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This outcome, ultimately, would be a muted victory for international legal norms in U.S. courts.

**Kiobel’s Broader Significance:**

**Implications for International Legal Theory**

*By Austen L. Parrish*

The U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.* has ushered in a new era for human rights enforcement. Unanimously, the Court ended so-called foreign-cubed human rights cases, that is, litigation where foreign plaintiffs sue foreign defendants for activity occurring abroad. The broadest form of universal civil jurisdiction that the Second Circuit’s decision in *Filártiga v. Peña-Irala* once appeared to promise is over. Alien Tort Statute (ATS) litigation, while not foreclosed, has become more limited.

So far, the analysis of *Kiobel* has been doctrinal, focusing, for example, on whether the Supreme Court correctly applied the presumption against extraterritoriality. Alternatively, the commentary has been forward-looking, discussing the types of cases that will be seen after *Kiobel* or predicting the next battleground for human rights advocacy. For its part, the popular press has caricatured the decision either as representing the end to plaintiff’s litigation run amok or as signaling the United States’ deference to corporate interests over human rights interests.

*Kiobel*, however, has broader significance. The decision reflects a rejection of attempts to reconceive global governance, from both left-leaning and right-leaning academics. In *Kiobel*,

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7 *See* Beth Stephens, *Kiobel Insta-Symposium: Closing Avenues for Relief*, OPINIO JURIS (Apr. 24, 2013), at http://opiniojuris.org/2013/04/23/kiobel-instasymposium-closing-avenues-for-relief (describing how some “are crowing about the resounding defeat of rapacious trial lawyers who used these cases to shake down virtuous multinational corporations” and noting that little supports this characterization).
the Court unanimously refused to adopt the unilateral approach encouraged by pluralists and other modern internationalists that would displace international multilateral approaches to global governance. The Court also did not fully embrace the perspective championed by international law skeptics, who would prefer that international norms have no role in U.S. jurisprudence. Justice Stephen Breyer’s concurrence particularly reinforces the view that U.S. courts should heed international jurisdictional norms, while reaffirming that exorbitant assertions of extraterritoriality are disfavored—a position that is consistent with long-standing international law principles.9

The *Kiobel* decision, then, is friendlier to international law than some have suggested. While *Kiobel* deprives advocates of one enforcement tool, the decision vindicates, rather than undermines, the interests of the human rights community. *Kiobel* suggests that efforts to build respect for human rights will need to occur multilaterally, instead of through unilateral extraterritorial regulation. If it spurs a reexamination of how to rebuild and legitimize international institutions, the decision’s rejection of two popular theories in legal scholarship will be a welcome development.

**Rejecting Global Legal Pluralism**

The approach that the Court most roundly rejected is one that has been in ascendance among legal scholars recently: global legal pluralism. Legal pluralists have sought to take descriptive accounts from other disciplines, particularly sociology and anthropology, and turn them into normative theories for global governance.10 By staking a normative vision, they distinguish themselves from earlier pluralists who sought to better understand the world but not create an alternative jurisprudence.11 Unlike traditional international law scholars, pluralists contend that international norms in the age of globalization are best created and enforced at the substate level.12

Pluralists have sought, among other objectives, to change and redefine jurisdictional rules.13 They have sought to exploit, not resolve or manage, normative conflict and have attempted to expand jurisdictional bases to enable local courts to develop international law. Harold Koh’s transnational legal process, while not defined as “pluralist,” in many ways seeks to develop international law through substate actors in this way.14

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10 See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1156 (2007) (“In sum, pluralism offers not only a more comprehensive descriptive account of the world we live in, but also suggests a potentially useful alternative approach to the design of procedural mechanisms, institutions, and practices.”).


Yet global legal pluralism, as prescription, is no friend to international human rights. It rejects the universal norms upon which human rights depend and instead relies on domestic courts as experimentation sites where norms will develop and later migrate to the international system. This approach to global governance requires a unique faith that courts in other countries will interpret and develop human rights in a specific (and similar) way. But little suggests that this sort of consensus exists. The concern, then, is less that other nations will hail U.S. citizens into their courts for alleged violations but that other courts will develop norms of civil liability that are in tension, or are even inconsistent, with human rights. For these reasons, the pluralist recipe for promoting human rights everywhere will likely be (despite best intentions) counterproductive.

Extraterritorial regulation of foreigners is problematic for other reasons too. Many view this kind of regulation as inherently illegitimate. Even if a substantive right could be universally agreed upon, procedural mechanisms for justice vary. Other nations view American adjudication skeptically and—rightly or wrongly—perceive American courts as biased, just as Americans often view foreign courts skeptically. Extraterritorial regulation of nonnationals is also seen as undemocratic and reflective of American exceptionalism and legal imperialism in its worst form.

That Chief Justice John Roberts’s majority opinion was unsympathetic to court-encouraged pluralistic approaches was unsurprising. But Breyer’s concurrence also rejected them by failing to find that Congress had authorized universal civil jurisdiction. While Breyer would look to “international jurisdictional norms” to determine the ATS’s reach, he was unwilling to


19 That the ATS has been employed generally against foreigners, but not against U.S. actors, increases the appearance of exceptionalism. James C. Hathaway, America, Defenders of Democratic Legitimacy?, 11 EUR. J. INT’L L. 121, 132 (2000) (noting how the “United States simultaneously asserts the right to lead, but also to be exempted from the rules it promotes”).


21 See ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 228 (2009) (suggesting that Americans only support decisions made by “American courts, which are staffed by Americans who share American values and interests”).


23 Chandra Lekha Sriram, Human Rights Claims vs. the State: Is Sovereignty Really Eroding?, 1 INTERDISC. J. HUM. RTS. 107, 117 (2006) (“To the degree that proceedings take place only in the courts of powerful Western states, and often in those of former colonizers, the argument that cases are selective, and even driven by imperialistic agendas, can be and has been raised.”).


25 Id. at 1673–75 (Breyer, J., concurring); see also Wuerth, supra note 5, at 611–12.

26 Kiobel, 133 S.Ct. at 1673 (Breyer, J., concurring).
find that those norms permitted a free-for-all, where each nation’s courts could claim authority to hear any case in the world. Both opinions relied on a more traditional territorial understanding “where distinct American interests [would need be] at issue” for jurisdiction to attach.27 Citing Justice Joseph Story, both the majority and Breyer’s concurrence noted that Congress adopted the ATS when it was clear that “[n]o nation ha[d] ever yet pretended to be the custos morum of the whole world.”28

Rejecting Sovereignism

Yet Kiobel was not a victory for right-leaning theorists either. Over the last fifteen to twenty years, a group of legal scholars (often referred to as international law skeptics or Sovereigntists) have attacked international law and its institutions,29 arguing that international law must be narrowly cabined to avoid undermining American interests.30 For Sovereigntists, international law usually undermines democratic sovereignty. They generally recoil when courts cite to foreign law31 and oppose the creation of international institutions. From this perspective, ATS litigation constitutes an attempt by left-leaning groups to infuse internationalist values where they do not belong.

In many ways, the Sovereigntist position is an attempt to redefine and constrain the role of courts. Sovereigntists appear more animated by separation of powers and federalism concerns than by concerns over developing effective global governance.32 The Court, however, did not fully adopt or endorse the Sovereigntist approach. The majority came closest, with its invocation of legislative primacy.33 But the majority’s application of the presumption against extraterritoriality was similar to how the Court has long approached jurisdictional rules. The Court was reluctant to assume that Congress had authorized the broadest reach of possible jurisdiction.34 The Court’s majority opinion was consistent with

27 Id. at 1674.
28 Id. at 1668 (majority opinion); id. at 1674 (Breyer, J., concurring).
30 See, e.g., JACk L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 167–84, 225–26 (2005) (arguing that international law is often rhetorical and that “international law scholars exaggerate its power and significance”); POSNER, supra note 21, at ix–xvi, 28–39 (criticism of the expansion of global legalism and warning on the overreliance on international law and its institutions); Michael Stokes Paulsen, The Constitutional Power to Interpret International Law, 118 YALE L.J. 1762, 1804 (2009) (“The force of international law is thus largely an illusion . . . [merely] a rhetorical, political trope . . . .”).
31 See Austen L. Parrish, Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law, 2007 U. ILL. L. REV. 637, 639–40, nn.8–10 (describing opposition to citation of foreign law).
32 For a more in-depth discussion, see Parrish, supra note 22, at 822–27, 841–56.
34 The Court often refuses to assume that Congress has utilized all jurisdictional power granted to it, even in the face of broad statutory language. See, e.g., Louisville & Nashville R.R. Co. v. Motley, 211 U.S. 149, 152–53 (1908) (interpreting the statutory grant of federal question jurisdiction to be narrower than what is constitutionally permitted); Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267 (1806) (Marshall, C.J.) (interpreting the statutory grant of diversity jurisdiction to be narrower than constitutional limits).
international law’s respect for sovereignty and self-determination. Breyer’s concurrence also was not sympathetic to the skeptics’ view, as it sought to interpret the statute “consistent with international law and foreign practice.” In addition, the entire Court foreclosed only foreign-cubed cases. *Kiobel* says little about how to decide ATS claims when significant ties to the United States exist. The least controversial claims from an international law perspective—those seeking to hold U.S. actors liable for human rights violations, especially in places under U.S. control—should remain viable. For international law skeptics, *Kiobel* does little to insulate American jurisprudence from transnational norms.

**Conclusion**

The doctrinal issues in *Kiobel* are important. The decision reflects culture-war-type debates over tort reform, the role of courts, separation of powers, and federalism. The case, however, also says something important about approaches to global governance. The decision may mark the beginning of a welcome retreat from a failed strategy of aggressive American unilateralism that has been promoted by both right-leaning and left-leaning academics.

Much work remains in the human rights area. Tremendous barriers to justice exist. International law and institutions remain underdeveloped, often to the benefit of multinational corporations and other actors. Our courts can and should play an important role in enforcing and developing international law, particularly to hold our own citizens accountable for human rights abuses (whether occurring in the United States or abroad). The hope after *Kiobel* is that the human rights community will turn away from unilateral enforcement and focus its attention on rebuilding international law and its institutions. In this way, *Kiobel* underscores the failings of two extremes in legal scholarship—one that has sought to isolate internationalism, and another that has sought to privilege unilateralism.

**CORPORATIONS AND TRANSNATIONAL LITIGATION: COMPARING KIOBEL WITH THE JURISPRUDENCE OF ENGLISH COURTS**

*By Andrew Sanger*

As a result of the U.S. Supreme Court’s decision in *Kiobel v. Royal Dutch Petroleum Co.*, claims brought under the Alien Tort Statute (ATS) must “touch and concern the territory of the United States . . . with sufficient force” for federal courts to recognize a federal common

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35 See, in this Agora, Marco Basile, *The Long View on Kiobel: A Muted Victory for International Legal Norms in the United States?*


37 See Wuerth, *supra* note 5, at 603, 608–13, 621 (describing cases that may remain viable).


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