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Kiobel, Bauman, and the Presumption Against the ExtraTerritorial Application of the Alien Tort Statute

Ross J. Corbett*

¶1

The U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.* greatly curtailed the sorts of claims that can be brought under the Alien Tort Statute ("ATS").¹ Contrary to some predictions, however, it did not dictate an effective end to international human rights litigation under the ATS² or require that defendants of ATS lawsuits be United States nationals.³ The Court said that the presumption against a statute's applicability to extraterritorial conduct governed the ATS, but it may have also suggested that some tort claims arising under the law of nations could displace that presumption, so long as those claims "touch and concern the territory of the United States" with "sufficient force."⁴ The possibility that some claims might displace the presumption against extraterritoriality was important enough that Justice Kennedy emphasized it in his concurring opinion.⁵ The Court did not articulate any test for determining whether a claim's nexus with the territory of the United States had "sufficient force," however, and the circuit courts have given conflicting guidance on the question.⁶ In the following term,

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¹ 133 S. Ct. 1659 (2013).

² Cf. Paul Hoffman & Beth Stephens, *International Human Rights Cases Under State Law and In State Courts*, 3 U.C. IRVINE L. REV. 9 (2013) (anticipating the end of international human rights ATS litigation after *Kiobel*); Christopher Whytock et al., *Foreword: After Kiobel: International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1 (2013) (same). See also Roger P. Alford, *The Future of Human Rights Litigation After Kiobel*, 89 NOTRE DAME L. REV. 1749, 1763–64 (2014) (arguing that *Kiobel* effectively ended international human rights litigation under the ATS, but not under state law).

³ Cf. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002) (arguing that the ATS is unconstitutional if held to apply to foreign defendants).

⁴ See *Kiobel*, 133 S. Ct. at 1669. For objections to the Court's presumption against the ATS's extraterritorial applicability, see *Kiobel*, 133 S. Ct. at 1672 (Breyer, J., concurring in judgment); Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013); Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT'L L. 65 (2013); Jonathan Hafetz, *Human Rights Litigation and the National Interest: Kiobel's Application of the Presumption Against Extra-Territoriality to the Alien Tort Statute*, 28 MD. J. INT'L L. 107 (2013); David Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT'L L. 241 (2013).

⁵ See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); see also *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring in judgment).

⁶ Compare *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528–31 (4th Cir. 2014) (citizenship of defendants one factor in assessing nexus), with *Baloco v. Drummond Co.*, No. 12-15268, 2014 WL 4699481, at *3 (11th Cir. Sept. 23, 2014) (fact that defendants include U.S. nationals is insufficient nexus); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014) (fact that defendants are U.S.

however, the Supreme Court placed a further restriction upon litigation against foreign entities—human rights claims or otherwise—by clarifying general personal jurisdiction in *Daimler AG v. Bauman*.⁷ This article suggests that, because *Bauman* serves to allay the foreign policy concerns underlying *Kiobel* in a more surgical manner, and because the effect of *Kiobel* is to leave litigation concerning overseas violations of customary international law to the state courts, *Kiobel* should be read to bar less human rights litigation than it otherwise might.

¶2 At a minimum, U.S. citizens should be liable to suit in federal court for their actions abroad. The same argument extends to corporations that are “at home” in the United States under *Bauman* and even to permanent residents, i.e., to defendants who are not U.S. nationals but whose strongest tie in practice is to the United States. The maximal extent of ATS jurisdiction that would be compatible with *Kiobel* would encompass every defendant over which general jurisdiction could be asserted after *Bauman* or that could fall within a state’s long-arm statute.

I. INTRODUCTION

¶3 The Alien Tort Statute was first enacted, with somewhat different wording, by the First Congress in the Judiciary Act of 1789. It currently reads: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁸

¶4 In time, the Statute’s potential utility regarding human rights abusers was recognized. In 1980, the Second Circuit permitted a suit by two Paraguayan citizens against another Paraguayan citizen for the wrongful death of a fourth Paraguayan citizen in Paraguay resulting from torture. In that case, *Filartiga v. Pena-Irala*, the court held that torture was so universally condemned that it should be held to be a violation of the law of nations under the ATS.⁹ The only connection any of the parties had to the United States was that the plaintiffs were seeking asylum and the defendant could be served notice (he was being held at the Brooklyn Navy Yard pending deportation for overstaying

corporations is insufficient nexus); *Balintulo v. Daimler AG*, 727 F.3d 174, 189–90 & 190 n.24 (2d Cir. 2013) (nationality of defendants is irrelevant to ATS jurisdiction); *see also Doe v. Nestle USA, Inc.*, No. 10-56739, 2014 WL 4358453, at *12–14 (9th Cir. Sept. 4, 2014) (permitting plaintiffs to amend complaint against U.S. nationals to allege domestic conduct sufficient to satisfy touch and concern test, and thus implicitly rejecting view that nationality alone suffices); *Ben-Haim v. Neeman*, 543 F. Appx. 152, 154–5 (3d Cir. 2013) (affirming dismissal of foreign-conduct case with one U.S. corporate defendant and one unincorporated organizational defendant with headquarters in the U.S., implicitly rejecting view that nationality alone suffices); *cf. Cardona*, 760 F.3d at 1192–94 (Martin, J., dissenting) (citizenship of defendant should be one means of establishing nexus); *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings, SE*, 763 F.3d 198, 219 (2d Cir. 2014) (Leval, J., concurring) (“touch and concern” is a flexible, multifactor test rather than a bright-line rule).

⁷ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

⁸ 28 U.S.C. § 1350 (2013). As originally enacted, it read, “the district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.” Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73. For the various revisions to the text of the ATS, *see William Casto, The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 468 n.4 (1986).

⁹ 630 F.2d 876, 880 (2d Cir. 1980).

his tourist visa).¹⁰ *Filartiga* seemed to open the door to so-called foreign-cubed¹¹ civil prosecutions of human rights abuses—where the plaintiffs, defendants, and wrongful acts were all foreign—and to transform evolving standards of human rights norms into statutorily backed causes of action.¹²

¶5 The Supreme Court did not address this new use of the ATS until twenty-four years later in *Sosa v. Alvarez-Machain*, in which a Mexican national claimed he had been abducted by Mexican police to stand trial in the United States for murder at the behest of the Drug Enforcement Agency.¹³ Fidelity to the statute, the Court held, meant recognizing it as a simple grant of jurisdiction over causes of action that were already recognized when it was passed, namely, those few violations of the law of nations that also sounded in tort—offenses against ambassadors, violations of safe conduct, and perhaps piracy.¹⁴ Yet our understanding of law has changed from that of the First Congress, the Court argued.¹⁵ We no longer view law as a brooding omnipresence, the content of which can be discovered, and with the elimination of any general federal common law that this shift in our legal theories entailed, the creation of private causes of action now usually requires Congress to act.¹⁶ Thus, the Court concluded, the ATS could continue to have vitality only if the civil actions cognizable under it were restricted to those eighteenth-century offenses and whatever widely accepted contemporary norms of international law might be comparably specific.¹⁷

¶6 In 2013, the Supreme Court again restricted the sorts of claims that could be heard in federal court under the ATS in *Kiobel v. Royal Dutch Petroleum Co.*¹⁸ That case involved the claim that the defendants had helped and encouraged Nigerian police to attack Ogoni villagers; none of the relevant conduct took place inside the United States.¹⁹ Given the canon of construction that a congressional statute is not meant to regulate behavior beyond the territory of the United States unless Congress has manifested its intent that it do so,²⁰ the Court asked whether there was sufficient reason to think that the

¹⁰ *Id.* at 878–79.

¹¹ For the source of the phrase “foreign-cubed,” see Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1775 n.20 (2014).

¹² See *Filartiga*, 630 F.2d at 881 (“[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”); *Kadic v. Karadzic*, 70 F.2d 232, 238–41 (2d Cir. 1995) (applying *Filartiga*’s evolving standards test); see also Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After Filártiga v. Peña Irala*, 22 HARV. INT’L L.J. 53, 59 (1981) (evolving nature of international law has long been recognized); Curtis Bradley & Jack Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 356–62 (1997) (*Filartiga* initiated the paradigm of modern human rights litigation, which now uses the ATS as the statutory ground for a cause of action, despite its jurisdictional character).

¹³ 542 U.S. 692, 697–99 (2004). An earlier case, *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428 (1989), dealt with a civil action brought under the ATS but was decided on Foreign Sovereign Immunities Act grounds.

¹⁴ *Sosa*, 542 U.S. at 732–33.

¹⁵ *Id.* at 721–27.

¹⁶ *Id.*

¹⁷ *Id.* at 731–38.

¹⁸ 133 S. Ct. 1659 (2013).

¹⁹ *Id.* at 1662–63, 1669.

²⁰ See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877–78 (2010).

ATS was intended to have extraterritorial application—and found that there was not.²¹ The controversy its answer has generated stems in part from the fact that the Court’s interpretation of the ATS turned upon policy considerations.²² Those who attack the Court’s answer tend to think that there are strong policy reasons in support of the extraterritorial application of the ATS such that the ATS would provide something approaching the assertion of universal jurisdiction over human rights abuses.²³ The Court, by contrast, enumerated a number of grave difficulties that would arise if the ATS were to have an extraterritorial application—including that it would provide something approaching the assertion of universal jurisdiction over human rights abuses—and held 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.”²⁴

¶7 The Court did not hold that the Alien Tort Statute was to have no extraterritorial applicability, at least not unequivocally.²⁵ Parts II and III of the majority opinion argue that there is a presumption against the extraterritorial applicability of congressional statutes and this presumption applies to claims brought under the ATS.²⁶ The logic of those parts would apply to all ATS litigation,²⁷ but in applying that logic to the particular facts in *Kiobel*, finding that they did not suffice to overcome this presumption, the Court went on to then note that any claims sufficient to displace that presumption would have to do more than merely “touch and concern” the territory of the United States.²⁸ The Court’s wording here is best described as “suggestive,” insofar as it does not bare its meaning openly. *Kiobel* may be read to have closed the door to all foreign-conduct ATS litigation whatsoever, leaving the statute to authorize only suits brought by aliens for events that transpired within the United States. But the Court may also have implied that some conduct abroad that touches and concerns the territory of the United States might indeed do so “with sufficient force” to displace the presumption against extraterritoriality. This would certainly be a narrow set of cases, narrower than those elaborated by Justice Breyer in his opinion concurring in the judgment,²⁹ but there are strong reasons of

²¹ *Kiobel*, 133 S. Ct. at 1664–69.

²² See Kaki Johnson, *Kiobel v. Royal Dutch Petroleum Co.: The Alien Tort Statute’s Presumption Against Extraterritoriality*, 60 LOY. L. REV. 171, 198–201 (2014) (the Court’s decision reflects its foreign policy judgments); Julian Ku, *Kiobel and the Surprising Death of Universal Jurisdiction Under the Alien Tort Statute*, 107 AM. J. INT’L L. 835 (2013) (*Kiobel* signals the death of universal jurisdiction); cf. Donald Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO L.J. 709, 732–37 (2012) (explaining policy concerns of federal courts over ATS litigation).

²³ See, e.g., Colangelo, *supra* note 4, at 1332–41 (ATS grants universal jurisdiction, and so the presumption against extraterritoriality does not apply); Stephanie Redfield, *Searching for Justice: The Use of Forum Necessitatis*, 45 GEO. J. INT’L L. 893, 921–23 (2014) (the Court should have considered that the ATS provided the only forum available in many human rights cases); Louise Weinberg, *What We Don’t Talk About When We Talk About Extraterritoriality: Kiobel and the Conflict of Laws*, 99 CORNELL L. REV. 1471, 1485–91 (2014) (claiming that the Court’s foreign-policy concerns are illusory).

²⁴ *Kiobel*, 133 S. Ct. at 1669.

²⁵ *Id.* at 1669; Sarah H. Cleveland, *The Kiobel Presumption and Extraterritoriality*, 52 COLUM. J. TRANSNAT’L L. 8, 9–10 (2013).

²⁶ *Kiobel*, 133 S. Ct. at 1664–69.

²⁷ Cleveland, *supra* note 25, at 9–10.

²⁸ *Id.*

²⁹ Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, would not invoke the presumption against territorial applicability at all, but would instead require that one of three conditions be met before a

federalism and foreign relations why we would not want this set of cases to be empty, and the history of the ATS suggests that the First Congress shared these same concerns.

¶8 Part II of this comment examines the language of *Kiobel* in order to establish that it need not be read as foreclosing all foreign-conduct human rights litigation. Part III looks at what is likely an unintended consequence of the *Kiobel* decision, namely, that rather than eliminating human rights litigation over violations committed abroad from domestic courts, it will shift that litigation from the federal courts to the state courts. That is, instead of buffering the United States from the dangers of being the forum for foreign-conduct human rights litigation, the ultimate impact of *Kiobel* may be that the United States will be embroiled in these issues by courts less amenable to control by—and less deferential to—the political branches of the federal government. Part IV builds upon previous research suggesting that the Alien Tort Statute was enacted precisely to take cases away from the states that could present the potential for embarrassment to the United States. Part V concludes, therefore, that foreign-conduct litigation should either be heard in the federal courts or excluded from both the federal and state courts. Such exclusion is done more effectively by policing personal jurisdiction, as the Court did in *Bauman*. Therefore, *Kiobel* should be read to permit foreign-conduct human rights litigation (1) when personal jurisdiction can be established on the basis of the new criteria for general jurisdiction or (2) when the brunt of the harm was felt in and intentionally aimed at the United States (and not other means of establishing specific jurisdiction).

II. THE MEANING OF “TOUCH AND CONCERN”

¶9 The effect of *Kiobel* on suits under the Alien Tort Statute for human rights violations committed abroad is not immediately clear. The first three parts of the majority opinion would seem categorically to forbid any such suits.³⁰ The fourth and concluding part, however, contains language that can be read in one of two ways. Either it limits the scope of the holding only to those cases in which there is no domestic conduct that contributes to human rights abuses abroad, in which case the presumption against extraterritoriality would still hold strong, or it suggests that a different set of facts could permit a suit for foreign-conduct human rights abuses.

¶10 The key language of the fourth part of the Court’s opinion is what it says about claims that “touch and concern the territory of the United States”:

¶11 On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. See *Morrison*, 561 U.S. — (slip op. at 17–24). Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices. If Congress were to determine otherwise, a statute more specific than the ATS would be required.³¹

case could be brought under the ATS: (1) the alleged tort occurred on U.S. soil; (2) the defendant is a U.S. national; or (3) an important U.S. interest was “substantially and adversely” affected by the defendant’s conduct. *Kiobel*, 133 S. Ct. at 1670 (Breyer, J., concurring).

³⁰ Cleveland, *supra* note 25, at 9–10.

³¹ *Kiobel*, 133 S. Ct. at 1669.

¶12 Although the Court cited to *Morrison v. National Australia Bank Ltd.*, the language of “touch and concern” does not appear in that opinion.³² Nor does the phrase “touch and concern” appear in the cases upon which *Morrison* relied.³³

¶13 The discussion in *Morrison* to which the *Kiobel* Court cited, however, addressed whether the presumption against extraterritorial application bars suit for a harm caused by the combination of activity within the United States and foreign conduct.³⁴ If the portion of the activities that occurred on U.S. soil were the “focus” of Congress’s concern in passing the statute (in *Morrison*, § 10(b) of the Securities Exchange Act), then any suit seeking damages for those activities would not be seeking an extraterritorial application of the statute and so would not be barred by the presumption against extraterritoriality.³⁵ *Kiobel* follows its citation to this discussion with a remark that bare corporate presence in the United States would not be sufficient to displace the presumption against extraterritoriality.³⁶ The content of the *Morrison* decision cited and *Kiobel*’s remark about corporate presence suggest that the “touch and concern” language deals with cases where all the relevant conduct did *not* take place outside of the United States.

¶14 Justices Kennedy, Alito, and Thomas all joined the majority opinion, but their dueling concurrences push us in opposite directions regarding what the Court meant by “touch and concern” and whether the only question in future cases will be whether there is sufficient domestic conduct to rebut the presumption against extraterritoriality.³⁷ Both concurrences suggested that the majority opinion left some significant questions unanswered³⁸ (as did the four justices who concurred only in the judgment),³⁹ but there is substantial daylight between them regarding what these significant, unanswered questions are. Justice Alito, joined by Justice Thomas, would require that the conduct occurring in the United States rise to the level of a violation of international law or treaty (rather than just contribute to an overseas violation) before suit could be brought under the ATS.⁴⁰ They suggested that this would answer what the majority left unanswered,⁴¹ thus implying that the question the majority left unanswered involved the *extent* of domestic activity that would be necessary for a suit not to involve any extraterritorial application of the ATS—and thus that there can be no extraterritorial application of the statute whatsoever. Justice Kennedy’s concurrence, by contrast, explicitly discussed human

³² See *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

³³ Cf. *Smith v. United States*, 507 U.S. 197 (1993); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155 (1993); *E.E.O.C. v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *Foley Bros. v. Filardo*, 336 U.S. 281 (1949); *Blackmer v. United States*, 284 U.S. 421 (1932).

³⁴ *Morrison*, 130 S. Ct. at 2883–88.

³⁵ *Id.*

³⁶ *Kiobel*, 133 S. Ct. at 1669.

³⁷ *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); *Kiobel*, 133 S. Ct. at 1669–70 (Alito, J., concurring).

³⁸ *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring) (“The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute.”); *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring) (“This formulation obviously leaves much unanswered.”).

³⁹ *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring in judgment) (the Court “leaves for another day the determination of just when the presumption against extraterritoriality might be ‘overcome.’”).

⁴⁰ *Id.* at 1670 (Alito, J., concurring).

⁴¹ *Id.* at 1669–70.

rights abuses committed abroad,⁴² suggesting that the majority opinion does not present an absolute bar to foreign-conduct human rights litigation.

¶15 Had the Court intended to foreclose foreign-conduct human rights litigation, it could have done so more clearly. The *Kiobel* majority opinion spoke of “claims” that touch and concern the territory of the United States, for example.⁴³ It did not speak of “conduct” that touches and concerns the territory of the United States or claims that “touch and concern conduct” within the territory of the United States, even though *Morrison* speaks of conduct, as does the sentence preceding *Kiobel*’s “touch and concern” remarks.⁴⁴ The beginning of the “touch and concern” sentence—“*And even where the claims touch and concern the territory of the United States*”⁴⁵—cuts both ways. It could mean that these claims are in contradistinction to the facts in *Kiobel*, where all the relevant activity took place abroad, or it could merely signal that what follows is dicta.

¶16 It should be unsurprising that different courts have come to different conclusions about what *Kiobel* requires regarding foreign-conduct ATS suits. Some courts have held that *Kiobel* represents an absolute bar to suits for international law violations committed in the territory of a foreign sovereign, even if some preparatory conduct occurred in the United States.⁴⁶ The Second and Eleventh Circuits have ruled that overseas human rights violations planned or otherwise facilitated from the United States might “touch and concern” U.S. territory with sufficient force, but that the bare fact that defendants are U.S. citizens does not.⁴⁷ The Ninth Circuit has implicitly applied the same rule, permitting plaintiffs to amend their complaint in order to allege actions within the United States while silently assuming that the defendants’ incorporation in the United States did not satisfy *Kiobel*.⁴⁸ The Fourth Circuit, by contrast, has considered the fact that the defendants were U.S. nationals and that the locus of their contractual relations was the United States, among other factors, in finding the presumption to have been rebutted.⁴⁹ A

⁴² *Id.* at 1669 (Kennedy, J., concurring).

⁴³ *Id.* (majority opinion).

⁴⁴ *Id.*; *Morrison v. Nat’l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883–88 (2010).

⁴⁵ *Kiobel*, 133 S. Ct. at 1669 (emphasis added).

⁴⁶ *E.g.*, *Jovic v. L-3 Services, Inc.*, No. 10-CV-5197, 2014 WL 4748614, at *5 (N.D. Ill. Sept. 24, 2014) (some domestic conduct insufficient if focus of conduct is abroad).

⁴⁷ *Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014) (Colombian citizens sued for actions of paramilitary groups allegedly facilitated by U.S. corporations, but as there was no domestic conduct alleged, the suit could not be brought under the ATS); *Balintulo v. Daimler AG*, 727 F.3d 174, 189–91 (2d Cir. 2013) (South African citizens sued for actions of the apartheid government allegedly facilitated by U.S. corporations, but were barred for lack of domestic conduct); *see also Doe v. Exxon Mobil Corp.*, No. 01-CV-1357, 2014 WL 4746256, at *12–14 (D.D.C. Sept. 23, 2014); *Krishanti v. Rajaratnam*, No. 09-CV-5395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014).

⁴⁸ *Doe v. Nestle USA, Inc.*, No. 10-56739, 2014 WL 4358453, at *12–14 (9th Cir. Sept. 4, 2014) (former child slaves from the Ivory Coast brought a class action against multinational companies that controlled Ivorian cocoa production prior to the decision in *Kiobel*; rather than dismiss for failing to allege domestic conduct or deciding the meaning of “touch and concern,” the court permitted plaintiffs to amend their complaint to allege domestic conduct).

⁴⁹ *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528–31 (4th Cir. 2014) (suit by Iraqi citizens against military contractor for alleged abuses at Abu Ghraib touched and concerned the territory of the United States, considering that: the defendant was a U.S. corporation; its employees accused of the abuses were U.S. citizens; the relevant contractual relationships were centered in the United States; the defendant’s manager’s might have covered up, tolerated, or given implicit (but not explicit) encouragement to the

number of district courts have noted that the Court’s remarks about claims that “touch and concern” the United States might allude to a test for whether a particular case of foreign conduct rebuts the presumption against extraterritoriality, but have held that any such test could not be satisfied in the case before them.⁵⁰ Other district courts have ruled that purely extraterritorial acts that touched and concerned the United States could displace the presumption against extraterritoriality and that the cases before them did so.⁵¹

¶17 It seems fair to say, then, that the majority’s “touch and concern” language is a kind of placeholder for future disagreement, neither requiring domestic conduct nor saying that no domestic conduct is required. This does not leave us completely free to devise whatever test we like for when (if ever) foreign-conduct human rights litigation may be brought under the ATS, but it does mean that *Kiobel* has not rendered all discussion on the topic moot.

III. *KIOBEL*’S LIKELY IMPACT: STATE COURTS AND INTERNATIONAL LAW

¶18 The Supreme Court in *Kiobel* evinced a strong concern for how human rights litigation might affect U.S. foreign interests. It noted that there is a presumption against the extraterritorial applicability of statutes “to protect against unintended clashes between our laws and those of other nations which could result in international discord.”⁵² Even though the ATS did not claim to regulate behavior abroad—it simply provides a forum for behavior forbidden by the law of nations—a reading of its jurisdictional grant as covering foreign conduct would implicate these same foreign policy concerns.⁵³ Because the ATS authorizes judges to discern the contours of international law, every case brought under it has the potential to embarrass the United States internationally, the Court reasoned; this would be doubly true if the case “reaches conduct within the territory of another sovereign.”⁵⁴ Because the prosecution of pirates for acts upon the high seas does not risk offending other sovereigns in this way, by contrast, actions under the ATS for torts committed during piracy did not implicate foreign policy concerns.⁵⁵ The Court emphasized that the “fledgling Republic” was “struggling to receive international recognition,” and so concluded that the ATS was not intended to be an unprecedented self-nomination as the guardian of the world’s morals.⁵⁶

foreign conduct complained of; and Congress may have signaled its intent that U.S. nationals not be shielded from responsibility for the sort of conduct engaged in abroad); *see also* *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717 (D. Md. 2014) (U.S. defendant and some U.S. activity alleged).

⁵⁰ *E.g.*, *Mohammadi v. Islamic Republic of Iran*, No. 09-CV-1289, 2013 WL 2370594, at *14 (D.D.C. May 31, 2013) (victim’s siblings sued for torture and murder in Iranian jail).

⁵¹ *Ahmed v. Magan*, No. 10-CV-00342, 2014 WL 4479077, at *1–2 (S.D. Ohio Aug. 20, 2013) (involving permanent resident defendant); *Mwani v. Laden*, 947 F. Supp. 2d 1, at *4–5 (D.D.C. 2013) (involving the 1998 terrorist attacks on U.S. embassies in Nairobi and Dar es Salaam).

⁵² *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

⁵³ *Id.*

⁵⁴ *Id.* at 1665.

⁵⁵ *Id.* at 1667.

⁵⁶ *Id.* at 1668.

Throwing open the doors of the courthouse to every plaintiff wronged anywhere in the world would generate friction with foreign sovereigns.⁵⁷

¶19 The policy considerations that drove the Court in *Kiobel* recommend against having particular cases heard in the United States, but the only necessary result of that decision is to exclude certain cases from federal court. A number of cases with the potential to damage U.S. foreign relations may still be heard in the United States, just now in state court. And the litigation of sensitive claims in state court has the potential to cut against the policy considerations that motivated the First Congress to pass the ATS and later spurred the Court in *Kiobel* to restrict its extraterritorial application.

¶20 Even before *Kiobel*, international human rights scholars were advocating a shift away from the federal courts and toward state courts.⁵⁸ They argued that international human rights litigation that took place in the states would not be brought under the ATS, so the subject matter cognizable in state courts would not be bound by the Court's holding in *Sosa*.⁵⁹ The Second Circuit had ruled that corporations could not be held liable under the ATS.⁶⁰ Litigation in state courts would not be bound by this holding, either.⁶¹ Similarly, there would be no barrier to liability for acting in concert.⁶² Further, state courts are not always as stringent as federal courts regarding exhaustion of remedies or *forum non conveniens*—or even pleading standards.⁶³

¶21 A shift in litigation strategy to the state court system will likely be accompanied by the lobbying of state governments and state courts to make them more hospitable to foreign-conduct human rights litigation.⁶⁴ Some states are more receptive to this sort of lobbying than others, and so we should not be surprised to see it succeed in some jurisdictions.

¶22 The effect of *Kiobel*, then, is not a prohibition on hearing foreign-conduct human rights cases in the United States. Rather, it is a pronouncement that the cases barred by the presumption against extraterritoriality may be heard *only* in the state courts.⁶⁵

A. State Jurisdiction Over the Law of Nations

¶23 The ATS authorizes suits in federal court for “tort,”⁶⁶ and the states have a clear authority to punish torts. The question is whether state courts have the authority to punish torts committed outside their borders, assuming they can obtain personal jurisdiction over

⁵⁷ *Id.* at 1669.

⁵⁸ See Patrick Borchers, *Conflict-of-Laws Considerations in State Court Human Rights Actions*, 3 U.C. IRVINE L. REV. 45 (2013); Childress, *supra* note 22, at 740; Hoffman & Stephens, *supra* note 2; Austen L. Parrish, *State Court International Human Rights Litigations: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 25 n.1 (2013) (listing scholars).

⁵⁹ See Borchers, *supra* note 58, at 48–49; Childress, *supra* note 22, at 740; Hoffman & Stephens, *supra* note 2.

⁶⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 131 (2d Cir. 2010), *aff'd*, 133 S. Ct. 1659 (2013).

⁶¹ Borchers, *supra* note 58, at 48–49.

⁶² *Id.*

⁶³ Childress, *supra* note 22, at 740.

⁶⁴ See, e.g., Jeffrey Meyer, *Extraterritorial Common Law*, 102 GEO. L.J. 301 (2014) (arguing that states should not restrict the extraterritorial applicability of their common law).

⁶⁵ *Cf.* Casto, *supra* note 8, at 510 (arguing pre-*Kiobel* that restrictions on the ATS would drive cases into state court).

⁶⁶ 28 U.S.C. § 1350.

the defendant.⁶⁷ A reliance on the doctrine of transitory torts will permit some suits, but only if there is a good-faith basis for believing that the case could have been brought under the laws of the jurisdiction where the violation occurred.⁶⁸ This would cover cases where for one reason or another the suit could not be brought in the jurisdiction where the tort was committed, either because the defendant could not be brought to court there or because the courts were nonfunctional. But the doctrine of transitory torts would not cover all human rights abuses committed abroad, and probably would not cover the abuses most in need of some forum: those that are not illegal in the place where the activity occurs or, if illegal, occur with official disregard of the nation's stated laws.⁶⁹ The question that hence arises is whether the states could recognize causes of action for violations of the law of nations, rather than the law of any particular legislative sovereign.

¶24 Choice-of-law principles currently serve to limit the applicability of a state's laws beyond its borders.⁷⁰ These principles are, however, state substantive law: they represent a choice by each state not to permit suits that do not in some way concern the state, and the states differ in how they choose to define the limits of their legislative or prescriptive jurisdiction.⁷¹

¶25 States do not possess an unlimited right to assert universal jurisdiction, of course, insofar as they are bound by the requirements of due process.⁷² The due process concerns that limit a state's legislative jurisdiction, however, stem from the unfair surprise to a defendant regarding what was and was not permissible when and where he or she acted,⁷³ and these concerns seem out of place when what is at issue are supposedly universal international law norms.

¶26 There has not been much occasion for the courts to treat the jurisdiction of the states to hear cases involving the law of nations, but the rarity with which this subject has been treated is more the result of historical accident than of any necessity. Where the states have heard cases involving conduct beyond their borders, it usually has been under

⁶⁷ For a good discussion of the extraterritorial effect of common law as distinct from state statutes, see Jeffrey Meyer, *supra* note 64. The Supreme Court seems to have rejected Meyer's contention that the presumption against extraterritoriality is weaker when it comes to common law in *Kiobel*, however, since the causes of action cognizable under the ATS form a part of federal common law.

⁶⁸ Chimène I. Keitner, *State Courts and Transitory Torts in Transnational Human Rights Cases*, 3 U.C. IRVINE L. REV. 81, 87–92 (2013). For an argument that human rights litigation ought to embrace the shift away from the ATS toward a theory of transitory torts, and an analysis of the choice-of-law problems that this shift brings, see Alford, *supra* note 2; Roger P. Alford, *Human Rights After Kiobel: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089 (2014).

⁶⁹ Cf. Keitner, *supra* note 68, at 92–93 (contrasting the doctrine of transitory torts with that of universal jurisdiction, only the latter clearly permitting the exercise of prescriptive jurisdiction where *lex loci* fails).

⁷⁰ See Alford, *supra* note 2, 1761–64; Meyer, *supra* note 64, at 314–19.

⁷¹ See Alford, *supra* note 2, 1761–64; Meyer, *supra* note 64, at 314–19.

⁷² See Alford, *supra* note 2, 1761–64; Childress, *supra* note 22, at 751–52; Curtis Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL FORUM 323, 326 n.13 (2001). Bradley also notes that state attempts to assert universal jurisdiction may be limited insofar as they are preempted by federal law or treaty. *Id.* The issue of preemption is addressed *infra* Part III.B.

⁷³ See, e.g., *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822–23 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307–13 (1981); see also Meyer, *supra* note 64, at 328–29 (discussing *Allstate*). Note that these cases were decided in the context of choice of law and the requirements of the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, in addition to due process. The Full Faith and Credit Clause is implicated, of course, only regarding other U.S. states. See Alford, *supra* note 2, at 1763–64 (2014).

the doctrine of transitory torts.⁷⁴ As the Supreme Court noted in *Kiobel*, that doctrine presumes that what is being tried in the United States would have also provided a cause of action where it occurred.⁷⁵ Moreover, there was less international interconnectedness in the past to give rise to cross-border suits for human rights violations, apart from those committed on the high seas.⁷⁶ Human rights litigation (as opposed to trials for war crimes or the passage of international agreements) is also a relatively recent phenomenon.⁷⁷

¶27 What law there is on the subject, however, suggests that the states would have jurisdiction to hear the sorts of cases that caused the *Kiobel* Court concern. In *United States v. Arjona*, for example, the Supreme Court noted that Congress's enumerated power "to define and punish . . . offenses against the law of nations"⁷⁸ did not strip the states of the authority to do the same thing.⁷⁹ The case involved Congress's power to punish the counterfeiting of *foreign* currency, when the Constitution speaks only of "the Securities and current Coin of the United States."⁸⁰ The Court ultimately found that punishing the counterfeiting of foreign currency was necessary and proper to Congress's power to define and punish offenses against the law of nations (and, as a nation whose currency was almost entirely paper money, the United States had an interest in promoting the view that counterfeiting was contrary to the law of nations).⁸¹ One reason why the act was necessary and proper was that Congress could not compel the states to outlaw the counterfeiting of foreign currency, but the Court further noted that it was entirely within the power of the states to enforce the law of nations by doing what Congress could not compel them to do.⁸² The Constitution makes the federal government the face of the United States abroad,⁸³ the Court noted, but it apparently does not strip the states of all concern for the law of nations.

¶28 The Court noted the concurrent legislative authority of the states concerning the law of nations in dicta, and it is difficult to predict whether the Court would uphold that ruling today, as *Arjona* was decided in 1887.⁸⁴ The view of the states as having obligations under the law of nations presupposes that they have a particular status among nations that was more prevalent in the nineteenth century than it is today.⁸⁵

⁷⁴ Hoffman & Stephens, *supra* note 2, at 11; Keitner, *supra* note 68, at 90; *see* *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980) (plaintiffs could have brought action in state court under the doctrine of transitory torts, as the state court had personal jurisdiction; torture was actionable in the foreign nation where it occurred, and the policies of the state were consistent with giving force to the foreign law).

⁷⁵ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1666 (2013); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 19 (1965); Blum & Steinhardt, *supra* note 12, at 63–64 (discussing transitory torts in the context of state court adjudication of the law of nations).

⁷⁶ One reason the abolition of the slave trade gave rise to cases dealing with universal jurisdiction was the fact that the slave trade involved transport through international waters. *E.g.*, *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822).

⁷⁷ Parrish, *supra* note 58, at 28–33; *see also* Bradley & Goldsmith, *supra* note 12, at 356–62 (*Filartiga* initiated modern human rights litigation).

⁷⁸ *United States v. Arjona*, 120 U.S. 479, 487 (1887) (quoting U.S. CONST. art. I, § 8, cl. 10).

⁷⁹ *Id.*

⁸⁰ U.S. CONST. art. I, § 8, cl. 6.

⁸¹ *Arjona*, 120 U.S. at 486–88.

⁸² *Id.* at 487.

⁸³ *Id.* at 483–84.

⁸⁴ *See id.*

⁸⁵ *Compare* *Desebats v. Berquier*, 1 Binn. 336, 347 (Pa. 1808) (Yeates, J.) (applying foreign inheritance law as "part of *lex gentium* . . . founded on the mutual courtesy of independent governments," *viz.* Great

¶29 There are reasons, however, for suspecting that, in the absence of preemption, the states are not barred from applying international law in their own courts. Prime among these is the fact that they could have heard the cases that were actionable under the Alien Tort Statute. As discussed at greater length below,⁸⁶ the ATS was enacted because of a worry that states might fail to hear such cases. The version of the ATS that formed a part of the Judiciary Act of 1789 explicitly said that the district courts were to have concurrent authority with the states;⁸⁷ the current version of the ATS does not provide the district courts with exclusive jurisdiction, thereby preserving the states' concurrent jurisdiction.⁸⁸

¶30 It is possible that a state court might claim jurisdiction on the theory that the plaintiffs are asking it to enforce federal common law, insofar as customary international law can form a part of federal common law⁸⁹ and state courts may enforce federal law (where Congress has not given the federal courts exclusive jurisdiction).⁹⁰ Ordinarily, federal common law suffices for federal question jurisdiction under 28 U.S.C. § 1331.⁹¹ This does not seem to be the case, however, when the content of federal common law comes from customary international law,⁹² although the position that it should does have some advocates.⁹³ A state court hearing such a federal common law claim would therefore have exclusive jurisdiction. Still, a state court that heard human rights abuse cases as a matter of federal law would certainly leave itself open to review by the Supreme Court.⁹⁴ Consequently, this theory of why the states could hear foreign-conduct human rights litigation is not as worrisome in terms of the national interest.

¶31 There is a way in which states could hear human rights cases without Supreme Court review, however. The state's jurisdiction to hear a case could instead be framed as a matter of state common law. Whether or not customary international law formed a part of a given state's common law would be a question of state law to be decided by the state

Britain and the Commonwealth of Pennsylvania) with Phillip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939) ("The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."). Under the modern view, states would have obligations to enforce international law as a matter of the Supremacy Clause, not as independent sovereigns. U.S. CONST. art. VI, cl. 2.

⁸⁶ See *infra* Part IV.

⁸⁷ Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 78.

⁸⁸ See 28 U.S.C. § 1350.

⁸⁹ Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) ("[T]he domestic law of the United States recognizes the law of nations."). Aside from the odd result regarding federal question jurisdiction discussed immediately following this note, this absorption of the law of nations by federal common law is problematic. See *infra* notes 115–16 and accompanying text.

⁹⁰ U.S. CONST. art. VI, cl. 2; *Claflin v. Houseman*, 93 U.S. 130, 135–42 (1876).

⁹¹ *Illinois v. City of Milwaukee*, Wis., 406 U.S. 91, 100 (1972).

⁹² See *Sosa*, 542 U.S. at 731 n.19 (denying that the Court's holding would permit federal question jurisdiction for customary international law claims under the rubric of federal common law).

⁹³ 13D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. JURIS. § 3563 (3d ed. 2013) ("A good argument can be made on this same theory that a claim based upon customary international law should be sufficient for federal question jurisdiction. When it is applied in the federal courts it owes its authority to the United States and should be regarded as a federal law."); *Casto*, *supra* note 8, at 471 (suggesting that federal courts have jurisdiction over cases with international law causes of action under general federal question jurisdiction); cf. *Alford*, *supra* note 2, at 1767–70 (suggesting diversity jurisdiction as a means of getting federal common law claims based on international law into the federal courts after *Sosa*).

⁹⁴ See 28 U.S.C. § 1257(a) (governing the U.S. Supreme Court's appellate jurisdiction over state courts).

supreme court.⁹⁵ That the law of nations did form a part of the common law was widely acknowledged at the nation's founding,⁹⁶ and while the general legal theory that gave rise to that judgment has since been abandoned in favor of positivism, nothing prevents a state court, eager to present itself as the vindicator of human rights, from adopting that judgment.⁹⁷

¶32 Closing the federal courts to *all* foreign-conduct human rights litigation not only raises the specter of state court adjudication of claims that implicate the national honor, but it raises the further specter of the state courts implicating the national honor according to fifty different—and likely contradictory—interpretations of customary international law.⁹⁸ In principle, there ought to be uniformity among the states regarding what international law requires, just as distinct sovereigns ought to agree on what it requires. The only procedure for enforcing such uniformity, however, would be for a case to work its way through the state court system and then be taken up by the U.S. Supreme Court. This would require that there be an issue of federal law, and the only way for there to be such an issue may well be if international law were incorporated into federal common law wholesale—a step the Supreme Court seems loath to take.

¶33 The ATS is not the only way to get into federal court, of course, and a number of problematic cases will doubtlessly be removable on diversity jurisdiction grounds. Two problems attend this solution, however. First, not all of the cases will be removable to federal court. A single alien co-defendant would destroy complete diversity, for

⁹⁵ Cf. Jessup, *supra* note 85, at 742–43 (*Erie* should not apply to international law, lest state courts have an unreviewable power to pass on the content of customary international law).

⁹⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876, 886 (2d Cir. 1980) (citing *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 113, 119 (1784)); *The Maria*, 165 Eng. Rep. 955, 958 (Adm. 1807); 1 WILLIAM BLACKSTONE, COMMENTARIES *263–67; Edwin Dickenson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 27 (1952). See also *Brown v. Union Ins. Co. at New-London*, 4 Day 179, 186 (Conn. 1810) (Connecticut adopts law of nations into its common law); *Desebats v. Berquier*, 1 Binn. 336, 345 (Pa. 1808) (Tilghman, C.J.) (law of nations incorporated into common law); *Pearsall v. Dwight*, 2 Mass. (1 Tyng) 84, 89 (Mass. 1806) (law of nations a part of the common law); *Casto*, *supra* note 8, at 489 (law of nations considered part of British common law in eighteenth century); Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims*, 18 N.Y.U. J. INT'L L. & POL. 1, 11 (1985) (same).

⁹⁷ Cf. Childress, *supra* note 22, at 750–51 (whether the presumption against extraterritoriality can be applied to state law is an open question). But see *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 69–70 (1st Cir. 1999), *aff'd sub nom. Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) (phrasing established prohibition on state regulation of extraterritorial *commercial* conduct in terms of a prohibition on state regulation of extraterritorial conduct *simpliciter*). Because the argument in *Natsios* was based on the Commerce Clause, 181 F.3d at 69–70, and because the Supreme Court upheld that ruling on conflict preemption rather than Commerce Clause grounds, see *Crosby*, 530 U.S. at 373–86, it is unclear both (a) whether the statement that “Massachusetts may not regulate conduct wholly beyond its borders” applies also to *noncommercial* conduct, 181 F.3d at 69, and (b) whether such an expansive reading of the First Circuit’s pronouncement would be good law.

⁹⁸ Cf. *Filartiga*, 630 F.2d at 890 (“[T]he foreign relations implications of [*forum non conveniens*] and other issues the district court will be required to adjudicate on remand underscores the wisdom of the First Congress in vesting jurisdiction over such claims in the federal district courts through the Alien Tort Statute. Questions of this nature are fraught with implications for the nation as a whole, and therefore should not be left to the potentially varying adjudications of the courts of the fifty states.”); Jessup, *supra* note 85, at 743 (“The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.”).

example.⁹⁹ Similarly, a refugee granted permanent residency could not sue a U.S. national from the same state in which he or she resided under diversity jurisdiction.¹⁰⁰ Resident aliens, moreover, are considered residents of the state in which they reside for the purposes of *defeating* diversity jurisdiction,¹⁰¹ but Article III does not extend the federal judicial power to suits between two aliens.¹⁰² While the requirement for complete diversity is statutory,¹⁰³ the bar on diversity suits between aliens that do not involve at least one citizen of a state is constitutional in origin.¹⁰⁴ Consequently, an alien could not sue a temporary or permanent resident for human rights abuses committed either abroad or within the United States under diversity jurisdiction, even though the potential defendants' domicile in the U.S. would effectively shield them from suit elsewhere in the world.¹⁰⁵ Foreign-cubed cases certainly could not be removed to federal court. And foreign plaintiffs could lock U.S. defendants into state court simply by bringing suit in the defendant's home state.¹⁰⁶ Second, even those cases that are removable on diversity grounds will be judged by state law, and hence by state interpretations of international law.¹⁰⁷

¶34

I do not mean to suggest that state-court jurisdiction in these matters is uncontestable. It is clear, however, that a good deal of litigation would be required for the federal judiciary to exclude the states from this realm. It is also clear that excluding the states from this realm would require that the Supreme Court adopt some doctrines that it would probably be disinclined to adopt otherwise.¹⁰⁸ It is not clear that the states actually

⁹⁹ See, e.g., *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir. 1985); *Ed & Fred, Inc. v. Puritan Marine Ins. Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975).

¹⁰⁰ See 28 U.S.C. § 1332(a)(2).

¹⁰¹ *Id.*

¹⁰² See U.S. CONST. art. III, § 2; Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 451–52 (2011).

¹⁰³ *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523 (1967).

¹⁰⁴ *Jackson v. Twentyman*, 27 U.S. (2 Pet.) 136 (1829); *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Blum & Steinhardt*, *supra* note 12, at 53.

¹⁰⁵ *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1671, 1674–75 (2013) (Breyer, J., concurring in judgment) (expressing concern that narrow reading of ATS would violate international law obligations not to provide safe harbor to human rights abusers).

¹⁰⁶ See 28 U.S.C. § 1441(b)(2); Childress, *supra* note 22, at 741. Childress suggests that defendants in the Second, Fifth, and Eleventh Circuits may be able to remove based on federal question jurisdiction, given rulings that state causes of action with substantial foreign policy interests implicate federal common law. *Id.* at 741–45 (citing *Pacheco de Perez v. AT&T Co.*, 139 F.3d 1368, 1376–78 (11th Cir. 1998); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 542–43 (5th Cir. 1997); *Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986)); *contrast with Patrickson v. Dole Food Co.*, 251 F.3d 795, 803–5 (9th Cir. 2001) (federal question jurisdiction does not extend to any case implicated by the federal common law of foreign relations; to do otherwise would negate the well-pleaded complaint rule). These cases are special in that they involved suits brought by a foreign government or that threatened the entire economy of a foreign government, however, and the substantial policy interests test they articulate is unlikely to enable ordinary defendants to remove based on federal question jurisdiction.

¹⁰⁷ *Cf. Bellia & Clark*, *supra* note 102, at 545 (*Erie* requires diversity suits to be judged by state law).

¹⁰⁸ *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 729–30 (2004) (refusing to overrule two centuries of precedent to declare that the law of nations does not form a part of the domestic law of the United States); *Sosa*, 542 U.S. at 731 n.19 (2004) (refusing to permit federal question jurisdiction for customary international law claims under the rubric of federal common law). See also *infra* notes 124–26 and accompanying text, discussing the Supreme Court's hesitance to invoke field preemption regarding any state action with more than an incidental impact on foreign affairs.

would be excluded from this realm, and it is not clear that they could be, except by preemption.

B. Federal Issue Preemption and the Law of Nations

¶35 Accompanying the difficulty of eliminating state legislative jurisdiction over extraterritorial conduct is a corresponding difficulty in saying that federal law has preempted the exercise of that jurisdiction. State law may be preempted (1) because a federal statute expressly says so; (2) because state law conflicts with a federal statute in such a way that either it is impossible to obey both or it interferes with realizing the goals of the federal statute; or (3) because the scope of the federal law manifests a congressional intent to “occupy the field” and leaves no room for parallel or augmented state regulations, or the federal interest is so dominant that the federal system itself is assumed to preclude state law on the same subject.¹⁰⁹ There certainly is no express preemption regarding the law of nations. Unless a state sought to penalize behavior that was commanded by federal law—which would be bizarre, but perhaps not unthinkable—there could be no conflict preemption. Nor does field preemption suffice to prevent the states from hearing foreign-cubed human rights litigation.

¶36 First, the Alien Tort Statute does not support much of an argument for preemption where preemption would matter most, *viz.* where the ATS does not provide litigants access to the federal courts. The statute is jurisdictional rather than substantive, and so it hardly conveys a decision by Congress to so occupy the field as to deprive the states of any role in enforcing the law of nations. It is true that the statute was later interpreted to have a substantive component, but that substantive component was seen as an invitation to the creation of federal common law rather than as positive legislation.¹¹⁰ Federal common law does preempt state law,¹¹¹ of course, but in cases where the substantive aspect of the ATS could be said to have that preemptive effect, the statute would necessarily function as a grant of jurisdiction to the federal courts.¹¹² The states would not be preempted substantively regarding any act that could not be heard in federal court. That is, the effect of limiting what can be heard in federal court under the ATS is to simultaneously limit the preemptive effect of the ATS on state substantive law.

¹⁰⁹ *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

¹¹⁰ *See Sosa*, 542 U.S. at 728–31.

¹¹¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424–27 (1964) (federal courts may craft common law where foreign affairs are concerned and federal supremacy over foreign affairs would be threatened if this common law did not preempt state rules of decision). This case has some strong language against leaving the states free to craft their own rules of decision in cases touching foreign affairs, but that language is tied to the question of preemption and does not control where—as is the case here *ex hypothesi*—federal law does not supply the rule of decision.

¹¹² *Cf. Republic of Philippines v. Marcos*, 806 F.2d 344, 354 (2d Cir. 1986) (because importance of the federal interest either preempts state law outright or creates a federal ingredient in state-law cause of action, federal court has jurisdiction to hear the case under general federal question jurisdiction even without the ATS); Childress, *supra* note 22, at 749 (state-court human rights litigation might be preempted if the claim effectively duplicates the ATS).

¶37 Nor can state-determined rules regarding international human rights be preempted on the argument that the law of nations forms a part of the laws of the United States.¹¹³ The Supreme Court has occasionally held that federal law embraces international law,¹¹⁴ but the most famous instances of this were decided prior to *Erie Railroad Co. v. Tompkins* and its rejection of any federal general common law that might justify that embrace.¹¹⁵ Even if federal law embraced international law, moreover, federal law does not preempt state law simply because the two may be parallel: there must be some expression or implication of Congress’s intent to preempt state law,¹¹⁶ and that would still be absent in this case. The fact that claims arising under international law do not suffice for federal question jurisdiction also cuts against this understanding of the content of federal law.¹¹⁷

¶38 Congress’s failure to provide a cause of action for certain human rights abuses is also probably not enough to trigger preemption. Admittedly, preemption can be triggered where Congress has given some indication that it does not wish to prohibit a certain kind of activity: when Congress decided not to regulate a particular labor-relations related

¹¹³ Those who say that federal common law must encompass the law of nations so as to give the latter preemptive effect, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998), argue backwards. Preemptive effect is the conclusion to be proven.

¹¹⁴ See, e.g., *Sosa*, 542 U.S. at 724 (“[T]he domestic law of the United States recognizes the law of nations.”); cf. Bradley & Goldsmith, *supra* note 12 (characterizing the wholesale importation of customary international law into federal common law as unconstitutional); Curtis Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816–21 (1997) (noting that enough lower federal courts and academics have ascribed to the importation of customary international law into federal common law that it deserves to be called the “modern position”); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 28–48 (1995) (criticizing *Filartiga*’s suggestion that customary international law could form part of federal common law).

¹¹⁵ Bradley & Goldsmith, *supra* note 114, at 849–59 (arguing that *Erie* makes it impossible to treat customary international law as federal common law); Weisburd, *supra* note 114, at 41–44 (same); cf. Jessup, *supra* note 85, 742–43 (sounding the alarm on *Erie*’s effect on international law). See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”); *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.”); cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law.”).

¹¹⁶ Cf. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2256 (2013) (presumption is against preemption, and interference with the police powers of the state generally requires a clear and manifest congressional purpose to do so). Where Congress has manifested that intent to occupy the field, however, even parallel or complementary state statutes are preempted. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012).

¹¹⁷ See *Sosa*, 542 U.S. at 731 n.19 (denying that the Court’s holding would permit federal question jurisdiction for customary international law claims under the rubric of federal common law).

activity, for example, the states could not regulate that activity.¹¹⁸ The same principle extends to law touching foreign relations. When Congress gave the president the authority to impose—and suspend—sanctions against Burma, for example, Massachusetts could not then impose its own nondiscretionary sanctions.¹¹⁹ The problem comes in determining that Congress has affirmatively decided not to regulate a given activity. Congressional failures to act do not themselves trigger field preemption; rather, there must be a decision to act in a consciously limited way.¹²⁰ If the United States refused to ratify or join a treaty, for example, or ratified it with reservations, this might be a good indication that the states could not enforce compliance with that treaty. In practice, however, few laws are likely to be preempted on these grounds for the simple reason that Congress does not ordinarily declare that it supports what are generally regarded as human rights.

¶39 Clearly, state policies that directly touch upon the powers of war and peace can be struck down as touching upon a national interest so vital that preemption of state law is presumed to be a part of the federal system itself. The Supreme Court held that California’s attempt to punish insurance companies that cooperated with the Nazis in confiscating policies held by Jews, if only by forcing the insurance companies to disclose certain information about their prior cooperation, intruded upon the president’s control of national foreign policy.¹²¹ Shortly thereafter, the Ninth Circuit for the same reason invalidated a California law permitting American prisoners of war to sue Japanese corporations for forced labor during World War II.¹²² It did the same to an attempt to permit reparations for the Armenian Genocide.¹²³

¶40 These cases do not stand for the proposition that field preemption excludes the states from any act “with more than incidental effect on foreign affairs,” even when legislating on traditional areas of state concern.¹²⁴ In these cases, the state either flouted a definite statement of U.S. foreign policy¹²⁵ or formulated its own foreign policy with regard to a specific issue instead of exercising its traditional police power in a manner that incidentally impacted foreign affairs.¹²⁶

¹¹⁸ *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 148–51 (1976) (congressional refusal to deem refusals to work overtime an unfair labor practice preempted states from deeming that refusal an unfair labor practice).

¹¹⁹ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372–74 (2000).

¹²⁰ *Cf. Inter Tribal Council of Ariz.*, 133 S. Ct. at 2256 (2013) (requirement for congressional intent for preemption to be triggered); *Int’l Ass’n of Machinists*, 427 U.S. at 148–51 (congressional decision not to include refusals to work overtime in list of unfair labor practices triggered preemption).

¹²¹ *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

¹²² *Deutsch v. Turner Corp.*, 324 F.3d 692, 711–14 (9th Cir. 2003).

¹²³ *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012).

¹²⁴ *See Garamendi*, 539 U.S. at 418–20 (citing *Zschernig v. Miller*, 389 U.S. 429, 432–33 (1968)) (no need to decide between *Zschernig* majority’s field preemption analysis and Justice Harlan’s conflict preemption analysis); Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause After Garamendi and Crosby*, 107 COLUM. L. REV. 746, 772–76 (2007) (*Crosby* and *Garamendi* signal shift away from dormant commerce clause and dormant foreign affairs power analysis in favor of conflict preemption); *cf. Deutsch*, 324 F.3d at 712–14 (finding direct conflict with U.S. foreign policy in invalidating California statute under dormant foreign affairs analysis).

¹²⁵ *Garamendi*, 539 U.S. at 401–12; *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 366–70 (2000); *Deutsch*, 324 F.3d at 712–14.

¹²⁶ *Movsesian*, 670 F.3d at 1071–72.

¶41 The Court has excluded some disputes between foreign parties from American courts even when those disputes touched upon matters of traditional state concern, but it has done so by restricting personal jurisdiction, not by expanding the doctrine of field preemption.¹²⁷ The fact that the Court has taken one route does not bar it from adopting the other, of course, excluding the states from governing torts that also make one *hostis humani generis*,¹²⁸ but it does suggest the novelty of suggesting that preemption bars such suits.

¶42 Torts are a traditional part of a state’s bailiwick, and state incorporations of the law of nations into their common law have not traditionally been opposed.¹²⁹ Because the states have a strong claim to render their interpretations of the law of nations binding as a matter of state law,¹³⁰ the claim that they are subject to field preemption is weak.

¶43 In the end, the states are relatively free regarding the law of nations. While Congress no doubt could ban the states from exercising any legislative jurisdiction over conduct that occurs outside of the United States, it has not done so. Similarly, although it would not be frivolous to argue that Congress has already implicitly preempted the states’ legislative jurisdiction that touches upon foreign affairs or that the structure of the Constitution itself must exclude them from the field, those arguments are not strong, and they would require that the Court break new ground.¹³¹ It is one thing to say that federal law provides the rule of decision in cases implicating foreign affairs; it is quite another to say that state law is preempted even where federal law provides no rule of decision. As the law now stands, states are not excluded from the field either as a matter of their competency to legislate or by federal preemption. The holding in *Kiobel* brings back a state of affairs that the ATS was passed in order to combat: state determination of suits that touched upon the national honor.

IV. THE ALIEN TORT STATUTE AND FEDERALISM

¶44 The motivating force behind the Alien Tort Statute was the danger posed by state court adjudication of claims touching the law of nations.¹³² While the ATS is unmistakably jurisdictional in nature, speaking of the jurisdiction of the district courts and appearing amidst other jurisdictional statutes,¹³³ it does not specify the *kind* of jurisdiction it was intended to convey. While we might today understand it as an exercise of Congress’s power to grant jurisdiction over cases arising under the Constitution, the laws of the United States, and treaties made under their authority¹³⁴—and we may have to

¹²⁷ See, e.g., *Asahi Metal Indus. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102 (1987).

¹²⁸ That is, an enemy of all humanity.

¹²⁹ See cases incorporating international law into state common law, *supra* note 97.

¹³⁰ See *supra* Part III.A.

¹³¹ Cf. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 418–20 (2003) (refusing to decide between *Zschernig* majority’s field preemption analysis and Justice Harlan’s conflict preemption analysis); *Garamendi*, 539 U.S. at 439–43 (Ginsburg, J., dissenting) (absent actual conflict with a formal expression of U.S. policy, state law should stand).

¹³² See Casto, *supra* note 8; cf. Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 871–82 (2006) (arguing that the ATS was only about safe-conduct, and thus only about torts committed where the U.S. exercised some protective power over the plaintiff).

¹³³ See Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77; 28 U.S.C. §§ 1330–1369.

¹³⁴ Cf. U.S. CONST. art. III, § 2.

in order to sustain its constitutionality—its primary purpose was to ensure a fair forum in which certain kinds of disputes could be heard.¹³⁵ It therefore secured more than simply a forum, but a specifically federal forum. On the other side of the coin, the ATS differed from straightforward diversity and alienage jurisdiction in that its motivation was not simply fairness to litigants.¹³⁶ The ATS is instead akin to the party-based grants of jurisdiction concerning states and ambassadors in that unfairness to one litigant or another could have broader political repercussions.¹³⁷ The origins of the ATS do not make it a straightforward human rights statute, however useful it may be to human rights litigation, but neither was its intended scope so restricted as to encompass only formal guarantees of safe conduct.¹³⁸ Rather, it was and remains a mechanism for asserting federal control over litigation that would have an impact on the national interest.

A. *Alien Plaintiffs' Access to the Federal Courts*

¶45 From the text of the Judiciary Act of 1789, it is clear that the ATS was not thought of as an exercise of Congress's power to grant jurisdiction over federal questions. The Judiciary Act speaks explicitly of jurisdiction concurrent with the states,¹³⁹ but not in order to make states the enforcers of federal law. The Supremacy Clause suffices for that,¹⁴⁰ and when it comes to federal questions the Judiciary Act either gives the federal district courts exclusive jurisdiction¹⁴¹ or subjects the state courts to federal appellate review.¹⁴² That is to say, the federal district courts were not given federal question jurisdiction concurrent with the states, federal questions instead being channeled into one system or the other regardless of the plaintiff's choice of forum.

¶46 Rather, where the Judiciary Act granted federal courts jurisdiction concurrent with the courts of the several states, it did so only in cases that could be heard in the states already. Federal diversity jurisdiction in suits at common law or equity was concurrent with the states, for example.¹⁴³ Federal jurisdiction in suits at common law brought by the United States (for more than \$100) was also concurrent with the states.¹⁴⁴ Similarly, federal jurisdiction for suits brought by an alien for tort in violation of the law of nations or a treaty of the United States was concurrent with the states.¹⁴⁵

¹³⁵ See Bellia & Clark, *supra* note 102, at 471–77; (discussing original intent of the ATS); Casto, *supra* note 8 (same); Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649, 652–63 (2002) (same); see also *infra* note 160 and accompanying text (discussing constitutionality of the ATS).

¹³⁶ Cf. Collins, *supra* note 135, at 662–63 (discussing the ATS and diversity jurisdiction).

¹³⁷ *Id.*

¹³⁸ Contrast with Lee, *supra* note 132.

¹³⁹ See Judiciary Act of 1789, ch. 20, §§ 9, 11, 1 Stat. 73, 76–79.

¹⁴⁰ U.S. CONST. art. VI, cl. 2; see *Clafin v. Houseman*, 93 U.S. 130, 135–42 (1876) (state courts can hear cases involving rights arising under federal law, absent exclusive federal jurisdiction); see also *Testa v. Katt*, 330 U.S. 386, 392–94 (1947) (state courts may not refuse to enforce federal law).

¹⁴¹ See Ch. 20, §§ 9, 11, 1 Stat. at 76–79 (exclusive jurisdiction over federal crimes and offenses, admiralty and maritime cases, seizures under the laws of the United States, and suits against consuls and vice-consuls (other than those brought under the ATS or by the United States)).

¹⁴² Ch. 20, § 25, 1 Stat. at 85–87.

¹⁴³ Ch. 20, §§ 11, 12, 1 Stat. at 78–79.

¹⁴⁴ Ch. 20, § 9, 1 Stat. at 77.

¹⁴⁵ *Id.*

¶47 Further light is shed on the purpose of the Alien Tort Statute by the fact that it granted jurisdiction to the district courts, not the circuit courts. Run-of-the-mill diversity suits, where local favoritism might affect either plaintiffs or defendants depending on the circumstances, were heard in the circuit courts.¹⁴⁶ Where the federal district courts had jurisdiction, by contrast, it was the status of the plaintiff that generated access to the federal courts.¹⁴⁷ The purpose of the ATS, like that of federal jurisdiction over suits brought by the United States, was to ensure that the plaintiff in particular had access to a fair forum.

¶48 The ATS was not simply about fairness to litigants, however. It was also about cases where unfairness to a litigant might have foreign-policy repercussions. Where foreign-affairs concerns did not arise, the Judiciary Act provided for diversity jurisdiction based on simple alienage and did not specify a particular cause of action necessary to take advantage of it.¹⁴⁸ All cases at common law for damages exceeding \$500 (exclusive of costs) to which an alien was a party could be brought in circuit court,¹⁴⁹ and any such case brought in state court against an alien could be removed to circuit court.¹⁵⁰ Because the law of nations was considered part of the common law,¹⁵¹ and because suits for violations of a treaty would also be heard at law, the ATS was not needed to operate in parallel to the Judiciary Act's general diversity jurisdiction provisions. Any suit by an alien for a tort in violation of the law of nations in excess of \$500 could be brought in circuit court as easily as a suit for breach of contract. Rather, the ATS enabled aliens with certain kinds of complaints to evade the \$500 jurisdictional threshold to have their cases heard in federal court.¹⁵² The view that the ATS was intended as an exception to the \$500 minimum is borne out by the fact that aliens suing under the ATS were expected to bring their suit in district court, not circuit court.¹⁵³ If an alien had a particular type of complaint, no matter how monetarily insignificant it might have been, that alien would never have to rely upon the state court systems for satisfaction.

¶49 Subsequent developments in the law do not rebut the view that the ATS is a quasi-diversity statute. The current version of the alienage diversity statute differs from the Judiciary Act of 1789 by specifying that one of the litigants must be a citizen of a state, thus excluding the alien v. alien suits that could be heard in circuit court under the 1789 Act.¹⁵⁴ It also raises the jurisdictional threshold to \$75,000 and treats permanent residents as citizens of the state in which they reside for diversity jurisdiction purposes.¹⁵⁵ Nonetheless, the relationship between current alienage diversity and the ATS remains unchanged: an alien alleging a tort in violation of the law of nations or a treaty of the United States does not have to allege \$75,000 in damages to make it into federal court.¹⁵⁶

¹⁴⁶ See Ch. 20, §§ 11, 12, 1 Stat. at 78–79.

¹⁴⁷ See Ch. 20, § 9, 1 Stat. at 77.

¹⁴⁸ See Ch. 20, § 11, 1 Stat. at 78.

¹⁴⁹ *Id.*

¹⁵⁰ Ch. 20, § 12, 1 Stat. at 79.

¹⁵¹ See *supra* notes 96–97 and accompanying text.

¹⁵² See Casto, *supra* note 8, at 497–98, 500–01; Randall, *supra* note 96, at 16–17.

¹⁵³ The district courts were decidedly inferior, the circuit courts being “envisioned as the major federal trial courts.” Casto, *supra* note 8, at 496.

¹⁵⁴ See 28 U.S.C. § 1332(a)(2).

¹⁵⁵ *Id.*

¹⁵⁶ See *id.* § 1350.

While alienage diversity was amended to require that one party be a citizen of a state, aliens suing under the ATS may still bring suit in federal court against other aliens, including permanent residents, subject only to the limitations of personal jurisdiction.¹⁵⁷

¶150 An argument might be made that Congress's failure to amend the ATS to require that the defendant be a citizen of a state, as it did with alienage diversity jurisdiction, was a simple oversight. The persuasiveness of this argument depends, however, upon a sense that Congress would have wanted to amend the statute in this way, had they been aware of the issue, and this is ultimately a judgment that Congress ought to have amended it. Because of the problems attending state adjudication of these claims, it certainly is not clear that Congress ought to have wanted to restrict the ATS in this way.

¶151 Moreover, there are constitutional reasons for the changes made to the alienage diversity statute that do not necessarily apply to the Alien Tort Statute. Congress may grant the federal courts jurisdiction over cases "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects."¹⁵⁸ The Judiciary Act of 1789, in granting jurisdiction over suits between two aliens, exceeded this party-based enumeration of the federal judicial power.¹⁵⁹ But the ATS need not be read as an exercise of the Constitution's party-based jurisdiction, and so it is not hindered by the absence of alien v. alien jurisdiction in Article III. Insofar as the law of nations can form a part of federal law, the jurisdiction granted under the ATS ought to be read as "arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority . . ."¹⁶⁰ The First Congress may have intended the ATS to function like the party-based jurisdictions of the federal courts, but its constitutional authority to achieve this goal must instead lie in its power to grant federal courts the authority to hear federal questions.

B. Federal Control Over Litigation Impacting the National Interest

¶152 Both the experiences of the Founding generation and subsequent history have borne out the First Congress's concern over state adjudication of suits with foreign policy implications. While the states certainly have a strong interest in maintaining the reputation of the United States abroad, a common interest does not ensure a common policy. Indeed, common goals frequently lead to counterproductive disagreements about

¹⁵⁷ See *id.*; on personal jurisdiction and extraterritoriality, see Linda S. Mullenix, *Personal Jurisdiction Stops Here: Cabining the Extraterritorial Reach of American Courts*, 45 U. TOL. L. REV. 705 (2014).

¹⁵⁸ U.S. CONST. art. III, § 2.

¹⁵⁹ Ch. 20, § 11, 1 Stat. at 78 ("[T]he circuit courts shall have original cognizance . . . of all suits of a civil nature at common law or in equity, where . . . an alien is a party . . .").

¹⁶⁰ U.S. CONST. art. III, § 2; see Blum & Steinhardt, *supra* note 12, at 98–102; Randall, *supra* note 96, at 17–18. These authors present the ATS as simply intended as an exercise of federal question jurisdiction, which is unlikely as a historical matter. The statute can be saved, however, by reading it in this way. Cf. Bellia & Clark, *supra* note 102, at 525–28 (arguing instead for a narrow reading of the ATS to conform with Art. III party-based grants of jurisdiction); Bradley, *supra* note 3 (same). Of course, if the Court should not have affirmed in *Sosa* that the law of nations forms a part of federal common law in light of the post-*Erie* abandonment of general federal common law, see *supra* notes 114–17 and accompanying text, then the ATS must be a party-based grant of jurisdiction, thus necessitating that the defendant be a U.S. national. As one of the arguments of this paper is that a U.S. defendant should suffice for jurisdiction under the ATS, this possibility will not be explored in full.

the best way to pursue those goals. Pursuit of a common goal usually requires some deference to the entity charged with choosing the means.

¶153 During the Revolutionary War, the Continental Congress asked that the states adopt various measures to punish violations of the law of nations, since foreign governments certainly wanted assurances that the new republic would abide by international norms—the states responded by doing nothing.¹⁶¹ Consequently, when a French ne'er-do-well attacked the secretary of the French legation in Philadelphia three years later, and then (after having posted bail) threatened him with assassination if the prosecution was not dropped, the nation was quite worried that Pennsylvania law would not provide adequate redress.¹⁶² Pennsylvania ultimately ruled that the law of nations formed a part of its own municipal law (and thus that the defendant's punishment would not be determined solely by the damage actually inflicted),¹⁶³ averting the crisis. Some years later, another violation of the rules protecting ambassadors occurred, leading again to the same worry that only the common law as interpreted by a particular state's courts could be relied upon for redress—and leading again to the same relief when the state (in this case, New York) incorporated the law of nations into its common law.¹⁶⁴ It was up to the states to provide a remedy for violations of the law of nations, however, and not all of them did.¹⁶⁵

¶154 Recent scholarship has downplayed the importance of these assaults on ambassadors, but in order to show that the First Congress's concern was with the less sensational problem of violence against foreign nationals who lacked diplomatic protection.¹⁶⁶ International law at the time required that offenses by one state's nationals against those of another be punished by the offender's government.¹⁶⁷ The states were less than reliable in this, especially where British subjects and their property were concerned.¹⁶⁸ At the same time, thwarting British creditors and abusing loyalists were prohibited by the Treaty of Paris—both were rampant.¹⁶⁹ Consequently, the ATS permits suits for torts in violation of a treaty of the United States, as well.¹⁷⁰ Of course, it was open to the First Congress to criminalize such actions rather than have them form the basis of a civil suit, but that approach to violations of international law was in decline and sat uncomfortably with the federal structure of the Constitution, at least where foreign ambassadors were not concerned.¹⁷¹

¶155 An argument could be made that these events suggest that the ATS was not originally intended to extend to all suits having an impact upon the national interest, but

¹⁶¹ Casto, *supra* note 8, at 490–91.

¹⁶² *Id.*

¹⁶³ *Republica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784).

¹⁶⁴ Casto, *supra* note 8, at 494.

¹⁶⁵ *Id.* at 493–94.

¹⁶⁶ See Bellia & Clark, *supra* note 102; Lee, *supra* note 132.

¹⁶⁷ Bellia & Clark, *supra* note 102, at 471–77; Lee, *supra* note 132, at 871–82.

¹⁶⁸ Bellia & Clark, *supra* note 102, at 501–03.

¹⁶⁹ *Id.* at 498–503.

¹⁷⁰ *Id.* at 515.

¹⁷¹ Lee, *supra* note 132, at 886–89 (arguing that the First Congress criminalized only violations of safe conduct granted to foreign ambassadors and other public officials, and even if it did criminalize all safe-conduct violations, prosecution outside of the District of Columbia would have been so uncertain that the ATS was needed to provide visiting merchants with redress). Lee's argument that the 1790 Crimes Act did not cover private persons seems strained: the clauses concerning safe conducts and violations of the law of nations would be redundant on his reading. See Crimes Act of 1790, Sess. II, ch. IX, § 28, 1 Stat. 112.

rather only to violations of safe conduct narrowly conceived.¹⁷² A sovereign was held accountable for violations of safe conduct because it controlled the territory in which those violations occurred, not because someone nominally owing that sovereign allegiance committed them anywhere in the world.¹⁷³ Extraterritorial violations of safe conduct were possible, but were generally restricted to actions taken by the sovereign's military.¹⁷⁴ By contrast, bringing the actions of private citizens within the ambit of the ATS required a more expansive understanding of safe-conduct violations than that which motivated the First Congress; that more expansive understanding not only hinged on specific treaty obligations (rather than simply on the law of nations), but it also still covered only a somewhat military kind of private activity, namely, privateering on behalf of a foreign belligerent.¹⁷⁵ The conclusion to be drawn from this history, it could be argued, is that the ATS was intended to cover "torts implicating a U.S. sovereign obligation,"¹⁷⁶ not simply torts that implicated the national honor or could be a major source of friction with foreign powers.

¶56 There is a difference between saying that the Alien Tort Statute was intended to cover violations of safe conduct, however, and saying that it was meant to cover only that kind of violation. It is telling that the language of the ATS does not restrict its jurisdictional grant to violations of safe conduct, while the First Congress was perfectly capable of restricting the operation of a statute to safe-conduct violations when it wanted to do so. The Crimes Act of 1790, for example, provided punishment for anyone who:
 ¶57 shall violate any safe-conduct or passport duly obtained and issued under the authority of the United States, or shall assault, strike, wound, imprison, or in any other manner infract the law of nations, by offering violence to the person of an ambassador or other public minister.¹⁷⁷

¶58 Ambassadors who had not yet obtained or could not produce a document of safe-conduct were protected only from violence.¹⁷⁸ Anyone with an express guarantee of safe conduct was protected from all violations of the law of nations.¹⁷⁹ The ATS, by contrast, does not restrict its operation to violations of express or implied safe-conducts, instead covering all tortious violations of international law.¹⁸⁰

¶59 Subsequent events have demonstrated that the national interest can be substantially affected by state-level litigation that does not involve the violation of formal safe-conducts or diplomatic privileges. While the plan of the federal convention was to leave foreign affairs to the national government,¹⁸¹ the states were not stripped of all the powers

¹⁷² See Lee, *supra* note 132, at 871–95; cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004) (recognizing an intention to cover assaults on ambassadors and piracy, as well as violations of safe conduct).

¹⁷³ See Lee, *supra* note 132, at 871–82.

¹⁷⁴ *Id.* at 889.

¹⁷⁵ Cf. *id.* at 889–95 (explaining expansion of what could be considered a violation of safe conduct in the eighteenth century).

¹⁷⁶ *Id.* at 895.

¹⁷⁷ Crimes Act of 1790, Sess. II, ch. IX, § 28, 1 Stat. 112.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ See 28 U.S.C. § 1350.

¹⁸¹ THE FEDERALIST NO. 42, at 232 (James Madison) (Clinton Rossiter ed., 1999) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations.").

that would be necessary to effectuate that plan.¹⁸² Nor have politicians at the state and local level been content to leave foreign affairs to the federal government. There was a host of state and local sanctions directed against the apartheid regime in South Africa, for example, or British activities in Northern Ireland.¹⁸³ Massachusetts imposed its own sanctions on Burma when Congress permitted the president to impose and lift sanctions as he thought most efficacious.¹⁸⁴ California sought to decide the terms on which World War II ought to have ended a half century later, enabling reparations for art seized from Jews¹⁸⁵ and for forced labor at the hands of the Japanese.¹⁸⁶ It also sought to enable reparations for the Armenian genocide.¹⁸⁷ These are only a few examples.

¶160 It is not the case, moreover, that a state's lack of deference to the foreign policy decisions of the national government is always reversible. After the International Court of Justice (ICJ) ruled that fifty-one Mexican nationals were entitled to review and reconsideration of their state-court convictions and sentences because they had been tried and sentenced in violation of the Vienna Protocol on Consular Relations,¹⁸⁸ President George W. Bush said that the United States would discharge its duties under international law by having state courts give effect to the ICJ's decision.¹⁸⁹ Texas, however, refused to review or reconsider those convictions, citing its own code of criminal procedure.¹⁹⁰ Because the Vienna Protocol required congressional enactment in order to be binding on the states and because the President's memorandum was not law, the Supreme Court held that it was powerless to force Texas to comply with the United States' treaty obligations.¹⁹¹ Now, we could imagine actions that Congress and the president could take to compel a state to respect the national government's authority in foreign relations. What this incident makes clear, however, is that the states can (and will) show a lack of concern with the foreign-policy implications of their state court activities, especially if they disagree with the foreign policy pursued.

¶161 Ordinarily, litigants are at the mercy of the state in which their case is heard when it comes to the fairness of the law and of the tribunal.¹⁹² The purpose of the Alien Tort

¹⁸² See Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 724–31 (2013) (noting continuing disagreement concerning relationship of federalism to foreign affairs); cf. Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 342 (1999) (arguing that it was not contrary to original intent of Constitution to leave states with the power to interfere in foreign affairs).

¹⁸³ See Howard Fenton, *The Fallacy of Federalism in Foreign Affairs*, 13 NW. J. INT'L L. & BUS. 563, 564–65 (1993).

¹⁸⁴ Massachusetts Act Regulating Contracts With Companies Doing Business With Burma, 1996 Mass Acts 239, ch. 130, held preempted by *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

¹⁸⁵ CAL. CIV. PROC. CODE § 354.3 (West 2000) held preempted by *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954 (9th Cir. 2009).

¹⁸⁶ CAL. CIV. PROC. CODE § 354.6 (West 2000), held preempted by *Deutsch v. Turner Corp.*, 324 U.S. 692 (9th Cir. 2003).

¹⁸⁷ CAL. CIV. PROC. CODE § 354.4 (West 2000), held preempted by *Movsesian v. Victoria Versicherung AG*, 670 F.3d 1067 (9th Cir. 2012) cert. denied, 133 S. Ct. 2795 (2013).

¹⁸⁸ *Case Concerning Avena and Other Mexican Nat'ls (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

¹⁸⁹ *Medellin v. Texas*, 552 U.S. 491, 498 (2008).

¹⁹⁰ *Ex parte Medellin*, 223 S.W.3d 315, 323 (Tex. Crim. App. 2006).

¹⁹¹ *Medellin*, 552 U.S. at 504–32.

¹⁹² See Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles,"* 78 VA. L. REV. 1769, 1800–3 (1992) (justifying diversity jurisdiction).

Statute was not to declare to the world that the United States would become a crusading enforcer of international law, but rather to ensure that a particular kind of litigant would not have to rely upon the state courts for a fair hearing.

C. Addressing *Kiobel's* Impact in Light of *Bauman*

¶62

There were problems with human rights litigation under the Alien Tort Statute that the Court could not ignore in rendering its decision in *Kiobel*. As soon as the law of nations was severed from its traditional moorings and transformed into customary international law, the ATS ceased to be a grant of jurisdiction over well-settled substantive law and became an invitation for judges to declare what was and was not permissible around the world.¹⁹³ Decisions of a sort entrusted by the Constitution to assemblies governed by majority vote could now be made, at least in the first instance, by individuals.¹⁹⁴ This was certainly not the intention behind the ATS,¹⁹⁵ and so the Court moved to rein in the district courts.¹⁹⁶ *Sosa* struck at their ability to declare new violations of international law,¹⁹⁷ but some courts nonetheless discovered previously unknown violations of the law of nations.¹⁹⁸ Doing business with a pariah regime subjected some corporations to suits for “aiding and abetting” in human rights abuses, a charge that sometimes could be escaped only on summary judgment.¹⁹⁹ There has been a constant push to recognize environmental damage as actionable under the ATS.²⁰⁰ In *Kiobel*, the

¹⁹³ Cf. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721–27 (2004) (describing how shifts in legal theory affected impact of the ATS).

¹⁹⁴ See Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT’L L. 457, 464–69 (2001).

¹⁹⁵ See *supra* Part IV.

¹⁹⁶ Cf. Weinberg, *supra* note 23, at 1478–85 (suggesting that the Court’s motivation in *Sosa* and *Kiobel* was to thwart human rights litigation).

¹⁹⁷ *Sosa*, 542 U.S. at 729 (“[T]he door is still ajar subject to vigilant doorkeeping”).

¹⁹⁸ E.g., *Sarei v. Rio Tinto PLC*, 650 F. Supp. 2d 1004, 1026–28 (C.D. Cal. 2009) *aff’d in part, rev’d in part and remanded*, 671 F.3d 736 (9th Cir. 2011), *cert. granted, judgment vacated*, 133 S. Ct. 1995 (2013) and *aff’d*, 722 F.3d 1109 (9th Cir. 2013) (racial discrimination); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1154–57 (E.D. Cal. 2004) (assassination of political opposition figure); see also *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 315–19 (D. Mass. 2013) (post-*Kiobel* case finding persecution of LBGTI community to satisfy *Sosa* standard).

¹⁹⁹ E.g., *In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 263–70 (S.D.N.Y. 2009) (denying motion to dismiss by automobile manufacturers, noting that selling military vehicles with awareness of their intended use to the apartheid South African regime constitutes aiding and abetting human rights violation, but dismissing claims against bank that loaned the regime money, computer manufacturer, and arms supplier); see also *Mastafa v. Chevron Corp.*, 770 F.3d 170, 185 (2d Cir. 2014) (affirming dismissal of suit filed in 2010 against oil company and bank that paid illegal surcharge levied by Iraq on oil sold under the Oil-for-Food program for “aiding and abetting” Saddam Hussein’s human rights violations); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 260–64 (2d Cir. 2009) (affirming summary judgment for oil company after eight years of litigation in suit claiming that the defendant’s investments in Sudan aided and abetted that country’s human rights violations).

²⁰⁰ E.g., James Boeving, *Half Full . . . or Completely Empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez-Machain*, 18 GEO. INT’L ENVTL. L. REV. 109, 133–46 (2005) (*Sosa* leaves future of environmental ATS litigation unclear); Maxine Burkett, *A Justice Paradox: On Climate Change, Small Island Developing States, and the Quest for Effective Legal Remedy*, 35 U. HAW. L. REV. 633, 649–52 (2013) (ATS suits for environmental harm may become viable as international law evolves); Stuart R. Butzier & Sarah M. Stevenson, *Indigenous Peoples’ Rights to Sacred Sites and Traditional Cultural Properties and the Role of Consultation and Free, Prior and Informed Consent*, 32 J. ENERGY & NAT.

Court targeted plaintiffs' ability to invoke the district courts' subject-matter jurisdiction.²⁰¹ In doing so, however, it transferred these same problematic decisions to the state court systems.²⁰²

¶63 The Supreme Court may have struck a third blow against inventive approaches to human rights litigation in *Daimler AG v. Bauman*.²⁰³ Where human rights abuses occur abroad, personal jurisdiction over the defendant usually exists only by way of general jurisdiction.²⁰⁴ After *Bauman*, general jurisdiction over a corporation may be exercised only in its place of incorporation or where it has its principal place of business.²⁰⁵

¶64 While the Court's concern has been with the potential for an embarrassing overabundance of human rights litigation in the federal courts,²⁰⁶ the possibility of state-court foreign-conduct human rights litigation means that the same national embarrassment can occur as a result of a paucity of such litigation at the federal level. A ruling about personal jurisdiction affects the cases that the states may hear in a way that *Sosa* and *Kiobel* did not; of the three, *Bauman* may have the greatest impact on ATS litigation. Nonetheless, even after *Bauman* a number of cases may still be heard in state courts implicating foreign relations to an extent that they ought to be heard in federal court. Consequently, we should opt for a reading of *Kiobel* that permits these cases to be heard in federal court.

V. ADDRESSING KIOBEL'S IMPACT IN LIGHT OF BAUMAN

A. *Bauman* and Personal Jurisdiction over Foreign Defendants

¶65 To a significant extent, the Court in *Daimler AG v. Bauman* mitigated many of the problems that might have arisen out of *Kiobel*. On one hand, if the court may assert specific jurisdiction over a defendant, in which case the litigation must necessarily arise out of the defendant's contacts with the forum state, the policy considerations that drove *Kiobel* seem less urgent. Regarding general jurisdiction, on the other hand, there was a gulf after *Kiobel* between the sorts of potentially embarrassing cases that could not be

RESOURCES L. 297, 327–28 (2014) (prior refusal to recognize environmental damage as violation of customary international law may change); Jaclyn Lopez, *The New Normal: Climate Change Victims in Post- Kiobel United States Federal Courts*, 8 CHARLESTON L. REV. 113, 140–44 (2013) (arguing for an international norm supporting ATS jurisdiction for climate change plaintiffs).

²⁰¹ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

²⁰² See *supra* Part III.

²⁰³ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

²⁰⁴ Cf. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (general jurisdiction is when a court exercises “personal jurisdiction over a defendant in a suit not arising out of or related to the defendant’s contacts with the forum”).

²⁰⁵ *Daimler*, 134 S. Ct. at 760–61. The Court noted that place of incorporation and principal place of business were paradigmatic bases of general jurisdiction, the true test being whether the corporation was at home in the forum state, and refused to extend general jurisdiction to any place where the defendant corporation merely had “continuous and systematic” contacts. While this does not mean that the paradigmatic bases of general jurisdiction are the only bases, the Court did not imply that it thought that other such bases might exist.

²⁰⁶ *Kiobel*, 133 S. Ct. at 1664–65, 1668–89; *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727–28 (2004).

heard in federal court and those that were barred from state court.²⁰⁷ We would want to read *Kiobel* in such a way as to minimize this gulf, but no reading could have eliminated it altogether. *Bauman* takes a step toward minimizing the gulf, but as this section argues, it too does not eliminate it altogether.

¶66 *Bauman* has its greatest effect regarding foreign corporations when the conduct giving rise to the litigation did not occur in the United States.²⁰⁸ A corporation must in some sense be American before it can be sued in an American court over its foreign conduct.²⁰⁹ The Court did not explicitly say that the only way to establish that a corporation's principal place of business was in the United States was to look to where it had its corporate headquarters, but it did refer to the case that identified "principal place of business" as "corporate headquarters" in noting the desirability of having clear jurisdictional rules.²¹⁰ With increasing multi-nationality and shifts in corporate structure, however, it is not inconceivable that foreign corporations will continue to be held to have their principal place of business within the United States.

¶67 Because of state long-arm statutes, moreover, some foreign-conduct human rights litigation can be conducted under the rubric of specific jurisdiction. States may exercise personal jurisdiction over those accused of intentional torts if the brunt of the harm was felt in their borders and that harm was intentionally aimed at the state.²¹¹ Some circuits have permitted suits to proceed when the plaintiff alleges only that the brunt of the harm was felt within the state.²¹² Most foreign-conduct human rights abuses will fail this standard, of course. Nonetheless, human rights abuses committed abroad in order to distress persons in the United States, such as dissidents in exile or foreign diplomatic personnel, certainly cause harm felt in and are aimed at the territory of the United States.²¹³ Further, foreign human rights abuses orchestrated from within the United States can also give rise to litigation under specific jurisdiction.

¶68 Tightening the rules of personal jurisdiction fails to keep foreign-conduct human rights litigation out of state court most obviously when the defendant is an individual. Personal jurisdiction over individuals may be established by nothing more than bare

²⁰⁷ See *supra* Part III.

²⁰⁸ *Bauman* did not address the question of when unincorporated organizations may be subject to general jurisdiction, in part because Daimler AG did not object to the plaintiffs' claim that a California court could exercise general jurisdiction over its subsidiary, Mercedes-Benz USA, LLC. See *Daimler AG v. Bauman*, 134 S. Ct. 746, 758 (2014). The Court may in the future tighten the rules governing general jurisdiction over unions, partnerships, limited liability companies, and the like.

²⁰⁹ *Id.* at 762 (defendant's "affiliations with the State [must be] so continuous and systematic as to render them essentially at home in the forum State" (citation omitted)).

²¹⁰ *Id.* at 760 (citing *Hertz Corp. v. Friend*, 559 U.S. 77 (2010)).

²¹¹ *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

²¹² See, e.g., *Indianapolis Colts, Inc. v. Metro. Balt. Football Club Ltd. P'p*, 34 F.3d 410 (7th Cir. 1994).

²¹³ See Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 608 (2013) (citing *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217 (S.D. Fla. 2011)). Many human rights abuses targeting the United States are covered by the Torture Victim Protection Act, 28 U.S.C. § 1350 note, 106 Stat. 73 (1992), but that statute permits recovery only by the person tortured or, in the case of extrajudicial killings, by those who could bring a wrongful death suit. Moreover, only acts committed under color of state authority are actionable, but states cannot be made subject to suit. See Alford, *supra* note 2, at 1755–56. Similarly, those subjected to forced labor or turned over to human traffickers in order to distress persons living in the United States may recover under the Trafficking Victim Protection Act, if they can make it to an American court, but the persons in the United States who were to be distressed by that forced labor may not. *Cf.* 18 U.S.C. § 1595.

service of process,²¹⁴ as a number of foreign ATS defendants have discovered the hard way.²¹⁵ With regard to natural persons, personal jurisdiction in principle poses no barrier to foreign-cubed human rights litigation in the state courts.

¶69 *Bauman* exiles a great deal of foreign-conduct human rights litigation—and human rights litigation in general—from both federal and state court, but it does leave openings for such litigation. The kinds of human rights litigation that can be heard in the United States after *Bauman*, however, by and large ought to be heard in the United States, and if that litigation is to be heard at all it ought to be handled in the federal system. Rather than trying to see *Bauman* and *Kiobel* as a tag team that tosses human rights litigation from the federal system—a result that would toss a number of cases into the state system rather than out of the country entirely—we should instead see *Bauman* as eclipsing *Kiobel*.

B. Letting *Bauman* Eclipse *Kiobel*

¶70 Three points are worth making at this juncture. One, the sort of foreign-conduct human rights litigation that could satisfy personal jurisdiction after *Bauman* does not, in the main, trigger the foreign policy concerns that led the Court in *Kiobel* to take a skeptical view of foreign-conduct human rights litigation under the Alien Tort Statute. Two, we would want all such litigation that might be heard in the states to have the potential to be heard in a federal court, and this would mean letting *Bauman* rather than *Kiobel* operate as a gatekeeper regarding foreign-conduct human rights litigation, at least where corporate defendants are concerned. Three, the “touch and concern” language of *Kiobel* can be read expansively enough that permitting *Bauman* to eclipse *Kiobel* regarding foreign corporate defendants does not require revisiting the latter’s holding. The total eclipse of *Kiobel* by *Bauman* is not possible with regard to individual defendants, however. The most that can be done regarding individual defendants is to read *Kiobel* to permit suits where personal jurisdiction could be established on the basis of the effects test that governs intentional torts or (perhaps) on the basis of domicile,²¹⁶ but not when personal jurisdiction is established solely by the in-person service of process.

¶71 *Kiobel* took aim at a specific kind of case, one in which the U.S. court system seemed to provide a kind of universal jurisdiction.²¹⁷ Nigerian police had targeted Ogoni villages in the early 1990s, supposedly with the help and encouragement of the Shell Petroleum Development Company of Nigeria.²¹⁸ A decade later, after being granted asylum in the United States, the plaintiffs filed suit for what had occurred in Nigeria.²¹⁹ Similarly, in *Bauman*, Argentine residents brought suit some two decades after the close of the Dirty War against the German parent corporation of Mercedes-Benz Argentina.²²⁰

²¹⁴ *Burnham v. Super. Ct. of Cal.*, 495 U.S. 604 (1990).

²¹⁵ *See, e.g., Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²¹⁶ For the effects test, see *Calder v. Jones*, 465 U.S. 783, 788–89 (1984).

²¹⁷ *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1668 (2013) (“[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms.”).

²¹⁸ *Id.* at 1662–63.

²¹⁹ *Id.*

²²⁰ *Daimler AG v. Bauman*, 134 S. Ct. 746, 750–51 (2014).

In *Tel-Oren v. Libyan Arab Republic*, Israeli plaintiffs looked for relief from an American court concerning the terrorist activities of Libya and various Palestinian groups in murdering civilians in Israel.²²¹ Indeed, it was precisely this sort of foreign-cubed litigation that marked the revitalization of the Alien Tort Statute in the first place.²²² This was a far cry from the adjudication of prizes²²³ or of property within the military jurisdiction of the United States²²⁴ that were formerly tried under the ATS.

¶72 Most cases where personal jurisdiction is available after *Bauman* do not raise the same concerns. A case in point is suits where the defendant is a U.S. citizen or business. Indeed, providing aliens a way to sue U.S. citizens in U.S. court was the most obvious point of the ATS, and it would certainly arouse the ire of foreign nations if our citizens and corporations were not answerable here for their conduct abroad. Conversely, general jurisdiction would now be unavailable concerning the defendants in *Kiobel*—a Nigerian company that was the joint subsidiary of Dutch and English corporations. Only regarding transient individuals, subject to jurisdiction by in-person service of process, can there be litigation over things in no way connected to the United States after *Bauman*. This fact does not mean, however, that the *Kiobel* Court’s policy concerns have not been fully addressed by *Bauman*. The *Kiobel* Court does not appear to have been primarily concerned with defendants like Americo Norberto Pena-Irala or even Radovan Karadžić, served with process while in New York to visit the United Nations but not while on the Headquarters grounds,²²⁵ as opposed to the cottage industry that might arise if corporate defendants with deep pockets and assets vulnerable to attachment could be sued in U.S. courts for activities that might be imputed to them or a subsidiary anywhere in the world.

¶73 This is not to say that U.S. corporations, lawful permanent residents, and citizens should be amenable to suit under the ATS upon bare policy grounds.²²⁶ As discussed above, the First Congress intended that the ATS should provide a remedy in cases where the defendant’s impunity would otherwise be a stain upon the national honor.²²⁷ Thus,

²²¹ *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 775 (D.C. Cir. 1984).

²²² *Cf. Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

²²³ *E.g., Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795); *Moxon v. the Fanny*, 17 F. Cas. 942 (D. Pa. 1793).

²²⁴ *E.g., O’Reilly De Camara v. Brooke*, 209 U.S. 45 (1908).

²²⁵ *Kadic v. Karadzic*, 70 F.3d 232, 237, 246–48 (2d Cir. 1995).

²²⁶ *Contrast Cardona v. Chiquita Brands Int’l, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014) (characterizing the dissent’s argument that “the United States would fail to meet the expectations of the international community were we to allow U.S. citizens to travel to foreign shores and commit violations of the laws of nations with impunity” as a “humane observation” or articulating “desirable goals of foreign policy”).

²²⁷ *See supra* Part IV. Thomas Lee’s opposition to permitting ATS suits based solely on the nationality of the defendant stems from his view that the ATS was intended to deal only with torts the commission of which violated a formal sovereign obligation of protection, not violations of international law that would impugn the national honor if they went unpunished. *See* Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 NOTRE DAME L. REV. 1645, 1668–69 (2014); Lee, *supra* note 132, at 871–95. Yet if the ATS really was intended as a “national security statute” rather than a human rights statute, as Lee forcefully argues, then it would seem that the First Congress would have had a concern for the moral or informal sovereign obligation to hold one’s own citizens to account for conduct abroad regardless of whether Grotius or Vattel would have blessed a war made against the United States for shirking that obligation and even regardless of whether the result was immediate war or diplomatic isolation. *Cf. Doug Cassel, supra* note 11, at 1778–79 (arguing for a permission under international law, but not a formal sovereign obligation, to police citizen behavior abroad in justifying ATS jurisdiction founded solely on nationality). That is, this paper does not argue that the ATS should be applied beyond the scope intended by the First Congress or that Congress’s intent should be

while the presumption against extraterritoriality might more often focus on the “site of the conduct” than on the “identity of the defendant,”²²⁸ there are strong reasons of legislative intent why that general rule does not hold regarding the ATS.²²⁹ Similarly, while the Court was clear in *Kiobel* that a defendant’s “mere corporate presence” in the United States would not suffice to bring a dispute within the jurisdiction conferred by the ATS,²³⁰ place of incorporation and principal place of business are far more robust ties than the minimal “continuous and systematic general business contacts” standard that governed general jurisdiction analysis when Royal Dutch Petroleum was haled into court.²³¹ The fact the ATS was not intended to assert jurisdiction over any human rights violation committed anywhere in the world²³² does not support a conclusion that the ATS was actually to have no effect whatsoever on violations whose connection to the United States lay solely in their perpetrators. After all, it is the norm that you sue a defendant at its home if you cannot get it to come to yours.

¶74 It would go too far, on the other hand, to insist that a defendant be a U.S. citizen before suit could be brought under the Alien Tort Statute.²³³ As argued above, such a requirement is not needed to conform the statute to the boundaries of the federal judicial power set by Article III.²³⁴ One of the *causes célèbres* that prompted the First Congress involved an attack by a Frenchman upon another Frenchman,²³⁵ and we would expect that aliens acting in a manner that touches and concerns the United States could be held accountable in the U.S. even if they cause less than \$75,000 in damages. Similarly, a requirement grounded in Article III that the defendant have U.S. citizenship would mean that permanent lawful residents of the United States could never be sued in the courts of the United States for violations of international law abroad.

¶75 *Bauman* largely allays the concerns at work behind *Kiobel*, and it does so in a more effective way. The “touch and concern” language of the latter is an invitation to litigation, with plaintiffs asserting a nexus with the territory of the United States and defendants decrying that nexus’s insufficiency. Courts have since been asked to engage in a fact-

discerned by reference to our own foreign policy considerations. Rather, the differences between the 1789 Alien Tort Statute and the violations of safe conduct condemned by the 1790 Crimes Act suggest that the former was not concerned solely with safe conducts and thus with violations occurring on American soil, but rather with the broader problem of cases affecting foreign relations.

²²⁸ *Balintulo v. Daimler AG*, 727 F.3d 174, 190 n.24 (quoting *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 74–76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

²²⁹ See *supra* Part IV.

²³⁰ *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

²³¹ *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416 (1984) (general jurisdiction requires “continuous and systematic general business contacts”). The Court would not explain that the threshold for general jurisdiction was an affiliation “so ‘continuous and systematic’ as to render [the defendant] essentially at home in the forum State” until June 27, 2011. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011) (citation omitted). This was ten months after the last substantive opinion in the suit against Royal Dutch Petroleum before the Supreme Court’s final ruling. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). See also Wuerth, *supra* note 213, at 608–9.

²³² See *supra* Part IV.

²³³ Contrast with *Bellia & Clark*, *supra* note 102, at 525–28; Bradley, *supra* note 3.

²³⁴ See *supra* Part IV.A.

²³⁵ Casto, *supra* note 8, 490–91.

sensitive analysis of how much of a nexus is enough of a nexus.²³⁶ A lack of personal jurisdiction, on the other hand, is more readily established, in part because the Court adopted a clear standard for general jurisdiction²³⁷ and in part because courts are more used to dealing with questions of personal jurisdiction. More importantly, a rule regarding the subject-matter jurisdiction of the *federal* courts fails to keep the case out of *state* court.

¶76 Because *Bauman* addresses the policy concerns of *Kiobel*, while *Kiobel* fails to address those concerns when it comes to state courts, it makes sense to let the former eclipse the latter. This article now turns to whether *Kiobel*'s language permits this. That is, if personal jurisdiction can be asserted over a defendant after *Bauman*, is it also the case that, on a plausible reading of *Kiobel*, the litigation touches and concerns the territory of the United States with sufficient force to displace the presumption against extraterritoriality?

¶77 It is unproblematic to see *Kiobel* as satisfied whenever personal jurisdiction is obtained by reason of the defendant's domicile.²³⁸ In those cases, there is certainly some nexus with the territory of the United States. They might be foreign-conduct cases, but they are not foreign-cubed. The plaintiff may be an alien, the conduct may have occurred for the most part overseas, but the defendant will either be a U.S. national or a resident alien. Were state courts to provide foreign plaintiffs with inadequate satisfaction, either because of the law applied or the fairness of their proceedings, the national honor might certainly be implicated in ways that drove the ATS in the first place. A similar logic applies to corporate defendants that have their principal place of business in the United States. Such suits could in many cases be heard under the federal courts' diversity jurisdiction, but the ATS both provides a uniform cause of action subject to federal control and fills in the gaps of diversity jurisdiction.²³⁹

¶78 Leaving aside cases where the defendant is closely associated with the United States, the broadest application of the ATS that respects *Kiobel*'s requirement that the conduct complained of touch and concern the territory of the United States—other than illegal conduct actually taking place within or orchestrated from the United States—would be where some harm was targeted at the United States. Terrorist attacks on U.S. embassies abroad may qualify.²⁴⁰ As discussed above, the torture or enslavement of family members of aliens in the United States in order to affect their activities, or simply to cause distress, would also touch and concern U.S. territory.²⁴¹ Because the ATS was

²³⁶ See, e.g., *Jovic v. L-3 Services, Inc.*, No. 10-CV-5197, 2014 WL 4748614, at *5 (N.D. Ill. Sep. 24, 2014); *Doe v. Exxon Mobil Corp.*, No. 01-CV-1357, 2014 WL 4746256, at *12–14 (D.D.C. Sep. 23, 2014); *Krishanti v. Rajaratnam*, No. 09-CV-5395, 2014 WL 1669873, at *10 (D.N.J. Apr. 28, 2014); *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717 (D. Md. 2014); *Kaplan v. Central Bank of Islamic Republic of Iran*, 2013 WL 4427943, at *15–16 (D.D.C. Aug. 20, 2013); *Ahmed-Al-Khalifa v. Minister of Interior, Federal Republic of Nigeria*, 2013 WL 3991961, at *2 (N.D. Fla. Aug. 2, 2013); *Ahmed-Al-Khalifa v. Trayers*, 2013 WL 3326212, at *2 (D. Conn. Jul. 1, 2013); *Mohammadi v. Islamic Republic of Iran*, 2013 WL 2370594, at *14 (D.D.C. May 31, 2013).

²³⁷ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 760–62 (2014).

²³⁸ See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 528–31 (4th Cir. 2014); *Du Daobin v. Cisco Sys., Inc.*, 2 F. Supp. 3d 717 (D. Md. 2014); *Ahmed v. Magan*, No. 10-CV-00342, 2014 WL 4479077, at *1–2 (S.D. Ohio Aug. 20, 2013).

²³⁹ For these gaps, see *supra* notes 99–107 and accompanying text.

²⁴⁰ See *Mwani v. Laden*, 947 F. Supp. 2d 1 (D.D.C. 2013).

²⁴¹ See *supra* note 221 and accompanying text.

enacted in order to ensure a federal forum to aliens who could not otherwise avail themselves of diversity jurisdiction, and because such cases could be heard in state courts where personal jurisdiction was had over the defendant, such cases are not as foreign to the original intent of the ATS as other foreign-cubed human rights litigation.²⁴²

Moreover, foreign states have less justification to complain that the United States is regulating conduct within their borders if that conduct intentionally harms persons under the legal protection of the American government. Insofar as the presumption against extraterritoriality is founded upon a tacit congressional respect for comity among sovereigns, that presumption ought to be weaker where that comity is lacking.

¶79 This is not to argue that *Bauman* can completely eclipse *Kiobel*, but only that *Kiobel* should be read narrowly, its policy objectives having been satisfied by *Bauman*. Because individual defendants are still subject to personal jurisdiction by the bare service of process, even the least restrictive reading of *Kiobel* does not permit ATS suits wherever personal jurisdiction is satisfied. That is, a state court might be able to assert personal jurisdiction over a transient defendant and that defendant may find him-or-herself unable to remove to federal court under the ATS on this reading. While undesirable from a policy standpoint, that result is compelled by *Kiobel*, even when read to permit a wide range of foreign-conduct human rights litigation.

¶80 This is also not to say that federal courts would have to hear every case that could be heard under the *Bauman-Kiobel* criteria outlined above simply because a plaintiff or defendant desired it. The same discretionary doctrines of *forum non conveniens*, comity, exhaustion, and deference to the executive that courts could invoke in ATS cases before *Kiobel* can be invoked afterwards.²⁴³

VI. CONCLUSION

¶81 The Supreme Court's decisions regarding the Alien Tort Statute can be understood as reactions to the threat of international scandals initiated by a district court judge's interpretation of customary international law. The Court first attempted to provide guidance regarding the substantive law to be applied in *Sosa*, but it further curtailed lower federal court discretion through a narrowing of their jurisdiction in *Kiobel*. The result of this narrowing, however, is to leave foreign-conduct human rights litigation to the states. Nothing prevents the states from taking such cases. If there is to be an American forum, however, it is preferable that this forum be federal. Because congressional action would most likely be necessary in order to take such cases away from the states, and because Congress enacted the ATS out of federalism concerns, we ought to interpret *Kiobel* in such a way that permits greater access to the federal courts.

²⁴² See *supra* Part IV.

²⁴³ Cf. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1674 (2013) (Breyer, J., concurring in judgment) (suggesting that these doctrines be employed to reduce international friction); *Doe v. Exxon Mobil Corp.*, Nos. 01-CV-1357 & 07-CV-1022, 2014 WL 4746256, at *6–8 (D.D.C. Sep. 23, 2014) (applying these doctrines in context of ATS suit).