Court does not adequately explain why it does not use a more flexible alternative.[248] To fill this void, critics of the presumption have suggested a variety of tests to determine when U.S. law should apply abroad. This Section argues that understanding the presumption against extraterritoriality as nondelegation explains why the Supreme Court has preferred the presumption over three other approaches to the extraterritoriality question: applying the *Charming Betsy* canon, using limiting principles, and divining congressional intent. Because each of these proposed alternatives calls upon courts to make foreign policy determinations, principles of nondelegation counsel in favor of applying the presumption against extraterritoriality.

1. The Charming Betsy *canon*

Some commentators have suggested that the Court should discard the presumption against extraterritoriality in favor of the

247. Buxbaum, *supra* note 165, at 62 (arguing that the territorial approach is insufficient to "address the messy and often unpredictable patterns of transnational economic activity").

248. *E.g.*, Vasquez, *supra* note 149, at 69 (observing that the presumption is an inefficient means for managing foreign policy conflict and that other approaches, too, are "designed to avoid clashes with the laws and policies of other nations").

Charming Betsy canon.[249] The *Charming Betsy* canon originates in the 1804 case of the same name and instructs courts that "act[s] of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[250] In other words, where a statute is ambiguous, a court applying the *Charming Betsy* canon will adopt an interpretation that conforms with international law, under the assumption that Congress does not intend to violate international law unless it expressly says so. Proponents of substituting the *Charming Betsy* canon for the presumption against extraterritoriality would tie the question of extraterritoriality to international law principles of prescriptive jurisdiction.[251] These principles specify when nations can permissibly exercise jurisdiction and, according to the most recent Restatement, allow states to adjudicate claims based not only on territoriality but also on nationality and conduct that causes effects in or is directed at the state in question.[252]

Deciding questions of extraterritoriality using only the *Charming Betsy* canon would require courts to assume Congress intends statutes to apply abroad to the maximum extent that international law will allow.[253] This is a departure from the traditional conception of the *Charming Betsy* canon, which has traditionally been used as a "braking mechanism"—courts typically apply the canon "to restrain the scope of federal enactments . . . not . . . to give such enactments a more expansive reading."[254]

There are important nondelegation reasons for believing that the Court should not use the *Charming Betsy* canon in such an aggressive fashion. Applying the presumption against extraterritoriality is still necessary because even when Congress *can* exercise extraterritorial jurisdiction under international law, the question of whether U.S. law *should* apply extraterritorially still involves a foreign policy choice. In *Morrison*, for example, even though the "effects" test would have been a valid and

249. *See, e.g.*, Clopton, *supra* note 53, at 23–25.

250. Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

251. Clopton, *supra* note 53, at 23–25.

252. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987).

253. Clopton, *supra* note 53, at 24–25.

254. Bradley, *supra* note 183, at 490.

uncontroversial exercise of prescriptive jurisdiction under the well-accepted subjective territorial principle,[255] foreign *amici* still objected to the application of U.S. law.[256] The point here is not to show that the presumption against extraterritoriality is a superior tool for averting foreign conflict, but to suggest that the extraterritoriality decision still involves policy choices when principles of prescriptive jurisdiction would allow U.S. law to apply abroad. In short, the *Charming Betsy* canon does not resolve nondelegation issues.

Additionally, those who argue for replacing the presumption with the *Charming Betsy* canon overlook that their critique of the presumption against extraterritoriality as a tool of judicial activism to override congressional intent is a criticism of interpretative canons generally.[257] By advocating for a different canon, these critics merely argue that the Court should adopt the canon that reflects their policy preference—that US law should apply abroad to the maximum extent that international law allows. By contrast, the Supreme Court's use of the presumption against extraterritoriality draws its legitimacy not from ideas about the ideal conduct of foreign relations policy, but from the structural principles that underlie the nondelegation doctrine. To apply only the *Charming Betsy* canon would be to give courts full discretion to decide a statute's geographic scope. This, the Court's recent extraterritoriality cases show, is simply unacceptable from a nondelegation perspective.

As a result, courts should apply the presumption against extraterritoriality first, since it does the best job of ensuring that Congress—not courts—decides the question of extraterritoriality. In cases where the presumption does not apply or is overcome, the *Charming Betsy* canon acts as a backstop to avert extreme foreign relations results. This approach is in line with that endorsed by the Supreme Court in cases where the presumption against extraterritoriality does not apply.[258] In any event, the presumption

255. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (AM. LAW INST. 1987).

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

257. *See* Bradley, *supra* note 183, at 505–07.

258. *See, e.g.*, Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); *see also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting).

against extraterritoriality's superior protection of nondelegation values may explain the Supreme Court's continued adherence to the presumption in foreign relations cases.

2. Discretionary limiting principles

The nondelegation principles preserved by the presumption against extraterritoriality also explain why the Supreme Court clings to the presumption instead of embracing more flexible alternatives. In his concurring opinion in *Kiobel*, Justice Breyer proposed a "jurisdictional" alternative to the presumption against extraterritoriality that focuses on whether the person violating the statute is an American national and whether the violation occurred in the United States or violated an important American national interest.[259] This initial inquiry would "rel[y] upon courts also invoking" "[f]urther limiting principles" such as exhaustion of remedies, *forum non conveniens*, and international comity.[260] It would also "depend[] (for its workability) upon courts obtaining, and paying particular attention to, the views of the Executive Branch."[261]

This discretionary approach fails for reasons grounded in the nondelegation doctrine.[262] The approach is largely indeterminate, offering lower courts no analytical structure and little guidance. Courts are left to determine on a case-by-case basis whether they should recognize foreign comity interests, defer to the executive, require that plaintiffs exhaust remedies in other tribunals, or simply

259. Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring in the judgment). Note that Justice Breyer is apparently not categorically opposed to the presumption against extraterritoriality. He concurred with the Court's application of the presumption in *Morrison*, 561 U.S. at 273. In *RJR Nabisco*, he concurred with the Court's use of the presumption with respect to RICO's substantive provisions, but he also argued that the presumption should not apply separately to the statute's private right of action. RJR Nabisco, Inc. v. European Cmty.,136 S. Ct. 2090, 2116 (2016).

260. *Kiobel*, 133 S. Ct. at 1674, 1677.

261. *Id*.

262. Justice Breyer had earlier applied a version of this open-ended inquiry in *Empagran*, an antitrust case in which foreign victims of an international price-fixing conspiracy perpetuated by a foreign vitamin cartel attempted to seek redress under the U.S. antitrust laws. F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155 (2004). Writing for the Court, Justice Breyer held that notions of international comity required the Court to find that claims brought by foreign victims for foreign antitrust violations committed by foreign cartelists were not actionable under the U.S. antitrust laws. *Id*. at 165.

decide that the case is better suited for an alternative forum. In effect, this method gives courts free reign both to decide what is "reasonable" in any given case and to enforce that result with the judicial doctrine of their choosing. That Justice Breyer's test recommends that courts obtain and give weight to the views of the executive branch provides little comfort. In *RJR Nabisco*, for example, Justice Breyer suggested that the majority had deferred *too much* to the executive branch's claims that private RICO suits were detrimental to international relations.[263] This suggests that the decision of extraterritoriality would be almost completely within the discretion of the judiciary—a result that runs afoul of nondelegation.

Also troubling is Justice Breyer's suggestion that courts determine what types of extraterritorial conduct implicate "important American national interest[s]."[264] This proposal would require courts to determine when national interests are at stake and define those interests in the first place. But identifying the nation's priorities is the province of the democratically-accountable political branches; when the task requires interpreting the will and interests of the body politic, it is paramount that the people's chosen representatives make the decision. Hence, this discretionary approach invites judges to engage in foreign policy-making—a responsibility the Constitution delegates to Congress, not the judiciary.

3. Divining congressional intent

Another approach to determining extraterritoriality when the statute in question is silent or ambiguous is to determine what Congress would have wanted had it considered the issue. This approach, which the Court expressly repudiated in *Morrison*, was espoused by the Second Circuit, other courts of appeal, and Justice Stevens.[265] Predictably, the nondelegation doctrine sheds light on why the Court opted to apply the presumption against

263. *RJR Nabisco*, 136 S. Ct. at 2116 (Breyer, J., dissenting). Note that Justice Breyer did not expressly apply the framework he introduced in *Kiobel*, in *RJR Nabisco*, or, for that matter, in *Morrison*.

264. *Kiobel*, 133 S. Ct. at 1671.

265. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 257–61 (2010).

extraterritoriality instead of attempting to determine what Congress would have done had it considered whether the statute should apply to foreign activity.

The majority opinion in *Morrison* expresses a marked distaste for the "unpredictable and inconsistent" conduct and effects tests used by lower courts to determine extraterritoriality in section 10(b) claims.[266] The Court rejected the notion that congressional silence invited the judiciary to "divin[e] what Congress would have wanted" if it had considered the matter and that courts should consider new factors in any given case.[267]

Morrison's rejection of the post-hoc-intent approach comports with nondelegation principles. As Justice Scalia observed, deciding what Congress would have wanted ultimately boils down to a policy choice.[268] By rejecting tests that may invite expansive judicial policymaking in favor of the presumption against extraterritoriality, *Morrison* upholds structural nondelegation norms. The presumption's ability to preserve structural norms helps explain why the Court continues to apply it instead of attempting to construct congressional intent as to the scope of geoambiguous statutes.

4. A note on institutional competence

The preceding paragraphs illustrate that alternatives to the presumption against extraterritoriality—applying the *Charming Betsy* canon, using limiting principles, and divining congressional intent—all take for granted that the Court should use some sort of interpretative device to determine if extraterritoriality is appropriate for a statute. Each of the approaches fails to consider, however, that Congress, not courts, should make the sensitive policy decision of extraterritoriality. Although insistence on congressional policymaking may seem unduly doctrinaire, there are important functional justifications for enforcing nondelegation with respect to the

266. *Id.* at 256, 258, 260 (criticizing the various formulations of the conduct and effects tests as "complex in formulation," "unpredictable in application," and estranged from any "textual or even extra textual" foundation).

267. *Id.* at 256.

268. *Id.* at 259.

judiciary. Courts are "fundamentally underequipped to formulate national policies or develop standards for matters not legal in nature"[269]—the type of choices inherent in questions of statutory extraterritoriality. This idea—that the Constitution does not endow courts with the tools necessary for policymaking—is an important motivation of both the nondelegation doctrine and the presumption against extraterritoriality.[270]

Without the resources to engage in a comprehensive review of an issue, judges must make decisions based on relatively limited knowledge. This handicap, a result of the Constitution's institutional design, means federal courts are unable to evaluate issues holistically.[271] Judges may decide only the cases and controversies before them, so issues can be resolved only—and quite literally—on a case-by-case basis.[272] The judiciary also lacks the flexibility the political branches enjoy. Because of *stare decisis* and the weight of precedent, courts cannot easily reverse course if a decision produces inadvertent negative foreign policy consequences. Courts, in other words, are not functionally prepared to make foreign policy decisions.

Because of these deficiencies, enforcing nondelegation as to the judiciary does not pose the same drawbacks as limiting delegations to executive agencies—there is no trade-off between formalism and functionalism. While agencies have the expertise to excel in the specialized fields they regulate, unelected judges are generally ill-suited to assume policy-making roles. Courts have no information-gathering capacity to speak of; their review is largely limited to litigation briefs.

269. Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 230 (1986) (quoting United States ex rel. Joseph v. Cannon, 642 F.2d 1373, 1379 (D.C. Cir. 1981)).

270. *See, e.g.*, Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) (applying the presumption against extraterritoriality because "[congress] alone has the facilities necessary to make fairly such an important policy decision"); James O. Freedman, *Delegation of Power and Institutional Competence*, 43 CHI. L. REV. 307, 317–22 (1976).

271. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 140 (2d ed. 1996) ("Judge-made law . . . can serve foreign policy only interstitially, grossly, and spasmodically; [courts'] attempts to draw lines and make exceptions must be bound in doctrine and justified in reasoned opinions, and they cannot provide flexibility, completeness, and comprehensive coherence.").

272. Nielson, *supra* note 78, at 268 ("Generalist judges are 'not experts' and they 'encounter issues one case at a time, which may make it hard for them to see the big picture.'" (quoting Lemos, *supra* note 78, at 445–46)).

These informational limitations are particularly acute in the context of foreign affairs. Unlike the executive branch and Congress, the Supreme Court cannot maintain a running diplomatic dialogue with foreign nations. The Court's use of amicus briefs in *RJR Nabisco* provides a poignant example of the judiciary's institutional incapacity to conduct foreign affairs. In *RJR Nabisco*, the Court attempted to grapple with this drawback by looking to amicus briefs filed in previous extraterritoriality cases by the same European countries who were the respondents in *RJR Nabisco*.[273] The Court noted that while the respondent countries wanted to avail themselves of RICO's private treble damages action, these countries had previously warned that private treble damages suits based on foreign conduct in antitrust cases would have "unjustifiably permit[ed] their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic . . . laws embody."[274] Citing this discrepancy, the Court declined to apply a "double standard" to foreign countries and other private plaintiffs.[275]

The *RJR Nabisco* Court's use of amicus briefs from previous cases is rather unusual.[276] Professor Bookman argues this "unprecedented" use of prior amicus briefs is an unfortunate instance of "gotcha" diplomacy that undermines the Court's claims of preserving international harmony.[277] These arguments are well-taken, but they only reinforce the necessity of the presumption against extraterritoriality. Without the diplomatic intelligence available to other branches, courts are left grasping for whatever

273. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106–07 (2016).

274. *Id*. (citations omitted). Justice Alito also cited to amicus briefs submitted in *Morrison*, where France—a respondent in *RJR Nabisco*—warned that allowing private U.S. securities claims based on extraterritorial activity would interfere with foreign securities regulatory regimes, "upset[ing a] delicate balance and offend[ing] the sovereign interests of foreign nations." *Id*. at 2107 (citations omitted).

275. *Id*. at 2108.

276. Bookman, *supra* note 181, at 60; *see also* Kristen Eichensehr, *Legal scholarship highlight: Foreign-government amici and foreign relations*, SCOTUSBLOG (Oct. 21, 2016, 11:21 AM), http://www.scotusblog.com/2016/10/legal-scholarship-highlight-foreign-government-amici-and-foreign-relations/ (noting that while it is unusual for the Supreme Court to use a party's previous amicus briefs against it, reliance on the amicus briefs of foreign governments is common practice in foreign relations cases).

277. Bookman, *supra* note 181, at 60.

information they can marshal to make difficult decisions about sensitive foreign affairs issues. By applying the presumption against extraterritoriality, the Court can avoid[278] the jurisprudential equivalent of bringing a knife to a gunfight—inserting itself into the explosive realm of foreign affairs armed only with law clerks and litigation briefs.

In short, the nondelegation view of the presumption against extraterritoriality helps explain why the Supreme Court prefers the categorical presumption to other, more discretionary alternatives. As the foregoing evaluation of three of these alternatives—the *Charming Betsy* canon, limiting principles, and constructed congressional intent—suggests, discretionary approaches fail to adequately protect against the potential for judicial policymaking. The presumption against extraterritoriality, on the other hand, accounts for nondelegation concerns and the institutional competence considerations that inform them.

IV. CONCLUSION

The Supreme Court's recent applications of the presumption against extraterritoriality signal a more robust insistence on clear congressional indications that statutes apply outside the territorial borders of the United States. This Comment has argued that this insistence is driven not by judicial preference, but principles of nondelegation. By applying the presumption, the Supreme Court rebuffs a broad congressional delegation of policymaking responsibility to the judiciary—the decision of whether U.S. law should apply abroad. Understanding the presumption against extraterritoriality as nondelegation makes clear that the Supreme Court is motivated not by a penchant for territorialism, but the need to preserve structural values. In addition to shedding light on previously unanswered questions regarding the presumption's rationales and application, the nondelegation paradigm explains why the Court prefers the presumption to other approaches to managing foreign conflict. Ultimately, the presumption ensures that sensitive

278. Note that the *RJR Nabisco* Court's discussion of foreign amicus briefs was dicta used to support its application of the presumption against extraterritoriality. *See RJR Nabisco*, 136 S. Ct. at 2106–08. Still, it illustrates the type of information upon which the Court might be forced to rely in the absence of the presumption.

questions of foreign policy are made by the branches most competent to do so—those elected through the democratic process. In this sense, the presumption against extraterritoriality is less about territorial boundaries and more about constitutional ones.

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