

Kiobel, Unilateralism, and the Retreat from Extraterritoriality

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Kiobel, Unilateralism, and the Retreat from Extraterritoriality

AUSTEN L. PARRISH[†]

INTRODUCTION	208
I. EXTRATERRITORIALITY AS GLOBAL GOVERNANCE	212
A. Early Beginnings	213
B. Extraterritoriality's Rise	218
C. The Impact of Legal Theory	221
II. DOMESTIC DEBATES TAKE THEIR TOLL	226
A. Transnational Litigation in the Supreme Court	226
B. Domestic Debates and U.S. Culture Wars	229
III. REBUILDING INTERNATIONAL LAW	230
A. The Costs of Extraterritorial Regulation	231
B. The Benefits of Multilateralism	235
CONCLUSION	239

INTRODUCTION

With the U.S. Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*,¹ the general mood among those in the human rights community is pessimistic.² Because it curtails use of the Alien

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

2. See Editorial, *A Giant Setback for Human Rights*, N.Y. TIMES, Apr. 18, 2013, at A26 ("The Supreme Court's conservatives dealt a major blow Wednesday to the ability of American federal courts to hold violators of international human rights accountable."); David G. Savage, *Justices Rule U.S. Courts Not World Forum for Human Rights Suits*, L.A. TIMES, Apr. 17, 2013, at 21 ("In a decision welcomed by corporate leaders and decried by human rights activists, the justices said U.S. courts are limited mostly to deciding disputes over conduct that took place on American territory, not on foreign soil."); see, e.g., *Kiobel Ruling Undermines U.S. Leadership on Human Rights*, HUM. RTS. FIRST (Apr. 17, 2013), <http://www.humanrightsfirst.org/2013/04/17/kiobel-ruling-undermines-u-s-leadership-on-human-rights> ("Today in its decision in *Kiobel v. Royal Dutch Petroleum*, the Supreme Court gutted the Alien Tort Statute (ATS), a law that has been on the books for more than

Tort Statute (ATS),³ viewing *Kiobel* as a loss in an ongoing ideological struggle is tempting. From this perspective, *Kiobel* is another indication that the Court continues to reinvent itself with a particular brand of conservative activism,⁴ the United States remains deeply hostile to international law and its institutions,⁵ and corporate interests have yet again won out over the protection of individuals.⁶ For some, the Court's finding that the Alien Tort Statute does not redress claims of human rights violations by foreigners against foreigners on foreign soil can be scratched up as a win on the side of those pushing for tort reform, for those who believe there is too much litigation in the United States,⁷ and for those who courts, as unelected institutions, need to be carefully watched and constrained.⁸ The first reaction of many academics concerned with protecting

200 years and for the last 30 years has been a critical avenue to hold serious human rights violators accountable.”); *Kiobel v. Shell: Light Dims on Human Rights Claim in the U.S.*, CTR. FOR JUST. & ACCOUNTABILITY, <http://cja.org/section.php?id=510> (last visited May 13, 2013) (“[T]he Supreme Court significantly limited human rights litigation as we know it.”).

3. 28 U.S.C. § 1350 (2006). The Alien Tort Statute was enacted in 1789 as part of the first Judiciary Act. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

4. See Geoffrey R. Stone, *When is Judicial Activism Appropriate?*, CHI. TRIB., Apr. 13, 2012, at 19 (“[W]e have now entered a troubling era of conservative constitutional jurisprudence [that] is best characterized as ‘conservative activism.’”).

5. For a recent discussion in the popular press, see John B. Bellinger III, Op-Ed, *Obama’s Weakness on Treaties*, N.Y. TIMES, Dec. 18, 2012, at A35 (noting “Republican opposition to international agreements, which certainly has risen among the party’s senators in recent years,” and that the Obama Administration has secured Senate approval of the fewest number of treaties in any four-year presidential term since World War II).

6. See Geoffrey Pariza, Student Article, *Genocide, Inc.: Corporate Immunity to Violations of International Law After Kiobel v. Royal Dutch Petroleum*, 8 LOY. U. CHI. INT’L L. REV. 229, 253 (2011) (“If allowed to stand, *Kiobel* will have a tremendous impact on the future of ATS litigation concerning corporate defendants. . . . The decision has already had a negative impact on ATS plaintiffs complaining of human rights violations, child labor, and environmental contamination . . .”).

7. See, e.g., Claude Wyle, *Congress Judiciary Committee Chair Seeks to Reduce Accountability for Corporations*, LEGAL EXAMINER S.F. (Mar. 8, 2013, 3:53 PM), <http://sanfrancisco.legalexaminer.com/miscellaneous/congress-judiciary-committee-chair-seeks-to-reduce-accountability-for-corporations.aspx?googleid=307520> (“Bob Goodlatte, the Judiciary Chairman of the United States House of Representatives, released an inflammatory statement . . . blaming litigation costs for America’s bad economy and poor global competitiveness.”).

8. See *infra* notes 104–108 and accompanying text; see, e.g., Anton Fagan, *Determining the Stakes: Binding and Non-Binding Bills of Rights*, in HUMAN RIGHTS IN PRIVATE LAW 73, 84 (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (describing an academic’s opinion of judges as “a group of unelected individuals” whose ability to change private law is potentially “anti-democratic” and “must be subjected to constitutional constraint”).

human rights will be to decry the result and paint the case as a setback.⁹

But, in many ways, this particular narrative misconstrues what's at stake. While the *Kiobel* decision may reflect the U.S. Supreme Court's turn to the right, international and human rights lawyers should find some solace in the decision. Viewed through a different lens, *Kiobel* is a case about whether the United States should privilege unilateralism over multilateralism, and whether it prefers international over pluralistic approaches to global governance. In this way, those concerned about the advancement of human rights should spend little time (and for academics, little ink) decrying the *Kiobel* result. Instead, the case may signal the beginning of a modest, and welcome, retreat from a failed strategy of aggressive American

9. The commentary on the international law blog, *Opinio Juris*, on the day the Court released its *Kiobel* decision provides an example. See, e.g., Roger Alford, *The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013, 5:48 PM), <http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation/> (“The ATS as we know it is dead . . . But after *Kiobel*, human rights lawyers have precious few alternatives.”); Anthony J. Colangelo, *An Extraterritorial Cause of Action*, OPINIO JURIS (Apr. 17, 2013, 4:26 PM), <http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-an-extraterritorial-cause-of-action/> (“[T]he Court’s extension of the presumption against extraterritoriality to causes of action is both conceptually mistaken and doctrinally unsupported under longstanding principles of the law of nations.”); Thomas H. Lee, *When Can the Presumption Against Extraterritoriality Be Rebutted?*, OPINIO JURIS (Apr. 17, 2013, 3:29 PM), <http://opiniojuris.org/2013/04/17/kiobel-insta-symposium-when-can-the-pre-sumption-against-extraterritoriality-be-rebutted/> (“Based on my quick read through the opinions, it seems that it’s a win for corporations and a loss for international human rights groups”); Peter Spiro, *Human Rights Will Survive Kiobel*, OPINIO JURIS, (Apr. 17, 2013, 12:09 PM), <http://opiniojuris.org/2013/04/17/human-rights-will-survive-kiobel/> (“This is a tough loss for the human rights advocacy community, ending an era”); Julian Ku, *SCOTUS Votes 9-0 That Corporations Cannot Be Sued Under ATS for Extraterritorial Acts Without U.S. Interest at Stake*, OPINIO JURIS (Apr. 17, 2013, 11:52 AM), <http://opiniojuris.org/2013/04/17/scotus-votes-9-0-that-corporations-cannot-be-sued-under-ats-for-extraterritorial-acts-without-u-s-interest-at-stake/> (“Bottom line: Corporate general counsels! Rest easy, your long, transnational ATS nightmare is over!”). The commentary on SCOTUSBlog shortly thereafter provides another example. See, e.g., Oona Hathaway, *The Door Remains Open to “Foreign Squared” Cases*, SCOTUSBLOG (Apr. 19, 2013, 4:27 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/> (concluding that “foreign cubed cases” are now “off the table”); Donald Childress, *An ATS Answer With Many Questions (and the Possibility of a Brave New World of Transnational Litigation)*, SCOTUSBLOG (Apr. 18, 2013, 5:03 PM), <http://www.scotusblog.com/2013/04/kiobel-commentary-an-ats-answer-with-many-questions-and-the-possibility-of-a-brave-new-world-of-transnational-litigation/> (arguing that plaintiffs’ ability to file ATS claims in federal court is now substantially limited and predicting “a brave new world of transnational litigation” under state and foreign law).

unilateralism—viewed by other countries as legal imperialism¹⁰—that has taken root in a number of public and private law contexts. The case could mark an opportunity to renew efforts to return to more vigorous international lawmaking based on multilateral consensus. In this way, to the extent *Kiobel* is a step to interring unilateral regulation of foreigners for conduct occurring abroad, the case is not a setback for international law or human rights, but rather a vindication of them.

This Article recasts *Kiobel* as one case in a line of cases involving unilateral, extraterritorial regulation. It unfolds in three parts. Part I begins by describing the rise of extraterritoriality and how extraterritoriality, in both the public and private law contexts, became a uniquely American way to build empire. Innovations in legal theory from both the right and left of the political spectrum aided and spurred the prevalence of extraterritorial laws. As right-leaning academics attacked international law and its institutions, left-leaning academics began to exalt sub-state mechanisms and transnational networks, as a way to operationalize pluralistic as well as liberal theories of international law and relations. Those pressures from both sides of the academic spectrum created an intellectual environment where unilateral use of domestic law became perceived by many academics and policymakers as a more preferable way to address global challenges and as a substitute for more robust international lawmaking.

After describing extraterritoriality's rise, the Article sketches its decline. Part II describes how extraterritorial approaches eventually came under sustained attack. Those attacks, however, rarely reflected debates about international law and global governance. Rather the attacks replicated domestic political and culture war debates—squabbles over tort reform, over separation of powers and federalism, and over the role of courts. Finally, Part III explains why *Kiobel* has a brighter side for those committed to advancing human rights. *Kiobel*'s curtailing of extraterritorial regulation of foreigners may be a setback for those promoting pluralistic and certain kinds of liberal

10. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 28–29 (1987) (describing how an exorbitant jurisdictional assertion “can readily arouse foreign resentment” and “provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields”); John Byron Sandage, *Forum Non Conveniens and the Extraterritorial Application of United States Antitrust Laws*, 94 YALE L.J. 1693, 1698 (1985) (explaining that using the effects test to justify extraterritorial jurisdiction was perceived as “Yankee ‘jurisdictional jingoism’” that spurred “wide-spread resentment”).

international relations theories, but it should not be a setback for human rights.

Understanding the focus and limits of this critique is important. The perspective advanced is supportive of efforts to aggressively prevent atrocities, like those present in *Kiobel*, from re-occurring. Respect for human dignity is a key component of an effective and legitimate global governance regime. It's a perspective that embraces national courts as appropriate places to use and enforce international law, and that those courts can play a critical role in promoting international human rights. Concerns about extraterritoriality do not arise if we hold our own citizens and corporations liable for human rights abuses, whether occurring in the United States or abroad. It rejects, however, the notion that meaningful, sustainable change can occur through unilateral regulation of foreign conduct, divorced from international agreement even when addressing so-called universal norms. The costs of extraterritorial regulation, whereby each nation defines their own version of international norms and then applies them to foreigners for conduct occurring abroad—whether in public law cases like *Kiobel*, or in the private, commercial law context—are significant. Most problematically, unilateral, extraterritorial regulation can undermine other longer-lasting, multilateral efforts to advance respect for human rights.

I. EXTRATERRITORIALITY AS GLOBAL GOVERNANCE

Extraterritoriality has been defined in varying ways. Generally though, extraterritorial laws are understood to refer to national laws—enacted unilaterally and untethered from international agreement—that regulate conduct abroad.¹¹ Extraterritoriality can also be understood in terms of jurisdiction, when a legislative body

11. Cf. Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1218 n.3 (1992) (“A case ‘involves extraterritoriality when at least one relevant event occurs in another nation.’”); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 123 (2011) (“A law is extraterritorial if it governs acts that occur outside the nation-state’s borders, even if committed by the nation’s own citizens.”); Anthony J. Colangelo, *A Unified Approach to Extraterritoriality*, 97 VA. L. REV. 1019, 1024–25 (2011) (explaining how the concerns over extraterritoriality “drop out for statutes implementing international law” but “persist for statutes enacted under legislative sources authorizing the enactment of purely national law”).

uses a basis of prescriptive jurisdiction other than a territorial one.¹² While extraterritorial jurisdiction has innocuous forms (for example, jurisdiction over one's own nationals or jurisdiction to punish offenses directed at state security), it becomes contentious when one state purports to tell foreigners what they can or cannot do on foreign soil.¹³ Despite its contentiousness, unilaterally-imposed extraterritorial laws have recently become prominent fixtures in global governance.¹⁴

A. *Early Beginnings*

Until recently, extraterritorial laws were exceptional in the international system; if they were not prohibited, they were at least strongly disfavored.¹⁵ Long-established public international law principles of territorial integrity, sovereign equality, nonintervention, and self-determination¹⁶ meant that power ended at the border.¹⁷ A

12. For an overview on the different bases of jurisdiction, see Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 445 (Supp. 1935) (describing five bases of jurisdiction, including territorial, protective, nationality, universal, and passive personality); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987) (describing bases of jurisdiction); I.A. SHEARER, STARKE'S INTERNATIONAL LAW 183–212 (11th ed. 1994) (describing bases of jurisdiction under international law).

13. See *Developments in the Law: Extraterritoriality*, 124 HARV. L. REV. 1226, 1228 (2011) (“[T]here are serious legal, diplomatic, and moral tensions inherent in the extraterritorial application of law.”); INT’L BAR ASS’N, REPORT OF THE TASK FORCE ON EXTRATERRITORIAL JURISDICTION 11 (2009), available at <http://www.ibanet.org> (“The starting point for jurisdiction is that all states have competence over events occurring and persons . . . present in their territory. This principle, known as the ‘principle of territoriality,’ is the most common and least controversial basis for jurisdiction.”). For a detailed description of similar problems regarding extraterritorial jurisdiction, see Austen L. Parrish, *The Effects Test: Extraterritoriality’s Fifth Business*, 61 VAND. L. REV. 1455 (2008).

14. Austen L. Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 820 (2009) (describing the “rise of extraterritorial domestic law (law unilaterally applied to the conduct of foreigners abroad)”).

15. *Developments in the Law*, *supra* note 13, at 1228 (“The exceptionalism of extraterritoriality reflects the foundational ideals of the international state system.”).

16. See American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (setting out a citizen’s right to participate in government); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (setting out the right to self-government); U.N. Charter art. 2, para. 7 (noting UN’s basic respect for the principle of equal rights and self-determination). See generally Stuart Elden, *Contingent Sovereignty, Territorial Integrity and the Sanctity of Borders*, 26 SAIS REV. 11, 11 (2006) (“Since the end of World War II, the international political system has been structured around three central tenets: the notion of equal sovereignty of states, internal competence for domestic jurisdiction, and territorial preservation of existing boundaries.”).

17. See U.N. Charter art. 2, para. 7 (providing that “matters which are essentially within the domestic jurisdiction of any state” are excluded from UN jurisdiction); Corfu Channel

state's domestic laws, with rare exceptions, only applied to peoples within the state's borders.¹⁸ The reason for the limitation was largely pragmatic: it sought to reduce conflict between nations and ensure international peace and stability.¹⁹ But there was also a moral imperative against extraterritorial regulation. Each nation, it was believed, should have the right to choose its own path, without interference from others.²⁰ The international system did not foreclose domestic courts from being involved in global governance, nor did the system presume regulatory free-zones. But cross-border regulation was primarily the purview of international law and international institutions, not domestic law. To the extent domestic law and courts were used to decide foreign, extraterritorial disputes, it was through international agreement.²¹

(U.K. v. Alb.) 1949 I.C.J. 4, 35 (Apr. 9) (rejecting a state's claim of a right of intervention to secure evidence from the territory of another state, noting that "[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. IV, ch. 1, subch. A, intro. note (1987) (recognizing an international norm against a state exercising power in another state's sovereign territory).

18. See S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7) ("[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial . . ."); *id.* at 56 (dissenting opinion of Lord Finlay) ("A country is no more entitled to assume jurisdiction over foreigners than it would be to annex a bit of territory which happened to be very convenient for it.").

19. See U.N. Charter art. 2, para. 4 (describing how each state has territorial integrity and political independence and prohibiting the use of force or threat of the use of force).

20. See, e.g., International Covenant on Civil and Political Rights art. 1, Dec. 16, 1966, 999 U.N.T.S. 171 (providing that "[a]ll peoples have the right to self-determination"); International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (same). For a recent discussion, see Dinah Shelton, *Self-Determination in Regional Human Rights Law: From Kosovo to Cameroon*, 105 AM. J. INT'L L. 60, 60 (2011) (arguing that the right of self-determination is universal in scope, while noting no right to secession).

21. The famous Trail Smelter arbitration is a good example of this. The 1909 Boundary Waters Treaty was drafted precisely because at the time there existed "no remedies or redress" for transboundary harms. Robert Day Scott, *The Canadian-American Boundary Waters Treaty: Why Article II?*, 36 CAN. B. REV. 511, 518 n.15 (1958) (quoting the Draft Press Release, prepared for Secretary Knox, in Chandler P. Anderson Papers, Manuscript Division, Library of Congress) ("[T]he treaty proceeds to establish a new rule for the benefit and protection of those interests, on either side of the boundary . . . there being, under existing conditions no remedies or redress in such cases."); Stephen C. McCaffrey, *Transboundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States*, 3 CAL. W. INT'L L.J. 191, 196 (1973) (discussing reasons for the drafting of the 1909 Boundary Waters Treaty). See generally TRANSBOUNDARY HARMS IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER

Among other restrictions,²² two complimentary procedural doctrines worked together to render extraterritorial regulation extraordinary. One was prescriptive jurisdiction,²³ which limited states from enacting laws that regulated foreign conduct.²⁴ The other was adjudicatory jurisdiction, which prevented courts from asserting power over foreign defendants outside a state's borders with which the state had no contact.²⁵ As Justice Story famously declared, "every nation possesses an exclusive sovereignty and jurisdiction within its own territory," and "it would be wholly incompatible with equality and exclusiveness of the sovereignty of any nation, that other nations should be at liberty to regulate either persons or things not within its

ARBITRATION (Rebecca M. Bratspies & Russell A. Miller eds., 2006). For an overview and a discussion of recent, similar litigation, see Austen L. Parrish, *Trail Smelter Déjà vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Transboundary Water Pollution Disputes*, 85 B.U. L. REV. 363 (2005).

22. The local action rule was most prominent among these restrictions. See Joel A. Gallob, *Birth of the North American Transboundary Environmental Plaintiff: Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85, 96 (1991) (describing the local action rule as providing that "an action in tort for damage to real property must be brought where the property is located"); H. Scott Fairley, *Private Remedies for Transboundary Injury in Canada and the United States: Constraints Upon Having to Sue Where You Can Collect*, 10 OTTAWA L. REV. 253, 264-67 (1978) (describing how U.S. courts approached the local action rule to prevent transboundary disputes); see also *British S. Afr. Co. v. Companhia de Moçambique* [1893] A.C. 602 (H.L.) (appeal taken from Eng.). Forum non conveniens was another procedural doctrine that continues to inhibit certain forms of transnational litigation. For a recent discussion, see Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011).

23. For an early treatment, see Willis L.M. Reese, *Legislative Jurisdiction*, 78 COLUM. L. REV. 1587, 1608 (1978).

24. See, e.g., *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("[T]he general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."); *The Appollon*, 22 U.S. (9 Wheat.) 362, 370 (1824) ("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); *Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812) ("The jurisdiction of the nation within its own territory is necessarily exclusive and absolute.").

25. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878) (setting out what was believed to be universal and undisputed principles of international law that "no State can exercise direct jurisdiction and authority over persons or property without its territory"); see also *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 174 (1850) (noting how jurisdictional limits were derived from international legal principles based on territorial limits on power). See generally KEVIN M. CLERMONT, *CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE* 5 (1999) (describing how territorial jurisdiction "arose among a band of independent sovereigns, limited in what they *could* do, but more importantly limiting themselves in what they *would* do in order to avoid stepping on the others' toes"); Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 796-808 (1955) (explaining how the American colonies inherited a long-standing tradition from international law that recognized territorial borders as the key limitation on a sovereign's authority and jurisdiction).

own territories.”²⁶ Justice Holmes similarly explained the “general and almost universal” rule: “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done.”²⁷ This basic understanding was unassailable.²⁸

The United States, for much of the nineteenth and twentieth centuries, strongly promoted these foundational tenets to the international system. In the nineteenth century, when the United States was not yet a World Power, the prohibition on extraterritorial regulation was particularly aligned with U.S. interests.²⁹ Extraterritorial laws were synonymous with empire-building and the unseemly bullying of smaller nations by great powers.³⁰ Extraterritoriality also closely resembled—and was a variation on—the “taxation without representation” that the early colonists decried.³¹ Put simply, the United States didn’t want European powers meddling in its internal affairs. This was true in the human rights context too after World War II, where human rights were enforced on a state-to-state level and strong territorial states were seen as essential to securing respect for those rights.³² Rather than ignoring the

26. JOSEPH STORY, COMMENTARIES ON THE CONFLICTS OF LAWS §§ 18, 20 (1834).

27. *Am. Banana Co.*, 213 U.S. at 356; see also 1 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 311–12 (1935) (“Since the power of a state is supreme within its own territory, no other state can exercise power there It follows generally that no statute has force to affect any person, thing, or act, outside the territory of the state that passed it.”).

28. Cf. 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 236 (1906) (“There is no principle better settled than that the penal laws of a country have no extraterritorial force”); Harvard Research in International Law, *supra* note 12, at 480–84 (describing the settled tenets of territorial jurisdiction).

29. See generally KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? THE EVOLUTION OF TERRITORIALITY IN AMERICAN LAW 57 (2009) (“As a weak nation, with an uncertain relationship to the great powers of the day, the early United States was unsurprisingly drawn to the principle of complete sovereign control within demarcated geographic borders.”); BARTHOLOMEW SPARROW, THE *INSULAR CASES* AND THE EMERGENCE OF AMERICAN EMPIRE (2006) (recounting the application of U.S. constitutional provisions to new U.S. territories acquired after the Spanish-American War).

30. See RAUSTIALA, *supra* note 29, at 57.

31. See, e.g., DANIEL A. SMITH, TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY 21–23 (1998) (describing the leading slogan of the American Revolution, “No Taxation without Representation”); see also Grant Dorfman, *The Founders’ Legal Case: “No Taxation Without Representation” Versus Taxation No Tyranny*, 44 Hous. L. Rev. 1377, 1377–80 (2008) (describing the history behind the phrase “No Taxation without Representation”).

32. For a detailed description of this history post-World War II, see Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. Rev. 1099, 1108–11 (2011) (describing the territorial underpinnings of human rights).

territorial limits of international law, leaders in the human rights movement sought to harness the power of the territorial state to protect against genocide and other atrocities that had occurred with Nazi Germany.

This is not to say that law was always strictly territorially confined; exceptions existed.³³ And even aside from these exceptions, there were times when territorial limits were honored in the breach, particularly when the United States was dealing with so-called “less-civilized” nations.³⁴ But the exceptions were narrow and limited, and more often than not viewed as highly contentious, if not illegal.³⁵ The antitrust area provides one example, where the United States tendentiously reinterpreted the “objective territoriality” principle³⁶ to justify its regulation of foreign conduct.³⁷ The rest of the world, however, viewed the projection of U.S. commercial law abroad as American exceptionalism in its worst form.³⁸ In the context of “less-civilized” nations, the disparate treatment was, in hindsight, a source

33. See Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification Under the European Convention*, 20 EUR. J. INT'L L. 1223, 1223 (2009) (“[E]xisting categories of extraterritorial jurisdiction can best be understood as limited exceptions to the rule of territorial jurisdiction . . .”). See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–403 (1987).

34. See DANIEL S. MARGOLIES, SPACES OF LAW IN AMERICAN FOREIGN RELATIONS 140–75 (2011) (describing U.S. extraterritorial activity on the southern border); Daniel S. Margolies, *The “Ill-Defined Fiction” of Extraterritoriality and Sovereign Exception in Late Nineteenth Century U.S. Foreign Relations*, 40 SW. L. REV. 575 (2011) (describing the use of extraterritoriality by the United States in the late nineteenth century). Territorial integrity was also not respected when dealing with indigenous tribes. S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 23–26 (2d ed. 2004) (explaining that “[t]o see indigenous peoples as ‘states’ would in the end prove all too difficult for Western eyes”).

35. See ANAYA, *supra* note 34 (explaining how an exception allowed Westerners to disavow indigenous people from statehood).

36. S.S. “Lotus” (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 30 (Sept. 7) (describing the objective territoriality principle as situations where a crime’s effects were so much a part of the act that produced them and the effect was a constituent element of the crime). For a discussion of the objective territoriality principle, see Austen L. Parrish, *Evading Legislative Jurisdiction*, 87 NOTRE DAME L. REV. 1673, 1680–81 (2012).

37. See generally Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999).

38. Cf. *Developments in the Law*, *supra* note 13, at 1270–71 (“[A]pplying U.S. antitrust law overseas poses potential conflicts with other countries’ laws and can prompt international political disputes. Similarly, when other countries exercise jurisdiction in a manner that affects American interests, policymakers and affected parties in the United States face challenges in either confronting or complying with foreign antitrust principles.” (footnote omitted)).

of embarrassment.³⁹ Extraterritorial regulation thus sat in the shadow of the law: something to be tolerated on occasion, but rarely embraced.

B. Extraterritoriality's Rise

Academics studying the Alien Tort Statute are familiar with its commonly told history. For many years, the statute lay dormant. In 1980, however, with the landmark *Filártiga v. Peña-Irala* case,⁴⁰ the Second Circuit catapulted the statute to the forefront as a tool to remedy human rights abuses.⁴¹ Through cases such as *Tel-Oren v. Libyan Arab Republic*,⁴² *Kadic v. Karadžić*,⁴³ *Doe v. Unocal Corp.*,⁴⁴ and *Sosa v. Alvarez-Machain*,⁴⁵ among others, domestic human rights litigation evolved.⁴⁶

This doctrinal story while not inaccurate is far from complete. Changes in application of the Alien Tort Statute represent just one example of much broader transformations that were occurring.⁴⁷ Beginning in the 1980s and then in full force in the 1990s, extraterritoriality began to take on a new significance in a wide range of contexts. While commercial laws, like antitrust and securities, had been long applied abroad, non-commercial laws had been more

39. A good example exists with indigenous peoples. See generally ANAYA, *supra* note 34, at 26–28 (explaining how territorial sovereignty was initially associated only with the “civilized” European nations).

40. 630 F.2d 876 (2d Cir. 1980).

41. See generally Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*, 27 YALE J. INT’L L. 1, 6–10 (2002) (describing the case and its implications); Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004).

42. 726 F.2d 774 (D.C. Cir. 1984).

43. 70 F.3d 232 (2d Cir. 1995).

44. 403 F.3d 708 (9th Cir. 2005).

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

46. See Jonathan C. Drimmer & Sarah R. Lamoree, *Think Globally, Sue Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 BERKELEY J. INT’L L. 456, 460 (2011) (describing the number of cases filed annually and trends in Alien Tort Statute litigation).

47. See generally Paul B. Stephan, *A Becoming Modesty – U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627 (2002) (describing the globalization of U.S. civil justice). For a recent discussion, see Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 715 (2012) (“In looking at ATS cases, therefore, one confronts many of the questions related to transnational litigation in U.S. courts.”).

constrained.⁴⁸ The 1990s saw this change (some would say dramatically) as extraterritoriality became widespread in all areas of U.S. law.⁴⁹

The trend was not limited to the United States, however. In response to American unwillingness to limit the reach of its laws, other countries began to embrace unilateral extraterritorial regulation too.⁵⁰ Some even hoped that greater unilateral regulation would paradoxically spur eventual international regulation and harmonization.⁵¹ National courts began to play a more prominent role in global governance.⁵² The development of universal jurisdiction and the increase of Alien Tort Statute cases were representative of this trend.

48. See Jonathan Turley, "When in Rome": *Multinational Misconduct and the Presumption Against Extraterritoriality*, 84 NW. U. L. REV. 598 (1990) (describing how market and non-market cases were treated differently by courts).

49. For a general discussion of extraterritoriality in U.S. law, see GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (5th ed. 2011); VED P. NANDA & DAVID K. PANSIUS, *LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS* (2d ed. 2008); see also Rep. of the Int'l Law Comm'n, 58th Sess., May 1–June 9, July 3–Aug. 11, 2006, Annex E, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10, at 516 (2006); Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110 app. at 181–84 (2011) (listing U.S. laws that apply extraterritorially); CHARLES DOYLE, CONG. RESEARCH SERV., RS22497, *EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW* 94–166 (2012) (listing U.S. federal criminal statutes that have an extraterritorial application).

50. See Parrish, *supra* note 14, at 846–48 (listing contexts in which U.S. laws have been applied extraterritorially and situations where foreign nations have begun to use their laws extraterritorially too). Several have described the exportation of American-style litigation. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 281 (1990) (Brennan, J., dissenting) (describing the exportation of U.S. law); see also Mark A. Behrens et al., *Global Litigation Trends*, 17 MICH. ST. J. INT'L L. 165 (2009) (describing the spread of U.S. style litigation). For a discussion in the human rights context, see Anne Bloom, *Taking on Goliath, Why Personal Injury Litigation May Represent the Future of Transnational Cause Lawyering*, in *CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA* (Austin Sarat & Stuart Scheingold eds., 2001).

51. See William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L.J. 101, 169 (1998) (describing how the United States and Europe have both adopted a unilateral approach to antitrust law with positive outcomes in regulation and harmonization).

52. See, e.g., Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59 (2009) (describing how national courts are beginning to more aggressively engage with and interpret international law); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 217–18 (2003) (describing a world of transnational judicial interaction and relations); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 67, 96–115 (2009) (analyzing the global impact of domestic courts); Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (describing the changing role of national courts in transnational regulation).

In some ways, the rise of extraterritoriality was a matter of convenience. Extraterritorial laws were politically more expedient than traditional international law making, as treaties increasingly became viewed as overly difficult and time consuming.⁵³ After the Cold War, domestic regulation applied to foreign conduct also became a more palatable (albeit surreptitious way) for the United States to exert global influence than traditional overt empire building.⁵⁴ At the very least, it became a way to expand the sphere of American influence without having to worry about the constraints that international treaties impose.⁵⁵

A number of changes explain the trend towards extraterritorial regulation. Globalization played a role,⁵⁶ although its role is often overstated.⁵⁷ Changes in domestic procedural rules also encouraged the trend.⁵⁸ The doctrines of prescriptive and adjudicatory jurisdiction

53. See, e.g., Oscar Schachter, *New Custom: Power, Opinio Juris, and Contrary Practice*, in *THEORY OF INTERNATIONAL LAW AT THE THRESHOLD OF THE 21ST CENTURY* 531, 533–34 (Jerzy Makarczyk ed., 1996) (explaining how treaty negotiation was perceived as “slow and cumbersome” and ascribing this as a reason for the development of customary international law); Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L.J.* 1236, 1241 (2008) (criticizing and describing limits of traditional treaties).

54. See Nico Krisch, *More Equal than the Rest? Hierarchy, Equality, and U.S. Predominance in International Law*, in *UNITED STATES HEGEMONY AND THE FOUNDATION OF INTERNATIONAL LAW* 135, 156 (Michael Byers & Georg Nolte eds., 2003) (describing the U.S. shift away from international law and towards domestic law as a tool of foreign policy).

55. See *id.* at 156, 162–63 (explaining how from a “U.S. perspective, law is an important device for the regulation of international society – as long as it is not applied to itself”). For a description of some of the possible reasons for U.S. unilateralism in human rights, see Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, in *THE COST OF ACTING ALONE: MULTILATERALISM AND US FOREIGN POLICY* 345 (Shepard Forman & Stewart Patrick eds., 2001).

56. See David J. Gerber, *Prescriptive Authority: Global Markets as a Challenge to National Regulatory Systems*, 29 *HOUS. J. INT’L L.* 287, 298 (2004) (noting how global markets “enhance pressure on [jurisdictional rules] by increasing the likelihood, intensity, and potential consequences of conflicts among states and, to a growing extent, among international and transnational institutions”). For a broader description on the impact of globalization, see THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999); THOMAS L. FRIEDMAN, *THE WORLD IS FLAT* (2007).

57. For a general discussion, see Austen Parrish, *Domestic Responses to Transnational Crime: The Limits of National Law*, 23 *CRIM. L.F.* 275, 285 (2012) (explaining how globalization and extraterritoriality are not twinned concepts); see also RAUSTIALA, *supra* note 29, at 118–19 (noting how in early periods of globalization domestic law remained strictly territorially prescribed and that “history presents a puzzle for accounts that link extraterritoriality to economic interdependence”).

58. George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 *SUP. CT. REV.* 347, 347 (describing how doctrines of adjudicatory and legislative jurisdiction, as

drifted away from their territorial orientations, and courts and academics adopted the doctrines wholesale into the international arena without much contemplation as to whether such adoption was appropriate.⁵⁹ The legislature was also incentivized to regulate extraterritorially as Congress grew generally indifferent to foreign concerns.⁶⁰ The general growth of domestic regulation post-New Deal may also have made extraterritorial regulation more likely.⁶¹ Lastly, changes in legal theory created a new legal orthodoxy that disfavored international law and promoted unilateral domestic regulation. This last change, while it has not received as much attention, may have had the biggest impact.

C. *The Impact of Legal Theory*

Innovations in intellectual thought—both from the left and right of the political spectrums—have had a particular influence in the area of extraterritorial regulation.⁶² The first came in the form of a

well as venue and choice of law, were “swept clear of nearly all rules, at least those that [could] be applied in more or less determinate fashion”).

59. See, e.g., Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT'L L. 301, 341 (2008) (describing how courts are prone to use domestic doctrines, without thought, when addressing transnational issues); Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 ROGER WILLIAMS U. L. REV. 1, 71 (2004) (“[I]n the United States there is a continuing attempt to squeeze the parallel proceedings problem into the shoes of domestic doctrines, shoes that are both too small and too old to fit the larger needs of transnational dispute resolution.”). For a general discussion of the incorrect reliance on domestic precedent in the transnational context, see *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1222–24 (11th Cir. 1999). See generally Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 WAKE FOREST L. REV. 1, 2 (2006) (describing how in the personal jurisdiction context, courts failed to distinguish domestic and transnational contexts and understand the meaningful differences).

60. See Paul B. Stephan, *The Political Economy of Extraterritoriality* 5 (APSA Annual Meeting Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1900156 (explaining how one would predict that “Congress would push both for immunity for domestic producers from foreign regulation and for extraterritorial application of U.S. regulation”).

61. See Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1, 12–13 (2002) (“In the New Deal and immediate postwar eras, domestic regulatory law expanded markedly in the U.S. and across the globe.”); Anne-Marie Slaughter & David T. Zaring, *Extraterritoriality in a Globalized World* 2–5 (1997), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=39380 (connecting the growth of extraterritoriality with the rise of the regulatory state).

62. For a recent discussion of the trends in the Alien Tort Statute context, see Childress, *supra* note 47, at 710–12 (discussing how “two primary camps in this debate” have “elicited such pronounced, rich, cross-disciplinary, and wide-ranging perspectives”). For a detailed

sustained attack on multilateralism from scholars who are hostile to international law and institutions. These scholars—sometimes referred to as nationalists, revisionists, or Sovereigntists—are usually associated with right-leaning groups.⁶³ For them, international law poses a threat to democratic sovereignty.⁶⁴ International law, they contend, amounts to no more than “a mere set of rhetorical statements that are obeyed only when convenient”⁶⁵ and “international law essentially doesn’t matter (or doesn’t matter very much).”⁶⁶ American exceptionalism—the idea that the United States is different from the rest of the world and unbound by the rules it promotes—drives this worldview.⁶⁷

This is not to say that anti-internationalism is something new. A long American legal tradition⁶⁸ has promoted isolationist positions.⁶⁹ But in the 1990s and 2000s, the nature of these attacks became more pronounced and sustained. In the past, right-leaning academics had supported international laws that promoted free trade and neo-liberal

treatment, see Parrish, *supra* note 14, at 822–27 (detailing the ideological differences between the sovereigntists and the modern internationalists).

63. See Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000, at 9 (introducing the term “Sovereigntists” and describing their basic beliefs); see also Jonathan D. Greenberg, *Does Power Trump Law?*, 55 STAN. L. REV. 1789, 1791 (2003) (describing the difference between realists and liberal internationalists).

64. For two stark examples, see Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299 (2002) (arguing that international law and particularly international organizations are a threat to U.S. democratic sovereignty); Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 34 (“[I]nternational law is a threat to democracy and to the hopes of democratic politics all over the world.”).

65. Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT’L L. 485, 492–93 (2005).

66. Greenberg, *supra* note 63, at 1791 (describing realist and liberal internationalist scholarship).

67. See James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT’L L. 121, 121 (2000); see also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1480–87 (2003).

68. See Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT’L L. 551, 552 (2003).

69. See Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT’L L. 369, 389 (2005) (“US reluctance to international treaties has strong cultural roots, goes back to the late 18th century when the country was still weak, and finds expression in the high hurdles erected by the US Constitution for treaty ratification.”).

policies.⁷⁰ But in the 1990s that subsided too. Even innocuous bilateral agreements that sought to preserve American sovereignty and security were viewed as conspiracies to create world governments.⁷¹ The mere mention of foreign or international law in a judicial decision spurred radical reactions.⁷² In the political realm, “an increasing number of Republicans had come to view treaties in general (especially multilateral ones) as liberal conspiracies to hand over American sovereignty to international authorities.”⁷³

The second innovation came from the political left. Traditionally, those supportive of international law sought to use multilateral treaties and international institutions as a way to promote human and environmental rights and to secure global peace and stability.⁷⁴ But this changed, as internationalists began to focus on sub-state mechanisms and non-governmental actors, and attacked

70. See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 CHI. J. INT’L L. 381, 381 (describing how conservatives generally approve of global multilateral trade agreements but are openly skeptical of other global multilateral agreements).

71. See Debora VanNijnatten, *The Security and Prosperity Agreement as an “Indicator Species” for the Emerging North American Environmental Regime*, 35 POL. & POL’Y 664, 666 (2007) (noting that the Security and Prosperity Agreement had “become a lightning rod for those opposed to a North America whose constituent nations are more economically, politically, or culturally integrated – and there are many such opponents.”); cf. Beth Lyon, *The Unsigned United Nations Migrant Worker Rights Convention: An Overlooked Opportunity to Change the “Brown Collar” Migration Paradigm*, 42 N.Y.U. J. INT’L L. & POL. 389, 414 (2010) (“Seven human rights treaties are pending on the Foreign Relations Committee calendar and six of them have been pending for more than 10 years.”); Ken I. Kersch, *The New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 346 (2005) (describing “an elite-driven, politically-motivated worldwide trend toward judicial governance, which is antithetical to democratic self-rule, if not to the rule of law itself”).

72. The most radical included calls for mass impeachment and death threats. See Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has ‘Run Amok,’ Adding Congress is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21 (describing how Senator Coburn’s chief of staff, Michael Schwartz, has called for “mass impeachment” of federal judges); Tony Mauro, *Ginsburg Discloses Threats on Her Life: In Speeches, Justice Says She and Sandra Day O’Connor Were Targeted Because of Use of Foreign Law in Cases*, LEGAL TIMES, Mar. 20, 2006, at 8. See generally Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637 (describing the debate over the use of foreign and international law).

73. Bellinger, *supra* note 5. Opposition to the Rome Statute and the International Criminal Court is also a common example of this. See Mariano-Florentino Cuellar, *The International Criminal Court and the Political Economy of Anti-treaty Discourse*, 55 STAN. L. REV. 1597, 1605 (2003) (“[O]ne might say that the ICC impinges on American sovereignty because criminal jurisdiction has long been primarily based on territoriality and nationality.”).

74. See, e.g., Quincy Wright, *The Interpretation of Multilateral Treaties*, 23 AM. J. INT’L L. 94, 99 (1929) (concluding that multilateral treaties present an “interest of stability and of generality”).

traditional treaty law.⁷⁵ Some of the change was driven by a tendency of some legal academics to take descriptive theories from other disciplines and turn them into prescriptive or normative theories. So while anthropologists and sociologists were content to note that international relations were disaggregating, legal scholars argued that international law normatively should disaggregate.⁷⁶ The old theories of territoriality, which promoted multilateral agreement, were also viewed as outdated.⁷⁷ Some even argued that the growth in the extraterritorial application of national laws, regardless of legality, was not only desirable, but also inevitable.⁷⁸

These intellectual trends had their impact. The United States slowly withdrew and disengaged from international law and many of its institutions.⁷⁹ The enthusiasm that once existed for international

75. See Jose E. Alvarez, *Interliberal Law: Comment*, 94 AM. SOC'Y INT'L L. PROC. 249, 250 (2000) (describing the central assumption of liberal theory that "the future of effective international regulation lies not with traditional treaties . . . but with transnational networks"); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 246 (2000) (criticizing traditional public international law, particularly how it "assumes its own pride of place in the rules contributing to international order" and the resulting "unmistakable message is that international order is created from the top down").

76. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 5–6 (2004).

77. See Yves Dezalay & Bryant G. Garth, *Legitimizing the New Legal Orthodoxy*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 306, 316 (Yves Dezalay & Bryant G. Garth eds., 2002) (describing how "[a]n earlier [male] WASP establishment" was largely responsible for crafting international law in the immediate post-World War II period); Anne-Marie Slaughter, *Breaking Out: The Proliferation of Actions in the International System*, in *GLOBAL PRESCRIPTIONS: THE PRODUCTION, EXPORTATION, AND IMPORTATION OF A NEW LEGAL ORTHODOXY* 25 (Yves Dezalay & Bryant G. Garth eds., 2002) (describing how a new generation of scholars, which included women and minorities, sought to distinguish themselves from the earlier architects of international law).

78. See Stephen Coughlan et al., *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, 6 CAN. J.L. & TECH. 29, 29 (2006) (initially prepared as a Report to the Law Commission of Canada) (arguing that globalization "ensure[s] that the extraterritorial application of national legal powers cannot be avoided"). But see RAUSTIALA, *supra* note 29, at 118 (describing, but disagreeing with, the commonly held view that, as economic and social activity globalizes, the law must inevitably follow suit and become less territorially bounded).

79. See Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1197 (2005) (describing the U.S. disengagement from multilateral treaties and international legal obligations as "dazzlingly broad"); see also PATRICIA JUREWICZ & KRISTIN DAWKINS, *THE TREATY DATABASE: A MONITOR OF U.S. PARTICIPATION IN GLOBAL AFFAIRS* iii (2004), available at http://www.acp-eu-trade.org/library/files/Jurewicz-P-and-Dawkins-K_EN_sep2004_IATP_the-treaty-database-us-participation.pdf (describing the steady decline in the U.S. government's support of the United Nations and the agreements it helped establish);

law and institutions as the Cold War came to an end was soon replaced with a general skepticism. The United States declined to become a party to a number of key conventions,⁸⁰ and attempted to limit its obligations under existing treaties.⁸¹ At the same time, a dramatic expansion in unilateralism occurred.⁸² Sovereignists were much less concerned about unilateral domestic laws (initially believing them to not threaten sovereignty), and the new internationalists overlooked the unilateral and imperial aspects of extraterritorial laws, viewing those laws as at least some progress in addressing global challenges. In the Alien Tort Statute context, the cases seemed a logical extension of public law litigation that had

PHILIPPE SANDS, *LAWLESS WORLD: AMERICA AND THE MAKING AND BREAKING OF GLOBAL RULES* 227–28, 233 (2005) (arguing that the Bush Administration had “scant regard for the international rule of law” and that “the rewriting of international conventions could be achieved unilaterally”).

80. See Isaac Baker, *Rogue State? U.S. Spurns Treaty After Treaty*, GLOBAL POL’Y F. (Dec. 8, 2005), <http://www.globalpolicy.org/component/content/article/157/27021.html> (naming several treaties rejected by the U.S. Government).

81. See generally Detlev F. Vagts, *Taking Treaties Less Seriously*, 92 AM. J. INT’L L. 458, 458–60 (1998) (describing an “alarming exacerbation” of the U.S. failure to fully respect its treaty obligations in the 1990s); Thomas M. Franck, *Taking Treaties Seriously*, 82 AM. J. INT’L L. 67, 67 (1988) (explaining that “the United States seems increasingly content to be perceived by other nations as indifferent to its most solemn treaty obligations”). In the human rights context, the United States began to attach reservations to treaties it ratified. See, e.g., JOSEPH D. BECKER, *THE AMERICAN LAW OF NATIONS: PUBLIC INTERNATIONAL LAW IN AMERICAN COURTS* 41 (2001) (describing how in the 1990s, the United States “adopted the practice of attaching reservations (or their equivalent) to ratified treaties”); Margaret E. McGuinness, Medellín, *Norm Portals, and the Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 759 (2006) (“[T]he United States in the exercise of its foreign affairs powers has become more sophisticated in its use of reservations, understandings and declarations to limit its obligations under the central human rights regimes . . .”).

82. This unilateralism appeared in a wide range of contexts. See, e.g., Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354 (2006) (“America’s new diplomatic strategy emphasizes strategic unilateralism and tactical multilateralism, characterized by a broad antipathy toward international law and global regime-building through treaty negotiation.”); William H. Taft, IV, *A View from the Top: American Perspectives on International Law After the Cold War*, 31 YALE J. INT’L L. 503, 504 (2006) (arguing that, although an “acceleration of international cooperation” was expected after the Cold War ended, the “1990s revealed a loss of enthusiasm in the United States for multilateral approaches”). An example of unilateralism occurred not only in how the United States responded to terrorism, but also in areas like humanitarian intervention. See, e.g., W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT’L L. 3, 17 (2000) (supporting unilateralism in the context of humanitarian intervention, even when the action is contrary to the UN Charter or international law); Saira Mohamed, *Restructuring the Debate on Unauthorized Humanitarian Intervention*, 88 N.C. L. REV. 1275, 1317 (2010) (explaining how unauthorized humanitarian intervention is a practice where states unilaterally exempt themselves from the constraints of international law).

been embraced as part of the U.S. civil rights movement.⁸³ As activists turned to courts, the U.S. legal system began to export its particular brand of justice. And then—more recently and less noticed in the United States—other countries began to follow suit.⁸⁴

II. DOMESTIC DEBATES TAKE THEIR TOLL

The above has briefly described a rise of extraterritorial domestic laws, often as a substitute for more traditional international lawmaking. In the last few years, however, transnationalism in the United States has come under attack. Ironically, these attacks have had little to do with international law or theory.

A. *Transnational Litigation in the Supreme Court*

Kiobel is by no means unique. In a number of other contexts, U.S. courts have begun to display a nervousness about being a battleground for foreign disputes. *Kiobel* may have called into doubt the applicability of the Alien Tort Statute to corporations, but recently courts have also decided that corporations cannot be sued under the Trafficking Victims Protection Act,⁸⁵ that the Racketeer Influenced and Corrupt Organization Act does not apply to

83. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991); Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEXAS INT'L L.J. 169 (1987). Professor Koh's work builds, in part, on the public law litigation work by Abram Chayes in the 1970s. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

84. See Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. IRVINE L. REV. 127 (2013) (describing human rights litigation outside the United States); Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe? Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L L. 259 (2012) (describing how European states are becoming more open to exercising extraterritorial jurisdiction); INT'L BAR ASS'N, *supra* note 13, at 142 (surveying twenty-seven states and finding that "[s]ome states have recently shown an increased tendency to broaden the ambit of their criminal law" extraterritorially); Diane F. Orentlicher, *Whose Justice? Reconciling Universal Jurisdiction with Democratic Principles*, 92 GEO. L.J. 1057 (2004) (describing the spread of universal jurisdiction criminal prosecutions); see also Beth Stephens, *Expanding Remedies for Human Rights Abuses: Civil Litigation in Domestic Courts*, in 2 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 119, 138 (Kelly D. Askin & Dorean M. Koenig eds., 2000) (encouraging the spread of transnational human rights litigation beyond the United States).

85. *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011).

extraterritorial corporate activities,⁸⁶ and that the principal antifraud provision of the federal securities laws does not apply extraterritorially to foreign transactions.⁸⁷ In a host of contexts, U.S. courts have refused to be the primary venue for global litigation.

The U.S. Supreme Court has led the retreat. The clearest recent example was the unanimous decision in *Morrison v. National Australia Bank Ltd.*⁸⁸ *Morrison* was a product of the U.S. housing bubble and mortgage crisis. The case involved three Australian investors who had bought stock in Australia's largest bank.⁸⁹ The investors claimed that the bank's Florida-based subsidiaries had miscalculated interest rates on mortgages it was servicing, causing the value of the parent bank's stock to plummet.⁹⁰ Seeking a class action remedy, the investors brought suit in the United States, claiming that the subsidiary had made false and misleading statements to the U.S. Securities and Exchange Commission.⁹¹ The critical issue focused on extraterritoriality: whether the anti-fraud provisions of the American securities laws applied when foreign plaintiffs sued "foreign and American defendants for misconduct in connection with securities traded on foreign exchanges."⁹²

The Court concluded that the American Securities laws did not apply. The decision put an end to so-called "foreign-cubed" cases, or cases brought by foreign claimants against a foreign company in relation to shares bought on a foreign exchange.⁹³ The decision was striking in that both the Court's liberal and conservative members were in general agreement. While they disagreed over the doctrinal tests to be used—reflecting the same division in *Kiobel*—the Justices uniformly found some meaningful connection with the United States necessary. The message was clear: U.S. courts are not the world's courts.

86. See, e.g., *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

87. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010).

88. *Id.*

89. *Id.* at 2875–76.

90. *Id.* at 2876.

91. *Id.*

92. *Id.* at 2875.

93. Jonathan R. Tuttle et al., *Morrison v. National Australia Bank: Reflecting on its Impact One Year Later*, in *SECURITIES LITIGATION & ENFORCEMENT INSTITUTE* 2011 701, 703 (Practising Law Inst. ed., 2011).

A second line of cases arose in the adjudicatory jurisdiction area, with *J. McIntyre Machinery, Ltd. v. Nicastro*⁹⁴ and *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁹⁵—the Court’s first foray into personal jurisdiction in almost twenty years. In *McIntyre*, a plaintiff had suffered serious injuries while operating a shearing machine in New Jersey, at the company where he worked.⁹⁶ The plaintiff filed a lawsuit in New Jersey state court against the British manufacturer of the shearing machine.⁹⁷ The question was whether the New Jersey court had personal jurisdiction over the British corporation. In *Goodyear*, the parents of two boys, who were killed in a bus accident in France, brought a lawsuit in North Carolina.⁹⁸ The lawsuit alleged that the accident resulted from a defective tire manufactured in Turkey at the plant of a foreign subsidiary of Goodyear.⁹⁹ The lawsuit named Goodyear as a defendant as well as three of its subsidiaries organized and separately incorporated in Turkey, France, and Luxembourg. The foreign corporate defendants moved to dismiss on the ground that the North Carolina court had no personal jurisdiction over them.¹⁰⁰

In both cases, the Court strongly reaffirmed that territorial sovereignty is critical to a court’s personal jurisdiction analysis—that borders matter.¹⁰¹ The Court in *Goodyear* explained that defendants are not subject to general jurisdiction unless they are “essentially at home” in the forum.¹⁰²

94. 131 S. Ct. 2780 (2011). For a description of the case, see Adam Steinman, *The Lay of the Land: Examining the Three Opinions in J. McIntyre, Ltd. v. Nicastro*, 63 S.C. L. REV. 481 (2011).

95. 131 S. Ct. 2846 (2011).

96. *McIntyre*, 131 S. Ct. at 2786.

97. *Id.*

98. *Goodyear*, 131 S. Ct. at 2850.

99. *Id.*

100. *Id.*

101. For an analysis, see Lea Brilmayer & Matthew Smith, *The (Theoretical) Future of Personal Jurisdiction: Issues Left Open by Goodyear Dunlop Tires v. Brown and J. McIntyre Machinery v. Nicastro*, 63 S.C. L. REV. 617, 617–18 (2012) (explaining how in both cases the Court found boundaries important as a matter of principle and that state sovereignty is central to the personal jurisdiction analysis); see also Adam N. Steinman, *The Meaning of McIntyre*, 18 SW. J. INT’L LAW 417 (2012).

102. *Goodyear*, 131 S. Ct. at 2851. For a detailed discussion of the case, see Allan Stein, *The Meaning of “Essentially at Home” in Goodyear Dunlop*, 63 S.C. L. REV. 527 (2012).

B. Domestic Debates and U.S. Culture Wars

Ironically, the attack on domestic courts unilaterally resolving international challenges through extraterritorial laws have benefited little from the serious debate about the role of courts in global governance, but instead mostly reflect recurring domestic debates largely untethered from international concerns.¹⁰³

Much of the criticism of transnational litigation mirrors debates raised in the tort reform movement.¹⁰⁴ For a number of scholars, transnational litigation is just another battle between the plaintiff and defense bars. For them, the Alien Tort Statute encourages the filing of “frivolous lawsuits that only serve to fill the coffers of contingency-fee law firms.”¹⁰⁵ Echoing the long-standing debate of whether too much litigation exists in the United States,¹⁰⁶ much of the attack is based on the idea of litigation out-of-control.¹⁰⁷ From this perspective, Alien Tort litigation only serves the interests of “avaricious class-action lawyers” and the “latter day pirates of the plaintiffs’ bar” seeking “gargantuan remedies for domestic torts.”¹⁰⁸

When the focus is not on a so-called litigation crisis, the debate pivots to one over the role of courts, and whether the courts are somehow usurping the prerogatives of other branches when it

103. It’s unsurprising that debates about the Alien Tort Statute often reflect domestic political squabbles. See Jide Nzelibe, *Desperately Seeking Political Cover: The Partisan Logic of Alien Tort Statute Litigation* 3 (Northwestern Searle Ctr. on Law, Regulation, and Econ. Growth, Working Paper No. 009, 2010), available at http://www.law.northwestern.edu/searlecenter/papers/Nzelibe_Alien_Tort_Statute.pdf (discussing the debates between Democrats and Republicans regarding international policy).

104. See generally F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 470–80 (2006) (describing the tort reform movement).

105. Daniel Swearingen, *Alien Tort Reform: A Proposal to Revise the Alien Tort Statute*, 48 HOUS. L. REV. 99, 110 (2011). For a well-cited example, see Joseph G. Finnerty III & John Merrigan, Op-Ed, *Legal Imperialism*, WALL ST. J., Feb. 28, 2007, at A15 (“While asbestos and tobacco litigation bonanzas are winding down, America’s most aggressive contingency-fee law firms still have in place a fee structure in search of an investment strategy. And so, faced with shrinking domestic opportunities, these firms have gone global.”).

106. See Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L.J. 447 (2004).

107. See Finnerty & Merrigan, *supra* note 105, at A15 (“[I]t ultimately will be impractical for U.S. courts to police these monster ATS class actions if they are allowed to proliferate; they dwarf in size the asbestos cases that currently plague the U.S. courts.”).

108. Lucien J. Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT’L L. 3, 8 (2003) (quoting John E. Howard, *The Alien Tort Claims Act: Is Our Litigation-Run-Amok Going Global?*, U.S. CHAMBER OF COMMERCE (Oct. 9, 2002), <http://www.uschamber.com/press/opeds/0210howardlitigation.htm>).

addresses foreign matters.¹⁰⁹ The *Morrison* case and the debates over prescriptive jurisdiction provide a good example. One is struck how the Justices are much less concerned about the effect of a particular rule, and much more concerned with legislative primacy and the spectre of judicial creativity or policy-making.¹¹⁰ And if separation of powers is not the concern, then the attack on extraterritoriality often focuses on defending a particular kind of federalism, rather than offering any sort of plausible conception of international law.¹¹¹

This focus on the domestic is not surprising. American scholars regularly rely on domestic theory, without any serious consideration as to whether the domestic can be so easily grafted onto the international, or whether the two situations are comparable at all.¹¹²

III. REBUILDING INTERNATIONAL LAW

Most of the discussion surrounding *Kiobel*, both before and after the decision, has focused on doctrinal issues. Did the Court correctly apply the presumption against extraterritoriality? Does the presumption against extraterritoriality apply in cases involving common law tort litigation? Does international law permit domestic

109. See, e.g., Recent Cases, *Ninth Circuit Uses International Law to Decide Applicable Substantive Law Under Alien Tort Claims Act*, 116 HARV. L. REV. 1525, 1529 (2003) (describing the risk that the Alien Tort Statute becomes “a generator of interminable litigation” and invitation for “judicial creativity” to interpret international law without constraint) (internal quotation marks omitted). For a general discussion, see Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1413–14 (2006) (describing how scholars like Curtis Bradley, Eric Posner, and Jack Goldsmith critique international law from a particular domestic perspective concerned about federalism).

110. See, e.g., Lea Brilmayer, *The New Extraterritoriality: Morrison v. National Australia Bank, Legislative Supremacy, and the Presumption Against Extraterritorial Application of American Law*, 40 SW. L. REV. 655, 666–67 (2011) (describing legislative supremacy as “the decision’s chief ideological component,” but explaining how the *Morrison* decision ultimately permits judicial creativity). For a general discussion of the concern over judicial policymaking in the constitutional context, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519 (2012).

111. See Childress, *supra* note 47, at 709 (describing how federalism has factored into debates over Alien Tort Statute litigation); see also Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295–96 (1994).

112. Cf. Paul R. Dubinsky, *Is Transnational Litigation a Distinct Field? The Persistence of Exceptionalism in American Procedural Law*, 44 STAN. J. INT’L L. 301, 341 (2008) (describing how courts are prone to use domestic doctrines when addressing transnational issues).

courts to adjudicate foreign-cubed cases? But regardless of the doctrinal answers—and whether such cases are legally permitted—extraterritorial and unilateral approaches to global governance have significant costs. It's not clear that these kinds of laws are helpful in advancing and protecting human rights.

A. *The Costs of Extraterritorial Regulation*

Unilateral extraterritorial regulation of foreigners is problematic for several reasons. Legitimacy is a primary concern. Extraterritorial laws are in tension with democratic principles because they impose obligations on individuals who have had no formal voice in the political process.¹¹³ Even when the underlying norm is universally agreed upon, rarely do foreigners view those norms as being appropriately adjudicated world wide—the “mere enforcement” of international law does not exist. Indeed, American-style litigation has its unique procedural aspects.¹¹⁴ Seldom do foreigners view themselves as getting a fair shake in our courts,¹¹⁵ just as Americans

113. See Parrish, *supra* note 14, at 859–60 (describing how extraterritorial laws are undemocratic because they regulate foreigners who have no say in the enactment of those laws); see also Mark P. Gibney, *The Extraterritorial Application of U.S. Law: The Perversion of Democratic Governance, the Reversal of Institutional Roles, and the Imperative of Establishing Normative Principles*, 19 B.C. INT'L & COMP. L. REV. 297, 312–13 (describing the unfairness and undemocratic nature of extraterritorial laws).

114. See Linda Silberman, *Comparative Jurisdiction in the International Context: Will the Proposed Hague Judgments Convention be Stalled?*, 52 DEPAUL L. REV. 319, 320 (2002) (noting that the complaints foreigners make about U.S. civil litigation include complaints about “juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules”); Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 560–64 (1989) (discussing forum shopping and the perceived advantages it creates for plaintiffs in U.S. litigation); Linda J. Silberman, *Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard*, 28 TEX. INT'L L.J. 501, 502 (1993) (explaining how U.S. courts offer procedural advantages for foreign plaintiffs “beyond those of foreign forums,” including “the existence of civil juries, the availability of broad discovery, easier access to courts and lawyers, contingent fee arrangements, and the absence of ‘loser-pay-all’ cost-shifting rules”).

115. See, e.g., Elmer J. Stone & Kenneth H. Slade, *Special Considerations in International Licensing Agreements*, 1 TRANS. L. 161, 169 (1988) (explaining how both U.S. and foreign parties fear discrimination in each other's respective court systems); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundation and Modern Justifications for Federal Jurisdiction over Disputes Involving Noncitizens*, 21 YALE J. INT'L L. 1, 22–25 (1996) (describing the fear and perception of bias against foreign citizens); cf. Chandra Lekha Sriram, *Human Rights Claims v. the State: Is Sovereignty Really Eroding?*, 1 INTERDISC. J. HUM. RTS. 107, 117 (2006) (“To the degree the proceedings take place in the courts of powerful Western states, and often in those of former colonizers, the argument that cases are selective, and even driven by imperialistic agendas, can be and has been raised.”).

often view foreign systems skeptically.¹¹⁶ This perception of bias may be misplaced and empirically wrong,¹¹⁷ but it is widespread.¹¹⁸ The legitimacy point is pronounced in the human rights context where the United States appears to promote a double standard by frustrating efforts to hold its own citizens and officials liable for foreign human rights abuses.¹¹⁹ The lack of perceived legitimacy

116. See ERIC POSNER, *THE PERILS OF GLOBAL LEGALISM* 228 (2009) (noting that “American legalism does not extend very far from its shores” and that Americans do not support decisions unless made by “American courts, which are staffed by Americans who share American values and interests”).

117. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1121–22, 1143 (1996) (exploring reasons why foreigners fear U.S. courts but concluding that empirically foreigners do not fare badly in U.S. litigation); Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 442 (2007) (noting that “commentary down to the present day deploys the assumption that foreign litigants arrive here at a disadvantage,” even though empirical evidence suggests otherwise); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719, 732–34 (2009) (describing the perception of bias against foreigners and in favor of plaintiffs in choice-of-law decisions, but finding it empirically untrue).

118. See *Smith Kline & French Laboratories, Ltd. v. Bloch* [1983] 2 All E.R. 72 (A.C.) 74 (Lord Denning M.R.) (“As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune.”); Utpal Bhattacharya et al., *The Home Court Advantage in International Corporate Litigation*, 50 J.L. & ECON. 625, 629 (2007) (“Our article supports the conclusion . . . [that] foreign firms are disadvantaged in U.S. courts.”); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1503 (2003) (“Whether the xenophobic bias exists in fact, there can be no controversy about the reality of the perception that bias exists in American courts and American juries.”); John S. Willems, *Shutting the U.S. Courthouse Door?: Forum Non Conveniens in International Arbitration*, 58 DISP. RESOL. J. 54, 56 (2003) (“Litigants are attracted to the high quality of U.S. courts, the willingness of U.S. courts to exercise jurisdiction over international disputes, and, rightly or wrongly, the belief that U.S. courts are ready to award large sums of damages.”); see also Parrish, *supra* note 59, at 44–47 (citing sources and describing the perception of bias in U.S. courts). The perception that U.S. courts are plaintiff friendly is long-standing.

119. See, e.g., *Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011) (finding that U.S. officials are immunized for claims brought under the Alien Tort Statute for actions within their scope of employment); see also *Medellín v. Texas*, 552 U.S. 491, 504 (2008) (holding that while there may exist “an international law obligation on the part of the United States . . . not all international law obligations automatically constitute binding federal law enforceable in United States courts”); Karen Lin, *An Unintended Double Standard of Liability: The Effect of the Westfall Act on the Alien Tort Claims Act*, 108 COLUM. L. REV. 1718 (2008) (describing the double-standard created where U.S. officials are immunized for human rights violations). For a discussion on American exceptionalism in the human rights field, see Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89, 94 (2007) (noting “the longstanding refusal of the United States to incorporate international human rights law into its legal system”); Hathaway, *supra* note 67, at 132 (noting how the “United States simultaneously asserts the right to lead, but also to be exempted from the rules it promotes”).

calls into serious question the long-term sustainability of enforcing human rights norms unilaterally.

Aside from the legitimacy concern, whether extraterritorial laws actually work is unclear. Scant evidence exists to support claims that unilateral extraterritorial laws deter future human rights abuses or provide remedies for past violations.¹²⁰ In the criminal and human rights context, despite the explosion of extraterritorial laws, “prosecutions have been few.”¹²¹ Human rights civil claims are often unenforceable and remain symbolic at best.¹²²

Unilateral regulation, applied extraterritorially, also runs the risk of being counter-productive.¹²³ As an initial matter, because universal jurisdiction is controversial, its use risks turning the focus away from the victims and the perpetrators of human rights abuses, and instead redirects global attention to the methods of enforcement.¹²⁴ The contentiousness also risks eroding international cooperation in other areas¹²⁵ and creating an unnecessary level of confusion. The result of

120. See Michael D. Goldhaber, *The Life and Death of the Corporate Alien Tort*, THE AM. LAW., Oct. 12, 2010 (describing how most Alien Tort Statute cases have resulted in favorable rulings to corporate defendants).

121. See DOYLE, *supra* note 49, at 1 (noting how successful prosecutions are rare and the “practical and legal complications” of exercising extraterritorial jurisdiction); Catherine Beaulieu, *Extraterritorial Laws: Why They Are Not Really Working and How They Can Be Strengthened*, ECPAT INT’L COMPENDIUM OF ARTICLES, Sept. 2008, at 8–9, 16 (noting the “very low number of prosecutions and convictions achieved under extraterritorial laws,” at least in relation to offences against children); Benjamin Perrin, *Taking a Vacation from the Law? Extraterritorial Criminal Jurisdiction and Section 7(4.1) of the Criminal Code*, 13 CAN. CRIM. L. REV. 175, 176 (2009) (“In the decade following the adoption of Canada’s extraterritorial child sex crime provisions . . . only a single conviction was entered.”).

122. See Julian Ku, *The Alien Tort Statute as a Species of Extraterritorial U.S. Law*, SCOTUSBLOG (July 16, 2012), <http://www.scotusblog.com/2012/07/online-kiobel-symposium-the-alien-tort-statute-as-a-species-of-extraterritorial-u-s-law/> (“[A]s very few ATS cases amounted to enforceable judgments or significant settlements, the ATS seemed a largely symbolic tool. The ATS fascinated academics, especially international law professors, but it seemed to have little practical significance.”); Anne-Marie Slaughter & David Bosco, *Plaintiff’s Diplomacy*, FOREIGN AFF., Sept.-Oct. 2000, at 102, 106 (stating that the principal benefit in human rights litigation under the Alien Tort Claims Act may be “the public attention they generate”); cf. Randall S. Abate, *Kyoto or Not, Here We Come: The Promise and Perils of the Piecemeal Approach to Climate Change Regulation in the United States*, 15 CORNELL J.L. & PUB. POL’Y 369, 398 (noting that private environmental citizen suits “were often more symbolic than substantive”).

123. See Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211, 303 (2005) (“[T]o date the human rights community has offered little outward reflection on whether an aggressive agenda focused on domestic courts may harm the very institutions to which these advocates have turned.”).

124. For a more developed analysis, see Parrish, *supra* note 57.

125. See, e.g., Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURAL AND ENFORCEMENT MECHANISMS 96 (M. Cherif Bassiouni ed.,

aggressive foreign regulation is increased uncertainty, overlapping concurrent jurisdiction, and an increased likelihood of parallel proceedings. This piecemeal approach to a shared challenge increases the fragmentation of international law that has become a standing concern. Most importantly, extraterritorial domestic laws give the illusion that serious steps are being taken, when in actuality little progress has been made.

Lastly, there is the reciprocity concern. We should be concerned with how other countries will define and develop human rights laws.¹²⁶ Creating an international free-for-all where any nation has the authority to unilaterally prosecute international human rights abuses requires that we be comfortable with other countries prosecuting Americans for activity taking place within our borders,¹²⁷ even when that activity might be considered legal and not a human rights abuse by U.S. standards.¹²⁸ The United States has promoted a particular vision of human rights. As law migration occurs,¹²⁹ it's

3d ed. 2008) ("Vigorous assertions of jurisdiction [in the criminal law context] ultimately erode cooperation."). For an example, see Thabo Mbeki, President of South Africa, Statement of the National Houses of Parliament and the Nation at the Tabling of the Report of the Truth and Reconciliation Commission (Apr. 5, 2003) ("[W]e consider it completely unacceptable that matters that are central to the future of our country should be adjudicated in foreign courts which bear no responsibility for the well-being of our country.").

126. A number of commentators have noted the increase of human rights litigation in other parts of the world. See Cassandra Burke Robertson, *Transnational Litigation and Institutional Choice*, 51 B.C. L. REV. 1081, 1130 (2010) (describing how the threat of liability that defendants face in foreign courts has increased); see also Eugene Gulland, *All the World's a Forum*, NAT'L L.J., Feb. 11, 2002, at B13 ("Recent foreign court decisions . . . suggest a more aggressive tendency to prefer non-U.S. forums and apply non-U.S. law to disputes involving U.S. companies.").

127. For concerns of this kind of reciprocity, see Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457, 461 (2001) (explaining how "other nations may retaliate by allowing suits against U.S. government actors").

128. See Alfred P. Rubin, *Can the United States Police the World*, 13 FLETCHER F. WORLD AFF. 371, 374 (1989) (explaining how imposing U.S. law "creates a defensive reaction in even our allies . . . It creates a precedent and a sense of righteousness in others who would apply their laws and their versions of international law to Americans whose actions they do not like"); see also POSNER, *supra* note 116, at 228 (arguing that "before long" China, Russia, India, and Brazil "will be able to advance their views about international law – views that no doubt will serve their interests" and noting that "Russia has quickly learned that pliable human rights language and the precedents of Kosovo and Iraq can be turned to its advantage").

129. Y. Dezalay & B. Garth, *Dollarizing State and Professional Expertise: Transnational Processes and Questions of Legitimation in State Transformation, 1960-2000*, in TRANSNATIONAL LEGAL PROCESSES: GLOBALISATION AND POWER DISPARITIES 199 (Michael Likosky ed., 2002) (describing how ideas and norms are imported and exported); Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's*

unclear whether other courts in other nations will develop human rights in the same way, or whether those conceptions will be more illiberal and non-western, or at least different.¹³⁰ The spread of U.S.-style litigation may make this possibility even more pronounced.¹³¹

B. *The Benefits of Multilateralism*

To meaningfully advance human rights, re-embracing multilateral¹³² solutions would be wise. Multilateral approaches are longer-lasting. They also avoid fragmentation and piece-meal approaches to solving a common problem and are more consistent with other international law principles and mechanisms.¹³³

First, treaties are usually more durable than unilateral forms of governance. Because multilateral agreements are a product of consent and negotiation,¹³⁴ they are less likely to be viewed as imperialistically imposed and more easily enforced.¹³⁵ Because of

Multiple Ports of Entry, 115 YALE L.J. 1564, 1574 (2006) (describing how legal norms can migrate across borders).

130. See Paul B. Stephan, *A Becoming Modesty – U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 655 (2002) (“The problem lies in the unwillingness of foreign states, including their judiciary, to go along with our project and their ability to sabotage it.”). For a description of the competition, conflicts, and contestation that take place between international actors who have different normative and regulatory agendas, see LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE (Yves Dezalay & Bryant Garth eds., 2011).

131. See Behrens et al., *supra* note 50, at 166 (noting the spread of U.S.-style litigation, litigation funding, and punitive damages); R. Daniel Kelemen & Eric C. Sibbitt, *The Globalization of American Law*, 58 INT’L ORG. 103, 103 (2004) (describing the spread of U.S.-styled litigation in other nations).

132. For definitions of multilateralism, see Robert O. Keohane, *Multilateralism: An Agenda for Research*, 45 INT’L ORG. 731 (1990) (describing the coordination of national policies among three or more states); James Caporaso, *International Relations Theory and Multilateralism: The Search for Foundations*, 46 INT’L ORG. 599, 600–02 (1992) (describing multilateralism and the concept of “diffuse reciprocity” whereby nations benefit over a longer period of time).

133. For a discussion of the benefits of multilateralism, see John W. Head, *What Has Not Changed Since September 11 – The Benefits of Multilateralism*, 12 KAN. J.L. & PUB. POL’Y 1, 9 (2002) (“Multilateralism has been a key feature of U.S. policy for more than fifty years. Despite some temporary departures, the United States has taken a leadership role in creating an extensive network of global treaty rules and international institutions, on grounds that multilateral action promises greater rewards than does a policy of going it alone.”).

134. Vienna Convention on the Law of Treaties arts. 2(b), 11, May 23, 1969, 1155 U.N.T.S. 331 (noting that treaties only create obligations and rights through consent); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 1, ch. 1, intro. note (1987) (“Modern international law is rooted in acceptance by states which constitute the system.”).

135. See Hathaway, *supra* note 67, at 129 (criticizing unilateralism and noting that the costs of multilateralism are “more than compensated for by gains in both political legitimacy

this characteristic, multilateral agreements make “fundamental transformations legitimate and peaceful.”¹³⁶ They also contain a degree of legitimacy that unilateral approaches lack because multilateral agreements are more egalitarian and democracy reinforcing. Others agree. An increasing body of literature suggests that without multilateral cooperation and the creation of multilateral institutions, progress in human rights and other related areas will fail; that the global challenges are too great without attempts to achieve wide-spread cooperation and consensus.¹³⁷

Second, developing international treaty law and international institutions is to harmonize standards by definition, thereby avoiding the risks of piece-meal and hodge-podge approaches. This fragmentation point is particularly important in the human rights context because human rights are often not easy to define, and they represent contested ideals.¹³⁸ Human rights become “universal” not through some sort of predetermined inevitability, but only through careful building of coalitions with different groups allied in purpose.¹³⁹ Re-embracing multilateralism also provides an opportunity for those supportive of human right goals to “lock-in” a particular vision of global governance. Multilateral institutions are more likely to preserve, for some time, an order that reflects existing preferences.¹⁴⁰ As the number of voices on the international stage

and meaningful enforceability that accrue from an understanding of international law as a system of consent-based rules and operations”).

136. Amitav Acharya, *Multilateralism, Sovereignty and Normative Change in World Politics*, in *MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER, AND STRUCTURAL CHANGE* 113 (Edward Newman et al. eds., 2006).

137. See, e.g., BARBARA ADAMS & GRETCHEN LUCHSINGER, *RECLAIMING MULTILATERALISM: FOR PEOPLE, RIGHTS, AND SUSTAINABLE DEVELOPMENT* (2012).

138. See Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, 20 HUM. RTS. Q. 201, 203 (1998) (“What makes certain rights universal, moral, and important, and who decides?”); see also DEBRA L. DELAET, *THE GLOBAL STRUGGLE FOR HUMAN RIGHTS: UNIVERSAL PRINCIPLES IN WORLD POLITICS* 14 (2006) (“Ultimately, human rights are not something concrete that we can simply define, identify, and implement . . .”).

139. See *LAWYERS AND THE CONSTRUCTION OF TRANSNATIONAL JUSTICE*, *supra* note 130 (describing successful and not so successful strategies to build institutions and credibility for the transnational legal field).

140. See Krisch, *supra* note 69, at 373 (noting how multilateral regimes are “less vulnerable to later shifts in power” and are “relatively stable”); Pierre Klein, *The Effects of U.S. Predominance on the Elaboration of Treaty Regimes and on the Evolution of the Law of Treaties*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 363, 363–65 (Michael Byers & Georg Nolte eds., 2003) (explaining how “[t]he influence exerted by a particularly powerful State on the treaty-making process may therefore have an important impact on the shaping of international law”).

increases, international human rights groups should be particularly concerned that human rights concerns will be drowned out by the concerns of other competing groups.¹⁴¹

Third, multilateral approaches are more consistent with common understandings of international law and institutions.¹⁴² The international system was structured to encourage cooperation, reduce conflict, and promote democratic self-government. Unilateral extraterritorial regulation is in tension with these basic goals. Also, to the extent that unilateralism imposes national, rather than universal, approaches, it is in inherent tension with the broader goals of human rights, which depend on universalism.

The Court's more liberal members appear to agree. The opinion of Chief Justice Roberts in *Kiobel*, joined by the Court's more conservative members, was unsurprising. It tracked the *Morrison* decision to find that Congress would not be assumed to have used a contentious form of jurisdiction (i.e., an extraterritorial one) without clear indication of its intent.¹⁴³ In many ways, this is consistent with how other jurisdictional statutes have previously been interpreted. Rarely has the Court found that Congress intended to use all the power granted to it under international law or the U.S. Constitution.¹⁴⁴ Regardless of whether commentators agree with how

141. See DAVID CHANDLER, FROM KOSOVO TO KABUL AND BEYOND: HUMAN RIGHTS AND INTERNATIONAL INTERVENTION 59 (new ed. 2006) (“[W]ith neither a membership capable of influencing elections, nor the financial capacity to make donations or influence election campaigns, human rights NGOs lack the powers of traditional interest groups in the domestic political sphere.”); Franz von Benda-Beckmann, *Human Rights, Cultural Relativism and Legal Pluralism: Towards a Two-Dimensional Debate*, in THE POWER OF LAW IN A TRANSNATIONAL WORLD: ANTHROPOLOGICAL ENQUIRIES 115, 116 (Franz von Benda-Beckmann et al. eds. 2009) (“[A]nthropologists and nongovernmental organizations have also shown and defended the relativity and variability of social organizations and their cultural values, which often were not in conformity with the ideal notions expressed in many human rights”); cf. Bryant G. Garth, *Rebuilding International Law After the September 11th Attack: Contrasting Agendas of High Priests and Legal Realists*, 4 LOY. U. CHI. INT’L L. REV. 3, 3 (2006) (“[T]here is competition to be a relevant voice in international relations . . .”)

142. José E. Alvarez, *Multilateralism and Its Discontents*, 11 EUR. J. INT’L L. 393, 394 (2000) (“Multilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN.”).

143. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (“We therefore conclude the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption. . . . If Congress were to determine [it wishes to reach foreign corporate activities], a statute more specific than the ATS would be required.”).

144. See, e.g., *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149, 152–53 (1908) (interpreting the statutory grant of federal question jurisdiction to be narrower than what is constitutionally permitted); *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806)

the presumption against extraterritoriality was applied in *Kiobel*, the Roberts decision was expected.

The Breyer concurrence—joined by Justices Ginsburg, Sotomayor, and Kagan—however, has much greater implications for international law. Breyer would not have imposed any presumption against extraterritorial regulation and instead would have “looked to established international jurisdictional norms to help determine the statute’s substantive reach.”¹⁴⁵ In finding then that the Alien Tort Statute would not apply to foreign-cubed cases, the Breyer concurrence underscored that the broadest forms of universal civil jurisdiction are not permitted under international jurisdictional law. Instead, American courts may exercise “jurisdiction only where distinct American interests are at issue.”¹⁴⁶ While Breyer recognizes that international norms have long imposed a duty for nations “not to provide safe harbors for their own nationals who commit such serious crimes abroad,”¹⁴⁷ the concurrence rejects the idea that human rights claims because of their universal nature can be raised in any court. As the concurrence explains, the facts of *Kiobel* do not support providing such broad extraterritorial jurisdiction under international law.¹⁴⁸ In this way, Breyer respects traditional concepts of international law that would find broad assertions of extraterritorial power problematic.¹⁴⁹

One final point: scholars often assert, without explanation, that in a globalized world, extraterritorial domestic regulation is necessary.¹⁵⁰ But why this is so is unclear. We have seen periods

(interpreting the statutory grant of diversity jurisdiction to be narrower than constitutional limits).

145. *Kiobel*, 133 S. Ct. at 1673 (Breyer, J., concurring in the judgment) (citation omitted).

146. *Id.* at 1674.

147. *Id.* at 1675.

148. *Id.* at 1677 (“Applying these jurisdictional principles to this case, however, I agree with the Court that jurisdiction does not lie.”).

149. For an earlier argument that Alien Tort Statute suits against foreigners for foreign conduct violate international jurisdictional law, see Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT’L L.J. 271, 284–86 (2009).

150. See Kirshner, *supra* note 84, at 262, 266 (describing how as corporations become increasingly transnational that “extraterritorial jurisdiction is necessary”); Slaughter & Zaring, *supra* note 61, at 2–4 (arguing that a “third shift [in extraterritoriality] is imminent, as a necessary response to the forces of globalization” and that with globalization the “tidy circles demarcating national jurisdiction, even based on an expanded conception of territoriality, became either impossible or meaningless”). But see RAUSTIALA, *supra* note 29, at 118 (describing, but disagreeing with, the commonly held view that as economic and

where the world's economy was highly integrated, and yet domestic law remained strictly territorially prescribed.¹⁵¹ And conversely, we have seen nations use extraterritorial laws aggressively, even during times of isolation.¹⁵² No clear reason exists why global regulation cannot be achieved through multilateral means. At the very least, there should be some burden to demonstrate that multilateral agreement is unavailable before jumping to unilateral enforcement.

CONCLUSION

In the near term, human rights advocates may view the *Kiobel* decision as an unraveling of progress made. But that initial pessimism should quickly give way. While the broadest promise of *Filártiga* that the Alien Tort Statute should be treated as a kind of global cause of action is now gone, the most important parts of Alien Tort Statute litigation remain. Claims against U.S. citizens, including corporations, or foreign citizens living in the United States should still be viable. More importantly, while the human rights community may initially moan the loss, in the longer term the rejection of unilateral regulation of foreigners for conduct abroad is a positive development for international law. As described above, the growth of global, unilateral regulation of the kind pluralists embrace is no friend to human rights.

Let me end on a different note. A recent surge of commentary invites the human rights community into a similar, or perhaps greater, folly—to double-down and promote foreign-cubed cases under state law and in state courts.¹⁵³ With luck, this invitation will be declined.

social activity globalizes that law must inevitably follow suit and become less territorially bounded).

151. For an overview, see Parrish, *supra* note 57, at 285. See also RAUSTIALA, *supra* note 29, at 118–19 (“As economic historians often point out, in the years preceding the First World War the international system was in fact highly globalized . . . [which] presents a puzzle for accounts that link extraterritoriality to economic interdependence.”).

152. See RAUSTIALA, *supra* note 29, at 119; see also Margolies, *supra* note 34, at 576 (noting how the United States used extraterritorial laws as a particularly important tool of foreign policy even in the nineteenth century).

153. See Christopher A. Whytock et al., *Foreword: After Kiobel – International Human Rights Litigation in State Courts and Under State Law*, 3 U.C. IRVINE L. REV. 1, 8 (2013) (“We may be on the verge of a new world of transnational human rights litigation where U.S. state courts and courts outside the United States will increasingly overshadow U.S. federal courts as forums for the adjudication of human rights claims.”); see also Paul Hoffman & Beth Stephens, *International Human Rights Cases under State Law and in State Courts*, 3 U.C. IRVINE L. REV. 9, 10 (2013) (predicting that, regardless of the *Kiobel* decision, human rights cases will continue in both federal and state courts). This strategy has

While individual litigants may have few choices, employing a state law strategy is unlikely to meaningfully advance human rights. These cases face tremendous hurdles to success.¹⁵⁴ While the presumption against extraterritoriality may not apply, courts will rightly be reluctant to adjudicate foreign claims for abuses occurring abroad to which the state has no interest. The same root concerns that motivated the *Kiobel* court to decide the way it did, will cause state court judges to decline to hear these cases too. The cost of lost time and energy to this kind of strategy could be significant.

The human rights community has a different option: to re-embrace multilateral engagement. Global human rights challenges are too daunting and complex for any nation, no matter how powerful, to effectively manage on its own. Progress can be made if human rights groups refocus energies to press the United States, its citizens, and corporations to respect human rights and the rule of law, and to promote international agreements with other nations. That respect includes avoiding unilateral imposition of U.S. law (even those laws purporting to incorporate international norms) on foreigners for conduct occurring abroad.

been tried before. See Paul L. Hoffman, *The Application of International Human Rights in State Courts: A View from California*, 18 INT'L L. 61 (1984).

154. See generally Austen L. Parrish, *State Court International Human Rights Litigation: A Concerning Trend?*, 3 U.C. IRVINE L. REV. 25, 40–41 (2013) (discussing potential drawbacks of human rights litigation in state courts and under state law).