

Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century

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I. INTRODUCTION

The *Empagran* decision¹ concerned a global price-fixing agreement between mostly European producers of certain vitamin products, resulting in some \$7 billion in overcharge.² Once the cartel was discovered, several types of law enforcement took place. One was public enforcement: the U.S. Department of Justice, the European Commission, and the antitrust agencies of several other countries imposed stiff administrative fines.³ Another was private domestic enforcement: a class action by U.S. purchasers ended in a billion dollar settlement; separate proceedings in other jurisdictions led to further payments, though at far lower amounts. The most interesting proceedings were the actions brought in the *Empagran* case. Plaintiffs had purchased vitamin products in countries other than the United States, many of which do not provide the means for proper public or private prosecution against the cartel – Ecuador, Panama, the Ukraine.⁴ They nonetheless brought suit in U.S. federal court and alleged applicability of the Sherman Act under their reading of the effects doctrine as formulated in the Foreign Trade Antitrust Improvement Act⁵: the price fixing had an effect on the U.S. market, even though these particular plaintiffs had not suffered their particular injuries as participants in the U.S. market. Justice Breyer held, for a unanimous court, that the plaintiffs' claim was not covered.

Empagran is often discussed as a decision representing a transnationalist approach to statutory interpretation in accordance with the demands of globalization; Justice Breyer himself has referred to it in this sense in lectures.⁶ This is, however, only one possible reading, and perhaps only the most superficial one. A second reading, focusing less on the rhetoric and more on the actual application, shows the decision in *Empagran* to be *isolationist*. Despite the talk of

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¹ *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004). I co-authored an amicus curiae brief in the case, but the remarks here are independent from the argument made there.

² For details on the vitamins cartel, see John M. Connor, *Global Price Fixing* (2007).

³ Not all agencies were similarly harsh. The Swiss agency issued a mere injunction to cease future price-fixing – at the time the harshest instrument available against a first-time perpetrator.

⁴ One named plaintiff came from Australia, which does have effective enforcement. He withdrew in light of the possibility to sue in Australia. See *Bray v. F. Hoffman-La Roche Ltd.* (2002) 118 FCR 1; *aff'd* (2003) 130 FCR 317 (Australia). The class was not confined to plaintiffs from countries lacking effective antitrust enforcement.

⁵ 15 U.S.C. § 6a).

⁶ See *infra* notes 12, 25, 34.

globalization, the reading reveals the decision to represent a return to a stark territorialism. A third reading, finally, focusing on what is left unsaid in the opinion, reveals a *hegemonialist* opinion, in which the interests of the developed world are brought into congruence, while those of the developing world remain outside the analysis altogether. These three readings define the structure of this paper.

These different readings are not specific to international antitrust, nor to the role of the Court in the twenty-first century. This becomes clear when the rhetoric in *Empagran* is juxtaposed with arguments made two hundred years earlier in cases involving the extraterritorial application of British and American laws prohibiting the slave trade. Although the slave trade problem is very different from the problem of global cartels, some structural similarities may explain why we find surprisingly similar arguments. Slavery, slave trade and piracy represented the big global challenge to the nation state of the nineteenth century, not unlike the way in which the global economy challenges the system of states in the twenty-first century. In both situations, private actors engage in the enforcement of presumably global norms: prize seekers in the nineteenth century, private plaintiffs in the twenty-first. Sometimes the law rewards these private actors – as privateers on the oceans, as private attorney generals in international antitrust. Sometimes it despises them – as pirates, or as greedy plaintiffs (or plaintiffs’ lawyers). These structural similarities do not make these cases, or the situations they address, similar in substance. Yet, their structural similarity invites courts to make strikingly similar arguments in their attempts to balance the national with the international, and the public interests with the private. This similarity can therefore provide an important element in answering the question whether international law has changed.

II. A TRANSNATIONALIST READING:

INTERNATIONAL LAW AS INTERNATIONAL RELATIONS

Here is how Justice Breyer justifies limiting the scope of U.S. antitrust law in *Empagran*:

this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.⁷

This quote is Justice Breyer’s restatement of the *Charming Betsy* presumption against statutory interpretations in violation of international law. That presumption, formulated in the nineteenth

⁷ 542 U.S. 155 at 164 (2004) (internal references omitted).

century⁸ is thus applied, apparently without great difficulty, to the twenty-first century situation of global interdependence.⁹ In this so-perceived modern world, transnational law has become a hybrid that transcends boundaries – between public and private law,¹⁰ between international and comparative law,¹¹ and even between foreign and domestic law. In Justice Breyer’s words, “we live in a world where today the law of everywhere is becoming everywhere.... It’s spreading around, this law... to the point where it becomes harder and harder to say, ‘well, that’s there and this is here.’”¹² This goes beyond mere interdependence of different territorial states. Instead, we find a blurring of all boundaries, a transcendence of territorial states altogether, and the replacement of separate legal systems with one space of legal argument.¹³ Territorial boundaries no longer matter (a frequent theme in globalization debates), but that is no problem, because good judicial craftsmanship can help bring about global harmony.

Yet another boundary is broken down for the sake of international harmony, that between international law and international relations. Gerald Neuman’s suggestion that “in *Empagran*, ... Justice Breyer subtly gave the Government more law than it wanted, by invoking the *Charming Betsy* canon,”¹⁴ may not be exact. The *Charming Betsy* presumption has traditionally been a legal doctrine of statutory interpretation, formulated to resolve *actual* conflicts with international law. “Work together in harmony,” by contrast is a doctrine of *international relations*, formulated to avoid *potential* conflicts with foreign *sovereigns*. Rather than insert the *Charming Betsy* doctrine into foreign relations (as Neuman suggests), the Court inserts international relations into the *Charming Betsy* doctrine. In *Empagran*, the Court establishes itself as an organ of international relations, and international law is merely an element in the assessment of the best approach.

Of course, the federal courts have played a role in foreign relations since the founding of the republic, as David Sloss has demonstrated,¹⁵ and foreign relations have always been a consideration for the *Charming Betsy* presumption. In the early days of the Republic, the deference to foreign law in statutory interpretation was often based on a desire to avoid conflict with stronger countries.¹⁶ This could imply that the *Charming Betsy* presumption was historically

⁸ Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804); chapter 1, notes xx – xx and accompanying text.

⁹ Classical texts are Joseph Nye & Robert Keohane, *Power and Interdependence: World Politics in Transition* (1977); Richard N. Cooper, *Economic Policy in an Interdependent World* (1985).

¹⁰ Harold Hongju Koh, *Transnational Legal Process*, 75 Nebr. L. Rev. 181, 184 (1994); Anne-Marie Slaughter, *A Global Community of Courts*, 44 Harv. Int’l L. Rev. 191, 192 (2003).

¹¹ Stephen Breyer, *Keynote Address*, 97 Am. Soc’y Int’l L. Proc. 265, 267 (“my description blurs the differences between what my law professors used to call comparative law and public international law”).

¹² U.S. Supreme Court Justice Stephen Breyer: A Presentation on International Law, April 10, 2009, *available at* <http://www.youtube.com/watch?v=o5zaImTF92g>. The quoted passage begins at 16:40.

¹³ Michael Zürn, *From Interdependence to Globalization*, in *Handbook of International Relations* 235 (Walter Carlsnaes, Thomas Risse-Kappen, Beth A. Simmons eds. 2002).

¹⁴ Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 Sup. Ct. Rev. 111, 124.

¹⁵ David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 St. Louis Univ. L. J. 145 (2008).

¹⁶ See *Talbot v. Seeman*, 5 U.S. 1, 11 (1801); John Fiske, *The critical Period of American History, 1783-1789*, pp. 127-28 (1888); Frederick C. Leiner, *The Charming Betsy and the Marshall Court*, 45 Am. J. Leg. Hist. 1, 18 (2001).

tioned to the status of the United States as a weak nation,¹⁷ and as a consequence, it could have become dispensable once the United States became the world's only superpower.¹⁸ But the weak nation reasoning cannot explain everything. Not only has the doctrine survived the rise of the United States in decisions after World War II.¹⁹ More importantly, *Charming Betsy* was not an isolated U.S. decision: around the same time, British courts announced a similar doctrine for the British Empire, then the world's biggest power. In *Le Louis*, Sir William Scott (later Lord Stowell) held that the new British antislavery act abolished slavery but did not allow seizure of foreign ships involved in slave trade.²⁰ The legal basis was a canon of interpretation similar to the *Charming Betsy*: "neither this British Act of Parliament, nor any commission founded on it, can affect any right or interest of foreigners, unless they are founded upon principles and impose regulations that are consistent with the law of nations. That is the only law which Great Britain can apply to them; and the generality of any terms employed in an Act of Parliament must be narrowed in construction by a religious adherence thereto."²¹

This suggests that the *Charming Betsy* presumption traditionally represented, at least primarily, not a pure policy assessment but an intrinsically *legal* doctrine. Even if its application was meant to avoid international discord, the only relevant discord was that created by violations of the law of nations.²² In *Empagran*, by contrast, the Court speaks not of compatibility with international law, but instead of compatibility with foreign "sovereign authority" and "legitimate sovereign interests."²³ It thereby turns the legal doctrine into a policy. Scholars have interpreted the *Charming Betsy* presumption as an implied deference of international relations matters to the Executive.²⁴ The Court in *Empagran* apparently accepts the view of international law as international relations, but draws a different conclusion: if international law is international governance, then the courts themselves, first and foremost the U.S. Supreme Court, must adopt the role of global governor.²⁵ In a world in which diplomatic protests addressed to the executive

¹⁷ Cf. e.g., Curtis Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L. J. 479, 492 (1998).

¹⁸ *Id.*, at 519.

¹⁹ See Chapter 12, notes xx – xx and accompanying text.

²⁰ *Le Louis* (1817) 165 E.R. 1464, 1474 (2 Dodson's Admiralty Repts. 210, 239). For historical context, see Tara Helfman, Note: *The Court of Vice Admiralty at Sierra Leone and the Abolition of the West African Slave Trade*, 115 Yale L.J. 1122 (2006).

²¹ *Le Louis*, 165 E.R. at 1474 (2 Dodson's Admiralty Repts. at 239); see also *Leroux v. Brown* (1852) 22 L.J.C.P. 1, 3 per Maule, J. ("If the meaning of the Act is doubtful, it is a reason for not putting a particular interpretation upon it, that that interpretation would violate the comity of nations.")

²² See Chapter 12, notes xx – xx and accompanying text.

²³ *Compare Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455 (2007).

²⁴ Bradley, *supra* note xx.

²⁵ Stephen Breyer, International Governance and American Law, speech at the Brookings Institution, 24 June, 2008, available at http://www.brookings.edu/events/2008/0624_international_law.aspx. Cf. Ralf Michaels, *US-Gerichte als Weltgerichte: Die Avantgarde der Globalisierung*, 31 DAJV-Newsletter 46-54 (2006); Christopher Whytock, Domestic Courts and Global Governance, 84 Tul. L. Rev 67, 74-96 (2010).

are being supplemented by amicus briefs addressed to the Court—in the *Empagran* case, seven foreign governments submitted such briefs—²⁶ this seems a logical step.

This rise of international relations as basis of the *Charming Betsy* presumption coincides with the decline of international law. Dutifully, Justice Breyer cites § 403 of the Restatement on Foreign Relations, but a real analysis of whether the assertion of jurisdiction would violate § 403, or international law more generally, is absent. More strikingly, there is also no detailed analysis of “potentially conflicting laws.”²⁷ If Justice Breyer’s thoughts on the globalization of law were apt, one might expect the potential for such conflicts to be low. Elsewhere, he has claimed that “[t]he commercial law of the various states, for example, has become close to a single, unified body of law.”²⁸ Indeed, price-fixing is banned in nearly every legal system in the world (a point emphasized in *Empagran*, ironically, by the defendants). Plaintiffs’ lawyers had even claimed that the ban on price-fixing amounted to a principle of customary international law, a suggestion the lower court rejected.²⁹ Moreover, the effects doctrine for establishing jurisdiction in antitrust matters, whose contours were still in dispute worldwide when the U.S. Supreme Court previously addressed the application of the Sherman Act against British reinsurers in *Hartford Fire*,³⁰ has since become universally accepted, albeit with variants.

However, Justice Breyer does not consider such agreement on ends to be sufficient to assume similarity: “[E]ven where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies.”³¹ Interestingly, Sir William Scott argued similarly about the slave trade in *Le Louis*: “Nor is it to be argued, that because other nations approve the ultimate purpose, they must therefore submit to every measure which any one state or its subjects may inconsiderately adopt for its attainment.”³² In *Empagran*, this speculation might have suggested an actual comparative law analysis. For example, the Court might have considered distinguishing between plaintiffs from states that have a functioning antitrust regulation scheme (and had said so in their amicus curiae briefs) and those from states without such a scheme. Indeed, in other contexts, Justice Breyer has famously suggested how fruitful it is to look at other nations’ laws, even where this is not mandated.³³ When he speaks about the

²⁶ Briefs were submitted by the Governments of the Federal Republic of Germany and Belgium (jointly); Canada; Japan; Great Britain, Ireland and the Netherlands (jointly); and the United States. All favored dismissal.

²⁷ *Empagran*, 542 U.S. at 164.

²⁸ Breyer, *supra* note xx, at 267. Cf. Chris Noonan, *The Emerging Principles of International Competition Law* (2007).

²⁹ *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 WL 761360, at 8-9 (citing *In re Microsoft Corp. Antitrust Litigation*, 127 F.Supp.2d 702, at 717, and *Kruman v. Christie's Intern. PLC*, 129 F.Supp.2d 620, at 627). See also Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 Tul. J. Int'l & Comp. L. 415 (2007) (arguing that the UNCTAD Set of Principles and Rules on Competition might evolve into customary international law).

³⁰ *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).

³¹ *Empagran*, 542 U.S. at 167.

³² *Le Louis*, 165 E.R. at 1480 (257).

³³ See, e.g., *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 I-CON 519 (2005).

Empagran opinion in presentations, he likes to point out that the Court, in order to decide, “had to know something about the antitrust law of the European Union.”³⁴ The *Empagran* decision itself displays little such analysis. The Court considered a detailed comparative law analysis “too complex to prove workable”:

Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system.³⁵

The image remains of a Court that is not only aware of its role in an interdependent world, but also willing and equipped with the tools necessary to fulfill that role, even if it ultimately prefers caution over action. The tools are mainly those of international relations, not international law. Deference to international law gives way to deference to foreign sovereigns; detailed analysis of the exact requirements of international law gives way to an analysis of the likelihood of international conflict. Forty years earlier, the *Sabbatino* Court was criticized for adopting its own “strong sense ... that its engagement [in foreign relations] may hinder, rather than further, this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere.”³⁶ No similar reaction to *Empagran* has occurred.

III. AN ISOLATIONIST READING:

EXTRATERRITORIALITY IN A POST-TERRITORIAL WORLD

What are the consequences of this transnationalist, post-territorial, “work together in harmony” jurisprudence for *Empagran*? The answer is, to put it mildly, surprising:

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. ... But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?*³⁷

This is quite a striking move. Justice Breyer starts with the recognition that both regulated events and regulatory instruments transcend territorial boundaries: we are interdependent because

³⁴ Stephen Breyer, *After-Dinner Remarks*, 41 Int'l Law. 1007, 1009 (2007); Breyer, *supra* note xx, at 14.

³⁵ *Empagran*, 542 U.S. at 168-69. For a similar argument, see *Spector v. Norwegian Cruise Line*, 545 U.S. 119, 154 n.4 (2005) (Scalia, J., dissenting).

³⁶ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). I thank William S. Dodge for pointing out the relevance of *Sabbatino* in this context.

³⁷ *Empagran*, 542 U.S. at 165.

actions in and by one state have impacts on other states. He ends with the conclusion that we must confine application of our laws to strictly territorial boundaries. Because the world has become deterritorialized, we must apply our laws in a strictly territorial fashion. Because the world has become interdependent, we must allow for independent regulation by different regulators. In order to “work together in harmony,” each nation must act in isolation for itself: the U.S. regulates the U.S. market; Japan regulates the Japanese market, and so on. And the real trigger lies not in the valid sovereignty interests of foreign nations, but in the lack of sovereign interests of the United States. Suddenly, we have moved away from the twenty-first century world of interdependence and cooperation into the nineteenth-century U.S. role of isolationism and the desire to keep exclusive territorial competences strictly separate.

It follows as a matter of course that, in such a world, extraterritorial application of U.S. law is unavailable. All that we can hope for is persuasion:

Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.³⁸

Justice Marshall expressed a similar idea in *The Antelope* when he suggested that “[t]he parties to the modern law of nations do not propagate their principles by force.”³⁹ Still, it is not clear what exactly Justice Breyer has in mind. America's antitrust policies *have*, in fact, won much of their own way in the international marketplace for ideas⁴⁰ – including the idea of private enforcement, which is being actively discussed in the European Union, and including leniency for whistleblowers. If anything, the difference is not in the substantive antitrust laws but in the procedure for their enforcement, but procedure has traditionally been a matter for *lex fori*.

How did we get from a “highly *interdependent* commercial world” to “*independent* foreign harm” and “a foreign nation's ability *independently* to regulate its own commercial affairs”? By way of an assumption so crucial that Justice Breyer mentions numerous times. Here is the most elaborate formulation of the fiction: “We reemphasize that we base our decision upon the following: the price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect.”⁴¹ This assumption is a fiction. In a “highly interdependent commercial world,” effects on one nation's markets are never independent from

³⁸ Empagran, 542 U.S. at 169.

³⁹ *The Antelope*, 23 U.S. 66, 121 (1825); see Chapter 1, notes ___-___ and accompanying text.

⁴⁰ See Joel Davidow, *The Worldwide Influence of U.S. Antitrust*, 35 Antitrust Bull. 603 (1990).

⁴¹ Empagran, 542 U.S. at 164.

effects on another nation's markets.⁴² The vitamins cartel, in order to avoid arbitrage, had to keep prices roughly the same in all geographically close markets. Justice Breyer knows this, but he faces a challenge: the globalization he invokes comes back to haunt him. The doctrines which the Court has at its disposal were made for a nineteenth-century world defined by territorial states. These doctrines do not fit globalization and the transcendence of territorial borders. Perhaps new doctrines are needed; perhaps the old doctrine must be deterritorialized.⁴³ The Court, however, finds another way. Instead of deterritorializing existing rules, it reterritorializes the phenomena to which these rules are applied. Rather than adapt the doctrines to globalization, it adapts globalization to the doctrines. If the nineteenth-century rules do not fit the twenty-first-century world, too bad for the latter – the Court turns it, by fiction, into a nineteenth-century world.

This result, of course, does not require all the globalization talk, as Justice Scalia's concurrence makes clear

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.⁴⁴

This concurrence links the decision to another venerated canon of international law, the presumption against extraterritorial application of statutes, as formulated by Justice Story in *The Apollon*.⁴⁵ That presumption, however, has become problematic, because territoriality has changed both its social and legal meaning. In 1825, jurisdiction was thought to be largely confined to national territory. Consequently, the presumption against extraterritoriality was almost equivalent to a presumption against violations of international law. Roger Alford neatly explains how this idea withered away in U.S. law in the twentieth century.⁴⁶ Today, international law no longer poses such extensive restrictions on domestic jurisdiction over foreign conduct. The presumption against extraterritoriality has survived this shift, but it has lost its grounding in international law.⁴⁷

Moreover, this decline of territoriality as a limit in international law has gone hand-in-hand with the declining importance of territoriality in society. Modern transportation has made

⁴² This is not a new insight. See *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (“Almost any limitation of the supply of goods in Europe, for example, or in South America, may have repercussions in the United States if there is trade between the two.”); see also Chapter 8, notes xx – xx and accompanying text.

⁴³ Ralf Michaels, *Territorial Jurisdiction after Territoriality*, in *Globalisation and Jurisdiction* 105 (Pieter J. Slot & Mielle Bulterman eds., 2004).

⁴⁴ *Empagran*, 542 U.S. at 176 (Scalia, J., concurring).

⁴⁵ *The Apollon*, 22 U.S. 362, 370 (1824); see chapter 1, notes xx – xx and accompanying text.

⁴⁶ Chapter 8, notes xx – xx and accompanying text.

⁴⁷ William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 *Berkeley J. Int'l L.* 85, 114 (1998).

crossing boundaries much easier; new modes of communication make territorial boundaries meaningless for many important endeavors; globalized markets pay little respect to national boundaries. The conduct of important actors, which is the object of most statutory regulation, is trans-territorial. A canon of interpretation that insists on territoriality stands in odd contrast to these developments.

Prior to the shift, Congress was presumed not to legislate beyond territorial boundaries because that would be unusual and would violate international law. Now that the canon has lost its legal foundation in international law and its teleological foundation in a presumed predominantly local character of regulated behavior, it is unclear what justifies it. One suggestion is that courts should avoid extraterritorial application to avoid subjecting the United States to foreign criticism without participation by the political branches,⁴⁸ but this does not explain why limits of scope should be those of territorial boundaries. Another justification is “the commonsense notion that Congress generally legislates with domestic concerns in mind.”⁴⁹ This justification is weak where, as in *Empagran*, the statute at hand is one aimed at determining the scope of extraterritorial application (though the justification has been used in such contexts, too).⁵⁰ More importantly, the justification begs the very question of what exactly are “domestic concerns.”⁵¹ In choice of law, such insights have led in the twentieth century to the development of interest analysis, whereby courts determine the scope of application on the basis of governmental interest and then resolve resulting conflicts with the regulatory interests of other states. If the presumption against extraterritoriality was once a presumption against the violation of choice-of-law rules, as has been argued,⁵² one might expect it to change along with choice-of-law rules, as many authors have suggested it should.⁵³ *Empagran* suggests the powerful grip that ideas of territoriality still hold even over a Justice who claims to be above it.

Territorial limits to jurisdiction present normative problems when applied to phenomena that do not respect territorial boundaries. If the effects of certain conduct transcend boundaries, while congressional statutes are presumed to remain within territorial boundaries, then the effects outside the borders remain unregulated. This has led some to conclude that the presumption against extraterritoriality, revived under the Rehnquist Court,⁵⁴ is merely a fig leaf for judicial

⁴⁸ See e.g. Curtis Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 Va. J. Int'l L. 505 (1997).

⁴⁹ E.E.O.C. v. Arabian American Oil Co., 499 U.S. 244, 248 (1991) (quoting *Foley Bros. v. Filardo*, 338 U.S. 281, 285 (1949)); *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (cited approvingly by Justice Breyer in *Small v. United States*, 544 U.S. 386, 388-89 (2005)).

⁵⁰ *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 455-56 (2007).

⁵¹ Dodge, *supra* n. 47 at 119 (suggesting that “domestic concerns” are “effects within the United States”); Andrew Guzman, *Choice of Law: New Foundations*, 90 Geo. L.J. 883 (2002).

⁵² Note: *Preserving the Inviolability of Rules of Conflict of Laws by Statutory Construction*, 49 Harv. L. Rev. 319 (1938).

⁵³ See, e.g., William S. Dodge, *The Public-Private Distinction in the Conflict of Laws*, 18 Duke J. Int'l. Comp. L. 371 (2008) (with further references at 372 n. 8).

⁵⁴ John H. Knox, *Legislative Jurisdiction, Judicial Canons, and International Law*, ___ Am. J. Int'l L. ____.

dislike of congressional regulation.⁵⁵ Justice Holmes' decision in *American Banana* has been explained by his aversion to the Sherman Act.⁵⁶ Justice Breyer, after deciding *Empagran*, has been praised as "the go-to guy for American business in regulatory and economic cases."⁵⁷

Such crude realist speculations on the Justices' real intentions must remain somewhat speculative even for individual decisions; for the law at large, they have limited explanatory value. In *Empagran*, especially, the suggestion that the real goal is underregulation may not fully hold. The Court emphasizes that other countries have antitrust laws, too. Presumably, therefore, regulation of the cartel would not stop at U.S. borders. Instead, other nations would regulate, even if they did so by different means. This suggests that today the presumption against extraterritoriality is not merely a policy decision in favor of multinational corporations. The Court refuses to concentrate all claims concerning the global cartel in one nation's courts,⁵⁸ but it does not reject the idea that all these claims should be heard somewhere. Instead, the presumption against extraterritoriality establishes a checkerboard map of regulatory authorities, in which each country is responsible for regulating its own territory. This checkerboard map resembles that of the nineteenth century, but the resemblance is superficial. Then, it represented the reality of most social relations and of international law. Today, territorial borders are an arbitrary and formalist device in a globalized world, but one that helps to avoid overlapping regulatory claims precisely because of its formal character.⁵⁹ The nineteenth-century checkerboard view of the world survives in the twenty-first century, but it changes its character: it has become a formal-technical device for the allocation of regulatory authority.

IV. A HEGEMONIALIST READING:

THE ABSENCE OF THE DEVELOPING WORLD

A problem remains. The idea of decentralized regulation – each regulates its own markets, so all the world is regulated – can succeed only if regulatory authority exists everywhere on the checkerboard. This is a problem in antitrust law. Although the United States is no longer the only country with effective antitrust enforcement, many countries still lack the capacity or political will (or both) to crack down on cartels. None of these considerations, however, can be found in the *Empagran* decision. The most striking passage in the opinion is one in which Justice Breyer suggests such a checkerboard world of regulation: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination

⁵⁵ See Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 202.

⁵⁶ *But cf.* Alfred S. Neely, *A Humbug Based on Economic Ignorance and Incompetence—Antitrust in the Eyes of Justice Holmes*, 1993 Utah L. Rev. 1, 37-39.

⁵⁷ Michael J. Greve, *The Justices at Home and Abroad*, 21 Federalist Outlook 6 (2004), available at <http://federalismproject.org/depository/FederalistOutlook21.pdf>.

⁵⁸ *Cf.* Hannah Buxbaum & Ralf Michaels, *Jurisdiction and Choice of Law in International Antitrust Law – A US Perspective*, in *International Antitrust Litigation – Conflict of Laws and Coordination* (Jürgen Basedow, Stéphanie Francq, Laurence Idot, eds., forthcoming).

⁵⁹ *Cf.* Dodge, *supra* note xx, at 115-16; William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 Harv. Int'l L. J. 101, 123 (1998).

about how best to protect Canadian or British or Japanese customers from anticompetitive conduct...?”⁶⁰

This is a strange way of putting the problem. In *Empagran*, the named plaintiffs were not “Canadian, or British or Japanese customers” – they came from Ukraine, Ecuador, and Panama. Yet throughout the opinion, Justice Breyer never addresses the sovereign interests of those countries. When he states that application of U.S. law “would undermine foreign nations’ own antitrust enforcement policies,”⁶¹ he is not speaking of Ecuador (which may be quite happy if the United States cracks down on cartels impacting that country).⁶² Instead, he speaks of Germany and Canada. When he fears that “to apply our remedies would unjustifiably permit [foreign nations’] citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody,”⁶³ the balance of competing considerations he has in mind is that of Germany, Canada, and Japan, not that of Ukraine. In the end, Justice Breyer is not allowing Canada, Great Britain, or Japan to determine how best to protect their consumers as he proclaims. Instead, he is protecting Canadian, British, and Japanese corporations against their overcharged customers abroad.⁶⁴ All named plaintiffs come from developing countries; all defendants and all amicus briefs come from developed countries. The court will apparently listen to the latter, and ignore the former.

In doing so, the Court adopts not only the nineteenth century idea of neatly distinguished territorial entities; it also adopts the old idea of an international law limited to European and North American countries.⁶⁵ Developed countries regulate their markets, and the rest of the world remains unregulated – with the consequence that European and American defendants can retrieve the money they lose to American and European plaintiffs and regulators. Justice Breyer’s harmony among countries creates quite an exclusive club. In the name of avoiding U.S. hegemony over other developed countries, the Supreme Court endorses hegemony of developed over undeveloped countries. It avoids the imperialism of imposing U.S. law on others, but it endorses the imperialism of restricting access to U.S. law.

The exclusive focus on the sovereign interests of Western countries is best demonstrated, ironically, by the near absence of non-Western countries in Western discourse, especially in the United States. But it has a long and well-known history in international law. An uneasy relation to developing countries characterized the Court’s first major opinion on international antitrust,

⁶⁰ *Empagran*, 542 U.S. at 165.

⁶¹ *Id.* at 168.

⁶² See the discussion in Michal Gal, *Antitrust in a Globalized Economy: The Unique Enforcement Challenges Faced by Small and Developing Jurisdiction*, 33 *Fordham Int’l L. J.* 1, 40-45 (2009).

⁶³ 542 U.S. at 167.

⁶⁴ See, e.g., Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae at 2; Brief of the Government of Japan as Amicus Curiae, p. 1. All foreign governments and the U.S. government supported the defendants.

⁶⁵ See Chapter 2, notes xx – xx and accompanying text.

American Banana.⁶⁶ There, Justice Holmes suggested that the presumption against extraterritoriality might not apply to “regions subject ... to no law that civilized countries would recognize as adequate,”⁶⁷ but he did not ultimately apply this exception to Costa Rica, which for the time has aptly been characterized as a “Banana Republic”.⁶⁸ One explanation can perhaps be found in a citation to a passage in Dicey’s work on conflict of laws dealing with “law governing acts done in uncivilized countries.”⁶⁹ Dicey realized that deference to uncivilized countries could hardly be justified by principles of civility. Nonetheless, he suggested applying the rules governing relations with civilized countries by analogy, as far as possible.⁷⁰ In other words, the inclusion of non-Western nations in the family of nations does not alter the concept of a state in international law. Instead, that concept, crafted after Western models, is imposed on non-Western countries by analogy.

We can see even more striking similarities in the treatment of Africa in the slave trade cases. In *Le Louis*, Sir Walter Scott was aware that deference to the interests of France operates to the detriment of Africa – “peace in Europe will be war in Africa.”⁷¹ In the end, however, relations with France were more important than those with Africa. Scott asked: “Why is the British judge to intrude himself *in subsidium juris*, when everything requisite will be performed in the French Court in a legal and effectual manner?”⁷² . The ensuing move from natural law to positivism foreshadowed the U.S. Supreme Court’s similar move, beginning with Marshall’s opinion in *The Antelope*.⁷³ Less often discussed is how the move leads to a reduction in international law’s reach: if only the interests and positions of states count, then states that are unable to have their positions heard will be ignored.

Justice Breyer does not play out the developing against the developed world in the same way. Rather, he seems to imply that all countries share the same sovereign interest in self-determination, which must be respected, even if most developing countries lack the means to crack down on big international cartels. This equation among sovereigns is reminiscent of Chief Justice Marshall’s argument why a universally shared law of nations against slavery does not exist: “The parties to the modern law of nations do not propagate their principles by force; and Africa has not yet adopted them. Throughout the whole extent of that immense continent, so far as we know its history, it is still the law of nations that prisoners are slaves.”⁷⁴ Of course, this

⁶⁶ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); see chapter 8, notes xx – xx and accompanying text.

⁶⁷ 213 U.S. at 355.

⁶⁸ Chapter 8, text accompanying note xx.

⁶⁹ Albert Venn Dicey, *A digest of the law of England with reference to the conflict of laws* 724 (2d ed. 1908).

⁷⁰ *Id.* at 726.

⁷¹ *Le Louis* (1817), 165 E.R. at 1479 (254)

⁷² *Id.* at 1479 (256).

⁷³ See Chapter 1, notes xx – xx and accompanying text (discussing *The Antelope*).

⁷⁴ *The Antelope*, 23 U.S. 66, 121 (1825). For virulent criticism, see Guyora Binder, *The Slavery of Emancipation*, 17 *Cardozo L. Rev.* 2063 (1996).

curious “gesture towards including Africa within the law of nations”⁷⁵ was of little use to Africa, or at least to its inhabitants subject to the slave trade. Moreover, Marshall confined the judge’s standard of international law to “the general assent of that portion of the world of which he considers himself as a part”⁷⁶ – in other words, the Western world, which has long supported the slave trade. In such a world, which treats slavery as either a sovereign choice by sovereign African states, or as a given fact of African customs that Western nations are free to accept or reject, a genuine African interest in the abolition of slavery is absent from any analysis.

This suggests that the role of sovereignty for developing countries may be more complex than is often argued. Traditionally, the extraterritorial application of developed countries’ laws is criticized for stripping developing countries of their own regulatory independence,⁷⁷ with U.S. courts “as agents of U.S. hegemony.”⁷⁸ The underlying assumption is that developing countries’ sovereignty is merely formal: they lack the economic and political power to be truly independent. Even if this assumption is correct, the conclusion does not necessarily follow. Cases from *The Antelope* through *Empagran* suggest that the *refusal* to apply law extraterritorially -- especially regarding conduct that is almost universally condemned (slavery, price-fixing) – can also be a problem, because it leaves third world countries unprotected against the power of transnational commercial actors. If developing countries lack the domestic means to regulate those actors themselves, they may depend on developed countries’ willingness to regulate their own actors.

The Court’s real choice in *Empagran* is not between imperialism and international harmony. Rather, the choice is between two kinds of imperialism: one that comes from imposing U.S. law on the rest of the world, and the other from rejecting access to the courts necessary for protection against Western corporate actors. The Court avoids one kind of imperialism, but Justice Breyer’s pride seems unwarranted, because the Court falls, perhaps unavoidably, for another kind.

The omnipresence of some kind of imperialism suggests that a proper analysis of the decision might be framed in terms of empire – not in the sense of the United States as an empire, but in the sense of a transnational super-state that transcends individual states and imposes a collective logic on all of them.⁷⁹ Susan Marks has translated this dystopia into international law;⁸⁰ her text suggests eerie parallels with *Empagran*. When she speaks of “a new, global form of sovereignty composed of agencies which operate in diverse arenas (national, regional, and

⁷⁵ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* 54 (2005).

⁷⁶ *The Antelope*, 23 U.S. at 121.

⁷⁷ E.g. B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 Int’l Community L.Rev. 1, 12 (2006).

⁷⁸ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 Ind. J. Global Leg. Stud. 383, 416 (2003).

⁷⁹ Michael Hardt & Antonio Negri, *Empire* (2000).

⁸⁰ Susan Marks, *Empire’s Law*, 10 Ind. J. Global Leg. Stud. 449 (2003). See also Mark Goodale, *Empires of Law: Discipline and Resistance within the Transnational System*, 14 Social & Leg. Stud. 553 (2005).

global), yet interlock to form a single framework of governance for the entire world,” a “regime that knows no territorial boundaries,” that is “dedicated to the inauguration of perpetual peace (even if ... it remains enmeshed with the deployment and rationalization of violence),”⁸¹ she paints a picture that looks very much like Justice Breyer’s. However, instead of praising international harmony, she highlights the totalitarian and violent character of such a regime: “today hierarchies are constituted and sustained by more complex patterns and logics, which are obscured, and hence reinforced, where globalization is elided with neo-imperialism.”⁸² When she goes on to find that “with deterritorialization comes reterritorialization,”⁸³ she could have the isolationist reading of *Empagran* in mind. When she finally cites Hardt and Negri for the idea that “the geographical and racial lines of oppression and exploitation that were established during the era of colonialism and imperialism have in many respects not declined but instead increased exponentially,”⁸⁴ the link to slavery is made.

V. CONCLUSION

We should not exaggerate. Marks’ neo-marxist analysis is no less hyperbolic than Justice Breyer’s neoliberal celebration of nations working in harmony. The important insight is that both analyses are available simultaneously.

In the end, *Empagran* is transnationalist in rhetoric, isolationist in application, and hegemonial in its effect. A decision with a seemingly straightforward argument is found riddled in the conflict between these different logics. A decision with few references to international law displays deep links to some of the most pressing international law issues. A decision with forward-looking globalization rhetoric is mired in history. A decision praising harmony displays somber parallels to decisions refusing interference with the evil of slave trade. This has implications for our understanding of international law today, and of its history.

So, does international law in the Supreme Court manifest qualities of continuity or change? The easy answer, of course, is that it displays both change and continuity. The use of the *Charming Betsy* canon suggests continuity; its transformation from a legal doctrine to an instrument of foreign politics suggests change. The recognition of globalization and an interdependent world suggests change; the effective return to strict territoriality represents continuity, or even regress. The presumption against extraterritoriality is a remnant from times past; its function as a formal-technical device to allocate regulatory power has changed.

But the real answer is more complex. The question of continuity or change presumes a linear development that is hard to discern in *Empagran*. The three different readings of the opinion – transnationalist, isolationist, and hegemonialist – have a particular relevance for historical analysis. If all readings of the decision are possible, perhaps the opinion is rooted in

⁸¹ Marks, *supra* n. 80, at 461.

⁸² *Id.* at 463.

⁸³ *Id.* at 464.

⁸⁴ *Id.*, citing Hardt & Negri, *supra* n. 79, at 43.

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various times. This means, in turn, that *Empagran* does not represent the end point of some linear development, or some sequence of different periods that neatly follow one another. Rather, these different logics can all coexist within one opinion, sometimes one paragraph or even one sentence. If *Empagran* is emblematic of the new period of globalization, then it demonstrates that globalization is not a time period separate from others. Rather, it is characterized by what Ernst Bloch has called *Gleichzeitigkeit des Ungleichzeitigen*, the simultaneity of the non-simultaneous.⁸⁵

Marks' description of empire as a regime that has overcome not only territorial but also temporal boundaries reflects this aspect. Empire has long been a topic of American history. Washington's concept of the United States as an "infant empire" and Jefferson's dream of an "empire of liberty" attest to a celebration of empire from the nation's founding.⁸⁶ Discussion whether today's United States is an empire has reappeared, with some celebrating, some criticizing the perceived role of the United States as a modern empire that does not require territorial acquisitions to rule the world.⁸⁷ The history of international law in the U.S. Supreme Court is also the history of empire, and the current Court cannot escape that history.

In the end, the absence of such analyses -- both in *Empagran* and in its scholarly reception -- is itself relevant. Scholars view the decision as a move towards comity and transnationalism, like they view the slave trade cases as the move from a natural law conception of international law to a positivist understanding, and this technical character of international law discourse makes it possible to draw connections between the cases. The field, with its core elements such as sovereign interests and territoriality, has a formal-conceptual quality that makes it applicable over different time periods and vastly different issues. That propensity for abstraction, in the face of fundamental changes in world history, can sometimes represent a shocking absence of concern for real life problems. Sometimes, by contrast, this propensity is how international law remains able, in the face of such changes, to serve as "gentle civilizer," as Martti Koskenniemi has pointed out.⁸⁸ *Empagran*, with its reaches back into history, both visible and invisible, represents both.

⁸⁵ Ernst Bloch, *The Heritage of our Time* (1991); cf. David C. Durst, Ernst Bloch's Theory of Nonsimultaneity, 77 *Germanic Review* 171 (2002).

⁸⁶ Niall Ferguson, *Colossus – The Rise and Fall of the American Empire* 2, 34 and *passim* (2004).

⁸⁷ The best comparative analysis is Charles S. Maier, *Among Empires: American Ascendancy and Its Predecessors* (2007).

⁸⁸ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002).