

# University of Michigan Journal of Law Reform

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Volume 53

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2019

## Age of Unreason: Rationality and the Regulatory State

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### Recommended Citation

Louise Weinberg, *Age of Unreason: Rationality and the Regulatory State*, 53 U. MICH. J. L. REFORM 1 (2019).  
Available at: <https://repository.law.umich.edu/mjlr/vol53/iss1/2>

<https://doi.org/10.36646/mjlr.53.1.age>

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**AGE OF UNREASON:  
RATIONALITY AND THE REGULATORY STATE**

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Louise Weinberg\*

ABSTRACT

*A curious phenomenon, not previously remarked, appears in current international and interstate cases in a common configuration. These are cases in which a nonresident sues a company at the company's home; the plaintiff would almost certainly win there on stipulated facts; and judgment is for the defendant as a matter of law. In cases in this familiar configuration it appears that courts will struggle to find rationales. Judges attempt to rely on arguments which ordinarily would be serviceable, but which, in cases so configured, seem to become irrational. Because the relevant configuration of cases is common, the problem is widespread. And it is serious. A judgment unsupported by good reasons will appear to be a naked preference for the judgment winner. The Supreme Court has held that the bare appearance of a want of neutrality is a denial of due process. Many cases are cited, but this Article focuses on two recent examples, seemingly unrelated. The first example is a prominent international case in the United States Supreme Court, raising an issue of statutory construction. The second is an interstate case in a state supreme court, raising an issue of choice of law. But these disparate examples are importantly similar in that both are in the above-described configuration, and in both, the trial court withholds its own law. And in both, the court has trouble finding rational support for the outcome. This difficulty seems to be virtually inevitable in cases so configured. Critical and explanatory analyses are offered. The interstate example also raises a special problem of legal theory, discussed here as well.*

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## INTRODUCTION

This Article is about a previously unremarked but striking phenomenon, appearing in current international and interstate cases. These are cases in a discrete but common configuration. In this configuration of cases, defending lawyers offer arguments that are ordinarily effectual, and judges ruling for a defendant try to make use of these arguments. But the usual defenses turn out to make little sense.

This strange difficulty is apparently a function of the shape of the litigation in which it arises. These are cases in which the plaintiff has come to a defendant company's home to file suit; the plaintiff would almost certainly win there on stipulated facts; and judgment is for the defendant company as a matter of law. The court holds, on some ground, that the case cannot go forward. Or an appellate court reverses, sometimes reversing judgment on a jury verdict. But in such cases arguments supporting judgment for the defendant are very likely to turn sour. The ensuing struggle for reason can readily be seen in published opinions in cases in this configuration.

A quick look at the typical scenario will show the reader what I mean. Suppose that in a transnational case an American company

is sued at home by a foreigner for a tort in violation of an act of Congress. The stipulated facts are such that the American company almost certainly would lose on the merits under the statute. In other words, the foreigner is forum shopping and seeks the benefit of our law.

Since, *ex hypothesi*, the defendant company is likely to lose on the merits, it cannot easily find defenses on the merits. At best, the defendant can argue for a new construction of the statute, but any found chink in the statute is likely to be regarded by some observers as a misconstruction. If the statute could rationally be so construed, the foreign plaintiff would not have come to the United States to sue. Plausible arguments wholly off the merits fare even worse. I do not refer to *dispositive* defenses off the merits, such as a short period of limitations. Had there been a dispositive defense here, the foreign plaintiff would not have brought suit here.

Now suppose that the American defendant moves to dismiss, and the federal court grants the motion. The court relies chiefly on the argument that adjudicating the case would be injurious to the foreign relations of the United States. It also emphasizes that the foreign place of injury, which is also the place where the plaintiff resides, is more nearly concerned with the case than is the United States, since our only contact with the case is as residence of the defendant company. On such facts our contact with the case might be argued to be so tenuous as to make the case extraterritorial to us. Often, too, a dismissing court will rely on a choice of foreign law, or a putatively more convenient forum abroad.

It appears to be a characteristic feature of cases thus configured that these sorts of considerations, usually quite effective, lose force. *Ex hypothesi*, American law in such cases is plaintiff-favoring. (The reader will recall that the foreign plaintiff has come to our courts shopping for our law.) In these cases, the usual defenses tend to benefit the foreign plaintiff, not the American defendant raising the defense. When judgment for the defendant in such a case is sought to be supported by judicial concern for our foreign relations, for example, it is often the fact that a failure to allow the foreign plaintiff to proceed is more likely to *offend* the plaintiff's home country. The foreign country would be best accommodated by affording the benefit of American law to the foreign country's own national.

Or, to take another example, suppose that the court rules that the plaintiff's home country—Scotland, let us say—has “the more

significant contact”<sup>1</sup> with the case, since it was also the place of injury as well as the plaintiff’s home country. Therefore, Scottish law, which provides a defense in such cases, should be applied—especially since deference to Scottish law would be in exercise of a benevolent comity.

Yet Scotland has no interest in applying its defense. Defenses are naturally enacted or devised for the benefit of local companies and companies doing business in the locality. Scotland has zero interest in protecting from liability all the world’s companies. It has zero interest in protecting from liability an American company without any connection with Scotland. And Scotland has zero interest in frustrating a Scottish citizen’s chance to recover in America from an American company.

Cases, of course, can go either way. So it is not unusual for American courts to conform to our examples, and to give judgment for the American defendant. But in such cases the judgment is all too likely to have been awarded to the defendant home party for no good reason—that is, for reasons which, as we have just seen, can have less rational application in the case than might have been expected. The phenomenon occurs in both international and interstate litigation.

Unfortunately, when handing down this sort of ordinary judgment in a case configured in the ordinary way just described, relying on the ordinarily persuasive sorts of reasons here noted, a court can strip its judgment of an appearance of neutrality. The problem is serious, and it is widespread.<sup>2</sup> If the judgment lacks a

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1. This is the widely adopted formula set out in RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1967).

2. The following are selections of current transnational and interstate cases in federal courts and state high courts, tending to show near-arbitrary decisions not to enforce law when it would regulate the conduct of a defendant. (State lower-court cases or earlier cases are too numerous for inclusion.)

In the Supreme Court of the United States, for a few representative recent transnational examples, *see, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856 (2017) (denying foreign detainees a right to sue federal officials because the action to enforce the Constitution is “disfavored”); *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016) (discussed here) (denying relief for foreign nations suing an allegedly racketeering American company because the statute does not repeat its language of extraterritoriality when incorporating legislation having such language); *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2882 (2010) (denying relief to purchasers of stock in an action against an American defendant to enforce American law against fraud in the sale of securities on the ground that the stock exchange and transactions thereon were abroad).

For a recent interstate case in the Supreme Court, *see Franchise Tax Board v. Hyatt*, 136 S. Ct. 1277 (2016) (setting a \$50,000 cap on damages on the novel ground that the Full Faith and Credit Clause requires a state to apply its own law; attempting to justify this by detecting “hostility” at the forum state, although the state’s high court had remittitur’d most of the jury’s award, reducing damages from some \$450 million to \$1 million).

In the United States Courts of Appeals, for representative recent transnational cases, *see, e.g.*, *Armada (Singapore) PTE v. Amcol Internat’l Corp.*, 885 F.3d 1090 (7th Cir. 2018)

rational basis it will appear, at least to those alert to the problem, like a naked preference for the home party. The Supreme Court has held that the bare appearance of a want of neutrality is a denial of due process.<sup>3</sup> I think of this as a “neutrality difficulty.”

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(affirming dismissal of a Civil RICO claim against an Illinois defendant because the injury occurred abroad, although the defendant’s conduct was within the regulatory scope of the statute); *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018) (on remand, ruling, in pertinent part, that our foreign relations with Mexico would be damaged if we allowed the grieving Mexican family to recover for the wrongful death of their boy at the hands of a United States border official, where Mexico had filed a brief urging justice for the family); *Mujica v. Airscan Inc.*, 771 F.3d 580 (9th Cir. 2014) (ruling that wrongful death and personal injuries claims by Colombian citizens against an American company could not go forward under the Torture Victims Protection Act because not justiciable under the doctrine of “international comity,” notwithstanding the statute); *Bulgaria Ltd. v. Bulgarian-American Enterprise Fund*, 589 F.3d 417 (7th Cir. 2009) (affirming dismissal for *forum non conveniens* of a case by a British company against an American organization on the ground that Bulgarian courts are not inadequate).

In the United States District Courts, for a few representative recent examples, *see, e.g.*, *Dantas v. Citibank*, 2018 WL 3023158 (S.D.N.Y. 2018) (dismissing for “prudential” considerations “favoring settlements” a challenge by a foreign plaintiff to a settlement with an American defendant allegedly obtained under duress); *Gerba v. Nat’l Hellenic Museum*, 2018 WL 3068409 (N.D. Ill. 2018) (dismissing a nonresident plaintiff’s action for retaliatory firing of a whistleblower because the complaint alleged wrongdoing, but not that the wrongdoing was criminal); *Otto Candies v. Citigroup*, 2018 WL 3008740 (S.D. Fla. 2018) (dismissing for *forum non conveniens* a case brought by various foreign companies against an American company alleging conspiracy to commit violations of RICO in a wide range of countries on the supposition that Mexican courts are adequate and more convenient).

In the state supreme courts, for a few recent representative transnational cases, *see, e.g.*, *America K-9 Detection Services, LLC v. Freeman*, 556 S.W.3d 246 (Tex. 2018) (holding nonjusticiable under the “political questions” doctrine a negligence case involving a contract working-dog biting a civilian on a foreign military base); *Aranda v. Philip Morris*, 2018 WL 1415215 (Del. 2018) (affirming dismissal for *forum non conveniens* in a case brought by Argentine tobacco farmers to challenge an American grower’s demand that they use pesticides causing illness in growers’ employees); *Gramercy Emerging Markets Fund v. Allied Irish Banks, P.L.C.*, 173 A.3d 1033 (Del. 2017) (affirming dismissal for *forum non conveniens* of claims “arising” in Bulgaria); *Jahnke v. Deere & Co.*, 2018 WL 2271338 (Iowa 2018) (holding an Iowa civil rights statute could not be applied extraterritorially to an Iowan alleging discrimination in employment by an American company when it demoted him by transferring him to a post in Iowa from a better position in China).

In interstate cases in the state supreme courts, for a few recent representative examples, *see, e.g.*, *MM.M. v. Pfizer, Inc.*, 239 W.Va. 876 (2017) (applying the law of a state without any interest in its application); *Ross v. R. J. Reynolds Tobacco Co.*, 89 N.E.3d 763 (Ill. 2017) (mandating interlocutory review of a denial of a motion to dismiss for *forum non conveniens*, which is discretionary); *Bayer Corp. v. Hon. Joan L. Moriarty*, 536 S.W.3d 227 (Mo. 2017) (*en banc*) (holding that nonresident plaintiffs could obtain neither specific nor general jurisdiction in Missouri over a corporation, notwithstanding that there already was jurisdiction in a parallel action by similarly injured Missouri plaintiffs); *Almond v. Rudolph*, 794 S.E.2d 10 (W.Va. 2016) (holding unavailable a writ of prohibition to prevent dismissal of nonresidents from a product liability class suit, on grounds of *forum non conveniens*); *American Electric Power Co. v. Swope*, 301 S.E.2d 485 (W.Va. 2017) (granting a writ of prohibition against denial of a motion to dismiss on the assumption that Ohio law must govern); *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10C–12–054, 2013 WL 5460164 (Del. Super. 2013) (in a wrongful death suit, applying the law of the place of the grieving family’s mental anguish to deny recovery for mental anguish).

3. *See Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009) (holding that a state supreme court judge’s repeated refusal to recuse himself created an appearance of a want of neutrality in violation of the Due Process Clause of the Fourteenth Amendment, where a

When I speak of “neutrality,” I do not mean to suggest some equivalence between plaintiffs and defendants. The blindness of Lady Justice is not a blindness to the difference between those who can plead injuries and those who allegedly caused them. Blind Justice, rather, would decline to place on the scales all distinctions of status, power, or wealth; all distinctions of person, fealty, or belief; and, above all, any *connection* between a party and the judge that nevertheless adjudicates that party’s case. The connection could be familial or commercial. It could be the appearance of a bribe or a threat. Perhaps the most common connection between a court and a litigant is the widely presumed home court advantage enjoyed by a resident party in an interstate or international case.

To the extent that the home court advantage exists, it is a slight but not trivial predilection of judges to favor a valuable or vulnerable local enterprise. This protective inclination could be what comes into play in our narrowly defined but common configuration of cases. Or it could be an ideological or political defendant-orientedness. Like plaintiff-orientedness, defendant-orientedness is a psychological reality about which there is little useful to be said or done. Such predilections, conscious or unconscious, seem likely to be at play in litigation generally. But it is only in our specific configuration of cases that judgment for the defendant so dependably seems to entail a struggle for, and failure of, reason.

As for the shopped-for home law in the configuration of cases under study here, I would characterize it, in the run of cases, as “regulatory.” The defendant resides at the forum state, but forum law does not favor the defendant. It exposes the defendant to liability. We will be exploring, here, the limits, if any, of the reach of regulatory law beyond borders. In particular, we will be investigating the curious irrationality of argument accompanying a court’s departure from its own regulatory law. And we will come up against that little “neutrality difficulty.”

We will be working with two illustrative—but very different—cases. Our international case turns on statutory construction. Our interstate case turns on choice of law. What these two disparate cases have in common is that, in each, the nonresident has come to the defendant’s home to find favorable law there. In other words, local law, from the point of view of the resident company, is regulatory. In each of our examples, the court at the defendant’s home looks with disfavor at the nonresident plaintiff’s case, and local law is held unavailable. And, in each, there ensues a struggle

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party appearing before an appellate panel that included that judge had contributed \$3 million to his election campaign).

for reason. Reasonable and ordinary justifications for withholding local law in cases configured like this will appear insufficient to support the result. This struggle for reason is the strange feature that prompted the writing of this paper.

In these dissimilar examples, we find that the neutrality difficulty—in itself a denial of due process—carries with it not only the curious irrationality of argument that engenders it, but also a host of other signs of dysfunction. These include an inattentiveness to the regulatory interests of the sovereign adjudicating the case; a disregard of the judicial oath of office; a challenge to democratic theory; and ultimately a sense that the rule of law has been impotent and that there has been a failure of justice.

## I. OUR INTERNATIONAL CASE: RJR-NABISCO V. EUROPEAN COMMUNITY

### A. *A Troubled History*

Consider the 2016 Supreme Court case of *RJR-Nabisco, Inc. v. European Community*.<sup>4</sup> *RJR-Nabisco* involved seriously tortious—indeed, criminal—violations of an act of Congress, the federal anti-racketeering law familiarly known as RICO.<sup>5</sup>

In RICO, Congress took hold of the problem of organized crime. RICO offers not only criminal penalties and government enforcement mechanisms civil in form, but also, with so-called “Civil RICO,” a statutory private right to sue for damages<sup>6</sup>—damages that are trebled.<sup>7</sup> Corporations as well as organized Mafia-

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4. 136 S. Ct. 2090 (2016). For recent comment on *RJR-Nabisco* from another structural perspective, see Zachary D. Clopton, *Diagonal Public Enforcement*, 70 STAN. L. REV. 1077 (2018). On the territorialism of *RJR-Nabisco*, see Victoria Safran, *RICO's Extraterritorial Reach: The Impact of European Community v. RJR-Nabisco*, 4 STAN. J. COMPLEX LITIG. 47 (2017); Note, “Supreme Court Review,” *Racketeer Influenced and Corrupt Organizations Act—Extraterritoriality—RJR Nabisco, Inc. v. European Community*, 130 HARV. L. REV. 487 (2016).

5. Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961–1968.

6. 18 U.S.C. § 1964.

7. 18 U.S.C. § 1964(c). This provision in RICO is modeled on the Clayton Act. See S. REP. NO. 91-617 at 79, 80–81 (stating that “[t]he committee feels . . . that much can be accomplished here by adopting the civil remedies developed in the antitrust field to the problem of organized crime”). As in the Clayton Act, and as is usual when Congress provides for treble damages, Civil RICO also provides for attorney fees and costs. 18 U.S.C. § 1964. One might suppose that punitive damages also would be available under Civil Rico. But, as in antitrust suits under the Clayton Act, punitive damages are considered to be subsumed under treble damages. Cf. *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (approving an award of treble damages on a federal antitrust claim and punitive damages on a pendent state claim).



like groups can be drawn into Civil RICO litigation if they engage in certain criminal activities in violation of RICO.<sup>8</sup>

The alleged tortfeasor in *RJR-Nabisco* had originally been a prosperous American corporation, R. J. Reynolds Tobacco Company, growing tobacco in North Carolina and producing Camel cigarettes.<sup>9</sup> As concern developed about the hazards of smoking, R. J. Reynolds originated filtered cigarettes, and later, mentholated cigarettes. But the link between cigarette smoking and lung cancer was becoming clearer. The long ordeal of litigation against the company got under way. Burdened by suits for wrongful death and personal injuries, RJR became a target not only of class action lawyers, but also of legislative committees, prosecutors, and investigative journalists. Their combined researches eventually revealed that the company had been lying for decades.<sup>10</sup> RJR had been lying about the hazards of cigarette smoking. It had lied about the healthfulness of filtered cigarettes and of mentholated cigarettes. It was lying about addiction. As its troubles multiplied, the company began moving deliberately to make its cigarettes even more addictive, and lying about those efforts. Ultimately, RJR was working hard to entice children, efforts that became more zealous over time.<sup>11</sup>

The company's problems were compounded by its management's efforts to overcome them. There was a flurry of spin-offs and leveraged mergers and acquisitions. RJR became a conglomerate, an owner not only of tobacco companies like Brown & Williamson, but also, most prominently, of Nabisco, formerly the National Biscuit Company, particularly valued for its popular Oreo cookies. In RJR's atmosphere of moral degradation, some of its executives sought to profit personally from these maneuvers, engaging in insider trading. Some were systematically looting the company through bloated compensation packages and perquisites. All this left the American tobacco giant crippled.<sup>12</sup>

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8. See, e.g., *H. J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) (RICO action against a telephone company for injunctive relief); *Republic of Iraq v. Abb AG*, 768 F.3d 145 (2d Cir. 2014) (including a RICO action by a foreign sovereign).

9. For RJR's own account of its history, see R. J. Reynolds Tobacco, *A Look into Our Past*, <https://www.rjrt.com/transforming-tobacco/history/>.

10. See generally, e.g., PETER PRINGLE, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* (2014); MICHAEL RABINOFF, *ENDING THE TOBACCO HOLOCAUST: HOW BIG TOBACCO AFFECTS OUR HEALTH, POCKETBOOK AND POLITICAL FREEDOM—AND WHAT WE CAN DO ABOUT IT* (2010); MARK WOLFSON, *THE FIGHT AGAINST BIG TOBACCO: THE MOVEMENT, THE STATE AND THE PUBLIC'S HEALTH* (2001).

11. See generally, e.g., BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR-NABISCO* (1990); Report, "Camel Cigarettes: A Long History of Targeting Camels to Kids," [https://www.tobaccofreekids.org/microsites/camel/Camel\\_History.pdf](https://www.tobaccofreekids.org/microsites/camel/Camel_History.pdf).

12. Floyd Norris, *Fund Books Loss on RJR After 15 years: A Long Chapter Ends for Kohlberg Kravis*, N.Y. TIMES, July 9, 2004, at B1 (reporting that "[t]he greatest leveraged buyout ever is

The case that is the focus of these pages began back in 2001, in the United States District Court for the Eastern District of New York. This was an action brought by the European Community, representing twenty-six member countries.<sup>13</sup> According to the Community's complexly pleaded complaint—amended and re-amended as the litigation wore on—RJR-Nabisco was the instigator, supervisor, leading actor, and chief beneficiary of a circular four-way trade involving narcotics, support of terrorism, money laundering, and black marketeering.<sup>14</sup> If we focus on the primary allegations, taking them as true, we can glimpse the main outlines of the scheme.

To begin with, narcotics were obtained by RJR-Nabisco for export to Europe, largely through Colombian intermediaries. The narcotics were then shipped from South America through the Panama Canal with a cargo of RJR-Nabisco's Camel cigarettes. This route was chosen to insulate the narcotics in the cargo from scrutiny at a U.S. port. The narcotics and the Camels would be made available on Europe's black markets. (Cigarettes can be heavily regulated in European countries, with the result that in those countries there are profitable black markets for cigarettes. Camel cigarettes are favored by European smokers for their combination of Turkish and American tobaccos.) European customers for the narcotics or cigarettes paid for them with euros. Some of these euros were used, with the assistance of Russian intermediaries, to buy Turkish tobacco and additional supplies of narcotics from terrorist groups. The foreign black marketers and other conspirators openly exchanged these euros for dollars. The Turkish tobacco was shipped to RJR in North Carolina. After the various foreign agents took their respective cuts in euros or dollars the remaining freshly-laundered dollars were exported to RJR in payment, and the cycle would recommence. This is just one understanding of the complaint, but it suffices to convey the general nature of the alleged enterprise.<sup>15</sup>

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ending, not with a bang but with a whimper of loss. After 15 years of scrambling and pain, Kohlberg Kravis Roberts is through with its investment in RJR-Nabisco.”); Constance L. Hays, *The Overview, End of an Empire: RJR-Nabisco Splits Tobacco Ventures and Food Business*, N.Y. TIMES (Mar. 10, 1999), <https://www.nytimes.com/?1999/03/10/?business/end-empire-overview-rjr-nabisco-splits-tobacco-ventures-food-business.html>.

13. *European Cmty. v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456 (E.D.N.Y. 2001). The European Community was one of three European trade organizations. In 2009, it was absorbed by the European Union. See Matthew J. Gabel, *European Community*, BRITANNICA ENCYCLOPEDIA, <https://www.britannica.com/topic/European-Community-European-economic-association>.

14. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 133–34 (2d Cir. 2014).

15. The complaint also alleged that RJR-Nabisco's employees would take monthly trips from the United States to Colombia through Venezuela, bribe border guards in order to enter Colombia illegally, receive payments there, travel back to Venezuela, and wire the

In conducting these operations, RJR was allegedly acting in violation of RICO, the Racketeer Influenced and Corrupt Organizations Act.<sup>16</sup> The lawsuit in federal District Court in Brooklyn was a “Civil RICO” action.<sup>17</sup> Both civil and criminal liabilities under RICO require that a defendant enterprise engage in a pattern of violations<sup>18</sup> of enumerated predicate crimes.<sup>19</sup> A pattern of violations is properly pleaded if at least two predicate criminal violations are alleged.<sup>20</sup>

RJR-Nabisco was allegedly committing several predicate crimes, including mail fraud,<sup>21</sup> support of terrorism,<sup>22</sup> money laundering,<sup>23</sup> and violations of the Travel Act.<sup>24</sup>

The complaint pleaded injuries to and within the twenty-six countries represented by the plaintiff European Community. But there were also allegations of American domestic injuries. Perhaps the European Community pleaded American injuries to help the District Court to see the defendant’s conduct as evoking the na-

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funds to RJR’s accounts in the United States; that RJR’s employees filed fraudulent documents with the U.S. Customs Service and the Bureau of Alcohol, Tobacco and Firearms to further the scheme; and that RJR acquired Brown & Williamson Tobacco for the purpose of expanding its illegal activities. Apparently, the business of money-laundering in support of terrorism generally follows the trade routes outlined here and in the text, with the participation of Colombians and Russians. Cf. U.N. OFF. ON DRUGS & CRIME, *Drug Trafficking and the Financing of Terrorism*, <http://www.unodc.org/unodc/en/frontpage/drug-trafficking-and-the-financing-of-terrorism.html> (last visited Sept. 6, 2019) (noting that “drug trafficking has provided funding for insurgent groups in various regions throughout the world”).

16. 18 U.S.C. §§ 1961–68 (1988).

17. RICO creates a private civil cause of action available to “[a]ny person injured in his business or property by reason of a violation” of its prohibitions. 18 U.S.C. § 1964(c) (2012). Jurisdiction is vested in the federal district courts. Plaintiffs may recover treble damages, costs, and attorney’s fees. These remedies are modeled on the Clayton Act, 15 U.S.C. §§ 12–27 (2012), which, in addition to furnishing additional substantive provisions to flesh out the Sherman Antitrust Act, provides rights to sue, 15 U.S.C. §§ 1–7 (2012) (at law); *id.* at § 15 (remedies, including treble damages, fees, and costs); *id.* at § 26 (injunction).

18. RICO’s prohibition of “pattern[s] of racketeering activity” is set out at 18 U.S.C. § 1962, and a pattern of racketeering activity is defined in 18 U.S.C. § 1961(5) as the committing of two or more predicate crimes within a ten-year period.

19. 18 U.S.C. §§ 1961(1), 1961(5), 1962(c).

20. 18 U.S.C. § 1961(5).

21. 18 U.S.C. § 1341.

22. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001). The Patriot Act was enacted in response to the Islamic terror attacks on the United States of September 11, 2001, by four passenger jets hijacked by Saudi individuals working out of Hamburg. Two of the hijacked jets flew into the twin skyscraper towers of the World Trade Center, causing their burning and collapse and ultimately obliterating a large part of lower Manhattan, the city’s financial district, including seven office buildings and a subway station. A third hijacked jet destroyed a part of the Pentagon, near Washington, D.C., in Virginia. A fourth hijacked jet, believed to be on course to crash into the Capitol, was brought down in Pennsylvania by its heroic passengers. These attacks killed some 3,000 individuals in addition to the hundreds of hijacked passengers.

23. 18 U.S.C. § 1956 (2012).

24. 18 U.S.C. § 1952 (2012) (prohibiting use of the U.S. mails or any means of interstate or international travel in furtherance of criminal activity).

tional interests underlying RICO. But the Europeans waived those domestic American claims, perhaps doubting their standing to raise them. This put District Judge Garaufis in position to throw the foreign violations out with the domestic ones—which he did, on grounds of extraterritoriality.<sup>25</sup> (This waiver also put the Supreme Court in the same position. It, too, would throw out the same baby with the same bathwater.<sup>26</sup>) Judge Garaufis could cite in support of the dismissal the emerging “new territorialism” of the Supreme Court.<sup>27</sup>

### B. *A Problematic Presumption*

The “new territorialism” appears to be the old territorialism, superimposed belatedly on subjects previously not understood to be strictly under such constraint. The traditional American territorialist view, at its most problematic, was a conviction that the Constitution of the United States had no bearing on the conduct of federal officials beyond our borders; nor did the United States have any interest in the effects of a federal official’s misconduct as experienced beyond our borders.<sup>28</sup> This, notwithstanding the lack of any

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25. *European Cmty. v. RJR Nabisco, Inc.*, 814 F. Supp. 2d 189 (E.D.N.Y. 2011).

26. *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2111 (2016).

27. *See* *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (interpreting the Alien Tort Statute, 28 U.S.C. § 1350 (2012)); *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247 (2010) (Securities Exchange Act of 1934, 15 U.S.C. §78(a) (fraud in the purchase and sale of securities)). For commentary, *see generally* “Symposium on Extraterritoriality,” 99 CORNELL L. REV. (2014), with articles by John Coffee, Anthony Colangelo, Eugene Kontorovich, Jenny Martinez, Gerald Neuman, Louise Weinberg, and Juliet Moringiello & William Reynolds.

28. The supposed inability of American courts to apply the Constitution beyond our borders is often traced to *The Insular Cases* (*Dorr v. United States*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Balzac v. Porto Rico*, 258 U.S. 298 (1922)). But the individual holdings in these cases do not seem to support the assertion particularly well. *Downes*, for example, held that the transaction at issue did not come within the relevant constitutional language. *Balzac* did hold that the Sixth Amendment did not apply in Puerto Rico, but that is a position that might be different today. Modern discussions can be more contextual than territorial, involving the question whether there are “substantial connections” with the United States. *See* *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990). On the general question of the extraterritoriality of the Constitution in our own time, *see* Gerald L. Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441 (2014) (commenting on *Boumediene v. Bush*, 553 U.S. 723 (2008)). In this impressive paper, Professor Neuman suggests grounds for optimism that *Boumediene* put a significant crimp in our newly-revived territorialism, since the case extended the protection of the Constitution to territory in Cuba. But *Boumediene* seems too easy a case for optimism, since the detention facilities at Guantanamo Bay are under the custody and control of the United States. To some extent this feature of control is shared by the border gulch involved in the cross-border shooting case of *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), *on remand*, 869 F.3d 357 (5th Cir. 2017), *cert. granted*, 139 S. Ct. 2636 (2019), discussed *infra* note 29. I should add that I share Professor Neuman’s conviction that federal officials must act constitutionally wherever they act. There

legitimate national interest in licensing our officials to behave badly when overseas, and notwithstanding our actual interests in reputation, honor, dignity, reliability, and the esteem these intangible characteristics foster. Territorialism at that extreme had been a mistake, as the Supreme Court seems to know, but one that the Court seems reluctant to correct.<sup>29</sup>

In its current form, territorialism, at best, reflects a belief that the United States exhibits a courteous attention to the comity of nations by declining to interfere with a foreign sovereign's control over events occurring within that sovereign's own borders. This *politesse* can take many forms, but latterly appears in a hoary canon of statutory construction, an old rule that, in the silence of Congress about the territorial scope of a statute, the statute is presumed to have domestic application only.<sup>30</sup> That is the rule lately revived and inserted into securities fraud cases in *Morrison v. Bank of Australia*.<sup>31</sup> That is the rule recently extended to transnational human rights litigation under the Alien Tort Statute in *Kiobel v. Royal Dutch Petroleum Co.*<sup>32</sup> The presumption against extraterritorial application of

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is an obvious parallel between Professor Neuman's position vis-à-vis American officials to the position taken in this paper vis-à-vis American companies and their officials.

29. See the punt by the United States Supreme Court in *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017), *on remand*, 869 F.3d 357 (5th Cir. 2017), *cert. granted*, 139 S. Ct. 2636 (2019). In *Mesa*, a federal border patrol agent standing on American soil fired two shots at a Mexican boy cowering behind a column on Mexican soil, killing the boy. In oral argument in the Supreme Court, Justice Sotomayor protested, "Wouldn't shooting potshots at Mexican citizens be shocking to the conscience?" Transcript of Oral Argument at 34, *Hernandez v. Mesa*, 137 S. Ct. 2003 (2017) (No. 15-118). In that initial round, the Supreme Court was evidently too embarrassed to deny extraterritorial constitutional duties on the part of United States officials, or to view the border gulch, wholly under United States control, as extraterritorial. Instead, the Court remanded to the Fifth Circuit to determine whether special factors counseled hesitation vis-à-vis the availability of a *Bivens* claim for damages. The Court of Appeals dutifully found that special factors counseled hesitation. *Hernandez v. Mesa*, 885 F.3d 811 (5th Cir. 2018). Predictably, the arguments deployed in the Fifth Circuit on remand were irrational. For example, potential harm in our "foreign affairs" was held to be a special factor counseling hesitation, although Mexico will be offended by the denial of relief to the grieving Mexican family. 885 F.3d, at 819; *see* of the Government of the United Mexican States as Amicus Curiae in Support of the Petitioners, *Hernandez v. Mesa*, No. 17-1678 (July 20, 2018); *see also* Petition for Writ of Certiorari, *Hernandez v. Mesa*, No. 17-1678 (June 15, 2018) (noting the irrationality of the foreign relations argument). The parents again petitioned the Supreme Court for review. Certiorari was granted to decide the question of whether a *Bivens* action will ever be available for a plausibly pleaded violation of clearly established law by a rogue federal official. *See Hernandez v. Mesa*, 139 S. Ct. 2636 (2019). The case was argued November 12, 2019.

30. For thoughtful consideration of the territorial question in contracts cases in both kinds of inter-sovereign litigation, *see* Hannah L. Buxbaum, *Determining the Territorial Scope of State Law in Interstate and International Conflicts: Comments on the Draft Restatement (Third) and on the Role of Party Autonomy*, 27 DUKE J. COMP. & INT'L L. 381 (2017).

31. *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247 (2010).

32. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). *Kiobel* rendered the Alien Tort Statute [ATS] a virtual nullity in the only cases for which it *mattered*, the case on wholly foreign facts, in effect deleting perhaps the greatest lower-court case in American legal history, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). In *Filartiga*, the Second Cir-

law can be overcome, but according to Chief Justice Roberts, writing for the Court in *Kiobel*, only if a case “touches and concerns” the United States with “sufficient force” to overcome the presumption.<sup>33</sup> And now, just as the federal Courts of Appeals are struggling to define what “touches and concerns” the United States “with sufficient force,” they must also struggle to identify a “focus.” Under *Morrison*, it appears that what “touches and concerns” must be a “focus” of the legislature’s own concern.<sup>34</sup> But the Supreme Court has also looked to the “gravamen” of a complaint.<sup>35</sup>

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cuit held, by Judge Kaufman, that the perpetrator of foreign atrocities is *hostis humani generis*, the enemy of all mankind, and that it is in the “collective” interest of all nations to open their courts to civil suits against that enemy wherever found. *Id.* at 890. The transnational case is the only significant case under the ATS; our courts already have power, however limited, over violations of human rights occurring here and have no urgent need of *Filartiga* for domestic cases. See Louise Weinberg, *What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471 (2014).

In *Kiobel*, Chief Justice Roberts explained that, because the ATS was a jurisdictional grant only, the question was whether claims thereunder could be extended extraterritorially. However, he did not explain *why* a presumption against extraterritorial application of legislation could be relevant to the common law claim pleaded in *Kiobel*. *Kiobel*, 569 U.S. at 115. That was a cause of action made cognizable under the great case of *Filartiga v. Pena-Irala*. The supposition that the ATS is only jurisdictional probably derives in part from its being couched at its outset as a jurisdictional grant. But it is also easily read to provide a cause of action for which the jurisdiction is granted, an action “for a tort . . . in violation of the law of nations.” See Judiciary Act of 1789, § 9, 1 Stat. 73, 77 (codified as amended at 28 U.S.C. § 1350 (2012)) (“And be it further enacted, That the district courts shall have . . . cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”). But see *Jara v. Núñez*, 878 F.3d 1268, 1274 (11th Cir. 2018) (following the reasoning of the Supreme Court; ruling that the “focus” of the *claim* in the case was extraterritorial and that therefore there was no *jurisdiction*).

Occasionally a court can be found working around the Court’s demolition of the ATS, perhaps not very convincingly. To take a recent example, in *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1126 (9th Cir. 2018), the Court of Appeals ruled that allegations of *funding* child slavery in the Ivory Coast *related to* the required “focus,” and held (taking advantage of the Supreme Court’s not having determined whether aiding and abetting claims are cognizable under the ATS), that the plaintiffs, former child slaves, could plead a cause of action under the ATS for *aiding and abetting* child slavery. The Ninth Circuit here was eliding the further question of corporate liability *vel non*, which had been decided in the negative a few months previously in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), also arguably a case of secondary liability.

33. *Kiobel*, 569 U.S. at 124-25.

34. See *Morrison v. Nat’l Australia Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010) (stating that there was nothing in the “focus” of the securities fraud section of the Securities Exchange Act of 1934 to suggest a national interest in regulating foreign exchanges); 15 U.S.C. § 78(a); 17 C.F.R. 240.10b-5 (2018) (civil liability for fraud in the purchase and sale of securities).

For an interesting recent case converting the “focus” test into a modified interest analysis, see *In re Liquidation of Bernard L. Madoff Investment Securities LLC*, 917 F.3d 85 (2d Cir. 2019) (ruling that the “focus” question was whether the relevant transfers were sufficiently domestic to warrant application of our law, and that the United States’ interest in applying its law to disputes arising out of a fraudulent transfer of funds from the Madoff debtor’s United States bank accounts in furtherance of a massive Ponzi scheme orchestrated by him outweighed the interest of any foreign state).

35. *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 394-95 (2015) (holding that an American woman who purchased a Eurail pass passenger ticket in the United States, but fell

In *RJR-Nabisco*, the Second Circuit cut this Gordian knot. The court simply found the extraterritoriality argument altogether unconvincing, without regard to any of these niceties. Abstract “rules,” “tests,” “doctrines,” and the like, superimposed on a real problem, will not necessarily provide real understanding of that problem or rational solutions for it. The Second Circuit panel vacated the District Court’s judgment of dismissal and remanded.<sup>36</sup> Judge Leval, concurring, pointed out that a RICO defendant must have committed predicate offenses. Otherwise no Civil RICO action could lie. And as to each of *RJR-Nabisco*’s alleged predicate offenses, Congress had clearly manifested its intention that the legislation apply extraterritorially.<sup>37</sup> The explicit extraterritoriality of all of *RJR-Nabisco*’s particular predicate violations made Congress’s purposes quite clear.<sup>38</sup> The Second Circuit denied rehearing *en banc*.<sup>39</sup> In my view Judge Leval was right. I venture to add that the regulatory interests underlying the statute could not rationally be limited to our borders.<sup>40</sup>

The Supreme Court reversed.<sup>41</sup> The Court held, by Justice Alito (four to three<sup>42</sup>), that Civil RICO could not ground an otherwise proper action when the damages complained of were incurred abroad.<sup>43</sup>

### C. *The Struggle for Reason*

On these facts my adroit reader has already predicted that, in *RJR-Nabisco*, Justice Alito would have had to struggle to find plausible reasons to support his insistence, for any recovery, that the injuries alleged be domestic. Let us consider six key aspects of that territorialist struggle.

(1) *Foreign relations and extraterritoriality*. Justice Alito’s least persuasive attempt to support the Court’s ruling may have been his

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between platform and train on an Austrian railway, could not sue, the “gravamen” of her complaint having to do with her injury abroad, rather than her contract here).

36. *European Cmty. v. RJR Nabisco*, 764 F.3d 129, 136–37 (2d Cir. 2014).

37. *Id.* at 134.

38. The anti-terror and money laundering predicates at issue were part of the USA Patriot Act of 2001, enacted in response to the 9/11 attacks on this country, *supra* note 22.

39. *European Cmty. v. RJR Nabisco*, 783 F.3d 129 (2d Cir. 2015).

40. For the rational reach of regulatory law, see *infra* Parts I-D, II-D, III-B.

41. *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2111 (2016). For recent commentary on *RJR-Nabisco*, see *supra* note 4.

42. Justice Sotomayor did not take part, and there was also the seat left vacant by Justice Scalia’s death. Justice Alito’s opinion for the Court was joined by the Chief Justice and Justices Kennedy and Thomas. Justices Ginsburg, Breyer, and Kagan joined Alito’s opinion as to Parts I, II, and III, and dissented from the remainder and the judgment.

43. *RJR Nabisco*, 136 S. Ct. at 2111.

argument that permitting application of Civil RICO to foreign events would produce “friction” in our foreign relations. As Justice Alito put this, “[P]roviding a private civil remedy for foreign conduct creates a potential for international friction . . . .”<sup>44</sup>

Thus Justice Alito began his fall down the rabbit hole of unreason. Even if his point about “friction” in our international relations were not a speculation about a potential problem in some other case in the future, an observer might well find irrational the fear that some day a foreign country might be offended by making an American malefactor pay damages to it. Justice Alito found votes for this position, but the reader, I think, can see here the souring of common defenses that occasioned this paper.

Nevertheless, let us take this concern about “friction” seriously. We can say that it rests on the reasonable view that every sovereign has its own mode of redress for injuries, and no sovereign should be expected to suffer gladly what amounts to a denigration of its own control over events within its own borders. So far, so good. But *RJR-Nabisco* falls into irrationality when the Court asks us to believe that foreign countries, themselves seeking justice under an act of Congress, will be content only if we show them the door.<sup>45</sup>

Thus it was that, having bracingly reminded us that “We cannot rule the world,”<sup>46</sup> Justice Alito wound up declining to rule a company in North Carolina.

(2) *Foreign relations and delicate balances*. In a recent case involving American parties and an injury occurring in Mexico, Judge Posner voiced similar trepidations,<sup>47</sup> particularly when it comes to damages. Posner suggested that the generosity of American recoveries could be inappropriate when measured against the standards of under-developed countries.<sup>48</sup>

This problem of over-generosity and under-development was a particular concern of Justice Alito in *RJR-Nabisco*. “Even when foreign countries permit private rights of action,” he wrote, “they often have different schemes for litigating them and may approve of different measures of damages. Allowing [foreigners] to pursue private suits in the United States [might] upset that delicate balance and offend the sovereign interests of foreign nations.”<sup>49</sup>

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44. *Id.* at 2106.

45. *See, e.g.*, Petition for Writ of Certiorari, *Hernandez v. Mesa*, No. 17-1678, *supra* note 29.

46. *RJR Nabisco*, 136 S. Ct., at 2100 (citing *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

47. *Spinozzi v. ITT Sheraton Corp.*, 174 F.3d 842 (7th Cir. 1999).

48. *Id.*

49. *RJR Nabisco*, 136 S. Ct. at 2106-07.



Here we see the hazards of applying abstract reasoning to real facts. Justice Alito, although vaguely referring to “foreigners” who choose to pursue their litigation here, was really concerned about a foreign *defendant*, because the defendant, a foreign company, is the party that Alito was imagining might be required to pay damages on a scale out of proportion with customary damages in its own country. Who is this defendant company, hailing from an under-developed country, a company that can be sued here, and one that is unfairly surprised by a trebling of damages? (This is hardly the case the Court was called upon to decide, but let us deal with it as if it were.) We can see at once that this third-world defendant is a chimera. A third-world company will not be amenable to suit here unless it is “at home” here.<sup>50</sup> A company sophisticated enough to be at home in the United States and sufficiently sophisticated to be doing business here—and sufficiently successful to be worth suing—is sophisticated enough to have a lawyer and to know that it is under a duty to conform to American law. This company is not surprised by treble damages.

Moreover, the damages that Justice Alito was worried about trebling are very different from the real-life damages this mythical third world company might actually be called upon to pay. Under Civil RICO, damages are simply actual economic damages.<sup>51</sup> In other words, these are damages sustained at that foreign place at the relevant time.<sup>52</sup>

To be sure, these are to be trebled, and this led Justice Alito to reason, from the conjecturally more limited remedies available under foreign law, that Congress’s provision of treble damages should not govern the case before him. However, there was no foreign defendant in *RJR-Nabisco* to protect from American treble damages. The argument had no rational application in a case against an American company making and selling its products here.

In the face of such verities, Justice Alito doubled down. Glimpsing the irrationality of the argument about treble damages levied

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50. See *Daimler AG v. Bauman*, 571 U.S. 117, 122 (2014) (holding, in pertinent part, that a company must be “at home” at the forum attempting to assert general jurisdiction over it, with the implication that the forum must be the place of incorporation or a principal place of business).

51. 18 U.S.C. § 1964(c) (“Any person *injured in his business or property* by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney’s fee . . .”) (emphasis added).

52. See *Guinness v. Miller*, 291 F. 769 (S.D.N.Y. 1923) (Hand, L.: “The form of the obligation must therefore be to indemnify the victim for his loss in terms of the money of the foreign sovereign, and that obligation necessarily speaks as of the time when it arose; that is, when the loss occurred.”).

on foreigners, he fell back on the speculation that the need to respect delicate balances in foreign law would be more pressing in *other cases*, and therefore should simply be applied *in all cases*. And in doing so he pasted over his inapposite concern for foreign defendants under a very different, and apposite, concern for foreign plaintiffs:

Respondents urge that concerns about international friction are inapplicable in this case because here the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but rather the foreign countries themselves . . . . Even assuming that this is true, however, . . . [w]e reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry . . . . Rather than guess anew in each case, we apply the presumption in all cases . . . .<sup>53</sup>

Justice Alito continued, "Respondents suggest that we should . . . discard [our] reservations when a foreign state sues a U.S. entity in this country under U.S. law—instead of in its own courts and under its own laws—for conduct committed on its own soil. We refuse to adopt this double standard."<sup>54</sup> He concluded, "Although 'a risk of conflict between the American statute and a foreign law' is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex."<sup>55</sup> Yet there was no such risk—and, indeed, no conflict—in the case. All these countries were in perfect agreement with our law and sought its benefit.

In my view, RJR-Nabisco, a sophisticated but predatory American company, if in violation of RICO, richly deserved the purely economic penalty Congress provided for a pattern of violations of our laws. With treble damages, Congress struck its own balance between too low a penalty on the one hand, and jury-awarded punitive damages on the other.

(3) *The text and the territorial presumption.* Justice Alito soldiered on, figuratively shrugging off what must have been, to him, a sur-

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53. *RJR Nabisco*, 136 S. Ct. at 2108. The reader may note Justice Alito's hostility to the forum-shopping plaintiffs. In my view, it is a court's hostility to a nonresident that presents a problem, not the nonresident who seeks justice where it is available. In *RJR* itself, the forum was particularly suited to a case brought by a multi-membered plaintiff class alleging a series of complex international transactions. The federal district court in the Eastern District of New York is renowned for its competence in complex cases.

54. *Id.*

55. *Id.* at 2107.

prising unsuitability of anything he could think of to say in support of his concerns about foreign relations, damages, and delicate balances. He turned, like a drowning man sighting *terra firma*, to a close reading of statutory text.

For some years it has seemed that both in the academy and in the courts, “we are all textualists now.”<sup>56</sup> But Justice Alito encountered some difficulty in attempting to find a textual reason for reading a territorial limit into a regulatory statute that does not contain one.

We can say of RICO, at the very least, that Congress’s intention in RICO is regulatory. Congress intends to regulate rackets and racketeering. As to that regulatory intention, in a case against American racketeers, it could not matter where the criminal activities or the injuries consequent upon them occurred.<sup>57</sup> “Thou shalt not kill” is a command that does not vary depending upon the location of the killing.<sup>58</sup>

But in RICO, Congress did not rely solely upon the natural reach of regulatory law, but went out of its way, in addition, and repeatedly, to make its extraterritorial intentions explicit in every predicate relevant to the case. Justice Alito had to acknowledge that Congress had given RICO extraterritorial scope. As he put this, “[I]t is hard to imagine how Congress could have more clearly

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56. Elena Kagan, “The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes” (Harvard Law School, Nov. 18, 2015) (“We’re all textualists now.”). *But see infra* note 98 and accompanying text for the insight of the American legal realists that law cannot be construed rationally in disregard of its purposes. Although textualists have little use for purposive reasoning, and clearly have prevailed, it seems obvious that it makes no sense to construe a piece of text, much less an omission, in a way that defeats its purposes. For this reason, other features of statutory constructions discounted by textualists, such as the historical context at the time of enactment, can be very helpful. For an excruciating example of irrational and unjust textualism, see *Astrue v. Capato*, 566 U.S. 541 (2012) (Ginsburg, J., for a unanimous Court, interpreting five words, “For purposes of this Chapter,” to strip dependent twin infants of their Social Security support, because they were conceived *in vitro* and posthumously born, and the state in which their wage-earner father died domiciled would not permit posthumous children to inherit). By failing to respect the purposes of Social Security, enacted in response to the Great Depression, the Court managed to impoverish an entire family of six dependents, who thereafter, of course, would have had to share their own modest support with the unsupported twins. See Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1107–14 (2013).

57. Cf. DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST., Council Draft No. 3) at § xv.

58. I note, however, that in a prosecution here of *foreign* racketeers, domestic injury would probably have to be pleaded to provide a nexus with the case—a basis for an American court’s assertion of jurisdiction. A taking of jurisdiction, like all government action, requires some legitimate governmental interest on the part of the government involved—the “rational basis” on which due process depends. Governmental interests, the Supreme Court has held, are generated by a “contact” or “contacts” between the particular case and the respective government such that application of that interested government’s law is rational and not unfair. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)).

indicated that it intended RICO to have extraterritorial effect. [Its] unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.”<sup>59</sup>

Struggling against this, Justice Alito pitched on the unlikely expedient of reading the two parallel sets of text, civil and criminal, under two different standards. All that intention and structure and meaning could be attributed to *Criminal* RICO. RJR-Nabisco’s crimes could be *prosecuted*, given the explicit extraterritorial scope of each predicate crime at issue in *RJR-Nabisco*, as well as the implicit extraterritorial reach Justice Alito could not help seeing in RICO overall. But, he pointed out, *Civil* RICO contains no statement of its own about extraterritorial scope. (Neither does criminal RICO.)

So it was that Justice Alito went on to hold, for the Court, that the statute’s failure to be explicit about extraterritorial application on its *civil* side, unlike its equal failure on its criminal side, was fatal to civil enforcement in the absence of domestic injury. And so Civil RICO was held to be a virtual nullity in international litigation.<sup>60</sup>

The interpretation of a legislative omission is bound to be somewhat tenuous. Yet the presumption against extraterritorial application, of course, itself depends on an omission. The canon against extraterritoriality arises only in the silence of Congress, and thus amounts, ironically, to a non-textual insistence on text. Omissions can be intentional, of course, but how can we tell whether they are intentional or not? Justice Alito thought the omission intentional for Civil RICO, but thought the same omission was intended to be of no consequence in construing Criminal RICO. The question for us is whether a statute concededly instinct with extraterritorial intention<sup>61</sup> can rationally ground an interpretation that renders the statute inoperative to remedy foreign injuries in lawsuits by foreign friends against Americans—but not in *prosecutions* of Americans for the same foreign injuries. The answer would appear to be, “No,” and there is very little in the Court’s opinion that gets us over this reality.

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59. *RJR Nabisco*, 136 S. Ct. at 2103.

60. For a similar position in a state court, see the dictum in *McCann v. Foster Wheeler LLC*, 225 P.3d 516 (Cal. 2010) (decreeing that thenceforth California would remedy only those toxic tort claims arising in California, whether or not the plaintiff is a Californian, thus furnishing a haven for California “toxic” tortfeasors who cause injuries anywhere else, and forcing injured Californians in toxic tort cases “arising” elsewhere to have to look to courts away from home for justice, although the general rule is that the plaintiff who can obtain jurisdiction over the defendant can always sue at home).

61. *RJR Nabisco*, 136 S. Ct. at 2103 (“[I]t is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect.”).

Indeed, it is bound to be hard to erase any statutory text in the interest of textualism. It is hard to erase from RICO such features as its declaration of the scope of Congress's power under the Constitution. That appears in Congress's definition of a Civil RICO defendant; the statute explicitly covers every defendant enterprise which is "engaged in, or the activities of which affect, interstate or foreign commerce."<sup>62</sup> As for plaintiffs, the statute is equally explicit that its civil remedy is for the use of "[a]ny person injured in his business or property by reason of a violation of section 1962."<sup>63</sup> And Congress explicitly mandated that the statute be given a liberal construction.<sup>64</sup> In light of these mandates, why was not the explicit extraterritorial reach of each alleged predicate violation sufficient?

In fact, it is. Those violations were essential allegations of a Civil RICO complaint, as Judge Leval, concurring, pointed out below.<sup>65</sup> The reader will recall that Civil RICO, like Criminal RICO, is read to require allegations of violation of at least two predicate criminal laws, and that each of the predicates involved in this case is explicitly extraterritorial in scope.<sup>66</sup>

Then, too, there is the bearing of terrorism. In the wake of 9/11, the Patriot Act added additional crimes to the list of RICO predicates, mainly money-laundering offenses abroad in support of terrorism,<sup>67</sup> which were among those at issue in *RJR-Nabisco*. With respect to that foreign conduct, as Justice Ginsburg pointed out, dissenting from the judgment, it would be inappropriate to impose any rule of construction which would limit "foreign allies' access to our courts to battle against money laundering."<sup>68</sup> Ginsburg also argued that Civil RICO, being a wholesale incorporation of RICO, incorporates its extraterritoriality.<sup>69</sup> "RICO's private right of action . . . expressly incorporates § 1962," she wrote, "whose extraterritoriality, the Court recognizes, is coextensive with the underlying predicate offenses charged."<sup>70</sup> It appears that the textual defense in *RJR-Nabisco* made as little sense as might have been expected in cases in our configuration.<sup>71</sup>

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62. 18 U.S.C. § 1962 (2012).

63. 18 U.S.C. § 1964(c) (2012).

64. 18 U.S.C. § 1961 (2012) ("The provisions of [RICO] shall be liberally construed to effectuate its remedial purposes.").

65. *European Cmty. v. RJR Nabisco, Inc.*, 764 F.3d 129, 136-37 (2d. Cir. 2014).

66. 18 U.S.C. § 1961(5) (defining a "pattern" of activity).

67. *Id.*

68. *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2113, 2117 n.3 (2016) (Ginsburg, J., dissenting in part).

69. *Id.* at 2113.

70. *Id.*

71. In stressing the need for repeated statutory mention of extraterritoriality, albeit only in the context of civil suit, Justice Alito displayed the inconsistency required to avoid judicial obliteration of RICO in cases of transnational misconduct with an American nexus.

A most versatile omission, this failure to re-state the obvious. It is an omission that, according to Justice Alito, would not “count” in a *prosecution* of RJR-Nabisco, but one which annihilates a *civil* claim against RJR-Nabisco on identical facts. Justice Alito wrote: “[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.”<sup>72</sup> How can this be a principled textualism, when it relies not only on what it calls an omission, but on a conveniently *variable* reading of that omission?

And so, ironically, in *RJR-Nabisco*, a textualist judge and his textualist majority bowed to a supposed duty to disregard the acknowledged purposes of an act of Congress, subordinating the statute to a late blooming judicially created hurdle that Congress had no way of predicting. Far from engaging in statutory construction, this textualist Court elevated a supposed statutory silence to eviscerate the actual text of an act of Congress.

Thinking about all this, we can begin to see that the textualist argument, at least in this case, an argument supposedly in the service of deference to the legislature and separation of powers, in fact thumbs its figurative nose at the legislature, and, through what we might call the “gotcha” theory of statutory interpretation, works very hard, perversely, to frustrate a legislature’s purposes.

(4) *The private right to sue*. But Alito’s most curious venture into unreason in *RJR-Nabisco* was to associate each of the foregoing arguments with an overarching argument, that Congress should not authorize private rights to sue,<sup>73</sup> at least in cases of injury abroad. (He could hardly argue that Congress *could* not do so.) For Justice Alito, this was the key question posed by the case—the question whether “RICO’s private right of action, contained in § 1964(c), appl[ies] to injuries that are suffered in foreign countries.”<sup>74</sup> Is there any good reason why the answer to this question, about a statute concededly instinct with extraterritorial intent, should be “no?” Yet, Alito mused, “[i]t is not enough to say that a private right of action must reach abroad because the underlying law gov-

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Less importantly, he also displayed a rather optimistic assessment of the legislative process. No member of Congress sits down and writes a bill. The drafting of legislation is commonly done in committee, by aides in the offices of the respective members. And no member of Congress can read through every word in every bill. As Nancy Pelosi is said to have remarked about the Affordable Care Act, “We have to enact it to find out what’s in it.” Dan Macguill, *Did Nancy Pelosi Say Obamacare Must be Passed to ‘Find Out What Is in It’?*, SNOPE (June 22, 2017), <https://www.snopes.com/fact-check/pelosi-healthcare-pass-the-bill-to-see-what-is-in-it/>.

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

73. *Id.* at 2091; 18 U.S.C. § 1964(c).

74. *RJR Nabisco*, 136 S. Ct. at 2119.

erns conduct in foreign countries. Something more is needed . . . .”<sup>75</sup> The reader, perhaps, may be forgiven for asking, “Why?”<sup>76</sup>

Justice Alito went so far as to set it down that “[t]he creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not . . . .”<sup>77</sup> Again, the reader will be forgiven for asking, “Why?”

What is happening here is an unprecedented inapposite transfer of a whole sphere of argumentation from one area of law to another.

The conservative wing of the Supreme Court has long exhibited what might justly be perceived as hostility to civil litigation altogether.<sup>78</sup> It is as though the Court would prefer to be a court of criminal appeals. A special butt of the Justices, as far back as the days of the late Burger Court,<sup>79</sup> has been the so-called “implied” private right to sue to enforce an act of Congress. This is not only because an implied right, by definition, is not express. The problem for the Court has been that, if Congress has not provided a right to sue, the litigation of a statutory violation is authorized only by federal common law.<sup>80</sup> And as everybody (still!) thinks he knows, there is supposed to be something not quite right about federal common law<sup>81</sup>—some emanation, perhaps, of *Erie*,<sup>82</sup> or of the Rules of Decision Act.<sup>83</sup>

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75. *Id.* at 2108.

76. *Cf.* Symeon C. Symeonides, *Choice of Law in the American Courts in 2016*, 65 AM. J. COMP. L. 1, 5 (2017) (pointing out that in *RJR Nabisco*, “the Supreme Court stretched the presumption against extraterritoriality to the farthest extreme so far, by requiring courts to apply the presumption separately for *each section* of a statute”).

77. *RJR Nabisco*, 136 S. Ct. at 2106.

78. *See* Timothy P. Carney, *Trial Lawyer Industry Tries to Buy a Democratic Majority*, WASH. EXAMINER MAG. (Oct. 22, 2014, 5:00 AM), <https://www.washingtonexaminer.com/trial-lawyer-industry-tries-to-buy-a-democratic-majority>; Leslie Wayne, *Trial Lawyers Pour Money into Democrats’ Chests*, N.Y. TIMES (March 23, 2000), <https://www.nytimes.com/2000/03/23/us/trial-lawyers-pour-money-into-democrats-chests.html>.

79. *See, e.g.*, *Middlesex Cty. Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1 (1981) (holding that there can be no implied cause of action for interstate water pollution either under the Clean Water Act or the Civil Rights Act); *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981) (holding that there can be no implied cause of action under an act of Congress regulating conditions in certain caretaker institutions).

80. It has been argued that private rights to sue make more business for the plaintiffs’ trial bar, which, through its professional association is widely believed to give monetary support to the Democratic Party. *See, e.g.*, Adam Bonica, Adam S. Chilton & Maya Seny, *The Political Ideologies of American Lawyers*, 8 J. LEG. ANAL. 277, 281 (2016); Wayne, *Trial Lawyers*, *supra* note 78.

81. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1034 (1982) (referring to “the constraints imposed on federal common law by *Erie* and its progeny”); Martin Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TULANE L. REV. 803, 809 (1994) (referring to “the ban in the Rules of Decision Act . . . on the creation of federal common

Under the influence of Justice (later Chief Justice) Rehnquist and Justice Scalia, the Supreme Court became increasingly averse to federal common-law actions to enforce acts of Congress.<sup>84</sup> Judicial creation of a private right to sue to enforce an act of Congress came to be regarded as a relic of the “heady days” when the Court was willing to permit it.<sup>85</sup> Increasingly, only the clear intention of

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law”). For a current example, finding problematic the realist acknowledgment that judges “make” law, see, e.g. Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527, 528 (2019).

The Court’s dislike of implied rights has been developing against a background of hostility to federal common law altogether. For decades the Court has spent much of its energy in working up hostility to federal common lawmaking, as if that was not the very business the Justices were *in*. Yet judge-made constraints on judicial lawmaking are judicial lawmaking too. Moreover, the Court’s attack on federal common law *ex ante*, becomes, *ex post*, an irrational attack on the Supreme Court’s own precedents.

82. But see Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805–52 (1989). There is no such emanation, of course. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Erie* held only that identified state law must apply in all courts when it applies. Justice Brandeis reasoned that there can be no “general” federal common law, that all law must be the law of an identified sovereign. In state-law cases, that sovereign is the state, and under *Erie*, state law (obviously) applies in all courts when it applies. Of course, in federal-law cases, that sovereign is the nation, and under the Supremacy Clause federal law (obviously) applies in all courts when it applies.

83. But see Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860–75 (1989). The Rules of Decision Act, 28 U.S.C. § 1652, provides, in its tautological obsolete way, “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.” This antique traces back 240 years to Section 34 of the First Judiciary Act of 1789 § 34 (“And be it further enacted, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.”). In practice, over the intervening 240 years, judges in all courts have been quite able to decide federal questions within their jurisdiction, and are free, if they wish, to incorporate a state rule by reference if there is no strong national interest in the question. Similarly, over the intervening 240 years, judges in all courts have been quite able to decide state questions within their jurisdiction, subject to supreme federal law.

84. The Court’s distaste for implied statutory rights to sue has culminated, latterly, in such cases as *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855 (2017) (stating that further resort to the *Bivens* cause of action is a disfavored activity). *Bivens* is the only general damages remedy against a federal official for violation of the Constitution and federal laws.

85. *Corr. Services Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring) (“*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be ‘implied’ by the mere existence of a statutory or constitutional prohibition. As the Court points out, we have abandoned that power to invent ‘implications’ in the statutory field.”) (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)). The Court increasingly reveals a dangerous disinclination to enforce the Constitution. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) is the common-law mechanism grounding actions against federal officials for civil rights violations, and thus is the federal-officer analog of the Civil Rights Act of 1871, which grounded suit against *state* officials for civil rights violations. *Bivens* is thus a lynchpin of American constitutionalism and the rule of law. One might suppose it sufficiently difficult for plaintiffs to recover damages in both kinds of civil rights actions to satisfy the Court’s distaste for them, since defendant officials, federal and state, enjoy so-called official or qualified immunity from liability for violations of law “not clearly established.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). What is “clearly established” can seem to lie in the eyes of the beholder. See *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).



Congress, preferably in an express provision of a right to sue, will make an act of Congress enforceable in a lawsuit.

In developing this body of law, the Court seems unaware of an obvious and basic proposition of tort law: that a tort caused by violation of a statute is *far more serious* than a tort caused by a breach of some general duty.<sup>86</sup> Indeed, a tort in violation of a statute can be held to be negligence *per se*, or can result in a presumption of negligence, or shift the burden of proof of negligence. At the very least it can comprise competent evidence of negligence.<sup>87</sup> Even at federal common law, in admiralty, a statutory violation<sup>88</sup> is far more serious than some violation of a general duty. A statutory violation causing a collision, for example, shifts an extraordinary burden to the violating vessel to prove not only that its violation did not cause the collision, but also that it *could not* have done so.<sup>89</sup> Given the naturally heightened importance of a tort when caused by violation of a statute, it is astonishing that the Court continues and even strengthens its steady assault on remedies for torts caused by violations of acts of Congress.

But the most egregiously irrational feature of Justice Alito's opinion in *RJR-Nabisco* was his treatment of RICO's *express* private right to sue. In Alito's hands—at least if extraterritoriality is an issue—the express private right to sue fares no better than the “implied” private right to sue upon which the Court has been heaping obloquy for so long.

It makes no sense to say that an action can be permitted only with the greatest caution if the right to sue has not been given in a statute expressly, and then to say that a right that *has* been given in a statute expressly must also be permitted only with the greatest caution. That about covers all the ground, as far as cases of extraterritoriality are concerned. Justice Alito was saying that even Congress, hitherto the only proper lawgiver in conservatives' eyes, cannot, in international cases, be understood as a lawgiver at all, if it omits to repeat that it really means that what it has enacted with conceded extraterritorial intent is to be given extraterritorial effect.

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86. Cf. W. PAGE KEETON et al., PROSSER AND KEETON ON TORTS 230 (5th ed. 1984).

87. *Id.* at 230 (reviewing the alternatives; concluding that negligence *per se* is probably the majority rule).

88. The inland rules of navigation, for example, are codified. See 33 U.S.C. § 2071–2073 (2004).

89. *The Pennsylvania*, 86 U.S. 125, 136 (1873) (“In such a case the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute.”).

But Justice Alito here became even more sweeping in his language, and thus even more irrational. His broadened language could be read to disapprove of new classes of civil litigation altogether. Quoting language from an earlier case, Justice Alito wrote, “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.”<sup>90</sup>

Justice Alito seems here to be arguing, in effect, that Congress meant to discourage altogether the use of the civil remedy that Congress itself enacted.

Alito’s attempt to justify this bit of unreason only led him further down the rabbit hole. He did not attempt to explain why attorneys (who labor under a need to win cases to meet payroll and pay overhead—not to mention a need not to violate Rule 11) are not an effective “check” on private litigation. He also omitted to mention that a prosecutor’s discretionary decision not to prosecute is unreviewable, so that in the absence of a private right to sue there may be no access to justice at all for victims of criminal activity violating an act of Congress. And if he intended this part of his opinion to have to do exclusively with international cases, I should have thought the State Department to be more effective than local U.S. Attorneys in dealing with, or at least in informing courts of, foreign relations issues, if only because State Department officials are under no pressure to secure convictions.<sup>91</sup>

(5) *The law to be applied.* An extraordinary rule was discovered and set out with approval by Justice Alito in *RJR-Nabisco*. He wrote,

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90. *RJR Nabisco v. European Community*, 136 S. Ct. 2090, 2106 (2016) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

91. It is part of the complexity of the issues raised by *RJR Nabisco* that the European Community probably had few avenues for relief abroad. After the decision in *RJR Nabisco*, the question arises whether the individual countries involved, or the European Union itself, was competent to do anything about the linked problems of terror, narcotics, and tobacco glimpsed in the *RJR Nabisco* litigation. See Anatole Abaquesne de Parfourus, “*Breaking Through the Foul and Ugly Mists of Vapours*”—*Regulation of Alternative Tobacco and Related Products by the New TPD and Exercise of EU Competence*, 19 GERMAN L.J. 1291 (2018). It is widely noted that civil litigation in European countries, unlike criminal prosecution, can be inexpedient and even unavailable. The courts often are not like common-law courts. Earlier cases can appear as unexplained bald statements of decision. Contingency fees are often considered unethical, and the winner’s attorney fees tend to get shifted to the loser, thus impeding the kind of court access individuals enjoy in the United States. Moreover, courts may not have powers to handle class or other complex actions, or to provide court orders. A few European nations, inspired by our Supreme Court, have instituted constitutional courts, but these can suffer from some of the same sorts of impediments as do other courts in European countries, and have proved controversial. See Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20 GERMAN L.J. 225 (2019) (arguing that the trend toward constitutionalism has produced a populist backlash in Europe).

“Respondents’ argument [that a nonresident traditionally can sue in our courts on foreign injuries] might have force if they sought to sue RJR for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U.S. courts.”<sup>92</sup> This view, if established, would be a rule that in a transnational case brought by a nonresident, the law of the plaintiff’s home country applies. But even if the laws of all the member states of the European Union explicitly provided that, in cases of statutory tort there could be no recovery for economic harms, that defense could have no rational application to an American tobacco company sued here. France’s local defenses exist to protect French defendants. France has no interest at all in extending its laws to protect all the companies in the world in all the courts in the world from the consequences of their statutory torts. We are talking about the rational application of law.<sup>93</sup> Once again, we can see defensive argument making scant sense when proffered in our configuration of cases.

(6) *The “point” of Civil RICO.* We have seen that, having acknowledged that RICO was instinct with extraterritorial intent, Justice Alito gave little or no value to that insight. Perhaps Chief Justice Roberts might have preferred Justice Alito to have pitched his argument on the “focus” of the law. Consider its anti-terror provisions enacted in the wake of 9/11. The 9/11 attack on the United States was a serious foreign attack on our home country. There was damage to the Pentagon as well as to New York skyscrapers and surrounding structures. There were some 3,000 dead. In effect, this was the first aerial bombardment of the United States by a foreign force, deploying four planes. Pitilessly, those were four *passenger* planes. (What distinguishes terrorism from freedom fighting, revolution, or war is the terrorists’ deliberate and indiscriminate violence against civilians.) The foreign force that struck us that day was not a foreign nation but rather a foreign criminal organization of Islamic terrorists. The Patriot Act, and its amendments to RICO, were part of Congress’s response to this.

The “focus” of the Patriot Act might be supposed, by a territorialist Court, to be the various places in this country comprising the *loci delicti* on September 11, 2001: The World Trade Center and environs in New York, or the Pentagon in Virginia, or a field in Pennsylvania where the heroes of flight 93, with their quiet “Let’s roll,” went to their deaths bringing down one of the hijacked planes. That plane is now widely believed to have been headed toward the Capitol, in contemplation of murder of the Senators and

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92. *RJR Nabisco*, 136 S. Ct., at 2109.

93. On the essentially local quality of legal defenses, see *infra* Part III-A(3).

members of the House, with the Constitution in the rotunda burning. Or, more comprehensively, the *locus delicti* might be the United States itself. But the purpose of RICO is not to deal with hijacked planes, murdered thousands, destroyed skyscrapers, a gutted financial district, or threats to our seat of government and its grand traditions, but rather to deal with criminal organizations and their crimes—with rackets and racketeering.

In the context of the Patriot Act, this means, *inter alia*, a focus on organized money-laundering in support of Islamic terrorism. In the context of RICO, this means the conduct of organized criminal activity—that is, racketeering. As Justice Alito acknowledged at the very outset of his opinion in *RJR-Nabisco*, “RICO is founded on the concept of racketeering activity.”<sup>94</sup> Obviously a purpose of “Civil” RICO is to bring the prohibitions of RICO home to offending companies in their bank accounts and stock prices, and in their salaries and bonuses for executives. RICO, in sum, is “focused” on organized racketeers and their rackets, wherever the injuries consequent on those rackets may occur. And that focus is extended to the list of predicate violations that can ground prosecutions—and can also ground actions brought under Civil RICO<sup>95</sup>—in the Patriot Act’s additions of the offenses of money-laundering abroad and support of terrorism.

Civil RICO is regulatory in a manner complementary to RICO—it is about deterrence of rackets. Again, dollars are different from prison terms, but unquestionably dollars add to deterrence in this context. Dollar damages, trebled, will affect predator companies and their shareholders, and can drive predator companies into bankruptcy,<sup>96</sup> affecting those who have financed or supplied them as well.

An American defendant company, having committed tortious violations of an act of Congress, is well within the regulatory concerns of the United States, wherever it commits those acts.<sup>97</sup> Our courts have full power to remediate the torts caused by an American company’s violation of an act of Congress. In the configuration of cases we are examining, a foreign place of injury has no concerns to the contrary. It is the very lack of foreign interest in defeating claims of foreign injury that makes nonsense of defenses in cases in our configuration.

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94. *RJR Nabisco*, 366 S. Ct., at 2096.

95. See 18 U.S.C. § 1962(c).

96. Individuals violating criminal RICO can be imprisoned up to twenty years. Their fines are capped at \$250,000. Companies violating criminal RICO can be fined twice the gross losses attributable to the violation. 28 U.S.C. § 1963.

97. DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 57, at § xv (correctly explaining that the location of regulated conduct is immaterial).

Today's task in interpretation of law, habitual with lawyers and judges, is text-bound. We tend to subordinate purposive reasoning to text. Yet it is not possible to determine the scope of any rule without knowing the reason for the rule; its *telos*, its point. If the purpose of Congress in RICO is to deter and punish racketeers, that legislation applies to racketeers. It applies, at a minimum to all racketeers here, and to American racketeers everywhere. Purposive reasoning would suggest that if courts must apply any presumption in divining the intentions of a legislature, that presumption should accommodate the desired functioning of the legislation, not defeat it.

It was the great American legal realist, Karl Llewellyn, who pointed out that for every beloved old canon of construction one could propose an equally convincing but opposite one.<sup>98</sup> Unfortunately, Llewellyn's famous list of twenty-eight examples does not include a presumption against extraterritorial application of statutory law. Had it done so, it might then have included an equal and opposite presumption, something like this: "In the silence of a statute, territorial limits are not to be judicially inferred to block the force of the enactment within the rational scope of its purposes and the legislative power."

I am confident in this suggestion, and also in its superiority to the Court's presumption, because, as we have been reminded, Llewellyn also pointed out in the same article that law cannot be interpreted rationally without regard to its purposes.<sup>99</sup>

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The Court in *RJR-Nabisco* fell into unreason when it refused to enforce an act of Congress without a convincing reason for such disregard. It was irrational to contend that our foreign relations with Europe would be negatively affected by allowing Europe to try to prove its case. There was no convincing textual reason to disregard the conceded extraterritorial reach of RICO. There was no reason to disapprove a civil action provided by Congress on the

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98. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VANDERBILT L. REV. 395, 401 (1950) (containing twin tables of twenty-eight canons and their opposites). For an interesting study of the Roberts Court's love affair with canons of construction, see Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71 (2018). For the importance of *Erie* beyond its focus on the common law, see Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation: Erie for the Age of Statutes*, 54 WM. & MARY L. REV. 753 (2013); Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, *supra* note 56.

99. Llewellyn, *supra* note 98, at 400; see *Heydon's Case* (1584), 76 Eng. Rep. 637; 3 Co. Rep. 7 (holding that, in construing legislation, courts must consider the "mischief" that the statute was intended to correct).

ground that the Court likes prosecutions better. There was scant sense in the Court's view that foreign plaintiffs must be satisfied with their own countries' laws even when their own countries have no objection to ours. It is true that treble damages are heavy, no doubt, but that was the balance struck by Congress between low actual damages and freewheeling punitive damages. The Court took it upon itself to upend an act of Congress for no reason.

In short, there was no justification for the Court's failure to enforce the Act. Justice Alito's unseemly struggle for reason in an attempt to frustrate the intentions of Congress in a matter of vital national policy is an embarrassment. But such unreason is inevitable in the configuration of cases of which *RJR-Nabisco* is representative. It would appear that a court is under obligation, reflected in the oath of office, to give access to the claims of non-residents seeking to instantiate the actual regulatory policies of the sovereign at the place of trial, and, somewhat surprisingly, cannot escape the obligation on any rational basis. That is something that has not been suspected, much less understood.

#### D. *The Regulatory Interests of the United States*

This paper has proceeded from the tacit premise that the degree of national commitment to good conduct on the part of our companies and their executives is a potent determinant of the degree of the world's confidence in our trade relations, business dealings, and exports. The rule of law—our own law as enacted by Congress, our own regulations thereunder, and the federal common law the Supreme Court supplies—is part of our national character in others' eyes, a component of our soft power, if you will. Lax, permissive laws, in this view, to the extent they license substandard conduct by our companies and their executives, are injurious, and not only to our reputation. Because of the harm to our reputation they are injurious to our foreign markets, thus to our international commerce, and thus to our economy. Strong regulatory law—law furthering safety, reliability, and freedom from corrupt or predatory practices—law extending to the whole of the nation's power over international commerce, over our entire sphere of interest and desired influence in our globalized, interconnected world—self-evidently advances our national interests, shared with other nations, in trade, prosperity, and good relations.

Because the conduct of our national companies and their representatives engages these national interests wherever they act with consequences abroad, it becomes necessary that American businesses and their officers and agents act in accordance with Ameri-

can law wherever they act, wherever their actions have effect. Of course, our companies must also comply with the law in force wherever they act—but only when compliance would not require violation of our own law. If an American company abroad cannot act in compliance with local law without violating ours, that company, in my view, should not be doing business in that country. Nothing should diminish an American company's obligation to conform its conduct to the laws of the United States.

Thus, it becomes important that American law require good conduct without territorial or other arbitrary limits. Unwritten limits on written remedies simply invite misconduct, with damage to the interests of the United States. As for a court's solicitude toward a struggling local enterprise, there is no virtue in protecting any enterprise from responsibility for wrongdoing—no advantage to the company or the polity in allowing a statutory tort to go unremedied. If need be, the company can seek the protections of bankruptcy.<sup>100</sup> Acts of Congress are law which every court in this country is sworn to uphold.

To be sure, both conservatives and liberals can see a need to relieve enterprise of undue regulatory burdens. Deregulation commends itself when regulation requires massive paperwork, for example, without substantial benefit to anyone. But deregulation by irrational judicial fiat does not commend itself. Executives—and lawyers and politicians as well—those who are ideologically committed to the goal of deregulation—might consider that sound regulation can cartelize an industry, making affordable the cost of doing better business by diminishing or eliminating the price competition of companies doing shoddy business. It can require honest business from all, freeing all from dishonest competition. In this way, national reputational interests can be advanced, and our well-regulated companies can share in this advantage.

What has been said here underscores that the significant contacts between a sovereign and its regulated company, when in the courts of the regulating sovereign, are contacts between the regulating sovereign itself and the *conduct* of the regulated company. The location of *injury* resulting from that conduct is, of course, a matter of concern to courts at the place of injury. But the place of injury is of concern to the courts of the regulatory state only when the conduct-regulating state seeks to measure actual economic *damages* for the injuries caused by the prohibited conduct.<sup>101</sup>

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100. See 28 U.S.C. § 1963.

101. See *supra* note 51 and accompanying text on economic damages.

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We can now see how unreason becomes a predictable feature of litigation in the configuration of cases seen in *RJR-Nabisco*. In that litigation, the Roberts Court put itself in the position of protecting a predatory company from having to defend a lawsuit. It is not clear that the Community could have made out its case; the question we are considering, rather, is one of access. Here, access was denied on the novel thinking that even expressly-authorized lawsuits should be disapproved in favor of prosecutions, at least in cases in which the plaintiff is foreign. The Court stepped in, took a hand, and embarked on an unconvincing struggle in the service of neutering an act of Congress, with the consequence of insulating an American criminal enterprise from exposure to liability at the suit of foreign friends.

This was an award of judgment to the home company without the support of a convincing reason. With this, the Supreme Court gave its decision every appearance of a naked preference for the home party. The little difficulty of apparent want of neutrality thus reared its head, rendering the decision in *RJR-Nabisco* arbitrary and indeed unconstitutional as a matter of due process<sup>102</sup>—whether or not the Supreme Court will ever see this.

Today, RJR is once more a stripped-down North Carolina company, Reynolds America, in its original business of supplying the dwindling market for Camel cigarettes. Recently it has formed R. J. Reynolds Vapor Company and has put itself in the business of developing another addictive—and dangerous<sup>103</sup>—tobacco product.<sup>104</sup> It is a subsidiary of a subsidiary that is wholly owned by a British holding company, British American Tobacco, P.L.C.<sup>105</sup>

## II. AN INTERSTATE CASE: ROWE V. HOFFMANN-LA ROCHE

Although *Rowe v. Hoffmann-La Roche*<sup>106</sup> is a choice-of-law case, and *RJR-Nabisco* is not, *Rowe* is analogous to *RJR-Nabisco* in that, in

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102. See *Caperton*, 556 U.S., 868 (2009).

103. The Centers for Disease Control and Prevention and state agencies have reported 2,051 lung injury cases and 40 deaths linked to vaping. Jonathan Corum, *Vaping Illness Tracker*, N.Y. TIMES, <https://www.nytimes.com/interactive/2019/health/vaping-illness-tracker.html> (last updated Nov. 15, 2019).

104. See RJREYNOLDS VAPOR COMPANY, <https://www.rjrvapor.com> (last visited Nov. 16, 2019).

105. See BRITISH AMERICAN TOBACCO, <http://www.bat.com> (last visited Sept. 8, 2019).

106. *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 767 (N.J. 2007). For earlier comment on *Rowe*, including mine, see, e.g., Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, 2015 U. ILL. L. REV. 1999 (2015); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001 (2008); Symeon C. Symeonides, *Choice of Law in the*



both cases, a nonresident sues a defendant company at the defendant's home; access to the law at the place of trial is withheld; and there is a surprising inadequacy of reason to explain the result.

### A. A Troubled History

Hoffmann-La Roche, an American subsidiary of a Swiss holding company, is a major manufacturer of pharmaceuticals. The company has borne a substantial burden of litigation over the sufficiency of its warnings of the dangerous side effects of its once-popular acne medication, Accutane.<sup>107</sup>

Accutane is not a topical ointment; it is a drug taken internally. Its side effects include substantial risks of deep depression, attempted suicide, and suicide. The company's original warnings were compliant with the regulations of the federal Food and Drug Administration (FDA). But the company appears to have taken a deliberate decision not to update its warnings<sup>108</sup> as claims of injury and death mounted.<sup>109</sup>

Like RJR-Nabisco, Hoffmann-La Roche sought salvation from its litigation troubles and consequent financial difficulties in spin-offs and mergers. There was an attempt to fix prices in international

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*American Courts in 2007: Twenty-First Annual Survey*, 56 AM. J. COMP. L. 243 (2008); see generally William A. Dreier, *Liability for Drug Advertising, Warnings, and Frauds*, 58 RUTGERS L. REV. 615 (2006).

107. Accutane was discontinued in 2009. However, it remains available in its generic form, isotretinoin, and is prescribed as a drug of last resort. Hoffmann-La Roche has also been in litigation for years over other popular but dangerous drugs, notably Risperdal, prescribed for certain psychological disorders, but which allegedly can cause men to grow breasts. See *Risperdal*, DRUG DANGERS, <https://www.drug dangers.com/risperdal/> (last visited Sept. 8, 2019).

108. See Alliance for Human Research Protection, *Hoffman LaRoche Rebuffed Call to Monitor Accutane Users – USA Today*, USA TODAY (Dec. 7, 2004), <https://ahrp.org/hoffman-laroche-rebuffed-call-to-monitor-accutane-users-usa-today/> (reviewing an investigative report that “affirms the indispensable role of litigation in bringing the facts about adverse drug effects to public knowledge. Lawsuits against Hoffmann-La Roche, manufacturer of the acne drug, Accutane, uncovered internal company memos by Roche’s safety experts who recommended changing the US label to reflect the evidence that Accutane ‘probably caused’ depression and other psychiatric illnesses in some patients.”).

109. See Diane K. Wysowski, et al., *Depression and Suicide in Patients Treated with Isotretinoin*, 344 N. ENGL. J. MED. 460 (Feb. 8, 2001) (stating that “[b]etween 1982 and May 2000, the Food and Drug Administration (FDA) received reports of 431 cases of depression, suicidal ideation, suicide attempts, or suicide in U.S. patients treated with isotretinoin (Accutane, Hoffmann-La Roche), which is indicated for the treatment of severe nodular acne. There were 37 patients who committed suicide, 24 of them while using isotretinoin and 13 after ceasing to use it. Of these patients, 31 (84 percent) were male, and their median age was 17 years (range, 13 to 32).”).

For information on Accutane suicides in the United Kingdom, see Tracie Egan Morrissey, *Accutane to Be Reviewed in UK After Series of Suicides*, JEZEBEL (Apr. 29, 2014), <https://jezebel.com/accutane-to-be-reviewed-in-uk-after-series-of-suicides-1569215503>.

markets; the Justice Department fined the company a half billion dollars in that scandal.<sup>110</sup>

In the case that would become *Rowe v. Hoffmann-La Roche*,<sup>111</sup> the back-story begins up in Michigan, when Robert Rowe, at the time a sixteen-year-old lad with a stubborn case of acne, went to a doctor and received a prescription for Accutane. Some three months after he stopped taking the medicine a mysterious deep depression fell upon the boy,<sup>112</sup> and he drove his car into a house in an attempt to commit suicide. He sustained serious injuries. (I cannot say that I believe this story, but the case arose on review of a successful motion to dismiss, and we must take the allegations of the plausible complaint as true.)

Several years after these events, Rowe discovered that depression and suicide were side effects of Accutane. He sued. The gravamen of his products liability suit was the failure of the defendant Hoffmann-La Roche to warn of the serious side effects of Accutane, specifically the risk of suicidal depression.

Robert Rowe, being a resident of Michigan, might have sued the company there. Personal jurisdiction could be had under Michigan's long-arm statute.<sup>113</sup> But it is hard to say that in suing in New Jersey Rowe was forum shopping in some pejorative sense, since New Jersey was a principal place of the company's business in the United States. However, Rowe undoubtedly was counting on securing the benefit of New Jersey law.<sup>114</sup> He would certainly lose his case if it were tried under the law of his home state, Michigan.

### B. *A Problematic Presumption*

Michigan's warning requirements for dangerous pharmaceuticals could conceivably be read as codifying needed basic regulation of the conduct of its own makers of pharmaceuticals, and might have been thought to provide law for Robert Rowe's case. But Michigan draws a line that makes the overriding effect of its law protective of its resident pharmaceutical companies. When Rowe first brought his case, Michigan was also a principal place of busi-

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110. See Criminal Cartel/Enforcement Status Reports, U.S. DEP'T JUST. (March 28, 2001), <https://www.justice.gov/atr/speech/criminal-cartel-enforcement-status-reports>.

111. *Rowe*, 917 A.2d 767, 767 (N.J. 2007).

112. See Wysowski, *Depression and Suicide*, *supra* note 109, on post-Accutane injuries. These evidently account for roughly a third of cases.

113. See Mich. Comp. Laws § 600.705(2).

114. Cf. Louise Weinberg, *Choice of Law and Minimal Scrutiny*, 49 U. CHI. L. REV. 440, 463-64 (1982) (pointing out that the Supreme Court has set up a forum-shopping system, and offering reasons why).

ness of Pfizer, the giant pharmaceuticals house, and scores of other pharmaceutical and medical device companies, clustered particularly around Michigan's great university at Ann Arbor.<sup>115</sup> Michigan had every incentive to protect its pharmaceuticals industry from liabilities that in its view might be excessive.

To be sure, Michigan law requires that drug makers in Michigan conform to the warning requirements imposed by the federal Food and Drug Administration.<sup>116</sup> Courts tend to apply a presumption of sufficiency to warnings that conform to FDA regulations. Michigan achieves its protective but reasonable goal by making this presumption conclusive.<sup>117</sup> This Michigan statute would certainly have defeated Rowe's case if he had filed it in Michigan, because Hoffmann-LaRoche's warnings had fully complied with FDA regulations at the time Accutane went on the market.

New Jersey's regulation of drug warnings, on the other hand, is more stringent than the FDA's. The relevant New Jersey statute also presumes the adequacy of FDA-compliant warnings, but makes the presumption rebuttable.<sup>118</sup> Under New Jersey case law, the presumption can be rebutted by a failure to update warnings in light of post-approval experience.<sup>119</sup> However, mere negligence in failure to update warnings is not enough to rebut the presumption. There must be a *knowing* failure to update, if significant unwarned risks emerge in medical reports and litigation. If, in the face of mounting evidence of a dangerous side effect, there is reckless disregard or deliberate concealment—if, in other words, the case ordinarily would warrant punitive damages—the presumption of sufficiency of the warnings is rebutted.<sup>120</sup> Nevertheless, although New Jersey law requires a showing that punitive damages would be appropriate, New Jersey law precludes awards of punitive damages.<sup>121</sup>

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115. For a list of Michigan pharmaceuticals and medical-device firms after Pfizer's departure from Michigan, see Michigan Biotech, Pharmaceutical & Life Sciences Companies, BIOPHARMGUY, <https://biopharmguy.com/links/state-mi-all-geo.php> (last visited Sept. 8, 2019); see also Jay Greene, *Life after Pfizer: A Decade Later, Michigan Pharmaceutical Companies Have Found Paths to Growth*, CRAIN'S DETROIT BUS. (MAY 14, 2017, 8:00 AM), <http://www.craindetroit.com/article/20170514/NEWS/170519924/life-after-pfizer-a-decade-later-michigan-pharmaceutical-companies>.

116. Mich. Comp. Laws § 600.2946(5) (2006).

117. *Id.* In other states, compliance with inadequate or minimal regulations might not be conclusive as to due care, but would be treated as competent evidence of due care. See, e.g., J.C. v. Pfizer, 814 S.E.2d 234 (W.Va. 2018). For a proposed change in Michigan's presumption which would make it rebuttable, see *infra* note 136 and accompanying text.

118. N.J. Stat. Ann. § 2A:58C-4 (West 2018).

119. *Id.*

120. See *Perez v. Wyeth Labs., Inc.*, 734 A.2d 1245, 1259 (N.J. 1999) (“[A]bsent deliberate concealment or nondisclosure of after-acquired knowledge of harmful effects, compliance with FDA standards should be virtually dispositive” of a failure-to-warn claim.”).

121. N.J. Stat. Ann. § 2A:58C-5 (West 2018).

Robert Rowe was therefore seeking compensatory damages only. He argued that, if Hoffmann-La Roche's warnings had been upgraded to reveal the more serious risks of Accutane as they became apparent, he would not have used Accutane. His injuries, which were severe, would have been prevented. One suspects that few purchasers do read the long multilingual lists of dire side effects in small print on thin paper folded and inserted into a box. But in thinking about Rowe's case we must assume that if warnings accurately disclosing the risks of Accutane had been available, Robert Rowe would have read them and would not have used the drug.

The New Jersey trial court ruled that Michigan law applied and granted the manufacturer's motion for summary judgment. After all, Michigan was the place of injury, and, besides, it seemed reasonable to apply Michigan law to a resident of Michigan, who purchased a drug in Michigan with a prescription furnished by a Michigan doctor. However, on the facts of *Rowe*, the apparently "reasonable" choice of Michigan law would have been irrational. The New Jersey Superior Court, Appellate Division, reversed on this ground.<sup>122</sup>

Using a basic interest analysis, the Appellate Division, by Judge Wecker, held, correctly, that Michigan's defendant-protecting standard had no rational application in Rowe's case, since there was no Michigan defendant in the case to protect. Judge Wecker then correctly identified New Jersey's interest as regulatory.<sup>123</sup> He saw that New Jersey had an interest in providing a more patient-protective standard to govern cases of a defendant drug company's knowing or reckless failure to update its warnings as evidence of danger emerged. Judge Wecker could rely, in support of this thinking, on an earlier case in New Jersey's Supreme Court.<sup>124</sup> Thus, New Jersey law applied.

There was a dissent in the Appellate Division. Among other things, the dissent identified an interest in New Jersey's not becoming a magnet forum.<sup>125</sup> This concern, although speculative and disconnected from the pleadings, was to surface again in the state's Supreme Court. Given the rather nice work in the Appellate Divi-

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122. *Rowe v. Hoffman La-Roche, Inc.*, 383 N.J. Super. 442 (Super. Ct. App. Div. 2006).

123. For excellent discussions of regulatory governmental interests, see Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763 (2017) (generally treating tort law as reflecting regulatory policies, whether compensatory or deterrent); Neuman, *Extraterritoriality*, *supra* note 28 (exploring the national interest of the United States in regulating the conduct of its own officials, with a survey of cases).

124. *Rowe*, 383 N.J. Super. at 453 (citing *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996)).

125. *Id.* at 465 (avoiding the phrase "magnet forum;" instead using the term "haven," more appropriately used to describe states the courts of which would shield defendants).

sion, it was something of a shock when the state's Supreme Court reversed,<sup>126</sup> holding that Robert Rowe's case must be dismissed.

### C. *The Struggle for Reason*

(1) *An unconvincing construction.* The New Jersey high court's opinion in *Rowe*,<sup>127</sup> by Judge LeFelt, opened by re-classifying *Rowe*, not implausibly, as a no-conflict case. Judge LeFelt reasoned that both New Jersey and Michigan require warnings of dangerous side effects in the labeling of pharmaceuticals. Both states seek to protect their residents. The difference, then, was one of degree only. It was a minor difference in the strength of the presumption of sufficiency of the FDA requirements; the two statutes were "substantially congruent."<sup>128</sup>

This seemingly plausible argument loses force when we recall the actual workings of the Michigan statute. As we have seen, there was no way to construe Michigan law as simply protective of Michigan patients who might purchase pharmaceutical products manufactured out of state. That vague speculation should have been forestalled by the fact that Michigan's conclusive presumption clearly insulated FDA-compliant drug companies from liability.<sup>129</sup> Michigan's immunity rule could rationally comprise only a defense, and a defense only for Michigan drug companies; Michigan had no interest in protecting every other state's drug companies—as the Appellate Division had perceived.

Judge LeFelt properly abandoned this line of reasoning but, strangely, did not delete it. He seems to have concluded, after a review of earlier cases, that his "no-conflict" classification could be made to square with New Jersey precedent only if he were prepared to apply New Jersey law and to let Rowe's case go forward. Instead, he wound up ruling that *Rowe* was a "true conflict" after all, since the laws differed and the difference would affect the outcome.<sup>130</sup> This definition of a "true conflict" was unhelpful. It would also describe a "false conflict" (a case in which only one state has a governmental interest, but the laws differ and the outcome would differ depending on which state's law applied). It would also describe an unprovided case (a case in which neither state has a gov-

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126. *Rowe v. Hoffman-La Roche*, 917 A.2d 767 (N.J. 2007).

127. *Id.*

128. *Id.* at 774.

129. *See, e.g., M.M. v. Pfizer, Inc.*, 806 S.E.2d 800 (W.Va. 2017) (applying Michigan's failure-to-warn statute as a complete defense).

130. *Id.* at 775.

ernmental interest, but the laws differ and the outcome would depend on which was applied).<sup>131</sup>

Judge LeFelt proceeded to identify what he thought to be the respective states' interests. He was correct that New Jersey's governmental interest in the case was regulatory (this had been held in the same earlier New Jersey case on which the court below had relied).<sup>132</sup> But he fell again into unreason when he tried to identify Michigan's interest in its conclusive presumption of adequacy as an interest in making prescription drugs *more affordable* to Michigan's citizens.<sup>133</sup>

This is a poignant example of the souring of defensive argument in cases configured as *Rowe* was. Carried to the extreme, Judge LeFelt's affordability argument would lead to the conclusion that there is a legitimate governmental interest in deleting the law of products liability altogether, on the theory that eliminating the expense of defending the lawsuits would make products more affordable. The reality is that nobody wants to make dangerous products more affordable. Why would Michigan want to make more available to its residents a life-threatening drug of last resort like Accutane, particularly when the manufacturer has knowingly obscured the news that the drug could kill them?

Then, too, it is hardly obvious that adding a line to the existing warnings would make a drug more expensive. On the contrary, drugs are less expensive the fewer wrongful death lawsuits are brought, extracting dollars from the maker.

(2) *The scales of injustice.* Judge LeFelt went on to *weigh* this non-existent Michigan interest in the affordability of killer drugs against New Jersey's regulatory interest. The weighing of governmental interests is a process—however popular—that the Supreme Court of the United States has wisely disapproved in its own interstate conflicts cases,<sup>134</sup> and one in which analysts of my stripe would also prefer not to indulge. The United States Supreme Court has been quite correct in its perception that a court must remain free

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131. These categories will be further defined and discussed below. The taxonomy is addressed in Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106, and is derived from Brainerd Currie's writings on conflict of laws collected in BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* (1963).

132. See *Gantes v. Kason Corp.*, 679 A.2d 106 (N.J. 1996).

133. *Rowe*, 917 A.2d, at 774.

134. See *Franchise Tax Bd. of Calif. v. Hyatt*, 538 U.S. 488, 496 (2003) (“[W]e abandoned the balancing-of-interests approach to conflicts of law under the Full Faith and Credit Clause. We have recognized, instead, that ‘it is frequently the case under the Full Faith and Credit Clause that a court can lawfully apply either the law of one State or the contrary law of another.’ We thus have held that a State need not ‘substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.’”) (citations omitted).

to apply its own law and policies, however weighty some other polity's interests might be in the matter. But with this dubious "weighing," Judge LeFelt was able to conclude that Michigan law—which we have seen to be without rational application in Rowe's case—was the only appropriate law for it.<sup>135</sup>

(3) *On forum shopping.* We have seen that a significant feature of Judge LeFelt's opinion was his well-expressed feeling that there was something abusive about a nonresident's using New Jersey courts. Judges tend to see actions by nonresidents as forum shopping and tend to see forum shopping as an evil. But this reaction seems odd in a case like *Rowe*, in which the plaintiff has come to the very place where the defendant company has its principal place of business, arguably the most convenient and appropriate place of trial against any company, from the company's own perspective.

In *Rowe*, one might conclude that, in dismissing the case of a forum-shopping plaintiff, *Rowe* was a clear case of discrimination against the nonresident. But in Judge LeFelt's view, a Michigan individual had come to New Jersey with his late-blooming Michigan miseries to sue a valued local enterprise. Judge LeFelt candidly wrote,

To allow a life-long Michigan resident who received an FDA-approved drug in Michigan and alleges injuries sustained in Michigan to by-pass his own state's law and obtain compensation for his injuries in this State's courts completely undercuts Michigan's interests, while overvaluing our true interest in this litigation. In this instance, where the challenged drug was approved by the FDA and suit was brought by an out-of-state plaintiff who has no cause of action in his home state, this State's interest in ensuring that our corporations are deterred from producing unsafe products . . . must yield. . . .<sup>136</sup>

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135. Two of the judges dissented in part. *Rowe v. Hoffman-La Roche, Inc.*, 917 A.2d 776, 776 (N.J. 2007) (Stern, J. dissenting). They urged delay and pointed out that a bill had passed the Michigan House, H.B. 4044-4045, 94th Leg., Reg. Sess. (Mich. 2007), which if adopted, would repeal Mich. Comp. Laws § 600.2946(5), and enact a rebuttable presumption that products are safe if they are subject to, and comply with, pertinent government safety standards. But the Court thought it imprudent to delay, given the vagaries of legislative action.

136. *Rowe*, 917 A.2d at 778. For an amusing view of the Michigan "diaspora" of plaintiffs seeking to avoid Michigan's conclusive presumption of adequacy, see Eric Alexander, *Michigan Strikes Back in Pennsylvania*, DRUG & DEVICE L. (Dec. 15, 2017), <https://www.druganddevicelawblog.com/2017/12/michigan-strikes-back-in-pennsylvania.html> (discussing the phenomenon of the "tourism" of the "Michigan Diaspora"); see also Eric Alexander, *Direct-Filed MDL Case on Thin Ice for Personal Jurisdiction*, DRUG & DEVICE L., <https://www.druganddevicelawblog.com/author/alexander> (last visited Oct. 29,

Note here the inadvertently revelatory self-contradicting admission that Michigan's interest was defendant-protecting, after all. Apparently, the holding in *Rowe* was less an application of Michigan law than an expression of the New Jersey judges' objections to being made use of.<sup>137</sup> In 2018 the New Jersey high court clearly repudiated *Rowe* on this point, ruling that choices of law must not be based on animus to nonresidents.<sup>138</sup>

Judicial distaste for forum shopping, endemic as it is, is forgetful of the fact that the plaintiff's choice of forum is not only in the long tradition of the common law in this country,<sup>139</sup> but also is reflected in the traditional understandings of freedom and federalism that underlie the promise of interstate Privileges and Immunities guaranteed by Article IV, and in particular, traditional understandings of interstate access to courts, a vital part of that promise.<sup>140</sup> Moreover, notwithstanding that the forum shopping plaintiff gains the advantage of favorable forum law, all that that plaintiff actually gets, in most instances, is a chance to prove its case.

I will return to this forum shopping issue shortly.<sup>141</sup>

(4) *By what authority?* We have seen that the New Jersey high court was unable to find a convincing reason for departing from New Jersey's own law. Yet it nevertheless applied Michigan law and threw the case out. Even if Michigan's statutory defense could have been applied rationally in *Rowe*, a question would still be raised, here as in *RJR-Nabisco*: By what authority does a court disregard its own sovereign's applicable and constitutional law?

2019). The author praises Pennsylvania for a recent change. Pennsylvania now will irrationally apply the law of an uninterested state, Michigan, to defeat the cases of Michigan "tourists" seeking better law than they can get at home. The author praises those federal courts which have done the same. I note that federal courts are required to apply the law that the plaintiff's chosen forum state "would" apply. *Cf. Klaxon v. Stentor*, 313 U.S. 487 (1941); *Van Dusen v. Barrack*, 376 U.S. 612 (1964).

137. For the realist argument that choices of foreign (non-forum) law should be understood as forum law, since they reflect the forum judiciary's actual preferences, *see infra* Part III-A.

138. *See In re Accutane Litigation*, 194 A.3d 503, 522 (N.J. 2018) (on certified questions, ruling that a court should not apply its choice-of-law principles in a way that discriminates against nonresidents).

139. On the deference due a plaintiff's choice of forum, *see Van Dusen v. Barrack*, 376 U.S. 612 (1964) (holding in a transferred case that the law of the transferor court governs at the transferee court, including the transferor court's choice-of-law rules). For current discussion of the deference due the plaintiff's choice of forum in a state's written and common law, *see Univ. of Md. Med. Sys. Corp. v. Kerrigan*, 174 A.3d 351 (Md. 2017).

140. On the right of access to courts as emanating from the Article IV Privileges and Immunities Clause, *see Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148 (1907); *Blake v. McClung*, 172 U.S. 239, 249 (1898).

141. On the problem of "the magnet forum," *see infra* Part III-A, III-C(2).



In failing to enforce its own statute, the New Jersey Supreme Court in *Rowe* defeated the modest regulatory intentions of New Jersey's own legislature while advancing no interest of its sister state. Indeed, if Rowe's home state of Michigan can be said to have had any interest at all in Rowe's case, it might have been a certain warm glow of expectation that its resident would bring home a little money.<sup>142</sup>

Even if *Rowe* had been a true conflict—even if Michigan could have had any legitimate governmental interest in preventing its resident, Robert Rowe, from recovering for his injuries in a state that would allow recovery<sup>143</sup>—that would not have been reason enough for the New Jersey high court to avoid the obligation of applying its own regulatory law against its own company within the scope of the regulation, as the Appellate Division saw. The presumption of sufficiency of FDA-compliant warnings having been rebutted in Rowe's case, Rowe was entitled to have his case heard. There was no need to look to Michigan law.

One often hears of “comity” in a two-sovereign litigation. But comity certainly ought not to be extended to the uninterested state in a false conflict case.<sup>144</sup> Indeed, I would argue that comity need not (and, I would argue, ought not) extend even to an interested

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142. On recoveries as sparing innocent dependents and heirs, taxpayers, medical services, and charitable resources, see *infra* note 208.

143. For a startling example of this sort of unreason, see, e.g., *Laugelle v. Bell Helicopter Textron, Inc.*, No. 10C-12-054, 2013 WL 5460164 (Del. Super. 2013) (in a wrongful death suit, the defendant's corporate home state applying the law of the plaintiffs' home state, Massachusetts, as place of the grieving family's mental anguish, to deny recovery for mental anguish). The Delaware Court took the position that Massachusetts, the widow's home state, was the place of most significant contact with the widow's grief, and therefore Massachusetts law applied. But Massachusetts had no interest in protecting Delaware corporations or Texas manufacturers from damages for grief, and Delaware had a regulatory interest in allowing damages for grief as against a Delaware corporation found to be at fault in the death of a helicopter pilot. A counterargument was available, that, as place of incorporation only, Delaware's only governmental interest in Bell Helicopter was in its corporate governance. *Laugelle* probably should have been resolved by Delaware law, in the bare justice-furnishing interest of the forum. See *infra* Part III-D(3). Another solution would have been a decision henceforth to apply Delaware's substantive rules of decision when a Delaware corporation with no other contact with Delaware than as place of incorporation is sued in Delaware for a tort. In its footnote 19, the *Laugelle* court explains that the plaintiffs declined to rely on Texas law. It appears that economic loss was a significant part of the damages claimed, and under Texas law, when so claimed, economic damages are held to be exclusive.

144. In the language of governmental interest analysis in choice-of-law theory, a false conflict is a case in which there is only one interested state—that is, only one state with an interest in having its law applied to a particular issue. In such cases a court obviously should apply the law of the only interested state to that issue. These sorts of analyses were the contribution of Brainerd Currie. BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 131, including, on page 77, one of the most influential law-review articles in American legal history, his *Married Women's Contracts*, 25 U. CHI. L. REV. 227 (1958). For a general exegesis see Louise Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106.

non-forum state in a *true* conflict case.<sup>145</sup> What matters is the forum's own law and policy.

It is true that New Jersey's regulatory law would benefit not only New Jersey residents, but all users of New Jersey pharmaceuticals, wherever their injuries were suffered. It is a characteristic of regulatory law—conduct-regulating law—that it necessarily applies to the regulated conduct wherever it is engaged in, wherever and to whomever any injuries consequent on a violation occur.<sup>146</sup> New Jersey's statute, to the extent it is enforced, helps to assure national and world markets of the safety of New Jersey pharmaceuticals, and underscores the reliability of warnings accompanying them. The company shares this interest with the state.

#### D. *The Regulatory Interests of a State*

Our reading of *Rowe v. Hoffmann-La Roche* underscores the importance of regulatory interests at the place of trial and reveals the want of reason that seems to accompany failure to give effect to them.

It is common wisdom that, over the long haul, companies concerned about vulnerability to suit, as, for example, a corporation owning a highly polluting paper mill, will tend to produce its risky or polluting products in a state the laws of which are, on the whole, favorable to its activities. In addition, the presence of a valuable enterprise in a state, depending upon the means and political sophistication of that enterprise, will itself tend, over time, to produce law protective of that enterprise. When, however, the influence even of a valuable and politically powerful industry<sup>147</sup> is not entirely successful, and law is enacted reining in perceived excesses in that industry, we may conclude that the regulatory interests of the state are considerable, however modest the regulation.

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145. Cf. *Alaska Packers Ass'n v. Indus. Acc. Comm'n*, 294 U.S. 532, 547 (1935); *Pac. Employers Ins. Co. v. Indus. Acc. Comm'n*, 306 U.S. 393, 404–05 (1939) (both cases holding that the interested forum need not apply the law of another interested state). I would go beyond this. In my view, the interested forum *should not* apply another state's law, even if the other state also has a legitimate governmental interest in applying its law.

146. *Accord*, DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 57.

147. For a possible example of the political power of the national pharmaceutical industry, apparently extending to power over the Food and Drug Administration—the agency that is supposed to be its watchdog—see the puzzling if not distressing failure-to-warn case of *Merck, Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct 1668 (2019). This case raises the question whether a state-law failure-to-warn claim is preempted, in a case in which the FDA *rejected* the drug manufacturer's proposal to warn about a risk, although the FDA was provided with the relevant scientific data. The court remanded for discreet bench trial to assess the FDA's reasons for rejecting the proposed additional warning.

Even so, in some instances a company in that industry may well see the point of a given regulation and approve of it.<sup>148</sup> As we have seen, regulatory law offers benefits. Competitors in the state might welcome a level playing field, and, after all, the state's reputational interests are also the industry's.

The New Jersey high court fell down the rabbit hole of unreason when it began rooting around for arguments that might justify its failure to vindicate New Jersey's regulatory interests. *Rowe*, like *RJR-Nabisco*, demonstrates the irrationality of defense arguments in cases in which the court refuses to allow a nonresident to try to recover under forum law at the defendant's home.<sup>149</sup> One sees in these examples the difficulty of finding rational bases for departures from plaintiff-favoring forum law when the plaintiff, a nonresident, leaves her home to sue the defendant at his.<sup>150</sup> And each of our two cases illustrates how the analyst's familiar descriptor, "plaintiff-favoring," can fail to capture the regulatory interests of the forum, which may be more aptly described as "defendant-regulating."

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148. For one industry's interest in uniform governance, see, e.g., Tim Worstall, *Why Google, Facebook, the Internet Giants, Are Arguing for Net Neutrality*, FORBES (July 15, 2014, 4:08 AM), <https://www.forbes.com/sites/timworstall/2014/07/15/why-google-facebook-the-internet-giants-are-arguing-for-net-neutrality/#771233d048a0>.

149. For the views of the chief proponent of codified rules, now more sophisticated than past rules because distilled from insights gleaned from interest analysis and empirical study, see, among his many fine writings, Symeon C. Symeonides, *Choice-of-Law Methodology: Fifty Years After Brainerd Currie*, 2015 ILL. L. REV. 197 (2015). For an equally optimistic argument that departures from forum law in the interests of comity and interstate harmony, fairness as well as justice, are an important benefit of the law of conflict of laws, and that the occasion for such departures can be reduced to a few simple rules, incorporating the insights of the interest analysts, see Joseph William Singer, *Multistate Justice: Better Law, Comity, and Fairness in the Conflict of Laws*, 2015 U. ILL. L. REV. 1923 (2015). For similar views brought to bear more specifically upon transnational litigation, see the learned and interesting Donald Earl Childress III, *Comity as Conflict: Resituating International Comity as Conflict of Laws*, 44 U.C. DAVIS L. REV. 11 (2010). For influential earlier challenges to interest analysis, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Lea Brilmayer, *Governmental Interest Analysis: A House Without Foundations*, 46 OH. ST. L. J. 459 (1985). But see Louise Weinberg, *Against Comity*, 80 GEORGETOWN L. J. 53 (1991); Louise Weinberg, *On Departing from Forum Law*, 35 MERCER L. REV. 595 (1984) (arguing that departures from forum law are irrational, discriminatory, unjust, and unconstitutional). I have proposed that the whole field be reorganized by kinds of conflict, as identified by interest analysis, rather than kinds of claims. See Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106. But, in the realist tradition, I have had to come to a simpler conclusion. The only rule I rely on here is the rule of *lex fori*.

150. Of course, cases will arise in which a faraway state boasts law that is "better," law that is remedial, as opposed to the defendant-protecting law of the forum. (The plaintiff will have been forced to the defendant-protecting forum by jurisdictional rules, or by the universality of a particular defendant-protecting rule.) In such cases, the forum tempted to "apply" better law should instead "adopt" it as its own. According to local-law theory, as developed by American legal realists, the law applied by the forum, whatever its source, is always the forum's own law, as a practical matter, because it reflects the forum's own policy choices. Moreover, honest adoption of the chosen rule, when possible, will help to minimize the discrimination and dysfunction that accompany a departure from pre-existing forum law.

The good news from New Jersey is that, in 2017, in the case of *McCarrell v. Hoffmann-La Roche*, New Jersey's Supreme Court, in effect, repudiated *Rowe*.<sup>151</sup> On the certified question whether New Jersey's equitable tolling provision could be applied to keep alive a nonresident's case against Hoffmann-La Roche (a case also involving Accutane and the inadequacy of its warnings), the New Jersey Supreme Court held that New Jersey's equitable tolling law was indeed applicable, and the plaintiff would have a chance to prove her case.<sup>152</sup> The court relied on New Jersey's strong regulatory interests in the safety of New Jersey pharmaceuticals.<sup>153</sup> Although the court avoided dealing with *Rowe* beyond a bare irrelevant citation to it, *McCarrell* was an obvious repudiation of the reasoning in *Rowe*. The New Jersey court reached this result under *Restatement (Second)*, but it acknowledged that it would have reached the same result under its former method, governmental interest analysis.<sup>154</sup>

### III. SOME THEORETICAL CONSIDERATIONS

#### A. *Democratic Theory and Local Law Theory*

(1) *On departing from forum law.* Perhaps it is time to acknowledge that departures from the law of the forum are problematic. It is understood that such departures from the law of the forum are discriminatory.<sup>155</sup> But commentators (myself included) have not sufficiently taken into account that departures from the law of the forum will also undermine the regulatory concerns of the forum when the forum is the defendant's home state. Those are cases in which, as I have been arguing, regulatory interests need to be recognized and accorded full value, mindful of the fact

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151. *McCarrell v. Hoffmann-La Roche, Inc.*, 153 A.3d 207 (N.J. 2017); see also *In re Accutane Litigation*, 194 A.3d 503 (N.J. 2018). In this latter case, a class action, the New Jersey court held the presumption of adequacy of warnings to have been rebutted, where Hoffmann-La Roche could not have known of the particular risk, a risk of inflammatory bowel disease. Of course, Hoffmann knows now.

152. *McCarrell*, 153 A.3d at 225.

153. *Id.* at 211 (stating that "Our jurisprudence has long recognized that this State has a substantial interest in deterring its manufacturers from placing dangerous products in the stream of commerce. Inadequate warning labels can render prescription medications dangerous.").

154. *Id.*

155. For the leading early work on discrimination in the conflict of laws, see Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Equal Protection*, 28 U. CHI. L. REV. 1 (1960); Brainerd Currie & Herma Hill Schreter, *Unconstitutional Discrimination in the Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323 (1960). For the "comfort" of the American Law Institute (ALI) reporters with this stubborn fact, see *infra* Part III-C.

that regulatory law is likely to be law that has overcome powerful political opposition for critical reasons of public safety or order.

The forum with regulatory interests raises most acutely the general question whether it is ever appropriate for a court to disregard its own laws and policies. If the honest answer seems to be “No,” the logical conclusion is that abstract choice-of-law “rules” are fundamentally unsound. It is the whole point of choice-of-law rules to decide, in an abstract, neutral way, whether or not to give access to the forum’s own law. The first questions that come to mind are whether, and how, a court can disregard the commands of its own legislature—a legislature voted into office by its own citizenry? How can it do this when under the oath of office? What theory of democracy could support judicial disregard of an American state’s own legislation, if it is constitutional and there is no supreme federal law to the contrary? For that matter, how can any state supreme court disregard its own cases, without candidly overruling them? The more urgent questions are whether local law obtained in the public interest and for the general welfare, notwithstanding great political pressure, might even be the more precious when within the special keeping of local courts.

These questions are complicated by an old observation. All law applied in courts can be seen as local law.<sup>156</sup> When a court chooses some other state’s law, it is, after all, making its own policy choice. These questions are further complicated by the fact that a state legislature can certainly empower its courts to apply the laws of other sovereigns. The legislature can enact a code of choice-of-law rules. Or it can authorize courts to develop choice-of-law rules.

We can acknowledge these complications and nevertheless see that political theory, democratic values, and the oath of office all suggest that a court’s duty is to its own statutes and cases. In this country, of course, state law must give way to supreme federal law, but that imperative aside, it appears that the interested forum cannot depart from its own law without discrimination and other unfairness.<sup>157</sup>

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156. For early realist perceptions that the forum always applies its own law whatever it says it is doing, *see, e.g.*, *Guinness v. Miller*, 291 F. 769, 770 (S.D.N.Y. 1923) (Hand, L., stating that “no court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that [the forum] sovereign”); Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 *YALE L.J.* 457, 469 (1924). *See also* Ernest G. Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 *YALE L.J.* 736, 748 (1924) (regarding local policy); *see also* David Cavers, *The Two “Local Law” Theories*, 63 *HARV. L. REV.* 822 (1950); Frederick J. de Sloovere, *The Local Law Theory and Its Implications in the Conflict of Laws*, 41 *HARV. L. REV.* 421 (1928).

157. For my long-discomfort with departures from forum law, *see supra* note 149.

Prudential considerations alone should counsel greater respect for the law of the forum. Since plaintiffs tend to sue where they can win, the plaintiff enters the forum as an agent of enforcement of law and local policy. When such private attorneys general are denied access to local law, the chance of enforcement is lost, and the forum relinquishes its own justice.

(2) *The non-neutrality of “neutral” systems.* “Neutral” systems of abstract rules purporting to require disinterested, fair “choices” of other states’ laws can produce departures from the law of the court chosen by plaintiffs, and thus inevitably must often yield defendant-favoring results. In other words, choice-of-law rules are likely to be defendant-biased, since they exist to legitimize departures from the law of the forum.

Consistent forum bias is plaintiff-biased, no doubt. But it has this merit, that the plaintiff seeks enforcement of law. And it has this limit, that the plaintiff does not necessarily “win,” but gains only a chance to prove its case, or has restored to it the verdict of a jury. On the other hand, consistent defendant bias has this demerit, that the law under which an action was brought will not be enforced. And defendant-bias suffers from an immoderate and unjust consequence, that the defendant, an alleged wrongdoer, typically “wins,” and does so without trial of the merits. One sees this with disturbing clarity in cases against known predators such as RJR-Nabisco.

That courts are free to “choose” the law that governs them is a long-hallowed and unshakable tradition, but it is troubling. It is especially troubling when choices of law are effected through application of a set of “rules.” Rules, gratifyingly neutral because of their very abstraction, even if codified and enacted, are only unrealities superimposed upon reality. By design, they are mechanisms detached from the human crises to which they are addressed. In the two examples this Article offers, I think the reader will feel not only the offense to democracy when the forum denies its own law, but also, in the very arbitrariness of such denials, an offense to due process, a risk of pointless injustice when a departure from forum law will favor a tortfeasor for no reason, and an appearance of bias when, as is likely, that tortfeasor is a resident of the forum.

In a wholly domestic version of *Rowe*, what would authorize New Jersey to deprive Rowe of his day in court? What purpose would be served by not putting him to his proof? What purpose would be served by shielding Hoffmann-La Roche from having to defend against accusations of reckless indifference which we know to be accurate? Why, then, should it make a difference that the plaintiff, Robert Rowe, is a nonresident? Does not a discrimination between

residents and nonresidents need justification? Must not a discrimination have at least some rational basis? Under Article IV's Privileges and Immunities Clause, can residence in another state of this Union, without more, justify denying access to the law of the forum?

The starry-eyed search for better choice-of-law systems, it would appear, has been naïve, mistaken, and indeed, seriously subversive of the rule of law.

(3) *The "better law" problem.* Not all departures from forum law are defendant-favoring. Consider a case in which law is chosen through the blind application of some naïve "jurisdiction-selecting" choice rule (such as "the law of the place of injury governs if it is also the place of conduct"<sup>158</sup>), and by some stroke of luck the plaintiff is thereby afforded a chance to prove her case—a chance which forum law would have denied her.<sup>159</sup> While the defendant-oriented observer may feel some annoyance, the plaintiff-favoring observer may feel a twinge of gladness for the fortunate plaintiff. It is part of her good fortune that, as it happens, the chosen state does have constitutional power, since, as place of injury and conduct, it has strong deterrent and remedial interests in having its deterrent and remedial law applied. But we may feel some unease. We know that the forum is the place where the defendant's insurer has a principal place of business and where both parties reside, and we know that as joint domicile of the parties, the forum picks up some power to settle their dispute. Let us suppose that the law of the forum favors the defendant. The parties, let us suppose, are related—husband and wife. Let us suppose that the forum protects its insurance companies from suits that might be collusive. In a case such as this, the departure from forum law may not seem quite right. The forum here has a legitimate interest in applying its law, and thus constitutional power to do so. Although the law at the place of injury and conduct is more remedial, and, in my view, "better," I have been arguing that the interested forum cannot depart from its own law.<sup>160</sup>

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158. This is the position of the ALI in the forthcoming RESTATEMENT (THIRD) OF CONFLICT OF LAWS, § 6.04.

159. This anomalous situation might arise for any reason, including careless legal representation. It might arise, for example, in a case dismissed for *forum non conveniens*, on the theory that the plaintiff should sue in the country in which she was injured. Once at that foreign locale she finds, to her relief, that that place chooses to apply the law of the place of conduct, which turns out to be favorable to her, although the law of the place of injury itself would not have been favorable to her.

160. See Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106, at 2017.

With this “better law” problem, I am invoking the early work of Professor Robert Leflar, the legal theorist who advocated that the forum choose “better law.”<sup>161</sup> Better law was one of Leflar’s influential “choice-influencing considerations,”<sup>162</sup> to be used in deciding cases of true conflict. “Better” law, to Leflar, I would venture to say, was remedial law. It is true that, in the run of tort cases, plaintiff-favoring law is, in fact, “better,” in the sense that the typical plaintiff seeks enforcement of law. The plaintiff in a case of tort vindicates the basic compensatory and deterrent policies underlying the law of torts. These are policies that are widely shared.<sup>163</sup> The policies underlying tort *defenses*, on the other hand, are generally quite local. They are exceptions to more widely-shared tort policies, and are deployed to ensure the well-being of some valued local enterprise or industry.

The home of a great manufacturer of washing machines might provide a defense or two for cases of washing-machine floods—perhaps a short statute of limitations, or a cap on damages. But defenses reflect an essentially parochial state interest. Other states may or may not share interests in sparing the makers of washing machines from oppressive liabilities. But all states share an interest in remedying the harms caused to their residents by badly designed products, and in deterring bad design in products sold on their markets or sold to their residents.

Lawyers and judges are rarely explicit about remedial law as “better law,” not liking to seem to be favoring a party. But the re-

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161. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 275 *passim* (1966).

162. Robert A. Leflar, *Conflicts Law, More on Choice-Influencing Considerations*, 54 CALIF. L. REV. 1584, 1586–88 (1966). The five considerations were: (1) predictability of result, (2) preservation of interstate or international order, (3) simplicity in application for the judiciary, (4) the forum’s governmental interests, and (5) application of the better law. See also Albert A. Ehrenzweig, *A Counter-Revolution in Conflicts Law? From Beale to Cavers*, 80 HARV. L. REV. 377, 377 (1966) (proposing “principles of preference”). See also the famed and widely disregarded “Section 6” of RESTATEMENT OF CONFLICT OF LAWS (AM. LAW INST. 1967), with its list of factors to be taken into account in determining the state of most significant contact with a case. Good writers and fine judges from their day to this have not grasped that true conflicts do not need solving—that the interested forum must apply its own law. Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106. I would go further today, and say that even the *uninterested* forum in a false conflict case (i.e., the other state is an interested state) must apply its own law. That is because I am identifying adjudicatory interests. See *infra* Part III-D. If more remedial law (i.e., “better” law) exists within the rationally-assessed power of another state, the forum tempted to “apply” it should, instead, *adopt* the remedial position as its own.

163. But see Larry Kramer, *The Myth of the “Unprovided-For” Case*, 75 VA. L. REV. 1045 (1989). Dean Kramer does not want to take into account this feature of tort policy (that it is widely shared) and the essential local-ness of defendant-protecting policy. *Id.* at 1056. Thus, he rejects the proposition advanced, for example, by the late Robert Sedler, that the forum apply the law reflecting the shared policies of all states. Robert Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 190 (1977).



medial vector of law is basic, and there are important recognitions of this truth. We find it in the familiar maxim of ancient Roman law, “*Ubi jus, ibi remedium*,” and in Blackstone’s *Commentaries*,<sup>164</sup> echoed in our greatest case, *Marbury v. Madison*:

[I]t is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress [quoting Blackstone]. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.<sup>165</sup>

This essential justice-seeking vector of law in courts is also found in such famous American opinions at federal common law as Chief Justice Chase’s, while sitting on Circuit in admiralty way back in 1873 in the case of *The Sea Gull*, Chase wrote, “[C]ertainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.”<sup>166</sup>

All this said, there remains something jarring about the commentators’ enthusiasm for better law. It is not obvious, as we have seen, that a court should be free to depart from the commands of its own legislature in order to apply perceived “better” law elsewhere. Fortunately it is somewhat unlikely that there will be better—more remedial—law elsewhere, since the plaintiff has had the choice of forum. But my point here is that departures from an interested forum’s law, for better or worse, are not, at root, consistent with democratic theory, and, when effected without sufficient rational basis, will turn out to be unconstitutional.

It might be argued that, in our New Jersey pharmaceuticals case, Michigan’s law was not only constitutional but even the better law for the case, based as it was on the FDA’s approval. True, Hoffmann-La Roche’s warnings had become inadequate, and the FDA had taken no further action. However, the FDA has the *institutional competence* to weigh the costs and benefits of a rule as time passes, and to strike the right balance.<sup>167</sup> Thus, it might be supposed that the state should defer to the federal agency.

This argument fails for three reasons. First, it has never been supposed that FDA standards create a ceiling, rather than a floor,

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164. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 23 (1768).

165. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

166. *The Sea Gull*, 21 F. Cas. 909, 910 (C.C. Md. 1865) (Chase C.J., sitting on Circuit).

167. I am indebted to Melissa Wasserman and Tom McGarity for this hypothesis.

on the states' powers over the health of their citizens and the duties of their companies. Second, New Jersey's legislature had already determined the degree of deference its courts owed to the agency determination, and had created a slightly higher and therefore "better" level of protection for consumers of New Jersey pharmaceuticals. And third, the balance struck here was not between the FDA and New Jersey, but rather between New Jersey and Michigan. But no rational application of Michigan's conclusive presumption was available for balancing against New Jersey's regulatory interest—as we have seen.

"Better law" is, perhaps, the best rationale for departures from forum law. The law of conflict of laws itself might well have its origin as an escape device—as an effort by judges to escape unjust but applicable home law, and to find better law elsewhere. Choice rules become more intelligible if the effort is to find better law than the forum can supply—a way to give a tort plaintiff a chance to prove her case.

I have suggested in earlier work that the forum *adopt* rather than "apply" identified "better" law.<sup>168</sup> Earlier American legal realists made similar suggestions.<sup>169</sup> Once a law is seen as "better," the practical effect of choosing it will be to undermine the previous position. Counsel will point out that home law was departed from, and argue for the better position. The sensible thing for courts to do with perceived "better" law is to adopt a new rule, rather than purport to continue to honor the old, while "choosing" better law elsewhere.

### B. *The Constitution and Choices of Law*

(1) *Arbitrary choices and due process.* When the constitutional powers of, and constraints upon, courts choosing law are better understood, it will be better remembered that application of an uninterested state's law is unconstitutional not only because it is discriminatory but also, and especially, because it is not due process.<sup>170</sup> The choice of Michigan law in Rowe's case was clearly unconstitutional on both grounds.

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168. Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106, at 2001, 2021; Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631, 1632 (2005); *see also* Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237 (2011). For earlier "local law theory," *see supra* note 156.

169. In the view of the American legal realists, the forum always applies its own law, whatever it says it is doing. *Op. cit. supra* note 156.

170. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (holding that application of the law of a state with insignificant contacts with a case violates the Due Process

Choices of law are subject to constitutional control under the Due Process Clause because due process requires *some rational basis* for every rule applied in courts. The requirement of some rational basis is a requirement of a legitimate governmental interest. Courts are not free to apply the law of a state without a legitimate governmental interest in the application.

In 1930, in *Home Insurance Company v. Dick*,<sup>171</sup> the Supreme Court laid the basis for this clarified modern understanding. The Court held, by Justice Brandeis, that the uninterested Texas forum in that case did not have power to apply its own law to a contingent hypothetical obligation of New York re-insurers in connection with a boat fire in Mexico. Texas had no legitimate interest in governing the case by its own law and could not do so without violating the Due Process Clause of the Fourteenth Amendment.<sup>172</sup>

Note the interesting parallel between Brandeis's thinking in *Dick* and his thinking in *Erie*.<sup>173</sup> In both cases the Court held that the uninterested forum—the courts of a sovereign without a legitimate governmental interest in the issue before it—could not *constitutionally* apply its own law to that issue.<sup>174</sup> In *Dick*, there was insufficient Texas contact with the case to generate a legitimate Texas governmental interest in it; none could be identified to justify Texas's displacement of relevant Mexican or New York law. In *Erie*, no sovereign interest of the United States could be identified to justify a court's displacement of relevant state law.

(2) *Reasonableness versus rationality*. There is a further problem that the Constitution creates for choice-of-law rules. How can abstract "rules" for choosing law avoid arbitrary or irrational governance? In *Rowe*, what could have been more *reasonable* than application of the law of the place of purchase, treatment, injury, and the plaintiff's own residence? But Michigan turned out to have zero interest in the result, protecting another state's tortfeasor, while denying Michigan's own resident a chance to prove his case. There is a difference, it turns out, between reasonableness and rationality; and irrational law cannot be due process.

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Clause; relying on the interest-analytic test announced in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981)); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) (striking down the law of an uninterested state under the Due Process Clause).

171. *Dick*, 281 U.S. 397; cf. Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958).

172. *Dick*, 281 U.S. 397.

173. *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that only the law of an identified sovereign can constitutionally apply in American courts, and that the sovereign whose law governs an issue is the same in all courts).

174. For exploration of this parallel between *Erie* and *Dick*, see Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, *supra* note 56.

The United States Supreme Court may never acknowledge the due process violation in a case like *Rowe*, but we can.<sup>175</sup> We know that contacts, however many and seemingly important, are not always “significant.”<sup>176</sup> A contact becomes significant only when it generates a legitimate interest in governance. As Chief Justice Rehnquist put this, “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, *creating state interests*, such that choice of its law is neither arbitrary nor fundamentally unfair.”<sup>177</sup>

(3) *The especially arbitrary choice.* It is an interesting feature of the choice-of-law problem that American courts following choice-of-law rules will often choose law without any knowledge of what the law is at the respective concerned states. Choice rules commonly choose places, not laws.

In applying a typical such rule, let us say, “the rule of the place of conduct governs the conduct of the defendant,” courts are content to choose law without knowing its content. The veil of ignorance, for such courts, is a warrant of special neutrality and fairness, an assurance of the disinterestedness of the judges. But we may wonder why Justice, rightly blind to fear or favor, should be blind to justice itself. Typical choice rules are place-selecting—“jurisdiction-selecting,” in David Cavers’ formulation<sup>178</sup>—and, because deliberately blind to the law at the place selected, are as neutral as a flip of a coin. But who would want her legal rights determined by the flip of a coin? Does not such neutrality come at too high a price if it can result in pointless denials of justice? The place of injury or of conduct, or both, without any other contact with a case, has compensatory and deterrent interests only. It will be found to have no interest in applying a local defense to defeat or diminish the otherwise meritorious claims of out-of-staters. And we may find ourselves wondering whether the choice rule applied by the court was as blindly neutral as had been hoped. There is the likelihood that the judge purporting to be forced by a “rule” to hand judgment to the defendant knows very well that that will be the consequence of the choice.

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175. *Id.*

176. The vague rule of the “place of most significant contact” has a built-in error of requiring a “balancing” of contacts. It is the popular general provision of RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1967).

177. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985) (quoting the plurality opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312–13 (1981), with which the dissent was in “substantial agreement”). The emphasis in the text above is supplied.

178. David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 201 (1933).

I have focused here on due process, but it has long been understood that arbitrary choices of law are discriminatory as well as wanting in due process.<sup>179</sup> Such discrimination can be between the parties in a case, between similarly situated plaintiffs in different cases, and between similarly situated defendants in different cases. It can invoke the Privileges and Immunities Clause of Article IV, as well as the Equal Protection clause of the Fourteenth Amendment and the anti-discrimination component of the Due Process Clause of the Fifth Amendment.

### C. *The ALI<sup>180</sup> and the Nonresident Plaintiff*

(1) *Discriminating against nonresidents.* The preliminary draft of *Restatement (Third) of Conflict of Laws* takes the position, contrary to that urged here, that the forum should *not* impose liability on its resident defendant for a violation of forum standards when to do so would benefit a nonresident plaintiff.<sup>181</sup> The position seems discredited in the very utterance. But echoing Justice Alito's *cri de coeur* in *RJR-Nabisco*, "We cannot rule the world," the Reporters quote Judge Fuld in the old casebook case of *Neumeier v. Kuehner*,<sup>182</sup> remarking that to allow the nonresident to recover for a violation of forum law would be to supply "manna to all the world."<sup>183</sup> In this view, justice for persons whose own states will not help them seems unreasonable. Yet *injustice* for such persons also seems unreasonable.

Take the particular problem of the nonresident plaintiff who has been injured elsewhere, one in the position of young Rowe, or the plaintiff countries in *RJR-Nabisco*. The Reporters of the American Law Institute's current draft *Restatement (Third) of Conflict of Laws* do not want to see the 'license to kill' that the forum virtually issues when it withholds its justice from anyone injured elsewhere by a resident.<sup>184</sup> It is the nonresident who most often has been injured elsewhere. And consider that, if all states with remedial law refuse to apply it for nonresidents, there will exist a massive closing

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179. See Currie & Schreter, *supra* note 155 and accompanying text.

180. Disclosure: I am an adviser to of the current ALI project, DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST., Council Draft No. 3). I confess to unhappiness with the commitment of the project to its proliferation of "rules."

181. Reporters' Memorandum, DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS (AM. LAW INST., Council Draft No. 3).

182. *Neumeier v. Kuehner*, 286 A.2d 454, 458–59 (N.Y. 1972).

183. DRAFT RESTATEMENT (THIRD) OF CONFLICT OF LAWS, *supra* note 57, at § xv (quoting *Neumeier v. Kuehner*, 286 A.2d 454, 458–59 (N.Y. 1972)).

184. Brainerd Currie, *Conflict, Crisis and Confusion in New York*, 1963 DUKE L. J. 1, 35–36 (1963), SELECTED ESSAYS ON THE CONFLICTS OF LAWS, *supra* note 131, at 703.

of the doors of justice for the injured, who, beyond their own states' borders, are nonresidents everywhere.<sup>185</sup> Why would that be a good thing? Indeed, why would it ever be wrong for a court to furnish its justice evenhandedly to all who appear before it? If a court declines to discriminate against nonresidents, why is that a bad thing?

(2) *The problem of the "magnet forum."* If a court becomes a "magnet" for its remedial law, or for its competence, fairness, and accessibility in cases within its jurisdiction, why is that a bad thing?<sup>186</sup> There may be a fear that companies will flee the state in which local courts enforce regulatory acts of the local legislature. In such cases, the political power of such companies was insufficient to block regulatory law, yet the threat of their leaving must depress the spirit of independence in any thoughtful judge. Threats, and distinctions in political power, are precisely the sort of external influences on a case that are not supposed to weigh, in a perfect world, on the scales of justice. In the face of a possible loss of major business to the state, one can only admire the courage of justice-dispensing courts that do enforce local regulatory law.

It may be pie in the sky to say this, but if all states reliably did enforce local regulatory law, much injustice would be avoided. Meanwhile, a court that is valued so highly for fairness and competence as to become a magnet for multi-sovereign litigation (a court such as the illustrious Eastern District of New York, in which the European Community chose to bring its case against RJR) invites admiration rather than outrage. And the citizens of the magnet state can be confident that their renowned courts administer the law of the legislature they themselves have elected.

(3) *The ALI and the forum shopper.* It is not entirely clear why plaintiffs' freedom to choose the place of trial is so distressing to the ALI, and indeed to many judges and lawyers. Law students learn to think of forum shopping as an abuse, notwithstanding that the defendant in any event has to be within the jurisdiction of the forum. All this evident revulsion suggests a mental image of greedy lawyers who easily could have sued where plaintiffs reside, rushing to magnet forums, confident that the magnet forums can be counted on to provide "manna for all the world." But in an actual case on the facts of *Rowe v. Hoffmann-La Roche*, it is hard to see how this "manna" scenario would play out. There are no lawyers, greedy or otherwise, urging patients to demand Accutane from their doctors. Nor are there greedy patients out there risking death in order

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185. Weinberg, *Against Comity*, *supra* note 149, at 70–81.

186. See also, on forum shopping, *supra* note 114 and accompanying text.

to obtain damages in New Jersey. Nor should we regard with suspicion lawyers defending misbehaving companies. What we do see in litigation of some importance are lawyers practicing our learned profession on either side of a versus sign, and generally doing so quite creditably.

The Reporters are not embarrassed to say that they are “unaware of any support” for the position that a nonresident plaintiff should be allowed to recover under forum law.<sup>187</sup> They decline to acknowledge the existence of regulatory interests at the forum, and in service of that stringency they are resolved to tolerate wholesale injustice to nonresident plaintiffs, not to mention disregard of the Privileges and Immunities Clause. Yet the Reporters acknowledge, at least, that their position is discriminatory. Unnervingly, they say that they are “comfortable” with this.<sup>188</sup>

The Reporters may have worked themselves into such positions in part because they sometimes use the place of injury as a “neutral” tie-breaker, and any such abstract rule can yield arbitrary results. Yet the geographical location either of injuries or the injured is not a matter of concern to the conduct-regulating state. With preternaturally unperturbed inconsistency, the Reporters acknowledge this also.<sup>189</sup>

#### D. Regulatory Interests and the “Unprovided” Case

(1) *No law for the case.* Robert Rowe’s case would seem to present a classic example of what experts in the conflict of laws would term “an unprovided case.”<sup>190</sup> The unprovided case is a configuration of cases first identified by Brainerd Currie.<sup>191</sup> An unprovided case is a case in which the law of the plaintiff’s state favors the defendant, and the law of the defendant’s state favors the plaintiff.<sup>192</sup> In such a case, Currie posited that neither state would have any interest in having its law applied, since the plaintiff’s residence with defendant-favoring law could have no interest in favoring other states’ de-

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187. Draft Restatement (Third) of Conflict of Laws, *supra* note 57, at § xvi. 15.

188. *Id.* at § xv.

189. *Id.*

190. Writers today typically use better English and term this sort of case “unprovided-for.” I prefer Currie’s original usage.

191. BRAINERD CURRIE, *Survival of Actions*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 131, at 152 & n.79. Currie argued that in such cases the forum should apply its own law, as the only clearly constitutional choice. A departure from forum law would set up an irrational discrimination between similarly situated parties.

192. Currie, *The Constitution and the Choice of Law*, in SELECTED ESSAYS ON THE CONFLICT OF LAWS, *supra* note 131, at 188.

defendants, and the defendant's residence with plaintiff-favoring law could have no interest in favoring other states' plaintiffs.<sup>193</sup>

In this Article, however, I have *not* viewed *Rowe v. Hoffmann-La Roche* as an unprovided case—although it fits the description. Rather, I have treated *Rowe* as a false conflict in which New Jersey was the only interested state. A false conflict case is one in which only one state has any interest in the application of its law. A false conflict is easily resolved by applying the law of “the only interested state.”<sup>194</sup>

In *Rowe*'s case, viewed as an “unprovided” one, New Jersey law favored the Michigan plaintiff, and Michigan law favored the New Jersey defendant. But by jettisoning the language about law “favoring” one side or the other, and identifying law that is regulatory, we have been able to see the otherwise submerged interests of New Jersey in *Rowe*. What might have looked like an “unprovided” case thus begins to look very different.

Somewhat to my chagrin, however, this way of thinking about *Rowe* puts me into unaccustomed agreement with an influential argument put forward by Larry Kramer. In a well-known early paper, Dean Kramer took the position that Currie's unprovided case is a “myth.”<sup>195</sup> It was part of his argument that some governmental interest can usually be drummed up in one of the concerned states. For example, an unprovided case like *Rowe* might arise—one in which the interests of the two states were congruent, the difference being merely an exception. The unprovided case would then turn out to be a no-conflict case. (This was the initial reasoning of Judge LeFelt in the New Jersey Supreme Court in *Rowe*.) Kramer also pointed out that the place of injury with inapplicable defendant-favoring law always has a residual interest, *qua* place of injury, in deterrence of a tort on its territory.<sup>196</sup> Once some residual interest of that kind can be found, the unprovided case ceases to exist.

So, by identifying the regulatory interest of New Jersey in *Rowe*, I seem to have illustrated Dean Kramer's point for him<sup>197</sup>—that the unprovided case is a “myth.”

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193. *Id.*

194. Currie, SELECTED ESSAYS ON THE CONFLICTS OF LAWS, *supra* note 131, at 726.

195. Kramer, *supra* note 163.

196. *Id.* at 1045–46.

197. See Weinberg, *A Radically Transformed Restatement for Conflicts*, *supra* note 106, at n.37. As Dean Kramer saw, the residual law of the place of injury with an inapplicable defense is always remedial, and makes the forum at the place of injury an interested forum, notwithstanding its local defense. Residual remedial tort law at the place of injury is as applicable to nonresidents as it is to residents, since the forum cannot make its territory safe for its residents without making it safe for its visitors. Louise Weinberg, *Theory Wars in the Conflict of Laws*, *supra* note 168. Thus, when the plaintiff is suing at home, which is also the place of injury, and the home state has defendant-favoring law, the uninterested forum should not



I pause to note that Dean Kramer's point does not matter. In a putatively unprovided case, as elsewhere, forum law is "the only clearly constitutional choice."<sup>198</sup> If law must be applied unjustifiably, at least forum law will not discriminate between similarly situated parties in later cases. So whether *Rowe* was a false conflict in which New Jersey was the only interested state, or an unprovided case, the result should be the same. In either case, New Jersey law needed to be applied.

(2) *The regulatory state.* At a deeper level, I have shown here that the unprovided case—indeed, a "myth"—is a myth not only because some interest in either contact state can always be drummed up. Rather, I am arguing that affirmative standards are not the beginning and end of a legislature's regulatory expedients. A liability rule of any kind at the forum where the defendant resides—a feature of the cases studied here, and an essential feature of Currie's "unprovided" category—is likely to be as defendant-regulating as it is "plaintiff-favoring." In other words, a liability rule can be perceived as *regulatory*. This is also an insight of Michael Green.<sup>199</sup> And so the case, "unprovided" at first blush, in which there is a liability rule at the forum, becomes a false conflict case rather than an unprovided one.

In *Rowe*, the imposition of liability *simpliciter* would have been more strongly regulatory than New Jersey's law. Instead, since liability already existed under state common law, the New Jersey legislature provided a defense of immunity and an exception to that defense, an exception for reckless disregard. This was regulation by exception, if you will, one of the kinds of unprovided cases which Dean Kramer (and I) turn into a false conflict.

I would prefer to view such cases in a more general way. Governmental interests can be protective and regulatory at the same time. New Jersey's regulation in *Rowe* operated to protect plaintiff

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extend the benefit of its defenses to the nonresident defendant, in whom it has no legitimate governmental interest. Instead, the forum should be guided by its own underlying residual tort policies, as Dean Kramer would also say.

If the forum purports to apply the law of some third state, assuming some plausible interest can be found there, it would risk plunging into the general dysfunction seen in *McCann v. Foster Wheeler, L.L.C.*, 225 P.3d 516 (Cal. 2010) (applying the local defense of a third state on speculative reasoning, to frustrate the remedial laws of both concerned states). The *McCann* court also declared that thenceforth California companies could commit torts extraterritorial to California with impunity in California courts). This is similar to the Supreme Court's new territorialism—amounting to a bizarre invitation to wrongdoers to behave badly when abroad and then hide out at home.

198. See Currie & Schreter, *supra* note 155. Since departures from forum law raise issues of discrimination, forum law is the only clearly constitutional choice in all cases except those few false conflicts in which the other state is the only interested state and no adjudicatory interest of the forum can be discerned.

199. Michael S. Green, *The Return of the Unprovided-For Case*, 51 GA. L. REV. 763 (2017).

patients using New Jersey pharmaceuticals, but only in egregious cases of deliberate or reckless failure to update warnings in light of experience. In ordinary cases of mere negligence the same provision operated to protect New Jersey defendant drug companies. The two concerns existed together in the statute.

New Jersey's law on damages in failure-to-warn cases is similarly Janus-faced. Damages may be awarded only where punitive damages would be warranted, and this favors plaintiffs. But punitive damages themselves are proscribed, and this protects New Jersey drug makers from open-ended dollar liabilities.

The New Jersey legislation affects plaintiffs in other ways as well. When the defendant's conduct does not warrant punitive damages, New Jersey's presumption about the sufficiency of warnings becomes as conclusive as Michigan's. The plaintiff's right to sue is *extinguished*. In other words, the statute is a threat as well as a promise, providing for contingencies facing either way.<sup>200</sup>

The New Jersey statute is properly characterized as "regulatory" when we recognize that it cannot be confined rationally to New Jersey plaintiffs.<sup>201</sup> Insofar as warnings are concerned, it requires good behavior by New Jersey drug makers—good behavior to all the world. The state's identified regulatory interests are reputational. The legislature wishes the entire market of its pharmaceuticals industry, world-wide,<sup>202</sup> to stand assured of the probity of New Jersey pharmaceuticals houses, and of the safety of their drugs, as reflected in the thoroughness and clarity of their warnings. This latter point suggests that the regulatory interest of the state in *Rowe*, even in enforcing a mere exception to a defense, is much too encompassing to warrant a description of Rowe's case as "unprovided." Nor is that regulatory interest, embodied as it is in a statute, in any sense residual, or somehow drummed up.

So, yes, *Rowe* was a false conflict to begin with, and New Jersey was the only interested state. In other words, the unprovided case is more of a myth than Dean Kramer may have supposed, and his "myth" thesis is descriptive of a broader swathe of cases than he or I have anticipated.

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200. See *supra* note 7 on the availability *vel non* of punitive damages when a legislature provides for treble damages.

201. Currie eventually recognized regulatory interests, but considered them "altruistic." However, he acknowledged that vindication of altruistic interests is well within the powers of courts. CURRIE, *The Verdict of Quiescent Years*, in SELECTED ESSAYS ON THE CONFLICTS OF LAWS, *supra* note 131, at 617.

202. The fact that Hoffmann-La Roche was a Swiss giant's American subsidiary may suggest, but does not require, a market predominantly nationwide in the United States rather than a global one.

(3) *Adjudicatory interests.* Beyond this, I begin to suspect that Brainerd Currie's category of "unprovided" cases apparently can amount to a "myth" whether or not some traditional interest in one of the contact states can be smoked out. I am thinking of the possibility of *adjudicatory* interests. Adjudicatory interests may be important enough to be taken into account. The forum would appear to have the interest that arises when both parties stand before it and submit to its justice. Law-providing and justice-providing interests would be subsumed under this heading. Assuming uncontested jurisdiction,<sup>203</sup> there will be dispute-resolving, law-providing, justice-affording interests that arguably turn the forum into a sufficiently interested one to justify it not only in taking a case but also in furnishing its own brand of justice for it.

These interests are akin to, if not the perfect equivalent of, the similarly compound adjudicatory interests of the joint domicile.<sup>204</sup> In the case of *Hughes v. Fetter*, for example, the Court, by Justice Black, held that a state court must take jurisdiction over a sister state's transitory cause of action.<sup>205</sup> That holding is important and right. But Justice Black was assuming, in the fashion then customary, that the resultant case would be tried under the sister state's law, because the tort "arose" in the sister state. It might explain *Hughes v. Fetter* in a more modern way to say that the forum state had no interest in *not* taking the case. But beyond this, I would argue that the forum state in *Hughes v. Fetter* had every interest in settling the dispute between the parties, because of a fact not much emphasized by Justice Black. They were joint domiciliaries of the forum state. Indeed, a plaintiff may always sue at home, assuming jurisdiction over the defendant. The plaintiff pays taxes to fund her own state's courts. It does not matter where her claim "arose."

These sorts of interests, although merely adjudicatory, are stronger than might be thought. Imagine a case Currie would call an unprovided one. For the sake of argument, let us disregard the fact that the liability rule at the forum reflects a regulatory interest, and assume, as a traditional interest analyst would, that the forum

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203. For a learned and comprehensive discussion of the effect of personal jurisdiction limits on trans-sovereign litigation, see Jeffrey M. Schmitt, *Rethinking the State Sovereignty Interest in Personal Jurisdiction*, 66 CASE W. RES. L. REV. 769 (2016); see also for valuable insights, Charles W. Rhodes, *Liberty, Substantive Due Process, and Personal Jurisdiction*, 82 TUL. L. REV. 567, 623 (2007) (discussing the extraterritorial reach of regulatory interests at the forum, and arguing that only the law of personal jurisdiction can limit that reach). I agree with him.

204. See Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws*, 27 DUKE J. COMP. & INT'L L. 405 (2017) (finding, upon impressive empirical investigation, across-the-board support in courts for the law of the joint domicile).

205. 341 U.S. 609 (1951) (placing state courts under obligation to try a transitory action arising in a sister state, under the Full Faith and Credit Clause, U.S. CONST. art. IV, sec 1).

is an “uninterested” one. We can see, nevertheless, that the “uninterested” forum’s contacts with a case, *qua* forum, are hardly inconsiderable.

- ▶ The defendant has submitted itself to the benefits and burdens of forum law. This is the classic understanding of a constitutional exercise of jurisdiction.
- ▶ The plaintiff has shopped for the forum, precisely, for its law.
- ▶ The judges at the forum are pledged under the oath of office to uphold the forum’s law.
- ▶ The insurer presumably has the actuarial expertise to have predicted and evaluated the risk of trial at a place with plaintiff-favoring law, and to have accounted for that risk in the premium charged the defendant.

True, these connections with the forum are not “significant” in the sense in which any choice-of-law theory would find them. True, the weighing or balancing of interests, especially insignificant ones, is an unprofitable enterprise. But together, these identified connections between the forum and the the case do appear to take on some weight as against the position of the other state. Consider that the other state in our putatively unprovided case can boast as a “contact” only the residence of a plaintiff it will not allow to recover,<sup>206</sup> and, perhaps an injury on its territory which it declines to remediate.<sup>207</sup> And this other state has no interest in frustrating its resident’s chance to recover in any other state’s courts, as long as it has no relation to the defendant. After all, the plaintiff’s uninterested state of residence is somewhat better off, as I have pointed out here, when its resident returns with funds.<sup>208</sup>

I have been trying to show that the forum is unlikely, whatever the case, to be a wholly uninterested one. Moreover, I have argued that the only law consistent with democratic theory is the law of the forum—barring some statute authorizing courts in conflicts cases

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206. The plaintiff’s residence with no other contact with a case cannot rationally apply defendant-favoring law, having no defendant to favor.

207. The place of injury, with no other contact with a case, always retains remedial interests in safety, compensation, and deterrence. But if its law is defendant-favoring, application of its law will fly in the face of its remedial interests. The defendant’s residence with no other contact with a case, having plaintiff-favoring law but having no contact with the plaintiff or her injuries, nevertheless should not dismiss the plaintiff’s case. To do so would be to discriminate against nonresidents. This, of course, is the case that is the second subject of this paper.

208. See *supra* note 142 and accompanying text (pointing out that recovery in damages can help to support disabled plaintiffs and their innocent dependents and heirs, insulating them from dependency on local public and charitable resources, and can provide heirs, insulating them from undeserved hardship, and providing funds for reimbursement to unpaid medical and caretaking creditors, while avoiding windfalls to insurers).

to decline to follow their own precedents, or to fashion new rules of their own, or to enforce a code of choice rules enacted by their own legislature.<sup>209</sup> In a sense, even sister state law in courts is forum law, since in applying it judges make a policy choice. These things being so, the conclusion that the forum should, and probably must, apply its own law, should not be very surprising, although I must acknowledge that few can be found today who would agree with me about this.

#### CONCLUSION: THE PHENOMENON OF UNREASON

We see the force of regulatory interests quite vividly in our transnational case, *RJR-Nabisco*, with the Patriot Act's response to 9/11 in Civil RICO. More subtle is the regulatory interest of the state in the case of *Rowe v. Hoffmann-La Roche*. But, overt or subtle, when regulatory interests at the forum are apparent, it will not do to say, "This is an uninterested state" simply because the state can be said not to "favor" its own. A state or country, the laws of which would bear down on its culpable resident defendants, cannot be deemed to be "uninterested."

The struggle for reason we have noted in the configuration of cases explored here simply reflects—in two ways—the want of interest in the nonforum state in impeding vindication of the forum's legitimate governmental interests. First, in every false conflict in which the forum is the only interested state, the nonforum state will have no interest in applying its law, *ex hypothesi*. So, of course, there will be a struggle to find some reason for applying that other state's law. This explains the futile struggle for reason in cases like *RJR-Nabisco* and *Rowe*. Second, in every no-conflict case in which forum policy is shared, the nonforum state will also have no interest in applying its law. In *RJR-Nabisco*, the American forum shared with the twenty-six plaintiff countries the policies grounding the act of Congress. The European Community had no interest at all in impeding vindication of the United States' legitimate governmental interests. A sovereign sharing the regulatory interest of the forum will have as little reason as an uninterested sovereign in furnishing a defense. So of course there were futile struggles for reason in both *RJR-Nabisco* and *Rowe*.

We might suppose that a court has broad discretion to withhold its own law for good and sufficient reasons. The problem—the sub-

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209. See, e.g. LA. CIV. CODE 3515 (Act of 1991). The author of the Louisiana choice-of-law code was Symeon Symeonides.

ject of this paper—is that good and sufficient reasons are not easily found for doing so when a case falls within the home sovereign’s sphere of legitimate governmental interests.

All law is limited by the rational scope of its purposes. When tort law is plaintiff-favoring, it is also regulatory. As a practical matter, law is deterrent when it is compensatory. And law’s regulatory purposes, as a general rule, are not territorially limited. Application of case law limits on regulatory law, in my view, should require rational justification on the facts of the particular case. When reason will not support those limits, the forum’s regulatory law must be enforced.

We have seen here the difficulty courts at the regulatory state encounter in a certain configuration of cases when they attempt to depart from their own law. Arguments offered to support a departure from forum law in this class of cases can seem to turn sour, like good milk curdling as we watch. Courts withholding regulatory law, as we have seen in our analyses of *Rowe* and *RJR-Nabisco*, can put into the hands of a predatory company a license to injure without fear of damages in courts at home. This is a result as dangerous as it is arbitrary and unjust.

What Holmes called “the life of the law” has to be logic, in some measure, as well as experience, although Holmes disputed this.<sup>210</sup> What I mean is that the life of the law, in large part, is *reason*. As long as judges and lawyers fail to identify and accord due weight to the purposes of law—to the legitimate governmental interests the law would function to vindicate—there is an identified configuration of cases in which defenses are likely to turn irrational, and an apparent want of neutrality is likely to embarrass judgment.

This too-common collapse of reason—and the collapse of justice with it—is a rather startling—and indeed unsettling—discovery. Unreason in the decision of cases can do no honor to our country, our courts, or to the grand tradition of the rule of law.

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210. Cf. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

