BALANCING HUMAN RIGHTS PROTECTIONS AND JUDICIAL RESTRAINT IN FOREIGN AFFAIRS: A CALL FOR A NEW APPROACH TO CLAIMS BROUGHT UNDER THE ALIEN TORT STATUTE

Riley Schulz*

* Riley Schulz is a J.D. Candidate at George Mason University Antonin Scalia Law School and will graduate in Spring of 2025. She received a Bachelor of Arts in Politics and Law from Wisconsin Lutheran College in 2022. Riley is the Senior Research Editor of the National Security Law Journal for the 2024-2025 Editorial Board. She sincerely thanks her husband for his support and encouragement in the writing of this piece.

INTRODUCTION

Even amid an era of impassioned social awareness and concern for human rights, most people remain unaware of the Alien Tort Statute ("ATS")—a viable wellspring of human rights protections. Despite its somewhat obscure status in the United States Code ("U.S.C."), the Alien Tort Statute has become the basis for an increasing number of claims brought for human rights abuses committed against foreigners. Precisely because of the statute's obscurity, and its archaic origins, courts have questioned the viability of the statute as a protection against human rights violations.[1] This article argues that the ATS is not only viable as a human rights statute, but that it should be applied more expansively, not more narrowly, as some argue.

The ATS allows foreigners to sue violators of international law in United States ("U.S.") courts.[2] A significant catalyst for ATS litigation occurred in 1980, when the U.S. Court of Appeals for the Second Circuit held in *Filartiga v. Pena-Irala*, that claims for violations of international human rights law could be brought under the ATS.[3] In support of the ATS's sweeping potential for championing human rights, parties have used ATS to vindicate a broad range of harms. These include government violence directed at political dissidents,[4] government contracts with external personnel to effectuate torture,[5] and terrorist attacks facilitated by corporations' financial complicity.[6] In the face of these sorts of grievous harms, the early history of ATS

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[1] *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 723-24 (2004) (arguing that the First Congress intended ATS to apply only to three primary offenses: violation of safe conducts, infringement of ambassador rights, and piracy).

[2] *See* 28 U.S.C. § 1350.

[3] STEPHEN MULLIGAN, CONG. RSCH. SERV., R44947, THE ALIEN TORT STATUTE (ATS): A PRIMER 6-7 (2018), https://crsreports.congress.gov/product/pdf/R/R44947/4.

[4] *See* Boniface v. Villiena, 338 F. Supp. 3d 50, 60 (D. Mass. 2019).

[5] *See Sosa*, 542 U.S. at 697.

[6] *See* Jesner v. Arab Bank, PLC, 584 U.S. 241, 248 (2018); *see also* Photeine Lambridis, *Corporate Accountability: Prosecuting Corporations for the Commission of International Crimes of Atrocity*, 53 N.Y.U. J. OF INT'L L. AND POL. 144, 144 (2021) (describing corporate complicity as financially profiting through ongoing conflicts by supplying arms, raw materials, and other resources which are used to perpetuate atrocity crimes such as genocide, war crimes, and crimes against humanity).

litigation—reflected by a receptive application of the statute—demonstrated the Judiciary's commitment to providing a remedy for various human rights violations.

Modern courts, however, have diverted from this course and have jurisdictionally kneecapped ATS on the basis of foreign policy concerns. The Supreme Court ignited this trend in 2004, when it began to limit the jurisdictional reach of the ATS in *Sosa v. Alvarez-Machain*.[7] The Court's 2013 *Kiobel v. Royal Dutch Petroleum Company* decision solidified these limitations by holding that a "presumption against extraterritoriality" applies to ATS claims.[8] But the Court went further, holding that even where claims "touch and concern" U.S. territory, "they must do so with sufficient force to displace the presumption . . . ."[9] The Court justified this judicial hands-off approach by recognizing that certain ATS claims may implicate foreign policy decisions better left to the legislative and executive branches.[10] Although grounded in good faith separation of powers concerns, this approach is inconsistent with historical understandings of international law and neglects human rights concerns.

Since *Kiobel*, courts have used the "touch and concern" test to apply a presumption against extraterritorial application to the ATS.[11] The district courts' application of this test has resulted in sweeping dismissals of the types of claims the statute historically covered, namely violations of international law, to leave the courts out of foreign policy entanglements. These jurisdictional dismissals have not only left many victims of egregious human rights violations without access to a remedy, but the trend also fails to recognize the legitimate role federal courts have long played in foreign affairs. Further, the judicial reticence to provide a forum to foreign victims and eagerness

[7] STEPHEN MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 2 (2018), https://crsreports.congress.gov/product/pdf/LSB/LSB10147 (explaining how this trend began with the Supreme Court's decision in *Sosa*, which held that "not all violations of international norms are actionable under the ATS"); *see also Sosa*, 542 U.S. at 732.

[8] *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

[9] *Id.* at 125.

[10] *See id.* at 117; *see also Sosa*, 542 U.S. at 727-28.

[11] *See, e.g.*, Boniface v. Villiena, 338 F. Supp. 3d 50, 60 (D. Mass. 2019).

to diminish the field of ATS's applicability is marked by significant inconsistencies.

The better approach is to replace *Kiobel*'s blanket presumption against the ATS's extraterritorial application and the touch and concern test with a clear framework for determining jurisdiction that covers human rights violations. To address the legitimate separation of powers concerns regarding judicial overreach in foreign policy decisions, the jurisdictional framework must include limiting principles. Accordingly, this Article proposes that federal ATS jurisdiction is proper when (1) the alleged tort occurs in U.S. territory; (2) the defendant is a U.S. national; or (3) the alleged offense is universally prohibited under international customary law. Where any of these factors are met, a court must also consider whether adjudication of the claim presents a nonjusticiable political question so as to limit any improper involvement of the Judiciary that may otherwise result from applying the above three factors alone.

As discussed below, this framework is a more faithful application to the original understanding of the ATS and has numerous advantages. This framework provides much-needed clarity to ATS jurisprudence, is consistent with the Framers' understanding of international law and foreign affairs at the time of the statute's enactment, and importantly, creates a remedy under U.S. law for basic violations of international customary law. In adopting this framework, the false dichotomy of choosing between human rights and reasonable judicial restraint would no longer mire courts' interpretations of the ATS.

To lay the foundation for a detailed justification of the proposed framework, Part I of this Article provides a history of the ATS from its enactment in 1789,[12] to its codification as a tool for human rights protection in 1980 with *Filartiga,*[13] and finally to its subsequent decline in popularity as a human rights tool within the courts beginning in 2004 with *Sosa.*[14] Part II discusses the various legal

[12] An Act to establish the Judicial Courts of the United States, 1 Stat. 73, 77 (1789) [hereinafter Judiciary Act].
[13] *See generally* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).
[14] *See generally Sosa*, 542 U.S. at 697-98.

issues stemming from the narrow interpretive approach courts have generally taken since 2004. The next portion of this article, Part III, proposes a new jurisdictional interpretative framework for ATS that balances the Judiciary's role in enforcing international norms with its obligation to refrain from political involvement in foreign affairs. Finally, Part IV describes the practical, institutional, and normative advantages that would result from the courts' adoption of this alternative framework.

I. BACKGROUND: HISTORICAL APPROACHES TO DEFINING THE PROTECTIONS GUARANTEED UNDER THE ALIEN TORT STATUTE

This section details the historical context surrounding the ATS's enactment and the interpretive gloss U.S. courts have since put on the statute.

A. Enactment of the ATS and its Context

The context of the ATS's enactment gives valuable insight into the intent behind the statute, namely its encompassing violations of international law.

The ATS's text is extremely brief, and its jurisdiction over human rights violations specifically is not obviously surmisable from the circumstances of its enactment and early interpretation. A description of these circumstances, however, is valuable nonetheless in understanding the statute. The ATS was enacted in 1789 as a part of the Judiciary Act.[15] The provision is "unlike any other in American law" and is "unknown to any other legal system in the world."[16]

Congress has made only minor modifications to the text of the statute since its enactment. Its substance has remained the same.[17] The

[15] *See* MULLIGAN, supra note 3.
[16] *Id.* (quoting Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 115 (2d Cir. 2010)).
[17] *See* William R. Casto, *The Federal Courts Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, *in* THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 119, n.4 (1999).

statute now 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."[18] The statute can be deconstructed into four critical elements: (1) A civil action (2) by an alien (3) for a tort (4) committed in violation of the law of nations or a treaty of the United States.[19] Per the first element, "the ATS allows only for civil (rather than criminal) liability."[20] The second ATS element gives the U.S. jurisdiction only for claims by individuals who are not U.S. nationals.[21] Together, the third and fourth elements limit the type of conduct for which claims may be brought under the statute. However, as this Article shows, the scope of these limitations is the subject of much controversy. The fourth element of the deconstructed statute—that conduct actionable under the ATS must violate the law of nations or U.S. treaties—inherently invokes principles of international law. Accordingly, to understand the intended scope of the ATS, it is necessary to delve into the Founders' understanding of international law at the time of the Judiciary Act of 1789.

The Founders' understanding of international law was heavily influenced by Emmerich de Vattel, a Swiss jurist and philosopher, who was a prominent voice on the law of nations in the late eighteenth.[22] Vattel's *magnum opus*, *The Law of Nations or the Principles of Natural Law*, was widely considered authoritative.[23] Notables who referenced Vattel's work at this time include Benjamin Franklin, the Second Continental Congress, and the drafters at the 1787

[18] 28 U.S.C. § 1350 (As originally enacted, the statute read, "And [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."); *see* Judiciary Act.
[19] *See* MULLIGAN, supra note 3.
[20] *Id.*
[21] *Id.; see also* 8 U.S.C. § 1101(a)(3) (defining an "alien" as any person who is "not a citizen or national of the United States").
[22] Carolina Kenny, *Emmerich de Vattel, The Law of Nations (1758)*, CLASSICS OF STRATEGY AND DIPL. (Aug. 7, 2015), https://classicsofstrategy.com/2015/08/07/law-of-nations-vattel-1758/.
[23] *See* Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 412 (2010) ("Both legal scholars and the courts, including the Supreme Court, have recognized the importance of the writings of Emmerich de Vattel to the Founders' understanding of the law of nations.").

Constitutional Convention.[24] Vattel's writings offered a more contemporary perspective of international law than other influential thinkers such as Grotius and Blackstone, who heavily emphasized the role of natural law and divine law in the law of nations.[25]

Vattel's approach to the law of nations has been described as "dualist" in that it seeks to balance competing aims of sovereignty while upholding enforcement of universal principles of conduct.[26] First, Vattel recognized that independent nations are owed an inherent level of deference in their governance as sovereign States.[27] He argued that because nations are "free, independent, and equal," each has a right to determine its own course of conduct.[28] As a consequence, he argued, "It is therefore necessary, on many occasions, that nations should suffer certain things to be done, though in their own nature unjust and condemnable, because they cannot oppose them by open force, *without violating the liberty of some particular state, and destroying the foundations of their natural society*."[29] Thus, Vattel's writings recognized the inherent necessity of preserving State sovereignty in an ordered, international society.

Despite Vattel's emphasis on State sovereignty, he contemplated limitations on such sovereignty to prevent violations of certain universal rights and obligations set by international norms.[30] He argued that long held customs, mutually observed by nations in their interactions with one another, form a kind of law known as the "customary law of nations" or "custom of nations."[31] According to

[24] *See id.* at 412; Thomas Willing Bach, *The United States and the Expansion of the Law Between Nations,* 64 U. PENN. L. REV. 113,115 (1915); Abraham C. Weinfeld, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts"*, 3 U. CHI. L. REV. 453,459 (1936).
[25] *See* Vega, *supra* note 23, at 414.
[26] *See id.* at 411-14.
[27] *Id.* at 413-14 ("[A] sovereign state must 'govern itself by its own authority and laws.'").
[28] EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF NATURAL LAW 19 (1758), http://67.211.223.35/LoN.pdf.
[29] *Id.* at 19 (emphasis added).
[30] *See* Vega, *supra* note 23, at 415.
[31] DE VATTEL, *supra* note 28, at 20.

Vattel, such law is based on a *tacit* consent among countries.[32] Vattel further argued that the consequence of this customary law is that an obligation is imposed on nations to observe it. He posited, "[It] becomes obligatory on all the nations in question, who are considered as having given their consent to it, and [binds them] to observe it towards each other . . . ."[33] Thus, according to Vattel, the law of nations presupposes a deference for State sovereignty while simultaneously imposing a duty on nations to observe the law of nations, or "customary international law" as it is often called.[34]

Vattel was considered highly authoritative at the time of the Founding.[35] In fact, in the period following the American Revolution, Vattel's work is referenced more often than the work of other writers such as Pufendorf and Grotius, who the Founders also considered influential at the time. [36] Following the American Revolution, the U.S. relied heavily on the work of Vattel to aid in interpreting international questions, as the young country had no precedent of its own to guide them.[37] In drafting the Constitution, however, the Framers were inspired by more than just these principles espoused by Vattel and his contemporaries.

Certain foreign policy controversies highlighted tensions between the state and federal governments over jurisdiction of issues of international concern, thus demonstrating a need for a unified approach. A prominent example of a foreign policy controversy fresh in the Founders' minds was an incident involving a visiting French diplomat who was assaulted by a rogue adventurer while in the United States in 1784.[38] The State of Pennsylvania took custody of the individual and tried him in their court.[39] France's multiple extradition

[32] *Id.*
[33] *Id.*
[34] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 884 (2d Cir. 1980) (using "customary international law" interchangeably with "the law of nations").
[35] *See* J.S. Reeves, *Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547, 549 (1909).
[36] *Id.*
[37] *See id.* at 561.
[38] *See id.* at 556; J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874 (2007).
[39] *See* Reeves, *supra* note 35, at 556.

requests were repeatedly ignored, and because the central government could not force the State of Pennsylvania to comply with France's requests, tension mounted between the American and French governments.[40]

This incident, and various others like it,[41] made the Founders realize the importance of giving the federal government the sole authority over international legal disputes. As one commentator put it, "[L]ocal adjudications [like those under the Articles of Confederation] may have the effect of spawning fifty different standards on international issues."[42] Through experience, the Founders recognized the danger of enabling states to disregard treaty obligations implemented by the weak central government and to engage in rogue foreign diplomacy.[43] To make clear that the federal government was to have the sole power to govern matters of international import, the Founders included the Law of Nations Clause in Constitution.[44] That clause explicitly gives Congress the power "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[45]

Thus, the context surrounding the ATS's enactment makes clear that the Founders intended international law to play a role in American governance. This history, infused with Vattel's influence, demonstrates that the ATS was designed as a mechanism for courts to wield at least some enforcement power to punish offenses of an international nature.

B. Historical Application of the ATS in U.S. Courts

As the following historical survey of the Judiciary's approach to ATS claims shows, much controversy exists in deciding when a court may exercise jurisdiction over offenses of an international

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[40] *See* Kent, *supra* note 38, at 875-76.
[41] *See* Reeves, *supra* note 35, at 556.
[42] Michael C. Small, *Enforcing International Human Rights Law in Federal Courts: The Alien Tort Statute and the Separation of Powers*, 74 GEO. L.J. 163, 181 (1985).
[43] *See* Kent, *supra* note 38, at 895.
[44] *See* U.S. CONST. art. I, § 8, cl. 10.
[45] *Id.*

character. Further, the ATS's role in protecting human rights, however controversial, is a fairly modern conception. In fact, until 1980, U.S. courts rarely saw *any* type of claims brought under the ATS. Prior to that year, courts invoked jurisdiction under the ATS only twice.[46] Less than two dozen cases between 1975 and 1980 even cited the statute.[47] Thus, the ATS remained dormant for nearly 200 years after its enactment.

In 1980, however, the Second Circuit's holding in *Filartiga* revived the ATS and ignited the current debate over the statute's proper role in the human rights realm.[48] In that case, the Filartigas, citizens of Paraguay, brought suit against a former Paraguayan police officer for the wrongful death of their relative.[49] The Filartigas contended that the defendant kidnapped, tortured, and killed their relative and subsequently displayed the body in the family's home.[50] The brutal murder was retaliation against the family's political beliefs and activism against the President of the Republic of Paraguay.[51] The Filartigas claimed that the federal court had jurisdiction under the ATS.[52] The defendant's conduct fell under the statute's jurisdiction, the Filartigas argued, because the law of nation absolutely prohibits torture.[53] Yet the district court dismissed the Filartigas's wrongful death suit on jurisdictional grounds.[54] The judge reasoned that by precedent, the "law of nations" portion of the statutory text is

[46] *See* Bolchos v. Darrel, 3 F. Cas. 810, 810 (D.S.C. 1795) (finding jurisdiction of the district court proper where a French ship captain brought suit for restitution of slaves that were seized and sold from a ship he had captured); *see also* Abdul-Rahman Omar Adra v. Clift, 195 F. Supp. 857, 864-65 (D. Md. 1961) (finding the district court's jurisdiction proper under the ATS in an international child custody dispute involving Lebanese nationals).

[47] Beth Stephens, *The Curious History of the Alien Tort Statute*, 89 NOTRE DAME L. REV. 1467, 1472 (2014).

[48] STEPHEN MULLIGAN, CONG. RSCH. SERV., LSB10147, THE RISE AND DECLINE OF THE ALIEN TORT STATUTE 2 (2018).
https://crsreports.congress.gov/product/pdf/LSB/LSB10147.

[49] Filartiga v. Pena-Irala, 630 F.2d 876, 878 (2d. Cir. 1980).

[50] *Id.*

[51] *Id.*

[52] *Id.* at 880.

[53] *Id.* at 879.

[54] *Id.* at 880.

construed narrowly and "exclud[es] that law which governs a state's treatment of its own citizens."[55]

On appeal, the Second Circuit reversed the district court's judgment.[56] The Second Circuit held that "an act of torture committed by a state official against [a person] held in detention violates established norms of the international law of human rights, and hence the law of nations."[57] The decision included a pointed discussion on the scope of the law of nations.[58] The Second Circuit first emphasized that the law of nations is not static but is flexible and adapts to the norms of the evolving civilized world.[59] Specifically, the court stated, "[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[60] The court further explained that the presence of an established norm is necessary for a court to recognize a cause of action under the ATS. "The requirement that a rule commands the general assent of civilized nations to become binding upon them all is a stringent one," the court stated.[61] It further speculated that if this were not so, "the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[62] However, the court found clear and overwhelming evidence—in various constitutions as well as international treaties and accords—that the international community had "universally renounced" State-conducted torture ("official torture").[63] The court construed the ATS, therefore, not as "granting new rights to aliens, but simply as opening the federal courts for adjudication of rights already recognized by

[55] *Filartiga*, 630 F.2d at 880.
[56] *Id.* at 878.
[57] *Id.* at 880.
[58] *See generally id.* at 5-15
[59] *Id.* at 881.
[60] *Id.* (citing Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) (distinguishing between "ancient" and "modern" law of nations)).
[61] *Filartiga,* 630 F.2d at 881.
[62] *Id.* .
[63] *Id.* at 881-85 (collecting various U.N. declarations, international conventions, surveys, and memoranda).

international law."[64] The Second Circuit's pronouncements in *Filartiga* marked a revolutionary application of ATS at the time.

Filartiga was the catalyst for a trend of successful claims under the ATS, expanding the statute's scope. For example, in *Kadic v. Karadzic*, the Second Circuit held its jurisdiction was proper in a suit brought by Croat and Muslim citizens of Bosnia against the then-President of the Bosnian-Serb republic of "Srpska."[65] Rape, torture, and summary execution conducted by military forces during the Bosnian civil war was the conduct at issue in the suit.[66] The atrocities were found to be a part of a larger campaign of genocide, war crimes, and torture, which violated well-established tenets of international law.[67] Notably, the court stated that "evolving standards of international law govern who is within the [ATS's] jurisdictional grant."[68] Additionally, in *Forti v. Suarez-Mason*, the court found jurisdiction proper where Argentine citizens brought a claim against an Argentine general for military and police conduct committed under the general's orders.[69] The court reasoned that the international law norms prohibiting this State conduct were universal, readily definable, and obligatory.[70] Such victories under the ATS, however, were short-lived.

Expansive ATS claims began to decline in 2004 when the Supreme Court began to limit the statute's application. In *Sosa*, the Mexican government captured a DEA agent in Mexico and worked with a physician to prolong the agent's torture, leading to the agent's eventual murder.[71] The Mexican government refused to extradite the physician, so the U.S. hired Mexican nationals to forcibly abduct him and deliver him to the U.S.[72] After his acquittal and return to Mexico, the physician sued U.S. officials under the ATS for the physician's

[64] *Id.* at 887.
[65] Kadic v. Karadzic, 70 F.3d 232, 236-37 (2d Cir. 1995).
[66] *Id.*
[67] *Id.* at 244.
[68] *Id.* at 241 (quoting Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 425 (2d Cir. 1987)).
[69] Forti v. Suarez-Mason, 672 F. Supp. 1531, 1535-39, 1541-42 (N.D. Cal. 1987).
[70] *Id.* at 1541-42.
[71] Sosa v. Alvarez-Machain, 542 U.S. 692, 697-98 (2004).
[72] *Id.*

forcible abduction from Mexico and arbitrary confinement.[73] While the Court affirmed that the physician's claims were within the statute's jurisdictional reach, it held that no remedy existed because no international law custom existed prohibiting a one-time "illegal" detention of "less than a day."[74]

In reaching this holding, the Court reasoned that the common law aspect of violations of law of nations should limit causes of action to a "modest number of international law violations."[75] The Court further clarified that going forward, courts should interpret the "present-day law of nations" to include only those claims resting on pervasive international norms that are "comparable [in specificity] to the features of . . . 18th-century paradigms . . . ."[76] According to the Court in *Sosa*, these 18th-century paradigms include only "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[77] The Court's limited approach was based in *Erie*'s denial of the existence of federal common law.[78] The Court refused to "exercise innovative authority over substantive law" without legislative guidance.[79] Thus, *Sosa* imposed a large hurdle on future ATS claims in that plaintiffs could not merely establish the existence of an international norm prohibiting the alleged conduct to succeed in their claim. After *Sosa*, plaintiffs could only be successful on claims relating to safe conducts, ambassadors' rights, and piracy—an extremely limited subset of international conduct.

The meaning of *Sosa*'s holding has been widely debated.[80] Some view the Court's ruling as being consistent with *Filartiga* because it "affirmed federal court authority to recognize common law causes of action for a narrow set of human rights violations."[81] Others, however, view the decision as a separation of powers restriction on federal courts that apply the ATS in a way that interferes with foreign

[73] *Id.* at 698.
[74] *Id.* at 738.
[75] *Id.* at 724.
[76] *Id.* at 725.
[77] *Sosa*, 542 U.S. at 724.
[78] *Id.* at 726.
[79] *Id.*
[80] Stephens, *supra* note 47, at 1511.
[81] *Id.*

affairs.[82] The Court clarified the legacy of *Sosa*'s holding in its later 2013 *Kiobel* decision, where the Court solidified that grounds for ATS claims should be extremely limited.[83] *Kiobel* arose in the context of corporate actors.[84] Prior to *Kiobel*, the ATS was often used as an attempt to assert jurisdiction over corporate defendants.[85] Notably, approximately sixty cases prior to 2012 found jurisdiction proper over corporate defendants under the ATS.[86] Before *Kiobel,* ATS liability rules were understood to apply to natural persons and corporations alike.[87]

But *Kiobel* weakened the ATS's jurisdiction over corporate defendants. The petitioners in *Kiobel* were nationals of Nigeria.[88] They sued various "Dutch, British, and Nigerian corporations" under the ATS for aiding and abetting the Nigerian government in violating the law of nations.[89] Specifically, petitioners alleged these corporations recruited the Nigerian government to suppress environmental awareness protests staged by Nigerian citizens against the corporations.[90] Petitioners also accused the corporations of providing food, transportation, and property to Nigerian forces who violently raided villages.[91] That the alleged harm occurred in Nigeria, a sovereign nation, was consequential to the Court's holding that the claims were barred.[92]

Relying on the presumption against extraterritoriality, a canon of statutory interpretation, the Court held that the claims of the Nigerian nationals were barred.[93] The canon states that where "a statute gives no clear indication of an extraterritorial application, it has

[82] *Id.*
[83] *Id. See generally* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013).
[84] Stephens, *supra* note 47, at 1518.
[85] *Id.* at 1519.
[86] *Id.* at 1518.
[87] *Id.* at 1519.
[88] *Kiobel*, 569 U.S. at 111.
[89] *Id.* at 111-12.
[90] *Id.* at 113.
[91] *Id.*
[92] *Id.* at 111.
[93] *Id.* at 124.

none."[94] The purpose of this presumption is in part to prevent international discord by limiting clashes between U.S. and foreign laws.[95] The Court found that such foreign policy concerns were even more implicated where, as in *Kiobel*, the conduct underlying the claim occurs in another sovereign country.[96] Although the presumption against extraterritorial application guided the decision, the Court also established a test to guide future cases: the touch and concern test.[97] The Court stated, "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."[98] The Court also clarified that "mere corporate presence" does not meet this standard.[99]

The Court's reliance on the presumption against extraterritorial application was largely justified on separation of powers concerns.[100] The Court emphasized the danger of courts entangling themselves in foreign policy decisions by recognizing novel causes of action in the international realm.[101] More specifically, the Court argued that its adjudication of conduct occurring in another sovereign State could reap serious diplomatic consequences for the U.S. government.[102] In the Court's view, applying the presumption against extraterritorial application to ATS claims constituted proper deference to the political branches by allowing them full discretion to shape U.S. international involvement.[103]

Also underlying the Court's limited interpretation of the ATS was its reliance on *Sosa*'s mandate that ATS claims contain features similar to the three principal offenses against the law of nations

[94] *Kiobel,* 569 U.S. at 115 (quoting Morrison v. National Australia Bank Ltd., 561 U.S. 247, 255 (2010)).
[95] *Id.* (quoting EEOC v. Arabian American Oil Co., 499 U.S. 244, 248 (1991)).
[96] *Id.* at 117.
[97] *Id.* at 124-25.
[98] *Id.*
[99] *Id.* at 125.
[100] *See Kiobel*, 569 U.S. at 116.
[101] *Id.*
[102] *See id.* at 116-17.
[103] *See id.* 115-117.

existing at the time of the statute's enactment: violation of safe conducts, infringement of ambassador's rights, and piracy.[104] According to the *Kiobel* Court, the Founders' understanding of international law did not support a finding that Congress intended the ATS to allow claims for violations of the law of nations occurring abroad, aside from piracy.[105]

In his concurrence, Justice Breyer proposed an alternate approach to ATS claims.[106] He argued against applying the presumption against extraterritoriality.[107] Rather, according to Justice Breyer, the ATS has jurisdiction where: (1) the alleged tort occurs on American soil; (2) the defendant is an American national; or (3) the defendant's conduct substantially and adversely affects an important American national interest.[108] Justice Breyer further clarified that such "American national interest" should include "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[109] Although this framework seems to provide a more systematic approach to analyzing ATS claims, courts have often applied the majority's touch and concern test instead.[110] Application of the touch and concern test has resulted in a general reluctance to apply the statute and consequentially, a steady decline of successful ATS claims.[111]

[104] *Id.* at 119 (citing *Sosa*, 542 U.S. at 723-24).
[105] *Id.* at 120-21.
[106] *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring).
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *See, e.g., Boniface v. Viliena*, 338 F. Supp. 3d 50, 56, 63 (D. Mass. 2018).
[111] *See, e.g., id.* at 56, 63 (finding Haitian citizens' allegations of violent voter intimidation by Haitian defendant did not present sufficient connection to U.S. because conduct occurred in Haiti); *Nestle USA, Inc. v. Doe*, 593 U.S. 628, 634 (2021) (finding allegations against corporations for aiding and abetting in trafficking plaintiffs in the Ivory Coast to produce cocoa did not "draw a sufficient connection"); *Jesner v. Arab Bank, PLC*, 584 U.S. 241, 272 (2018) (holding the ATS does not subject *any* foreign corporations to liability).

II. THE INSUFFICIENCY OF THE MODERN APPROACH

The Court's restrictive approach to ATS claims, beginning with *Sosa* and solidified in *Kiobel*, is problematic for several reasons. A fundamental defect of the touch and concern test is its reliance on the presumption against extraterritorial application. Such reliance runs afoul of congressional intent and disregards clear precedent.

First, the Court's application of the presumption against extraterritorial application to the ATS is inconsistent with the original intent of the statute. Given the Constitution's Law of Nations Clause[112] and the text of the ATS itself,[113] some level of international reach was contemplated at the Nation's inception. Extraterritorial reach of the ATS, then, is readily justifiable as the means by which Congress chose to exercise its power to initiate nonviolent punitive sanctions against other States under the Law of Nations Clause.[114]

Further, the Founders' familiarity with Vattel,[115] who viewed certain customary principles of international law to impose binding obligations,[116] supports the proposition that the ATS's jurisdictional grant was meant to give teeth to those obligations and thus uphold international norms. Additionally, the understanding of international law during the Founding was likely not as static as the majority in *Sosa* asserted when it interpreted the "law of nations" to encompass only the three categories of violations prevalent in the 18th century.[117] The Founders' understanding of the law of nations as being based in customary international law, as evidenced by Vattel's influence on the Founders at the time, seems to imply an anticipation that international norms were adaptive. Vattel contemplated the virtue of such adaptiveness when he noted the "object of a natural society established

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[112] *See* U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power to define and punish "Offences against the Law of Nations.").

[113] 28 U.S.C. § 1350 (providing jurisdiction for a civil action committed in violation of "*the law of nations or a treaty of the United States*") (emphasis added).

[114] *See* Kent, *supra* note 38, at 852.

[115] *See supra* notes 35-37 and accompanying discussion of the Founder's familiarity with Vattel's work.

[116] DE VATTEL, *supra* note 28, at § 26..

[117] *See Sosa*, 542 U.S. at 724-25 (holding violations of "present-day law of nations" to be "comparable to the features of the 18th-century paradigms").

between all mankind [is to] render their condition as perfect as possible."[118] But this goal would be severely hindered by an interpretation of the law of nations which would prevent modern governance from adapting to changes in societal norms signaled at the international level. Therefore, restricting the law of nations merely to those offenses existing at the time of the founding impermissibly restricts the scope of the ATS. The interpretations of ATS jurisdiction beginning with *Sosa* restrict the scope of the ATS under the assumption that Congress did not contemplate adjudication of international claims. But this assumption is inconsistent with the statute's context.

The presumption against extraterritorial application of the ATS is further defective because it has little precedential authority. *Kiobel* introduced upheaval into nearly unanimous circuit court agreement that the ATS *does* have extraterritorial application.[119] One author summarized how lower courts viewed the statute's extraterritorial application prior to *Kiobel*:

> [S]everal courts have either explicitly found or implicitly assumed extraterritorial application of the ATS to be permissible. While some courts have explicitly upheld the ATS' extraterritorial application, others have done so implicitly, applying the ATS in extraterritorial contexts. [In 2011] Judge Posner of the Seventh Circuit Court of Appeals addressed the question directly, holding the ATS capable of extraterritorial application. He noted not only that all precedent was in favor of extraterritorial application, but also that courts had used the ATS extraterritorially since its creation.[120]

The Court's reliance on this presumption is not the only issue with the Court's current framework. The inconsistency of the lower courts' approaches to the ATS's extraterritoriality prior to *Kiobel* lends further support to the argument that the Court's application of the presumption against extraterritoriality in that case was unjustified.

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[118] DE VATTEL, *supra* note 28 at § 12.

[119] Alex S. Moe, *A Test By Any Other Name: The Influence of Justice Breyer's Concurrence in* Kiobel v. Royal Dutch Petroleum Co, 46 LOY. UNIV. OF CHI. L. J. 225, 226 (2014) (citing Flomo v. Firestone Natural Rubber Co., LLC, 643 F.3d 1013, 1017 (7th Cir. 2011) (collecting cases)).

[120] *Id.* at 251-52 (internal citations omitted).

Kiobel's touch and concern test is itself ill-defined and gives little direction for courts trying to apply it.[121] The test merely states that claims under the ATS may only displace the presumption against extraterritorial application where those claims touch and concern U.S. territory with sufficient force. Further, the Court provided no insight, other than its instant holding, as to what "touch and concern" means or what constitutes "sufficient force."[122] Because the Court essentially handed down a "you know it when you see it" approach to ATS claims, courts have applied the touch and concern test inconsistently. For example, one district court found the defendant's conduct to sufficiently touch and concern U.S. territory where the tortious conduct was merely planned in the U.S.[123] Yet, another court found the test was not met when the defendant, mayor of a foreign jurisdiction, was exercising control of the militia and coordinating persecution of his political opposition while residing in the U.S.[124] Ultimately, the test leaves courts gripping for answers.[125] Perhaps the most significant question left unanswered by the touch and concern test is how much of the alleged conduct must occur on U.S. soil for jurisdiction to lie.[126]

The previous paragraphs have demonstrated that current ATS adjudication is marked by an inaccurate understanding of the original intent of the statute and pervasive inconsistencies. The Court's gradual minimization of the ATS's extraterritorial reach has kneecapped the statute's reach. The Court's efforts to minimize the statute's scope are bewildering given that the statute's text itself contemplates some extraterritoriality given it applies to aliens who commit offenses against international law. Inevitably, the factual scenarios giving rise to such claims will likely occur outside the U.S., thus throwing into

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[121] *See Kiobel*, 569 U.S. at 124-25; *see also* Moe, *supra* note 120, at 266.
[122] *Kiobel*, 569 U.S. at 125 (finding mere presence of a corporate defendant insufficient to sufficiently touch and concern U.S. territory and rebut the presumption against extraterritorial application).
[123] Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 323-24 (D. Mass. 2013).
[124] *Boniface*, 338 F. Supp. 3d at 62-63.
[125] Moe, *supra* note 119, at 267 ("[T]he standard's brevity leaves several significant questions unanswered.").
[126] *Id.* at 269.

question the Court's emphatic hesitation to apply the statute extraterritorially.

The next section proposes a framework to adjudicate ATS claims practically and consistently within the statute's historical intent while keeping courts from deciding issues better left to the Executive and Legislative branches.

III. A PATH FORWARD: A PROPOSAL FOR GREATER BALANCE BETWEEN PROTECTION OF INTERNATIONAL NORMS AND DEFERENCE TO THE POLITICAL BRANCHES

This section proposes an approach to ATS adjudication that not only adheres to what this author purports to be the intended scope of the statute but also supports well-established principles of deference to the political branches and respect for State sovereignty. The proposed framework draws inspiration from three sources: the *Filartiga* majority and its progeny, Justice Breyer's *Kiobel* concurrence, and the political question doctrine. Importantly, the proposed framework merely determines whether federal jurisdiction is appropriate. Meeting the following proposed requirements does not guarantee that a claim will be meritorious.

For the reasons detailed in the previous section, the tradition of *Kiobel*—applying a presumption against extraterritoriality to ATS claims—must be abandoned for the proposed framework to be effective. An approach that focuses on the location of the conduct—as the *Kiobel* touch and concern test does—is doomed when used to interpret a statute like the ATS. This is because the text of the ATS itself emphasizes the nature of the offense and the status of the harmed party.[127] Further, distinctions based on location become increasingly arbitrary the more interconnected the world becomes. The proposed framework addresses these concerns.

This Article proposes that federal ATS jurisdiction is proper when (1) the alleged tort occurs in U.S. territory; (2) the defendant is

[127] *See* 28 U.S.C. 1350 (describing justiciable actions as those brought "by an alien for tort only, committed in violation of the law of nations . . . .").

a U.S. national; or (3) the alleged offense is universally prohibited under international customary law. Although this framework expands the ATS's applicability, judicial restraint remains vital to courts maintaining their proper function within the constitutional design. Therefore, where any of the above factors are met, a court must also consider whether the claim's adjudication presents a nonjusticiable political question.

The first prong of the proposed framework inquires whether the alleged tort occurred in U.S. territory.[128] Where this is the case, the inquiry need not go further because the U.S. has a clear interest in adjudicating the claim, and jurisdiction under the ATS would be satisfied. If the alleged tort did not occur in U.S. territory, the second prong of the framework asks whether the defendant is an American national.[129] Where the defendant is an American national, the U.S. similarly has an interest in adjudicating the claim. These first two prongs are drawn directly from Justice Breyer's concurrence in *Kiobel* and "extends jurisdiction where it is not likely to be controversial," that is, to uniquely American interests.[130]

The proposed framework's third prong, however, departs from Justice Breyer's test. Justice Breyer's third prong would find jurisdiction proper where "the defendant's conduct substantially and adversely affects an important American national interest."[131] This prong is insufficient for several reasons. First, the vagueness of terms like "substantially" and "important" open Justice Breyer's test up to the same criticisms as the majority's touch and concern test. Such subjective language offers little guidance to courts applying the test. Second, this prong's emphasis on the *effect* of the conduct rather than

[128] *See Kiobel*, 569 U.S. at 127 (Breyer, J., concurring) (declining the presumption against extraterritoriality as applied to the ATS in favor of a three-pronged analysis, the first prong of which would find jurisdiction where "the alleged tort occurs on American soil.").
[129] *Id.* (noting jurisdiction under the ATS may also lie where the defendant is an American national).
[130] Moe, *supra* note 119, at 265-66.
[131] *Kiobel*, 569 U.S. at 127 (Breyer, J., concurring).

the conduct itself also allows for a subjective interpretation that is inconsistent with the statute's focus on the offense itself.

To address these shortcomings, this article proposes an alternative third prong with a *Filartiga*-inspired inquiry. That is, where the alleged tort does not occur in U.S. territory and where the defendant is not an American national, the question is merely whether the tortious conduct is universally prohibited in international law. Though, as the court prudently noted in *Filartiga*, "the requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one."[132] The conduct must clearly and unambiguously be renounced universally by the international community.[133] Such a renunciation of conduct tends to be "codified" in observable documentation such as U.N. declarations, international conventions, and government memoranda. Summarily, this prong of the proposed analysis still requires evidence of an existing cause of action but aligns judicial interpretation of the statute with the ATS's focus on "offenses" rather than location or effects.

Finally, to prevent the Judiciary from overstepping its constitutional bounds, this framework requires a court to ask whether the ATS claim presents a nonjusticiable political question. Drawing from the well-known *Baker* test, courts determining whether jurisdiction exists over an ATS claim should consider various factors including whether the constitution delegates the issue to another branch and whether the Judiciary has standards to resolve the issue.[134] The type of adjudication this Article advocates may cause diplomatic

[132] *Filartiga*, 630 F.2d at 881.

[133] *See id.* at 881-84 (explaining that because the "prohibition [on torture] is clear and unambiguous" it has become part of customary international law).

[134] *See Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing factors to be considered in the political question doctrine analysis to include whether there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

tension with other nations. Thus, preventing the Judiciary from overstepping its bounds is critical. But as emphasized in *Baker*, the doctrine "is one of 'political questions,' not one of 'political cases.'"[135] So, that a case may have political implications does not necessarily bar it from adjudication.

To summarize, the proposed framework allows for federal jurisdiction over ATS claims where either (1) the alleged tort occurs on U.S. soil; (2) the defendant is a U.S. national; or (3) the alleged offense is universally prohibited under international customary law. Additionally, where any of these factors are met, a court must determine that the individual claim does not present a nonjusticiable political question as defined in *Baker*.[136]

IV. DEFENDING THE PROPOSAL

The proposed framework has various practical, institutional, and normative advantages. From a practical standpoint, this framework would provide much-needed clarity to ATS litigation. Although the Court attempted to provide some guidance for lower courts in *Kiobel*, the touch and concern test has resulted in inconsistent application by the courts, producing inconsistent results.[137] This inconsistency may be partially attributable to the test's focus on location and effects rather than the conduct itself. By making conduct the focus, the proposed framework eliminates the need for a court to make arbitrary determinations of whether conduct occurring in Country X should be owed more or less protection than conduct occurring in Country Y. Because the pertinent question in cases not involving direct U.S. interests is whether the conduct violates international customary law, the proposed analytic approach simply involves a survey of international customs and documentation to determine whether a norm exists. Although application will still differ from case to case due to unavoidable factors like the makeup of a court or a court's specific interpretation of international law, the subjectivity of a court's determination is comparatively limited. In this way, the

[135] *Id.*
[136] *See id.* at 217.
[137] *Compare Nestlé*, 2017 U.S. Dist. LEXIS 221739, *with Boniface*, 338 F. Supp. 3d at 62–63.

proposed framework provides a practical framework that allows a court faced with an ATS claim to perform a step-by-step, more concretely guided, analysis to decide whether jurisdiction is appropriate.

The proposed framework, which allows for more expansive application of the ATS, also has many institutional advantages. First, the proposed framework allows for more proactive application of a constitutional grant of power found in the Law of Nations Clause, which is currently suppressed by modern ATS jurisprudence. As stated in Part II of this article, the Clause allows Congress to define offenses against the Law of Nations.[138] This Article argues Congress intended the ATS to do just that. While Congress provided some guidance as to what claims the courts were to adjudicate under the ATS, the statute's general reference to the laws of nations seems to indicate Congress's intent that courts determine the contours of the conduct to be covered. Thus, the proposed framework more fully leverages the Judiciary's interpretive power, a power the courts have long held. The proposed framework boasts another institutional advantage by providing more clarity and consistency to the U.S.'s understanding of international law, which may enhance the U.S.'s diplomatic standing. The proposed framework focuses on the objective nature of the alleged conduct rather than the connection the conduct has to U.S. political interests. Thus, discrimination based on a defendant's origin is less likely and consistent adjudication will follow. Such consistent treatment may enhance the U.S.' diplomatic relationships with countries whose nationals may otherwise be discriminated against in ATS adjudication where the country lacks a sufficient relationship with the U.S.

The final institutional advantage of the proposed framework is that it promotes separation of powers principles. Separation of powers principles were a major justification for the Court's decision in *Kiobel*.[139] The Court stated, "The presumption against extraterritorial application helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign

[138] U.S. CONST. art. I, § 8, cl. 10.
[139] *See Kiobel*, 569 U.S. at 124.

policy consequences not clearly intended by the political branches."[140] Deference to the political branches is certainly necessary where the issue falls on either Congress or the Executive to answer.[141] However, the grant of jurisdiction that the ATS contemplates seems to preclude the extensive deference modern ATS jurisprudence requires. The very language of the ATS gives courts jurisdiction over claims by foreigners in disputes occurring abroad.[142] So, if international law today is understood to include human rights, the ATS gives American courts the authority to adjudicate claims by foreigners against their own government.[143] If American courts are not an appropriate forum for these claims, Congress may signify as much through amendment or repeal of the ATS.[144] Yet, Congress has not done so. The ATS must therefore be interpreted to convey to the courts the same the authority it conveyed at its enactment. Adjudication of international claims falling within the expansive definition of the law of nations embraced by this Article is encompassed in this authority. In sum, the proposed framework allows the Judiciary to exercise the powers rightfully delegated to it while simultaneously providing a limiting principle—the political question doctrine—should an ATS claim present an issue more proper for the political branches.

A final advantage of the proposed framework lies in its normative value as a tool to fight human rights abuses. It is unlikely that the Founders specifically anticipated that the ATS would be expanded to address the specific types of human rights abuses alleged in cases like *Filartiga*. This low likelihood, however, should not preclude the statute's application to such claims. Under that reasoning, every statute that intersected with international affairs would need "a statement of interpretation so as to avoid disrupting current American foreign policy."[145] Under such prescriptive bounds, courts and legislatures could not easily adapt to evolving circumstances. That conclusion does not fare well. To interpret the ATS under such a fundamentally flawed justification is wrong given

[140] *Id.* at 116.
[141] *See, e.g.*, *Baker*, 369 U.S. at 212.
[142] Small, *supra* note 42, at 178.
[143] *Id.*
[144] *Id.*
[145] *Id.* at 180.

the ATS's textual reference to the law of nations—a body of law that is inherently flexible and continuously evolving.

A more reasonable perspective is that the Founders understood the law of nations would change as time passed and that the ATS would adapt to such changes. The Founders' familiarity with Vattel means they were likely familiar with the principle that membership in the international community produces not only rights to sovereign governance but also obligations to uphold international norms. While the modern conception of international law has expanded to include various human rights protections, the basic principle of rights and obligations as espoused by Vattel remains. International law today leaves human rights enforcement to individual countries.[146] Thus, "every nation has a duty not only to enforce human rights norms in its own backyard, but also to ensure that human rights are respected globally."[147] Thus, under principles of international law, more expansive ATS claims may be seen as a means by which the U.S. can satisfy its international obligations to expand notions of what constitutes adequate human rights protections.[148] Further, a more receptive interpretive framework for ATS claims "is consistent with America's role as a bastion of civil and political liberty."[149] The proposed framework allows the U.S. to be a champion for foreign victims of human rights abuses where corrupt or inaccessible courts facilitate impunity.[150]

Although the ATS certainly has the potential to be a powerful tool if more expansively applied than it is currently, an overly expansive approach has the potential to overwhelm U.S. courts and create diplomatic tension. Thus, it is important to emphasize here an important limiting principle the proposed framework places on ATS claims. In accordance with *Filartiga*, jurisdiction under the ATS attaches "only to clear violations of international law."[151] This is a high bar. A norm must be truly universal in the international community

[146] *Id.* at 178.
[147] *Id.*
[148] *See* Small, *supra* note 42, at 179.
[149] *Id.*
[150] *See* Moe, *supra* note 119, at 274-75
[151] Small, *supra* note 42, at 174.

and supported by concrete evidence to constitute such a clear violation. Thus, these limiting principles mitigate against "unfounded" concerns that "adoption of the reasoning in *Filartiga* would open the floodgates to trivial human rights litigation . . . ."[152]

To conclude, this section has sought to show how the various practical, institutional, and normative advantages of a more expansive approach to ATS jurisdiction make the proposed framework a prudent alternative. Further, the framework's limiting principles—specified conduct and the political question doctrine—ensure ATS jurisprudence will not become overly expansive.

CONCLUSION

This Article argues the modern construction courts place on the ATS is problematic. As human rights abuse claims continue to be brought under the ATS, the need for a more methodical approach is clear. The result of *Sosa* and *Kiobel*, and the cases following their tradition, has been a disunified approach to determining whether jurisdiction under the ATS exists. This has led to inconsistent, unpredictable results. More fundamentally, the narrow extraterritorial application of the ATS under *Sosa* and *Kiobel* runs afoul of the sound historical precedent and the context of the statute's enactment.

This Article proposes a new jurisdictional framework. Where the alleged tort occurs in the U.S., the defendant is a U.S. national, or the alleged offense is universally prohibited under international customary law, adjudication is justified because it either promotes a substantial U.S. interest or fulfills a U.S. obligation under international customary law. Because this framework requires each claim to be assessed in terms of the political question doctrine, it mitigates the separation of powers concerns that inspired the presumption against extraterritorial in *Kiobel*. The proposed framework's clarity and consistency would remedy many of the issues caused by patchy interpretations post-*Sosa* and *Kiobel*. Additionally, the expansion of ATS claims creates various institutional advantages by allowing Congress and the courts to play a more active role in defining the

[152] *Id.* at 174.

parameters of foreign conduct. Finally, the advantage of recognizing the relevance of the ATS and expanding its jurisdiction to promote universally recognized human rights cannot be understated.