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Brief Thoughts on *Jesner v. Arab Bank, PLC*, 584 U.S. --- (2018): The State of Judicial Remedies for Corporate Liability for Human Rights Violations

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Abstract: On April 24, 2018, the U.S. Supreme Court issued its much anticipated opinions in Jesner v. Arab Bank (No. 16-499) (Argued October 11, 2017; decided April 24, 2018) 584 U.S. -- (2018). Justice Kennedy delivered an opinion for a majority as to Parts I and II(B)(1) and II(C) concluding, in an important part, that foreign corporations were not amenable to suit brought under the Alien Tort Statute (28 U.S.C. § 1350; ATS). Justice Kennedy was joined only by the Chief Justice and Justice Thomas in Parts II(A), (B)(2)-(3) and III. Justices Thomas, Alito and Gorsuch delivered concurring opinions and, from a jurisprudential perspective, at least, Justice Sotomayor delivered a dissenting opinion in which Justices Ginsburg, Breyer and Kagan joined, contesting both the conclusion that foreign corporation were not amenable to suit under ATS and with respect to the nature and character of ATS itself. While the issue of the scope and application of ATS will likely come back to haunt the Supreme Court again in the next several years, the issue of corporate liability may not. For all the passion of the litigation, the issue was both an exercise in misdirection and one that the Supreme Court suggested might be easily fixed—not by them but through legislation. The difficulty here is not whether corporations are absolved "from responsibility under the ATS for conscience shocking behaviors" (Sotomayor, dissenting, slip op. p. 1) but whether they might be made both liable and amenable to suit for such behaviors in the United States at all. Rather than investing the time and energy spent on reshaping ATS (and the constructions of relevant international law) to suit the times (as the legal community has sought to do for a generation), the opinion appears to suggest that this time might be better spent on getting the desired result in Congress. This essay briefly considers the *Jesner* decision, with a focus on the issue of corporate amenability to suit generally and specifically under the peculiar constructions of the ATS.

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On April 24, 2018, the U.S. Supreme Court issued its much anticipated opinions in Jesner v. Arab Bank (No. 16-499) (Argued October 11, 2017; decided April 24, 2018) 584 U.S. -- (2018). Justice Kennedy delivered an opinion for a majority as to Parts I and II(B)(1) and II(C) concluding, in an important part, that foreign corporations were not amenable to suit brought under the Alien Tort Statute (28 U.S.C. § 1350; ATS) which provides that "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."

With respect to the rest—the issues around the nature, scope and application of ATS itself, the Supreme Court remains fractured and the law unsettled. Justice Kennedy was joined only by the Chief Justice and Justice Thomas in Parts II(A), (B)(2)-(3) and III. Justices Thomas, Alito and Gorsuch delivered concurring opinions and, from a jurisprudential perspective, at least, Justice Sotomayor delivered a dissenting opinion in which Justices Ginsburg, Breyer and Kagan joined, contesting both the conclusion that foreign corporation were not amenable to suit under ATS and with respect to the nature and character of ATS itself.

While the issue of the scope and application of ATS will likely come back to haunt the Supreme Court again in the next several years, the issue of corporate liability may not. For all the passion of the litigation, the issue was both an exercise in misdirection and one that the Supreme Court suggested might be easily fixed—not by them but through legislation. The difficulty here is not whether corporations are absolved "from responsibility under the ATS for conscience shocking behaviors" (Sotomayor, dissenting, slip op. p. 1) but whether they might be made both liable and amenable to suit for such behaviors in the United States at all. Rather than investing the time and energy spent on reshaping ATS (and the constructions of relevant international law) to suit the times (as the legal community has sought to do for a generation), the opinion appears to suggest that this time might be better spent on getting the desired result in Congress. And that, the possibility of direct statutory authority creating extraterritorially applied liability against persons and corporations for violations of international law wherever committed, to some real extent, is a victory (and the great challenge) for those who seek to do exactly as Justice Sotomayor and the dissenting Justices argue is both right and good.

This essay briefly considers the *Jesner* decision, with a focus on the issue of corporate amenability to suit generally and specifically under the peculiar constructions of the ATS.

The facts of the case are well known. A group of plaintiffs who were killed or injured by acts of terrorism committed abroad brought suit against the Arab Bank, PLC and some of its officials for complicity. Specifically, the corporate defendant Arab Bank and the natural persons who engaged in acts on its behalf, caused or facilitated the acts of terrorism that itself made the illegal activities of the terrorists and the resulting violent deaths and injury possible.

The Arab Bank has a long history and connection to Israel, where the victims of the alleged financing operations lived.

> The Beginning of the Journey
>
> With seven investors and a startup capital of 15,000 Palestinian Pounds, Arab Bank was registered on May 21, 1930 and commenced its operations in Jerusalem on July 14 of the same year. Abdul Hameed Shoman, the founder, was named the Bank's first chairman. Since its founding, the Bank's legacy has been to act as an active and leading partner in the socio-economic development of the region.
>
> Trust and Commitment from the Start
>
> After the British Mandate Authority withdrew from Palestine in 1948, the Bank lost its branches in Jafa and Haifa. When customers who were obliged to leave the country asked for their deposits, Arab Bank fully redeemed all claims. This decision won the Arab Bank a great reputation and became a historical turning point in its growth: it fostered a strong commitment from the Bank towards its customers and ingrained an enormous loyalty from its customers, which prevails to this day.
>
> The lost branches were re-established: Haifa branch was relocated to Beirut followed by Amman, Jaffa branch in Nablus and later Ramallah. When the branch in Jerusalem was caught up in the civil disturbance, the Bank's activities were moved to offices within the old city of Jerusalem.
>
> In 1948, the Bank's headquarters were transferred to Amman, Jordan, where it was officially incorporated as a public shareholding company. (Arab Bank/Home/About Us/Our History))

Even clothed in modern euphemism on its website, the close intertwining of the history of the Bank and the religious and ethnic wars in Israel-Palestine-Jordan is hard to miss, though it is one that is rarely spoken of in those terms within polite global elite societies. The Petitioners contended that international and domestic law imposed "responsibility and liability" (Slip. Op., p. 2), which one can assume means both a legal duty and a societal responsibility under norms with regulatory but not legal effect, on a corporation if its "human agents" use the corporate machinery "to commit crimes in violation of international law that protect human rights." (Ibid). That, for the Court, presented the question it chose to consider: "whether the Judiciary has the authority, in an ATS action, to make that determination and then to enforce that

liability in ATS suits, all without any explicit authorization from Congress to do so." (Ibid). A majority and plurality of the Justices determined, for a set of wide ranging reasons, incorporating many judicial and normative premises, that the answer must be "no." But here is the point that is worth noting–that no was that Congress had made no such grant in ATS; it did not go to the question of whether the courts could have entertained such a suit had Congress explicitly directed the courts to do so through appropriately adopted statute. To get to that answer (and to leave the door open of such liability for corporations) the majority (and plurality) asks and answers two questions:

> The Court must first ask whether the law of nations imposes liability on corporations for human-rights violations committed by its employees. The Court must also ask whether it has authority and discretion in an ATS suit to impose liability on a corporation without a specific direction from Congress to do so. (slip op. p.2)

After a short history of the case and the context in which the suit arose (slip op. pp. 3-6), Justice Kennedy, for the majority, began a consideration of the question of the extent that law of nations imposes liability for corporate human rights violations committed by its employees (slip op. ¶ I(B)). Justice Kennedy starts with a history of the difficulties of authority in those respects by the general government of the United States during the time the Republic was organized under an Articles of Confederation (slip op. p. 6-7). This history set up the argument, elaborated later, about the fundamental and ancient concern about the international relations effects of litigation in U.S. courts (and thus the balance of authority between the judicial and political branches) balanced against the perceived need to "ensure adequate remedies for foreign citizens" (Slip op. p.7).

Nonetheless, the discussion was framed narrowly around the incidents in the 1780s that caused embarrassment to the young Republic and produced the reaction memorialized both in the grant of jurisdiction in Article III of the new Constitution for a General Government, and the statutory grant of jurisdiction that was to be the ATS (Ibid., pp. 7-8), "against the backdrop of the general common law, which in 1789 recognized a limited category of 'torts in violation of the law of nations.'" (Ibid., 8, quoting in part Sosa v. Alvarez-Machain, 542 U. S. 692, 714 (2004)). That limited category of tort actions was then described to underline the reading of that statute in both Sosa (pp. 715-19) and then in Kiobel v. Royal Dutch Petroleum Co., 569 U. S. 108, 114, 123-124 (2013): "principal objective of the statute, when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." (Ibid., pp. 8-9).

The rest is history. It is from and through this kernel of a quite narrow and even more specific interpretive foundation, grounded in original understanding and general intent, that the court reads the subsequent history of the ATS. That interpretive perspective was central to Justice Kennedy's reading of the subsequent history of the application of ATS by the courts during the glory days of judicial internationalism grounded in an expansive interpretation of ATS starting with Filartiga v v. Pena-Irala,

630 F. 2d 876 (1980) and ending with the turn away from this internationalism (Ibid., pp. 9-11). This "rectification campaign" in the courts produced the great principles that Justice Kennedy would apply. The first is a reinvigorated presumption against extraterritorial application if U.S. law or the jurisdiction of U.S. courts. The second is the presumption against using jurisdictional grants to create substantive rights. In both cases, the presumption could be overcome, but subject to balancing against separation of powers implications and implications for foreign relations by vesting the judicial authority with substantive and personal jurisdiction over such conflicts.

This history is important for two reasons. The first is that here one finds crystallized the current law respecting the scope and application of the ATS within a set of general principles now better articulated. Whether or not anyone agrees with this framing as a matter of law, politics, philosophy or history is another matter. But for the moment, those who shares these views constitute a majority of the members of the Supreme Court. The second is that the narrowing of the law of ATS under these general principles appears to leave the door open to substantial expansion of judicial power along the conceptual lines suggested by the dissenting justices—but not in ATS. But that poses a problem for those who have invested substantial resources in a reinvigorated internationalized U.S. common law—that is the construction of an internationally scoped common law applicable by and through the U,S, courts as the remedial base for the remediation of international law, especially those respecting human rights. In place of common law, Justice Kennedy offers the possibility of statute; not the ATS, but a properly drawn and explicit statute enacted by the political branches that would vest such authority in the courts.

There is great irony here—and an inversion of position by the great actor-stakeholders in the global fight for the legalization of the responsibility of enterprises for gross violations of human rights law and norms. In the international arena there has long been an aversion to soft law and societal techniques for developing norms and governance frameworks among key drivers of the business and human rights discourse. They would see a comprehensive treaty--the construction of legislatively based hard law, and not organic or judicially crafted fractured systems, as the only legitimate means of creating the fundamental system of human rights obligations that ought to be imposed on enterprises. Yet that is essentially the position taken by Justice Kennedy with respect to the organic transformation of ATS to suit the times. Yet this approach in the domestic arena does not elicit a similar sort of favor--the reasons for which are clarified in the dissenting opinion of Justice Sotomayor. It is true enough that the analogy does not work precisely; there are vast differences between the development of U.S. constitutional common law--the glosses on the basic law of the Republic that serves as its constitutional operating system--and the move toward soft law frameworks focusing on the development of regulatory governance in the societal sphere in the international arena. One is law, the other is not in the traditional sense. One is structured through courts, the other through leadership of international organizations and effectuated through markets. Still, the impulse is clearly related--whether an architecture of control is to be effectuated through formal law structures, or whether it is to be organically crafted through remedial or market institutions.

But these conceptual *bon bons* add sugar but not substance to what follows from the development of these good, old fashioned principles of legislative centering legal craft. It is one thing to agree on good old fashioned principles--conceptual frameworks can embrace all sorts of meaning. It is quite another to bridge conception to implementation in a concrete case. It is to that work that Justice Kennedy devotes Part II of the opinion. And it is in this Part II that Justice Kennedy finds himself at his weakest. Here only Parts II(B)(1) and II(C) appear to have any authority--though only time will tell which of the sections of Part II and Part III, or of the dissent, will eventually carry greater weight in future cases. The Steel Seizure Case (Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) serves as a reminder that it is not always the majority opinion that tends to have lasting jurisprudential value.

So, with respect to what do a majority of the Justices agree? Section II(B)(1) suggests the first of these points of agreement. Initially, a majority of the Justices appear to agree that the case must be decided consistently with a general principle of law that militates against the extension of judicially t created private rights of action (slip op. PP. 19-20). This is principle now at least a generation old in its present guise (e.g., ibid., p. 19), but one with an evolving character--the principle us being transformed from a prudence principle (e.g., this si not something the courts ought to do in the sprint of comity in a divided powers system) to a principle of constitutional limitation of the judicial power itself (e.g., the constitution′s Art. III limits the judicial power to create rights of action in the way that the Chancery once foreclosed the addition of new writs under common law). Citing Ziglar v. Abbasi, 582 U.S. -- (2017), the majority underlined the rule as they now see it: ″Thus, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a dam- ages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." (Slip op., p. 19). Whatever one thinks of this principle and its evolution, at least one has here a moment of clarity and a direction away from the judiciary to the legislature--such private rights of action are not foreclosed, they are just not to be squeezed out of a cocktail of tailored judicial decisions constituting a common law jurisprudence. This is to some extent a great pity--the turn toward the narrowing of the judicial power appear to run counter to the thrust of history and the practice of institutions; and the refocus on the 19th century mechanics of legislative enactments seems both inefficient and unrealistic in the face of the administrative state and the interlocking apparatus of state based administrative discretionary oversight, judicial interpretation, and assessment and data driven management. *But for a court already well invested in the forms of historicism, demanding its practice ought not to come as a surprise.* More importantly, perhaps, as much as this may be distasteful to some, the interpretation may be lamentable as policy but it is perfectly plausible as law--it may be wrong as a matter of policy but it is not outside the range of perfectly plausible interpretive outcomes.

This historicism detached from historical realities is especially perverse when extended to the consideration of the amenability of corporations to suit. In ways that corporate lawyers might now find quaint, the analysis turns on an ancient view of corporations as ″artificial entities″ (Ibid. p. 19). The analogy seems to be that since a legislature created the ″artificial″ entity, only the legislature ought to be able to determine its amenity to suit--even it seems, where such entities are endowed with the rights and burdens of juridical persons ″of woman born″ (″Be bloody, bold, and resolute. Laugh to scorn; The power

of man, for none of woman born; Shall harm Macbeth." Macbeth, Act 4, Scene 1). Yet for what is no doubt its great logical power, one is left wondering what, if anything that has to do with the reality of the relationship of the development of corporate law between statute and judiciary in a field of law that has never been entirely a creature of statute! And thus, the corporate law is "not of woman born" but has always been a creature not merely of compilations of statute but also of a robust judicial development (e.g., fiduciary duty, agency and authority, etc.). But none of this plays into the consciousness of the majority for reasons that remain to be revealed. And thus, in short, because the ATS dies not specify a private right of action against a corporation, the principles against reading such remedial rights into statutes, and the caution against judicial extension of corporate rights and duties beyond those statutorily mandated, precludes a determination that corporations are amenable to suit under the ATS.

Beyond this, the majority agreed only on what appears as Section II(C) of Justice Kennedy's opinion (slip op. 25-27). Here one understands the Supreme Court as orchestrating a quite coherent retreat from international space--at exactly the same time that states, through international organizations, have sought to produce greater engagement by national courts in matters of international law. As implausible as this may seem to the dissenting Justices, the fundamental *historicism* of the majority Justices (note it has not been suggested for a minute that this might plausibly characterized as original understanding but rather as an ideologically infused historicism with a formalist preservationist objective) makes this a logical extension of a view that insists on preserving the cultural norms and expectations of the young Republic--at least when it suits them. Thus, Justice Kennedy emphasizes that the ATS was "intended to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable. Brief for United States as Amicus Curiae 7. But here, and in similar cases, the opposite is occurring." (Ibid., p. 25). Justice Kennedy notes the relatively minor connection with the United States (minor. that is, unless one looks, for example, at U.S. anti-terrorism legislation, perhaps for example the "International Money Laundering Abatement and Financial Anti-Terrorism Act of 2001" of the U.S. Patriot Act of 2001).

While Justice Kennedy marginalizes the contacts with the United States, he privileges the annoyance of the Kingdom of Jordan with respect to this disrespectful litigation against one of its Banks (Ibid., p. 26)). This annoyance has political ramifications as Jordan is currently part of a united front against common enemies of the United States and its partners (Ibid). Justice Kennedy also reminded his readers of the several times that foreign sovereigns appeared before U.S. courts to evidence their annoyance with having to put up with ATS litigation--a bad thing it seems in relation to the conduct of the foreign relations of the United States. Perhaps so; but if undertaken under law that becomes irrelevant. And that itself contributes to a perhaps lamentably unnecessary circularity in an argument that could have been more straightforward by cutting directly to the issue of legitimacy, one already covered. So, if that is the case, what purpose does this Section II(C) serve? Perhaps it serves to suggest the outward parameters of any post ATS legislation that imposes corporate liability. But that suggestion is undercut by Justice Kennedy's broad suggestion of Congressional power in Section III. That leaves the more modest goal of

deepening the interpretive conclusion of Section II(B)(1). That, indeed, appears to be the object which is underlined by the explicit balancing undertaken at its end between the interpretive discretion of the courts and the foreign policy consequences (Ibid., p. 27).

As for the rest, the Supreme Court offers only a glimpse at the range of plausible approaches to the specifics of the ATS and the likelihood of continued jurisprudential fracture without resolution. Only three Justices agreed with Justice Kennedy's argument "that current principles of international law extend liability—civil or criminal—for human-rights violations to corporations or other artificial entities. This is confirmed by the fact that the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach." (Ibid., pp. 14, Section II(A)(1)). Nor was there much agreement with respect to the standard adopted by Judge Cabranes in the *Kiobel* Coiurt of Appeals decision--"a specific, universal and obligatory norm of liability for corporations." (Ibid., pp. 13, Section II(A)). And lastly, there appeared to be little taste for the arguments made by Justice Kennedy with respect to the weakness of claims for the establishment of a principle of direct corporate legal liability under international law ((Ibid., pp. 15-16, Section II(A)(2)). All of that effort appeared to be a dry run for arguments that are likley to be deployed in later cases—that is Justice Kennedy and his few fellow Justices might well have been creating the sort of jurisprudential position that might rely on in anticipated future cases. "In any event, the Court need not resolve the questions whether corporate liability is a question that is governed by international law, or, if so, whether international law imposes liability on corporations."((Ibid., pp. 17-18, Section II(A)(2)). This strategic dicta might be well remembered; it is likely to come back with a vengeance at the appropriate time. Yet for the moment it appears to have few adherents on the Court.

Likewise, there were few takers for the discussion in Section II(B)(2) on a theoretical discussion of "the appropriate boundaries of judge-made causes of action." (Slip op. p. 19). The same applied to the guidance that Justice Kennedy sought to offer relating to standards useful for the exercise of what he termed judicial discretion in permitting actions against corporations in Part II(B)(3), pp. 23-25). His parade of horribles is interesting as a matter of international relations, perhaps, but hardly worth the weight of time expended in reading them as law (Ibid., pp. 23-24). Ironically, it is just this sort of discussion that ought to raise issues of separation of powers especially from a Justice who is in the process of writing a narrow historicist opinion grounded in fear of second guessing the political branches. But it is sometimes said that one is most aware of the foibles of others and least aware of one's own.

More importantly, this section raises both concern and offers an opportunity. That language at first blush appears to be anti-business in the sense that any application of human rights-based liability is bad for business (as well as being "bad" law under the current circumstances). "In other words, allowing plaintiffs to sue foreign corporations under the ATS could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts." (Ibid., p. 24). This is an argument that was not unpopular in the run up to the

endorsement of what became the U.N. Guiding Principles for Business and Human Rights. In that context, the business detriment consequence that the court feared has not appeared to have come true; thus, Justice Kennedy indulges in a contextless conjecture at the invitation of a government that has proven relatively naïve and indifferent to that context. But more importantly, and especially in an emerging "America First" era, this argument has a straightforward solution. It is as easy to write human rights protections into bilateral investment treaties—starting with the model U.S. BIT (here)—as it is to enact a statute to overcome the Supreme Court's objections to the deficiencies of ATS.

Finally, Part III is the most interesting of those part of the decision that attracted few adherents. The section starts with an appealing syllogism: "With the ATS, the First Congress provided a federal remedy;" that remedy applied specifically to a "narrow category of international law violations committed by individuals" (e.g., juridical persons of women born). Corporations, much less foreign corporations are not individuals. Therefore, only Congress may extend ATS to that category of individual. (Slip op. p 27).

The rest is post hoc justification. But the justification provides a large measure of hope for those who seek in the courts a strong remedial mechanism for corporate violations of domestic and international human rights law (including human rights norms built into the contracts and agreements among parties, including state owned and private corporations, within production chains). At this point, and in their enthusiasm for the idea of legislation, it appears that the Justices put off their judicial role for a moment to give political advice to any future legislature thinking about legislating corporate liability for human rights violations. This is both good news and bad. The bad news, of course, is the sort of privileged presumption implicit in this lecturing. The good news is that it provides a framework for guessing about the sort of legislation these Justices, at least, might be willing to concede as within the authority of Congress and the President. the majority Justices presume to give the Congress some advice on the possible parameters of future legislation. The majority for example, leaves open the possibility that the "

> political branches can determine, referring to inter- national law to the extent they deem proper, whether to impose liability for human-rights violations upon foreign corporations in this Nation's courts, and, conversely, that courts in other countries should be able to hold United States corporations liable. . . . If Congress and the Executive were to determine that corporations should be liable for violations of international law, that decision would have special power and force because it would be made by the branches most immediately responsive to, and accountable to, the electorate."(Slip op. p. 27-28).

Or Congress could more finely tailor such exposure to corporate liability under ATS or such other statute as it might, in its judgment, deem suitable for inclusion in the domestic legal order (Ibid., 28). "Finally, Congress might find that corporate liability should be limited to cases where a corporation's management was actively complicit in the crime. Cf. ALI, Model Penal Code §2.07(1)(c) (1985)." (Ibid.).

It is to the hard work of legislating corporate liability for human rights violations, then, that stakeholders must turn to next. To a large extent, this ought to be seen as a profound victory for those who would see a vigorous human rights-based system of liability be developed within the domestic law of the U.S. and overseen by its courts. It would certainly accord with the emerging comprehensive treaty for business and human rights approach currently being formulated by the Human Rights apparatus in Geneva (see, e.g., here, discussed here). But them that is the problem. It is much easier, though risky, to seek the growth of legal structures through the bits and pieces of judicial determination--that is to invest in the construction of a strong common law of business and human rights--then to seek a legislative imprimatur through statute. And what better place to engage in this activity than in the United States, the principal bastion of common law-based jurisprudence. In place of an organic jurisprudence centered in the courts, the majority opinion offers the strict formalism of traditional law through legislation. And, as suggested above, that legislation can touch not merely on jurisdictional statutes with broader subject matter jurisdiction, but also may create opportunities for broadening the scope of the U.S.'s bilateral investment treaties to ensure appropriate coverage and the protection of U.S. corporations investing abroad.

To this basic insight, much of the rest that was written merely adds to the understanding of the ideological politics of the Supreme Court, especially that of the remaining justices likely to side with the Kennedy plurality in future cases. In these there is the kernel of a danger of radical historicism that could easily veer into a judicial methodology lacking a historically based fidelity to the core political principles of the Republic, or even a fidelity to the even more ancient cultures and practices of the common law judiciary—one which was equally radically rejected by the late Justice Scalia and his ilk from the 1990s. Justice Alito writes both to express a desire to rewrite the Sosa case (slip op., p. 1-5) and to fight with the dissenting justices around a variety of points they took the trouble to make (Ibid., pp. 5-7). In the process he also can't resist the temptation of indulging in the sort of policy analysis that he has taken the trouble to insist are really only the purview of the political branches (Ibid., p. 7 "Creating causes of action under the ATS against foreign corporate defendants would be a no-win proposition. Foreign corporate liability would not only fail to meaningfully advance the objectives of the ATS, but it would also lead to precisely those "serious consequences in international affairs" that the ATS was enacted to avoid.").

The most junior Justice Gorsuch devoted his concurrence (in part and in the judgement) to insisting that the courts had been using ATS to create new causes of action in the form of extending the jurisdictional scope of that statute and because any presumption of foreignness moved the action from the courts to the political branches in some way. With this view of things he takes the time to urge "restraint before taking up cases like this one." (Ibid, p. 1 Gorsuch concurring in part). Justice Gorsuch was particularly vexed at the idea that courts might read a cause of action into a statute that creates a jurisdictional basis for asserting a cause of action with respect to which the domestic legal order of the United States has little control (the "law of nations") (Ibid., pp. 2-6). On that basis a case is made for retreating from Sosa, a view he shares with Justice Alito (Ibid.). But at heart, Justice Gorsuch apparently can't get over the idea of permitting foreigners to seek relief in U.S. courts--despite that even on the most conservative reading of ATS that is precisely what the founding generation of legislators sought to do. And

so he revises an Article II concern grounded in his view of original understanding and (perversely) judicial precedent (Ibid., 5-6). He then spends a but of time getting into the heads of the founding generation to develop what he believes to be a better view of what they intended (Ibid., pp. 7-9). These are ultimately bound up with a discomfort of reaching out to any law–of nations or otherwise" that do not appear to emanate form our own political branches (Ibid., 8-9 ("Congress may act to bring provisions of international law into federal law, but they cannot find their way there on their own.")).In the end, however, Justice Gorsuch appears to see very little role for ATS within the context of his reading of the Judiciary Act of 1789 with anything having to do with the issues currently raised (Ibid., pp. 10-13) and his more modest view of the extent of the judicial power under Article III.

No analysis of *Jesner*, however, without at least a nod in the direction of the dissenting opinion authored by Justice Sotomayor. To a large extent, that dissent is one of what is likely to be a number of increasingly well refined exercises in nostalgia. These will reflex both the nostalgia for a jurisprudential age now clearly passing, but also in the process serve to memorialize its ideologies, sensibilities and practices. For that alone the dissenting opinion is worth both reading and preserving. What it is not of much use for is the power of its jurisprudence in this "New Era" of jurisprudence represented by the five justices that determined the effective outcome of *Jesner*. But it is far too late for anything but lamentation among those who whom that sort of jurisprudence was meaningful.

Justice Sotomayer provides a quite lucid analysis in the style of elite global judges whose outlook dominated more or less from about the period after 1945 and through the early part of this present century. She focuses on the ATS itself as a nexus point of policy, the underlying normative nature of which has been dynamically transformed over the course of the last two centuries. She ties that dynamic development to the original understanding of the First Congress–that is that at the time of enactment Congress knew exactly what it was doing by deliberately tying jurisdiction to a concept (the "law of nations") that was understood even in the 1780s to be dynamic, and then assumed that the dynamism was written into the text of the ATS itself by the reference to a concept (again "the law of nations") that was explicitly at the center of the statutory text. She then places this deliberately dynamic construct within the judicial authority to assert its traditional jurisprudence against all persons–natural or juridical. The approach is functional–given to ensure that the text fulfills its intentions (Slip op., p. 1 Sotomayor, dissenting). In the process she provides a spirited defense of a view of Sosa that appears to be passing away (at least among a majority of Justices). The approach could not be more different than that of Justice Kennedy–formalist, historicist in a narrow sense, textualist in a formalist sense, and given to ensure that the text fulfills the terms of its words. Neither is inherently wrong, but both reflect sensibilities quite incompatible–though both compatible with currents of American jurisprudential thought.

Justice Sotomayer first tilts at windmills–though for purposes of its historical value, a tilting with much use. She challenges the plurality for assuming "without deciding that whether corporations can be permissible defendants under the ATS turns on the first" of the two part Sosa test (Ibid.). That, Justice Sotomayer suggests "misconceives how international law works and so misapplies the first step of Sosa."

(Ibid. pp. 1-2). Her analysis begins with a close reading of Sosa. From that she draws the conclusion, not incorrect, that the first step of Sosa merely goes to the normative scope to which the ATS applies (Ibid. 2-3). However, it was not meant to apply to the question of the "mechanisms of enforcing these norms" (Ibid. p. 3) to which the "specific, universal and obligatory" standard should not apply (Ibid., p. 3). For those mechanics—such as those who may be amenable to suit, international leaves those details to states (Ibid). The argument is aggressive but not implausible. She finds further support for this "distinction between prohibiting conduct and determining enforcement" (Ibid., p. 4) in the text of ATS itself.

Justice Sotomayor then engages (Ibid. Part I(B)(1) Sotomayor dissenting) in a challenge to the reading of footnote 20 of the Sosa case that she found distressing in the opinion of the Justices contributing to the decision of the court, the corporation exception language. She not unreasonably ties the language back to the specific norm of international law that forms the basis of the ATS suit (Ibid., p. 6). That is, the scope of the norm violated determines the proper scope of appropriate defendants. "Assuming the prohibition against financing of terrorism is sufficiently "specific, universal, and obligatory" to satisfy the first step of Sosa, a question on which I would remand to the Court of Appeals, nothing in international law suggests a corporation may not violate it." (Ibid., p. 7). Yet from the perspective of Justice Kennedy, the reasoning is irrelevant since most norms is structured might not be included in the small group of 1787 "law of nations" catalogue. The two sets of justices are, at a fundamental level, talking past each other.

This difference then plays out in the way both Justice Sotomayor and Kennedy approach the issue of the history of international tribunals toward jurisdiction over corporations (Ibid., pp. 8-12). Justice Sotomayor dismisses Justice Kennedy's analysis suggesting it proves "only that states' collective efforts to enforce various international-law norms have, to date, often focused on natural rather than corporate defendants." (Ibid., 9). She then put forward examples where corporations were indeed subject to some sort of action under international law—none of which appears to have occurred in 1787 (and again that is the problem of jurisprudentially talking past each other compelled by the logic of their ideological starting points). (Ibid., 10-12).

And at last Justice Sotomayor comes to the foundational thesis of the dissent: "Instead of asking whether there exists a specific, universal, and obligatory norm of corporate liability under international law, the relevant inquiry in response to the question presented here is whether there is any reason— under either international law or our domestic law—to distinguish between a corporation and a natural person who is alleged to have violated the law of nations under the ATS." (Ibid., 12). This turns the analysis on its head—not whether corporations ought to come into the jurisdiction of the ATS, but whether there is any reason to exclude them. Justice Kennedy would presume that corporations are out unless there is explicit proof that they should be in; Justice Sotomayor would presume that corporations are in unless there is explicit proof that they were meant to be excluded. It comes as no surprise that Justice Sotomayer produces a wealth of text, cases, and logic to support the position of the dissenting justices that indeed there appears no reason to exclude corporations—because corporations tend to be included elsewhere

(Ibid., pp. 12-14); because the historical background as they read does not suggest otherwise (Ibid., 14); and because an Attorney General said so a century ago (Ibid., 15).

Justice Sotomayer then spends some time arguing with Justice Gorsuch (Ibid., pp. 15-18). Sje concludes, to her satisfaction, that Sosa is still good law. And it may well be if there are five justices left in total that agree with Justice Sotomayor—and for the reasons she suggests. But that does not appear to be the case anymore. So these arguments are valuable more as a memorial to a plausible perspective and a future dissent, rather than as a dress rehearsal for the defense of Sosa against another and this time direct challenge.

Justice Sotomayor then tackles the issue of the exercise of judicial discretion in ATS cases (Ibid., 19-23). She argues for remand to consider whether the particular facts of the case merit corporate liability. She laments that Justice Kennedy used "a sledgehammer to crack a nut" (Ibid., p. 23). More importantly, she urges caution in moving from judicial engagement with ATS to an approach that centers the political branches. She notes with irony the changeable nature of political branch approaches (Ibid. p. 23-24). She rejected reliance on the Torture Victim Protection Act of 1991 (Ibid., pp. 25-28 "To infer from the TVPA that no corporation may ever be held liable under the ATS for any violation of any international-law norm, moreover, ignores that Congress has elsewhere imposed liability on corporations for conduct prohibited by customary international law." (Ibid., p. 27). And Justice Sotomayor rejects arguments against corporate amenability to ATS suit grounded in foreign policy concerns, or its relevance to the goals of ATS (Ibid., pp. 29-32).

> In sum, international law establishes what conduct violates the law of nations, and specifies whether, to constitute a law-of-nations violation, the alleged conduct must be undertaken by a particular type of actor. But it is federal common law that determines whether corporations may, as a general matter, be held liable in tort for law-of- nations violations. Applying that framework here, I would hold that the ATS does not categorically foreclose corporate liability. Tort actions against corporations have long been available under federal common law. Whatever the majority might think of the value of modern-day ATS litigation, it has identified nothing to support its conclusion that "foreign corporate defendants create unique problems" that necessitate a categorical rule barring all foreign corporate liability. (Ibid., pp. 32-33).

Lastly, Justice Sotomayor argues against any categorical rule on the basis of functional arguments (Ibid., Part III). Corporations are useful vehicles through which the socialization of legal norms might be efficiently developed (Ibid., p. 33-34). One must be careful of the connection between profit and human rights abuses (Ibid., p. 34); and corporate liability advances cultures of "for law-of-nations accountability that Justice Sotomayor finds comforting (Ibid.).

Taken as a whole, the dissenting opinion makes as plausible a case, given its starting premises, as the opinion of Justice Kennedy. Yet that insight also suggests even more strongly the weakness of the construction of international normative systems of liability and remedy built on the sands of judicial glosses

of oracular statutes from the 18th century. Perhaps more than the opinions of Justices Kennedy, Alito and Gorsuch, the dissenting opinion of Justice Sotomayor makes the strongest case for the approach that the best way to ensure that corporations that violate human rights laws are accountable under law is to legislate that outcome—at least in the United States.