

University of Chicago Law School

Chicago Unbound

Journal Articles

Faculty Scholarship

2016

A Review (reviewing Stephen Breyer, *The Court and the World: American Law and the New Global Realities*)

Eric A. Posner

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles



Part of the [Law Commons](#)

Recommended Citation

Eric Posner, "A Review (reviewing Stephen Breyer, *The Court and the World: American Law and the New Global Realities*)," 126 *Yale Law Journal* 504 (2016).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

THE YALE LAW JOURNAL

ERIC A. POSNER

A Review

*The Court and the World:
American Law and the New Global Realities*

BY STEPHEN BREYER

ALFRED A. KNOPE, 2015

AUTHOR. Kirkland & Ellis Distinguished Service Professor, University of Chicago Law School. Thanks to Will Baude and Curt Bradley for helpful comments, Kathrine Gutierrez for valuable research assistance, and the Russell Baker Scholars Fund for financial support.



BOOK REVIEW CONTENTS

I. NATIONAL SECURITY CASES	507
II. THE CROSS-BORDER REACH OF STATUTES	511
III. TREATIES	517
IV. THE “FOREIGN LAW” CONTROVERSY	519
CONCLUSION	523

Justice Stephen Breyer argues that we live in an “ever more interdependent world,”¹ one in which commercial transactions, environmental problems, and security challenges cross borders to a greater extent than at any time in the past. These interactions have produced a wave of legal disputes that require the attention of the Supreme Court. He argues that Supreme Court Justices should inform themselves about foreign countries and foreign legal systems so that they can decide these foreign relations cases correctly, and that they should not be afraid to learn from foreign legal systems. Additionally, U.S. Justices should help judges in other countries advance the rule of law in their countries by meeting with them and informing them how the American legal system operates.

Breyer makes this argument by marching through cases that are drawn from what scholars usually call “foreign relations law,”² cases involving national security, statutes with extraterritorial effect, treaties, and constitutional interpretation using foreign and international sources. The book can be read at two levels. At one level, it simply describes the recent cases and shows that the Court must deal, one way or another, with foreign and international texts and events that occur overseas. But Breyer has bigger fish to fry. He attempts to show that the Court should try to advance liberal legal norms abroad and at home, and argues that its experience with foreign relations cases has prepared it for that role. In so doing, he defends opinions that he has written as a Supreme Court Justice (often in concurrence or dissent). However, his argument falls flat. Breyer does not successfully show that the Court’s experience with foreign relations cases qualifies it to be a knight-errant for the cosmopolitan version of liberal legalism that he espouses.

The key problem is that while the Court does “engage” with the world (as Breyer puts it), Breyer gives no reason for thinking that the Court engages with the world *well*. Do the Court’s decisions advance America’s interests or create frictions with foreign countries? Do they advance the rule of law in authoritarian countries or impose American ideologies on people who disagree with them? Justice Breyer does not tell us. Nor is he clear what the Court’s goal should be. American interests? Liberal ideals? Something else?

Part of the problem is that Breyer’s focus is narrow. He discusses a handful of Supreme Court decisions, most of them of recent vintage, and a few other judicial decisions here and abroad. He provides almost no context for the cases

-
1. STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* 4 (2015).
 2. For a comprehensive treatment of foreign relations law, see CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2d ed. 2015).

he discusses—the wars in which they arose, the relationships between the United States and the countries involved in the cases, the tensions between the executive branch and Congress, and the similar political tensions and problems in the foreign countries. Aside from a few chapters on national security-related cases, he gives little sense of historical change. The book faintly evokes the spirit of the mid- to late-1990s—a period of optimism about globalization and international cooperation, the advance of democracy after the collapse of communist dictatorships, and the essential reasonableness and cosmopolitanism of the “international community.” Law professors who wrote during that optimistic period saw a steady advance in human rights and the international rule of law and the decline of “sovereignty,” and put great faith in American judges as instruments of progressive, cosmopolitan change.³ But Breyer’s discussion is too hermetic to supply such an argument. And times have changed. An otherwise uninformed reader would not know about the crisis of the European Union; the rise of authoritarianism across the world, including in Hungary, Poland, Turkey, Russia, Egypt, Honduras, Thailand, the Philippines, and Rwanda;⁴ the pressure on human rights; the rise and collapse of the Arab Spring; or the increasing assertiveness of Russia and China. If the Court can handle the world, it may be because the world, in Breyer’s account, is a much more peaceful and homogenous place than it really is.

I. NATIONAL SECURITY CASES

In the first part of the book, Breyer sketches the history of national security cases in the Supreme Court, which he divides into four stages.⁵ During the Civil War, the Court refused to interfere with executive actions—this was the Ciceronian stage—*silent enim leges inter arma*. This stage ended before World War II. The second stage—“the President wins”—is not much different, but the Court at least takes jurisdiction and insists on judicial review before declaring the President the victor. This stage extended through World War II. In the third stage, the Court finally declares that the President may go too far—

3. *E.g.*, LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS 69-91 (1990); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 65-103 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997). For a recent discussion by a member of this group, see Peter J. Spiro, *Sovereignism’s Twilight*, 31 BERKELEY J. INT’L L. 307 (2013).

4. Arch Puddington & Tyler Roylance, *Freedom in the World 2016*, FREEDOM HOUSE (2016), http://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf [<http://perma.cc/2L5W-R7Z4>].

5. BREYER, *supra* note 1, at 12-13.

exemplified by the *Steel Seizure* case⁶ during the Korean War. The fourth stage is “no blank check”—and was initiated during the War on Terror after 9/11. “Rather than sit on the sidelines and declare that cases of this kind pose an unreviewable ‘political question,’ or take jurisdiction but ultimately find for the President or Congress as a matter of course, today’s Court will be more engaged when security efforts clash with other constitutional guarantees.”⁷ Breyer sees this evolution as a good thing, but cautions that the Court will produce good outcomes and contribute to public confidence only if it informs itself about the nature of foreign threats.⁸

Breyer’s account can be compared to those of his late colleague, Chief Justice William Rehnquist, and of Professor Geoffrey Stone, both of whom wrote books on this topic.⁹ Rehnquist argues that the Court’s tradition of deference to the executive branch in time of war resulted from the Court’s recognition of the executive branch’s superior expertise over military matters as well as numerous practicalities, including the executive’s control over the military, the need for speed and secrecy during wartime, and the central role of the President in maintaining public morale. For Rehnquist, a measure of deference was necessary even if it allowed injustices to occur.¹⁰ Stone argues that the Court was wrong in most cases to adopt a deferential attitude toward aggressive national security actions by the executive branch. In virtually every case, he argues, the basis for the action turned out to be false or exaggerated.¹¹ For this reason, Stone urges the Court to scrutinize executive actions during war and other emergencies.

Neither Rehnquist nor Stone argued that the Court had become less deferential over time—though they wrote before or only at the start of the Guantanamo cases (Rehnquist in 1998, Stone in 2004). Breyer, by contrast, presents a Whig history, one in which the Court has shown itself increasingly willing to scrutinize actions of the executive, which he attributes to greater rights consciousness after World War II,¹² increasing public reliance on judicial protec-

6. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

7. BREYER, *supra* note 1, at 80.

8. *Id.* at 87.

9. There is, of course, a huge literature on this topic. For a useful recent contribution that takes a quantitative approach and discusses the literature, see Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1 (2005).

10. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 222 (1998).

11. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 528 (2004).

12. BREYER, *supra* note 1, at 66.

tion of rights beginning with *Brown v. Board of Education*,¹³ and increasing global interdependence, as a result of which foreign threats are routine rather than anomalous.¹⁴

It takes some manipulation of historical materials to construct this neat story of progress, however. Breyer disregards cases that conflict with it. For example, as early as 1804, the Supreme Court countermanded a military order of the executive on the grounds that it misinterpreted an act of Congress.¹⁵ During the Civil War, Justice Taney declared Merryman's detention unlawful; the U.S. government ignored his decision, but Taney tried.¹⁶ In the 1866 case of *Ex parte Milligan*, the Court rejected the government's wartime use of military tribunals in areas in which civilian courts were open.¹⁷ Breyer notes that *Milligan* was decided after the war was over and argues that it thus does not count against his thesis that in Stage One the Ciceronian view prevailed.¹⁸ But 1866 was a period of military occupation in the South, and Breyer cites *Curtiss-Wright*, another non-wartime case, for his thesis that "the President wins" in Stage Two,¹⁹ while disregarding a case that is in tension with his thesis—*Ex parte Endo*, where the Court granted the writ of habeas corpus filed by an internee during World War II.²⁰

Stage Three is exhausted by the Korean War-era *Steel Seizure* case, in which the President's attempt to seize steel mills in order to ensure that a strike would not interfere with the production of steel for military armaments was blocked by the Court.²¹ Breyer rightly sees the *Steel Seizure* opinion as a repudiation of emergency power, but then what to make of Stage Four—the Guantanamo cases of *Rasul v. Bush*,²² *Hamdi v. Rumsfeld*,²³ *Hamdan v. Rumsfeld*,²⁴ and *Boumediene v. Bush*?²⁵ While Breyer presents these cases as the apex of judicial

13. *Id.* at 65.

14. *Id.* at 81.

15. *Little v. Barreme*, 6 U.S. 170, 179 (1804); *see also* *Brown v. United States*, 12 U.S. 110, 125-26 (1814) (also constraining the executive's wartime power).

16. *Ex parte Merryman*, 17 F. Cas. 144, 148 (1861).

17. 71 U.S. 2, 10 (1866).

18. BREYER, *supra* note 1, at 79.

19. *Id.* at 25-31; *see* *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

20. *Ex parte Endo*, 323 U.S. 283, 297 (1944).

21. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

22. 542 U.S. 466 (2004).

23. 542 U.S. 507 (2004).

24. 548 U.S. 557 (2006).

25. 553 U.S. 723 (2008).

scrutiny of emergency action by the executive, they are more ambiguous than he lets on. For one thing, it is not clear whether the cases should be considered wartime cases. The “War on Terror” was an ambiguous quasi-war rather than a classic interstate war like the Korean War and World War II. This alone may explain why the Court was less deferential than it might have been otherwise. More important, the Court acted with extreme sluggishness—*Boumediene*, the most important of the quartet, was decided seven years into the War on Terror, almost as long as the American involvement in World War I, World War II, and the Korean War combined. Moreover, the Court yielded to the government on major issues—above all, on the power to detain indefinitely, with limited procedural protections. It did not order the government to release a single detainee, instead leaving further development of the law to the lower courts, and then refused to grant writs of certiorari requested by detainees unhappy with the lower court rulings.²⁶ And it remains unclear whether the government has released detainees because of judicial orders or for military and political reasons.²⁷ By contrast, the steel mills were returned to their owners; the Pentagon papers were published.²⁸

The problem here is methodological. There is no easy way to measure the variable of interest—the extent to which the Supreme Court defers to executive action. Counting up wins and losses for the government does not work because the legal aggressiveness of the government’s actions varies. So the Whig history fails, and with it, the largely implicit but unmistakable argument that the Court has learned from its mistakes that engagement with the executive is to be preferred to passivity. An alternative view is that the Court has repeatedly blundered—overestimating foreign threats and credulously relying on the exaggerations of the executive branch (as Stone argues). Or that it has wisely deferred to the executive branch in most cases (as Rehnquist argues). Both of these nar-

26. See, e.g., *Kiyemba v. Obama*, 561 F.3d 509 (D.C. Cir. 2009) (denying the release of Uighurs held at Guantanamo Bay), *cert. denied*, 559 U.S. 1005 (2010).

27. See Aziz Z. Huq, *What Good Is Habeas?*, 26 CONST. COMMENT. 385, 409 (2010) (noting that the United States government claims that “detainees are in effect seeking collateral review of the primary sorting mechanism for making military detention decisions, which is internal to the military” and that about one-third of successful habeas petitions do not result in release); see also Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy 14-15* (Aug. 24, 2016) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2823701 [<http://perma.cc/L6PW-E54A>] (describing various D.C. Circuit decisions from 2010 to 2013, in which numerous panels found that the demarcation of the end of hostilities—and correspondingly, the end of the executive’s relatively unconstrained detention authority—was a nonjusticiable political question).

28. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

ratives are equally consistent with the case law. The doctrinal history supplied by Breyer is unable to distinguish between these competing explanations.

For this reason, this section of the book also does not advance Breyer's overall thesis that the Court is capable of engaging with the world. Indeed, he does not tell us in so many words how the national security cases might support such an argument, but implicitly at least, the argument seems to be that if the Court is to protect the civil liberties of Americans and even foreigners against executive-branch efforts to protect the United States from foreign threats, then it must be able to evaluate those foreign threats and maybe foreign public opinion as well. If this is his argument, then he needs to show that the Court did take into account these factors and did it properly—but, again, he supplies no such evidence.

II. THE CROSS-BORDER REACH OF STATUTES

Breyer's second topic is the Court's approach to statutes that apply, or might be interpreted to apply, to the activities of Americans or foreigners overseas. Breyer argues that because Congress passes such statutes, the Court must stand ready to interpret them, and in order to interpret them, the Court must inform itself of foreign practices and foreign legal systems. He considers four cases. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, the Court held that foreign buyers of vitamins from a worldwide cartel consisting of companies located largely but not entirely outside the United States could not sue the cartel members under U.S. antitrust law.²⁹ In *Intel Corp. v. Advanced Micro Devices, Inc.*, the Court held that a statute authorized district courts to order discovery of documents for use in foreign proceedings even if the relevant foreign tribunal objected.³⁰ In *Morrison v. National Australia Bank Ltd.*, the Court held that American securities fraud law did not create a cause of action for Australian purchasers of the stock of an Australian corporation, whose stock was listed on the Australian stock exchange, where the corporation had allegedly committed fraud in connection with its purchase of an American business.³¹ And in *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court held that a Thai national who resided in the United States did not violate U.S. copyright law by asking family and friends in Thailand to buy the inexpensive foreign edition of some U.S. books, which he resold in the United States at a profit.³²

29. 542 U.S. 155, 175 (2004).

30. 542 U.S. 241, 246 (2004).

31. 561 U.S. 247, 265 (2010).

32. 133 S. Ct. 1351, 1358 (2013).

The cases all involve statutes that were written in broad terms that made it possible to read them as applying overseas. The statute in *Intel* explicitly referred to foreign tribunals.³³ But the vagueness of the statutes suggested that Congress had not always given careful consideration to whether they should be applied overseas, and, if so, how the overseas application of the statute should take account of the unique characteristics of a cross-border transaction and the attitudes of foreign governments. This problem—the problem of extraterritorial application of statutes—has existed since the Founding. To address it, the courts developed a presumption against extraterritoriality, reflecting the assumption that Congress normally seeks to regulate domestic matters only, and that application of statutes overseas creates friction with other countries that should be minimized.³⁴ However, as these cases illustrate, courts have frequently found that presumption to be rebutted.

Breyer argues that in all of these cases, the Court was required to struggle with the foreign implications of American laws. He draws three lessons from this: (1) that American interests are entwined with the interests and activities of foreign countries; (2) that the Court must understand these connections in order to resolve cases appropriately; and (3) that the Court can depend on the executive branch, foreign governments, and other interested parties to supply it with the information it needs. Maybe Breyer is right that all these cases show that the Court can engage with the world in a productive fashion. But his next illustration suggests some grounds for doubt.

The Alien Tort Statute (ATS), originally enacted in 1789, provides: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”³⁵ Because the statute was hardly ever used or even mentioned during the first 190 years of its existence, no one knows what Congress intended. The best guess is that Congress sought to give foreign officials and other citizens access to federal courts if they were victims of torts on American soil, as state courts were thought to be unreliable forums when foreign relations were at stake.³⁶ At the time, a mob attack on a foreign dignitary could be an act of war if he were not given a remedy in court. The statute was probably a jurisdiction-

33. *Intel*, 542 U.S. at 241; see 28 U.S.C. § 1782 (2012) (“The district court of the district in which a person resides . . . may order him to give his testimony . . . for use in a proceeding in a foreign or international tribunal . . .”).

34. See, e.g., *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818) (discussing the political nature of overseas applications of piracy statutes).

35. Alien Tort Statute, 28 U.S.C. § 1350 (2012).

36. BRADLEY, *supra* note 2, at 202-04.

granting statute that did not create substantive rights but instead allowed international law to be enforced to a limited extent.

In 1980, the Second Circuit released an opinion in a case called *Filartiga v. Pena-Irala*, in which the family of a man tortured to death by a police officer in Paraguay sued that officer in federal court.³⁷ The court held that the family had a cause of action under the ATS because torture was a violation of the law of nations.³⁸ The plaintiffs eventually won a large award against the defendant, who, however, fled back to Paraguay, and in any event did not have the funds to pay. The Second Circuit decision opened the floodgates to ATS litigation. Public interest groups concerned about human rights took aim at former and current dictators and other major malefactors. Suits were brought against the estate of former Philippine leader Ferdinand Marcos,³⁹ against former Bosnian leader Radovan Karadžić,⁴⁰ and against Kelbessa Negewo, a former Ethiopian government official.⁴¹ Private lawyers realized that they could bring suits against multinational corporations that were complicit in human rights violations of foreign governments. Lawsuits were brought against Unocal,⁴² Chiquita,⁴³ and corporations that did business with the apartheid government in South Africa,⁴⁴ among many others. While foreign governments and acting heads of state were protected by sovereign immunity, virtually everyone else was fair game.

The Supreme Court has heard two ATS cases: *Sosa v. Alvarez-Machain* and *Kiobel v. Royal Dutch Petroleum*.⁴⁵ In *Sosa*, the plaintiff was a Mexican doctor who had been kidnapped by American drug agents from Mexico and brought to the United States for trial.⁴⁶ The Americans believed that he had assisted in the torture-murder of another agent, although he was ultimately acquitted. *Sosa* then turned around and sued the Americans under the ATS, arguing that the kidnapping violated international law. The Court reversed the Ninth Circuit's

37. 630 F.2d 876, 878 (2d Cir. 1980).

38. *Id.* at 887.

39. *Hilao v. Estate of Marcos*, 25 F.3d 1467 (9th Cir. 1994).

40. *Kadic v. Karadžić*, 70 F.3d 232 (2d Cir. 1995).

41. *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996).

42. *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002).

43. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

44. *In re S. Afr. Apartheid Litig.*, 15 F. Supp. 3d 454 (S.D.N.Y. 2014).

45. *Kiobel v. Royal Dutch Petrol.*, 133 S. Ct. 1659 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

46. *Sosa*, 542 U.S. at 692.

ruling in his favor, holding that an “illegal detention of less than a day” did not violate “a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized,” or, in other words, a norm that is “specific, universal, and obligatory.”⁴⁷ The Court was worried that plaintiffs could characterize nearly any abusive or illegal act as a violation of international law. If they could, then U.S. courts would be flooded with lawsuits by aliens against foreign and U.S. officials, including in circumstances where the aliens would not normally be afforded a remedy. And “[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”⁴⁸

In the second case, *Kiobel*, the plaintiffs were Nigerian citizens who argued that the defendant oil companies aided the Nigerian government’s violent suppression of protests against oil extraction in the Niger delta.⁴⁹ The Second Circuit ruled for the defendants on the ground that the law of nations did not create liability for corporations. The Supreme Court affirmed, but on a different ground—that the ATS does not apply extraterritorially. While the bulk of the majority opinion is a textualist evaluation of the statute and its sources, Chief Justice Roberts makes several policy arguments of relevance here. He emphasizes “the danger of unwarranted judicial interference in the conduct of foreign policy,” which would arise from extraterritorial application of the ATS.⁵⁰ He also says:

[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms. As Justice Story put it, “No nation has ever yet pretended to be the *custos morum* of the whole world” It is implausible to suppose that the First Congress wanted their fledgling Republic—struggling to receive international recognition—to be the first. Indeed, the parties offer no evidence that any nation, meek or mighty, presumed to do such a thing.⁵¹

The lesson of *Sosa* and *Kiobel* was clear. The Court feared that an expansive interpretation of the ATS would involve the federal courts in foreign controver-

47. *Id.* at 738, 725, 732.

48. *Id.* at 727-28.

49. *Kiobel*, 133 S. Ct. at 1662.

50. *Id.* at 1664.

51. *Id.* at 1668 (citation omitted).

sies that they did not understand, and without a specific mandate from Congress.⁵² In doing so, the majority rejected Breyer's optimism that the Court can take on the world.

Breyer tries to interpret *Sosa* and *Kiobel* so as not to completely shut the door to victims of foreign abuses like the plaintiffs in *Filartiga*.⁵³ He sees the statute as an important way for America to help foreign victims of human rights abuses. But his defense of the ATS is muted. He does not go as far as academic defenders of the ATS,⁵⁴ who have sought the most generous interpretations of the ATS, ones that would have precisely the effect of converting the U.S. judiciary into the *custos morum* of the world. Why not? While Breyer supplies more questions than answers, a hint can be found in his concerns about international comity. "Can we interpret our statutes so that (if our lead were followed by [foreign] courts) it would keep nations from stepping on one another's toes?"⁵⁵ He is not sure. Breyer reassures himself that the ATS mirrors foreign practices. As he says in his concurrence in *Kiobel*:

Other countries permit some form of lawsuit brought by a foreign national against a foreign national, based upon conduct taking place abroad and seeking damages. Certain countries, which find "universal" criminal "jurisdiction" to try perpetrators of particularly heinous crimes such as piracy and genocide, see Restatement § 404, also permit private persons injured by that conduct to pursue "*actions civiles*," seeking civil damages in the criminal proceeding Moreover, the United Kingdom and the Netherlands, while not authorizing such damages ac-

52. Although the Court clearly sought to cut back on ATS cases in *Sosa*, the number of cases in federal district courts rose in its wake. According to a Westlaw search, district courts issued twenty-seven opinions citing the ATS in 2003 and twenty in 2004, the year *Sosa* was decided. This number increased to forty-one in 2005 and sixty in 2010. The reason is probably that *Sosa* was the first Supreme Court case that explicitly acknowledged the basic approach to ATS litigation in *Filartiga*, rejecting a stricter position that would have eliminated the value of the statute for plaintiffs. The number of opinions fell from fifty-nine in 2013—the year *Kiobel* was decided—to thirty-eight in 2014 and thirty-five in 2015. (The search term was "28 U.S.C. § 1350.")

53. As Curtis Bradley notes, Breyer tries to argue that the holding of the majority opinion is the position that he took in his concurrence. See Curtis Bradley, Book Review, 110 AM. J. INT'L L. 130, 135 (2016) (reviewing STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015)) ("What Justice Breyer now maintains is entailed by the majority opinion is what he seemed to suggest in his concurrence in *Kiobel* was *not* the majority's position.")

54. See, e.g., Koh, *supra* note 3.

55. BREYER, *supra* note 1, at 163.

tions themselves, tell us that they would have no objection to the exercise of American jurisdiction in cases such as *Filartiga* and *Marcos*.⁵⁶

And yet foreign governments have objected vociferously to other ATS cases—above all, the apartheid litigation. The Netherlands and Britain submitted an amicus brief in *Kiobel* objecting to ATS jurisdiction, as did the United States. Both briefs argued that ATS litigation in this instance would violate the principles of international law and comity.⁵⁷ And as Breyer seems to be aware, there is nothing like the ATS in any other country.⁵⁸ The universal jurisdiction statutes to which Breyer refers authorize criminal enforcement, to be brought by government authorities attentive to the implications of such actions for foreign relations, with weak and ambiguous restitution rights for victims. Moreover, not mentioned by Breyer, these statutes are rarely used by foreign governments, and in recent years have been weakened⁵⁹—often under pressure from the U.S. government, which frets about their possible application to American officials.

The story of the ATS retrospectively throws a shadow on Breyer's sunny discussion of overseas application of the antitrust and securities laws. Foreign governments deeply resent all of these extensions of American power; the only difference is that they have made much more noise about the ATS in litigation. With his nose firmly buried in the briefs, Breyer gives more credence to the opposition to the ATS, but still tries to dismiss it. But the bottom line for even a Justice with cosmopolitan instincts is whether the Court can really understand why foreign governments and populations do not want American laws applied to them even when we Americans are convinced that they advance the rule of law around the world. It seems to me that the majorities in *Sosa* and *Kiobel* take this worry more seriously than Breyer does.⁶⁰

56. *Kiobel*, 133 S. Ct. at 1676 (Breyer, J., concurring).

57. Brief of the Governments of the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland as Amici Curiae in Support of Neither Party at 6, *Kiobel*, 133 S. Ct. 1659 (No. 10-1491).

58. See BRADLEY, *supra* note 2, at 230.

59. See Ernest A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, 64 DUKE L.J. 1023, 1028-43 (2015).

60. In *RJR Nabisco, Inc. v. European Community*, No. 15-138, slip op. at 1 (U.S. June 20, 2016), the Court was confronted with this tradeoff once again. One question in that case was whether the private right of action in the civil RICO statute applied extraterritorially. *Id.* at 18. European countries, which had brought a RICO claim against an American company, argued that it did. *Id.* The majority rejected this view, in part on the ground that extraterritorial application would create “friction” with foreign countries. *Id.* at 21. Justice Breyer disagreed. *Id.*, slip op. at 1 (Breyer, J., concurring in part and dissenting in part).

III. TREATIES

Breyer argues that another reason that the Supreme Court cannot avoid addressing “foreign law” is that it must interpret treaties. As before, the problem is that Breyer is right only in the unimportant sense that the Court must decide cases that come before it, while ignoring serious questions about whether the Court does its job well. Breyer discusses six cases. Let us focus first on *Abbott v. Abbott*, where the Court was required to interpret the Hague Convention on the Civil Aspects of International Child Abduction.⁶¹ A married couple, the Abbotts, moved to Chile and subsequently separated. Mrs. Abbott was awarded custody of their child, while Mr. Abbott was awarded visitation rights. Fearing that Mr. Abbott was planning to illegally move the child to Britain, Mrs. Abbott preemptively moved with the child to Texas, where Mr. Abbott found them and sued in federal district court to obtain an order that the child be returned to Chile. The Convention bans the removal of a child from a country if (among other things) the removal “is in breach of rights of custody.”⁶² The question was whether Mr. Abbott’s visitation rights in Chile should be interpreted as a “right of custody.” If so, then the treaty prohibited Mrs. Abbott’s actions. Employing the standard tools of interpretation, the Court held that Mr. Abbott’s visitation rights counted as custody under the terms of the treaty because his rights authorized him under Chilean law to block the child from being removed from Chile.⁶³

What is the purpose of discussing this run-of-the-mill treaty interpretation case? “What is novel,” says Breyer, “is that the traditional approach [of treaty interpretation] required the Court to understand not only an international document—namely, a treaty—but a foreign country’s laws and customs in an area most *unfamiliar* to federal courts, domestic relations”⁶⁴ But this practice is not actually novel. Many treaties of old vintage require the Court to interpret foreign law. Every extradition request requires a court to interpret foreign criminal law because extradition treaties require that the illegal act in question be a crime under the law of both countries. Courts also interpret foreign law in run-of-the-mill tort and contract cases, in which relevant events take place in foreign jurisdictions, as well as enforcement-of-judgment cases, in which courts are asked to enforce a judgment issued by a court in a foreign jurisdiction.

61. 560 U.S. 1 (2010).

62. *Id.* at 8.

63. *Id.* at 10.

64. BREYER, *supra* note 1, at 175.

Two much more important cases address the relationship between the International Court of Justice (ICJ) and the federal judiciary. The ICJ is an international court of general jurisdiction; the United States has agreed to be bound by its rulings under certain conditions. A pair of cases in the ICJ established that the United States violated a treaty called the Vienna Convention on Consular Relations by failing to inform foreign nationals arrested for criminal activity on U.S. soil of their right to obtain advice from their nation's consulate.⁶⁵ The United States argued that the defendants in question had, under the procedural default rule, forfeited their Vienna Convention claims by failing to raise them at trial. But the ICJ also held that the procedural default rule violated international law to the extent that it prevented the defendants from asserting their treaty rights when they finally learned of them.

In *Sanchez-Llamas v. Oregon*, a defendant who was not informed of his right to consular advice under the Vienna Convention argued that he was entitled to relief. The Court held that while the ICJ's interpretation of international law was entitled "to respectful consideration," the ICJ was wrong in its holding that the procedural default rule violated the Vienna Convention.⁶⁶ In *Medellin v. Texas*, where the defendant argued that the prior ICJ holding⁶⁷ in his favor bound the United States, the Court went further and held that the relevant international law was not self-executing and therefore not binding on the courts.⁶⁸ These two cases, unlike the Hague Convention cases, were actually important; they demonstrated a rejection by the majority of the sensitivity to international law that Breyer advocates. Accordingly, he wrote dissents in both cases.

In the conclusion of this portion of the book, Breyer points out that with the growth of standard-setting and regulation by international bodies, the Court will increasingly face a tradeoff. If it holds that the rules issued by these bodies are automatically incorporated into domestic law, then Americans may be deprived of constitutional procedural guarantees and democratic control over the rules that bind them. But if it instead holds that the international rules are subject to domestic procedural rights and democratic controls, then the Court may interfere with international cooperation. This tradeoff has been much discussed in the academic literature, with no consensus as to how it

65. *La Grand* (Ger. v U.S.), Judgment, 2001 I.C.J. 466 (June 27); *Avena & Other Mexican Nationals* (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (Mar. 31).

66. *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353 (2006) (citing *Breard v. Greene*, 523 U.S. 371, 375 (1998)).

67. *Avena*, 2004 I.C.J. 12.

68. *Medellin v. Texas*, 552 U.S. 491 (2008).

should be made.⁶⁹ The Court in *Sanchez-Llamas* and *Medellin* decisively opted for constitutional protections. Breyer declines to do much more than identify the tradeoff and repeat his mantra that the “courts and the legal profession . . . [must] understand both the legal and practical realities elsewhere in the world if we are to preserve our basic American values.”⁷⁰ But it is just not clear what practical implications follow from this observation.

The upshot is that the reader is left wondering how to evaluate the Court’s decisions. Because of Breyer’s hermetic approach, we are given no information as to whether the Court’s refusal to follow the ICJ has harmed America’s interests by damaging its reputation or creating frictions with foreign countries. Nor do we know whether these decisions damaged the ICJ’s reputation in a way that has caused harm to other countries. However, I do agree with Breyer that the Court needs to know something about the world if it is to interpret treaties.

IV. THE “FOREIGN LAW” CONTROVERSY

In a brief chapter, Breyer wades into the controversy over using “foreign law” to interpret the Constitution. This debate excited scholars, journalists, and even politicians some years ago but has since died down.

At its core, the debate concerned whether the Court should interpret ambiguous clauses of the Constitution in light of various foreign and international materials, including judicial opinions and statutes in foreign countries, international law, and decisions of international tribunals. One aspect of the debate centered on the meaning of “cruel and unusual punishment” in the Eighth Amendment. The Court has held that this phrase should be interpreted in light of evolving standards of decency rather than as forbidding only punishments regarded as cruel and unusual in 1789.⁷¹ How does one determine evolving standards of decency? A relatively uncontroversial approach was to count the number of (American) states that had abolished a type of punishment, and, if the number exceeded a threshold, to declare that punishment “cruel and unusual.” In this way, the judgments of state legislatures and state courts gave content to “cruel and unusual.” But what of the legislatures and courts of foreign countries? Should they count as well?

69. See, e.g., *The Law and Politics of International Delegation*, LAW & CONTEMP. PROBS., Winter 2008 (Curtis A. Bradley & Judith G. Kelley eds.).

70. BREYER, *supra* note 1, at 235.

71. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

In several cases, the Court said that they should. In *Atkins v. Virginia*, the Court noted foreign law and world opinion in abolishing capital punishment for crimes committed by the mentally retarded.⁷² In *Roper v. Simmons*, the Court held that the juvenile death penalty violates the Eighth Amendment, noting that no other country recognized the death penalty for people who commit crimes as juveniles.⁷³ The Court also cited foreign law in *Lawrence v. Texas*, which abolished the crime of homosexual sodomy.⁷⁴ Occasional citations to foreign law can be found in a handful of other opinions in the Court's history. These opinions do not, however, tell us the extent to which foreign law motivated or influenced the Court's ultimate decision.

The leading critic of foreign law has been Justice Scalia. For Justice Scalia, the decisive objection was that foreign law played no role in originalism, his brand of constitutional interpretation. Justice Scalia and others have also argued that the Court is not competent to evaluate foreign law, which often reflects legal peculiarities and cultural differences in foreign countries. He has argued that citation to foreign law is an opportunistic cover for ideological decision making, and that, if foreign law were really to play a role in constitutional interpretation, democracy and American sovereignty would suffer as a consequence.⁷⁵

Breyer argues, reasonably, that the Court must create rules—this is true even if originalism were accepted—and that it may be advantageous to consider what works and does not work in other countries.⁷⁶ This is not much different from what state common law courts do when they look at the law in other (American) states. Breyer also claims that citation to foreign law has diplomatic value. When the Supreme Court cites a foreign opinion, it gives moral support to judges who seek to advance rule-of-law values in foreign countries where the

72. 536 U.S. 304, 315 n.21 (2002).

73. 543 U.S. 551, 575-78 (2005); see also *Graham v. Florida*, 560 U.S. 48, 80-82 (2010) (holding that juveniles may not be sentenced to life in prison without parole for a crime other than homicide).

74. 539 U.S. 558, 572-73, 576-77 (2003).

75. Justice Scalia's views can be found in his debate with Justice Breyer at American University. *Constitutional Relevance of Foreign Court Decisions*, C-SPAN (Jan. 13, 2005), <http://www.c-span.org/video/?185122-1/constitutional-relevance-foreign-court-decisions> [<http://perma.cc/7EQR-F2WU>].

76. Numerous academics have supported this argument. For a philosophical version, see JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS (2012). For a social science approach, see Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006). For a summary of the debate and other citations to the literature, see BRADLEY, *supra* note 2, at 161-64.

ruling elite is hostile to them.⁷⁷ This seems considerably less plausible than Breyer's first argument, and he gives no evidence for this claim. In any event the explosive political reaction⁷⁸ seems to have put a damper on the Court's enthusiasm for citing foreign law, with foreign law references apparently being limited to Eighth Amendment cases for the time being, despite the much more general application indicated by Breyer's arguments.

Breyer's major argument in this section is that the Court addresses foreign legal materials all the time. This may be the central point of his book, though he does not make this point until page 244. His argument is worth quoting at length:

My hope is that the cases I've now discussed suggest that the critics' concerns about judicial references to foreign law are beside the point. Their fears don't much resonate when one understands the way in which foreign law and practices are actually considered It is not the cosmopolitanism of some jurists that seeks this kind of engagement but the nature of the world itself that demands it.

. . . As we have seen, a great many recent cases—whether involving treaties, the foreign reach of American statutes, or questions of U.S. jurisdiction over activity taking place abroad—made it unavoidable that the Court analyze foreign or international legal rules, statutes, or practices to arrive at a reasoned decision. In such cases, doing so was not simply helpful but essential. At the same time, I find little evidence that it has led to any result not entirely consistent with American laws and practice.⁷⁹

Breyer believes that reliance on foreign law is not a choice; it is “unavoidable” and “essential.” It is the “nature of the world” that requires this practice ra-

77. Justice Breyer makes this argument in his debate with Justice Scalia at American University:

Look, let me be a little bit more frank, that in some of these countries there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they are trying to protect human rights, they are trying to protect democracy. They have a document called a constitution, and they want to be independent judges. And for years people all over the world have cited the Supreme Court, why don't we cite them occasionally? They will then go to some of their legislators and others and say, “See, the Supreme Court of the United States cites us.” That might give them a leg up, even if we just say it's an interesting example. So, you see, it shows we read their opinions. That's important.

Constitutional Relevance of Foreign Court Decisions, *supra* note 75, at 28:48-29:30.

78. See BRADLEY, *supra* note 2, at 164 & nn.128-31.

79. BREYER, *supra* note 1, at 244-45.

ther than the Justices' cosmopolitan inclinations. One might think that this argument should be a sufficient refutation of the critics because if reliance on foreign law is "unavoidable," then why bother squabbling over justification?

But Breyer is confusing two different views. Justice Scalia and the other critics of foreign law objected to its use to interpret (or modify) the U.S. Constitution. They did not object to treaty or statutory interpretation that required the Court to account for foreign law. Breyer's arguments, based as they are on examples of treaty and statutory interpretation, do not support his conclusion. Instead, reliance on foreign law for the purpose of interpreting (or modifying) the Constitution is a choice. The debate is whether it is a wise choice or not. In *Obergefell v. Hodges*,⁸⁰ in which the Court found a right to same-sex marriage, the majority (which Breyer joined) chose *not* to rely on foreign law, even though there was plenty that could have been cited.⁸¹

Why did the Court eschew foreign law in this instance? It may be because same-sex marriage has been rejected by the vast majority of countries, many of which reject gay rights altogether and instead criminalize homosexual activity. One amicus brief tried to evade these obstacles through a twofold maneuver.⁸² First, it argued that, when determining world opinion, the Court should disregard countries that do not share "our constitutional values."⁸³ Once one eliminates countries that do not share our values, the ratio of countries that recognize same-sex marriage to those that do not may not look so bad.⁸⁴ However, the amicus brief fails to tell us which countries do and do not share our val-

80. 135 S. Ct. 2584 (2015).

81. Compare Brief for Foreign and Comparative Law Experts Harold Hongju Koh et al. as Amici Curiae in Support of Petitioners at 4, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) [hereinafter Brief for Foreign and Comparative Law Experts] ("Since 2001, twenty countries have embraced equal marriage throughout their jurisdictions for reasons that have persuasive force before this Court."), with Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Law Research Project as Amici Curiae in Support of the Respondent at 3, *Obergefell*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574) ("[A]ny form of same-sex marriage has only been adopted by 17 of the 193 member states of the United Nations.").

82. Brief for Foreign and Comparative Law Experts, *supra* note 81, at 12.

83. *Id.*

84. The remaining countries are mostly countries populated by white Europeans, recalling a line in *Reynolds v. United States*: "Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." 98 U.S. 145, 164 (1879), quoted in Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 145 n.71 (2005).

ues.⁸⁵ For example, suppose we eliminate all countries designated “not free” or “partly free” by Freedom House. The ratio is still not promising—about seventeen out of eighty-six.⁸⁶ Second, the brief argues that the Court must look for a “progression.”⁸⁷ Even though most countries that share “our constitutional values” reject same-sex marriage, fewer such countries do so today compared to in the past. It is not hard to see why even a cosmopolitan-minded majority would decline this attempt to manipulate world opinion to fit its holding. But then what is left of Breyer’s argument that reliance on foreign law is not only wise but “unavoidable”?

In the passage quoted above, Breyer also argues that the Court has been prepared to use foreign law in constitutional interpretation through its involvement in treaty cases and cases involving extraterritorial statutory interpretation. Unlike the prior argument, this argument is not about necessity, but about the capacity of the Court to interpret foreign materials correctly. However, as I noted before, those chapters do not actually show that the Court interpreted foreign legal materials *well*—only that the Court interpreted them. Breyer’s own cautious phrasing, with its double negative—“little evidence” that the Court’s reliance on foreign law is “not entirely consistent” with American law—perhaps betrays awareness of this problem with his claim.⁸⁸

CONCLUSION

Each of Breyer’s arguments boils down to the claim that, because the Supreme Court is unavoidably engaged in international relations, it should embrace this role enthusiastically rather than reluctantly. But each of his arguments advances this claim haltingly or not at all. The national security cases prove, he says, that the Court must understand foreign threats. But in the cases he cites, he fails to show that the Court helped foreign relations by imposing some modest limits on the U.S. government’s military and counterterrorism operations. The extraterritorial statute cases and the treaty cases only show the ambiguity that the Court faces, as it is unclear whether the Court’s decisions have advanced international relations or created international frictions. It remains obscure whether the Court does any good for international relations, or

85. See Brief for Foreign and Comparative Law Experts, *supra* note 81, at 12.

86. The Koh brief lists twenty countries, but as the brief by fifty-four experts notes, this figure counts the United Kingdom as three countries (England, Scotland, and Wales) and includes Finland based on proposed rather than actual legislation. Freedom House classifies eighty-six countries as “free” as of 2016. See Puddington & Roylance, *supra* note 4, at 20.

87. Brief for Foreign and Comparative Law Experts, *supra* note 81, at 14.

88. BREYER, *supra* note 1, at 245.

for the rights of Americans, when it uses foreign and international law to interpret the U.S. Constitution. Breyer tries to evade these problems by defining (mostly implicitly) the Court's foreign relations mission as one in which it tries to advance liberal values. However, whether the United States actually should advance liberal values abroad, and if so, how it should conduct this mission, are hotly contested political questions both in this country and abroad.

The major impression the book leaves the reader is the weakness of the Supreme Court in the face of foreign challenges. The Court is hobbled by its limited institutional role as a judicial body of last resort, one that is only intermittently engaged with foreign relations issues because such engagement must emerge in cases and controversies, and only after they wend their way through the lower courts. Because the Court works by majority rule, it cannot speak to the world with a strong, consistent voice. At a time when democracy and human rights are in retreat, when the foreign judges with whom Breyer hobnobs are brushed aside like gnats by authoritarian governments, the Court's capacity to assist those judges in the "sustained struggle against arbitrariness" seems puny.⁸⁹

89. BREYER, *supra* note 1, at 280.