



3-2014

# Things We Do with Presumptions: Reflections on Kiobel v. Royal Dutch Petroleum

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## Recommended Citation

89 Notre Dame L. Rev. 1719 (2014).

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THINGS WE DO WITH PRESUMPTIONS:  
REFLECTIONS ON *KIOBEL V. ROYAL*  
*DUTCH PETROLEUM*

Carlos M. Vázquez\*

INTRODUCTION

The Court in *Kiobel v. Royal Dutch Petroleum Co.* relied on the presumption against extraterritoriality in declining to recognize a federal cause of action for the defendants' alleged breaches of customary international law.<sup>1</sup> The bulk of Chief Justice Roberts's opinion for the Court defended the applicability of the presumption to the claims brought under the Alien Tort Statute (ATS).<sup>2</sup> As Justice Alito's concurring opinion noted, however, the Chief Justice's opinion adopted a "narrow approach" that "[left] much unanswered."<sup>3</sup> Similarly, Justice Kennedy's concurrence observed that the Chief Justice's opinion properly "[left] open a number of significant questions."<sup>4</sup> In determining what exactly the Court decided in *Kiobel* and what it left undecided, it is useful to distinguish several things that might be done with a presumption such as that against extraterritoriality.

Most straightforwardly, the courts apply the presumption in interpreting federal statutes. Specifically, they use the presumption in determining the applicability of the statute to claims based partially or wholly on conduct that occurred outside United States territory. On the assumption that Congress legislates with domestic conditions in mind, a court applying the presumption interprets a statute not to apply "extraterritorially" unless Congress has expressed a contrary intent.

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

2 *Id.* at 1664–69.

3 *Id.* at 1669–70 (Alito, J., concurring).

4 *Id.* at 1669 (Kennedy, J., concurring); *see also id.* at 1673 (Breyer, J., concurring) (“[Roberts’s opinion] leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’” (quoting *id.* at 1666 (majority opinion))).

A threshold question when a court is asked to apply the presumption against extraterritoriality is whether the presumption is applicable to the type of statute in question. With respect to certain types of statutes, application of the presumption against extraterritoriality would not advance the purposes of the presumption. I argue in Part I that the presumption should be regarded as categorically inapplicable to statutes conferring jurisdiction on the federal courts. I argue further that the majority opinion in *Kiobel* supports the conclusion that the presumption is inapplicable to such statutes. It is clear from the Court's opinion that it was not applying the presumption to determine the geographical scope of the ATS *qua* jurisdictional statute. It was instead applying the presumption to determine the geographical scope of the federal common law cause of action it had recognized in *Sosa v. Alvarez-Machain*.

Even when the presumption against extraterritoriality is applicable, courts will not always conclude that the statute does not apply extraterritorially. Although the courts presume that Congress meant for the statute to apply only domestically, that presumption can be *rebutted* or *overcome*. The usual way in which the presumption can be rebutted or overcome is through sufficient evidence that Congress meant for the statute to apply extraterritorially. In some cases, the Court has focused exclusively on the statute's text, suggesting that the presumption against extraterritoriality is a clear statement rule that can be overcome only by clear statutory language.<sup>5</sup> But, in *Morrison v. National Australia Bank Ltd.*, the Court recognized that "context" can be taken into account as well.<sup>6</sup> And, in *Kiobel*, the Court recognized that a statute's "historical background" might also "overcome" the presumption.<sup>7</sup> These methods of rebutting or overcoming the presumption are discussed in Part II.

When a court finds the presumption applicable and not rebutted or overcome, it must determine whether the statute applies to the particular case before it. As the Court recognized in *Morrison*, a non-extraterritorial statute might reach a case based on conduct that is partly foreign and partly domestic.<sup>8</sup> Applying the presumption in such a case, the Court explained, requires identification of "the 'focus' of congressional concern" under the relevant statute.<sup>9</sup> If the statute is non-extraterritorial, the conduct that was

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5 See *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 258 (1991).

6 130 S. Ct. 2869, 2883 (2010).

7 *Kiobel*, 133 S. Ct. at 1666 (majority opinion).

8 *Morrison*, 130 S. Ct. at 2884.

9 *Id.* These three things that one might do with a presumption might usefully be placed on a spectrum. The first asks whether a broad category of statutes should be regarded as beyond the scope of the presumption (because the assumptions underlying the presumption do not apply or because the presumption's purposes would not be advanced). The second asks whether the presumption is inapplicable to a particular statute (because there is sufficient evidence that Congress wanted the statute to apply extraterritorially). The third inquiry operates at a case-specific level (asking whether the statute as construed in light of the presumption applies to the particular conduct in question). The lines between these three categories are not always clear, and the Court in *Morrison* and

the focus of congressional concern must have occurred in the United States. When a court determines the statute's applicability to the facts of a particular case, it might be said to be determining whether the presumption has been *satisfied* in the particular case. How to satisfy the presumption is discussed in Part III.

The Court in *Kiobel* may have recognized a fourth thing that might be done with the presumption against extraterritoriality: the presumption might in certain circumstances be *displaced*. The majority used this term in the final paragraph of its opinion, a paragraph that has generated much debate about what sorts of questions the Court left open in *Kiobel*. The Court wrote that "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."<sup>10</sup> The Court may have been using the term to refer to the issue I have refer to as the "satisfying" of the presumption. There is also some basis, however, for understanding the Court to have left open the possibility that the presumption might be inapplicable or rebutted with respect to some claims brought under the ATS for violations of customary international law. What the Court meant by "displacing" the presumption is the subject of Part IV.

#### I. DETERMINING WHETHER THE PRESUMPTION IS APPLICABLE

The presumption against extraterritoriality is a technique for interpreting statutes. It reflects the Court's assumption that Congress, when it legislates, is concerned with domestic conditions and does not mean to "rule the world."<sup>11</sup> The presumption also seeks to "protect against unintended clashes between our laws and those of other nations which could result in international discord."<sup>12</sup> Because Congress "alone has the facilities necessary to make fairly such an important policy decision," the courts will interpret the statute not to apply extraterritorially in the absence of "the affirmative intention of the Congress clearly expressed."<sup>13</sup>

A threshold question concerning the presumption against extraterritoriality will frequently be whether the statute in question is one to which the presumption should apply. Certain categories of statutes do not implicate the concerns that underlie the presumption. For example, the assumption that Congress legislates with only domestic conditions in mind is not valid for

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*Kiobel* blurred them. For example, it blurred the line between the second and the third categories by recognizing that the presumption can be overcome with respect to specific applications of a statute (as opposed to the statute as a whole). See *infra* text accompanying notes 68–69, 72; see also *infra* notes 77, 123 (noting Court's blurring of the line between the first and second categories). Nevertheless, the distinctions drawn in this Article retain analytical value.

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

11 *Id.* at 1664 (majority opinion) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007)).

12 *Id.* (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 248 (1991)).

13 *Id.* (quoting *Aramco*, 499 U.S. at 248).

certain types of statutes. Consider a statute enacted to implement a treaty. Because treaties, by their nature, address matters of international concern, it is difficult to say that a statute implementing a treaty was enacted with only domestic situations in mind. To be sure, it is possible that a given treaty imposes obligations on parties only with respect to conduct occurring within their borders. For example, the United States has taken the position that the International Covenant on Civil and Political Rights does not impose extra-territorial obligations.<sup>14</sup> Its interpretation conflicts with that of other nations and some international bodies, and the State Department's Legal Adviser recently urged reconsideration of this position.<sup>15</sup> Whether the United States' position is correct or not, it is clear that the question is a matter of treaty interpretation, to be decided in accordance with international law principles of treaty interpretation.<sup>16</sup> The presumption against extraterritoriality has no relevance in determining the extraterritorial scope of treaties. The presumption therefore should have no bearing on the extraterritorial scope of a statute implementing a treaty.

Another type of statute that does not implicate the concerns that underlie the presumption against extraterritoriality is one that limits the authority of executive officials. As noted, the purpose of the presumption against extraterritoriality is to guard against unintended clashes with the laws of other nations and, more generally, to avoid international friction. If a statute limiting the authority of executive officials were interpreted to apply only to conduct within U.S. territory, however, the result would be an *expansion* of the authority of the relevant officials to act overseas. Interpreting such a statute not to apply extraterritorially thus increases the power of such officials to cause international friction. Applying the presumption against extraterritoriality to this type of statute would not advance the goal of avoiding clashes with other nations. There may be other reasons to interpret such a statute narrowly, but the avowed purpose of the presumption against extraterritoriality—avoiding international friction—is not one of them.

For both of the foregoing reasons, the presumption against extraterritoriality should have been deemed inapplicable to the statute in question in

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14 U.N. CCPR, Hum. Rts. Comm., 53d Sess., 1405th mtg. ¶ 20, U.N. Doc. CCPR/C/SR.1405 (Apr. 24, 1995) (statement of State Department Legal Adviser Conrad Harper).

15 See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Memorandum Opinion on the Geographic Scope of the International Covenant on Civil and Political Rights 2–5 (Oct. 19, 2010), *available at* <http://www.nytimes.com/interactive/2014/03/07/world/state-department-iccpr.html?action=click&contentCollection=World&module=RelatedCoverage&region=Marginalia&pgtype=article> (describing criticisms of the United States position and recommending change in position). A similar debate surrounds the extraterritorial applicability of the Convention Against Torture. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict (Jan. 21, 2013), *available at* <https://www.documentcloud.org/documents/1053901-state-department-cat-memo.html>.

16 See Vienna Convention on the Law of Treaties arts. 31–33, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

*Sale v. Haitian Centers Council, Inc.*,<sup>17</sup> which involved the extraterritorial applicability of a statute forbidding the return of refugees to countries where they would be persecuted on various specified grounds. The Court applied the presumption against extraterritoriality and concluded that the statute prohibited officials from returning refugees to their persecutors if they reached our shores but did not prohibit officials from interdicting such refugees on the high seas and returning them to their persecutors.<sup>18</sup> In apparent recognition of the argument made above that applying the presumption against extraterritoriality to this statute would not help avoid international friction, the Court in *Morrison* cited *Sale* for the proposition that the presumption “applies regardless of whether there is a risk of conflict between the American statute and a foreign law.”<sup>19</sup> Presumably it applies in such a context because of the assumption that Congress legislates with domestic conditions in mind. The validity of the latter assumption with respect to the statute involved in *Sale* is questionable, however, as the statute was enacted to implement a treaty—the United Nations Protocol Relating to the Status of Refugees.<sup>20</sup>

The concerns underlying the presumption against extraterritoriality are also categorically inapplicable to the type of statute involved in *Kiobel*: statutes conferring jurisdiction on the federal courts. Neither of the explanations for the presumption against extraterritoriality supports its application to this sort of statute. The first explanation is that, when Congress enacts a statute, it intends to regulate only domestic conduct. In the words of the Court in *Kiobel*, Congress does not intend to “rule the world.” A statute conferring federal jurisdiction does not regulate conduct at all—it merely allocates jurisdiction as between federal and state courts. The second explanation is that applying the presumption avoids international friction by avoiding unintended clashes with the laws of other nations. Interpreting a jurisdictional statute not to apply extraterritorially would actually *frustrate* this purpose. If a statute conferring federal jurisdiction were interpreted to apply only to purely domestic cases, the result would be that extraterritorial cases would have to be brought in state courts. There is no reason to think that state courts would be more likely than the federal courts to rule in a way that avoids international friction. Indeed, the Founders clearly believed the contrary—they authorized federal jurisdiction in cases touching upon foreign relations because they believed the federal courts were more likely to be sensitive to foreign relations concerns, and thus were more likely to avoid inter-

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17 509 U.S. 155 (1993); see Nicholas R. Koberstein, Comment, *Without Justification: Reliance on the Presumption Against Extraterritoriality in Sale v. Haitian Centers Council, Inc.*, 7 GEO. IMMIG. L.J. 569 (1993) (elaborating critique of *Sale* on these grounds).

18 *Id.* at 177–88.

19 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010).

20 *Sale*, 509 U.S. at 159 (citing United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577).

national friction, than the state courts.<sup>21</sup> Since the framers of the Alien Tort Statute were also Founders, it is reasonable to attribute to them the same preference of having cases implicating foreign relations be heard in the federal rather than the state courts.

There may, of course, be foreign-relations-related reasons for dismissing some suits from *both* federal and state courts. For example, a suit against a foreign sovereign may have to be dismissed on grounds of foreign sovereign immunity.<sup>22</sup> Additionally, a suit that requires the court to hold invalid the act of a foreign state within its own territory may have to be dismissed on the basis of the act of state doctrine.<sup>23</sup> But a dismissal on these grounds differs profoundly from a dismissal for lack of federal jurisdiction. Dismissal of a suit against a foreign state for lack of federal jurisdiction leaves it open to the plaintiff to pursue the case in state court. To be sure, the state court would also be required to dismiss the suit on foreign sovereign immunity or act-of-state grounds.<sup>24</sup> But a lack of federal jurisdiction would mean that *this question* would be decided by a state court rather than a federal court. If the state courts are more likely to decide that issue erroneously, as the Founders appear to have believed, construing the jurisdictional statute not to apply extraterritorially would increase the likelihood of international friction.

In sum, it seems clear that applying the presumption against extraterritoriality to statutes conferring federal jurisdiction would run afoul of the principal purpose of the presumption. Because cases with extraterritorial elements are, as a class, more likely to raise foreign relations concerns than purely domestic cases, the considerations that underlie the presumption against extraterritoriality cut in favor of interpreting jurisdictional statutes to apply extraterritorially. If so, the presumption should have been deemed inapplicable to the ATS.

While the Court in *Sale* overlooked the reasons for finding the presumption inapplicable to the statute before it, the Court in *Kiobel* appears to have recognized that the presumption is inapplicable to jurisdictional statutes. Although the majority opinion did not say so in so many words, its analysis shows that the Court did not hold that the ATS, *qua* jurisdictional statute, does not apply to extraterritorial cases.<sup>25</sup> A careful reading of the opinion supports the conclusion that the Court in *Kiobel* held instead that the pre-

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21 See Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM J. INT'L L. 531, 539–40 (2012).

22 See 28 U.S.C. § 1604 (2006).

23 See *W.S. Kirkpatrick & Co. v. Env'tl. Tectonics Corp., Int'l*, 493 U.S. 400, 406–09 (1990) (“Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. . . . The act of state doctrine . . . requires that, in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”).

24 See 28 U.S.C. § 1604 (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States *and of the States* except as provided in sections 1605 to 1607 of this chapter.”).

25 See *infra* notes 28–32 and accompanying text.

sumption against extraterritoriality applies to the federal common law causes of action that it had recognized in *Sosa v. Alvarez-Machain*.

In *Sosa*, the Court made it clear that the ATS is “purely jurisdictional.”<sup>26</sup> The statute confers jurisdiction on the federal courts over certain claims based on customary international law (and treaties). It does not itself create a cause of action. The Court in *Sosa* concluded that, at the time of the enactment of the ATS, a cause of action for certain “torts in violation of the law of nations” was thought to exist as a matter of general common law—the “ambient law of the era.”<sup>27</sup> Since, post-*Erie*, we no longer believe in the general common law, the Court in *Sosa* concluded that the cause of action for violation of the norms that were deemed actionable in 1789 should continue to be recognized today as federal common law causes of action, and that the courts may recognize new causes of action for analogous norms of present-day customary international law, also as a matter of federal common law. Recognizing a federal common law cause of action was, in the Court’s view, an appropriate modern translation of the pre-*Erie* assumptions that underlay the ATS’s conferral of federal jurisdiction over such claims.

The Court’s analysis in *Kiobel* supports the conclusion that the Court was holding that the presumption against extraterritoriality applies to the judicially created federal common law remedy recognized in *Sosa*, not to the ATS *qua* jurisdictional statute. The Court in *Kiobel* reiterated that the ATS was “strictly jurisdictional” and, as such, “does not directly regulate conduct or afford relief.”<sup>28</sup> In addition, the Court recognized that “the question” before it in *Kiobel* was “not what Congress has done but instead what courts may do.”<sup>29</sup> If the Court had held that the ATS, as a jurisdictional statute, did not apply to extraterritorial cases, the question before it would, indeed, have been the determination of the geographical scope of “what Congress [had] done.”<sup>30</sup> In the Court’s view, the fact that the issue was “what courts may do” strengthened the case for applying the presumption against extraterritoriality.<sup>31</sup> The Court reiterated the *Sosa* Court’s statements about the need for caution in recognizing causes of action in this area because of the possible foreign relations consequences and it expressed the view that these concerns “are all the more pressing when the question is whether a cause of action . . . reaches conduct within the territory of another sovereign.”<sup>32</sup>

Recognizing that the Court in *Kiobel* was applying the presumption to determine the geographical scope of the federal common law cause of action recognized in *Sosa* helps explain an otherwise mystifying aspect of the Court’s decision to apply the presumption against extraterritoriality in the

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26 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 743 (2004) (Scalia, J., concurring).

27 *Id.* at 714 (majority opinion).

28 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Sosa*, 542 U.S. at 713).

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 1664–65.



case. The ATS applies to torts “in violation of the law of nations.”<sup>33</sup> Thus, the statute confers jurisdiction over actions based on violations of legal norms that apply universally. If the concern underlying the presumption against extraterritoriality is the impropriety of the United States purporting to “rule the world,” the concern seems inapplicable to a statute that applies only to conduct that is prohibited by universally applicable international law. Some commentators have argued, on this ground, that the ATS does not even constitute an example of the United States exercising jurisdiction to prescribe law.<sup>34</sup> In an action under the ATS, these commentators have argued, the U.S. courts are not prescribing rules; they are merely applying rules of international law that independently govern the conduct in question.

The Court did not provide a clear answer to this argument either in *Sosa* or in *Kiobel*. In prior work, I have explained why recognition of a private cause of action for violation of the sorts of customary international law norms involved in cases like *Kiobel* does constitute an exercise by the United States of jurisdiction to prescribe. While it is true that in all cases brought under the ATS, the defendant’s conduct will be prohibited by independently applicable norms, the plaintiff’s remedy is not conferred by such law.<sup>35</sup> Even though international law imposed the substantive obligation that was violated by the defendant in such well-known ATS cases as *Filartiga v. Pena-Irala*,<sup>36</sup> international law did not entitle the plaintiff to monetary relief from the individual defendant. International law generally provides for the responsibility of the defendant’s state for the violation and sometimes provides for the personal criminal liability of the defendant, but it does not provide for personal civil liability of the defendant to the injured individual. For the defendant to be personally liable in damages, international law must be supplemented by domestic law. In cases brought under the ATS, the domestic law that provides for the personal damage liability of the defendant is the federal common law that establishes the cause of action, as recognized in *Sosa*.<sup>37</sup>

If federal law is supplementing international law by establishing a private damage remedy, the United States is exercising its jurisdiction to prescribe law. It might be argued that the fact that the United States is not actually imposing any new obligations on the defendant should nevertheless have led the Court in *Kiobel* to apply the presumption against extraterritoriality with less force. After all, the concern about the United States purporting to “rule the world” is implicated *to a lesser extent* where the United States is merely

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33 *Id.* at 1665.

34 See, e.g., Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT’L L. 1329, 1331–32 (2013); William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT’L L.J. ONLINE 35, 37 (2010); William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1603 (2014).

35 Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1504, 1547 (2011).

36 630 F.2d 876 (2d Cir. 1980).

37 See Vázquez, *supra* note 35, at 1504 & n.40.

attaching a remedy to an internationally prescribed norm.<sup>38</sup> Cutting against this position, however, is the notion that the secondary rules of international law (those prescribing remedies for violation of primary rules) are carefully calibrated. A nation that unilaterally adds a remedy to those available under international law upsets the careful balance. Thus, when the United States defended a contemplated use of force in Syria on the ground that the Syrian regime had violated international law by using chemical weapons on its own people,<sup>39</sup> other nations responded that a nation's violation of international law—even one as important as the prohibition of the use of chemical weapons—does not entitle another state to use force against it in the absence of Security Council authorization (except in limited circumstances, such as in self-defense).<sup>40</sup> Although it is true that a nation's creation of a remedy for a violation of international law is a lesser exercise of jurisdiction to prescribe than the imposition of a substantive obligation, it is nevertheless an exercise of prescriptive jurisdiction that might legitimately trigger foreign objections. That the defendant's conduct was not prescribed unilaterally by the United States does not mean that recognition of a federal common law damage remedy is not an exercise of jurisdiction to prescribe.

That the Court found the presumption against extraterritoriality to be applicable in determining the geographical scope of the federal common law cause of action recognized in *Sosa*, rather than the "strictly jurisdictional" statute that Congress enacted, raises some interesting questions about the jurisdictional statute's applicability to nonfederal causes of action where the plaintiff seeks relief for injuries caused by violations of customary international law taking place abroad. In discussing this issue, it is useful to distinguish three possible types of claims.

First, assume that a state (say, California) recognizes a private cause of action for violations of customary international law occurring abroad and an alien seeks damages for such a violation. Would there be federal jurisdiction under the ATS, given that it is a suit by an alien for a tort in violation of customary international law? The reasons that led Congress to confer jurisdiction on the federal courts for such claims, where the cause of action was based on the general law, would seem equally applicable where the cause of action is based on state law. There might be an issue whether Article III permits a grant of jurisdiction over such a case. There is no substantial Arti-

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38 See Vázquez, *supra* note 21, at 542.

39 Oona A. Hathaway & Scott J. Shapiro, *On Syria, a U.N. Vote Isn't Optional*, N.Y. TIMES, Sept. 4, 2013, at A23; Press Release, The White House, Statement by the President on Syria (Aug. 31, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/31/statement-president-syria>.

40 See Jillian Blake & Aqsa Mahmud, *A Legal 'Red Line'?: Syria and the Use of Chemical Weapons in Civil Conflict*, 61 UCLA L. REV. DISCOURSE 244, 257 (2013); David Davenport, *International Law? U.S. Military Action in Syria Is Actually Prohibited by the U.N. Charter*, FORBES (Sept. 11, 2013, 8:44 A.M.), <http://www.forbes.com/sites/daviddavenport/2013/09/11/international-law-u-s-military-action-is-actually-prohibited-by-the-un-charter/>; Curtis Doebbler, *The Use of Force Against the People of Syria Will Be a Serious Violation of International Law*, JURIST (Sept. 8, 2013), <http://jurist.org/forum/2013/09/curtis-doebbler-force-syria.php>.

cle III question where federal common law creates the cause of action.<sup>41</sup> There would be no Article III problem even if the cause of action was based on state law if the underlying substantive law (in this case, customary international law) were deemed to have the status of federal law for Article III purposes. That customary international law does have such status is the “modern position,”<sup>42</sup> but this position has been questioned by some scholars.<sup>43</sup> Even if customary international law were not considered federal law for Article III purposes, Article III jurisdiction could be based on one or more theories of protective jurisdiction.<sup>44</sup> These questions are beyond the scope of this Article.

In an earlier article, I suggested that state causes of action based on violations of customary international law for which there is no federal cause of action for the reasons given in *Sosa* are very likely preempted.<sup>45</sup>

In limiting the federal right of action to [a] subset of customary international law norms, the Court in *Sosa* expressed concern about the foreign relations sensitivities of extending the right of action to less-well-established norms and the potential interference with the “discretion of the Legislative and Executive Branches in managing foreign affairs” that could result. These same structural concerns would result from the recognition and enforcement of State law rights of action.<sup>46</sup>

This would be true at least when the violation was committed by a foreign or federal official.<sup>47</sup> *Kiobel* relied on similar concerns in holding that the federal cause of action does not apply extraterritorially, so perhaps the Court would conclude that state causes of action for violations of customary international law occurring abroad are preempted as well. The presumption against extraterritoriality has until now been regarded as applicable to federal statutes, not state law. But perhaps the Court will extend the “presumption” to state laws based on its purpose of avoiding foreign relations problems. If so,

41 See Vázquez, *supra* note 21, at 532.

42 See Vázquez, *supra* note 35, at 1515.

43 See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (questioning the “modern position” which is reflected in the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987)); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555, 577, 584–85 (2002) (positing that customary international law should be regarded as a form of non-preemptive federal law); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 370 (2002) (arguing that customary international law should continue to be understood as general law). These perspectives and others are discussed in Vázquez, *supra* note 35.

44 On protective jurisdiction, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 764–72 (6th ed. 2009). See generally Carlos M. Vázquez, *The Federal “Claim” in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CAL. L. REV. 1731, 1733 (2007) (defending some theories of protective jurisdiction).

45 See Vázquez, *supra* note 35, at 1626–27.

46 *Id.* (footnote omitted) (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

47 *Id.* at 1627.

the presumption would presumably not be rebuttable by clear legislative intent to reach extraterritorial conduct, as state legislatures have no greater claim to a power to cause foreign relations problems than do state (or federal) courts. As applied to state legislation (or common law), therefore, the presumption would not function as a presumption but rather as a flat limit on state legislative power, akin to the limit recognized in *Zschernig v. Miller* now known as the dormant foreign relations doctrine.<sup>48</sup> If the Court does not recognize this federal limit on the scope of state legislative power, and if Article III concerns were overcome, then the ATS should be construed to confer federal jurisdiction over state causes of action for extraterritorial violations of customary international law.

A harder question would be posed by a state tort claim based on extraterritorial conduct where the alleged conduct would make out a violation of customary international law. Should the ATS be construed to cover such a case, even if the state cause of action does not require a showing that the conduct violates customary international law? Ordinary tort claims based on conduct abroad are frequently brought in the state and federal courts.<sup>49</sup> In the absence of diversity, the threshold Article III problem would be more difficult to overcome in this context, although conceivably Article III jurisdiction could be based on a protective jurisdiction theory. The fact that the suit concerns an alien might justify federal concern, but concern about bias to foreigners is typically the basis for conferral of diversity jurisdiction, and Article III diversity jurisdiction does not permit federal jurisdiction on the basis of party alignment when the suit is between aliens. In any event, the fact that such a case does not require the court “to hold that a foreign government or its agent has transgressed [the] limits”<sup>50</sup> of international law weakens the case for federal jurisdiction. For the same reason, the case for regarding the state cause of action as preempted is weaker as well.

What about a suit raising a *foreign* cause of action for a violation of customary international law?<sup>51</sup> Could such a suit be brought in federal court under the ATS, or would it have to be brought in state court? Clearly, there is no obstacle to a state (or a federal court with jurisdiction, for example if the parties are diverse) entertaining an action based on the law of the place where the conduct took place. Indeed, applying foreign law is usually regarded as a means of deferring to foreign interests and avoiding interna-

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48 See *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (holding that an Oregon statute defining the property rights of foreigners was an unacceptable “intrusion by the State into the field of foreign affairs”). See generally Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259 (2001) (defending a version of the dormant foreign affairs doctrine).

49 See, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804 (1986).

50 *Sosa*, 542 U.S. at 727.

51 The idea of such a suit is not far-fetched. In *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1582 (2013), the D.C. Circuit held that Iranian law conferred a cause of action for violation of a treaty between the United States and Iran, even though the court had earlier concluded that the treaty did not confer privately enforceable rights as a matter of U.S. law. 539 F.3d 485, 491 (D.C. Cir. 2008).

tional friction. But, if the foreign cause of action incorporates international law, the suit would require the court to declare the defendant, possibly a foreign official, to have breached international law. Such a judicial declaration is no less likely to cause a foreign relations problem because the cause of action was created by foreign law. Perhaps the act of state doctrine would require dismissal of some such cases.<sup>52</sup> If not, there is a substantial reason for wanting these cases in federal rather than state courts. (Again, Article III concerns would have to be overcome, either on the theory that customary international law is federal law even when it is incorporated into a foreign cause of action or on a theory of protective jurisdiction.)

In sum, the presumption against extraterritoriality would appear to be categorically inapplicable to some types of statutes, either because the background assumption underlying the presumption against extraterritoriality—that Congress generally legislates with domestic conditions in mind—is unlikely to be true, or because application of the presumption would frustrate, rather than advance, the presumption’s purpose of avoiding international friction. For both reasons, the presumption should be regarded as inapplicable to statutes conferring jurisdiction on the federal courts. The Court in *Kiobel* appears to have recognized the inapplicability of the presumption against extraterritoriality to jurisdictional statutes. The Court did not hold that the ATS’s jurisdictional grant did not extend to cases based on foreign conduct. The Court instead applied the presumption to determine the geographical scope of the federal common law cause of action it had recognized in *Sosa*, holding that a federal cause of action exists only for claims having sufficient contacts with the United States. If so, then the ATS may continue to confer jurisdiction over some cases by aliens for violations of customary international law occurring abroad.

## II. REBUTTING (OR OVERCOMING) THE PRESUMPTION

Even if the presumption is applicable, it does not always require the conclusion that a statute does not apply extraterritorially. When a court uses the presumption to interpret a statute, it will conclude that the statute does not apply extraterritorially in the absence of sufficient evidence that the statute was meant to apply extraterritorially. In other words, the presumption can be rebutted through evidence of a congressional intent to extend the statute beyond the nation’s borders. If Congress has reasons for extending the statute’s coverage beyond our borders and determines that those reasons outweigh the potential foreign policy problems that might result from

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52 See *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 406–09 (1990) (“Act of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. . . . The act of state doctrine . . . requires that, in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.”). The act of state doctrine was held to be inapplicable in *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075 (D.C. Cir. 2012).

extraterritorial application of the statute, the courts will give effect to the congressional intent.

The Court's 1991 decision in *Aramco* appeared to treat the presumption as a super-strong clear statement rule. The Court seemed to insist on very clear indication of extraterritorial applicability in the text of the statute.<sup>53</sup> A clear statement rule sometimes operates to frustrate rather than to ascertain Congress's intent, but such an approach might be defensible as a mechanism for ensuring that Congress deliberates on the foreign policy considerations that underlie the presumption. In any event, the Court in later cases retreated from *Aramco*'s treatment of the presumption as a clear statement rule.<sup>54</sup> In *Morrison*, the Court denied that the presumption operates as a clear statement rule, recognizing that "context can be consulted as well," albeit as a "source[ ] of statutory meaning" that helps to give "'the most faithful reading of the text.'"<sup>55</sup>

Because the presumption has traditionally been framed as a technique to interpret statutes, determining whether the presumption has been rebutted poses particular challenges when it is being applied, as it was in *Kiobel*, to determine the geographical scope of a federal common law rule. A presumption grounded in the assumption that Congress ordinarily is concerned only with domestic matters would appear to be inapplicable to determining the geographic scope of a rule created by the courts rather than by Congress. The presumption also seems inapposite to the extent that it seeks to "preserv[e] a stable background against which Congress can legislate with predictable effects."<sup>56</sup>

Indeed, the Court's discussion of this issue in *Morrison* might have led it to find the presumption inapplicable in *Kiobel*. The concurring Justices in *Morrison* argued that it was anomalous to apply the presumption against extraterritoriality to causes of action under § 10(b) and Rule 10b-5, since the cause of action was created by the courts as a matter of federal common law, not by Congress.<sup>57</sup> The Court responded to this argument not by denying the force of its logic but by disputing its premise. The issue in *Morrison*, the Court said, was not the scope of the remedy but the scope of the underlying conduct-regulating rule:

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53 EEOC v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 258 (1991); see *id.* at 261 (Marshall, J., dissenting) (characterizing the majority as having adopted a clear statement rule); William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 86 (1998) ("[*Aramco*] suggested that only a 'clear statement' in the language of the statute itself would be sufficient to overcome the presumption."); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 184 (noting that *Aramco* reflects "strong clear statement principles" and "establishes a strong preference that can be overcome only by unequivocal language").

54 See Dodge, *supra* note 53, at 97.

55 *Morrison v. Nat'l Austral. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (quoting *id.* at 2892 (Stevens, J., concurring)).

56 *Id.* at 2881.

57 *Id.* at 2890, 2892 (Stevens, J., concurring).

It is doubtless true that, because the implied private cause of action under § 10(b) and Rule 10b-5 is a thing of our own creation, we have also defined its contours. But when it comes to “the scope of [the] conduct prohibited by [Rule 10b-5 and] § 10(b), the text of the statute controls our decision.”<sup>58</sup>

Thus, the Court did not disagree with the assertion that the presumption has no role to play in determining the geographic scope of a judicially created remedy, but it concluded that the issue before it was the geographic scope of the “conduct prohibited by [Rule 10b-5 and] § 10(b).”<sup>59</sup> Because the federal common law cause of action recognized in *Sosa* is “a thing of [the courts’] own creation,” it would seem to follow from *Morrison*’s reasoning that the Court can itself “define[ ] its contours” without regard to the presumption against extraterritoriality.<sup>60</sup> Nevertheless, without addressing the point, the Court in *Kiobel* declined to go down that road.

So how does one rebut the presumption against extraterritoriality when the question is the extraterritorial scope of a rule of federal common law? If one applied a clear statement rule of the sort the Court seemed to endorse in *Aramco*, one would presumably conclude that the presumption can virtually never be rebutted. There will rarely be explicit statutory language about the geographical scope of a legal rule if the rule was created by the courts rather than the legislature. The one exception that comes to mind is where Congress instructs the courts to formulate federal common law on a given topic, as the Court held that Congress had done when it enacted the Taft-Hartley Act.<sup>61</sup> The ATS can hardly be described as an express instruction to the courts to develop a federal common law cause of action for violations of customary international law (as discussed below, the Court’s rationale for recognizing such a cause of action in *Sosa* was very different), yet the Court in *Kiobel* repeatedly referred to the possibility of “rebutting” or “overcoming” the presumption.<sup>62</sup>

As noted, the Court in *Morrison* retreated from the *Aramco* “clear statement” approach to the presumption, stating that “[a]ssuredly context can be consulted as well [as text].”<sup>63</sup> The Court in *Morrison* contemplated that context would be taken into account insofar as it helps identify “‘the most faithful reading’ of the text,”<sup>64</sup> a use of context that would be difficult to implement with respect to a judicially created cause of action. But, in *Kiobel*, the majority took context into account in a different way. Quoting the “context” language from *Morrison*, the Court asked whether the ATS’s “historical

58 *Id.* at 2881 n.5 (majority opinion) (alterations in original) (citation omitted) (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 173 (1994)).

59 *Id.* (alteration in original).

60 *Id.*

61 *See Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957).

62 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1665–66, 1669 (2013).

63 *Morrison*, 130 S. Ct. at 2883.

64 *Id.* (quoting *id.* at 2892 (Stevens, J., concurring)).

background . . . overc[a]me” the presumption against extraterritoriality.<sup>65</sup> It discussed the historical incidents that very likely prompted the enactment of the ATS, asking whether those incidents revealed a congressional concern over disputes based on conduct that took place abroad. “Two notorious episodes involving violations of the law of nations . . . shortly before passage of the ATS” occurred within U.S. territory and thus, in the Court’s view, did not suggest a congressional intent to cover foreign conduct.<sup>66</sup> The third type of violation of customary international law that was very likely on Congress’s mind was piracy, which the majority distinguished because it generally takes place on the high seas rather than in the territory of a foreign state. Justice Breyer persuasively responded that piracy typically occurs on a foreign ship, which is considered to be within the jurisdiction of the flag state<sup>67</sup>—a point to which the majority did not respond. The Court cited *Morrison*’s statement that “‘when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms,’”<sup>68</sup> and apparently extended that interpretive principle to inferences from the statute’s historical background, leading it to conclude (apparently) that the cause of action under the ATS extends to conduct on the high seas but not on foreign territory.<sup>69</sup>

The Court also took into account an opinion of Attorney General Bradford from 1795, apparently as evidence of what the First Congress meant when it enacted the ATS.<sup>70</sup> The Court noted the respondents’ argument that the Bradford opinion was distinguishable because it involved violations of a treaty and “the applicable treaty had extraterritorial reach.”<sup>71</sup> The fact that the treaty had extraterritorial reach, however, does not distinguish it from the substantive rules of customary international law that were the basis of such cases as *Filartiga* and *Kiobel*, which also have universal reach. Notably, the Court’s dismissal of the Bradford opinion did not rely on the fact that the treaty had extraterritorial reach. The Court instead found the Bradford opinion to be insufficient to “counter the weighty concerns underlying the presumption against extraterritoriality” because the opinion “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

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65 *Kiobel*, 133 S. Ct. at 1666.

66 *Id.*

67 *Id.* at 1672 (Breyer, J., concurring).

68 *Id.* at 1667 (majority opinion) (quoting *Morrison*, 130 S. Ct. at 2883).

69 Other language in the opinion, however, suggests that the existence of a cause of action for violations of customary international law occurring on the high seas may be limited to piracy. See *id.* at 1667 (stating that “pirates may well be a category unto themselves”).

70 *Id.* at 1668 (noting petitioners’ argument that the Bradford opinion “confirm[s] that ‘the Founding generation understood the ATS to apply to law of nations violations committed on the territory of a foreign sovereign’” (quoting Petitioners’ Supplemental Opening Brief at 33, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491))).

71 *Id.*



Britain.”<sup>72</sup> The Court thus seems to have found the presumption to have been overcome with respect to causes of action against U.S. citizens for violations of treaties.

The Court’s analysis in *Kiobel* shows that the presumption can be rebutted (at least with respect to federal common law rules) through analysis of context, including the historical background that led the Congress to enact a related statute. But the conclusions the Court drew from the ATS’s context seem difficult to square with the Court’s analysis in *Sosa*, to which the Court in *Kiobel* purported to be faithful. As discussed in Part I, the Court in *Kiobel* recognized the inapplicability of the presumption to the ATS *qua* jurisdictional statute and applied the presumption against extraterritoriality instead to determine the geographical scope of the federal common law cause of action recognized in *Sosa*. The *Sosa* Court regarded the federal common law cause of action as a translation into post-*Erie* categories of the pre-*Erie* assumption that a cause of action existed under the general law as it was understood at the time of the ATS’s enactment. Searching for a congressional intent to *extend* the law extraterritorially seems inconsistent with the *Sosa* Court’s reasons for recognizing a federal common law cause of action, as that decision was based on conclusions about the Founding generation’s understanding about the “ambient law of the era.”<sup>73</sup> The general common law was understood by the Founding generation to be universal in its application.<sup>74</sup> *Sosa*’s rationale for recognizing a federal common law cause of action thus supports the conclusion that the cause of action is not territorially limited.

Indeed, the majority opinion in *Sosa* appears to assume that the federal common law cause of action it recognized extended to extraterritorial cases such as *Filartiga*. In recognizing the need for caution in recognizing a cause of action for newly developed norms of customary international law, the Court said:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on *the power of foreign governments over their own citizens*, and to hold that a foreign government or its agent has transgressed those limits.<sup>75</sup>

The Court obviously had *Filartiga*-style extraterritorial cases in mind and urged caution because such cases pose potential foreign relations problems. But the Court in *Sosa* plainly contemplated that a cause of action would exist for some such claims. The Court in *Kiobel* relied on the very same concerns to conclude that the statute is not extraterritorial in its scope.

In sum, rebutting the presumption against extraterritoriality usually requires evidence of a congressional intent to extend a statute to foreign

<sup>72</sup> *Id.*

<sup>73</sup> *Sosa*, 542 U.S. at 714.

<sup>74</sup> See Anthony J. Bellia Jr. & Bradford R. Clark, *General Law in Federal Court*, 54 WM. & MARY L. REV. 655, 666 (2013) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*67).

<sup>75</sup> *Sosa*, 542 U.S. at 727 (emphasis added).

lands. Such congressional intent will usually be absent when the question is the extraterritorial reach of a judicially created cause of action. The Court in *Kiobel* entertained the possibility that the ATS's context, including its historical background, might reveal a legislative intent that the cause of action apply extraterritorially by suggesting that Congress had foreign disputes in mind when it passed the law. Drawing inferences from context regarding Congress's intent in enacting the ATS is difficult because Congress did not intend to create a cause of action; it intended instead to permit some pre-existing causes of action to be brought in federal rather than state court. Congress assumed that the cause of action for breaches of certain norms of international law was provided by the general common law. Seeking to translate the Framers' assumption into post-*Erie* terms, the Court in *Sosa* concluded that causes of action for breaches of analogous norms of customary international law could be recognized today as federal common law causes of action. A modern court seeking to draw inferences about Congress's understanding of the geographical scope of the causes of action that would be brought in federal court under the ATS would presumably conclude that the cause of action was not understood to be geographically limited, as both the law of nations (the source of the defendant's obligation) and the general common law (the source of the plaintiff's cause of action) were both understood to be universal.

A statute's "historical background" might alternatively help us understand the appropriate geographical scope of a related federal common law rule by revealing Congress's purposes in enacting the statute. A "purposive" approach to the rebutting or overcoming of the presumption is in tension with the approach to statutory interpretation that at least some of the Justices in the majority in *Kiobel*—including importantly the author of *Morrison*—favor.<sup>76</sup> But it is difficult to escape the conclusion that the Court in *Kiobel* effectively adopted such an approach when it considered whether the statute's "historical background" overcame the presumption. The Court looked at the incidents that may have led to the enactment of the ATS to determine whether Congress had foreign disputes in mind when it enacted the ATS. To ask what sorts of disputes Congress had in mind in enacting the statute is an indirect way to ask what Congress's purposes were in enacting the statute.<sup>77</sup>

There is little direct evidence of Congress's purpose in enacting the ATS. Congress's purposes must be inferred from the statute's text and the contemporaneous incidents that the Court considered in *Kiobel*. At a broad level, Congress surely meant to protect the federal interest in avoiding foreign rela-

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<sup>76</sup> See generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997) (discussing Justice Scalia's approach to legal interpretation).

<sup>77</sup> By recognizing that the presumption may be rebutted by inferences from Congress's purposes in enacting the statute, as reflected in the statute's historical background, the Court blurred the distinction between the question of the presumption's applicability (the focus of Part I) and the question whether the presumption has been rebutted or overcome. The distinction is clearer to the extent the rebutting of the presumption is based on evidence that Congress specifically intended the statute to apply extraterritorially.

tions problems by giving jurisdiction to federal courts, which were assumed to be more likely than state courts to resolve the dispute in accordance with the law and with appropriate sensitivity to those federal interests. But this broad interest underlay a number of grants of jurisdiction. Congress must have had a more specific purpose in conferring jurisdiction on the federal courts in suits by an alien for a tort in violation of the law of nations.

The majority in *Kiobel* inferred from the “two notorious episodes” that preceded the statute’s enactment, as well as the two cases in which the ATS was invoked shortly after its passage, that the statute was designed to address the “embarrass[ment]” caused by the United States’ “potential inability to provide judicial relief to foreign officials injured in the United States.”<sup>78</sup> “Such offenses against ambassadors violated the law of nations, ‘and if not adequately redressed could rise to an issue of war.’”<sup>79</sup> That Congress’s only concern was to redress injuries caused on U.S. territory is difficult to square with the fact, acknowledged by the Court, that Congress also had piracy in mind in enacting the ATS. But even the Court’s analysis of Congress’s reasons for being concerned about assaults on ambassadors fails to support its conclusion that Congress was only interested in such assaults if they occurred on U.S. territory. The Court in *Kiobel* noted that Congress wished to provide redress when failure to provide it would “rise to an issue of war.”<sup>80</sup> Failure to provide redress would have had that effect not only when it occurred on U.S. territory, but also when caused by U.S. citizens outside U.S. territory.<sup>81</sup> International law principles of attribution today would similarly hold the United States responsible for an unremedied injury not only if it occurred on U.S. territory, but also if it was caused by a U.S. citizen acting outside the United States.<sup>82</sup> Indeed, the United States would be responsible under international law for an unremedied injury caused by a foreigner abroad if the injury was caused at the behest of U.S. officials.<sup>83</sup> This was the situation in *Sosa*, where the injury was caused by a Mexican citizen on Mexican soil at the behest of U.S. officials.<sup>84</sup> The Court’s own search for Congress’s purpose in enacting the ATS, as reflected in the statute’s “historical background,” should thus have led the Court to conclude that the presumption was overcome with respect to this further category of claim.

In sum, the Court should have concluded—based on its own assessment of Congress’s purpose of avoiding embarrassment and possible war resulting from the failure to remedy injuries that would otherwise be attributed to the United States—that the *Sosa* cause of action extends to some disputes not based on domestic conduct. Reading the ATS in light of this purpose would have yielded the conclusion that the cause of action extends to injuries

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78 *Kiobel*, 133 S. Ct. at 1666, 1668 (majority opinion).

79 *Id.* at 1668 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004)).

80 *Id.* (internal quotation marks omitted).

81 See Vázquez, *supra* note 21, at 539.

82 *Id.*

83 *Id.*

84 *Sosa*, 542 U.S. at 698.

caused by foreign conduct if the injury produced a violation of international law and was perpetrated by U.S. citizens or at the behest of U.S. officials, as well as when the injuries occurred on U.S. territory. A purposive approach should have led the Court to find the presumption against extraterritoriality to have been rebutted or overcome with respect to violations of the law of nations perpetrated by or at the behest of U.S. nationals, just as the majority concluded that the presumption was overcome with respect to treaty violations by U.S. nationals. So read, the statute would have been broader than the majority suggested but narrower than Justice Breyer would have read it. I argue in Part IV that *Kiobel* leaves open this possibility.

### III. SATISFYING THE PRESUMPTION

When the presumption against extraterritoriality is applicable and not rebutted or overcome, courts read the statute not to apply “extraterritorially.” As the Court put it (not entirely accurately) in *Morrison*, “[w]hen a statute gives no clear indication of an extraterritorial application, it has none.”<sup>85</sup> Determining whether a statute, so construed, reaches a particular transaction or occurrence will not always be straightforward. There will of course be *some* easy cases. If all of the relevant connections are with the United States, the statute applies; if all of the relevant connections are with other nations, the statute does not apply. But, in an increasingly interconnected world, there will frequently be cases with connections both to the United States and to other countries (or other places outside the United States). Determining whether the statute, read in light of the presumption against extraterritoriality, applies to the particular case may be understood as an inquiry into whether the requirements of the presumption are satisfied in the particular case.<sup>86</sup>

In determining whether a statute, read in light of the presumption against extraterritoriality, reaches a particular case, the first question that arises concerns the sorts of connections to the United States that are relevant. One possibility is that the presumption is satisfied if the effects of the conduct are felt in the United States, or if the conduct was intended to produce effects on U.S. territory. Some scholars have argued that the presumption, properly understood, should permit the application of statutes to conduct that has effects in the United States.<sup>87</sup> Another possibility is that the

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85 *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2873 (2010). The statement is inaccurate insofar as the Court recognized that a non-extraterritorial statute can apply to cases based in part on foreign conduct, such as cases alleging foreign fraud in connection with the sale of a security on a U.S. exchange. See *infra* text accompanying notes 93–100.

86 Strictly speaking, it is an inquiry into whether the conditions for the statute’s applicability are satisfied. But, since these conditions are dictated by the presumption against extraterritoriality, we might fairly say that a court is determining whether the requirements of the presumption are satisfied.

87 See, e.g., Dodge, *supra* note 53, at 90 (“[U]nder the presumption, acts of Congress should presumptively apply only to conduct that causes *effects* within the United States regardless of where that conduct occurs.”).

statute applies if the defendant or plaintiff (or both) are nationals of the United States. With respect to the ATS, Justice Breyer favored the latter approach.<sup>88</sup>

Other scholars have argued persuasively that only the location of the conduct, as distinguished from that of the conduct's effects or the nationality of the parties, is relevant:

As traditionally used by judges and commentators, . . . "territoriality" referred to acts occurring within the nation and was meant to exclude assertions of authority based on nationality or effects. . . . The presumption against extraterritoriality, in other words, refers to a presumption that laws regulate only acts occurring within the United States.<sup>89</sup>

Indeed, it is the presumption's exclusive focus on the place of the relevant conduct that distinguishes it from other techniques for determining the geographic scope of statutes.

That the Court in *Kiobel* understood the presumption to focus on the place of the conduct underlying the claim is supported by the majority's consistent references to the place of conduct as the focus of the presumption.<sup>90</sup> Justice Breyer certainly read the majority to understand the presumption as barring application of the statute on the basis of the nationality of the defendant. Justice Breyer would have recognized a cause of action where the defendant was a U.S. national;<sup>91</sup> his understanding that the majority's reasoning disallowed that conclusion was one of the reasons he declined to join that opinion.<sup>92</sup>

Narrowing the focus to the location of the conduct underlying the claim makes it possible to dispose of many cases. Thus, where all of the conduct underlying the claim occurred in the United States, the statute applies, even if all of the parties are foreign and even if all of the effects were felt abroad. Conversely, where all of the conduct underlying the claim occurred outside the United States (whether in other countries or on the high seas), the statute does not apply, even if all of the parties are U.S. nationals and all of the effects were felt (and were intended to be felt) in the United States.

More difficult are the cases in which some of the conduct underlying the claim took place in the United States and some took place outside the United States. The majority did not address this question. The Court in *Morrison* addressed whether the fact that some relevant conduct took place on U.S. territory sufficed to satisfy the presumption, and it concluded that it did not.<sup>93</sup> It reasoned that "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some*

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88 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671 (2013) (Breyer, J., concurring).

89 Kramer, *supra* note 53, at 181.

90 *Kiobel*, 133 S. Ct. at 1662, 1664–69 (majority opinion).

91 *Id.* at 1671 (Breyer, J., concurring).

92 *Id.*

93 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

domestic activity is involved in the case.”<sup>94</sup> The Court held instead that the presumption is satisfied when the conduct that “was the ‘focus’ of congressional concern,”<sup>95</sup> or the conduct “that the statute seeks to ‘regulate’”<sup>96</sup> or to “‘protec[t]’”<sup>97</sup> took place on U.S. territory. The statute before the Court in *Morrison* punished deceptive conduct “‘in connection with the purchase or sale of any security.’”<sup>98</sup> According to the Court, it was the purchase and sale of the securities that was the “object[ ] of the statute’s solicitude”—the transaction that the statute sought to “regulate” and “protect.”<sup>99</sup> Thus, the Court concluded, it was the purchase or sale of the security that had to have occurred in the United States; that some of the deceptive conduct took place in the United States does not warrant application of the statute.<sup>100</sup>

The Court’s holding in *Morrison* that the purchase or sale of the security and not the deceptive conduct was Congress’s “focus” is not self-evident. It is of course true, as the Court noted, that “[s]ection 10(b) does not punish deceptive conduct, but only deceptive conduct ‘in connection with the purchase or sale of [certain specified] securities.’”<sup>101</sup> This does mean that deceptive conduct not in connection with purchases or sales of securities is not prohibited. But it is equally true that sales or purchases of securities without deceptive conduct are not prohibited. It would seem that the deceptive conduct and the purchase or sale of the security were both foci of congressional concern. Indeed, if the presumption against extraterritoriality focuses on the location of the relevant conduct rather than its effects, it would seem to make more sense to focus on the conduct prohibited by the statute (in this case, the deceptive practices) rather than the object of the prohibited conduct (in this case the sale or purchase of the security), as the latter seems more akin to the effect of the conduct rather than the conduct itself. The Court’s focus on the sale or purchase does seem consistent with the traditional *lex loci delicti* test, under which the law applicable to a claim was that of the place of the last event necessary to give rise to liability.<sup>102</sup> Since deceptive practices without a subsequent sale or purchase do not give rise to liability, the “last event” necessary to give rise to liability would be the sale or purchase. Although the Court in *Morrison* did not cite the much-maligned first *Restatement of the Law of Conflict of Laws*, its holding lends credence to Larry Kramer’s claim that the Court’s new emphasis on the pre-

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94 *Id.*

95 *Id.* (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 255 (1991)).

96 *Id.* (quoting *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971)).

97 *Id.* (quoting *Superintendent of Ins.*, 404 U.S. at 10).

98 *Id.* (quoting 15 U.S.C. § 78j(b) (2006)).

99 *Id.*

100 *Id.*

101 *Id.* (quoting 15 U.S.C. § 78j(b)).

102 See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 (1934) (“The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”).

sumption against extraterritoriality is a throwback to the days when Professor Beale's theories prevailed.<sup>103</sup>

Be that as it may, Justice Alito's discussion of what it would take to satisfy the presumption for causes of action under the ATS would strengthen the presumption to an extent that seems incompatible with *Morrison's* reasoning or result. Justice Alito quoted *Morrison's* "craven watchdog" language and purported to apply its analysis, under which the presumption is satisfied "only if the event or relationship that was 'the "focus" of congressional concern' under the relevant statute takes place within the United States."<sup>104</sup> He then cited *Sosa* as having concluded that Congress's concern when it enacted the ATS was "focus[ed]" on "the 'three principal offenses against the law of nations' that had been identified by Blackstone: violation of safe conducts, infringement of the rights of ambassadors, and piracy."<sup>105</sup> Because the Court in *Sosa* held that a cause of action should not be recognized "'for violations of any international law norm with less definite content and acceptance among civilized nations than [these] historical paradigms,'" Justice Alito concluded that the presumption would not be satisfied unless all of the conduct sufficient to meet the *Sosa* test took place in the United States.<sup>106</sup>

Justice Alito's conclusion does not follow from the *Morrison* analysis. *Morrison* denied that all of the relevant conduct had to have taken place in the United States, lest the presumption be transformed into a "craven watchdog."<sup>107</sup> It concluded that the presumption would be satisfied if particular acts took place in the United States, even if some acts essential to the claim took place abroad.<sup>108</sup> Justice Alito, on the other hand, understands "the 'focus' of congressional concern" to encompass *all* of the acts necessary to make out a claim.<sup>109</sup> This was not the rule even under Professor Beale's approach.<sup>110</sup> If every state adopted Justice Alito's approach, injuries caused by conduct spanning more than one country would never be covered by *any* nation's law. Justice Alito goes well beyond what is necessary to prevent the presumption from becoming a "craven watchdog." Indeed, under Justice Alito's approach, it would be the statute that Congress passed that would warrant that epithet. The fact that only Justice Thomas joined Justice Alito's concurrence suggests that a majority of the Court would not go that far.

103 See generally Kramer, *supra* note 53 (arguing that the Supreme Court revived an anachronism by adopting the presumption against extraterritoriality).

104 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1670 (2013) (Alito, J., concurring) (quoting *EEOC v. Arabian Am. Oil Co. (Aramco)*, 499 U.S. 244, 255 (1991)).

105 *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–24 (2004)).

106 *Id.* (quoting *Sosa*, 542 U.S. at 732).

107 *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2884 (2010).

108 *Id.*

109 *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring).

110 Under Professor Beale's approach, as reflected in the original *Restatement of Conflict of Laws*, the applicable law in tort cases was that of the state where the injury occurred, even if all of the conduct leading up to that injury occurred in another state. See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377 (1934). For a vivid example of this approach, see *Ala. G.S.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

If one recognizes that the cause of action extends to claims based on conduct that occurred partly in the United States and partly elsewhere, the courts will have to work out what conduct exactly has to have occurred in the United States, and *Morrison* tells them that they are to do so by determining the particular “focus of congressional concern.” As the foregoing discussion of *Morrison* suggests, doing so is no easy task. It is particularly difficult when, as with the ATS, Congress did not purport to be regulating primary conduct at all. One way to approach the identification of the “focus of [Congress’s] concern” when it passed a statute would be to ask what Congress’s purpose was in enacting the statute. But, as shown by our discussion in Part II, Congress’s purposes in enacting the ATS should have led the Court to conclude that the cause of action extends to some violations of the law of nations occurring entirely abroad, such as those perpetrated by U.S. nationals or at the behest of U.S. officials. The Court’s conclusion that the presumption was not rebutted would appear to rule out the conclusion that the statute extends to such cases. One way out of this difficulty would be to recognize that the presumption can be satisfied through connections to the United States other than the location of the conduct on which the suit is based. But such an approach would be a departure from the Court’s usual approach to the presumption and seems to deprive the presumption of its distinctiveness as an approach to determining the geographical scope of federal statutes. The Court’s reference to the possibility of “displacing” the presumption may offer an escape from this conundrum.

#### IV. DISPLACING THE PRESUMPTION

In the passage of its opinion that has generated the most commentary among scholars trying to ascertain what the Court decided and what it left open, the Court referred to the possibility of “displacing” the presumption against extraterritoriality. The Court wrote that, “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.”<sup>111</sup> What the Court meant by “displacing” the presumption is far from clear.

In the past, the Court has used the term “displace” in a variety of ways in describing what might be done with a presumption. Perhaps the clearest sense in which a presumption might be “displaced” is when the Court decides that statutes should no longer be interpreted through application of the presumption in question. Thus, in *Landgraf*, the Court wrote that “[t]he authorities we relied upon in *Bradley* lend further support to the conclusion that we did not intend to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment.”<sup>112</sup> Analogously, one might say that the presumption against extraterritoriality would be displaced if the Court decided that

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111 *Kiobel*, 133 S. Ct. at 1669 (majority opinion).

112 *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 (1994).



the geographical scope of federal statutes should henceforth be decided through application of a presumption in favor of extraterritoriality. More realistically, the Court might displace the presumption against extraterritoriality with an approach requiring that the geographical scope of federal statutes be decided by means of ordinary principles of interpretation, or by means of a “presumption against extrajurisdictionality.”<sup>113</sup> The Court would have “displaced” the presumption against extraterritoriality, in this sense of that term, if it had rejected the presumption wholesale. Although the Court in *Kiobel* did not reject the presumption wholesale, its use of the term “displace” suggests that it left open the possibility that the presumption might be inapplicable or overcome with respect to particular types of claims.

Justices Alito and Thomas understood the majority’s reference to “displacement” of the presumption to be addressed to the question whether the presumption has been satisfied in the particular case.<sup>114</sup> Justice Alito framed his concurrence as an elaboration of the “touch and concern” passage in the majority opinion, the passage that has been widely understood to describe the limitations of the majority’s holding in the case.<sup>115</sup> As discussed in Part III above, Justice Alito’s concurrence addressed how much of the conduct has to have taken place in the United States for a federal common law cause of action to exist in light of the presumption against extraterritoriality,<sup>116</sup> and he concluded, improbably, that *all* of the conduct necessary to make out a violation of a cognizable norm of international law must have taken place on U.S. soil (a position that seven Justices declined to endorse).<sup>117</sup> Clearly, therefore, Justice Alito and Thomas take the view that the only issue left open by the majority is the quantity of conduct in the United States necessary to satisfy the presumption in the context of the ATS.

Some aspects of the majority opinion support that interpretation. Perhaps most revealingly, following the “touch and concern” language, the majority opinion cited the pages of the *Morrison* opinion discussed in Part III, above, addressing how a court is to determine what conduct must take place in the United States in order to satisfy the presumption against extraterritoriality.<sup>118</sup> Additionally, the majority referred to claims touching and concerning “*the territory* of the United States,” thus suggesting that connections to the United States unrelated to territory are not relevant.<sup>119</sup> Indeed, the term “touch and concern” itself suggests a territorial focus, as it is a term of art in

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113 See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 351 (2010).

114 *Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring); see *supra* Part III.

115 *Kiobel*, 133 S. Ct. at 1670.

116 See *supra* notes 104–10 and accompanying text.

117 See *supra* note 109 and accompanying text.

118 *Kiobel*, 133 S. Ct. at 1669 (majority opinion).

119 *Id.* (emphasis added).

the law of real property, referring to a requirement for a covenant that “runs with the land.”<sup>120</sup>

Cutting against this interpretation, however, is the Court’s use of the term “displace.” That term seems inapt to describe the issue we have been calling the “satisfying” of the presumption. Indeed, displacing a presumption seems like the opposite of satisfying it. There are admittedly a number of cases indicating that a presumption can be “displaced” in a particular case through the introduction of sufficient evidence of the relevant kind. For example, in *Reno v. American-Arab Anti-Discrimination Committee*, the Court wrote that, to make out a selective prosecution claim, “a criminal defendant [must] introduce ‘clear evidence’ displacing the presumption that a prosecutor has acted lawfully.”<sup>121</sup> This case-specific approach to displacement might be thought analogous to the case-specific analysis the courts employ to determine whether the presumption has been satisfied. But the cases that use the term “displace” to refer to the amount of evidence that must be submitted in a particular case involve evidentiary presumptions, not interpretive presumptions. When the law presumes certain facts to be true, it requires the introduction of sufficient evidence to establish the contrary. Because what is being presumed is a fact that the litigants must prove in a case, it makes sense to say that a litigant displaces the presumption in a particular case by introducing sufficient evidence to the contrary.

An interpretive presumption is addressed to the legislature, not to the litigants. An interpretive presumption assumes that a statute means one thing unless the legislature supplies sufficient indication of its intent to enact the contrary. Thus, with respect to an interpretive presumption, the analogous use of the term “displace” would be to refer to the quantum of evidence of Congress’s intent necessary to support the disfavored interpretation. Indeed, individual justices, and lower courts more frequently, have used the term “displace,” with respect to an interpretive presumption, to refer to exactly that question.<sup>122</sup> This is, of course, one aspect of what we referred to

120 STEVEN H. GIFIS, *BARRON’S LAW DICTIONARY* 494 (3d ed. 1991) (“[I]n real property law, a requirement for a covenant which ‘runs with the land’ is that it touch and concern the land involved.”).

121 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (citation omitted); see *Clark v. Arizona*, 548 U.S. 735, 771 (2006) (“[A] State . . . must be able to deny a defendant the opportunity to displace the presumption of sanity more easily when addressing a different issue in the course of the criminal trial.”); *Scott v. Sandford*, 60 U.S. 393, 568 (1856) (“When, therefore, as in this case, the necessary averments as to citizenship are made on the record, and jurisdiction is assumed to exist, and the defendant comes by a plea to the jurisdiction to displace that presumption, he occupies, in my judgment, precisely the position described in [cited case].”).

122 See, e.g., *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 86 (1996) (Stevens, J., dissenting) (“*Hans* itself looked to see whether Congress had displaced the presumption that sovereign immunity obtains.”); *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 865 F.2d 566, 575 (3d Cir. 1989) (“[W]e find that the legislative history of the FCIA does not displace the *Bradley* presumption.”); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 (Ct. Cl. 1980) (per curiam) (“The [statutory] language, being so plainly all

above as the rebutting or overcoming of the presumption. I have not been able to find any examples of a court referring to the question whether the requirements of an interpretive presumption are *satisfied* as the “displacing” of the presumption. The plain meaning of the term “displace,” and the courts’ use of the term in the past in reference to presumptions, describe the conclusion that the presumption is *rebutted* or *overcome*, not that it is satisfied.

The Court may also have been using the term “displace” to refer to the possibility that the presumption is inapplicable to or overcome with respect to certain claims brought under the ATS.<sup>123</sup> Support for the latter interpretation of “displace” can be found in Justice Kennedy’s brief concurring opinion. That opinion begins by noting that the majority was “careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.”<sup>124</sup> Since virtually all of the ATS cases brought before *Kiobel* were based on violations of international law that took place entirely abroad, the question of the amount of conduct that must take place in the United States for the claim to be actionable would not appear to be a “significant” one. Moreover, that is just one question; Justice Kennedy wrote that the majority had left open *a number* of questions about the cause of action’s reach.<sup>125</sup> If so, then the Court left open some questions in addition to the amount and type of conduct that has to take place in the United States for the claim to be actionable.

Justice Kennedy then noted that “[m]any serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA), and that class of cases will be determined in the future according to the detailed statutory scheme Congress has enacted.”<sup>126</sup> This sentence may be read to support the conclusion that Congress did not leave open the possibility that the presumption against extraterritoriality might be inapplicable to certain sorts of ATS cases. If the phrase “that class of cases” refers to “human rights abuses committed abroad,” then Justice Kennedy might have been saying here that, if the violation was committed entirely abroad, only specifically extraterritorial statutes such as the TVPA govern. But Justice Kennedy might have been referring instead to the class of cases “addressed by Congress in statutes such as the Torture Victim Protection Act.”<sup>127</sup> If so, the sentence would neither support nor detract from the view that the Court left open the

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inclusive, must displace that general presumption which accords to Congress an intent that statutes are to have a prospective application only.”).

123 As noted above, *see supra* note 77, the Court in *Kiobel* blurred the distinction between the applicability of the presumption to a particular category of statute and the rebutting or overcoming of the presumption with respect to a given statute when it recognized the possibility of rebutting the presumption by reference to the statute’s purposes as reflected in its historical background.

124 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

125 *Id.*

126 *Id.* (citation omitted).

127 *Id.*

possibility that the presumption against extraterritoriality might be inapplicable to some ATS cases.

Most importantly, Justice Kennedy next wrote 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.”<sup>128</sup> A case involving serious violations of international law would not be covered by the TVPA if the international norm that was violated was not among those for the violation of which the TVPA creates a cause of action,<sup>129</sup> or if the violation was perpetrated by an individual not acting “under [the] actual or apparent authority, or color of law, of any foreign nation.”<sup>130</sup> (On the other hand, a case is not “not covered” by the TVPA because the violation occurred on U.S. territory.)<sup>131</sup> Justice Kennedy is saying here that there may be serious violations involving norms other than those relating to torture and extrajudicial killing, or involving violations perpetrated under the actual or apparent authority of the United States, that are not covered by the majority’s reasoning or holding. The strong implication is that these cases would not be subject to the Court’s holding that the presumption against extraterritoriality limits the reach of the *Sosa* cause of action.

On the other hand, Justice Kennedy completed the sentence by noting that “in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”<sup>132</sup> His reference to the “implementation” of the presumption against extraterritoriality in such cases may suggest that he was not saying that the presumption might be inapplicable to some such cases. But Justice Kennedy might have meant instead that a finding that the presumption is inapplicable to a particular type of “serious violation” of an international law norm is an “implementation” of the presumption. One might plausibly view a court’s inquiry into whether the presumption is inapplicable or overcome as an “implementation” of the presumption.

As discussed in Part II, the majority in *Kiobel* recognized that the presumption might be overcome by context, including the statute’s historical background. As discussed above, the Court’s analysis in this respect is tantamount to an inquiry into whether Congress’s purpose in enacting the statute supports an inference of extraterritorial applicability. As also noted above, one of Congress’s purposes in enacting the ATS was to avoid foreign relations problems that would be caused by breaches of international law that would be attributable to the United States if left unremedied. One circumstance in which an unremedied breach would give rise to the responsibility of the

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128 *Id.*

129 The TVPA applies only to torture or extrajudicial killing. *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, § 2(a), 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

130 *Id.*

131 *Id.*

132 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

United States under international law is when the violation was perpetrated (in the language of the TVPA) “with the actual or apparent authority of [the United States],”<sup>133</sup> even if the violation took place on foreign soil.<sup>134</sup> This purposive analysis would support the recognition of a cause of action for violations of norms of international law that meet the *Sosa* test even if they occurred abroad if such violations would be attributable to the United States when left unremedied. In other words, this analysis would support the conclusion that the presumption against extraterritoriality should be deemed “displaced” in this category of ATS cases. Justice Kennedy might therefore have considered that this type of case is not “covered” by the “holding” of *Kiobel* insofar as the majority (implicitly) recognized the need to identify Congress’s purpose, concluded that that Congress did not intend to “rule the world,” and recognized that one of the purposes of the ATS was to avoid embarrassment and war.

Justice Kennedy’s opinion might suggest that he might find the presumption against extraterritoriality to be displaced (that is, inapplicable or overcome) in other sorts of cases as well. Kennedy noted that the Court had left open “a number” of “significant questions.”<sup>135</sup> And, given the numerous separate bars to recovery against U.S. officials who violate international law,<sup>136</sup> recognition of a cause of action for violations of international law attributable to the United States may not even rise to the level of a “significant” question (although *Sosa* itself shows that such cases do arise from time to time). The other types of ATS claims as to which Justice Kennedy might regard the presumption against extraterritoriality to be displaced (in the sense of being inapplicable or overcome) remain to be identified.

I have relied heavily on Justice Kennedy’s brief concurring opinion to buttress my textual argument that the majority’s reference to the possible “displacement” of the presumption against extraterritoriality with respect to some ATS claims is a reference to the possible inapplicability of the presumption to some such claims. As discussed above, the majority opinion in some respects supports a contrary interpretation of “displace.” The other Justices in the majority thus may or may not have understood the term to mean what I have suggested here. Even if those Justices were not using the term in its straightforward sense, however, it is fair to interpret the term to reflect the sorts of questions Justice Kennedy believed *Kiobel* left undecided. Without Justice Kennedy’s concurrence, the Chief Justice’s opinion would have been the opinion of a plurality rather than of a majority. For this reason, whatever questions Justice Kennedy indicated were left open were left open. Justice Kennedy did not himself use the term “displace” in discussing the issues *Kiobel* leaves open. But it seems clear that the otherwise mystifying final paragraph of the majority opinion—the paragraph Justice Alito cites for the pro-

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133 28 U.S.C. § 1350 note.

134 See *supra* note 131 and accompanying text.

135 *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

136 See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699–712 (2004) (discussing the foreign country exception to the Federal Tort Claims Act).

position that the Court “leaves much unanswered”—was included to allay Justice Kennedy’s concerns. Because Justice Kennedy seems rather clearly to have been contemplating the inapplicability of the presumption to some ATS cases, the reference to the possible “displacement” of the presumption should be understood, consistent with the plain meaning of the term and the Courts’ prior use of it, to refer to the possible inapplicability of the presumption with respect to ATS cases involving some categories of serious violations of international law.

#### CONCLUSION

There are several things that one might do with a presumption such as that against extraterritorial application of statutes. As a threshold matter, one might conclude that the presumption is inapplicable to certain types of statutes because the concerns underlying the presumption would not be advanced by applying the presumption to them. Second, one might conclude that the presumption has been rebutted or overcome. Usually, one rebuts the presumption through evidence that Congress intended the statute to apply extraterritorially. In *Kiobel*, the Court recognized that context can be taken into account in rebutting the presumption and that the presumption might be overcome as well by the statute’s “historical background.” Third, one might satisfy the presumption. The presumption is satisfied (or, to be more precise, the conditions for applying the statute, as construed pursuant to the presumption, are satisfied) if the relevant conduct took place in the territory of the United States. This Article discussed the Court’s treatment of when the presumption does and does not apply and how one rebuts and satisfies the presumption when it does apply and explored some questions raised by the Court’s analysis of these issues.

*Kiobel* refers to a fourth thing one might do with the presumption: displace it. Justice Alito seems to have understood the Court’s reference to the possibility of displacing the presumption to be a reference to the question of what it takes to satisfy the presumption. There is some support for that view in the majority opinion. On the other hand, the plain meaning of the term “displace,” and the courts’ prior use of the term to describe something one might do with a presumption, suggests that the term refers to a way of rebutting or overcoming the presumption or determining that it is inapplicable in certain circumstances. I draw support for the latter interpretation from Justice Kennedy’s concurring opinion, which indicates that some cases alleging serious violations of international law may not be covered by the reasoning or holding of the majority. I suggest that one category of cases to which the presumption should not be applied consists of cases in which the violation, if unremedied, would give rise to the international responsibility of the United States. In some such cases, the violation will have occurred on U.S. soil, but in other cases the violation might have been perpetrated by U.S. citizens, or at the behest of U.S. officials, on foreign soil.

