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The Judicial Philosophy of Chief Justice John Roberts: An Analysis Through the Eyes of International Law

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THE JUDICIAL PHILOSOPHY OF CHIEF JUSTICE JOHN ROBERTS: AN ANALYSIS THROUGH THE EYES OF INTERNATIONAL LAW

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ABSTRACT

This Article is about two things: international law in the United States and Chief Justice John Roberts's judicial philosophy. How do the two relate? Quite nicely, actually. First, Chief Justice Roberts has penned majority opinions in several landmark cases directly addressing important international law issues. Second, cases involving international law serve as an excellent window into a Justice's judicial philosophy. Consider Chief Justice Roberts's concluding paragraph in Medellin v. Texas, a watershed case in which the Court held that judgments of the International Court of Justice (ICJ) are generally not enforceable in U.S. courts:

> *In sum, while the ICJ's judgment in Avena creates an international law obligation on the part of the United States, it does not of its own force constitute binding federal law that pre-empts state restrictions . . . Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended 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.*

Federalism, separation of powers, treaty interpretation, U.S. sovereignty—all issues touched on in just two sentences. Moreover, as international law expands from governing only relations between States to touching every area within the jurisdiction of the several states, the status of international law in the United States has come under increasing scrutiny. No longer is it uncontroversial to say that international law is part of our law. Indeed, liberal and conservative Justices routinely split over cases involving international law.

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Part I of this Article will provide an overview of five international law issues in the United States ((1) the presumption against extraterritoriality; (2) international human rights litigation in U.S. federal courts; (3) the doctrine of self-executing treaties; (4) the scope of the treaty power; and (5) customary international law as federal common law) and then provide an update on the current status of these issues under Chief Justice Roberts. Part II draws conclusions about Chief Justice Roberts's judicial philosophy based on the cases discussed and ultimately concludes that the Chief Justice is a prudentialist, a judge who holds fast to "the conviction that federal judges must cultivate the virtues of modesty and humility, staying true to their constitutional duty to interpret the law while fending off whenever possible the temptation to intrude upon the proper provinces of other public and private institutions."

INTRODUCTION

This Article is about two things: international law in the United States (U.S.) and Chief Justice John Roberts's judicial philosophy. How do the two relate? Quite nicely, actually. First, Chief Justice Roberts has penned majority opinions in several landmark cases directly addressing important international law issues. Second, cases involving international law serve as an excellent window into a Justice's judicial philosophy. Consider Chief Justice Roberts's concluding paragraph in *Medellín v. Texas*, a watershed case in which the Court held that judgments of the International Court of Justice (ICJ) are generally not enforceable in U.S. courts:

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[1] Medellín v. Texas, 552 U.S. 491, 522–23 (2008) (internal quotations omitted).

[2] S.S. Lotus (Fr. v. Turk.), Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("International law governs relations between independent States.").

within the jurisdiction of the "several states,"[3] the status of international law in the United States has come under increasing scrutiny. No longer is it uncontroversial to say that "[i]nternational law is part of our law."[4] Indeed, liberal and conservative Justices routinely split over cases involving international law.[5]

Part I of this Article will provide an overview of five international law issues in the United States and then provide an update on the current status of these issues under Chief Justice Roberts. Part II draws conclusions about Chief Justice Roberts's judicial philosophy based on the cases discussed. Before turning to the issues themselves, however, a word is in order about how others have characterized Chief Justice Roberts's judicial philosophy.

In 2007, shortly after Roberts's confirmation, one commentator published an article arguing that Chief Justice Roberts was a prudentialist.[6] In short, a prudentialist judge is one who holds fast to "the conviction that federal judges must cultivate the virtues of modesty and humility, staying true to their constitutional duty to interpret the law while fending off whenever possible the temptation to intrude upon the proper provinces of other public and private institutions."[7] In a similar vein, former Attorney General Alberto Gonzalez, one of the people tasked by President George W. Bush to identify Supreme Court nominees, described Chief Justice Roberts's judicial philosophy as comprising four principles: judicial avoidance, judicial deference, narrow construction, and clarity.[8] Part II will test whether these characterizations are accurate.

I. INTERNATIONAL LAW IN THE UNITED STATES UNDER THE ROBERTS COURT

Although international law touches the U.S. legal system in a myriad of ways, only five will be discussed in this Article: (1) the presumption that U.S. statutes do not have extraterritorial effect; (2) international human rights

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[3] Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 400 (2000).

[4] The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* The Nereide, 13 U.S. 388, 423, 3 L. Ed. 769 (1815) ("[T]he Court is bound by the law of nations, which is a part of the law of the land.").

[5] *See infra* Part I.

[6] Daniel Breen, *Avoiding "Wild Blue Yonders": The Prudentialism of Henry J. Friendly and John Roberts*, 52 S.D. L. REV. 73, 89, 127–31 (2007).

[7] *Id.* at 76.

[8] Alberto R. Gonzales, *In Search of Justice: An Examination of the Appointments of John G. Roberts and Samuel A. Alito to the U.S. Supreme Court and Their Impact on American Jurisprudence*, 22 WM. & MARY BILL RTS. J. 647, 693–94 (2014).

litigation in U.S. federal courts; (3) the doctrine of self-executing treaties; (4) the scope of the treaty power; and (5) customary international law as federal common law. In the last six years alone, Chief Justice Roberts wrote majority opinions in landmark cases directly addressing the first four issues.[9] The fifth issue, customary international law as part of federal common law, was confronted by the Court in 2004, before the Chief Justice joined the Court, and indirectly by Chief Justice Roberts in 2013. Each of these issues will be addressed in turn in this Part.

A. The Presumption Against Extraterritoriality

Nothing in the Constitution limits Congress from passing legislation regulating conduct outside of U.S. territory.[10] In light of political concerns and jurisdictional limits imposed by international law, however, the question is whether Congress actually intends such a result. In a system run by sovereign and equal states, each state, generally, only has jurisdiction to regulate matters within its own geographical territory. This is the central premise behind the "presumption against extraterritoriality."[11] "It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'"[12] Considered a canon of statutory construction, the presumption against extraterritorial application has been a key component in the Court's jurisprudence since the early nineteenth century.[13] Over the years, the

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[9] Other international law issues directly addressed by Chief Justice Roberts include the rights of the Guantanamo Bay detainees, *see* Boumediene v. Bush, 553 U.S. 723, 802–03 (2008) (Roberts, C.J., dissenting) (arguing that the Court should not have addressed the question of whether the detainees had a constitutional right to habeas corpus because "the system the political branches constructed adequately protects any constitutional rights aliens captured abroad and detained as enemy combatants may enjoy"), and the scope of the foreign affairs powers, *see* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2116 (2015) (Roberts, C.J., dissenting) (arguing that the power to recognize foreign sovereigns is not exclusive to the Executive but is shared with Congress, and, even if it were exclusive, the issue was moot because the case did not implicate the recognition power). Chief Justice Roberts also joined the majority opinion in *Samantar v. Yousuf*, a unanimous judgment that held that the Foreign Sovereign Immunities Act does not apply to individuals. Samantar v. Yousuf, 560 U.S. 305, 319 (2010).

[10] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 (2010).

[11] In addition to the presumption against extraterritoriality, a related canon of statutory interpretation is known as the *Charming Betsy* presumption. Under this presumption, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Murray v. Schooner Charming Betsy, 6 U.S. 64, 118, 2 L.Ed. 208 (1804).

[12] Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991) (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284–85 (1949)).

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

Supreme Court has offered several rationales for the presumption, including: (1) "protect[ing] against unintended clashes between our laws and those of other nations which could result in international discord";[14] (2) that "Congress ordinarily legislates with respect to domestic, not foreign matters";[15] and (3) "that the determination of whether and how to apply federal legislation to conduct abroad raises difficult and sensitive policy questions that tend to fall outside both the institutional competence and constitutional prerogatives of the judiciary" (i.e., separation of powers concerns).[16] Thus, the presumption operates as a nice backdrop against which Congress can legislate, assuming, of course, that the Court's use and application of the presumption is itself clear and predictable.

After gaining traction in the early twentieth century,[17] the presumption "began to wane."[18] Indeed, the Restatement Third of Foreign Relations Law (1987) even went so far as to declare that the presumption, though often quoted by the courts, "does not reflect the current law of the United States."[19] The status of the presumption against extraterritoriality took a dramatic turn in 1991. In *Equal Employment Opportunity Commission v. Arabian American Oil Co.* (*Aramco*), the Court considered whether Title VII of the Civil Rights Act of 1964 applied extraterritorially.[20] In analyzing this question, Chief Justice Rehnquist framed the presumption against extraterritoriality as requiring Congress to "make a clear statement that a statute applies overseas."[21] Finding no such clear statement in the text of the statute, and rejecting the use of legislative history and administrative interpretations, the majority concluded that Title VII did not have extraterritorial effect.[22]

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[14] *Aramco*, 499 U.S. at 248.

[15] *Morrison*, 561 U.S. at 255.

[16] Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 516 (1997) (internal citations omitted). Other commentators have suggested up to six potential rationales for the presumption. *See, e.g.*, Dodge, *supra* note 13, at 90 (finding six potential rationales in the Court's jurisprudence and among scholars, but arguing that the only legitimate rationale for the presumption's continued application is that Congress generally legislates with respect to domestic concerns).

[17] *See* Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909).

[18] Dodge, *supra* note 13, at 85.

[19] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 415 n.2 (1987) (citing United States v. Sisal Sale Corp., 274 U.S. 268 (1927) and United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)).

[20] Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

[21] *Id.* at 258; *see also* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 109 (1991) (citing *Aramco* as requiring a "plain statement of extraterritorial statutory effect").

[22] *Aramco*, 499 U.S. at 258.

Accordingly, *Aramco* ushered in a new era for the presumption against extraterritoriality. Following *Aramco*, however, the Court indicated that perhaps it overstated the strength of the presumption with respect to the clear statement requirement. For example, in *Hartford Fire Insurance Co. v. California*, the majority opinion did not even mention the presumption when analyzing the extraterritorial application of the Sherman Act.[23] This decision, coupled with other inconsistent decisions applying the presumption,[24] left much ambiguity in the lower courts with respect to what the presumption actually meant and required.[25]

Since joining the Court, Chief Justice Roberts has confronted several cases in which the presumption against extraterritoriality played a key role in the Court's decision.[26] Two are worth mentioning. The first, *Morrison v. National Australia Bank Ltd.*, addressed "whether § 10(b) of the Securities Exchange Act of 1934 provides a cause of action to foreign plaintiffs suing foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."[27] *Morrison* involved a suit by foreign shareholders against a foreign company, National Australia Bank, alleging that the bank engaged in fraudulent activity involving one if its subsidiaries.[28] In an opinion written by Justice Scalia (in which Chief Justice Roberts joined), the majority held that § 10(b) did not apply extraterritorially, finding "no affirmative indication" in the Securities Exchange Act that it was meant to have such effect.[29]

In ruling against extraterritorial application of § 10(b), the Court made several important statements regarding the presumption. First, the Court noted

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[23] *See generally* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993). In his dissent, Justice Scalia discussed the presumption but noted that "it is now well established that the Sherman Act applies extraterritorially." *Id.* at 814 (Scalia, J., dissenting).

[24] *See, e.g.*, Small v. United States, 544 U.S. 385, 388–89, 394 (2005) (relying on the presumption, despite noting it did not apply, to find that the phrase in 18 U.S.C. § 922(g)(1), "convicted in any court," encompasses only domestic, not foreign, convictions); *see also id*. at 401 (Thomas, J., dissenting) ("The Court's creation [of a new statutory canon based on the presumption] threatens to wreak havoc with the established rules for applying the canon against extraterritoriality.").

[25] *See* John H. Knox, *A Presumption Against Extrajurisdictionality*, 104 AM. J. INT'L L. 351, 390–96 (2010) (outlining the confusion and different interpretations in lower courts with respect to the presumption against extraterritoriality).

[26] *See, e.g.*, Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454 (2007) (the presumption against extraterritoriality reflects the understanding "that United States law governs domestically but does not rule the world").

[27] Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 250–51 (2010).

[28] *Id.* at 250–52.

[29] *Id.* at 265.

that the presumption should be applied "in all cases."[30] In this vein, the Court chastised the Second Circuit for disregarding the presumption[31] and for engaging in "judicial-speculation-made-law—divining what Congress would have wanted if it had thought of the situation before the court."[32] Accordingly, any time a petitioner seeks to establish extraterritorial effect of a U.S. statute, the presumption must be applied. Second, the Court articulated a new standard for the presumption: "When a statute gives no clear indication of an extraterritorial application, it has none."[33] The Court explained that its "clear indication" standard did not require Congress to actually state, "this law applies abroad."[34] On the contrary, "context can be consulted as well."[35] Accordingly, the Court explicitly disavowed interpreting *Aramco's* "clear statement rule" as requiring an explicit statement in the text of the statute, but reaffirmed *Aramco's* central holding that the presumption was a high threshold to overcome and only a clear indication from Congress would be sufficient to rebut it.

In the second case, *Kiobel v. Royal Dutch Petroleum*, the Court reaffirmed *Morrison's* framing of the presumption as requiring a "clear indication" of congressional intent.[36] Chief Justice Roberts wrote for the majority. In *Kiobel*, a group of Nigerians residing in the United States sued several foreign oil companies, claiming that the corporations aided and abetted the Nigerian government in committing violations of the "law of nations" in Nigeria.[37] The Plaintiffs filed suit under the Alien Tort Statute (ATS).[38] Importantly, the Court acknowledged that although the ATS is "only jurisdictional," the presumption against extraterritoriality should nonetheless apply to the statute.[39] The Court then held that nothing in the text or history of the ATS evinced a "clear indication" that the ATS was intended to apply abroad.[40]

Kiobel is significant with respect to the presumption against extraterritoriality for several reasons. First, the Court reaffirmed *Morrison's*

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30 *Id.* at 261.
31 *Id.* at 255.
32 *Id.* at 261.
33 *Id.* at 255.
34 *Id.* at 265 (internal quotations omitted).
35 *Id.*
36 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).
37 *Id.* at 1662. For a more detailed discussion of this case, see infra Part I.B.
38 *Kiobel*, 133 S. Ct. at 1662; *see also* 28 U.S.C. § 1350 (1988); *infra* Part I.B.
39 Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).
40 *Kiobel*, 133 S. Ct. at 1669 (citing Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 283 (2010)).

central holding that the presumption requires a "clear indication" of Congressional intent for a statute to apply extraterritorially.[41] Second, the Court extended the application of the presumption from statutes purporting to *regulate conduct abroad* to the ATS, a statute that is "strictly jurisdictional."[42] The Court found that one of the primary justifications for the canon—deferring to the "political branches" on matters implicating foreign policy—was particularly acute with respect to the ATS.[43] Indeed, claims under the ATS must involve aliens and the law of nations,[44] and, like in *Kiobel*, often involve the deliberate acts of foreign governments against their own citizens, thereby forcing U.S. courts to sit in judgment on the actions of foreign sovereigns.[45] Accordingly, the Court held in *Kiobel* that "[t]he principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS."[46] Third, Chief Justice Roberts, in the last paragraph of his opinion, limited the effect of the presumption with respect to suits brought under the ATS. Noting that all the relevant conduct took place abroad, the Court found that the plaintiffs could not overcome that presumption.[47] However, Chief Justice Roberts held that "even where the claims [under the ATS] touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[48] While Chief Justice Roberts's statement opens a host of questions about the meaning and application of the presumption,[49] foremost of which is whether the presumption applies to conduct or effects, or both,[50] it is significant for the status of the presumption—at least with respect to suits

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41 *Id.* at 1664.

42 *Id*. *But see* William S. Dodge, *Dodge—The Presumption Against Extraterritoriality Does Not Apply to Jurisdictional Statutes*, OPINIO JURIS (Jan. 28, 2014, 12:00 PM), http://opiniojuris.org/2014/01/28/guest-post-dodge-presumption-extraterritoriality-apply-jurisdictional-statutes/ ("My point is simply that the Supreme Court in *Kiobel*, consistent with its prior cases, did not apply the presumption to the ATS as a jurisdictional statute but rather to the substantive cause of action that *Sosa* had recognized.").

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

44 *See* 28 U.S.C. § 1350.

45 *E.g.*, Filártiga v. Peña-Irala, 630 F.2d 876, 878 (2d Cir. 1980) (involving a claim by citizens of Paraguay against another citizen of Paraguay, who, at the time of the conduct in dispute, was the Inspector General of Police, for torture taking place in Paraguay).

46 *Kiobel*, 133 S. Ct. at 1665.

47 *Id.* at 1669.

48 *Id*.

49 *Id.* at 1669 (Kennedy, J., concurring).

50 Dodge, *supra* note 13, at 88–89 (finding that the presumption against "extraterritorial" application could mean that acts of Congress apply to (1) *conduct* that occurs in the United States, (2) conduct that causes *effects* in the United States, regardless of where the conduct actually occurs, or (3) *both* conduct occurring in the United States and conduct causing effects of the United States, unless a contrary intent appears).

50 Equal Emp't Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244, 248 (1991).

brought under the ATS—because it may permit lower courts to balance the strength of the connection of the claim to the United States against the presumption that the ATS only applies domestically.[51]

What can we glean from these cases with respect to the presumption against extraterritorial application? First, the presumption is here to stay. Despite the outcry of some scholars that the presumption should be jettisoned,[52] Chief Justice Roberts has firmly embedded the presumption into the Court's jurisprudence. Second, the Chief Justice has helped give the presumption teeth. Defining the presumption as requiring a "clear indication" from Congress and holding that it applies in all cases—including to statutes that are only jurisdictional—significantly contrasts with Justice Marshall's view of the presumption.[53] Finally, the Chief Justice's characterization of the presumption reinforces separation of powers and the narrow role of the judiciary in foreign affairs. By strengthening the presumption and adopting a clear background rule against which Congress can legislate, Chief Justice Roberts ensured that the President and Congress—not the judiciary—will be the branches that decide whether U.S. statutes apply abroad.

B. International Human Rights Litigation in U.S. Federal Courts

In terms of international law, Chief Justice Roberts's opinion in *Kiobel* is important for another, and perhaps more important, reason than just the presumption against extraterritoriality. *Kiobel* severely, although not completely,[54] curtailed the use of the U.S. federal courts as a forum for litigating international human rights cases.[55] Long the goal of some human rights activists, opening U.S. courts to foreign plaintiffs in human rights cases

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[51] *See infra* Part I.B.

[52] *E.g.*, Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. REV. 1 (2014).

[53] *Aramco*, 499 U.S. at 261 (Marshall, J., dissenting).

[54] *Kiobel*, 133 S. Ct. at 1669.

[55] *Id.* at 1668. For purposes of this Article, "international human rights cases" primarily refers to cases that are (1) brought by foreign plaintiffs, (2) against foreign defendants, whether individuals, corporations, or governments, (3) for violations of international law (4) that occurred outside the territorial jurisdiction of the United States. *See* Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995) ("Most Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan. Their claims seek to build upon the foundation of this Court's decision in *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980), which recognized the important principle that the venerable Alien Tort Act, 28 U.S.C. § 1350 (1988), enacted in 1789 but rarely invoked since then, validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.").

has been controversial since the movement started.[56] One of the primary reasons for the controversy is separation of powers concerns.[57]

The birth of the movement can be traced to *Filártiga v. Peña-Irala*, decided by the Second Circuit in 1980.[58] *Filártiga* summed up the movement's goal well: "Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence."[59] The argument for using U.S. federal courts as a forum for litigating international human rights cases goes something like this. Governments all over the world commit severe human rights abuses every day. Despite human rights treaties and domestic constitutions guaranteeing various rights and redress against such abuses, victims, for numerous reasons,[60] are often unable to obtain access to justice—whether in their home country or before an international tribunal. Accordingly, the United States—a nation committed to human rights and the rule of law—should open its courts to those who cannot otherwise obtain justice, regardless of whether the United States has any traditional legal interest in the case. Indeed, to some human rights advocates, the U.S. interest in protecting human rights is a sufficient legal basis in and of itself to open our courts to foreign victims of human rights abuses.[61]

Filártiga embodies these goals. In *Filártiga*, two Paraguayan nationals residing in the United States filed suit against the Paraguayan Inspector General of Police for kidnapping and torturing their family member to death in Paraguay. Although the Filártigas served the complaint on Peña-Irala in the United States, all conduct relevant to the complaint occurred in Paraguay.[62] Regardless of the injustice committed against Mr. Filártiga, the immediate question is: on what legal basis could two aliens bring suit in the United States

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[56] *See generally* Curtis A. Bradley, *The Cost of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 458 (2001); s*ee also* Sosa v. Alvarez-Machain, 542 U.S. 692, 749–50 (2004) (Scalia, J., concurring) ("The notion that a law of nations, redefined to mean the consensus of states on any subject, can be used by a private citizen to control a sovereign's treatment of its own citizens within its own territory is a 20th-century invention of internationalist law professors and human rights advocates.").

[57] *See, e.g.*, *Sosa*, 542 U.S. at 746–47 (Scalia, J., concurring).

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

[59] *Id.* at 890.

[60] Corruption, broken justice systems, cultural norms, and lack of knowledge about the legal process all contribute to the lack of enforcement of basic rights for millions of people throughout the globe.

[61] *See* Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1105 (9th Cir. 2009) ("American federal courts—be they in California or any other state—have a strong interest in adjudicating and redressing international human rights abuses."), *reh'g granted, vacated*, 603 F.3d 1141 (9th Cir. 2010).

[62] *Filártiga*, 630 F.2d at 878.

against another alien representing a foreign government for conduct that occurred entirely outside the United States?

According to the Second Circuit, the ATS provided the answer.[63] Passed in 1789 by the First Congress as part of the Judiciary Act, the ATS provides that "[t]he 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."[64] Until *Filártiga*, the ATS was all but dead letter. Indeed, the ATS had only been used once in the past 170 years.[65] This fact was of little importance to the Second Circuit, which held that the ATS was a proper medium to enter through the sacred gate of federal subject matter jurisdiction.[66] According to the court, the ATS was constitutional under Article III because it involved the law of nations, "which has always been part of the federal common law."[67] And because the prohibition on torture had allegedly attained the status of customary international law, the suit was proper.[68] Importantly, the Second Circuit placed no territorial limits on the reach of the ATS.

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[63] Since *Filártiga* was decided, the U.S. Congress passed the Torture Victim Protection Act. 28 U.S.C. § 1350 (1991). The Torture Victim Protection Act (TVPA), in addition to the ATS, is the other primary statute by which foreign plaintiffs litigate international human rights cases in U.S. federal courts. The TVPA was passed to "carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." *Id.* Under the TVPA, any individual, including aliens, may sue an "individual who, under actual or apparent authority, or color of law, of any foreign nation," subjects the individual to torture or extrajudicial killing. *Id.* § 1350(2)(a). Accordingly, the TVPA expresses Congress's clear intent to permit aliens to sue individuals acting in a governmental capacity for torture even when the torture occurs outside the United States. In the only Supreme Court case addressing the TVPA, *Mohamad v. Palestinian Authority*, the Roberts Court unanimously ruled that the TVPA applies exclusively to natural persons and does not impose liability against any organizational entity. Mohamad v. Palestinian Authority, 132 S. Ct. 1702, 1710–11 (2012).

[64] 28 U.S.C. § 1350 (2015). The ATS is also referred to as the Alien Tort Claims Act.

[65] The ATS provided the basis for jurisdiction over a child custody suit between two aliens in *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961). Until *Adra*, the ATS had not been invoked since 1795. Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (finding that the ATS provided an alternative basis of jurisdiction over a suit to determine title to slaves on board an enemy vessel taken on the high seas).

[66] *See Filártiga*, 630 F.2d at 887.

[67] *Id.* at 885. The Second Circuit did not even mention *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938), which famously held that "[t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." For a further discussion of international law as federal common law, see infra Part I.E.

[68] *Filártiga*, 630 F.2d at 884.

The doors were now wide open. Aliens could come to the United States and sue their own governments under the ATS for violations of international law, regardless of whether the complaint indicated any connection to the United States.[69] Over the next thirty years, some 173 cases were brought, at least in part, under the ATS in U.S. federal courts.[70]

The Supreme Court did not have occasion to address the scope of the ATS until 2004, before Chief Justice Roberts joined the Court. In *Sosa v. Alvarez-Machain*,[71] the Court held that the ATS provided jurisdiction over violations of international law that possessed the same "definite content and acceptance among civilized nations" as the "historical paradigms"—violations of safe conduct, offenses against ambassadors, and piracy—familiar to the Founders.[72] Although the Court *purported* to limit the scope of the ATS to only clearly definable norms of international law,[73] it, like the Second Circuit in *Filártiga*, made no mention of any territorial limits on the ATS. Thus, the U.S. federal courts continued to remain a legitimate option for foreign plaintiffs suing for human rights abuses committed outside U.S. territory.[74]

Nine years later, Chief Justice Roberts had his first (and thus far only) crack at the ATS. Although the Supreme Court initially granted certiorari to

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[69] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (affirming the judgment under the ATS against a former Ethiopian official for torture and cruel, inhuman, and degrading treatment); Kadic v. Karadžić, 70 F.3d 232, 236 (2d Cir. 1995) (concluding that alleged war crimes, genocide, torture, and other atrocities committed by a Bosnian Serb leader were actionable under the ATS); Xuncax v. Gramajo, 886 F. Supp. 162, 162–63 (D. Mass. 1995) (deeming torture, summary execution, "disappearance," and arbitrary detention by Guatemalan military to be actionable violations under the ATS).

[70] Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 357 (2011) (noting that since 1980, "U.S. courts have issued 173 opinions in cases brought, at least in part, under the ATS").

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

[72] *Id.* at 694, 732.

[73] *See id.* at 750 (Scalia, J., concurring) ("In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts themselves have used—invites them to try again.").

[74] *E.g.*, Sarei v. Rio Tinto, PLC, 671 F.3d 736, 742–43 (9th Cir. 2011), *cert. granted*, *vacated sub nom.*, Rio Tinto, PLC v. Sarei, 133 S. Ct. 1995 (2013) (finding jurisdiction under the ATS for claims made by residents of Papua New Guinea against international mining group for genocide and war crimes occurring during mining operation in Papua New Guinea); Flomo v. Firestone Nat. Rubber Co., 643 F.3d 1013, 1025 (7th Cir. 2011) ("*Sosa* was a case of nonmaritime extraterritorial conduct yet no Justice suggested that therefore it couldn't be maintained."); Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (finding jurisdiction under the ATS for claims brought by Nigerian nationals against Pfizer for engaging in non-consensual medical experimentation in conjunction with the Nigerian government in Nigeria).

decide the issue of corporate civil tort liability under international law,[75] it subsequently ordered re-argument on the broader question of "[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."[76] *Kiobel* involved a suit by a group of Nigerians that accused three oil companies—which were incorporated in the Netherlands, Britain, and Nigeria—of violating the law of nations in Nigeria by aiding and abetting the Nigerian government in committing numerous human rights violations, including extrajudicial killings and torture.[77]

As discussed in Part I.A, Chief Justice Roberts first held that the presumption against extraterritoriality applies to causes of action brought under the ATS.[78] According to the Chief Justice, applying the presumption against extraterritoriality to the ATS served the important purposes of preventing outright clashes with the political branches and "impinging" on their discretion in matters of foreign affairs.[79] Second, the Chief Justice held that nothing in the text, history, or purposes of the ATS rebutted the presumption.[80] Indeed, "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."[81] Applying the law to the facts, the Court held that "all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[82] "Mere corporate presence," according to Chief Justice Roberts, was not sufficient to displace the presumption.[83]

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[75] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013).

[76] Order Granting Re-argument, Kiobel v. Royal Dutch Petroleum Co. (2012) (No. 10-1491), http://www.supremecourt.gov/orders/courtorders/030512zr.pdf.

[77] *Kiobel*, 133 S. Ct. at 1662–63. For more detail about the Ogoni people and the abuses they suffered, see Soc. & Econ. Rights Action Ctr. v. Nigeria, African Comm'n on Human and People's Rights, Comm. No. 155/96 (2001), http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

[78] *Kiobel*, 133 S. Ct. at 1660.

[79] *Id.* at 1664–65.

[80] *Id.* at 1665–69.

[81] *Id.* at 1668.

[82] *Id.* at 1669.

[83] *Id.* Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, wrote a separate opinion. Unlike the Chief Justice, Justice Breyer interpreted the ATS as authorizing suits in the United States based on principles of international law governing the prescriptive jurisdiction of states. *Id.* at 1671 (Breyer, J., concurring).

How does *Kiobel* affect the status of international human rights litigation in the U.S. federal courts? First, the days of traditional *Filártiga*-style litigation are over, at least for suits brought under the ATS.[84] No longer will a foreign plaintiff be able to bring suit in U.S. federal courts when the claim bears no connection to the United States.[85] This is significant because many of the cases that were successfully brought under the ATS post-*Filártiga* were exactly this type of case.[86] Second, despite the clear limiting effect of *Kiobel*, the implications of the Court's holding are yet to be determined.[87] The ambiguity lies in Chief Justice Roberts's statement, "[a]nd even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[88] On one hand, this phrase could be interpreted to strengthen the effect of the presumption against extraterritoriality with respect to suits brought under the ATS. Chief Justice Roberts could be stating that any connection to the United States—like mere corporate presence or the status of a defendant as a U.S. national—is not sufficient to overcome the presumption. Only when the crux of the case—the actual violation of the law of nations that is the subject of the

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[84] For claims of torture, aliens can bring a civil suit against another "individual" acting in a governmental capacity even when the relevant conduct takes place entirely outside the United States. *See supra* note 63.

[85] Beyond *Kiobel*, the Roberts Court issued an 8-1 opinion in *Daimler AG v. Bauman* written by Justice Ginsburg that created another hurdle to litigating international human rights cases in the United States. Daimler AG v. Bauman, 134 S. Ct. 746 (2014). *Daimler AG* involved a suit under the ATS brought by Argentine nationals against a German corporation for allegedly collaborating with the Argentine government to "kidnap, detain, torture, and kill" plaintiffs and their families during Argentina's "Dirty War" of the late 1970s and early 1980s. *Id.* at 748. The Court held that Daimler's contacts with California were insufficient to subject the corporate defendant to general personal jurisdiction in California because a corporation's "affiliations with the State [must be] so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Id.* at 761 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2851 (2011)). Daimler's contacts with California did not meet this high standard. The Court further noted that the Ninth Circuit's reliance on the ATS and TVPA to support general jurisdiction was erroneous in light of *Kiobel* and *Mohamad*, 132 S. Ct. 1702 (2012). *Id.* at 762–63.

[86] *See, e.g.*, Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (Ethiopian national sued former Ethiopian official for torture occurring in Ethiopia); Kadic v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (Bosnian nationals sued the President of the Bosnian–Serb republic of "Srpska" for genocide and other atrocities committed in Bosnia).

[87] *See Kiobel*, 133 S. Ct. at 1670 (Alito, J., concurring). *Kiobel* also left open the issue of whether corporations possess liability under international law. Several courts have already addressed the issue post *Kiobel*. *E.g.*, Doe I v. Nestle USA, Inc., 738 F.3d 1048, 1049 (9th Cir. 2013) (holding that "corporations can face liability for claims brought under the Alien Tort Statute" and noting that the Supreme Court in *Kiobel* "suggest[ed] in dicta that corporations may be liable under [the] ATS so long as [the] presumption against extraterritorial application is overcome"); *In re* South African Apartheid Litigation, 15 F. Supp. 3d 454 (S.D.N.Y. 2014) (holding, in defiance of Second Circuit precedent, that corporations are liable under the law of nations and therefore under the ATS).

[88] *Kiobel*, 133 S. Ct. at 1669.

complaint—occurs in U.S. *territory* can the presumption be overcome. This view is supported, if not completely confirmed, by Chief Justice Roberts's statement that the "petitioners' case seeking relief for violations of the law of nations *occurring outside the United States is barred*."[89] Moreover, this is effectively how Justice Alito interpreted "touch and concern" in his concurring opinion.[90] On the other hand, the Chief Justice's statement could be interpreted to weaken the effect of the presumption with respect to suits brought under the ATS. In essence, Chief Justice Roberts could be stating that even if the conduct that is the subject of the complaint occurred outside U.S. territory, the presumption could be overcome if the United States is sufficiently implicated in the suit—as through the nationality of a corporate defendant.[91]

When exactly claims "touch and concern" the United States with "sufficient force" will be determined in a later case, as Justice Kennedy noted in his concurring opinion,[92] but only after the lower courts have their say and influence. Indeed, the circuits are already split on the issue along the lines outlined above.[93] Chief Justice Roberts left the door open, even if ever so

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[89] *Id.* (emphasis added); *see also id.* at 1667 ("These prominent contemporary examples—immediately before and after passage of the ATS—provide no support for the proposition that Congress expected causes of action to be brought under the statute for violations of the law of nations occurring abroad.").

[90] *Id.* at 1669 (Alito, J., concurring); *see also infra* note 93.

[91] *E.g.*, *In re* South African Apartheid Litigation, 15 F. Supp. 3d at 465 (holding that corporations may be held liable under the ATS and that, based on *Kiobel*, "Plaintiffs may move for leave to file an amended complaint against the remaining American defendants"). *But see id.* ("In that motion plaintiffs must make a preliminary showing that they can plausibly plead that those defendants engaged in actions that 'touch and concern' the United States with sufficient force to overcome the presumption against the extraterritorial reach of the ATS . . . .").

[92] *Kiobel*, 133 S. Ct. at 1669 (Kennedy, J., concurring).

[93] *Compare* Balintulo v. Daimler AG, 727 F.3d 174, 189 (2d Cir. 2013) (denying claim under the ATS brought by victims of apartheid against South African subsidiaries of American corporations because, under *Kiobel*, "claims under the ATS cannot be brought for violations of the law of nations occurring within the territory of a sovereign other than the United States"), Ben-Haim v. Neeman, 543 F. App'x 152, 155 (3d Cir. 2013) (interpreting *Kiobel* as holding "that the ATS does not apply when all of the relevant conduct took place outside the United States"), Cardona v. Chiquita Brands Int'l, Inc., 760 F.3d 1185, 1191 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015) (holding no jurisdiction under the ATS where plaintiffs were Colombian citizens filing suit against American corporations for alleged acts of torture occurring in Colombia because, under *Kiobel*, "the ATS does not apply extraterritorially"), *and* Chowdhury v. Worldtel Bangladesh Holding, Ltd., 746 F.3d 42, 44–45, 47–50 (2d Cir. 2014) (denying ATS claims filed by a Bangladeshi plaintiff who allegedly was detained and tortured by the Bangladesh National Police at the direction of his Bangladeshi business partner because *Kiobel* bars suits under the ATS where all the relevant conduct occurred outside the United States), *with* Doe v. Drummond Co. Inc., 782 F.3d 576, 586 (11th Cir. 2015) ("Thus, courts have been left to form their own interpretations as to the meaning and requirements of these standards."), Mujica v. Airscan Inc., 771 F.3d 580, 591 (9th Cir. 2014) (noting that *Kiobel* "did not hold that plaintiffs may *never* bring ATS claims based on extraterritorial conduct"), Al Shimari v. CACI Premier Tech., Inc., 758 F.3d 516, 520, 530–31 (4th Cir. 2014) (finding jurisdiction under *Kiobel*'s "touch and concern standard" where four

slightly, to use the ATS as a means to litigate some, albeit a narrow class, of international human rights cases in U.S. federal courts. And with the door open, it is certain that some "ambitious lower courts"[94] will take the opportunity to continue to use the U.S. federal courts as fora for litigating these cases and expressing their views on the law of nations.[95] In any event, despite the ambiguity, Chief Justice Roberts's opinion in *Kiobel* demonstrates his commitment to separation of powers and the primacy of the political branches over U.S. foreign affairs. Under *Kiobel*, Congress, not the courts, will determine whether U.S. courts should be open to foreign plaintiffs to litigate *Filártiga*-style cases.[96]

C. Self-Executing Treaties

Since the early nineteenth century, the Supreme Court has distinguished between treaties that have automatic domestic legal effect and those that require implementing legislation from Congress. This is known as the doctrine of self-executing treaties. A treaty is "equivalent to an act of the legislature," i.e., self-executing, when it "operates of itself without the aid of any legislative provision."[97] On the other hand, a treaty is not self-executing when it requires Congress to pass legislation giving it effect.[98] Thus, treaties do not constitute binding domestic law enforceable by U.S. courts "unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms."[99]

Iraqis sued a U.S. corporation for alleged torture committed in Iraq during the Iraq war because several factors gave the claim sufficient connection to the United States), Mwani v. Laden, 947 F. Supp. 2d 1, 5 (D.D.C. 2013) (finding that an ATS claim involving a terrorist attack against the U.S. embassy in Nairobi did "touch and concern" the United States with sufficient force to overcome the presumption even though the plaintiffs were all Kenyans, the defendants were all aliens, and the relevant conduct occurred in Kenya), *and* Sexual Minorities Uganda v. Lively, 960 F. Supp. 2d 304, 309–11 (D. Mass. 2013) (allowing suit under the ATS against an American Pastor who "attempted to foment, and to a substantial degree has succeeding [sic] in fomenting, an atmosphere of harsh and frightening repression against LGBTI people in Uganda" because "*Kiobel* makes clear that its restrictions on extraterritorial application of American law do not apply where a defendant and his or her conduct are based in this country").

94 Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

95 *E.g.*, *Al Shimari*, 758 F.3d at 520, 530–31 (finding jurisdiction under the ATS for a claim brought by Iraqi nationals against U.S. corporations for alleged torture occurring only in Iraq because of the connection of the claim to the United States).

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

97 Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254, 314 (1829), *overruled in part by* United States v. Percheman, 32 U.S. (7 Pet.) 51 (1833).

98 Whitney v. Robertson, 124 U.S. 190, 194 (1888).

99 Medellín v. Texas, 552 U.S. 491, 505 (2008) (quoting Igartua-De La Rosa v. United States, 417 F.3d 145, 150 (1st Cir. 2005) (en banc) (Boudin, C. J.)).

Like the presumption against extraterritoriality and opening our courts to foreign plaintiffs to litigate international human rights cases, whether a treaty is self-executing has significant implications for separation of powers.[100] Under the scheme adopted by the Founders, the Constitution divides the treaty power between the President, who has the power to "make" treaties, and the Senate, which must provide "advice and consent" by a two-thirds vote.[101] The judiciary, then, is generally excluded from having a role in making, and even enforcing, treaties.[102] This makes perfect sense when treaties are viewed as commitments between sovereign nations that are enforced primarily "on the interest and the honor of the governments which are parties to it."[103] Indeed, "[t]he point of a non-self-executing treaty is that it '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.'"[104]

So when is a treaty self-executing? Is there a presumption that a treaty is not self-executing?[105] Does the treaty's text have to make clear that the treaty is self-executing? These issues were addressed by Chief Justice Roberts in *Medellín v. Texas*.[106] To understand *Medellín*, it is necessary first to examine the history leading up to it. *Medellín* is the culmination of a long battle between Mexico and the United States over the interpretation and application of Article 36 of the Vienna Convention on Consular Relations (VCCR), which obligates all authorities who detain a foreign national to "inform the person concerned without delay of his right[]" to communicate with his consulate, among other things.[107] *Medellín* is also the final round in a long—and more

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[100] Beyond separation of powers concerns, whether a treaty is self-executing also has huge implications for federalism. This concern, however, is better addressed in the context of the scope of the treaty power under the Constitution. This issue will be addressed in the next section, Part I.D.

[101] U.S. CONST. art. II, § 2, cl. 2.

[102] *Medellín*, 552 U.S. at 516 ("The dissent's contrary approach would assign to the courts—not the political branches—the primary role in deciding when and how international agreements will be enforced. To read a treaty so that it sometimes has the effect of domestic law and sometimes does not is tantamount to vesting with the judiciary the power not only to interpret but also to create the law."); Bradley and Goldsmith, *supra* note 3, at 441–42.

[103] *Medellín*, 552 U.S. at 505 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)).

[104] *Id.* at 516 (quoting *Foster*, 27 U.S. (2 Pet.). at 314).

[105] *Compare id.* at 505, *with id.* at 533 (Stevens, J., concurring) ("[T]he text and history of the Supremacy Clause, as well as this Court's treaty-related cases, do not support a presumption against self-execution."), *and id.* at 546 (Breyer, J., dissenting) ("But the case law does make clear that, insofar as today's majority looks for language about '"self-execution' in the treaty itself and insofar as it erects 'clear statement' presumptions designed to help find an answer, it is misguided.").

[106] *Medellín*, 552 U.S. at 504–06, 514, 519, 525–27.

[107] Vienna Convention on Consular Relations art. 36, Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) [hereinafter VCCR].

significant—battle between the U.S. Supreme Court and the ICJ. In 2004, in a case (*Avena*) brought by Mexico against the United States pursuant to the Optional Protocol to the VCCR,[108] the ICJ held that fifty-one Mexican nationals were entitled to "review and reconsideration" of their state-court convictions and sentences in the United States because of violations of Article 36 of the VCCR.[109] Importantly, the ICJ also held that allowing Texas to apply its state procedural default rules to Article 36 violations "would have the effect of preventing 'full effect [from being] given to the purposes for which the rights accorded under this article are intended,' and thus violate paragraph 2 of Article 36."[110] Thus, according to the ICJ, Texas and other states' use and application of their own rules of criminal procedure placed the United States in breach of its treaty obligations under the VCCR.

After *Avena*, in *Sanchez-Llamas v. Oregon*, Chief Justice Roberts held—in direct contrast to *Avena*—that a state may apply its regular procedural default rules to claims under the VCCR.[111] In rejecting the petitioner's argument that the Supreme Court should follow the ICJ's interpretation of the VCCR in *Avena*, Chief Justice Roberts affirmatively rejected the notion that the Supreme Court was bound by the ICJ's decisions:

> Although the ICJ's interpretation deserves "respectful consideration," we conclude that it does not compel us to reconsider our understanding of the Convention in *Breard*.[112] Under our

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[108] Vienna Convention on Consular Relations, Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 596 U.N.T.S. 487 (entered into force Mar. 19, 1967) [hereinafter Optional Protocol].

[109] Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12, ¶ 153 (Mar. 31); *see also* LaGrand (Ger. v. U.S.), Judgment, 2001 I.C.J. 466, ¶ 91 (June 27) (holding that where a defendant was not notified of his rights under Article 36, application of the procedural default rule failed to give "full effect" to the purposes of Article 36 because it prevented courts from attaching "legal significance" to the Article 36 violation).

[110] Mex. v. U.S., 2004 I.C.J. ¶ 113 (quoting VCCR, *supra* note 107, art. 36(2)).

[111] Sanchez–Llamas v. Oregon, 548 U.S. 331, 360 (2006).

[112] Breard v. Greene, 523 U.S. 371 (1998), was the beginning of the battle between the ICJ and the U.S. Supreme Court over the interpretation and application of the VCCR. Breard, a citizen of Paraguay, was convicted of rape and murder and set to be executed by the state of Virginia. *Id.* at 372–73. After failing to gain ground in the U.S. courts, Paraguay brought suit against the United States before the ICJ, claiming the United States violated the VCCR for failing to inform Breard of his rights under the VCCR at the time of his arrest. *Id.* at 374. The ICJ issued an interim order instructing the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings . . . ." *Id.* "Breard then filed a petition for an original writ of habeas corpus and a stay application in [the Supreme] Court in order to 'enforce' the ICJ's order," claiming that the VCCR was "the 'supreme law of the land' and thus trump[ed] the procedural default doctrine." *Id.* at 374–75. In direct contrast to the ICJ's

> Constitution, "[t]he judicial Power of the United States" is "vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That "judicial Power . . . extend[s] to . . . Treaties" . . . [and includes] the duty "to say what the law is." If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution.[113]

Further complicating the matter, President Bush issued a memorandum post-*Avena* to the states declaring that the United States would "discharge its international obligations" under *Avena* "by having State courts give effect to the decision."[114] The President's memorandum, coupled with the Supreme Court's decision in *Sanchez-Llamas*, set the stage for another round between the ICJ and the U.S. Supreme Court. Based on the President's memorandum, Medellín, who was one of the fifty-one named Mexican nationals and convicted of murder in a Texas state court, filed a second application for writ of habeas corpus.[115] The Texas Court of Criminal Appeals dismissed Medellín's application as an abuse of the writ under state law.[116] The Supreme Court then granted certiorari to address whether *Avena* was "directly enforceable as domestic law in a state court in the United States" and whether the President's memorandum obligated the states to carry out the ICJ's decision.[117]

Medellín v. Texas was the forum for the final showdown. In analyzing whether the ICJ's judgment constituted a "binding" obligation on U.S. federal and state courts, Chief Justice Roberts noted that the question turned on whether specific provisions of the Optional Protocol to the VCCR, the United Nations (U.N.) Charter, or the ICJ Statute were self-executing.[118] Finding that the Optional Protocol was nothing more than a "bare grant of jurisdiction," the

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interim order, the Supreme Court held that Breard's VCCR claim was subject to procedural default and therefore he could not raise the issue on habeas corpus review. *Id.* at 374–76.

113 *Sanchez-Llamas*, 548 U.S. at 353–54 (internal citations omitted).

114 Medellín v. Texas, 552 U.S. 491, 498 (2008).

115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.* at 504.

Chief Justice turned to the U.N. Charter.[119] Article 94 of the U.N. Charter provides that "[e]ach Member of the United Nations *undertakes to comply* with the decision of the [ICJ] in any case to which it is a party."[120] He held that the phrase, "undertakes to comply," was clearly not a "directive to domestic courts" but rather simply a "'call upon governments to take certain action.'"[121] In other words, Article 94 was not self-executing because it addressed itself to the political branches and not the courts. Chief Justice Roberts found additional support for his reasoning in the enforcement structure for the ICJ's decisions.[122] Under Article 94(2), the sole remedy for failure to comply with an ICJ decision is referral to the U.N. Security Council, which is an expressly diplomatic and non-judicial remedy.[123]

The Chief Justice also responded to the dissent's criticism that the majority's opinion focused solely on the text of the relevant treaties in deciding whether a treaty was self-executing.[124] First, responding to Justice Breyer,[125] Chief Justice Roberts "confess[ed]" that he did believe it important to answer the question whether a treaty is self-executing based on the text of the treaty.[126] Indeed, the determination regarding self-execution must be decided based on the text because the text is what the Senate reviews when deciding whether to ratify a treaty. Moreover, Chief Justice Roberts noted that the dissent's "multifactor, judgment-by-judgment analysis" was hardly what the Founders could have envisioned.[127] On the contrary, the Framers' careful division of the treaty power between the President and Senate indicated that in no way did

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[119] The Optional Protocol provides: "Disputes arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, *supra* note 108, art. 1.

[120] U.N. Charter art. 94, ¶ 1 (emphasis added).

[121] *Medellín*, 552 U.S. at 508 (quoting Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 938 (D.C. Cir. 1988) (quoting Diggs v. Richardson, 555 F.2d 848, 851 (D.C. Cir. 1976))); *see also id.* at 534 (Stevens, J., concurring) ("Absent a presumption one way or the other, the best reading of the words 'undertakes to comply' is, in my judgment, one that contemplates future action by the political branches.").

[122] *Id.* at 509–11 (majority opinion).

[123] U.N. Charter art. 94, ¶ 2.

[124] *Medellín*, 552 U.S. at 514.

[125] *Id.* at 514; *see also id*. at 549 (Breyer, J., dissenting) ("[T]he absence or presence of language in a treaty about a provision's self-execution proves nothing at all."); *id.* at 552 ("True, neither the Protocol nor the Charter explicitly states that the obligation to comply with an ICJ judgment automatically binds a party as a matter of domestic law without further domestic legislation. But how could the language of those documents do otherwise?").

[126] *Id.* at 514 (majority opinion).

[127] *Id.* at 514–15.

they intend to vest the judiciary the power to decide whether a treaty provision was self-executing without looking to the treaty language.[128]

Chief Justice Roberts concluded: "Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended 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.'"[129] Roberts then addressed the second issue—the constitutionality of the President's memorandum—and held that the President's memorandum did not bind the states because it was an unconstitutional attempt to "make law," a function reserved to Congress alone under Article I,[130] and was not within the bounds of the President's foreign affairs authority.[131]

What are the implications of the Chief Justice's opinions in *Medellín* and *Sanchez-Llamas*? First, a high hurdle exists to concluding that a treaty is self-executing. Only when the text of the treaty provides a "clear and express statement" that a provision is to be self-executing can the courts interpret it as such.[132] And while the Chief Justice never mentioned a "presumption" against self-execution, the very use of a "clear statement" requirement implies that functionally a presumption does exist.[133] Second, *Medellín* is significant because ICJ judgments—at least with respect to some seventy treaties to which the United States is party—will likely never be automatically enforceable in U.S. courts.[134] This is significant for a number of reasons, not the least of which is that it upholds separation of powers by reserving U.S. policy on the effect of ICJ decisions to the political branches, not the judiciary. *Medellín* also upholds separation of powers principles in the context of the treaty power because it gives the judiciary virtually no wiggle room to conclude that a treaty is self-executing unless the President and Senate make it clear. Third,

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128 *Id.* at 515.

129 *Id.* at 523.

130 *Id.* at 523–27.

131 *Id.* at 527–32.

132 *Id.* at 517 ("Given that ICJ judgments may interfere with state procedural rules, one would expect the ratifying parties to the relevant treaties to have clearly stated their intent to give those judgments domestic effect, if they had so intended."); *see also id.* at 546–47 (Breyer, J., dissenting) (interpreting the majority opinion to require a "clear statement" in the text of the treaty to find that a provision is self-executing).

133 *Id.* at 506 n.3 (majority opinion).

134 *Id.* at 540–41 (Breyer, J., dissenting) (interpreting the majority opinion to require Congress to enact specific legislation before ICJ judgments against the United States become enforceable in U.S. Courts); *see also id.* ("Approximately 70 U.S. treaties now in force contain obligations comparable to those in the Optional Protocol for submission of treaty-based disputes to the ICJ." (internal citations omitted)).

Roberts's opinion reinforces federalism. Treaties often override state legislation, and of course, under the Supremacy Clause, can constitutionally do so.[135] But by requiring a treaty's language to give a clear statement that its provisions are self-executing, Congress and the President—the political branches of government—are the ones to decide when to preempt state laws in matters generally reserved to the states.[136] Finally, both *Sanchez-Llamas* and *Medellín* reflect Chief Justice Roberts' dualist view of international law. This will be discussed in more depth in Part II.

D. The Scope of the Treaty Power

Arguably the most contentious international law issue in the United States is the scope of the treaty power. The question is this: can Congress and the President do by treaty what they otherwise could not do under Article I, § 8?[137] Since 1920, the answer to this loaded question seems to have been yes. In *Missouri v. Holland*, Justice Holmes famously remarked that "[if] the treaty is valid, there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government."[138] *Missouri v. Holland* involved the Migratory Bird Treaty Act of July 3, 1918, a statute passed by Congress to implement a 1916 treaty entered into between the United States and Great Britain to protect several species of migratory birds that were in danger of becoming extinct.[139] Missouri argued that the Migratory Bird Act was unconstitutional under the Tenth Amendment.[140] This was particularly true, argued Missouri, considering that a district court had just held that a statute of Congress that was passed prior to the treaty and attempted to accomplish the same result as the Migratory Bird

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[135] U.S. CONST. art. VI, cl. 2. *But see* discussion *infra* Part I.D (discussing the scope of the treaty power under the Constitution).

[136] *See* Sossamon v. Texas, 131 S. Ct. 1651, 1661 (2011) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." (quoting Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 139 (2005) (plurality opinion))).

[137] There are actually two constitutional questions that fall under the broader question. This first is whether there are limits to the treaty power itself. In other words, what is a "treaty?" Are only certain matters the proper subjects of a constitutional treaty? Justice Thomas addressed this issue in his concurring opinion in *Bond v. United States*, 134 S. Ct. 2077 (2014). *See infra* note 165 and accompanying text. The second question is whether the Necessary and Proper Clause allows Congress to implement via statute non-self-executing treaties that would otherwise violate Article I, § 8. Justice Holmes easily concluded that the answer to this question was yes. *See infra* note 138 and accompanying text. Justice Scalia, on the other hand, disagrees. *See infra* notes 165–68 and accompanying text.

[138] Missouri v. Holland, 252 U.S. 416, 432 (1920).

[139] *Id.* at 430–31.

[140] *Id.* at 430.

Treaty Act was held to be unconstitutional.[141] In essence, Missouri argued that the Constitution limited Congress's power to ratify treaties just as it limited Congress's authority to pass laws.

Justice Holmes held that while there may be some limits to the treaty power, such limits cannot be determined strictly by the Constitution. Rather, limits on the treaty power, if any, should be determined based on whether the subject of legislation was one requiring "national action" and involving the "sharpest exigency," as well as considering "what this country has become" in deciding what powers it needs.[142] The only apparent constitutional limit on the treaty power was whether Congress's implementing legislation "contravene[d] any prohibitory words to be found in the Constitution."[143] Finding no such "prohibitory words," Justice Holmes concluded:

> Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power . . . . We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.[144]

Thus, *Missouri v. Holland* has come to stand "for the proposition that the Tenth Amendment has no bearing on Congress's ability to legislate in furtherance of the Treaty Power in Article II, § 2 of the Constitution."[145]

For the first time in years,[146] the Court had an opportunity to address the issue in *Bond v. United States.*[147] Indeed, the Third Circuit practically begged the Court to provide guidance and clarification on this critical issue.[148] *Bond*

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141 *Id.* at 432.

142 *Id.* at 433–34.

143 *Id.* at 433.

144 *Id.* at 435.

145 United States v. Bond, 681 F.3d 149, 151 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013), *rev'd*, 134 S. Ct. 2077 (2014).

146 The issue was tangentially addressed in *Reid v. Covert*, 354 U.S. 1, 18 (1957), which held generally that treaties cannot contravene specific constitutional provisions but also upheld *Missouri v. Holland*, 252 U.S. 416 (1920).

147 Bond v. United States, 134 S. Ct. 2077 (2014). This was the second time the case reached the Court. In the first case, the Court held that federalism and the Tenth Amendment provide a litigant who otherwise has standing a basis to challenge the constitutionality of a federal statute. Bond v. United States, 131 S. Ct. 2355, 2365 (2011).

148 *Bond*, 681 F.3d at 170 ("I hope that the Supreme Court will soon flesh out '[t]he most important sentence in the most important case about the constitutional law of foreign affairs,' Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1868 (2005), and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.").

involved the Chemical Weapons Convention Implementation Act of 1998,[149] a statute passed by Congress to carry out the obligations of the United States under the Convention on Chemical Weapons.[150] The Act prohibits any person "knowingly . . . to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon."[151] "Chemical weapon" is defined as a "toxic chemical,"[152] which is defined in relevant part as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of [where] they are produced . . . ."[153] The Act exempts use of toxic chemicals for certain peaceful purposes.[154]

The facts of the case are quite heartrending. After Bond found out that her husband had impregnated her best friend, Bond stole an arsenic-based compound from her employer and purchased another toxic chemical commonly used for cleaning lab equipment.[155] Intending to harm, but apparently not kill, her friend-turned-nemesis, Bond traveled to the other woman's "home on at least 24 occasions and spread the chemicals on [her] car door, mailbox, and door knob."[156] Only one time, however, was Bond able to injure her new adversary. On this occasion, the woman suffered a minor burn that was treated with water.[157] Eventually, Bond was caught, and in addition to being charged with mail theft, she was also charged with violating the Chemical Weapons Convention Implementation Act of 1998.[158]

A straightforward, textual application of the facts to the statute indicates that Mrs. Bond violated the Act. She "knowingly" "used" a "chemical weapon" for a non-peaceful purpose. She also knowingly possessed and acquired a chemical weapon for a non-peaceful purpose. Seems

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149 18 U.S.C. § 229 (1998).

150 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Sept. 3, 1992, S. Treaty Doc. No. 103–21, 1974 U.N.T.S. 317.

151 18 U.S. C. § 229(a)(1).

152 *Id.* § 229F(1)(A).

153 *Id.* § 229F(8)(A).

154 *Id.* § 229F(7).

155 Bond v. United States, 134 S. Ct. 2077, 2085 (2014).

156 *Id.*

157 *Id.*

158 *Id.*

straightforward, right?[159] Bond is guilty. Not to Chief Justice Roberts (and five other members of the Court). Relying on the principles of constitutional avoidance[160] and federalism, Chief Justice Roberts held that Bond's conduct did not fall within § 229(a): "The problem with [the government's] interpretation is that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do."[161] Thus, the Court found ambiguity—not in the text of the statute—but

> from the improbably broad reach of the key statutory definition given the term—"chemical weapon"—being defined; the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so in light of the context from which the statute arose—a treaty about chemical warfare and terrorism.[162]

Relying on this alleged ambiguity and the lack of any "clear indication" from Congress, the Court used the "background principle" of federalism to conclude that the Act did not reach Bond's conduct.[163]

Justices Scalia, Thomas, and Alito wrote concurring opinions, all of which disagreed that the Act did not cover Bond's conduct.[164] Justice Thomas wrote primarily to articulate the original meaning of the treaty power. He argued that the power to make treaties is confined "to arrang[ing] intercourse with other nations, but not to regulate purely domestic affairs."[165] Justice Scalia joined Justice Thomas's opinion in full but wrote separately to chastise the Chief Justice for rewriting the text of the statute simply "to leave in place an ill-considered ipse dixit [*Missouri v. Holland*] that enables the fundamental

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159 United States v. Bond, 681 F.3d 149, 155 (3d Cir. 2012), *cert. granted*, 133 S. Ct. 978 (2013), *rev'd*, 134 S. Ct. 2077 (2014) ("Bond's behavior 'clearly constituted unlawful possession and use of a chemical weapon under § 229.'" (quoting United States v. Bond, 581 F.3d 128, 139 (3d Cir. 2009))); *Bond*, 134 S. Ct. at 2094 (Scalia, J., concurring) ("As sweeping and unsettling as the Chemical Weapons Convention Implementation Act of 1998 may be, it is clear beyond doubt that it covers what Bond did.").

160 *Bond*, 134 S. Ct. at 2087–88 ("[I]t is a 'well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'" (quoting Escambia County v. McMillan, 466 U.S. 48, 51 (1984) (per curiam))).

161 *Id.* at 2088 (internal citations and quotations omitted).

162 *Id.* at 2090.

163 *Id.* at 2090–91.

164 Justice Alito joined Justice Thomas's opinion in full and joined part of Justice Scalia's opinion. Justice Alito concluded in his short opinion: "Section 229 cannot be regarded as necessary and proper to carry into execution the treaty power, and accordingly it lies outside Congress' reach unless supported by some other power enumerated in the Constitution." *Bond*, 134 S. Ct. at 2111 (Alito, J., concurring).

165 *Id.* at 2103 (Thomas, J., concurring).

constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power."[166] Justice Scalia further argued that the text and structure of the Constitution afford Congress no power independent of Article I, § 8 to carry treaties into execution.[167] Justice Scalia also rebuked Chief Justice Roberts for turning to canons of statutory construction when the text of the statute, in this case the definition of "chemical weapon," was unambiguous:

> Who in the world would have thought that a definition is inoperative if it contradicts ordinary meaning? When this statute was enacted, there was not yet a "Bond presumption" to that effect—though presumably Congress will have to take account of the Bond presumption in the future, perhaps by adding at the end of all its definitions that depart from ordinary connotation "and we really mean it."[168]

Where does this leave constitutional law with respect to the treaty power? In largely the same place it has been for almost a hundred years. All we know is that three Justices stand poised to confine the treaty power to a foreign relations subject matter restriction and normal constitutional limits—including the Tenth Amendment. But, until another case presents itself to the Court, lower courts will likely continue to feel constrained by the *ipse dixit* of *Holland*. And if the Senate continues its policy of not ratifying major human rights treaties,[169] and when it does ratify them of expressly making them non-self-executing,[170] it is unlikely that a justiciable case will present itself anytime soon. As for the Chief Justice, *Bond* indicates his marked intention to favor precedent, defer to the political branches, and avoid broad, constitutional rulings—despite what the Constitution might require. These issues will be discussed in greater detail in Part II.

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166 *Id.* at 2102 (Scalia, J., concurring).

167 *Id.* at 2098–2102.

168 *Id.* at 2097.

169 For example, the Senate has not ratified the Convention on the Rights of the Child. *See* Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

170 *E.g.*, U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, S. REP. NO. 102-23 (1992) [hereinafter U.S. CCPR RDUs].

E. International Law as Part of Common Law, as Part of Federal Common Law, as Part of the U.S. Constitution?

Is international law part of U.S. law? In traditional thought, international law has three primary sources of law,[171] although two are predominant: treaties and customary law. Under the U.S. Constitution, only treaties are given the esteemed status as "Supreme Law of the Land";[172] the un-codified law of nations, or customary law, is not mentioned in the Supremacy Clause. Instead, customary international law is mentioned only in Article I, § 8 where Congress is authorized to define and punish offences in violation of the "law of nations."[173] Despite the lack of textual authority for applying the law of nations, the Supreme Court routinely applied customary international law in cases before it since the early days of the republic.[174] Indeed, in 1900 in *The Paquete Habana*, the Supreme Court famously declared that "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[175]

In what, then, did the Supreme Court base its authority to apply international law? The answer lies in the "general common law":[176] "[T]he understanding that emerged after 1789 was that, in matters not closely tied to a particular State and not governed by statutory law, federal and state courts applied a 'general' common law that was neither state law nor federal law, but

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171 Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (entered into force Oct. 24, 1945). Article 38 lists a third primary source, general principles and equity. *Id.*

172 U.S. CONST. art. VI, cl. 2.

173 U.S. CONST. art. I, § 8, cl. 10; *see also* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1557 (1984) ("But neither the constitutional grants to Congress and the federal courts, nor any act of Congress, declared or necessarily implied that the law of nations was incorporated as self-executing domestic law.").

174 *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895); Jecker Torre & Co. v. Montgomery, 59 U.S. 110 (1856); Kennett v. Chambers, 55 U.S. 38, 50 (1852); Ennis v. Smith, 55 U.S. 400, 422–26 (1853); Bank of Augusta v. Earle, 38 U.S. 519, 589 (1839); The Nereide, 13 U.S. 388, 423 (1815) ("Till such an act be passed, the Court is bound by the law of nations which is part of the law of the land."); M'Donough v. Dannery, 3 U.S. 188, 197 (1796); Edwin M. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 33 (1952).

175 The Paquete Habana, 175 U.S. 677, 700 (1900).

176 International law is part of the common law, so if common law is part of federal law, federal courts have authority to adjudicate claims involving the law of nations. Triquet v. Bath, 97 Eng. Rep. 936 (K.B. 1764) (Mansfield, J.); *see also* Talbot v. Janson, 3 U.S. 133, 161 (1795) (Iredell, J.) (noting that the defendant's action was "palpabl[y] a violation of our own law (I mean the common law, of which the law of nations is a part, as it subsisted ether before the act of Congress on the subject, or since that has provide a particular manner of enforcing it)"); 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

rather part of common adjudicatory enterprise."[177] This understanding was the basis for Justice Story's famous decision in *Swift v. Tyson*,[178] where he held that the Judiciary Act[179] did not require federal courts to follow state rules of decision in nonlocal matters like the law merchant, which was part of the law of nations.[180] On the contrary, federal courts were permitted to express their own opinion on what the general common law was and apply that law in cases before them.[181]

As all first-year law students know, the Supreme Court overruled *Swift* in *Erie Railroad Co. v. Tompkins*, which famously held that

> [t]here is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.[182]

Accordingly, a straightforward reading of *Erie* signaled the end of international law as "part" of federal law, especially because *Swift* involved the law merchant, which was part of international law.[183] Although the issue lay dormant for some time,[184] the Supreme Court provided some clarity in *Banco Nacional de Cuba v. Sabbatino*. In *Sabbatino*, the Court held that the "Act of State Doctrine" prohibited the Court from entering judgment against a foreign sovereign.[185] Importantly, the Court noted that *Erie* could not possibly have been intended to apply to the Act of State Doctrine: "we are constrained to

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177 INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 27 (David L. Sloss et al. eds., 2011).

178 *See* Swift v. Tyson, 41 U.S. 1 (1842).

179 The Judiciary Act instructed federal courts "[t]hat the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States, in cases where they apply." Judiciary Act of 1789, ch. 20.

180 *Swift*, 41 U.S. at 18–19.

181 *Id.*

182 Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

183 Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004) (Scalia, J., concurring) ("*Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the 'law merchant,' then a subset of the law of nations.").

184 Bergman v. De Sieyes, 170 F.2d 360, 361 (2d Cir. 1948) ("Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here.").

185 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[186] Years later, the Second Circuit in *Filártiga* did not even discuss *Erie* in holding that the law of nations was part of federal common law. Instead, the Court cited *Sabbatino* and several pre-*Erie* cases for its conclusion that "federal jurisdiction over cases involving [customary] international law is clear."[187]

The Supreme Court addressed this issue in *Sosa v. Alvarez-Machain*, just before Chief Justice Roberts joined the Court.[188] According to the majority, written by Justice Souter, customary international law remained as one of the few living bodies of federal common law post-*Erie*.[189] Instead of serving as a *bar* to federal courts making rules of decision under international law, *Erie* merely counseled "for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the [Alien Tort Statute]."[190] Justice Scalia, joined by Justices Thomas and Rehnquist, disagreed. According to Justice Scalia, *Erie*, combined with the now predominate Holmesian view that judges do not discover the common law but consciously make it, precluded federal courts from "creat[ing] causes of action for the enforcement of international-law-based norms."[191] Justice Scalia argued that international law is not one of the surviving "limited enclaves"[192] of federal common law post-*Erie* because Congress has not authorized the courts lawmaking power in this area, a necessary condition precedent under *Erie* for the federal courts to exercise substantive lawmaking power.[193]

Chief Justice Roberts has not addressed the issue. While *Kiobel* involved the liability of corporations under international law, Chief Justice Roberts's opinion did not address that issue and therefore did not discuss the status of

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186 *Id.* at 425.

187 Filártiga v. Peña-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

188 *But see* Eric Engle, Alvarez-Machain v. United States *and* Alvarez-Machain v. Sosa: *The Brooding Omnipresence of Natural Law*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 149, 158 (2005) ("The *Sosa* Court addressed this issue, the role of international law in the common law, only indirectly in its discussion of federal common law post-*Erie*. However, due to the confusion *Erie R.R. Co. v. Tompkins* generated, that issue persists and was in no way settled or even directly addressed by the *Sosa* court.").

189 Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

190 *Id.* at 725–26.

191 *Id.* at 739 (Scalia, J., concurring).

192 *Id.* at 729 (majority opinion).

193 *Id.* at 741–42 (Scalia, J., concurring).

international law as federal common law.[194] Thus, the status of customary international law as part of the federal common law stands on the thin floor of *Sosa*, but without much foundation. Does *Sosa's* holding apply beyond the human rights context? Is international law part of federal common law only as international law was understood at the time of the founding? *Sosa* says no,[195] but the issue is far from settled.[196] These questions and more are left open to be answered by Chief Justice Roberts and his Court at a later date. But the question arises, why did Chief Justice Roberts in *Kiobel* avoid the issue of corporate liability under international law and the broader issue of whether customary international law is automatically incorporated into justiciable federal law? The answer lies in the Chief Justice's judicial philosophy.

II. CHIEF JUSTICE ROBERTS

At the beginning of the Article it was posited that Chief Justice Roberts is a prudentialist.[197] In analyzing Chief Justice Roberts's prudentialism, one commentator found him to be "a Chief Justice who takes limits on judicial authority seriously, who appreciates the need to respect the tasks and authority of other institutions of government, and whose general watchwords as a judge are modesty and humility."[198] Similarly, former Attorney General Alberto Gonzalez summarized the Chief Justice's judicial philosophy in four principles: judicial avoidance, judicial deference, narrow construction, and clarity.[199]

To determine whether this hypothesis is correct, this Part analyzes the cases discussed to see what trends emerge. At least four observations are noteworthy. First, the cases discussed in Part I indicate Chief Justice Roberts's marked commitment to defer to the political branches. By strengthening and clarifying the presumption against extraterritoriality, restoring the ATS to its likely original meaning, and reaffirming that a treaty's text must indicate that it is self-executing, the Supreme Court has ensured that Congress and the President, not the Courts, will determine U.S. foreign policy. Moreover, in *Bond* the

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194 *See supra* Part I.B. Note, however, that *Kiobel* did state that *Sosa* "held that federal courts may 'recognize private claims [for such violations] under federal common law.'" Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1663 (2013) (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004)).

195 *Sosa*, 542 U.S. at 724–25; *Kiobel*, 133 S. Ct. at 1671 (Breyer, J., concurring) ("*Sosa* essentially leads today's judges to ask: Who are today's pirates?").

196 *See, e.g.*, Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010).

197 Breen, *supra* note 6; *see also supra* Part I.

198 Breen, *supra* note 6, at 130.

199 Gonzales, *supra* note 8, at 668.

Chief Justice strained the plain meaning of the text to ensure a result that did not curtail the political branches' discretion in using treaties as they see fit.

Second, the cases indicate Chief Justice Roberts's deep respect for separation of powers. By clarifying the presumption against extraterritoriality, Congress will have a clear backdrop against which it can legislate. And less ambiguity in the meaning and application of the presumption seriously curtails the ability of federal judges from using it as a convenient tool to accomplish their own policy goals. The same applies to the doctrine of self-executing treaties. By holding that the primary factor to determining whether a treaty is self-executing is the treaty's text, Chief Justice Roberts gave the Senate a clear opportunity to express its will when ratifying treaties and less room for the courts to pick and choose which treaties they want to enforce. Indeed, Chief Justice Roberts's primary point of dispute with the dissent's approach in *Medellín* was that it allowed the judiciary to usurp the constitutionally-designated role of the political branches in treaty practice through its "multifactor, judgment-by-judgment analysis that would 'jettiso[n] relative predictability for the open-ended rough-and-tumble of factors.'"[200]

Medellín's second holding—that the President's memorandum directing the states to enforce *Avena* was an unconstitutional exercise of the lawmaking power—further shows commitment to separation of powers.[201] If the President's memorandum was in fact binding "law," it must have been made consistent with the Constitution, and the Constitution vests Congress, not the President, with the authority to make laws. Congress had not passed a law delegating this authority to the President, and therefore the President was unconstitutionally attempting to make law.[202] Former Attorney General Alberto Gonzalez characterized the Chief Justice's philosophy regarding separation of powers as to "[d]efer to the separate political branches and elected officials so long as they operate within constitutional boundaries."[203] In other words, defer unless one branch is clearly violating separation of powers. This is exactly what Chief Justice Roberts did in *Medellín*.

Kiobel's effect on international human rights litigation also lends support to this proposition. International human rights litigation involves creating causes

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[200] Medellín v. Texas, 552 U.S. 491, 514 (2008*)* (quoting Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 547 (1995)).

[201] *Id.* at 526–27.

[202] *Id.*

[203] Gonzalez, *supra* note 8, at 693.

of action, fashioning remedies, and defining international law. It also seriously implicates U.S. foreign policy as U.S. courts sit in judgment on foreign governments' practices. All of these issues, at least in the U.S. constitutional system, are questions for Congress. Yet the scope of international human rights litigation under the ATS was initiated and shaped by the judiciary. *Kiobel* presented an opportunity for Chief Justice Roberts to restore control over the scope and nature of international human rights litigation to Congress. Acting within settled legal precedent, Chief Justice Roberts took that opportunity by applying the presumption against extraterritoriality to causes of action brought under the ATS.

Third, the cases analyzed demonstrate a staunch commitment to federalism. Indeed, the entire basis behind *Bond*'s holding was federalism, and *Medellín* and *Sanchez-Llamas* firmly support federalism as well. Treaties often override state law. If Article 94 of the U.N. Charter were self-executing, as Justice Breyer claimed, an ICJ judgment would have required Texas to cast aside a foundational rule of criminal procedure—an issue reserved to the states under the Constitution. Instead, Chief Justice Roberts held that the treaty was not self-executing and required the Senate to make clear its intention to make a treaty self-executing in the text of the treaty. Accordingly, Chief Justice Roberts upheld federalism and left the decision to preempt state law to elected officials in Congress.[204] Even Justice Stevens, who concurred in the judgment, noted that federalism supported the Chief Justice's opinion.[205]

Fourth, the cases indicate the Chief Justice's commitment to a dualist perspective of international law. Dualism maintains that "[i]nternational [l]aw and municipal law are two quite different spheres of legal action, and theoretically there should be no point of conflict between them. Municipal law addresses itself to the subjects of sovereigns, international law to the sovereigns themselves."[206] Moreover, to a dualist, a municipal law that violates international law does not render the municipal law void; "it merely follows that the sovereign has violated international law."[207] *Kiobel* unambiguously demonstrates a dualist perspective. Chief Justice Roberts interpreted the ATS

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[204] *Medellín*, 552 U.S. at 513–14 ("The pertinent international agreements, therefore, do not provide for implementation of ICJ judgments through direct enforcement in domestic courts, and 'where a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one on the States through lawmaking of their own.'" (quoting Sanchez–Llamas v. Oregon, 548 U.S. 331, 347 (2006))).

[205] *Id.* at 536 (Stevens, J., concurring).

[206] MARY ELLEN O'CONNELL, RICHARD F. SCOTT & NAOMI ROHT-ARRIAZA, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS 21–22 (6th ed. 2010).

[207] *Id.*

consistently with U.S. rules of statutory construction, whereas Justice Breyer, in dissent, would have construed the ATS to be "consistent with international law and foreign practice."[208] More than *Kiobel*, *Medellín* flatly rejects the notion that international law preempts municipal law in domestic affairs. In *Medellín*, Chief Justice Roberts acknowledged that although *Avena* undoubtedly constituted an "international law obligation" of the United States,[209] this fact had no bearing on whether it was binding domestic law enforceable in U.S. courts. On the contrary, whether *Avena* bound "the subjects" of the United States was governed by U.S. law, and under U.S. law non-self-executing treaties are not automatically enforceable in domestic courts. Further, the Chief Justice was emphatic in *Sanchez-Llamas* that the Supreme Court of the United States—not the ICJ—has final say over determining the meaning of a treaty that is to be given effect as U.S. federal law.[210] This is quintessential dualism.

Judicial deference, separation of powers, federalism, preserving U.S. sovereignty—sounds a lot like a conservative, not a prudentialist, justice. What, then, distinguishes the prudentialist judicial philosophy from the conservative judicial philosophy? Undoubtedly, the two have significant overlap. Both are committed to confining the judiciary to its proper, but narrow, role under the Constitution. Both are committed to separation of powers and federalism. And both view international law as law that governs relations between States and that is not to be enforced by federal courts absent clear direction from Congress.[211] But the prudentialist judicial philosophy, unlike the conservative judicial philosophy, is also pragmatic when thinking about these first principles. Instead of ruling blindly on the case before him, a prudentialist justice will consider the practical effects of the holding of the case—including the effects on other public and private institutions' ability to carry out their legitimate functions in American democracy; the impact of the decision on the public's perception of the Court;[212] ensuring that the Court is not the final arbiter of contentious political issues; and the ability to build

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208 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1675 (2013) (Breyer, J., concurring).

209 *Medellín*, 552 U.S. at 504.

210 Sanchez–Llamas v. Oregon, 548 U.S. 331, 353–54 (2006).

211 *E.g.*, Al-Bihani v. Obama, 619 F.3d 1, 9 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("International-law norms that have not been incorporated into domestic U.S. law by the political branches are not judicially enforceable limits on the President's authority under the AUMF. This separate opinion explains at great length my reasons for reaching that conclusion.").

212 Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) ("The legitimacy of this Court ultimately rests 'upon the respect accorded to its judgments.'" (quoting Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring))).

consensus across political lines. Taking into account practical effects "does not mean that a prudentialist judge will be unlikely to subject other institutions to constitutional standards; it means only that he or she will do so in a way that respects the place that those institutions themselves hold in the American historical and constitutional scheme."[213]

For the conservative, legislatures, not judges, consider practical effects.[214] A conservative justice simply rules based on the meaning of the text of the law as it was understood by those who passed it. If the law compels a result that, for example, ends up making the executive's job more difficult, so be it.[215] Indeed, on some level the entire purpose of the Constitution was to make it difficult for the government to do anything.[216] But to a prudentialist, the practical effects of a particular ruling are important considerations in deciding how to rule in a particular case.[217] If the practical effects of a case will undermine the prudentialist's "first principles"[218]—like by ending debate on a contentious political issue,[219] or unnecessarily hamstringing other institutions

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[213] Breen, *supra* note 6, at 87.

[214] Consider the following statement made by Justice Kennedy, certainly not the Court's most conservative Justice:

> It is not novel or new for justices to be concerned that they are making so many decisions that affect a democracy. And we think a responsible, efficient, responsive legislative and executive branch in the political system will alleviate some of that pressure. We routinely decide cases involving federal statutes, and we say, "Well, if this is wrong, the Congress will fix it." But then we hear that Congress can't pass the bill one way or the other, that there's gridlock. And some people say, "Well that should affect the way we interpret the statutes." That seems to me a wrong proposition. We have to assume that we have three fully functioning branches of the government, that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic.

Notable & Quotable: Anthony Kennedy, WALL ST. J. (Mar. 24, 2015), http://www.wsj.com/articles/notable-quotable-anthony-kennedy-1427238816.

[215] *E.g.*, NLRB v. Canning, 134 S. Ct. 2550 (2014) (Scalia, J., concurring).

[216] *See* THE FEDERALIST NO. 51 (James Madison) (noting that when framing a government, it is necessary to oblige the government to control itself).

[217] Breen, *supra* note 6, at 86.

[218] Medellín v. Texas, 552 U.S. 491, 524 (2008) (stating that the President's need for flexibility in foreign policy "do[es] not allow us to set aside first principles"); Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2113 (2015) (Roberts, C.J., dissenting) ("The first principles in [constitutional foreign policy] are firmly established.").

[219] *E.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the constitutionality of the individual mandate in the Affordable Care Act by finding that it was a tax, not a regulation of commerce); King v. Burwell, 135 S. Ct. 2480, 2490 (2015) (saving the Affordable Care Act's subsidy program by ruling that the phrase, "exchange established by the State," includes exchanges created by the federal government); Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting) ("Understand well what this dissent is about: It is not about whether, in my judgment, the institution of marriage should be changed to include same-sex couples. It is instead about whether, in our democratic republic, that decision should rest

of government[220]—the prudentialist will find a way to craft the opinion consistent with his first principles, despite the fact that a "formal" reading of the law compels a different result. Moreover, a prudentialist, unlike a conservative, will generally avoid broad rulings—even if the law mandates a broad ruling. To the prudentialist, avoiding broad rulings is a practical way to ensure that the judiciary plays only a small role in American democracy—certainly a first principle of prudentialist judicial philosophy. Thus, although similar, prudentialist and conservative judicial philosophies are distinct.

Bond illustrates this distinction well. In *Bond,* the Chief Justice ignored the plain meaning of the text to avoid having to make a broad-sweeping pronouncement of constitutional law that would have significant effects on the President and Congress's ability to conduct foreign policy through the treaty power. Instead of a broad constitutional ruling that would overturn precedent (even if that precedent does not comport with the Constitution), the Chief Justice issued a narrow ruling that had little impact beyond the case itself.[221] For the conservative Justices—Thomas, Scalia, and Alito—the case was simple. The meaning of the Chemical Weapons Implementation Act was clear, and the function of judges is to apply the plain meaning of the text to the case before them. This analysis resulted in a conviction under the Chemical Weapons Act, and therefore required the Court to address the constitutional issue based on the original meaning of the Constitution, regardless of what practical barriers the ruling might impose on the political branches and despite the fact that precedent must be overruled. For the conservatives, applying the plain meaning of the text of statutes and the original meaning of the Constitution blindly is what was "prudent" because that is what the Constitution required. Indeed, construing statutes "creatively" (i.e., ignoring the plain meaning of the text) is legislating, not judging.[222] Legislatures vote on the text of a statute, not its purposes, and the judiciary's job is to say what the law—the text of a statute—is.[223] Thus, to the conservative Justices, creatively construing the Chemical Weapons Implementation Act in the name

with the people acting through their elected representatives, or with five lawyers who happen to hold commissions authorizing them to resolve legal disputes according to law. The Constitution leaves no doubt about the answer.").

220 Bond v. United States, 134 S. Ct. 2077 (2014).

221 *But cf. id.* at 2097 (Scalia, J., concurring).

222 George F. Will, *On Obamcare, John Roberts Helped Overthrow the Constitution*, WASH. POST (June 25, 2015), http://www.washingtonpost.com/opinions/john-roberts-helps-overthrow-the-constitution/2015/06/25/47d9ffde-1b67-11e5-93b7-5eddc056ad8a_story.html.

223 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

of judicial deference[224] was actually "judicial dereliction"[225] and undermined separation of powers.

The analysis for the prudentialist in *Bond* was different. Because the scope of international law is vastly expanding, the treaty power has become an important tool for the President and Congress to carry out foreign policy. The President and Congress therefore purportedly need the ability to use treaties flexibly to carry out foreign policy and provide leadership in the international arena. Accordingly, rather than making a broad ruling striking down the Act as unconstitutional, the prudentialist would (and indeed did) find a way to issue a narrow ruling—all the while trying to uphold the rest of the prudentialist's judicial philosophy. This is exactly what Chief Justice Roberts tried to accomplish in *Bond.* Chief Justice Roberts used the principle of federalism to find the statute ambiguous and then rule modestly against the government's construction of the Act. Construing the statute in this fashion resulted in no conviction and, therefore, rendered the constitutional issue moot. Not only did the Chief Justice afford the political branches flexibility in foreign affairs, reinforce the importance of federalism, and issue a narrow ruling, but the Chief Justice also attracted the Court's liberal wing to his opinion. Building consensus, if possible, is critical to a prudentialist. Moreover, the Chief Justice's opinion still arguably reigned in an overreaching federal government, effectively signaling to the political branches that treaties that intrude upon purely local matters will not be tolerated.

Beyond desiring to afford the political branches sufficient flexibility, Chief Justice Roberts also likely ruled the way he did in *Bond* because Congress and the President have, at least to some extent, largely policed themselves with respect to the treaty power. While the President and Congress certainly have the potential to completely overstep their constitutional bounds if the treaty power is not confined to its original meaning, the fact is that thus far, they have not used the treaty power to completely run roughshod over the Tenth

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224 *See* King v. Burwell, 135 S. Ct. 2480, 2496 (2015) ("In a democracy, the power to make the law rests with those chosen by the people. Our role is more confined—'to say what the law is.' Marbury v. Madison, 1 Cranch 137, 177 (1803). That is easier in some cases than in others. But in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan.").

225 Will, *supra* note 222.

Amendment. Even Justice Scalia admitted that the harm, although great, is only a potential harm.[226]

Consider human rights treaties. While great on paper, the major human rights treaties have the potential to cut the legs right off of federalism.[227] Indeed, human rights treaties "touch on almost every aspect of domestic civil, political, and cultural life."[228] If there was one treaty area where the political branches could overstep constitutional bounds of federalism, it would be through human rights treaties. So what have the political branches done with these treaties? In short, nothing. The political branches have refused to ratify the International Covenant on Economic, Social and Cultural Rights,[229] the Convention on the Rights of the Child,[230] and the Convention on the Elimination of All Forms of Discrimination against Women.[231] And the three major human rights treaties the United States has ratified, the International Convention on the Elimination of All Forms of Racial Discrimination,[232] the Convention Against Torture,[233] and the International Covenant on Civil and Political Rights, are explicitly non-self-executing.[234] Thus, to the prudentialist, it would be improper to make a broad ruling and unnecessarily hamstring the political branches in carrying out their constitutionally assigned function of conducting foreign affairs when they are already (to a certain extent) complying with the Constitution.

Bond also demonstrates another key aspect of the prudentialist judicial philosophy that somewhat differs from the conservative judicial philosophy:

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226 Bond v. United States, 134 S. Ct. 2077, 2100 (2014) (Scalia, J., concurring) ("If that is true, then the possibilities of what the Federal Government *may* accomplish, with the right treaty in hand, are endless and hardly farfetched." (emphasis added)).

227 For example, the Convention on the Rights of the Child, which the United States has not ratified, covers many issues that implicate family law, an issue traditionally reserved to the states. *See* Convention on the Rights of the Child, *supra* note 169.

228 Bradley & Goldsmith, *supra* note 3.

229 International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

230 Convention on the Rights of the Child, *supra* note 169.

231 Convention on the Elimination of All Forms of Discrimination against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

232 International Convention on the Elimination of All Forms of Racial Discrimination Preamble, *opened for signature* Dec. 21, 1965, 5 I.L.M. 352, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

233 Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26 1987).

234 U.S. Senate Resolution of Advice and Consent to Ratification of the Convention on the Elimination of All Forms of Racial Discrimination, S. REP. NO. 103-29 (1994); U.S. Senate Resolution of Advice and Consent to Ratification of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, S. REP. NO. 101-30 (1990); U.S. CCPR RDUs, supra note 170.

gradualism and respect for tradition and precedent. Indeed, the very definition of prudence implies distaste for abrupt change and hunger for only "careful, gradual reform."[235] In *Bond*, the Chief Justice upheld federalism and still creatively avoided having to address a major constitutional issue and the question of whether to overrule a precedent decided almost a hundred years ago[236] and affirmed in the 1950s.[237] Because the Chief Justice did not believe any first principles were at stake, prudence counseled that the question was better left for another day. While a conservative justice also respects precedent, a conservative's fidelity is first and foremost to the original meaning of the Constitution. If a previous case clearly contradicts the original meaning of the Constitution and undermines the constitutional structure, a conservative will not hesitate to overrule the case and reign in an overreaching executive or legislature. Justice Scalia indirectly explained this distinction in his concurring opinion in *Bond*:

> We have here a supposedly "narrow" opinion which, in order to be "narrow," sets forth interpretive principles never before imagined that will bedevil our jurisprudence (and proliferate litigation) for years to come . . . . All this to leave in place an ill-considered ipse dixit [*Holland*] that enables the fundamental constitutional principle of limited federal powers to be set aside by the President and Senate's exercise of the treaty power. We should not have shirked our duty and distorted the law to preserve that assertion; we should have welcomed and eagerly grasped the opportunity—nay, the obligation—to consider and repudiate it.[238]

For Chief Justice Roberts, however, *Bond* was an "unusual" case, which warranted "limited analysis."[239] In other words, rarely has the federal government used a treaty in a manner that so clearly violates the Constitution. This rarity required judicial restraint, especially considering that the Chemical Weapons Treaty is undoubtedly a proper subject for a treaty under the original meaning of the Constitution and that establishing a neutral, principled rule to govern the treaty power is not necessarily an easy task.[240] Prudence, therefore,

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235 Breen, *supra* note 6, at 87.

236 Missouri v. Holland, 252 U.S. 416, 433 (1920).

237 Reid v. Covert, 354 U.S. 1, 18 (1957).

238 Bond v. United States, 134 S. Ct. 2077, 2102 (Scalia, J., concurring).

239 *See id.* at 2093 (majority opinion).

240 *Id.* at 2110 (Thomas, J., concurring) ("I acknowledge that the distinction between matters of international intercourse and matters of purely domestic regulation may not be obvious in all cases."); *see also* Mark Strasser, *International Covenant as Bond: On Federalism and Congress's Ability to Promote National Interests via the Treaty Power*, 84 MISS. L.J. 309, 347–48 (2015).

counseled avoiding the issue in favor of allowing it to continue to be refined in the crucible of separation of powers, federalism, and democracy.[241]

Kiobel also demonstrates the gradualist tendency of prudentialism. Customary international law has seemingly been accepted as part of federal common law since the founding. While *Erie* changed the analysis, the issue is hardly settled.[242] The D.C. Circuit is sharply divided on the question,[243] and the extent to which international law is automatically incorporated into federal law has immense repercussions for the constitutional system of the United States. *Kiobel* presented the opportunity for Chief Justice Roberts to express his views on the subject, although whether he would have commanded a majority opinion is questionable considering Justice Kennedy voted in the majority in *Sosa*. Instead of attacking this issue, the Chief Justice found another way to rule in *Kiobel* that avoided the question and still returned the authority over international human rights litigation to Congress.

Remember that in *Kiobel* the Supreme Court initially granted certiorari to decide whether the law of nations recognized corporate liability for human rights abuses.[244] To answer that question, of course, the Court would again have had to confront whether international law is part of federal common law. This question was implicitly answered affirmatively by a liberal majority in *Sosa* before Chief Justice Roberts joined the Court.[245] Instead of addressing this issue again, however, the Court—after oral arguments—ordered supplemental briefing to address "under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States."[246] This question was not addressed by *Sosa*. *Sosa* simply assumed that the ATS did allow U.S. federal courts to entertain causes of action that occurred outside the United States.[247] Thus, with a narrow ruling based on the presumption against extraterritoriality, Chief Justice Roberts did

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241 *See* Zivotofsky *ex rel.* Zivotofsky v. Kerry, 135 S. Ct. 2076, 2116 (2015) (Roberts, C.J., dissenting) ("It has not been necessary over the past 225 years to definitively resolve a dispute between Congress and the President over the recognition power. Perhaps we could have waited another 225 years.").

242 *See supra* Part I.E.

243 *See* Al-Bihani v. Obama, 619 F.3d 1, 6 (D.C. Cir. 2010).

244 Kiobel v. Royal Dutch Petroleum Co., 133. S. Ct. 1659, 1663 (2013).

245 *See supra* Part I.E.

246 *Id.*; Kiobel, 133 S. Ct. at 1663.

247 Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (2004); *see also Kiobel*, 133 S. Ct. at 1675 (Breyer J., concurring) ("Not surprisingly, both before and after *Sosa*, courts have consistently rejected the notion that the ATS is categorically barred from extraterritorial application.").

not overrule *Sosa*, a very recent and high-profile case, yet still largely corrected *Sosa's* constitutional error of allowing the courts to formulate U.S. policy with respect to international human rights litigation.[248] This strategy allowed the Chief Justice to respect precedent yet not sacrifice first principles of separation of powers and judicial deference.

CONCLUSION

Chief Justice Roberts is a prudentialist. This judicial philosophy of modesty and humility is exemplified in just a sampling of international law-related cases in which Chief Justice Roberts penned majority opinions. The presumption against extraterritoriality is now a clear legal standard Congress can use to ensure that its will, and not an unelected judge's will, is carried out in the courts. Whether the United States is a proper forum for litigating international human rights cases will be determined by the democratic process. The Senate is now in a stronger position to ensure that it will be the institution to decide whether to allow the courts a role in foreign affairs through the enforcement of treaties against the political branches. The limits to the treaty power, if any, remain hidden. Whether international law is part of federal common law is left to be litigated in all the federal courts on an issue-by-issue basis.

While these results appear fairly "conservative" in nature, Part II demonstrated that the prudential and conservative judicial philosophies are different. The core distinction is the prudentialist's elevation of judicial deference, narrow rulings, and gradualism above the original meaning of the text. In other words, the prudentialist is first and foremost committed to confining the judicial branch to a minor role in American democracy. This is no doubt a noble goal, and it certainly seems to be Chief Justice Roberts's goal. For far too long has the Court usurped the role of the people, the states, and the political branches by constitutionalizing issues that in fact have no basis in the Constitution.[249] When the Court does this, it destroys the democratic process by taking any debate on the issue away from public life, state legislatures, and Congress, where the people's voices can be heard, to the federal courts, where they cannot. Accordingly, adhering to a judicial

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[248] Flomo v. Firestone Nat. Rubber Co., LLC, 643 F.3d 1013, 1025 (7th Cir. 2011) ("Deny extraterritorial application [to the ATS], and the statute would be superfluous . . . .").

[249] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2626 (2015) (Roberts, C.J., dissenting) ("If you are among the many Americans—of whatever sexual orientation—who favor expanding same-sex marriage, by all means celebrate today's decision . . . . But do not celebrate the Constitution. It had nothing to do with it.").

philosophy that seeks to narrow the role of the judiciary is vital to the proper functioning of our democratic system and correcting the serious flaw in the current reign of judicial supremacy.[250]

But, contrary to what Chief Justice Roberts may believe, confining the judiciary to a narrower role than the Constitution mandates is also dangerous. Under the Constitution, the Supreme Court sits atop an independent, co-equal branch of government that is tasked with a critical function in our system of separation of powers and checks and balances. To protect liberty, including democracy, each branch must carry out its assigned function, that is, "ambition must counteract ambition."[251] So the question arises, what does the Constitution require of an Article III judge? While this question is well beyond the scope of this Article, two points are certain: the judiciary has merely "judgment," not "force []or will";[252] and the judicial function must be separate from the legislative and executive functions.[253] As the esteemed Montesquieu, on whom the Founders greatly relied in shaping the Constitution, remarked:

> [T]here is no liberty if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[254]

Undoubtedly, then, any legitimate judicial philosophy desiring to uphold democracy and claiming adherence to the Constitution must seek to exercise only "judgment" and to separate completely the judicial function from the legislative and executive functions. So does Chief Justice Robert's prudentialism accomplish these two goals? While the cases analyzed in Part I indicate that this answer is generally yes, *Bond* demonstrates that prudentialism can sometimes lead the Chief Justice to exercise his "will" instead of "judgment" (by ignoring the plain meaning of the text) and join the judicial power to the legislative power (again, by ignoring the plain meaning of the

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250 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land . . . .").

251 THE FEDERALIST NOS. 47, 51 (James Madison).

252 THE FEDERALIST NO. 78 (Alexander Hamilton).

253 *See* U.S. CONST. arts. I-III; *infra* note 254.

254 CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. XI 182 (Thomas Nugent, trans., D. Appleton & Co. 1900) (1748); *see also* THE FEDERALIST NO. 47 (James Madison).

text).[255] In other words, the Chief Justice's commitment to judicial deference and narrow rulings can easily become judicial enablement. And judicial enablement can lead to the political branches (or the liberal wing of the Court) trampling the Constitution and democracy.[256] Ironic for a judicial philosophy that is founded on separation of powers, judicial deference, and democracy.

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[255] Will, *supra* note 222 ("What Roberts does by way of, to be polite, creative construing (Justice Antonin Scalia, dissenting, calls it 'somersaults of statutory interpretation') is legislating, not judging."); *see also* Bond v. United States, 134 S. Ct. 2077 (2014).

[256] *See generally* Randy E. Barnett, *The Wages of Crying Judicial Restraint*, 36 HARV. J.L. & PUB. POL'Y 925 (2013); *see also* Randy E. Barnett, *The Definition of Insanity: Jeb Bush Still Favors Appointing Judges "with a proven record of judicial restraint,"* VOLOKH CONSPIRACY (June 27, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/27/jeb-bush-still-favors-appointing-judges-with-a-proven-record-of-judicial-restraint/.