

Living with History: Will the Alien Tort Statute Become a Badge of Shame or Badge of Honor?

Tyler R. Giannini

ABSTRACT. On the same day that Juneteenth was announced as a U.S. national holiday to honor the end of legalized slavery in the United States, the Supreme Court ruled that claims involving Nestlé USA’s complicity in the enslavement of children in the cocoa industry could not proceed under the 1789 Alien Tort Statute (ATS) because most of the allegations involved conduct outside the United States. While the decision was the latest setback for human rights cases, it also highlighted the connection between historical legacies and contemporary debates that have been ever-present in modern ATS jurisprudence. This Essay grapples with this living history and specifically the questions of extraterritoriality and U.S. corporate-actor liability under the ATS. History—including newly unearthed materials from George Washington’s presidency—makes clear the Founding generation was concerned with providing remedies for actions by private U.S. subjects that might embroil the country in foreign-affairs problems or undermine the nation’s status among “civilized” nations. This historical concern with U.S. nationality jurisdiction is glaringly absent from not only the Court’s holding in *Nestlé* but also its discussion. But the Nestlé corporation’s nationality almost certainly mattered. Otherwise, the Court could have simply extended an earlier holding that causes of action against foreign corporations were not permitted under the ATS. In considering this proposition, the Essay looks past *Nestlé*’s narrow extraterritorial ruling and interrogates the importance of the yet-to-be answered relevance of U.S. nationality in future ATS jurisdictional analysis. The Essay concludes that U.S. subject liability remains possible and would bring the Court back in line with the clear eighteenth-century historical paradigm on the question of U.S.-actor liability.

INTRODUCTION

On June 17, 2021, President Biden announced that Juneteenth would become a federal national holiday to mark and honor the end of legalized slavery in the United States.¹ That same day, the Supreme Court handed down its most recent

1. Remarks by President Biden at Signing of the Juneteenth National Independence Act, 2021 DAILY COMP. PRES. DOC. 515 (June 17, 2021). The term Juneteenth commemorates June 19,

Alien Tort Statute (ATS) decision in *Nestlé USA, Inc. v. Doe*,² declining to grant jurisdiction in a case involving the Nestlé Corporation’s complicity in the trafficking and enslavement of children in Côte d’Ivoire’s cocoa industry.³ The dissonance between the two events is striking, speaking volumes about both the progress made since the days of American enslavement and the persistence of injustices related to the failure of the United States to confront its dark history with slavery. This Essay examines the current state of ATS jurisprudence and the interplay between historical legacies and contemporary debates regarding U.S. corporate-actor liability under the ATS. After detailing a string of Supreme Court decisions that have sharply curtailed the scope of the ATS, the Essay considers how history—which has shaped much of the ATS jurisprudence—can provide guidance for future extraterritorial cases involving U.S. actors.

Because the ATS was enacted by the First Congress in 1789,⁴ ATS jurisprudence is steeped in history. More than most statutes, history has defined the parameters of the thirty-three-word statute.⁵ In this arena, history is more than merely interesting—it has fundamentally affected how the Supreme Court has adjudicated ATS claims over the past two decades. Indeed, the Court’s ATS decisions have hinged in large part on history and eighteenth-century historical paradigms regarding offenses and jurisdiction. From the question of the very purpose of the ATS to the questions of who falls under its scope and whether the statute applies outside the United States, history has been central to the disposition of each issue.

The Essay is organized into three Parts. Part I examines the role of history in the Supreme Court’s ATS jurisprudence since it first considered the statute in 2004. Part II discusses newly unearthed materials from George Washington’s presidency. Those materials provide uncontroverted contemporaneous evidence that the Founding generation was concerned with providing remedies for actions by private U.S. citizens that might embroil the country in foreign-affairs

1865, when a Union Army General announced the end of legalized slavery in Texas. See ANNETTE GORDON-REED, ON JUNETEENTH 11-13 (2021).

2. 141 S. Ct. 1931 (2021).

3. *Id.* at 1935, 1937.

4. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77.

5. The 1789 statute originally stated that “[t]he district courts . . . shall . . . 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.” *Id.* The Alien Tort Statute (ATS) has changed little since its passage, and currently reads in its entirety: “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 (2018).

problems or undermine the nation's status among "civilized" nations.⁶ Part II also considers a historical rule articulated by Emmerich de Vattel, the leading international-law jurist of the Founding generation. That rule, which has been largely overlooked by the Court, explicitly states that sovereigns have an obligation to provide remedies for their subjects' international law violations (or "great crimes").⁷ Finally, Part II takes up the implications of this history for the Court's current ATS jurisprudence, particularly focusing on the need for a modified approach to extraterritorial jurisdiction involving U.S. subjects to bring the Court back in line with historical paradigms.

Part III then examines the future of ATS jurisprudence involving U.S. actors in light of *Nestlé*, arguing that the Court's future disposition of cases can – and should – ensure that ATS jurisprudence is aligned with the history. Part III stresses that the most stable ATS holdings are likely to be those with identifiable through-lines connecting historical doctrines to modern ones. Part III also argues that while *Nestlé* is understandably viewed by many as a setback for human rights, its holding is a narrow one with importance beyond its dismissal of the claims on extraterritoriality grounds. *Nestlé* is also significant because of what it did *not* do and what it did not discuss – specifically with regards to the issue of U.S.-actor liability. *Nestlé*'s status as a U.S. corporation almost certainly mattered to the *Nestlé* Court at some level; otherwise, the Court would have simply extended its 2018 *Jesner v. Arab Bank, PLC* holding – that causes of action against *foreign* corporations were not permitted under the ATS.⁸ *Nestlé* thus also stands for the proposition that U.S. actors, including corporations, are not immune from suit in the way foreign corporations are. In considering this proposition, Part III traces a possible path forward that may resemble the decade-long road to having five Justices express support for corporate liability under the ATS. *Nestlé* is arguably the first step on a similar path to recognizing the importance of U.S.-based actors in ATS jurisprudence, which has largely been preoccupied with issues of territorial jurisdiction (rather than the nationality of covered parties).⁹ The position that U.S. actors can be held to account under the ATS no

6. See Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 464, 482-88, 494 (1989) (discussing the enactment of the ATS as part of an effort by the United States to join the "community of civilized nations" and the ways in which the concepts of "honor" and "virtue" played important roles in the international community).

7. 1 EMMERICH DE VATTEL, *THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS*, at bk. II, ch. VI, §§ 76-77, 84 (London, J. Newberry et al. 1759).

8. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

9. As Justice Kennedy noted in *Kiobel v. Royal Dutch Petroleum Co.*, where the majority considered the question of territorial jurisdiction under the ATS, there may be other "international law principles" and "reasoning" guiding ATS jurisprudence beyond territorial jurisdiction alone.

matter where they committed a violation of international law may not yet have received five explicit votes, but it should eventually. This correction – or perhaps clarification – remains possible and would bring the Court back in line with the clear eighteenth-century historical paradigm.

I. HISTORY MATTERS

From the very outset of modern ATS litigation, starting with the Second Circuit’s declaration in 1980 in *Filartiga v. Pena-Irala* that “the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind,”¹⁰ courts have looked to history to understand the obligations of the United States as a member of the international community.¹¹ The Supreme Court, too, has consistently identified the importance of history in ATS jurisprudence since first considering the statute in the 2004 *Sosa v. Alvarez-Machain* decision.¹² In the Court’s three subsequent ATS cases,¹³ history continued to animate the Justices’ debates on the central questions of extraterritoriality, corporate liability, and whether there are different rules for U.S. subjects under the ATS compared to foreign subjects.

A. *Sosa’s History: Justice Souter’s Framework*

Sosa is all about history. Indeed, the Court looked to historical materials to answer and shape all of the core holdings in the case. A unanimous Court relied on history to conclude that the Founding generation intended the statute to be given immediate “practical effect” to help the United States avoid being embroiled in foreign entanglements, including those resulting from private actors involved in law of nations violations.¹⁴ All nine Justices also agreed that history indicated that Congress meant to provide federal jurisdiction through the ATS

569 U.S. 108, 125 (2013) (Kennedy, J., concurring). Piracy, for example, involves jurisdiction on the high seas, and other cases may involve safe harbor or universal jurisdiction. Thus, there may be at least five different contexts requiring differing jurisdictional analyses: 1) territory, 2) nationality, 3) piracy and the high seas, 4) safe harbor, and 5) universal jurisdiction. This Essay is concerned primarily with territorial and nationality-based jurisdiction.

10. 630 F.2d 876, 890 (2d Cir. 1980).

11. *See id.* (“Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”).

12. 542 U.S. 692 (2004).

13. Those three cases are *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), and *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

14. *Sosa*, 542 U.S. at 715-17, 724.

for “a relatively modest set of actions,”¹⁵ and a six-Justice majority used history to define the standard of actionable ATS claims.¹⁶

In Part III of *Sosa*, which was joined by all nine Justices, Justice Souter chronicled the historical evidence to establish two interrelated principles: first, that the ATS was purely jurisdictional, and second, that it was nevertheless to be given “practical effect the moment it became law”¹⁷ and not be “placed on the shelf” to lie “fallow indefinitely.”¹⁸ Looking to history, including the fact that the ATS was part of the first Judiciary Act that was “otherwise exclusively concerned with federal-court jurisdiction,”¹⁹ the Justices agreed that the ATS was purely jurisdictional.²⁰ As a purely jurisdictional statute, however, the question remained as to where a cause of action for international-law violations could originate. With the *Sosa* defendants arguing that an additional congressional statute was necessary to establish a cause of action and the plaintiff arguing that the cause of action came from the ATS itself, Souter chose a third approach to articulate the Court’s position—one advanced by professors of federal jurisdiction and legal history. The historians’ approach stated that “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.”²¹ History was the deciding factor in the debate, said Souter: “We think history and practice give the edge to th[e] . . . position” that the statute should be given immediate effect with federal courts being able to recognize causes of action using their common law powers.²²

Even as the Court noted the uncertainty of some jurists regarding the statute’s origins,²³ the Justices agreed that history ultimately did clarify the purpose behind the enactment of the ATS. Two separate, infamous incidents involving an attack on a French diplomat in Philadelphia and the arrest of the Dutch Ambassador’s servant by a police constable in New York City during the preconstitutional period highlighted the impotency of the federal government to address

15. *Id.* at 720.

16. *Id.* at 724-25.

17. *Id.* at 724.

18. *Id.* at 719.

19. *Id.* at 713.

20. *Id.* at 712-14, 729.

21. *Id.* at 714 (citing Brief of Professors of Federal Jurisdiction & Legal History as Amici Curiae in Support of Respondents, *Sosa*, 542 U.S. 692 (No. 03-339)).

22. *Id.*

23. *Id.* at 712 (noting that Judge Henry Friendly had “called the ATS a ‘legal Lohengrin’ and that ‘no one seems to know whence it came’”) (internal citations omitted); *see also id.* at 719.

international-law violations.²⁴ Justice Souter also described the Continental Congress’s “preoccupation” with providing a federal judicial remedy for violations by private actors lest they lead to “serious” international affairs consequences for the young nation.²⁵ Thus, the ATS had both a remedial purpose and a related purpose of upholding international law as a “civilized nation”²⁶ in order to avoid foreign-affairs problems.

All nine Justices also agreed that history demonstrated that international-law violations in question were limited to a “modest” number of causes of action.²⁷ There was particular note of three violations identified by William Blackstone: offenses against ambassadors, violations of safe conduct, and prize captures and piracy cases.²⁸ While these so-called “Blackstone Three” offenses received clear attention – an inordinate amount of attention, in fact – Justice Souter’s holding did not close the door on additional claims.²⁹

In order to provide a standard for recognizing new ATS claims, Justice Souter again turned to history. While expounding on the need for courts to use their common-law powers carefully, Souter, joined by six Justices for this portion of the opinion,³⁰ stated that any new claims must be of a character “accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”³¹ The Court cited material

24. *Id.* at 716-17 (discussing an attack on a French diplomat in May 1784 that came to be known as the Marbois Affair and a similar incident during the 1787 Continental Convention itself involving the Dutch Ambassador); *see also* William R. Casto, *The Federal Court’s Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 492-94 (discussing both incidents, including the national prominence of the Marbois Affair).

25. *Sosa*, 542 U.S. at 715-16.

26. Highlighting the importance of the United States joining the community of nations, the Court uses the term “civilized” nation no less than six times in its opinion. *Id.* at 715, 722, 725, 732, 734, 737; *see also* Burley, *supra* note 6, at 464, 482-88, 494.

27. *Sosa*, 542 U.S. at 720, 724.

28. *Id.* at 715, 719-20.

29. *See id.* at 720 (“[T]he common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims.”) (emphasis added). The new historical materials, discussed below, indicate that those interpreting the ATS at the time did not limit the offenses to the Blackstone Three. *See infra* Sections II.A-B.

30. While Justice Scalia agreed with Part III of *Sosa* that the ATS was to be given practical effect, he argued in a concurrence that no new causes of action should be recognized in the modern era after *Erie*, as that case “close[d the] door” on new claims. *See Sosa*, 542 U.S. at 746 (Scalia, J., concurring); *but see id.* at 729-30 (majority opinion) (six-Justice majority explaining why an “enclave[]” for federal common law for international law and foreigner affairs survived *Erie*).

31. *Id.* at 725 (majority opinion).

from several cases favorably to demonstrate when this bar might be met,³² including *Filartiga v. Pena-Irala*'s statement that "the torturer has become . . . an enemy of all mankind."³³ Souter, however, emphasized that "the door is still ajar" for new claims "subject to vigilant doorkeeping,"³⁴ and courts should be cautious when considering new claims, given the general grant of foreign-affairs powers to the executive and legislative branches, as well as the general limitation on the common-law powers of federal courts.³⁵

In sum, each of *Sosa*'s holdings and conclusions flowed from historical evidence. The purely jurisdictional ATS was to be given immediate effect through federal courts recognizing a modest number of causes of action using their common-law powers. Newly recognized offenses must resemble the eighteenth-century paradigm, and to maintain the modest scope of offenses, courts should be cautious, vigilant doorkeepers. The very purpose of the ATS was to provide a *federalized judicial remedy* for foreigners so as to not leave remedies only to state courts. Such a remedy was meant to include international offenses by *private* actors that, if left unaddressed, could embroil the young nation in serious foreign-affairs entanglements. While the Court ultimately dismissed the *Sosa* plaintiff's particular claims, opining that there was not international consensus that a twenty-four-hour arbitrary detention represented an offense of the law of nations,³⁶ the *Sosa* framework established a series of interrelated and historically rooted holdings that have defined the ATS legal landscape since.

B. *Kiobel*, *Jesner*, and *Nestlé*: Holdings Based on Modern Doctrines

In the three Supreme Court ATS cases after *Sosa*, history remains important, but each holding relies on modern doctrines rather than historical ones. In 2013, *Kiobel* added a general extraterritoriality test to the ATS for all suits, even though the matter itself involved a "foreign cubed" case, with foreign plaintiffs, foreign defendants, and conduct that took place on foreign soil.³⁷ In its discussion, the *Kiobel* Court found that nothing in the text and available history provided conclusive evidence that the ATS was meant to apply generally on foreign soil.³⁸

32. *Id.* at 731-32 (first citing *Filartiga*, 630 F.2d at 890, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791-95 (D.C. Cir. 1984) (Edwards, J., concurring); and then citing *In re Estate of Marcos Hum. Rts. Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

33. *Id.* (quoting *Filartiga*, 630 F.2d at 890).

34. *Id.* at 729.

35. *See id.* at 724-28.

36. *Id.* at 738.

37. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 111-12, 124-25 (2013).

38. *See id.* at 118-24 (analyzing the text, historical background, and incidents known at the time).

History also informed the briefing and oral arguments and likely had a significant role in preventing a ruling that would have prohibited lawsuits against corporations, which was the original question presented to the Court.³⁹ In the *Kiobel* majority opinion, however, Chief Justice Roberts was not persuaded by the historical record, ultimately finding that the history did not provide sufficient evidence to overcome the modern doctrine that statutes do not generally apply outside the United States.⁴⁰ In affirming the Second Circuit’s dismissal, Roberts concluded that “mere corporate presence” was not sufficient to overcome the presumption against extraterritoriality.⁴¹

Nestlé’s majority affirmed the presumption against extraterritoriality in *Kiobel*, adding no new historical analysis. In conducting its extraterritorial analysis, however, *Nestlé* applied the two-part test established in *RJR Nabisco, Inc. v. European Community*.⁴² As with *Kiobel*, the first part of the *RJR Nabisco* test looks to the text of the statute to assess whether it provides clear evidence that the law applies outside the United States.⁴³ If the text is not clear, the second prong evaluates whether there is sufficient U.S.-based conduct relevant to the “focus” of the statute to constitute a territorial application of the statute while still allowing for other conduct on foreign territory to be evaluated as well.⁴⁴ Though territorial jurisdiction was a well-accepted basis for establishing a court’s jurisdiction during the Founding Era, the court-developed requirement that statutes must explicitly articulate extraterritorial jurisdiction is a modern doctrine.⁴⁵ *Nestlé* did not resolve the question regarding the “focus” of the ATS, but it did hold that “generic” pleading would not suffice to establish jurisdiction and “more

39. See *id.* at 114 (noting the Court originally considered the question whether courts could recognize ATS claims involving corporate liability and, after oral argument, the Court asked for supplemental briefing on the question of extraterritoriality); *infra* Section III.A (discussing Justice Gorsuch’s historically rooted analysis for concluding that ATS claims should be permitted against corporations).

40. See *Kiobel*, 569 U.S. at 124.

41. See *id.* at 125.

42. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021) (citing *RJR Nabisco, Inc. v. Eur. Cmty.*, 579 U.S. 325, 337 (2016)). While not dealing with the ATS per se, the Court’s analysis of extraterritoriality in *RJR Nabisco* would prove highly relevant to future analyses of claims under the ATS.

43. *Id.* (citing *Kiobel*, 569 U.S. at 115-118, 124).

44. *Id.* (citing *RJR Nabisco*, 579 U.S. at 337); see also *Kiobel*, 569 U.S. at 124-25 (noting there was not sufficient “relevant conduct” in the United States in the case to overcome the presumption against extraterritoriality).

45. See *Kiobel*, 569 U.S. at 115-16, 118-19, 121-22, 124-25 (applying interpretative principles from *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247 (2010)).

domestic conduct than general corporate activity” must be alleged in order for ATS claims to proceed.⁴⁶

In 2018, *Jesner* added a ban on suits against foreign corporations, reasoning that all cases against foreign corporations would implicate foreign-affairs concerns in problematic ways that courts are ill equipped to resolve without specific guidance from Congress.⁴⁷ The *Jesner* Court did not engage in analysis regarding extraterritoriality but instead held that the ATS does not permit claims against *foreign* corporations.⁴⁸ As with the *Kiobel* and *Nestlé* decisions, the *Jesner* test stems from the Court’s concern with exercising its common-law powers, not history. That reluctance, however, is drawn from modern doctrines.

II. HISTORY DEEPENED, HISTORY EXPANDED

Significant revelations over the past decade have allowed for a greater understanding of various ATS jurisdictional questions surrounding U.S. corporate actors and their actions at home and abroad. There are now five documented incidents – starting with the 1784 Marbois Incident and spanning through the 1794 British Sierra Leone incident – that all indicate the ATS was viewed by the Founding generation to apply to wrongs on U.S. territory as well as wrongs by U.S. subjects, no matter where they occurred. One of the striking conclusions is that the Founding generation would have used a variety of approaches and not solely focused on territorial jurisdiction as the Court has done in *Kiobel* and *Nestlé*.⁴⁹

Each of the five separate incidents – two predating the ATS and three following its enactment – follow a demonstrable pattern. The circumstances vary, but all involve U.S. subjects, or individuals in the United States, implicated in law-of-nations violations that caused foreign-policy problems. Only two involve the territory of the United States; three involve U.S. subjects acting extraterritorially. The incidents caused diplomatic strife with four different foreign powers (Great Britain, France (twice), the Netherlands, and Spain). The incidents also illustrate how the Founding generation analyzed international-law violations by private actors and what they felt the obligations of the United States were. Private actors could violate international law and draw the United States into diplomatic friction by offending foreign powers. Just as importantly, both the United States and the foreign power in each case understood that the United States had an

46. See *Nestlé*, 141 S. Ct. at 1936-37.

47. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

48. *Id.*

49. See *supra* note 9 (discussing various contexts that may alter the jurisdictional analysis).

obligation to provide redress if it were to uphold the harmony that constituted “civilized” conduct among nations.

Furthermore, the historical figures involved in addressing and analyzing these incidents may not all be household names today, but they represent a veritable who’s who of the Founding generation. They include the first two Secretaries of State (Thomas Jefferson and Edmund Randolph), the first two Attorneys General (Edmund Randolph and William Bradford), and two of the first Chief Justices of the United States (John Jay and Oliver Ellsworth). In addition, all of these figures followed the rules as articulated by the leading international-law jurist of the time – Emmerich de Vattel – who has received scant attention from the Court despite his importance to the Founding generation. Not a single incident has been identified in which the Framers apply a contrary approach outside of the framework identified by Vattel.

A. Washington’s Presidency and Private American Offenders

Over the last decade, additional information has come to light that reinforces the *Sosa* framework. That information has also demonstrated that the Founding generation considered both territorial and nationality jurisdiction as bases for ATS claims and viewed the ATS as a way of help the United States meet international obligations and avoid diplomatic rows.⁵⁰ The most illuminating materials are those discovered in 2020; namely, 1792 opinions by then-Secretary of State Thomas Jefferson and then-Attorney General Edmund Randolph affirming ATS jurisdiction in two incidents involving Spanish Florida and French Saint-Domingue.⁵¹ These opinions, along with Attorney General William

50. See, e.g., David Golove, *The Alien Tort Statute and the Law of Nations: New Historical Evidence of Founding-Era Understanding*, JUST SEC. (Nov. 17, 2020), <https://www.justsecurity.org/73376/the-alien-tort-statute-and-the-law-of-nations-new-historical-evidence-of-founding-era-understandings> [https://perma.cc/PUY5-MQZH] (discussing newly discovered materials from 1792); Brief of Professors of Legal History Barbara Aronstein Black et al. as Amici Curiae Support of Respondents, *Nestlé*, 141 S. Ct. 1931 (Nos. 19-416, 19-453) [hereinafter Professors of Legal History Amicus Brief (*Nestlé*)] (same); see also Curtis A. Bradley, *Agora: Kiobel: Attorney General Bradford’s Opinion and the Alien Tort Statute*, 106 AM. J. INT’L L. 509, 518-26 (2012) (discussing new historical materials revealing more information on the incidents informing the Bradford Opinion, *Breach of Neutrality*, 1 U.S. Op. Atty. Gen. 57 (1795)); Supplemental Brief of Professors of Legal History William R. Casto et al. as Amici Curiae in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491) (same).

51. The discovery was unearthed by Professor David Golove, who was also among the amici curiae of professors of legal history that filed a brief with the Court in *Nestlé* that analyzed the importance of the new materials. See Golove, *supra* note 50; Professors of Legal History Amicus Brief (*Nestlé*), *supra* note 50, at 15-20.

Bradford's Opinion of 1795 regarding an attack on British Sierra Leone in 1794,⁵² are part of a demonstrable pattern: when private U.S. subjects were involved in international-law violations outside the United States, aggrieved foreign powers complained, and the United States felt obliged to respond—offering the ATS as one way of meeting its international obligations.

Before turning to the opinions in detail, it is important to note that both of the 1790s incidents mirror previously documented episodes during the pre-constitutional period involving infringements of foreign diplomats' rights. The most famous of these—the Marbois Incident—involved an attack on a French diplomat in Pennsylvania in 1784, but a second incident occurred in New York during the Constitutional Convention involving the Dutch ambassador.⁵³ These incidents help explain the impetus for the passage of the ATS in 1789.

The 1790s incidents pick up the story *after* the enactment of the ATS. In a 1792 document entitled “Opinion on Offenses against the Law of Nations,” Secretary of State Thomas Jefferson and Attorney General Edmund Randolph explicitly affirmed that the ATS provided a civil cause of action for the law-of-nations offense of “robbery” in two incidents involving U.S. subjects on foreign territory.⁵⁴ Both incidents implicated U.S. citizens in unlawfully capturing enslaved persons—one on Spanish territory and one on French territory. Like the Marbois Incident, the robberies raised immediate concerns as to whether there would be an effective federal forum available to provide redress for law-of-nations violations.

One incident involved three U.S. citizens, who entered Spanish Florida and stole five enslaved persons from a Spanish subject and returned to Georgia.⁵⁵ The second incident similarly implicated U.S. citizens, this time acting on French territory. In a letter responding to complaints from the French, Jefferson recounted how an American ship captain landed on Saint-Domingue, a French island that is today Haiti.⁵⁶ After luring them in with false promises of employment, the U.S. captain captured several persons enslaved by residents of the island and then returned to the United States, where the enslaved individuals

52. Breach of Neutrality, 1 U.S. Op. Atty. Gen. 57 (1795).

53. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716-17 (2004).

54. See Thomas Jefferson, Opinion on Offenses Against the Law of Nations (Dec. 3, 1792), reprinted in 24 THE PAPERS OF THOMAS JEFFERSON DIGITAL EDITION 693 (James P. McClure & J. Jefferson Looney, eds. 2022) [hereinafter JEFFERSON PAPERS]; Edmund Randolph, Edmund Randolph's Opinion on Offenses against the Law of Nations (Dec. 5, 1792), reprinted in JEFFERSON PAPERS, *supra*, at 702.

55. Letter from Josef Ignacio de Viar and Josef de Jaudenes to Thomas Jefferson (June 26, 1792), reprinted in JEFFERSON PAPERS, *supra* note 54, at 129-31.

56. See Letter from Thomas Jefferson to Jean Baptiste Ternant (Nov. 9, 1792), reprinted in JEFFERSON PAPERS, *supra* note 54, at 603.

were sold.⁵⁷ The incidents fall squarely within the *Sosa* paradigm of actions by private subjects implicating the United States in foreign entanglements and causing diplomatic strife. Both incidents provoked international outcries. Spain demanded compensation for the “robbery” and punishment of the offenders and spoke of the threat to “harmony and good relations” between the two nations.⁵⁸

Jefferson and Randolph clearly understood that the United States had an obligation to act, either by criminally prosecuting the individuals, extraditing them, or providing compensation to the victims.⁵⁹ No extradition treaties existed,⁶⁰ leaving only the possibility of criminal or civil action.⁶¹ In two separate opinions assessing options for addressing these incidents, Jefferson and Randolph confidently asserted that there was jurisdiction for a civil remedy, given the ATS.⁶² In his opinion, Secretary Jefferson directly quoted the ATS in full.⁶³ Attorney General Randolph responded affirming that federal courts had civil jurisdiction.⁶⁴

Jefferson and Randolph’s exchange about the availability of federal criminal jurisdiction and urgent need to provide some sort of redress was just as illuminating. In contrast to his certainty about the civil jurisdiction provided by the ATS, Jefferson initially doubted whether there was federal criminal jurisdiction (though he was later convinced otherwise by Randolph).⁶⁵ In correspondence reminiscent of pleas to Pennsylvania in the Marbois incident, Jefferson had written to the governor of Georgia asking him to act to the satisfaction of the Spanish government.⁶⁶ Jefferson was concerned that there may not be an alien citizen capable of pursuing an ATS-based claim,⁶⁷ so ensuring either federal criminal prosecution or action at the state level was all the more important to assuage the foreign powers.

57. *Id.*

58. *Id.*

59. See Randolph, *supra* note 54, at 702.

60. *Id.*

61. See Jefferson, *supra* note 54, at 693.

62. *Id.* at 694; Randolph, *supra* note 54, at 702. Jefferson also noted the incidents were not cases of piracy nor ones involving ambassadors that were provided for in the Constitution and each had specific statute respectively. See Jefferson, *supra* note 54, at 695.

63. See Jefferson, *supra* note 54, at 694.

64. See Randolph *supra* note 54, at 702.

65. See Jefferson, *supra* note 54, at 693-95; Golove, *supra* note 50.

66. Letter from Thomas Jefferson to Edward Telfair, in JEFFERSON PAPERS, *supra* note 54, at 155-56.

67. See Thomas Jefferson, Opinion on Offenses Against the Law of Nations, in Jefferson Papers, *supra* note 54, at 694; Golove, *supra* note 50.

Another international incident occurred in 1794 amid war between Britain and France, provoking a British complaint that sparked Bradford's Opinion.⁶⁸ The U.S. government issued a proclamation of neutrality in 1793 and criminalized breaches of neutrality in June 1794.⁶⁹ Despite those efforts, two Americans—David Newell and Peter Mariner—joined a French attack on British Sierra Leone in September 1794. The British complaint described the actions of the American pair in detail, highlighting the pair's "wanton aggressions" and asserting that they were "contrary to the existing neutrality between the British and American Governments."⁷⁰ The complaint accused Newell of "exciting the French soldiery to the commission of excesses," as well as supporting the "plundering" of British property. Mariner was similarly alleged to be "exceedingly active in promoting the pillage of the place," encouraging violence on the part of the French, and stating that his "heart's desire was to wring his hands in the blood of Englishmen."⁷¹

As with the earlier incidents involving Spanish and French territory, the British issued complaints to U.S. officials demanding redress for the harms by U.S. subjects. The British foreign secretary initially reached out to John Jay, then Special Envoy to Great Britain, and eventually the demand for compensation by the injured British subjects ended up on the desk of Secretary of State Randolph, who had by then replaced Thomas Jefferson in the post.⁷² Randolph passed on the complaint to Attorney General Bradford.⁷³ In analyzing the situation, Bradford (like Jefferson before him) questioned whether criminal prosecution was available, but Bradford famously opined—in a clear reference to the ATS—that there was "no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit."⁷⁴

The materials surrounding the Bradford Opinion reinforce several points. Some have argued that attacks creating liability under the ATS may have been limited to piracy.⁷⁵ However, this interpretation seems unlikely given the

68. See Bradley, *supra* note 50, at 518.

69. See *id.*

70. See Memorial of Zachary Macaulay, Acting Governor of the Sierra Leone Colony, and John Tilley, Agent of the Proprietors of Bance Island, Sent to Lord Grenville, British Foreign Secretary, November 28, 1794, reprinted in Bradley, *supra* note 50, at 529-30 [hereinafter Macaulay/Tilley Memorial].

71. See *id.* at 529.

72. Bradley, *supra* note 50, at 518-19.

73. *Id.* at 519-20.

74. Breach of Neutrality, 1 U.S. Op. Atty. Gen. 57, 59; see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 721 (2004) (quoting this passage of the Bradford Opinion).

75. Bradley, *supra* note 50, at 520-21; see also *id.* at 7 & n.40 (discussing lower court cases that had previously read the Bradford Opinion to be limited to the high seas).

Bradford Opinion's focus on breaches of neutrality. Similarly, given that the Americans landed on *shore* to commit plunder⁷⁶—whereas piracy offenses are limited to the high seas—the British Sierra Leone incident affirms that the Founding generation viewed the ATS as applying to extraterritorial offenses by U.S. subjects outside the scope of piracy. Relatedly, and just as importantly, action by the U.S. government in response to the incident was deemed a duty and international obligation, part of nations' "common interest in the cause of humanity and in the general welfare of mankind."⁷⁷ As Professor Curtis A. Bradley noted in reviewing the materials, "Under the customary international law of the late 1700s, when the ATS was enacted, the United States would have had a duty to ensure that certain torts in violation of international law, especially those committed by its citizens, were punished and redressed."⁷⁸

Together, the 1790s incidents highlight that the United States was concerned with joining the group of "civilized" nations and this status required meeting international obligations to redress not only harms on its territory, but harms caused by its subjects. The incidents also align precisely with the rule articulated on the subject by Vattel at the time, and there now appears to be uncontroverted evidence among contemporaneous interpreters that the ATS should apply in such situations.

B. *More Vattel (Less Blackstone Three)*

Emmerich de Vattel, who was one of the most prominent, if not *the* most prominent, international-law scholars of the Founding generation provides us with a nuanced and comprehensive general rule that is directly relevant to U.S. corporate-actor cases under the ATS.⁷⁹ While the Court has been presented with

76. Macaulay/Tilley Memorial, *supra* note 70, at 529 (noting an American "did land" in Freetown to do injury to "the persons and property" there); Bradley, *supra* note 50, at 520–21 ("Many of the allegations specifically concerned pillaging and destruction of property in Freetown. As Bradford himself noted in his opinion, the complaint was that U.S. citizens were involved in 'attacking the settlement, and plundering or destroying the property of British subjects on that coast.'").

77. Letter from George Hammond, Minister Plenipotentiary to the United States from Great Britain, to Edmund Randolph, U.S. Secretary of State, June 25, 1795, *reprinted in* Bradley, *supra* note 50, at 528.

78. Bradley, *supra* note 50, at 526 & n.112.

79. See, e.g., Supplemental Brief of Professors Anthony J. Bellia Jr. and Bradford R. Clark as Amici Curiae in Support of Respondents at 9, *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (No. 10-1491) [hereinafter Bellia and Clark Amicus Brief (*Kiobel*)] (describing Vattel as "the most cited authority on the law of nations during the Founding period"); see also Burley, *supra* note 6, at 484–85 (describing Vattel's "overwhelming influence" on the Founding generation's approach to international law).

Vattel's historical material in numerous cases since *Sosa*,⁸⁰ the Court's opinions have not brought Vattel to the fore despite his importance.⁸¹ Vattel's materials, however, speak directly to the issues of extraterritoriality in ATS cases involving U.S. subjects. Although Blackstone is also critically important to understanding the ATS, the Court's fixation on the Blackstone Three has obscured the clarity that Vattel provides. The Blackstone Three, for example, do not adequately explain the Opinions of Jefferson, Randolph, and Bradford, while Vattel's seminal work *The Law of Nations* does.

Vattel outlines the contours of jurisdiction in a *variety* of circumstances. In *The Law of Nations*, he establishes an obligation for sovereigns to provide redress in three circumstances involving "great crimes" by a nation's subjects: first, for violations taking place on the nation's territory; second, for actions of a sovereign's subjects *wherever* they occurred; and third, when nations have provided safe harbor for perpetrators that are not its subjects.⁸² Vattel states that failure to provide some form of redress in *any* of these three circumstances would be considered a breach of the law of nations.⁸³ (To be clear, Blackstone also agrees that a sovereign had a duty to address and remedy international offenses by a sovereign's private subjects.⁸⁴) The resulting sovereign's breach could lead to foreign entanglements, disrupt international relations, and threaten the standing of a nation among the "civilized" community of nations – all consequences concordant with *Sosa's* concern about triggering "serious consequences in international affairs."⁸⁵

1. *The Great Crimes of Private Citizens No Matter Where They Occur*

Vattel devotes an entire section to Justice Souter's concern with offenses by private actors. That section – aptly titled "Of the Concern a Nation may have in

80. See, e.g., Professors of Legal History Amicus Brief (*Nestlé*), *supra* note 50, at 6–10; see also Bellia and Clark Amicus Brief (*Kiobel*), *supra* note 79, at 9–10 (citing some of Vattel's thoughts on foreigners and sovereign authority).

81. *Kiobel's* majority has one passing reference to Vattel about ambassadors. See *Kiobel*, 569 U.S. at 119. Vattel is only mentioned once in Justice Breyer's concurrence as well, though it is an important passage about great crimes and holding nationals to account. See *Kiobel*, 569 U.S. at 136 (Breyer, J., concurring). In *Jesner*, Vattel gets a mention in only one footnote in all of the Justices' opinions. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1416 n.3 (2018) (Gorsuch, J., concurring). Justice Sotomayor does not reference Vattel once in her lengthy dissent in *Jesner*. See *Jesner*, 138 S. Ct. at 1419 (Sotomayor, J., dissenting).

82. See *supra* note 9 (discussing five possible circumstances that would require different jurisdictional analyses).

83. VATTEL, *supra* note 7, at bk. II, ch. VI, §§ 75–77, 84.

84. See 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

85. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715 (2004).

the Actions of its Citizens” – particularly illuminates questions of extraterritoriality and the treatment of a sovereign’s private subjects involved in great crimes.⁸⁶ In this chapter, Vattel is centrally concerned that “private persons” may “ill-treat” or “injur[e]” foreign subjects and thus offend a foreign sovereign: a sovereign “ought not to suffer his subjects to molest the subjects of others . . . much less should he permit them audaciously to offend foreign powers.”⁸⁷

Vattel continues that such injuries are concerned with “respect to great crimes, or such as are equally contrary to the laws, and the safety of all nations.”⁸⁸ Vattel mentions two of Blackstone’s Three: piracy and attacks on ambassadors.⁸⁹ However, Vattel also names several other potential offenses, including assassinations, robbery, and theft,⁹⁰ along with “plunder,” “robber[y],” and committing “massacre[s].”⁹¹ Such offenders, Vattel believed, could be treated as “the common enemies of the human race.”⁹²

In addition, Vattel is explicit that offenses by private actors can be extraterritorial and take place on the soil of another state: “If the offended state keeps the guilty in his power, he may, without difficulty, punish him, and oblige him to make satisfaction. If the guilty escape and returns into this own country, justice may be demanded from his sovereign.”⁹³ In discussing plunder and robbery, Vattel also discusses offenses taking place on foreign lands: “The princes whose subjects are robbed and massacred, and whose lands are infested by these robbers, may justly punish the entire [offending] nation.”⁹⁴

2. *The Sovereign’s Duty to Provide Redress to Uphold Harmony Among Civilized Nations*

When one sovereign’s subjects injured another state’s subjects, the law of nations considered the sovereign of the offending party to be responsible for

86. See VATTEL, *supra* note 7, at bk. II, ch. VI.

87. *Id.* § 76 (spelling modernized); see also § 71 (discussing “private persons” ability to “offend and ill-treat” foreign citizens or sovereigns (spelling modernized)).

88. *Id.* § 76 (spelling modernized); see also *id.* § 71 (discussing injuries in general terms).

89. *Id.* § 77 (discussing attacks on ambassadors); *id.* § 78 (discussing the “haunts of pirates”).

90. *Id.* § 76.

91. *Id.* § 78 (spelling modernized).

92. *Id.* § 78.

93. *Id.* § 75 (spelling modernized).

94. *Id.* § 78 (emphasis added) (spelling modernized).

providing redress.⁹⁵ Allowing one's subjects to attack other states or their citizens was viewed as an affront to the "civilized" world.⁹⁶ The law of nations established general obligations on states to respect and uphold the rule of law, harmony between states, and to maintain peace and safety among nations. Vattel spoke of how the law of nations demanded states "mutually to respect each other" with the aim of upholding "justice and equity."⁹⁷ Liability for private subjects violating the law of nations contributed to "the safety of the state, and that of human society."⁹⁸ Vattel was also clear about the consequences of permitting lawless behavior, stating that it would "disturb tranquility"⁹⁹ and, in severe instances, devolve into "nothing but one nation robbing another."¹⁰⁰

To prevent such affronts to civilized society and disturbances to international harmony, a sovereign had a "duty" to provide redress for injuries caused by its subjects. This redress could take multiple forms: the sovereign of a private party who committed a law-of-nations violation could "deliver[] up, either the goods of the guilty . . . make[] a recompense, in cases that will admit of reparation, or . . . render [the violator] subject to the penalty of his crime," at which point "the offended [would have] nothing farther to demand from him."¹⁰¹ The law of nations left it up to the state as to what form of redress would be administered—civil, criminal, or extradition. Regardless of the specific manner in which states were to grant redress, however, it is clear in Vattel's rule that courts were to play a critical role.

In fact, failure to redress an offense was itself a breach of the law of nations. To denounce or disavow the violation was not sufficient to uphold a state's international obligation; failure to act to address the harm in question could render the sovereign itself "in some measure an accomplice in the injury, and

95. *Id.* § 71-72; see also BLACKSTONE, *supra* note 84, at *68 (noting that "where the individuals of any state violate" the law of nations, it is the "duty of the government under which they live" to provide redress); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 465 (2011) ("In 1789, Congress would have reasonably understood the ATS to encompass all tort claims for intentional injuries that a US citizen inflicted upon the person or property of an alien.").

96. See VATTEL, *supra* note 7, at bk. II, ch. VI, § 77.

97. *Id.* § 71.

98. *Id.* § 72.

99. *Id.* § 71 (noting that whoever "offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever" is subject to penalty under law of nations).

100. *Id.* § 72.

101. *Id.* § 77.

responsible for it.”¹⁰² The consequences of inaction were thus severe: a nation would be deemed an accomplice in great crimes and be considered to have disrupted the international order by failing to meet its international obligations.

C. *The Implications of the New History*

The implications of the new historical evidence and Vattel’s rule are twofold. First, Justice Souter got the history right in *Sosa*. The staying power of the *Sosa* framework also shows that fully ahistorical positions have not gained traction. Second, the historical evidence has shown the Founding generation took a more comprehensive approach to extraterritorial jurisdiction than the Supreme Court’s jurisprudence reflects. With regard to U.S. corporate actors, this more nuanced and complete approach to jurisdiction brings into question how broadly *Kiobel*’s presumption against extraterritoriality should be applied. It also highlights the need for a modified extraterritorial analysis regarding violations by U.S. subjects abroad to bring the Court’s jurisprudence in line with the eighteenth-century historical paradigm.

1. *Vindicating Justice Souter’s Framework*

The emergence of new materials and scholarly work over the past two decades has affirmed that Justice Souter’s historical analysis in *Sosa* was correct. Jefferson, Randolph, and Bradford, addressing incidents at the time of the ATS’s passage, all confirm that the ATS was interpreted to have practical effect the moment it became law and was *not* viewed as requiring further enabling legislation.¹⁰³ The undue attention given to the Blackstone Three in *Sosa* is worth updating, however, as the new evidence makes clear that Vattel’s “great crimes” framework was the more generalizable rule of the time. Ultimately, however, an originalist analysis rooted in history firmly supports *Sosa*’s holdings that the federal judiciary could recognize new claims using their common-law powers to provide remedies for foreign individuals who experienced wrongs at the hands of U.S. subjects violating international law. Indeed, no contrary historical evidence currently exists.

While difficult to conclusively prove, the cumulative historical record appears to have also kept ahistorical positions regarding the ATS from taking hold

102. *Id.* § 77; see also Professors of Legal History Amicus Brief (*Nestlé*), *supra* note 50, at 9; *Nestlé*, 141 S. Ct. at 1941-42 (Gorsuch, J., concurring) (citing BLACKSTONE, *supra* note 84, at *68-69) (noting need for U.S. courts to provide remedies lest they face reprisals by other nations).

103. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

with a majority on the Court.¹⁰⁴ The position first put forth by Justice Scalia in *Sosa*, that no new causes of action could be recognized in the post-*Erie* era, has never garnered more than three votes. Relatedly, attempts to limit causes of action to only the Blackstone Three have been discredited by the history, with Jefferson's conclusion that robbery was actionable under the ATS being but one example of a justiciable non-Blackstonian offense of the time. The continued attempts to limit claims to the Blackstone Three now find the support of only three current Justices of the Court: Thomas, Gorsuch, and Kavanaugh.¹⁰⁵

The same Justices also continue to assert that foreign-affairs concerns justify not recognizing *any* new causes of action, on the grounds that court inaction is preferable when foreign affairs are potentially implicated because of the risk of "complicating" or "rupturing" foreign relationships.¹⁰⁶ As ATS claims almost always implicate foreign affairs, the argument goes, courts should never recognize new causes of action without express congressional authorization.¹⁰⁷ Contrary to this understanding, the historical evidence now overwhelmingly demonstrates that, at the time of the ATS's passage, court *inaction* was understood as a potential source of foreign strife. The five documented incidents all clearly indicate the same concern. In each, the executive branch repeatedly offers the courts as a way to meet U.S. obligations *or* laments its inability to effectuate a judicial remedy. Thus, Justice Thomas's attempt to justify not recognizing a cause of action because "foreign-policy . . . concerns [are] inherent in ATS litigation" is a non sequitur.¹⁰⁸ Indeed, the history demonstrates that foreign embroilment and maintaining harmony between nations are two sides of the same coin. In some circumstances, court action might overstep the expected reach of a sovereign and unnecessarily touch on foreign policy. But in other circumstances, court *inaction* might result in a breach of international law, leading to foreign-policy problems of a different kind. The foreign-policy implications of the actions of private citizens were exactly what drove the Founding generation to provide for judicial

104. See *Sosa*, 542 U.S. at 739 (Scalia, J., joined by Roberts, C.J. & Thomas, J., concurring); *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1937 (2021) (Thomas, J., joined by Gorsuch & Kavanaugh, JJ.).

105. See *Nestlé*, 141 S. Ct. at 1943 (Gorsuch, J., joined by Kavanaugh, J., concurring) (arguing that child slavery was not among the originally understood ATS causes of action); *id.* at 1940 (Thomas, J., joined by Gorsuch & Kavanaugh, JJ.) (majority opinion).

106. See *id.* at 1943 (Gorsuch, J., concurring, joined by Kavanaugh, J.); see also *id.* at 1939-40 (Thomas, J., majority opinion, joined by Gorsuch & Kavanaugh, JJ.).

107. See *id.* at 1939-40 (Thomas, J., majority opinion, joined by Gorsuch & Kavanaugh, JJ.); see also *id.* at 1943 (Gorsuch, J., concurring, joined by Kavanaugh, J.).

108. *Id.* at 1939 (Thomas, J., joined by Gorsuch & Kavanaugh, JJ.) (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018)).

recourse through the ATS. Those concerns remain as relevant today as they were then and explain why *Sosa* has survived.

2. *U.S. Subjects Need a Different Extraterritorial Analysis than Kiobel*

While *Sosa* was correct, the updated historical material has also revealed that *Sosa* did not capture all aspects of the jurisdictional analysis. The Founding generation took a more comprehensive, nuanced approach to territorial and nationality jurisdiction. Vattel's approach to the extraterritoriality analysis, along with the historical materials, demonstrate the need to revisit *Kiobel's* and *Nestlé's* extraterritorial jurisdictional analysis, recognizing that their holdings that a presumption against extraterritoriality applies in all circumstances are too broad. Instead, the law of nations established a *duty* to provide redress for offenses by the sovereign's private subjects no matter where they occurred. Vattel makes this explicit; Jefferson, Randolph, and Bradford all apply the rule in their opinions. The Court's rule should be modified to reflect this reality and bring the Court back into alignment with the history.

This realignment would comport with the *Kiobel* decision's note that "[a]ssuredly context can be consulted' in determining whether a cause of action applies abroad."¹⁰⁹ The context changes when a U.S. subject is involved. Justice Breyer and Justice Kennedy have also highlighted that jurisdictional analysis may require more explanation than was provided in *Sosa* and *Kiobel*. In his *Sosa* concurrence, for example, Breyer noted that while *Sosa* focused on the subject matter (i.e., substantive claims) of law-of-nations offenses in its jurisdictional discussion, international law also included "procedural" jurisdictional elements.¹¹⁰ Moreover, the eighteenth-century law of nations outlined more than just subject-matter offenses. It also explained *where* those obligations applied and against *whom* they must be enforced. Territorial jurisdiction was the starting point but not the end point.¹¹¹ Kennedy's *Kiobel* concurrence noted that other

109. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 119 (2013) (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010)).

110. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 761-63 (2004) (Breyer, J., concurring) (discussing comity and universal jurisdiction and how procedural elements are also part of jurisdictional analysis). Justice Breyer in his *Kiobel* concurrence also raised the possibility of jurisdiction based on nationality or "national interest," but he relied on modern sources rather than historical ones. See *Kiobel*, 569 U.S. at 127-28, 132-33 (Breyer, J., concurring) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402-404 (AM. L. INST. 1986)).

111. See Professors of Legal History Amicus Brief (*Nestlé*), *supra* note 50, at 8 (noting that territorial jurisdiction was well established and uncontroversial); see also Bradley, *supra* note 50, at 511 (noting the historical acceptance of territorial jurisdiction as well as nationality-based jurisdiction and jurisdiction over pirates); VATTEL, *supra* note 7, bk. II, ch. VII, § 84 (discussing

cases may not be covered by the “reasoning and holding of today’s case; and in those disputes, the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation.”¹¹² The history offers such “further elaboration and explanation”—and, indeed, clarity regarding a sovereign’s duty to regulate the conduct of its subjects no matter where an offense occurred.¹¹³

Chief Justice Roberts’ analysis in *Kiobel* also reveals the limitations of establishing *one singular rule* for extraterritoriality. *Kiobel*’s textual analysis of the ATS includes one sentence analyzing the phrase “the law of nations,” noting merely that violations of the law of nations can occur inside or outside of the United States, while the remaining portion is spent analyzing the phrase “any civil action,” the term “torts,” and the doctrine of “transitory torts.”¹¹⁴ As the case did not involve U.S. subjects, *Kiobel* does not consider the non-subject-matter jurisdictional element of the “law of nations” that was of import to Vattel and Bradford. And *Kiobel*’s discussion of history now seems even more incomplete in light of the Jefferson and Randolph materials. *Kiobel* focuses almost entirely on the Blackstone Three, piracy’s uniqueness, and the territorial elements of the Bradford Opinion.¹¹⁵ In discussing the Blackstone Three, Roberts discusses the Marbois and New York incidents, emphasizing the territorial aspects of the events but failing to emphasize that U.S. subjects were involved in at least one of the incidents.¹¹⁶ Roberts then finds piracy to be unique because it occurs on the “high seas” (not foreign soil) and reasons that, as a result, the Bradford Opinion provides no precedential value for the extraterritoriality inquiry.¹¹⁷ In distinguishing piracy as requiring a different jurisdictional analysis, however, Roberts reinforces the idea that the context matters when making a jurisdictional determination.

Similarly, while Chief Justice Roberts is preoccupied with justifying why the Bradford Opinion is “ambiguous,” “defies a definitive reading,” and cannot

a sovereign exercising jurisdiction in “all the places under [its] obedience”); THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW bk. II, ch. IX, § 12, at 509 (2d ed. 1832) (discussing both territorial and nationality-based jurisdiction).

112. *Kiobel*, 569 U.S. at 125 (Kennedy, J., concurring).

113. See, e.g., Bradley, *supra* note 50, at 511 (discussing the long and accepted history of a sovereign regulating its “subjects” and those “resident” in its territory); Bellia and Clark Amicus Brief (*Kiobel*), *supra* note 79, at 9-10 (discussing Vattel’s rule that a sovereign was obligated to provide redress for injuries caused by its subjects at home or abroad or face “reprisals or war”).

114. See *Kiobel*, 569 U.S. at 118-19.

115. See *id.* at 119-23.

116. See *id.* at 120-21 (noting that a New York constable entered the Dutch Ambassador’s house, causing an international incident).

117. See *id.* at 121.

overcome a general presumption against extraterritoriality,¹¹⁸ his discussion appears to affirm that the involvement of a U.S. citizen would change the analysis. He focuses on the possibility that a treaty might have applied extraterritorially,¹¹⁹ but his discussion of the treaty reinforces the point that Vattel's framework was the norm of the day. Roberts notes: "Whatever [the Bradford Opinion's] precise meaning, *it deals with U.S. citizens* who, by participating in an attack taking place both on the high seas and on a foreign shore, violated a treaty between the United States and Great Britain."¹²⁰

Though Chief Justice Roberts performs a textual analysis of the word "treaty" in *Kiobel*, he elides without explanation a similar analysis of the term "law of nations" as it appears in the ATS. Because the ATS is a purely jurisdictional statute, it would have been entirely appropriate to look to the various dimensions of jurisdiction provided for under the law of nations.¹²¹ If Roberts had, Vattel would have provided the answer: the ATS's incorporation of the "law of nations" established a duty to provide redress for the offenses of U.S. actors *outside the United States*. While that may not have applied to the facts in *Kiobel*, it would have established an accurate jurisdictional rule that reflected the Founding generation's understanding of the ATS. In sum, Roberts mistakenly tries to find *one* rule regarding extraterritoriality, when Vattel's treatment of the law of nations provided for rules that are more nuanced and complete, which were then applied in numerous contexts by the Founding generation.

Kiobel's flawed historical reasoning is embedded in *Nestlé's* jurisdictional analysis, which also applies an extraterritorial analysis to dismiss the claims. *Nestlé* applies the *RJR Nabisco* test, a two-step test for determining a statute's extraterritorial applicability. *Nestlé* spends virtually no time considering the first prong of the *RJR Nabisco* test, which states that courts should analyze the text of the statute to decide extraterritoriality. *Nestlé* cites *Kiobel* to justify the idea that the text of the ATS does not clearly support extraterritoriality, thus carrying forward the flawed, thin analysis of the textual reference to the "law of nations."¹²² *Nestlé* then moves on to analyze the second prong of *RJR Nabisco*, which considers whether the "focus" of the Statute's regulated conduct is in the United States.

118. *Id.* at 109-10, 123.

119. *See id.* at 123; *but see id.* at 721 (finding it more likely that Bradford was considering a common law cause of action rather than a violation of a treaty).

120. *Id.* at 123 (emphasis added).

121. It may seem confusing that the law of nations is doing jurisdictional work both in the ATS and in establishing the cause of action under federal common law, but there is no logical problem with such an approach. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 761-63 (2004) (Breyer, J., concurring) (discussing substantive and procedural jurisdictional elements of universal jurisdiction).

122. *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021) (citing *Kiobel*, 569 U.S. at 115-18).

This strictly territorial conduct analysis, however, obscures the accepted historical rule that territorial jurisdiction coexisted with nationality jurisdiction. The extraterritoriality rules articulated in *Kiobel* and *Nestlé* should be clarified by the Court lest they entrench an ahistorical rule and fail to cohere with the historical evidence regarding obligations to provide redress for harms caused by U.S. defendants.

III. WHERE DOES THE COURT GO FROM HERE?

Over the last decade, the Supreme Court has demonstrated overt hostility toward human rights cases brought under the ATS—particularly cases involving extraterritorial violations by corporate actors. *Nestlé* is the third successive dismissal of such a case. With the emergence of the Court's strong conservative majority, there are good reasons to be pessimistic about future human rights cases that might come before the current Court. However, the ATS has not been completely eradicated, and the accumulated historical evidence arguably explains its tenuous survival. But does history also help chart a path forward? This Part takes up that question, cautiously imagining how a modern analog of the incidents that occurred during Washington's Presidency would permit claims against U.S. subjects committing extraterritorial offenses.

It is important to stress several points, starting with the observation that the most stable ATS holdings are likely to be ones where there is alignment between the historical rules and modern ones. This is what it means to live with history. It is just as critical to look past what *Nestlé* explicitly holds—namely its narrow extraterritorial ruling—and notice what questions the Court did *not* answer. Here, the looming unanswered question about U.S. nationality is glaringly absent from not only the Court's holding but also its discussion. But the *Nestlé* corporation's nationality *must* have mattered. Otherwise, the Court may well have just extended its holding in *Jesner* that causes of action against *foreign* corporations were not permitted under the ATS.¹²³ Arguably more important than its narrow holding regarding extraterritoriality, *Nestlé* can be said to stand for the proposition that U.S. actors—including corporations—are not immune from suit in the way foreign corporations are.

A. *The Road to Five Votes for Corporate Liability*

The decade-long path to the Court's five votes affirming the existence of corporate liability informs a cautiously optimistic path forward for the question of U.S.-actor liability abroad. After *Sosa*, the Court did not accept another ATS case

123. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

until it granted certiorari in *Kiobel* on the issue of whether the statute permitted corporate liability.¹²⁴ Ultimately, the Court has now considered the corporate-liability question three times: in *Kiobel*, in *Jesner*, and in *Nestlé*. With Justice Gorsuch's *Nestlé* concurrence, in which he was joined by Justice Alito,¹²⁵ five Justices explicitly expressed support for the proposition that corporate liability does, in fact, exist under the ATS.¹²⁶ While getting to five votes was long in the making, history played a major role in the debate and its eventual resolution. Those five votes represented an unusual coalition—Justices Breyer, Alito, Sotomayor, Kagan, and Gorsuch—adopting in their several separate opinions a rather moderate position that brings the historical and modern doctrines into alignment.¹²⁷ While Justice Breyer has since been replaced by Justice Jackson, whose position on ATS corporate liability is unknown, she will likely prove to be ideologically closer on the issue to Justices Kagan and Sotomayor than the Justices who have rejected corporate liability.

In *Kiobel*, significant additional historical materials were provided to the Court on the treatment of legal persons. The relevant historical materials came to the Court during *Kiobel*'s first round of briefing. After oral argument, however, the Court asked for entirely new briefing on the question of extraterritoriality.¹²⁸ Ultimately, the Court did not use *Kiobel* to rule on the issue of corporate liability. One reasonable inference is that there were not five votes for or against establishing corporate liability under the ATS at the time. While the Court may not have affirmatively established a corporate liability rule in *Kiobel*, the historical materials may have persuaded enough Justices not to *eliminate* corporate liability entirely.

Next up was *Jesner*, which once again failed to garner sufficient votes for establishing corporate liability. A five-Justice majority held that the Court could not exercise its common-law power to recognize causes of action against *foreign* corporations, but the leading concern revolved around foreign policy and not entity liability.¹²⁹ Only three Justices joined a portion of the opinion that appears to support, though does not establish, a categorical rule that modern international law does not recognize a “norm” of corporate liability and thus the ATS

124. See *Kiobel*, 569 U.S. at 114.

125. *Nestlé*, 141 S. Ct. at 1940 (Gorsuch, J., concurring).

126. See *id.* at 1941-42; *id.* at 1947 n.4 (Sotomayor, J., concurring); *id.* at 1950 (Alito, J., dissenting).

127. See *id.* at 1941 (Gorsuch, J., concurring); *id.* at 1947 n.4 (Sotomayor, J., concurring); *id.* at 1950 (Alito, J., dissenting).

128. See *Kiobel*, 569 U.S. at 114.

129. See *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406-07 (2018).

may not permit cases against *any* corporations.¹³⁰ Four Justices, in dissent, supported a definitive rule establishing corporate liability under the statute.¹³¹ The clear question left unanswered in *Jesner* was whether the ATS allowed for liability against *domestic* corporations.

In *Nestlé*, five Justices finally went on record on the question of corporate liability generally. Along with the Court's liberal wing reaffirming their position from *Jesner* that corporate liability did exist,¹³² Justices Alito and Gorsuch authored separate opinions that looked to history in finding for corporate liability under the ATS. Joined by Alito, Gorsuch's *Nestlé* concurrence stated unambiguously: "The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding."¹³³ Emphasizing the relevance of history, Gorsuch further noted that "one of the earliest ATS cases involved an action against a vessel."¹³⁴

The common-sense argument for corporate liability appears to have been even more persuasive. Justice Gorsuch states in *Nestlé*, "Distinguishing between individuals and corporations would seem to make little sense. If early Americans assaulted or abducted the French Ambassador, what difference would it have made if the culprits acted individually or corporately?"¹³⁵ He continues to note that, from the perspective of the aggrieved, it would not matter: "Either way, this Nation's failure to 'oblige the guilty to repair the damage' would have provided just cause for reprisals or worse."¹³⁶ Justice Alito's dissent in *Nestlé* is even more succinct, stating that "[c]orporate status does not justify special immunity" and expressing that he "would hold that if a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation."¹³⁷ Notably, both Gorsuch and Alito make reference to the involvement of U.S. subjects in their discussion on corporate liability—arguably foreshadowing how that factor may be important in their jurisdictional analysis going forward.

130. *Id.* at 1399-1402 (Kennedy, J., joined by Roberts, C.J. & Thomas, J.). The opinion did not rely on history but instead looked to modern sources and arguments. *Id.*

131. *Id.* at 1419 (Sotomayor, J., joined by Ginsburg, Breyer, & Kagan, JJ., dissenting).

132. *Nestlé*, 141 S. Ct. at 1947 n.4 (Sotomayor, J., concurring).

133. *Id.* at 1940 (Gorsuch, J., concurring).

134. *Id.* at 1942 (citing *Jansen v. The Vrow Christina Magdalena*, 13 F. Cas. 356, 358-59 (D.S.C. 1794) (No. 7,216)).

135. *Id.* at 1942.

136. *Id.* (citing *VATTEL*, *supra* note 7, § 76).

137. *Id.* at 1950 (Alito, J., dissenting).

B. Nestlé Starts the Road to U.S.-Actor Liability

Nestlé is understandably viewed by many as a setback for human rights.¹³⁸ But it also stands for the proposition that *Jesner* was not extended to U.S. corporations—that U.S. actors require a different analysis than foreign corporate defendants under the ATS. That position may not have received five explicit votes yet, but it ultimately should, as it represents the clear eighteenth-century historical paradigm and would bring the modern and historical positions into alignment.

Nestlé's holding is a narrow one, applying an extraterritorial analysis to the specific facts before the Court. *Nestlé* is thus limited to the pleadings in the case: namely, that general corporate activity," like that identified by the *Nestlé* plaintiffs, will not overcome the typical presumption against extraterritoriality.¹³⁹ The *Nestlé* Court noted that the plaintiffs identified "operational decisions" that are "common to most corporations" and emphasized that such "generic allegations" would not create a "sufficient connection" between the cause of action and the United States to allow claims to proceed.¹⁴⁰

Conspicuously absent from the *Nestlé* holding—and indeed the entire majority opinion—is how U.S. nationality may affect the analysis. As it did a decade earlier in *Kiobel*, the Court in *Nestlé* turned to extraterritoriality to dismiss the case. But in doing so, it implicitly signaled that U.S.-actor liability and something akin to nationality-based jurisdiction were not off the table. Why did the Court not simply extend *Jesner*? Perhaps because a holding that U.S. actors are entirely immune from suit for egregious violations of the law of nations committed on foreign soil was just as unpalatable as a holding that there was general corporate immunity under the statute. Such a holding would also have been patently inconsistent with the history of the ATS. In this way, there are echoes in *Nestlé* of the trajectory that began with *Kiobel* on the question of corporate liability. Corporate liability did not receive five votes for a decade, but it was never

138. See, e.g., Adam Liptak, *Supreme Court Limits Human Rights Suits Against Corporations*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/17/us/supreme-court-human-rights-nestle.html> [<https://perma.cc/5CPF-KTSN>]; William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), <https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality> [<https://perma.cc/RS4U-B8DL>].

139. *Nestlé*, 141 S. Ct at 1935, 1937.

140. *Id.* (emphasis added). Thomas speaks in *Nestlé* of decision-making in the United States as being insufficient relevant conduct to establish jurisdiction, *id.* at 1937, but surely that cannot be an absolute rule. For example, one can imagine a scenario where a corporate body makes intentional decisions to pursue illegal corporate activity in violation of an accepted *Sosa* offense.

fully defeated. So while *Nestlé* offers a setback, it also provides a starting point for the eventual explicit articulation of U.S.-actor liability and nationality jurisdiction under the ATS.

One additional key to long-term recognition of U.S. corporate-actor liability is to consider whether modern equivalents of the historical incidents that demonstrate the eighteenth-century paradigms exist. Such cases would offer the opportunity to bring the history and modern cases into alignment on the issue of nationality jurisdiction. History indicates that key factors in any nationality-jurisdiction analysis include whether the relevant actions consist of private-actor violations of the law of nations that could embroil the country in foreign-affairs problems and undermine the standing of the United States as a “civilized” nation. Any violation would also need to be committed by a U.S. subject and involve a great crime as defined in *Sosa*.

Several cases currently making their ways through the lower courts arguably meet the necessary criteria. The ATS claims from *In re Chiquita Brands International Inc.* involve a U.S. corporation (and corporate executives) that have been implicated in supporting paramilitaries that committed widespread killings of civilians in what are widely considered crimes against humanity.¹⁴¹ In fact, one of the paramilitaries in question was placed on the U.S.-designated terrorist list for its involvement in human rights violations.¹⁴² Such a designation can be read as an analogous executive action to Washington’s 1793 Neutrality Proclamation, which instituted prosecutions for breaches of neutrality during the war between Great Britain and France in the mid-1790s¹⁴³ and ultimately led to the Bradford Opinion. In 2007, Chiquita pled guilty to criminal charges and paid a twenty-five million dollar fine for transferring funds to Colombian paramilitaries.¹⁴⁴ The killings fit squarely within Vattel’s great crimes of “massacres” and “assassinations.”¹⁴⁵ In addition, the foreign sovereign (Colombia) has indicted Chiquita executives, including Americans, for their involvement in the killings.¹⁴⁶ The

141. *In re Chiquita Brands Int’l Inc. Alien Tort Statute & S’holders Derivative Litig.*, No. 08-md-01916, slip op. at 1-2 (S.D. Fla. Aug. 23, 2022) (identifying the Revolutionary Armed Forces of Colombia as having been provided with material support by the Chiquita corporation).

142. *Id.* at 2; *see also* Factual Proffer paras. 5-8, *United States v. Chiquita Brands Int’l, Inc.*, No. 07-cr-00055 (D.D.C. Mar. 19, 2007).

143. *Neutrality Proclamation*, April 22, 1793, *reprinted in* 12 THE PAPERS OF GEORGE WASHINGTON: PRESIDENTIAL SERIES 472-74 (Christine Sternberg Patrick & John C. Pinheiro eds., 2005); *see also* Golove, *supra* note 50.

144. *In re Chiquita Brands Int’l Inc. Alien Tort Statute & S’holders Derivative Litig.*, slip op. at 2.

145. *See* VATTEL, *supra* note 7, at bk. II, ch. VI, §§ 76, 78.

146. Ray Downs, *Colombia Charges 13 Ex-Chiquita Executives for Financing Death Squads*, UPI (Sept. 2, 2018), <https://www.upi.com/Colombia-charges-13-ex-Chiquita-executives-for-financing-death-squads/3501535934661> [<https://perma.cc/N3QM-HRTZ>]; *see also* Off. of the

International Criminal Court has also followed the indictments as part of its preliminary investigation in Colombia.¹⁴⁷ These actions signal that an ATS case would not cause potential diplomatic strife but instead would align precisely with what the international community and the relevant foreign sovereign are demanding. Indeed, court inaction on the ATS claims—and a recent district-court decision that relied on *Nestlé* to hold that decision-making in the United States did not suffice to establish jurisdiction¹⁴⁸—appears to fall squarely within the historical paradigm of *failing* to provide necessary redress to foreigners, as articulated by Vattel and affirmed by the Opinions of the Founding generation.

In *Alvarez v. John Hopkins*, the U.S. defendants—Johns Hopkins University, the Rockefeller Foundation, and the Bristol-Myers Squibb Company—have been sued for conducting medical experiments in Guatemala without the knowledge or consent of their subjects during the 1940s and 1950s.¹⁴⁹ After these experiments, involving syphilis and other diseases, came to light, President Obama “offered profound apologies” and Secretary of State Hillary Clinton and Secretary of Health and Human Services Secretary Kathleen Sebelius called the testing “reprehensible” and stated that the “abhorrent research practices” did “not represent the values of the United States, or our commitment to human dignity and great respect for the people of Guatemala.”¹⁵⁰ The responses are reminiscent of the Founding generation’s concern with foreign affairs. In addition, the ATS claims only appear to alleviate foreign-affairs concerns rather than exacerbate them given that President Alvaro Colom of Guatemala described the testing as “a profound violation of human rights.”¹⁵¹ Indeed, like its historical analogs, here U.S. subjects have been implicated in disrespecting the sovereignty of a foreign nation (Guatemala) and violating the rights of its citizens (through

Prosecutor, *Report on Preliminary Examination Activities (2018)*, INT’L CRIM. CT. para. 151 (Dec. 5, 2018), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/181205-rep-otp-PE-ENG.pdf> [<https://perma.cc/6Z9L-TG2J>].

147. See, e.g., Off. of the Prosecutor, *Report on Preliminary Examination Activities (2020)*, INT’L CRIM. CT. paras. 114-15 (Dec. 14, 2020), <https://www.icc-cpi.int/sites/default/files/itemsDocuments/2020-PE/2020-pe-report-eng.pdf> [<https://perma.cc/VH55-BVG7>].

148. *In re Chiquita Brands Int’l Inc. Alien Tort Statute & S’holders Derivative Litig.*, slip op. at 23.

149. *Est. of Alvarez v. Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 640 (D. Md. 2019).

150. *US Apologizes for Infecting Guatemalans with STDs in the 1940s*, CNN (Oct. 1, 2010), <http://www.cnn.com/2010/WORLD/americas/10/01/us.guatemala.apology/index.html> [<https://perma.cc/3WUA-UB72>]. The testing in Guatemala was uncovered by historians researching disturbing events in the United States between the 1930s and 1970s in Tuskegee, Alabama when some “400 poor African-American men” with preexisting syphilis were not told of the disease or treated for the condition. *Id.*

151. *Id.*

illegal and unethical human experimentation);¹⁵² and if such harms are left without a judicial remedy, they would undermine the international standing of the United States as a civilized nation. Thus, like *Chiquita*, the *Alvarez* case seems to fit the historical paradigm that would emphasize the importance of providing redress for offenses by U.S. actors both inside and outside the United States.

CONCLUSION

Living with history has been and will continue to be part of the landscape of ATS jurisprudence. At this moment, it cannot be lost on observers that the Court's exclusive focus on extraterritoriality has brought ATS case law out of step with the Founding generation's concern with the actions of private U.S. actors committing offenses of the law of nations—no matter where they occurred. The *Nestlé* decision and the recent district-court decision in *Chiquita*, however, make clear that the dominant jurisdictional analysis remains territorial. The judicial preoccupation with such territorial analyses threatens to undermine an important goal of the ATS: to uphold the “honor” of the nation as part of the international community.¹⁵³ The historical evidence only reinforces the discord between the Founders and the modern Court. Even as Jefferson, himself a slaveowner, expressed a belief that ATS actions over the extraterritorial theft of enslaved people would have been actionable, the *Nestlé* Court in 2021 has refused to allow claims involving enslaved children to proceed on the grounds of a myopic territorial analysis. Despite the current dissonance, a corrective remains possible, with *Nestlé* offering an implicit nod to the importance of nationality jurisdiction and cases involving U.S. actors.

Going forward, the Court should make explicit that jurisdiction involving U.S. actors is possible and thus bring ATS jurisprudence back in line with the history. Whether the courts do so in the coming years will ultimately determine whether the ATS becomes a badge of shame or a badge of honor.¹⁵⁴

Clinical Professor of Law, Harvard Law School. I am grateful to Emily Ray, Ankita Gupta, Richard Herz, and Amaya Giannini for all their input and feedback on this Essay and its many drafts. The editors of the Yale Law Journal also provided invaluable

152. See Vattel, *supra* note 7, at bk. II, ch. VI, § 76 (discussing how a sovereign “ought not to suffer his subjects to molest the subjects of others . . . much less should he permit them audaciously to offend foreign powers.” (spelling modernized)); see also § 71 (discussing “private persons” ability to “offend and ill-treat” foreign citizens or sovereigns (spelling modernized)).

153. Burley, *supra* note 6, at 494.

154. *Id.*

LIVING WITH HISTORY

suggestions, and I thank them for their ongoing engagement and tireless support in bringing this piece to fruition.