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David L. Sloss

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Kiobel and Extraterritoriality: A Rule Without a Rationale

DAVID L. SLOSS[†]

Analysis of recent judicial decisions applying the presumption against extraterritoriality indicates that U.S. courts and commentators invoke at least four different rationales for the presumption: an international law rationale; a domestic political science rationale; an international relations rationale; and a domestic judicial policy rationale. This Essay briefly discusses each rationale and its application to *Kiobel v. Royal Dutch Petroleum Co.*¹ I conclude that neither of the first two rationales offers a persuasive justification for applying the presumption against extraterritoriality to limit extraterritorial application of the Alien Tort Statute (ATS)² in *Kiobel*. The U.S. Supreme Court purported to apply an international relations rationale in *Kiobel*, but that rationale requires judicial deference to the foreign policy judgment of the political branches, and the majority in *Kiobel* defied the Obama Administration's foreign policy preferences. Finally, I conclude that the domestic judicial policy rationale is problematic because it manifests judicial hostility to democratic lawmaking.

I. THE INTERNATIONAL LAW RATIONALE

Historically, the presumption against extraterritoriality began as a presumption against extra-jurisdictionality.³ In other words, it was a presumption that courts should not apply U.S. law extraterritorially in

[†] Professor of Law and Director, Center for Global Law and Policy, Santa Clara University School of Law.

1. 133 S. Ct. 1659 (2013).

2. 28 U.S.C. § 1350 (2006).

3. See John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 352 (2010) ("For most of U.S. history, the Supreme Court . . . applied a presumption against *extrajurisdictionality*: that is, a presumption that federal law does not extend beyond the jurisdictional limits set by international law." (footnote omitted)).

violation of international legal rules limiting the jurisdictional reach of national laws.⁴ Throughout the nineteenth century, international law imposed strict jurisdictional limits on the extraterritorial application of domestic statutes.⁵ In practice, the presumption against extraterritoriality was an application of the *Charming Betsy* canon⁶—a canon that encouraged courts to construe U.S. statutes in conformity with international legal rules.⁷

During the first half of the twentieth century, the international law rationale for the presumption against extraterritoriality became untenable because international law changed. The Permanent Court of International Justice decided the *Lotus* case in 1927.⁸ *Lotus* established a permissive rule: states can apply their laws extraterritorially unless there is a specific prohibition barring the extraterritorial application of domestic law. The court said:

Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, [international law] leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules⁹

After *Lotus*, international law no longer imposed strict limits on the extraterritorial application of domestic statutes.¹⁰

4. *Id.*

5. David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE* 7, 38 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) [hereinafter *CONTINUITY AND CHANGE*].

6. See William S. Dodge, *Morrison's Effects Test*, 40 *SW. L. REV.* 687, 687 (2011) (“The presumption against extraterritoriality was born from the marriage of the *Charming Betsy* canon . . . and an international law rule that jurisdiction was generally territorial.”).

7. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

8. S.S. “*Lotus*” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

9. *Id.* at 19.

10. Knox, *supra* note 3, at 355 n.30; see also Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 *HASTINGS INT'L & COMP. L. REV.* 323, 331 (2012) (“In [*Lotus*], the Permanent Court of International Justice articulated the fundamental rule that prescriptive jurisdiction – the ability of a government to prescribe law relating to certain activity – is permissive in

In *Kiobel*, the defendants argued that international law prohibits U.S. courts from applying U.S. law extraterritorially to “foreign-cubed” cases—i.e., cases involving foreign plaintiffs, foreign defendants, and foreign conduct.¹¹ This argument is clearly untenable. As an initial matter, it is debatable whether the *Kiobel* plaintiffs were even asking U.S. courts to apply U.S. law extraterritorially.¹² Arguably, it would be more accurate to say that the *Kiobel* plaintiffs were asking U.S. courts to apply international law extraterritorially. If that is an accurate description of the case, then it is unclear why the presumption against extraterritoriality is even relevant.

Setting aside that issue, this Essay assumes that *Kiobel* can fairly be characterized as a case involving the extraterritorial application of U.S. law. Even so, the international law rationale cannot justify application of the presumption against extraterritoriality in *Kiobel*. In the year 2013, there is no blanket rule of international law that prohibits States from enacting legislation to regulate the activities of foreigners in foreign countries. Nor is there any rule of international law that prohibits domestic courts from exercising jurisdiction over foreign-cubed cases. To the contrary, the universality principle is a widely accepted principle of international law that authorizes States to apply their laws extraterritorially to address heinous conduct that violates universal human rights norms.¹³ The universality principle is not limited to criminal cases; it applies equally to civil cases.¹⁴

international law and, unless a prohibition to prescriptive jurisdiction is proved, a state may properly claim jurisdiction. . . . The International Court of Justice has reaffirmed the enduring force of this rule as recently as 2010, noting that the rule articulated in *Lotus* remains a cornerstone of the international law of jurisdiction.” (alteration in original)).

11. See Supplemental Brief for Respondents at 37, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491) (“[T]he *Charming Betsy* canon also bars application of U.S. law to a ‘foreign-cubed’ ATS case . . .”).

12. See Anthony J. Colangelo, *Kiobel: Muddling the Distinction Between Prescriptive and Adjudicative Jurisdiction*, 28 MD. J. INT’L L. 65 (2013).

13. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 404 cmt. a (1987) (“Universal jurisdiction over [some] offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.”).

14. *Id.* § 404 cmt. b (“In general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, but international law does not preclude the application of non-criminal law on this basis . . .”); see also Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 153 (2006) (“It could be said, then, that though embryonic, state practice endorsing the exercise of universal civil jurisdiction as a permissive customary norm is beginning to emerge.”).

Assuming that the *Kiobel* plaintiffs' allegations are true, extraterritorial jurisdiction is consistent with international law because it falls within the scope of the universality principle.

In sum, the universality principle authorizes states to exercise jurisdiction extraterritorially in cases like *Kiobel*. Therefore, insofar as the Supreme Court wants to preclude application of the ATS to foreign-cubed cases, it cannot legitimately invoke an international law rationale to justify that outcome.

II. THE DOMESTIC POLITICAL SCIENCE RATIONALE

In the middle of the twentieth century, when the Supreme Court recognized that international law no longer supported the presumption against extraterritoriality, the Court developed a new rationale for the presumption. In *Foley Brothers. v. Filardo*,¹⁵ the Court announced that the presumption against extraterritoriality "is based on the assumption that Congress is primarily concerned with domestic conditions."¹⁶ *Filardo* changed the rationale supporting the presumption from an international law rationale to a domestic political science rationale.¹⁷

The basic idea is straightforward. Congressmen want to get re-elected. Hence, when they introduce legislation, they tend to focus primarily on how that legislation will affect their constituents.¹⁸ Therefore, when courts interpret legislation, they should assume that Congress wanted to use the legislation to shape events domestically, not overseas, unless a contrary intention is manifest. This rationale generally makes sense as long as the presumption against extraterritoriality is rebuttable. However, litigants should be able to rebut the presumption by providing specific evidence that Congress enacted a particular statute to influence foreign affairs, not just to shape domestic affairs.

No one seriously disputes the proposition that Congress enacted the ATS to influence foreign affairs. Congress' primary goal when it enacted the ATS was to reduce a source of friction with important

15. 336 U.S. 281 (1949).

16. *Id.* at 285.

17. See Melissa A. Waters, *International Law as an Interpretive Tool in the Supreme Court: 1946-2000*, in CONTINUITY AND CHANGE, *supra* note 5, at 380, 386-88.

18. *Cf. id.* at 387.

U.S. allies.¹⁹ During the 1780s, before ratification of the Constitution, the United States lacked a central authority capable of enforcing international obligations. The national government's inability to enforce international obligations created diplomatic tensions with both Britain and France.²⁰ The Framers' desire to ensure effective enforcement of international obligations and promote harmonious relations with key allies was a central reason for adopting the Constitution.²¹ It was also the primary reason for including the ATS in the 1789 Judiciary Act.²² The legislative intention is evident on the face of the statute, which provides federal courts jurisdiction over claims by aliens who sue "for a tort only, committed in violation of the law of nations or a treaty of the United States."²³ The textual focus on *aliens* and *international law* demonstrates that Congress was concerned with foreign affairs, not domestic affairs, when it enacted the ATS.

Thus, the domestic political science rationale does not support application of the presumption against extraterritoriality to restrict extraterritorial application of the ATS because the historical evidence demonstrates conclusively that Congress was not "primarily concerned with domestic conditions" when it enacted the ATS.²⁴

III. THE INTERNATIONAL RELATIONS RATIONALE

In *F. Hoffmann-La Roche v. Empagran S.A.*,²⁵ Justice Breyer asserted that U.S. courts should construe statutes so as to "take account of the legitimate sovereign interests of other nations."²⁶ He cited *Charming Betsy* to support this proposition, but the traditional *Charming Betsy* canon does not support his claim. The *Charming Betsy* canon focuses on international law: courts should interpret statutes to avoid violations of international law.²⁷ Justice Breyer's analysis focuses on international relations: courts should consider the

19. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–20 (2004) (discussing the historical context of the enactment of the ATS).

20. See Sloss, Ramsey & Dodge, *supra* note 5, at 9–12 (discussing the conflict with Britain over the 1783 peace treaty and a Pennsylvania Supreme Court case involving French subjects).

21. *Id.* at 11.

22. See *Sosa*, 542 U.S. at 715–20.

23. 28 U.S.C. § 1350 (2006).

24. *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949).

25. 542 U.S. 155 (2004).

26. *Id.* at 164.

27. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

legitimate sovereign interests of other countries.²⁸ *Empagran* is one of several recent cases in which Supreme Court Justices have invoked an international relations rationale to justify application of the presumption against extraterritoriality.²⁹ Although the international relations rationale supports application of the presumption against extraterritoriality in some cases, it does not justify the Supreme Court's application of the presumption in *Kiobel*.

In his opinion for the Court in *Kiobel*, Chief Justice Roberts invoked an international relations rationale to justify the presumption against extraterritoriality.³⁰ He also emphasized the separation-of-powers principles that are a key feature of the international relations rationale. In particular, Chief Justice Roberts referred to "the danger of unwarranted judicial interference in the conduct of foreign policy,"³¹ and warned courts to be "wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."³² Unfortunately, despite paying lip service to these important separation-of-powers principles, the Court subverted the very principles it claimed to endorse by adopting an opinion that is starkly at odds with the clearly expressed foreign policy preferences of the political branches.

To be clear, my objection to the Court's opinion in *Kiobel* is not about the result. The Court could have justified dismissal of plaintiffs' claims by employing any one of several rationales that are consistent with U.S. foreign policy interests.³³ Instead, the Court chose to employ a rationale that is antithetical to key U.S. foreign

28. See Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, in CONTINUITY AND CHANGE, *supra* note 5, at 533, 534.

29. See, e.g., *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454–55 (2007); *Pasquantino v. United States*, 544 U.S. 349, 378 (2005) (Ginsburg, J., dissenting).

30. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) ("This presumption 'serves to protect against unintended clashes between our laws and those of other nations which could result in international discord.'" (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991))).

31. *Id.*

32. *Id.* (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)).

33. See *id.* at 1674 (Breyer, J., concurring in the judgment) (concurring in the decision to dismiss plaintiffs' claims, but reasoning that the decision is justified because there are not "distinct American interests at issue" in this case, and noting that dismissal might also be justified in some cases on the basis of recognized doctrines of "exhaustion, *forum non conveniens*, and comity").

policy interests—as those interests have been articulated by the political branches.

After the Court ordered reargument in *Kiobel*, it faced a simple, stark choice. Should the Court adopt a bright-line rule that slams the door on *all* human rights claims against foreign defendants under the ATS? Or should the Court adopt a case-by-case approach that leaves the courthouse doors open to *some* human rights claims under the ATS?³⁴ This is not a new question; it has been with us since the Second Circuit's 1980 decision in *Filártiga v. Peña-Irala*.³⁵ Since that time, Congress and several presidents have made it abundantly clear that they favor the case-by-case approach, not the bright-line rule, because the case-by-case approach furthers the U.S. foreign policy interest in promoting vigorous enforcement of international human rights norms.³⁶

Despite clear evidence that Congress and the Executive Branch favor the case-by-case approach, the Court in *Kiobel* adopted a bright-line rule that it is *never* appropriate for federal courts acting “under the ATS to provide a cause of action for conduct occurring in the territory of another sovereign.”³⁷ The Court justified that rule by invoking our foreign policy interest in avoiding “unintended clashes between our laws and those of other nations which could result in international discord.”³⁸ The Court was undoubtedly right to note that overly aggressive judicial enforcement of human rights claims under the ATS could generate unwanted international discord. But the *Kiobel* majority was seemingly blind to factors weighing on the other side of the balance. Its bright-line rule undermines our foreign policy interest in promoting vigorous enforcement of human rights norms by slamming the door on virtually all human rights litigation under the ATS. The political branches have determined that our foreign policy requires a sensitive, case-by-case balancing of competing interests. *Kiobel* upended that balance.

34. The Court's decision in *Kiobel* does not affect human rights claims under the Torture Victim Protection Act, nor does it affect human rights litigation in state courts. However, those claims do not rely on the ATS. Absent further congressional legislation, the only human rights claims that can be litigated under the ATS in the wake of *Kiobel* are claims against domestic government officials. Claims against domestic officials have constituted a small fraction of ATS litigation over the past three decades. *See generally* BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 281–307 (2d ed. 2008). The plaintiffs in those cases almost always lose. *See id.*

35. 630 F.2d 876 (2d Cir.1980).

36. *See infra* notes 39–54 and accompanying text.

37. *Kiobel*, 133 S. Ct. at 1669.

38. *Id.* at 1664 (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)).

The relevant legislative materials demonstrate that Congress has endorsed the case-by-case balancing approach to human rights litigation under the ATS. Congress enacted the Torture Victim Protection Act (TVPA)³⁹ in 1992, largely in response to a circuit split concerning the appropriate judicial response to ATS human rights litigation. In *Filártiga*, the Second Circuit adopted a case-by-case approach that opened the federal courts to *some* human rights claims under the ATS.⁴⁰ In a separate concurring opinion in *Tel-Oren v. Libyan Arab Republic*,⁴¹ Judge Robert Bork advocated a bright-line rule that would bar *all* ATS claims, absent express congressional authorization.⁴² The legislative history of the TVPA leaves no doubt that Congress enacted the statute to repudiate Judge Bork's bright-line rule, and to endorse the Second Circuit's case-by-case balancing approach in *Filártiga*.⁴³ The statute specifically authorized claims by or on behalf of victims of torture and summary execution.⁴⁴ Additionally, both the House and Senate Reports stated, "claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by [the ATS]."⁴⁵ For emphasis, the House Report added, "[The ATS] should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law."⁴⁶

Both *Filártiga* and *Tel-Oren* involved claims based on "conduct occurring in the territory of another sovereign."⁴⁷ Moreover, the text of the TVPA specifically addresses actions taken "under actual or apparent authority, or under color of law, of any foreign nation."⁴⁸ Viewed in this context, it is hard to imagine how the Senate and

39. Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2006)).

40. See *Filártiga*, 630 F.2d at 882–85.

41. 726 F.2d 774 (D.C. Cir. 1984).

42. *Id.* at 798 (Bork, J., concurring).

43. See S. REP. NO. 102-249, at 3–5 (1991); H.R. REP. NO. 102-367, at 3–4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 85–86; see also Ryan Goodman & Derek P. Jinks, *Filártiga's Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 513–23 (1997) (providing a detailed review of the legislative history of the TVPA, and demonstrating that Congress endorsed the *Filártiga* approach).

44. See 28 U.S.C. § 1350 note.

45. S. REP. NO. 102-249, at 5; H.R. REP. NO. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. 84, 86.

46. H.R. REP. NO. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. 84, 86; see also S. REP. NO. 102-249, at 5 (stating that the ATS "should remain intact").

47. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013).

48. 28 U.S.C. § 1350 note.

House Reports accompanying the TVPA could have provided a clearer expression of congressional intent. Congress unmistakably wanted to preserve the option for future plaintiffs to bring ATS claims based on conduct occurring in other countries to vindicate human rights norms other than torture and summary execution. Moreover, Congress sought to preserve human rights litigation under the ATS to promote U.S. foreign policy goals—specifically, “to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights.”⁴⁹

In addition to Congress, the Executive Branch has also endorsed the case-by-case balancing approach to ATS claims involving human rights abuses committed on the territory of a foreign sovereign. The Obama Administration filed two amicus briefs in *Kiobel*.⁵⁰ In the second brief, the Solicitor General argued that “the Court should not articulate a categorical rule foreclosing any such application of the ATS” to human rights violations committed on the territory of a foreign state.⁵¹ Instead, he counseled, “claims based on conduct in a foreign country should be considered in light of the circumstances in which they arise.”⁵² The position articulated by the Solicitor General is not based exclusively on legal analysis; it reflects the considered foreign policy judgment of the Executive Branch. Specifically, the brief states, “it is the view of the Department of State that recognizing a cause of action in the circumstances of *Filártiga* is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights.”⁵³

All human rights claims against foreign defendants under the ATS involve a tension between competing foreign policy objectives. On the one hand, every Republican and Democratic president since Jimmy Carter has endorsed the principle that the United States should use its influence in foreign affairs to promote vigorous enforcement

49. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, pmb., 106 Stat. 73, 73 (1992).

50. Brief for the United States as Amicus Curiae Supporting Petitioners, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491); Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

51. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 50, at 4.

52. *Id.* at 5; *see also id.* at 6 (noting that there are circumstances in which a court may recognize a federal common law cause of action based on the ATS for extraterritorial violations of the law of nations).

53. *Id.* at 13.

of international human rights norms.⁵⁴ This principle supports a more plaintiff-friendly approach to ATS litigation that “leaves the door ajar” for some human rights claims under the ATS.⁵⁵ On the other hand, if U.S. courts are overly receptive to ATS claims, ATS litigation could become a troubling source of tension between the United States and important allies.⁵⁶ This factor weighs in favor of a more defendant-friendly approach to ATS litigation. Prior to *Kiobel*, the lower federal courts, as well as the Supreme Court itself in *Sosa*, adopted a case-by-case approach that struck a balance between these competing foreign policy goals.

Despite the Obama Administration’s forceful argument that the case-by-case approach is the best way to advance the United States’ foreign policy agenda, and despite compelling evidence that Congress endorsed this approach when it adopted the TVPA, the Supreme Court in *Kiobel* chose to defy Congress and the President by adopting a bright-line rule that blocks virtually all human rights litigation under the ATS. The Court professed fealty to the principle that courts should not impinge “on the discretion of the Legislative and Executive Branches in managing foreign affairs.”⁵⁷ But the Court’s judicially created bright-line rule significantly limits the range of Executive discretion by removing one tool—case-by-case support for ATS litigation—that several presidents have found to be a useful tool for communicating the United States’ support for vigorous enforcement of international human rights norms. Thus, the Supreme Court decision in *Kiobel* contravenes core separation-of-powers principles. In a case raising sensitive foreign policy concerns, the Supreme Court had the audacity to invoke a judicial foreign policy rationale to support a legal position directly contrary to the clearly expressed foreign policy preferences of the federal political branches.

54. See generally DAVID WEISSBRODT ET AL., INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 672–701 (4th ed. 2009).

55. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004) (“Whereas Justice Scalia sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping . . .”).

56. See, e.g., *Matar v. Dichter*, 563 F.3d 9 (2d Cir. 2009) (dismissing ATS claims against a former high-ranking Israeli government officer).

57. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Sosa*, 542 U.S. at 727).

IV. THE DOMESTIC JUDICIAL POLICY RATIONALE

The stark contrast between Chief Justice Roberts' foreign relations rhetoric and his willful disregard for the actual foreign policy preferences of the political branches suggests that there may be a different, unstated rationale for the Court's extraterritoriality holding in *Kiobel*. Professor Paul Stephan has suggested one possible rationale to explain the presumption against extraterritoriality. He argues that the modern Supreme Court "has concluded that there is something exceptional and possibly unwise about the way the United States conducts civil litigation."⁵⁸ Professor Stephan notes that "unique features of U.S. civil justice include a right to a jury trial, no risk that plaintiffs will pay the other side's attorneys fees, generous and intrusive pretrial discovery, the class action device, and the possibility of super-compensatory recoveries."⁵⁹ These features of the U.S. civil litigation system, which are not present in most other advanced industrial democracies, tend to tilt the scales in favor of plaintiffs. For that reason, among others, several of the United States' closest allies have objected to the extraterritorial application of U.S. laws.⁶⁰ Professor Stephan contends that the Court shares their concerns. He says, "The modern Court has not sought to undo the progressive reforms of civil litigation It has, however, tried to construct boundaries on civil litigation, especially in areas that entail substantial judicial discretion and modest legislative guidance."⁶¹ Thus, the presumption against extraterritoriality can be understood as one of the boundaries the Court has erected to restrain the perceived excesses of the U.S. civil litigation system.

The Court's effort to constrain civil litigation links its extraterritoriality jurisprudence to its ATS jurisprudence. In *Sosa*, the Court held that the ATS authorizes federal courts to create a federal common law cause of action to enforce international norms,⁶² but the Court sharply limited the scope of that cause of action and urged

58. Paul B. Stephan, *Response Essay – Empagran: Empire Building or Judicial Modesty?*, in CONTINUITY AND CHANGE, *supra* note 5, at 553.

59. *Id.* at 554.

60. For example, in *Kiobel*, the Dutch and British governments filed an amicus brief highlighting the unique features of the U.S. civil litigation system and urging the Court to impose restraints on the extraterritorial application of the ATS. *See* Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 5–6, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491).

61. Stephan, *supra* note 58, at 555.

62. *Sosa*, 542 U.S. at 724.

lower courts to be cautious in exercising their statutory authority.⁶³ In *Morrison v. National Australia Bank Ltd.*,⁶⁴ the Court applied the presumption against extraterritoriality to limit the ability of private plaintiffs to bring civil suits to enforce federal securities laws.⁶⁵ In both cases, judicially imposed limits on civil suits to enforce federal statutes—the Alien Tort Statute in *Sosa* and the Securities Exchange Act in *Morrison*—manifest the Court’s desire to erect boundaries to constrain the perceived excesses of private civil litigation.

I cannot say that Professor Stephan’s analysis is incorrect, but I believe it is incomplete. A more comprehensive analysis would have to account for the large body of case law in which the Court has enthusiastically endorsed civil litigation as a tool to enforce judicially created constitutional norms. An analysis along these lines might be summarized in three points. First, the Court uses its control over the litigation process to encourage civil litigation in which plaintiffs seek to enforce judicially created constitutional norms—especially constitutional norms that restrict Congress’ lawmaking power.⁶⁶ Second, the Court uses its control over the litigation process to create obstacles for civil plaintiffs who seek to enforce democratically created statutory norms embodied in federal legislation enacted by Congress.⁶⁷ Third, as exemplified by its recent decision in *Kiobel*, the Court uses its control over the litigation process to create obstacles for civil plaintiffs who seek to enforce international norms rooted in a broad-based international consensus.⁶⁸

A detailed defense of these claims is well beyond the scope of this Essay. Even so, a comparison of two recent Supreme Court decisions involving federal health care regulation illustrates the central point. In *Douglas v. Independent Living Center of Southern*

63. *Id.* at 725–28.

64. 130 S. Ct. 2869 (2010).

65. *Id.* at 2881–83.

66. *See, e.g.*, Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (holding that the Medicaid expansion provisions of the Patient Protection and Affordable Care Act exceeded Congress’ power under the Spending Clause); Citizens United v. FEC, 130 S. Ct. 876 (2010) (holding that federal statute barring independent corporate expenditures for electioneering communications violated the First Amendment).

67. *See, e.g.*, *Morrison*, 130 S. Ct. 2869 (restricting extraterritorial application of federal securities laws); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (restricting extraterritorial application of federal antitrust law).

68. *See* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

California, Inc.,⁶⁹ plaintiffs sued to enforce a provision of the federal Medicaid statute.⁷⁰ Justices Scalia, Thomas, and Alito joined a dissent authored by Chief Justice Roberts in which he argued that the plaintiffs lacked a private right of action⁷¹ and therefore could not bring suit to enforce a federal statutory norm. According to the dissent, plaintiffs cannot sue to enforce a statutory norm endorsed by Congress unless they can also identify a statute that explicitly authorizes them to file suit.⁷² (In fact, 42 U.S.C. § 1983 is a federal statute that authorized private lawsuits in cases like *Douglas* until the Supreme Court adopted a narrowing construction that restricted the use of § 1983 to enforce federal statutory norms.)⁷³

Compare *Douglas* to *National Federation of Independent Business v. Sebelius*,⁷⁴ where private plaintiffs sued to invalidate key provisions of the Patient Protection and Affordable Care Act. By asking the Court to invalidate a federal statute, the plaintiffs effectively invited the Court to engage in constitutional lawmaking, an invitation that the Court eagerly accepted.⁷⁵ In *Sebelius*, the plaintiffs could not identify any statute that authorized them to file suit. Even so, no Justice questioned whether they had a private right of action. Under current Supreme Court doctrine, plaintiffs *do not* need statutory authorization to file a suit in which they invite a court to engage in constitutional lawmaking to invalidate a democratically enacted federal statute. However, plaintiffs *do* need statutory authorization to file a suit in which they ask a court to enforce a democratically enacted federal statute.⁷⁶ Thus, the Court's private right of action doctrine privileges judicial lawmaking over

69. 132 S. Ct. 1204 (2012).

70. *Id.* at 1209.

71. *Id.* at 1211–15 (Roberts, C.J., dissenting).

72. *See id.* at 1211–13.

73. In *Maine v. Thiboutot*, 448 U.S. 1 (1980), the Court held that § 1983 “was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights.” *Id.* at 5 (quoting *Monell v. Dep’t. of Soc. Servs.*, 436 U.S. 658, 700–02 (1978)) (internal quotation marks omitted). Twenty years later, though, in *Gonzaga University v. Doe*, 536 U.S. 273 (2002), the Court effectively restricted the use of § 1983 to enforce (democratically created) statutory norms, while preserving § 1983 as a broad remedy to enforce (judicially created) constitutional norms. The question presented in *Douglas* would never even have arisen if the Court had not previously engaged in judicial policy making in *Gonzaga* to restrict the use of § 1983 to enforce statutory norms.

74. 132 S. Ct. 2566 (2012).

75. In *Sebelius*, the Court created a new, unprecedented constitutional limitation on Congress' Commerce Power. *Id.* at 2585–93. It also held for the first time since the 1930s that Congress had acted beyond the scope of its constitutional power under the Spending Clause. *See id.* at 2633–40.

76. *Gonzaga*, 536 U.S. at 283–84.

democratic lawmaking: the Court has invented a set of procedural rules that restrict access to court for plaintiffs who seek to enforce democratically created statutory norms, while granting access to court for plaintiffs who seek to enforce judicially created constitutional norms.

This pattern of judicial decision-making is deeply disturbing. The Supreme Court encourages federal courts to employ their judicial power to enforce constitutional norms created by the Supreme Court because the Court favors judicial lawmaking that it controls. In contrast, the Supreme Court erects obstacles for plaintiffs who seek to enforce statutory or international law norms because those norms are the product of lawmaking processes that the Court does not and cannot control. Thus, instead of portraying the Court's extraterritoriality jurisprudence as evidence of the Court's skepticism about civil litigation, as Professor Stephan suggests, one might reasonably conclude that the Court's jurisprudence manifests judicial hostility to democratic lawmaking processes.

CONCLUSION

This Essay has identified four different rationales for the presumption against extraterritoriality. In the nineteenth century, the Court invoked an *international law rationale* to justify the presumption against extraterritoriality. Today, the international law rationale provides little support for the Supreme Court's extraterritoriality jurisprudence because international law imposes very weak constraints on the extraterritorial application of U.S. law, whereas the Court seeks to impose much tighter constraints. In the mid-twentieth century the Court adopted a *domestic political science rationale* to justify the presumption against extraterritoriality. That rationale remains valid today, but it provides no support for those who seek to restrict the extraterritorial application of the ATS.

The Court has never explicitly invoked a *domestic judicial policy rationale* to justify its extraterritoriality jurisprudence. Even so, Professor Stephan makes a plausible argument that the domestic judicial policy rationale helps illuminate the normative judgments implicit in the Court's extraterritoriality jurisprudence. However, instead of portraying the Court's extraterritoriality jurisprudence as evidence of the Court's skepticism about civil litigation, as Professor Stephan suggests, one might reasonably conclude that the Court's

jurisprudence manifests judicial hostility to democratic lawmaking processes.

In the past decade, the Court has sometimes invoked an *international relations rationale* to justify the presumption against extraterritoriality. Applied with proper sensitivity, the Court could use the international relations rationale to support the Executive Branch in its careful, case-by-case balancing of competing foreign policy concerns. Unfortunately, in the hands of Chief Justice Roberts in *Kiobel*, the international relations rationale became a blunt weapon that the Court's majority used to impose its own foreign policy preferences in opposition to key foreign policy goals endorsed by the political branches. Congress and the President have made it abundantly clear that they want to use the U.S. legal system in a limited set of cases to help promote enforcement of widely accepted international human rights norms. In *Kiobel*, the Supreme Court invoked an international relations rationale to justify application of the presumption against extraterritoriality, and applied that presumption to subvert the international human rights policies of the federal political branches.