The Supreme Court as a Filter Between International Law and American Constitutionalism

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This Essay describes and defends the Supreme Court's role as a filter between international law and the American constitutional system. In this role, the Court ensures that when international law passes into the U.S. legal system, it does so in a manner consistent with domestic constitutional values. This filtering role is appropriate, the Essay explains, in light of the different processes used to generate international law and domestic law and the different functions served by these bodies of law. The Essay provides examples of this filtering role in four scenarios: the intersection of treaties and individual rights; the relationship between the treaty power and American federalism; delegations of authority to international institutions; and the domestic application of customary international law.

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INTRODUCTION

In his informative and timely book, Justice Breyer repeatedly emphasizes that the Supreme Court is a domestic court, not an international tribunal, and

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that there is no Supreme Court for the world.[1] Against that backdrop, Justice Breyer suggests various functions that the Supreme Court can perform as it faces an increasingly international docket, such as promoting harmonization, fostering collaboration, and helping to promote the rule of law. I do not disagree that the Supreme Court can play these roles in appropriate cases. In this Essay, I will describe another important role that the Supreme Court does and should serve, which is to act as a filter between international law and the American constitutional system. Although not Justice Breyer's focus, this filtering role is illustrated by a number of the cases that he discusses in his book.

By filter, I do not mean that the Court is or should be some sort of impermeable barrier to international law. Rather, the idea is that the Court should ensure that when international law passes into the U.S. legal system, it does so in a manner consistent with domestic constitutional values. Although this filtering process might in some instances dilute or narrow international law as it is applied within the United States, this is not inevitably the result. Filters can operate to improve and refine something for a particular purpose—think of a filter for coffee, for example—and this is often what happens when U.S. courts attempt to tailor international law to the U.S. domestic system.

This filtering role is needed because international law is generated through processes that often make it ill-suited for direct application in the U.S. legal system, and because it is frequently designed to perform functions different from those demanded of domestic law. The two principal sources of international law are customary international law and treaties. Customary international law arises out of the evolving practices and beliefs of nations.[2] Although the United States contributes to its formation and change, this body of law does not require any specific approval process in the United States. Moreover, because customary international law is unwritten and evolving, its content is often uncertain and contested. Indeed, even the types of evidence that should count toward ascertaining its content are the subjects of substantial dispute.[3] Because of its contested and evolutionary character, determinations of the content of customary international law implicate not only legal considerations but also considerations of U.S. foreign policy.[4]

1. *See* STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 6, 149, 236 (2015).

2. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (explaining that customary international law "results from a general and consistent practice of states followed by them from a sense of legal obligation").

3. For discussion of some of the debates and uncertainties surrounding custom as a source of international law, see CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., 2016).

4. *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432–33 (1964) ("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

Treaties, by contrast, do engage directly with U.S. constitutional processes, in that they require the agreement of the President and two-thirds of the Senate. Nevertheless, treaties are frequently vague because they are negotiated with representatives of a variety of legal and political systems and often have to be finessed to generate agreement among the parties. Even when treaties are precise, they often use terminology that differs from comparable concepts in U.S. law. The executive branch also dominates U.S. involvement in the treaty negotiation process, with the Senate serving only as an approval body after the text of the treaty has been set. Legislative involvement is therefore lower than for domestic statutes.[5]

Another component of international law today is the output of international institutions. Operating under delegations of authority in treaties, many modern international institutions have the power to adjudicate disputes and issue binding rulings. These institutions also often have the power to fill in the gaps of treaties or update them, without the requirement of new treaty ratifications. The growth of this international regulatory authority resembles in some ways the rise of the administrative state in the United States, but without the same level of domestic oversight. There is no Administrative Procedure Act for international institutions, and there is often no centralized judicial review. Because only executive agents represent the United States in these international institutions, the executive branch—rather than the legislature—dominates U.S. involvement in international regulatory output even more than it dominates the treaty negotiation and ratification process.[6]

In describing the Supreme Court as a filter, I should make clear that it is not the only filter in the United States, or even the primary one. Other government institutions also operate as filters, and sometimes the most important action that the courts take is to facilitate the filtering actions of other institutions. For example, the Senate often includes reservations and other conditions with its advice and consent to treaties to address constitutional and policy concerns. To take a relatively uncontroversial example, the Senate has

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also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.").

5. The vast majority of international agreements concluded by the United States since the 1930s have not even gone through the senatorial advice and consent process and instead have been concluded as some form of "executive agreement." CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 76 (2d ed. 2015). Although executive agreements concluded with the ex ante or ex post approval of Congress—so called "congressional-executive agreements"—arguably involve more democratic involvement than treaties because they are supported by both houses of Congress rather than just the Senate, the negotiation process is still dominated by the executive branch. *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L. J. 1236, 1308 (2008).

6. *See* BRADLEY, *supra* note 5, at 102. Congress does, however, sometimes attempt to influence executive branch participation in international organizations. *See, e.g.*, Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT'L L. 517 (2013).

attached reservations to some human rights treaties making clear that the United States is not agreeing to criminalize hate speech.[7] Free speech protections are stronger in the United States than in some other countries, so this reservation helped avoid a potential conflict between the Constitution and U.S. treaty commitments.

Using some of the cases that are discussed in Justice Breyer's book, I will give examples of the Supreme Court's filtering role in four scenarios: (1) the intersection of treaties and individual constitutional rights; (2) the relationship between the treaty power and American federalism; (3) delegations of authority to international institutions; and (4) the domestic application of customary international law.

I.
TREATIES AND INDIVIDUAL RIGHTS

The filtering role in the first scenario—the intersection of treaties and individual rights—is illustrated by the Supreme Court's 1957 decision in *Reid v. Covert*.[8] In that case, two wives of U.S. servicemembers stationed abroad were being tried for murdering their husbands—one in England and the other in Japan. The issue was whether the wives could be tried in U.S. military courts, even though they were civilians. The Uniform Code of Military Justice allowed military trials of persons living with servicemembers stationed abroad as long as such trials would be consistent with any international agreements to which the United States was a party. The United States had agreements with England and Japan allowing for such trials. Initially, the Supreme Court concluded that this arrangement was constitutional, but it then took the unusual step of granting rehearing, and in its second decision it held that the arrangement violated the jury trial provisions of the Constitution. A plurality of the Court explained that "[t]he United States is entirely a creature of the Constitution" and "[i]ts power and authority have no other source."[9] As for the agreements with England and Japan, the plurality stated that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."[10]

The Supreme Court later confirmed this proposition in a case concerning free speech rights, *Boos v. Barry*.[11] At issue there was the constitutionality of a

7. *See, e.g.*, U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. 8070 (Apr. 2, 1992) (including a reservation stating that Article 20 of the Covenant, which provides that any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility, or violence shall be prohibited by law, "does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States").

8. 354 U.S. 1 (1957).

9. *Id.* at 5–6.

10. *Id.* at 16.

11. 485 U.S. 312 (1988).

District of Columbia statute that prohibited the display of any sign within five hundred feet of a foreign embassy if that sign tended to bring that foreign government into "public odium" or "public disrepute." In concluding that this statute violated the First Amendment right of free speech, the Court rejected the argument that the statute was a proper implementation of a U.S. treaty obligation to protect the peace of embassies. The Court quoted the plurality opinion in *Reid* for the proposition that an international agreement cannot confer power on the government that is free from the restraints of the Constitution.[12] The Court also held that "the fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis."[13]

II.
THE TREATY POWER AND AMERICAN FEDERALISM

The Court's filtering role in the second scenario—the relationship between the treaty power and American federalism—is illustrated by the Court's 2014 decision in *Bond v. United States*.[14] That case concerned criminal legislation that implemented the Chemical Weapons Convention, a treaty that the United States joined in 1997. This legislation—the Chemical Weapons Convention Implementation Act (the Act)—purported to criminalize all non-peaceful uses of "chemical weapons," which the Act broadly defined to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[15] The issue in *Bond* was whether the Act applied to the attempt by a woman in Pennsylvania to use toxic chemicals to poison another woman in Pennsylvania as part of a domestic dispute.

In concluding that the statute should not be interpreted to apply to this situation, the Court explained that a literal interpretation of the statute would have significant implications for the American federal system of government.[16] The federal system, the Court emphasized, allocates much of the responsibility for criminal law and enforcement, including local poisoning cases, to the state rather than national level.[17] The Court also noted that, in cases involving domestic statutes, it had generally declined to read federal law as intruding on the traditional responsibility of the states "unless Congress ha[d] clearly indicated that the law should have such reach."[18] Applying the same approach here, the Court said that it would "insist on a clear indication that Congress

12. *Id.* at 324.
13. *Id.*
14. 134 S. Ct. 2077 (2014).
15. 18 U.S.C. §§ 229(a), 229F(1)(A), 229F(8)(A) (2012).
16. *Bond*, 134 S. Ct. at 2091–92.
17. *Id.* at 2092–93.
18. *Id.* at 2083.

meant to reach purely local crimes, before interpreting the statute's expansive language in a way that intrudes on the police power of the States."[19] The Court found no such clear indication.

Bond was a case in which Congress did a poor job of exercising its own filtering role. For reasons of democratic self-governance and sufficient notice to criminal defendants, it has long been assumed that criminal liability in the United States cannot be premised directly on a treaty.[20] Instead, when a treaty calls for criminalization, Congress must pass implementing legislation defining the offense and specifying the penalty. The Chemical Weapons Convention expressly recognized that this implementing legislation may be necessary when it stated that "[e]ach State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention."[21] Congress, however, essentially photocopied the treaty into the U.S. Code.[22] The result created tension not only with principles of American federalism, but also with individual liberty, since it would not have been apparent to potential criminal defendants that an international regime designed to address situations like Syria's use of chemical weapons (and the severe penalties that Congress imposed in connection with this regime) would apply to local crimes within the United States.[23] The Court's application of a "clear indication" requirement helped ensure that these values would actually be considered in the political process, and it also allowed the Court to avoid having to address, at least for now, how far that process could go with respect to intrusions on federalism.

III.
DELEGATIONS OF AUTHORITY TO INTERNATIONAL INSTITUTIONS

The Court's filtering role in the third scenario—delegations of authority to international institutions—is illustrated by the Supreme Court's 2008 decision in *Medellin v. Texas*.[24] This case resembles a law professor's imaginative hypothetical, with enough moving parts to make your head spin. In 1945, the United States ratified the Charter of the United Nations (UN Charter). Article 94 of the UN Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in

19. *Id.* at 2090.

20. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, cmt. i (1987).

21. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. VII(1), Jan. 13, 1993, 32 I.L.M. 800, 810.

22. *See Bond*, 134 S. Ct. at 2085 (noting that the Act "closely tracks the text of the treaty").

23. In an earlier decision in the *Bond* case, in which the Supreme Court held that the defendant had standing to raise the federalism argument, the Court noted that there is a connection between federalism and individual liberty. *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

24. 552 U.S. 491 (2008).

any case to which it is a party."[25] During the next several decades, the United States agreed in various treaties to submit disputes under the treaties to the International Court of Justice (ICJ). In 1969, for example, the United States ratified the Vienna Convention on Consular Relations (Vienna Convention), which among other things, requires that when the United States arrests nationals from other party countries, it must notify them that they have the right to have their consulate notified of the arrest and to communicate with the consulate.[26] At the same time, the United States also ratified an Optional Protocol to the Vienna Convention providing that disputes between countries under the Convention could be heard in the ICJ.[27]

For many years, the United States often failed to provide the consular notice required under the Vienna Convention, especially for arrests made at the state and local levels. For one thing, many police departments were simply unaware of the obligation.[28] Eventually, advocates of foreign-citizen prisoners on death row seized on this treaty violation as a potential ground for obtaining new trials or sentencing hearings. U.S. courts, however, rejected the challenges, concluding that limitations on federal habeas law trumped the treaty rights that were now being invoked. Foreign countries then started bringing cases against the United States in the ICJ—first Paraguay,[29] then Germany,[30] and finally Mexico. In the Mexico case, the ICJ held that the United States had breached the treaty and that it was obligated to provide "review and reconsideration" for fifty-one Mexican citizens on death row in various states, notwithstanding any domestic law limitations (such as rules of procedural default) that would otherwise disallow reopening those cases.[31]

In the *Medellin* case, which was brought by one of the Mexican citizens named in the ICJ decision, the Supreme Court had to decide what effect the ICJ's judgment had in the U.S. legal system. There was no dispute that the judgment was binding on the United States under international law, by virtue of the UN Charter. But this was a case in which Texas law would ordinarily disallow the petitioner a new hearing, so the question was whether the treaty obligation relating to the ICJ decision created *domestic* law with sufficient

25. U.N. Charter art. 94(1), 59 Stat. 1051, T.S. No. 993 (1945).

26. Vienna Convention on Consular Relations and Optional Protocol on Disputes, art. 36, Apr. 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

27. Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, T.I.A.S. No. 6820.

28. *See, e.g.*, S. Adele Shank & John Quigley, *Foreigners on Texas's Death Row and the Right of Access to a Consul*, 26 ST. MARY'S L.J. 719, 748 (1995) ("Telephone calls by the authors to a number of major-city police departments indicated little awareness of the Vienna Convention and an absence of any procedure to inform foreign nationals of their right of consular access.").

29. *See* Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 9).

30. *See* LaGrand Case (Ger. v. U.S.), 2001 I.C.J. 466 (June 27).

31. *See* Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12, 71–72 (Mar. 31).

force to override the Texas law.[32] Sometimes treaty obligations do have this domestic effect. Unlike the British system, which requires parliamentary implementation before treaties have domestic effect, the U.S. Constitution provides that treaties are the supreme law of the land and that they are binding on state judges.[33] But, from early in its history, the Supreme Court has distinguished between "self-executing" treaty obligations and "non-self-executing" obligations, based on the idea that not all treaties are intended to be, or are suited to be, directly applied by courts as domestic law.[34] In *Medellin*, a majority of the Court concluded that the obligation in the UN Charter to comply with ICJ judgments was non-self-executing.

The Court reasoned that it was unlikely that the President and Senate, when they agreed to the UN Charter in 1945, thought that they were delegating to an international court the authority to issue rulings that would be "immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."[35] Among other things, the Court noted that the only type of enforcement specified in the UN Charter for seeking compliance with ICJ judgments was through the United Nations Security Council (Council), and that the United States had successfully insisted in the UN Charter on having a veto authority over Council decisions.[36] The Court also noted that in the U.S. system, even basic constitutional claims are often precluded in a criminal case after a conviction has become final. It thus saw no reason to think that the treaty was intended to create the "improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'"[37]

32. The Court had held in an earlier decision that the Vienna Convention obligation, even if self-executing, did not itself override such state law limitations. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 355–57 (2006). In reaching this conclusion, the Court disagreed with the ICJ's contrary interpretation of the Vienna Convention, while still giving that interpretation "respectful consideration." *See id.* at 355. For additional discussion of that decision, see Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order*, 2006 SUP. CT. REV. 59.

33. *See* U.S. CONST. art. VI ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

34. *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) ("[W]hen the terms of the [treaty] stipulation import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.").

35. Medellin v. Texas, 552 U.S. 491, 510 (2008).

36. *Id.* at 509–10.

37. *Id.* at 523 (quoting *Sanchez-Llamas*, 548 U.S. at 360). For additional discussion of the implications of *Medellin* for treaty self-execution, see Curtis A. Bradley, *Intent, Presumptions, and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540 (2008) and Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP. CT. REV. 131. For an argument that the decisions and rulings of international institutions should generally be presumed not to operate as self-executing law in the U.S. legal system, see Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003).

IV.
DOMESTIC APPLICATION OF CUSTOMARY INTERNATIONAL LAW

The Court's filtering role in the fourth and final scenario—the domestic application of customary international law—is illustrated by two Supreme Court decisions: *Sosa v. Alvarez-Machain*, decided in 2004; and *Kiobel v. Royal Dutch Petroleum*, decided in 2013. These decisions involved human rights suits brought under the Alien Tort Statute (ATS). The ATS dates back to the First Judiciary Act of 1789, and it provides that the federal district courts shall have jurisdiction over suits by aliens for torts that violate either treaties or the "law of nations,"[38] which was the phrase that historically was used to refer to customary international law. For almost two hundred years after its enactment, the ATS was a relatively unknown provision that was almost never successfully invoked as a basis for jurisdiction. That changed in 1980, when the Second Circuit ruled in *Filártiga v. Peña-Irala* that victims of human rights abuses abroad could use the statute to sue the perpetrators of the abuse when the perpetrators could be served with process in the United States.[39]

The circuit judge who authored the opinion in *Filártiga* observed at the end of the opinion that the court's decision represented "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[40] Although this goal is appealing, it is unlikely that it is what Congress had in mind in 1789 when it enacted the statute. The text, statutory context, and historical backdrop of the ATS suggest that Congress intended to provide for federal jurisdiction over certain sensitive tort cases to avoid unnecessary friction between the United States and other nations that might arise from leaving the cases to state court adjudication.[41] In particular, Congress was likely concerned about cases in which the United States would have had an international obligation to provide an avenue for redress, and it therefore wanted to avoid having compliance with this obligation rest solely on state courts.[42] Most international human rights cases, including *Filártiga*, do not implicate this concern, since the United States does not have an obligation to provide redress for victims of foreign human rights abuses. In fact, allowing international human rights litigation may actually contradict the original purpose of the statute, since such litigation often *creates* friction with other countries.[43]

It took the Supreme Court a long time to weigh in on this issue—too long, probably—since lower courts had been expressing concerns for years that they

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38. *See* 28 U.S.C. § 1350 (2012).
39. *See* 630 F.2d 876 (2d Cir. 1980).
40. *Id.* at 890.
41. *See* BRADLEY, *supra* note 5, at 202–03.
42. *See id.* at 203.
43. *See* John B. Bellinger III, Legal Adviser, Dep't of State, Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches (Apr. 11, 2008), http://2001-2009.state.gov/s/l/rls/103506.htm [http://perma.cc/2QYJ-RXTH].

did not have enough guidance about what they should be doing with these international cases.[44] Eventually, in 2004, the Court in *Sosa v. Alvarez-Machain* attempted to cabin ATS litigation without completely shutting it down.[45] *Sosa* was an unusual ATS case, in that the allegedly tortious conduct—the kidnapping of a Mexican doctor in Mexico—was carried out at the behest of the U.S. government. But the Court also considered the use of the ATS for international human rights litigation more generally. In his majority opinion, Justice Souter observed that judicial application of the ATS required "vigilant doorkeeping."[46] He explained that "[a] series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [ATS]."[47] Among other things, Justice Souter suggested that "[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution."[48] Relatedly, he noted that the Court had "no congressional mandate to seek out and define new and debatable violations of the law of nations."[49] Applying this cautionary approach, the Court held that violations of modern norms of customary international law would be actionable under the ATS only if the norms were widely accepted and specifically defined,[50] a test that the Court found was not met in that case.

In a concurring opinion, Justice Scalia expressed skepticism that general statements about judicial caution would have much effect on cabining ATS litigation in our large and decentralized federal court system,[51] and it turned out that he was right. As Justice Breyer states in his book, "[m]any lower courts seemed to find in *Sosa* a green light, not a note of caution."[52] Among other things, by the time the Court decided *Sosa*, an increasing number of cases were being brought against multinational corporations for allegedly "aiding and abetting" human rights violations abroad, and this growth in ATS cases continued after *Sosa*.[53] Multinational corporations are attractive defendants because they have no sovereign immunity, they tend to be amenable to service in the United States, they frequently have deep pockets, and they often have an

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44. *See, e.g.*, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984) (Edwards, J., concurring) ("This case deals with an area of the law that cries out for clarification by the Supreme Court.").

45. 542 U.S. 692 (2004).

46. *Id.* at 729.

47. *Id.* at 725.

48. *Id.* at 727–28.

49. *Id.* at 728. For a consideration of the implications of *Sosa* for the application of customary international law more generally in the U.S. legal system, see Curtis A. Bradley et al., Sosa*, Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869 (2007).

50. *Sosa*, 542 U.S. at 725.

51. *See id.* at 747–48 (Scalia, J., concurring).

52. BREYER, *supra* note 1, at 155.

53. *See* Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L. REV. 1823, 1824–25 (2010).

incentive to enter into a financial settlement to avoid negative publicity. The growth in ATS litigation prompted expressions of concern from other countries, which argued that U.S. courts were overreaching the proper bounds of their jurisdiction. As a Legal Adviser to the State Department explained, in this litigation the United States was "regarded as something of a rogue actor" because it was "perceived . . . as having in effect established an International Civil Court."[54]

The Supreme Court returned to the ATS in 2013, in *Kiobel v. Royal Dutch Petroleum*.[55] In that case, citizens of Nigeria who were residing in the United States brought suit against Dutch and British oil companies for allegedly aiding and abetting human rights abuses by the Nigerian military. In upholding a dismissal of this suit, the Court in *Kiobel* held that the ATS, like other federal statutes, is subject to a presumption against extraterritoriality. That is, unless and until Congress amends the statute to indicate that it applies abroad, the presumption is that claims cannot be brought under the statute for conduct that takes place outside the United States. The ATS presented a somewhat unusual candidate for the presumption against extraterritoriality, in that it is a jurisdictional provision that references international law, and international law is of course not limited in its application to U.S. territory. But the Court explained that the judicial development by the federal courts of remedies for violations of this international law, a practice initiated in *Filártiga* and then approved with caution in *Sosa*, involved the application of domestic law (namely, judicially developed federal common law). This element of domestic law made it appropriate to apply the presumption against extraterritoriality.[56] And the Court said that, if anything, "the danger of unwarranted judicial interference in the conduct of foreign policy [wa]s magnified in the context of the ATS, because the question [wa]s not what Congress has done but instead what courts may do."[57]

The presumption against extraterritoriality is strong medicine, and in his concurrence in *Kiobel*, Justice Breyer expressed the view that its application there was too strong.[58] But it should be noted that the *Kiobel* decision does not

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54. *See* Bellinger III, *supra* note 43.

55. 133 S. Ct. 1659 (2013).

56. *Id.* at 1663–64.

57. *Id.* at 1664.

58. *See id.* at 1671. In his book, Justice Breyer seems to interpret the majority opinion as still allowing for claims relating to foreign human rights abuses if the defendant now resides in the United States. *See* BREYER, *supra* note 1, at 161. That was what Justice Breyer had argued in his concurrence that the majority *should* have allowed, *see* 133 S. Ct. at 1671, but it seems doubtful that this is the best reading of what the majority *actually* held. 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," *id.* at 1669, 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

preclude Congress from authorizing broader human rights litigation in U.S. courts if it so chooses. Instead, the decision simply leaves that important policy choice to the legislative and executive branches, which, as a matter of separation of powers, are more appropriately positioned to weigh the foreign policy trade-offs implicated by this litigation. Congress has specifically authorized and defined the limits of international human rights claims in other statutes, most notably in the 1992 Torture Victim Protection Act,[59] and it can do so again if it thinks that ATS litigation should be broader than is allowed under *Kiobel*.

CONCLUSION

In sum, the Supreme Court plays an important role in mediating between international law and constitutional values of individual liberty, federalism, and the separation of powers—a role that is needed in light of the different processes used to generate international law and domestic law, as well as the different functions served by these bodies of law. Occasionally, the Court carries out this role through direct application of the Constitution, as in *Reid v. Covert*. Most of the time, however, it does so indirectly—through, for example, application of the non-self-execution doctrine, as in *Medellin*; invocation of presumptions and clear-statement rules, as in *Bond* and *Kiobel*; and by tailoring the domestic application of international law to specific statutory schemes or political branch practices, as in *Sosa*. These various filtering techniques have thus far allowed the Court to avoid having to specify the structural constitutional limitations on U.S. engagement with international law, something that is probably for the best, as Justice Breyer observes in his book.[60] This filtering role means that sometimes the international law applied by the U.S. legal system will differ from the international law applied by an international tribunal, such as the ICJ, a tribunal that is sometimes colloquially referred to as the "World Court." As Justice Breyer reminds us in his book, however, the U.S. Supreme Court is not, and should not try to be, the World Court.

States." *Id.* (emphasis added). 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. *Cf.* Warfaa v. Ali, 811 F.3d 653, 661 (4th Cir. 2016) ("Mere happenstance of residency, lacking any connection to the relevant conduct, is not a cognizable consideration in the ATS context.").

59. *See* 28 U.S.C. § 1350 (2012).

60. *See* BREYER, *supra* note 1, at 234–35.