INTERNATIONAL DECISIONS

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KIOBEL V. ROYAL DUTCH PETROLEUM CO.: THE SUPREME COURT AND THE ALIEN TORT STATUTE

The U.S. Supreme Court has finally decided *Kiobel v. Royal Dutch Petroleum Co.*[1] It is the Court's second modern decision applying the cryptic Alien Tort Statute (ATS), which was enacted in 1789.[2] Since the 1980 court of appeals decision in *Filartiga v. Pena-Irala*[3] permitting a wide of range human rights cases to go forward under the statute's auspices, the ATS has garnered worldwide attention and has become the main engine for transnational human rights litigation in the United States.[4] The statute itself and the decisions that it generates also serve as state practice that might contribute to the developing customary international law of civil universal jurisdiction, immunity for defendants in human rights cases, the duties of corporations, and the right to a remedy for violations of fundamental human rights.[5] During the 1990s, the ATS became the focal point for academic disputes about the status of customary international law as federal common law.[6] Indeed, to the extent that the "culture wars" have played out in U.S. foreign relations law, the ATS has been their center of gravity.[7]

The *Kiobel* decision was slow to arrive, in part because the Court took the unusual step of putting the case over from one Term to the next so that it could order supplemental briefing and a second oral argument on the statute's extraterritorial application.[8] Certiorari had been

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

[2] The statute 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." 28 U.S.C. §1350 (2006).

[3] 630 F.2d 876 (2d Cir. 1980).

[4] *See* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS (2d ed. 2008).

[5] *See* Jones v. Saudi Arabia [2006] UKHL 26, [13]–[14] (appeal taken from Eng.) (Lord Bingham); *id.* at [38]–[39] (Lord Hoffmann); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AJIL 142, 146–49, 153–54 (2006); Jordan J. Paust, *Human Rights Responsibilities of Private Corporations*, 35 VAND. J. TRANSNAT'L L. 801, 802–09 (2002); Jane Wright, *Retribution but No Recompense: A Critique of the Torturer's Immunity from Civil Suit*, 30 OXFORD J. LEGAL STUD. 143, 160–62 (2010); *cf.* Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, para. 30, UN Doc. A/HRC/4/35 (Feb. 19, 2007).

[6] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

[7] *See, e.g.*, David J. Bederman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475 (2001).

[8] Kiobel v. Royal Dutch Petroleum Co., 132 S.Ct. 1738 (2012) (mem.) (restoring case to active docket).

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granted in 2011 to consider whether corporations could be liable under the ATS. The initial round of briefing focused on that issue, which had generated a split among circuit courts.[9]

But the decision seemed overdue for another reason as well. After more than thirty years of extensive high-profile litigation along with sustained academic commentary, a large and seemingly ever-growing number of basic questions about the statute still remained unanswered. These questions included not only the amenability of corporations to suit and the statute's extraterritorial application, but also the potential immunity of individual defendants,[10] the appropriate deference to afford the U.S. government as to the statute's interpretation and case-by-case application,[11] the existence and scope of an exhaustion requirement,[12] the application of the *forum non conveniens* doctrine,[13] the viability of aiding and abetting claims,[14] the source of applicable law,[15] and the statute's purpose and substantive scope.[16] The Court's first modern ATS case, *Sosa v. Alvarez-Machain*,[17] clarified that the ATS permitted federal common law claims based on contemporary customary international law norms of requisite specificity and universality, but this standard itself generated uncertainty,[18] and the opinion explicitly left open issues of deference and exhaustion.[19] As lower courts and litigants hacked their way through a thickening jungle of unresolved ATS issues, clarification from Congress or the Supreme Court felt long overdue.[20]

[9] Kiobel v. Royal Dutch Petroleum Co., 132 S.Ct. 472 (2011) (mem.) (granting certiorari); *see also* Sarei v. Rio Tinto, PLC, 671 F.3d 736 (9th Cir. 2011) (en banc), *vacated,* 133 S.Ct. 1995 (2013) (mem.); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013 (7th Cir. 2011).

[10] *See, e.g.*, Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012), *petition for certiorari filed*, 81 USLW 3503 (Mar. 04, 2013) (NO. 12-1078, 12A707).

[11] *See Developments in the Law—Access to Courts*, 122 HARV. L. REV. 1151, 1193–94, 1196–99 (2009).

[12] Sarei v. Rio Tinto, *supra* note 9; Sarei v. Rio Tinto, PLC, 550 F.3d 822, 825–26 (9th Cir. 2008) (en banc). In the 2013 memorandum decision in *Rio Tinto*, 133 S.Ct. 1995, the Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded for further consideration in light of its decision in *Kiobel*.

[13] *Compare* Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 103–06 (2d Cir. 2000) (*forum non conveniens* disfavored in ATS cases), *with* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum (No. 10-1491), *supra* note 1, at 25 n.13 (explicitly disagreeing with the Second Circuit's analysis in *Wiwa*).

[14] *See* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 (arguing that some aiding and abetting liability claims should not go forward under the ATS).

[15] *Compare* Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 284–92 (2d Cir. 2007) (Hall, J.), *aff'd sub nom due to lack of a quorum*, Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008) *(*mens rea for aiding and abetting supplied by federal common law), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (mens rea supplied by customary international law). *See also* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008).

[16] *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 641–42 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AJIL 461 (1989); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[17] 542 U.S. 692 (2004).

[18] *Compare* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (holding that claims of cruel, inhuman, and degrading treatment do not meet the *Sosa* test), *with In re* S. African Apartheid Litig., 617 F.Supp.2d 228, 253–55 (S.D.N.Y. 2009) (holding to the contrary). *See also* Aldana v. Del Monte Fresh Produce, N.A., Inc., 452 F.3d 1284, 1284 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc).

[19] Sosa v. Alvarez-Machain, 542 U.S. at 724–25, 733 n.21; *see also id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); Republic of Austria v. Altmann, 541 U.S. 677, 702 (2004); *cf. id.* at 714 (Scalia, J., concurring). *But see id.* at 733–38 (Kennedy, J., dissenting).

[20] The Court appeared poised to consider the ATS in a 2008 case raising issues of deference to the executive branch and of aiding and abetting liability, but it lacked a quorum. Khulumani v. Barclay Nat'l Bank Ltd., *supra* note 15. Congress codified some claims that had been brought under the ATS by creating a federal cause of action

The Court's *Kiobel* decision definitively resolved one important question: the presumption against extraterritoriality applies to the ATS.[21] On the facts of the case—the relevant conduct took place within the territory of a foreign sovereign, the claims did not "touch and concern" U.S. territory, and the foreign defendants had no more than a "corporate presence" in the United States—the Court held that the presumption was not overcome.[22] Although four justices disagreed about the invocation of the presumption, the Court was unanimous in deciding that the claims lacked sufficient connection with the United States. The plaintiffs lost 9 to 0.

Going forward, if courts apply a strong version of the presumption and only permit claims based on conduct in the United States allegedly in violation of a norm of international law that meets the *Sosa* standard, then ATS litigation as we know it today is effectively dead, as some commentators have already predicted.[23] Other commentators assert, however, that the *Kiobel* presumption is not that robust.[24] In particular, it is unclear whether conduct in the United States that aids and abets an egregious violation of international law elsewhere is actionable after *Kiobel*, and whether the aiding and abetting conduct itself would have to meet the *Sosa* standard for specificity and universality. As such issues are litigated in the lower courts, ATS cases will become even less certain, at least in the short term. Some of the unresolved ATS questions may take a back seat as the courts interpret *Kiobel*, but other questions, such as those concerning the purpose of the statute and appropriate level of deference to the executive branch, may assume even greater significance.

The first part of this International Decision discusses the *Kiobel* case and analyzes its potential significance for ATS litigation. Parts II and III analyze the *Kiobel* opinion in terms of separation of powers and the development and enforcement of customary international law.

I. WHAT REMAINS OF THE ALIEN TORT STATUTE?

Background: ATS Litigation and Kiobel

Kiobel arose out of conduct that took place in Ogoniland, Nigeria, an oil-rich region of the Niger delta. During the early 1990s, residents of Ogoniland protested the environmental effects of oil extraction, including gas flares and the construction of pipelines. The Nigerian government attempted to quell the unrest, sometimes violently, and in 1994, several Ogoni leaders were murdered. Nine Ogoni were sentenced to death for the murders in a 1995 trial that was widely viewed as lacking basic procedural protections. Among those sentenced to

for torture and extrajudicial killing. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, sec. 2, 106 Stat. 73 (1992). The statute does not apply to corporations. Mohamad v. Palestinian Auth.,132 S.Ct. 1702 (2012).

[21] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1668–69.

[22] *Id.* at 1669.

[23] *See* Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS, Apr. 17, 2013, *at* http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/; *see also* Curtis A. Bradley, *Supreme Court Holds That Alien Tort Statute Does Not Apply to Conduct in Foreign Countries*, ASIL INSIGHTS (Apr. 18, 2013), *at* http://www.asil.org/insights130418.cfm. Several commentators have predicted that future ATS-type claims will be brought in state courts or under state law. *See* Christopher A. Whytock, Trey E. Childress & Mike Ramsey, *After* Kiobel*: Human Rights Litigation in State Courts and Under State Law*, U.C. IRVINE L. REV. (forthcoming 2013) (evaluating the viability of such claims).

[24] *See* Oona Hathaway, Kiobel *Commentary: The Door Remains Open to "Foreign Squared" Cases*, SCOTUSBLOG (Apr. 18, 2013), *at* http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

death and subsequently executed was Ken Saro-Wiwa, an author and outspoken leader of the Ogoni. His quickly became a cause célèbre.

Events in Ogoniland provided the basis for several lawsuits filed in the United States against an individual and entities related to the corporation now known as Royal Dutch Shell.[25] These cases include *Kiobel*. The complaint alleged that Royal Dutch Petroleum Company (incorporated in the Netherlands), Shell Transport and Trading Company (incorporated in England), and Shell Petroleum Development Company of Nigeria (incorporated in Nigeria) aided and abetted the Nigerian military in committing extrajudicial killing, torture, crimes against humanity, and other human rights violations. The plaintiffs, including Esther Kiobel, whose husband was one of the men sentenced to death and executed in 1995, now live in the United States, where they have been granted political asylum.[26]

When it was filed in 2002, the *Kiobel* case reflected broad changes in ATS litigation. Early cases, like *Filartiga* itself, were generally brought by public interest organizations against individual defendants, frequently former government officials with few resources. Beginning in the mid-1990s, however, ATS litigation focused increasingly on corporate defendants such as Barclay National Bank, Chevron, Del Monte, Ford, IBM, Rio Tinto, Talisman Energy, and Unocal, all of whom allegedly aided and abetted foreign governments' human rights violations such as slave labor, extraordinary rendition, apartheid, war crimes, and torture.[27] Major law firms represented these deep-pocket defendants, and plaintiffs were sometimes represented by private, for-profit lawyers working on a contingency fee. The cases increased dramatically in their scope and complexity. Suits against corporate defendants also caused concern about ATS litigation within the U.S. Department of State, especially under the George W. Bush administration. The government began to advocate for the dismissal of many suits (including some against individuals)[28] based on the presumption against extraterritoriality, foreign policy considerations, and the rejection of aiding and abetting liability.[29]

The Supreme Court itself limited the scope of the ATS in the 2004 *Sosa* decision.[30] That case was brought by a Mexican doctor against a Mexican citizen based on an abduction that took place in Mexico at the instigation of the U.S. Drug Enforcement Agency.[31] In *Sosa*, the

[25] *See generally 1980s to the New Millennium*, *at* http://www.shell.com/global/aboutshell/who-we-are/our-history/1980s-to-new-century.html. Other lawsuits included *Wiwa v. Shell Petroleum*, *Wiwa v. Anderson*, and *Wiwa v. Shell Petroleum Dev. Co. of Nigeria*. These cases settled in 2009. *See* Settlement Agreement and Mutual Release, *available at* http://ccrjustice.org/files/Wiwa_v_Shell_SETTLEMENT_AGREEMENT.Signed-1.pdf.

[26] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1662–63.

[27] *See, e.g.*, Khulumani v. Barclay Nat'l Bank Ltd., *supra* note 15; Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, *supra* note 18; *Settlement in Principle Reached in Unocal Case*, EARTHRIGHTS INT'L, Dec. 13, 2004, *at* http://www.earthrights.org/content/view/104/62/; Peter Spiro, *Chevron Wins ATS Case. Will Corporations Fight, Not Settle?*, OPINIO JURIS (Dec. 2, 2008), *at* http://opiniojuris.org/2008/12/02/chevron-wins-ats-case-will-corporations-fight-not-settle/. Occasional cases are brought against corporations based on primary rather than secondary liability. *See* Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009).

[28] *See, e.g.*, Brief of United States as Respondent Supporting Petitioner at 46–50, Sosa v. Alvarez-Machain (No. 03-339), *supra* note 17.

[29] *See, e.g.*, *id.*; Brief for the United States as Amicus Curiae at 5–12, Presbyterian Church v. Talisman Energy Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0016); Brief for the United States as Amicus Curiae at 2–3, Khulumani v. Barclay Nat'l Bank Ltd. (Nos. 05-2141, 05-2326), *supra* note 15; Brief for the United States as Amicus Curiae at 4, Doe v. Unocal Corp., 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); *see generally* Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773 (2008).

[30] Sosa v. Alvarez-Machain, *supra* note 17.

[31] *Id.* at 697–99.

Court held that a contemporary ATS claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" of piracy, safe conducts, and assaults against ambassadors.[32] The *Sosa* opinion urged "judicial caution" in recognizing ATS causes of action, in part based on concerns about their potential impact on U.S. foreign relations.[33] Alvarez-Machain's claims of arbitrary arrest and detention were rejected because the Court was not convinced that they violated sufficiently specific binding norms of customary international law.[34]

The district court in *Kiobel* dismissed some claims, such as forced exile, because they did not meet the *Sosa* test.[35] It also dismissed the Nigerian corporation from the case for lack of personal jurisdiction.[36] Although the Dutch and UK defendants had also raised personal jurisdiction defenses in their answers to the complaint, they did not pursue these arguments, probably because the Court of Appeals for the Second Circuit had previously held (in a different ATS case) that the federal courts in New York had general jurisdiction over them based on their offices in New York City.[37] In its *Kiobel* decision a three-judge panel of the Second Circuit reasoned that corporations could not be held liable under the ATS, and it accordingly dismissed the case over a strong dissent from Judge Leval.[38] The Second Circuit then denied the petition for rehearing en banc by a 5-5 vote.[39]

The 2011 grant of certiorari by the Supreme Court was not surprising in light of this division within the Second Circuit itself and the split between that circuit and other circuits on the question of corporate liability under the ATS.[40] Moreover, although the Supreme Court had lacked a quorum in the South African apartheid cases,[41] in *Kiobel* none of the justices recused themselves, perhaps making it an attractive case in which to consider the ATS. On the same day as the *Kiobel* grant of certiorari, the Court also granted certiorari in a Torture Victim Protection Act[42] (TVPA) case raising questions of corporate liability, affording the Court the opportunity to consider this issue under both statutes in the same Term.[43]

[32] *Id.* at 725, 731–32.

[33] *Id.* at 727–28.

[34] *Id.* at 736–37.

[35] 456 F.Supp.2d 457, 464 (2006), *aff'd in part, rev'd in part*, 621 F.3d 111 (2nd Cir. 2010), *aff'd*, 133 S.Ct. 1659 (2013).

[36] Kiobel v. Royal Dutch Petroleum Co., No. 02 Civ. 7618 (KMW) (HBP), 2010 WL 2507025 (S.D.N.Y. June 21, 2010).

[37] *See* Wiwa v. Royal Dutch Petroleum Co., *supra* note 13. Some justices in *Kiobel* appeared to question whether the personal jurisdiction by the New York courts over the Dutch and UK defendants would pass constitutional muster. *See* Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1678 (Breyer, J., concurring in the judgment). The Court has subsequently granted certiorari in another ATS case based on general personal jurisdiction, but this time the defendant has the preserved the argument. DaimlerChrysler, A.G. v. Bauman, 133 S.Ct. 1995 (2013) (mem.) (granting certiorari).

[38] Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010), *aff'd*, 133 S.Ct. 1659 (2013).

[39] Kiobel v. Royal Dutch Petroleum Co., 642 F.3d 379 (2d Cir. 2011).

[40] This split intensified after the plaintiffs petitioned for a writ of certiorari. *See* Flomo v. Firestone Natural Rubber Co., *supra* note 9; Sarei v. Rio Tinto, *supra* note 9; Doe v. Exxon Mobil Corp., 654 F.3d 11, 39 (D.C. Cir. 2011)

[41] *See* Linda Greenhouse, *Conflicts for Justices Halt Apartheid Appeal*, N.Y. TIMES, May 13, 2008, at A14.

[42] *See supra* note 20.

[43] Mohamad v. Palestinian Auth., *supra* note 20. The questions of corporate liability in *Kiobel* and *Mohamad* reached the Court at a time when many observers described its decisions as favoring corporations. *See Corporations and the Court,* ECONOMIST, June 25, 2011, at 75.

The first round of *Kiobel* briefing in the Supreme Court focused on corporate liability. At the first oral argument in February 2012, however, the statute's application to conduct outside the United States was discussed extensively.[44] The Court thereafter directed supplemental briefing on "[w]hether and under what circumstances the [ATS] 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."[45] The briefing attracted the input of many amici, including the governments of Argentina, Germany, the Netherlands, the United Kingdom, and the United States, as well as the European Commission, scholars, nonprofit organizations, and corporations.

The Majority Opinion and Justice Alito's Concurrence

Chief Justice Roberts wrote the Court's opinion for a five-justice majority, holding that the presumption against extraterritoriality applied to the ATS and that it mandated dismissal of the case. Based on the "perception that Congress ordinarily legislates with respect to domestic, not foreign matters,"[46] the presumption prevents conflicts between the United States and foreign sovereigns that might result from the application of U.S. statutes to conduct abroad.[47] It applies to statutes that "give[] no clear indication of an extraterritorial application."[48]

Most recently, in the 2010 case *Morrison v. National Australia Bank, Ltd.*,[49] the Court had applied the presumption to the Securities Exchange Act. Some of the alleged fraud in that case took place in the United States, and the U.S. government argued that the presumption should not apply. The Court ordered dismissal, however, because the securities had been bought and sold on foreign securities exchanges.

The Securities Exchange Act and other statutes to which the presumption applies differ from the ATS in some potentially relevant respects, as both the petitioners and Justice Breyer's concurrence point out.[50] Most of the majority's opinion is spent explaining why the presumption nevertheless applies. First, the Supreme Court held in *Sosa* and reaffirmed in *Kiobel* that the ATS is a "purely jurisdictional" statute that does not directly regulate conduct. Instead, it delegates to federal courts the power to recognize causes of action based on customary international law.[51] The *Kiobel* majority also acknowledged that the presumption against extraterritoriality is not jurisdictional but is, instead, a substantive or "merits" determination that heretofore has been applied to statutes that prohibit specific conduct without language indicating extraterritorial application.[52] Petitioners therefore maintained that, since the language

[44] Transcript of Oral Argument at 6–13, Kiobel v. Royal Dutch Petroleum Co. (No. 10-1491), *supra* note 1 (oral argument of Paul Hoffman on behalf of the petitioners on February 28, 2012).

[45] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1663 (quoting Kiobel v. Royal Dutch Petroleum Co., *supra* note 8).

[46] *Id.* at 1672 (Breyer, J., concurring in the judgment) (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. 2869, 2877 (2010)).

[47] EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[48] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1664 (quoting Morrison v. Nat'l Austl. Bank Ltd., 130 S.Ct. at 2878).

[49] 130 S.Ct. 2869.

[50] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1672 (Breyer, J., concurring in the judgment).

[51] Sosa v. Alvarez-Machain, *supra* note 17, at 714, 724–25; Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

[52] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

of the ATS is jurisdictional and does not directly regulate conduct, the presumption did not apply.[53] The *Kiobel* majority rejected this argument, however, reasoning that "danger of unwarranted judicial interference in the conduct of foreign policy" is heightened, not diminished, in the ATS context "because the question is not what Congress has done but instead what courts may do."[54]

Second, Justice Breyer emphasized that since the ATS is explicitly designed to provide redress to aliens for violations of international law, it arguably does govern foreign matters.[55] The *Kiobel* majority disagreed as a textual matter, however, because tortious conduct against aliens in violation of international law can occur within U.S. territory.[56] Indeed, the historical basis for the statute (as understood in *Sosa*) includes some "notorious episodes" that took place in the United States.[57]

Third, *Sosa* had apparently interpreted the ATS as providing redress for piracy, an application of the statute to conduct outside the United States, which suggests that the presumption does not apply because, as the majority acknowledged, the "Court has generally treated the high seas the same as foreign soil for purposes of the presumption against extraterritorial application."[58] In response, the majority focused again on the potential foreign policy consequences of the ATS, which are less pronounced for piracy because, it reasoned, this offense occurs on the high seas rather than "within the territorial jurisdiction of another sovereign."[59]

The majority opinion concluded its discussion of the presumption by pointing out that, if the Court interpreted the ATS as providing a "cause of action for conduct occurring in the territory of another sovereign," the decision could result in "diplomatic strife" and open up the possibility that foreign nations might "hale our citizens" into their courts for conduct occurring in the United States.[60] The presumption ensures that such risks are taken by the political branches, not the courts—a recurring theme of the majority opinion—and one that is discussed at more length in part II, below.

Finally, in a short paragraph the Court applied the presumption to the facts in *Kiobel*. Following *Morrison*, all the Court *needed* to say was that the conduct that generates the cause of action (and thus was the focus of congressional concern) took place neither in the United States nor on the high seas (like piracy, which the Court seemed to accept as an ATS violation).[61] Indeed, Justice Alito (joined by Justice Thomas) wrote separately to underscore this point: relying on *Morrison*, he argued that unless the conduct that violates international law and gives rise to the cause of action under the *Sosa* standard took place in the United States, the presumption bars the suit.[62] Full stop. But Chief Justice Roberts added two additional considerations—

[53] Petitioners' Supplemental Opening Brief at 34, 2012 WL 2096960, Kiobel v. Royal Dutch Petroleum Co. (No. 10–1491), *supra* note 1.

[54] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1664.

[55] *Id*. at 1671–72 (Breyer, J., concurring in the judgment).

[56] *Id*. at 1665 (majority opinion).

[57] *Id*. at 1666–67.

[58] *Id*. at 1667.

[59] *Id*. Justice Breyer disagreed with this conclusion, reasoning that piracy takes place aboard vessels that are equivalent to the sovereign territory of their home country. *Id.* at 1672 (Breyer, J., concurring in the judgment).

[60] *Id.* at 1668–69 (majority opinion).

[61] *Id.* at 1667.

[62] *Id*. at 1669–70 (Alito, J., concurring).

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prompting the Alito/Thomas concurrence to lament that the majority "obviously leaves much unanswered."[63]

This closing paragraph of the majority opinion reasoned that if the "claims" "touch and concern the territory of the United States," they must do so with "sufficient force" to displace the presumption, language that may suggest "touch and concern" with "sufficient force" means something *less* than domestic conduct that violates international law under the *Sosa* test. Otherwise, why not just write the latter and avoid the Alito/Thomas concurrence? Examples of claims involving conduct within the United States that might satisfy Chief Justice Robert's language but not the Alito/Thomas concurrence could include the design, manufacture, or testing of products;[64] supervision or management;[65] financing;[66] or providing a "safe harbor" within the United States to alleged perpetrators of acts abroad.[67] Other possibilities might include conduct elsewhere that was intended to have an impact in the United States,[68] conduct in territory under the control of the United States, or conduct in a "failed state" that may not qualify as a foreign sovereign.[69] The last example involves conduct outside the United States but not necessarily within the territory of a foreign sovereign, making it arguably akin to piracy. Although the Court appeared to accept piracy-based ATS claims, the Chief Justice also reasoned that the "pirates may well be a category unto themselves,"[70] perhaps suggesting that the ATS would not reach other violations of international law occurring outside the territory of any foreign sovereign.[71]

The Court's next sentence added a second consideration. It reasoned that corporations are often "present" in many countries, so this "presence" alone is not enough to displace the presumption. Again, this language appears unnecessary unless some other kind of presence might suffice, such as the physical presence of individual defendants or the incorporation of legal entities under domestic state law.[72] To be sure, the Court did not decide that such cases *could* go

[63] *Id*. at 1669.

[64] *See*, *e.g.*, *In re* S. African Apartheid Litig., 346 F.Supp.2d 538, 545 (2004) ("the South African police shot demonstrators 'from cars driven by Daimler–Benz engines,' [and] the regime tracked the whereabouts of African individuals on IBM computers") (citation omitted).

[65] *See*, *e.g.*, Sosa v. Alvarez-Machain, *supra* note 17, at 698 ("[T]he [Drug Enforcement Agency] approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.")

[66] *See*, *e.g.*, *In re* S. African Apartheid Litig., 346 F.Supp.2d at 545 (alleging that the apartheid-era government of South Africa "received needed capital and favorable terms of repayment of loans from defendant banks").

[67] *See* Roger Alford, Kiobel *Insta-Symposium: Degrees of Territoriality*, OPINIO JURIS (Apr. 22, 2013), *at* http://opiniojuris.org/2013/04/22/kiobel-insta-symposium-degrees-of-territoriality/(listing examples); *In re* S. African Apartheid Litig., *supra* note 18.

[68] *See*, *e.g.*, Magnifico v. Villanueva, 783 F.Supp.2d 1217 (S.D. Fla. 2011) (alleging fraud and human trafficking in the Philippines designed to bring forced laborers to the United States).

[69] *See*, *e.g.,* Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (en banc) (alleging that human rights abuses took place in Abu Ghraib prison, Iraq, when it was under the complete control of the United States); Yousuf v. Samantar, *supra* note 10 (alleging conduct that took place in Somalia, which is sometimes described as a "failed state").

[70] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1667.

[71] The majority opinion later reasons that the ATS should not interpreted to "provide a cause of action for conduct occurring in the territory of another sovereign." *Id*. at 1669.

[72] *See* William S. Dodge, Kiobel *Insta-Symposium*: *The Pyrrhic Victory of the Bush Administration Position in* Kiobel, OPINIO JURIS, Apr. 23, 2013, *at* http://opiniojuris.org/2013/04/23/kiobel-insta-symposiumthe-pyrrhic-

forward; it merely left the possibility open, perhaps because the Court could not agree or did not wish to resolve more than it had to in this case. The Court did not directly address the question on which it originally granted certiorari—corporate liability under the ATS—but the opinions arguably assume the viability of ATS suits against corporations.

Not surprisingly, these ambiguities in the majority opinion have already generated spirited commentary on what *Kiobel* will mean for future ATS cases. The blogospheric spin is well under way.[73]

Justice Kennedy's Concurrence

Justice Kennedy's short concurrence in *Kiobel* may establish him as the "swing vote" in future ATS cases, as he is in so many other profoundly contested areas of law. Justices Alito and Thomas lamented the Court's "narrow approach," but Justice Kennedy celebrated it: "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute. In my view that is a proper disposition."[74] The last paragraph of the chief justice's opinion seems specifically written to keep Justice Kennedy's vote and thereby ensure a majority.

Justice Kennedy's opinion goes on to note that with the TVPA, Congress has created a "detailed statutory scheme" to address some human rights abuses committed abroad.[75] His fourth and final sentence says that other cases "with allegations of serious violations of international law principles protecting persons" may arise that are not covered by the TVPA or by the "reasoning or holding of today's case."[76] Those disputes may require "some further elaboration and explanation" as to the "proper implementation of the presumption."[77]

The last sentence of Justice Kennedy's opinion, like the first, suggests that the ambiguity in the last paragraph of the majority opinion was not accidental, nor was it manufactured through wishful thinking by the plaintiffs' bar. Although it seems clear that Justice Kennedy would not go as far as Justices Alito and Thomas in foreclosing future ATS cases, on its face Justice Kennedy's opinion merely states that issues are left open—not that he would ultimately resolve them in one way or another. The opinion seems carefully crafted to reveal little more than the author's openness to persuasion from either side in future cases.

Justice Kennedy's reference to the TVPA as a "detailed statutory scheme" is interesting because the ATS most certainly is not. It is, instead, an open-ended delegation of common law–making power to the federal courts, although the history of the statute and concerns about federal common law led the *Sosa* Court to construe the delegation narrowly. Even the Court's narrowing in *Sosa* had unavoidable elements of common law reasoning, for it interpreted the 1789

victory-of-the-bush-administration-position-in-kiobel/ (noting that the Court's language on corporate presence "should send chills down the spines of corporations domiciled in the United States (and their general counsels)").

[73] *Compare* Hathaway, *supra* note 24, *with* Meir Feder, *Commentary: Why the Court Unanimously Jettisoned Thirty Years of Lower Court Precedent (and What That Can Tell Us About How to Read* Kiobel*)*, SCOTUSBLOG (Apr. 19, 2013), *at* http://www.scotusblog.com/2013/04/commentary-why-the-court-unanimously-jettisoned-thirty-years-of-lower-court-precedent-and-what-that-can-tell-us-about-how-to-read-kiobel/.

[74] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1669 (Kennedy, J., concurring).

[75] *Id.*

[76] *Id.*

[77] *Id.*

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statute in light of *Erie*,[78] the modern reluctance to infer private rights of action, and contemporary developments in customary international law.

If there is a statutory analog to the ATS, perhaps it is the Sherman Act, which delegates broad discretion to the federal courts to develop the substantive rules of antitrust.[79] The presumption against extraterritoriality applies to the Sherman Act, too, or at least it did at one time. Indeed, the most famous U.S. case applying the presumption is an antitrust case: *American Banana v. United Fruit Co.*, which dismissed a suit between two U.S. companies based on anticompetitive conduct abroad.[80] Moreover, one of the reasons for the presumption is to prevent international strife,[81] and in "almost no other area has the extraterritorial application of U.S. law sparked as much protest from other nations as it has in the area of antitrust."[82] Yet the presumption is not applied today to the Sherman Act, based apparently on the Court's understanding that the purpose of the statute could not be realized if it applied only to conduct in the United States.[83] Because the presumption goes to the substantive reach of the statute, it follows that a significant delegation of substantive lawmaking power by Congress to the courts (an unusual feature of both the Sherman Act and the ATS) also includes a delegation with respect to the "proper implementation of the presumption" (to use Justice Kennedy's language), thereby enabling courts to ensure that the statute's goals are achieved. The Sherman Act analogy supports this claim, and nothing in the Court's opinion in *Kiobel* is explicitly to the contrary.

The purpose of the ATS is contested, however, as already noted. One academic view, consistent with much of the majority's opinion, holds that the statute provided a remedy for violations of international law for which the United States could otherwise be held responsible, including injury to foreign officials that occurred in the United States.[84] In light of the historical record, this view is plausible, but the text of the ATS itself is not limited in this way. Justice Breyer understands the statute as an effort to avoid a "safe harbor" for those who violate international law and to provide redress for those injured by "today's pirates"—in part because international law imposed a duty on states not to give pirates safe harbor.[85] Interestingly, the majority opinion does not explicitly reject Justice Breyer's historical understanding, but it does emphasize that the historical context is not enough to displace the general application of the presumption.

[78] Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

[79] *See* William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661, 663 (1982); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429–30 (2008).

[80] Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[81] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1669; *see generally* John Knox, *A Presumption Against Extrajurisdictionality*, 104 AJIL 35, 379–88 (2010) (discussing the purposes of the presumption).

[82] William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 99 (1998).

[83] In *Hartford Fire Ins. Co. v. California*, Justice Souter noted the *American Banana* cases but then said without explanation that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." 509 U.S. 764, 795–96 (1993); *see also id.* at 814 (Scalia, J., dissenting) (stating that the presumption has been "overcome" in Sherman Act litigation and citing earlier decisions of the Court and the Second Circuit). Even when the Court declines to apply the Sherman Act to conduct abroad, it does not do so based on the presumption. *See* F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 169 (2004). Today, amendments to the Sherman Act may make its extraterritorial application clear, but the Court had already ruled that the statute applied extraterritorially in *Hartford Fire Ins. Co.*

[84] *See supra* text accompanying notes 56–57.

[85] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1672–74 (Breyer, J., concurring in the judgment).

There is an even broader historical narrative, however—one that was suggested by *Sosa*'s reference to prize litigation.[86] As a weak nation at the end of the eighteenth century, the United States not only sought to avoid violating international law (although it certainly did that)[87] but also affirmatively benefited from a strong *overall* system of international law with robust enforcement mechanisms, including the law of neutrality as implemented by prize courts.[88] To put the point in the context of piracy, as a weak naval power that profited greatly from commercial shipping, the United States had a strong interest in the judicial enforcement of laws against piracy in courts around the world,[89] as it also did with regard to other norms of international law. Unfortunately, the text and history of the ATS do not give much guidance in selecting among plausible accounts of its purpose. Thus, implementing the presumption to effectuate the purposes of the statute will not resolve all uncertainty around the statute's application, but it might convince some justices not to apply the presumption as broadly as Justice Alito's opinion and the *Morrison* precedent suggest.

Justice Breyer's Concurrence

Justice Breyer, writing for himself and Justices Ginsburg, Sotomayor, and Kagan, concurred in the Court's judgment but disagreed with its reasoning. Justice Breyer thought the presumption inapplicable, citing the text of the statute and its application to piracy, as discussed above.[90] Instead of the presumption, Justice Breyer would look to "international jurisdictional norms" to determine the jurisdictional reach of the ATS, in combination with *Sosa*'s concern about generating friction.[91] According to Justice Breyer, this analysis entails that the statute applies when the alleged tort occurred "on American soil," when the defendant is an American national, or when "the defendant's conduct substantially and adversely affects an important American national interest." American interests include preventing torturers and other "common enem[ies] of mankind" from finding a "safe harbor" in the United States.[92]

The interpretation of the ATS endorsed by Justice Breyer would allow cases like *Filartiga* and *Marcos*, in which the defendants had taken up residence in the United States, to go forward.[93] The *Sosa* opinion cited these two cases with approval,[94] a consideration that might

[86] The historical record suggests that the ATS covered neither prize nor piracy, *see* Lee, *supra* note 16, at 866–68, but the point here is that for the same reason that prize and piracy were actionable in federal courts, the United States as a weak nation generally had a strong interest in the creation and enforcement of international law, as it could not depend on force alone to achieve its foreign policy objectives.

[87] *Cf.* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1668 (citing Bradley, *supra* note 16, at 641–42).

[88] JOHN FABIAN WITT, LINCOLN'S CODE (2012).

[89] *See* FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 6–7 (2005).

[90] *See supra* text accompanying note 59.

[91] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1673 (Breyer, J., concurring in the judgment).

[92] *Id.* at 1671.

[93] Filartiga v. Pena-Irala, *supra* note 3, at 878–79 (2nd Cir. 1980) (noting that Pena-Irala had sold his house Paraguay and came to the United States with his partner; the couple resided in the Brooklyn until their tourist visa expired and they were deported); *In re* Marcos Litigation, 25 F.3d 1467, 1469 (9th Cir. 1994) (noting that Marcos had fled the Philippines for Hawaii in 1986, where he was subsequently sued).

[94] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1675 (Breyer, J., concurring in the judgment) (citing Sosa v. Alvarez-Machain, *supra* note 17, at 732).

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matter for justices especially concerned with stability and consistency from the Court.[95] Although the TVPA now provides a cause of action for the precise conduct at issue in *Filartiga*, some justices (including Kennedy) hinted at oral argument that they might be unwilling to rule inconsistently with that case.[96] The facts of *Kiobel* did not satisfy Justice Breyer's test, however, as the defendants' only connection to the United States was a New York office owned by an affiliated company that helped attract capital investors.[97] Justice Breyer did not embrace universal civil jurisdiction, despite his concurring opinion in *Sosa*, which appeared to adopt that doctrine. This issue is addressed in more detail in part III.

II. *KIOBEL* AND SEPARATION OF POWERS

The *Kiobel* decision's ultimate impact on ATS litigation may be determined in part by the views of the executive branch.[98] The Court stressed that the "political branches" and not the courts should make the foreign policy judgment involved in applying the statute to "conduct occurring in the territory of another sovereign."[99] It is unclear, however, whether the Court was referring only to Congress and its legislative capacity or meant to include the executive branch's use of amicus briefs and statements of interest. In future litigation the issue is most likely to arise (at least in the short term) by the government arguing that a particular case or class of cases should go forward under the ATS despite the presumption. If the upshot of *Kiobel* is a desire to shift decision making to a politically accountable actor with greater expertise in foreign affairs, then deferring to the executive branch is consistent with the presumption. However, if the point of the presumption is to leave decision making with Congress, as some language in *Kiobel* suggests,[100] then there is little basis for deferring to the executive. The Court has suggested in *Sosa* and *Altmann* that the executive might receive case-by-case deference,[101] and Justice Breyer mentioned this possibility more than once in his concurring opinion in *Kiobel*.[102] The issue of deference to the executive came up at oral argument in *Kiobel*, and in the end the

[95] *Confirmation Hearing on the Nomination of John G. Roberts Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55, 142 (2005). Fealty to *Sosa* probably explains why the Court persisted in the view that the ATS applies to piracy, even while conceding that piracy made application of the presumption less clear. The respondents had argued that piracy does not come within the ATS, *see* Transcript of Oral Argument, *supra* note 44, at 23–26 (oral argument of Kathleen Sullivan on behalf of respondents on October 1, 2012), and there is historical support for that position. *See* Lee, *supra* note 16, at 866–68.

[96] Transcript of Oral Argument, *supra* note 44, at 23–24, 37 (oral argument of Kathleen M. Sullivan on behalf of respondents on October 1, 2012).

[97] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1667 (Breyer, J., concurring in the judgment).

[98] The issue can arise in two postures. First, there might be a direct conflict between the presumption (no extraterritorial application) and the views of the executive (apply the statute extraterritorially); this kind of conflict has been discussed extensively by academics but has not been resolved by courts. Second, the executive may submit its views on whether the presumption applies at all or is overcome on the facts of the case.

[99] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1668–69 (2013).

[100] *Id.* at 1664, 1666, 1668 (referring to the views of Congress).

[101] Sosa v. Alvarez-Machain, *supra* note 17, at 733 n.21 (2004) (noting a "strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy"); *id.* at 761 (Breyer, J., concurring in part and concurring in the judgment); Republic of Austria v. Altmann, *supra* note 19, at 701–02 (similar). *But see id.* at 735–36 (Breyer, J., dissenting).

[102] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1671, 1674, 1677 (Breyer, J. concurring in the judgment).

Court did not defer to the government's argument opposing the application of the presumption to the ATS.[103]

The following subsections analyze the deference due to the executive branch on a case-by-case basis and on the general principles governing the application and scope of the presumption.[104] It considers doctrine and theory, as well as the significance of the government's change in position from administration to administration.

Doctrine

The U.S. government argued that the presumption against extraterritoriality should not apply to the ATS.[105] This interpretation is not entitled to *Chevron* deference[106] because the ATS does not delegate any sort of authority to the executive branch, nor is this interpretation binding on the courts as a result of the president's constitutionally based lawmaking power.[107] At the oral argument in *Kiobel*, the solicitor general said the executive branch's position was entitled only to "persuasiveness" deference.[108] This low level of deference to the executive's views on general interpretive principles for the ATS is in keeping with the Court's recent cases on the presumption against extraterritoriality.[109] It is also consistent with the Court's refusal to defer to the executive's views on the general interpretation of statutes and common law doctrines dealing with foreign relations.[110] More broadly, empirical evidence shows that "persuasiveness" or "consultative deference"—in which the Court does not invoke one of the doctrinal

[103] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3 (arguing that "canons of statutory construction, such as the presumption against extraterritorial application of an Act of Congress" are "not directly applicable" in ATS cases).

[104] To illustrate this distinction, courts might defer on a case-specific basis (for example, "this case against IBM based on its conduct in South Africa does not threaten U.S. foreign relations or foreign policy"), or they might defer on more general principles (for example, "cases against U.S. nationals should go forward, even if based on conduct abroad"). *See* Republic of Austria v. Altmann, 541 U.S. at 701–03 (giving the government's views on statutory interpretation "no special deference" but suggesting that deference might be afforded to the State Department's "opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct"). Deference on more general principles is like the deference sought by the executive branch on the applicability of the presumption. Notice that general principles advocated by the executive in one case might be inconsistent with case-specific deference in another.

[105] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 3, 15–22.

[106] Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984); *cf.* Republic of Austria v. Altmann, 541 U.S. at 701–02.

[107] *See* Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 420–21 (2003); *see also* Lewis S. Yelin, *Head of State Immunity as Sole Executive Branch Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

[108] *See* Transcript of Oral Argument, *supra* note 44, at 44 (oral argument by General Donald B. Verrilli for the United States as amicus curiae, supporting respondents on October 1, 2012); *see also* Republic of Austria v. Altmann, 541 U.S. at 701–02 (views of the U.S. government as to the interpretation of Foreign Sovereign Immunities Act, *see infra* note 126, are "of considerable interest to the Court," but "they merit no special deference"); Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000) (suggesting that "persuasiveness deference" is appropriate in ATS cases).

[109] The government also opposed the presumption and lost in *Morrison v. Nat'l Austl. Bank Ltd.*, *supra* note 46, *see* Paul B. Stephan, Morrison v. Nat'l Australia Bank, Ltd.: *The Supreme Court Rejects Extraterritoriality*, ASIL INSIGHTS (Aug. 2, 2010), and in *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991). It unsuccessfully advocated for the presumption in *Sosa*, *supra* note 19, and in *Rasul v. Bush*, 542 U.S. 466 (2004). Cases in which the Court has agreed with the executive include *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993), *Smith v. United States*, 507 U.S. 197 (1993), and *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007).

[110] Republic of Austria v. Altmann, 541 U.S. at 701–03; W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400 (1990).

deference regimes but still seems to at least consider the views of the agency in question—is a common form of deference.[111] Apparently even more common, however, are cases in which the agency makes some sort of finding or submission that the Court effectively ignores.[112] That is what happened in *Kiobel*.

The "case-by-case" deference mentioned favorably in *Altmann* and *Sosa* apparently refers to something stronger than persuasiveness deference, but it has no obvious doctrinal home.[113] As other scholars have put it, the law is "peculiarly" unsettled about the basis for deference to the executive branch in foreign relations cases.[114] Again, neither *Chevron* nor executive lawmaking deference applies, and some scholars emphasize that deference is inconsistent with the judiciary's constitutional function of resolving cases. Moreover, in the act-of-state context—another area of federal common law pertaining to foreign affairs and international law—the Court has rejected various balancing tests and forms of case-by-case deference in favor of across-the-board determinations about the applicability of the doctrine.[115] The act-of-state decisions would generally suggest that the Court should apply the presumption against extraterritoriality without affording the government any particular deference. Also worth noting is that Justice Kennedy's dissenting opinion in *Altmann* strongly disagreed with the majority's reference to case-by-case deference in the immunity context,[116] which suggests that his (potentially dispositive) vote in ATS cases may afford little deference of any sort to the government. In lower courts, review of ATS cases over the past decades suggests that they are applying something like persuasiveness deference to case-by-case submissions about the foreign relations impact of particular cases.[117] The Court's language in *Altmann* and *Sosa*, however, may have led to greater deference to the executive branch in more recent litigation.[118] Finally, in other contexts, scholars have noted the diminishing utility of doctrines involving multiple deference categories.[119]

In short, it is a doctrinal mess.

[111] *See* William N. Eskridge & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1111–15 (2008).

[112] *Id.* at 1117, 1119 (noting that in 53.6 percent of cases surveyed, "the Court invoked no deference regime at all," and asking "why the Court so often opts not to invoke a deference regime, especially given the range of deference regimes available and the Court's strong rhetorical support for them").

[113] The political question and international comity doctrines might apply, but that is uncertain, as is the relationship between those doctrines and deference to the executive branch.

[114] Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1198 (2007) (noting that "the law has—peculiarly—not settled on a general principle of deference when an executive agency advances an interpretation of a statute that has foreign relations implications").

[115] In *First National City Bank v. Banco Nacional de Cuba*, a three-justice plurality accepted the so-called "Bernstein exception," pursuant to which courts will not apply the act of state doctrine if the State Department says that they should not. First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 764–70 (1972). Six justices explicitly rejected the exception, however. *Id.* at 772–73 (Douglas, J., concurring in result); *id.* at 773 (Powell, J., concurring in the judgment); *id.* at 785–93 (Brennan, J., dissenting); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436 (1964) (expressing skepticism about a reverse-Bernstein exception); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., 493 U.S. 400, 408 (rejecting an expansion of the act of state doctrine for cases that the State Department determines would embarrass foreign sovereigns).

[116] Republic of Austria v. Altmann, *supra* note 19, at 735–36 (2004) (Kennedy, J., dissenting).

[117] *See* Stephens, *supra* note 29, at 787–88 (surveying lower court cases).

[118] *Developments in the Law—Access to Courts*, *supra* note 11, at 1193–99.

[119] *See* Peter Strauss, *"Deference" Is Too Confusing: Let's Call Them* "Chevron *Space" and* "Skidmore *Weight*," 112 COLUM. L. REV. 1143 (2012).

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Theory

As a matter of theory, there is a facially appealing argument that courts should give very strong, *Chevron*-level deference to executive branch interpretations of the ATS, including questions of extraterritoriality, based on both democratic accountability and expertise. [120] This argument relies on a simple calculus that compares the executive branch to the courts or that compares the rationales for deference in foreign relations cases to *Chevron* cases. [121] For a variety of familiar reasons, it is argued, the executive branch is better positioned than courts to predict how a class of cases or a specific case will affect U.S. foreign policy and interests, including the potential for negative consequences that the presumption against extraterritoriality is designed to prevent.[122] If mistakes occur, the president can be held politically accountable; courts cannot. Accordingly, in interpreting the ATS generally and in evaluating its foreign policy implications in particular cases, the executive branch easily wins over courts, and deference (even in the absence of any delegation) is better justified in the foreign relations cases than even in *Chevron* cases.[123]

This reasoning is flawed, however, even on its own terms, at least with respect to case-by-case deference.[124] Courts did employ a very strong form of deference to the executive in one particular type of foreign relations case, and this approach impeded rather than advanced U.S. foreign policy interests. For decades, the courts gave broad deference to the executive branch both for case-by-case determinations of foreign state immunity and for the general principles that should guide immunity determinations when the executive branch made no submission. The result: foreign countries lobbied the State Department aggressively, and over time the department's decisions became inconsistent and unsatisfactory both to the department itself and to foreign sovereigns.[125] Eventually, at the request of the State Department, a statute was passed to vest courts, not the executive, with the power to make foreign sovereign immunity determinations.[126]

Affording the government a high level of deference in ATS cases could have the same effect because it will frequently create the same incentives for foreign sovereigns: rather than submit amicus briefs to the courts, they will send their diplomats to the State

[120] Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–98 (2004) (defending judicial deference to the executive branch in ATS cases based on democratic accountability and expertise); Posner & Sunstein, *supra* note 114.

[121] *See* Posner & Sunstein, *supra* note 114, at 1204–07; Ku & Yoo, *supra* note 120, at 188–99. Most of the academic response to the pro-deference position has focused on national security cases and statutes that constrain or empower the executive. *See*, *e.g.*, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations* Law, 116 YALE L.J. 1230 (2007). Neither is at issue here.

[122] Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1699.

[123] *See* Posner & Sunstein, *supra* note 114; Ku and Yoo, *supra* note 120.

[124] There are also doctrinal and potential constitutional problems with these arguments, *see infra* text accompanying notes 105–19.

[125] *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. Law and Governmental Relations, H. Judiciary Comm.*, 94th Cong. 34–35 (1976) (testimony of Monroe Leigh, legal adviser, Department of State) (testifying that case-by-case deference means that "the State Department becomes involved in a great many cases where we would rather not do anything at all, but where there is enormous pressure from the foreign government that we do something," and adding that "in practice I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures").

[126] Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified in scattered sections of 28 U.S.C.); Republic of Austria v. Altmann, *supra* note 19, at 715–38 (2004) (Kennedy, J., dissenting).

Department.[127] The State Department makes more submissions on general principles than on a case-by-case basis in ATS litigation and is well-aware of the dangers of pressure from foreign sovereigns.[128] In this context,the reaction of foreign sovereigns to an adverse court decision is less harmful to U.S. foreign policy than the reaction to an adverse decision of the State Department.[129] In other words, the theorists have incorrectly assumed that the foreign policy costs of the decision do not depend on whether the decision is made by the courts or the executive.[130] The problem of foreign sovereigns pressuring the State Department has led Congress to legislate concerning immunity, and it has been a factor in the Supreme Court's refusal to accord broad deference to the government in developing and applying the act of state doctrine.[131] These considerations suggest that if courts do afford deference on a case-by-case basis in ATS cases, that level of deference should be low—that is, an ill-defined level of deference that looks something like "persuasiveness" or an analogy to *Skidmore* deference.[132] A low-level of deference diminishes the accountability-based rationale, however, because domestic interest groups, like foreign sovereigns, will have difficulty allocating responsibility for decisions to the executive branch. At the same, time this kind of deference leaves open the possibility that a persuasive submission from the government might warrant expertise-based dismissal in unusual cases.

Inconsistent Positions

The executive branch has taken inconsistent positions over time on the extraterritorial application and other general aspects of the ATS. As the government's brief in *Kiobel* noted,[133] its argument against the presumption in that case was a change of position from the Bush administration, which had explicitly argued that the presumption should apply.[134] The Carter and

[127] The effect might be less in ATS litigation because the cases are not brought against foreign sovereigns themselves. ATS cases brought against foreign corporations and individuals, however, have generated significant opposition from foreign governments. *See*, *e.g.*, briefing in Sosa v. Alvarez-Machain, *supra* note 17; Yousuf v. Samantar, *supra* note 10, *petition for certiorari filed*; Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009). Cases against U.S. nationals based on conduct abroad might not generate similar pressure from foreign sovereigns. *But see In re* S. African Apartheid Litig., *supra* note 18. In any event, most ATS cases are brought against foreign defendants.

[128] *See* John Bellinger, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Beyond*, 42 VAND. J. TRANSNAT'L L. 1, 11 (2009) (focusing specifically on the difficulties that case-by-case submissions create for the executive).

[129] Decisions of courts might also generate adverse reactions from foreign sovereigns, of course, *see* Zschernig v. Miller, 389 U.S. 429 (1968), but the immunity example suggests that they are not as damaging over the long-term as State Department decisions made on a case-by-case basis. Indeed, in *Zschernig*, the U.S. government disagreed with the Court: it did not believe that the state court statute and the court decisions applying it harmed U.S. foreign relations. *Id.* at 460–61 (Harlan, J., concurring in the result).

[130] *See* Ku & Yoo, *supra* note 120, at 192.

[131] The Court has rejected the claim that the act of state doctrine should not apply to purported violations of international law unless the executive branch affirmatively states that the doctrine is applicable. The Court reasoned, in part, that "[o]ften the State Department will wish to refrain from taking an official position, particularly at a moment that would be dictated by the development of private litigation but might be inopportune diplomatically." Banco Nacional de Cuba v. Sabbatino, *supra* note 115, at 436. In the immunity context, Congress did not just shift authority from the executive to the courts; it also enacted a federal statute guiding the court's decision making. In that sense it is not analogous to the question of deference in the ATS context.

[132] *Cf.* Kevin M. Stack, *The President's Statutory Power to Administer the Law*, 106 COLUM. L. REV. 263 (2006) (arguing that, at a minimum, *Skidmore* requires the reviewing court to consider the agency's position and the basis for its view).

[133] Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 13, at 21 & n.11, 22.

[134] Brief of United States as Respondent Supporting Petitioner at 46–50, *supra* note 28.

Clinton administrations had supported ATS litigation based on conduct abroad in cases like *Filartiga* and *Doe v. Unocal*, but without explicitly addressing the presumption against extraterritoriality.[135] The Reagan administration took a narrow view of ATS litigation, arguing that the statute was intended to apply only when the United States could be held accountable for the tortious conduct—a rationale that did not extend to conduct committed by aliens abroad.[136] At oral argument in *Kiobel*, Chief Justice Roberts and Justice Scalia grilled Solicitor General Verrilli on the flip-flop point, asking why the Court should defer to his view and not that of the "solicitors general who took the opposite position."[137] The chief justice ended the exchange by stating that "whatever deference you are entitled to is compromised by the fact that your predecessors took a different position."[138]

The relevance of a prior inconsistent position depends on the reason for deferring to the executive in the first place. If the executive branch merits deference because it is a politically accountable actor,[139] then positions that change from one administration to the next serve the purposes of deferring.[140] But deference based on expertise—and lower levels of deference are difficult to justify on political accountability grounds—can be undermined by changes in agency interpretations from administration to administration.[141] Inconsistent positions receive less expertise-based deference, which is appropriate here. The application of the statute to extraterritorial conduct as a general matter should be seen as a question of policy rather than expertise. Some argue that U.S. interests are best served by restricting the ATS to avoid entanglement with foreign governments and to encourage foreign investment, whereas others argue that U.S. interests are better served by enforcing international human rights law.[142] Different administrations have adopted one or the other of these policies; picking between them is not an expertise-based decision. It is possible that some broader principles about the ATS might be expertise based. For example, the executive might want customary international law to develop in a particular direction with respect to aiding and abetting liability, universal jurisdiction, or corporate liability, and for that direction to remain constant over administrations;

[135] *See* Memorandum for the United States as Amicus Curiae at 1, Filartiga v. Pena-Irala (No. 79-6090), *supra* note 3; Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc., 176 F.R.D. 329 (C.D. Cal. 1997) (No. 96-6112).

[136] Brief for the United States of America as Amicus Curiae, Trajano v. Marcos, 878 F.2d 1438 (9th Cir. July 10, 1989) (Nos. 86-2448, 86-15039, 86-2449, 86-2496, 87-1706, 87-1707).

[137] Transcript of Oral Argument, *supra* note 44, at 43–44 (oral argument of General Donald B. Verrilli Jr. for the United States as amicus curiae, supporting the respondents).

[138] *Id.*; *see also* Trajano v. Marcos, 978 F.2d 493, 498–500 (9th Cir. 1992) (noting the Justice Department's change of position and concluding that the court was not bound by its submission). The Court did not mention the government's opposition to the presumption in the *Kiobel* opinion. It did refer to the flip-flop issue in a backhanded way. A sentence discussing the 1795 opinion of Attorney General Bradford noted that the solicitor general, "having once read the opinion" in one way, "now suggests" that the opinion could mean the opposite. In the next sentence the Court says that the "opinion defies a definitive reading and we need not adopt one here." Kiobel v. Royal Dutch Petroleum Co., *supra* note 1, at 1668. Although the specific reference is to the Bradford Opinion, it is hard not to see this as a veiled reference to the government's other (more substantial) changes of position.

[139] *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., *supra* note 106, at 865–66.

[140] Bradley, *supra* note 108, at 701.

[141] *See* Jody Freeman & Adrian Vermeule, Massachusetts v. EPA: *From Politics to Expertise*, 2007 SUP. CT. REV. 51 (discussing the tension between democratic accountability and protecting agency decision making from politics); *cf.* Medellín v. Texas, 552 U.S. 491, 528 n.14 (2008) (describing earlier statements from the solicitor general's office that contradicted its position in this case).

[142] *See supra* note 159.

the executive's capacity to do so may have important consequences for U.S. treaty negotiations and for the application of customary international law in forums around the world.[143]

In summary, the government should receive, at best, persuasiveness deference on general interpretive questions, consistent with the Court's approach in *Kiobel*. This conclusion is bolstered by the changes in government position from administration to administration, which undercut any expertise-based rationale for deferring. Some of the Court's language in *Sosa* and *Altmann*, however, points toward greater case-by-case deference to the government. These statements are in tension with the Court's approach in the act-of-state context, and they should also generate significant concerns about pressure on the State Department from foreign governments.

III. *KIOBEL* AND CUSTOMARY INTERNATIONAL LAW

ATS litigation has the potential to play an important role in the development and enforcement of customary international law. Decisions of national courts can constitute state practice and evidence of *opinio juris*, the two requirements of customary international law.[144] Thus, ATS cases are sometimes cited to show a customary international law norm of "civil universal jurisdiction"—which purportedly gives nations the power to apply their own law (known as "prescriptive jurisdiction") to extraterritorial conduct of "universal concern" such as piracy and the slave trade.[145] The *Kiobel* case serves as an example. Torture is widely viewed as a universal jurisdiction offense, so arguably the United States could apply its laws to criminalize torture occurring in Nigeria that involved neither a U.S. victim nor a U.S. perpetrator. Application of the ATS to conduct occurring within the territory of a foreign sovereign could be defended on these terms, and the *Kiobel* causes of action based on universal jurisdiction could go forward. Had the Court taken this approach, the decision would have had significant implications for customary international law.

Not a single justice, however, adopted universal civil jurisdiction in *Kiobel*. Even Justice Breyer, who had advanced this argument in a concurring opinion in *Sosa*,[146] did not explicitly rely on it here. Instead, Justice Breyer's *Kiobel* concurrence interpreted the statute as providing jurisdiction only "where distinct American interests are at issue"—a position based, in part, on the history of the statute and, in part, on an effort to "minimize international friction."[147] The *Kiobel* opinions themselves thus provided no state practice or *opinio juris* evidencing a customary international law norm of universal civil jurisdiction, but they also did not provide evidence

[143] See Ingrid B. Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931 (2010) (developing this argument); *see also* Banco Nacional de Cuba v. Sabbatino, *supra* note 115, at 432–33 ("When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.").

[144] *See* Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), para. 55 (Int'l Ct. Justice Feb. 3, 2012).

[145] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §404 (1987); *see also* Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735 (2004). Universal jurisdiction is widely accepted for some criminal offenses—which may provide the basis for its application in civil cases. *See* Sosa v. Alvarez-Machain, *supra* note 17, at 761–62 (Breyer, J., concurring in part and concurring in the judgment); *see also* Carlos Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AJIL 531, 542–43 (2012).

[146] Sosa v. Alvarez-Machain, 542 U.S. at 761–62 (Breyer, J., concurring in part and concurring in the judgment).

[147] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1674 (Breyer, J., concurring in the judgment).

against such jurisdiction. That is, none of the justices reasoned that international law does not permit universal civil jurisdiction. Instead, they did not reach this question, because they unanimously decided that *Congress* did not intend for this statute to extend that far. Indeed, although Justice Breyer declined to rely on universal civil jurisdiction in this case, he cited extensive authority in support of universal criminal jurisdiction and noted (as he had in *Sosa*) that in many countries criminal jurisdiction also supports civil remedies.[148]

Justice Breyer did explicitly urge consideration of "international jurisdictional norms" to help construe the scope of the ATS. The relationship between his opinion and customary international law of prescriptive jurisdiction, however, is ultimately unclear. As described above, Justice Breyer did not argue for the application of universal jurisdiction in *Kiobel*. Instead, in his view, jurisdiction would lie when the tort occurs on "American soil" (corresponding to the territoriality basis for jurisdiction in customary international law) or at the hands of a U.S. national (corresponding to nationality), or when important American interests are at stake (arguably corresponding to some form of protective jurisdiction).[149] This last basis includes, in Justice Breyer's analysis, an interest in not serving as a "safe harbor" for modern-day pirates, which extends to non-U.S. nationals who take up residence in the United States.[150] This application of the ATS goes beyond the traditional understanding of protective jurisdiction.[151] It could be defended as an exercise of universal jurisdiction, but universal jurisdiction (unlike Justice Breyer's approach) is not based on (or limited by) an important or distinct interest of the forum state.

In the end, Justice Breyer might be best understood as endorsing civil universal jurisdiction with a kind of subsidiarity requirement, pursuant to which there must be some connection between the forum state and defendant, such as the defendant's residence there.[152] The favorable reference to "comity, exhaustion, and *forum non-conveniens*" doctrines[153] could similarly accord preference to forums with a strong connection to the defendant or to the conduct at issue in the lawsuit, also consistent with universal jurisdiction tempered by subsidiarity.

In addition to arguing for universal jurisdiction, the *Kiobel* petitioners took the position that prescriptive jurisdiction limitations do not reach the ATS in the first place because the statute applies international law, not the law of the United States.[154] Under this view, extraterritoriality should pose no prescriptive jurisdiction concerns because the applicable law is customary international law, not domestic U.S. law. The problem with such an argument is that the ATS cause of action *is* U.S. law—federal common law—and the *Sosa* test for permissible causes of action is a uniquely American one.[155] Justice Breyer implicitly rejected the petitioners'

[148] *Id.* at 1675–76.

[149] *Id.* at 1673–74.

[150] *Id.* at 1674–75.

[151] *Id.*; *see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §402 cmt. f (listing espionage, counterfeiting, and other examples).

[152] *See* Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 40 (2011) (describing amended Spanish universal jurisdiction legislation as providing that "Spanish courts cannot assert universal jurisdiction unless the accused is on Spanish territory, or there is another relevant link between Spain and the case"); *cf.* Harmen van der Wilt, *Universal Jurisdiction Under Attack*, 9 J. INT'L CRIM. JUST. 1043, 1047–50 (2011) (discussing whether universal jurisdiction includes a preference for criminal prosecution by the state of nationality or the state on whose territory the conduct occurred).

[153] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1677 (Breyer, J., concurring in the judgment).

[154] Petitioners' Supplemental Opening Brief, *supra* note 53, at 38–40.

[155] *See* Wuerth, *supra* note 143. *But see* Anthony J. Colangelo, Kiobel: *Muddying the Distinction Between Prescriptive and Adjudicatory Jurisdiction,* MARY. J. INT'L L. (forthcoming 2013).

argument by discussing the prescriptive jurisdiction limitations on the application of federal common law in ATS cases.[156] Indeed, none of the opinions identified the applicable law in ATS cases as customary international law.[157] After *Kiobel*, it is clear that in ATS cases, courts are applying federal common law, some of which is derived, in part, from customary international law.[158]

IV. CONCLUSION

The ATS, in general, and *Kiobel*, in particular, have engendered much handwringing, some of it shrill. Those who favor the decision lament the lower court opinions and law professors who ignored the presumption against extraterritoriality for so long, thereby permitting this unique and pernicious form of American exceptionalism. Those opposed to the decision lament the corporate and individual human rights abuses that may go entirely unaddressed. And then there is the seemingly unending lack of certainty about the statute, which now focuses on detailed parsing of the opinions in *Kiobel*.

In truth, however, the statute is difficult, and not just because it is a 200-year-old textual cipher. The real difficulty is the policy conflict behind the ATS. Both sides of the debate capture important and deeply held views: on one side, the need to redress horrific violations of the most fundamental human rights, and on the other, the view that many of these cases have little to do with the United States, may impose foreign policy costs, and may not enhance net social welfare for those most harmed.[159] At a high level of abstraction, there is a parallel to the now-pressing question of what the United States and other countries should or should not do in Syria to enforce international human rights and humanitarian law. From the perspective of international law, this division tracks in some respects the differences between "modern" customary international law with its normative impetus and "traditional" custom with its basis on the sovereign equality of states, predictability, and stability.[160] Many individuals identify strongly with one side of this debate or the other, which is part of what makes the debate difficult to resolve collectively.

The division of authority and the interplay among Congress, the Court, and the executive branch also make the ATS difficult to interpret. Domestic lawyers refer to this division as separation of powers, whereas international lawyers see it as fragmentation or, perhaps more charitably, pluralism. As with the ATS, the doctrinal areas of foreign state immunity and prescriptive jurisdiction are developed in large part through national legal systems and their courts.[161] In both doctrinal areas, separation of powers has complicated the application and

[156] Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. at 1673–74 (Breyer, J., concurring in the judgment).

[157] *Id.* at 1667 (majority opinion) (referring to the ATS as "applying U.S. law").

[158] *See* Wuerth, *supra* note 143 (discussing choice of law in ATS cases and arguing that all of the applicable law is judge-made federal common law, the development of which is authorized by the statute).

[159] *Compare* Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Social Responsibility*, 56 RUTGERS L. REV. 971 (2004), *and* Pierre N. Leval, *The Long Arm of International Law: Giving Victims of Human Rights Abuses Their Day in Court*, FOREIGN AFF., Mar./Apr. 2013, at 16, *with* Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 279 (2009), *and* Robert H. Bork, Op-Ed, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16.

[160] *See* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AJIL 757 (2001).

[161] *See* H. Lauterpacht, *Decisions of Municipal Courts as a Source of International Law*, 1929 BRIT. Y.B. INT'L L. 65, 69–70; CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 4 (2008).

development of customary international law in domestic systems around the world. The ability of courts, legislatures, and executive branches to act at least somewhat independently of each other has led to uncertainty,[162] doctrinal innovation,[163] competition among the branches,[164] violations of international law,[165] "passing the buck" as one domestic actor pushes decision making and the implementation of international law to another domestic actor,[166] and a decidedly political slant to worldwide efforts to enforce human rights norms in domestic courts.[167] The ATS may be exceptional in various respects, but the underlying conflict in values that makes its application difficult are not. Nor are the power dynamics that shape the course of its development.[168]

For all the downsides of fragmentation, the resulting tumult provides an opportunity for human rights activists to achieve in one forum what they could not in another. Universal civil jurisdiction and limitations on official immunity are unlikely to garner widespread support if undertaken as across-the-board treaty commitments, but domestic actors have created state practice that supports both. These initiatives succeed because the social conflict underlying the doctrinal uncertainty is resolved differently by different state organs acting at different times: hence the change in ATS policy from one administration to the next; the willingness of Congress to act—sometimes—to limit immunity and create human rights causes of action; and the Court's decisions to limit, but not (yet) entirely foreclose, ATS litigation. Universal criminal jurisdiction has been similarly pulled in different directions through the domestic legal orders in Europe.[169] In the words of Nico Krisch, pluralism provides a "chance to contest, destabilize, delegitimize entrenched power positions," but it also brings into the open that "[a]mongst the many laws in a pluralist order, law can no longer decide; recourse must be had to other, often political means."[170] Viewed also from this perspective, the *Kiobel* decision and the arc of ATS litigation as a whole are entirely unexceptional.

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[162] The resolution of particular issues within one branch may, for example, depend upon the context in which they arise—for example, litigation versus state-to-state negotiations. *See* Ingrid Wuerth, *International Law in Domestic Courts and the* Jurisdictional Immunities of the State *Case*, 13 MELB. J. INT'L L. 819, 833–34 (2012); Rebecca Ingber, *Interpretation Catalysts and Executive Branch Legal Decision-Making*, 38 YALE J. INT'L L. (forthcoming 2013).

[163] *See*, *e.g.*, van der Wilt, *supra* note 152 (discussing the development of a subsidiarity requirement for universal jurisdiction based on state practice in Europe).

[164] *See* Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AJIL 241 (2008).

[165] *See*, *e.g.*, Ferrini v. Federal Republic of Germany, Cass., sez. un., 11 marzo 2004, n.5044, 87 RIVISTA DI DIRITTO INTERNAZIONALE [RDI] 539 (2004), 128 ILR 658 (reported by Andrea Bianchi at 99 AJIL 242 (2005)).

[166] *See*, *e.g.*, Medellín v. Texas, *supra* note 141; Giuseppe Cataldi, *The Implementation of the ICJ's Decision in the* Jurisdictional Immunities of the State *case in the Italian Domestic Order: What Balance Should be Made Between Fundamental Human Rights and International Obligations*?, ESIL REFLECTIONS (Jan. 24, 2013), *at* http://www.esil-sedi.eu/node/281.

[167] *See* Langer, *supra* note 152.

[168] *See* NICO KRISCH, BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW 23 (2010).

[169] *See* Langer, *supra* note 152; van der Wilt, *supra* note 152; *see also* Steven R. Ratner, *Belgium's War Crimes Statute: A Postmortem*, 97 AJIL 888, 889 (2003).

[170] KRISCH, *supra* note 168, at 306–07.