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"Foreignness"

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This Essay considers when, exactly, a plaintiff, defendant, or course of conduct is deemed "foreign" for the purpose of different procedural doctrines. By considering the meaning and relevance of "foreignness" in the context of personal jurisdiction, diversity jurisdiction, forum non conveniens, and the presumption against extraterritoriality, the Essay underscores how the concept of foreignness is neither self-explanatory nor a simple binary distinction. The complexity of foreignness should in turn challenge judges, litigants, and observers to question what rhetorical work the concept of "foreignness" may be doing in judicial reasoning. The goal is thus two-fold: to encourage more precise invocations of foreignness when it is indeed relevant for particular procedural doctrines, and to caution against the rhetorical use of "foreignness" as a short-hand for dismissing, or dismissively treating, cases in U.S. courts.

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Introduction

What does it mean for a case to be "foreign-cubed"? More specifically, when is a plaintiff, defendant, or course of conduct "foreign"? The answer is not as straightforward as it may initially appear. Different doctrines draw the line differently when it comes to legal permanent residents, interrelated corporate entities, or conduct that occurs across multiple countries (or perhaps—in cases involving international waters or Bitcoin transactions—in no country). By considering the meaning and relevance of "foreignness" across procedural doctrines, this Essay underscores how the concept of foreignness is not a simple binary distinction. Rather, what counts as "foreign" depends on the question being asked, with the line between "here" and "there" varying depending on the doctrine and the context.

The complexity of foreignness should in turn challenge judges, litigants, and observers to question what rhetorical work the concept of "foreignness" is doing in judicial reasoning. The concept of foreignness, particularly when unmoored from specific doctrines, is not self-explanatory. Labels like "foreign-cubed," I want to suggest, are not objective determinations as much as a trope that signals the author's gestalt conception of a case. The goal of this Essay is thus two-fold: to map some of the different meanings of "foreignness" in procedure in order to highlight its variability and encourage its precise invocation, and to caution against the rhetorical use of "foreignness" as a shorthand for dismissing, or dismissively treating, cases in U.S. courts.

I. Foreignness in Procedure

A number of procedural doctrines ask judges to consider whether a party or course of conduct is "foreign." This Part draws out the role of "foreignness" in the federal court treatment of forum non conveniens, personal jurisdiction, subject matter jurisdiction, and the presumption against extraterritoriality, particularly as it is applied to the Alien Tort Statute (ATS).[1]

A. Forum Non Conveniens

Since the adoption of 28 U.S.C. § 1404, federal judges invoke forum non conveniens primarily to dismiss cases they believe are more properly heard in a foreign court. The Supreme Court ratified this practice

1. This is not an exhaustive list of doctrines that invoke foreignness. Others include abstention in transnational cases (sometimes called international comity abstention), dormant foreign affairs preemption, limits on foreign sovereign immunity, and the federal venue statute (28 U.S.C. § 1391).

in its 1981 decision *Piper Aircraft Co. v. Reyno*.[2] In doing so, the Court explicitly baked "foreignness" into the forum non conveniens analysis. Although the Supreme Court acknowledged "that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum," the Court concluded that "the presumption applies with less force when the plaintiff or real parties in interest are foreign."[3] The Court justified this differential treatment based on the assumption that a plaintiff's "home forum" is a "convenient" location for the suit.[4] By choosing to forego the convenience of suing close to home, the Court assumed, the plaintiff must be pursuing an illegitimate forum shopping motive.[5] Thus "a foreign plaintiff's choice [of forum] deserves less deference."[6]

There is much to critique in this reasoning. Most significantly, there can be perfectly valid reasons—including jurisdictional necessity—that may compel a plaintiff to accept the inconvenience of suing in a foreign forum. And in practice, as we shall see, the different treatment of plaintiffs depending on their "foreignness" introduces unnecessary complications into an analysis that is already highly discretionary.[7]

B. Personal Jurisdiction

It has not been lost on commentators that the most difficult and consequential personal jurisdiction cases before the Supreme Court in recent years have involved foreign defendants.[8] In particular, the Court's refinement of general personal jurisdiction has a significant impact on foreign defendants, particularly corporate defendants.[9] After *Goodyear v. Brown* and *Daimler v. Bauman*, a defendant is only subject to general jurisdiction where it is "at home."[10] For individual defendants, that is their domicile; for a corporation, that is their place of incorporation or principal place of business.[11] As a general matter,

2. 454 U.S. 235, 251 (1981).

3. *Id.* at 256.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See infra* Part II.A (discussing the difficulty of defining "foreign" plaintiffs for purposes of forum non conveniens).

8. *See, e.g.*, William S. Dodge & Scott Dodson, *Personal Jurisdiction and Aliens*, 116 MICH. L. REV. 1205, 1206 (2018).

9. *See id.* at 1207.

10. 564 U.S. 915, 924 (2011); 134 S. Ct. 746, 751, 760 (2014).

11. *Daimler*, 134 S. Ct. at 760.

corporations organized and based in other countries are thus no longer subject to general personal jurisdiction in the United States.[12]

The same is not necessarily true for individual defendants who are foreign citizens. Foreign citizens who are domiciled in the United States would still seem to be subject to general jurisdiction, as would foreign domiciliaries who are served in person while in the United States.[13] While judges and commentators have noted that the reasoning of *Daimler* casts doubt on the continuing constitutionality of such transient (or "tag") jurisdiction, today it appears that foreign individuals doing business in the United States are more likely to be subject to general personal jurisdiction in U.S. courts than are foreign incorporated businesses.[14]

Foreignness also appears to matter for the determination of specific personal jurisdiction, which requires both a finding of minimum contacts on the part of the defendant and a determination that exercising jurisdiction based on those contacts would be constitutionally reasonable.[15] Regarding the reasonableness determination, *Asahi Metal Industries Co. v. Superior Court* explicitly linked that analysis to a defendant's foreignness.[16] "The unique burdens placed upon one who must defend oneself in a foreign legal system," the Court explained, "should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders."[17] Nonetheless, the Court hedged that "often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even the serious burdens placed on the alien defendant."[18] Thus the foreignness of the defendant may matter, but it matters less if the plaintiff (or the case as a whole) feels sufficiently domestic to override concerns for the burdened defendant.[19]

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12. For an important possible exception, see Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath* Daimler *Wrought?*, 91 N.Y.U. L. REV. 344, 383 (2016) (arguing for a different analysis in the judgment enforcement context).

13. *E.g.*, Kadic v. Karadzic, 70 F.3d 232, 247 (2d Cir. 1995).

14. *See, e.g.*, Jamarillo v. Naranjo, No. 10-21951-CIV, 2014 WL 4898210, at *4–5 (S.D. Fla. Sept. 30, 2014) (questioning the constitutionality of tag jurisdiction as applied to foreign defendants after *Daimler*, but nonetheless concluding that a foreign citizen serving a U.S. prison sentence was subject to general personal jurisdiction based on personal service).

15. *See* Dodge & Dodson, *supra* note 8, at 1212–17.

16. 480 U.S. 102, 114 (1987).

17. *Id.*

18. *Id.*

19. *See, e.g.*, Tellez v. Madigral, EP-15-CV-304-KC, 2016 WL 11121114, at *10 (W.D. Tex. Sept. 16, 2016) (where both the plaintiff and the defendant were Mexican citizens but the plaintiff resided in Texas, finding that the burden on the defendant was outweighed by the plaintiff's

The relevance of foreignness is not as explicit in the minimum contacts analysis, but the Court in *J. McIntyre Machinery v. Nicastro* emphasized the defendant's foreignness and its use of an independent U.S. distributor to manage the marketing and sales of its products in the United States.[20] Commentators have worried that *Nicastro* provides foreign companies with a roadmap for avoiding personal jurisdiction in any particular U.S. state.[21] Because both *Nicastro* and *Asahi* lacked a majority decision regarding the minimum contacts analysis, however, it is not clear that either case has worked a substantial narrowing of specific personal jurisdiction, including when it comes to foreign defendants.[22]

C. Subject Matter Jurisdiction

Some grants of subject matter jurisdiction to the federal courts turn on the foreign status of a party. Article III extends federal judicial authority, for example, to "Cases affecting Ambassadors, other public Ministers and Consuls" as well as to "Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."[23] Accordingly, the diversity statute grants the federal courts authority to hear civil actions between "citizens of a State and citizens or subjects of a foreign state," between "citizens of different States and in which citizens or subjects of a foreign state are additional parties," and between "a foreign state . . . as plaintiff and citizens of a State or of different States."[24] More specific grants of subject matter jurisdiction also include requirements of foreignness.[25] Most famously, the ATS grants original jurisdiction to the district courts over "any civil

interest in suing close to home and the state's interest in providing a forum for its residents to seek redress for "injuries inflicted by out-of-state defendants").

20. 564 U.S. 873, 878 (2011).

21. *See, e.g.*, Dodge & Dodson, *supra* note 8, at 1228; *see also id.* at 1228 n.149 (gathering commentators).

22. *See* Plixer Int'l, Inc. v. Scrutinizer GmbH, 905 F.3d 1, 10 (1st Cir. 2018) (holding that Breyer's concurrence in *Nicastro* controls, specifically his statement that the case required no change in personal jurisdiction law, and gathering similar opinions from the Fifth, Federal, and D.C. Circuits). *See infra* Part II.B (further exploring the effect of foreignness on minimum contacts analysis).

23. U.S. CONST. art. III.

24. 28 U.S.C. § 1332(a)(2)–(4) (2018).

25. *See, e.g.*, 28 U.S.C. § 1351 (2012) ("Consuls, vice consuls, and members of a diplomatic mission as defendant") (incorporating definition of "family" for members of diplomatic missions that excludes "nationals of the United States" and, under some circumstances, legal permanent residents as well); 28 U.S.C. § 1364 (2012) ("Direct actions against insurers of members of diplomatic missions and their families") (same).

action *by an alien* for a tort only, committed in violation of the law of nations or a treaty of the United States."[26]

D. Presumption Against Extraterritoriality

The modern presumption against extraterritoriality incorporates foreignness both in rationale and in application. The presumption is justified in part by the "commonsense notion that Congress generally legislates with domestic concerns in mind."[27] The distinction is binary, dividing U.S. territory from everywhere else: In the context of the presumption, "extraterritorial" includes spaces that are not "foreign" in that they do not belong to another country, like international waters and Antarctica.[28]

In *Morrison v. National Australian Bank* and *RJR Nabisco, Inc. v. European Community*, the Supreme Court articulated a two-step framework for applying the presumption.[29] At the first step, the court looks for a "clear indication" from Congress that the statute should have extraterritorial effect.[30] If it finds none, the court continues to the second step, which requires determining the "focus" of the statute.[31] The court must then determine whether that "focus" is alleged (or established, depending on the stage of proceedings) to have occurred within the United States, in which case the non-extraterritorial statute is permissibly applied domestically.[32] If the "focus" instead occurred outside the United States, the non-extraterritorial statute does not provide relief for the plaintiff's claim.[33] The two-step analysis, then, requires an evaluation of both Congress's extraterritorial intent and the geographic location of the statute's focus in a particular case.[34]

In *Kiobel v. Royal Dutch Petroleum Co.*, the Court concluded that the ATS does not rebut the presumption against extraterritoriality.[35]

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26. 28 U.S.C. § 1350 (2012) (emphasis added).

27. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2100 (2016) (quoting Smith v. United States, 507 U.S. 197, 204 n.5 (1993)).

28. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 121 (2013) ("This Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application." (citing Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 173–74 (1993)); *see also* Smith v. United States, 507 U.S. 197, 204 (1993) (similar in regards to Antarctica).

29. 561 U.S. 247, 255 (2010); 136 S. Ct. 2090, 2101 (2016).

30. *RJR Nabisco*, 136 S. Ct. at 2101.

31. *Id.*

32. *Morrison*, 561 U.S. at 255.

33. *Id.*

34. *Id.*

35. 569 U.S. 108, 124 (2013).

It thus affirmed the dismissal of the plaintiffs' suit because "all the relevant conduct took place outside the United States."[36] The Court then continued, "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."[37] This language was purposefully vague, according to Justice Anthony Kennedy's concurrence.[38] The circuit courts have split over whether *Kiobel* thus suggested a different, more flexible approach than *Morrison* for evaluating whether an ATS claim is problematically foreign or adequately domestic.[39]

Justices Samuel Alito and Clarence Thomas, however, would not have been so vague: They would have applied *Morrison*'s "focus" test to the ATS and concluded that "a putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless *the domestic conduct* is sufficient to violate an international law norm"[40] that satisfies the requirements of *Sosa v. Alvarez-Machain*.[41] Justice Alito also authored the Court's majority opinion the next time the presumption against extraterritoriality appeared before the Court.[42] He used that opportunity in *RJR Nabisco* to describe *Kiobel* as reflecting *Morrison*'s two-step framework.[43] The only reason *Kiobel* had not explicitly invoked *Morrison*'s focus test, he asserted, was because the parties in *Kiobel* did not assert *any* domestic conduct.[44]

This seems to be a point of disagreement between the Justices. Justice Kennedy, in authoring the next ATS case to appear before the Court, cited *Kiobel*'s "touch and concern" standard and notably did not refer to *Morrison*'s focus test.[45] Whether *Morrison*'s focus test applies to the ATS—that is, how the "foreignness" of conduct underlying an ATS claim is to be determined—remains an open question.[46]

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36. *Id.* at 124.

37. *Id.* at 124–25 (emphasis added).

38. *Id.* at 125 (Kennedy, J., concurring).

39. *See* Vasundhara Prasad, *The Road Beyond Kiobel: The Fifth Circuit's Decision in Adhikari v. Kellogg Brown & Root, Inc. and Its Implications for the Alien Tort Statute*, 59 B.C. L. REV. E. SUPP. 369, 370–71 (2018).

40. *Kiobel*, 569 U.S. at 126–27 (Alito, J., concurring) (emphasis added).

41. Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004).

42. RJR Nabisco, Inc. v. Eur. Cmty., 136 S. Ct. 2090, 2096 (2016).

43. *Id.* at 2101.

44. *Id.*

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

46. See *infra* Part II.C for further discussion of this question.

II. The Variability of Foreignness

This Part considers, in turn, what it means for a plaintiff, defendant, or course of conduct to be foreign in the relevant sense under these different doctrines. The goal is partly doctrinal clarification insofar as there is a risk that different applications of foreignness can be conflated. But this Part also aims to undermine the sense of "foreignness" as a stable and self-explanatory concept. Once different uses of "foreignness" are juxtaposed, it is easier to see slippage between those uses. In addition to promoting correct application where the meaning of "foreign" is stable, then, this Part also aims to prompt caution or reform where it is not.

A. Plaintiffs

What makes a plaintiff "foreign"—her citizenship or her residence? The answer depends on the procedural question being asked.

Subject matter jurisdiction typically turns on citizenship, given Article III's reference to "Citizens or Subjects" of "foreign States" (language that is echoed in the diversity statute).[47] But the diversity statute replaces citizenship with domicile in a particular circumstance: In a dispute between foreign citizens and U.S. citizens, diversity jurisdiction is excluded if the foreign citizen is a legal permanent resident domiciled in the same state as the U.S. citizen.[48] Whether a foreigner's citizenship or domicile matters for diversity purposes thus turns on whether the foreigner is a legal permanent resident and on who else is involved in the suit.

The ATS more definitively links subject matter jurisdiction to citizenship as it is limited to actions brought by "aliens." ATS plaintiffs thus may be (and often are) foreign citizens with legal permanent residence status in the United States—as were the plaintiffs in *Kiobel*.[49] The Second Circuit has gone so far as to assume, without deciding, that a U.S. *citizen* could bring an ATS claim as long as he or she was a foreign citizen at the time of the alleged wrongdoing.[50] An ATS plain-

47. *See* 28 U.S.C. § 1332 (2018).

48. § 1332(a)(2). The statute does not, however, similarly except legal permanent residents in § 1332(a)(3), which establishes jurisdiction over actions between "citizens of different States and in which citizens or subjects of a foreign state are additional parties." Thus, a New Yorker could not sue in federal court a French citizen who is a legal permanent resident domiciled in New York—unless perhaps he also sues another U.S. citizen from a different state. *See* 13E Fed. Practice & Proc. Juris. § 3604 (3d ed.).

49. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 113 (2013).

50. *See* Mastafa v. Chevron Corp., 770 F.3d 170, 175 n.1 (2d Cir. 2014).

tiff, in short, may be "foreign" in the sense relevant for the statute yet have significant, even permanent, ties to the United States.

In contrast, "foreignness" for forum non conveniens turns on residence. In directing courts to give less deference to a "foreign" plaintiff's choice of forum, the *Piper* Court did not specify whether the foreign plaintiffs it had in mind were foreign citizens or foreign residents—the real plaintiffs-in-interest in *Piper*, after all, were both.[51] But the Court justified its differential presumption by the inconvenience of litigating far from home.[52] Regardless of the flaws in that reasoning, whether the plaintiff lives in close proximity to the chosen forum is a question of residence, not citizenship. Federal courts have recognized this connection in both directions: U.S. citizens who reside abroad but sue in the United States are "foreign" in the relevant sense and should receive less deference for their forum choice.[53] Conversely, foreign citizens with legal permanent residence or asylum status in the United States should receive the stronger presumption of deference for suing in their "home" district.[54]

Yet even when judges recognize that the stronger presumption should apply to legal permanent residents, they may nonetheless discount the plaintiffs' interests in suing in a U.S. forum. That is, such plaintiffs are still discounted as "foreign," even if they are locals in the doctrinal sense. In *Aldana v. Del Monte Fresh Produce N.A., Inc.*, the Eleventh Circuit dismissed an ATS and Torture Victim Protection Act (TVPA) case brought by Guatemalan labor leaders who accused the defendants of complicity in their torture.[55] The plaintiffs had been granted asylum in the United States based on the same incidents.[56] As U.S. residents, then, they were entitled to full deference for their choice of forum. The Eleventh Circuit did not say it was applying the weakened presumption, but it stressed the plaintiffs' outsider status by twice calling out the plaintiffs' "forum shopping";[57] by emphasizing that "all of the individuals involved [in the case] were (at least at the time) Guatemalan citizens . . .";[58] and by agreeing with the district court's observation that the case would "impose[ ] an inappropriately

51. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).

52. *Id.*

53. *See, e.g.*, Iragorri v. United Techs. Corp., 274 F.3d 65, 73 n.5 (2d Cir. 2001) (en banc).

54. *See, e.g.*, Palacios v. The Coca-Cola Co., 757 F. Supp. 2d 347, 352–53 (S.D.N.Y. 2010), *aff'd*, 499 F. App'x 54, 57 (2d Cir. 2012).

55. 578 F.3d 1283, 1286 (11th Cir. 2009).

56. *Id.* at 1287.

57. *See id.* at 1298–99 (quoting twice the district court's concern about "preventing forum shopping").

58. *Id.* (emphasis added).

heavy burden on this Court and this community" given the presumed lack of local interest in the matter.[59]

Even though the *Aldana* plaintiffs were local in the relevant sense, then, their foreignness seems to have colored the district court's and the circuit court majority's forum non conveniens analysis. As the dissent in *Aldana* summarized, "[I]t is perfectly reasonable for Plaintiffs to have brought this lawsuit in the court of the country of their residence, particularly because United States' law governs their claims and one of the Defendants, Del Monte, is incorporated and located in the United States."[60] Nor can the majority's characterization of *Aldana* as impermissibly foreign be explained instead by the foreign location of the alleged wrongdoing. In a similar case—alleging tortious conduct in a foreign country that involved a mix of U.S. and foreign defendants—the same district court declined to dismiss the case for forum non conveniens.[61] The primary difference in *Klyszcz v. Cloward H2O LLC* was that the case was brought by U.S. citizens.[62]

To take another example, the Southern District of New York applied no deference to a plaintiff's choice of forum even though the plaintiff was a U.S. citizen living in New York.[63] The court justified that lack of deference based on the plaintiff's choice to invest in foreign assets.[64] It also discounted the U.S. status of the other named plaintiff, a Delaware limited liability company, because it was a "shell" company "not entitled to the full measure of 'home forum' deference."[65] A likely greater determinant, however, was a sense that the plaintiff was still foreign in a meaningful way. Tellingly, the opinion initially introduces the plaintiff (a U.S. citizen) as "a Russian national now living in New York."[66]

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59. *Id.* at 1298.

60. *Id.* at 1305.

61. Klyszcz v. Cloward H2O LLC, No. 11-23023-Civ., 2012 WL 4468345, at *6 & n.3 (S.D. Fla. Sept. 26, 2012).

62. *Id.* Neither the *Klyszcz* nor the *Aldana* plaintiffs lived in Florida. Courts are divided as to whether U.S. citizens are still considered not-foreign when they sue in a different state, but the better view is that they should be. *See* Iragorri v. United Techs. Corp., 274 F.3d 65, 73 n.5 (2d Cir. 2001) (en banc); Reid-Walen v. Hansen, 933 F.2d 1390, 1394 (8th Cir. 1991). If so, legal permanent residents should also be considered not-foreign when they sue in a state other than the state of their domicile. *See* Palacios v. The Coca-Cola Co., 757 F. Supp. 2d 347, 352, 352 n.3 (S.D.N.Y. 2010), *aff'd*, 499 F. App'x 54, 54 (2d Cir. 2012) (recognizing in light of Second Circuit precedent on forum non conveniens that any U.S. forum is a "home forum" for legal permanent residents).

63. RIGroups LLC v. Trefonisco Mgmt. Ltd., 949 F. Supp. 2d 546, 553 (S.D.N.Y. 2013).

64. *Id.*

65. *Id.* at 552.

66. *Id.* at 548. The opinion does later note that the plaintiff "is now a naturalized United States citizen living in New York City," *id.* at 549, and a few pages further on notes her "status as an American citizen," only to conclude that this status "warrants limited, or perhaps even no

In short, the courts' perceptions of the plaintiffs' foreignness in these cases affected the forum non conveniens analysis in a way that does not align with the convenience rationale of *Piper*'s differential presumption. The plaintiffs' perceived "foreignness," in other words, altered the legitimacy of their status as litigants even if they were suing in presumptively convenient forums.

Making things more complicated, forum non conveniens motions are often raised in ATS cases. That requires judges to consider whether plaintiffs who are foreign for ATS jurisdictional purposes (i.e., non-U.S. citizens) may nonetheless be not-foreign for purposes of *Piper*'s differential presumption (i.e., U.S. residents). The attendant risk of conflation could explain why the Eleventh Circuit in *Aldana* treated the U.S. resident plaintiffs as nonetheless foreign in its forum non conveniens analysis. The distinction also helps to answer a question that Justice Alito raised in his concurrence in *Jesner v. Arab Bank, PLC*.[67] Justice Alito wondered why an ATS plaintiff would not simply use the diversity statute to sue a U.S. corporation,[68] perhaps on the assumption that any ATS claim would meet the diversity statute's amount in controversy requirement. But the section of the diversity statute to which Justice Alito referred explicitly treats legal permanent residents as equivalent to state citizens for diversity purposes.[69] An asylum grantee living in New York City, for example, cannot invoke 28 U.S.C. § 1332(a)(2) to sue in federal court a U.S. corporation that is either incorporated in New York or has its principal place of business there: Both the plaintiff and the defendant would be considered New York "citizens" under the diversity statute. In focusing on the necessary "foreignness" of ATS plaintiffs, it can be easy to miss that they may well be not-foreign for other purposes.

Even if judges focus on the correct characteristic, how are they to characterize groups of plaintiffs with mixed status? Here again the doctrines differ. For purposes of diversity jurisdiction, the question is one of statutory interpretation. The addition of one foreign citizen plaintiff defeats subject matter jurisdiction if all the defendants are foreign citizens, regardless of the number of U.S. citizen plaintiffs also joined.[70] But if all U.S. citizen plaintiffs and defendants are diverse

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deference, as the Complaint alleges injuries only to" the Delaware limited liability company (the same one that the court had discounted as merely a "shell" company), *id.* at 552.

67. 138 S. Ct. 1386, 1410 (2018) (Alito, J., concurring in part and concurring in the judgment).

68. *Id.* (citing 28 U.S.C. § 1332(a)(2) (2018)).

69. *See* § 1332(a)(2).

70. *See, e.g.*, Universal Licensing Corp. v. Paola del Lungo, S.p.A., 293 F.3d 579, 581 (2d Cir. 2002) ("[D]iversity is lacking within the meaning of these sections . . . where on one side there are citizens and aliens and on the opposite side there are only aliens.").

(e.g., two New Yorkers suing two Californians), it does not matter how many foreign citizen plaintiffs are added.[71] The lines are clear, even if they feel somewhat arbitrary.

In contrast, the line for forum non conveniens' differential presumption is less definite. In *Vivendi SA v. T-Mobile USA Inc.*, the Ninth Circuit concluded that a belatedly added U.S. plaintiff was insufficient to change the level of deference given to a foreign corporation's choice of U.S. forum.[72] But in *Carijano v. Occidental Petroleum Corp.*, the Ninth Circuit clarified that "the strong presumption in favor of the domestic plaintiff's choice of forum" is not lessened "when both domestic and foreign plaintiffs are present."[73] The stronger presumption still applies, the court explained, even when a single U.S. non-profit is joined as a plaintiff with twenty-five "foreign plaintiffs."[74] The D.C. Circuit, meanwhile, has held that the strong presumption applies when a third of the plaintiffs in a case are U.S. citizens.[75] In contrast, the Southern District of New York reduced the strength of the presumption where "half of the named Plaintiffs continue to reside abroad."[76]

The Southern District's approach in this latter case reflects the Second Circuit's "sliding scale" solution to *Piper*'s differential presumption.[77] Given all of these possible permutations of foreignness, and given the imperfect match between foreignness and illegitimate forum shopping purposes,[78] the Second Circuit has concluded that the deference due to a plaintiff's choice of forum should be one of degree.[79] "The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's forum choice."[80] There is much to be said for eschewing the false dichotomy suggested by *Piper*, yet the sliding scale approach has its own difficul-

71. *See* 28 U.S.C. § 1332(c).

72. 586 F.3d 689, 689, 694–95 (9th Cir. 2009).

73. 643 F.3d 1216, 1216, 1228 (9th Cir. 2011).

74. *Id.*

75. Simon v. Republic of Hungary, 911 F.3d 1172, 1183 (D.C. Cir. 2018). The opinion identifies the citizenship of the plaintiffs, but not their residence. *Id.*

76. Palacios v. The Coca-Cola Co., 757 F. Supp. 2d 347, 353–54 (S.D.N.Y. 2010), *aff'd*, 499 F. App'x 54, 54 (2d Cir. 2012); *see also* Harp v. Airblue Ltd., 879 F. Supp. 2d 1069, 1072, 1076 (C.D. Cal. 2012) (applying the stronger presumption where one out of the five plaintiffs was a U.S. citizen, but giving considerable weight to the foreign residency of the remaining plaintiffs when evaluating private interests and accordingly dismissing the complaint for forum non conveniens).

77. *Palacios*, 757 F. Supp. 2d at 353–54, *aff'd*, 499 F. App'x at 54.

78. For example, is it illegitimate forum shopping for a foreign plaintiff to sue a U.S. defendant in the defendant's home district? *See infra* and text accompanying note 89.

79. Iragorri v. United Techs. Corp., 274 F.3d 65, 71 (2d Cir. 2001) (en banc).

80. *Id.* at 71–72.

ties.[81] It certainly does not simplify the judge's work; if anything, by asking judges to consider factors like "the availability of witnesses or evidence to the forum district" and "the inconvenience and expense to the defendant resulting from litigation in that forum," it moves up to this threshold determination the ultimate weighing of private interests on which the forum non conveniens analysis turns.[82] A simpler approach would be to drop the differential presumption altogether. The plaintiff's choice of forum would then always receive strong deference, but the plaintiff's lack of a real nexus to the forum or convenience in litigating there would be addressed when weighing the public and private interest factors.

B. Defendants

When it comes to defendants, it turns out that foreignness does not matter as much as one might think—or where perhaps it should.

The doctrine of forum non conveniens, for example, does not explicitly distinguish between U.S. and foreign defendants, though I have argued elsewhere that it should.[83] Forum non conveniens is often justified by its historical pedigree, yet traditionally forum non conveniens dismissals were limited to cases involving foreign defendants.[84] That limitation was rooted in the doctrine's justifications as either preventing grave injustice for defendants forced to litigate over great distances[85] or as ensuring that limited judicial resources served local interests.[86] Thus in 1945, for example, "a New York state court refused to dismiss a case against a New York company even though it involved more than a thousand Cuban plaintiffs suing under Cuban law for unpaid wages in Cuba . . . given the well-established rule that local defendants could not invoke forum non conveniens."[87]

The contrary modern practice of federal courts is also in tension with other doctrines, like the Supreme Court's promise in *Daimler* that general jurisdiction still leaves "plaintiffs recourse to at least one

81. *See, e.g.*, Maggie Gardner, *Parochial Procedure*, 69 STAN. L. REV. 941, 991–92 (2017) (raising additional questions that complicate the application of the differential presumption); *see also id.* at 992–93 (critiquing the sliding scale approach as requiring judges to evaluate forum shopping motives, which is often a subjective inquiry).

82. *Iragorri*, 274 F.3d at 72.

83. Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 453–54 (2017).

84. *See id.* at 415–16 (gathering historical examples).

85. *Id.* at 416 (describing Scottish and English practice, which informed the federal doctrine's private interest factors).

86. *Id.* at 415 (describing New York state's forum non conveniens practice, which informed the federal doctrine's public interest factors).

87. *Id.* at 415–16 (describing Vigil v. Cayuga Constr. Corp., 54 N.Y.S.2d 94, 97–98 (N.Y. City Ct. 1945)).

clear and certain forum in which a corporate defendant may be sued on any and all claims."[88] Indeed, a foreign plaintiff's decision to sue a U.S. corporation in its home jurisdiction would seem a proper forum shopping consideration (or at least not an inherently illegitimate one) that is not captured by *Piper*'s binary distinction between foreign and U.S. plaintiffs.[89] Forum non conveniens, in short, is a doctrine where courts *should* distinguish more clearly between U.S. and foreign defendants (based, as with plaintiffs, on the defendant's domicile).

With the ATS, the circuits are split over whether a defendant's U.S. citizenship or domicile should cut in favor of jurisdiction.[90] *Kiobel* did not settle this question, as the defendants there were foreign corporations with "mere corporate presence" in the United States.[91] That left the door open for later plaintiffs to argue that a defendant's greater connection with the United States should alter the analysis.[92] Foreignness (or the lack thereof) does seem relevant here: The presence of a U.S. defendant increases the nexus to the United States while ameliorating concerns about international comity.[93]

While it is unsettled how much a defendant's U.S. citizenship should count *towards* the existence of subject matter jurisdiction over an ATS case,[94] the Supreme Court recently held that the foreign citizenship of

88. Daimler AG v. Bauman, 134 S. Ct. 746, 760 (2014); *see also* Gardner, *supra* note 83, at 453–54.

89. *Compare* Del Istmo Assurance Corp. v. Platon, No. 11-61599-CIV, 2011 WL 5508641, at *1–2 (S.D. Fla. Nov. 9, 2011) (applying weakened presumption even though foreign corporation sued U.S. defendants in their home forum), *with* Reid-Walen v. Hansen, 933 F.2d 1390, 1395 (8th Cir. 1991) (noting that forum non conveniens dismissals should be disfavored when a U.S. defendant is sued in its home forum). *See also* Iragorri v. United Techs. Corp., 274 F.3d 65, 73 (2d. Cir. 2001) (en banc) (noting relevance of this circumstance in adopting sliding scale approach).

90. *See* Edward T. Swaine, *Kiobel and Extraterritoriality: Here, (Not) There, (Not Even) Everywhere*, 69 OKLA. L. REV. 23, 45–46 (2016) (gathering cases). The question here is not whether the ATS is *limited* to suits against U.S. defendants, but whether a suit brought against a U.S. defendant "touches and concerns" the United States more than does a suit brought against a foreign defendant. Justice Gorsuch, in contrast, has argued that the ATS only allows suits brought against U.S. defendants. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1414–17 (2018) (opinion of Gorsuch, J., concurring in part and concurring in the judgment).

91. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 125 (2013). One might ask, however, what constitutes "mere corporate presence," as compared to extensive business activity that purposefully benefits from access to U.S. laws and markets.

92. *Cf. id.* at 133 (opinion of Breyer, J., concurring in the judgment) (asserting that the ATS provides jurisdiction where "the defendant is an American national").

93. *Accord, e.g.*, Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 530 (4th Cir. 2014); Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1775–76 (2014); Prasad, *supra* note 39, at 390.

94. *Compare* Al Shimari, 758 F.3d at 530 (U.S. citizenship of defendant is relevant), *and* Doe v. Drummond Co., Inc., 782 F.3d 576, 595 (11th Cir. 2015) (U.S. citizenship of defendant relevant but not sufficient), *with* Mastafa v. Chevron Corp., 770 F.3d 170, 188–89 (2d Cir. 2014) (U.S. citizenship of defendants is irrelevant for jurisdictional purposes).

a corporation *bars* suits against that corporation under the ATS.[95] After *Jesner*, the foreign citizenship of ATS defendants does matter, but only if the defendant is a corporation. A similar divide in the treatment of foreign corporations and foreign individuals occurs with general personal jurisdiction, given that only foreign individuals are subject to tag jurisdiction in the United States.[96] Thus, a foreign citizen domiciled in another country who passes through the United States is more at risk of being subjected to general personal jurisdiction in a U.S. court than is a foreign corporation that does continuous and systematic business here but has its principal place of business elsewhere.

That distinction, of course, largely aligns with how individuals and corporations with U.S. citizenship are treated. Indeed, personal jurisdiction doctrines—whether general or specific—do not really distinguish between U.S. and foreign defendants.[97] This parallel treatment remains true even after *Nicastro*, which seemed to suggest that foreign manufacturers could avoid specific personal jurisdiction in the United States by selling their products to an independent U.S. distributor.[98] Because the courts of appeal have largely agreed that *Nicastro*'s fractured opinions did not alter existing personal jurisdiction law,[99] the lower courts have continued to apply stream-of-commerce reasoning to foreign corporations just as they would to domestic ones. Even if a national border exists between a foreign manufacturer and a fully independent U.S. distributor, in other words, the foreign manufacturer may still be subject to specific personal jurisdiction if it knew or should have known of sales in a particular U.S. state. If the plaintiff can demonstrate more than isolated sales within the forum, knowledge and thus purposeful availment can be inferred back up the chain.[100]

Thus a Chinese corporation that did not ship products to Illinois and "was indifferent as to where its products were sold in the United States" nonetheless had minimum contacts with Illinois given that

95. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1403 (2018).

96. *See supra* Part I.B.

97. For arguments that different tests *should* apply, see Dodge & Dodson, *supra* note 8, at 1208–11; Linda J. Silberman & Nathan D. Yaffe, *The Transnational Case in Conflict of Laws: Two Suggestions for the New Restatement Third of Conflict of Laws*, 27 DUKE J. COMP. & INT'L L. 405 (2017).

98. *Cf.* Dodge & Dodson, *supra* note 8, at 1216 ("[T]he justices in *McIntyre* appeared willing to recognize the unique influences of a defendant's alienage status, but no position commanded a majority.").

99. *See supra* note 22.

100. *See* Silberman & Yaffe, *supra* note 97, at 415 n.31 (noting that the lower courts have largely distinguished *Nicastro* on this basis).

third parties had sold 28,000 units of the allegedly defective product in the state.[101] A Taiwanese corporation had minimum contacts with Minnesota even though it sold its lithium batteries to two distributors in California and Massachusetts, given that one of those distributors had twenty-six customers in Minnesota, including the insured's company.[102] And a Swedish designer of a heated seat integrated by the third-party plaintiffs into a skid loader had minimum contacts with Texas even though the Swedish defendant did not have specific knowledge of the roughly 1,200 skid loaders sold in Texas—given that "Texas is a major market for industrial, farm, and construction equipment."[103] In short, *Nicastro* seems readily distinguishable as long as the plaintiff can point to actual (and more than sporadic) sales in the state.[104]

This focus on in-state sales has also limited the ability of multinational enterprises to manage their U.S. contacts by separately incorporating their manufacturing and distributing operations in different countries. Applying Federal Circuit law to patent infringement suits, for example, district courts have invoked stream-of-commerce theory to reach foreign manufacturers who rely on related U.S. corporations to distribute the infringing product in the United States.[105] Thus the Northern District of Texas found minimum contacts established when a foreign parent "transfers title of the accused products [overseas] to an American corporation that [the parent] created for the purpose of distributing and selling its products in the United States."[106] "As the fourth largest provider of mobile devices sold in the United States," the court reasoned, the foreign parent corporation "must be reasonably aware that products delivered to [its U.S. subsidiary] are in fact

101. Hubert v. Bass Pro Outdoor World, LLC, No. 15-cv-0047-MJR-SCW, 2016 WL 4132077 (S.D. Ill. Mar. 16, 2016).

102. State Farm Fire & Cas. Co. v. BMC USA Corp., No. 16-1793, 2017 WL 4325693 (D. Minn. Sept. 27, 2017).

103. Stephenson v. Caterpillar, No. 2:16-CV-00071-JRG-RSP, 2018 WL 6038359, at *3 (E.D. Tex. Oct. 30, 2018).

104. For an example of a case where lack of evidence of in-state sales seems to have doomed the plaintiff's effort to assert specific personal jurisdiction over a foreign manufacturer, see Dreibelbeis v. Daesung Celtic Enersys Co., Ltd., No. 3:17-CV-100-JD, 2018 WL 3141850, at *4 (N.D. Ind. June 27, 2018).

105. For an additional example, beyond those discussed here, see FOX Factory, Inc., v. SRAM, LLC, 3:16-cv-03716-WHO, 2017 WL 4551486, at *5 (N.D. Cal. Oct. 11, 2017) (asserting personal jurisdiction over a foreign subsidiary that "manufacture[d] the accused products in Taiwan and transfer[red] them to [the U.S. parent], which s[old] the products to distributors such as Giant Bicycle that have a facility in California," such that "[t]he products [we]re eventually sold to California consumers at dozens of retail locations").

106. Seven Networks, LLC v. ZTE (USA), Inc., No. 3:17-cv-1495-M, 2018 WL 2427147, at *3 (N.D. Tex. May 30, 2018).

being sold in the United States," including the Northern District of Texas where the U.S. subsidiary had its principal place of business.[107]

To take a more complicated relationship between a foreign parent and a U.S. subsidiary, the Northern District of Illinois asserted personal jurisdiction over a foreign holding company that did not manufacture, import, or distribute the infringing product.[108] The product was instead manufactured by an unrelated Chinese defendant and sold initially to a Hong Kong subsidiary that imported the products to California.[109] There the title passed to a U.S. subsidiary that then sold the infringing products to Home Depot, with which the U.S. subsidiary had an exclusive retail agreement.[110] Despite this lengthy (and slightly removed) chain of distribution, the court found that the foreign parent corporation had minimum contacts with Illinois because it:

> [A]pproved and allocated capital necessary to develop and bring to market the allegedly infringing product, and it had at least some say in the decision to continue exploiting a longstanding distribution channel [with Home Depot] that inexorably deposits a significant number of the products at issue in Illinois [given Home Depot's seventy-six stores in the state].[111]

Further, the foreign parent's "knowledge of the regular flow of products into Illinois cannot seriously be questioned, given [its] requests for and receipt of regular sales updates."[112] Nonetheless, without actual evidence of in-state sales from which knowledge can be inferred, courts may not be willing to assert personal jurisdiction over foreign corporations even when their operations are interwoven with their U.S. counterparts.[113]

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107. *Id.*

108. Chamberlain Grp., Inc. v. Techtronic Indus. Co., Ltd., No. 16 C 6097, 2017 WL 3394741, at *5 (N.D. Ill. Aug. 8, 2017).

109. *Id.*

110. *Id.* at *1–2. Home Depot accounted for about half of the foreign parent's global sales. *Id.* at *2.

111. *Id.* at *5.

112. *Id.*

113. In *Krausz Industries Ltd. v. Smith-Blair, Inc.*, 188 F. Supp. 3d 545 (E.D.N.C. 2016), for example, Smith-Blair (a U.S. corporation) was the sub-sub-subsidiary of a Bermudian parent corporation, while a factory in Shanghai that manufactured the accused product was owned by a separate subsidiary (Sensus Shanghai) also multiple levels below the parent. *Id.* at 550. Nonetheless, Smith-Blair employees worked at the Shanghai facility and communicated regularly with Sensus Shanghai employees regarding production of the infringing product, and some of the employees at the Shanghai facility used "smith-blair.com" email addresses. *Id.* at 550–51. There was also evidence that Smith-Blair had sales representatives assigned to North Carolina, sold the products to distributors with locations in North Carolina, and maintained a website allowing direct orders from consumers. *Id.* at 551. Nonetheless, the Eastern District of North Carolina concluded it lacked personal jurisdiction over Sensus Shanghai because there was no evidence

In continuing to assert specific jurisdiction over foreign corporations based on stream-of-commerce reasoning, the lower courts may be ignoring signals from some members of the Supreme Court to treat foreign defendants differently. That lack of distinction between foreign and U.S. defendants here seems justifiable, however, as the special concerns of foreign defendants are already addressed through the other half of the personal jurisdiction analysis—the application of the reasonableness factors. Indeed, the lower courts have been willing to invoke the reasonableness factors on behalf of (and perhaps only on behalf of) foreign defendants.[114] According to a recent survey undertaken by Linda Silberman and Nathan Yaffe, both federal and state courts pretty much never reject personal jurisdiction over U.S. defendants based on reasonableness, but courts do—at least occasionally—conclude that asserting personal jurisdiction over foreign defendants would be unreasonable even though those defendants have minimum contacts with the forum.[115]

Relying on the reasonableness factors to calibrate due process concerns for foreign defendants is preferable to the alternatives. Making the minimum contacts inquiry more demanding would also alter the standard for U.S. defendants—a narrowing of personal jurisdiction that would not be justified domestically. On the other hand, designing a distinct minimum contacts test for "foreign" defendants would introduce the definitional complications surveyed here. And relying on forum non conveniens to exclude cases against foreign defendants allows for unnecessary subjectivity on the part of judges (given the under-defined role of "foreignness" in forum non conveniens) and a second "bite at the apple" on the part of defendants (given the incorporation of similar considerations within personal jurisdiction's reasonableness factors). In contrast, the existing two-step doctrine of personal jurisdiction adequately addresses the due process concerns of foreign defendants through use of a simple rule-like inquiry paired with a calibrating set of factors that can account for individual context, thus obviating the need for different tests that would require an *ex ante* definition of "foreignness."

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that the accused products "actually entered North Carolina or that any of its products have been found in North Carolina." *Id.* at 555.

114. *See, e.g.*, Delta Stone Prods. v. Xpertfreight, No. 2:16-cv-369-CW-EJF, 2017 WL 3491845, at *7 (D. Utah Aug. 14, 2017) (recognizing a foreign insurance agency's minimum contacts with a U.S. state based on contractual language but finding personal jurisdiction nonetheless unreasonable because, "[d]espite advances in transportation and communication, the record does not support a finding that RSA travels to and/or operates in the United States to conduct economic activity").

115. Silberman & Yaffe, *supra* note 97, at 408.

That said, it is still fairly rare for a court to determine that a foreign defendant has minimum contacts with the forum but that the exercise of jurisdiction over that foreign defendant would be unreasonable.[116] What stands out in the analysis of reasonableness in this regard is the courts' ready invocation of "progress in communications and transportation"[117] and the availability of U.S. counsel[118] as making litigation in the United States feasible for foreign defendants. Courts are also solicitous of individual U.S. plaintiffs, who they worry may not be able to pursue litigation in foreign courts.[119] Those standard invocations in the personal jurisdiction context contrast with judges' standard assessments regarding similar factors in the context of forum non conveniens.[120] There, judges often emphasize the cost and burden of long-distance travel[121] and have been willing to dismiss suits brought by individual U.S. plaintiffs (often tourists harmed while on vacation) despite the challenges they would face in pursuing their case in a foreign court.[122]

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116. For example, Silberman and Yaffe conclude that courts do not dismiss on reasonableness grounds when a U.S. plaintiff has brought a personal injury claim against a foreign defendant. *Id.* at 415. While they report that almost nineteen percent of the cases they reviewed involving foreign defendants were dismissed on reasonableness grounds (accounting for twenty-seven out of eighty-eight cases), that figure includes an undisclosed number of cases where the court also did not find minimum contacts to be established. *See id.* at 409 tbl.1, 413.

117. Seven Networks, LLC v. ZTE (USA), Inc., No. 3:17-cv-1495-M, 2018 WL 2427147, at *4 (N.D. Tex. May 30, 2018); *see also* Stephenson v. Caterpillar, No. 2:16-CV-00071-JRG-RSP, 2018 WL 6038359, at *4 (E.D. Tex. Oct. 30, 2018); Chamberlain Grp., Inc. v. Techtronic Indus. Co., Ltd., No. 16 C 6097, 2017 WL 3394741, at *7 (N.D. Ill. Aug. 8, 2017); Precision Orthopedic Implants, Inc. v. Limacorporate S.P.A., No. 2:16-cv-02945-ODW, 2016 WL 7187299, at *9 (C.D. Cal. Dec. 9, 2016) (in finding personal jurisdiction over a contract dispute, noting that "foreign defendants, as a general matter, should not be immune from personal jurisdiction in a particular forum merely because they reside abroad").

118. *See, e.g.*, *Chamberlain Grp.*, 2017 WL 3394741, at *7; *Stephenson*, 2018 WL 6038359, at *4.

119. Silberman & Yaffe, *supra* note 97, at 421 (citing Pro Axess, Inc. v. Orlux Distrib., Inc., 428 F.3d 1270, 1281 (10th Cir. 2005); Pope v. Elabo GmbH, 588 F. Supp. 2d 1008, 1021 (D. Minn. 2008)).

120. On the similarities between forum non conveniens analysis and the reasonableness factors for specific personal jurisdiction, see for example Gardner, *supra* note 83, at 434 & nn.246–48 (gathering sources).

121. *See, e.g.*, Palacios v. The Coca-Cola Co., 757 F. Supp. 2d 347, 352–53 (S.D.N.Y. 2010), *aff'd*, 499 F. App'x 54 (2d Cir. 2012) (taking "cost considerations" into account); Del Istmo Assurance Corp., No. 11-61599-CIV, 2011 WL 5508641, at *6 (S.D. Fla. Nov. 9, 2011) ("Even if witnesses consented to appear before this Court, their travel arrangements would be costly.").

122. *See, e.g.*, Estate of Thomson v. Toyota Motor Corp. Worldwide, 545 F.3d 357, 367 (6th Cir. 2008); Harp v. Airblue Ltd., 879 F. Supp. 2d 1069, 1074–76 (C.D. Cal. 2012); Lynch v. Hilton Worldwide, Inc., No. 11-1362, 2011 WL 5240730, at *8 (D.N.J. Oct. 30, 2011). *But see* Reid-Walen v. Hansen, 933 F.2d 1390, 1398 (8th Cir. 1991) (flagging that courts should be sensitive to sending plaintiffs to litigate in foreign forums).

It is possible that this different assessment of the burden of long-distance litigation could be explained by procedural posture or context. The reasonableness factors, after all, are a constitutional inquiry while forum non conveniens is a purely discretionary determination.[123] But the advances of modernity that have made it easier for foreign defendants to appear before U.S. courts are relevant to whether transnational cases can be efficiently litigated in those same courts.[124]

C. Conduct

Finally, there is the question of determining the "foreignness" of a course of conduct. What makes conduct "foreign" differs by doctrine: forum non conveniens suggests a center of gravity test; the presumption against extraterritoriality turns on a single connecting factor; and the Alien Tort Statute arguably uses a threshold approach. The first two of these approaches are unnecessarily binary, suggesting there is a single best "home" for a dispute. But for most transnational cases, all of the relevant conduct will not occur in a single country; put another way, multiple countries may have a legitimate nexus to the conduct and resulting dispute. For this reason, a threshold approach—like that suggested by *Kiobel*'s "touch and concern" test—seems the most pragmatic. Such an approach would ask not where a dispute *best* belongs, but whether it is *sufficiently* domestic to be litigated here (even if it might also be litigated elsewhere).

Consider first the public and private interest factors weighed in a forum non conveniens analysis.[125] Many of these factors encourage judges to hypothesize a "home" for the case: judges are to weigh, for

123. My personal view is that the gap between constitutional and statutory authority to exercise jurisdiction, on the one hand, and judicial discretion to decline jurisdiction, on the other, should be fairly narrow—and that current forum non conveniens practice sweeps more broadly than is warranted. *See* Gardner, *supra* note 83; *see also* Maggie Gardner, *Abstention at the Border*, 105 VA. L. REV. 63 (2019) (arguing for narrowed and better-specified grounds of abstention in transnational cases).

124. For forum non conveniens analyses that do take into account the increasing efficiency in transportation and communication, see for example Simon v. Republic of Hungary, 911 F.3d 1172, 1186 (D.C. Cir. 2018) ("Digitization . . . has eased the burden of transcontinental document production and has increasingly become the norm in global litigation."); *Reid-Walen*, 933 F.3d at 1397 ("[T]he time and expense of obtaining the presence or testimony of foreign witnesses is greatly reduced by commonplace modes of communication and travel."); Bohn v. Bartels, 620 F. Supp. 2d 418, 432 (S.D.N.Y. 2007).

125. The private interest factors include the "relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises . . . ; and all other practical problems that make trial of a case easy, expeditious and inexpensive." Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947). The public interest factors include:

example, "the local interest in having localized controversies decided at home," the undue burden of jury duty on a community "which has no relation to the litigation," and the preference for trial "in a forum that is at home with the . . . aw that must govern the case."[126] To the extent a case does not feel at "home" here, these factors suggest judges should dismiss the case on the understanding that it will be more at "home" elsewhere. In *Piper*, after all, the only possible alternative forum was Scotland.[127] But as some judges have acknowledged, many transnational cases are not centered in any one jurisdiction—they may not be any more at "home" elsewhere.[128] Put another way, a transnational case may not have a clear geographic center of gravity. Yet the forum non conveniens analysis, by suggesting that cases do have one clear home, can lead to the dismissal of cases considered too inconvenient to litigate in the United States that may be no easier to litigate anywhere else.

The presumption against extraterritoriality—as developed in *Morrison*—defines a course of conduct's "nationality" by the location of its most critical component, or what the Court refers to as the "focus" of the relevant federal statute. Whereas forum non conveniens encourages a comparative analysis, in other words, the presumption against extraterritoriality directs judges to identify a single connecting factor and the geographic location where it was carried out.

Others have pointed out, however, that the formalism of the focus test results in some unsatisfactory fictions.[129] As Aaron Simowitz has queried, can a statute have more than one "focus"? What if the "focus" is unlocatable—because, for example, it involves something intangible? What if the statute's "focus" was located in the United

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> [T]he administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 n.6 (1981) (quoting *Gilbert*, 330 U.S. at 509).

126. *Gilbert*, 330 U.S. at 508–09.

127. *Piper*, 454 U.S. at 235.

128. For examples of decisions noting that a transnational case will be difficult and burdensome to litigate no matter where it is tried, see Reid-Walen v. Hansen, 933 F.2d 1390, 1397 (8th Cir. 1991); Cooper v. Tokyo Elec. Power Co., Inc., No. 12-CV-3032, 2014 WL 5465347, at *13–15 (S.D. Cal. Oct. 28, 2014); Baxter Int'l Inc. v. AXA Versicherung AG, 908 F. Supp. 2d 920, 926 (N.D. Ill. 2012).

129. The following examples are all developed at greater length in Aaron Simowitz, *Extraterritoriality in the Funhouse Mirror*, 59 CONN. L. REV. (forthcoming 2019). For a defense of the current presumption against extraterritoriality, as set up in *Morrison* and *RJR Nabisco*, see William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. (forthcoming 2020).

States, but the case still feels overwhelmingly (and problematically) foreign?[130] Ultimately, the focus test still views the world in binary terms: The essence of a course of conduct is either domestic or it is foreign. The terms have changed, but the insistence that disputes can be neatly geographically allocated remains.

It is in this sense that the "touch and concern" language of *Kiobel* may present a different—and more pragmatic—approach to identifying the "nationality" of a course of conduct. Though the Supreme Court did not elaborate at the time on what it meant by "touch and concern," the language could be interpreted as eschewing either the comparative approach of *Piper* or the formalistic approach of *Morrison*.[131] Rather than identify the singular "nationality" of the conduct, in other words, the question whether claims "touch and concern" the United States might ask instead whether the conduct is domestic *enough*. Nonetheless, the inquiry requires further definition to avoid the sort of subjective invocations of "foreignness" critiqued here: For example, the U.S. conduct might need to be a proximate cause of the injury or satisfy an element of the claim. Allegations that U.S. defendants knowingly enabled, profited from, or covered up in the United States the infliction of injury in another country might thus sufficiently "touch and concern the territory of the United States,"[132] even if such claims also touch and concern other countries.

Over time, however, and especially following the Supreme Court's decision in *RJR Nabisco*, some of the federal circuit courts have amalgamated *Kiobel*'s "touch and concern" language with *Morrison*'s focus test.[133] Justice Alito in his *Kiobel* concurrence asserted that the focus test would require conduct sufficient to violate the law of nations to have occurred within the United States.[134] That approach again tries to divide the world into here and everywhere else.[135] Such a binary view of the world does not always match up with the international law violation alleged, which may be inherently transnational.

130. The Second Circuit confronted this last question in *Parkcentral Global Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198 (2d Cir. 2014).

131. *See* Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 527–29 (4th Cir. 2014); *see also* Doe v. Drummond Co., Inc., 782 F.3d 576, 586 (11th Cir. 2015) (emphasizing the Supreme Court left open in *Kiobel* what "touch and concern" means).

132. *Al Shimari*, 758 F.3d at 528–31.

133. Doe v. Nestle, S.A., 906 F.3d 1120, 1125 (9th Cir. 2018) ("Because *RJR Nabisco* has indicated that the two-step framework is required in the context of ATS claims, we apply it here."); Adhikari v. Kellogg Brown & Root, 845 F.3d 184, 194 (5th Cir. 2017) ("*RJR Nabisco* makes clear that *Morrison*'s 'focus' test still governs" ATS cases); *see also Drummond*, 782 F.3d at 590–91 & nn.20–21; Mastafa v. Chevron Corp., 770 F.3d 170, 183–85 (2d Cir. 2014).

134. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 126–27 (2013) (Alito, J., concurring).

135. *See* Swaine, *supra* note 90, at 24, 42.

For example, how does one traffic human beings (or anything else) without engaging in conduct in multiple countries?[136]

Some circuits have thus spoken in terms of *Morrison*'s "focus," but nonetheless recognized that something less than *all* conduct establishing the violation needs to have occurred in the United States.[137] That intermediate approach at least recognizes that the concept of "focus" in *Morrison* was circumscribed: Requiring all of the elements of an international law violation to occur within the United States would greatly expand *Morrison*'s treatment of a statute's focus as pertaining to a discrete fact or element. Still, this intermediate position remains unsatisfying. Trying to squeeze "touch and concern" into the "focus" language of *RJR Nabisco* involves metaphysical gymnastics that are removed from the historical intent of the First Congress, as well as the realities of the interconnected global economy and the transnational nature of many (if not most) international law violations.[138]

Nor is there any requirement that the focus test be read into *Kiobel*'s "touch and concern" language. *Kiobel* purposefully did not adopt *Morrison*'s focus test.[139] Lower courts have put much weight on *RJR Nabisco*'s characterization of *Kiobel* as implicitly applying the focus test, but that language was dicta in a case that did not involve ATS claims. Indeed, since *RJR Nabisco*, the Court *has* decided another ATS case—and there the Court repeatedly referred to *Kiobel*'s "touch and concern" standard while conspicuously avoiding the focus test.[140] Though *Jesner*'s discussion of *Kiobel* was again dicta, its treatment of *Kiobel* underscores that the *sui generis* ATS may require a more flexible approach.

That more flexible approach has much to commend it, even beyond the ATS context. Asking whether a dispute "touches and concerns" the United States might allow judges to evaluate the sufficiency of a

136. *See Adhikari*, 845 F.3d at 208–09 (Graves, J., concurring in part and dissenting in part) ("The particular violation alleged here, human trafficking, is a transnational crime that uses a global supply chain, which typically extends across multiple countries and requires an extensive transnational network to succeed.").

137. *See Nestle*, 906 F.3d at 1125–26 ("The focus of the ATS is not limited to principle offenses."); *Drummond*, 782 F.3d at 592 ("Displacement of the presumption will be warranted if the claims have a U.S. focus and adequate relevant conduct occurs within the United States."); *Mastafa*, 770 F.3d at 186 (asking whether conduct which constitutes the international law violation "sufficiently 'touches and concerns' the territory of the United States").

138. As Ed Swaine has pointed out, for example, strict application of Justice Alito's *Kiobel* concurrence would seem to exclude piracy from the scope of the ATS, even though the Supreme Court considers piracy to be one of the quintessential international wrongs that the First Congress had in mind when adopting the ATS. Swaine, *supra* note 90, at 38, 43.

139. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013).

140. Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1406 (2018).

dispute's U.S. nexus without having to decide if that nexus is greater or lesser than the dispute's nexus with other countries. Avoiding the comparative question obviates the need for formalist fictions or all-or-nothing divisions between the United States and everywhere else. In light of the Supreme Court's modern (re)turn to territoriality, a touch-and-concern standard may provide a middle ground that prioritizes territoriality without unduly reifying it.

III. "FOREIGNNESS" AS TROPE

Returning to the initial question, what does it mean to call a case "foreign-cubed"? In the D.C. Circuit's recent decision in *Simon v. Republic of Hungary*, the dissent opened with the assertion that "this foreign-cubed case—involving wrongs committed by Hungarians against Hungarians in Hungary—should be litigated in Hungary."[141] The majority painted a different picture: Fourteen survivors of the Holocaust—none of whom still lived in or were citizens of Hungary, and four of whom had become U.S. citizens—sought compensation for expropriation of their property by Hungary's state-owned railroad company when they and their families were transported to concentration camps during the Second World War.[142] Some of the evidence was located in Hungary, but some of it was located at the United States Holocaust Memorial Museum in Washington, D.C.[143] Few potential witnesses were still alive, and the panel majority asserted that the defendant had identified none who were in Hungary.[144]

Different readers might look at this dispute and feel differently as to where it should properly be litigated. But the label of "foreign-cubed" does no analytical work here. Whether the plaintiffs were meaningfully foreign, for example, depends on whether one evaluates them collectively or individually, or currently or at the time the claims arose. Instead, "foreign-cubed" serves as a rhetorical shorthand for why the case does not belong in U.S. courts—an intuition that should be identified and explained (as the dissent in *Simon*, to be fair, then proceeded to do).[145]

For particular doctrines in particular ways, foreignness does matter. But loose invocations of "foreignness" add little to judicial analysis while excusing under-justified determinations. In the worst case, the

141. Simon v. Republic of Hungary, 911 F.3d 1172, 1190 (D.C. Cir. 2018) (Katsas, J., dissenting).

142. *Id.* at 1175, 1178 (majority opinion).

143. *Id.* at 1186.

144. *Id.* at 1188.

145. *Id.* at 1190.

rhetoric of "foreignness" serves as a signal to the reader about the worth (or lack thereof) of the plaintiffs and their claims. "Foreigners" do not belong in U.S. courts; "foreign" disputes do not implicate U.S. interests. In an era when "foreignness" can justify the exclusion of religious minorities, the separation of families, the belittlement of congresswomen, and the internment of young children, invoking the trope of "foreignness" carries moral weight. "Foreignness" should be treated not as a self-evident conclusion, but as a doctrinally specific question to be answered. There is no simple, objective line between here and everywhere else, and suggesting that there is obscures the degree to which we are connected—politically, economically, and ethically—to the lives of others.