THE TWO THAT GOT AWAY: *FIRST AMERICAN FINANCIAL CORP. V. EDWARDS* AND *KIOBEL V. ROYAL DUTCH PETROLEUM CO.*

Jonathan S. Massey[*]

I. INTRODUCTION

Given the attention lavished on the landmark ruling, *National Federation of Independent Business v. Sebelius,*[1] regarding the constitutionality of the Affordable Care Act, it is easy to overlook the fact that the Court decided some sixty-four other cases on the merits during the 2011 Term.[2] Still, the total of sixty-five merits cases decided after oral argument was the lowest total in the past two decades.[3] One factor in the relatively

* Partner, Massey & Gail LLP. Mr. Massey is a Supreme Court practitioner and appellate advocate who submitted amicus briefs in both *First American Financial Corp. v. Edwards* and *Kiobel v. Royal Dutch Petroleum*, from which some of this article is taken.

1. 567 U.S ___, 132 S. Ct. 2566 (2012).

2. Kedar Bhatia, *Final October Term 2011 Stat Pack and Summary Memo*, SCOTUSBLOG (June 30, 2012, 7:59 PM), http://www.scotusblog.com/2012/06/final-october-term-2011-stat-pack-and-summary-memo/.

3. *Id.*

low number of merits decisions was the Court's action in two cases that were briefed and argued, but not decided: *First American Financial Corp. v. Edwards*[4] and *Kiobel v. Royal Dutch Petroleum*.[5]

In *First American*, the Court heard argument on November 28, 2011 but issued a one-sentence order on June 28, 2012 dismissing the writ of certiorari as improvidently granted.[6] In *Kiobel*, the Court heard argument on February 28, 2012, but ordered rebriefing on an issue not included in the original grant of certiorari on March 5, 2012.[7] The *Kiobel* case was restored to the calendar and will be reargued on the opening day of the Court's next Term, October 1, 2012.[8]

Both *First American* and *Kiobel* raised fundamental questions of vital importance. But for the shadow cast by the health care litigation, *First American* and *Kiobel* would themselves have been regarded as blockbusters. *First American* presented the question of whether a homebuyer who uses real estate settlement services has standing under Real Estate Settlement Procedures Act of 1974 (RESPA) to maintain an action in federal court in the absence of any claim that the alleged violation affected the price, quality, or other characteristics of the settlement services provided.[9] More broadly stated, the question was the extent to which the standing doctrine of Article III limits Congress's authority to create new statutory rights enforceable through private rights of action—a question of great significance for many consumer protection laws

4. 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 567 U.S. ___, 131 S. Ct. 3022 (June 20, 2011), *cert. dismissed*, 567 U.S. ___, 132 S. Ct. 2536 (June 28, 2012) (No. 10-708) (dismissing certiorari as improvidently granted).

5. 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 565 U.S. ____, 132 S. Ct. 472 (Oct. 17, 2011), *reh'g granted*, 565 U.S. ___, 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10-1491).

6. Order Dismissing Writ of Cert., *First Am. Fin. Corp.*, 567 U.S. ___, 132 S. Ct. 2536 (No. 10-708).

7. Order for Reargument, *Kiobel*, 565 U.S. ___, 132 S. Ct. 1738 (No. 10-1491) (ordering rebriefing and restoring to calendar for reargument).

8. *Id.*; SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2012 (2012), *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalOct2012.html.

9. *First Am. Corp.*, 610 F.3d at 516.

and other regulatory schemes that contain private rights of action.

In *Kiobel*, the initial question presented was whether corporations may be held liable under the 1789 Alien Tort Statute (ATS), for aiding and abetting a foreign government's alleged violations of international law against its own citizens within its own sovereign boundaries.[10] After argument, the Court ordered the parties to address the antecedent question of whether the 1789 law has any extraterritorial application at all to acts occurring entirely overseas, with minimal connection to the United States.[11]

Both cases present fundamental questions of law with wide implications for many other proceedings. The *Kiobel* case will be eagerly watched during the 2012 Term. Because the *First American* case was dismissed rather than set for reargument, the Court will not decide the issues raised in *First American* next Term.[12] But the issues will not go away and will likely reappear before the Court in a different guise—with new parties and a new controversy—in the years to come.

II. THE *FIRST AMERICAN* CASE AND THE ARTICLE III LIMITS ON THE CREATION OF PRIVATE RIGHTS OF ACTION

"Under Article III, the Federal Judiciary is vested with the 'Power' to resolve not questions and issues but 'Cases' or 'Controversies.' This language restricts the federal judicial power 'to the traditional role of the Anglo–American courts.'"[13] Central to the "case" or "controversy" requirement is the concept of "injury in fact."[14] "In the English legal tradition, the need to

10. *Kiobel*, 621 F.3d at 124.

11. *See* Order for Reargument, *Kiobel*, 565 U. S. ___, 132 S. Ct. 1738 (No. 10-1491).

12. Order Dismissing Writ of Cert., *First Am. Fin. Corp.*, 567 U.S. ___, 131 S. Ct. 2536 (No. 10-708).

13. Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. ___, ___, 131 S. Ct. 1436, 1441 (2011) (quoting Summers v. Earth Island Inst., 555 U.S. 488 (2009)).

14. *Id*. at ___, 131 S. Ct. at 1442 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992)).

redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees."[15] Thus, cases and controversies are limited to the adjudication of legal rights in the traditional litigation setting.[16] The Supreme Court has instructed that "[w]e have always taken [the case-or-controversy requirement] to mean cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process."[17] "The purpose of the case-or-controversy requirement is to 'limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process.'"[18]

> Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary. If the judicial power were "extended to every *question* under the constitution," Chief Justice Marshall once explained, federal courts might take possession of "almost every subject proper for legislative discussion and decision."[19]

The injury in fact requirement ensures that plaintiffs in federal court are asserting their own individual rights as opposed to the kinds of generalized public rights that should be pressed in the political branches.[20] "For the federal courts to decide

15. *Id*. at ___, 131 S. Ct. at 1441.

16. *Id*. at ___, 131 S. Ct. at 1442; *see* Davis v. Fed. Election Comm'n, 554 U.S. 724, 732 (2008) ("Article III restricts federal courts to the resolution of cases and controversies." (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997))).

17. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) (citing Muskrat v. United States, 219 U.S 346, 356–57 (1911)).

18. GTE Sylvania, Inc. v. Consumers Union of United States, Inc., 445 U.S. 375, 382 (1980) (quoting Flast v. Cohen, 392 U.S. 83, 95 (1968)).

19. *Winn*, 563 U.S. at ___, 131 S. Ct. at 1442 (quoting 4 PAPERS OF JOHN MARSHALL 95 (C. Cullen ed., 1984)).

20. S*ee* Allen v. Wright, 468 U.S. 737, 750–52 (1982); The Chicago Junction Case, 264 U.S. 258, 272–73 (1924) (Sutherland, J., dissenting); F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 277 (2008); Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 723, 733 (2004); *see also* Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (distinguishing "the undifferentiated public interest in . . . compliance with the law" from "an 'individual right' vindicable in the courts"); Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208,

questions of law arising outside of cases and controversies would be inimical to the Constitution's democratic character. And the resulting conflict between the judicial and the political branches would not, 'in the long run, be beneficial to either.'"[21]

A. The Historical Background of Injury in Fact

The question presented in *First American* was how these principles of justiciability related to Congress's authority to create private rights of action are enforceable in federal court.[22] This question requires an examination of the evolution of the requirement of injury in fact.

The distinction between the standing inquiry and the substance of a plaintiff's claim is traceable to *Association of Data Processing Service Organizations v. Camp*, a decision for the Court written by Justice William O. Douglas,[23] one of the nation's most liberal Justices.[24] In *Camp*, the Court held that a trade association of data processors and a data processing corporation, as competitors of national banks, were "aggrieved" persons under the Administrative Procedure Act and, therefore, had standing to seek review of a ruling by the Comptroller that national banks could make data processing services available to other banks and to banks' customers.[25] Justice Douglas, in reasoning that the immediate impact was to increase access to the courts, opined that absence of a legally protectable right to avoid competition from national banks did not deprive the data processors of standing.[26]

---

224 n.14 (1974) (holding Article III requires plaintiffs "to allege a specific invasion of [a] right suffered by him").

21. *Winn*, 563 U.S. at ___, 131 S. Ct. at 1442 (quoting United States v. Richardson, 418 U.S. 166, 188–89 (1974) (Powell, J., concurring)).

22. Edwards v. First Am. Corp., 610 F.3d 514, 517 (9th Cir. 2010) (citing Warth v. Seldin, 422 U.S. 490, 500 (1975)), *cert. granted*, 567 U.S. ___, 131 S. Ct. 3022 (June 20, 2011), *cert. dismissed*, 567 U.S. ___, 132 S. Ct. 2536 (June 28, 2012) (No. 10-708).

23. 397 U.S. 150, 151 (1970).

24. *See* Melvin I. Urofsky, *William O. Douglas as a Common Law Judge*, 41 DUKE L.J. 133, 133 (1991) (recounting that Justice Douglas "championed the liberal position on nearly every issue before the Court").

25. *Camp*, 397 U.S. at 157.

26. *Id*. at 154.

> The "legal interest" test goes to the merits. The question of standing is different. It concerns, apart from the "case" or "controversy" test, the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. . . . That interest, at times, may reflect aesthetic, conservational, and recreational as well as economic values. . . . We mention these noneconomic values to emphasize that standing may stem from them as well as from the economic injury on which petitioners rely here. Certainly he who is likely to be financially injured, may be a reliable private attorney general to litigate the issues of the public interest in the present case.[27]

The initial effect of *Data Processing* was to permit a plaintiff adversely affected by the entry of a new competitor to bring suit despite the lack of a claim "founded on a statute which confers a privilege" against competition.[28]

However, "[b]y decoupling standing from questions of substantive law, the *Data Processing* Court sowed the initial seeds of doubt regarding Congress'[s] power to create standing where public rights were not infringed."[29] Judge William Fletcher of the Ninth Circuit has written that "[m]ore damage to the intellectual structure of the law of standing can be traced to *Data Processing* than to any other single decision."[30] Richard Stewart, a noted professor of both administrative and environmental law, as well as a former Assistant Attorney General in charge of the Environment and Natural Resource Division of the U.S. Department of Justice, has called *Data Processing* an "unredeemed disaster."[31] *Data Processing* gained this title because separation of standing and substantive law casts doubt upon the traditional view that Congress may "define new legal rights, which in turn will confer standing to vindicate an injury

27. *Id*. at 153–54 (citations omitted) (internal quotation marks omitted).

28. *Id*. at 153 (citing Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137–38 (1939)).

29. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 394 (3d ed. 2000).

30. William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988).

31. Richard B. Stewart, *Standing for Solidarity*, 88 YALE L.J. 1559, 1569 (1979).

caused to the claimant."[32] Historically, the injury in fact requirement of Article III was thought only to constrain federal judicial authority to find standing in the absence of a statute; it was not understood as cabining the legislative branch in fashioning private causes of action and creating substantive rights embedded in regulatory schemes.[33]

In *Warth v. Seldin*, for example, the Court opined that "[t]he actual or threatened injury required by Article III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" and that "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief."[34] The Court has held that statutes may create rights that establish standing even if they are "directed at avoiding circumstances of potential, not actual, impropriety."[35] Additionally, "[w]e have no doubt that if Congress enacted a statute creating such a legal right, the requisite injury would be found in an invasion of that right."[36]

In *Linda R.S. v. Richard D.*, the Court similarly affirmed that "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[37] And in *International Primate Protection League v. Tulane Educational Fund*, the Court explained that "standing is gauged by the specific common-law, statutory or constitutional claims that a party presents[]"[38] and that "standing should be seen as a question of substantive law, answerable by reference to the statutory and constitutional provision whose protection is invoked."[39] The Court even inferred

32. Vermont Agency of Natural. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 773 (2000) (citation omitted).

33. TRIBE, *supra* note 29, at 394.

34. 422 U.S. 490, 500 (1975).

35. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 224 n.14 (1974).

36. *Id.* (citing O'Shea v. Littleton, 414 U.S. 488, 493 (1974)).

37. 410 U.S. 614, 617 n.3 (1973) (citation omitted).

38. 500 U.S. 72, 77 (1991).

39. *Id.* (quoting William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 229 (1988)) (internal quotation marks omitted).

that the congressional granting of authority to review the decisions of administrative agencies created new courses of action for injured plaintiffs.[40]

These decisions reflect the principle that when Congress imposes a substantive law obligation on the part of a defendant to conduct himself in a certain way with respect to a particular plaintiff, the plaintiff's allegation of injury arising out of a violation of her individual rights almost always satisfies standing requirements.[41] That is so because violations of individual rights invariably cause injuries personal to the plaintiff.[42] Some commentators have gone so far as to argue that the injury in fact requirement is therefore "superfluous in cases alleging the violation of a private right."[43] In any event, it is hard to see how the violation of a private right could not constitute an injury in fact sufficient for standing. Just as "there is ordinarily little question" that a person who is the object of government action has standing to sue to challenge the legality of the action,[44] a person who is the object of private action that violates her individual rights generally has standing to sue to challenge the legality of the action.[45] In either situation, plaintiffs have standing to sue to complain about illegal conduct directed at them.[46]

40. Sierra Club v. Morton, 405 U.S. 727, 737–38 (1972) ("Broadening the categories of injury that may be alleged is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.").

41. *See Int'l Primate Prot. League*, 500 U.S. at 77; *Linda R.S.*, 410 U.S. at 617 n.3; *Sierra Club*, 405 U.S. at 738.

42. *See* Hessick, *supra* note 20, at 282 (citing Ashby v. White, 2 Ld. Raym. 938, 955, 92 Eng. Rep. 126, 137 (1702) (Holt, C.J., dissenting) *rev'd,* 3 Salk. 17, 91 Eng. Rep. 665 (1703)).

43. *Id*. at 277.

44. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561–62 (1992).

45. Warth v. Seldin, 422 U.S. 490, 500 (1975).

46. *See Lujan*, 504 U.S. at 561–62; *Warth*, 422 U.S. at 500.

B. The *First American* Case

The *First American* case arose against this jurisprudential background. In 1974, Congress enacted RESPA to protect consumers in the market for real estate settlement services.[47] The legislative history of RESPA, including committee reports, hearings, and a report commissioned from the Department of Housing and Urban Development, and the Veterans' Administration, documents rampant schemes by which brokers, escrow agents, sellers, and settlement attorneys were paid fees for referring business to settlement service providers, undermining competition for settlement services and harming consumers.[48]

RESPA's stated purposes include "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services."[49] To achieve this goal, section 8 of RESPA gives consumers a substantive right to a real estate settlement free from kickbacks or fees for referrals.[50] RESPA provides that:

> [N]o person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.[51]

Section 8 of RESPA also provides that no portion of the charge for any covered settlement service may go to any person "other than for services actually performed."[52] Finally, section 8 creates

47. 12 U.S.C. §§ 2601 to 2617 (2006).

48. S. REP. NO. 93–866, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546; H.R. REP. NO. 93–1177, at 7 (1974); *Real Estate Settlement Costs, FHA Mortgage Foreclosures, Housing Abandonment, and Site Selection Policies: Hearings Before the Subcomm. on Housing of the H. Comm. on Banking & Currency*, 92d Cong. 3, 8, 21–22, 53 (1972) [hereinafter *1972 House Hearings*]; *Mortgage Settlement Costs: Hearings Before the Subcomm. on Housing and Urban Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 92d Cong. 14 (1972); DEP'T OF HOUSING & URBAN DEV. & VETERANS' ADMIN., REP. ON MORTGAGE SETTLEMENT COSTS (1972), *reprinted in 1972 House Hearings*, *supra*, at 735–872.

49. 12 U.S.C. § 2601(b)(2) (2006).

50. 12 U.S.C. § 2607 (2006).

51. 12 U.S.C. § 2607(a) (2006).

52. 12 U.S.C. § 2607(b) (2006).

a private right of action for victims of violations of these anti-kickback provisions[53] and holds violators "liable to the person or persons charged for the settlement service involved in the violation in an amount equal to three times the amount of any charge paid for such settlement service."[54]

The plaintiff in *First American* alleged that First American Corporation (First American) violated RESPA's anti-kickback provisions by paying a real estate settlement firm, Tower City Title Agency of Cleveland, Ohio, for referrals of title insurance services to First American.[55] First American owns, among other entities, First American Title Insurance Company, which issues title insurance policies nationwide.[56] In 1998, First American Title entered into an agreement with Tower City in which Tower City agreed to refer title insurance underwriting to First American Title.[57] In exchange for the referrals, First American Title purchased a minority interest in Tower City.[58]

The plaintiff purchased a home in Cleveland, Ohio in September 2006.[59] Tower City acted as the settlement agent in the transaction.[60] Pursuant to its prior arrangement with First American Title, Tower City referred the title insurance to First American Title, which issued a policy to plaintiff.[61] When the plaintiff discovered the kickback, she filed a class action complaint in district court against First American and First American Title, alleging that they violated RESPA section 8 by paying individual title companies such as Tower City in exchange for exclusive referral agreements with First American Title.[62] First American moved to dismiss for lack of subject matter jurisdiction, arguing that the plaintiff lacked standing to bring

53. *See* 12 U.S.C. § 2607(d) (2006).

54. 12 U.S.C. § 2607(d)(2) (2006).

55. Edwards v. First Am. Corp., 610 F.3d 514, 515 (9th Cir. 2010), *cert. granted*, 567 U.S. ___, 131 S. Ct. 3022 (June 20, 2011), *cert. dismissed*, 567 U.S. ___, 132 S. Ct. 2536 (June 28, 2012) (No. 10-708).

56. *Id.* at 516.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

her RESPA claim.[63] The district court denied First American's motion, holding that RESPA gave the plaintiff a "right to be free from referral-tainted settlement services," the violation of which constituted an injury that established her standing.[64]

On appeal, the Ninth Circuit affirmed the district court's holding that the plaintiff had standing to bring her RESPA claim.[65] The court of appeals rejected First American's argument that a RESPA plaintiff must allege an overcharge in order to establish standing to sue for violations of RESPA's anti-kickback provisions.[66] The Ninth Circuit noted that the legislative history of RESPA includes findings that violations of RESPA's anti-kickback provision "could result in harm beyond an increase in the cost of settlement services."[67]

Oral argument on November 28, 2011, revealed a Supreme Court that was closely divided on principles of standing and on the interpretation of RESPA.[68] Justice Breyer raised a hypothetical question that illustrated the differing views on the Court.[69] He imagined a telephone solicitation statute prohibiting telemarketers from calling between 7 pm and 7 am and imposing a private right of action with $500 statutory damages for violations.[70] He continued, "[M]y grandmother, who is always complaining no one ever calls her, loved the telephone call. She loved it. Best thing happened to her in a month. Okay? Now, can she sue?"[71] First American's counsel said, "No . . . [i]f she does not have actual injury, the fact of the statutory violation would not give rise to standing in that case."[72] But then Justice Breyer

63. *Id*.

64. Edwards v. First Am. Corp., 517 F. Supp. 2d 1199, 1204 (C.D. Cal. 2007), *aff'd in part, rev'd in part*, 610 F.3d 514 (9th Cir. 2010), *cert. granted*, 567 U.S. ___, 131 S. Ct. 3022 (June 20, 2011), *cert. dismissed* 567 U.S. ___, 132 S. Ct. 2536 (June 28, 2012) (No. 10-708).

65. *First Am. Corp.*, 610 F.3d at 518.

66. *Id*.; *accord* Alston v. Countrywide Fin. Corp., 585 F.3d 753, 755 (3d Cir. 2009); Carter v. Welles-Bowen Realty, Inc., 553 F.3d 979, 989 (6th Cir. 2009).

67. *First Am. Corp.*, 610 F.3d at 517.

68. Transcript of Oral Argument, *First Am. Fin. Corp.*, 567 U.S. ___, 132 S. Ct. 2536 (No. 10-708).

69. *Id*. at 3–4.

70. *Id*.

71. *Id*. at 4.

72. *Id*.

changed the hypothetical: "So, in other words, if the FDA bans a substance on the ground that 98 percent of the people it hurts, and there's some kind of automatic recovery, $500, anybody who bought the substance because it wasn't supposed to be sold, and she's one of the 2 percent that it helped."[73] At this point, First American's counsel appeared to switch positions: "In the case in which someone is exposed to a substance that has—that is illegal, they might well suffer a harm, and the harm might be the exposure to the substance."[74]

Tellingly, however, no other member of the Court joined Justice Breyer in discussing an issue that related directly to *Data Processing* and the question of whether Congress may confer injury in fact by statute.[75] After Justice Breyer's series of hypothetical questions, Justice Ginsburg raised an analogy to trusts and restitution,[76] Justice Sotomayor accused First American of advancing an incorrect interpretation of RESPA,[77] and Justice Scalia commented regarding First American's standing argument:

> That's not so extraordinary. It's what has to be shown—in Sherman Act cases, right? Contracts and combinations in restraint of trade are unlawful; but in order to recover under the Sherman Act, you have to show not only that it was unlawful, but that you were harmed by it.[78]

Clearly, there was no consensus among the Justices regarding the role of Congress in creating injury in fact.[79] Later in the argument, Justice Breyer proposed another hypothetical involving a private right of action based on congressional fact-finding:

> Suppose Congress makes a finding, and this is the finding: We think that lawyers or whoever is engaged in these who hire title insurance companies should hire the best one on the merits, not on the basis of which one will give them the biggest

73. *Id*.
74. *Id*. at 5.
75. *See id*. at 3–5.
76. *See id*. at 6.
77. *See id*. at 7–9.
78. *Id*. at 9.
79. *See id*. at 3–9.

> kickback. We think that's so because that will help keep people secure. Everyone in such—who buys a house will feel more secure knowing that the market worked there. We can't prove who feels insecure and who doesn't. We think in general they would. And so, we give everybody the right to recover $500 if they are injured where the injury consists of being engaged in a transaction where the title insurance company was not chosen on the merits but was chosen in whole or in part on the basis of a kickback. And they write that right into the statute.
>
> So, therefore, there is no doubt that the plaintiff here suffered the harm that Congress sought to forbid. That harm was being engaged in a transaction where the title insurance company was not chosen on the merits but partly in terms of a kickback.80

First American's counsel responded that Article III would prevent a federal court from entertaining a private cause of action under such a statute.[81] Yet, this response, which would represent a dramatic narrowing of the traditional power of the legislature in creating substantive rights that confer standing, drew remarkably little outcry on the bench.[82] Justice Kagan did ask a follow-up question regarding Congress's ability to regulate title insurance and create the ability for plaintiffs to sue in federal court for breach of a "no-kickback" contractual provision without demonstrating concrete financial loss.[83] Justice Kennedy also was prompted to ask:

> [S]uppose the Congress works with economists and concludes there is a reasonable probability that if there were no kickbacks, there would be a more competitive market, there would be lower prices for some of the escrow fees, some of the collateral fees in addition to the title insurance, and the plaintiff then alleges that there is this reasonable probability that there would be a more efficient market, resulting in cost savings. Would that be enough?[84]

80. *Id*. at 16–17.
81. *See id*. at 17.
82. *See id*.
83. *See id*. at 17–18.
84. *Id*. at 24.

First American demurred, and yet the Justices did not seem to recognize the significant ramifications of First American's argument for congressional power. *Havens Realty Corp. v. Coleman* illustrates the traditional view of Congress's authority.[85] *Havens* involved alleged violations of section 804(d) of the Fair Housing Act, which makes it unlawful "[t]o represent to any person because of race, color, religion, sex, . . . or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."[86] The plaintiffs in *Havens* were "testers"—"individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices."[87] The defendant real estate company argued the plaintiffs lacked standing because they approached the defendant expecting to receive false information without the intention to buy or rent a home, and therefore had not been harmed by the defendant's misrepresentations.[88] The Court rejected this argument on the basis that the statute created an "enforceable right to truthful information" and that plaintiffs had been harmed by virtue of their deprivation of that statutory right, thereby satisfying Article III's injury requirement.[89]

Similarly, in *Federal Election Commission v. Akins*, the Court, citing *Havens*, explained that it had "previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."[90] And in *Public Citizen v. Department of Justice*, the Court held that failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue."[91]

RESPA creates an enforceable right to receive real estate settlement services untainted by kickbacks,[92] just as the Fair

85. 455 U.S. 363 (1982).
86. 42 U.S.C. § 3604(d) (2006).
87. *Havens*, 455 U.S. at 373.
88. *Id*. at 369, 373–74.
89. *Id*. at 373–74.
90. 524 U.S. 11, 21 (1998) (citing *Havens*, 455 U.S. at 373–74).
91. 491 U.S. 440, 449 (1989).
92. 12 U.S.C § 2607(a) (2006).

Housing Act at issue in *Havens* creates an enforceable right to truthful information regarding the availability of housing without any further proof regarding the use to which the consumer would put that information.[93] The deprivation of that statutory right is itself an injury, regardless of whether the consumer suffers additional consequential damages.[94] Requiring a RESPA plaintiff to show consequential damages to establish her standing would be the equivalent of requiring a Fair Housing Act plaintiff to allege a harm beyond the violation of his statutory rights, a position that *Havens* explicitly rejected.[95] Yet, the Court did not see the issue that way at oral argument.[96]

The Court's evident unwillingness to recognize Congress's traditional power to create substantive rights that confer standing would create a number of anomalies. First, it would deny the legislature the ability to engage in fact-finding to identify injuries and appropriate remedies.

Congress's authority to define injuries that will establish standing finds additional support in well-established general principles of judicial deference to legislative judgments.[97] The Court has held that "courts must accord substantial deference to the predictive judgments of Congress."[98] This deference is due in part because Congress "is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data'" bearing upon legislative questions.[99] The Court in *Turner I* stated: "We owe Congress'[s] findings an additional measure of deference out of

93. *Havens*, 455 U.S. at 373 (quoting Warth v. Seldin, 422 U.S. 490, 500 (1975)).

94. *Id*. at 373–74.

95. *Id*.

96. *Id*. at 370–71 (recognizing issue is whether the claim had become moot).

97. *See, e.g*., Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n (*Turner I*), 412 U.S. 622 (1994) (plurality opinion).

98. *Id*. at 665; *see also* Holder v. Humanitarian Law Project, 561 U.S. ____, 130 S. Ct. 2705, 2728 (2010) ("[T]hat judgment, however, is entitled to significant weight . . . ."); Bartnicki v. Vopper, 532 U.S. 514, 550 (2001) (Rehnquist, C.J., dissenting) (quoting *Turner I*, 512 U.S. at 665 (plurality opinion)).

99. *Turner I*, 512 U.S. at 665–66 (plurality opinion) (quoting Walters v. Nat'l Ass'n. of Radiation Survivors, 473 U.S. 305, 331 n.12 (1985)).

respect for its authority to exercise the legislative power."[100] In sum, "deference must be accorded to [Congress's] findings as to the harm to be avoided and to the remedial measures adopted for that end, lest we infringe on traditional legislative authority to make predictive judgments when enacting nationwide regulatory policy."[101]

These principles indicate that the judgments made by Congress in enacting RESPA are therefore entitled to deference. Congress found that kickbacks in real estate transactions harm consumers and that this harm justifies prohibiting all such kickbacks,[102] regardless of an individual consumer's ability to establish an overcharge—a burdensome inquiry that may often be difficult and expensive for an individual consumer to conduct, particularly given the relatively small financial stake typically at issue. Indeed, RESPA includes an explicit finding that kickbacks and referral fees "tend to increase unnecessarily the costs of certain settlement services."[103] Congress could have decided to regulate settlement costs directly but instead intentionally and rationally chose "to regulate the underlying business relationships and procedures of which the costs are a function."[104] Congress also decided not to require individual RESPA plaintiffs to prove harm beyond the violation of their statutory right to services free of kickbacks.[105] Congress's chosen approach is consistent with the nature of the systemic, anti-competitive effects of kickbacks, which can become significant in the aggregate even if they are small and difficult to prove individually.

Congress's approach is also consistent with common law restitution principles that do not require proof of harm beyond unjust enrichment of the defendant at the hands of the

100. Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n (*Turner II*), 520 U.S. 180, 196 (1997).

101. *Id*.

102. 12 U.S.C. § 2601(a)–(b)(2) (2006); S. REP. NO. 93-866, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548.

103. 12 U.S.C. § 2601(b)(2) (2006).

104. S. REP. NO. 93-866, at 3 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6546, 6548.

105. *See* 12 U.S.C. § 2607 (2006).

plaintiff.[106] In discussing principles of agency law, for example, the Supreme Court has flatly rejected the argument that a principal must demonstrate consequential losses from an agent's conflict of interest as a prerequisite of suit:

> It is immaterial if that appears whether the complainant was able to show any specific abuse of discretion, or whether it was able to show that it had suffered any actual loss by fraud or otherwise. It is not enough for one occupying a confidential relation to another, who is shown to have secretly received a benefit from the opposite party, to say, "You cannot show any fraud, or you cannot show that you have sustained any loss by my conduct." Such an agent has the power to conceal his fraud and hide the injury done his principal. It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency.[107]

Another anomaly of refusing to recognize congressionally conferred rights as "injury in fact" is it would leave congressionally created causes of action enforceable only in state courts, which are not bound by Article III.[108] The Supreme Court observed that:

> The constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute.[109]

The Court noted that "[a]lthough the state courts are not bound to adhere to federal standing requirements, they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own

106. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. 5 (2006).

107. United States v. Carter, 217 U.S. 286, 305–06 (1910); *see also* Michoud v. Girod, 45 U.S. 503, 553, 557, 559 (1846); RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); GEORGE GLEASON BOGERT ET AL., THE LAW OF TRUSTS AND TRUSTEES § 543(P), at 382–83 (2d rev. ed. 1993).

108. ASARCO Inc. v. Kadish, 490 U.S. 605, 620 (1989).

109. *Id*. at 617; *see also* Pennell v. City of San Jose, 485 U.S. 1, 8 (1988).

interpretations of federal law."[110] An unwillingness to recognize statutory violations as sufficient to confer Article III standing would relegate enforcement of federal statutory schemes to state courts.

To be sure, Congress does not have a blank check when it comes to Article III. In particular, Congress may not "abrogate the Art. III minima."[111] The Supreme Court recognized that "Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit."[112] Thus, Congress may not attempt to bestow a statutory private right of action without an alleged deprivation of an individual substantive statutory right. For example, the Line Item Veto Act at issue in *Raines v. Byrd* created a private right of action to challenge the constitutionality of the Act but established no individual substantive rights.[113] Similarly, *Lujan v. Defenders of Wildlife* involved a suit brought under the Endangered Species Act's citizen suit provision.[114] The Court held that neither that provision nor the substantive portions of the Act the defendants had allegedly violated created any "individual rights" and on that basis found no standing.[115]

But there can be little question that RESPA, in addition to creating a private right to sue, creates an individual, substantive statutory right to real estate settlement services free of kickbacks.[116] The invasion of this right creates an injury in fact that establishes standing. To rule otherwise would accord Congress no role in the standing inquiry, disregarding Congress's judgment that kickbacks in real estate settlement services cause harms and requiring a completely independent inquiry by courts. Where Congress has "identif[ied] the injury it seeks to vindicate

110. *Kadish*, 490 U.S. at 617.

111. Gladstone Realtors v. Vill. of Bellwood, 441 U.S. 91, 100 (1979).

112. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 497, 516 (2007) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

113. *See* Line Item Veto Act, Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996); Raines v. Byrd, 521 U.S. 811, 829–30 (1997).

114. 504 U.S. 555 (1992); 16 U.S.C. § 1540(g) (2006).

115. *Lujan*, 504 U.S. at 577–78 (quoting Stark v. Wickard, 321 U.S. 288, 309–10 (1944)).

116. 12 U.S.C. § 2607(a) (2006).

and relate[d] the injury to the class of persons entitled to bring suit," deference is due to Congress's judgment that plaintiffs have suffered a judicially cognizable injury, and a court must recognize the invasion of the substantive statutory right as injury in fact. [117]

The issue presented in *First American* has wide-ranging implications because Congress has used private rights of action to enforce many regulatory objectives. The Legislature has enacted numerous statutes to protect consumers from unscrupulous business practices.[118] Many of these statutes contain private rights of action which provide individuals victimized by prohibited business practices an opportunity to seek redress from the violator.[119] Federal consumer protection statutes often provide that plaintiffs may recover an amount based on what they were charged for the unlawful service or an amount specified in the statute. For example, the Truth in Lending Act provides that a violator is liable to a victim "in an amount equal to the sum of . . . any actual damage sustained by such person as a result of the failure [and] . . . twice the amount of any finance charge in connection with the transaction."[120] The Fair Credit Reporting Act states that a violator who obtains a consumer report under false pretenses or knowingly without a permissible purpose is liable to a victim in an amount equal to "actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater."[121]

The issue presented in *First American* will therefore persist, and how the Court addresses it will have broad implications for many congressional statutory schemes.

---

117. *Envtl. Prot. Agency*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in judgment)) (internal quotation marks omitted).

118. *See, e.g.*, Truth in Lending Act of 1968 § 130, 15 U.S.C. §§ 1601–1667(f) (2006) (regulating creditor disclosures); Fair Credit Reporting Act of 1968 § 616, 15 U.S.C. §§ 1681–1681x (2006) (regulating consumer credit reporting agencies); Fair Debt Collection Practices Act of 1977 § 813, 15 U.S.C. §§ 1692–1692p (2006) (regulating debt collectors).

119. *See, e.g.*, Truth in Lending Act of 1968 § 130, 15 U.S.C. § 1640 (2006); Fair Credit Reporting Act of 1968 § 616, 15 U.S.C. § 1681n (2006); Fair Debt Collection Practices Act of 1977 § 813, 15 U.S.C. § 1692k (2006).

120. 15 U.S.C. § 1640(a)(1)–(2) (2006).

121. 15 U.S.C. § 1681(n)(a)(1)(B) (2006).

III. THE *KIOBEL* CASE AND U.S. TORT LIABILITY FOR VIOLATIONS OF INTERNATIONAL LAW OCCURRING ENTIRELY OVERSEAS

The *Kiobel* case was the second important case *not* decided by the Supreme Court during the 2011 Term, and it too presented fundamental legal questions.[122]

A. The Initial Question Presented In *Kiobel*

The case was brought by twelve Nigerian citizens alleging that a Nigerian corporation, Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), aided and abetted the Nigerian government in harming Nigerian citizens in Nigeria.[123] The district court dismissed SPDC for lack of personal jurisdiction.[124] But the plaintiffs nonetheless pursued their suit against the English and Dutch companies that indirectly held stock of SPDC.[125]

Soon after the original complaint was filed, the Nigerian government formally objected to the Attorney General of the United States that the suit would improperly assert "extra territorial jurisdiction of a United States court . . . for events which took place in Nigeria;"[126] "jeopardize the on-going process initiated by the current government of Nigeria to reconcile with the Ogoni people in Nigeria;"[127] "compromise the serious efforts of the Nigerian Government to guarantee the safety of foreign investments, including those of the United States;"[128] and "gravely undermin[e] [Nigeria's] sovereignty and plac[e] under

122. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (Oct. 17, 2011), *reh'g granted*, 565 U.S. ___, 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10-1491).

123. *Id*. at 117.

124. Kiobel v. Royal Dutch Petrol. Co., No. 02 Civ. 7618, 2010 WL 2507025, at *1 (S.D.N.Y. June 21, 2010).

125. *Kiobel*, 621 F.3d at 123.

126. Joint Appendix at 129, Kiobel v. Royal Dutch Petrol. Co., No. 10-1491 (U.S. Mar. 5, 2012).

127. *Id*. at 130.

128. *Id*. at 129.

strain the cordial relations that exist with the Government of the United States of America."[129]

The corporate defendants moved to dismiss the case for failure to state a claim under Federal Rules of Civil Procedure 12(b)(6).[130] "The district court dismissed plaintiffs' claims for aiding and abetting property destruction, forced exile, extrajudicial killing, and violations of the rights to life, liberty, security, and association."[131] However, "the district court denied defendants' motion to dismiss plaintiffs' claims for aiding and abetting arbitrary arrest and detention, crimes against humanity, and torture . . . ."[132] The court certified the order for interlocutory appeal under 28 U.S.C. § 1292(b).[133]

The Second Circuit affirmed the district court as to the dismissed claims and reversed the district court as to the remaining claims, thereby dismissing all of Plaintiff's claims in the amended complaint.[134] Judge Cabranes authored the majority opinion, joined by Chief Judge Jacobs; Judge Leval concurred in the judgment.[135] The majority focused on the corporate-liability question, framing it as whether "the customary international law of human rights has . . . to date recognized liability for corporations that violate its norms."[136] The court of appeals held that international law has not recognized, in a sufficiently "specific, universal, and obligatory" manner, a norm of corporate responsibility for violations of the human rights at issue.[137] Judge Leval concurred only in the judgment.[138] He disagreed with the majority's holding regarding corporate responsibility but nonetheless agreed that the

129. *Id*. at 131.

130. Kiobel v. Royal Dutch Petrol. Co., 456 F. Supp. 2d 457, 459 (S.D.N.Y. 2006).

131. Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 124 (2d Cir. 2010), *cert. granted*, 565 U.S. ___, 132 S. Ct. 472 (Oct. 17, 2011), *reh'g granted*, 565 U.S. ___, 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10-1491).

132. *Id*. (citing *Kiobel*, 456 F. Supp. 2d at 465–67).

133. *Id*.

134. *Id*. at 149.

135. *Id*. at 115.

136. *Id*. at 125.

137. *Id*. at 141 (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 732 (2004)) (internal quotation marks omitted).

138. *Id*. at 149 (Leval, J., concurring).

plaintiffs' amended complaint should be dismissed because it "does not contain allegations supporting a reasonable inference that [the corporate defendants] acted with a purpose of bringing about the alleged abuses."[139]

B. The Corporate Liability Question

The Supreme Court granted certiorari, initially limited to the question whether the ATS[140] creates a cause of action for a corporation's alleged complicity in a foreign government's commission of arbitrary arrest and detention, crimes against humanity, and torture against its own citizens within its own sovereign boundaries.[141] The focus of the case, at least at first, was on whether there was *corporate responsibility* for the torts alleged by the plaintiffs.[142]

That question had divided lower courts and commentators, largely because of its fairly recent vintage.[143] Until the post-World War II Nuremberg trials, international law was seen as a largely state-versus-state affair. Obligations and correlative duties were primarily confined to states, rather than individuals.[144] The Nuremberg trials represent the birth of modern international law principles applicable to non-state actors.

Accordingly, the lower courts that have previously considered the corporate liability issue have consulted the Nuremberg experience for guidance.[145] Those who support corporate defendants occasionally over-read the evidence, taking the fact that no

139. *Id*. at 188.

140. 28 U.S.C. § 1350 (2006).

141. *See Kiobel*, 621 F.3d 111, *cert. granted*, 565 U.S. ___, 132 S. Ct. 472 (No. 10-1491).

142. *Kiobel*, 621 F.3d at 149.

143. *Compare id*. (holding corporate defendants not subject to ATS liability) *with* Doe v. Exxon Mobil Corp., 654 F.3d 11, 15 (D.C. Cir. 2011) (finding corporations not immune from liability under ATS).

144. *See* KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 253 (2011) ("A number of scholars believe that the [Nuremburg Military Tribunal] trials provide precedent for corporate criminal responsibility.")

145. Sarei v. Rio Tinto, P.L.C., 671 F.3d 736, 761 (9th Cir. 2011) (en banc); *id*. at 787 (McKeown, J., concurring in part and dissenting in part); *Exxon Mobil Corp*., 654 F.3d at 52 n.43 (D.C. Cir. 2011); *id*. at 83–84 (Kavanaugh, J., dissenting in part).

corporate entities were in fact charged at Nuremberg as evidence of a settled rule that corporations and similar business entities could not be charged.[146] On the other side, some argue that the Nuremberg trials embodied a growing norm of corporate accountability.[147] Both extremes are wrong. The truth is that the Nuremberg and related postwar trials do not demonstrate the existence of a 1940s international norm of corporate criminal liability that might serve as precedent in suits against corporations under the ATS.

Post-World War II trials encompassed a number of proceedings.[148] At the first Nuremberg trial (1945 to 1946) before the four-power International Military Tribunal (IMT), neither natural nor legal persons from the private sector were tried.[149] The sole business defendant named in the indictment, Gustav Krupp, was chosen because of the notoriety of his family-owned arms empire, but only after miscommunication between chief American prosecutor, Justice Robert Jackson, and his British counterpart, Attorney General Sir Hartley Shawcross.[150] With so many candidates for inclusion in a first trial, Jackson favored indicting several industrialists, but the two chiefs settled on one business figure, neglecting to specify whether their agreement on "Krupp" meant Gustav Krupp, who led the firm till 1943, or his son Alfried, who assumed control thereafter.[151] Then they agreed with the father without investigating whether he was physically able to be tried, which the judges ruled he was not.[152] Soon after, the head of the American economic case, Assistant Attorney General Francis Shea, was eased out of his job and not

146. *Contra Sarei*, 671 F.3d at 761 (stating lower courts have found corporations may be liable for war crimes).

147. *Id*.

148. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 89–90 (1992) (proceedings listed twenty-four defendants).

149. *Id*. at 90–93.

150. *Id*. at 90–92.

151. *Id*. at 91–93.

152. *Id*. at 153–54; HARTLEY SHAWCROSS, LIFE SENTENCE: THE MEMOIRS OF HARTLEY SHAWCROSS 101–02 (1995).

replaced.[153] As a result, there was no private-sector economic defendant of any sort in the trial.[154]

The IMT did not try any corporations that were charged, and it appears that corporate criminal liability was not discussed.[155] In the end, even the leading public-sector economic defendant, former Reichsbank President and Economics Minister Hjalmar Schacht, was acquitted, with the court providing reasons that made future international cases against economic actors extremely difficult.[156]

The Allies then discussed the possibility of a second international trial without success.[157] Meanwhile, an American team led by General Telford Taylor began to prepare cases for presentation to U.S. tribunals either in addition to or instead of an international trial.[158] Taylor's office ultimately charged 185 defendants in twelve trials from 1946 to 1949, and four of the trials involved individual defendants—not corporations—from private businesses.[159] No corporations were charged or tried, and the most recent study of the topic has termed the effort to find in these trials a precedent for corporate liability "misguided."[160]

One Nuremberg panel did permit a lawyer to speak on behalf of a corporation "from a moral point of view,"[161] and then referred to the possibility of guilt for "private individuals, including juristic persons," but the phrase was entirely in dicta.[162] The court promptly said that the issue was immaterial as no corporations were charged: "[T]he corporate defendant, Farben, is

153. TAYLOR, *supra* note 148, at 141–43.

154. *Id*. at 142–43.

155. *See generally* United States v. Goering (*The Nuremberg Trial*), 6 F.D.R. 69 (Intl Mil. Trib. 1946).

156. *Id*.; Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1161 (2009); Symposium, *Critical Perspectives on the Nuremberg Trials and State Accountability*, 12 N.Y.L. SCH. J. HUM. RTS. 453, 510–11 (1995).

157. HELLER, *supra* note 144, at 19–20.

158. *Id*.

159. *Id*. at 253.

160. *Id*.

161. United States v. Krauch (*I.G. Farben Case*), 8 TRIALS OF WAR CRIMINALS 1081, 1152 (1948).

162. *Id*. at 1132, 1136.

not before the bar of this Tribunal and cannot be subjected to criminal penalties in these proceedings."[163]

Today, human rights scholars often praise the four Nuremberg trials charging individual economic actors, and they are right to point to the vigorous and skillful American prosecution efforts.[164] But the cases were failures in the conventional legal sense. The judges displayed indifference and sometimes hostility to the prosecution's evidence and seemed to disbelieve that the German business leaders before them could possibly have been complicit in mass atrocities.[165] In the *I.G. Farben Case*, the judges largely ignored the prosecution's evidence, especially regarding the firm's involvement with Auschwitz, convicting only those defendants whose personal presence at the camp was conceded[166] and acquitting everyone on charges of involvement with poison gas,[167] even though to this day some courts and ATS supporters misstate these acquittals as convictions.[168]

Some advocates of corporate liability have pointed to the London Charter creating the IMT,[169] which provided for charges against "organizations."[170] These advocates contend that business corporations are a form of legal organization.[171] Therefore, even if

163. *Id*. at 1153.

164. GEORGE P. FLETCHER, TORT LIABILITY FOR HUMAN RIGHTS ABUSES 164 (2008).

165. *Id*.

166. *I.G. Farben Case*, 8 TRIALS OF WAR CRIMINALS at 1153–67.

167. *Id*. at 1169.

168. FLETCHER, *supra* note 164, at 164 (2008).

169. *See* Mara Theophila, *"Moral Monsters" Under the Bed: Holding Corporations Accountable for Violations of the Alien Tort Statute After* Kiobel v. Royal Dutch Petroleum Co., 79 FORDHAM L. REV. 2859, 2885 (2011).

170. Charter of the International Military Tribunal art. 9–10, *annexed to* The Agreement for the Prosecution and Punishment of The Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter] (establishing the laws and procedures for the Nuremberg Tribunal).

171. *See, e.g*., Kiobel v. Royal Dutch Petrol. Co., 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring), *cert. granted*, 565 U.S. ___, 132 S. Ct. 472 (Oct. 17, 2011), *reh'g granted*, 565 U.S. ___, 132 S. Ct. 1738 (Mar. 5, 2012) (No. 10-1491); *see also* Brief of Amici Curiae Nuremberg Scholars Omer Bartov et al., at 20, *Kiobel*, 565 U.S. ___, 132 S. Ct. 1738 (No. 10-1491) (advocating that business corporations are a form of legal organizations).

Nuremberg trials did not charge corporations, they allowed and implied corporate liability.[172] But the evidence makes clear that the term "organizations" was meant to include only government agencies and security and party formations.[173] As the war ended, the Allies issued a broad law listing over sixty types of Nazi Party and government organizations (including all six later tried at Nuremberg) that were destroyed and banned, with their property confiscated.[174] Organizations are not business entities, as prosecutors' illustrations might show; they are meant to include nothing more than party, government, and security formations.[175] Moreover, the London Charter of August 8, 1945 referred not to verdicts, but to declarations of criminality for accused organizations.[176] Organizations were not tried in the usual sense at Nuremberg,[177] and indeed the Allies did not expect that there would be any question as to whether Nazi party entities would be permitted to continue.[178]

Nor does the governance of German business corporations during the four years of the Allied occupation support a norm of international corporate liability. Although some business managers and directors were ousted from certain companies and some firms' property was forfeited in part, these examples do not support a broad norm of corporate liability.[179] The history was far more complicated than one of systematic legal accountability for

172. *See* Theophila, *supra* note 169, at 2896.

173. *Kiobel*, 621 F.3d at 134 (majority opinion) (discussing IMT's imposition of criminal liability on SS and Gestapo but not onto I.G. Farben); s*ee also* Joel Slawotsky, *The Conundrum of Corporate Liability Under the Alien Tort Statute*, 40 GA. J. INT'L & COMP. L. 175, 184–85 (2011).

174. Control Council Law No. 2 pmbl., *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *in* 1 ENACTMENTS AN APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 131–32 [hereinafter Control Council Law No. 2], *available at* www.loc.gov/rr.frd/Military_Law/Enactments/law-index.pdf.

175. *See, e.g.*, BRADLEY F. SMITH, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944–1945 36, 162, 173 (1982); Letter from Robert H. Jackson, U.S. Chief of Counsel to President Harry Truman (June 7, 1945), *available at* http://avalon.law.yale.edu/imt/imt_jack01.asp.

176. London Charter, *supra* note 170, at 1548.

177. *See* Control Council Law No. 2, *supra* note 174 at 132.

178. Sheldon Glueck, *The Nuernburg Trial and Aggressive War*, 59 HARV. L. REV. 396, 406–07 (1946).

179. *See* HELLER, *supra* note 144, at 313–30.

a culpable sector of Germany.[180] At differing times and for a variety of reasons, occupation officials permitted, protected, and even nurtured business output and companies.[181] The major banks in the western zones were broken into regional units[182] but were quickly allowed to merge into zone-wide institutions, and eventually into nationwide entities in 1957.[183] Alfried Krupp was not only given back the factories and fortune that Nuremberg judges had seized as ill-gotten fruits of international crime, but also was quietly allowed to re-enter the arms industry.[184] Many large and most small firms were largely untouched.[185]

Atop the multiplicity of administrative and governing bodies was the Allied Control Council, a body authorized to issue rules governing all four zones consisting of the four commanders-in-chief or military governors or their deputies.[186] Supporters of corporate liability have tried to gain traction for their position by highlighting a decree known as Control Council Law No. 9 (Nov. 30, 1945), providing for the breakup of the I.G. Farben company and the seizure and dispersal of its property.[187] The reality, however, is that the dissolution of I.G. Farben was political rather than legal in character. The choice of I.G. Farben as a target and the decision to dissolve it were not legally weighed and determined, but had been contemplated by the U.S. during the war.[188] I.G. Farben was deeply involved in the German war effort and collaborated closely with Nazi officials.[189] Its dissolu-

180. *See generally id.* at 131.

181. *See generally id.*

182. *Dresdner Bank from 1872 to 2009*, COMMERZBANK, https://www.commerzbank.com/media/konzern/neue_commerzbank/marke/geschichte/dresdner_bank_history.pdf (last visited Sept. 13, 2012).

183. *See generally,* HELLER, *supra* note 144 at 313–30.

184. RAUL HILBERG, *German Railroads/Jewish Souls*, in SOCIETY 14:1, at 60–74 (1976), *reprinted in* SOCIETY 35.2, at 162–74 (1998).

185. LUCIUS D. CLAY, DECISION IN GERMANY 330-32 (1950).

186. Bush, *supra* note 156, at 118.

187. Control Council Law No. 9 pmbl., *Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *in* 1 ENACTMENTS AN APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 225–305 [hereinafter Control Council Law No. 9], *available at* www.loc.gov/rr.frd/Military_Law/Enactments/law-index.pdf.

188. Bush, *supra* note 156, at 1114 n.51.

189. PETER HAYES, INDUSTRY AND IDEOLOGY: I.G. FARBEN IN THE NAZI ERA 378 (1987).

tion was not based on legal criteria. There were no hearings, findings of fact, or evidentiary records.[190] Rather, it was an executive and political decision agreed by the four commanders acting as part of their war-making authority.[191] The Allies knew that the firm had manufactured extensive war material and been a critical part of the Nazi war effort, and was therefore dangerous to the Allies.[192] Its complicity with crimes against humanity or Auschwitz slave labor or poison gas was only being pieced together in November 1945 and was not relevant to the decision to dissolve.[193] Rather, the dissolution of I.G. Farben was akin to the disposition of the Nazi Party and military organizations, the other large institutions that were the subject of Control Council proceedings in the same period early in the occupation.[194]

In fact, the dissolution of I.G. Farben was less significant than the disbanding of the party and the military. Very quickly, the I.G. Farben dissolution was forgotten,[195] and three huge successor firms emerged—BASF, Hoechst, and Bayer.[196] The firms were permitted to trade with each other and with their former partners and subsidiaries including Degesch, the firm at the center of Zyklon B production.[197] They paid I.G. Farben's shareholders the face value of the portions of its capital that each successor took over, so that the seizure and dissolution of I.G. Farben actually involved no financial penalty to its owners.[198] The successor firms also saw to it that employees of the former

190. *Id*.

191. *Id*.

192. OFFICE OF MILITARY GOV'T, DIVISION OF INVESTIGATION OF CARTELS AND EXTERNAL ASSETS, REPORT OF THE INVESTIGATION OF I.G. FARBENINDUSTRIE A.G. ch. 2 (1945).

193. HAYES, *supra* note 189.

194. *Id*.

195. *Id*.

196. HAROLD ZINK, THE UNITED STATES IN GERMANY 1944–1955, at 266–67 (1957).

197. PETER HAYES, FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH 299–300 (2004).

198. RAYMOND G. STOKES, DIVIDE AND PROSPER: THE HEIRS OF I.G. FARBEN UNDER ALLIED AUTHORITY 189 (1988).

Farben, including those imprisoned at Nuremberg, were given pensions or new employment.[199]

C. Reargument On the Question of Extraterritoriality.

At oral argument on February 28, 2012, the Justices alluded briefly to the historical evidence regarding a corporate liability norm, but they quickly moved on to broader questions of extraterritoriality of the U.S. statute at issue, the ATS. Justice Ginsburg asked, "What happened to I.G. Farben? I thought that it was dissolved and its assets taken."[200] She also recognized that "there was no civil liability adjudicated in Nuremberg. It was about criminal."[201]

But it soon became clear that the Court's concern was in fact more fundamental—whether ATS authorized any tort liability at all for the events at issue.[202] Given the nature of the lawsuit—a suit by twelve Nigerian plaintiffs against Dutch and English corporate entities based on actions of their subsidiary that occurred in Africa—the concern about extraterritoriality was understandable.[203] As Justice Alito commented to counsel for the plaintiffs:

> [T]he first sentence in your brief in the statement of the case is really striking: "This case was filed by . . . twelve Nigerian Plaintiffs who alleged . . . that Respondents aided and abetted the human rights violations committed against them by the Abacha dictatorship . . . in Nigeria between 1992 and 1995." What does a case like that—what business does a case like that have in the courts of the United States?[204]

The ATS dates back to 1789.[205] Justice Alito wondered, "Do you really [think that] the first Congress wanted victims of the

199. STEPHAN H. LINDNER, INSIDE IG FARBEN: HOECHST DURING THE THIRD REICH 350–65 (Helen Schoop trans., 2008).

200. Transcript of Oral Argument at 35, Kiobel v. Royal Dutch Petrol. Co., 565 U.S. ___, 132 S. Ct. 472 (2011) (No. 10-1491) [hereinafter Kiobel Transcript] (argued Feb. 28, 2012).

201. *Id*. at 36.

202. *See id*. at 8–12.

203. *See id*.

204. *Id*. at 11 (alterations in original) (citation omitted).

205. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*,

French Revolution to be able . . . to sue French defendants in the courts of the United States?"[206]

The Justices seemed troubled by the extraordinary nature of the extraterritorial assertion of U.S. law in this context. Justice Alito observed, "Well, there's no particular connection between the events here and the United States. So, I think the question is whether there's any other country in the world where these plaintiffs could have brought these claims against the Respondents."[207] Chief Justice Roberts added, "[I]f there is no other country where this suit could have been brought, regardless of what American domestic law provides, isn't it a legitimate concern that allowing the suit itself contravenes international law?"[208]

A week after oral argument, the Court directed the parties to file supplemental briefs on the question: "Whether and under what circumstances the Alien Tort Statute, 28 U.S.C. §1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[209] The Court's questions regarding extraterritoriality will be addressed on the first day of the new Term, when the case is reargued on October 1, 2012.[210]

IV. CONCLUSION

The Supreme Court's blockbuster decisions are digested and debated by pundits, scholars, and practitioners alike. But very often the cases that the Court does *not* decide escape the attention they deserve. Last Term, both *First American* and *Kiobel* presented fundamental questions of wide significance that

106 COLUM. L. REV. 830, 832 (2006) (explaining ATS was "[o]riginally a clause of the Judiciary Act of 1789 . . .").

206. Transcript of Oral Argument at 12, *Kiobel*, 565 U.S. ___, 132 S. Ct. 472 (No. 10-1491).

207. *Id*. at 7.

208. *Id*. at 8.

209. Order for Reargument, Kiobel v. Royal Dutch Petrol. Co., 565 U.S. ___, 132 S. Ct. 1738 (2012) (No. 10-1491).

210. *SUPREME COURT OF THE UNITED STATES OCTOBER TERM 2012* (Aug. 13, 2012) *available at* http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentViewer.aspx?Filename=MonthyArgumentCalOct2012.html.

the Court began to analyze but did not resolve. During the next Term, we will learn the Court's answers to the issues raised by *Kiobel*. We will need to wait longer to discover the Court's approach to the Article III issues presented by *First American*. But given the timelessness of those issues, we can be assured that they, too, will eventually be the subject of a decision by the Supreme Court.