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Shadow Amendments

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SHADOW AMENDMENTS

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The Supreme Court's jurisprudence surrounding the Alien Tort Statute ("ATS") reflects the phenomenon of shadow amendments, an inevitable outcome of statutory construction. These judicial interpretations altered the ATS and narrowed its reach. Through repeated shadow amendments, the Court has moved the ATS far beyond its original thirty-three word configuration and understanding. These shadow amendments reflect an aggressive form of statutory construction, an ironic description for a Court that has long championed deference to Congress and fealty to legislative text. This dynamic is evident in Nestlé USA, Inc. v. Doe*, the Court's most recent ATS decision. But shadow amendments are not limited to the ATS; they occur whenever courts interpret statutes, regulatory provisions, or even constitutional text. Characterizing judicial interpretations as shadow amendments highlights their unique status and practical impact. They are not formal amendments—only Congress can amend a statute. Yet, they achieve a similar outcome. The term "shadow amendment" provides an accurate description of judicial interpretation as legislation. Because of their ubiquity and profound consequences, shadow amendments merit careful monitoring.*

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I. INTRODUCTION

In recent years, the Supreme Court has issued multiple opinions on the Alien Tort Statute ("ATS").[1] With each opinion, the Court has gradually rewritten the ATS by adding various qualifications to the statutory language.[2] These judicial interpretations—referred to here as "shadow amend-

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[1] 28 U.S.C. § 1350. *See, e.g.*, Jesner v. Arab Bank PLC, 138 S. Ct. 1386 (2018); Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Sosa v. Alvarez-Machin, 542 U.S. 692 (2004).

[2] *See infra* Part III.

ments"—have substantively altered the statute by narrowing its reach.[3] Characterizing judicial interpretations as shadow amendments highlights their unique status and practical impact. They are not formal amendments—only Congress can amend a statute. Yet, they achieve a similar outcome. They hover over the statute, affecting its meaning without changing the actual text.

Nestlé USA, Inc. v. Doe represents the Supreme Court's most recent ATS decision.[4] It offers another example of the Court's use of shadow amendments, in this case to reject claims alleging U.S. corporate complicity in child slave labor committed in the Ivory Coast.[5] More broadly, the case highlights the challenges generated by cumulative shadow amendments. As the number of shadow amendments increases, they may begin to affect a statute's cohesion and functionality. With each iteration, the statute may be less likely to provide an accurate reflection of original legislative intent. Indeed, shadow amendments can constrain or expand the text with each added word. The power of shadow amendments is even more pronounced when they eviscerate the text, and the Court then proclaims that only Congress can provide a remedy to change its interpretation.

This essay examines the Supreme Court's use of shadow amendments—an inescapable byproduct of judicial review and statutory construction—through a case study of the ATS. Part II defines shadow amendments and describes the challenges they can pose. To better understand shadow amendments, Part III surveys the legislative and judicial history of the ATS and reveals how the Court has rewritten the statutory language through multiple opinions. Part IV then examines the Court's recent decision in *Nestlé USA, Inc. v. Doe*, which adds yet another shadow amendment to the ATS. Finally, Part V examines the cumulative impact of shadow amendments on the ATS. With each new word, these shadow amendments have profoundly narrowed the statute's reach. They reflect an aggressive form of judicial activism, an ironic description for a Court that has long championed deference to Congress and fealty to legislative text.

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[3] *See* William J. Aceves, *Judicial Activism, Corporate Exceptionalism, and the Puzzlement of* Nestlé v. Doe, JUST SECURITY (Dec. 11, 2020), https://www.justsecurity.org/73794/nestle-cargill-v-doe-series-judicial-activism-corporate-exceptionalism-and-the-puzzlement-of-nestle-v-doe/ [https://perma.cc/EM8H-PH8P].

[4] 141 S. Ct. 1931 (2021).

[5] *See* Adam Liptak, *Supreme Court Limits Human Rights Suits Against Corporations*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/17/us/supreme-court-human-rights-nestle.html [https://perma.cc/JL7G-5CBM]; Jess Bravin & Brent Kendall, *Supreme Court Rules Cargill, Nestle Can't Be Sued in Child-Labor Case*, WALL ST. J. (June 17, 2021), https://www.wsj.com/articles/supreme-court-rules-cargill-nestle-cant-be-sued-in-u-s-for-abuses-in-ivory-coast-11623947396 [https://perma.cc/VU7L-9EZV].

Shadow amendments are not limited to the ATS or the Supreme Court.[6] They occur whenever a court interprets a statute.[7] Their legislative impact, however, is often difficult to assess because shadow amendments, unlike congressional amendments, are not formally incorporated into the statutory text. By translating the Court's shadow amendments into legislative language and inserting them directly into the relevant statute, the methodology used in this essay provides a simple yet effective technique for viewing their individual impact and potential for cumulative harm.[8] Word count analysis provides another technique for measuring this veiled form of judicial activism.[9] These methodologies can be used to assess shadow amendments to any statutes, regulatory provisions, or even constitutional text.[10] Because of their ubiquity and profound consequences, shadow amendments merit careful monitoring.

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[6] Shadow amendments are not limited to federal law; they also occur when courts interpret state law.

[7] Shadow amendments are distinct from "shadow precedents," which refer to the judicial phenomenon of disregarding statutory overrides and relying on prior judicial interpretations of statutes. *See* Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511, 512 (2009) (describing how federal courts often narrowly construe congressional overrides of judicial decisions and instead rely on those same overridden precedents to interpret statutes).

[8] There is an inevitable degree of subjectivity involved in translating judicial opinions into shadow amendments. Different interpretations will result in different word choices and word counts. Despite such variation, shadow amendments still offer a valuable guide for assessing the impact of judicial review and statutory construction.

[9] Word count analysis involves calculating the number of words that appear in a document. U.S. Supreme Court opinions have been subject to different forms of word count analysis. *See, e.g.*, DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 303 (7th ed. 2005); Adam Feldman, *Empirical SCOTUS: An Opinion is Worth At Least a Thousand Words (Corrected)*, SCOTUSBLOG (Apr. 3, 2018, 12:03 PM), https://www.scotusblog.com/2018/04/empirical-scotus-an-opinion-is-worth-at-least-a-thousand-words/ [https://perma.cc/8CSM-8Q8N]; Ryan C. Black & James F. Spriggs II, *An Empirical Analysis of the Length of U.S. Supreme Court Opinions*, 45 HOUS. L. REV. 3 (2008); Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writing*, 62 U. CHI. L. REV. 1371 (1995); Peter H. Schuck & E. Donald Elliott, *To the* Chevron *Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990).

[10] Various approaches have been used to measure the nature and scope of judicial activism in statutory interpretation. *See, e.g.*, Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. 1275 (2020); Bruce G. Peabody, *Legislating from the Bench: A Definition and a Defense*, 11 LEWIS & CLARK L. REV. 185 (2007); Frank B. Cross & Stefanie A. Lindquist, *The Scientific Study of Judicial Activism*, 91 MINN. L. REV. 1752 (2007); *see also* David A. Strauss, *The Supreme Court, 2014 Term—Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1 (2015) (describing how constitutional text and interpretation are often inconsistent); Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1 (1975) (critiquing the Court's habit of drafting constitutional opinions that look like detailed legislative codes).

II. Defining Shadow Amendments

Statutory construction is perhaps the most common function of judicial review.[11] It is, in fact, an essential task. Statutes routinely contain language that is ambiguous and subject to multiple interpretations.[12] As Chief Justice John Marshall observed, "[s]uch is the character of human language."[13] Times also change, and statutory language may develop new meanings requiring clarification. Shadow amendments are, therefore, an inevitable outcome of statutory construction.[14] They represent judicial interpretations that can broaden or narrow a statute's reach. These interpretations "take on a canonical role" and are then construed by courts as if they appeared in the original text.[15]

Shadow amendments are found in every area of law. In civil procedure, for example, the Supreme Court has issued a well-known shadow amendment to the federal question statute.[16] Codified at 28 U.S.C. § 1331, the extant statute provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[17] However, the Court's interpretation of the statute extends beyond these twenty-two words. The Court has indicated that a federal question must be present on the face of the plaintiff's well-pleaded complaint in order to meet the statutory requirements for subject-matter jurisdiction.[18] In other words, a plaintiff cannot rely on a defendant's potential defenses to state a

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[11] *See generally* Linda D. Jellum, Mastering Statutory Interpretation (2d ed. 2014); Robert A. Katzmann, Judging Statutes (2016); Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts (2012); Lawrence M. Solan, The Language of Statutes: Laws and Their Interpretation (2010); William N. Eskridge Jr., Philip P. Frickey & Elizabeth Garrett, Legislation and Statutory Interpretation (2d ed. 2006).

[12] *See, e.g.*, Jellum, *supra* note 11, at 87; Richard A. Epstein, Design for Liberty 15 (2011); Frederick Schauer, *A Critical Guide to Vehicles in the Park*, 83 N.Y.U. L. Rev. 1109 (2008); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527 (1947). *But see* Scalia & Garner, *supra* note 11, at 6–7 (arguing that words and statutes can have definite meanings).

[13] McCulloch v. Maryland, 17 U.S. 316, 414 (1819).

[14] *See generally* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretative Canon Use in the Roberts Court*, 117 Mich. L. Rev. 71 (2018); Thomas W. Merrill, *Legitimate Interpretation—Or Legitimate Adjudication?*, 105 Cornell L. Rev. 1395 (2000).

[15] Frederick Schauer, *Book Review: Opinions as Rules*, 53 U. Chi. L. Rev. 682, 684 (1986) ("[T]he words of an opinion take on a canonical role not unlike that played by the words in a statute."); *see also* Adam N. Steinman, *A Constitution for Judicial Lawmaking*, 65 U. Pitt. L. Rev. 545, 547–49 (2004).

[16] I am indebted to Professor Bill Dodge for this example.

[17] 28 U.S.C. § 1331.

[18] *See, e.g.*, Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152 (1908) ("It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.").

federal claim.[19] Accordingly, judicial interpretations of the federal question statute now incorporate this requirement. With this shadow amendment, the statute reads: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States **[as long as the federal claim appears on the face of the complaint]**." This shadow amendment is recognized as black letter law and is treated by courts as if it appears in the actual statute.[20]

The federal diversity statute—which provides for subject-matter jurisdiction in cases involving diverse parties—contains numerous shadow amendments. For example, the statute describes how a corporation's citizenship should be established for purposes of diversity jurisdiction. Codified at 28 U.S.C. § 1332(c)(1), the statute provides in pertinent part: "[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ."[21] For decades, the meaning of "principal place of business" was subject to different interpretations by the lower courts.[22] In 2010, the Supreme Court considered these competing interpretations and determined that a corporation's citizenship should be assessed by reference to its "nerve center."[23] The Court defined this as "the place where the corporation's officers direct, control, and coordinate the corporation's activities."[24] Accordingly, judicial interpretations of corporate citizenship for purposes of the diversity statute incorporate this requirement. The statute now reads:

> [A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business, **[which for purposes of this statute means the State or foreign state where the corporation's officers direct, control, and coordinate the corporation's activities]** . . . .

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[19] Tennessee v. Union & Planter's Bank, 152 U.S. 454, 464 (1894) ("A suggestion of one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws.").

[20] *See* John B. Oakley, *Federal Jurisdiction and the Problem of the Litigative Unit: When Does What "Arise Under" Federal Law?*, 76 TEX. L. REV. 1829, 1834 (1998); William Cohen, *The Broken Compass: The Requirement that a Case Arise "Directly" Under Federal Law*, 115 U. PA. L. REV. 890, 893 (1967); Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 160 (1953).

[21] 28 U.S.C. § 1332(c)(1).

[22] *See, e.g.*, Capitol Indem. Corp. v. Russellville Steel Co., 367 F.3d 831, 836 (8th Cir. 2004); Wis. Knife Works v. Nat'l Metal Crafters, 781 F.2d 1280, 1282 (7th Cir. 1986).

[23] Hertz Corp. v. Friend, 559 U.S. 77, 92–93 (2010).

[24] *Id.* at 80–81.

Like its federal question counterpart, this shadow amendment is recognized as black letter law and is treated by courts as if it appears in the actual statute.[25]

A priori, shadow amendments are not problematic. Indeed, they are a necessary feature of judicial review. As Justice Holmes recognized, "judges do and must legislate."[26] In the realm of statutory construction, interpretation is legislation and, therefore, interpretation *is* law.[27] Justice Scalia viewed judicial review somewhat differently, but nevertheless acknowledged he was "not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law."[28]

But shadow amendments become problematic when they ignore the plain meaning of a statute or reject legislative intent. These concerns—often described by some critics as judicial activism—are well-known.[29] Shadow amendments are also problematic when they overwhelm the text through accretion. A single shadow amendment may not affect a statute's functionality; in fact, most do not. But as they grow in size and number, shadow amendments will have a cumulative impact. Each new word adds more to the text. Over time, the statute's cohesion and functionality will change. Moreover, its contemporary understanding may no longer reflect the original intent—of either the Congress that drafted the statute or the President who signed it. Each shadow amendment creates a slightly different statute. Akin to the philosophical puzzle known as the Ship of Theseus, accretion raises questions about the implications of change on a statute's meaning.[30] When an

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[25] *See* 13 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION § 3623 (3d ed. 2021).

[26] S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[27] Editor, *Genuine and Spurious Interpretation*, 25 THE GREEN BAG 504, 507 (1913) ("The judge must legislate, and selective interpretation is legislation . . . ."); *see also* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1147 (2017) ("Everybody knows that in legal interpretation we start with written words and somehow end up with law."); Aileen Kavanagh, *The Elusive Divide Between Interpretation and Legislation Under the Human Rights Act 1998*, 24 OX. J. LEG. STUD. 259, 266 (2004) ("[I]nterpretation combines the activities of applying and making the law.").

[28] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring). Justice Scalia believed judges make law "*as though* they were 'finding' it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be." *Id.*

[29] *See, e.g.*, Hon. James Andrew Wynn, *When Judges and Justices Throw Out Tools: Judicial Activism in* Rucho v. Common Cause, 96 N.Y.U. L. REV. 607 (2021); Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 71 U. COLO. L. REV. 1401 (2002); Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009). The term judicial legislation is also used. *See, e.g.*, Hon. Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31 (2015); Ezra R. Thayer, *Judicial Legislation: Its Legitimate Function in the Development of the Common Law*, 5 HARV. L. REV. 172 (1891).

[30] Philosophers from Plutarch to Thomas Hobbes have debated over the thought experiment posed by the mythical Ship of Theseus. *See* 1 PLUTARCH'S LIVES 21 (A.H. Clough ed., John Dryden trans., Little Brown & Co. 1875). In this story, the Ship of Theseus was constructed of wooden planks. As the planks decayed with time, they were replaced with new wood. Eventually, every plank on the ship had been replaced. The question posed by this

object's constituent parts have been replaced, does it still retain its original identity? Accretion thus reveals how "judicial tinkering" can replace a statute's identity over time.[31]

Because shadow amendments are an essential product of judicial review and statutory construction, courts protect them through several forms of self-serving behavior. This reflects several judicial interests, including a desire for coherence and consistency.[32] For example, courts often rely on prior judicial decisions rather than a statute's legislative history when interpreting statutes.[33] This practice offers primacy to judicial reasoning over legislative deliberations. Through *stare decisis*, judicial interpretations of legislation enjoy a strong presumption of correctness when subject to subsequent judicial review.[34] In fact, the Supreme Court often applies a heightened version of *stare decisis*—known colloquially as "super strong *stare decisis*"—when assessing the continuing applicability of judicial decisions interpreting statutes.[35]

When faced with criticism about shadow amendments, courts will often raise separation of powers concerns and argue that only Congress can provide a remedy.[36] "If there is any inconsistency or illogic" in the interpretation of a statute, as the Supreme Court noted in one case, "it is an inconsistency and illogic of long standing that is to be remedied by the Con-

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thought experiment is whether the ship retains its original essence or constitutes a new and distinct object. This metaphor has been used in various disciplines. *See, e.g.*, Matthew T. Bodie, *Trademark's "Ship of Theseus" Problem*, 95 S. CAL. L. REV. POST. 27 (2022); Graeme S. Cumming & John Collier, *Change and Identity in Complex Systems*, 10 ECOL. & SOC'Y 29 (2005).

[31] *See* Christian Talley, *Stare Decisis and the Identity-Over-Time Problem: A Comment on the Majority's Wrongness in* Kisor v. Wilkie, 73 S.M.U. L. REV. F. 204, 221 (2020). The identity-over-time problem appears in several academic fields. *See, e.g.*, John Symons, *The Individuality of Artifacts and Organisms*, 32 HIST. PHIL. LIFE SCI. 233 (2010).

[32] *See generally* Stephanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1166 (2005); Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 537 (2004).

[33] *See generally* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. REV. 1165 (2016) (noting the propensity of federal courts to rely on their own decisions rather than legislative history to interpret statutes).

[34] William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988) (arguing statutory precedents enjoy a "super-strong" presumption of correctness).

[35] JELLUM, *supra* note 11, at 234–37; ESKRIDGE JR. ET AL., *supra* note 11, at 285.

[36] *See generally* ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE 18, 42 (2017); Frances R. Hill, *Partisan Gerrymanders: Upholding Voter Suppression and Choosing Judicial Abdication in* Rucho v. Common Cause, 75 U. MIAMI L. REV. 459, 469 (2021); William J. Aceves, Hernandez, Bivens*, and the Supreme Court's Expanding Theory of Judicial Abdication*, 118 MICH. L. REV. ONLINE 1, 11–12 (2020). This dynamic is also evident in the Court's major questions doctrine, which concerns deference to administrative agencies. *See generally* Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 786 (2017); Note, *Major Question Objections*, 129 HARV. L. REV. 2191, 2193 (2016); Gary Lawson & Stephen Kam, *Making Law Out of Nothing at All: The Origins of the* Chevron *Doctrine*, 65 ADMIN. L. REV. 1, 2 (2013).

gress and not by this Court."[37] And yet, courts are inclined to ignore congressional overrides when Congress adopts legislation to correct judicial interpretations.[38]

While any court has the ability to issue shadow amendments, this power is most pronounced at the Supreme Court.[39] With few exceptions, it has the power to generate its own docket.[40] The Court decides whether to grant petitions for certiorari.[41] It guides the parties by determining the "questions presented."[42] And, of course, it drafts its own opinions, which can often move beyond the issues contained in the petition for certiorari or even the "questions presented."[43] Because these powers and practices reveal the Court's agenda setting power, it is here that the legislative analog is most pronounced.[44]

In sum, shadow amendment is a descriptive term used to portray the consequences of statutory construction. It simply reflects what courts do. In most cases, shadow amendments are uncontroversial because they do not diverge from plain meaning or legislative intent, nor do they cause meaning-

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[37] Flood v. Kuhn, 407 U.S. 258, 284 (1972).

[38] This phenomenon has aptly been labeled as "shadow precedents." Widiss, *supra* note 7, at 515. *See also* JEB BARNES, OVERRULED? LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS 90 (2004).

[39] The extraordinary power wielded by the Supreme Court has generated growing calls for reform. *See, e.g.*, Daniel Epps & Garesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 400 (2021) ("In the wake of Republicans' hasty effort to confirm then-Judge Amy Coney Barrett to replace Justice Ginsburg, the calls for Court reform became louder."); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. REV. 1778, 1855 (2020). In 2021, these calls led to the appointment of a presidential commission to study potential Supreme Court reform. *See* PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES, FINAL REPORT 1 (2021).

[40] Most cases brought before the Supreme Court involve its appellate jurisdiction, where review is discretionary. There are a handful of cases where the Supreme Court has original jurisdiction. *See, e.g.*, U.S. CONST. art. III, § 2, cl. 1; (addressing several examples of the Court's original jurisdiction, including in cases between "two or more States"); 28 U.S.C. § 1251(a) (granting original and exclusive jurisdiction in all controversies between states). However, the Court has also treated judicial review in cases involving its original jurisdiction as discretionary. *See, e.g.*, Arizona v. California, 140 S. Ct. 684, 684 (2020) (dismissing a case brought to the Supreme Court under its original jurisdiction). *See generally* James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 CALIF. L. REV. 555, 564 (1994).

[41] *See generally* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1647 (2000); Scott H. Bice, *The Limited Grant of Certiorari and the Justification of Judicial Review*, 1975 WIS. L. REV. 343 (1975) (describing how the Court exercises discretion over which cases it reviews and suggesting ways the Court should regulate this discretion).

[42] Jane S. Schacter, *Judicial Capacities*, 2020 WIS. L. REV. 283, 285 (2020); Sanford Levinson, *Comment on Ruben and Blocher: Too Damn Many Cases, and an Absent Supreme Court*, 68 DUKE L.J. ONLINE 17, 23 (2018).

[43] Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 864 (2022).

[44] *See* Aziz Z. Huq, *The Constitutional Law of Agenda Control*, 104 CALIF. L. REV. 1401, 1435 (2016); Lee Epstein, Jeffrey A. Segal & Jennifer Nicoll Victor, *Dynamic Agenda-Setting on the United States Supreme Court: An Empirical Assessment*, 39 HARV. J. LEGIS. 395, 401–04 (2002).

ful change. In some cases, however, this judicial output can have profound implications by changing a statute's identity over time.

III. Shadow Amendments and the Alien Tort Statute

The ATS was originally drafted in 1789 as part of the First Judiciary Act. At the time, the statute provided that the district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[45] While sparse, the historical record reveals the statute was intended to provide redress for violations of the law of nations perpetrated against foreign nationals.[46] The failure to provide such a remedy was seen by the founding generation as both legally problematic under the law of nations but also politically risky for U.S. foreign relations.[47] Subsequent legislative amendments to the ATS in 1873, 1911, and 1948 updated the text and reformatted its language to its current thirty-three word configuration.[48] Codified at 28 U.S.C. § 1350, the statute provides: "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."[49] These edits reflect the only times that Congress has amended the ATS.[50] Every subsequent revision to the legislative text has occurred through shadow amendments drafted by the Supreme Court.[51]

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[45] The Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 79.

[46] Thomas H. Lee, *The Three Lives of the Alien Tort Statute: The Evolving Role of the Judiciary in U.S. Foreign Relations*, 89 Notre Dame L. Rev. 1645, 1646 (2014); Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 465 (2011); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am. J. Int'l L. 461, 465 (1989).

[47] Martin S. Flaherty, Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs 73–75 (2019); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 939–40 (2010).

[48] Congress first revised the ATS in 1873 to read: "The district courts shall have jurisdiction as follows: . . . Of all suits brought by any alien for a tort 'only' in violation of the law of nations, or of a treaty of the United States." Rev. Stat. tit. 13, ch. 3, § 563 (1873). In 1911, Congress made further revisions so the statute read: "The district courts shall have original jurisdiction as follows: . . . Of all suits brought by any alien for a tort only, in violation of the laws of nations or of a treaty of the United States." Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1093 (1911). In 1948, Congress adopted the modern version of the statute. Pub. L. No. 80-773, 62 Stat. 869, 934 (1948).

[49] 28 U.S.C. § 1350.

[50] The Torture Victim Protection Act of 1991 ("TVPA") provides a federal cause of action for torture and extrajudicial killing and appears as a statutory note to the ATS. Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note. However, the TVPA is a distinct statute and not a part of the ATS. *See* William J. Aceves, *Correcting an Evident Error: A Plea to Revise* Jesner v. Arab Bank, PLC, 107 Geo. L.J. Online 63, 65 (2018).

[51] The ATS is a unique statute because it establishes subject-matter jurisdiction and empowers federal courts to recognize private rights of action for certain torts. *See infra* text

Even after its initial adoption and subsequent legislative revisions, the ATS lay dormant for decades. A 1980 decision by the Second Circuit was the first time that a federal court offered a meaningful assessment of the ATS.[52] In *Filártiga v. Peña-Irala*, the Second Circuit indicated that the ATS was "part of an articulated scheme of federal control over external affairs."[53] According to the court, this interpretation explained why Congress had recognized "federal jurisdiction over suits by aliens where principles of international law are in issue."[54] The *Filártiga* decision established that the ATS was a jurisdictional statute. However, the ATS did more. It also empowered federal courts to recognize causes of action for violations "of the rights already recognized by international law."[55] Because the Supreme Court declined to grant certiorari in *Filártiga*, the Second Circuit's opinion would eventually have a significant impact on how other courts considered the ATS.[56] This would begin to change when the Supreme Court took a greater interest in the statute.

In *Argentine Republic v. Amerada Hess*,[57] the Supreme Court began a slow but steady process of drafting shadow amendments to the ATS. This case involved a lawsuit brought against the Argentine government by two Liberian corporations alleging that the bombing of their vessel on the high seas constituted a violation of international law.[58] Federal jurisdiction was premised on the ATS.[59] While the district court dismissed the lawsuit for lack of subject matter jurisdiction, the Second Circuit reversed in a divided opinion.[60] Relying on *Filártiga*, the court held that the ATS granted jurisdic-

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accompanying notes 67–76. The Court's shadow amendments have addressed both the jurisdictional and cause of action components of the ATS.

[52] *See* Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980). There are isolated references to the ATS in earlier federal litigation, although these cases offered little analysis and no meaningful assessment of the statute's scope. *See, e.g.*, Adra v. Clift, 195 F. Supp. 857, 859 (D. Md. 1961) (referencing federal jurisdiction under the ATS); Bolchos v. Darrell, 3 F. Cas. 810, 810 (D.S.C. 1795) (identifying ATS as an alternate means for establishing federal jurisdiction).

[53] 670 F.3d at 885. *See generally* MARIA ARMOUDIAN, LAWYERS BEYOND BORDERS: ADVANCING INTERNATIONAL HUMAN RIGHTS THROUGH LOCAL LAWS AND COURTS 18–34 (2021); WILLIAM J. ACEVES, THE ANATOMY OF TORTURE: A DOCUMENTARY HISTORY OF *Filártiga v. Peña-Irala* (2007) (detailing the history of *Filártiga* and showcasing trial documents as well as commentary from litigation participants).

[54] *Filártiga*, 670 F.3d at 885.

[55] *Id.* at 887.

[56] *See generally* Sandra Coliver, Jennie Green & Paul Hoffman, *Holding Human Rights Violators Accountable by Using International Law in U.S. Courts: Advocacy Efforts and Complementary Strategies*, 19 EMORY INT'L L. REV. 169, 170–71 (2005); Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 281 (2003); Jeffrey M. Blum & Ralph Steinhardt, *Federal Jurisdiction Over International Human Rights Claims: The Alien Tort Claims Act After* Filártiga v. Peña-Irala*,* 22 HARV. INT'L L.J. 53, 112–13 (1981).

[57] 488 U.S. 428 (1989).

[58] *Id.* at 431–32.

[59] *Id.* at 432.

[60] Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir. 1987). *See generally* Monroe Leigh, *Judicial Decisions:* Amerada Hess v. Argentine Republic, 82 AM. J. INT'L L. 126, 126–29 (1988); William F. Webster, Amerada Hess Shipping Corp. v. Argentine

tion, and the subsequent adoption of the Foreign Sovereign Immunities Act ("FSIA") by Congress in 1976 did not eliminate existing remedies under the ATS.[61]

In a unanimous opinion, the Supreme Court reversed the Second Circuit.[62] Reviewing the history and text of the FSIA, the Court determined that the statute was meant to serve as the exclusive means for suing foreign governments in U.S. courts.[63] Accordingly, the ATS could not provide subject matter jurisdiction in such cases.[64] Other defendants, however, would remain subject to its provisions. According to the Court, "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants, and it of course has the same effect after the passage of the FSIA as before with respect to defendants other than foreign states."[65] Inserting the Supreme Court's interpretation of the ATS into the text results in a statute that functionally reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States **[but not when the violation is committed by a foreign State**]." To be clear, this is not a legislative amendment adopted by Congress. While the FSIA was adopted by Congress, it was silent on its relationship to the ATS. Rather, it was the Supreme Court that drafted this shadow amendment to the ATS. The outcome, however, is the same.

While *Amerada Hess* precluded ATS claims against foreign states, other defendants remained subject to its provisions. In subsequent cases, litigants raised various international law violations, including genocide, war crimes, crimes against humanity, summary execution, and torture.[66] However, a significant issue developed in the lower courts regarding the types of violations that could be brought under the ATS.

In *Sosa v. Alvarez-Machain*,[67] the Supreme Court added a second shadow amendment to address the type of claims that could be brought under the ATS. The *Sosa* lawsuit arose out of the abduction of a Mexican citizen, Humberto Alvarez-Machain, from Mexico and his transport to the United States for criminal prosecution.[68] Alvarez-Machain had been indicted

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Republic*: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1119–21 (1988).

[61] *See* Amerada Hess Shipping Corp., 830 F.2d at 426. *See generally* Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611.

[62] *Amerada Hess*, 488 U.S. at 433.

[63] *Id.* at 434.

[64] *See id.* at 438–39.

[65] *Id.* at 438.

[66] Beth Stephens, *Translating* Filártiga*: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT'L L. 1, 72–76 (2002); *see* Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2305–06 (2004).

[67] 542 U.S. 692 (2004).

[68] *See* William J. Aceves, *The Legality of Transborder Abductions: A Study of* United States v. Alvarez-Machain, 3 SW. J.L. & TRADE AM. 101, 104–08 (1996); Michael G.

in federal court for complicity in the murder of a U.S. Drug Enforcement Administration agent in Mexico.[69] He was subsequently acquitted of the charges and returned to Mexico. Alvarez-Machain then filed an ATS lawsuit raising claims of arbitrary detention against several U.S. and foreign defendants.[70] After several years of litigation, the Ninth Circuit allowed a single claim of arbitrary detention against one defendant to proceed.[71]

On appeal, the Supreme Court considered whether an isolated claim of arbitrary detention was actionable under the ATS.[72] To determine the statute's modern reach, the Court began by identifying three torts involving violations of the law of nations that existed when the ATS was adopted in 1789: (1) violations of safe conduct; (2) infringement of the rights of ambassadors; and (3) piracy.[73] According to the Court, these claims could be brought under the ATS. However, the Court acknowledged that federal courts could also recognize private rights of action for other international torts under the ATS as long as the relevant norms identified under the law of nations were specific, universal, and obligatory.[74] This framing would ensure that ATS cases did not create unforeseen consequences to "the foreign relations of the United States."[75] This second shadow amendment further revised the statute.

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of **[a specific, universal, and obligatory norm of]** the law of nations or a treaty of the United States **[but not when the violation is committed by a foreign State].**

McKinnon, United States v. Alvarez-Machain: *Kidnapping in the "War on Drugs"—A Matter of Executive Discretion or Lawlessness?*, 20 PEPP. L. REV. 1503, 1535–37 (1993).

[69] McKinnon, *supra* note 68, at 1535. The abduction of Alvarez-Machain also gave rise to a different case before the Supreme Court, *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), in which the Court held that a transborder abduction did not prevent Alvarez-Machain from being tried in the United States. *Id.* at 659.

[70] Alvarez-Machain also raised a separate claim against the United States under the Federal Tort Claims Act. *See* Alvarez-Machain v. United States, 96 F.3d 1246, 1249 (9th Cir. 1996).

[71] Alvarez-Machain v. United States, 331 F.3d 604, 641 (9th Cir. 2003).

[72] Sosa v. Alvarez-Machain, 542 U.S. 692, 733–34 (2004).

[73] *See id.* at 715. Blackstone identified these three offenses against the law of nations in his work on the common law. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *66, *68. However, there is no indication that they were the only possible offenses against the law of nations that could be prosecuted in domestic courts or that the law of nations could not expand to include other offenses. In fact, Blackstone acknowledged the existence of other norms within the law of nations. *See id.* at *67 (discussing disputes relating to prizes, shipwrecks, and hostage-taking).

[74] *Sosa*, 542 U.S. at 725–26. In addition, the Court made clear that the ATS is a jurisdictional grant, but the statute also acknowledges the common law power of the federal courts to recognize private rights of action for violations of the law of nations. *Id.* at 712.

[75] *Id.* at 727–28.

Sosa was a significant ruling because it allowed ATS litigation to proceed, "subject to vigilant doorkeeping" by the federal courts.[76]

In *Kiobel v. Royal Dutch Petroleum Co*., the Court drafted a new shadow amendment that addressed the statute's extraterritorial reach.[77] This case involved claims brought against several foreign corporations for human rights abuses committed in the Ogoni region of Nigeria.[78] While the district court would have allowed some of the plaintiffs' claims to proceed, the Second Circuit dismissed the entire complaint.[79] The Supreme Court originally granted certiorari on the question of corporate liability, which was then briefed by the parties.[80] After oral argument, the Court requested the parties address the question of extraterritoriality.[81] This request resulted in a new round of briefing and argument.

In a 5-4 decision, the Court affirmed the dismissal of the case.[82] The Court first determined that ATS claims must overcome the presumption against extraterritoriality, which generally limits the applicability of federal statutes to only domestic conduct.[83] Repeating its earlier admonitions from *Sosa*, the Court expressed concern with the dangers posed by "unwarranted judicial interference in the conduct of foreign policy . . . ."[84] Thus, ATS claims involving foreign conduct may be pursued only when they "touch and concern" the United States with sufficient force to overcome the presumption against extraterritoriality.[85] The Court did not explain what con-

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[76] *Id.* at 729. *See generally* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241 (2004).

[77] 569 U.S. 108 (2013). *See generally* Sarah H. Cleveland, *After* Kiobel, 12 J. INT'L CRIM. JUST. 551 (2014); Roger Alford, *Human Rights After* Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation*, 63 EMORY L.J. 1089 (2014) (arguing that *Kiobel* significantly limited the reach of the ATS and has precluded the majority of human rights claims).

[78] *Kiobel*, 569 U.S. at 108.

[79] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 149 (2d Cir. 2010).

[80] *Kiobel*, 569 U.S. at 114.

[81] The Court asked the parties to address the following question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." Kiobel v. Royal Dutch Petroleum Co., 565 U.S. 1244 (2012) (order requesting supplemental briefing).

[82] *Kiobel*, 569 U.S. at 114.

[83] *Id.* at 115. The Court cited its earlier decision in *Morrison v. Nat'l Austl. Bank Ltd.*, which stated that a statute has no extraterritorial application when its text provides no clear indication of such reach. 561 U.S. 247, 255 (2010). *See generally* William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 HARV. L. REV. 1582 (2020) (arguing that the presumption against extraterritoriality has grown stronger in recent years due to Supreme Court decisions). The Court's application of the presumption against extraterritoriality to the ATS is puzzling because the presumption had not been applied previously to jurisdictional statutes. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. a (AM. L. INST. 2018) ("The presumption does not apply to provisions granting subject-matter jurisdiction to federal courts."). The Court justified its application because "the principles underlying the canon of interpretation similarly constrain courts considering causes of action that may be brought under the ATS." *Kiobel*, 569 U.S. at 116.

[84] *Kiobel*, 569 U.S. at 116 (citing *Sosa*, 542 U.S. at 727).

[85] *Id.* at 124–25.

nections were sufficient to meet the "touch and concern" standard. It added, however, that mere corporate presence in the United States was insufficient.[86] This shadow amendment expanded the text while further narrowing the statute's reach.

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of **[a specific, universal, and obligatory norm of]** the law of nations or a treaty of the United States **[but only when the tort touches and concerns the United States with sufficient force to overcome the presumption against extraterritoriality, although mere corporate presence is insufficient,] [and not when the violation is committed by a foreign State]**.

In 2018, the Supreme Court finally considered the issue of corporate liability under the ATS. *Jesner v. Arab Bank, PLC* involved five lawsuits brought against a foreign bank that allegedly served as a financial intermediary to several designated terrorist groups.[87] The district court dismissed the lawsuits because of circuit precedent that foreign corporations could not be subject to ATS liability.[88] The Second Circuit affirmed the decision, and the Supreme Court granted certiorari.[89]

In a 5-4 decision, the Supreme Court upheld this interpretation of the ATS, thereby narrowing the statute's reach yet again.[90] The Court's decision was based on separation of powers concerns and foreign policy considerations.[91] According to the Court, allowing foreign corporations to be sued in U.S. courts would create diplomatic tensions, which Congress was better suited to consider.[92] Incorporating this shadow amendment extended the ATS to read:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of **[a specific, universal, and obligatory norm of]** the law of nations or a treaty of the United States **[but only when the tort touches and concerns the United States with sufficient force to overcome the presumption against extraterritoriality, although mere corporate presence is insufficient,] [and not when the violation is committed by a foreign State] [or a foreign corporation]**.

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[86] *Id.* at 125.
[87] 138 S. Ct. 1386, 1393 (2018).
[88] Linde v. Arab Bank, No. 04-CV-2799, 2013 WL 1952458 (E.D.N.Y. May 10, 2013) (order dismissing all claims).
[89] *Jesner*, 138 S. Ct. at 1395.
[90] *See id.* at 1408.
[91] *Id.* at 1403.
[92] *Id.* at 1407.

Because *Jesner* addressed only foreign corporations, it left open the question of ATS liability for U.S. corporations.

In thirty-three years, the Supreme Court's shadow amendments functionally transformed the ATS from its original thirty-three word configuration to a lengthier eighty-one words.[93] These cumulative amendments caused significant confusion in the lower federal courts and generated extensive litigation as parties debated their meaning.[94] This struggle set the stage for the Court's next ATS decision.

IV. *NESTLÉ USA, INC. V. DOE*

In *Nestlé USA, Inc. v. Doe*, the plaintiffs were victims of child slave labor who were forced to work at cocoa plantations in the Ivory Coast.[95] They alleged the two defendants, U.S. corporations Nestlé USA, Inc. and Cargill, Inc., were complicit in their mistreatment and that federal courts should have jurisdiction over their claims pursuant to the ATS.[96]

The district court originally dismissed the lawsuit under the logic of *Kiobel*, but the Ninth Circuit reversed.[97] According to the Ninth Circuit, the plaintiffs had alleged that the defendants' employees "regularly inspect[ed] operations in the Ivory Coast and report[ed] back to the United States offices, where these financing decisions, or 'financing arrangements,' originated."[98] In these circumstances, the court found such domestic conduct was relevant for purposes of determining whether the ATS claims could proceed. It then remanded the case to allow the plaintiffs to amend their complaint to specify whether the relevant conduct was attributable to the defendants.[99] The defendants appealed the Ninth Circuit's decision to the Supreme Court.[100] The questions presented to the Court were twofold: (1) did aiding and abetting in U.S. territory satisfy the "touch and concern" stan-

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[93] Different interpretations of the Court's decisions could result in different words and eventual word counts. However, such variation would not have a meaningful impact on the underlying analysis.

[94] *See, e.g.*, Recent Cases, Doe I v. Nestle, S.A., 133 HARV. L. REV. 2643 (2020); Leading Case, Jesner v. Arab Bank, PLC, 132 HARV. L. REV. 397 (2018). *See generally* Cortelyou C. Kenney, *Measuring Transnational Human Rights*, 84 FORDHAM L. REV. 1053 (2015) (performing quantitative analysis of post-1980 human rights litigation, including ATS suits); Roxanna Altholz, *Chronicle of a Death Foretold: The Future of U.S. Human Rights Litigation Post*-Kiobel, 102 CALIF. L. REV. 1495 (2014).

[95] 141 S. Ct. 1931, 1935 (2021).

[96] *Id.* Separate lawsuits were filed against Nestlé USA, Inc. and Cargill, Inc. The cases were consolidated by the Supreme Court.

[97] Doe v. Nestle, S.A., 906 F.3d 1120, 1122 (9th Cir. 2018), amended by Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019).

[98] *Id.* at 1126 (quoting Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 834 F.3d 201, 217 (2d Cir. 2016)).

[99] *Id.* at 1127.

[100] Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom.* Nestle USA, Inc. v. Doe I, 207 L.Ed.2d 1114 (U.S. Jul. 2, 2020) (No. 19-416); Doe v. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019), *cert. granted sub nom.* Cargill, Inc. v. Doe I, 207 L.Ed.2d 1114 (U.S. Jul. 2, 2020) (No. 19-453).

dard set forth in *Kiobel*, and (2) were U.S. corporations subject to ATS claims.[101]

In a fractured opinion, the Supreme Court rejected the plaintiffs' ATS claims.[102] While aiding and abetting as well as corporate liability were the primary issues briefed by the parties, the Court focused its opinion on the standards for assessing extraterritoriality in ATS cases.[103]

Part II of the *Nestlé* opinion considered whether the plaintiffs' action met the *Kiobel* standard for allowing extraterritorial claims under the ATS.[104] In their briefing, the plaintiffs had argued that all major operational decisions regarding the defendants' cocoa supply chain in the Ivory Coast were made or approved in the United States.[105] Moreover, they argued the defendants knew that child slave labor was being used and that they "purposefully relied on the enslavement of children to increase profits by ensuring the flow of cheap cocoa."[106] Accordingly, the plaintiffs argued that aiding and abetting "child slavery and forced labor from U.S. territory 'touch[es] and concern[s]' the United States" sufficiently to overcome the presumption against extraterritoriality.[107]

Eight justices rejected this argument, finding the plaintiffs' claims were extraterritorial and could not proceed.[108] Writing for the majority, Justice Thomas stated that the alleged connections between the corporate defendants and the overseas harms were insufficient to overcome the presumption against extraterritoriality.[109] However, Justice Thomas did not apply the *Kiobel* "touch and concern" standard to assess the defendants' conduct. In fact, the term "touch and concern" does not appear in any part of the Court's opinion, including the concurring or dissenting opinions. Instead, Justice Thomas argued that the "plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.' "[110] The "focus" standard was used by the Court in *RJR Nabisco, Inc. v. European Community*, a non-ATS case that examined the standard for overcoming the presumption against extraterritoriality.[111]

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[101] *Id.*

[102] *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936.

[103] Notwithstanding the focus on other topics, five justices explicitly rejected the claim of corporate immunity under the ATS.

[104] *Nestlé USA, Inc.*, 141 S. Ct. at 1936.

[105] *See* Brief for Respondents at 4, *Nestlé USA, Inc.*, 141 S. Ct. 1931 (2021) (No. 19-416).

[106] *Id.* at 5.

[107] *Id.* at 11.

[108] *Nestlé USA, Inc.,* 141 S. Ct. at 1936–37. Only Justice Alito dissented from the Court's opinion. *Id.* at 1950 (Alito, J., dissenting).

[109] *Id.*

[110] *Id.* at 1936 (quoting RJR Nabisco, Inc. v. European Community, 579 U.S. 325, 337 (2016)).

[111] 579 U.S. 325 (2016). But as Professor Dodge has explained, the assertion in *RJR Nabisco, Inc.* that conduct must occur in the United States was mere dictum. William S. Dodge, *The Presumption against Extraterritoriality in Two Steps*, 110 AJIL UNBOUND 45, 49–50 (2016).

Applying the new "focus" standard, Justice Thomas concluded that the plaintiffs' claims could not proceed. To do so would impermissibly seek extraterritorial application of the ATS because "[n]early all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[112] According to Justice Thomas, the plaintiffs' allegations that major operational decisions were made in the United States "cannot alone establish domestic application of the ATS."[113] Moreover, general corporate activity, including decision-making, is insufficient.[114] Something more is required because "generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek—aiding and abetting forced labor overseas—and domestic conduct."[115]

While Part II of the opinion garnered eight votes, Part III of the opinion received far less support.[116] Only Justices Gorsuch and Kavanaugh joined Justice Thomas in this part of the opinion.[117] According to Justice Thomas, there was a separate and more fundamental reason why the plaintiffs' ATS claims should be dismissed: federal courts did not have authority to create a cause of action under the ATS because "[t]hat job belongs to Congress, not the Federal Judiciary."[118] While he was prepared to accept the ability of federal courts to recognize the three historical torts involving the law of nations that existed when the ATS was adopted in 1789 (violations of safe conduct, infringement of the rights of ambassadors, and piracy), Justice Thomas declined to extend this judicial power to any other torts.[119] His reasons for limiting judicial authority stemmed from separation of powers concerns as well as foreign policy considerations.[120]

For Justice Thomas, federal courts simply do not have the capacity to develop private rights of action for violations of international law. This power belongs to Congress, and courts must defer to congressional competence.[121] According to Justice Thomas, the test for allowing private rights of action under the ATS "is extraordinarily strict. A court "must" not create a private right of action if it can identify even one ""sound reaso[n] to think

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[112] *Nestlé USA, Inc.*, 141 S. Ct. at 1937.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at 1934.
[117] *Id.*
[118] *Id*. at 1937. In his concurring opinion, Justice Gorsuch also argued that courts do not have discretion to create new causes of action under the ATS. Nestlé USA, Inc., 141 S. Ct. at 1942 (Gorsuch, J., concurring).
[119] *Id*. at 1939. *See also* Sosa v. Alvarez-Machain, 542 U.S. 692, 715. This position can be traced to Judge Bork's concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).
[120] *Nestlé USA, Inc.*, 141 S. Ct. at 1939–40.
[121] *Id.* at 1937.

Congress might doubt the efficacy or necessity of [the new] remedy.'"'"[122] In fact, Justice Thomas argued that congressional action was necessary before courts could recognize additional ATS causes of action: "Whether and to what extent defendants should be liable under the ATS for torts beyond the three historical torts identified in *Sosa* lies within the province of the Legislative Branch."[123]

In concurrence, Justice Gorsuch echoed the concerns raised by Justice Thomas in Part III of the Court's decision.[124] He rejected the idea that federal courts have authority to create new causes of action under the ATS.[125] Justice Sotomayor also concurred in the Court's judgment, but she rejected Justice Thomas's efforts to limit the ATS to the three historical torts recognized in 1789.[126] Such an approach would contravene the "Court's express holding in *Sosa* and the text and history of the ATS."[127] Finally, Justice Alito dissented because he believed the Court should have addressed corporate liability under the ATS—which was the primary question in the petitions for certiorari—instead of resolving the case by addressing the issue of extraterritoriality.[128]

In *Nestlé*, the Court held the plaintiffs had failed to "plead facts sufficient to support a domestic application of the ATS."[129] On remand, the Ninth Circuit affirmed the district court's original dismissal of the lawsuit, thereby ending the litigation.[130]

V. The Power of Shadow Amendments

Legal professionals routinely analyze statutory language. While this invariably begins with the text, this analysis must also include assessing the consequences of interpretation. Shadow amendments function as the judicial equivalent of formal amendments adopted by Congress. Thus, translating shadow amendments into legislative language and placing them into the text is a valuable methodology for understanding a statute.[131] Because the ATS is

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[122] *Id.* at 1938–39 (alterations in original) (quoting Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1402 (2018)).

[123] *Id.* at 1940.

[124] *Id.* at 1942–43 (Gorsuch, J., concurring).

[125] *Id.*

[126] *See id*. at 1944 (Sotomayor, J., concurring in part and concurring in the judgment).

[127] *Id.*

[128] *Id.* at 1950 (Alito, J., dissenting). Justice Alito indicated that corporate status did not justify special immunity from ATS claims: "[I]f a particular claim may be brought under the ATS against a natural person who is a United States citizen, a similar claim may be brought against a domestic corporation." *Id.*

[129] *Id*. at 1937 (majority opinion).

[130] Doe v. Nestle S.A., 4 F.4th 706 (9th Cir. 2021).

[131] Scholars have also recognized the value of analyzing language through diagrams and schematics. *See, e.g.*, James Durling, *Diagramming Interpretation*, 35 Yale J. Regul. 325, 327 (2018); Adam L. Rosman, *Visualizing the Law: Using Charts, Diagrams, and Other Images to Improve Legal Briefs*, 63 J. Legal Educ. 70, 70 (2013); Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 Tex. Rev. L. &

a mere thirty-three words long and has been subject to repeated shadow amendments, it provides an ideal example for assessing this judicial output.[132]

A. Word Counts

Between 1989 and 2018, the Supreme Court adopted four shadow amendments to the ATS. In *Nestlé*, the Court issued a fifth shadow amendment to the statute, replacing the "touch and concern" standard identified in *Kiobel* with a "focus" standard. ATS plaintiffs must now establish that the conduct relevant to the statute's focus occurred in the United States, a narrower framing than the *Kiobel* standard.[133] When corporate defendants are involved, the Court indicated that even general corporate presence or activity in the United States is insufficient for ATS liability; something more is required.[134] These revisions were added to the shadow amendments already in place. Accordingly, the statute now reads:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of **[a specific, universal, and obligatory norm of]** the law of nations or a treaty of the United States **[but only when the conduct relevant to the statute's focus occurred in the United States, although general corporate presence or activity, including decision-making, is insufficient,] [and not when the violation is committed by a foreign State] [or a foreign corporation]**.

The ATS has thus grown from its original thirty-three word configuration to a heftier eighty words. While it may seem unusual to consider a statute's word count, it can provide a tangible and measurable data point.[135]

POL. 261, 266 (2004) ("For those of you who think that diagramming sentences in grade school was a waste of time, it has been used often by our Court to make sure we have the correct reading of a sentence.").

[132] Scholars have also been using large databases of naturally occurring text to assess legal language. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275, 277 (2021); James C. Phillips, Daniel M. Ortner & Thomas R. Lee, *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 20, 23 (2016).

[133] *Nestlé USA, Inc.*, 141 S. Ct. at 1936–37.

[134] *Id.* at 1937.

[135] Numerous studies have used word count analysis to study legislation. *See, e.g.,* Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. REGUL. 818, 840 (2021) (using word counts to assess an agency's normative orientation in promulgating rules); Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1590–91 (2018) (using word counts to measure degree of specificity in legislation); David L. Schwartz, *Explaining the Demise of the Doctrine of Equivalents*, 26 BERKELEY TECH. L.J. 1157, 1185 (2011) (using word counts to assess and explain changes in patent law); Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 INT'L REV. L. & ECON. 295, 305 (1996) (using word counts to assess judicialization of public policy).

If "we're all textualists now," as Justice Kagan announced, and words matter in statutory construction, this development merits some reflection.[136]

Through multiple shadow amendments, the ATS has grown in size by 142% of its original length. Studies of legislation have identified the value of word count analysis. Large word counts are seen as a proxy for "substantive complexity and detail."[137] They are also seen as constraining the actions of regulatory bodies.[138] In studies of legislation, "[m]ore words imply more precise instructions . . . and thus less discretion."[139] As a result, legislative amendments that increase the number of words in a statute will, "on average and *ceteris paribus*," often lead to more complexity, precision, and corresponding constraints on behavior.[140]

This dynamic is particularly evident with jurisdictional statutes. Federal courts are courts of limited subject-matter jurisdiction, and they only have authority to adjudicate specified claims.[141] While Article III of the Constitution establishes the broad parameters of federal subject-matter jurisdiction, the details are regulated by Congress through various jurisdictional statutes.[142] Thus, judicial authority to consider claims in federal court is gov-

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[136] Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube at 8:28 (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/9M52-P3MR] ("Well I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench."). *See also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, 35–36 (2006) ("[W]e have all become textualists."). *But see* Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 Vand. L. Rev. 499, 502 (2017) (arguing that recent Supreme Court decisions have questioned this proposition).

[137] Sari Graben & Eric Biber, *Presidents, Parliaments, and Legal Change: Quantifying the Effect of Political Systems in Comparative Environmental Law*, 35 Va. Env't L.J. 357, 399 (2017); *see also* Joseph P. Liu, *Copyright Rulemaking: Past as Prologue*, 33 Berkeley Tech. L.J. 627, 629–30 (2018) (analyzing the historical increase in the word count of the Copyright Act and underlying copyright regulations as a possible proxy for their complexity); Kerri Milita, *Election Laws and Agenda Setting: How Election Law Restrictiveness Shapes the Complexity of State Ballot Measures*, 15 State Pol. & Pol'y Q. 119, 126 (2015) (explaining that hard policy initiatives often concern issues that are technical and thus will require more words to summarize than simple policy initiatives).

[138] John D. Huber, Charles R. Shipan & Madelaine Pfahler, *Legislatures and Statutory Control of Bureaucracy*, 45 Am. J. Pol. Sci. 330, 332, 335 (2001).

[139] *Id.* at 337.

[140] Farhang, *supra* note 135, at 1590 ("[T]he claim is that over a large body of statutes, on average and *ceteris paribus*, increasingly detailed policy instructions will be associated with increasing word counts."); *see also* John D. Huber & Charles R. Shipan, Deliberate Discretion? The Institutional Foundations of Bureaucratic Autonomy 44–56 (2002). Large word counts may reflect other factors, such as a broad legislative scope. *See* Graben & Biber, *supra* note 137, at 399; *see also* Liu, *supra* note 137, at 632.

[141] Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994) ("Federal courts are courts of limited jurisdiction."). *See generally* Stephen E. Sachs, *The Unlimited Jurisdiction of the Federal Courts*, 106 Va. L. Rev. 1703 (2020) ("A federal court's *subject-matter* jurisdiction is affirmatively limited by the Constitution.") (emphasis in original); Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. Rev. 1778 (2020).

[142] *See* John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. Chi. L. Rev. 203, 204 (1997); Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1037 (1982). While

erned by the scope of the applicable jurisdictional statute. Word count analysis posits that legislative amendments which increase the word count of jurisdictional statutes will, on average and *ceteris paribus*, be more likely to constrain federal subject-matter jurisdiction.[143] While increased word counts do not reveal the explicit meaning of the added text,[144] they suggest some change has occurred and that this change has likely constrained federal jurisdiction.

Like their legislative counterparts, shadow amendments reflect intentional drafting, albeit by judges. If shadow amendments are analogous to legislative amendments, word count analysis can be equally relevant. Accordingly, shadow amendments that increase the word count of jurisdictional statutes—like the Alien Tort Statute—will be more likely to constrain federal subject-matter jurisdiction.

The surplusage canon of statutory construction reinforces these findings.[145] Since shadow amendments function as the judicial equivalent of formal amendments to legislation adopted by Congress, courts should interpret them through traditional canons of statutory construction. The surplusage canon provides that every word in a statute should be given effect (*verba cum effectu sunt accipienda*).[146] Thus, every new word changes a statute's meaning, some subtly, others significantly.[147] Textualists—who give primacy to legal text[148]—should be concerned about shadow amendments that increase word count. Even purposivists—who see legislation as "a purposive act" and believe "judges should construe statutes to execute that legislative

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long-recognized, congressional authority over federal court jurisdiction poses separation of powers concerns. Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 260 (2012); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 882 (2011).

[143] Historically, federal courts have narrowly interpreted jurisdictional statutes. *See* WRIGHT & MILLER, *supra* note 25, at § 3602.1 ("It is a familiar proposition that the constitutional policy of limited jurisdiction requires that the statutes granting subject matter jurisdiction to the federal courts be strictly construed."). *But see* Bruhl, *supra* note 136, at 499, 502 (arguing that recent Supreme Court decisions have questioned this proposition).

[144] Black & Spriggs II, *supra* note 9, at 629 ("We are not suggesting the amount of verbiage in an opinion measures the content of law in a direct sense, but we nonetheless submit that it represents an empirical referent capable of revealing interesting variation . . . .").

[145] *See generally* Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389 (2005); Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647 (1992); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

[146] Williams v. Taylor, 529 U.S. 362, 404 (2000). *See also* JELLUM, *supra* note 11, at 132–33; SCALIA & GARNER, *supra* note 11, at 174; Mendelson, *supra* note 14, at 75.

[147] *See* Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 812 (1983) ("Every word in a statute counts [and] every word is a constitutive act . . . ."). While Judge Posner was describing the legislative drafting process, his remarks apply with equal vigor to judicial drafting.

[148] *See* Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 273 (2020); Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 274 (2019); David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 220 (2019); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 327 (1995).

purpose"[149] —should care about shadow amendments and their corresponding word counts.

Like the Ship of Theseus, the modern ATS is not the same statute that was adopted in 1789 or amended by Congress in 1873, 1911, or 1948. Each shadow amendment created a slightly different statute, thereby affecting its identity over time. Thus, the ATS of 2022 is not even the same statute that was amended by the Supreme Court in 1989, 2004, 2013, 2018, or 2021. Each shadow amendment and its corresponding word count added greater specificity to the ATS, constraining its reach with each iteration.

B. Words Count

After five shadow amendments, the ATS of 2022 is far removed from the original version of the ATS adopted in 1789, and it reflects a worldview that would be foreign to its drafters. The narrowing of the ATS—requiring that the relevant conduct occur in the United States—is contrary to the historical record.[150] In 1792, for example, then-Secretary of State Thomas Jefferson cited to the ATS as a mechanism for providing civil redress in cases where a U.S. citizen commits an extraterritorial violation of the law of nations.[151] Jefferson's interpretation of the ATS was confirmed in an exchange with Attorney General Edmund Randolph.[152] Significantly, Oliver Ellsworth—the presumed author of the ATS—appeared to agree with this view.[153] In 1795, the new Attorney General William Bradford issued an opinion with similar conclusions.[154] For the founding generation, the extraterritorial nature of the underlying conduct and its purported focus within the United States were irrelevant facts for assessing ATS jurisdiction.

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[149] KATZMAN, *supra* note 11, at 31; *see also* Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 266 (2002); Peter L. Strauss, *The Courts and Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 253 (1998).

[150] *See* Brief of Amici Curiae Professors of Legal History at 7–8, Doe I v. Nestle USA, Inc., 788 F.3d 946 (9th Cir. 2015) (discussing recently discovered historical record regarding the ATS).

[151] Thomas Jefferson, *Opinion on Offenses against the Law of Nations* (Dec. 3, 1792), *reprinted in* 24 THE PAPERS OF THOMAS JEFFERSON 693, 694 (John Catanzariti ed., 2018).

[152] Thomas Jefferson, *Edmund Randolph's Opinion on Offenses against the Law of Nations* (Dec. 5, 1792), *reprinted in* 24 THE PAPERS OF THOMAS JEFFERSON 702 (John Catanzariti ed., 2018).

[153] David Golove, *The Alien Tort Statute and the Law of Nations: New Historical Evidence of Founding-Era Understandings*, JUST SECURITY (Nov. 17, 2020), https://www.justsecurity.org/73376/the-alien-tort-statute-and-the-law-of-nations-new-historical-evidence-of-founding-era-understandings/ [https://perma.cc/8C4H-T494]. While this historical evidence was presented to the Supreme Court in *Nestlé* by a group of legal historians, the Court ignored it. *See* Brief of Amici Curiae Professors of Legal History, *supra* note 150, at 15–25.

[154] *See* Breach of Neutrality, 1 Op. Att'y Gen. 57 (1795) (acknowledging the possibility of ATS claims against U.S. citizens for actions committed abroad).

The consequences of the Court's shadow amendments are profound.[155] Consistent with word count analysis, they have constrained the statute's reach and limited judicial discretion. Cases that could once be filed under the ATS are no longer viable. Even cases that the Court itself once cited with approval would fail the strictures of the modern ATS.[156]

Substantively, the arguments offered by the Court to justify these shadow amendments are also unpersuasive. The assertion that separation of powers concerns counsel against recognizing private rights of action is belied by the very statute the Supreme Court has been interpreting. Congress gave federal courts that authority under the ATS. In her concurring opinion in *Nestlé*, Justice Sotomayor pointed out that "[r]espect for the separation of powers is hardly served by refusing a legislatively assigned task."[157] She observed that the First Congress specifically assigned the task of recognizing private rights of action under the ATS to the federal courts.[158] In fact, "[i]t would be surprising (and, I suspect, distressing) to the Congress that enacted the ATS to learn that federal courts lack institutional capacity to do the very thing the ATS presumes they will do."[159] Accordingly, Justice Sotomayor argued that "'a federal court's authority to recognize a damages remedy' under the ATS very much 'rest[s] at bottom on a statute enacted by Congress.'"[160]

The assertion that foreign policy considerations preclude modern ATS claims is equally unconvincing. There is little evidence that ATS claims involving violations of safe conduct, infringement of the rights of ambassadors, or piracy—which the Supreme Court would presumably allow—would generate "fewer foreign-policy concerns than a suit for aiding and abetting child slavery."[161] In fact, Congress has adopted other statutes that explicitly authorize civil claims for human trafficking and forced labor, as well as for torture and extrajudicial killings committed anywhere in the world.[162] These statutes undermine the foreign policy arguments raised against the ATS. Moreover, every concern the Court has raised with respect to ATS jurisdiction, and the corresponding shadow amendments it adopted in response to

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

[156] In *Sosa*, for example, the Supreme Court cited to several cases that presumably would fail the new *Kiobel-Nestlé* "focus" standard. Sosa v. Alvarez-Machain, 542 U.S. 692, 731–32 (2004) (citing with approval *In re* Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1993) and Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980)).

[157] Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1947 (2021) (Sotomayor, J., concurring in part and concurring in the judgment).

[158] *Id.*

[159] *Id.* at 1948. *See also* FLAHERTY, *supra* note 47, at 69 (recognizing the role of the Supreme Court in addressing cases that affect foreign affairs).

[160] *Nestlé USA, Inc.*, 141 S. Ct. at 1947 (Sotomayor, J., concurring in part and concurring in the judgement).

[161] *Id.* at 1948.

[162] *See, e.g.*, Trafficking Victims Protection Reauthorization Act of 2003, 22 U.S.C. §§ 7101–7114; Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note.

these concerns, could be resolved by well-established rules on personal jurisdiction as well as extant judicial doctrines, including the political question doctrine, *forum non conveniens*, and the act of state doctrine.[163]

The history of the Court's ATS shadow amendments reveals other troubling features. While shadow amendments function as the judicial equivalent of legislative amendments, the Court has engaged in a cavalier approach to its own work product.[164] In *Kiobel*, for example, the Court indicated that ATS claims involving foreign conduct may only be pursued when they "touch and concern" the United States with sufficient force to overcome the presumption against extraterritoriality.[165] Yet the Court failed to apply its own extraterritoriality test to the underlying cause of action in the case.[166] Eight years later, the Court applied a different standard to determine the viability of extraterritorial claims under the ATS. In *Nestlé*, the Court replaced the "touch and concern" standard with the narrower "focus" test to assess the defendants' conduct.[167] It did so with no explanation even though its own case law did not require that "the conduct of the statute's focus occur[ ] in the United States."[168] More broadly, the presumption against extraterritoriality did not even exist in its present form when Congress adopted the ATS in 1789 or amended it in 1873, 1911, and 1948. Yet the *Kiobel-Nestlé* line of cases seems to assert "the Court's authority to change the presumption against extraterritoriality, and to apply it retroactively, without regard to the expectations of the enacting Congress."[169] Commentators have regularly criticized the Court for such "backdoor" lawmaking.[170]

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[163] Aceves, *supra* note 3; *Nestlé USA, Inc*., 141 S. Ct. at 1948 (Sotomayor, J., concurring in part and concurring in the judgment). *But see* Sarei v. Rio Tinto PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated on other grounds*, 569 U.S. 945 (2013) (dismissing political question and act of state challenges to ATS case).

[164] *Cf.* Daniel A. Farber, *Statutory Construction and Legislative Supremacy*, 78 GEO. L.J. 281, 298 (1989) ("Judges must not allow legislators to use statutes to strike poses, knowing that courts will bail them out later."); Felix Frankfurter, *A Symposium on Statutory Construction: Foreword*, 3 VAND. L. REV. 365, 368 (1950) ("Judicial expansion of meaning beyond the limits indicated is reprehensible because it encourages slipshodness in draftsmanship and irresponsibility in legislation.").

[165] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124–25 (2013).

[166] Dodge, *supra* note 83, at 1607–08.

[167] *Nestlé USA, Inc.*, 141 S. Ct. at 1936 (quoting RJR Nabisco, Inc. v. Eur. Cmty., 579 U.S. 325, 337 (2016)).

[168] *See id*. The Restatement (Fourth) does not require that conduct occur in the United States. *See* RESTATEMENT (FOURTH), *supra* note 83, at § 404.

[169] Dodge, *supra* note 83, at 1587. However, Professor Dodge argues that the application of the new presumption against extraterritoriality to existing federal statutes is appropriate. *Id*. at 1588. There are broader concerns about the Court's use of substantive canons to interpret a statute in ways that seem contrary to the plain text. *See* Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010) ("A court applying a canon to strain statutory text uses something other than the legislative will as its interpretive lodestar, and in so doing, it acts as something other than a faithful agent.").

[170] *See, e.g.*, Krishnakumar, *supra* note 10, at 1280. *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 598 (1992).

The ATS is a paradigm for how shadow amendments can overwhelm a statute through activism and accretion. After five shadow amendments, the Supreme Court has generated unneeded complexity and moved the ATS far beyond its original thirty-three word configuration and understanding. The ATS now includes conditions that significantly affect its cohesion and limit its functionality. In fact, these conditions have left the ATS almost a nullity.[171] Having interpreted the ATS in such a manner, it is incongruous for the Supreme Court to assert that these judicially created amendments should now be remedied by Congress.[172] Indeed, this assertion is contrary to the Court's own reasoning that the ATS was not intended to be a "jurisdictional convenience to be placed on the shelf" until Congress adopted additional causes of action.[173]

As reflected in the historical record, Congress is fully capable of amending the ATS.[174] Indeed, it has done so on several occasions.[175] It has also drafted new legislation to promote accountability for human rights abuses committed abroad, including the Torture Victim Protection Act and the Trafficking Victims Protection Reauthorization Act.[176] If the Supreme Court truly disagrees with the ATS and what Congress originally drafted in 1789 and amended in 1873, 1911, and 1948, it would do well to heed its own advice: those who disagree with federal legislation should look to Congress—and not the courts—for relief.[177]

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[171] *See, e.g.*, Oona A. Hathaway, Nestlé USA, Inc. v. Doe *and* Cargill, Inc. v. Doe*: The Twists and Turns of the Alien Tort Statute*, AM. CONST. SOC'Y, SUP. CT. REV. 2020–21, https://www.acslaw.org/analysis/acs-journal/2020-2021-acs-supreme-court-review/nestle-usa-inc-v-doe-and-cargill-inc-v-doe-the-twists-and-turns-of-the-alien-tort-statute/ [https://perma.cc/W9A8-GRV4]; William S. Dodge, *The Surprisingly Broad Implications of* Nestlé USA, Inc. v. Doe *for Human Rights Litigation and Extraterritoriality*, JUST SECURITY (June 18, 2021), https://www.justsecurity.org/77012/the-surprisingly-broad-implications-of-nestle-usa-inc-v-doe-for-human-rights-litigation-and-extraterritoriality/ [https://perma.cc/PEH9-WE3X].

[172] *See, e.g.*, *Nestlé USA, Inc.*, 141 S. Ct. at 1943 (Gorsuch, J., concurring) ("[A]ny debate over the plaintiffs' proposed cause of action belongs before lawmakers, not judges.").

[173] Sosa v. Alvarez-Machain, 542 U.S. 692, 719 (2004).

[174] In May 2022, for example, Senator Richard Durbin introduced legislation to amend the ATS in order to explicitly establish jurisdiction for extraterritorial harms. *See* Alien Tort Statute Clarification Act, S. 4155, 117th Cong. (2022).

[175] *See supra* note 48.

[176] *See supra* note 162.

[177] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1753 (2020) ("The place to make new legislation, or address unwanted consequences of old legislation, lies in Congress."); Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979) ("[W]e are not at liberty to legislate. If there is to be a federal damages remedy under these circumstances, Congress must provide it."); United States v. Louisiana, 394 U.S. 1, 6 (1969) ("But any alleged inequitable results, as well as any alleged detriment to orderly mineral development, derive from a consistent reading of the scheme Congress fashioned; thus Texas must look to Congress for relief.").

VI. Conclusion

While courts have interpreted statutes for centuries, there is value in attaching a discrete label to their work product. The term "shadow amendment" provides an accurate description of judicial interpretation as legislation. It also affects how we think about statutory construction.[178] In fact, "studies [of labeling] suggest a sort of linguistic Heisenberg principle: as soon as you label a concept, you change how people perceive it."[179] Judicial interpretations should be perceived as what they are: ersatz amendments to statutes.[180] There are benefits to naming legal phenomenon, as reflected in the recent labeling of the Supreme Court's shadow docket, yet another spectral product of the legal system.[181] While the shadow docket—cases considered outside of the Court's regular review process—existed for decades, naming this legal phenomenon brought greater awareness to the Court's practice.[182] Because the shadow docket is controversial, this heightened scrutiny has also led to calls for reform.[183]

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[178] Even the term "statutory construction" suggests that judicial interpretation is not a passive exercise but instead implicates the active building of legislation. *See, e.g.*, Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 99 (2003) (discussing the relationship between construction and interpretation in the constitutional context); Francis Lieber, Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics 56 (1839); Jamal Greene, *On the Origins of Originalism*, 88 Tex. L. Rev. 1, 10 (2009) (explaining that originalism rose to prominence as a means of "control[ling] activist judges"). However, ardent textualists and originalists reject this interpretation. *See, e.g.*, Scalia & Garner, *supra* note 11, at 13–15; John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 Nw. U. L. Rev. 776 (2009) ("Construction is also in fundamental tension with the judicial function in constitutional law because it permits judges to declare binding obligations even though no law guides them.").

[179] Adam Alter, *The Power of Names*, New Yorker (May 28, 2013), https://www.newyorker.com/tech/annals-of-technology/the-power-of-names [https://perma.cc/G9BL-GM6L].

[180] *See* Kavanagh, *supra* note 27, at 261 (arguing interpretation involves *judicial* lawmaking).

[181] *See generally* Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic (2022); William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & Lib. 1 (2015).

[182] Identification and naming have contributed to some of the most significant advances in legal scholarship. *See, e.g.*, Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241 (1991) (identifying and describing the consequences of intersectionality); Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. Chi. Legal F. 139 (1989) (same); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 Am. U. L. Rev. 367 (2006) (identifying and describing the consequences of crimmigration).

[183] *See, e.g.*, Mark Walsh, *The Supreme Court's "Shadow Docket" Is Drawing Increasing Scrutiny*, ABA J. (Aug. 20, 2020), https://www.abajournal.com/web/article/scotus-shadow-docket-draws-increasing-scrutiny [https://perma.cc/GX9M-N55T]; David Cole, *The Supreme Court's Dangerous "Shadow Docket*," Wash. Post (Aug. 19, 2020), https://www.washingtonpost.com/opinions/2020/08/19/supreme-court-justices-are-misusing-shadow-docket/ [https://perma.cc/5MR2-5Y8C]; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019).

The power of the methodology presented in this essay lies in its modesty. Shadow amendments display the consequences of statutory construction in a way that is simple and clear.[184] Its modesty also comes from its neutrality. Shadow amendments reflect a methodology and not an ideology. Thus, they offer both textualists and purposivists a heuristic technique for assessing the consequences of this most common product of judicial review.

Recognizing shadow amendments changes how we think about statutory construction. However, their impact extends beyond the statutory realm into any situation that involves judicial interpretation of text. In addition, shadow amendments can affect every facet of legal analysis. Lawyers can craft legal arguments that use shadow amendments in support of their positions. Scholars can use shadow amendments to analyze legal text. Academics can use shadow amendments to teach about the law. This methodology can improve all forms of legal analysis.

This essay reveals the value of labeling and monitoring shadow amendments. There are several ways to do this. For example, shadow amendments can be translated into legislative language and inserted into the relevant statute. These visual depictions provide a simple methodology for assessing their impact. Monitoring changes to word count can also gauge shadow amendments' potential effects on a statute. Both textualists and purposivists should agree with these modest prescriptions for assessing the practical consequences of judicial review and statutory construction.

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[184] *See* Scott McLachlan & Lisa C. Webley, *Visualization of Law and Legal Process: An Opportunity Missed*, 20 INFO. VISUALIZATION 192, 192 (2021) (arguing that law has become so complex and verbose as to be incomprehensible even to legal professionals and suggesting that visualization can help address this shortcoming). *But see* Morrell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 4 (2003) (arguing that judges have developed a consistent and coherent approach to statutory interpretation).