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 \textit{Kiobel v. Royal Dutch Petroleum Co.} \(^5\) In \textit{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[es] 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, \textit{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 \textit{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. \(^11\)

\(^2\) 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.” \textit{Id.} For the history and development of the ATS, see infra section I.A, pp. 1903–05.
\(^3\) \textit{Developments in the Law — Extraterritoriality}, 124 HARV. L. REV. 1226, 1233 (2011) [hereinafter \textit{Extraterritoriality}].
\(^5\) 133 S. Ct. 1659 (2013).
\(^6\) \textit{Id.} at 1669. For an explanation of this presumption, see infra section I.B, pp. 1905–07.
\(^7\) \textit{Kiobel}, 133 S. Ct. at 1669.
\(^9\) See infra section II.C, pp. 1910–11. A different circuit split has emerged over aiding and abetting liability under the ATS. \textit{See} Ryan S. Lincoln, Comment, \textit{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.
\(^11\) See \textit{Kiobel}, 133 S. Ct. at 1670 (Alito, J., concurring).
the Court’s doctrine on the presumption against extraterritoriality.\textsuperscript{12} It also minimizes the potential for international friction while being faithful to the Court’s precedent.\textsuperscript{13} And it would best maintain the separation of powers principle that foreign affairs are matters for the political branches, not the courts.\textsuperscript{14}

Despite all of these benefits, Justice Alito’s concurrence is surprisingly unpopular in the \textit{Kiobel} literature. Scholars have labeled Justice Alito’s opinion “extreme”\textsuperscript{15} and inconsistent with precedent.\textsuperscript{16} One scholar has even argued that Justice Alito’s view is “[t]he one thing that the \textit{Kiobel} presumption cannot mean.”\textsuperscript{17} Indeed, although there are many proposals for clarifying \textit{Kiobel}’s “touch and concern” test, virtually all of them involve some kind of multifactor standard.\textsuperscript{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 \textit{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.

\section{I. The Road to \textit{Kiobel}}

\subsection{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

\textsuperscript{12} See infra section III.A, pp. 1912–16.

\textsuperscript{13} See infra section III.B, pp. 1916–20.

\textsuperscript{14} See infra section III.C, pp. 1920–23.

\textsuperscript{15} William R. Casto, \textit{The ATS Cause of Action Is Sui Generis}, 89 Notre Dame L. Rev. 1545, 1560 (2014); Sarah H. Cleveland, \textit{The \textit{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.


\textsuperscript{17} Steinhardt, supra note 10, at 1705 (emphasis added).

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

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.
33 Ernest A. Young, Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel, 64 DUKE L.J. 1023, 1051 (2013).
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. In Sosa v. Alvarez-Machain, the Supreme Court clarified that courts can create ATS causes of action as a form of federal common law. The Court admitted that the ATS was “strictly jurisdictional.” 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. Simply put, the Court explained, the First Congress thought that courts could recognize ATS causes of action as a form of common law. And nothing precludes modern courts from doing so as well.

Still, the Court said, the judiciary should exercise caution before creating ATS causes of action. For one thing, Congress is in a far better position than courts to create private causes of action. And because the ATS touches on matters of international law, courts should be especially worried about negatively impacting America’s foreign relations. 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. Courts should also consider the “practical consequences” of making those norms actionable — consequences that may require deferring to the executive branch’s views. Despite Sosa’s plea for caution, ATS litigation continued “largely unabated” following the decision.

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 at 774, 819 (D.C. Cir. 1984) (Bork, J., concurring); Filartiga, 630 F.2d at 889 & n.25.
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 Act64 (RICO). *RJR Nabisco* explained that *Morrison* reflects a two-

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.”).
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).
step presumption against extraterritoriality test. At step one, the Court asks if the statute “gives a clear, affirmative indication that it applies extraterritorially.” If the statute doesn’t give this indication, then the statute doesn’t apply extraterritorially. The question then becomes what a domestic application of the statute looks like. Thus, at step two, the Court asks what the statute’s “focus” is. If the conduct that’s relevant to the statute’s focus took place in the United States, then the statute applies. 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.

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. They sued a group of Dutch, British, and Nigerian corporations that allegedly helped Nigerian police forces raid Ogoni villages and destroy property.

In a “landmark decision,” the Court held that the plaintiffs couldn’t bring an ATS suit, because the ATS didn’t rebut the presumption against extraterritoriality. Writing for the majority, Chief

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65 See RJR Nabisco, 136 S. Ct. at 2101.
66 Id.
67 See id.
68 Id.
69 Id.
70 Id.
71 Id.
73 Id. at 1662–63.
74 Alford, supra note 32, at 1753.
75 Kiobel, 133 S. Ct. at 1609. 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\(^7\) noted that the presumption usually applies to statutes that regulate conduct.\(^7\) The ATS, however, is only a jurisdictional statute.\(^7\) But because ATS suits can have harmful foreign policy consequences, the presumption against extraterritoriality should similarly apply to ATS causes of action.\(^7\) The Court explained that nothing in the text, history, or purpose of the ATS rebutted the presumption.\(^8\) As a result, a plaintiff cannot bring an ATS claim for a violation of international law that occurred abroad.\(^9\)

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.\(^8\)

*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.\(^8\) He cryptically noted that in future cases, “the presumption against extraterritorial application may require some further elaboration and explanation.”\(^8\)

Justice Alito also concurred.\(^8\) He similarly noted that the majority opinion “le[ft] much unanswered.”\(^8\) He wrote separately, therefore, to express his own, “broader” view.\(^8\) In Justice Alito’s opinion, the ATS’s “focus” is the tort committed in violation of the law of nations.\(^8\) As a result, he wrote, courts shouldn’t recognize an ATS claim unless

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\(^7\) The Chief Justice was joined by Justices Scalia, Kennedy, Thomas, and Alito.

\(^8\) Id. at 1665–67.

\(^7\) *Kiobel*, 133 S. Ct. at 1664.

\(^8\) Id. at 1665–69. 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).

\(^8\) *Kiobel*, 133 S. Ct. at 1669 (internal citation omitted).

\(^8\) Id. (Kennedy, J., concurring).

\(^8\) Id.; see also Steinhardt, supra note 10, at 1705 (“[T]he Kennedy concurrence reaches new heights in what looks like intentional obscurity.”).

\(^8\) Justice Alito was joined by Justice Thomas.

\(^8\) *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring).

\(^8\) Id. at 1670.
the “domestic conduct” at issue is “sufficient to violate an international law norm.”

Justice Breyer concurred in the judgment. 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.

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. 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. Indeed, the phrase “touch and concern” seemed to come out of nowhere; it had no precedent in the Court’s foreign relations case law. Accordingly, scholars have criticized Kiobel for being “complex and confusing” and for “fail[ing] as precedent” because of how little direction it provides.

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. 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. On the one hand, the Court implied that its extraterritorial analysis was conduct based. 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).
Court said that ATS “claims” must “touch and concern” the United States, and a “claim” is more than just conduct. On the one hand, the Court insisted that at least some conduct must occur domestically to satisfy the “touch and concern” test. 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.

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.

Similarly, in the Second Circuit, an ATS defendant must have engaged in enough domestic conduct to “give[ ] rise to a violation” of the law of nations.

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.”

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.

The Ninth Circuit has likewise suggested “that a defendant’s U.S. citizenship or corporate status is

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


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


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.” Finally, the Fourth Circuit requires courts to conduct an intensive “fact-based analysis” on each ATS claim. 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.” The Fourth Circuit emphasizes that an ATS case will not usually meet this standard. 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.

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,” 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. 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.” The presumption against extraterritoriality, international comity, 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

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108 See Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527 (4th Cir. 2014).
110 Id.
111 Al Shimari, 758 F.3d at 528–29.
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).
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.”\(^{125}\)


\(^{118}\) 499 U.S. 244 (1991).


\(^{121}\) 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.


\(^{125}\) 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.” 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.

The Court responded, however, that section 10(b)’s “focus” is the purchase or sale, not the deceptive conduct. 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.” 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.” 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.” There was no need to move on to step two, since there was no relevant conduct in Kiobel that occurred domestically. 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.” 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.

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

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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.


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

stable background” that Congress can rely on in all cases to produce “predictable effects.”

Second, one might insist that the United States has an interest in remedying human rights violations that involve significant domestic conduct. The ATS can further that interest by subjecting the people who commit those human rights violations to civil liability. 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.

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.” 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.”

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. It is not the Court’s function “to extend [a statute] to admirable purposes it might be used to achieve.” In other words, the Court explained, courts should not use this presumption to guess what Congress might have wanted in a particular scenario.

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.

\[\text{References}\]

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. As a result, when a statute has multiple interpretations, the Court chooses the interpretation that least interferes with America’s foreign relations. This philosophy underlies not only the presumption against extraterritoriality, but also the Charming Betsy canon and the Empagran canon. 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.”

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. Private causes of action for foreign conduct allow litigants to become “diplomatic force[s] in their own right.” And these litigants have little incentive to consider the foreign policy costs of their actions. 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. 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. They can also discourage companies from investing

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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.
154 Kiobel, 133 S. Ct. at 1664.
155 Id. at 1664–65.
158 Id.
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-

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).
168 Cf. Slaughter & Bosco, supra note 136, 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

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.
pleas to dismiss the suit against Exxon.\textsuperscript{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.\textsuperscript{179} Truth be told, this test has proven to be quite strict in practice.\textsuperscript{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.\textsuperscript{181} But it’s in the very nature of a holistic test to be unpredictable.\textsuperscript{182} When it comes to international comity, the Court has consistently warned against using a “case-by-case” assessment that can have unpredictable results.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{186} The second is that when ATS suits \textit{do} occur, the potential for international friction would be minimal, since a country is “afforded the most deference” internationally when it regulates conduct with-

\textsuperscript{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).

\textsuperscript{179} See supra section II.C, pp. 1910–11.

\textsuperscript{180} See supra section II.C, pp. 1910–11.

\textsuperscript{181} See supra section II.C, pp. 1910–11.

\textsuperscript{182} See supra section II.C, pp. 1910–11.

\textsuperscript{183} See supra section II.C, pp. 1910–11.

\textsuperscript{184} See supra section II.C, pp. 1910–11.

\textsuperscript{185} Id. at 27–28; Cooper, supra note 171, at 515–16.

in its own territory. 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. To be sure, such a reading wouldn’t necessarily eliminate all potential for foreign strife. 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.”

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. But the question here isn’t what Congress can do; it’s what Congress has done. 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. 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.” To be sure, a court can hear a case even if it touches on foreign affairs, and may consider international comity when doing so. But when the question is whether a cause of action reaches foreign conduct, the Court is “par-

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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”).


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].


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


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.”

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.” 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. That coordination ensures that a prosecution will not interfere with efforts by the State Department to further American interests abroad.

Private litigants, however, have no such foreign policy concerns. In fact, these plaintiffs often turn to courts precisely because they consider “traditional diplomacy” to be ineffective. 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.”

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. 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. 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.

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. Each statute, however, requires a
state prosecutor to approve the lawsuit before it can move forward.\footnote{See id. at 860–61.} Notably, Belgium did not have such a provision when it first passed its statute in 1993.\footnote{Id. at 859–60.} But after receiving an enormous amount of foreign backlash from its “victim-initiated” suits, it amended the law.\footnote{Id. at 860.} 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 \textit{Sosa}. Another option would be to order lower courts to dismiss ATS cases whenever the executive branch objects.\footnote{\textit{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. \textit{See Amy Endicott, The Judicial Answer? Treatment of the Political Question Doctrine in Alien Tort Claims}, 28 \textit{BERKELEY J. INT’L L.} 537, 538, 546–47 (2010).} But that approach could also cause separation of powers problems.\footnote{\textit{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).} A doctrine of total submissiveness to the Executive could lead to an infringement of the \textit{judiciary}’s powers.\footnote{\textit{See First Nat’l City Bank v. Banco Nacional de Cuba}, 406 U.S. 759, 773 (1972) (Powell, J., concurring in the judgment).} 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.”\footnote{Id. at 773 (Douglas, J., concurring in the result); see Beth Stephens, \textit{The Modern Common Law of Foreign Official Immunity}, 79 \textit{FORDHAM L. REV.} 2669, 2712 (2011).}

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.\footnote{\textit{See}, e.g., RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016); \textit{Kiobel v. Royal Dutch Petroleum Co.}, 133 S. Ct. 1659, 1664–65 (2013).} Justice Alito’s rule represents the best 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 \textit{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.”\footnote{\textit{Kiobel}, 133 S. Ct. at 1669.} If Congress were to deter-
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,\textsuperscript{217} the Antiterrorism and Effective Death Penalty Act of 1996,\textsuperscript{218} the Federal Courts Administration Act of 1992,\textsuperscript{219} and the Justice Against Sponsors of Terrorism Act\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.