RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY RICHARD B. BILDER

BOOK REVIEWS

The Court and the World: American Law and the New Global Realities. By Stephen Breyer. New York: Alfred A. Knopf, 2015. Pp. viii, 382. Index. $27.95.

Stephen Breyer has served as an associate justice on the United States Supreme Court for over twenty years. He is considered to be one of the liberal members of the Court and is known for his pragmatic approach to judicial decisionmaking, an approach often associated with case-by-case balancing, rather than application of bright-line rules. He has also developed a distinctive voice in cases concerning international affairs. In particular, he has advocated—sometimes on behalf of a majority of the Court, but more often in concurring or dissenting opinions—for a greater and more context-specific focus on considerations of international comity.[1]

Justice Breyer has written several books while serving on the Court. His first two books concern constitutional and statutory interpretation and the general role of the judiciary.[2] In his most recent book, *The Court and the World: American Law and the New Global Realities*, Justice Breyer has shifted his attention to the increasingly "'foreign' aspect of the Court's docket" (p. 4)—that is, to cases involving non-U.S. citizens or activities occurring at least partly outside the United States. He notes that such cases are "no longer unusual" (p. 3) and that they pose particular challenges for him and his colleagues on the bench, such as in obtaining the information that they need to make sufficiently informed decisions.

The book is divided into four parts, covering national security, statutory interpretation, treaty interpretation and application, and direct interactions among judges. Throughout the book, Justice Breyer provides detailed descriptions of relevant Supreme Court cases—both historic cases and cases decided during the time that he has served on the Court. In addition to making a variety of observations about particular legal issues and trends, Justice Breyer uses these cases to develop two general themes: first, that the judicial resolution of international disputes, if pursued with sensitivity to the interests of other nations, can contribute to the international rule of law; and, second, that U.S. judges increasingly need to take account of foreign laws, procedures, and practices (p. 6). As he observes in the introduction and elsewhere, "[T]here is no Supreme Court of the World with power to harmonize differences among the approaches of different nations" (*id.*), so if national courts are going to address modern problems they need to work collaboratively. For this and other reasons, "judicial awareness can no longer stop at the border" (p. 4).

In part I of the book, which encompasses the first four chapters, Justice Breyer discusses cases that present tensions between national security and individual liberty. He suggests that the Supreme Court has been "steadily more willing to intervene and review presidential decisions affecting national security" (p. 13). At times in the past,

[1] *See, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1670 (2013) (Breyer, J., concurring); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 273 (2010) (Breyer, J., concurring in part); Medellín v. Texas, 552 U.S. 491, 538 (2008) (Breyer, J., dissenting); Sosa v. Alvarez-Machain, 542 U.S. 692, 760 (2004) (Breyer, J., concurring in part); F. Hoffman-La-Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (writing for the Court).

[2] *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006); STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW (2010).

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he notes, the Court has followed Cicero's statement, "*[s]ilent enim leges inter arma*"—that is, the laws are silent during wartime (p. 15). U.S. courts did little to protect individual liberties during the American Civil War, World War I, and World War II, he notes, and some lower courts invoked the political question doctrine as a basis for declining to adjudicate issues relating to the Vietnam War. At other times, the Court has been willing to resolve cases relating to national security, but it has interpreted presidential power in this area expansively, such as in the "sole organ" dicta in the 1936 *Curtiss-Wright* decision[3] and the broad deference to the executive branch in the infamous *Korematsu* decision concerning exclusion of Japanese-Americans from the West Coast during World War II.[4]

The Supreme Court's 1952 decision in the *Steel Seizure* case, in which the Court held that President Harry Truman had exceeded his authority in seizing the nation's steel mills during the Korean War,[5] marked a shift in the Court's approach, says Justice Breyer. In this decision, he explains, the Court "asserted it was now in the business of reviewing the President's wartime authority, on which it would hereafter enforce limits" (p. 64). The shift in the Court's approach became particularly evident, he suggests, in the Court's "War on Terror" decisions following the terrorist attacks of September 11, 2001 (p. 83). He explains that these decisions continued the trend away from Cicero's aphorism and clarified that the president does not have a "blank check" (p. 13). Moreover, Justice Breyer states approvingly that these war-on-terror decisions reflected a contextual case-by-case approach rather than a bright-line categorical approach.

Emphasizing one of his general themes, Justice Breyer concludes this part of the book by noting how these national security cases require the courts "to engage with new sources of information about foreign circumstances, in greater depth than in the past" (p. 81). He also suggests that U.S. courts should look to how other democracies have handled similar tensions between national security and individual liberty, explaining that "their examples can help us to find our own Constitution's answer to what is ultimately an American constitutional problem" (p. 83).

Part II of the book (chapters 5–6) discusses recent international decisions by U.S. courts involving statutory interpretation. The focus of chapter 5 is on four cases relating to international commerce: *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*,[6] which concerned the extraterritorial application of U.S. antitrust law; *Intel Corp. v. Advanced Micro Devices, Inc.*,[7] which concerned the ability to obtain discovery of evidence relating to a foreign proceeding; *Morrison v. National Australia Bank Ltd.*,[8] which concerned the extraterritorial application of the securities fraud statute; and *Kirtsaeng v. John Wiley & Sons, Inc.*,[9] which concerned the application of the "first sale" doctrine in U.S. copyright law to goods first sold outside the United States. In these cases, Justice Breyer explains, the Court considered international comity in deciding whether and to what extent to apply U.S. laws abroad. Thus, for example, in *Empagran* (an opinion authored by Justice Breyer), the Court noted that it "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."[10] These cases illustrate a change in the Court's conception of comity, contends Justice Breyer, "from one emphasizing the more formal objective of simple conflict avoidance to the more practical objective of maintaining cooperative working arrangements with corresponding enforcement authorities of different nations" (p. 133).

[3] *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Recently, in *Zivotofsky v. Kerry*, 135 S.Ct. 2076, 2090 (2015), the Supreme Court distanced itself from some of the dicta in *Curtiss-Wright*.

[4] *See* Korematsu v. United States, 323 U.S. 214, 218–19 (1944).

[5] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

[6] *Empagran*, 542 U.S. 155.

[7] Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

[8] Morrison v. Nat'l Austl. Bank Ltd, 561 U.S. 247 (2010).

[9] Kirtsaeng v. John Wiley & Sons, Inc., 133 S.Ct. 1351 (2013).

[10] *Empagran*, 542 U.S. at 164.

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The focus in chapter 6 is on human rights litigation brought under the Alien Tort Statute (ATS). Here, Justice Breyer traces the development of this litigation, starting with the Second Circuit's 1980 decision in *Filartiga v. Peña-Irala*.[11] He explains, for example, how the Supreme Court sought to cabin this litigation in its 2004 decision in *Sosa v. Alvarez-Machain*,[12] but adds that "[m]any lower courts seemed to find in *Sosa* a green light, not a note of caution" (p. 155). In particular, he describes how suits under the ATS against multinational corporations continued to proliferate after *Sosa* and how these suits generated foreign relations friction. Justice Breyer also discusses more generally the "special issues" entailed by broad application of the ATS, including issues of judicial legitimacy (pp. 145–49).

The Court's most recent decision concerning the ATS is *Kiobel v. Royal Dutch Petroleum Co.*,[13] and Justice Breyer discusses it in some detail. In *Kiobel*, the Court held that claims under the ATS are subject to the presumption against extraterritoriality, and the Court therefore directed dismissal of the claims before it because they sought "relief for violations of the law of nations occurring outside the United States."[14] Although Justice Breyer did not join the majority opinion in *Kiobel* and concurred only in the judgment, he suggests a somewhat narrow reading of the decision, whereby (among other things) it would not bar claims by victims of foreign human rights abuses when brought against individuals now residing in the United States (p. 161). He also observes more generally that ATS litigation "is here to stay" (p. 163).

In part III of the book (chapters 7–10), Justice Breyer turns to the interpretation and application of treaties. In chapter 7, he discusses two Supreme Court decisions interpreting the Hague Convention on the Civil Aspects of International Child Abduction:[15] *Abbott v. Abbott*, in which the Court construed the scope of the right of custody under the Convention,[16] and *Lozano v. Montoya Alvarez*, in which the Court considered whether a limitations period specified in the Convention was subject to equitable tolling.[17] Both cases, Justice Breyer expresses, required the Court to try to "learn about the laws, customs, and practices dealing with family matters abroad" (p. 171).

Chapter 8 discusses investment treaties and the growth of international commercial arbitration. The chapter focuses in particular on the Court's 2014 decision in *BG Group PLC v. Republic of Argentina*,[18] in which the Court (in an opinion authored by Justice Breyer) held that a U.S. court should give deference to an arbitral panel's interpretation of a local litigation requirement in an investment treaty's arbitration clause. The basic question in cases like this one, Justice Breyer explains, is "how can courts exercise judicial review of arbitral decisions to ensure that awards are fair and consistent with domestic laws, without undermining the efficiency and neutrality of the arbitral system?" (p. 181).

In chapter 9, Justice Breyer considers the constitutional scope of the national government's power to conclude treaties. Here, he observes that there has been a vast growth in the number of international organizations that address a wide array of issues that traditionally have been regulated only domestically. Uncertainties remain, he notes, concerning the extent to which the Constitution permits delegations of authority by the United States to such international organizations, as illustrated by a D.C. Circuit decision that held that if certain decisions made under the Montreal Protocol on Substances That Delete the Ozone Layer were treated as legally binding in the United

[11] Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

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

[13] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659 (2013).

[14] *Id.* at 1669.

[15] Convention on the Civil Aspects of International Child Abduction, *opened for signature* Oct. 25, 1980, TIAS 11,670, 1343 UNTS 98.

[16] *See* Abbott v. Abbott, 560 U.S. 1 (2010).

[17] *See* Lozano v. Montoya Alvarez, 134 S.Ct. 1224 (2014).

[18] BG Group PLC v. Republic of Argentina, 134 S.Ct. 1198 (2014).

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States, it would "raise serious constitutional questions."[19]

As Justice Breyer points out, the Supreme Court has not yet dealt with constitutional issues relating to international delegations. The closest that it has come has been in cases considering the effect of decisions by the International Court of Justice (ICJ) concerning U.S. noncompliance with Article 36 of the Vienna Convention on Consular Relations, which provides that when a party country arrests nationals from another party country, the former is supposed to advise them of their right to have their consulate notified of the arrest and to communicate with the consulate.[20] In *Sanchez-Llamas v. Oregon*, the Court gave "'respectful consideration'" to the ICJ's reasoning concerning the effect of Article 36 on domestic rules of procedural default but ultimately disagreed with that reasoning.[21] Despite being a dissenter in *Sanchez-Llamas*, Justice Breyer fairly presents the majority's reasoning and usefully underscores that the majority was not claiming that the United States may ignore ICJ judgments (p. 210).

In *Medellín v. Texas*, the Court held that the commitment of the United States under Article 94 of the United Nations Charter, whereby it "'undertakes to comply with the decision of the International Court of Justice in any case to which it is a party,'" was not self-executing and thus did not cause the ICJ judgments to preempt state law.[22] Again, despite not having joined the majority opinion, Justice Breyer treats it with respect, noting: "Naturally, since I wrote the dissent, I am persuaded by its reasoning, but that is beside the point. The Court's majority opinion is authoritative, not the dissent. So it is more important to consider the significance of that opinion" (p. 215).

Finally, Justice Breyer also discusses in chapter 9 the Court's 2014 decision in *Bond v. United States*, which involved a federal criminal prosecution under a statute that implements the Chemical Weapons Convention.[23] As Justice Breyer notes, the majority in *Bond* did not address the constitutional scope of the treaty power, and it therefore left in place the landmark 1920 decision, *Missouri v. Holland*,[24] which held that the treaty power is not subject to the federalism constraints that apply to domestic legislation. Instead, the Court in *Bond* made use of statutory interpretation to cut back on the domestic application of the Chemical Weapons Convention, reasoning that even a statute implementing a treaty should not be presumed to alter the usual balance of federal and state power absent a clear indication of congressional intent to do so.[25]

In a postscript to this part of the book, Justice Breyer further emphasizes one of his repeated themes, which is that "one must keep in mind the fact that the Supreme Court of the United States is a domestic court, not an international court" (p. 236). He also makes clear that he is sympathetic to the decisions of the Court in which the Court has sought to learn from foreign laws and practices, even in constitutional cases (such as in death penalty cases in which the Court has construed the Eighth Amendment ban on "cruel and unusual punishments" (p. 237)). Judicial decisionmaking, as Justice Breyer sees it, is not mechanical but rather involves "a kind of problem solving" (p. 240). He also suggests that the critics of the Court's invocations of foreign and international law in constitutional cases "at best overstate their concerns" (p. 245). "It is not the cosmopolitanism of some jurists that seeks this kind of engagement,"

[19] *See* NRDC v. EPA, 464 F.3d 1, 9 (D.C. Cir. 2006) (discussing Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10 (1987), 1522 UNTS 3, 26 ILM 1550 (1987)).

[20] Vienna Convention on Consular Relations, Art. 36, Apr. 24, 1963, 21 UST 77, 596 UNTS 261.

[21] *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 353 (2006) (quoting Breard v. Greene, 523 U.S. 371, 375 (1998)).

[22] Medellín v. Texas, 552 U.S. 491, 508–10 (2008) (quoting UN Charter Art. 94(1)).

[23] *See* Bond v. United States, 134 S.Ct. 2077 (2014) (discussing ratification of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. No. 103-21 (1993), 1974 UNTS 45, 32 ILM 800 (1993)).

[24] Missouri v. Holland, 252 U.S. 416 (1920).

[25] *See Bond*, 134 S.Ct. at 2091; *see also* Curtis A. Bradley, *Bond, Clear Statement Requirements, and Political Process*, AJIL UNBOUND (June 3, 2014), *at* https://www.asil.org/blogs/bond-clear-statement-requirements-and-political-process.

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he contends, "but the nature of the world itself that demands it" (*id.*).

In part IV of the book (chapters 11–12), which is relatively short, Justice Breyer discusses interactions between U.S. judges and foreign judges. He explains in chapter 11 how the United States could benefit from looking to foreign legal practices, such as the European Court of Justice's use of proportionality analysis and its approach to issues involving the regulation of commerce, and India's use of alternative dispute resolution to help reduce its backlog of cases. In chapter 12, he describes conversations that he and other justices have had in China; an Internet discussion that he had with professors, students, and constitutional authorities in Tunis; and a conversation that he had with the president of the Supreme Court of Ghana. Such interactions, he contends, can help build support for the rule of law—by, for example, promoting the idea of judicial independence—a theme that he repeats in the epilogue.

The Court and the World provides an interesting and accessible overview of some of the most important international cases decided by the Supreme Court in recent decades. Justice Breyer's survey of these cases usefully highlights the increasingly cross-border nature of the Supreme Court's docket and some of the challenges that this phenomenon presents. His writing is clear and engaging, and his treatment of the Court's opinions, even ones that he voted against, is generally fair and balanced. His call for greater attention to what could be called "comparative foreign relations law"—that is, a consideration of how other nations handle comparable legal issues relating to their interactions with the world—should be given serious attention, not only by judges but also by scholars.[26] The book is likely to have broad appeal, at least to those with legal training, and it is likely to confirm Justice Breyer's status on the Court as a particularly "internationalist" justice.

Some readers may find that the book is *too* balanced. Probably because he is commenting on cases that have come before him and that may implicate issues that will come before him in the future, Justice Breyer is generally quite cautious about making arguments that go beyond the scope of what the Court has decided. (The principal exception, as noted below, is his discussion of the *Kiobel* case, and that discussion is potentially problematic.) When he does take a position on issues, he tends to be somewhat vague or diffident. For example, he notes in passing the challenge of maintaining democratic self-governance while also transferring more authority to international institutions to address modern problems (p. 199), but he does not say much about how to address that challenge. Similarly, his contention that the Supreme Court does not operate in a "hermetically sealed legal system" (p. 246) is unlikely to provoke serious disagreement, even from his conservative colleagues on the Court. And his references to the international "rule of law" and how it might be improved through judicial decisionmaking and engagement are underdeveloped.

Justice Breyer does suggest that the decisions that he discusses demonstrate particular trends in the Court's approach to international cases—in particular, trends in favor of greater judicial engagement with issues implicating foreign affairs and in favor of contextual case-by-case deliberation. Although some of the cases certainly seem to be consistent with these observations, at times he appears to strain to fit all of the recent cases into the same mold. In *Morrison* and *Kiobel*, for example, the Court opted for a categorical approach to extraterritoriality rather than the more contextual approach suggested by Justice Breyer. In *Medellín*, a majority of the Court rejected Justice Breyer's proposed "practical, context-specific judicial approach" to determining whether a treaty is self-executing.[27] And, while it is true that the Supreme Court held against the government on some issues in the war-on-terror cases, the Court has broadly

[26] For an effort to prompt greater dialogue among scholars about comparative foreign relations law, see Courts, Treaties, Custom and the Use of Force, Duke University-Geneva Conference on Comparative Foreign Relations Law (July 10–11, 2015), *at* https://law.duke.edu/news/duke-university-geneva-conference-comparative-foreign-relations-law.

[27] *Compare Medellín*, 552 U.S. at 550–51 (Breyer, J., dissenting), *with id.* at 514–15 (majority opinion) (rejecting the dissent's proposed approach on the ground that it is too indeterminate and ad hoc).

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allowed the government to operate under a controversial war framework and has avoided review of decisions concerning both detention and the use of force.[28]

A rare exception to Justice Breyer's cautious treatment of the cases is his discussion of the *Kiobel* decision, which limited the extraterritorial reach of the ATS. In particular, Justice Breyer contends that, despite the Court's holding in *Kiobel* that the presumption against extraterritoriality applies to claims under the ATS, the decision preserves the ability of victims of human rights abuses abroad to sue under the ATS when the perpetrator is now residing in the United States (p. 161). This claim relies on an aggressive reading of the majority opinion. While the majority did state, as Justice Breyer notes, that the presumption against extraterritoriality could be overcome in some situations in which the plaintiff's "claims touch and concern the territory of the United States,"[29] the majority was specifically referring there to a connection between the plaintiff's *claims* and the United States, not between the defendant's current *residence* and the United States. Moreover, the majority made clear that dismissal of an ATS claim is proper if "all the relevant *conduct* took place outside the United States."[30]

What Justice Breyer now maintains is entailed by the majority opinion is what he seemed to suggest in his concurrence in *Kiobel* was *not* the majority's position. Justice Breyer concurred only in the judgment in *Kiobel* in order to express his disagreement with the majority's reasoning. He argued that, instead of limiting the ATS to situations in which relevant conduct occurs in the United States, which he understood to be the majority's approach, the statute should be applied whenever the defendant's conduct implicates "an important American national *interest*."[31] Justice Breyer further asserted in his concurrence that the United States has a "distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[32] In making this argument, he did not seem to believe that he was describing what was entailed by the majority opinion.[33]

However one construes it, *Kiobel* illustrates how the proposition that "the Supreme Court is not a World Court," something that Justice Breyer repeats throughout the book, can mean more than one thing. It could mean, as Justice Breyer tends to see it, that U.S. courts should pay more attention to international and foreign laws and practices when interpreting and applying U.S. law. But it could also imply judicial modesty in applying U.S. laws abroad, evaluating foreign conduct, and incorporating international law in the absence of political branch guidance, limitations that Justice Breyer has not always embraced.

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The Law of Global Governance. By Eyal Benvenisti. The Hague: Hague Academy of International Law, 2014. Pp. 331. $21, €15.

Eyal Benvenisti was just elected the Whewell Professor of International Law at Cambridge University, succeeding James Crawford, who, in 2014, became a judge of the International Court of Justice (ICJ). Most recently the Anny and Paul Yanowicz Professor of Human Rights at Tel Aviv University and earlier the Hersch Lauterpacht Professor of Law at the Hebrew University of Jerusalem, Benvenisti has also, since 2003, been a Global Visiting Professor at New York University School of Law, probably the epicenter of work on global administrative law. *The Law of Global Governance*, Benvenisti's slender but potent pocketbook, is adapted, with copious annotation, from a set of five lectures that he delivered on that topic at the Hague Academy of International Law in 2013.

[28] *See* Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism,"* 128 HARV. L. REV. F. 294, 298–99 (2014).

[29] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1669 (2013).

[30] *Id.* (emphasis added).

[31] *See id*. at 1674 (Breyer, J., concurring) (emphasis added).

[32] *Id.* at 1671.

[33] Although the lower courts have differed to some extent in their interpretation of the "touch and concern" test from *Kiobel*, no court so far has held that the mere U.S. residence of a defendant is sufficient to meet that test.

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