NOTES

CLARIFYING *KIOBEL*'S "TOUCH AND CONCERN" TEST

The Alien Tort Statute[1] (ATS) is a single sentence long.[2] It's a pithy statute, but for many years it served as a "lynchpin" of human rights litigation.[3] For three decades, foreign plaintiffs used the ATS to sue foreign defendants for human rights violations that occurred outside the United States.[4] The Supreme Court put a stop to that practice, however, in *Kiobel v. Royal Dutch Petroleum Co.*[5] In *Kiobel*, the Court held that the ATS didn't rebut the "presumption against extraterritoriality."[6] As a result, the Court explained, a plaintiff cannot file an ATS suit unless her claim "touch[es] and concern[s] the territory of the United States."[7]

But the Court gave almost no explanation of how an ATS claim might fulfill this "touch and concern" requirement.[8] Accordingly, *Kiobel*'s mysterious test has caused a circuit split.[9] The Court is likely to eventually grant certiorari to resolve this split.[10] And when the Court does, this Note argues that it should adopt the rule that Justice Alito outlined in his *Kiobel* concurrence. Simply put, an ATS claim should only "touch and concern" the United States if the wrongful conduct that occurred in the United States suffices to constitute an international law violation.[11] Justice Alito's approach best accords with

---

[1] 28 U.S.C. § 1350 (2012).

[2] The ATS reads in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.* For the history and development of the ATS, see *infra* section I.A, pp. 1903–05.

[3] *Developments in the Law — Extraterritoriality*, 124 HARV. L. REV. 1226, 1233 (2011) [hereinafter *Extraterritoriality*].

[4] *See* Bryan M. Clegg, Comment, *After* Kiobel*: An "Essential Step" to Displacing the Presumption Against Extraterritoriality*, 67 SMU L. REV. 373, 375 (2014).

[5] 133 S. Ct. 1659 (2013).

[6] *Id.* at 1669. For an explanation of this presumption, see *infra* section I.B, pp. 1905–07.

[7] *Kiobel*, 133 S. Ct. at 1669.

[8] *See* Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1784 (2014); Ralph G. Steinhardt, Kiobel *and the Weakening of Precedent: A Long Walk for a Short Drink*, 107 AM. J. INT'L L. 841, 842 (2013).

[9] *See infra* section II.C, pp. 1910–11. A different circuit split has emerged over aiding and abetting liability under the ATS. *See* Ryan S. Lincoln, Comment, *To Proceed with Caution? Aiding and Abetting Liability Under the Alien Tort Statute*, 28 BERKELEY J. INT'L L. 604, 604–05 (2010). The aiding and abetting liability circuit split is beyond the scope of this Note.

[10] *See* Ralph G. Steinhardt, *Determining Which Human Rights Claims "Touch and Concern" the United States: Justice Kennedy's* Filartiga, 89 NOTRE DAME L. REV. 1695, 1704 (2014) ("[The 'touch and concern' test] can be expected to generate the next 'cert-worthy' conflict among the circuit courts of appeals.").

[11] *See Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

the Court's doctrine on the presumption against extraterritoriality.[12] It also minimizes the potential for international friction while being faithful to the Court's precedent.[13] And it would best maintain the separation of powers principle that foreign affairs are matters for the political branches, not the courts.[14]

Despite all of these benefits, Justice Alito's concurrence is surprisingly unpopular in the *Kiobel* literature. Scholars have labeled Justice Alito's opinion "extreme"[15] and inconsistent with precedent.[16] One scholar has even argued that Justice Alito's view is "[t]he one thing that the *Kiobel* presumption *cannot* mean."[17] Indeed, although there are many proposals for clarifying *Kiobel*'s "touch and concern" test, virtually all of them involve some kind of multifactor standard.[18] No one ever seems to have made the case for Justice Alito's bright-line, conduct-based rule.

This Note makes that case, and it proceeds in three Parts. Part I outlines the Court's jurisprudence on the ATS and the presumption against extraterritoriality. Part II summarizes *Kiobel* and the "touch and concern" circuit split. Part III explains why the Court should adopt Justice Alito's proposed rule. Section III.A outlines how the Court's doctrine on the presumption against extraterritoriality mandates adopting Justice Alito's view of the ATS. Section III.B describes how the Court's concerns about international comity mandate this approach as well. Finally, section III.C argues that adopting Justice Alito's rule best maintains separation of powers principles between the judiciary and the political branches.

I. THE ROAD TO *KIOBEL*

A. The Alien Tort Statute

The ATS provides federal district courts with jurisdiction over "any civil action by an alien for a tort only, committed in violation of the

---

[12] *See infra* section III.A, pp. 1911–16.

[13] *See infra* section III.B, pp. 1916–20.

[14] *See infra* section III.C, pp. 1920–23.

[15] William R. Casto, *The ATS Cause of Action Is Sui Generis*, 89 NOTRE DAME L. REV. 1545, 1560 (2014); Sarah H. Cleveland, *The* Kiobel *Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT'L L. 8, 22 (2013) (arguing that Justice Alito's view imposes an "extremely high territorial bar"); *see also* Cassel, *supra* note 8, at 1797.

[16] *See, e.g.*, Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on* Kiobel v. Royal Dutch Petroleum, 89 NOTRE DAME L. REV. 1719, 1740 (2014); *see also* Franklin A. Gevurtz, *Determining Extraterritoriality*, 56 WM. & MARY L. REV. 341, 372–73 (2014).

[17] Steinhardt, *supra* note 10, at 1705 (emphasis added).

[18] *See, e.g.*, Cassel, *supra* note 8, at 1811–12; Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors from* Kiobel*'s "Touch and Concern" Test*, 66 HASTINGS L.J. 443, 445–46 (2015); Mohamed Chehab, Note, *Finding Uniformity Amidst Chaos: A Common Approach to* Kiobel*'s "Touch and Concern" Standard*, 93 U. DET. MERCY L. REV. 119, 156 (2016).

law of nations or a treaty of the United States."[19] The First Congress passed the ATS in 1789.[20] It's not clear why.[21] The general idea, however, seems to be that Congress wanted to give foreign officials the power to sue U.S. citizens who injured them on U.S. soil.[22]

In any event, for almost 200 years the ATS lay dormant.[23] But in 1980, the Second Circuit "breathed new life"[24] into the ATS in *Filartiga v. Pena-Irala*.[25] Joel and Dolly Filartiga, two Paraguayan citizens, sued Americo Pena-Irala, a Paraguayan government official, for torturing their family member to death.[26] The Filartigas argued that the ATS provided jurisdiction for their suit, but the district court disagreed.[27] The Second Circuit reversed, calling their suit "undeniably an action by an alien, for a tort only, committed in violation of the law of nations."[28] The court held that torture by a state official is a violation of international human rights law, and thus the law of nations.[29] In sweeping language, the court declared that "for purposes of civil liability, the torturer has become — like the pirate and slave trader before him — *hostis humani generis*, an enemy of all mankind."[30]

Filartiga "open[ed] up a new field of human rights litigation."[31] Alien plaintiffs subsequently filed over 150 ATS lawsuits,[32] alleging abuses ranging from genocide to summary execution to war crimes.[33] These lawsuits initially focused on foreign government officials, but soon targeted corporations that helped foreign governments carry out human rights abuses.[34]

---

19 28 U.S.C. § 1350 (2012).

20 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

21 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 718–19 (2004) ("[D]espite considerable scholarly attention, it is fair to say that a consensus understanding of what Congress intended [in passing the ATS] has proven elusive.").

22 *See Kiobel*, 133 S. Ct. at 1668; John B. Bellinger III, Speech, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT'L L. 1, 3 (2009); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 465 (1989).

23 The statute only provided jurisdiction in two cases between 1789 and 1980. *Extraterritoriality*, *supra* note 3, at 1235.

24 Burley, *supra* note 22, at 461.

25 630 F.2d 876 (2d Cir. 1980).

26 *Id.* at 878–79.

27 *Id.* at 880.

28 *Id.* at 887.

29 *Id.* at 880.

30 *Id.* at 890.

31 Burley, *supra* note 22, at 461.

32 *See* Roger P. Alford, *The Future of Human Rights Litigation After* Kiobel, 89 NOTRE DAME L. REV. 1749, 1751–52 (2014).

33 Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After* Kiobel, 64 DUKE L.J. 1023, 1051 (2015).

34 John Bellinger III & R. Reeves Anderson, *Whither to "Touch and Concern": The Battle to Construe the Supreme Court's Holding in* Kiobel v. Royal Dutch Petroleum, *in* U.S. CHAMBER

Filartiga's holding only concerned subject matter jurisdiction; it therefore didn't resolve the question of where an ATS plaintiff's cause of action comes from.[35] In *Sosa v. Alvarez-Machain*,[36] the Supreme Court clarified that courts can create ATS causes of action as a form of federal common law.[37] The Court admitted that the ATS was "strictly jurisdictional."[38] But it also insisted that the ATS was not meant to be "stillborn," a law that was useless until Congress authorized specific causes of action.[39] Simply put, the Court explained, the First Congress thought that courts could recognize ATS causes of action as a form of common law.[40] And nothing precludes modern courts from doing so as well.[41]

Still, the Court said, the judiciary should exercise caution before creating ATS causes of action.[42] For one thing, Congress is in a far better position than courts to create private causes of action.[43] And because the ATS touches on matters of international law, courts should be especially worried about negatively impacting America's foreign relations.[44] In short, *Sosa* explained, courts shouldn't recognize an ATS cause of action for an international law norm with "less definite content and acceptance" than the sorts of norms recognized in 1789.[45] Courts should also consider the "practical consequences" of making those norms actionable[46] — consequences that may require deferring to the executive branch's views.[47] Despite *Sosa*'s plea for caution, ATS litigation continued "largely unabated" following the decision.[48]

B. The Presumption Against Extraterritoriality

The second piece of the *Kiobel* puzzle is the presumption against extraterritoriality. The presumption against extraterritoriality states that "legislation of Congress, unless a contrary intent appears, is meant

---

INST. FOR LEGAL REFORM, FEDERAL CASES FROM FOREIGN PLACES 22, 22–23 (George T. Conway et al. eds., 2014); Young, *supra* note 33, at 1051–52.

35 *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 819 (D.C. Cir. 1984) (Bork, J., concurring); *Filartiga*, 630 F.2d at 889 & n.25.

36 542 U.S. 692 (2004).

37 *Id.* at 724, 732. For the facts and procedural posture of *Sosa*, see *id.* at 697–99.

38 *Id.* at 713.

39 *Id.* at 714; *see also id.* at 719.

40 *Id.* at 724.

41 *Id.* at 724–25.

42 *Id.* at 725.

43 *Id.* at 727.

44 *Id.*

45 *Id.* at 732.

46 *Id.*

47 *See id.* at 732–33, 733 n.21.

48 Bellinger III, *supra* note 22, at 2.

to apply only within the territorial jurisdiction of the United States."[49] The presumption ensures that courts don't create "international discord" by applying U.S. law "to conduct in foreign countries."[50] It also reflects the understanding that Congress usually only intends its legislation to apply domestically.[51] The Court has applied this presumption to many statutes over the past thirty years, including Title VII of the Civil Rights Act of 1964,[52] the Federal Tort Claims Act,[53] and the Patent Law Amendments Act of 1984.[54]

The Supreme Court has clarified the presumption against extraterritoriality doctrine in two recent cases. The first case is *Morrison v. National Australia Bank Ltd*.[55] *Morrison* dealt with the extraterritoriality of section 10(b) of the Securities and Exchange Act of 1934.[56] Section 10(b) forbids using "any manipulative or deceptive device" in connection "with the purchase or sale of any security registered on a national securities exchange."[57] The Court found that section 10(b) failed to rebut the presumption against extraterritoriality.[58] But that finding didn't end the matter: although the plaintiffs had purchased their securities outside the United States, they insisted that the deceptive conduct occurred inside the United States.[59] The Court considered this irrelevant.[60] The "focus" of section 10(b) is the "purchase-and-sale transaction[]," the Court explained, not the deceptive conduct.[61] And because the plaintiffs purchased their stocks outside the United States, it didn't matter that the deceptive conduct occurred domestically.[62]

The second case is *RJR Nabisco, Inc. v. European Community*,[63] which applied the presumption against extraterritoriality to the civil suit provision of the Racketeer Influenced and Corrupt Organizations Act[64] (RICO). *RJR Nabisco* explained that *Morrison* reflects a two-

---

[49] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010) (quoting EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991)).

[50] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016).

[51] *Id.*

[52] *See Aramco*, 499 U.S. at 248–49. Congress later amended Title VII to give it extraterritorial effect. *See* 42 U.S.C. § 2000e(f) (2012) ("With respect to employment in a foreign country, [the term 'employee'] includes an individual who is a citizen of the United States.").

[53] *See* Smith v. United States, 507 U.S. 197, 203–04 (1993).

[54] *See* Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454–56 (2007).

[55] 561 U.S. 247 (2010).

[56] 15 U.S.C. § 78j(b) (2012).

[57] *Id.*

[58] *See Morrison*, 561 U.S. at 265.

[59] *Id.* at 266.

[60] *Id.* at 266–67.

[61] *Id.*

[62] *Id.* at 273.

[63] 136 S. Ct. 2090 (2016).

[64] 18 U.S.C. § 1964 (2012); *see RJR Nabisco*, 136 S. Ct. at 2106, 2111.

step presumption against extraterritoriality test.[65] At step one, the Court asks if the statute "gives a clear, affirmative indication that it applies extraterritorially."[66] If the statute doesn't give this indication, then the statute doesn't apply extraterritorially.[67] The question then becomes what a domestic application of the statute looks like.[68] Thus, at step two, the Court asks what the statute's "focus" is.[69] If the conduct that's relevant to the statute's focus took place in the United States, then the statute applies.[70] But if the conduct that's relevant to the statute's focus took place *outside* the United States, "then the case involves an impermissible extraterritorial application," regardless of where any other relevant conduct occurred.[71]

II. *KIOBEL* AND ITS DISCONTENTS

A. Kiobel v. Royal Dutch Petroleum

The ATS and the presumption against extraterritoriality came together in spectacular fashion in *Kiobel*. The *Kiobel* plaintiffs were residents of Ogoniland, Nigeria.[72] They sued a group of Dutch, British, and Nigerian corporations that allegedly helped Nigerian police forces raid Ogoni villages and destroy property.[73]

In a "landmark decision,"[74] the Court held that the plaintiffs couldn't bring an ATS suit, because the ATS didn't rebut the presumption against extraterritoriality.[75] Writing for the majority, Chief

---

[65] *See RJR Nabisco*, 136 S. Ct. at 2101.

[66] *Id.*

[67] *See id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1662 (2013).

[73] *Id.* at 1662–63.

[74] Alford, *supra* note 32, at 1753.

[75] *Kiobel*, 133 S. Ct. at 1669. To be sure, the Court gave conflicting signals about if it was applying the presumption to ATS federal common law causes of action, or to the ATS itself. *Compare, e.g.*, *id.* at 1664 ("[T]he question is not what Congress has done but instead what courts may do."), *with id.* at 1665 (finding that the ATS doesn't "evince a clear indication of extraterritoriality" (internal quotation marks omitted)). *See also* Roger Alford, *Does the Presumption Against Extraterritoriality Apply to the ATS or the Underlying Federal Common Law Claims?*, OPINIO JURIS (Jan. 24, 2014, 12:11 AM), http://opiniojuris.org/2014/01/24/presumption-extraterritoriality-apply-ats-federal-common-law-claims [https://perma.cc/X6MS-AQXK]. In *RJR Nabisco*, the Court strongly implied that *Kiobel* applied the presumption to the ATS itself, and this Note will proceed on that assumption. *See RJR Nabisco*, 136 S. Ct. at 2100–01 (explaining that *Kiobel* dealt with whether the ATS "*confers federal-court jurisdiction*" over extraterritorial causes of action, *id.* at 2100 (emphasis added)); *id.* at 2101 ("[*T*]*he ATS* lack[ed] any clear indication that *it* extended to the foreign violations alleged in [*Kiobel*]." (emphasis added)); *id.* (finding that the presumption against extraterritoriality applies to all statutes even if, like the ATS, they "merely confer[] jurisdiction"). For a contrary view, however, see William S. Dodge, *The Presumption Against*

Justice Roberts[76] noted that the presumption usually applies to statutes that regulate conduct.[77] The ATS, however, is only a jurisdictional statute.[78] But because ATS suits can have harmful foreign policy consequences, the presumption against extraterritoriality should similarly apply to ATS causes of action.[79] The Court explained that nothing in the text, history, or purpose of the ATS rebutted the presumption.[80] As a result, a plaintiff cannot bring an ATS claim for a violation of international law that occurred abroad.[81]

In a concluding paragraph, however, the Court hinted that an ATS claim involving foreign conduct might survive if it "touch[ed] and concern[ed]" the United States:

> On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.[82]

Kiobel produced two concurrences and a concurrence in the judgment. Justice Kennedy wrote a one-paragraph concurrence that praised the majority opinion for "leav[ing] open" significant questions about the ATS's reach.[83] He cryptically noted that in future cases, "the presumption against extraterritorial application may require some further elaboration and explanation."[84]

Justice Alito also concurred.[85] He similarly noted that the majority opinion "le[ft] much unanswered."[86] He wrote separately, therefore, to express his own, "broader" view.[87] In Justice Alito's opinion, the ATS's "focus" is the tort committed in violation of the law of nations.[88] As a result, he wrote, courts shouldn't recognize an ATS claim unless

---

Extraterritoriality Still Does Not Apply to Jurisdictional Statutes, OPINIO JURIS (July 1, 2016, 4:57 PM), http://opiniojuris.org/2016/07/01/32658/ [https://perma.cc/J4WY-Y7N8].

[76] The Chief Justice was joined by Justices Scalia, Kennedy, Thomas, and Alito.

[77] *Kiobel*, 133 S. Ct. at 1664.

[78] *Id.* (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 713 (2004)).

[79] *Id.*

[80] *Id.* at 1665–67.

[81] *See id.* at 1667–69. As the Court later clarified in *RJR Nabisco*, because there was no way that a domestic application of the ATS would salvage the plaintiffs' claims, *Kiobel* didn't need to determine the ATS's "focus." *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016).

[82] *Kiobel*, 133 S. Ct. at 1669 (internal citation omitted).

[83] *Id.* (Kennedy, J., concurring).

[84] *Id.*; *see also* Steinhardt, *supra* note 10, at 1705 ("[T]he Kennedy concurrence reaches new heights in what looks like intentional obscurity.").

[85] Justice Alito was joined by Justice Thomas.

[86] *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring).

[87] *Id.* at 1670.

[88] *Id.*

the "domestic conduct" at issue is "sufficient to violate an international law norm."[89]

Justice Breyer concurred in the judgment.[90] Instead of applying the presumption against extraterritoriality, he argued that the Court should allow an ATS suit to go forward when the tort occurred in the United States, when the defendant is a U.S. national, or when the defendant's conduct implicates a national interest.[91]

B. The Kiobel *Enigma*

Kiobel's "touch and concern" paragraph soon developed an infamous reputation among commentators. Before that paragraph, the Court seemed ready to forbid foreign ATS claims completely.[92] But the Court concluded with an about-face. It asserted instead that an ATS claim only needs to "touch and concern" the United States. Despite the importance of explaining that statement, the Court gave almost no guidance beyond simply noting that "mere corporate presence" isn't enough.[93] Indeed, the phrase "touch and concern" seemed to come out of nowhere; it had no precedent in the Court's foreign relations case law.[94] Accordingly, scholars have criticized *Kiobel* for being "complex and confusing"[95] and for "fail[ing] as precedent" because of how little direction it provides.[96]

Still, the future of ATS litigation hinged on figuring out what the Court meant. As a result, commentators have spent the past four years discussing *Kiobel* in an almost-Talmudic kind of back-and-forth. On the one hand, the "touch and concern" paragraph is only dicta.[97] On the other hand, Justice Kennedy provided the fifth vote for the majority, and he seemed to want to leave the door open for extraterritorial ATS causes of action.[98] On the one hand, the Court implied that its extraterritorial analysis was conduct based.[99] On the other hand, the

---

[89] *Id.*

[90] Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

[91] *See Kiobel*, 133 S. Ct. at 1671, 1673 (Breyer, J., concurring in the judgment).

[92] Cleveland, *supra* note 15, at 9.

[93] *See Kiobel*, 133 S. Ct. at 1669.

[94] One commentator has noted that the phrase "touch and concern" appears in the common law of covenants. *See* Ranon Altman, Comment, *Extraterritorial Application of the Alien Tort Statute After* Kiobel, 24 U. MIAMI BUS. L. REV. 111, 132–33 (2015). But even in that context, the phrase has been criticized for being vague and ultimately meaningless. *See id.*

[95] Alford, *supra* note 32, at 1754.

[96] Steinhardt, *supra* note 8, at 842 (emphasis omitted).

[97] *See* Balintulo v. Daimler AG, 727 F.3d 174, 190 (2d Cir. 2013).

[98] *See* Recent Case, Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013)*, 127 HARV. L. REV. 1493, 1499 & n.50 (2014).

[99] *See* Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What that Can Tell Us About How to Read* Kiobel*)*, SCOTUSBLOG (Apr. 19, 2013, 11:30 AM), http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously

Court said that ATS "*claims*" must "touch and concern" the United States, and a "claim" is more than just conduct.[100] On the one hand, the Court insisted that at least *some* conduct must occur domestically to satisfy the "touch and concern" test.[101] On the other hand, the Court stated that "mere corporate presence" in the United States doesn't suffice — which implies that corporate *domicile* in the United States alone might.[102]

In short, *Kiobel* can be read in any number of ways, depending on one's ideological lens. As a result, it may be fruitless to try to discern *Kiobel*'s true meaning. And, like many other confusing Supreme Court opinions before it, *Kiobel* soon created a circuit split.

C. The "Touch and Concern" Circuit Split

Five circuits have attempted to define the contours of *Kiobel*'s "touch and concern" test. Their approaches reflect a spectrum between a bright-line rule and a totality of the circumstances standard.

Both the Fifth Circuit and the Second Circuit have adopted rules similar to Justice Alito's. The Fifth Circuit — which is the only circuit so far to incorporate *RJR Nabisco* into its "touch and concern" analysis — believes that the ATS doesn't provide jurisdiction for international law violations that occur abroad.[103] Similarly, in the Second Circuit, an ATS defendant must have engaged in enough domestic conduct to "giv[e] rise to a violation" of the law of nations.[104]

By contrast, the Eleventh, Ninth, and Fourth Circuits have read *Kiobel*'s "touch and concern" test more flexibly. In the Eleventh Circuit, an ATS claim satisfies this test if the claim has "a U.S. focus and *adequate* relevant conduct occurs within the United States."[105] Thus, although the location of the defendant's conduct is relevant, so is the defendant's U.S. citizenship, as well as the potential national interest in allowing the case to proceed.[106] The Ninth Circuit has likewise suggested "that a defendant's U.S. citizenship or corporate status is

---

-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/ [https://perma.cc/HA2F-5ZHY].

100 *See* Clegg, *supra* note 4, at 390 (emphasis added).

101 *See* John Bellinger, *Reflections on* Kiobel, LAWFARE (Apr. 22, 2013, 8:52 PM), https://www.lawfareblog.com/reflections-kiobel [https://perma.cc/9UJA-HPEV].

102 *See* Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases [https://perma.cc/LK78-DZWY] ("[*Kiobel*] indicate[s] that U.S. corporations could, in some cases, be subject to ATS liability for actions committed against foreigners abroad.").

103 *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 197 (5th Cir. 2017).

104 Balintulo v. Daimler AG, 727 F.3d 174, 192 (2d Cir. 2013).

105 Doe v. Drummond Co., 782 F.3d 576, 592 (11th Cir. 2015) (emphasis added), *cert. denied*, 136 S. Ct. 1168 (2016).

106 *See id.* at 592, 594, 596.

one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States."[107] Finally, the Fourth Circuit requires courts to conduct an intensive "fact-based analysis" on each ATS claim.[108] In its view, an ATS claim "touches and concerns" the United States "when extensive United States contacts are present and the alleged conduct bears . . . a strong and direct connection to the United States."[109] The Fourth Circuit emphasizes that an ATS case will not usually meet this standard.[110] However, it has allowed one ATS case to proceed that involved American employees of a U.S. corporation — under contract with the U.S. government — who allegedly committed torture abroad.[111]

III. THE CASE FOR JUSTICE ALITO'S *KIOBEL* CONCURRENCE

The *Kiobel* Court must have known that lower courts would divide over the "touch and concern" test. Indeed, when one writes an opinion that's "careful to leave open a number of significant questions,"[112] a circuit split is inevitable. Luckily, as section II.B demonstrates, the Court wrote *Kiobel* so ambiguously that the Justices have a remarkable amount of flexibility in crafting a future holding.

This Part therefore argues that when the Court next discusses the "touch and concern" test, it should embrace Justice Alito's concurrence.[113] Simply put, the ATS should not provide jurisdiction unless the wrongful conduct that occurred in the United States is itself a "tort . . . committed in violation of the law of nations."[114] The presumption against extraterritoriality, international comity,[115] and the separation of powers all mandate adopting this rule.

A. The Presumption Against Extraterritoriality

RJR Nabisco clarified that the presumption against extraterritoriality doctrine consists of two steps, and that these same two steps

---

[107] Mujica v. AirScan Inc., 771 F.3d 580, 594 (9th Cir. 2014), *cert. denied sub nom.* Mujica v. Occidental Petroleum Corp., 136 S. Ct. 690 (2015).

[108] *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014).

[109] Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016).

[110] *Id.*

[111] *Al Shimari*, 758 F.3d at 528–29.

[112] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring).

[113] As the Second Circuit has noted, although the *Kiobel* majority did not adopt Justice Alito's rule, "it did not reject it either." Balintulo v. Daimler AG, 727 F.3d 174, 191 n.26 (2d Cir. 2013).

[114] 28 U.S.C. § 1350 (2012).

[115] "International comity" technically refers to a court's decision to defer to the acts of a foreign government. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2078 (2015). However, this Note uses the phrase more broadly to refer to respect for foreign governments and international cooperation.

applied in both *Morrison* and *Kiobel*.[116] (Notably, that clarification resolved a circuit split over whether *Kiobel* incorporated *Morrison*'s "focus" test.[117]) As outlined above, at step one, the Court asks if the statute indicates that it applies extraterritorially. If it doesn't, the Court must then determine the scope of the statute's domestic application. Thus, at step two, the Court determines the statute's "focus." The conduct relevant to the statute's focus must have taken place in the United States for a lawsuit under that statute to go forward.

Crucially, the Court has always identified a statute's "focus" to be something explicitly mentioned in the statute's text. In *EEOC v. Arabian American Oil Co.* (*Aramco*),[118] for example, the Court determined Title VII's "focus" to be the worker's employment.[119] In *Morrison*, the Court found section 10(b)'s "focus" to be the securities transaction.[120] And in *RJR Nabisco*, the Court held that the "focus" of RICO's civil suit provision was the plaintiff's injury.[121] In fact, the Court has rejected a theory of a statute's domestic application that lacked "textual support."[122] The aim of this doctrine, in other words, is to give a statute domestic effect in a way that "its language suggests."[123]

Thus, another way of stating the presumption against extraterritoriality is that every statute presumptively has the phrase "[in the United States]" in it. That is, if a statute doesn't rebut the presumption, the Court implicitly reads those words into the statute. So, for example, after declaring Title VII to be nonextraterritorial in *Aramco*, the Court effectively read the statute as follows: "It shall be an unlawful employment practice for an employer . . . to discharge any individual [in the United States]" because of the employee's "religion, sex, or national origin."[124] Similarly, post–*RJR Nabisco*, the civil RICO provision only provides a cause of action if the plaintiff was "injured in his business or property [in the United States] by reason of a violation."[125]

---

116 RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100–01 (2016).

117 *See* Perlette Jura & Dylan Mefford, *Extraterritoriality: The ATS in Focus*, LAW360 (Oct. 25, 2016, 10:25 AM), https://www.law360.com/banking/articles/855264/extraterritoriality-the-ats-in-focus [https://perma.cc/78KD-T3XG].

118 499 U.S. 244 (1991).

119 *See* 42 U.S.C. § 2000e-2 (2012); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 266 (2010).

120 *See* 15 U.S.C. § 78j(b) (2012); *Morrison*, 561 U.S. at 266–67.

121 *See* 18 U.S.C. § 1964(c) (2012); *RJR Nabisco*, 136 S. Ct. at 2106, 2111.

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

123 *Id.*

124 *See Aramco*, 499 U.S. at 259; *cf.* 42 U.S.C. § 2000e-2.

125 *Cf.* 18 U.S.C. § 1964(c). To be sure, it's possible that the phrase should be "[in the United States or on the high seas]." The Court has been inconsistent about whether a nonextraterritorial statute applies to the high seas. *Compare* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667 (2013) (holding that the ATS isn't extraterritorial but applies to piracy), *with* Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440–41 (1989) (holding that a

Sometimes, however, the parties dispute where the phrase "[in the United States]" belongs in a statute. That was the case in *Morrison*. The *Morrison* plaintiffs implicitly wanted the Court to put the phrase "[in the United States]" in the statute after the words "use or employ." Under that reading, section 10(b) would make it unlawful "[t]o use or employ [in the United States], in connection with the purchase or sale of any security . . . any manipulative or deceptive device."[126] That reading covers the exact state of affairs that the *Morrison* plaintiffs alleged: the defendants engaged in deceptive conduct in the United States, and they did so "in connection with the purchase or sale" of a security.[127]

The Court responded, however, that section 10(b)'s "focus" is the purchase or sale, not the deceptive conduct.[128] In other words, at step two, the Court held that the phrase "[in the United States]" should be put after the words "any security." Thus, in full, section 10(b) makes it unlawful to "use or employ, in connection with the purchase or sale of any security [in the United States] . . . any manipulative or deceptive device."[129] Or, in the Court's words, "the focus of the Exchange Act is not upon the place where the deception originated, but *upon purchases and sales of securities in the United States*."[130] At bottom, then, "step two" — the "focus" test — consists of nothing more than figuring out where the words "[in the United States]" belong in a statute.

To apply this framework to the ATS: the *RJR Nabisco* Court explained that *Kiobel* stopped after "step one."[131] There was no need to move on to step two, since there was no relevant conduct in *Kiobel* that occurred domestically.[132] In a future case, however, the Court will need to move on to step two and clarify the ATS's "focus."

So where does the phrase "[in the United States]" fit into the ATS? One possibility is to put the phrase after the words "the district courts," so that the ATS would read: "The district courts [in the United States] shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations."[133] But that reading is untenable. First, it would only logically make sense if, at the time of the ATS's drafting, there were district courts that

---

nonextraterritorial statute doesn't apply to international waters). This is an issue for a different note.

126 *Cf.* 15 U.S.C. § 78j(b) (2012).

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

128 *Id.*

129 *Cf.* 15 U.S.C. § 78j(b).

130 *Morrison*, 561 U.S. at 266 (emphasis added).

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

132 *Id.*

133 *Cf.* 28 U.S.C. § 1350 (2012). For ease of reading, this Part leaves out the final ATS phrase "or a treaty of the United States."

weren't in the United States. Second, *Kiobel* forecloses that reading; under such a reading, any ATS suit — even one with no connection to the United States — could go forward as long as the plaintiffs filed suit in a U.S. district court. Not even the narrowest interpretation of *Kiobel* could sustain that understanding.[134] A similar result would occur by putting the phrase "[in the United States]" after the words "original jurisdiction," "any civil action," or "alien."

The most sensible solution is to put the phrase after "committed." Thus, if the Court properly applies step two of the *RJR Nabisco* test, the ATS should read: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed [in the United States] in violation of the law of nations."[135] In other words, just as Justice Alito outlined, the tort at issue in an ATS suit must have been committed in the United States, and the tort must have been a violation of the law of nations. Under this analysis, the defendant's citizenship, the defendant's U.S. contacts, and the U.S. interests at issue are all immaterial. The conduct relevant to the ATS's focus is the *tort*. Thus, if the tort "occurred in a foreign country, then [an ATS suit] involves an impermissible extraterritorial application [of the ATS,] regardless of any other conduct that occurred in U.S. territory."[136] Or, in Justice Alito's words, an ATS cause of action can only survive if "the domestic conduct is sufficient to violate an international law norm."[137]

One might agree that a strict reading of *Morrison* and *RJR Nabisco* produces this result, but nonetheless insist that special rules should apply to the ATS. First, one could argue, the ATS is "strictly jurisdictional," and the presumption against extraterritoriality usually applies to statutes that regulate *conduct*.[138] But the Court has applied the presumption to jurisdictional statutes before.[139] And when it has, it has given no indication that the doctrine operated any differently. As the Court emphasized in *Morrison*, this presumption should be "a

---

[134] *See* Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1539–40 (2014) (outlining *Kiobel*'s narrowest possible holding).

[135] *Cf.* 28 U.S.C. § 1350. One could also put the phrase after the word "tort" and reach the same result: "The district courts shall have original jurisdiction of any civil action by an alien for a tort [in the United States] only, committed in violation of the law of nations."

[136] *RJR Nabisco*, 136 S. Ct. at 2101.

[137] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring).

[138] *Id.* at 1664 (majority opinion).

[139] *See, e.g.*, Smith v. United States, 507 U.S. 197, 203–04 (1993) (applying the presumption to the jurisdictional provision of the Federal Tort Claims Act, 28 U.S.C. § 1402(b)); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 440–41 (1989) (applying the presumption to the jurisdictional provision of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1603(c)).

stable background" that Congress can rely on in *all* cases to produce "predictable effects."[140]

Second, one might insist that the United States has an interest in remedying human rights violations that involve significant domestic conduct.[141] The ATS can further that interest by subjecting the people who commit those human rights violations to civil liability.[142] Thus, the argument goes, the Court should look beyond the ATS's text and apply the "focus" test flexibly here, so that the United States denies safe haven to torturers and war criminals.[143]

The problem is that the Court rejected that sort of logic in *Morrison*. In *Morrison*, the Solicitor General urged the Court not to read section 10(b) so rigidly. Instead, she argued, section 10(b) should prohibit "transnational securities fraud . . . when the fraud involves significant conduct in the United States that is material to the fraud's success."[144] The Solicitor General didn't link this argument to section 10(b)'s text. Instead, she insisted that such a reading was necessary to prevent the United States from becoming a "'Barbary Coast' for malefactors perpetrating frauds in foreign markets."[145]

The Court declined to accept her argument. "It is our function to give the statute the effect its language suggests, however modest that may be," the Court explained.[146] It is *not* the Court's function "to extend [a statute] to admirable purposes it might be used to achieve."[147] In other words, the Court explained, courts should not use this presumption to guess what Congress might have wanted in a particular scenario.[148]

So too with the ATS. As demonstrated above, applying the presumption against extraterritoriality to the ATS produces the rule that Justice Alito outlined. The fact that the ATS could be used for loftier purposes — such as exposing war criminals to civil liability when their conduct has a connection to the United States — is irrelevant. Departing from this logic would undermine the "stable background" that the presumption guarantees. Virtually every statute could further "admirable purposes" if it applied abroad. But *Morrison* bars changing the presumption against extraterritoriality doctrine for that reason alone.

---

[140] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010); *see also RJR Nabisco*, 136 S. Ct. at 2101.

[141] *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 209–11 (5th Cir. 2017) (Graves, J., concurring in part, dissenting in part).

[142] *See id.*

[143] *See id.*; *see also Kiobel*, 133 S. Ct. at 1672–74 (Breyer, J., concurring in the judgment).

[144] *Morrison*, 561 U.S. at 270.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *See id.* at 261.

In short, if the Court wants to preserve the "predictable effects" of the presumption against extraterritoriality, precedent mandates adopting Justice Alito's rule.

B. International Comity

The Court always hesitates to act in a way that could trigger negative foreign policy consequences.[149] As a result, when a statute has multiple interpretations, the Court chooses the interpretation that least interferes with America's foreign relations.[150] This philosophy underlies not only the presumption against extraterritoriality,[151] but also the *Charming Betsy* canon[152] and the *Empagran* canon.[153] The mindset reflects the belief that the judiciary should always try to avoid "adopt[ing] an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."[154]

As *Kiobel* made clear, those concerns are heightened when the question is whether a plaintiff can sue for conduct that occurred outside the United States.[155] Private causes of action for foreign conduct allow litigants to become "diplomatic force[s] in their own right."[156] And these litigants have little incentive to consider the foreign policy costs of their actions.[157] Thus, unless the Court is sure that Congress has intended to create a cause of action for foreign conduct, it risks placing delicate policy decisions in the hands of people who face almost no public accountability.[158] In the human rights litigation context specifically, ATS suits may interfere with the executive branch's "carefully calibrated strategy" toward governments with poor human rights records.[159] They can also discourage companies from investing

---

[149] *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013).

[150] *See, e.g.*, Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138, 147 (1957) ("For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain.").

[151] *See Kiobel*, 133 S. Ct. at 1664, 1669.

[152] *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

[153] *See RJR Nabisco*, 136 S. Ct. at 2106–07, 2107 n.9; F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

[154] *Kiobel*, 133 S. Ct. at 1664.

[155] *Id.* at 1664–65.

[156] Anne-Marie Slaughter & David Bosco, Essay, *Plaintiff's Diplomacy*, FOREIGN AFF., Sept.–Oct. 2000, at 102, 107.

[157] Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 347.

[158] *Id.*

[159] Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 461 (2001).

in a certain country out of fear of a lawsuit — thereby triggering that country's ire toward the United States.[160]

In short, if there were ever a vague statute that cried out to be interpreted in the way that least interferes with U.S. foreign relations, it would be the ATS. Obviously, the best way of ensuring that the Court doesn't trigger unintended foreign policy consequences would be to forbid courts from recognizing ATS causes of action until Congress passes another statute.[161] But the Court's precedent forecloses that possibility.[162] Courts do currently have the power to create ATS causes of action, albeit only in cases that "touch and concern the territory of the United States."[163]

Thus, the question becomes how to clarify this "touch and concern" test in a way that most reduces the "potential for international friction."[164] There are multiple options for doing so. The first option is for the Court to adopt a bright-line rule: an ATS claim "touches and concerns" the United States when the defendant is a U.S. national or corporation. Some scholars have advocated for this approach in *Kiobel*'s wake.[165] Making U.S. citizens and corporations liable for aiding foreign abuses, the argument goes, wouldn't negatively impact foreign relations.[166] As Professor Marty Lederman has insisted, for example, foreign policy would "presumptively be *advanced*" if the United States recognized civil liability "for harm caused by [its] own nationals."[167]

This argument, however, doesn't stand up to scrutiny in either theory or practice. If a court recognizes that a U.S. national has violated human rights law by working with a foreign government, then the court is *also* saying that the foreign government has violated human rights law.[168] Oftentimes, that will undoubtedly be true. But it is also true that "[w]hether in the civil or criminal context, one nation's exam-

---

[160] *See* Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 607–08 (2004).

[161] Judge Bork famously advocated for this position. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801, 805 (D.C. Cir. 1984) (Bork, J., concurring).

[162] *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 724–25 (2004).

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

[164] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016).

[165] *See, e.g.*, Cassel, *supra* note 8, at 1773; Beth Stephens, Essay, *Extraterritoriality and Human Rights After* Kiobel, 28 MD. J. INT'L L. 256, 273 (2013).

[166] *See* Austen L. Parrish, Kiobel*, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD. J. INT'L L. 208, 212 (2013); Stephens, *supra* note 165, at 273.

[167] Marty Lederman, Kiobel *Insta-Symposium: What Remains of the ATS?*, OPINIO JURIS (Apr. 18, 2013, 6:40 PM) (emphasis added), http://opiniojuris.org/2013/04/18/kiobel-insta-symposium-what-remains-of-the-ats [https://perma.cc/9CA9-AGMK].

[168] *Cf.* Slaughter & Bosco, *supra* note 156, at 107 (noting that private plaintiffs "use[] corporations as proxies for what are essentially attacks on government policy").

ination of the validity of another nation's human rights record directly implicates international relations."[169]

Experience demonstrates this phenomenon in practice: ATS suits that target American entities for foreign conduct often do interfere with American foreign policy. There are many examples,[170] but two in particular are worth highlighting. In 2002, a group of South African apartheid victims filed an ATS suit against companies — including American corporations like Ford and IBM — that did business with the apartheid regime.[171] South Africa adamantly protested the lawsuit, claiming that allowing apartheid victims to collect damages in a foreign forum would interfere with the government's Truth and Reconciliation Commission.[172] Similarly, in 2001, a group of Indonesian citizens filed an ATS suit against Exxon, claiming that Exxon aided and abetted human rights abuses by the Indonesian military.[173] Indonesia vigorously opposed the lawsuit, which it viewed "as a U.S. court trying [Indonesia] for its conduct of a civil war."[174]

And courts cannot be trusted to dismiss ATS suits like these that have negative foreign policy consequences.[175] The *Sosa* Court actually singled out the apartheid litigation described above as a good candidate for dismissal because of South Africa's objections.[176] But the Second Circuit refused to dismiss the case, noting that "although the views of foreign nations are an important consideration," they are not "dispositive."[177] The D.C. Circuit reacted similarly to Indonesia's

---

169 Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2158 (1999).

170 *See, e.g.*, Declaration of Rand Beers, Assistant Secretary of State for the Bureau of International Narcotics and Law Enforcement Affairs Regarding Potential Impact of *Arias* Litigation on United States National Security and Foreign Policy Interests at 1–2, Arias v. Dyncorp, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1908), ECF No. 7-2; Supplemental Brief for the United States as Amicus Curiae at 1–2, 15–16, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628), https://www.earthrights.org/sites/default/files/legal/Unocal-doj-unocal-brief.pdf [https://perma.cc/Q9V4-N6YH]; Letter from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to Daniel Meron, Principal Deputy Assistant Att'y Gen., Civil Div., U.S. Dep't of Justice (Dec. 23, 2004), *excerpted in* INT'L LAW INST., DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2004, at 376–80 (Sally J. Cummins ed., 2006), https://www.state.gov/documents/organization/139391.pdf [https://perma.cc/4JJF-Q3TW].

171 Dustin Cooper, Comment, *Aliens Among Us: Factors to Determine Whether Corporations Should Face Prosecution in U.S. Courts for Their Actions Overseas*, 77 LA. L. REV. 513, 514–15 (2016).

172 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004).

173 Petition for a Writ of Certiorari at 3, Exxon Mobil Corp. v. Doe, 544 U.S. 909 (2008) (No. 07-81), 2007 WL 2140564.

174 *Id.* at 14.

175 *Cf.* Bellinger III, *supra* note 22, at 7 (noting that the Executive warns courts when ATS suits can cause international friction, but those warnings "have not always won traction").

176 *See Sosa*, 542 U.S. at 733 n.21.

177 *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 263 (2d Cir. 2007) (per curiam), *aff'd mem. sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

pleas to dismiss the suit against Exxon.[178] Those are precisely the damaging foreign relations repercussions that the Court has warned against. They demonstrate that concerns for foreign discord don't go away simply because an ATS suit is targeting an American entity.

A second option would be for the Court to adopt a holistic yet exacting "totality of the circumstances" standard, similar to the ones adopted by the Eleventh, Ninth, and Fourth Circuits.[179] Truth be told, this test has proven to be quite strict in practice.[180] Even the Fourth Circuit, which has arguably adopted the most flexible test of the circuits, has insisted that an ATS case will "rare[ly]" proceed under its rule.[181] But it's in the very nature of a holistic test to be unpredictable.[182] When it comes to international comity, the Court has consistently warned against using a "case-by-case" assessment that can have unpredictable results.[183] That's especially true when it comes to the ATS, because courts are attempting to discern an international law norm from a set of vague and amorphous sources.[184] To best minimize international discord, then, the Court must adopt a clear rule so that individuals and foreign governments can be on notice for when their conduct might give rise to a lawsuit.[185]

The third option would be for the Court to adopt Justice Alito's rule: the ATS should only provide jurisdiction for torts that are committed inside the United States. There are multiple benefits to this rule. The first is that it ensures that ATS suits will be infrequent, since ATS suits almost never involve torts that occur inside the United States.[186] The second is that when ATS suits *do* occur, the potential for international friction would be minimal, since a country is "afforded the most deference" internationally when it regulates conduct with-

---

[178] *See* Doe v. Exxon Mobil Corp., 654 F.3d 11, 59–61 (D.C. Cir. 2011); *id.* at 89–91 (Kavanaugh, J., dissenting in part).

[179] *See supra* section II.C, pp. 1910–11.

[180] *See* JOHN B. BELLINGER III & R. REEVES ANDERSON, U.S. CHAMBER INST. FOR LEGAL REFORM, AS *KIOBEL* TURNS TWO: HOW THE SUPREME COURT IS LEAVING THE DETAILS TO LOWER COURTS 4 (2015) (noting that "lower courts have dismissed nearly 70 percent of ATS cases" for failing *Kiobel*'s "touch and concern" test).

[181] Warfaa v. Ali, 811 F.3d 653, 660 (4th Cir. 2016).

[182] *See* Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177–79 (1989); *see also* Doe v. Exxon Mobil Corp., No. 01-1357, 2015 WL 5042118, at *8, *14 (D.D.C. July 6, 2015) (applying a holistic multifactor test to the *Exxon* case described above and refusing to dismiss the suit against Exxon).

[183] *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2108 (2016); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 168 (2004); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 260–61 (2010).

[184] *See* James L. Stengel & Kristina Pieper Trautmann, *Determining United States Jurisdiction over Transnational Litigation*, 35 REV. LITIG. 1, 27 (2016).

[185] *Id.* at 27–28; Cooper, *supra* note 171, at 515–16.

[186] *See* Curtis A. Bradley, *Attorney General Bradford's Opinion and the Alien Tort Statute*, 106 AM. J. INT'L L. 509, 512 (2012).

in its own territory.[187] Finally, the rule accords with Congress's probable intent in passing the ATS, since the incidents that gave rise to the need for the ATS involved torts committed on U.S. soil.[188] To be sure, such a reading wouldn't necessarily eliminate all potential for foreign strife.[189] But it would certainly minimize it. The rule thus ensures that Congress expresses itself clearly before the Court steps into a field "where the possibilities of international discord are so evident."[190]

Of course, Congress could, consistent with international law, pass a law that regulates foreign conduct, as long as the statute is reasonable and the conduct has a substantial nexus to the United States.[191] But the question here isn't what Congress *can do*; it's what Congress *has done*.[192] In case of doubt, courts must presume that Congress didn't intend to negatively impact America's foreign relations. Justice Alito's approach represents the best method of implementing that doctrine when it comes to the ATS.

C. Separation of Powers

The Constitution commits foreign relations solely to the executive and legislative branches.[193] And because foreign policy decisions are so "delicate" and "complex," the Court has stressed that these decisions "are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."[194] To be sure, a court can hear a case even if it touches on foreign affairs,[195] and may consider international comity when doing so.[196] But when the question is whether a cause of action reaches foreign conduct, the Court is "par-

---

187 Jason Jarvis, Comment, *A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle*, 30 PEPP. L. REV. 671, 694–95 (2003); *see also* Steinhardt, *supra* note 10, at 1709 (calling "[t]he territoriality principle of jurisdiction" the "*sine qua non* of sovereignty").

188 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1667–68 (2013); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491–94 (1986).

189 Consider, for example, the foreign backlash to legislation that allows 9/11 victims to sue Saudi Arabia for its alleged role in the attack — even though 9/11 certainly occurred inside the territorial United States. *See* Ben Hubbard, *Angered by 9/11 Victims Law, Saudis Rethink U.S. Alliance*, N.Y. TIMES (Sept. 29, 2016), http://www.nytimes.com/2016/09/30/world/middleeast/chagrined-by-9-11-victims-law-saudis-rethink-us-alliance.html [https://perma.cc/WHA2-UDTK].

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

191 *See Kiobel*, 133 S. Ct. at 1675–77 (Breyer, J., concurring in the judgment); Steinhardt, *supra* note 10, at 1707–08.

192 *See* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 272 (2010).

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

194 Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948).

195 *See* Baker v. Carr, 369 U.S. 186, 211 (1962).

196 *See, e.g.*, Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1237 (11th Cir. 2004).

ticularly wary of impinging on the discretion" of the political branches "in managing foreign affairs."[197]

As the Court emphasized last Term, a private right of action allows the judiciary to enforce a norm "without the check imposed by prosecutorial discretion."[198] That's a big deal in the foreign affairs context. When federal prosecutors are deciding whether to file charges in a case that involves foreign relations, they coordinate with an internal Office of International Affairs.[199] That coordination ensures that a prosecution will not interfere with efforts by the State Department to further American interests abroad.[200] Private litigants, however, have no such foreign policy concerns.[201] In fact, these plaintiffs often turn to courts precisely because they consider "traditional diplomacy" to be ineffective.[202] And because ATS causes of action are judge-made, the judiciary's efforts to provide these plaintiffs with relief can often frustrate the Executive's "efforts to reform foreign government practices or help end foreign conflicts."[203]

That effect is a feature, not a bug, of transnational human rights litigation. The specific aim of these lawsuits is often to take diplomacy out of the hands of the political branches.[204] Professors Anne-Marie Slaughter and David Bosco have described how this kind of "Plaintiff's Diplomacy" allows litigants to "bypass[] the uncertainty of political negotiations" in an effort to seek redress.[205] And when the judiciary helps plaintiffs achieve that goal, it can often interfere with the Executive's ability to "employ the full range of foreign policy options when interacting with" foreign governments.[206]

These separation of powers concerns aren't unique to the United States. Belgium, Germany, and France each have human rights statutes that are similar to the ATS.[207] Each statute, however, requires a

---

[197] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664 (2013) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004)).

[198] RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016) (quoting *Sosa*, 542 U.S. at 727).

[199] *See* Paul B. Stephan, *Private Litigation as a Foreign Relations Problem*, 110 AJIL UNBOUND 40, 42 (2016).

[200] *See* Bellinger III, *supra* note 22, at 11; Bradley, *supra* note 159, at 460–61; *see also* Bradley, *supra* note 157, at 347.

[201] *See RJR Nabisco*, 136 S. Ct. at 2107 n.9.

[202] *See* Slaughter & Bosco, *supra* note 156, at 115.

[203] Bellinger III, *supra* note 22, at 11.

[204] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2349 (1991); Slaughter & Bosco, *supra* note 156, at 107; *Extraterritoriality*, *supra* note 3, at 1283.

[205] Slaughter & Bosco, *supra* note 156, at 115.

[206] Brief for the United States as Amicus Curiae in Support of Petitioners at 21, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) (mem.) (No. 07-919).

[207] *See* Vivian Grosswald Curran & David Sloss, *Reviving Human Rights Litigation After* Kiobel, 107 AM. J. INT'L L. 858, 859–62 (2013).

state prosecutor to approve the lawsuit before it can move forward.[208] Notably, Belgium did *not* have such a provision when it first passed its statute in 1993.[209] But after receiving an enormous amount of foreign backlash from its "victim-initiated" suits, it amended the law.[210] Since the ATS doesn't have such a requirement of Executive approval, however, it still retains the potential to generate friction between the courts and the political branches.

Perhaps the best way to resolve this problem would be for the Court to eliminate the judge-made ATS cause of action entirely. But, as the last section noted, the Court couldn't do that without overturning *Sosa*. Another option would be to order lower courts to dismiss ATS cases whenever the executive branch objects.[211] But that approach could also cause separation of powers problems.[212] A doctrine of total submissiveness to the Executive could lead to an infringement of the *judiciary's* powers.[213] The Court has consistently refused to be, in Justice Douglas's phrase, "a mere errand boy for the Executive Branch[,] which may choose to pick some people's chestnuts from the fire, but not others'."[214]

Instead of deferring unquestionably to the Executive, the Court usually responds to the interbranch friction that a private cause of action can cause by limiting the scope of that cause of action.[215] Justice Alito's rule represents the best of way of doing so here. As noted in the previous section, ATS suits would be infrequent if the Court adopted Justice Alito's rule. And when these suits *would* occur, they would occur because of torts inside the territorial United States — suits that have the least potential to harm America's foreign policy prerogatives.

In short, Justice Alito's approach best upholds the separation of powers principle that the Court "defers [political] decisions, quite appropriately, to the political branches."[216] If Congress were to deter-

---

[208] *See id.* at 860–61.

[209] *Id.* at 859–60.

[210] *Id.* at 860.

[211] *Sosa* explained that judges should consider dismissing ATS suits as nonjusticiable political questions when the Executive objects, but lower courts have largely ignored that advice. *See* Amy Endicott, *The Judicial Answer? Treatment of the Political Question Doctrine in Alien Tort Claims*, 28 BERKELEY J. INT'L L. 537, 538, 546–47 (2010).

[212] *See* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 263 n.14 (2d Cir. 2007) (per curiam), *aff'd mem. sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008).

[213] *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 773 (1972) (Powell, J., concurring in the judgment).

[214] *Id.* at 773 (Douglas, J., concurring in the result); *see* Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2712 (2011).

[215] *See, e.g.*, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1664–65 (2013).

[216] *Kiobel*, 133 S. Ct. at 1669.

mine that human rights victims deserve a broader private cause of action, it could certainly amend the ATS. And while it may seem unlikely that Congress would ever do that, the Torture Victim Protection Act of 1991,[217] the Antiterrorism and Effective Death Penalty Act of 1996,[218] the Federal Courts Administration Act of 1992,[219] and the Justice Against Sponsors of Terrorism Act[220] are all proof that Congress can be amenable to human rights litigation with the right amount of lobbying.

CONCLUSION

The *Kiobel* Court outlined two paths for ATS jurisprudence. The first path is represented by Justice Kennedy's concurrence and Justice Breyer's concurrence in the judgment. It's a path of doctrinal instability. It's a path of international discord. And it's a path of the least politically accountable branch making some of the most politically delicate decisions.

The second path is represented by Justice Alito's concurrence. It's a path that retains the presumption against extraterritoriality as "a stable background against which Congress can legislate."[221] It's a path that minimizes the potential for international friction. And it's a path that delegates complex foreign relations decisions to the political branches, where they belong.

At least six petitions for writs of certiorari have been filed over the past three years urging the Court to clarify *Kiobel*'s "touch and concern" test.[222] The Court has denied all of them. It cannot keep shirking this question. Lower courts will only continue to divide over the meaning of *Kiobel*'s final paragraph. At some point, the Court will need to explain what it meant. There's only one sensible solution the Court could provide, and it is Justice Alito's.

---

[217] Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

[218] Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241–42 (codified as amended at 28 U.S.C. § 1605A).

[219] Pub. L. No. 102-572, § 1003(a)(4), 106 Stat. 4506, 4522 (codified at 18 U.S.C. § 2333 (2012)).

[220] Pub. L. No. 114-222, 130 Stat. 852 (2016) (to be codified at scattered sections of 18 and 28 U.S.C.).

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

[222] *See* Petition for Writ of Certiorari, Ntsebeza v. Ford Motor Co., 136 S. Ct. 2485 (2016) (No. 15-1020); Petition for Writ of Certiorari, Doe v. Drummond Co., 136 S. Ct. 1168 (2016) (No. 15-707); Petition for a Writ of Certiorari, Nestle U.S.A., Inc. v. Doe, 136 S. Ct. 798 (2016) (No. 15-349); Petition for a Writ of Certiorari, Mujica v. Occidental Petroleum Corp., 136 S. Ct. 690 (2015) (No. 15-283); Petition for Writ of Certiorari, Baloco v. Drummond Co., 136 S. Ct. 410 (2015) (No. 15-263); Petition for a Writ of Certiorari, Cardona v. Chiquita Brands Int'l, Inc., 135 S. Ct. 1842 (2015) (No. 14-777).