

Oklahoma Law Review

Volume 69 | Number 1

2016

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Edward T. Swaine

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Recommended Citation

Edward T. Swaine, *Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere*, 69 OKLA. L. REV. 23 (2016),
<https://digitalcommons.law.ou.edu/olr/vol69/iss1/2>

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KIOBEL AND EXTRATERRITORIALITY: HERE, (NOT) THERE, (NOT EVEN) EVERYWHERE

EDWARD T. SWAINE*

Title notwithstanding, the Beatles' "Here, There and Everywhere" is relentlessly local.¹ The object of affection is wanted everywhere, just so long as it's next to Paul: the song could have been called "Here," but the chorus would have suffered.

The Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*² was also relentlessly, and unexpectedly, local in character. Notwithstanding the global outlook suggested by the Alien Tort Statute (ATS), which governs civil actions by "an alien" for torts contrary to "the law of nations or a treaty of the United States,"³ the Court invoked the presumption against extraterritoriality to limit the statute's reach.⁴ Several years later, and notwithstanding the Court's subsequent instruction in *RJR Nabisco, Inc. v. European Community*,⁵ courts and commentators still struggle to find its governing principle—and, for those trying to put the ATS to some use, that limiting principle's own metes and bounds.

There was, as always, a silver lining for advocates of the ATS. Many suppose a frontier remains open given the majority's cryptic suggestion that ATS claims may "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application."⁶ Others note Justice Kennedy's pronouncement, in his concurrence, that future cases *might* require future opinions—the equivalent of declaring *terra incognita*, though in this case due more to the cartographer's indecision than to any dearth of information about the terrain.⁷ Still others took heart in Justice Breyer's concurrence in the

* Professor of Law, George Washington University Law School. This Article is based on remarks delivered at the University of Oklahoma Law School in October 2015, but updated to reflect the subsequent decision in *RJR Nabisco v. European Community*, 136 S. Ct. 2090 (2016). I would like to thank Alden DiIanni-Morton for excellent research assistance.

1. THE BEATLES, *REVOLVER* (Capitol Records 1990) (1966). But then there's THE BEATLES, *Across the Universe*, on *LET IT BE* (Abbey Road 1970).

2. 133 S. Ct. 1659 (2013).

3. 28 U.S.C. § 1350 (2012).

4. *Kiobel*, 133 S. Ct. at 1665.

5. 136 S. Ct. 2090 (2016).

6. *Kiobel*, 133 S. Ct. at 1669.

7. *Id.* at 1669 (Kennedy, J., concurring) ("Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by

judgment, for himself and three others, that would have taken territory into account—not as part of the presumption against extraterritoriality—but not determinatively, where other features implicated American equities.⁸ The result was that additional factors, like wrongdoing by American nationals (or domiciliaries),⁹ or other interests,¹⁰ might permit the statute to reach overseas conduct.

Naturally, ATS skeptics view *Kiobel* differently. Many of those concerned about the use of U.S. courts to address foreign controversies—including some of those courts themselves—welcomed the result and took a broader view of the majority's implications for future cases.¹¹ Those looking for absolutes tended to embrace Justice Alito's concurrence, which would have given bite to the presumption by suggesting that claims touching and concerning anywhere *else* fall outside the statute—to critics, something painfully close to asserting that the “there” excluded from the ATS is nearly “everywhere.”¹²

This Article tries to determine which reading of *Kiobel* is best and which is likely to prevail—having benefit, in the latter regard at least, of *RJR Nabisco*, but handicapped by heightened uncertainty about the Court's composition.¹³ *Kiobel* was a 5-4 decision, with the late Justice Scalia siding with the majority¹⁴—meaning that Justice Breyer's concurrence in the

the [Torture Victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”).

8. *Id.* at 1671 (Breyer, J., concurring in the judgment).

9. *See, e.g.*, Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1775-76 (2014) (focusing on nationality).

10. *See, e.g.*, Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT'L L. 8 (2013) (reviewing possibilities).

11. *See, e.g.*, Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES.COM (Apr. 21, 2013, 10:00 AM), <http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction/#3c6d131b4af5>.

12. *Kiobel*, 133 S. Ct. at 1669-70 (Alito, J., concurring) (“[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa's* requirements of definiteness and acceptance among civilized nations.”).

13. At the time of the symposium, the late Justice Scalia was still serving on the Court and the petition for certiorari in *RJR Nabisco* had just been granted; at the time this Article was finalized, no replacement had been confirmed.

14. *Kiobel*, 133 S. Ct. 1659.

judgment had as much support among those now serving on the Court as Chief Justice Roberts' majority opinion did—and *RJR Nabisco* was a 4-3 decision (rendered after Justice Scalia's passing) in which Justice Sotomayor, who had sided with Justice Breyer in *Kiobel*, recused herself.¹⁵ If one takes the decisions as written, and assumes that the Court will follow issues resolved in them on the basis of *stare decisis*, how can we expect the Court would resolve a subsequent matter concerning extraterritoriality and the ATS?

Unsurprisingly, given its title, this Article puts a heavy emphasis on territoriality—not, it should be stressed, as a matter of normative preference, but purely as a reflection of the Court's recent cases. It is accordingly inconsistent with some of the more expansive readings of the ATS, though it stops short of Justice Alito's prescription. If future cases are to depart substantially from territoriality, the better path is not to explore what *Kiobel* left unresolved, but to revisit what it purported to settle.

I. Invoking the Presumption

Kiobel migrated from being a case about whether the ATS permitted corporate liability¹⁶ to one concerning “[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States”¹⁷—or, as the Chief Justice Roberts put it in the majority opinion, “[W]hether a claim may reach conduct occurring in the territory of a foreign sovereign.”¹⁸

Not slow on the uptake, respondents thereafter emphasized the presumption against extraterritoriality (more exactly, “the presumption

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

16. The petition for certiorari sought review of whether corporations were liable like other private party defendants for violations of the law of nations, and the Supreme Court granted certiorari without changing the questions presented. *See Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (2011) (Mem.); Petition for Writ of Certiorari, *Kiobel*, 132 S. Ct. 472 (2011) (No. 10-1491). In its decision on the merits, the Court said it had formerly been addressing the question of the lower court's decision that “the law of nations does not recognize corporate liability”—fair, so far as it goes, but certainly shifting to the international law question, and indicating that it had ultimately decided to bypass that. *Kiobel*, 133 S. Ct. at 1663.

17. *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (Mem.) (citation omitted).

18. *Kiobel*, 133 S. Ct. at 1664.

against extraterritorial application”).¹⁹ That presumption, as the Court had explained not long before *Kiobel*, meant that “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”²⁰ The presumption’s rationale varied. Early on, the concern was that extraterritoriality might violate the law of nations: since statutes were not to be construed to violate international law if it could be avoided, extraterritorial application would not be presumed.²¹ A second rationale was “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”²² Such a clash might be intended; the key is to avoid having the judiciary make the choice for the United States.²³ Third, the canon reflected “[t]he presumption that United States law governs domestically but does not rule the world”²⁴—because, irrespective of any clash with foreign law, Congress “is primarily concerned with domestic conditions.”²⁵

Kiobel followed other recent cases in neglecting the first rationale, concerning compatibility with international law;²⁶ this was consistent, as

19. *Id.* (explaining policies behind “the presumption against extraterritorial application”). Similar phrasing was employed throughout *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010), the leading case prior to *Kiobel*.

20. *Morrison*, 561 U.S. at 255; *see also* EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’” (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949))).

21. *See* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting) (“Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.”). *See generally* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 352 (2010) (proposing “a presumption that federal law does not extend beyond the jurisdictional limits set by international law”).

22. *Aramco*, 499 U.S. at 248.

23. *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (“For us to run interference in . . . 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.”).

24. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007).

25. *Aramco*, 499 U.S. at 248 (quoting *Foley Bros.*, 336 U.S. at 285). In *Morrison*, the Court made clear that the clash highlighted in *Aramco* was not a prerequisite. *Morrison*, 561 U.S. at 255 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993)); *see also* *RJR Nabisco, Inc., v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016).

26. *See Morrison*, 561 U.S. at 267 (“We know of no one who thought that the Act was intended to ‘regulat[e]’ foreign securities exchanges—or indeed who even believed that

noted below, with the Court's informal presumption that questions of international law are usually best skirted. (Certainly one might expect that it would be unenthusiastic about ducking *Kiobel*'s original inquiry, involving difficult appraisals of the international law on corporate liability, only to grapple with international conundrums concerning jurisdiction.) *Kiobel* did rely to at least some degree on the second and third rationales.²⁷ And it described a fourth, slightly broader one: "[E]nsur[ing] that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches."²⁸ This reinforced the idea that foreign policy consequences *other* than clashes between U.S. and foreign law might animate the presumption. Taken seriously, it might also justify invoking the presumption when there was room to doubt the assumption (integral to the third rationale) that Congress was "primarily concerned with domestic conditions"—as when, say, the statute's topic was the law of nations.

The Court described such rationales largely by way of background, rather than suggesting that one or more must be met each time the presumption is applied to a particular statute. Even when it related them to the ATS,²⁹ it was for a special reason: as the Court conceded, the presumption was "typically appl[ied] . . . to discern whether an Act of Congress regulating conduct applies abroad,"³⁰ and it had previously determined in *Sosa v. Alvarez-Machain* that the ATS was a "'strictly jurisdictional'" statute that did not "directly regulate conduct or afford relief."³¹ Nevertheless, the Court thought that "the principles underlying the

under established principles of international law Congress had the power to do so." (alteration in original)).

27. See, as to the second rationale, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (first quoting *Aramco*, 499 U.S. at 248; then quoting *Benz*, 353 U.S. at 147) as to the second rationale. See *id.* (quoting *Microsoft*, 550 U.S. at 454). The third rationale was less conspicuous, though Justice Breyer attributed it to the *Kiobel* majority. See *id.* at 1672 (Breyer, J., concurring in the judgment).

28. *Id.* at 1664 (majority opinion). The Court also discussed objections by foreign states to extraterritorial application of the ATS, as well as a scenario in which foreign states would feel at liberty to apply similar approaches to conduct of U.S. citizens. See *id.* at 1669.

29. *Id.* at 1664-65, 1667, 1669.

30. *Id.* at 1664.

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

canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS.”³²

Still, applying the presumption to jurisdictional statutes was controversial. To minimize the novelty, one could seize on this reference in *Kiobel* to the constraint of the “principles underlying” the presumption, as opposed to the constraints of the presumption itself.³³ Yet no such distinction seems to have been intended, since the Court concluded that “the presumption against extraterritoriality applies to claims under the ATS.”³⁴ And nothing in its subsequent decision in *RJR Nabisco* suggested otherwise. There, the Court not only recalled *Kiobel*’s reasoning,³⁵ but added that the presumption against territoriality required rebuttal “regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction.”³⁶

To be sure, despite what the Court said, there’s reason to resist the idea that the presumption *generally* applies to jurisdictional statutes, as opposed to causes of action implied under a jurisdictional statute.³⁷ Perhaps future

32. *Id.* After discussing said principles, the Court confirmed that the presumption applied to the ATS. *Id.* at 1665 (“The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS.”).

33. *Cf.* Eugene Kontorovich, *Kiobel Surprise: Unexpected by Scholars but Consistent with International Trends*, 89 NOTRE DAME L. REV. 1671, 1687-89 (2014) (suggesting, more generally, that the Court applied a presumption against universality, as opposed to one against extraterritoriality).

34. *Kiobel*, 133 S. Ct. at 1669. The Court went on to address whether, “even if the presumption applies,” it may yet be rebutted. *Id.* at 1665. As discussed below, moreover, the Court found “nothing in the statute rebuts that presumption” and that the claims concerned did not “displace the presumption against extraterritorial application.” *Id.* at 1669. The Court also dispensed for the most part with discussing the principles underlying the presumption and considered the presumption directly. *See id.* at 1666, 1669. This did not mean the Court avoided discussing the underlying rationale. *See id.* at 1668 (adverting to “the weighty concerns underlying the presumption against extraterritoriality”).

35. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100-01 (2016).

36. *Id.* at 2101.

37. A point stressed by William Dodge, who notes how *RJR Nabisco* and prior cases like *Morrison* appeared to focus on the substantive statutes at issue rather than the underlying jurisdictional ones, and who suggests that the hazards of extending the presumption to general jurisdiction statutes (like 28 U.S.C. § 1331) mean that the Court could not have intended to encompass jurisdictional statutes generally. William S. Dodge, *The Presumption Against Extraterritoriality Still Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (July 1, 2016, 4:57 PM), <http://opiniojuris.org/2016/07/01/32658/>; William S. Dodge, *The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), <http://opiniojuris.org/2014/01/28/guest->

cases will draw sub-categorical distinctions among types of jurisdictional statutes, or perhaps inquire (as in *Kiobel*) whether the policies behind the presumption are served before assessing jurisdictional statutes, or perhaps it will consider the presumption to be non-jurisdictional in character even when bearing on jurisdictional statutes.³⁸ For ATS purposes, at least, *RJR Nabisco* indicated that the jurisdictional nature of that particular statute made no difference, and further portended that “certain applications of [a] statute” might trigger a separate application of the presumption—in the case of the Racketeer Influenced and Corrupt Organization Act (RICO), requiring examination not only the predicate offenses, but also the substantive provisions of RICO itself and its remedial provisions.³⁹

Having disregarded the potential distinctiveness of jurisdictional statutes, *Kiobel* also showed little interest in drawing lines based on other jurisdictional questions.⁴⁰ Although it has been said that *Kiobel* rejected universal jurisdiction⁴¹—leaving territoriality or some other theory as a prescriptive basis justifying the ATS under international law—the Court exhibited no interest in the question.⁴² The most that can be said is that, given the Court’s truncation of the ATS’s geographic reach, the ATS no longer depended on universal jurisdiction. By the same token, *Kiobel* made clear, if it were necessary, that the presumption against extraterritoriality applies regardless of the particular basis for jurisdiction under constitutional or international law.

As a related matter, the Court was also unreceptive to the argument that the nature of the offenses concerned was reason to avoid invoking the presumption. As previously, the Court distinguished between

post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/. As noted in the text, there may be other possible distinctions.

38. See *Kiobel*, 133 S. Ct. at 1664-65. In *Morrison v. Nat’l Austl. Bank Ltd.*, the Court specifically addressed extraterritoriality as “a merits question” distinct from subject-matter jurisdiction. 561 U.S. 247, 253-54 (2010). Since *Kiobel*, some lower courts have understood extraterritoriality to pose a jurisdictional issue in the fullest sense, though it is just one of many. See, e.g., *Mastafa v. Chevron Corp.*, 770 F.3d 170, 179 (2d Cir. 2014) (describing the issue as jurisdictional, but not addressing it first, and noting that the order of inquiry among jurisdictional questions is a matter of discretion).

39. See *RJR Nabisco*, 136 S. Ct. at 2100-01.

40. It also failed to engage the issue of the constitutional basis for the ATS, variously stated to be either the Offenses Clause or Article III’s grant of foreign diversity jurisdiction over controversies between U.S. citizens and foreign citizens.

41. See, e.g., Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute’s Jurisdictional Universalism in Retreat*, 2012-2013 CATO SUP. CT. REV. 149 (2013).

42. Justice Breyer, at least, mentioned the issue in passing. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1673, 1676 (2013) (Breyer, J., concurring in the judgment).

acknowledging the existence of global norms and recognizing a cause of action.⁴³ The latter, its ostensible concern, might entail defining the norm, indicating who could be liable (a question that probably loomed large, given the original issue of corporate liability in *Kiobel*), establishing (potentially) rules of exhaustion and statutes of limitations, and so forth.⁴⁴ “Each of these decisions,” the Court stressed, “carrie[d] with it significant foreign policy implications.”⁴⁵ Others, naturally, might say that limiting causes of action also had significant policy implications, but the Court’s view of the status quo *ex ante* led it to be less concerned about that.

II. Rebutting the Presumption

Assuming the presumption against territoriality is germane—because a claim, arising under virtually any kind of statute, entails reaching outside the United States—what happens then? As synthesized by the Court in *RJR Nabisco*, the “first step” is to “ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially.”⁴⁶ This burdens Congress with the obligation to indicate, somehow, that the relevant statutory provision *should* apply extraterritorially. *Kiobel* provided an example of the provision establishing jurisdiction over genocide, which applies “‘regardless of where the offense is committed’ if the alleged offender is, among other things, ‘present in the United States.’”⁴⁷ On the other hand, it is not enough for a statute to use indiscriminate language like “any” or “every,” as the ATS does in referring to “*any* civil action.”⁴⁸ Nor does the term “torts” do the trick, even when coupled with the historical understanding of transitory torts.⁴⁹

The Court accepted that “context,” not just text, might overcome the presumption, but took a narrow view of the contextual evidence presented to it.⁵⁰ Of the three offenses the First Congress might have had in mind when it enacted the ATS, two (offenses against ambassadors, and violations

43. *Id.* at 1664-66 (majority opinion).

44. *Id.* at 1665.

45. *Id.*

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

47. *Kiobel*, 133 S. Ct. at 1665 (quoting 18 U.S.C. § 1091(e) (2006 ed., Supp. V)).

48. *Id.*

49. *Id.* at 1665-66.

50. *Id.* at 1666 (“‘[A]ssuredly context can be consulted’ in determining whether a cause of action applies abroad” (quoting *Morrison v. Nat’l Austl. Bank Ltd.* 561 U.S. 247, 265) (2010))).

of safe passage) were fully capable of arising within the United States.⁵¹ The outlier was the third, piracy. If Congress had piracy in mind—which does not, by its nature, arise from conduct taking place within the United States—how could it *not* have contemplated extraterritorial application? And wasn't the Court to suppose Congress had done so, given that the Court “has generally treated the high seas the same as foreign soil for purposes of the presumption”?⁵²

The Court's answer was that it was less problematic to apply U.S. law to piracy than to “conduct occurring within the territorial jurisdiction of another sovereign,” since the latter carried more “direct foreign policy consequences.”⁵³ Pirates were distinct, the Court reckoned, as they “were fair game wherever found, by any nation, because they generally did not operate within any jurisdiction.”⁵⁴ Congress' anticipation “of a cause of action against them” was not, therefore, “a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.”⁵⁵

One can dispute the Court's understanding of how far claims against pirates would have been thought to reach, since piracy *did* plausibly implicate conduct taken on foreign shores as well.⁵⁶ Even if one accepts the

51. *Id.*

52. As the Court noted, this meant it had previously declined to construe statutes as applying to conduct on the high seas. *Id.* at 1667 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 173-74 (1993), and *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 440 (1989)).

53. *Id.*

54. *Id.*

55. *Id.*

56. *See id.* at 1667-68. The Court discussed a much-controverted opinion by Attorney General William Bradford addressing conduct by U.S. citizens who, as part of a French privateer fleet, committed piratical acts against the British colony of Sierra Leone—notwithstanding American neutrality. *Id.* at 1667. Explaining U.S. authority to the British Ambassador, Attorney General Bradford stated:

So far . . . as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* within the jurisdiction of the . . . courts of the United States; and, so far as the offence was committed thereon, I am inclined to think that it may be legally prosecuted in . . . those courts. . . . But some doubt rests on this point, in consequence of the terms in which the [applicable criminal law] is expressed. But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being

Court's premises, however, its reasoning about the piracy counterexample was far from obvious. As Chief Justice Roberts noted, the presumption against extraterritoriality applies to each statutory provision, since even "[w]hen a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms."⁵⁷ That applies awkwardly to the ATS, since there the selfsame statutory provision governing piracy also applies to other offenses. Two possible solutions spring to mind. First, one might be forced to generalize from the case of piracy to all ATS-cognizable offenses and reckon that the ATS was intended to apply *outside* the United States even if not, necessarily, to conduct *within* other states—a principle of contra-territoriality. Nothing in the Court's provision-by-provision approach required the further step of recalculating what Congress contemplated for every potential action arising under a given provision, so it might be enough to conclude that Congress had anticipated some foreign application and then apply that inference consistently to other territorial questions arising under the same provision.⁵⁸ Second, and at the other end of the spectrum, one might conduct an offense-by-offense reckoning as to whether Congress had rebutted the presumption. Unfortunately, Congress left few solid clues as to what offenses it had in mind, let alone the proper

expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States

Id. at 1667-68 (alterations in original) (quoting *Breach of Neutrality*, 1 Op. Att'y Gen. 57, 58-59 (1795)). As the Court noted, the significance turned in part on what Bradford meant by "these acts of hostility" subject to civil jurisdiction: in particular, whether he meant them to include the acts "originat[ing] or [taking] place in a foreign country" that had been definitively excluded from the reach of criminal jurisdiction, or whether they were limited to "crimes committed on the high seas," which he thought *were* within U.S. criminal jurisdiction but on which "some doubt" might remain. *Id.* The Court declined to rest on his opinion, which it noted had been variously interpreted even by the Solicitor General, because "it deals with U.S. citizens who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain." *Id.* at 1668.

57. *Id.* at 1667 (first quoting *Morrison v. Nat'l Austl. Bank Ltd.* 561 U.S. 247, 265 (2010); then citing *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 455-56 (2007)).

58. *See* 561 U.S. at 264-65, 265 n.8. This would be consistent with the approach recently taken by the D.C. Circuit, which reaffirmed that when a substantive offense established by statute (in that case, the Maritime Drug Law Enforcement Act) applied extraterritorially, ancillary offenses like conspiracy would as well; extraterritoriality would, in other words, be imputed to the offenses arising under a statute with extraterritorial reach even if they had not been individually addressed by Congress. *United States v. Ballestas*, 795 F.3d 138, 144-45 (D.C. Cir. 2015).

geographic scope of each, besides (the Court supposed) its awareness of three offenses that were prominent in 1789.⁵⁹ Still, one might try to reckon which modern offenses particularly resembled piracy and which did not—an inquiry above and beyond the *Sosa*-mandated inquiry into whether modern offenses met other threshold criteria attributed to the original troika.⁶⁰

The Court embraced neither approach. Instead, it considered piracy, insofar as it contemplated extraterritorial claims, to be unrepresentative, at best licensing consideration of claims arising outside the United States . . . when they involved piracy.⁶¹ Addressing the ATS as a whole, rather than on an offense-by-offense basis, the Court concluded: “[T]he presumption against extraterritoriality applies to claims under the ATS, and . . . nothing in the statute rebuts that presumption,” such that “petitioners’ case seeking relief for violations of the law of nations occurring outside the United States”—irrespective of their footing in the international law concerning extrajudicial killing, crimes against humanity, torture, arbitrary arrest and detention, and other wrongs—“is barred.”⁶²

As this implies, the Court took the extraordinary nature of the alleged offenses as lacking even ordinary weight in assessing whether Congress had overcome the presumption, just as their nature made no difference in whether the presumption would apply in the first place. If anything, oddly enough, their gravity *backfired*. The Court invoked the concern it felt animated the ATS, which was the avoidance of diplomatic strife, in arguing that providing extraterritorial causes of action could actually generate strife—or, at least, cause other “serious foreign policy consequences” of the kind animating the presumption against extraterritoriality, like emboldening other states to consider the liability of U.S. citizens for acts taken in the United States or anywhere.⁶³ For the Court, aggressive interpretation of the ATS’s scope would make the United States a “uniquely hospitable forum,”⁶⁴ but at the same time, dangerously subject to imitation by other

59. See *Kiobel*, 133 S. Ct. at 1666-67.

60. 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, 1697-99 (2014).

61. *Kiobel*, 133 S. Ct. at 1667 (“We do not think that the existence of a cause of action against them is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.”).

62. *Id.* at 1669.

63. *Id.*

64. *Id.* at 1668.

states. This implicitly rejected the premise that universal jurisdiction was already established as an alternative that other states could embrace, but in any event suggested that U.S. courts should not welcome its arrival.

III. Applying Non-Extraterritorial Statutes

Since the ATS consists of one provision, and *Kiobel* found that the presumption against extraterritoriality was not overcome for that provision, all claims under it are constrained to one degree or another. The key for future cases is determining what remains—and it is here where the Court was least clear.

A. The Requirement of Statutory “Focus”

Part IV of the Court’s opinion provided:

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.⁶⁵

For some, this mysterious paragraph returned much of what the rest of the opinion had taken. Claims in which “all the relevant conduct took place outside the United States,” and which corporate presence was the only link to the United States, were barred. In all other circumstances, however, claims might “touch and concern the territory of the United States” so as to admit U.S. jurisdiction.⁶⁶

What does it mean to “touch and concern the territory of the United States,” including with “sufficient force”?⁶⁷ The separate opinions arguably spoke to the issue. Justice Kennedy, as previously noted, fanned hopes; his concurring opinion allowed that

[o]ther cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA nor by the reasoning and holding of today’s case; and in those disputes the proper implementation of the

65. *Id.* at 1669 (citation omitted).

66. *See, e.g.,* Cleveland, *supra* note 10, at 20-26.

67. *Kiobel*, 133 S. Ct. at 1669.

presumption against extraterritorial application may require some further elaboration and explanation.⁶⁸

And what Kennedy put into doubt as to the presumption's "implementation" might be elaborated by Justice Breyer's concurrence in the judgment, which expressed the view that

[t]he statute provides jurisdiction where (1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.⁶⁹

However, a much more restrictive gloss might be gleaned from Justice Alito's concurrence, which expressed the view that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations."⁷⁰

These separate opinions reflect the views of seven members of the present Court. Even so, there are good reasons for discounting them, at least as anything easily reconciled with the majority opinion and with *RJR Nabisco*. Justice Kennedy's opinion is provocatively noncommittal; it seems to reflect the view that the ATS does not overcome the presumption against extraterritoriality, but might have what some would view as extraterritorial application in the future. To this extent, it sounded like an attempt to stamp the Court's decision as "a restricted railroad ticket, good for this day and train only."⁷¹ Justice Breyer, who concurred in the judgment only, got off the train a bit earlier. He disagreed with the majority's decision even to "invoke the presumption against extraterritoriality" in the first place—which naturally impairs the ability to reconcile his view with the implementation of it.⁷² And Justice Alito's concurrence, for its part, elaborates what he described as a "broader

68. *Id.* (Kennedy, J., concurring).

69. *Id.* at 1674 (Breyer, J., concurring in the judgment).

70. *Id.* at 1670 (Alito, J., concurring).

71. *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

72. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

standard” supporting the majority’s application of the presumption to the case at hand, not an interpretation of the majority’s standard.⁷³ It is challenging to translate the rest of what he wrote into an understanding of how the presumption should be applied, if applied it must be.

It is more profitable to begin by clarifying the majority’s task in Part IV. Notwithstanding attempts to treat it as part of the overall opinion’s ebb and flow, or as a meaningless coda, the issue remaining for the Court was distinct and potentially significant. Having decided that the presumption against extraterritoriality was germane (notwithstanding the statute’s jurisdictional nature) and had not been overcome (notwithstanding, *inter alia*, piracy), it remained to determine whether the claims stated by the plaintiffs fell within the statute’s already-reckoned scope. This begat Part IV’s question: did the claims state a colorable connection to the United States, one with “sufficient force to displace the presumption against extraterritorial application”?⁷⁴ A separate inquiry was warranted, as the portion of *Morrison* cited by *Kiobel* suggests, because the presumption is “often . . . not self-evidently dispositive,” as “its application requires further analysis.”⁷⁵ In *Morrison*, as in *Kiobel*, the Court considered whether—despite the fact that the statute in question did not apply extraterritorially—it nonetheless applied to the facts alleged in that case because domestic activity had been alleged.⁷⁶ The problem, often, is not just whether *any* domestic connection is evident, but also whether *enough* is; most cases of prohibited extraterritorial application involve some contact with U.S. territory, and “the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved.”⁷⁷ In *Morrison*, the Court resolved that question by determining that because the “focus” of the Securities Exchange Act was “purchases and sales . . . in the United States,” rather than “the place where the deception originated,” facts of the latter sort were not sufficient.⁷⁸

Part IV of *Kiobel* strongly resembled this aspect of *Morrison*. To be sure, the Court’s phrasing was awkward. It is odd to say that the presumption is

73. *Id.* at 1670 (Alito, J., concurring).

74. *Id.* at 1669 (majority opinion) (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266-73 (2010)).

75. *Morrison*, 561 U.S. at 266.

76. *Id.* at 266-67.

77. *Id.* at 266.

78. *Id.*

“displace[d]” if there is sufficient activity⁷⁹—the presumption remains, and limits the statute, but fails to foreclose the claim. It is also odd to put this in terms of whether the claims “touch and concern” U.S. territory, language more familiar from property servitudes.⁸⁰ This led some courts applying *Kiobel* to question whether the Court adopted *Morrison*’s “focus” test, partly because of the Court’s unusual language, partly because of its brevity on the question, and partly because of problems posed by transposing a “focus” test to the ATS.⁸¹ Most courts, however, properly assumed continuity between the Court’s decisions.⁸² That assumption seems to have been vindicated by *RJR Nabisco*, which stated plainly that both *Morrison* and *Kiobel* contemplated a “focus” inquiry—the difference being that *Kiobel* did not require, on its facts, any resolution of what the ATS’s focus actually was, since there was nothing domestic about the allegations at all.⁸³

79. See *Kiobel*, 122 S. Ct. at 1669.

80. See Carlos M. Vázquez, *Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum*, 89 NOTRE DAME L. REV. 1719, 1741-47 (2014), for a close analysis. Professor Vázquez concludes that “displace” plausibly refers to the possibility of concluding that the presumption is wholly inapplicable, relying in large part on Justice Kennedy’s opinion; he acknowledges, however, that the majority opinion contained contrary indications, which in my view counsel decisively in the opposite direction—in part because Part IV, whatever its lack of clarity, is clearer yet than Justice Kennedy. *Id.* at 1747.

81. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014) (“[*Kiobel*] did not explicitly adopt *Morrison*’s focus test, and chose to use the phrase ‘touch and concern’ rather than the term ‘focus’ when articulating the legal standard it did adopt. Moreover . . . the concurring opinions . . . note that the standard in [*Kiobel*] leaves ‘much unanswered.’ Additionally, since the focus test turns on discerning Congress’s intent when passing a statute, it cannot sensibly be applied to ATS claims, which are common law claims based on international legal norms” (citations omitted)).

82. See *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 952-54 (9th Cir. 2015) (Bea, J., dissenting from the denial of rehearing en banc) (stressing consistency of *Kiobel* with *Morrison*); *Baloco v. Drummond Co.*, 767 F.3d 1229, 1236-37 (11th Cir. 2014) (treating *Kiobel* as consistent with “focus” test); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182-86 (2d Cir. 2014) (“Drawing upon the guidance provided by the Supreme Court in *Morrison* and *Kiobel* . . . a clear principle emerges for conducting the extraterritoriality-related jurisdictional analysis required by the ATS: that the ‘focus’ of the ATS is on conduct and on the location of that conduct.”).

83. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2100-01 (2016). Post-*RJR Nabisco* attempts to suggest to the contrary—that is, to dispute whether the Supreme Court regards *Kiobel* as establishing a different test than *Morrison*, putting aside the merits of that position—seem to me indefensible. See, e.g., Reply Brief for the Cross-Petitioner at 7, *Warfaa v. Ali*, No. 15-1464 (U.S. July 19, 2016) (representing that “[a]s this Court acknowledged in *RJR Nabisco*, the *Kiobel* test is not the ‘focus’ test set forth in *Morrison*”).

B. Determining the “Focus” of the ATS

The problem with Part IV lies less in discerning the question the Court was positing than in determining its method for answering it. In *Morrison*, the Court was evaluating activity both inside and outside the United States.⁸⁴ But its test, particular to the Exchange Act, was derived from what the “focus” of the Act revealed about the focus of congressional concern—which the Court thought centered on the purchase and sale of securities, rather than deceptive conduct, which was not punished save in tandem with such purchase and sale.⁸⁵ Of course, one might say that the purchase and sale of securities was not punished absent deceptive conduct, which might lead one to focus instead on where the deception was conducted. But the path the Court chose had the virtue of entailing focal points with determinate geography (transactions in securities listed on domestic exchanges and, somewhat less concretely, domestic purchases and sales of other securities) that were regulated as such by the Act.⁸⁶

Neither *Kiobel* nor *RJR Nabisco* advanced the state of the art. In *Kiobel*, Part IV of the majority opinion supposed that future claims must “touch and concern the territory of the United States,” and that “it would reach too far to say that mere corporate presence suffices.”⁸⁷ Other clues, including from the concurring opinions, are examined below, but *RJR Nabisco* (as just noted) thought that *Kiobel* did not actually reach the issue of the ATS’s focus.⁸⁸ In *RJR Nabisco* itself, the Court found that much of RICO overcame the presumption against extraterritoriality, thus mooted the question of the statute’s “focus” with respect to those provisions.⁸⁹ But the Court subjected the statutory private cause of action to a separate application of the presumption, which that provision did not overcome;⁹⁰ then, not wholly unlike *Kiobel*, the Court limited any “focus” inquiry because the plaintiffs had waived their claims for domestic injuries.⁹¹ For reasons the Court did not detail, it assumed that Congress had focused, as

84. *Morrison v. Nat’l Austl. Bank, Ltd.*, 561 U.S. 247, 267-69 (2010).

85. *Id.* at 266-67.

86. *Id.* at 266-68.

87. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

88. *See supra* note 83 and accompanying text.

89. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2103-04 (2016).

90. *Id.* at 2106-10.

91. *Id.* at 2011.

relevant for extraterritoriality purposes, on where the injury was suffered, as opposed to one of the other elements of the cause of action.⁹²

The difficulties posed by the “focus” inquiry for cases like *Morrison* and *RJR Nabisco* are redoubled for the ATS. That statute tells us only that Congress intended to create jurisdiction over “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.”⁹³ Courtesy of *Sosa*, we also know that Congress contemplated judicial recognition of a “modest number” of claims, “based on the present-day law of nations,” that “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” of which Congress must have been aware.⁹⁴ If Congress had a “focus” in addressing such disparate and contingent matters, it is not easy to discern;⁹⁵ the obvious breadth of the law of nations is compounded further when the disparate and contingent quality of U.S. treaties is thrown in the mix.

Nevertheless, not unlike the quick turn to the place of injury in *RJR Nabisco*, *Kiobel* leaped to some conclusions. The first concerned the indispensability of territoriality, and conduct within a territory, as a component of focus.⁹⁶ Naturally, some (perceived) extraterritorial reach is the predicate for raising the presumption against extraterritoriality in the first place. The problem to which the Court directed the parties was one in which “violations of the law of nations occur[ed] within the territory of a sovereign other than the United States”⁹⁷ or, as it put the question more frequently, one of “extraterritorial application” of the ATS.⁹⁸ Still more concretely, the Court characterized the presumption as being triggered by

92. See *id.* at 2102-03. For discussion of the legitimacy of this assumption, see William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 47-48 (2016); Carlos M. Vázquez, *Out-Beale-ing Beale*, 110 AJIL UNBOUND 68, 70-71 (2016).

93. 28 U.S.C. § 1350 (2012).

94. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-25 (2004). See also *id.* at 732 (alluding to “specific, universal, and obligatory” norms (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994))).

95. See, e.g., *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014).

96. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

97. *Id.* at 1663 (quoting *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (Mem.)).

98. *Id.* at 1664, 1669.

“conduct occurring in the territory of a foreign sovereign,”⁹⁹ and took it as a given that such conduct was what made the presumption relevant.¹⁰⁰

One might in principle distinguish between what triggers the germaneness of the presumption (so as to initiate the first step of the inquiry) from the statute’s “focus” for purposes of the doctrine’s second step. One might in particular resist the leap from concern about territoriality to concentrating on *conduct* within a territory, not least because—as the Court acknowledged in recognizing the distinctive posture of *Kiobel*—the ATS itself “does not directly regulate conduct.”¹⁰¹ But the Court considered elaboration of the statutory focus irrelevant because “all the relevant conduct took place outside the United States,”¹⁰² which presumed that the ATS’s “focus” was something requiring at least *some* degree of relevant conduct within the United States. Even Part IV’s choice of terms, however confusing in other respects, signaled—through both “displace” and “touch and concern,” concepts paying a neighborly visit from real property—the majority’s resolute focus on territory.¹⁰³ At a minimum, nothing in *Kiobel* operated to disturb the emphatically territorial character of the focus inquiry as elaborated in other cases. In practical terms, the *focus* test as administered by the Court was really a *locus* test, and one in which conduct was key.¹⁰⁴

A related implication was that—unlike the sub-statutory examination of whether the presumption against extraterritoriality had been overcome, which apparently required distinguishing between piracy and other claims¹⁰⁵—this “focus” inquiry was administered on a statutory basis, rather than with respect to a particular claim and its customary international law

99. *Id.* at 1664.

100. *Id.* at 1665 (“conduct within the territory of another sovereign”); *id.* at 1666 (“conduct in the territory of a foreign sovereign”); *id.* (“conduct in the territory of another sovereign”); *id.* at 1667 (“conduct occurring within the territorial jurisdiction of another sovereign”); *id.* (“conduct that does occur within the territory of another sovereign”); *id.* at 1669 (“conduct occurring in the territory of another sovereign”). The Court also contrasted conduct within U.S. territory. *Id.* at 1666-67.

101. *Id.* at 1664.

102. *Id.* at 1669.

103. *Id.*

104. For similar readings by lower courts, *see, e.g.*, *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197 (5th Cir. 2017) (stating that “the focus is on conduct that violates international law,” but emphasizing location); *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014) (stating that, as applied to the ATS, a “focus” analysis entails “examining the conduct alleged to constitute violations of the law of nations, and the location of that conduct”).

105. *See* discussion *supra* notes 56-62 and accompanying text.

basis.¹⁰⁶ The plaintiffs in *Kiobel* had seven different claims, at least three of which the district court had perceived might involve violations of the law of nations,¹⁰⁷ but the Court did not distinguish among them, and each phase of its inquiry considered the ATS as a whole.¹⁰⁸ Given the restrictive tendencies exhibited both in *Kiobel* and *RJR Nabisco*, one can envision the Court establishing some kind of *additional* hurdle that needed to be satisfied in the case of a particular kind of claim—say, accusing a foreign ally of the crime of aggression¹⁰⁹—but there was little in *Kiobel* suggesting that a particular claim could be more easily rescued at the second step.

The problems this poses are evident in the final substantive line of the majority opinion, which states, after alluding to “mere corporate presence” as lacking sufficient force, that “[i]f Congress were to determine otherwise, a statute more specific than the ATS would be required.”¹¹⁰ The difficulty, as the Court appreciated, is that the ATS not only lacked sufficient specificity to overcome the presumption against extraterritoriality, but likewise lacked anything sufficiently specific to establish a particular “focus” for purposes of the second step.¹¹¹ Absent contrary congressional instruction, the Court was disposed to view domestic conduct as its universal template for applying even those statutes bearing indirectly on conduct.

C. Specific Components of ATS “Focus”

Some post-*Kiobel* commentary speculated, not without reason, that future ATS actions might enjoy a different fate if the facts were just a bit different—that is, if the “foreign-cubed” facts in *Kiobel* were instead “foreign-squared,” with greater U.S. ties possible not solely through the conduct’s U.S. location, but also via the defendant’s nationality or perhaps even something about the plaintiff (who must, of course, remain an “alien” to recover under the ATS).¹¹² That was certainly suggested by Justice

106. See *Kiobel*, 133 S. Ct. at 1664, 1669.

107. *Id.* at 1663.

108. See *id.* at 1663, 1665, 1669. Justice Kennedy may well not have shared this assumption, but he did not elaborate. *Id.* at 1669 (Kennedy, J., concurring).

109. This would be in addition to the “limiting principles” like “exhaustion, *forum non conveniens*, and comity” on which Justice Breyer would depend. *Id.* at 1674 (Breyer, J., concurring in the judgment).

110. *Id.* at 1669 (majority opinion).

111. See *id.*

112. See, e.g., 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/>

Breyer's opinion, which would have opened inquiry into a wider array of considerations;¹¹³ Justice Alito's approach, on the other hand, would disregard variations on the facts not relating to the place of conduct.¹¹⁴ Although more detailed, the Court's "focus" analysis in *Morrison* and *RJR Nabisco* was not entirely straightforward, so one must proceed with caution. Nevertheless, several types of claims might survive truncation of the ATS, and they can be assessed from most plausible to least.

1. Claim-Related Conduct in the United States (and Elsewhere)

Although the Court did not formally address the ATS's "focus" for step two purposes, there are plenty of indications—the Court's predicate for raising the issue of extraterritoriality, discussions of the presumption in *Kiobel* and other cases, and the opening of Part IV—that "relevant conduct" within the United States may establish a claim under the ATS.¹¹⁵ The extremes are easy enough to address. If *all* the relevant conduct was within the United States, the issue of extraterritoriality would not even arise; if *none* was within the United States, Part IV suggests that the claim is a non-starter. The question is what degree of conduct within the United States might, at least if combined with some other factor (or a complement of conduct outside the United States), establish an ATS claim.

Justice Alito answered that the U.S. conduct must itself be sufficient to establish a claim under the ATS, making any conduct outside the United States essentially irrelevant to the inquiry.¹¹⁶ That approach has attracted support in the lower courts, at least in the Second Circuit,¹¹⁷ but it has

("'Foreign cubed' cases . . . are off the table. But there may remain significant scope for 'foreign squared' cases—cases in which the plaintiff or defendant is a U.S. national or where the harm occurred on U.S. soil.").

113. See *Kiobel*, 133 S. Ct. at 1673-74, 1677 (Breyer, J., concurring in the judgment).

114. See *id.* at 1670 (Alito, J., concurring).

115. *Id.* at 1669.

116. *Id.* at 1670 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*'s requirements of definiteness and acceptance among civilized nations.").

117. The leading example is the Second Circuit's decision in *Mastafa v. Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014). There, Judge Cabranes stated—in elaborating a two-step test that seemed to begin its step one, confusingly, with step two of the extraterritoriality test indicated in *RJR Nabisco*—that

the complaint must plead: (1) conduct of the defendant that "touch[ed] and concern[ed]" the United States with sufficient force to displace the presumption against extraterritoriality, and (2) that the *same conduct*, upon preliminary examination, states a claim for a violation of the law of nations or aiding and

pronounced difficulties. *Morrison* addressed a case in which the plaintiffs stressed that deceptive conduct, a key part of their claim, was stateside;¹¹⁸ while the Court instead focused on the location of the transactions with which that conduct was associated, it did not suggest that facts like those the plaintiffs emphasized were *also* necessary, such that everything had to take place within the United States. As to *Kiobel*, as previously noted, Justice Alito did not purport to be translating the majority's approach, but rather establishing his own standard;¹¹⁹ only Justice Thomas joined him, so three justices joining the majority opinion (Chief Justice Roberts, Justice Kennedy, and the late Justice Scalia) eschewed his approach.

On its merits, moreover, Justice Alito's approach is dubious. It is completely tenable, even in a globalized economy, to assume that Congress would sometimes expect a statute to apply only to torts that were entirely home-grown. But that seems less likely for the ATS, where Justice Alito's approach would not only avoid foreign territory, but also subvert piracy policy, given the indispensability of the high seas to such claims. Even if it is too much to allow piracy claims to overcome the presumption against extraterritoriality for all ATS claims, it seems a substantial step further to suggest that those claims or their analogs are excluded altogether from the scope of the statute.

It's coming up with an alternative that is hard. For anything short of Justice Alito's approach, the challenge lies in reckoning the appropriate amount of relevant conduct that would be sufficient, if sufficiency is to be something short of *complete* sufficiency for purposes of stating a claim satisfying *Sosa*. Perhaps "extensive 'relevant conduct' in United States territory" is enough,¹²⁰ or perhaps the relevant conduct must be alleged "to a degree necessary to overcome the presumption",¹²¹ perhaps just "*enough*" relevant conduct is enough.¹²² *Morrison*, however, found that a similar approach ("significant and material conduct," proposed by the Solicitor

abetting another's violation of the law of nations.

Id. at 187 (alterations in original); *see id.* at 182 (explaining that "[a]n evaluation of the presumption's application to a particular case is essentially an inquiry into whether the domestic contacts are sufficient to avoid triggering the presumption at all"); *accord* *Licci By Licci v. Lebanese Canadian Bank, SAL*, 834 F.3d 201, 215 (2d Cir. 2016) (citing *Mastafa*, 770 F.3d at 186); *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 167 (2d Cir. 2015) (same).

118. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266-67 (2010).

119. *Kiobel*, 133 S. Ct. at 1669-70 (Alito, J., concurring).

120. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528 (4th Cir. 2014). *Accord Warfaa v. Ali*, 811 F.3d 653, 659 (4th Cir. 2016).

121. *Baloco v. Drummond Co.*, 767 F.3d 1229, 1239 (11th Cir. 2014).

122. *Doe v. Drummond Co.*, 782 F.3d 576, 597 (11th Cir. 2015) (emphasis in original).

General) was insufficiently premised in the statute at issue; the Court also expressed a countervailing concern about developing the United States as a locus for foreign-concerned litigation, one echoed in both *Sosa* and *Kiobel*.¹²³ Or perhaps one might ask whether the “last event necessary to make an actor liable” took place, though that has more than its share of problems.¹²⁴

It may be helpful to look at the particular claims to determine more exactly the nature of the conduct that is relevant, as several lower courts have done.¹²⁵ In the end, however, it is hard to see how that avoids the underlying problem, in that it still requires assessing whether “location of the [relevant conduct] alleged in general terms . . . outweigh[s] the extraterritorial location of the rest of Plaintiffs’ claims”—or loosely affiliated inquiries into whether the “allegations of domestic conduct” are “extensive or specific” enough.¹²⁶ As discussed below, moreover, it is doubtful that any ATS claim can ever, by virtue of its nature, be substantially disassociated from U.S. territory.

This basic conundrum—deciding how much is enough—admits of no easy answers, other than Justice Alito’s, but the severity of its result can certainly be ameliorated. For example, it may be possible to expand slightly Congress’s supposed focus on conduct within the United States to encompass conduct outside the United States but not within foreign states—as with ordinary claims of piracy. Post-*Kiobel* cases have suggested that piracy constitutes an exception to its analysis, or perhaps an instance in which the presumption is overcome,¹²⁷ relying on language in *Kiobel* suggesting that piracy could not be extrapolated to the other matters¹²⁸ and

123. *See Morrison*, 561 U.S. at 270-72.

124. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (AM. LAW INST. 1934); *see Vazquez*, *supra* note 80, at 1739-40 (discussing the first Restatement’s compatibility with *Morrison*). The first Restatement was not followed in this regard by the Restatement (Second), nor is it likely to be followed by the Restatement Third. *See* RESTATEMENT (THIRD) OF CONFLICT OF LAW § 5.01 (AM. LAW INST., Preliminary Draft No. 2, 2016).

125. *See Drummond*, 782 F.3d at 597-99; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182-83, 185, 195 (2d Cir. 2014); *Mujica v. AirScan Inc.*, 771 F.3d 580, 591-92 (9th Cir. 2014); *Al Shimari*, 758 F.3d at 528-29.

126. *Drummond*, 782 F.3d at 598.

127. *See, e.g.*, *Inst. of Cetacean Research v. Sea Shepherd Conservation Soc.*, 153 F. Supp. 3d 1291, 1303-04, 1304 n.14 (W.D. Wash. 2015).

128. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1667 (2013) (“We do not think that the existence of a cause of action against [pirates] is a sufficient basis for concluding that other causes of action under the ATS reach conduct that does occur within the territory of another sovereign; pirates may well be a category unto themselves.”).

distinguishing the prudential considerations.¹²⁹ Alternatively, it might bear on whether Congress's focus—at the second, subsequent step, one only gestured at in Part IV—was *both* on conduct within the United States and conduct not within the territory of other states, which would enable appropriate claims relating to piracy and other offenses.¹³⁰ There would remain, however, a place for territoriality, mixed with contra-territoriality, and a need for clearer standards concerning when too much conduct elsewhere—be that outside the United States, or within a foreign state's territory—tips the scales against.

2. Party Status: Nationality, Residence, and Domicile

Perhaps due to uncertainty about the quantum of domestic conduct required, lower courts have also cited facts about the parties—such as U.S. nationality of the defendant, or its domicile or residency in the United States—as bearing on whether the claims “touch and concern” the United States or, alternatively, bear on the “focus” of the ATS.¹³¹ Other decisions have rejected the relevance of such facts,¹³² or more broadly, rejected the

129. *Id.* (explaining that high seas are “beyond the territorial jurisdiction of the United States or any other country,” and thus “[a]pplying U.S. law to pirates . . . does not typically impose the sovereign will of the United States onto conduct occurring within the territorial jurisdiction of another sovereign.”).

130. *See, e.g.,* *Shell Offshore, Inc. v. Greenpeace, Inc.*, 2015 WL 3745641, at *3 (D. Alaska June 12, 2015) (applying the piracy “exception” to “intentional tortious interference with maritime navigation, trespass and trespass to chattels, private nuisance, and civil conspiracy deriving from each of the other three claims”).

131. *See, e.g.,* *Mujica v. AirScan Inc.*, 771 F.3d 580, 594 (9th Cir. 2014) (“It may well be . . . that a defendant's U.S. citizenship or corporate status is one factor that, in conjunction with other factors, can establish a sufficient connection between an ATS claim and the territory of the United States to satisfy *Kiobel*.”); *Drummond*, 782 F.3d at 595-96 (finding “citizenship or corporate status of the defendant[]” relevant to the “touch and concern inquiry”). *Drummond* like most or all of these decisions, took the view that “it would reach too far to find that the only *relevant* factor is where the conduct occurred, particularly the underlying conduct,” *id.* at 593 n.24, but at the same time, found that U.S. citizenship of the defendants—while relevant—was “insufficient to permit jurisdiction on its own,” *id.* at 596. *See also* *Doe I v. Exxon Mobil Corp.*, No. 01-1357(RCL), 2015 WL 5042118, at *7 (D.D.C. July 6, 2015) (holding corporate citizenship alone was not enough for ATS jurisdiction); *Ahmed v. Magan*, No. 2:10-cv-00342, 2013 WL 4479077, at *2 (S.D. Ohio Aug. 20, 2013); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321-24 (D. Mass. 2013).

132. *See, e.g.,* *Mastafa v. Chevron Corp.*, 770 F.3d 170, 182-89 (2d Cir. 2014) (stating that “[w]e disagree with the contention that a defendant's U.S. citizenship has any relevance to the jurisdictional analysis”); *see also* *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 209 (5th Cir. 2017) (Graves, J., dissenting) (surmising from the majority's failure to mention a defendant's status as a U.S. corporation that it found nationality and related status

relevance of anything other than the location of the conduct—if all the conduct occurred abroad.¹³³

There are conflicting signals from the opinions in *Kiobel*. Those inclined to view the defendant's nature as significant can cite the majority's dismissal of "mere corporate presence;"¹³⁴ this may be read as suggesting that the presence of other entities might matter, or that corporate presence, coupled with some other territorial indicator, would not only "touch and concern" the United States but do so with "sufficient force." A defendant's links to the United States might also be considered to augment the legitimate regulatory interests of the United States and, to a degree, reduce the likelihood of foreign objection. Justice Breyer's concurrence in the judgment, at least, described a defendant's status as an American national as highly salient.¹³⁵

Still, the difficulties with such actor-specific factors are easy to anticipate. For one, Part IV of the opinion, which briefly mentions corporate presence as part of a hurried coda, is a flimsy basis for extrapolating the majority's interest in such considerations. Earlier in the opinion, the Court noted that Attorney General Bradford's opinion addressed conduct by U.S. citizens without suggesting that citizenship (or residence) might be enough,¹³⁶ and instead the Court harped on the location of conduct.¹³⁷ Subsequently, in *RJR Nabisco*, the Court rejected the defendant's arguments that the RICO statute should apply only to domestic enterprises because that "would lead to difficult line-drawing and counterintuitive results"; this was largely because it would be divorced from conduct, but also because there was no indication that Congress had

factors irrelevant, and signaling disagreement); *Warfaa v. Ali*, 811 F.3d 653, 660-61 (4th Cir. 2016) (noting, on the one hand, that "[n]othing in this case involved U.S. citizens, the U.S. government, U.S. entities, or events in the United States," but also suggesting that "[m]ere happenstance of residency"—on the facts of that case, an "after-acquired residence in the United States long after the alleged events of abuse"—"lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context").

133. *Balintulo v. Daimler AG*, 727 F.3d 174, 190-92 (2d Cir. 2013) ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.").

134. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

135. *Id.* at 1674 (Breyer, J., concurring in the judgment) (asserting "that the statute provides jurisdiction where," *inter alia*, "the defendant is an American national").

136. *Id.* at 1667-68 (majority opinion).

137. *Id.* at 1662, 1664, 1665 (focusing on "conduct occurring in the territory of a foreign sovereign").

taken on the imponderables of deciding based on the location of an entity rather than on location of conduct.¹³⁸

In neither instance was the Court undertaking a “focus” analysis, but rather addressing the prior question of whether the presumption had been overcome, so its observations were not completely apposite. Unfortunately, neither was Justice Breyer’s opposing instinct to credit nationality.¹³⁹ His point was entirely fair: a defendant’s nationality, at least if it were material to Congress, might reinforce an inference that the statute was not delimited on another, territorial basis.¹⁴⁰ However, that reasoning drove him to conclude that ATS overcame any presumption against extraterritoriality—which, if *stare decisis* holds, is more difficult to claw back than anything in Part IV.

In contrast, the majority’s lack of interest in party status seems to be a continuous thread connecting the first and second steps of its inquiry;¹⁴¹ if the statute were *conceded* to be only territorial in scope, as the majority would have it, it is not clear that any of the opinions in *Kiobel* would regard an actor’s status as decisive. Even the non-determinative salience of such status, independent of its territorial character, may be doubted. Part IV appeared to concede the potential relevance of “corporate presence” to ATS “focus,”¹⁴² but *presence* in the United States—even if it is not necessarily exclusive, as the Court noted critically—steps as much toward territoriality as it does toward American nationality.

If and to the extent party status is separate from territoriality, familiar problems arise. If such status is not in itself a sufficient condition, its significance—when it must be melded with an indeterminate amount of U.S. conduct—remains indeterminate. It seems unlikely, at bottom, that such status relieves plaintiffs of the burden of showing a substantial quantum of territorial conduct, perhaps such as might by itself convince a sympathetic court that the presumption was satisfied.

138. See *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2103-05 (2016).

139. *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring in the judgment).

140. Cf. *id.* at 1674-77 (citing U.S., international, and foreign examples differentiating claimants and defendants on the basis of nationality). Likewise, at least, in principle, a statute might overcome the presumption by indicating that it was relevant to aliens (though it would be helpful if it were oriented toward global problems, or added “everywhere”).

141. See *id.* at 1668-69 (majority opinion).

142. See *id.* at 1669.

3. Other Interests

Beyond the tort's commission on American soil and the American nationality of the defendant, Justice Breyer would have found jurisdiction—seemingly on an independent basis—where “the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind.”¹⁴³ That approach obviously spoke to Justices Ginsburg, Sotomayor, and Kagan; although Justice Kennedy did not join, it is not hard to see its appeal to him, given the reservations indicated in his concurrence.¹⁴⁴

In elaborating, Justice Breyer made clear that an “important American national interest” could redeem jurisdiction “only where *distinct* American interests are at issue.”¹⁴⁵ He made his meaning slightly plainer in discussing the harboring of defendants, his leading example.¹⁴⁶ While Justice Breyer agreed, seemingly, with Justice Story (and the majority) that the United States should not aspire to be “the *custos morum* of the whole world,”¹⁴⁷ he felt that permitting jurisdiction when the modern-day equivalent of pirates were present within the territory was consistent with a narrower, differentiated role.¹⁴⁸

The reasoning remained hard to reconcile with what the Court had communicated about the statute's focus. Certainly, longstanding international norms discouraged or even made illegal the harboring of pirates,¹⁴⁹ and U.S. cases had found ATS liability in instances where other kinds of defendants were later found in the United States.¹⁵⁰ Those propositions were not, however, necessarily related. Harboring piracy's modern equivalents might be considered distinctive if it were wrongful for the United States not to proceed against such defendants, but there was no

143. *Kiobel*, 133 S. Ct. at 1671, 1674 (Breyer, J., concurring in the judgment).

144. *See id.* at 1669 (Kennedy, J., concurring).

145. *Id.* at 1674 (Breyer, J., concurring in the judgment) (emphasis added).

146. *See id.*

147. *Id.* (quoting *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551)). The majority also quoted Justice Story, but added that “there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.” *Id.* at 1668 (majority opinion).

148. *See id.* at 1674 (Breyer, J., concurring in the judgment).

149. *Id.*

150. *See id.* at 1675 (citing *Filartiga v. Pena-Irala*, 630 F.2d 876, 878-79 (2d Cir. 1980), and *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1469, 1475 (9th Cir. 1994)).

attempt to show a degree of acceptance and specificity such as would satisfy *Sosa*.¹⁵¹ It is also unclear how Congress could be focused, in legislating against torts in violation of the law of nations, on redressing circumstances relating to a defendant's presence that might materialize only *after* the original torts were committed.¹⁵² A harboring factor would have only a tenuous relationship to the focus of the underlying statute, unless another actionable tort may be layered on—meaning that harboring would satisfy the presumption only to the extent that such a tort did, indeed, arise out of domestic conduct, being principally that of U.S. actors affording the wrongdoer repose.

On another reading, harboring did less work, simply illustrating circumstances in which international law acknowledged U.S. capacity (rather than obligation) to proceed. A similar claim was made for U.S. jurisdiction over its nationals, where Justice Breyer asserted not only that “[n]ations have long been obliged not to provide safe harbors for their own nationals who commit such serious crimes abroad,” but also that “[m]any countries permit foreign plaintiffs to bring suits . . . based on unlawful conduct that took place abroad.”¹⁵³ Unfortunately, that too seems fundamentally incompatible with the majority's approach. Per Chief Justice Roberts, the issue was not whether the United States had a plausible basis in international law for regulating the conduct, whether based on universality, nationality, or some other ground—including an effects-oriented form of territoriality that might be considerably broader than anything Congress might envision. International impermissibility was not the predicate for invoking the presumption against extraterritoriality, and in evaluating whether it had been overcome, the Court likewise evidenced no concern for the latitude afforded Congress by international law.¹⁵⁴ If anything, the

151. It may prove difficult, in fact, to distinguish a defendant's presence in the United States, as a “happenstance,” from a purposeful attempt to seek safe haven. In *Warfaa v. Ali*, Judge Gregory reached a different conclusion than the majority, noting that the case involved “a natural person who has sought safe haven” and that the defendant's “after-acquired residence” in the United States was distinguished from a “mere ‘happenstance.’” 811 F. 3d 653, 663-64 (4th Cir. 2016) (Gregory, J., concurring in part and dissenting in part) (citing to additional facts not solely based on the location of the injuries sustained). Whether a purposeful attempt to seek haven would then translate into “harboring” by the state itself is yet another matter.

152. *Cf. id.* at 661 (majority opinion) (noting “after-acquired residence in the United States long after the alleged events of abuse”).

153. *Kiobel*, 133 S. Ct. at 1675 (Breyer, J., concurring in the judgment).

154. *See id.* at 1668-69 (majority opinion). If anything, *Morrison* relied more heavily on this. *See Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010) (protesting that “[w]e

evidence suggested its irrelevance. In acknowledging that Congress “can indicate that it intends federal law to apply to conduct occurring abroad,” the Court cited the example of genocide, a crime unambiguously condemned under international law and subject to universal jurisdiction; even there, the Court held the statute up as an example because it applied (explicitly) where the alleged offender was, *inter alia*, “present in the United States,” and governed “regardless of where the offense is committed,” not because of anything directly relating to international obligations.¹⁵⁵ The ATS provides, by comparison, little evidence that might have persuaded the majority and little grounds for confidence that the Court would reverse course were the issue presented as one of statutory focus.

Most fundamentally, Justice Breyer’s interest in identifying “where distinct American interests are at issue”¹⁵⁶ was antithetical to the majority’s conception of the appropriate role for courts. For Chief Justice Roberts, that issue was joined far before “focus.”¹⁵⁷ Congress, in the majority’s view, was the body entrusted with and capable of determining whether there was an unwanted clash with other nations;¹⁵⁸ its subsequent discussion of the inherent dangers that U.S. courts supposedly posed was not, for all intents and purposes, rebuttable at all, even where they might in fact be shown to serve a distinctive U.S. interest.¹⁵⁹ While the Court remained concerned about making the United States a “uniquely hospitable forum” for norms that any state could adopt and enforce, it was not, similarly, open to the reply that such a unique role might be appropriate, or even that its opportunity to afford an appropriate forum was, if anything, the unique feature.¹⁶⁰

Compatibility with the majority aside, Justice Breyer’s pursuit of “distinct American interests” contains its own contradictions. His view, recall, was that the location of the tort, the defendant’s nationality, *or* the relation between the defendant’s conduct and an important American

know of no one . . . who even believed that under established principles of international law Congress had the power” to regulate foreign securities exchanges).

155. *Kiobel*, 133 S. Ct. at 1665 (quoting 18 U.S.C. § 1091(e) (2006 ed., Supp. V)).

156. *Id.* at 1674 (Breyer, J., concurring in the judgment).

157. *See id.* at 1664-65 (majority opinion).

158. *Id.* at 1664 (citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957)).

159. *See id.* at 1664-65. *Cf. RJR Nabisco v. European Cmty.*, 136 S. Ct. 2090, 2100 (2016) (stating that the presumption against extraterritoriality applies “across the board, ‘regardless of whether there is a risk of conflict between the American statute and a foreign law’”) (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010)).

160. *Id.* at 1668.

national interest (like avoiding harboring) could *each* establish American jurisdiction.¹⁶¹ Presumably the same goes for other jurisdictions as well. But if jurisdiction could in principle be exercised by the state where the conduct occurred, the state of the defendant's nationality, and the United States as the defendant's ultimate location, the distinctiveness of U.S. interests surely wanes, and the risk of regulatory clashes that troubled the Court seem more substantial.¹⁶²

IV. Conclusion

Although the application to the ATS of the presumption against extraterritoriality arose suddenly in *Kiobel*—an iceberg materializing before Lohengrin's swan-pulled boat¹⁶³—it is of lasting consequence for the statute's scope, unless rethought. This rethinking might take the form of a reconceptualization, in which the relevance of the presumption, or whether it was overcome, or whether the statute's focus may be reckoned by unexpected means, is somehow refashioned. Such opportunity is always available to a court of last resort, though *RJR Nabisco* made such a move more difficult.

Perhaps such rethinking may be emboldened, eventually, by the idea that statutory *stare decisis* loses force when it concerns a new constraint on a statute that is over 200 years old. The first Congress could not, certainly, have anticipated the nature of modern statutory presumptions; even if confined by a presumption to U.S. territory, the scope of that authority and its relation to the rest of the world—today's "here" and "there"—would likely have amazed it. For the time being, however, the Court's conception of the presumption against extraterritoriality, together with its notion of territoriality, has assumed a place in U.S. doctrine, and must be properly understood before any eviction can begin.

161. *Id.* at 1674 (Breyer, J., concurring in the judgment).

162. *See id.* at 1669 (majority opinion).

163. The well-known metaphor is Judge Friendly's, likening the ATS's own sudden appearance to Wagner's mysterious knight. *See IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir.1975); *see also Velez v. Sanchez*, 754 F.Supp.2d 488, 495-96 & n.4 (E.D.N.Y. 2010) (detailing Lohengrin's arrival), *aff'd in part and vacated in part*, 693 F.3d 308 (2d Cir. 2012).