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## Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation

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# Contesting Adjudication: The Partisan Divide over Alien Tort Statute Litigation

*By Jide Nzelibe\**

*Abstract: Ever since the modern revival of Alien Tort Statute (ATS) litigation in 1980, Democratic administrations have favored adjudication under the statute while Republican administrations have been against it. But why would this be the case? After all, the received wisdom assumes that presidents (from either party) are empire builders who prefer to shape international law and foreign policy without any meddling from the courts. This Essay advances a partisan entrenchment logic to explain the variance in support of ATS adjudication across different administrations. Under this logic, presidents and judges are political actors whose partisan preferences regarding substantive international law will sometimes trump their institutional or interpretive empire-building objectives. Thus, presidents who are sympathetic to the ideological goals of a specific international law norm may be willing to relinquish interpretive authority to courts in order to entrench the norm in a way that binds their successors and other domestic political actors. Conversely, judges who are unsympathetic to the policy goals of an international law norm may be willing to relinquish interpretive authority to the President (or the political branches) in order to prevent legal entrenchment. These divergent approaches toward ATS adjudication have been shaped by the preferences of interest groups aligned with the Republican and Democratic parties. The Article concludes by examining the conflicting litigation positions of lawyers from the Obama and Bush Administrations over the scope of the ATS in the Supreme Court's recent decision of *Kiobel v. Royal Dutch Shell Petroleum*.*

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I. INTRODUCTION

In perusing U.S. presidential submissions to federal courts in certain foreign affairs controversies, one may be forgiven for thinking that the government’s litigation positions are hardwired to be predictably inconsistent. Take, for instance, disputes under the Alien Tort Statute (ATS), a long dormant, founding-era statute that was judicially revived in the late 1970s to permit foreign plaintiffs to bring claims for egregious human rights abuses committed by foreign governments. In the initial case of *Filártiga v. Peña-Irala*,<sup>1</sup> the Carter Administration submitted an amicus brief to the Second Circuit cautioning that judicial refusal to recognize a private cause of action under the ATS “might seriously damage the credibility of our nation’s commitment to the protection of human rights.”<sup>2</sup> Since then every Democratic administration has echoed the view that judicial enforcement of ATS claims is broadly consistent with American foreign policy objectives.<sup>3</sup>

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<sup>1</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>2</sup> Memorandum for the United States as Amicus Curiae at 22–23, *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79–6090).

<sup>3</sup> See, e.g., Statement of Interest of the United States, *Kadic v. Karadzic*, 70 F.3d 232 (2d

By contrast, Republican administrations from that of Reagan to that of George W. Bush have been consistently skeptical of the adjudication of ATS controversies.<sup>4</sup> Take, for instance, the Bush Administration's submission before the Supreme Court in *Sosa v. Alvarez Machain*.<sup>5</sup> First, it argued that the history and context of the ATS cautioned against extraterritorial application.<sup>6</sup> Second, it insisted that allowing litigation to proceed under the statute would imperil American foreign policy.<sup>7</sup> Finally, the Administration warned the Court that adjudication under the ATS would be in fundamental tension with the constitutional separation of powers: "making any violation of customary international law actionable is profoundly flawed and would routinely generate the potential for judicial pronouncements at odds with the policies of the political branches on matters of foreign policy, which courts seek to avoid."<sup>8</sup>

Most recently, during arguments before the Supreme Court in *Kiobel v. Royal Dutch Petroleum Co.*,<sup>9</sup> the Office of the Solicitor General under the Obama Administration took the unusual step of backing away from a litigation position it adopted eight years earlier during the Bush Administration as to whether the ATS could apply extraterritorially and whether litigation under the statute threatened executive branch flexibility

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Cir. 1995) (Nos. 94-9035, 94-9069) (observing that prosecution under the ATS of Radovan Karadzic does not raise a political question); Brief for the United States as Amicus Curiae Supporting Petitioners at 15-21, *Kiobel v. Royal Dutch Petroleum*, No. 10-1491 (U.S. Dec. 21, 2011) (observing that domestic law regarding corporate liability should apply in ATS cases).

<sup>4</sup> See, e.g., Brief for the United States of America as Amicus Curiae at 3, *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (Nos. 86-2448, 86-15039) (arguing that the ATS "does not give the district courts subject matter jurisdiction over a suit by a foreign national plaintiff against a foreign government official based on acts occurring in a foreign country"); Reply Brief for the United States as Respondent Supporting Petitioner, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) (contending that the ATS is merely a jurisdictional grant and that it does not apply extraterritorially).

<sup>5</sup> See Brief for the United States as Respondent Supporting Petitioner at 46-50, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 182581 [hereinafter *Sosa* Brief for the United States] (opposing extraterritorial application of the ATS regardless of defendant's status).

<sup>6</sup> See *id.* at 47-49.

<sup>7</sup> See *id.* at 42-46, 48-49 (arguing that the ATS was designed "to open federal courts to aliens for the purpose of *avoiding*, not provoking, conflicts with other nations").

<sup>8</sup> *Id.* at 35; see also Supplemental Brief for the United States of America as Amicus Curiae at 4, *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (Nos. 00-56603, 00-56628) ("It would be extraordinary to give U.S. law an extraterritorial effect to regulate conduct by a foreign country vis-a-vis [sic] its own citizens in its own territory, and all the more so for a federal court to do so as a matter of common law-making power.").

<sup>9</sup> Order granting writ of certiorari, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 472 (Oct. 17, 2011) (No. 10-1491).

in foreign affairs.<sup>10</sup> As various commentators have observed, it is rare for the Solicitor General to change litigation positions before the Court from one administration to another, especially on issues that implicate the institutional interests of the executive branch.<sup>11</sup> In this case, however, the Obama Administration not only appeared to embrace a position regarding ATS adjudication that was more in line with prior Democratic administrations, but also seemed to implicitly reject that of its immediate predecessor. When the *Kiobel* Court eventually handed down its decision rejecting the plaintiffs' ATS claims,<sup>12</sup> it embraced a presumption against extraterritoriality that was more in line with the interpretation endorsed by the Bush Administration.<sup>13</sup> While the Court was divided five to four over how close a territorial link would be required, the Justices all agreed that ATS claims without a substantial link to the United States would no longer be actionable under the statute.<sup>14</sup>

Similar peculiarities abound in judicial efforts to enforce ATS claims. Some federal judges have declined to adjudicate ATS claims on the merits even when the executive branch encouraged them to do so. Moreover, breaking with a long tradition of judicial deference to the President on foreign affairs, certain federal judges have routinely declined presidential requests to abstain from adjudicating ATS claims. If there is a coherent logic to these varied judicial approaches in ATS claims, it has long confounded courts and academic commentators.<sup>15</sup> Indeed, for the most part, the commentary on ATS adjudication has been largely normative with

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<sup>10</sup> See *Sosa* Brief for the United States, *supra* note 10; but see Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 3–5, *Kiobel v. Royal Dutch Petroleum*, No. 10–1491 (U.S. June 11, 2012), 2012 WL 2161290 (arguing that extraterritorial application of the ATS against domestic corporations could be allowed but not against foreign corporations in the circumstances presented).

<sup>11</sup> See *infra* text accompanying note 176.

<sup>12</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

<sup>13</sup> As John Bellinger observes in a blog posting, the extraterritoriality issue was raised not only in amicus briefs he filed in *Kiobel*, but also in government briefs he helped file during the Bush Administration when he was the State Department Legal Adviser. See John Bellinger, *Reflections on Kiobel*, LAWFARE BLOG (Apr. 22, 2013, 8:52 PM), <http://www.lawfareblog.com/2013/04/reflections-on-kiobel/>.

<sup>14</sup> *Kiobel*, 133 S. Ct. at 1669–71.

<sup>15</sup> Courts sometimes suggest that some deference should be accorded the executive branch's foreign policy judgments in ATS cases, but what the scope of this deference means as a practical matter is somewhat unclear. See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 680 (2000) ("The executive branch, however, is not charged with administering the ATS. Rather, the statute is a direct congressional regulation of federal court jurisdiction. As a result, there is no basis in the statute for presuming a delegation of lawmaking power to the executive branch."); but see *Sosa*, 542 U.S. at 733 n.21 (observing that where the U.S. State Department has weighed in, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

various camps staking out their positions as to whether or not expansive judicial enforcement is desirable.<sup>16</sup>

This Article sidesteps the normative debates regarding ATS litigation and focuses on the following questions: Why would Democratic administrations from Carter through Obama be willing to encourage federal courts to resolve disputes that would likely constrain the President's flexibility to deploy the full range of foreign policy tools in bargaining with other states? And why have Republican administrations tended to stake out a much more skeptical position on the merits of judicially sanctioned litigation under the ATS? Moreover, why, despite invitations by certain presidential administrations, are some federal judges reluctant to adjudicate ATS claims on the merits? Finally, why are certain federal judges willing to expand the scope of ATS claims even when the executive branch discourages judicial involvement?

Unlike more conventional accounts, this Article attempts to explore the logic of ATS human rights litigation through the lens of partisan politics. Simply put, to understand both variations in presidential and judicial practices on ATS claims, one needs to focus on the underlying incentives faced by different regimes and the institutional actors within

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<sup>16</sup> See, e.g., Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353, 353 (2011) (arguing that the premise of corporate liability under the ATS has "shaky, indeed illusory, analytical and jurisprudential foundations"); Michael D. Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L. J. 271 (2009) (arguing that corporate liability under the ATS may conflict with international law principles of prescriptive jurisdiction); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002) (asserting that "the First Congress implicitly intended to limit the [ATS] to suits involving at least one U.S. citizen defendant"); *but cf.* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1149 (2011) (arguing that ATS litigation may actually promote the national security and foreign policy interests of the United States); Anthony D'Amato, Editorial Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62, 65 (1988) (observing that the ATS's history indicates that it was enacted to be "an important part of a national security interest" and that it applies to cases involving both alien plaintiffs and alien defendants); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687, 689 (2002) ("The argument that Congress meant to limit jurisdiction to suits against U.S. citizens, however, is contrary to the plain language of the Statute as well as the history leading to its adoption. . . . [T]he law of nations is part of the 'Laws of the United States' . . . ."); Sarah H. Cleveland, *The Alien Tort Statute, Civil Society, and Corporate Responsibility*, 56 RUTGERS L. REV. 971, 971 (2004) (arguing that ATS litigation does not harm U.S. foreign relations, nor America's "standing as an international leader in the promotion and protection of human rights"); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 489–93 (1989) (defending the use of Alien Tort litigation to vindicate broader abstract norms); Harold Hongju Koh, Review Essay, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2640 n.209 (1997) (observing the failure of some international law theorists to appreciate the ability of ATS litigation to internalize international legal norms).

such regimes. The central claim is that both political and judicial actors may be willing to sacrifice their institutional prerogatives to interpret international law and shape foreign policy if they believe that doing so will advance their political or ideological goals.

In this picture, a Democratic administration may be more willing to encourage expansive judicial interpretation of human rights controversies because doing so will allow it to shore up support among its left-leaning constituencies and help it distinguish its human rights credentials from the Republican opposition. More specifically, such a strategy may help left-leaning administrations entrench ideological objectives on issues in which they are perceived to have an electoral advantage over conservatives. By contrast, Republican administrations have a stronger incentive to play up their perceived strengths in promoting national security and business interests. They are therefore likely to consider an increased judicial role in human rights litigation as an obstacle to advancing those issues in which they tend to have an electoral advantage over Democrats. Furthermore, right-leaning judges may be more willing to defer to presidential exclusivity in international human rights policy, especially when they suspect that their fellow judges are more likely to be influenced by progressive international law norm entrepreneurs than the political branches.

Put differently, in the strategic environment depicted above, elected officials and judges have an incentive to provide mutual political capital for each other with regard to polarizing domestic disputes over international human rights enforcement. Left-leaning elected officials may rely on court decisions by sympathetic judges to shore up political support within their coalitions and attempt to depict conservative groups opposed to a progressive vision of human rights as outliers or extremists. Conservative elected officials may also seek to exploit deep-seated divisions within the judiciary over the merits of enforcing human rights to question the democratic pedigree of using courts to enforce contested norms of customary international law. Finally, right-leaning judges may also anticipate that they will receive political cover from sympathetic interest groups and members of Congress if they resist invitations of a Democratic administration to engage in a more expansive interpretation of ATS claims.

This Article first critically analyzes the extant literature on judicial involvement in foreign affairs controversies. It then outlines a simple partisan electoral competition explanation to account for the variation in both the judicial and presidential approaches to foreign relations controversies in the United States. Finally, it illustrates this dynamic by reference to civil disputes under the ATS.

The basic argument is that Democratic and Republican administrations are responsive to distinct constituencies who are likely to have conflicting preferences over the wisdom of ATS adjudication. Democrats have stronger ties to organized trade unions, transnational norm activists, and

minority groups who are likely to have complementary goals in pushing more aggressively for the domestic enforcement of international human rights norms. On the other hand, the constituency of the Republican Party includes internationally oriented business interests, as well as hawkish groups who are likely to view ATS adjudication as an obstacle to their policy objectives.

Yet, before the early 2000s, the distributional implications of ATS adjudication were not necessarily as pronounced for conservative leaning constituencies. Two developments changed this dynamic. The first was the expansion of the target of ATS claims to corporate defendants, which started in the late 1990s.<sup>17</sup> The other was the onset of the Bush Administration's war against terrorism in 2001, which raised concerns about the exposure of foreign military allies to tort claims in United States courts. These developments helped mobilize conservative business and hawkish constituencies who now view ATS adjudication not only as a hindrance to foreign policy flexibility of the executive branch, but also as a threat to their material and ideological interests.

This Article also explores the significance of the Court's recent decision in *Kiobel* and the conflicting positions staked out by lawyers from the Bush and Obama Administrations on the question of the territorial reach of the ATS. It concludes by exploring some implications for some of the debates concerning optimal constitutional design in foreign relations.

## II. COURTS AND FOREIGN AFFAIRS: ALTERNATIVE ACCOUNTS

Commentary on the willingness of courts to adjudicate more aggressively on foreign relations controversies tends to rely on formalist or functionalist explanations. Typically, formalists evaluate questions about the reach of judicial authority by reference to the constitutional text or the founders' perceived allocation of interpretive authority.<sup>18</sup> But the Constitution's text on foreign relations is sufficiently ambiguous that traditional canons of interpretation are unlikely to resolve the most contested questions about the role of either the courts or the political branches in foreign affairs.<sup>19</sup> Moreover, while resort to formal

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<sup>17</sup> See *Doe I v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); *Nat'l Coal. Gov't of the Union of Burma v. Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997).

<sup>18</sup> Cf. Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 154 (2004) (observing that the debate about whether the ATS creates a cause of action has been "one of the sharpest and most bitter" and that "neither side has convinced the other" using formalist and originalist methods).

<sup>19</sup> See Robert Knowles, *American Hegemony and the Foreign Affairs Constitution*, 41 ARIZ. ST. L.J. 87, 94 (2009) ("The uniqueness of foreign affairs stems in part from a void in the text that has long bedeviled constitutional analysis in this area. Article II of the

constitutional rules regarding the separation of powers is undoubtedly important, it does not explain why courts would ever change their willingness to intervene in foreign relations controversies or why the political branches would allow them. As a generation of social science scholarship suggests, political actors have a wide range of tools to constrain courts that act against their institutional interests regardless of what one thinks the constitutional text says.<sup>20</sup> And even when formal authority is specifically allocated to a specific branch of government, it does not necessarily mean that such authority will be politically sustainable over time, especially when domestic institutional actors have conflicting preferences.

Another class of explanations, which is more functionalist in nature, emphasizes factors such as the superpower status of the United States, the unique demands during the Cold War, and the competence of the political branches to adequately represent American interests abroad.<sup>21</sup> According to one such view, as the political realism that characterized much of the Cold War recedes, courts are emboldened to play a more significant role in safeguarding individual liberties and basic rights from the actions of autocratic governments.<sup>22</sup> A related view focuses on constructivist

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Constitution specifically allocates only a handful of foreign affairs powers to the President, but Article I fails to provide Congress with all, or even most, of the remaining powers necessary to conduct foreign policy.”); Jide Nzelibe, *Our Partisan Affairs Constitution*, 97 MINN. L. REV. 838, 841 (2013) (“[T]he established constitutional doctrine governing the allocation of foreign affairs authority is sufficiently sparse and ambiguous that there is often significant leeway for political actors to influence the contours of foreign affairs authority to suit their political objectives.”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 236–37 (2001) (“A common tenet of scholars who agree on little else is that once one moves beyond the war and treaty-making powers, the Constitution itself has little to say about the relative roles of the President and Congress, but rather contains substantial gaps that compel resort to other considerations.”).

<sup>20</sup> See, e.g., Lee Epstein, Jack Knight & Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L.J. 583, 585 (2001) (“[G]iven the institutional constraints imposed on the [U.S. Supreme] Court, the Justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches.”); William N. Eskridge, Jr., *The Judicial Review Game*, 88 NW. U. L. REV. 382, 384 (1993) (arguing that the “constitutional structure suggests that judicial review might be modeled as a positive political game”); Tonja Jacobi, *The Impact of Positive Political Theory on Old Questions of Constitutional Law and the Separation of Powers*, 100 NW. U. L. REV. 259, 159–62 (2006) (discussing the role of a strategic judiciary in a separation of powers context).

<sup>21</sup> See, e.g., Daniel Abebe, *Not Just Doctrine: The True Motivation for Federal Incorporation and International Human Rights Litigation*, 29 MICH. J. INT’L L. 1 (2007) (using international relations realism to argue for greater judicial deference to executive-branch views in ATS cases); Knowles, *supra* note 19, at 95–102; Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 992–95 (2004).

<sup>22</sup> See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004) (describing the worthwhile trend

explanations that stress the trans-judicial diffusion of norms across national borders.<sup>23</sup> In its most common version, this framework assumes a form of judicial cross-pollination, which results in a semi-convergence of beliefs by judges across states regarding the wisdom of using courts to protect human rights.<sup>24</sup>

While all these explanations help illuminate certain aspects of why judges might be more willing to enforce human rights norms, they are hardly sufficient. First, they do not account for the precise timing of when judges might decide to be more aggressive in enforcing human rights norms. Second, they hardly explain why there is significant variation in the willingness of judges to enforce these norms within and across various states. Third, like the formalist accounts, they do not explain why the political branches would suddenly be willing to allow courts to intrude on institutional terrain that has been traditionally occupied by other power holders. Fourth, these theories presuppose that the judiciary is a collective institution that has a coherent and well-defined set of institutional preferences. As Adrian Vermeule has observed in another context, such a notion suffers from the logical fallacy of division because the judiciary as an institutional actor is a “‘they,’ and not an ‘it.’”<sup>25</sup> Given the conflicting

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toward judicial empowerment); *see also* JEREMY A. RABKIN, *THE CASE FOR SOVEREIGNTY: WHY THE WORLD SHOULD WELCOME AMERICAN INDEPENDENCE* (2004) (arguing for greater national independence from world bodies and trends). Some commentators have also pointed to the increasing role played by international courts in resolving human rights disputes. *See* Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT’L L. & POL. 709, 709 (1999) (“When future international scholars look back at international law and organizations at the end of the twentieth century, they probably will refer to the enormous expansion and transformation of the international judiciary as the single most important development of the post-Cold War age.”).

<sup>23</sup> *See* Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 639–46 (2004); Roger P. Alford, *The Nobel Effect: Nobel Peace Prize Laureates as International Norm Entrepreneurs*, 49 VA. J. INT’L L. 61 (2008) (exploring how Nobel Laureates have played an especially important role as preference-creators in the development of international legal norms); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 506–29 (2005) (discussing norm export and its role in the development of customary international law on the death penalty). For a good discussion of norm diffusion in an international legal context, *see* Katerina Linos, *How Can International Organizations Shape National Welfare States?: Evidence from Compliance with European Union Directives*, 40 COMP. POL. STUD. 547 (2007).

<sup>24</sup> *See* Melissa Waters, *Creeping Monism: The Judicial Trend Toward Interpretative Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 628 (2007) (“By developing a wide variety of so-called interpretive incorporation techniques, judges are entrenching international treaty obligations into domestic law, thus becoming powerful mediators between the domestic and international legal regimes.”).

<sup>25</sup> *See* Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. CONTEMP. LEGAL ISSUES 549, 555–64 (2005) (observing that,

policy and ideological preferences of judges across the United States judiciary, it is a somewhat heroic assumption to think they will ever converge upon any coherent set of preferences or beliefs about how, when, and whether to enforce international law.

Finally, a realist approach to the expansion of judicial authority in foreign affairs focuses on the self-interested incentives of judges. Eyal Benvenisti and George Downs, for example, have emphasized institutional self-preservation rationales, contending that domestic courts may resort to greater judicial oversight of foreign affairs in order to resist globalization's threat to their national democratic processes.<sup>26</sup> In this picture, rather than being enamored by global justice and the prospect of spreading human rights norms, courts strategically expand their dockets in order to reclaim some of the policy space that has been delegated to international institutions.

This Article builds on the work of Benvenisti, Downs, and others to develop a more comprehensive realist framework for explaining both judicial and presidential attitudes towards foreign affairs controversies in the United States. Unlike Downs and Benvenisti, however, this framework does not focus on institutional self-preservation or empire building rationales. It instead stresses a partisan or an electoral logic to judicial intervention in disputes implicating foreign affairs. By incorporating partisan political competition, this approach better explains why we might observe variation in the willingness of American judges to adjudicate on disputes implicating certain foreign affairs, such as ATS disputes. Moreover, it also explains why different presidential administrations might exhibit divergent preferences for a more active role for courts in certain foreign relations controversies. At bottom, this account is consistent with the view that judges will not tend to go out on a lurch to grab power from the political branches, but are more likely to take on those roles assigned to them by other power holders for self-interested reasons.<sup>27</sup> After outlining the basic assumptions underlying the theory, this Article will then illustrate the theoretical framework by reference to disputes under the ATS.

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among other such factors, “[t]he collective character of the judiciary produces irreducible disagreement about competing interpretive approaches” and that even where disagreement is absent, “results [will] contradict widely agreed-upon interpretive rules, and thus count as mistakes from any normative perspective”).

<sup>26</sup> See Eyal Benvenisti & George W. Downs, *National Courts, Domestic Democracy, and the Evolution of International Law*, 20 EUR. J. INT'L L. 59, 61 (2009); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT'L L. 241, 244 (2008).

<sup>27</sup> See Keith E. Whittington, “Interpose Your Friendly Hand”: *Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586 (2005).

### III. THE THEORETICAL FRAMEWORK

This Part sketches out how partisan orientation influences both the willingness of presidents to delegate interpretive authority over certain foreign affairs controversies to judges and the willingness of judges to accept that delegation. More specifically, it explores why different administrations would have varying preferences towards empowering courts to address international human rights controversies.

At bottom, this framework assumes that societal pressure alone from human rights groups and their allies is not sufficient to account for why elected officials might take up the banner of protecting human rights in foreign countries. Simply put, elevating the legal protection of human rights violations committed in foreign countries is often fraught with significant political risks, and politicians are not likely to give up their institutional prerogative in this policy area unless they foresee tangible political benefits. But as suggested in more detail below, even when such benefits exist, they are not likely to be symmetric across Republican and Democratic administrations. On the contrary, the entrenchment of human rights policies through judicial empowerment is more likely to favor the ideological and electoral objectives of Democrats or left-leaning parties.

The theoretical framework advanced here envisions the partisan dynamic as involving two separate inquiries. First, how does the partisan orientation of an administration affect its choice of certain foreign policy objectives? Second, how does judicial empowerment affect the ability of elected officials to carry out and entrench their partisan foreign policy objectives?

#### A. The Electoral Logic: Partisan Orientation and Foreign Policy

Political ideologies play a significant role in both structuring how political parties are organized and how such parties solicit support from those members of the domestic audience on whom they depend for electoral support. In the United States, for instance, recent research suggests that political parties exhibit distinct ideological preferences over foreign policy objectives.<sup>28</sup> The received wisdom is that Republicans (or right-leaning parties) tend to emphasize free trade and a more hawkish national security stance, while Democrats (or left-leaning parties) tend to prioritize redistributive economic policies, human rights for oppressed and minority groups, a greater role for multilateral institutions, and the resolution of international conflict through peaceful mediation.<sup>29</sup> Taking a glance at

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<sup>28</sup> See, e.g., Charles A. Kupchan & Peter L. Trubowitz, *Dead Center: The Demise of Liberal Internationalism in the United States*, 32 INT'L SECURITY 7 (2007) (chronicling the rise of partisan polarization in American foreign policy).

<sup>29</sup> See generally Danny Hayes, *Candidate Qualities through a Partisan Lens: A Theory*

post-World War II (WWII) platforms of the Republican and Democratic parties appears to vindicate the received wisdom. For the most part, Democratic Party platforms have tended to adopt a much more sanguine view of multilateral institutions and international human rights norms than their Republican counterparts.<sup>30</sup> Republican Party platforms, on the other hand, tend to stress issues like national security, free trade, and assistance targeted to individuals subjected to mistreatment by communist regimes or other foreign adversaries of the United States.<sup>31</sup> Beyond the United States, comparative politics scholars have pointed out that European conservative parties are similarly more hawkish and less prone to egalitarian human rights sentiments than European left-leaning parties.<sup>32</sup>

Nonetheless, there is reason to believe that ideology alone is not sufficient to guarantee that a political party will stake out a strong position

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*of Trait Ownership*, 49 AM. J. POL. SCI. 908, 910 n.2 (2005) (reaffirming Petrocik's data from 1996 and observing that issue ownership between the parties has remained largely unchanged over the years); John R. Petrocik, *Issue Ownership in Presidential Elections, with a 1980 Case Study*, 40 AM. J. POL. SCI. 825, 832 (1996) (showing the results of surveys, which indicated generally favorable perceptions of Republicans in foreign policy, defense, economic, and social issues, while Democrats had favorable perceptions in social welfare issues); John R. Petrocik et al., *Issue Ownership and Presidential Campaigning, 1952–2000*, 118 POL. SCI. Q. 599, 599, 603 (2003) (“Democrats have an electoral advantage when problems and issues associated with social welfare and intergroup relationships are salient[,]” while “Republicans are viewed as likely to protect traditional American values, keep taxes low, government small, and national security strong.”).

<sup>30</sup> See *Political Party Platforms: 2008 Democratic Party Platform*, AM. PRESIDENCY PROJECT (Aug. 25, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78283> (endorsing the ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) as well as the Convention on the Rights of Persons with Disabilities); *Political Party Platforms: Democratic Party Platform of 1960*, AM. PRESIDENCY PROJECT (July 11, 1960), <http://www.presidency.ucsb.edu/ws/index.php?pid=29602> (affirming American commitment to the United Nations and the termination of all race discrimination); *Political Party Platforms: Democratic Party Platform of 1992*, AM. PRESIDENCY PROJECT (July 13, 1992), <http://www.presidency.ucsb.edu/ws/index.php?pid=29610> (emphasizing the importance of multilateral trade agreements and advocating for an American plan to eliminate world hunger).

<sup>31</sup> For instance, both the 1980 and 1984 platforms accused the Democrats of not being sufficiently solicitous of human rights of citizens in Soviet Bloc states. See *Political Party Platforms: Republican Party Platform of 1980*, AM. PRESIDENCY PROJECT (July 15, 1980), <http://www.presidency.ucsb.edu/ws/index.php?pid=25844>; *Political Party Platforms: Republican Party Platform of 1984*, AM. PRESIDENCY PROJECT (Aug. 20, 1984), <http://www.presidency.ucsb.edu/ws/index.php?pid=25845>.

<sup>32</sup> See Eric Belanger & Bonnie M. Meguid, *Issue Salience, Issue Ownership, and Issue-Based Vote Choice*, 27 ELECTORAL STUD. 477, 478 (2008) (analogizing the issue-ownership reputations of the American Democrats and Republicans with those of the English Labour Party and Conservative Party, respectively); Glenn Palmer et al., *What's Stopping You?: The Sources of Political Constraints on International Conflict Behavior in Parliamentary Democracies*, 30 INT'L INTERACTIONS 1, 7–8 (2004).

on certain foreign policy issues like human rights or national security. After all, parties are not simply policy maximizers; they also care about winning elections. There are, however, significant electoral benefits that political parties stand to gain by distinguishing their foreign policy positions.

First, while elected officials often seek a broad base of support for their policies to get elected, it is the views of the elected official's core constituency that are often most crucial in how policies are ultimately carried out. As Bueno De Mesquita and others have observed, politicians have an incentive to focus their efforts on the subset of the electorate that make up their winning coalition. In democracies that winning coalition is not necessarily a majority of the voters, but rather, a subset that is comprised of the politician's core partisan supporters.<sup>33</sup> Elected leaders have an incentive to be mindful of the policy preferences of the narrow coalitions that are largely responsible for keeping them in office. Thus, these leaders are likely to take measures that minimize the risks that they will erode their support among members of this coalition.<sup>34</sup>

All else equal, we should expect Democratic politicians, once they are in office, to be more likely to favor a more progressive approach to human rights policies than Republican politicians. Why would this be the case? Simply put, Democrats are more likely to have their winning coalition comprised of voters and interest groups who are sympathetic to promoting social and economic rights across national boundaries.<sup>35</sup> In other words, since governments of the left draw their base of support from labor and minority groups, such governments may be more open to pursuing an aggressive human rights policy because doing so is more likely to reinforce the power of their loyal constituencies. It might also weaken the power of domestic forces opposed to progressive social and economic reform. Moreover, the substantive nature of the rights protected under U.N. Human Rights Conventions and norms of customary international law are more likely to favor the substantive political goals of left-leaning parties. For instance, the various U.N. Human Rights Conventions typically touch on the scope of many substantive rights that are still the source of significant

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<sup>33</sup> See BRUCE BUENO DE MESQUITA ET AL., *THE LOGIC OF POLITICAL SURVIVAL* (2003); Edward L. Glaeser et al., *Strategic Extremism: Why Republicans and Democrats Divide on Religious Values*, 120 Q. J. ECON. 1283 (2005); Gábor Virág, *Playing for your Own Audience: Extremism in Two-Party Elections*, 10 J. PUB. ECON. THEORY 891 (2008).

<sup>34</sup> See, e.g., T. Clifton Morgan & Kenneth N. Bickers, *Domestic Discontent and the External Use of Force*, 36 J. CONFLICT RESOL. 25 (1992).

<sup>35</sup> As Bueno de Mesquita and others have observed, politicians have an incentive to focus their efforts on the subset of the electorate that makes up their winning coalition, and in democracies, that winning coalition is not necessarily a majority of the voters but rather a subset that is comprised of the politician's core partisan supporters. See MESQUITA ET AL., *supra* note 33, at 277–87.

contention in advanced democracies, such as capital punishment, abortion, discrimination towards women and minority groups, rights of immigrants and refugees, coercive interrogation, and rights of criminal suspects.<sup>36</sup> Moreover, many of the U.N. Human Rights Conventions espouse a vision of positive economic and social rights, such as access to decent living conditions, affordable housing, education, income, and employment<sup>37</sup>—objectives that although favored by many groups on the left, are largely anathema to core right-leaning constituencies.

On the other hand, both U.N. and Regional Human Rights Conventions do very little to protect the rights that right-leaning parties and constituencies care most about, such as the right to private property, school choice, or—more uniquely in the American context—the right to bear arms.<sup>38</sup> To be sure, these U.N. Conventions also tend to protect rights to worship and religious practice, which are of importance to certain right-leaning constituencies, but such rights are hardly under threat in modern democracies. Thus, to the extent that promoting a progressive global vision of human rights diverts resources and attention from those foreign policy issues Republican constituents care most about, we should anticipate Republican administrations being more sensitive to the political costs of prioritizing human rights policies in their interaction with foreign states. More importantly, however, many of the U.N. Human Rights Conventions and customary human rights norms may often pose an obstacle to achieving policy goals favored by right-leaning constituencies. For instance, the Religious Right in the United States, which has been a significantly influential advocacy coalition within the Republican Party, has been generally supportive of capital punishment and morality legislation and has been skeptical of government intrusion into the family sphere.<sup>39</sup> These

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<sup>36</sup> See, e.g., Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (entered into force May 3, 2008); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

<sup>37</sup> See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) (recognizing rights to health care, education, and a living wage); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) (declaring the right to a sufficient standard of living, including the right to health care).

<sup>38</sup> See Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 150 (Michael Ignatieff ed., 2005) (describing conservative opposition to human rights treaties in the United States).

<sup>39</sup> See, e.g., *U.S. Religious Landscape Survey*, THE PEW FORUM ON RELIGION & PUBLIC LIFE (2008) (showing results of surveys, which express disapproval of issues such as evolution, homosexuality, abortion and large government from Jehovah's Witnesses, Mormons, and evangelical Christians.); *Our Agenda*, CHRISTIAN COAL. OF AM., [http://www.cc.org/our\\_agenda](http://www.cc.org/our_agenda) (last visited June 19, 2012) (announcing its adherence to

positions conflict with both the spirit and the provisions of the various U.N. Human Rights Conventions. Indeed, such deep-seated partisan divisions over U.N. Human Rights Conventions continue to permeate the current political landscape. For instance, the 2008 Democratic platform endorsed the ratification of the U.N. Convention on the Rights of Persons with Disabilities (CRPD), and the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>40</sup> By contrast, the 2008 Republican platform vowed to reject the CEDAW and the U.N. Convention on the Rights of the Child (CRC):

Because the U.N. has no mandate to promote radical social engineering, any effort to address global social problems must respect the fundamental institutions of marriage and family . . . . We reject any treaty or agreement that would violate those values. That includes the U.N. convention on women's rights . . . and the U.N. convention on the rights of the child.<sup>41</sup>

Second, there is yet another, more important reason to think that the electoral benefits (and costs) associated with pursuing an aggressive international human rights policy are not going to be symmetric across Republican and Democratic administrations. As some commentators have observed, parties generally develop reputations for addressing certain issues better than others and have an incentive to emphasize those issues on which they have an electoral advantage. Thus, rather than seek votes according to a spatial model of electoral competition, where each party stakes out different positions on the same issue, parties tend to own issues and then try to compete by convincing voters that their issues are the most important. As one commentator famously put it, "parties do not debate positions on a single issue, but try instead to make end runs around each other on different issues."<sup>42</sup> As a result, candidates have an incentive to promote legal or

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views such as repealing of "Obamacare," protecting the Defense of Marriage Act, and making the Bush era tax cuts permanent); *Social Issues*, FOCUS ON FAMILY, <http://www.focusonthefamily.com/socialissues/social-issues.aspx> (last visited June 19, 2012) (advocating for, among other things, the disempowerment of "activist judges," bans on abortions, and heightened protection of religious freedom); cf. Christopher Raymond, *The Continued Salience of Religious Voting in the United States, Germany, and Great Britain*, 30 ELECTORAL STUD. 125, 127 (2011) ("A large part of what makes religious voters so tempting as a base of conservative political support is that their social values tend to correspond with conservative political values, which in turn facilitates conservative party identification and voting.").

<sup>40</sup> See *Political Party Platforms: 2008 Democratic Party Platform*, *supra* note 30.

<sup>41</sup> *Political Party Platforms: 2008 Republican Party Platform*, AM. PRESIDENCY PROJECT (Sept. 1, 2008), <http://www.presidency.ucsb.edu/ws/index.php?pid=78545>.

<sup>42</sup> William H. Riker, *Introduction to AGENDA FORMATION* 1, 4 (William H. Riker ed., 1993).

institutional arrangements that emphasize issues they own or that deemphasize issues associated with their political opposition. Thus, rather than try to persuade voters that they offer better policy options across a whole swath of issue areas, partisan candidates will attempt to make the policy problems associated with the issues they own “the programmatic meaning of the election and the criteria by which voters make their choice.”<sup>43</sup>

In the United States, Democrats and Republicans have developed distinct reputations among the electorate for handling a range of foreign and domestic policy issues, which are likely to have a direct effect on the preferences of both parties for placing certain issues on their campaign agendas.<sup>44</sup> Generally, Republicans have cultivated a better reputation for handling matters of national security, illicit drugs, crime, and so-called family values issues, while Democrats have an electoral advantage in economic redistribution and social welfare.<sup>45</sup> Consequently, we should expect Democrats to have a greater incentive than Republicans to place issues related to championing the weak against the strong on the policy agenda, especially if they suspect doing so will shore up the base and also appeal to swing voters.<sup>46</sup> On the other hand, conservative governments or Republicans, who voters associate with strong national security and pro-business policies, are not likely to be credible if they advocate aggressive human rights policies abroad.<sup>47</sup> Since voters are aware that an aggressive posture towards global human rights is unlikely to be consistent with the preferences of core Republican constituencies, voters are likely going to discount the credibility of a Republican candidate’s promise to promote human rights abroad.

Nonetheless, Democrats will only have an incentive to devote significant political capital to the expansion of human rights through judicial entrenchment when certain political conditions are ripe. After all, both swing voters and key Democratic constituencies may deem the aggressive promotion of human rights as an idealistic distraction that conflicts with other more important foreign and domestic policy objectives. Thus, a Democratic administration that is otherwise ideologically

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<sup>43</sup> Petrocik, *supra* note 29, at 828 (emphasis omitted).

<sup>44</sup> See Petrocik et al., *supra* note 29, at 599.

<sup>45</sup> *Id.* at 608–09.

<sup>46</sup> *Id.* at 601–02; Belanger & Meguid, *supra* note 32, at 478 (pointing out that parties “tend to strategically emphasize those issues on which they are perceived (at least for the moment) to be more competent”).

<sup>47</sup> See Helmut Norpoth & Bruce Buchanan, *Wanted: The Education President: Issue Trespassing by Political Candidates*, 56 PUB. OPINION Q. 87, 98 (1992) (arguing that an issue-trespassing strategy “runs the risk of raising issues where familiar party images strongly favor the opposing party. At best, voters may simply ignore the issue; at worst, they may vote for the opponent.”).

predisposed towards promoting human rights may, nonetheless, seek to downplay those issues if it believes that it will conflict with its objectives of obtaining political power. Thus, it is reasonable to assume that a Democratic administration is most likely going to champion human rights aggressively when doing so has obvious electoral benefits. The electoral benefits to a Democratic administration of pursuing an international human rights agenda is likely to be most pronounced when it can be used to cast disrepute on the foreign policy of a prior Republican administration. This is especially true when the prior administration is associated with an amoral foreign policy approach that has either become politically controversial or unpopular. Simply put, support for human rights can be used by a Democratic administration as part of a strategic effort to paint a prior Republican administration as being either complicit or indifferent to widespread human rights abuses in foreign countries.

#### B. The Strategic Role of Courts in Foreign Affairs: Political Entrenchment

Having discussed the nature of partisan division over foreign policy issues like human rights, the next relevant issue is how parties might seek to use other institutional actors to entrench their political preferences. There is a growing literature that explores how various institutions can be exploited instrumentally by political actors for self-interested purposes. Such an instrumental approach towards institutions features prominently in accounts exploring partisan preferences for the decentralization of authority, independent judiciaries, electoral systems, and the choice of presidency versus parliamentary systems.<sup>48</sup> That approach assumes that politicians will choose among alternative institutional arrangements with an eye towards the electoral or policy outcome each arrangement is likely to produce. At bottom, we would expect self-interested politicians to anticipate both threats and opportunities from new institutional arrangements and then take actions to decrease the risks that such arrangements would either undermine their policy preferences or cause them to lose office.

In the context of judicial empowerment, certain conditions have to be in place for political actors to consider the judiciary a valuable vehicle for political entrenchment. As some commentators have observed, delegation of authority to courts is more likely to occur when the current composition of the judiciary is considered ideologically sympathetic to the objectives of the governing coalition.<sup>49</sup> Since the post-WWII era, progressive public

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<sup>48</sup> See Kenneth Benoit, *Electoral Laws as Political Consequences: Explaining the Origins and Change of Electoral Institutions*, 10 ANN. REV. POL. SCI. 363 (2007) (surveying the literature); Thomas F. Remington & Steven S. Smith, *Political Goals, Uncertainty, Institutional Context, and the Choice of an Electoral System: The Russian Parliamentary Election Law*, 40 AM. J. POL. SCI. 1253 (1996).

<sup>49</sup> See, e.g., Whittington, *supra* note 27 (observing that elected officials “may favor the

interest groups fighting for changes in government policy on civil rights, environmental protection, and prisoners' rights have generally found courts to be hospitable vehicles for advancing their policy preferences.<sup>50</sup> Some scholars have suggested that the Warren Court focused its efforts on striking down Jim Crow era state legislation in the South when such legislation was out of step with the prevailing national sentiment.<sup>51</sup> But whether such strategies have been successful is a point of contention in the public law literature. As Gerald Rosenberg has argued, for instance, the belief by progressive elites in the 1950s and the 1960s that the federal courts could be used to achieve substantive social change proved to be largely illusory.<sup>52</sup> Nonetheless, progressive human rights groups have sought to use courts to effect changes in American foreign policy with respect to human rights, but it was only with the 1980 *Filártiga* case that they achieved a favorable judicial response that has withstood political backlash from other power holders.

In the context of international human rights, there are additional reasons to expect that delegating more authority to the courts will be valuable to a governing coalition that is sympathetic to the substantive agenda of the human rights movement. First, outside the judiciary, the options for political entrenchment of international human rights policies by elected officials are limited. In the United States, for instance, the executive branch has significant latitude in interpreting the scope of obligations under existing international legal commitments.<sup>53</sup> In this

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active exercise of constitutional review by a sympathetic judiciary”).

<sup>50</sup> See Cindy Vreeland, *Public Interest Groups, Public Law Litigation, and Federal Rule 24(a)*, 57 U. CHI. L. REV. 279, 281 (1990) (“Over the years, [public interest groups] have grown dramatically in number and in political power, and they have turned to the courts to pursue objectives unachievable through political processes.”); Paul Burstein, *Legal Mobilization as a Social Movement Tactic: The Struggle for Equal Employment Opportunity*, 96 AM. J. SOC. 1201, 1204 (1991) (“[L]itigation has been an important part of the repertoire of those seeking equal opportunity, at least since the NAACP began its campaign against segregation in the 1930’s.”).

<sup>51</sup> See, e.g., Whittington, *supra* note 27, at 588 (observing that “the Warren Court primarily targeted those states and interests who [sic] were resistant to national cultural and political trends”).

<sup>52</sup> See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991) (questioning whether the U.S. Supreme Court is able to bring about widespread social change).

<sup>53</sup> There is a rich debate in the literature about to what extent, if any, courts should defer to the President’s interpretation of international law. Nonetheless, as a descriptive matter, most commentators agree that courts do accord substantial deference. See Bradley, *supra* note 15, at 662 (“[M]atters labeled ‘political questions’ often are instances of judicially-permitted executive branch lawmaking.”); Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1752–58 (2007) (examining the practical impact of the deference doctrine); Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1236–38 (2007)

picture, presidents may strategically decide to interpret an international legal commitment expansively if it promotes their partisan preferences, or to interpret it very narrowly otherwise. Thus, even if one administration adopts an expansive view of what particular treaties or customary international law norms require in the context of human rights, there is no guarantee that a successive administration will also adopt the same, or even a similar, view. Even beyond the question of broad executive discretion in foreign policy, another significant domestic institutional barrier to partisan entrenchment of international human rights is the fragmented nature of American political authority.<sup>54</sup> In other words, institutional structures like federalism make it difficult for presidents or members of Congress to impose an expansive vision of human rights directly on the American people. Since much of the formal authority over social policy in the United States is vested directly in the states that are likely to have heterogeneous preferences regarding human rights, it is not clear that any executive branch mandate to enforce human rights norm would have much traction. Thus, the judiciary may serve a useful vehicle for overcoming resistance by state-level officials to the national imposition of progressive human rights policies, especially in those states where the preferences of dominant local politicians may be significantly out of step with that of the national governing coalition.

Second, in the midst of electoral uncertainty, courts may be a particularly valuable tool for locking in policy outcomes, especially when an administration is aware that its political adversaries will have an incentive to reverse course once they come into power.<sup>55</sup> In this scenario, the politics of judicial appointments assures a Democratic administration at least a plausible chance of finding some sympathetic judges who may be willing to ensure that the administration's human rights vision remains part of the future political agenda regardless of who gets elected. Moreover, the

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(examining the contexts in which courts will defer to Executive Branch determinations of foreign policy); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 194–99 (2006) (offering rebuttal to Justice Stevens's opinion in *Hamdan v. Rumsfeld*); Nzelibe, *supra* note 21, at 980 (exploring the institutional competency of courts with respect to allocations of foreign affairs power); Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1175–78 & nn.10–17 (2007) (examining the executive's power relative to judicial international relations doctrines); David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 497–99 (2007) (contrasting the deference to the Executive Branch in the decades before *Hamdan v. Rumsfeld* with the zero-deference approach of courts in the early nineteenth century).

<sup>54</sup> See generally Moravcsik, *supra* note 38 (describing how conservatives use the fragmented constitutional structure to oppose human rights treaties in the United States).

<sup>55</sup> For a broad statement of this political insurance argument, see TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

possible downside of judicial empowerment to a pro-human rights administration is very little, since unsympathetic judges do not ordinarily have the institutional capacity to entrench an anti-human rights agenda. In the context of judicial enforcement of ATS claims, for instance, the worst-case scenario is that an unsympathetic court may decline enforcement or decide the case adversely on the facts, in which case policy discretion over how to handle the relevant human rights dispute reverts back to the political branches, in other words, the status quo. In this picture, the partisan effect of expansive judicial oversight in international human rights is structurally asymmetric because it provides an administration with a progressive agenda an opportunity to improve on the status quo and, in the alternative, to do no worse than the status quo. For instance, a specific administration could plausibly decide to take a more aggressive stance on human policy against a foreign government regardless of the outcome of an ATS dispute. However, an administration that prefers a much more conciliatory approach to a foreign regime accused of human rights violations might find its flexibility constrained by an adverse judicial determination against the regime.

In sum, a key distinction between conventional political insurance explanations of judicial empowerment and the one offered here is that the veil of ignorance underlying judicial empowerment in this framework is pretty thin. In the traditional political insurance argument, developed in large part by Tom Ginsburg, two or more parties of equal strength operating under a veil of ignorance may favor judicial empowerment as a hedge against the possible loss of office.<sup>56</sup> By contrast, in this framework the effect of the empowerment of the court to resolve human rights controversies is usually favored by only the party that seeks a more aggressive stance on human rights enforcement. Provided that the pro-human rights preferences by a specific party are fixed over multiple electoral periods, judicial empowerment may become an unambiguous windfall for that party. On the other hand, for a party opposed to a more aggressive global human rights agenda, judicial empowerment is likely to be a one-sided cost with little or no countervailing political benefits.

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<sup>56</sup> See *id.* at 243 (“[South Korea’s] 1987 constitutional design reflected the deep political uncertainty faced by three political forces of roughly equal strength. No party could confidently predict it would win power . . . . A system of constitutional review served the interests of all parties under such uncertain conditions, and the design of the court provided it with institutional resources to expand its power.”); see also J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 722 (1994) (discussing the role of partisan competition for judicial independence); Matthew C. Stephenson, “*When The Devil Turns*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 72–73 (2003) (same).

#### IV. AN ILLUSTRATION: THE UNEVEN TRAJECTORY OF ALIEN TORT LITIGATION

In perusing the legal literature, there is a dearth of studies investigating the ideological and political roots of the judicial revival of litigation under the ATS in the late 1970s. Some of the literature hints at the politically charged environment surrounding the 1980 *Filártiga* decision.<sup>57</sup> There has, however, hardly been any systematic account of why ATS litigation emerged specifically during that period, or why subsequent administrations and certain judges initially took widely divergent positions on enforcing ATS claims. Subpart IV.A attempts to outline and explore the political logic of the Carter Administration's receptivity toward judicial enforcement of human rights in the 1970s. Subpart IV.B then illustrates the uneven trajectory of ATS litigation in the federal courts, including the increasing conservative backlash that resulted once certain courts embraced a novel aiding and abetting claim that allowed plaintiffs to bring ATS claims against domestic and foreign corporations.

##### A. The Origins: Carter's Human Rights Agenda and the Judicial Revival of ATS.

For a statute that has elicited so much controversy among contemporary commentators, the ATS is remarkably terse. In its entirety, the statute simply states that federal courts will have "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the laws of nations or a treaty of the United States."<sup>58</sup> In many respects, it is the very ambiguity of the ATS's terse wording that has provided much of the fodder for the modern partisan conflict over the role of human rights litigation in domestic courts.

Four different developments converged in 1980 to make the ATS a vehicle for achieving the judicial entrenchment of a progressive vision of

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<sup>57</sup> See PETER HENNER, *HUMAN RIGHTS AND THE ALIEN TORT STATUTE* 47 (2009) ("By the 1960s, it was generally agreed that a nation's treatment of its own citizens was covered by international law . . . . By 1980 there was a growing international consensus that the nations of the world had a responsibility to ensure that the terrible events that had occurred should never happen again."); Jerome J. Shestack, *Human Rights, the National Interest, and U.S. Foreign Policy*, 506 *ANNALS AM. ACAD. POL. & SOC. SCI.* 17, 20 (1989) ("By the 1970s, the world had changed considerably since WWII. Rough military parity had been established between the two superpowers. The number of participants in the international order had multiplied, and their ability to affect each other had extended. We were moving from a bipolar to a multipolar society in which the global agenda was diverse and complicated. At least, by the early 1970s, compelling reasons had arisen to validate the proposition that a strong human rights policy would serve our national interest.").

<sup>58</sup> 28 U.S.C. § 1350 (2011).

global human rights. First, the 1976 presidential elections ushered in a government that had a strong ideological commitment to a progressive human rights agenda and was aware that the issue of human rights could be used to burnish the credentials of the Democratic Party and discredit that of the Republican opposition.<sup>59</sup> Second, largely because of entrenched Republican congressional resistance, the Carter Administration faced significant obstacles in advancing its human rights agenda in the legislative arena.<sup>60</sup> Third, a well-developed coalition of progressive rights advocacy organizations that could mobilize resources and provide support for impact litigation was already in place during that time period.<sup>61</sup> Fourth, there were federal judges who were sufficiently sympathetic to a progressive vision of human rights and who were willing to accept the executive branch's invitation to engage in doctrinal innovation in this area.

To understand the Carter Administration's turn toward a more aggressive approach to human rights, it is necessary to explore the broader political context. When Carter emerged as the decisive victor in the 1976 presidential elections, the Republicans had been tarred not only by the Watergate controversy, but also by a growing congressional backlash against the amoral realism associated with Nixon's foreign policy.<sup>62</sup> In this

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<sup>59</sup> See, e.g., MARY E. STUCKEY, JIMMY CARTER, HUMAN RIGHTS, AND THE NATIONAL AGENDA 55 (2008) ("For Carter human rights would restore integrity to government practices and thus would also restore citizen trust in government. What the Republicans had ripped apart, Democrats would reunite.").

<sup>60</sup> SCOTT KAUFMAN, PLANS UNRAVELED: THE FOREIGN POLICY OF THE CARTER ADMINISTRATION 31 (2008) ("Turning to Congress did not guarantee success. Republicans tended to disapprove of actions that threatened U.S. relations with right-wing, anti-communist governments.").

<sup>61</sup> See, e.g., Kenneth Cmiel, *The Emergence of Human Rights Politics in the United States*, 86 J. AM. HIST. 1231, 1234, 1240 (1999) ("In the years just prior to the Carter presidency, there was a phenomenal burst of human rights activism in the United States . . . . Dozens of new [human rights] groups started up . . . and the few human rights organizations that already existed grew exponentially. Established foundations and church groups began devoting attention to the topic . . . . They were building international research and activist networks that would be a counterweight to entrenched defenders of national sovereignty."). As some commentators have observed, the shift occasioned by the *Filartiga* decision toward the idea of domestically enforced human rights obligations was relatively significant and swift. See Austen L. Parrish, *Rehabilitating Territoriality in Human Rights*, 32 CARDOZO L. REV. 1099, 1100, 1116 (2011) ("What is astonishing in this evolution is how, in a very short span of time, a change in mindset occurred. Before the 1980s, the idea that foreign nationals could sue or be sued in domestic courts for conduct abroad was almost unheard of.").

<sup>62</sup> See KAUFMAN, *supra* note 60, at 11 ("The 'imperial presidency,' in which much of the U.S. government's power rested in the hands of the chief executive, had begun to disappear. Americans reacted not just to Vietnam but to the Watergate scandal by electing 75 new faces to Congress in 1974."); STUCKEY, *supra* note 59, at 17 ("As badly as Watergate and Vietnam had divided the country, a clear commitment to human rights had the potential to bridge the various fissures that the previous decade had widened—among members of opposing parties, ideologies, and generations.").

political climate, partisan considerations coincided with principles to convince the Democrats that pushing human rights aggressively was not only appropriate, but also electorally prudent.<sup>63</sup>

By the late 1970s, the issue of human rights was used not only to galvanize important loyal constituencies in the Democratic Party, but also to discredit the Republican opposition. Thus, despite the occasional invocations to foreign policy bipartisanship, the White House constantly sought to paint the Republican opposition as apologists for the worst human rights abuses of American allies during the Vietnam War era. In a key Democratic fundraising event, for instance, President Carter made an explicit connection between the Nixon Administration's foreign policy agenda and Watergate:

As you well know, our nation has been deeply wounded in the last few years. The war in Vietnam . . . brought the condemnation of most of the rest of the World on our Nation. We have been embarrassed by the Watergate revelations and by the CIA investigations. There was a sense of malaise and a sense of discouragement and a sense of distrust of our own Government, a sense of betrayal of the fine ideals on which our country was founded. But I think it's accurate to say that a strong emphasis on human rights and every aspect of them has restored to our people a pride again.<sup>64</sup>

The Carter Administration also sought to draw parallels between the Republican and Democratic views on foreign policy and the parties' different positions on polarizing domestic issues like civil rights.<sup>65</sup> But in all these contexts, the administration's message was clear: By fixing the foreign policy damage wrought by the Nixon Administration and restoring America's stature in the world, the Democrats would not only demonstrate

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<sup>63</sup> See STUCKEY, *supra* note 59, at 17.

<sup>64</sup> Jimmy Carter, U.S. President, Remarks at a Democratic National Committee Fundraising Dinner, Los Angeles, California (Oct. 22, 1977), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1977, at 1895–96 (1978).

<sup>65</sup> For instance, in a 1979 Washington, D.C. speech, Carter announced:

Our concern with human rights, which is a foundation of the Democratic Party, begins here at home. We've chipped away at decades of neglect, and we've tried to root out examples of blatant prejudice. We've placed minorities, qualified in every way, in many decision-making jobs in the Federal Government . . . We've brought more minorities and more women into our judicial system than in all the rest of American history combined. And we are not through yet.

Remarks at a Fundraising Dinner, Democratic National Committee (Sept. 26, 1979), in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1979, at 1769 (1980).

their human rights credentials, but also raise doubts about those of the Republican Party.<sup>66</sup>

Initially, Carter moved quickly to make good on his commitment to pursue an aggressive human rights policy on the legislative and bureaucratic fronts. He signed the controversial U.N. Convention on Human Rights, as well as the American Convention on Human Rights, and transmitted a total of four different human rights conventions (including two others signed by previous administrations) to the Senate for ratification.<sup>67</sup>

But Carter's legislative agenda later ran into a number of obstacles. First, gains by conservatives during the 1978 midterm election significantly dampened Congress's initial enthusiasm to make international human rights a priority.<sup>68</sup> Indeed, strong opposition by Republican members of Congress thwarted Carter's initiatives to get a single human rights treaty ratified during his term in office.<sup>69</sup> At bottom, conservative activists and their allies in the Senate tended to view the U.N. human rights treaties as a ploy by left-leaning groups to impose a progressive agenda on the rest of the country.<sup>70</sup> In hindsight, as other commentators have observed, these concerns were not entirely unfounded.<sup>71</sup> After all, many of these U.N. treaties would have touched on many core domestic issues in which there was increasing polarization between the left and right, including criminal punishment, national security, family values, social and economic rights, religion, gender discrimination, and capital punishment. Second, beyond the conservative Republican backlash on Capitol Hill, President Carter also had to contend with resistance from career bureaucrats at the State Department. These bureaucrats viewed the administration's strong emphasis on human rights as a threat to the influence of the regional bureaus, which sometimes had to work closely with foreign regimes that had poor human rights track records.<sup>72</sup> In sharp contrast with Congress and

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<sup>66</sup> As Mary Stuckey observed in her study of the human rights agenda during the 1970s, President Carter took the position that, "The Democrats thus represented the best of the nation's practices and beliefs, which could be understood as his signature policy: human rights." STUCKEY, *supra* note 59, at 56.

<sup>67</sup> *See id.* at 117.

<sup>68</sup> *See* KAUFMAN, *supra* note 60, at 117–18.

<sup>69</sup> *See* STUCKEY, *supra* note 59, at 111 (Carter "failed to get any of [the treaties] ratified due to conservative fears that they would diminish U.S. sovereignty and impinge on the U.S. Constitution . . . Congress was a key barrier to implementing human rights internationally").

<sup>70</sup> *See* Jide Nzelibe, *Strategic Globalization: International Law as an Extension of Domestic Political Conflict*, 105 NW. U.L. REV. 635, 670–71 (2011).

<sup>71</sup> *See* Moravcsik, *supra* note 38, at 150 (describing conservative opposition to human rights treaties in the United States).

<sup>72</sup> *See* JULIE A. MERTUS, BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY 30

the State Department, the courts proved to be more receptive to Carter's human rights agenda. Because of congressional opposition, President Carter did not have much in the way of new legislation that he could use to fortify his human rights agenda in the courts. The political climate proved favorable, however, for judicial revival of the long dormant ATS.

Certain factors in the late-1970s made it more likely that domestic courts could operate with a considerable degree of autonomy in resuscitating the ATS and adjudicating human rights disputes. Most importantly, there was already a strong network of advocacy coalitions in place consisting of public interest groups, law professors, elected members of Congress, and journalists who were not only willing to coordinate efforts to pursue a human rights agenda in the political arena but also before the courts.<sup>73</sup>

In the context of the judicial revival of ATS, the advocacy organization that proved to be most instrumental was the New York based Center for Constitutional Rights (CCR), a progressive outfit that was founded in 1966 to pursue aggressive litigation strategies in support of civil rights.<sup>74</sup> Nonetheless, when the CCR attorneys first agreed to represent Joel and Dolly Filártiga in their claims against a Paraguayan police officer who allegedly tortured their son and brother, they did not have much reason to expect, based upon existing precedent, that any court would agree to review the case on the merits.<sup>75</sup> After all, besides the CCR, other civil rights groups had previously attempted to secure domestic enforcement of international human rights law in courts during the 1950s and 1960s, but without much success.<sup>76</sup>

By the late-1970s, there were hardly any significant changes either in the case law or in the composition of the judiciary that made it more likely any court would agree to hear the case.<sup>77</sup> More importantly, the relevant

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(2d ed. 2008) (observing that “clashes between the staff of the human rights and geographic bureaus were frequent, particularly over Latin America”).

<sup>73</sup> See, e.g., Cmiel, *supra* note 61, at 1234–36 (chronicling the rise, both in numbers and in power, of various human rights advocacy groups such as Amnesty International and Human Rights Watch in the 1970s, along with a growing interest in human rights among many members of Congress, leading to an explosion of reported information about human rights violations).

<sup>74</sup> See *Mission and History*, CTR. FOR CONST. RTS., <http://www.ccrjustice.org/missionhistory> (last visited Mar. 19, 2013) (touting its “creative use of law as a positive force for social change” and “daring and innovative legal strategies which have produced many important precedents”).

<sup>75</sup> See RICHARD ALAN WHITE, *BREAKING SILENCE: THE CASE THAT CHANGED THE FACE OF HUMAN RIGHTS* 213 (2004) (observing that CCR attorneys “felt that [a suit brought under the ATS] would be laughed out of court”).

<sup>76</sup> See Howard Tolley, Jr., *Interest Group Litigation to Enforce Human Rights*, 105 *POL. SCI. Q.* 617, 619–20 (1990–1991).

<sup>77</sup> See WHITE, *supra* note 75, at 235–37 (recounting the early procedural history of the

U.N. human rights treaties that had specified violations of the laws of nations had not been ratified by the U.S. Senate. Even among progressive public interest groups, however, the CCR had a reputation for being a particularly aggressive outfit that was often willing to take cases in which the chances of success on the merits were fairly slim.<sup>78</sup> Not surprisingly, despite what seemed like favorable facts in *Filártiga*, including the brutality of the alleged actions and the presence of the defendant in the United States, the federal district court dismissed the case for lack of subject matter in a terse opinion that largely recited existing case law.<sup>79</sup>

When the CCR attorneys decided to appeal the district court's decision, however, they found a much more sympathetic audience in the Second Circuit, especially in the person of Judge Irving Kaufman. As a Democratic appointee who was elevated to the Second Circuit by President Kennedy, Judge Kaufman already had some familiarity with the U.N. and international law; indeed, as a federal district judge, he had served as one of the American representatives to the Second U.N. Congress on the Prevention of Crime and the Treatment of Offenders.<sup>80</sup> The other members on the panel were Judge Amalya Kears, a Carter appointee who was affiliated with the Executive Committee of the Lawyers' Committee for Civil Rights Under Law;<sup>81</sup> and Wilfred Feinberg, who was a Johnson appointee.<sup>82</sup> Writing for the court, Judge Kaufman reasoned that, despite the absence of governing language in the treaty, international human rights law could also be found in "the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>83</sup>

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*Filártiga* case and the host of rejections that the CCR attorneys encountered in their attempts to have a court accept jurisdiction under the ATS).

<sup>78</sup> See HENNER, *supra* note 57, at 48 (recounting the CCR's "long history of advocating for social justice and human rights" as well as its attempts to utilize the then-unpopular ATS as a vehicle to "vindicate international human rights in U.S. courts").

<sup>79</sup> See *Filártiga v. Peña-Irala* 630 F.2d 876, 879–80 (2d Cir. 1980) (noting that the "district judge recognized the strength of" [Filártiga's] argument," but "felt constrained by dicta contained in two recent [Second Circuit] opinions . . . to construe narrowly 'the law of nations'").

<sup>80</sup> See Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders, London, U.K., Aug. 8–19, 1960, *Report Prepared by the Secretariat* 72, U.N. Doc. A/CONF.17/20 (Aug. 20, 1960).

<sup>81</sup> *Amalya Kears, JUST THE BEGINNING FOUND.*, <http://www.jtbf.org/index.php?src=directory&view=biographies&srctype=detail&refno=13> (last visited Mar. 19, 2013).

<sup>82</sup> *Biographical Directory of Federal Judges: Feinberg, Wilfred*, FED. JUD. CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=742&cid=999&ctype=na&instate=na> (last visited Mar. 19, 2013).

<sup>83</sup> *Filártiga v. Peña-Irala*, 630 F.2d 876, 880 (2d Cir. 1980) (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820)).

Applying these other sources of law, Judge Kaufman concluded that an “act of torture committed by a state official against one held in detention violated established norms of the international law of human rights, and hence the law of nations.”<sup>84</sup> Judge Kaufman understood his decision represented a significant shift in the legal landscape, but he seemed to embrace the role of a judicial maverick pushing for global social change. “Our holding today,” he declared, “giving effect to a jurisdictional provision enacted by the First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.”<sup>85</sup>

However, while a strong human rights movement and a sympathetic judiciary were undoubtedly important for revitalizing the ATS as a tool of human rights enforcement, they were hardly sufficient. Judicial willingness to expand into this delicate realm became politically palatable only when the executive branch was on board. To understand the importance of executive branch support in this dynamic, some historical context is necessary. In hindsight, Judge Kaufman’s soaring rhetoric notwithstanding, his decision in *Filártiga* turned out not to be particularly unprecedented. Indeed, courts had previously attempted to rely on the U.N. Charter and other international U.N. Conventions to enforce human rights domestically.<sup>86</sup> In the immediate post-WWII era, for instance, federal and state courts across the country were inundated with amicus briefs in a wide range of civil rights controversies that invoked both draft U.N. Human Rights Conventions and the U.N. Charter.<sup>87</sup>

Initially, some courts in the post-WWII era seemed receptive to these internationalist arguments.<sup>88</sup> Indeed, in at least one decision, *Sei Fujii v. State*,<sup>89</sup> the California Supreme Court explicitly relied upon the U.N. Charter as one of the grounds for striking down a portion of the California Alien Land Law. However, this post-war judicial alliance with international human rights agreements eventually ended after a severe and protracted political backlash that almost culminated in an amendment to the U.S. Constitution. The proposed amendment championed by Senator Bricker, Republican of Ohio, would have rooted out the possibility of using

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 889.

<sup>86</sup> See generally Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153 (1979).

<sup>87</sup> For a detailed discussion of the approaches of courts and litigants to U.N. human rights agreements, see Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 IOWA L. REV. 901 (1984).

<sup>88</sup> See, e.g., *Oyama v. California*, 332 U.S. 633, 673 (1948) (“[T]his nation has recently pledged itself, through the United Nations Charter, to promote respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language and religion.”).

<sup>89</sup> 242 P.2d 617 (Cal. 1952).

treaties to create binding domestic human rights law by requiring that a treaty shall become effective as internal law in the United States only through legislation “which would be valid in the absence of the treaty.”<sup>90</sup> In the end, the Bricker Amendment movement eventually fizzled out after President Eisenhower promised that none of the proposed U.N. human rights covenants would ever be ratified during his administration.<sup>91</sup> By the mid-1950s, however, courts were overtly distancing themselves from the notion—embraced by human rights activists and certain legal scholars—that the U.N. Charter could be construed as a legally binding document in domestic civil rights controversies.<sup>92</sup>

So what was the difference between *Filártiga* in 1980 and the human rights controversies of the 1950s? First, unlike the mid-1950s, when President Eisenhower opposed the use of courts to vindicate global human rights norms, the Carter Administration embraced the position eventually adopted by Judge Kaufman in *Filártiga*. In its amicus submission before the Second Circuit, the Carter Administration not only argued that the U.N. Charter “represent[ed] a clear break with the traditional view that a nation’s treatment of its citizens is beyond the concern of international law,” but also concluded that “not every case which touches upon foreign relations lies beyond judicial cognizance . . . . Like many other areas affecting international relations, the protection of fundamental human rights is not committed exclusively to the political branches of government.”<sup>93</sup> Thus, overt support by the Carter Administration meant that many of the

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<sup>90</sup> FRANK E. HOLMAN, STORY OF THE “BRICKER” AMENDMENT 27 (1954). Ostensibly, the import of the amendment language was to overrule the Supreme Court’s decision in *Missouri v. Holland*, 252 U.S. 416 (1920), and guarantee the maintenance of those domestic institutional barriers which were making it difficult to pass federal legislation. *Id.*

<sup>91</sup> See HOLMAN, *supra* note 90, at 36. More specifically, Secretary Dulles stated during congressional hearings:

[W]hile we shall not withhold our counsel from those who seek to draft a treaty or covenant on human rights, we do not ourselves look upon a treaty as the means which we would now select as the proper and most effective way to spread throughout the world the goals of human liberty to which this Nation has been dedicated since its inception. We therefore do not intend to become a party to any such covenant or present it as a treaty for consideration by the Senate.

*Treaties and Executive Agreements: Hearing on S.J. Res. 1 and S.J. Res. 43 Before the Subcomm. of the S. Comm. on the Judiciary*, 83d Cong. 825 (1953); see also Editorial Comment, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 348–49 (1995) (“To help defeat the [Bricker] amendment, the Eisenhower administration promised that the United States would not accede to international human rights covenants or conventions.”).

<sup>92</sup> See, e.g., *Rice v. Sioux City Mem’l Park Cemetery*, 349 U.S. 70 (1955); *Vlissidis v. Anadell*, 262 F.2d 398, 400 (7th Cir. 1959).

<sup>93</sup> Memorandum for the United States as Amicus Curiae, *supra* note 2, at 22.

perceived institutional risks associated with judicial intervention into this erstwhile politically charged terrain were muted.<sup>94</sup> However, despite its supportive invocation of the U.N. Charter, the government's submission in *Filártiga* did not reference the backlash that met prior judicial efforts to cite the U.N. Charter and other U.N. human rights covenants during the late 1940s and early 1950s. Neither did it discuss the subsequent Supreme Court decisions from the mid-1950s that had repudiated reliance on the U.N. Charter as a source of binding positive law in civil rights lawsuits.<sup>95</sup>

Second, from a distributive perspective, the political stakes involved in adjudicating the early ATS disputes were not that significant. Unlike during the 1950s human rights controversies, there were few, if any, domestic interest groups aligned with either party that perceived the revival of the ATS as a threat to their ideological or electoral objectives. After all, the only identifiable individuals who would have been obviously affected by the early ATS cases were certain current or former foreign government officials who might be served with process if they visited the United States. Even in those situations, the benefits to victims and human rights groups (or costs imposed on foreign defendants) have often turned out to be more symbolic than concrete. Thus, despite often rendering default judgments awarding significant sums of money to victims in the early ATS cases, collection on these judgments almost never occurred.<sup>96</sup> For instance, the defendant in *Filártiga* returned to Paraguay and the \$10.4 million judgment against him was never collected.<sup>97</sup> More often than not, these early ATS cases ended up proving to be hollow victories for both the victims and advocacy groups dedicated to promoting human rights.

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<sup>94</sup> Indeed, the *Filártiga* court quoted approvingly one of President Carter's speeches on human rights in which he observed that "no member of the United Nations can claim that mistreatment of the citizens is solely its own business. Equally, no member can avoid its responsibilities to review and to speak when torture or unwarranted deprivation occurs in any part of the world." *Filártiga v. Peña-Irala*, 630 F.2d 876, 889 n. 24 (2d Cir. 1980) (quoting President James Carter, Peace, Arms Control, World Economic Progress, Human Rights: Basic Priorities of U.S. Foreign Policy, Address Before the United Nations General Assembly Hall (Mar. 17, 1977), in DEP'T ST. BULL. 329 (Apr. 1977), at 332).

<sup>95</sup> See *supra* notes 86, 92 and accompanying text.

<sup>96</sup> See HENNER, *supra* note 57, at 244 ("ATS cases are usually unsuccessful in obtaining monetary damages, and in those very few cases where damages have been collected, it has only been after many years of litigation."); George Norris Stavis, Note, *Collecting Judgments in Human Rights Torts Cases—Flexibility for Non-Profit Litigators?*, 31 COLUM. HUM. RTS. L. REV. 209, 215–16 (1999) ("Regardless of the cause, an Alien Tort Claims Act victory in a United States court is the tip of the iceberg: successful collection has thus far evaded all plaintiffs.").

<sup>97</sup> See WHITE, *supra* note 75, at 281.

B. The Post-Filártiga Trajectory: The Conservative Pushback Against the Aiding and Abetting Cases

While Republican administrations since Reagan have been consistently lukewarm towards the judicial revival of the ATS, conservative opposition to adjudication under the statute became most pronounced and strident under the presidency of President George W. Bush in the early 2000s. I argue that the expansion of the target of ATS lawsuits to include American and foreign corporations as well as the onset of the war on terrorism helped to mobilize conservative domestic constituencies who now viewed the ATS not only as a hindrance to foreign policy flexibility, but also as a threat to their material and cultural interests.

1. *Lukewarm Conservative Opposition to ATS Based on Foreign Policy: 1980–1993*

Despite the low stakes in the early ATS cases, the pendulum quickly swung away from interest in human rights enforcement when the Reagan Administration came into power in 1980.<sup>98</sup> In his 1980 campaign, for instance, Reagan attempted to forge a foreign policy agenda that was clearly distinct from that of his predecessor.<sup>99</sup> Ironically, in stressing a fundamental reversal of course in foreign policy, the narrative deployed by the Republicans in 1980 echoed the one used by Carter against the Nixon and Ford Administrations four years earlier. The 1980 Republican Platform declared:

Never before in modern history has the United States endured as

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<sup>98</sup> Ernest Lefever, like other academics such as Ernst Haas and Stanley Hoffman, denounced the Carter human rights policy as wrongheaded: “[W]e cannot export human rights . . . in dealing with Third World countries, their foreign policy behavior should be the determining factor, not their domestic practices.” *Human Rights and US Foreign Policy: Hearings Before the Subcomm. on Int’l. Orgs. of the H. Comm. on Foreign Affairs*, 96th Cong. 230–231 (1979) (statement of Ernest Lefever), *reprinted in* JOSHUA MURAVCHIK, *THE UNCERTAIN CRUSADE: JIMMY CARTER AND THE DILEMMAS OF HUMAN RIGHTS POLICY* xvii (1986).

<sup>99</sup> The 1980 Republican Party Platform pronounced:

For three and one-half years, the Carter Administration has been without a coherent strategic concept to guide foreign policy, oblivious to the scope and magnitude of the threat posed to our security, and devoid of competence to provide leadership and direction to the free world. The Administration’s conduct of foreign policy has undermined our friends abroad, and led our meet [sic] dangerous adversaries to miscalculate the willingness of the American people to resist aggression. Republicans support a policy of peace through strength; weakness provokes aggression.

*Political Party Platforms: Republican Party Platform of 1980*, *supra* note 31.

many humiliations, insults, and defeats as it has during the past four years: our ambassadors murdered, our embassies burned, our warnings ignored, our diplomacy scorned, our diplomats kidnapped. The Carter Administration has shown that it neither understands totalitarianism nor appreciates the way tyrants take advantage of weakness.<sup>100</sup>

Once he assumed office, Reagan quickly attempted to distance himself from Carter's focus on human rights. Indeed, his first nominee for Chief Human Rights Officer was Ernest Lefever, an academic who was openly critical of Carter's approach to human rights.<sup>101</sup> Ultimately, however, Reagan did not succeed in achieving the clean break with Carter's legacy as his efforts to deemphasize human rights received significant pushback from the Democratic majority in Congress.<sup>102</sup> As various commentators have suggested, although the Carter Administration first encountered resistance to his agenda from the State Department bureaucracy, by the end of his term in office, human rights had become partially ingrained in the State Department's mission.<sup>103</sup> In the end, while retaining some of the rhetoric and institutional trappings of the human rights agenda established by Carter, Reagan decided to deploy such rhetoric and trappings to a largely narrow end—an attack on the human rights policies of communist bloc countries.<sup>104</sup>

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<sup>100</sup> *Id.*

<sup>101</sup> See *supra* note 86; Ernest W. Lefever, *United States, Japan, and the Defense of the Pacific*, 6 POL. REV. 89, 90 (1978) (“President Jimmy Carter’s efforts to develop a new foreign policy consensus have been singularly unsuccessful, partly because he does not understand the roots of the old alliance against communist expansion, and partly because he appears to be a vacillating victim of conflicting staff advice. On the deepest level, Mr. Carter gives the impression of being profoundly confused about America’s external responsibilities . . .”).

<sup>102</sup> See MERTUS, *supra* note 72, at 31–32 (observing that after taking office, Reagan attempted to “rein in the human rights work of the State Department . . . . The Lefever nomination proved to be a wake-up call on human rights for the Reagan administration. Having underestimated the support for human rights both within and outside government, the administration was surprised when the Senate Foreign Relations Committee rejected Lefever’s nomination with a vote of thirteen to four”).

<sup>103</sup> See, e.g., *id.* at 33 (“The Reagan administration reoriented the human rights agenda by recognizing . . . American exceptionalism throughout . . . . By the end of Reagan’s second term . . . human rights were accepted as an important component of the American national interest.”) (internal quotations omitted).

<sup>104</sup> See, e.g., *id.* at 32 (observing that Elliot Abrams, Reagan’s assistant secretary of the Bureau of Human Rights, “seized upon human rights as a useful tool for promoting his own anticommunist ideological agenda in Latin American and the Caribbean . . . . The self-serving manner in which Abrams used human rights to advance public policy goals is characteristic of the entire Reagan administration”); cf. Betty Glad, *Black and White Thinking: Ronald Reagan’s Approach to Foreign Policy*, 4 POL. PSYCHOL. 33, 44 (1983) (commenting that Reagan’s foreign policy was perhaps inconsistent in its condoning of human rights abuses by nations that were allied with the U.S. against the “Soviet

While both the Reagan and the elder Bush Administrations opposed the proliferation of ATS litigation as an unwarranted judicial interference with the executive branch's prerogative in foreign affairs, early partisan opposition to judicial enforcement was hardly strident or sustained. Prior to 1996, ATS disputes were still targeting foreign officials almost exclusively, and from a political perspective the stakes were still relatively low.<sup>105</sup> Nonetheless, both administrations were sufficiently concerned that a proliferation of such suits could constitute a threat to American foreign policy objectives. The Reagan Administration filed an amicus brief in the Ninth Circuit *Trajano* case, opposing claims brought by Philippine citizens alleging torture and wrongful death against former Philippine President Ferdinand Marcos.<sup>106</sup> And while the Administration of George H.W. Bush did not file any amicus brief in ATS actions, it expressed opposition to judicial enforcement of the extraterritorial torts against foreign officials in congressional testimony.<sup>107</sup> Nonetheless, the first formal legislative response to ATS litigation, the passage of the Torture Victims Protection Act (TVPA),<sup>108</sup> actually took place during the elder Bush's Administration. Moreover, while the Clinton Administration was noticeably less strident than Carter's in pursuing a human rights agenda, it filed statements of interest supporting litigation on the merits in *Kadic v. Karadzic* and *Doe v. Unocal*.<sup>109</sup>

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challenge").

<sup>105</sup> See Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 177 (2004) (pointing out that prior to recent developments in ATS jurisprudence, which has seen suits filed against corporations, foreign officials, and the United States itself, "the executive branch took a hands-off position throughout the 1990s, apparently maintaining the view, formally expressed in the *Filártiga* litigation, that private litigation to vindicate international human rights does not harm U.S. foreign policy or other national interests"); Beth Stephens, *Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 773-74 (2008) (observing that following the 1996 *Unocal* decision, where corporate liability under the ATS was upheld, the Bush Administration began filing amicus briefs in ATS cases because "litigation could undermine important U.S. foreign policy interests, including national security").

<sup>106</sup> Brief for the United States of America as Amicus Curiae, *supra* note 4.

<sup>107</sup> The Administration's opposition to the notion of aliens bringing tort claims against foreign officials was expressed during congressional hearings on the Torture Victim Protection Act (TVPA), although it is worth observing that George H.W. Bush eventually signed a version of the TVPA into law. See *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Judiciary Comm.*, 101st Cong. 11-16 (1990) (statement of John O. McGinnis, Deputy Assistant Attorney General, Dep't of Justice) (arguing that the international prevention of torture can better be realized through multilateral agreements rather than through the unilateral nature of the TVPA).

<sup>108</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

<sup>109</sup> Statement of Interest of the United States, Nat'l Coal. Gov't of the Union of Burma v.

In the early years, the ATS had somewhat of a mixed reception before the courts. Perhaps not surprisingly, in the immediate aftermath of *Filártiga*, judges appointed by Republican presidents tended to take a much more skeptical view of ATS claims. As one commentator has shown, with respect to the first twelve cases filed, that 77% of Republican-appointed judges ruled in favor of dismissal of ATS claims as opposed to 50% of Democrat-appointed judges.<sup>110</sup> The most well-known of these early cases was *Tel-Oren v. Libyan Arab Republic*, a split-panel D.C. Circuit decision in which Judge Bork famously opined that the ATS was simply a jurisdictional statute, which should not be read to require that “our courts must sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens.”<sup>111</sup> Through the early part of the Administration of George W. Bush, the ATS decisions were sufficiently confusing and disjointed that judges, commentators, and litigants alike were all clamoring for intervention by the Supreme Court.<sup>112</sup>

## 2. *Strident Backlash Against ATS by Business and National Security Interests: 2000–Present*

During George W. Bush’s presidency, the executive branch’s hostility to judicial enforcement of ATS claims took a decisive turn. Early on, the

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Unocal, Inc., 176 F.R.D. 329, 361–62 (C.D. Cal. 1997) (Civ. No. 96-6112-RAP(BQRx)); Statement of Interest of the United States, *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995) (Nos. 94-9035, 94-9069).

<sup>110</sup> See Tolley, *supra* note 76, at 633.

<sup>111</sup> 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).

<sup>112</sup> Take for example the D.C. Circuit Court of Appeals opinion in *Tel-Oren*. Judge Edwards concurred, saying:

This case deals with an area of the law that cries out for clarification by the Supreme Court. We confront at every turn broad and novel questions about the definition and application of the “law of nations.” As is obvious from the laborious efforts of opinion writing, the questions posed defy easy answers.

*Id.* at 775. Judge Bork, in a separate concurring opinion, agreed:

[T]he three opinions we have produced can only add to the confusion surrounding this subject. The meaning and application of section 1350 will have to await clarification elsewhere. Since section 1350 appears to be generating an increasing amount of litigation, it is to be hoped that clarification will not be long delayed. In the meantime, it is impossible to say even what the law of this circuit is. Though we agree on nothing else, I am sure my colleagues join me in finding that regrettable.

*Id.* at 823; see also Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461–63 (1989) (recounting the unpredictable history of ATS jurisprudence in the pre-*Sosa* era).

Bush Administration announced that it would not challenge these claims in court.<sup>113</sup> Subsequently, however, in amicus briefs submitted at all levels of the federal judiciary, the Bush Justice Department adopted a position that implicitly renounced the Second Circuit's holding in *Filártiga*.<sup>114</sup> The Bush Administration embraced a view that was radically different from that of prior Democratic administrations by arguing that the ATS was purely jurisdictional and did not create a cognizable cause of action.<sup>115</sup> It also adopted a more skeptical stance on the likely implications of ATS adjudication on American foreign policy. Significantly, the Bush Administration counseled against the use of judicial common law in discerning what qualifies as a violation of the "law of nations" under the ATS. "[C]ourts must rely upon legislative guidance before exercising substantive law-making authority," the Justice Department brief warned in *Unocal*, "and there is heightened need for such guidance when the issues could impinge upon the 'discretion of the Legislative and Executive Branches in managing foreign affairs.'"<sup>116</sup>

So what changed between the immediate post-*Filártiga* era and the later period of the Bush Administration? First, the events of September 11, 2001 catapulted issues related to fighting terrorism to the fore of the foreign policy agenda. Thus, the political climate became decisively less conducive to emphasizing human rights as a policy priority. For the Bush Administration, the benefits of securing the cooperation of foreign allies in the struggle against terrorism seemed to outweigh the costs of domestic criticism of many of these allies.<sup>117</sup> Moreover, as the Bush Administration

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<sup>113</sup> See MERTUS, *supra* note 72, at 192 ("The election of George W. Bush had many of the lawyers worried that the State Department would begin obstructing [ATS] cases. Yet when, after the administration was installed, the State Department indicated it would not bring new challenges to the [ATS], human rights lawyers thought they were in the clear.").

<sup>114</sup> See Stephens, *supra* note 105, at 773 ("The Bush administration adamantly opposed all ATS litigation as an interference in the foreign affairs powers of the executive branch . . . . [It] filed repeated submissions in corporate-defendant ATS cases, arguing that judicial involvement interferes with foreign policy.").

<sup>115</sup> See Brief for the United States of America as Amicus Curiae at 5–12, *Doe v. Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (Nos. 00-56603, 00-56628) ("It is a fundamental mistake to read the ATS as anything but a jurisdictional provision . . . . [T]he origins of the ATS are consistent with an understanding that it grants the federal courts subject matter jurisdiction over only those claims brought to enforce the 'law of nations' insofar as that law has been affirmatively incorporated into the laws of the United States.").

<sup>116</sup> Supplemental Brief for the United States of America as Amicus Curiae, *supra* note 8, at 3.

<sup>117</sup> For instance, in a State Department letter in an ATS case with a potential for political backlash from the Indonesian government, the Bush Administration argued: "U.S. counter-terrorism initiatives could be imperiled in numerous ways if Indonesia and its officials curtailed cooperation in response to perceived disrespect for its sovereign interests." Letter from William H. Taft, IV, Legal Advisor, U.S. Dep't of State, to Judge Louis F. Oberdorfer, U.S. District Court Judge for the District of Columbia 3 (July 29, 2002) (on file with the U.S.

came under increasing scrutiny for its own practices in interrogating and detaining terrorist suspects,<sup>118</sup> any emphasis on promoting human rights abroad would have likely proven to be an unwelcome distraction. Second, the decision by the Supreme Court to cite favorably to foreign and international law in a couple of controversial cases involving the juvenile death penalty and gay rights had mobilized a vocal public backlash against the use of international law in U.S. courts.<sup>119</sup>

Third, and most important, in the early-2000s, more courts started to endorse the notion that foreign and American corporations could be held liable for the human rights abuses committed by foreign governments under an ATS aiding and abetting theory.<sup>120</sup> To be sure, expanding the target of

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Dep't of State).

<sup>118</sup> See, e.g., Paul Hoffman, *Human Rights and Terrorism*, 26 HUM. RTS. Q. 932, 933 (2004) ("The way this 'war' is being waged is itself a threat to human security. By challenging the framework of international human rights and humanitarian law, so painstakingly developed over the last several decades, the 'war on terrorism' undermines our security more than any terrorist bombing."); Rodney C. Roberts, *The American Value of Fear and the Indefinite Detention of Terrorist Suspects*, 21 PUB. AFF. Q. 405, 405 (2007) ("[T]he treatment of these [detained] men is not merely illegal, but also immoral and unjust."); Mark Mazzetti, *C.I.A. Awaits Rules on Terrorism Interrogations*, N.Y. TIMES (Mar. 25, 2007), <http://www.nytimes.com/2007/03/25/washington/25interrogate.html> ("The interrogation of high-level terrorism suspects in C.I.A. prisons is one of the most criticized aspects of the Bush administration's response to the Sept. 11 attacks.").

<sup>119</sup> Both of the cases were narrowly decided and featured sharp dissents criticizing the majorities' discussion of international law. See *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting) ("More fundamentally, however, the basic premise of the Court's argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand."); *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on certain behavior. Much less do they spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct."); cf. Harlan Grant Cohen, *Supremacy and Diplomacy: The International Law of the U.S. Supreme Court*, 24 BERKELEY J. INT'L L. 273, 273 (2006) (recounting congressional reaction to *Roper*: "The halls of Congress seemed to shudder with anger . . . Representative Tom C. Feeney [said], 'The Supreme Court has insulted the Constitution by overturning its own precedent to appease contemporary foreign laws, social trends, and attitudes,' . . ."); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291, 296 (2005) ("Foreign and international law cannot be legitimately used in an outcome-determinative way to decide questions of constitutional interpretation.").

<sup>120</sup> There is a fairly vibrant debate about the wisdom of extending ATS liability to corporate conduct. See, e.g., Ramsey, *supra* note 16, at 273–75; Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 64 (2008–2009) ("[C]orporate ATS litigation has become a battleground in broader struggles over the role of tort litigation in regulating corporate behavior, and the role of U.S. courts in disputes that may implicate foreign affairs."); David Scheffer & Caroline Kaeb, *The Five Levels of CSR Compliance: The Resiliency of Corporate Liability under the Alien Tort Statute and the Case for a Counterattack Strategy in Compliance Theory*, 29 BERKELEY J. INT'L L. 334, 339 (2011).

ATS litigation to include American and foreign corporations made it much more likely that plaintiffs would be able to recover the kinds of monetary judgments that eluded them when they only sued foreign political officials. But this development mobilized domestic business constituencies that had remained relatively agnostic when ATS litigation started in the early-1980s.

Extending ATS litigation to include aiding and abetting claims against corporations was denounced by business leaders as a purely self-interested ploy by the tort plaintiffs' bar.<sup>121</sup> For instance, the U.S. Chamber of Commerce released a publication warning its members that ATS lawsuits were part of a broader strategy by plaintiffs' lawyers to use the unfavorable publicity of potential lawsuits and other out-of-court tactics to extract huge settlements from corporate defendants.<sup>122</sup> John Howard, the Vice President of the U.S. Chamber of Commerce at the time, alerted the business community in a 2002 editorial: "Did you know that, under current U.S. law, foreigners could sue your company in U.S. courts—if you simply did business, paid taxes, and complied with the laws of a foreign country in which those foreigners allege that an atrocity occurred?"<sup>123</sup> Such business groups became more active in litigation efforts to secure a narrower interpretation of the ATS, usually by amicus filings in aiding and abetting cases.<sup>124</sup> Foreign nations that had a significant multinational presence in the developing world also started submitting briefs expressing concern about the jurisdictional reach of the ATS.<sup>125</sup> As the number of ATS lawsuits targeting corporations proliferated, reaching over 150 cases in 2011 by one account,<sup>126</sup> business friendly commentators argued that the ATS was ripe for legislative intervention.<sup>127</sup> In 2005 Senator Diane Feinstein, a liberal Democrat from California, proposed an amendment to the ATS that would limit its scope to direct participation in the most heinous international

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<sup>121</sup> "U.S. national interests," the Vice President of the Chamber declared in a 2002 op-ed piece, "require that we not allow the continuing misapplication of this 18th century statute to 21st century problems by the latter day pirates of the plaintiffs' bar." John E. Howard, *The Alien Tort Claims Act: Is Our Litigation*, U.S. CHAMBER COM. (Oct. 9, 2002), <http://www.uschamber.com/press/opeds/2002/alien-tort-claims-act-our-litigation>.

<sup>122</sup> 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 (2011).

<sup>123</sup> Howard, *supra* note 121.

<sup>124</sup> See, e.g., Brief of National Foreign Trade Council et al. as Amici Curiae in Support of Petitioners at 7, *American Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (No. 07-919), 2008 WL 437020 (arguing that ATS litigation will hurt foreign investment).

<sup>125</sup> See, e.g., Brief of European Commission as Amici Curiae at 4–13, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339), 2004 WL 177036 (arguing that the ATS's extraterritorial reach should be limited by principles of prescriptive jurisdiction).

<sup>126</sup> See Drimmer & Lamoree, *supra* note 120, at 460.

<sup>127</sup> See GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789*, at 56 (2003).

crimes.<sup>128</sup> As a result, she was denounced by some fellow progressives as beholden to corporate interests.<sup>129</sup> Facing a growing outcry from progressive human rights groups, Senator Feinstein eventually capitulated and withdrew the bill.<sup>130</sup>

Leading conservative commentators also joined the fray, calling on judges to step up and stop the menace of runaway tort suits against domestic corporations by foreign plaintiffs in American courts. In a 2003 *Wall Street Journal* editorial, former Supreme Court Nominee Robert Bork ridiculed the notion that judges could fashion a cause of action for plaintiffs based upon evolving customary international law principles that were not endorsed by Congress.<sup>131</sup> “The notion that the [ATS] is infinitely expandable,” he noted, “is absurd.”<sup>132</sup> This skeptical view was increasingly echoed by conservative academic commentators not only within law schools,<sup>133</sup> but also in think tanks and economic circles. For instance, Gary Hufbauer, a prominent economic commentator and Fellow at the Institute for International Economics, coauthored a piece that estimated that ATS lawsuits could depress U.S. foreign trade with target countries by as much as ten percent, causing \$42 billion loss in American imports and \$21 billion loss in U.S. exports.<sup>134</sup> Other commentators have expressed skepticism as to whether the costs of litigation against corporations under the ATS would be worth the benefits in terms of improvement of human rights practices abroad.<sup>135</sup>

When the Supreme Court decided to hear its first ATS case, *Sosa v.*

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<sup>128</sup> Her proposal would have limited ATS claims to plaintiffs “asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort.” S. 1874, 109th Cong. (as introduced, Oct. 17, 2005).

<sup>129</sup> See Ariel Meyerstein, *The Law and Lawyers as Enemy Combatants*, 18 U. FLA. J.L. & PUB. POL’Y 299, 328–32 (2007).

<sup>130</sup> Letter from Diane Feinstein, U.S. Senator, to Arlen Specter, U.S. Senator (Oct. 25, 2005), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/05113-ij-atca-feinsteinto-specter.pdf>.

<sup>131</sup> See Robert H. Bork, *Judicial Imperialism*, WALL ST. J., June 17, 2003, at A16, available at <http://www.aei.org/article/judicial-imperialism/>.

<sup>132</sup> *Id.*

<sup>133</sup> See, e.g., Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353 (2010); Michael D. Ramsey, *Multinational Corporate Liability Under the Alien Tort Claims Act: Some Structural Concerns*, 24 HASTINGS INT’L & COMP. L. REV. 361 (2001).

<sup>134</sup> See Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT’L ECON. L. 245, 255 (2004); see also HUFBAUER & MITROKOSTAS, *supra* note 125, at 38.

<sup>135</sup> See, e.g., Alan Sykes, *Corporate Liability for Extraterritorial Torts Under the Alien Tort Statute and Beyond: An Economic Analysis*, 100 GEO. L.J. 2161 (2012).

*Alvarez-Machain*,<sup>136</sup> the Bush Administration encouraged the Justices to intervene and stop the onslaught of ATS litigation in the lower courts.<sup>137</sup> In *Sosa*, a Mexican doctor who was kidnapped and brought to the United States to face charges with regard to his alleged role in the murder of an American federal agent, sued one of his Mexican captors.<sup>138</sup> The government endorsed a categorical rule that the ATS could not apply to torts committed outside the United States: “Nothing in Section 1350, or in its contemporary history, suggests that Congress contemplated suits that would be brought based on conduct against aliens in foreign lands.”<sup>139</sup> The Solicitor General at the time, Ted Olson, also denounced the Ninth Circuit’s decision finding a cause of action under the ATS for the plaintiff as a “judicial exercise [that] was profoundly out of line with the separation of powers.”<sup>140</sup> John Bellinger, the State Department Legal Adviser under the Bush Administration, later called for the political branches to step in and protect the prerogative of the executive branch in foreign policy.<sup>141</sup>

Predictably, the Bush Administration’s position set off enormous criticism in certain quarters. Harold Koh, the State Department Legal Adviser under the early part of the Obama Administration, but a Yale Law School Professor at the time, declared that the Bush Administration “sought to upend almost 25 years of court rulings and contradicts previous government interpretations.”<sup>142</sup> A leader of Human Rights Watch, a prominent Washington-based non-governmental organization (NGO), released a statement announcing that the administration’s approach did not have “anything to do with the war on terror, . . . I think this is motivated by a very hard-core ideological resistance within the Justice Department to the whole concept of international law being enforced.”<sup>143</sup>

When the *Sosa* Court addressed the scope of ATS claims, it rendered a sufficiently cautious and parsed decision that left ideologues and interest groups on both sides of the partisan divide claiming victory.<sup>144</sup> Although

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<sup>136</sup> 542 U.S. 692 (2004).

<sup>137</sup> See *Sosa* Brief for the United States, *supra* note 10, at 7–10.

<sup>138</sup> *Sosa*, 542 U.S. at 697–98.

<sup>139</sup> *Sosa* Brief for the United States, *supra* note 10, at 48.

<sup>140</sup> *Id.* at 7.

<sup>141</sup> John B. Bellinger III, *Enforcing Human Rights in U.S. Courts and Abroad: The Alien Tort Statute and Other Approaches*, 42 VAND. J. TRANSNAT’L L. 1, 11–14 (2009).

<sup>142</sup> MERTUS, *supra* note 70, at 193.

<sup>143</sup> See *id.* at 194 (quoting Tom Malinowski, Director, Human Rights Watch).

<sup>144</sup> For example, scholars have differed widely in their views of the ramifications of the *Sosa* decision. Compare Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals about the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111, 112–13 (2004) (observing “the Court’s scant description of the test it envisions,” but arguing that the ruling left the ATS’s function “quite modest and limited” because it requires an “inquiry . . . that is far more restrictive than may initially appear”), with Beth Stephens,

the Court concluded that the ATS itself was merely a jurisdictional statute that did not create a cause of action for violations of the law of nations, it also ruled that courts could still recognize federal common law claims provided such claims “rest on 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.”<sup>145</sup>

Pro-business interest groups immediately applauded the Court’s decision as vindicating a very limited and circumscribed vision of judiciable ATS claims. For instance, Bill Reinsch, President of the National Foreign Trade Council announced:

We welcome the Court’s ruling in the *Sosa* case, which more closely limits the use of the ATS—a statute that has been misused more and more often over the last decade . . . . Particularly distressing has been the use of the ATS in a growing number of cases against multinational corporations that do business around the world. While the *Sosa* case did not involve American business, we believe the Court’s opinion clearly indicates that the ATS should not be used to institute foreign policy in American courts.<sup>146</sup>

On the other hand, Earth Rights International, the Human Rights NGO that represented the plaintiffs in the *Unocal* case, crowed that the ruling “sent a clear message to the corporate lobby and the Bush Administration that human rights matter, and that U.S. courts have an important role to play in their promotion and protection.”<sup>147</sup>

The *Sosa* justices were also divided along a somewhat ideological dimension. Predictably, the conservative justices were skeptical of judicial enforcement of ATS claims in the absence of a separate, legislatively-created cause of action. In a concurring opinion joined by Chief Justice Rehnquist and Justice Thomas, for instance, Justice Scalia criticized the majority for going too far in suggesting that federal courts could create

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*Sosa v. Alvarez-Machain*: “*The Door is Still Ajar*” for Human Rights Litigation in U.S. Courts, 70 BROOK. L. REV. 533, 535 (2004) (observing that while those who sought an expansive interpretation of the ATS and those who wanted the court to render it useless were disappointed, “the decision is a clear victory for those human rights advocates who view the statute as a means to hold the most egregious perpetrators accountable for the most egregious violations of international law”).

<sup>145</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

<sup>146</sup> Elizabeth Ann Chandler, *NFTC and USA\*Engage Cite U.S. Supreme Court Decision to More Narrowly Define Alien Tort Provision as Important Step in Curbing Erroneous Lawsuits*, NAT’L FOREIGN TRADE COUNCIL (June 30, 2004) (quoting Bill Reinsch), <http://www.nftc.org/newsflash/newsflash.asp?Mode=View&articleid=1691>.

<sup>147</sup> EARTHRIGHTS INT’L, IN OUR COURT: ATCA, SOSA AND THE TRIUMPH OF HUMAN RIGHTS 5 (2004), available at <http://www.earthrights.org/sites/default/files/publications/in-our-court.pdf>.

causes of action for the enforcement of international law norms.<sup>148</sup> More broadly, Justice Scalia's concurring opinion underscored a recurring concern of conservatives: progressive elites were exploiting both the courts and the open ended ambiguity of customary international law to achieve policy goals that they could not otherwise achieve in the political arena.<sup>149</sup> Specifically, his concurrence linked the proliferation of ATS litigation to a broader effort by progressive elites to impose international law norms in the United States.<sup>150</sup> To a certain degree, such grounds for skepticism are not entirely unfounded. One might reasonably conjecture that if courts succeed in rehabilitating a vision of customary international law that can expose foreign actors to liability in the United States, then it is very likely that they will eventually hold that such norms also bind domestic state and federal actors.

One contentious issue that the *Sosa* decision left largely unresolved is how much deference courts ought to accord to submissions by the executive branch regarding the foreign policy implications of ATS litigation. The Supreme Court observed that "a strong argument [can be made] that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."<sup>151</sup> The Court, however, did not specify how judges would go about evaluating the credibility of the executive branch's "friend of the court" submissions in ATS disputes. Take, for instance, how courts have treated submissions made by the Bush Administration in ATS litigation. In six out of the eight ATS cases in which the Bush Justice Department submitted amicus briefs, courts refused to accept the Administration's arguments that adjudication would hinder

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<sup>148</sup> Take, for example, this statement by Justice Scalia:

The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates . . . . The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.

*Sosa*, 542 U.S. at 749–50 (Scalia, J., concurring).

<sup>149</sup> *See id.*

<sup>150</sup> *See id.* at 750. For commentary supporting such a view, see John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 205–06 (2000) (describing a division between an elite class of academics and media professionals who favor international law and global governance and a majority of Americans who are against it); JEREMY A. RABKIN, *LAW WITHOUT NATIONS?: WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 16 (2005) (arguing against reliance on global governance norms favored by European elites).

<sup>151</sup> *Sosa*, 542 U.S. at 733 n.21.

foreign policy objectives.<sup>152</sup> Since the ATS ultimately involves questions of statutory interpretation, there is no obvious presumption of judicial deference towards the executive branch. But one might, nonetheless, speculate as to why courts have proven to be consistently less deferential to the executive branch in this area. One plausible explanation is that the divergent and inconsistent positions adopted by Democratic and Republican administrations have made courts wary that executive branch submissions might be tainted by “partisan” considerations.

On the political front, the pendulum has swung back to a more favorable view of ATS judicial enforcement. Other than obvious partisan considerations, concerns about interrogation and detention practices under the Bush Administration might have also played a role in framing the political context in which the current Administration is approaching ATS litigation. Nonetheless, the Obama Administration adopted positions in litigation that were not only solicitous of the notion of corporate liability under the ATS, but that implicitly repudiated the institutional concerns regarding ATS litigation advanced by its predecessor.<sup>153</sup>

In at least one case, the Obama Administration actually took the unusual step of reversing course from a previous administration’s position on the foreign policy implications of an ATS lawsuit while the litigation was still pending. In that case, *In re S. African Apartheid Litigation*, plaintiffs had brought an ATS suit accusing several major multinational corporations of aiding and abetting the apartheid South African government.<sup>154</sup> After almost eight years of litigation, with the case going back and forth between the district court and the Second Circuit, the defendants filed for dismissal on comity grounds. The district court denied their motion, and the defendants sought interlocutory appeal of the district

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<sup>152</sup> See Stephens, *Unreasonable Views of the Bush Administration*, *supra* note 105, at 774, app. c.

<sup>153</sup> See, e.g., Brief for the United States as Amicus Curiae, Pfizer, Inc., v. Rabi Abdullahi, 130 S. Ct. 3541 (2010) (No. 09-34.), 2010 WL 2214874 (arguing against granting certiorari in ATS case in part because there was no departure from other circuits when the Ninth Circuit allowed an ATS claim to proceed on the basis of the Nigerian government’s alleged participation in a non-consensual medical test); Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 3 (arguing in support of ATS plaintiffs that a corporation can be held liable in a federal common law suit based on the ATS for violating the law of nations).

<sup>154</sup> 617 F. Supp. 2d 228 (S.D.N.Y. 2009). For the long and complicated posture of this case, see Brief for the United States as Amicus Curiae Supporting Appellees at 1–6, *Balintulo v. Daimler AG*, No. 09–2778–cv (2d Cir. 2009) [hereinafter *Balintulo* Amicus Brief for United States], available at <http://www.state.gov/documents/organization/153495.pdf>. Meanwhile, the Second Circuit has ruled on the issue of corporate liability under the ATS. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *aff’d on other grounds*, 132 S. Ct. 472 (2011).

court's order denying dismissal.<sup>155</sup> On appeal, the main question was whether the Second Circuit had jurisdiction to hear the defendants' interlocutory appeal. Second Circuit jurisdiction would only exist when a final decision of the district court on the merits would be otherwise unreviewable. In 2005, the Bush Administration submitted an amicus brief in which it favored the Second Circuit's dismissal of the case because "[i]t would be extraordinary to give U.S. law an extraterritorial effect in such circumstances to regulate conduct of a foreign state over its citizens, and all the more so for a federal court to do so as a matter of common law-making power."<sup>156</sup>

Four years later, with a decision still pending before the Second Circuit, the Obama Administration filed an amicus brief urging the court not to dismiss the ATS claims because it had no jurisdiction to review the case. In order to suggest that there was no obvious conflict with the previous Administration's position, the Obama Administration argued that the Bush Administration did not explicitly request a dismissal.<sup>157</sup> According to the government brief:

[T]he court of appeals has jurisdiction under the collateral order doctrine only if the district court denied defendant's motion despite the fact that the Executive Branch explicitly sought dismissal of the suit on [foreign relations] ground[s]. The requirement of an *explicit* request for dismissal on foreign policy grounds by the Executive Branch is, in our view, critical.<sup>158</sup>

Despite its technical parsing of the legal rules, the government's brief was clearly signaling a change in policy from the prior Administration with respect to the prospect of corporate liability under the ATS. The Bush Administration's objection to the litigation in 2005 was not necessarily limited to the specific political context of South Africa, but to what it perceived as the broader foreign policy dangers of permitting aiding and

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<sup>155</sup> See *In re S. Afr. Apartheid Litig.*, 617 F. Supp. 2d 228, 254–55 (S.D.N.Y. 2009). In declining the motion to dismiss, the district court found that the foreign policy concerns previously stated by the United States in the 2005 brief were mitigated by the plaintiff's decision to file a narrower complaint. See *id.* at 276, 283–84, 286 n.259.

<sup>156</sup> Brief for the United States as Amicus Curiae in Support of Affirmance at 5, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2005) (Nos. 05–2141–cv, 05–2326–cv), available at <http://www.state.gov/documents/organization/87317.pdf>.

<sup>157</sup> See *Balintulo* Amicus Brief for United States, *supra* note 154, at 11 (observing that despite the Bush Administration's clear opposition to the litigation in a prior brief, "at no time did the United States explicitly inform the courts that the case-specific impact these suits would have on the United States' foreign policy was a sufficient basis by itself for dismissal").

<sup>158</sup> *Id.* (emphasis in original).

abetting liability against corporations under the ATS.<sup>159</sup> By contrast, the Obama Administration focused on the fact that since the South African government had withdrawn its prior objection to the litigation, the concerns about interfering with the executive branch's conduct of foreign affairs were no longer relevant.<sup>160</sup>

C. The Government's Peculiar Posture in *Kiobel*: A Collision Between Partisan and Institutional Interests?

The politically fraught issue of corporate liability under the ATS eventually reached the Supreme Court in in the recent case of *Kiobel v. Royal Dutch Petroleum Co.*<sup>161</sup> The Second Circuit rejected a claim by Nigerian citizens alleging that foreign oil companies had aided and abetted atrocities committed by the Nigerian government.<sup>162</sup> Observing that the ATS was a jurisdictional statute that did not create any new causes of action, the Second Circuit concluded that "international law of human rights does not impose *any* form of liability on corporations. . . ."<sup>163</sup> Since *Sosa* had not resolved the question of corporate liability under the ATS, and there was a growing circuit split on the issue,<sup>164</sup> the Supreme Court's grant of certiorari in *Kiobel* was hardly a surprise.

But the Supreme Court decided to duck the corporate liability issue in *Kiobel*, and instead rejected the plaintiffs' claims on extraterritoriality grounds.<sup>165</sup> In holding that the conduct alleged by the plaintiffs did not

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<sup>159</sup> See Brief for the United States as Amicus Curiae in Support of Affirmance, *supra* note 156, at 27 ("[G]iven the enormous practical consequences of broadening the scope of the ATS if this form of secondary civil liability were added, the courts should follow the Supreme Court's admonition in *Sosa* to exercise great caution against importing international criminal concepts of aiding and abetting into domestic tort law.").

<sup>160</sup> *Balintulo* Amicus Brief for United States, *supra* note 154, at 20–21 ("The Justice Minister [of South Africa] . . . is now of the view that this Court is an appropriate forum to hear the remaining claims of aiding and abetting in violation of international law. The United States takes at face value these formal statements from a high level South African government official.").

<sup>161</sup> 133 S. Ct. 1659 (2013).

<sup>162</sup> See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2011), *aff'd on other grounds*, 132 S. Ct. 472 (2011).

<sup>163</sup> *Id.* at 147.

<sup>164</sup> Compare *id.* (holding private corporations cannot have liability) with *Doe v. Exxon Mobil Corp.*, 654 F.3d 11(D.C. Cir. 2011) (holding private corporations can have liability); see also *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008) (holding that ATS does not provide an exception for corporations); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011) (holding the same as *Romero*).

<sup>165</sup> *Kiobel*, 133 S. Ct. at 1665 ("The principles underlying the presumption against extraterritoriality thus constrain courts exercising their power under the ATS"). The Court initially granted certiorari in *Kiobel* to address two specific issues: (1) whether the issue of corporate civil tort liability under the ATS is a merits question or instead an issue of subject

have a sufficient connection to the United States, the Court relied heavily on *Morrison v. National Australia Bank Ltd.*,<sup>166</sup> a recent case that applied the presumption against extraterritoriality to antifraud provisions of the Securities Exchange Act. The Court's embrace of this winning doctrinal hook was not entirely fortuitous. Two former Bush Administration officials—John Bellinger (Former Department of State Legal Adviser) and Paul Clement (Former Solicitor General)—had pushed the extraterritoriality argument on behalf of corporate clients during the first round of *Kiobel*.<sup>167</sup> More broadly, the Bush Administration had argued in two amicus briefs before the Supreme Court in 2004 and 2008 as well as in numerous appellate court briefs that the ATS should not apply overseas.<sup>168</sup>

*Kiobel* illustrates the likely tension that the executive branch faces in human rights litigation when it has to choose between its institutional and partisan (or policy) preferences. As the case wound its way up to the Supreme Court, there were some unusual twists and turns in the litigation posture of the United States. In the original amicus brief filed before the Court, Solicitor General Verilli initially supported the plaintiffs' position that foreign corporations could be held liable for international human rights violations under the ATS—a posture at odds with that adopted by the Bush Administration.<sup>169</sup> But in response to the Court's request for re-argument and further briefing,<sup>170</sup> the Solicitor General argued that the *Kiobel* case ought to be dismissed because it involved a foreign corporate defendant and

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matter jurisdiction; and (2) whether corporations are immune from tort liability for violations of the law of nations such as torture, extrajudicial executions, or genocide or may instead be sued in the same manner as any other private party defendant under the ATS for such egregious violations. See Brief for Respondents at (i), *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10–1491), 2012 WL 259389, at \*i. But after both briefing and oral argument on the case, the Court took the unusual step of asking the parties to reargue the case and brief the issue of the extraterritorial reach of the ATS. See Order Restoring Case to Calendar for Reargument, *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10–1491); Adam Liptak, *Supreme Court Seeks Clarification on Jurisdiction in a Human Rights Case*, N.Y. TIMES, Mar. 6, 2012, at A15.

<sup>166</sup> 130 S. (2010).

<sup>167</sup> See Brief of Amici Curiae, BP America et al. in support of Respondents at 5–24, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10–1491), 2012 WL 392536.

<sup>168</sup> See *Sosa* Brief for the United States, *supra* note 5, at 8–9; Brief for United States as Amicus Curiae in Support of Petitioners at 5, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389; see also Brief for the United States as Amicus Curiae Supporting Panel Rehearing or Rehearing En Banc at 12, *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390 (9th Cir. Sept. 28, 2006), available at <http://www.state.gov/documents/organization/98376.pdf>; Brief of the United States as Amicus Curiae in Support of Affirmance at 3, *Mujica v. Occidental Petroleum Corp.*, Nos. 05–56175, 05–56178, 05–56056 (9th Cir. Mar. 20, 2006).

<sup>169</sup> See Brief for the United States as Amicus Curiae Supporting Petitioners, *supra* note 3.

<sup>170</sup> See Order Restoring Case to Calendar for Reargument, 132 S. Ct. 1738 (2012).

hence lacked a sufficient nexus to the United States.<sup>171</sup> The government's brief conceded, however, that the requisite nexus might be established if the defendant were a United States corporation.<sup>172</sup> Tactically, the Solicitor General's office likely decided it could not afford to backtrack completely on the position it adopted before the Court in *Sosa* and *Ntsebeza*—that the ATS should not apply to purely extraterritorial claims.<sup>173</sup> As commentators observed, however, it is not certain that all institutional players in the executive branch were on board with the Solicitor General's move.<sup>174</sup> For instance, conspicuously absent from the government's brief in favor of dismissal of the *Kiobel* plaintiffs' claim was the State Department's Legal Adviser, who had joined the earlier brief on the issue of corporate liability and who had signed off on all the previous government briefs in ATS cases.<sup>175</sup>

In *Kiobel*, the Obama Administration likely had to make both strategic and prudential choices between the claims of two competing constituencies. One obvious constituency would be the progressive NGOs that filed amicus briefs before the Court in support of the *Kiobel* plaintiffs. The other plausible constituency is the Solicitor General's office, which might have been more concerned about defending its institutional interests. Specifically, the Solicitor General's office includes career lawyers who are not only likely to take a long view of the executive branch's institutional preferences, but who may also have distinct reputational concerns as repeat players before the Court.<sup>176</sup> These career lawyers are likely to be wary

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<sup>171</sup> The government did not argue in favor of a blanket rule against extra-territorial claims, but argued that there could be an exception if the extraterritorial tort claims alleged under the ATS would likely expose the United States government to liability. See Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, *supra* note 10, at 3.

<sup>172</sup> See *id.* at 21.

<sup>173</sup> More specifically, the Solicitor General staked out this position on extraterritoriality in its brief in the *Sosa* case, although the Court did not ultimately decide the case on that basis. See *Sosa* Brief for the United States, *supra* note 10, at 8–9.

<sup>174</sup> One such observer was John Bellinger, the State Department Legal Adviser under the Bush Administration. See John Bellinger, *Kiobel: Obama Administration Supports Shell, Argues ATS Should Not Apply to Aiding-and-Abetting Suits Against Foreign Corporations, Leaves Open Possibility of Suits Against U.S. Corporations*, LAWFARE BLOG (June 13, 2012, 7:55 PM), <http://www.lawfareblog.com/2012/06/kiobel-obama-administration-supports-shell-argues-ats-should-not-apply-to-aiding-and-abetting-suits-against-foreign-corporations-leaves-open-possibility-of-suits-against-u-s-corporations/>.

<sup>175</sup> See *id.*

<sup>176</sup> Various scholars have commented on the unique position occupied by the office of the Solicitor General and the tension it faces when it has to adopt political positions in litigation. See David A. Strauss, *The Solicitor General and the Interests of the United States*, 61 L. & CONTEMP. PROBS. 165, 172 (1998) (“The Solicitor General's Office appears before the Supreme Court dozens of times a year. The Office's reputation with the Justices, and the Court's image of the Office, are very important . . . . If the Court generally trusts the Office

about changing litigation positions on constitutional and statutory issues simply because of the arrival of a new administration with different policy priorities.<sup>177</sup> As Bruce Ackerman has argued elsewhere, the Solicitor General's culture of taking the long view with regard to the executive branch's priorities might not be shared by other offices within the Justice Department, where short-term political appointments are more common.<sup>178</sup>

Perhaps different institutional norms might explain why government attorneys outside the Solicitor General's office appeared to be more willing to stake out inconsistent positions on ATS litigation across presidential administrations. Even with that qualification, however, one might expect that the practice of blatantly reversing litigation positions by government attorneys should be relatively rare. As one commentator put it, "once lawyers from Departments of Justice and State take a position before the courts, they, to a certain extent, lock in their successors. While it is not unheard of for lawyers from one administration to repudiate positions taken in prior judicial filings, such reversals come at a considerable cost."<sup>179</sup>

Even then, the Solicitor General's position in *Kiobel* did not square comfortably with what that office told the Court a few years earlier in *Sosa*. Indeed, in what seemed like a partial about face from the government's position in *Sosa*, that the ATS did not apply extraterritorially regardless of the defendant's identity, Solicitor General Verilli now seemed to favor a multifactor approach in which United States (and not foreign) corporations could be held liable for a tort committed abroad under the ATS. In an exchange with the Solicitor General during oral argument, both Justice

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to engage in its traditional form of advocacy—which, as noted above, falls somewhere between what a private party would do and the impartial "tenth Justice" version—the Office will be more effective."); John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 810 (1992) ("The Solicitor General's career officials enhance their status and autonomy by projecting the image of a group of independent Supreme Court experts whose task is to interpret precedent for the Court—perhaps with a slight executive branch spin on interpretation, but certainly without expressing any assertive or radical views that would detract from the appearance of independence."); cf. Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010) (analyzing the relative stability of the executive branch's legal positions).

<sup>177</sup> As one commentator has observed about the Solicitor General's office, a distinction can be often be drawn between litigating the direct institutional interests of the federal government and other ideologically fraught issues that have only incidental or indirect institutional implications. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1377–78 (2010).

<sup>178</sup> See Bruce Ackerman, *Lost Inside the Beltway: A Reply to Professor Morrison*, 124 HARV. L. REV. F. 13, 16 (2011) (suggesting that the contemporary Office of Legal Counsel has been much more politicized than the Solicitor General's Office).

<sup>179</sup> Paul B. Stephan, *The Limits of Change: International Human Rights Under the Obama Administration*, 35 FORDHAM INT'L L.J. 488, 502 (2012).

Scalia and Chief Justice Roberts mused openly about which one of the Solicitor General's conflicting positions warranted deference from the Court:

GENERAL VERRILLI: I — I think *Filartiga* is the paradigm, and cases like *Filartiga* are the paradigm that — where we think ATS — ATS causes of action should be recognized.

JUSTICE SCALIA: General Verrilli, the — that's — that is a new position for the — for the State Department, isn't it?

GENERAL VERRILLI: It's a new —

JUSTICE SCALIA: And for — and for the United States Government? Why should — why should we listen to you rather than the solicitors general who took the opposite position and the position taken by Respondents here in other cases, not only in several courts of appeals, but even up here?

....

CHIEF JUSTICE ROBERTS: Your successors may adopt a different view. And I think — I don't want to put words in his mouth, but Justice Scalia's point means whatever deference you are entitled to is compromised by the fact that your predecessors took a different position.<sup>180</sup>

One could argue, however, that Solicitor General Verrilli found himself in a relatively unusual situation in *Kiobel*: if he embraced the underlying logic of the Bush Administration's position in *Sosa*, the ATS would be essentially rendered a dead letter. After all, the government's position in *Sosa* did not leave much wiggle room to make fine-tuned doctrinal distinctions in a latter case.<sup>181</sup> Given the seeming inconsistency of the

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<sup>180</sup> Transcript of Oral Argument at 43–44, *Kiobel v. Royal Dutch Petroleum*, No. 10–1491 (U.S. Oct. 1, 2012) (No. 10–1491), *available at* [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/10-1491rearg.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1491rearg.pdf).

<sup>181</sup> In response to Justice Scalia's question in *Kiobel*, Verrilli argued that the executive branch has to balance competing interests in foreign affairs. Justice Scalia seemed unconvinced:

GENERAL VERRILLI: Well, Justice Scalia, in a case like this one, in cases under the Alien Tort Statute, the United States has multiple interests. We certainly have foreign relations interests in avoiding friction with foreign governments; we have interests in avoiding subjecting United States companies to liability abroad. We also have interests in ensuring that our Nation's foreign relations commitments to the rule of law and human rights are not eroded.

Solicitor General's position across electoral cycles on the institutional interests at stake, the justices likely decided not to accord much deference to the government's position in *Kiobel*.

Ultimately, the Court's decision trimmed back the role of the federal judiciary in ATS controversies, an outcome inconsistent with what an empire building model of judicial behavior would predict. But whether the holding in the case will be a setback for cause lawyering by human rights groups, or whether it will simply shifts advocacy efforts to more promising alternative avenues, remains an open question.<sup>182</sup>

## V. CONCLUSION AND SOME NORMATIVE IMPLICATIONS

Although human rights litigation often arouses weighty debates in the legal literature, judicial enforcement of international human rights in the United States over the past three decades seems to have been shaped in part by both fortuitous circumstances and distributive partisan politics. Transformation in the attitudes by the international community and a solicitous reception by domestic judges are usually not sufficient for expansive human rights enforcement. Willingness by the executive branch is important as well. But different administrations may have conflicting preferences towards expanding the role of courts in this arena. For instance, while a popular backlash against the United States role in Vietnam and the spread of new international human rights agreements in the 1970s gave President Carter the political opening to push a human rights agenda in the courts, it does not imply that others would have chosen the same path.

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JUSTICE SCALIA: I understand that, but –

GENERAL VERRILLI: It's my responsibility to balance those sometimes competing interests and make a judgment about what the position of the United States should be, consistent with existing law.

JUSTICE SCALIA: It — it was –

GENERAL VERRILLI: And we have done so.

JUSTICE SCALIA: — it was the responsibility of your predecessors as well, and they took a different position. So, you know, why — why should we defer to the views of — of the current administration?

*Id.* at 43–44.

<sup>182</sup> See Austen L. Parrish, *Kiobel, Unilateralism, and the Retreat from Extraterritoriality*, 28 MD J. INT'L L. (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2255628](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255628) (arguing that the *Kiobel* decision marks an opportunity to renew efforts to return to more vigorous international lawmaking based on multilateral consensus).

Faced with a similar proliferation of international human rights agreements in the aftermath of WWII, the Eisenhower Administration took a firm stance against the notion that international norms of human rights could be binding in U.S. courts.<sup>183</sup> And ever since Carter formally supported broader judicial enforcement of the ATS in *Filártiga*, Republican and Democratic administrations have staked out divergent positions not only as to the statutory scope of the ATS, but also as to whether judicial enforcement would hinder or promote key American foreign policy objectives.

In the United States, Republican administrations are not only less ideologically inclined to push human rights enforcement as a foreign policy priority, they also appear to gain less electorally from doing so, since human rights tends to be most salient to left-leaning constituencies. Indeed, Republican-leaning business and national security interests have tended to view the expansion of ATS litigation not only as a threat to their commercial and ideological interests, but as a boon to the left-leaning tort plaintiffs' bar. On the other hand, Democratic administrations have discovered that they can not only appeal to their core constituencies by emphasizing human rights, but more importantly, they can also exploit it as a wedge issue to discredit controversial foreign policy positions of the Republican opposition. In many respects, the ideological battles over judicial enforcement under the ATS has mirrored many of the broader debates about the role that human rights should play in shaping American foreign policy. If one also considers the recent tendency of federal courts to cite approvingly to foreign and international law in politically charged controversies touching on issues like the death penalty and homosexual rights, it is perhaps not surprising that contemporary human rights litigation in the United States has come to be characterized by the logic of distributive politics.<sup>184</sup>

If all this is true, what should the courts do? One might argue that if the courts could coordinate around a common interpretive method or historical account of the origins of the ATS, then much of this protracted conflict could be avoided. For instance, it is plausible to think that with

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<sup>183</sup> See HOLMAN *supra* note 88 and accompanying text; see also *supra* note 91, and accompanying text; cf. Nzelibe, *supra* note 70, at 669 (2011) ("After all, even though Eisenhower had disfavored the Bricker Amendment as an interference with the Executive Branch's authority in foreign affairs, he shared his co-partisans' antipathy to human rights treaties, which he demonstrated by committing not to negotiate any more such treaties and by appointing a well-known treaty skeptic to replace Eleanor Roosevelt as delegate to the United Nations.").

<sup>184</sup> See, e.g., Ingrid Wuerth, *The Supreme Court and the Alien Tort Statute: Kiobel v. Royal Dutch Petroleum Co.*, 107 AM J. INT'L L. (forthcoming 2013) (manuscript at 1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2264323](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264323) ("Indeed, to the extent the 'culture wars' have played out in U.S. foreign relations law, the ATS has been their center of gravity.").

sufficient historical research and interpretive agreement about which kind of historical materials are relevant, one might be able to discern a much clearer understanding about what the framing generation meant by the phrase “violations of the laws of nations or of a treaty of the United States.”<sup>185</sup> But such an outcome is highly unlikely. Indeed, given the distributive issues at stake, any quest for interpretive coordination on such an old statute with sparse legislative history is likely to be self-defeating. As one commentator noted in another context:

[C]hoosing between textualism or legislative history, isn't much like choosing whether to drive on the left side of the road or the right. It is a mixed game of coordination and distribution, in which judges desire to coordinate, but some judges would prefer that all coordinate on one particular rule, while other judges would prefer that all coordinate on a different rule.<sup>186</sup>

Setting aside the question of likely distributive effects, one might still ask if the contemporary judicial enforcement of the ATS is normatively desirable. This Article does not purport to address that question, but it has nonetheless some implications for how the normative debate can be framed. At bottom, claims about the normative implications of expansive or narrow interpretations of the scope of the ATS are notoriously difficult to evaluate from both an empirical and theoretical perspective. Take, for instance, the common argument often made by human rights activists and Democratic administrations that judicial unwillingness to enforce human rights claims under the ATS will discourage the spread of human rights in other countries and undermine international institutions. Other than scattered anecdotes, there is hardly any empirical support for this claim. As one commentator sympathetic to the cause of human rights observed, “Human rights norms have in fact spread widely without much attention to U.S. domestic policy . . . . [G]overnment after government moved ahead toward more active domestic and international human rights policies without attending to U.S. domestic or international practice.”<sup>187</sup>

Similarly, claims that ATS adjudication will harm American business interests in any significant way might be overstated. To be sure, the proliferation of aiding and abetting claims under the ATS should be a source of some concern for business groups, but it might very well be that this is one of those circumstances where the judicial bark might be more than its bite. As legal realists have repeatedly observed, there is often a gulf between formal litigation outcomes and the implementation of such

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<sup>185</sup> 28 U.S.C. § 1350 (2011).

<sup>186</sup> Vermeule, *supra* note 25, at 571–72 (footnote omitted).

<sup>187</sup> Moravcsik, *supra* note 38, at 192.

outcomes, especially when the issue being litigated touches upon controversial issues in which there is significant political opposition.<sup>188</sup> As with the issue of civil rights litigation in the 1950s and 1960s, today's human rights activists might eventually discover that ATS litigation offers what Rosenberg and others have called empty promises and "hollow hope."<sup>189</sup> For instance, despite almost thirty years of litigation under the ATS, collection of judgments by prevailing plaintiffs has been notoriously low. Beyond the lack of administrative resources that the courts have for enforcing their decisions, it is questionable whether future administrations that are unsympathetic to the ATS will have either the willingness or resolve to track down scofflaw corporations and foreign state officials and force them to pay damages. Given these realities, perhaps one normative recommendation is that we ought to consider dialing down our expectations and rhetoric regarding the possible impact of ATS litigation.

Finally, a caveat and some words of caution. This Article does not purport to establish a clear causal relationship between human rights enforcement in the courts and the partisan orientation of judges and elected officials. In order to achieve what social scientists would typically call "goodness of fit," other plausible explanations of the growth of human rights litigation would have to be discarded. Nothing in this framework rules out the possibility that other factors might also help explain the trajectory of human rights litigation in the United States, including the modern proliferation of ATS lawsuits.

After all, judges and elected officials are heterogeneous actors who are susceptible to conflicting institutional and individual motivations, and to reduce them to single-minded maximizers of ideological or electoral goals is hardly fair or particularly illuminating. For instance, a plausible alternative explanation that is not ruled out by this framework is that the various judges, interest groups, and elected officials who stake out positions on human rights litigation do so because they are simply taking a moral stand on a fundamental issue of principle without necessarily expecting to

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<sup>188</sup> See Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 9 (1994) (commenting that, despite its hallowed status, "*Brown* [v. Board of Education] was *directly* responsible for only the most token forms of southern public school desegregation.") (emphasis in original); ROSENBERG, *supra* note 52, at 70 ("The use of the courts in the civil rights movement is considered the paradigm of a successful strategy for social change . . . . Yet, a closer examination reveals that before Congress and the executive branch acted, courts had virtually *no direct effect* on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. Courageous and praiseworthy decisions were rendered, and nothing changed.") (emphasis in original); cf. Tracey E. George, Mitu Gulati & Ann C. McGinley, *The New Old Legal Realism*, 105 NW. U.L. REV. 689, 733 (2011) ("Even when a case has a myriad of factors predicting a significant impact on the ground, it can in fact have only a negligible impact.")

<sup>189</sup> See ROSENBERG, *supra* note 52.

influence electoral or political outcomes. Obviously, such a model of expressive behavior would be incompatible with the instrumental account espoused here.<sup>190</sup> The goal here is not to suggest that an instrumental logic is the only approach, but that it is at least a plausible part of the story. In sum, this Article focuses on the partisan political interest in human rights litigation because it has been largely ignored in the literature and much of the recent treatment tends to focus on normative approaches that assume human rights regimes constitute structures of mutually beneficial cooperation, rather than plausible structures of power with obvious political losers and winners.

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<sup>190</sup> Cf. Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFF. Sept.–Oct. 2000, at 102, 106 (2000) (observing that one principal benefit of ATS lawsuits may be “the public attention they generate”).