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# Applying Domestic Statutes to Foreign Conduct: How Much Does *Kiobel* Touch and Concern the Presumption Against Extraterritorial Application

Jessica Neer McDonald

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# Applying Domestic Statutes to Foreign Conduct: How Much Does *Kiobel* Touch and Concern the Presumption Against Extraterritorial Application

Jessica Neer McDonald\*

*This paper examines a tumultuous history of applying United States law to foreign conduct in United States federal courts and the impact of recent Supreme Court decisions in this area. Despite its inconsistent application, the presumption against extraterritorial application may bridle Article III courts' authority of applying domestic law to foreign conduct. Notably, a complicated test of displacing the presumption has emerged from the recent Supreme Court case of *Kiobel v. Royal Dutch Petroleum Co.*, which concerned foreign conduct under the Alien Tort Statute ("ATS"). The test states the presumption is overcome if the foreign conduct "touches and concerns" the United States with sufficient force. This paper further analyzes the touch and concern test, which provokes residency, citizenship, and jurisdictional considerations. These considerations expand beyond ATS litigation for guiding litigants and courts on when the presumption may be displaced to apply domestic laws to foreign conduct.*

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## I. INTRODUCTION

With great power comes great responsibility.<sup>1</sup> Or does it? Improved methods of travel, communication, and technology have afforded greater ease in taking business and/or leisure international within the last century. This power of globalization is widespread and inevitable. Yet as people and business become increasingly international, consequences for misconduct abroad become increasingly difficult to remedy. Whether United States law may hold a person or corporation responsible in federal courts for conduct abroad is unpredictable, which suggests that the more people and business expand internationally, the less likely they will be accountable in the United States for conduct that occurs abroad.

Over the last century, Article III courts have variously expanded and contracted their role in addressing these matters, mostly contingent upon the court's interpretation or disregard of a doctrine referred to as the presumption against extraterritorial application.<sup>2</sup> The presumption against extraterritorial application is a canon of statutory interpretation that assumes domestic law does not apply beyond the United States, unless the operative statute explicitly calls for application beyond domestic conduct.<sup>3</sup> The extension of people and business all over the world has intensified the need to understand when domestic statutes may be applied to foreign conduct that directly or tangentially affect the United States.<sup>4</sup>

Jurisprudence concerning the Alien Tort Statute ("ATS") provides an interesting lens through which federal statutes or common law can guide foreign conduct in federal courts. The ATS is a thirty-three word jurisdictional statute that remained dormant for close to

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<sup>1</sup> See Stan Lee & Steve Ditko, *Spider-Man!*, AMAZING FANTASY #15, Aug. 1962, at 13.

<sup>2</sup> See *infra* Part I; see generally Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019 (2011) (offering a theoretical approach while contemplating the interaction of congressional powers to legislate extraterritoriality and international law).

<sup>3</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

<sup>4</sup> See also *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164-65 (2004) (stating the Supreme Court ordinarily construes statutes to avoid interfering with other nations' sovereign interests, which is "needed in today's highly interdependent commercial world").

two centuries.<sup>5</sup> The ATS was enacted as section 9 of the Judiciary Act of 1789<sup>6</sup> and was not heavily utilized until it was resurrected in 1980 through the Second Circuit opinion of *Filartiga v. Pena-Irala*.<sup>7</sup> It is the only statute of its kind in the world because it provides noncitizens a civil remedy in United States courts for violations of “the law of nations” or “a treaty of the United States.”<sup>8</sup>

In the seminal case of *Filartiga*, a Paraguayan family brought suit in a United States federal court against a Paraguayan military official for torturing their son in Paraguay.<sup>9</sup> The Second Circuit found that the “deliberate torture perpetrated under the color of official authority violate(d) universally accepted norms of the international law of human rights, regardless of the nationality of the parties.”<sup>10</sup> *Filartiga* thus opened the ATS as an avenue for human rights redress in federal courts.<sup>11</sup>

While the Second Circuit’s opinion in *Filartiga* effectively allowed the ATS to be utilized as a vehicle for human rights litigation in federal courts, the recent Supreme Court decision of *Kiobel v. Royal Dutch Petroleum Co.* might have obstructed it.<sup>12</sup> In 2013, *Kiobel*, a subsequent Supreme Court ATS case, yielded a case study of complicated questions that accompany widespread transnational

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<sup>5</sup> The statute states, “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.” 28 U.S.C. § 1350 (2012).

<sup>6</sup> See generally *Kiobel*, 133 S. Ct. at 1663 (describing two incidents that prompted the passage of the Alien Tort Statute).

<sup>7</sup> See Rachel Paul, Note & Comment, *Interpreting Liability Under the Alien Tort Statute*, 67 U. MIAMI L. REV. 705, 706 (2013); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461 (1989).

<sup>8</sup> Pierre N. Leval, *The Long Arm of International Law*, FOREIGN AFF. (Mar./Apr. 2013), <http://www.foreignaffairs.com/articles/138810/pierre-n-leval/the-long-arm-of-international-law> (“[T]he United States remains the only country in the world to entertain such lawsuits.”).

<sup>9</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 878 (2d Cir. 1980).

<sup>10</sup> *Id.*

<sup>11</sup> See Ismael Diaz, Comment, *A Critique of Proposals to Amend the Foreign Sovereign Immunities Act to Allow Suits Against Foreign Sovereigns for Human Rights Violations*, 32 U. MIAMI INTER-AM. L. REV. 137, 141 n.19 (2001).

<sup>12</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659; discussion *infra* Part III.

interactions, such as the weight of the presumption against extraterritorial application and its reach into different areas of law.<sup>13</sup> Unlike *Filartiga*, *Kiobel* involved United States residents and multi-national corporations that had a presence in the United States.

More specifically, *Kiobel* concerned United States residents who brought claims under the ATS against foreign corporations for alleged conduct that occurred in Nigeria.<sup>14</sup> The Court applied the presumption against extraterritorial application, which inhibits domestic statutes from guiding foreign conduct.<sup>15</sup> Although the defendants were corporations that had a presence in the United States and the plaintiffs were United States residents, “mere corporate presence” and plaintiff’s legal residency status was not enough to rebut the presumption.<sup>16</sup> Because the presumption applied and other factors could not overcome it, the ATS claims for the alleged foreign conduct were dismissed.<sup>17</sup>

*Kiobel*’s application of the presumption relied primarily on *Morrison v. National Australia Bank Ltd.*, a 2010 Supreme Court decision concerning securities.<sup>18</sup> *Morrison* explains that the presumption against extraterritorial application may be displaced if the alleged conduct was focused on a federal “congressional concern.”<sup>19</sup> Lower courts have also relied on *Morrison* to explain extraterritorial application of statutes in other contexts, such as antitrust, Racketeer Influenced and Corrupt Organizations (RICO), and Lanham Act claims.<sup>20</sup>

The application of *Morrison*, a “foreign-cubed” securities case, in a variety of unrelated subject areas is telling of the importance of understanding when domestic statutes can be applied to conduct that occurred abroad—a crucial role of United States federal courts. This note will evaluate the relationship between *Kiobel* and *Morrison*, the

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<sup>13</sup> See *Kiobel*, 133 S. Ct. 1659.

<sup>14</sup> See *id.* at 1662.

<sup>15</sup> See *id.* at 1669.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1664-67, 1669; *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010). Interestingly, *Morrison* is referred to as “foreign-cubed” due to the presence of three indicators: foreign plaintiffs, foreign defendants, and conduct occurring outside of the United States, which is akin to the factors present in *Filartiga*.

<sup>19</sup> *Morrison*, 561 U.S. at 266; see discussion *infra* Part I.B.

<sup>20</sup> See discussion *infra* Part I.B.ii.

impact *Kiobel* has on the presumption against extraterritorial application jurisprudence, and the reach *Kiobel* may have into other areas of the law. Part I offers a general background to the presumption against extraterritorial application and how its temperamental history may guide courts today to determine if the presumption should apply to any number of statutes.<sup>21</sup> Part I also details the Supreme Court's interpretation of the presumption against extraterritorial application within the last five years through *Morrison*, which has resurrected a strong presumption against extraterritorial application, and *Kiobel*.<sup>22</sup> Part II further explores *Kiobel*'s presumption "test" and the factors the majority and concurrences evaluate in applying the presumption against extraterritorial application to the ATS.<sup>23</sup> Part III discusses the effect *Kiobel* may have on the presumption as whole, while examining residency and citizenship considerations of the plaintiff or defendant and jurisdictional considerations.<sup>24</sup>

## II. PRESUMPTION AGAINST EXTRATERRITORIAL APPLICATION

Justice Oliver Wendell Holmes, Jr. stated in a 1909 antitrust case, "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."<sup>25</sup> Justice Holmes further outlined that without a clear mandate by Congress, courts must confine the statute being interpreted to the "territorial limits over which the lawmaker has general and legitimate power."<sup>26</sup> This interpretation

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<sup>21</sup> See *infra* Part I.

<sup>22</sup> See *infra* Part I.B.

<sup>23</sup> See *infra* Part II.

<sup>24</sup> See *infra* Part III.

<sup>25</sup> *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) (citing *Slater v. Mexican Nat'l. R.R. Co.*, 194 U.S. 120, 126 (1904)). The Sherman Act has expanded extraterritorial reach under *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945) and *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (2d Cir. 1976).

<sup>26</sup> *Am. Banana*, 213 U.S. at 357.

presents a rigid origination of the presumption against extraterritorial application, which has since been modified to allow for some extraterritorial application.<sup>27</sup>

In general, the presumption against extraterritorial application pertains to domestic statutes when used to govern foreign conduct to estop cases from being tried in United States federal courts.<sup>28</sup> The concept derives from the understanding that Congress creates laws with respect to domestic, and not foreign, affairs<sup>29</sup> and comity.<sup>30</sup> The most appropriate form of comity may be labeled as “prescriptive comity,” which Justice Scalia describes, in his dissent in *Hartford Fire Insurance Company v. California*, as “the respect sovereign nations afford each other by limiting the reach of their laws.”<sup>31</sup>

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<sup>27</sup> Accord Jonathan Turley, Legal Theory, “*When in Rome*”: *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U.L. REV. 598, 604, 608 (1990).

<sup>28</sup> See generally William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT’L L. 85, 85 (1998) [hereinafter Dodge, *Understanding the Presumption*].

<sup>29</sup> See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (citing *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993)); accord *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949); see also *Am. Banana Co.*, 213 U.S. at 357 (“All legislation is prima facie territorial.”) (quotation omitted).

<sup>30</sup> See *Am. Banana Co.*, 213 U.S. at 356. *American Banana*’s holding was substantially overturned by *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); see also *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, as recognized in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006) (“[The presumption] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.”); see generally John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT’L L. 351, 362-66 (2010) (describing early cases adopting *American Banana*’s presumption against extraterritoriality generally involved situations that were unlikely to cause conflicting jurisdictional claims by more than one country).

<sup>31</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting); see RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 402 (1987). Note that *Hartford*’s majority opinion did not elicit the presumption against extraterritoriality. Instead, Justice Scalia’s dissent took it upon itself to conclude the presumption was not at issue because of case law that held the Sherman Act did not invoke the presumption. *Hartford*, 509 U.S. at 814; see generally Stephen D. Piraino, Note, *A Prescription for Excess: Using Prescriptive Comity to Limit the Extraterritorial Reach of the Sherman Act*, 40 HOFSTRA L. REV. 1099 (2012) (describing the Sherman Act’s extraterritorial application).

Moreover, the presumption serves as a restriction for the judicial branch.<sup>32</sup> To maintain each branch of the government separation of the powers, the Supreme Court has expressed the need to avoid any interpretation of federal law that may have foreign policy consequences.<sup>33</sup> The presumption against extraterritorial application particularly inhibits situations not clearly outlined by the political branches.<sup>34</sup>

#### A. *Brief Background*

The application of the presumption to various statutes has proven inconsistent, but it is “an essential part of the Supreme Court’s jurisprudence.”<sup>35</sup> The inconsistency may largely result from its temperamental history.<sup>36</sup> This brief background will use case examples to highlight the presumption’s interesting history, highlight jurisdictional questions that accompany foreign conduct, and compare the presumption’s application on criminal statutes.

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<sup>32</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013); *see also* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 799 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (“[S]eparation of powers principles . . . caution courts to avoid potential interference with the political branches’ conduct of foreign relations.”).

<sup>33</sup> *See* Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 505, 551 (1997).

<sup>34</sup> *See, e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (“[T]he arguments should be directed to the Congress rather than to us.”); *Kiobel*, 133 S. Ct. at 1669 (“The presumption against extraterritoriality guards against our courts triggering such serious foreign policy consequences, and instead defers such decisions, quite appropriately, to the political branches.”); *see also*, Bradley, *supra* note 33, at 516 (“As part of [the] division of power, the Constitution assigns principal policymaking authority, as well as principal authority over foreign affairs, to the legislative and executive branches rather than to the judicial branch.”).

<sup>35</sup> *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 76 (D.C. Cir. 2011) (Kavanaugh, J., dissenting); *see generally* John H. Knox, *The Unpredictable Presumption Against Extraterritoriality*, 40 SW. L. REV. 635, 640 (2011).

<sup>36</sup> *See generally* Dodge, *Understanding the Presumption*, *supra* note 28, at 352-53; *see also* William S. Dodge, *The Presumption Against Extraterritoriality After Morrison*, 105 AM. SOC’Y INT’L L. PROC. 396, 396 (2011) [hereinafter Dodge, *After Morrison*] (“The Supreme Court’s recent extraterritoriality jurisprudence has been a mess.”).

In 1991, the Supreme Court opinion in *Equal Employment Opportunity Commission v. Arabian American Oil Company* (“*Aramco*”) compared varying precedent and set a strict application of the presumption.<sup>37</sup> The Supreme Court applied the presumption against extraterritoriality in a Title VII employment discrimination suit brought by an American citizen against an American company for conduct that occurred abroad.<sup>38</sup> The Court in *Aramco* found the presumption was not displaced on the basis that Congress has previously articulated the desire of extraterritorial application of a statute, and it did not do so when it enacted the Title VII statute.<sup>39</sup>

*Aramco* cited the Lanham Act as an example of a statute that Congress intentionally gave extraterritorial reach.<sup>40</sup> In *Steele v. Bulova Watch Co.*, the Supreme Court analyzed whether the Lanham Act, which was enacted to prevent the deceptive use of trademarks, reached alleged unlawful conduct by a United States citizen outside of the United States.<sup>41</sup> Because the unlawful conduct had an impact on the United States and the language of the statute gave “broad jurisdictional grant” and “sweeping reach into all commerce which may lawfully be regulated by Congress,”<sup>42</sup> the Supreme Court found that Congress intended the statute to have extraterritorial application.<sup>43</sup>

Conversely, *Aramco* analyzed two cases that found the respective statutes did not apply to foreign conduct. First, the *Aramco* Court analyzed the Federal Employers’ Liability Act<sup>44</sup> in the Supreme Court decision of *New York Central Railroad Co. v. Chisholm*.<sup>45</sup> In relation to the liability of railroad companies, the

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<sup>37</sup> See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 258.

<sup>40</sup> *Id.* at 252-53; see 15 U.S.C. § 1127 (2012); but see Bradley, *supra* note 33, at 527-28 (criticizing the reasoning the Lanham Act was found to have extraterritorial reach).

<sup>41</sup> *Arabian Am. Oil Co.*, 499 U.S. at 252 (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280, 286-87 (1952)).

<sup>42</sup> *Arabian Am. Oil Co.*, 499 U.S. at 252 (citing *Steele*, 344 U.S. at 286-87); compare 15 U.S.C. § 1127 (2012) (defining commerce as “all commerce which may lawfully be regulated by Congress”) with U.S. CONST. art. I, § 8, cl. 3 (stating Congress shall have the power to regulate “[c]ommerce with foreign Nations”).

<sup>43</sup> See *Steele*, 344 U.S. at 286-87.

<sup>44</sup> Federal Employers’ Liability Act, 45 U.S.C. §§ 51-60 (2012).

<sup>45</sup> *New York Cent. R.R. Co. v. Chisholm*, 268 U.S. 29 (1925).

statute addressed negligent injuries incurred by employees engaging in commerce between “any of the States or Territories and any foreign nation or nations . . . .”<sup>46</sup> Although the claim at issue in the case was filed by the estate of an American citizen against an American carrier for conduct that occurred thirty miles away from the United States in Canada, the Court found no language in the statute to warrant an extraterritorial application.<sup>47</sup> Thus, the Federal Employers’ Liability Act could not be applied to conduct that occurred abroad.<sup>48</sup>

Second, the *Aramco* Court considered the National Labor Relations Act<sup>49</sup> in the Supreme Court decision of *McCulloch v. Sociedad Nacional de Marineros de Honduras*.<sup>50</sup> Although the National Labor Relations Act’s definition of commerce included “between any foreign country,” the broad language did not specify an extraterritorial effect.<sup>51</sup> This example, along with *Chisholm*’s analysis of the Federal Employers’ Liability Act, supported the following strong presumption: without express language to indicate extraterritorial reach, there is none.<sup>52</sup>

Justice Marshall, joined by Justice Blackmun and Justice Stevens, austerey opposed the majority’s strict statutory interpretation.<sup>53</sup> The dissent countered that the presumption is not a “clear statement” rule; instead, courts should consider all factors of legislative intent.<sup>54</sup> More specifically, Justice Marshall reasoned that Congress intended Title VII to protect United States citizens from discrimination by United States employers abroad.<sup>55</sup>

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<sup>46</sup> 45 U.S.C. § 51.

<sup>47</sup> *Chisholm*, 268 U.S. at 30-31.

<sup>48</sup> *Id.* at 31.

<sup>49</sup> National Labor Relations Act, 29 U.S.C. §§ 151-169 (2012).

<sup>50</sup> *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963).

<sup>51</sup> *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 251-52 (1991) (citing *McCulloch*, 372 U.S. at 19).

<sup>52</sup> *Arabian Am. Oil Co.*, 499 U.S. at 251-52; *see also* *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”); *but see Arabian Am. Oil Co.*, 499 U.S. at 263-64 (Marshall, J., dissenting).

<sup>53</sup> *Arabian Am. Oil Co.*, 499 U.S. 244, at 260 (Marshall, J., dissenting).

<sup>54</sup> *Id.* at 261.

<sup>55</sup> *Id.*

Apart from *Aramco*'s strict application of the presumption for Title VII employment discrimination,<sup>56</sup> exceptions have been removed from the grasp of the presumption for other statutes, such as criminal statutes.<sup>57</sup> The seminal case of *United States v. Bowman* articulated that the presumption does not apply to criminal statutes because criminal statutes are "not logically dependent on their locality for the government's jurisdiction, but are enacted because of the right of the government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers, or agents."<sup>58</sup>

Both *Aramco* and *Bowman* reveal when the presumption against extraterritorial application may be overcome to allow application of a domestic statute to foreign conduct; although, some courts simply do not apply the presumption at all.<sup>59</sup> This is likely to change in the twenty-first century because the Supreme Court has addressed the presumption against extraterritorial application more definitively than it has in the past in two distinct areas of law.<sup>60</sup>

For example, in 2010, the Supreme Court in *Morrison v. National Australia Bank Ltd.* invigorated the presumption in a securities regulation case.<sup>61</sup> *Morrison* has had widespread effects on the overall canon of the presumption against extraterritoriality.<sup>62</sup> Three

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<sup>56</sup> Notably, Congress responded to *Aramco* by enacting the Civil Rights Act of 1991 to give Title VII specified extraterritorial reach. *See* Civil Rights Act of 1991, Pub. L. No. 102-166 (codified as amended at 42 U.S.C. § 2000e(f) (2012)).

<sup>57</sup> *See* *United States v. Bowman*, 260 U.S. 94, 98 (1922); *United States v. Yakou*, 428 F.3d 241, 252 (D.C. Cir. 2005); *United States v. Yousef*, 327 F.3d 56, 87-88 (2d Cir. 2003); *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002); *United States v. Ali*, 885 F. Supp. 2d 17, 23-24 (D.D.C. 2012); *but see* David Keenan & Sabrina P. Shroff, *Taking the Presumption Against Extraterritoriality Seriously in Criminal Cases After Morrison and Kiobel*, 45 LOY. U. CHI. L.J. 71, 80-87 (2013).

<sup>58</sup> *Bowman*, 260 U.S. at 98.

<sup>59</sup> *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (applying a domestic statute to foreign conduct without applying the presumption against extraterritoriality).

<sup>60</sup> *See* *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 278-80 (2010) (Stevens, J., concurrence); *see also* *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 439 (2007).

<sup>61</sup> *See Morrison*, 561 U.S. 247.

<sup>62</sup> *See generally* Dodge, *After Morrison*, *supra* note 36.

years later, the Supreme Court depended heavily on *Morrison* to address the presumption against extraterritorial application in *Kiobel*, a human rights case.<sup>63</sup> Exploring the effect of both these cases is an important indication of the future application of the presumption to various areas of law.

#### B. *Morrison v. National Australia Bank Ltd.*'s Presumption

The alleged fraud in *Morrison* resulted from National Australia Bank's purchase of a mortgage serving company that was headquartered in Florida.<sup>64</sup> The plaintiffs argued that because the fraud happened in Florida, United States securities laws should apply, specifically section 10(b) of the Exchange Act.<sup>65</sup> Conversely, the respondents asserted that because the fraud related to trading in Australian securities, United States securities law should not apply.<sup>66</sup>

The Second Circuit found that because it is not clear from the language of the Exchange Act if it has an extraterritorial application, the court must "discern" whether Congress would want the statute to apply through a "conduct" test, "effects" test, or a combination of the two tests.<sup>67</sup> The conduct test asks "whether the wrongful conduct occurred in the United States," and the effects test asks "whether the wrongful conduct had a substantial effect in the United States or upon United States citizens."<sup>68</sup> The Second Circuit specifically concluded the conduct test was necessary to assess whether there was sufficient United States involvement for federal court jurisdiction.<sup>69</sup>

Justice Scalia's majority opinion took a different approach.<sup>70</sup> The opinion criticized the Second Circuit's "disregard" of the presumption against extraterritoriality in federal securities cases and quashed the suggestion that extraterritorial reach is a question of subject-matter jurisdiction by defining the scope as a question of

<sup>63</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>64</sup> See *Morrison*, 561 U.S. at 250-51.

<sup>65</sup> See *id.* at 252-53.

<sup>66</sup> See *id.* at 253.

<sup>67</sup> See *Morrison v. Nat'l Austl. Bank Ltd.*, 547 F.3d 167, 171 (2d Cir. 2008).

<sup>68</sup> *Id.* (citing *SEC v. Berger*, 322 F.3d 187, 192-93 (2d Cir. 2003)); see *Psimenos v. E.F. Hutton & Co.*, 722 F.2d 1041, 1045 (2d Cir. 1983).

<sup>69</sup> See *id. Morrison*, 547 F.3d at 171 (citing *Itoba Ltd. v. LEP Group PLC*, 54 F.3d 118, 122 (2d Cir. 1995)).

<sup>70</sup> See *Morrison*, 561 U.S. at 249.

merits.<sup>71</sup> Under the issue of merits, the Court determined that because the focus of the Securities Exchange Act of 1934 is not on where the wrong began but upon the purchases and sales of securities on domestic soil, section 10(b) applies only to the transactions of securities listed on domestic exchanges.<sup>72</sup> The opinion bluntly stated, “When a statute gives no clear indication of an extraterritorial application, it has none.”<sup>73</sup>

The opinion determined that the focus in interpreting the extraterritorial application of statutes is not on where the prohibited conduct occurred, but where the conduct effects.<sup>74</sup> *Morrison* therefore shifts the analysis “from the location of the conduct to the location of the effects.”<sup>75</sup> Therefore, although the location of the conduct, as plaintiffs emphasize, is in Florida, the Court noted the rarity of a situation where a statute is prohibited extraterritorial application that does not have any contact at all with the United States.<sup>76</sup> “[The presumption] would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”<sup>77</sup> Therefore, *Morrison* sought to eliminate concerns of the “contact test,” and instead, emphasize the “effect test.”<sup>78</sup>

### 1. Justice Stevens’ Concurrence

Justice Stevens concurred in judgment, but differed in reasoning.<sup>79</sup> He wrote a separate concurrence to identify a possible unintended outcome of the majority’s holding and characterize the presumption against extraterritorial application differently.<sup>80</sup> The concurrence highlights that as a result of the majority’s holding, Amer-

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<sup>71</sup> *Id.* at 248.

<sup>72</sup> *Id.* at 249; accord Dodge, *Understanding the Presumption*, *supra* note 28.

<sup>73</sup> *Morrison*, 561 U.S. at 248.

<sup>74</sup> See Dodge, *After Morrison*, *supra* note 36, at 397 (citing William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687 (2011)).

<sup>75</sup> See Dodge, *After Morrison*, *supra* note 36, at 399.

<sup>76</sup> See *Morrison*, 561 U.S. at 249.

<sup>77</sup> See *id.* at 266.

<sup>78</sup> See Dodge, *After Morrison*, *supra* note 36, at 397 (citing William S. Dodge, *Morrison’s Effects Test*, 40 SW. L. REV. 687 (2011)).

<sup>79</sup> *Morrison*, 561 U.S. at 274 (Stevens, J., concurring).

<sup>80</sup> See *id.*

icans who bought shares on foreign exchanges cannot sue under federal securities laws.<sup>81</sup> Consequently, the focus of the Exchange Act is on the purchases and sales of securities in domestic markets regardless of the effect of any fraud suffered at home.<sup>82</sup>

Justice Stevens' portrayal of the presumption against extraterritorial application also differs from the majority's depiction.<sup>83</sup> The concurrence refers to the presumption as a "flexible rule of thumb" that the court turns into "something more like a clear statement rule."<sup>84</sup> He emphasizes that the presumption against extraterritoriality serves "as a theory of congressional purpose, a tool for managing international conflict, a background norm, a tiebreaker."<sup>85</sup>

## 2. *Morrison's* Effect

The effect of *Morrison* is evident in cases extending well beyond securities fraud. Defendants have utilized the stringent application of the presumption against extraterritoriality in areas of law such as

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<sup>81</sup> *See id.* at 285.

<sup>82</sup> *See id.* at 284.

<sup>83</sup> *See id.* at 278.

<sup>84</sup> *Id.*

<sup>85</sup> *See id.* at 280.

the Lanham Act,<sup>86</sup> Sherman Act,<sup>87</sup> RICO Act,<sup>88</sup> Torture Victim Protection Act,<sup>89</sup> and ATS.<sup>90</sup> Although some scholars warn against extending this securities-related case to other areas of law,<sup>91</sup> the difference in substantive law has not stopped courts around the country from utilizing *Morrison* to explain and/or apply the presumption in other arenas.<sup>92</sup> This is not surprising given *Morrison*'s reliance on precedent unrelated to securities regulation and its direct language that states, "we apply the presumption in all cases . . ."<sup>93</sup> For example, the Court frequently cites *Aramco*, an employment law case

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<sup>86</sup> See, e.g., *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601 (9th Cir. 2010) (comparing the Lanham Act to the Exchange Act in determining how *Morrison* affects the statute).

<sup>87</sup> See, e.g., *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (en banc) (examining how *Morrison* interplays with the Foreign Trade Antitrust Improvements Act of 1982, which was meant to limit the extraterritorial application of the Sherman Act).

<sup>88</sup> See, e.g., *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29 (2d Cir. 2010) (per curiam) (stating RICO does not apply extraterritorially without delving into the purpose of the statute); see generally Gideon Mark, *RICO's Extraterritoriality*, 50 AM. BUS. L.J. 543 (2013).

<sup>89</sup> See, e.g., *United States v. Belfast*, 611 F.3d 783 (11th Cir. 2010) (justifying the Torture Victim Protection Act's extraterritorial application by analyzing *Morrison*).

<sup>90</sup> See, e.g., *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (using *Morrison*'s strict application of the presumption).

<sup>91</sup> See David He, *Beyond Securities Fraud: The Territorial Reach of U.S. Laws After Morrison v. N.A.B.*, 2013 COLUM. BUS. L. REV. 148, 202-205 (2013) ("[W]hile defendants have been eager to expand the bounds of *Morrison*, attempts by the courts to limit other U.S. laws through the strict presumption against extraterritoriality, and to fit wholly different scenarios under *Morrison*'s transaction-based approach, have resulted in even great inconsistency and uncertainty."); Austen L. Parrish, *Morrison, the Effects Test, and the Presumption Against Extraterritoriality: A Reply to Professor Dodge*, 105 AM. SOC'Y INT'L L. PROC. 399 (2011).

<sup>92</sup> Some scholars suggest *Morrison* can be extended to limit Bowman's liberal interpretation of the presumption in criminal cases. See, e.g., Zachary D. Clopton, *Bowman Lives: The Extraterritorial Application of U.S. Criminal Law After Morrison v. National Australia Bank*, 67 N.Y.U. ANN. SURV. AM. L. 137, 181 (2011) ("A court looking at an ambiguous criminal statute may treat *Morrison* as the straw that broke Bowman's back, requiring a stringent presumption in criminal as well as civil cases.").

<sup>93</sup> *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 261 (2010).

concerning extraterritorial application, to justify applying the presumption in this securities case.<sup>94</sup> The Supreme Court has also relied heavily on *Morrison* recently to extend the presumption against extraterritorial application to the recent opinion of *Kiobel*, relating to the ATS.<sup>95</sup>

### III. INTERPRETING *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*'S PRESUMPTION

*Kiobel*'s effect on the overall application of the presumption against extraterritorial application will depend on whether subsequent courts will utilize the presumption as a strict rule statement against applying domestic statutes to foreign conduct, look to the structure, purpose, and legislative intent of the statute to examine if the presumption may be overcome, or some combination of the two. Evaluating this recent decision may provide guidance on applying the Alien Tort Statute and beyond.

In *Kiobel*,<sup>96</sup> Nigerians residing in the United States brought claims under the Alien Tort Statute<sup>97</sup> against foreign corporations

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<sup>94</sup> See, e.g., *id.* at 269 (“[W]e reject the notion that the Exchange Act reaches conduct in this country affecting exchanges or transactions abroad for the same reason that *Aramco* rejected overseas application of Title VII to all domestically concluded employment contracts . . . with American employers.”).

<sup>95</sup> See *Kiobel*, 133 S. Ct. 1659.

<sup>96</sup> The original question before the court concerned corporate liability, which was changed six days after oral arguments for more briefing and oral argument on a new question, “whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.” *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012). Some scholars believe because the Court did not explicitly state there is no corporate liability, such liability exists. See, e.g., Ursula Tracy Doyle, *The Evidence of Things Not Seen: Divining Balancing Factors From Kiobel’s “Touch and Concern” Test*, 66 HASTINGS L.J. 443, 448 (2015).

<sup>97</sup> Claims brought under the ATS are required to show the relevant international law is specific and universally respected. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

alleging that the corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria.<sup>98</sup> Chief Justice Roberts, writing for a five-Justice majority, found that claims under the ATS are not intended to have extraterritorial reach.<sup>99</sup> Any claim brought under the jurisdiction of the ATS has a presumption against extraterritorial application, which restricts federal courts from applying domestic law to violations committed outside of the United States.<sup>100</sup> The majority explains that the presumption serves an important role in preventing judicial interference in foreign policy.<sup>101</sup>

The Court states that the presumption may be displaced, or would not apply, if the claims touch and concern the United States “with sufficient force.”<sup>102</sup> Because all the relevant conduct occurred outside of the United States and mere corporate presence by the defendants in the United States is not a sufficient force to displace the presumption,<sup>103</sup> the court barred the ATS claims.<sup>104</sup> In the analysis below, Part II examines *Kiobel*'s touch and concern test and looks to the concurrences for further guidance.

#### A. *Touch and Concern Test*

To overcome the presumption against extraterritorial application, *Kiobel* notes several different methods in analyzing the statute in question.<sup>105</sup> First, Chief Justice Roberts reiterates that generic

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<sup>98</sup> See *Kiobel*, 133 S. Ct. at 1662-63. More specifically, the plaintiffs alleged the corporations provided “Nigerian forces with food, transportation, and compensations, as well as allowing the Nigerian military to use respondents’ property as a staging ground for attacks.” *Id.*

<sup>99</sup> See *id.* at 1669.

<sup>100</sup> See *id.* Although scholars question if the *Kiobel* plaintiffs were actually asking a federal court to apply international law extraterritorially, which may not call for the presumption against extraterritoriality. See David L. Sloss, *Kiobel and Extraterritoriality: A Rule Without a Rationale*, 28 MD. J. INT’L L. 241, 243 (2013).

<sup>101</sup> *Kiobel*, 133 S. Ct. at 1664-65; see *Mastafa v. Chevron Corp.*, 770 F.3d 170, 187 (2d Cir. 2014).

<sup>102</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>103</sup> See *id.* (“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.”).

<sup>104</sup> See *id.*

<sup>105</sup> See *id.* at 1664.

terms such as “any” or “every” found in the language of a statute does not historically indicate an extraterritorial effect that is sufficient to rebut the presumption.<sup>106</sup> Second, the context of the statute—such as the historical background of the statute in question—is a relevant inquiry.<sup>107</sup> The Court also follows *Morrison* in stressing that a statute carries its own private right of action and only applies extraterritorially with a “clear indication” from Congress.<sup>108</sup>

More importantly, a notable takeaway from *Kiobel* is the “test” the Court implemented for determining when the presumption against extraterritoriality can be displaced:

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.<sup>109</sup>

This test does not allude to the specific “conduct” or “effects” test that was discussed in detail in the *Morrison* decision.<sup>110</sup> Instead, if the claim touches and concerns the United States with sufficient force, the presumption may be overcome.<sup>111</sup> Yet the terms “touches

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<sup>106</sup> See *id.* at 1665 (citing *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 262 (2010); *Small v. United States*, 544 U.S. 385, 388 (2005); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248-50 (1991); and *Foley Bros., Inc. v. Royal Dutch Petroleum Co.*, 336 U.S. 281, 287 (1949)); accord *United States v. Palmer*, 16 U.S. 610, 632-33 (1818).

<sup>107</sup> See *Kiobel*, 133 S. Ct. at 1666.

<sup>108</sup> *Id.* at 1665 (quoting *Morrison*, 561 U.S. at 265); contra *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 745 (9th Cir. 2011) (holding that the ATS does not have extraterritorial reach by distinguishing from *Morrison*).

<sup>109</sup> *Kiobel*, 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 264-69); but see *Balintulo v. Daimler AG*, 727 F.3d 174, 190, 190 n.25 (2d. Cir. 2013) (emphasizing that if all relevant conduct occurred outside the United States, the claim is barred under the ATS and the touch and concern analysis was stated in dicta).

<sup>110</sup> Compare *Kiobel*, 133 S. Ct. at 1669 with *Morrison*, 561 U.S. at 257-60 (discussing the Second Circuit’s conduct and effects test).

<sup>111</sup> *Kiobel*, 133 S. Ct. at 1669.

and concerns” and “sufficient force” remain undefined and inherently vague; the concurrences attempt to provide further insight.<sup>112</sup>

### B. *Concurrences*

The test provided in Chief Justice Robert’s opinion “obviously leaves much unanswered,” as noted by a concurrence by Justice Alito, joined by Justice Thomas.<sup>113</sup> Justice Alito’s concurrence refers to the touch and concern test as “a broader standard” in which a cause of action under the ATS may overcome the presumption.<sup>114</sup> More specifically, the domestic conduct involved needs to be enough “to violate an international law norm that satisfies *Sosa*’s requirements of definiteness and acceptance among civilized nations.”<sup>115</sup> This stems from the determination that *Sosa*’s requirements of definiteness and acceptance is Congress’ focus under the ATS.<sup>116</sup>

Justice Kennedy also joined the majority and wrote a separate concurring opinion to expand on the reach and interpretation of the ATS.<sup>117</sup> He signed onto the majority’s framework, but noted a critical weakness.<sup>118</sup> Justice Kennedy highlighted the potential for suits to arise related to human rights violations that are not covered by the majority’s framework, yet may require a further inquiry into the presumption against extraterritorial application.<sup>119</sup> Overall, the concurrence serves as notice that the majority left “open a number of significant questions” concerning the ATS’s relationship with the presumption against extraterritorial application.<sup>120</sup>

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote separately to reject the application of the ATS to the

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<sup>112</sup> See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring); *id.* at 1669-70 (Alito, J., concurring); *id.* at 1670-78 (Breyer, concurring); discussion *infra* Part III.C.i.

<sup>113</sup> *Id.* at 1669 (Alito, J., concurring); see also *id.* (Kennedy, J., concurring) (“[T]he proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”).

<sup>114</sup> *Id.* at 1670 (Alito, J., concurring).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

plaintiffs' claims, but articulated a different analytical framework for consideration.<sup>121</sup> First, Justice Breyer's concurrence bluntly found that he would not apply the presumption against extraterritoriality.<sup>122</sup> Instead, the concurrence advocates for a nexus requirement where a suit can be brought in federal court if "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American interest."<sup>123</sup> He further elaborates that the third prong includes the interest of preventing the United States from being a safe harbor for "a torturer or other common enemy of mankind."<sup>124</sup> Unlike the majority opinion or *Morrison*, Justice Breyer's concurrence does not decide whether the application of the presumption is an issue of subject matter jurisdiction or question of merits.<sup>125</sup>

#### IV. *KIOBEL* IN APPLICATION

As *Kiobel*'s concurrences note, there are several questions left open for lower courts to interpret the *Kiobel* decision, such as the vague touch and concern test.<sup>126</sup> Notwithstanding, lower courts have followed a strict application of the presumption to foreclose *Filartiga*-type cases under the ATS, which was a concern highlighted in Justice Kennedy's concurrence.<sup>127</sup> Critics of *Kiobel* argue

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<sup>121</sup> *Id.* at 1670-71 (Breyer, J., concurring).

<sup>122</sup> *Id.* at 1671.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*; see also Katie Shay, *224 Years After the Judiciary Act, the U.S. Must Not Become a Safe Haven to Modern Pirates*, HUFFINGTON POST (Sept. 26, 2013, 11:56 AM), [http://www.huffingtonpost.com/katie-shay/alien-tort-statute\\_b\\_3988787.html](http://www.huffingtonpost.com/katie-shay/alien-tort-statute_b_3988787.html).

<sup>125</sup> Compare *Kiobel*, 133 S. Ct. at 1671 (ignoring any subject matter jurisdiction or merits question) with *id.* at 1665 (Roberts, C.J.) (treating the issue as a question of merits); see also Paul L. Hoffman, *Kiobel v. Royal Dutch Petroleum Co.: First Impressions*, 52 COLUM. J. TRANSNAT'L L. 28, 38 n.45 (2013) ("It is not clear whether Justice Breyer views the application of the presumption as an issue of subject matter jurisdiction or a merits question.").

<sup>126</sup> See *Kiobel*, 133 S. Ct. at 1669 (Alito, J., concurring); *id.* at 1669 (Kennedy, J., concurring).

<sup>127</sup> See *id.* at 1669 (Kennedy, J., concurring); see, e.g., *Balintulo v. Daimler AG*, 727 F.3d 174, 190 (2d Cir. 2013) ("[I]f all the relevant conduct occurred abroad, that is simply the end of the matter under *Kiobel*.").

the Supreme Court disregarded decades of ATS case law that was set forth since the statute's revival in *Filartiga*.<sup>128</sup>

Yet, there may be a silver lining for victims of human rights abuses looking to bring their suits in the United States, albeit a limited one. Suits involving extrajudicial killing and torture under the ATS are asserting viable causes of action for extrajudicial killing<sup>129</sup> and torture<sup>130</sup> under the Torture Victim Protection Act ("TVPA").<sup>131</sup> The ATS and TVPA share the same purpose, location within the United States Code, statute of limitations, and civil suit mechanism, but differ in their jurisdictional bases and causes of actions.<sup>132</sup> More specifically, both statutes provide remedies for extrajudicial killing and torture, but the TVPA likely survives *Kiobel*'s strict application of the presumption because it was explicitly enacted to "provid[e] a civil cause of action in U.S. courts for torture committed abroad."<sup>133</sup>

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<sup>128</sup> See He, *supra* note 91, at 193-94; see also William S. Dodge, *Alien Tort Litigation: The Road Not Taken*, 89 NOTRE DAME L. REV. 1577, 1587 (2014) [hereinafter Dodge, *Road Not Taken*] ("Although that presumption against extraterritoriality has a long history in American law, by the time *Filartiga* was decided it had largely fallen out of use."); see generally Dodge, *Understanding the Presumption*, *supra* note 28, at 85-86.

<sup>129</sup> See Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 § 3(a) (1992) (definition of extrajudicial killing).

<sup>130</sup> See *id.* at § 3(b) (definition of torture).

<sup>131</sup> See *Jaramillo v. Naranjo*, No. 10-21951-CIV, 2014 WL 4898210, at \*1 (S.D. Fla. Sept. 30, 2014) (dismissing ATS claim, but finding plaintiffs stated claims under the TVPA); *Mamani v. Berzain*, 21 F. Supp. 3d 1353, 1365-73 (S.D. Fla. 2014) (finding no relief under the ATS against a former Bolivian President living in the United States, but plaintiffs have stated claims under the TVPA); but see Hoffman, *supra* note 125, at 47 ("The *Filartiga* line of cases against individual defendants found in the United States should survive the new presumption.").

<sup>132</sup> See *Jaramillo*, 2014 WL 4898210, at \*9 (citing *Papa v. Unites States*, 281 F.3d 1004, 1012 (9th Cir. 2002) and *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1153 (11th Cir. 2005)); compare Alien Tort Statute, 28 U.S.C. § 1350 (2012), with Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350)).

<sup>133</sup> S. Rep. No. 102-249, at 4 (1991); see generally Chowdhury v. Worldtel Bangl. Holding, Ltd., 746 F.3d 42, 51 (2d Cir. 2014) (analyzing the TVPA to have extraterritorial application), *cert. denied sub nom.* *Khan v. Chowdhury*, 135 S. Ct. 401 (2014); see also *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 602 (11th Cir. 2015) ("Although the text of the TVPA along is sufficient to illustrate the Act's intended extraterritoriality, the legislature history fully supports this conclusion."); *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (Kennedy, J., concurring) ("Many serious concerns with respect to human rights abuses

Part III further discusses *Kiobel*'s effect on ATS litigation, while highlighting two other noteworthy areas: first, residency and citizenship considerations as discussed by Justice Breyer's concurrence;<sup>134</sup> and second, jurisdictional considerations because the ATS is a jurisdictional statute.<sup>135</sup>

#### A. *Residency and Citizenship Considerations*

As previously mentioned, Justice Breyer's concurrence in *Kiobel* would not apply the presumption, but would consider residency and citizenship as factors in finding jurisdiction.<sup>136</sup> Although the plaintiffs in *Kiobel* were United States residents and the defendants had corporate presence in the United States, the majority rejected whether residency and citizenship played into overcoming the presumption by finding that defendants' mere corporate presence in the United States was not enough to displace the presumption.<sup>137</sup> The Court declared that "[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices."<sup>138</sup> Therefore, just because the defendant also operated in the United States, this was not enough to displace the presumption.<sup>139</sup> Yet, the Court failed to give an indication of what residency or citizenship considerations are needed to displace the presumption, leaving open if this fits into the "touch and concern" inquiry.<sup>140</sup> Not surprisingly, courts have differed over the application or displacement of the presumption based on the citizenship status of the plaintiff or defendant.<sup>141</sup>

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committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 . . .").

<sup>134</sup> See discussion *infra* Part III.A. Justice Stevens also warned about these considerations in his *Morrison* concurrence. See *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 274-86 (2010).

<sup>135</sup> See discussion *infra* Part III.B.

<sup>136</sup> *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring).

<sup>137</sup> *Kiobel*, 133 S. Ct. at 1669.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Compare *Balintulo v. Daimler AG*, 727 F.3d 174, 190 n.24 (2d Cir. 2013), with *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013).

The plaintiffs in the Second Circuit case of *Balintulo v. Daimler AG* read *Kiobel* as allowing claims based on foreign conduct when the defendants are citizens or residents of the United States or where the defendants' conduct affects a United States interest.<sup>142</sup> The court said, "Nothing in the Court's reasoning in *Kiobel* suggests that the rule of law it applied somehow depends on a defendant's citizenship."<sup>143</sup> It foreclosed the ATS claim in *Balintulo* while emphasizing that if the conduct in question occurred outside of the United States, "that is simply the end of the matter under *Kiobel*."<sup>144</sup> Additionally, the analysis of whether the conduct touches or concerns the United States in *Kiobel* is merely dicta that is to be explored only if some relevant conduct occurs in the United States.<sup>145</sup>

A year later, the plaintiffs in the Eleventh Circuit case of *Cardona v. Chiquita Brands International* also tried to displace the presumption because the defendant, Chiquita Brands International, is a United States corporation.<sup>146</sup> The Eleventh Circuit responded, like the Second Circuit, by rejecting corporate citizenship as dispositive.<sup>147</sup> The court stated the difference between corporate presence and corporate citizenship does not change Congress' intent in whether the statute applies to torts extraterritoriality—the relevant conduct, the alleged torts, occurred outside of the United States, thus barring suit under the presumption.<sup>148</sup>

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<sup>142</sup> See *Balintulo*, 727 F.3d at 189-90.

<sup>143</sup> See *Balintulo*, 727 F.3d at 190 n.24; see also *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 75 (D.C. Cir. 2011) ("The presumption against extraterritoriality is focused on the site of the conduct, not the identity of the defendant.").

<sup>144</sup> See *Balintulo*, 727 F.3d at 190.

<sup>145</sup> See *id.*; see also *Balintulo*, 727 F.3d at 190 n.26 ("Like the Supreme Court, we have no reason to address how much conduct must occur in the United States because all the relevant conduct that purportedly violated the law of nations in this case is alleged to have occurred on the territory of a foreign sovereign.").

<sup>146</sup> *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.*; but see Oona Hathaway, *Kiobel Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUS BLOG (Apr. 18, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/> ("Robert's assertion [in *Kiobel*] that '[c]orporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices,' might indicate that U.S. corporations could, in

Interestingly, Judge Martin's dissent in *Cardona* would have found Chiquita Brands International's United States corporate citizenship as at least one of two reasons to displace the presumption.<sup>149</sup> Judge Martin points to "a fundamental principle of international law that every State has the sovereign authority to regulate the conduct of its own citizens, regardless of whether that conduct occurs inside or outside of the State's territory."<sup>150</sup> Furthermore, she distinguishes between offenses seeking relief in a United States court that occur on foreign soil by a foreign defendant with the situation in *Cardona* that, in her view, involved sufficient contact on United States soil by a United States corporation.<sup>151</sup>

Other courts have considered litigant residency and/or citizenship for displacing the presumption.<sup>152</sup> For example, the Fourth Circuit held that the ATS claims in *Al Shimari v. CACI Premier Technology* touched and concerned the United States with sufficient force to displace the presumption, in part, because of the defendant's status as a United States corporation and the defendant's employees' status as United States citizens, on whose conduct the ATS claims were based.<sup>153</sup> In *Al Shimari*, however, the plaintiffs pled other factors to warrant sufficient United States contact.<sup>154</sup> Also, the Eleventh

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some cases, be subject to ATS liability for actions committed against foreigners abroad.").

<sup>149</sup> See *Cardona*, 760 F.3d at 1192 (Martin, J., dissenting).

<sup>150</sup> See *id.* at 1193.

<sup>151</sup> See *id.* at 1195.

<sup>152</sup> See *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530 (4th Cir. 2014); *Ahmad v. Magan*, No. 2:10-cv-00342, 2013 WL 4479077, at \*2 (S.D. Ohio Aug. 20, 2013); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321-23 (D. Mass. 2013).

<sup>153</sup> See *Al Shimari*, 758 F.3d at 530.

<sup>154</sup> "We conclude the plaintiffs' ATS claims 'touch and concern' the territory of the United States with sufficient force to displace the presumption against extraterritorial application based on: (1) CACI's status as a United States corporation; (2) the United States citizenship of CACI's employees, upon whose conduct the ATS claims are based; (3) the facts in the record showing that CACI's contract to perform interrogation services in Iraq was issued in the United States by the United States Department of the Interior, and that the contract required CACI's employees to obtain security clearances from the United States Department of Defense; (4) the allegations that CACI's managers in the United States gave tacit approval to the acts of torture committed by CACI employees at the Abu Ghraib prison, attempted to 'cover up' the misconduct, and 'implicitly, if not expressly, encouraged' it; and (5) the expressed intent of Congress, through enactment of the

Circuit in *Doe v. Drummond Co.* expressed that “when an ATS claim involves a United States citizen defendant *or* where events underlying the claim occur both domestically and extraterritorially, the courts must engage in further analysis.”<sup>155</sup> Thus, even if all conduct occurred outside of the United States, the courts must engage in further analysis if a United States citizen defendant is involved.<sup>156</sup>

Overall, several courts read *Kiobel* as indicating the substantive analysis of conduct remains consistent regardless of the residency or citizenship of the parties to the claim; residency or citizenship is separate from the necessary analysis of *conduct* that touches and concerns the United States.<sup>157</sup> Nonetheless, some courts consider litigant residency and/or citizenship as relevant in displacing the presumption against extraterritorial application.<sup>158</sup>

### B. *Jurisdictional Considerations*

Although *Kiobel* heavily relies on *Morrison* to explain the presumption against extraterritorial application, the plain distinction between the statutory text of *Kiobel*'s ATS and *Morrison*'s Securities Exchange Act is that the ATS confers jurisdiction and does not expressly provide for causes of action. The ATS provides that “[t]he 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

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TVPA and 18 U.S.C § 2340A, to provide aliens access to United States courts and to hold citizens of the United States accountable for acts of torture committed abroad.” *Id.* at 530-31.

<sup>155</sup> *Doe v. Drummond Co., Inc.*, 782 F.3d 576, 586 (emphasis added).

<sup>156</sup> *See id.*

<sup>157</sup> *See Mastafa v. Chevron Corp.*, 770 F.3d 170, 189 (2d Cir. 2014); *Loginovskaya v. Batratchenko* 764 F.3d 266, 273 (2d Cir. 2014); *Baloco v. Drummond Co., Inc.*, 767 F.3d 1229, 1236 (11th Cir. 2014); *United States v. Vilar*, 729 F.3d 62, 74 (2d Cir. 2013); *see also Mamani v. Berzain*, 21 F. Supp. 3d, 1367-68 (S.D. Fla. 2014) (“Many courts have found in the wake of *Kiobel* that a defendant’s presence or residence in the United States at the time of the litigation . . . does not displace the *Kiobel* presumption.”); *but see Bradley*, *supra* note 33, at 510-511 (“[I]t is generally accepted that Congress has substantial power to legislate extraterritoriality, especially with respect to U.S. citizens.”).

<sup>158</sup> *See Al Shimari*, 758 F.3d at 530; *Ahmad v. Magan*, No. 2:10-cv-00342, 2013 WL 4479077, at \*2 (S.D. Ohio Aug. 20, 2013); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304, 321-23 (D. Mass. 2013).

or a treaty of the United States.”<sup>159</sup> Scholars comment that the incorporation of the ATS as a provision of the Judiciary Act is inconsistent with the view that the ATS would itself yield causes of action because the Judiciary Act focused on the jurisdiction of the federal courts.<sup>160</sup> Yet, “the First Congress did not intend the provision to be ‘stillborn.’”<sup>161</sup> Despite confusion, the ATS grants jurisdiction, and a cause of action is generally derived from federal common law for international human rights cases.<sup>162</sup> The *Morrison* opinion, in contrast, mentions section 27, the jurisdictional provision of the Exchange Act; however, the opinion did not apply the presumption to section 27.<sup>163</sup> This contrasts with the notion that the presumption against extraterritorial application is applied to the ATS, a jurisdictional statute.

The presumption is applicable to substantive statutes, but not generally to jurisdictional statutes.<sup>164</sup> Professor William Dodge posits that if the presumption against extraterritorial application is applied to jurisdiction statutes, then suits derived from substantive law—like the amended Title VII statute that is clearly intended to apply extraterritorially—would have to be dismissed for lack of subject matter jurisdiction. The unanimous court in *Morrison* supports

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<sup>159</sup> 28 U.S.C. § 1350 (2012).

<sup>160</sup> See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 592-93 (2002); accord *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712-13 (2004).

<sup>161</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1663 (2013) (quoting *Sosa*, 542 U.S. at 714).

<sup>162</sup> See *Sosa*, 542 U.S. at 724; see also Dodge, *Road Not Taken*, *supra* note 128, at 1577-78; see, e.g., *Al Shimari*, 951 F. Supp. 2d at 867 (“[I]t is unclear to the Court how to apply a ‘touch and concern’ inquiry to a purely jurisdictional statute such as the ATS.”); *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 (2d Cir. 1980) (stating the ATS allows a federal forum for international human rights violations).

<sup>163</sup> See *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 253-54 (2010); 15 U.S.C. § 78aa (2012); see also Dodge, *After Morrison*, *supra* note 36, at 399 (making the distinction that Justice Scalia consciously chose to not apply the presumption to Section 27).

<sup>164</sup> See Dodge, *After Morrison*, *supra* note 36, at 399; but see *Smith v. United States*, 507 U.S. 197 (1993) (granting jurisdiction under the Federal Tort Claims Act) and *Arg. Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (granting jurisdiction under the Foreign Sovereign Immunities Act).

this interpretation because of its clear distinction in applying the presumption to substantive, but not jurisdictional, statutes;<sup>165</sup> however, the Court in *Kiobel* noted the ATS was “strictly jurisdictional,” and proceeded to apply the presumption.<sup>166</sup>

*Kiobel* maintains that in order to overcome the presumption, the ATS must “evince a clear indication of extraterritoriality.”<sup>167</sup> The opinion also directly analyzes the language of the ATS to determine if causes of action recognized under the statute have extraterritorial reach.<sup>168</sup> Although some scholars criticize this confusion,<sup>169</sup> a closer reading of the decision generally finds the Court applying the presumption to the cause of action aspect of the ATS, or federal common law. For example, the majority notes, “[n]othing about this historical context suggests that Congress also intended federal common law under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.”<sup>170</sup>

The crux of the jurisdictional considerations is the distinction the Court made in *Kiobel* when it reviewed the true question the Court was framing in *Sosa*: “*Sosa* is not whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action under U.S. law to enforce a norm of international law.”<sup>171</sup> The latter question is what triggers the presumption against extraterritorial application, and ultimately, that is what the Supreme Court in *Kiobel* was attempting to cure. Because the Court was focused on the authority to recognize a cause of action under federal law, it examined the ATS although it is essentially a jurisdictional statute.

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<sup>165</sup> *Morrison*, 561 U.S. at 254; accord Turley *supra* note 27, at 636 (“The [presumption against extraterritorial application] was designed to determine subject matter jurisdiction, but did so by reference to prescriptive jurisdiction principles.”)

<sup>166</sup> *Kiobel*, 133 S. Ct. at 1664.

<sup>167</sup> *Id.* at 1665 (citation omitted).

<sup>168</sup> *Id.*

<sup>169</sup> See generally Anthony Colangelo, *Kiobel Insta-Symposium: Kiobel Contradicts Morrison*, OPINIO JURIS (May 10, 2013, 9:00 AM) <http://opiniojuris.org/2013/05/10/kiobel-insta-symposium-kiobel-contradicts-morrison/>.

<sup>170</sup> *Kiobel*, 133 S. Ct. at 1668-69.

<sup>171</sup> *Id.* at 1661.

Furthermore, the jurisprudence concerning the presumption against extraterritorial application does not generally speak to the effect of other forums where a claim may be brought. Instead, the focus is on whether the law of the United States can be applied to foreign conduct. Notably, the Supreme Court's oral arguments in *Kiobel*, covered whether the plaintiffs had another forum in which to bring suit.<sup>172</sup> The idea of the plaintiffs bringing a claim in the United Kingdom and the Netherlands was discussed, but did not appear in any manner in any of the resulting written opinions for the case.<sup>173</sup>

## V. CONCLUSION

Within the last five years, the Supreme Court has invoked a strict application of the longstanding doctrine of the presumption against extraterritorial application. *Morrison* and *Kiobel* guide not just how section 10(b) of the Securities Exchange Act and the Alien Tort Statute should be applied, but also whether *any* federal statute may be applied extraterritorially.<sup>174</sup> This cross between various areas of law is evident when analyzing how these decisions came to apply the presumption against extraterritoriality: *Kiobel*, a human rights case, relied on *Morrison*, a securities case, which relied on *Aramco*, an employment discrimination case. These three decisions specifically maintain that statutes carry their own private right of action that should not be applied extraterritorially without a "clear indication" from Congress.<sup>175</sup>

Yet, despite a seemingly bright-line rule of strict presumption, there remain many open questions surrounding when the presumption may be overcome. As noted by one commentator, "[t]he Court's extraterritoriality jurisprudence seems likely to remain a

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<sup>172</sup> Transcript of Oral Argument at 6, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

<sup>173</sup> *Id.*

<sup>174</sup> See Keenan & Shroff, *supra* note 57, at 74; see also Hoffman, *supra* note 125, at 35 ("Certainly, much of the language in the Roberts opinion suggests that he would apply the presumption against extraterritoriality categorically as it was applied in *Morrison*.").

<sup>175</sup> *Kiobel*, 133 S. Ct. at 1665 (quoting *Morrison*, 561 U.S. at 265).

mess for some time.”<sup>176</sup> Ultimately, the only consistency with the presumption against extraterritoriality is its inconsistent application.

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<sup>176</sup> Compare William S. Dodge, *Loose Canons: International Law and Statutory Interpretation in the Twenty-First Century*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 547, 551 (David L. Sloss, et al. eds., Cambridge University Press, 2011), available at <http://ssrn.com/abstract=1694653>, with *Morrison*, 561 U.S. at 261 (“Rather than guess anew in each case, we apply the presumption [against extraterritoriality] in all cases, preserving a stable background against which Congress can legislate with predictable effects.”).