# SUPREME COURT OF THE UNITED STATES

NOS. 91–1111 AND 91–1128

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS
91–1111 *v.*
CALIFORNIA ET AL.

MERRETT UNDERWRITING AGENCY MANAGE-MENT LIMITED, ET AL., PETITIONERS
91–1128 *v.*
CALIFORNIA ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 28, 1993]

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II, in which JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS have joined.

With respect to the petition in No. 91–1111, I join the Court's judgment and Part I and II-A of its opinion. I write separately because I do not agree with JUSTICE SOUTER's analysis, set forth in Part II-B of his opinion, of what constitutes a "boycott" for purposes of §3(b) of the McCarran-Ferguson Act, 15 U. S. C. §1013(b). With respect to the petition in No. 92–1128, I dissent from the Court's ruling concerning the extraterritorial application of the Sherman Act. Part I below discusses the boycott issue; Part II extraterritoriality.

Determining proper application of §3(b) of the McCarran-Ferguson Act to the present case requires precise definition of the word "boycott."[1] It is a relatively new word, little more than a century old. It

[1] Section 3(b) of the McCarran-Ferguson Act, 15 U. S. C. §1013(b), provides:

"Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland. The Land League, an Irish organization formed the previous year, had demanded that landlords reduce their rents and had urged tenants to avoid dealing with those who failed to do so. Boycott did not bend to the demand and instead ordered evictions. In retaliation, the tenants "sen[t] Captain Boycott to Coventry in a very thorough manner." J. McCarthy, England Under Gladstone 108 (1886). "The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent it, not to allow any one else to have anything to do with him. . . . [T]he awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one would supply him with food." *Id.*, at 108–109; see also H. Laidler, Boycotts and the Labor Struggle 23–27 (1968). Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "[t]o combine in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." 2 The Oxford English Dictionary 468 (2d ed. 1989).

Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was concededly not the case here. Brief for Petitioners in No. 91–1111 p. 31; see also Reply Brief for Petitioners in No. 91–1111 pp. 12–13. We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or *coerce him into abandoning it*." The refusal to deal may, in other words, be *conditional*, offering its target the incentive of renewed dealing if and when he mends his ways. This is often the case—and indeed seems to have been the case with the original Boycott boycott. Cf. McCarthy, *supra*, at 109 (noting that the Captain later lived "at peace" with his neighbors). Furthermore, other dictionary definitions extend the term to include a *partial* boycott—a refusal to engage in some, but not all, transactions with the target. See Webster's New International Dictionary 321 (2d ed. 1950) (defining "boycott" as "to withhold, wholly *or in part*, social or business intercourse from, as an expression of disapproval or means of coercion") (emphasis added).

It is, however, important—and crucial in the present case—to distinguish between a conditional boycott and a concerted agreement to seek particular terms in particular transactions. A concerted agreement to terms (a "cartelization") is "a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." L. Sullivan, Law of Antitrust 257 (1977). The parties to such an agreement (the members of a cartel) are not engaging in a boycott, because:

> "They are not coercing anyone, at least in the usual sense of that word; they are merely (though concertedly) saying `*we will deal with you only on the following trade terms*.'
>
> ". . . Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a

> `boycott' because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agreement would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion." *Ibid.* (emphasis added).

Thus, if Captain Boycott's tenants had agreed among themselves that they would refuse to renew their leases unless he reduced his rents, that would have been a concerted agreement on the terms of the leases, but not a boycott.[2] The tenants, of course, did more than that; they refused to engage in other, unrelated transactions with Boycott—*e.g.*, selling him food—unless he agreed to their terms on rents. It is this expansion of the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.

The proper definition of "boycott" is evident from the Court's opinion in *Eastern States Retail Lumber Dealers*' *Assn.* v. *United States*, 234 U. S. 600 (1914),

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[2]Under the Oxford English Dictionary definition, of course, this example would not be a "boycott" because the tenants had not suspended *all* relations with the Captain. But if one recognizes partial boycotts (as we and JUSTICE SOUTER do), and if one believes (as JUSTICE SOUTER does but we do not) that the purpose of a boycott can be to secure different terms in the very transaction that is the supposed subject of the boycott, then it is impossible to explain why this is not a boycott. Under JUSTICE SOUTER's reasoning, it *would* be a boycott, at least if the tenants acted "at the behest of" (whatever *that* means), *ante*, at 25, the Irish Land League. This hypothetical shows that the problems presented by partial boycotts (which we agree fall within §3(b)) make more urgent the need to distinguish boycotts from concerted agreements on terms.

which is recognized in the antitrust field as one of the "leading case[s] involving commercial boycotts." Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 873 (1955). The associations of retail lumber dealers in that case refused to buy lumber from wholesale lumber dealers who sold directly to consumers. The boycott attempted "to impose as a condition . . . on [the wholesale dealers'] trade that they shall not sell in such manner that a local retailer may regard such sale as an infringement of his exclusive right to trade." 234 U. S., at 611. We held that to be an "artificial conditio[n]," since "the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of a grievance of a member of one of the associations." *Id.*, at 611–612. In other words, the associations' activities were a boycott because they sought an objective—the wholesale dealers' forbearance from retail trade—that was collateral to their transactions with the wholesalers.

Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts. For example, in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930), and *United States* v. *First National Pictures, Inc.*, 282 U. S. 44 (1930), we held unreasonable an agreement among competing motion picture distributors under which they refused to license films to exhibitors except on standardized terms. We also found unreasonable the restraint of trade in *Anderson* v. *Shipowners Assn. of Pacific Coast*, 272 U. S. 359 (1926), which involved an attempt by an association of employers to establish industry-wide terms of employment. These sorts of concerted actions, similar to what is alleged to have occurred here, are not properly characterized as "boycotts," and the

word does not appear in the opinions.[3] In fact, in the 65 years between the coining of the word and enactment of the McCarran-Ferguson Act in 1945, “boycott” appears in only seven opinions of this Court involving commercial (nonlabor) antitrust matters, and *not once* is it used as JUSTICE SOUTER uses it—to describe a concerted refusal to engage in particular transactions until the terms of those transactions are agreeable.[4]

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[3]JUSTICE SOUTER points out that the Court in *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978), found the term boycott “does not refer to `“a unitary phenomenon,”'” *ante*, at 20 (quoting *Barry*, *supra*, at 543 (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974))), and asserts that our position contradicts this. *Ante*, at 26–27. But to be not a “unitary phenomenon” is different from being an all-encompassing one. “Boycott” is a multifaceted “phenomenon” that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc. It merely does *not* include refusals to deal because of objections to proposed terms.

[4]See *United States* v. *Frankfort Distilleries, Inc.*, 324 U. S. 293, 295–296, 298 (1945) (refusal to engage in *all* transactions with targeted companies unless they agreed to defendants' price-fixing scheme); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 535, 536, 562 (1944) (discussed *infra*, at 10–11); *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 722 (1944) (word used in reference to a refusal to deal as means of enforcing resale price maintenance); *Fashion Originators*' *Guild of America, Inc.* v. *FTC*, 312 U. S. 457, 461, 465, 467 (1941) (boycott of retailers who sold competitors' products); *United States* v. *American Livestock Commission Co.*, 279 U. S. 435, 436–438 (1929) (absolute boycott of a competing livestock association, intended to drive it

In addition to its use in the antitrust field, the concept of "boycott" frequently appears in labor law, and in this context as well there is a clear distinction between boycotts and concerted agreements seeking terms. The ordinary strike seeking better contract terms is a "refusal to deal"—*i.e.*, union members refuse to sell their labor until the employer capitulates to their contract demands. But no one would call this a boycott, because the conditions of the "refusal to deal" relate directly to the terms of the refused transaction (the employment contract). A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. This distinction is well illustrated by the famous boycott of Pullman cars by Eugene Debs' American Railway Union in 1894. The incident began when workers at the Pullman Palace Car Company called a strike, but the "boycott" occurred only when other members of the American Railway Union, not Pullman employees, supported the strikers by refusing to work on any train drawing a Pullman car. See *In re Debs*, 158 U. S. 564, 566–567 (1895) (statement of the case); H. Laidler, Boycotts and the Labor Struggle 100–108 (1968). The refusal to handle Pullman cars had nothing to do with Pullman cars themselves (working on Pullman cars was no more difficult or dangerous than working on other cars); rather, it was in furtherance of the collateral objective of obtaining better employment terms for the Pullman workers. In other labor cases as well, the term "boycott" invariably holds the meaning that we ascribe to it: its goal is to alter, not the terms of the refused

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out of business); *Eastern States Lumber Assn., supra,* at 610–611 (discussed *supra*, at 4–5); *Nash* v. *United States,* 229 U. S. 373, 376 (1913) (word used in passing).

transaction, but the terms of workers' employment.[5]

The one case in which we have found an activity to constitute a "boycott" within the meaning of the McCarran-Ferguson Act is *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U. S. 531 (1978). There the plaintiffs were licensed physicians and their patients, and the defendant (St. Paul) was a malpractice insurer that had refused to renew the physicians' policies on an "occurrence" basis, but insisted upon a "claims made" basis. The allegation was that, at the instance of St. Paul, the three other malpractice insurers in the State had collectively refused to write insurance for St. Paul customers, thus forcing them to accept St. Paul's renewal terms. Unsurprisingly, we held the allegation sufficient to state a cause of action. The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was "artificial": it bore no relationship (or an "artificial" relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors.

Under the standard described, it is obviously not a "boycott" for the reinsurers to "refus[e] to reinsure coverages written on the ISO CGL forms until the

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[5]See, *e.g.*, *Bedford Cut Stone Co.* v. *Stone Cutters*, 274 U. S. 37, 47, 49 (1927) (refusal to work on stone received from nonunion quarries); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 462–463 (1921) (boycott of target's product until it agreed to union's employment demands); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911) (boycott of company's products because of allegedly unfair labor practices); *Loewe* v. *Lawlor*, 208 U. S. 274 (1908) (boycott of fur hats made by a company that would not allow its workers to be unionized). See also *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 503–505 (1940) (distinguishing between ordinary strikes and boycotts).

desired changes were made," *ante*, at 21, because the terms of the primary coverages are central elements of the reinsurance contract—they are *what* is reinsured. See App. 16–17 (Cal. Complaint ¶¶26–27). The "primary policies are . . . the basis of the losses that are shared in the reinsurance agreements." 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, Principles of Reinsurance 87 (1990); see also *id.*, at 55; Gurley, Regulation of Reinsurance in the United States, 19 Forum 72, 73 (1983). Indeed, reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurer's policyholders. See *id.*, at 73–74; *Colonial American Life Ins. Co.* v. *Commissioner*, 491 U. S. 244, 247 (1989); T. Newman & B. Ostrager, Insurance Coverage Disputes 15–16 (1990). And in the other category of reinsurance (indemnity reinsurance), either the terms of the underlying insurance policy are incorporated by reference (if the reinsurance is written under a facultative agreement), see J. Butler & R. Merkin, Reinsurance Law B.1.1–04 (1992); R. Carter, Reinsurance 235 (1979), or (if the reinsurance is conducted on a treaty basis) the reinsurer will require full disclosure of the terms of the underlying insurance policies and usually require that the primary insurer not vary those terms without prior approval, see *id.*, at 256, 297.

JUSTICE SOUTER simply disregards this integral relationship between the terms of the primary insurance form and the contract of reinsurance. He describes the reinsurers as "individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it." *Ante*, at 21. While this factual

assumption is crucial to JUSTICE SOUTER's reasoning (because otherwise he would not be able to distinguish permissible agreements among primary insurers), he offers no support for the statement. But even if it happens to be true, he does not explain why it *must* be true—that is, why the law must exclude reinsurers from full membership and participation. The realities of the industry may make explanation difficult:

> "Reinsurers also benefit from the services by ISO and other rating or service organizations. The underlying rates and policy forms are the basis for many reinsurance contracts. Reinsurers may also subscribe to various services. For example, a facultative reinsurer may subscribe to the rating service, so that they have the rating manuals available, or purchase optional services, such as a sprinkler report for a specific property location." 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 18 (1990).

JUSTICE SOUTER also describes reinsurers as being "outside the primary insurance industry." *Ante*, at 22. That is technically true (to the extent the two symbiotic industries can be separated) but quite irrelevant. What matters is that the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" by reinsurance, Carter, *supra*, at 4, so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a number of reinsurers to insist upon such terms jointly is in no way a "boycott."[6]

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[6]Once it is determined that the actions of the reinsurers did not constitute a "boycott," but rather a concerted agreement to terms, it follows that their actions do not constitute "coercion" or "intimidation"

JUSTICE SOUTER seems to believe that a non-boycott is converted into a boycott by the fact that it occurs "at the behest of," *ante*, at 21, or is "solicited" by, *ibid.*, competitors of the target. He purports to find support for this implausible proposition in *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), which involved a classic boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy, the South-Eastern Underwriters Association (S.E.U.A.). The conspirators would not deal with independent agents who wrote for such companies, and would not write policies for customers who insured with them. See *id.*, at 535–536. Moreover, Justice Black's opinion for the Court noted cryptically, "[c]ompanies not members of S.E.U.A. were cut off from the opportunity to reinsure their risks." *Id.*, at 535 (emphasis added). JUSTICE SOUTER speculates that "the [*S.E.U.A.*] defendants could have [managed to cut the targets off from reinsurance] by prompting reinsurance companies to refuse to deal with nonmembers." *Ante*, at 22. Even assuming that is what happened, all that can be derived from *S.E.U.A.* is the proposition that one who prompts *a boycott* is a coconspirator with the boycotters. For *with or without the defendants' prompting*, the reinsurers' refusal to deal in *S.E.U.A.* was a boycott, membership in the association having no discernible bearing upon the terms of the refused reinsurance contracts.

JUSTICE SOUTER suggests that we have somehow mistakenly "posit[ed] . . . autonomy on the part of the reinsurers." *Ante*, at 25. We do not understand this.

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within the meaning of the statute. That is because, as previously mentioned, such concerted agreements do "not coerc[e] anyone, at least in the usual sense of that word," L. Sullivan, Law of Antitrust 257 (1977), and because they are precisely what is protected by McCarran-Ferguson immunity.

Nothing in the complaints alleges that the reinsurers were deprived of their "autonomy," which we take to mean that they were coerced by the primary insurers. (Given the sheer size of the Lloyd's market, such an allegation would be laughable.) That is not to say that we disagree with JUSTICE SOUTER's contention that, according to the allegations, the reinsurers would not "have taken exactly the same course of action without the intense efforts of the four primary insurers." *Ante*, at 25. But the same could be said of the participants in virtually all conspiracies: If they had not been enlisted by the "intense efforts" of the leaders, their actions would not have been the same. If this factor renders otherwise lawful conspiracies (under McCarran-Ferguson) illegal, then the Act would have a narrow scope indeed.

Perhaps JUSTICE SOUTER feels that it is undesirable, as a policy matter, to allow insurers to "prompt" reinsurers not to deal with the insurers' competitors—*whether or not* that refusal to deal is a boycott. That feeling is certainly understandable, since under the normal application of the Sherman Act the reinsurers' concerted refusal to deal would be an unlawful conspiracy, and the insurers' "prompting" could make them part of that conspiracy. The McCarran-Ferguson Act, however, makes that conspiracy lawful (assuming reinsurance is state-regulated), unless the refusal to deal is a "boycott."

Under the test set forth above, there are sufficient allegations of a "boycott" to sustain the relevant counts of complaint against a motion to dismiss. For example, the complaints allege that some of the defendant reinsurers threatened to "withdra[w] entirely from the business of reinsuring primary U. S. insurers who wrote on the occurrence form." App. 31 (Cal. Complaint ¶89), *id.*, at 83 (Conn. Complaint ¶93). Construed most favorably to the respondents, that allegation claims that primary insurers who wrote insurance on disfavored forms would be

refused all reinsurance, *even* as to risks written on *other forms*. If that were the case, the reinsurers might have been engaging in a boycott—they would, that is, unless the primary insurers' other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses). Cf. Gonye, Underwriting the Reinsured, in Reinsurance 439, 463–466 (R. Strain ed. 1980); 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 21–23 (1990) (same). Other allegations in the complaints could be similarly construed. For example, the complaints also allege that the reinsurers "threatened a boycott of North American CGL risks," not just CGL risks containing dissatisfactory terms, App. 26 (Cal. Complaint ¶74), *id.*, at 79 (Conn. Complaint ¶78); that "the foreign and domestic reinsurer representatives presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance," *id.*, at 29 (Cal. Complaint ¶82), *id.*, at 81–82 (Conn. Complaint 86); that some of the defendant insurers and reinsurers told "groups of insurance brokers and agents . . . that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the [revised] ISO forms were not approved." *Id.*, at 29 (Cal. Complaint ¶85), *id.*, at 82 (Conn. Complaint ¶89).

Many other allegations in the complaints describe conduct that may amount to a boycott if the plaintiffs can prove certain additional facts. For example, General Re, the largest American reinsurer, is alleged to have "agreed to either coerce ISO to adopt [the defendants'] demands or, failing that, `derail' the entire CGL forms program." *Id.*, at 24 (Cal. Complaint ¶64), *id.*, at 77 (Conn. Complaint ¶68). If this means that General Re intended to withhold all reinsurance on all CGL forms—even forms having no objectionable

terms—that might amount to a "boycott." Also, General Re and several other domestic reinsurers are alleged to have "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms." *Id.*, at 25 (Cal. Complaint ¶66), *id.*, at 78 (Conn. Complaint ¶70). Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on *either* form until *both* were changed to their liking. Again, that might amount to a boycott. "[A] complaint should not be dismissed unless `it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain* v. *Real Estate Bd. of New Orleans, Inc.*, 444 U. S. 232, 246 (1980) (quoting *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957)). Under that standard, these allegations are sufficient to sustain the First, Second, Third, and Fourth Claims for Relief in the California Complaint and the First and Second Claims for Relief in the Connecticut Complaint.[7]

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[7]We agree with JUSTICE SOUTER's conclusion, *ante*, at 23–24, n. 18, that the Seventh Claim for Relief of the California Complaint and the Sixth Claim for Relief of the Connecticut Complaint fail to allege any §3(b) boycotts.

The petitioners in No. 91–1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman Act.[8] It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). The respondents asserted nonfrivolous claims under the Sherman Act, and 28 U. S. C. §1331 vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953), make clear, that is sufficient to establish the District Court's jurisdiction over these claims. *Lauritzen* involved a Jones Act claim brought by a foreign sailor against a foreign shipowner. The shipowner contested the District Court's jurisdiction, see *id.*, at 573, apparently on the grounds that the Jones Act did not govern the dispute between the foreign parties to the action. Though ultimately agreeing with the shipowner that the Jones Act did not apply, see discussion *infra*, at 18, the Court held that the District Court had jurisdiction.

> "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to

[8]The counts at issue in this case are the Fifth, Sixth and Eighth Claims for Relief in the California Complaint. See App. 43–46 (Cal. Complaint ¶¶131–140), *id.*, at 47–49 (Cal. Complaint ¶¶146–150).

> determine whether it was or was not founded in law and in fact." 345 U. S., at 575.

See also *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 359 (1959).

The second question—the extraterritorial reach of the Sherman Act—has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, ___ (1991) (*Aramco*) (slip op., at 2) ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction—want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute. See *Romero*, *supra*, at 384 (holding no claim available under the Jones Act); *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 359 (1909) (holding that complaint based upon foreign conduct "alleges no case under the [Sherman Act]").

There is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it is known as "legislative jurisdiction," *Aramco*, *supra*, at ___ (slip op., at 8), Restatement (First) Conflict of Laws §60 (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see *id.*, at 231. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I,

§8, cl. 3 "[t]o regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United States interests are affected. See *Ford* v. *United States*, 273 U. S. 593, 621–623 (1927); *United States* v. *Bowman*, 260 U. S. 94, 98–99 (1922); *American Banana*, *supra*, at 356. But the question in this case is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "long-standing principle of American law `that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" *Aramco*, *supra*, at ___ (slip op., at 3) (quoting *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949)). Applying that canon in *Aramco*, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, 42 U. S. C. §§2000e–2000e-17 (1988 ed.), did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "`any activity, business, or industry in commerce.'" *Id.*, at ___ (slip op., at 4) (quoting 42 U. S. C. §2000e(h)). We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. *Id.*, at ___ (slip op., at 5); see also *id.*, at ___–___ (slip op., at 6–8). The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially. See *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U. S. 574, 582, n. 6 (1986);

*Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, 704 (1962); see also *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (CA2 1945).

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray* v. *The Charming Betsy*, 2 Cranch 64, 118 (1804) (Marshall, C. J.). This canon is "wholly independent" of the presumption against extraterritoriality. *Aramco*, 499 U. S., at ___ (Marshall, J., dissenting) (slip op., at 4). It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§401–416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. See *id.*, at 383. The Court nonetheless stated that, "in the absence of contrary congressional direction," it would apply "principles of choice of law that are

consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." *Id.*, at 382–383. "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." *Id.*, at 383.

*Romero* referred to, and followed, the choice-of-law analysis set forth in *Lauritzen* v. *Larsen*, 345 U. S. 571 (1953). As previously mentioned, *Lauritzen* also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The *Lauritzen* Court recognized the basic problem: "If [the Jones Act were] read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be `any seaman who shall suffer personal injury in the course of his employment.'" *Id.*, at 576. The solution it adopted was to construe the statute "to apply only to areas and transactions in which *American law would be considered operative under prevalent doctrines of international law*." *Id.*, at 577 (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon—of course—Chief Justice Marshall's statement in *The Charming Betsy* quoted *supra*, at 16. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim." 345 U. S., at 583; see *id.*, at 583–593 (discussing factors). See also *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 21–22 (1963) (applying *The Charming Betsy* principle to restrict application of National Labor Relations Act to foreign-flag vessels).

*Lauritzen*, *Romero*, and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded statutes must be

construed in light of international law in other areas as well. See, *e.g.*, *Sale* v. *Haitian Centers Council, Inc.*, 509 U. S. ___, ___, n. 35 (1993) (slip op., at 22, n. 35); *Weinberger* v. *Rossi*, 456 U. S. 25, 32 (1982). More specifically, the principle was expressed in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (CA2 1945), the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the `Conflict of Laws.'" *Id.*, at 443.

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." See *Timberlane Lumber Co.* v. *Bank of America, N.T & S.A.*, 549 F. 2d 597, 608–615 (CA9 1976); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294–1298 (CA3 1979); *Montreal Trading Ltd.* v. *Amax Inc.*, 661 F. 2d 864, 869–871 (CA10 1981); *Laker Airways* v. *Sabena, Belgian World Airlines*, 235 U. S. App. D. C. 207, 236, and n. 109, 731 F. 2d 909, 938, and n. 109 (1984); see also *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 131 U. S. App. D. C. 226, 236, and n. 31, 404 F. 2d 804, 814, and n. 31 (1968). The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict of Laws

§38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"). Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. *Romero*, *supra*, at 382–383; see also *Lauritzen*, *supra*, at 578–579; *Hilton* v. *Guyot*, 159 U. S. 113, 162–166 (1895). Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue.[9]

In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present case, I shall rely on the Restatement (Third) of Foreign Relations Law for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen*, *Romero*, and *McCulloch*) and in the decisions of other federal courts, especially

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[9]Some antitrust courts, including the Court of Appeals in the present case, have mistaken the comity at issue for the "comity of courts," which has led them to characterize the question presented as one of "abstention," that is, whether they should "exercise or decline jurisdiction." *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294, 1296 (CA3 1979); see also *In re Insurance Antitrust Litigation*, 938 F. 2d 919, 932 (CA9 1991). As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.

*Timberlane*. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this case would be resolved the same way under virtually any conceivable test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." Restatement (Third) §403(1). The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the extent to which the activity takes place within the territory [of the regulating state]," *id.*, §403(2)(a); "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated," *id.*, §403(2)(b); "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, §403(2)(c); "the extent to which another state may have an interest in regulating the activity," *id.*, §403(2)(g); and "the likelihood of conflict with regulation by another state," *id.*, §403(2)(h). Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States.[10] Great Britain

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[10]Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "[t]he interests of Britain are at least diminished where the parties are subsidiaries of American

has established a comprehensive regulatory scheme governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, §403(2)(g). See 935 F. 2d, at 932–933; *In re Insurance Antitrust Litigation*, 723 F. Supp. 464, 487–488 (ND Cal. 1989); see also J. Butler & R. Merkin, Reinsurance Law A.1.1–02 (1992). Finally, §2(b) of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in §3(b)—suggesting that "the importance of regulation to the [United States]," *id.*, §403(2)(c), is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," *ante*, at 31, rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the case. See *ante*, at 29, n. 22; *ante*, at 30, n. 24. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before. See the excerpt from *Lauritzen* quoted *supra*, at 14; see also *Romero*, 358 U. S., at 359. It is not realistic, and also not helpful, to pretend that the only really

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corporations." 938 F. 2d, at 933. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.

relevant issue in this case is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true conflict" counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a *violation* of another country's law. *Ante*, at 31–32. That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries—particularly our closest trading partners.

In the sense in which the term "conflic[t]" was used in *Lauritzen*, 345 U. S., at 582, 592, and is generally understood in the field of conflicts of laws, there is clearly a conflict in this case. The petitioners here, like the defendant in *Lauritzen*, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. See *id.*, at 575–576 (detailing the differences between foreign and United States law). Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, a conflict-of-laws analysis is necessary. See generally R. Weintraub, Commentary on Conflict of Laws 2–3 (1980); Restatement (First) of Conflict of Laws §1, Comment *c* and Illustrations (1934).

Literally the *only* support that the Court adduces for its position is §403 of the Restatement (Third) of Foreign Relations Law—or more precisely Comment *e* to that provision, which states:

> "Subsection (3) [which says that a state should defer to another state if that state's interest is clearly greater] applies only when one state

> requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."

The Court has completely misinterpreted this provision. Subsection (3) of §403 (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of §403 has been complied with—*i.e.*, after it has been determined that the exercise of jurisdiction by *both* of the two states is not "unreasonable." That prior question is answered by applying the factors *(inter alia)* set forth in subsection (2) of §403, that is, precisely the factors that I have discussed in text and that the Court rejects.[11]

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I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91–1128.

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[11]The Court skips directly to subsection (3) of §403, apparently on the authority of Comment *j* to §415 of the Restatement (Third). See *ante*, at 32. But the preceding commentary to §415 makes clear that "[a]ny exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in §403(2). Restatement (Third) §415, Comment *a*. Comment *j* refers back to the conflict analysis set forth in §403(3) which, as noted above, comes after the reasonableness analysis of §403(2).