VOLUME 120 FEBRUARY 2007 NUMBER 4

HARVARD LAW REVIEW

ARTICLES

SOSA, CUSTOMARY INTERNATIONAL LAW, AND THE CONTINUING RELEVANCE OF *ERIE*

Curtis A. Bradley, Jack L. Goldsmith & David H. Moore

TABLE OF CONTENTS

SOSA, CUSTOMARY INTERNATIONAL LAW, AND THE CONTINUING RELEVANCE OF *ERIE*

Curtis A. Bradley,[*] *Jack L. Goldsmith*[**] *& David H. Moore*[***]

This Article analyzes the Supreme Court's 2004 decision in Sosa v. Alvarez-Machain *against the backdrop of the post-*Erie *federal common law. The Article shows that, contrary to the assertion of some commentators,* Sosa *did not embrace the "modern position" that customary international law (CIL) has the status of self-executing federal common law to be applied by courts without any need for political branch authorization and, indeed, is best read as rejecting that position. Commentators who construe* Sosa *as embracing the modern position have confounded the automatic incorporation of CIL as domestic federal law in the absence of political branch authorization (that is, the modern position) with the entirely different issue of whether and to what extent a particular statute, the Alien Tort Statute (ATS), authorizes courts to apply CIL as domestic federal law. The Article also explains how CIL continues to be relevant to domestic federal common law despite* Sosa*'s rejection of the modern position. The fundamental flaw of the modern position is that it ignores the justifications for, and limitations on, post-*Erie *federal common law. As the Article shows, however, there are a number of contexts in addition to the ATS in which it is appropriate for courts to develop federal common law by reference to CIL, including certain jurisdictional contexts not amenable to state regulation (namely, admiralty and interstate disputes), as well as gap-filling and interpretation of foreign affairs statutes and treaties. The Article concludes by considering several areas of likely debate during the next decade concerning the domestic status of CIL: corporate aiding and abetting liability under the ATS, application of CIL to the war on terrorism, and the use of foreign and international materials in constitutional interpretation.*

I. INTRODUCTION

The most contested issue in U.S. foreign relations law during the last decade has been the domestic status of customary international law (CIL).[1] In the mid-1990s, the conventional wisdom among

[*] Richard and Marcy Horvitz Professor of Law, Duke Law School.
[**] Henry L. Shattuck Professor of Law, Harvard Law School.
[***] Assistant Professor, University of Kentucky College of Law.

For their comments and suggestions, we thank Steve Burbank, Bobby Chesney, Richard Fallon, Craig Green, Marty Lederman, Caleb Nelson, Gerald Neuman, Michael Ramsey, Paul Stephan, Mark Weisburd, and participants in workshops held at the University of Chicago, Duke, George Washington, Georgetown, and Northwestern law schools. For their excellent research assistance, we thank Geoffrey Antell, Wells Bennett, Michael Fawcett, Josh Kreamer, Amy Osborne, Matt Perault, Joel Schellhammer, and Jason Spitalnick.

Professor Goldsmith served as an expert declarant with respect to some of the issues in this Article in *Bowoto v. Chevron Corp.*, No. C 99-02506 SI (N.D. Cal. Aug. 30, 2006).

[1] CIL, historically referred to as part of the "law of nations," is the law of the international community that "results from a general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987); *see also* Statute of the International Court of Justice art.

international law academics was that CIL had the status of self-executing federal common law to be "applied by courts in the United States without any need for it to be enacted or implemented by Congress."[2] This "modern position" was criticized by so-called "revisionists" who argued that CIL had the status of federal common law only in the relatively rare situations in which the Constitution or the political branches authorized courts to treat it as such.[3]

A number of modern position proponents argue that the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[4] resolved this debate in their favor. Dean Harold Koh, for example, contends that "all of the . . . circuits have [embraced the modern position] (and now the U.S. Supreme Court has as well, in the *Alvarez-Machain* case)."[5] Professor Ralph Steinhardt claims that CIL "was and [after *Sosa*] remains an area in which no affirmative legislative act is required to 'authorize' its application in U.S. courts."[6] Professor Martin Flaherty similarly maintains that *Sosa*'s "import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute."[7]

38(1)(b), June 26, 1945, 59 Stat. 1055, 1060 (stating that international custom is a source of law that can be applied by the International Court of Justice "as evidence of a general practice accepted as law").

[2] Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984); *see also* Kadic v. Karadžic, 70 F.3d 232, 246 (2d Cir. 1995); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d, § 115 cmt. e; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295, 303–04, 332 n.109; Harold Hongju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846–47 (1998).

[3] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); *see also* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986).

[4] 124 S. Ct. 2739 (2004).

[5] Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12 (2004).

[6] Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2259 (2004).

[7] Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004); *see also* Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005) ("[A] six-member majority of the Supreme Court rejected [the revisionist] view in *Sosa v. Alvarez-Machain*."); Recent Case, 119 HARV. L. REV. 1622, 1627 (2006) ("In *Sosa*, the Court clearly rejected this revisionist argument, adopting the language of the predominant view."); *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 226, 453 (2004) ("Much of the majority's analysis is consistent with the view that . . . all customary international law has been included within federal common law."); *cf.* William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L

Both the pre- and post-*Sosa* debates largely turn on the implications of the Supreme Court's seminal decision in *Erie Railroad Co. v. Tompkins*.[8] Modern position proponents tend to discount *Erie*'s relevance to the domestic status of CIL.[9] Revisionists, by contrast, insist that *Erie* is of central importance in determining whether and to what extent CIL has the status of federal common law.

The debate over *Erie*'s relevance to the domestic status of CIL has significant practical implications. If modern position proponents are correct about *Sosa*, and CIL automatically has the status of federal law, CIL would provide a basis for federal question jurisdiction, and courts would be authorized to use CIL to preempt inconsistent state law and possibly even to override executive branch action and some federal legislation.[10] These consequences would dramatically expand the international human rights litigation permitted under the *Sosa* de-

L. 87, 96–97 (2004) (arguing that *Sosa* endorses a particularized rather than wholesale incorporation of CIL into federal common law); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 132 (arguing that *Sosa* allows courts to "recogniz[e] and incorporat[e] international norms, to the extent that they can be harmonized with other federal law"). *But cf.* David H. Moore, *An Emerging Uniformity for International Law*, 75 GEO. WASH. L. REV. 1 (2006) (arguing that *Sosa* not only endorses the revisionist position, but also evidences the emergence of a uniform doctrine governing the status of both treaties and CIL in federal courts).

[8] 304 U.S. 64 (1938).

[9] *See, e.g.*, Koh, *supra* note 2, at 1831 ("Curiously, [revisionists] read *Erie* as effecting a near complete ouster of federal courts from their traditional role in construing customary international law norms."); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997) ("[T]he *Erie* decision did not require that federal courts stop citing cases decided before 1938 and reinvent federal common law from scratch."); Jordan J. Paust, *Customary International Law and Human Rights Treaties* Are *Law of the United States*, 20 MICH. J. INT'L L. 301, 308 (1999) (criticizing revisionists for "their nearly obsessive focus" on *Erie* and Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 397 (1997) ("[W]hile *Erie* rejected the general common law, it upheld the federal courts' power to develop common law in areas properly governed by federal law, including international law.").

[10] For the claim that CIL creates federal jurisdiction and preempts state law, see, for example, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(1) (1987), and Brilmayer, *supra* note 2, at 303. For the view that CIL binds the executive branch, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4; Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 324–25 (1985); and Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1116–20 (1985). For the view that CIL might trump inconsistent prior federal law, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4, and Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 876–77 (1987). We should emphasize that not every proponent of the modern position embraces all of these propositions, although there is significant academic support for each of them, and for the more general claim that all of CIL is federal law. *See generally* Bradley & Goldsmith, *supra* note 3, at 817 nn.3–4, 837 nn.150–51.

cision and would provide a vehicle by which U.S. citizens could challenge the actions of their government (state and federal) based on evolving CIL. These consequences might have particularly significant implications for challenges to executive action in the war on terrorism.

In this Article, we hope to make three contributions to the debate about CIL's domestic status after *Sosa*. First, we attempt to focus the debate more directly on *Erie* and its implications for modern federal common law. Like the Court in *Sosa* (but unlike many proponents of the modern position), we believe that *Erie* is centrally relevant to the current status of CIL in U.S. courts. Any theory of the domestication of CIL as federal common law must be consistent with *Erie*'s basic premises, and in this Article we attempt to flesh out the implications of those premises for domesticating CIL.

Second, we examine the emerging claim that *Sosa* constitutes an endorsement of the modern position that CIL is incorporated wholesale into the U.S. legal system as federal common law. As we show, the decision in *Sosa* cannot reasonably be read as embracing the modern position and, indeed, is best read as rejecting it. Commentators who construe *Sosa* as embracing the modern position have confounded the automatic incorporation of CIL as domestic federal law in the absence of congressional authorization (that is, the modern position) with the entirely different issue of whether and to what extent a particular statute, the Alien Tort Statute[11] (ATS), authorizes courts to apply CIL as domestic federal law. The ATS, which was first enacted in 1789, grants federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[12] The Court in *Sosa* held that the ATS authorized federal courts to recognize federal common law causes of action for a narrow class of CIL violations. The Court based this conclusion on what was, in effect, a translation of the specific intentions of the ATS framers to the regime of post-*Erie* federal common law. As we show, the Court's analysis would be superfluous if it agreed with the modern position. Moreover, the Court's reasoning and conclusions on a number of points simply cannot be reconciled with the modern position.

Third, we explain how CIL continues to be relevant to domestic federal common law despite *Sosa*'s rejection of the modern position. The fundamental flaw of the modern position is that it ignores the justifications for, and limitations on, post-*Erie* federal common law. As we show, however, there are a number of contexts in addition to the ATS in which it is appropriate for courts to develop federal common

---

[11] 28 U.S.C. § 1350 (2000).

[12] *Id.*

law by reference to CIL. These include certain jurisdictional contexts — namely, admiralty and interstate disputes — and the gap-filling and interpretation of foreign affairs statutes and treaties. In short, rejection of the modern position does not entail a rejection of the judicial domestication of CIL, but at the same time courts can domesticate CIL only in accordance with the requirements and limitations of post-*Erie* federal common law — limitations that, as we explain, were reaffirmed by the Court in *Sosa*.

This Article proceeds as follows. Part II describes the basic principles of *Erie* and its implications for modern federal common law. Part III distinguishes and describes the various existing debates concerning the domestic status of CIL and shows how *Erie* is central to each of these debates. Part IV analyzes the *Sosa* decision, explains its implications for the existing debates, and shows how it is best read as rejecting the modern position. Part V considers some of the many ways in which CIL can, consistent with *Erie*, inform the development of federal common law in the U.S. legal system even after rejection of the modern position. It also discusses several likely areas of debate concerning the domestic status of CIL during the next decade.

II. *ERIE* AND MODERN FEDERAL COMMON LAW

This Part briefly describes the general common law framework that existed prior to *Erie*, the Court's justifications in *Erie* for rejecting that framework, and the contours of the post-*Erie* federal common law. We do not attempt here to offer new insights about these widely discussed subjects; our goal is merely to remind readers of certain settled propositions that, as we explain in Parts III and IV, are relevant to debates over the domestic status of CIL.

*A. Pre-*Erie *General Common Law*

Before *Erie*, federal and state courts in civil cases applied a body of law that came to be known as "general common law."[13] They "resorted to [general common law] to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign."[14] As Justice Holmes would eventually describe and criticize it, general common law was "a transcendental body of law

---

[13] *See generally* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1279–85 (1996); William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Stewart Jay, *Origins of Federal Common Law* (pt. 2), 133 U. PA. L. REV. 1231 (1985). Early in U.S. history, federal courts also applied a common law of crimes, but the Supreme Court disallowed this practice in the early 1800s. *See* United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812).

[14] Fletcher, *supra* note 13, at 1517.

outside of any particular State but obligatory within it unless and until changed by statute."[15]

Courts did not view general common law as having the status of federal law. They did not consider it part of the "Laws of the United States" within the meaning of the Supremacy Clause,[16] and claims arising under it did not fall within either Article III or statutory federal question jurisdiction.[17] Federal court interpretations of general common law were not binding on state courts, and the two court systems sometimes adopted differing interpretations of this law.[18]

A famous early application of general common law occurred in *Swift v. Tyson*,[19] in which the Supreme Court applied "principles established in the general commercial law," rather than New York state court decisions, to resolve a commercial dispute concerning the validity of an assignment of a negotiable instrument, even though the assignment had occurred in New York.[20] In support of its decision, the Court reasoned that the Rules of Decision Act,[21] which requires federal courts to apply the "laws of the several states"[22] in cases not governed by the Constitution, treaties, or federal statutes, applies only to "the positive statutes of the state," and not to state court decisions on "questions of a more general nature."[23]

Although relatively uncontroversial for much of the nineteenth century, the general common law regime became contested in the late nineteenth and early twentieth centuries as courts began to apply it to a broader array of cases. One of many criticisms of this regime was that it allowed litigants to forum shop between federal and state courts for the most favorable interpretation of the general common law. A notorious example of such forum shopping occurred in *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*[24] In that case, a Kentucky taxicab company reincorporated in Tennessee so that it could sue another Kentucky taxicab company under diversity jurisdiction for interference with an exclusive contract with a railroad

---

[15] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). Justice Holmes argued elsewhere that, instead of this "brooding omnipresence in the sky," the common law should in fact be understood as "the articulate voice of some sovereign or quasisovereign that can be identified." S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[16] U.S. CONST. art. VI, cl. 2.

[17] *See* Fletcher, *supra* note 13, at 1521–25.

[18] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note, at 41 (1987).

[19] 41 U.S. (16 Pet.) 1 (1842).

[20] *Id.* at 18.

[21] 28 U.S.C. § 1652 (2000).

[22] *Id.*

[23] *Swift*, 41 U.S. (16 Pet.) at 18.

[24] 276 U.S. 518 (1928).

and thereby obtain a federal court ruling concerning the validity of the contract. The Supreme Court upheld the existence of diversity jurisdiction and affirmed judgment for the plaintiff, even though Kentucky courts would have found the exclusive railroad contract to be invalid.

The Court in *Black & White Taxicab* explained its divergence from the state decisions as follows:

> For the discovery of common law principles applicable in any case, investigation is not limited to the decisions of the courts of the State in which the controversy arises. State and federal courts go to the same sources for evidence of the existing applicable rule. The effort of both is to ascertain that rule.[25]

Justice Holmes, along with two other Justices, dissented. He argued that the general common law regime rested on the "fallacy"[26] that law can exist without some definite authority behind it. Once it is recognized that state court application of general common law derives its authority from the state and thus is in effect state law, he reasoned, the practice of federal courts declining to follow that law in diversity cases should be seen as "an unconstitutional assumption of powers by the Courts of the United States."[27]

B. Erie v. Tompkins

The specific issue in *Erie* was what law a federal court sitting in diversity should apply to determine the tort duties that a railroad owed to someone walking along the railroad's tracks. In concluding that state law should be applied, the Court held that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."[28] The Court further made clear that, henceforth, "[t]here is no federal general common law."[29]

The Court in *Erie* determined that, contrary to its holding in *Swift v. Tyson*, the "laws of the several states" referenced in the Rules of Decision Act included judge-made law. Importantly, the Court explained that if *Swift* had involved only a mistaken statutory interpretation, the Court would have been hesitant to overrule it. But the Court concluded that the "unconstitutionality" of the general common law regime "ha[d] . . . been made clear and compel[led] [the Court]" to abandon it.[30]

---

[25] *Id.* at 529–30.

[26] *Id.* at 532 (Holmes, J., dissenting).

[27] *Id.* at 533.

[28] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[29] *Id.*

[30] *Id.* at 77–78. In addition to relying on constitutional grounds, the Court noted the many practical "defects, political and social," that attended the general common law regime, including

In its constitutional analysis, the Court endorsed Justice Holmes's positivist argument that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[31] As a result, the Court denied what it called the "fallacy" that there is a "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[32] This means, explained the Court, that the common law of a state "is not the common law generally but the law of that State existing by the authority of that State."[33]

The Court connected this positivist approach to common law with principles of federalism. The Court explained that "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts," and that "no clause in the Constitution purports to confer such a power upon the federal courts."[34] It concluded from these premises that disregard of state court decisions on commercial and tort law questions "invaded rights which . . . are reserved by the Constitution to the several States."[35]

At the time of *Erie*, the Court's constitutional analysis rested on both congressional and judicial incapacity to make common law rules on matters reserved to the states. The Court's observation about limited congressional power became less important as the Supreme Court approved significant expansions of legislative power in the post-*Erie* period. As a result, the Court's reasoning about constitutional limitations on the federal government's power to invade state rights evolved into an argument about limitations on the federal judiciary. As Professor Thomas Merrill notes, "the federalism principle identified by *Erie* still exists but has been silently transformed from a general constraint on the powers of the federal government into an attenuated constraint that applies principally to one branch of that government — the federal judiciary."[36]

---

the unfairness of allowing out of state plaintiffs to choose whether a case would be heard in state or federal court based on which court had a more favorable view of the general common law. *Id.* at 74–75.

[31] *Id.* at 79 (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)).

[32] *Id.* (quoting *Black & White Taxicab*, 276 U.S. at 533 (Holmes, J., dissenting)) (internal quotation mark omitted).

[33] *Id.*

[34] *Id.* at 78.

[35] *Id.* at 80.

[36] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 15 (1985); *see also* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) ("It is by no means enough [to justify federal common law–making] that . . . Congress could under the Constitution readily enact a complete code of law governing [the subject matter of the case]. Whether latent federal power should be exercised to displace state law is primarily a decision for Congress."); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10

C. *Post-*Erie *Federal Common Law*

Although there are statements in *Erie* suggesting that the only common law that federal courts can apply is the common law of the states, *Erie* in fact gave birth to the development of a new common law in the federal courts.[37] This "federal common law" is genuine federal law that binds the states under the Supremacy Clause and potentially establishes Article III and statutory "arising under" jurisdiction.[38]

The Supreme Court has never provided a comprehensive explanation of its approach to federal common law after *Erie*, and it has sometimes simply referred to the fact that there are "enclaves" of federal common law encompassing issues of national importance.[39] Nonetheless, certain basic parameters of post-*Erie* federal common law can be discerned from *Erie* itself and the various post-*Erie* federal common law decisions: it derives its authority from extant federal law, it is interstitial, and it must be tailored to the policy choices reflected in its federal law sources.

First, because "the federal lawmaking power is vested in the legislative, not the judicial, branch of government,"[40] federal common law must be grounded in extant federal law: the Constitution, a federal statute, or a treaty. It is this grounding in a federal law source that allows federal common law to have the status of preemptive law under the Supremacy Clause. Recall that *Erie* insisted that all law applied by federal courts must derive from a domestic sovereign source and thus must be either federal law or state law. *Erie*'s holding — that state law governed in diversity cases — followed from these premises because there was no basis in the Constitution or any federal statute for federal courts to develop their own law in such cases. From these same premises emerged the basic animating principle of post-*Erie* fed-

---

CONST. COMMENT. 285, 288 (1993) ("Any major extension of federal power must find its source in the Constitution or in a federal statute, not in the common law decisions of federal judges alone.").

[37] *See* Henry J. Friendly, *In Praise of* Erie — *and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–07 (1964).

[38] *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) ("[Section] 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."); *see also* Merrill, *supra* note 36, at 6–7 (distinguishing federal common law from general common law). Federal common law is often still "general" in the sense that its content is derived from general principles or practice. *See* Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006). But it is not general in the sense of applying across entire fields of law, and it has federal law status, rather than general law status, in U.S. courts. Even the modern federal common law of admiralty is applied in an interstitial way. *See infra* pp. 918–19.

[39] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) (noting that "there are enclaves of federal judge-made law which bind the States"); *see also* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recounting areas in which the Court has approved of federal common law).

[40] Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 95 (1981).

eral common law: when the common law being developed by federal courts did have some federal law basis, then it would have the status of truly federal law.

The Supreme Court has not always explicitly articulated this requirement of a federal law source. Nevertheless, the reasoning in even its most expansive federal common law decisions typically has reflected this requirement. In *Clearfield Trust Co. v. United States*,[41] for example, the Court held that the rights and duties of the United States government concerning federal checks must be governed by federal common law. The Court reasoned that, because the government's issuance of the check in question stemmed from its constitutional powers and was for services performed under a federal statute, the federal common law rights and duties associated with the check "find their roots in the same federal sources."[42] To take another example, in *Banco Nacional de Cuba v. Sabbatino*[43] the Court held that the act of state doctrine, pursuant to which courts assume the validity of foreign government acts taken within their territory, is a rule of federal common law binding on the states.[44] The Court grounded its decision in two federal law sources: "'constitutional' underpinnings" relating to the separation of powers in conducting U.S. foreign relations,[45] which the Court held "must be treated exclusively as an aspect of federal law,"[46] and numerous federal constitutional and statutory provisions suggesting that sensitive foreign relations questions are exclusive federal concerns.[47]

While there is much scholarly debate about the proper contours of federal common law, there is widespread agreement that federal common law must be grounded in a federal law source. For example, Professor Merrill advocates a restrictive approach to federal common law, whereby there would have to be a showing that the federal common law rule "can be derived from the specific intentions of the draftsmen of an authoritative federal text."[48] By contrast, Professor Martha Field argues for a broader approach, maintaining that the development of federal common law is appropriate so long as the court can "point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule."[49] The key point for present

---

[41] 318 U.S. 363 (1943).
[42] *Id.* at 366.
[43] 376 U.S. 398.
[44] *See id.* at 424–27.
[45] *Id.* at 423–24.
[46] *Id.* at 425.
[47] *See id.* at 425–26 & n.25.
[48] Merrill, *supra* note 36, at 47.
[49] Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 887 (1986); *see also* Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L.

purposes is that despite disagreement over how it is to be applied, there is general agreement on the requirement of a federal law source. Even Judge Henry Friendly, a particularly enthusiastic supporter of federal common law, tied federal common law to congressional intent.[50]

Second, the post-*Erie* federal common law must be interstitial; that is, courts are to develop it only in retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regimes. This requirement follows from the Court's reasoning in *Erie* that "[f]ederal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision."[51] As Justice Holmes famously noted in a pre-*Erie* dissent anticipating post-*Erie* federal common law, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[52]

Third, when developing federal common law, courts must act consistently with the policy choices reflected in extant federal law. As Justice Jackson explained, "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them."[53] This requirement follows from the fact that federal common law is a derivative form of lawmaking rather than an independent judicial power to make policy decisions.[54] As a result, "a federal court's primary responsibility in deriving an appropriate federal common law rule is to attempt to give effect to the underlying federal policy found in federal statutes, the Constitution, or another federal text."[55]

REV. 263, 288 (1992) ("[F]ederal judges must wait for Congress to take the first step. Once Congress has acted, however, federal courts can make any common law 'necessary and proper' to implement the statute.").

50 *See* Friendly, *supra* note 37, at 407 ("Just as federal courts now conform to state decisions on issues properly for the states, state courts must conform to federal decisions in areas where Congress, acting within powers granted to it, has manifested, be it ever so lightly, an intention to that end."); *see also id.* at 422 (noting that "state courts must follow federal decisions on subjects within national legislative power where Congress has so directed").

51 City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981) (citing Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938)); *see also* United States v. Standard Oil Co., 332 U.S. 301 (1947).

52 S. Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting). For post-*Erie* decisions in which the Court emphasized that federal common law is an interstitial judicial lawmaking power, see *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979); and *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 593 (1973).

53 D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942) (Jackson, J., concurring).

54 Professor Stephen Burbank argues that the proposition also follows from the Rules of Decision Act. *See* Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); *cf.* Merrill, *supra* note 36, at 31–32 ("The phrase 'require or provide' [in the Rules of Decision Act] is broad enough to embrace at least some interpretation of federal texts, and thus to support the creation of some federal common law.").

55 Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 968 (1996).

The Supreme Court has noted this requirement even in its broadest assertions of federal common law. For example, in explaining the propriety of developing federal common law to resolve collective bargaining disputes brought under the Labor Management Relations Act of 1947,[56] the Court stated that this law was to be "fashion[ed] from the policy of our national labor laws" and that some federal common law rules would "lie in the penumbra of express statutory mandates," whereas others "[would] lack express statutory sanction but [would] be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy."[57] As Professors Peter Westen and Jeffery Lehman explain, "[f]ederal common law is measured by the same standard of validity as federal statutory interpretation; the measure in each case is whether the law as declared by the courts is consistent with prevailing legislative policy."[58]

Consistent with these three principles, the Supreme Court has stated that the instances in which it is appropriate to develop federal common law are "few and restricted."[59] In the last fifteen years or so in particular, the Court has been emphatic about the exceptional nature of federal common law.[60] The Court has also adopted a restrictive approach in recent years to the judicial recognition of private rights of action under federal statutes and the Constitution, which can be seen as a remedial form of federal common law.[61]

III. PRE-*SOSA* DEBATES REGARDING THE DOMESTIC STATUS OF CIL

The *Sosa* case concerned actions taken by the U.S. Drug Enforcement Agency (DEA). In 1990, the DEA recruited Sosa and other

---

[56] ch. 120, 61 Stat. 136 (codified in scattered sections of 29 U.S.C.).

[57] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957); *see also Kimbell Foods*, 440 U.S. at 738 ("[I]n fashioning federal principles to govern areas left open by Congress, our function is to effectuate congressional policy."); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law.").

[58] Peter Westen & Jeffery S. Lehman, *Is There Life for* Erie *After the Death of Diversity?*, 78 MICH. L. REV. 311, 336 (1980); *see also* Kramer, *supra* note 49, at 287–88.

[59] Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

[60] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997) ("'Whether latent federal power should be exercised to displace state law is primarily a decision for Congress,' not the federal courts." (quoting *Wallis*, 384 U.S. at 68)); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (observing that the instances in which it is appropriate to create a federal common law rule are "few and restricted" (quoting *Wheeldin*, 373 U.S. at 651)). As we explain in this Article, *Sosa* continues this trend.

[61] *See, e.g.*, Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 66–74 (2001) (explaining why *Bivens* remedies for constitutional torts should not be extended to claims against private entities); Alexander v. Sandoval, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.").

Mexican nationals to abduct Alvarez-Machain, a Mexican national, and transport him from Mexico to the United States to stand trial for his alleged involvement in the torture and murder of a DEA agent in Mexico.[62] After he was acquitted, Alvarez-Machain sued Sosa under the ATS, alleging that Sosa had violated a CIL prohibition on arbitrary arrest.[63] Sosa, and the U.S. government acting as amicus curiae, argued that the ATS was simply a jurisdictional statute that did not create a cause of action for violations of CIL. Alvarez-Machain, by contrast, argued that the ATS did create CIL causes of action, including a cause of action for arbitrary arrest.[64]

The legal controversy in *Sosa* arose against the background of debates, in the courts and the academy, about four distinct issues concerning CIL's status in the domestic legal system. Since many commentators interpreting *Sosa* have confused the decision's resolution of one of these issues with its resolution of others, it is important to distinguish the issues carefully and to understand their relationship to one another. The first debate concerns the historical status of CIL in the U.S. legal system prior to *Erie v. Tompkins* during the era of "general common law." The second debate concerns CIL's domestic legal status, following *Erie*, in the absence of some authorization by the political branches to apply CIL as federal law. The third debate concerns whether the ATS or some related statutory enactment authorizes federal courts to apply CIL as federal law consistent with the usual requirements of post-*Erie* common law creation. The final debate concerns the scope of the CIL that can be applied in ATS litigation and, relatedly, how this CIL is to be identified. As we explain, *Erie* is central to each of these debates.

*A. CIL's Pre-*Erie *Status*

It is uncontroversial that, during the period prior to *Erie*, federal courts often applied CIL (which they referred to as part of the "law of nations") without requiring authorization from the federal political branches. Before *Sosa*, courts and scholars disagreed about whether CIL so applied had the status of genuinely federal law or whether it had the status of nonfederal general common law. Some proponents of the modern position argued that CIL was federal law and thus escaped

---

62 Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746–47 (2004).

63 Alvarez-Machain also sued the U.S. government under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000). *See Sosa*, 124 S. Ct. at 2747. Although the Ninth Circuit held that the government was liable for false arrest, the Supreme Court concluded that the government was immune from suit and ordered dismissal of Alvarez-Machain's FTCA claim. *See id.*

64 *Sosa*, 124 S. Ct. at 2754–55.

Erie's abolition of general common law. Revisionists claimed that CIL was general common law that fell squarely within *Erie*'s scope.

The debate turned in part on the meaning of certain historic statements concerning the domestic status of CIL. In the famous *Paquete Habana* decision,[65] the Supreme Court stated that CIL "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[66] Similarly, the Supreme Court stated in an earlier decision that it was "bound by the law of nations which is a part of the law of the land."[67] And some of the constitutional Founders, speaking later as judges, maintained that the law of nations was part of U.S. law.[68]

Citing these and similar statements, some courts and scholars argued that CIL historically had the status of federal law in the U.S. legal system.[69] Dean Koh claimed, for example, that CIL's status as federal law has been established since "the beginning of the Republic" and reflects "a long-accepted, traditional reading of the federal courts' function."[70] Supporters of this view interpreted phrases like "law of the land," "law of the United States," and "our law" as references to federal law that preempts state law and creates a basis for federal question jurisdiction. In addition, they claimed that viewing CIL as nonfederal law, and thus as not judicially enforceable against the states, would have been inconsistent with the Founders' well-documented desire to ensure that states complied with international law. The Second Circuit in *Filartiga v. Pena-Irala*[71] (the first decision

---

[65] The Paquete Habana, 175 U.S. 677 (1900).

[66] *Id.* at 700.

[67] The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); *see also* 11 Op. Att'y Gen. 297, 299–300 (1865); 1 Op. Att'y Gen. 566, 570 (1822); 1 Op. Att'y Gen. 26, 27 (1792); ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793, at 15 (Richard Loss ed., 1976).

[68] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793) (John Jay); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,760) (Samuel Chase and Richard Peters, Jr.); United States v. Ravara, 2 U.S. (2 Dall.) 297, 298–99 (C.C.D. Pa. 1793) (James Iredell, Richard Peters, Jr., and James Wilson); Henfield's Case, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793) (No. 6360) (John Jay); *id.* at 1117 (James Wilson).

[69] *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–8 (2d ed. 2003); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Pena-Irala, 22 HARV. INT'L L.J. 53, 57–58 (1981); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 34–46 (1952); Glennon, *supra* note 10, at 343–47; Koh, *supra* note 2, at 1841, 1846; Lobel, *supra* note 10, at 1090–95; Steven M. Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOK. J. INT'L L. 289, 289–91 (1982).

[70] Koh, *supra* note 2, at 1841, 1846.

[71] 630 F.2d 876 (2d Cir. 1980).

to approve of the use of the ATS for international human rights litigation) similarly asserted that CIL "has always been part of the federal common law."[72]

By contrast, other courts and scholars, and the *Restatement of Foreign Relations Law*, concluded that CIL did not have the status of federal law during the pre-*Erie* period.[73] In support of this conclusion, they cited pre-*Erie* decisions suggesting that CIL was not federal law for purposes of Article III or statutory federal question jurisdiction.[74] They also noted that the executive branch in the nineteenth century repeatedly described itself as lacking the authority, in the absence of congressional authorization, to force the states to comply with CIL.[75] Moreover, they pointed out that the most famous general common law decision — *Swift v. Tyson* — involved the international law merchant, a component of the "law of nations" of the time. These scholars contended that phrases like "law of the land," "law of the United States," and "our law" in the nineteenth century were not references to the "Laws of the United States" in Articles III or VI of the Constitution,[76] but rather were phrases commonly used to refer to general common law.[77] Finally, this group argued that CIL's status as general common law did not conflict with the Founders' desire to prevent states from violating CIL because it merely left the responsibility of policing state

---

[72] *Id.* at 885.

[73] *See, e.g.*, Sampson v. Fed. Republic of Germany, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note, at 41 (1987); Bradley & Goldsmith, *supra* note 3, at 822–26; Clark, *supra* note 13, at 1283; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832–33 (1989); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1233–34 (1988); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 368 (2002); *see also* CHARLES PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES 19 (1928); QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 161 (1922).

[74] *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that the question whether forcible seizure in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review"); N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1876) (holding that the Supreme Court has no jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case," because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States"); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545 (1828) (holding that a case involving application of the admiralty and maritime law — elements of the law of nations — "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III). In addition, *The Paquete Habana* itself strongly suggested the same conclusion when it stated that CIL as applied by federal courts did not bind either Congress or the President. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that customs and usages of civilized nations govern "where there is no treaty, and no controlling executive or legislative act"); *id.* at 708 (stating that courts must "give effect to" CIL "in the absence of any treaty or other public act of [the] government in relation to the matter").

[75] *See* Bradley & Goldsmith, *supra* note 3, at 825 & nn.56–58.

[76] U.S. CONST. art. III, § 2, cl. 1; *id.* art. VI, cl. 2.

[77] *See* Bradley & Goldsmith, *supra* note 3, at 822–26.

compliance with international law to the federal political branches, which could incorporate CIL into federal statutory or treaty law and could vest federal courts with jurisdiction in cases involving the interpretation of the general common law of CIL.[78]

B. CIL's Domestic Status in the Absence of Political Branch Authorization

The second pre-*Sosa* debate concerned the effect of *Erie* on CIL's legal status in the United States. In particular, the question was whether, after *Erie*, CIL had the status of federal common law.

As we briefly explained in the Introduction, modern position proponents maintained that, after *Erie*, CIL had the status of self-executing federal common law that federal courts were bound to apply even in the absence of political branch authorization.[79] This claim rested in part on the historical proposition, outlined earlier, that CIL had the status of federal law since the Founding and thus remained unaffected by *Erie*'s rejection of federal general common law. It also relied on the Supreme Court's holding in *Sabbatino* that the act of state doctrine, while not required by CIL, is based on principles of separation of powers and is therefore a rule of federal common law binding on the states.[80] The Court in *Sabbatino* reasoned that the act of state doctrine should be subject to a uniform national standard because it was "concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."[81] Supporters of the modern position argued that CIL similarly concerns the United States's relationship with the international community.[82]

---

[78] *See id.* at 871.

[79] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (expressing the view that CIL "has an existence in the federal courts independent of acts of Congress"); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (1987) ("Courts in the United States are bound to give effect to [customary] international law . . . ."); *id.* § 115 cmt. e ("[A]ny rule of customary international law . . . is federal law . . . [and] supersedes inconsistent State law or policy whether adopted earlier or later."); Brilmayer, *supra* note 2, at 324 (asserting that "whatever [customary] international law requires, it is binding on the states" (emphasis omitted)); Henkin, *supra* note 2, at 1561 (stating that CIL "is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress").

[80] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425–27 (1964). The Court in *Sabbatino* said that this conclusion was similar to the position taken by Professor Philip Jessup in an article arguing that, despite *Erie*, state courts should not have the final word on the interpretation of international law. *See id.* at 425 (citing Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)).

[81] *Id.* at 425.

[82] *See, e.g.*, Henkin, *supra* note 2; Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1057–68 (1967).

By contrast to the modern position, the revisionist view was that CIL does not automatically have the status of federal common law and that after *Erie*, federal courts needed some authorization from either the political branches or the Constitution in order to apply CIL.[83] The revisionist view built on the historical contention that CIL was not federal law prior to *Erie*. It argued that, after *Erie*, neither the Constitution nor any federal statute authorizes the modern position's envisioned wholesale application of CIL by the federal judiciary. Articles III and VI of the Constitution both refer to treaties, but not CIL, in their list of federal laws, and the Constitution's only reference to CIL is in the Article I Define and Punish Clause.[84] Revisionists argued that the constitutional text therefore suggests that Congress must act before CIL is incorporated into domestic law. As for *Sabbatino*, revisionists noted that the act of state doctrine, as articulated in *Sabbatino*, was designed to prevent judicial involvement in foreign affairs and was grounded in principles of separation of powers. They then argued that the primary application of the modern position concerns human rights cases against foreign governments — cases that, contrary to *Sabbatino*'s central premise, place federal courts in the center of foreign affairs controversies. They also noted that the application of a CIL of human rights as federal common law would be contrary to the post-*Erie* requirement that federal common law conform to the policies of the federal political branches. Congress has incorporated only select CIL principles into federal statutory law, and in the human rights context in which the modern position matters most, said revisionists, the political branches have made clear through their limitations on U.S. ratification of human rights treaties that they do not want international human rights norms to provide a basis for domestic litigation.

An intermediate position that emerged prior to *Sosa* was that federal courts could apply CIL as a type of law that was neither state law nor preemptive federal law.[85] Under the main variant of this approach, CIL would be applied like pre-*Erie* general common law and thus would be available as a rule of decision for federal and state courts but would neither preempt state law nor provide a basis for federal question jurisdiction.[86] Under a different variant, CIL would

---

[83] *See* sources cited *supra* note 3.

[84] *See* U.S. CONST. art. I, § 8, cl. 10 (granting Congress the power "[t]o define and punish . . . Offences against the Law of Nations").

[85] *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91 (2004); Michael D. Ramsey, *International Law as Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555 (2002); Weisburd, *supra* note 3; Young, *supra* note 73. It is possible that this is what Professor Jessup had in mind. *See* Jessup, *supra* note 80.

[86] *See* Aleinikoff, *supra* note 85, at 97; Weisburd, *supra* note 3, at 48–49; Young, *supra* note 73, at 467–68.

be treated as federal law for purposes of jurisdiction under Article III of the Constitution, but not for purposes of preemption under the Constitution's Supremacy Clause.[87]

C. Did the ATS Authorize Courts To Apply CIL as Federal Law?

The third debate prior to *Sosa* concerned whether there was, consistent with the usual requirements for post-*Erie* federal common law, any congressional statute that authorized federal courts to apply CIL as federal law. This debate was distinct from, though potentially related to, the modern position debate. One could reject the view that CIL is self-executing federal common law and believe nonetheless that Congress has authorized federal courts to apply CIL as federal law in certain cases.[88] The main focus of this debate was the ATS, the fount of modern international human rights litigation. Is the ATS a mere jurisdictional statute, or does it also create a cause of action for human rights abuses or otherwise authorize courts to apply CIL in cases properly brought under the ATS? A variety of answers were offered.

One answer was that the ATS is a purely jurisdictional statute that authorizes nothing with regard to substantive law.[89] This view rested primarily on the plain language of the ATS. Enacted as part of the Judiciary Act of 1789[90] — a statute that regulated the jurisdiction and structure of the federal courts, not causes of action — the ATS's original language provided that federal district courts "shall also have cognizance . . . of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[91] "Cognizance" was a term of art referring to jurisdiction, and the First Congress used different language when it created statutory civil actions.[92] The jurisdictional reading of the ATS found support in the current codification of the statute, which extends "original jurisdiction" over certain cases brought by aliens and does not refer to damages or other remedies.[93]

This jurisdictional reading of the ATS was consistent with the decision that reinvigorated the ATS in modern times, *Filartiga v. Pena-Irala*. The Second Circuit in *Filartiga* construed the ATS, for purposes of its decision, "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already rec-

---

[87] *See* Ramsey, *supra* note 85, at 575–77.

[88] *See* Bradley & Goldsmith, *supra* note 3, at 872–73 & nn.352–54.

[89] *See, e.g.*, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 591 (2002); Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 358 (1997).

[90] ch. 20, 1 Stat. 73.

[91] *Id.* § 9(b), 1 Stat. at 77.

[92] *See* William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 479 (1986).

[93] 28 U.S.C. § 1350 (2000).

ognized by international law."[94] The court proceeded to hold that a human rights suit brought by Paraguayan plaintiffs against a former Paraguayan official satisfied Article III because CIL was part of federal common law and the plaintiffs' CIL claim therefore arose under federal law.[95] The court in *Filartiga* did not hold, however, that either CIL itself or the ATS created the plaintiffs' cause of action. The court insisted that "the question of federal jurisdiction under the Alien Tort Statute, which requires consideration of the law of nations," and the "issue of the choice of law to be applied" were "distinct" issues and remanded to the district court to determine whether Paraguayan law or some other law governed the merits of the suit.[96]

A number of courts after *Filartiga*, however, including the Second Circuit, held that the ATS both established federal jurisdiction and also created a substantive federal cause of action for torts in violation of CIL.[97] The most prominent argument in support of this position was that the 1992 Torture Victim Protection Act[98] (TVPA), particularly its legislative history, confirmed that Congress had authorized causes of action in ATS litigation.[99] At least one court adopted a somewhat different position, interpreting the ATS not as creating a cause of action, but rather as authorizing the federal courts to do so.[100] The analogy for this latter position was the Supreme Court's decision in *Textile Workers Union v. Lincoln Mills*,[101] which implied federal common law–making powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.[102]

D. Scope and Sources of CIL in ATS Litigation

The ATS refers to torts in violation of the "law of nations," but it does not specify which law of nations rules can be applied or how to discern their content. Prior to *Sosa*, there was disagreement among courts and scholars over the scope and sources of CIL in ATS litiga-

---

94 Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980).

95 *Id.* at 886–87.

96 *Id.* at 889.

97 *See, e.g.*, Kadic v. Karadžic, 70 F.3d 232, 241 (2d Cir. 1995); *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

98 Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

99 *See, e.g.*, Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996) (stating, in denying rehearing of its earlier decision, that "Congress ha[d] made clear that its enactment of the Torture Victim Protection Act . . . was intended to codify the cause of action recognized by this Circuit in *Filártiga*, even as it extends the cause of action to plaintiffs who are United States citizens"). The TVPA provides a federal cause of action for acts of torture and "extrajudicial killing" committed under authority of foreign law. *See* 28 U.S.C. § 1350 note.

100 *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996).

101 353 U.S. 448 (1957).

102 *See id.* at 456–57.

tion. In terms of scope, the issue was whether plaintiffs could bring claims under all CIL norms relating to torts or only under a subset of such norms. In terms of sources, the issue was whether, in discerning the content of CIL, courts should focus on verbal evidence of state positions such as treaties and U.N. General Assembly resolutions or should instead focus primarily on state practice. Like the other debates discussed earlier in this Article, this debate over the scope and sources of CIL occurred against the backdrop of the narrow role for judicial lawmaking envisioned by *Erie*.

On the scope issue, the court in *Filartiga* suggested that all CIL rules relating to torts were eligible for ATS litigation. For guidance on the proper standard for determining rules of CIL, the court relied on pre-*Erie* decisions applying CIL outside the context of the ATS, such as *The Paquete Habana*. Based on these decisions, the court stated that, in order for a norm to qualify as a rule of CIL, it must "command the 'general assent of civilized nations.'"[103] Although the court described this requirement as "stringent," it viewed it as a general requirement for CIL, not a requirement unique to the ATS context.[104] The court also concluded that it should interpret international law not as it was in 1789 when the ATS was enacted, but "as it has evolved and exists among the nations of the world today,"[105] again suggesting that all rules properly found to be CIL would qualify.

On the sources issue, the court in *Filartiga* relied primarily on verbal evidence of state assent rather than on state practice. In concluding that official torture violated CIL, the court relied on, for example: references to human rights in the United Nations Charter; the U.N. General Assembly's nonbinding Universal Declaration of Human Rights;[106] another nonbinding General Assembly resolution concerning torture; various treaties that the United States had not at that time ratified; and the prohibitions on torture in a number of national constitutions.[107] The court did not maintain that the international community had abolished torture in practice. Indeed, the court acknowledged that the prohibition on torture is "often honored in the breach," but observed that it was not aware of any nation that verbally asserted that it had the right to engage in torture.[108]

After *Filartiga*, some courts sought to limit the scope of CIL claims by suggesting that only certain well-defined and widely accepted CIL norms could be brought in ATS litigation. The Ninth Circuit, for ex-

---

[103] Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).
[104] *Id.*
[105] *Id.*
[106] G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948).
[107] *See Filartiga*, 630 F.2d at 881–84.
[108] *Id.* at 884 & n.15.

ample, stated that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."[109] Other courts suggested that the ATS is limited to particularly egregious violations of CIL. The Second Circuit stated, for example, that the ATS "applies only to shockingly egregious violations of universally recognized principles of international law."[110] Some litigants and commentators suggested that ATS litigation should be limited to violations of *jus cogens* norms.[111] A *jus cogens* norm is a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[112] In the Ninth Circuit opinion that the Supreme Court reviewed in *Sosa*, the court rejected such a *jus cogens* limitation, explaining:

> The notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the [ATS] in 1789. Thus, to restrict actionable violations of international law to only those claims that fall within the categorical universe known as *jus cogens* would deviate from both the history and text of the [ATS].[113]

With respect to the sources of CIL, the Second Circuit eventually pulled back from the approach in *Filartiga*, which, as we noted earlier, had relied heavily on verbal statements and "consensus" and had downplayed actual practice. In particular, in *Flores v. Southern Peru Copper Corp.*,[114] the court held that, "[i]n determining whether a particular rule is a part of customary international law — i.e., whether States universally abide by, or accede to, that rule out of a sense of legal obligation and mutual concern — courts must look to concrete evidence of the customs and practices of States."[115] In other words, just as with the issue of scope, some courts began to develop a revisionist position with respect to the sources of CIL in ATS litigation. Some

---

[109] *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1475 (9th Cir. 1994).

[110] Zapata v. Quinn, 707 F.2d 691, 692 (2d Cir. 1983) (per curiam); *see also* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 167 (5th Cir. 1999). The Second Circuit later clarified that "*Zapata* does not establish 'shockingly egregious' as an independent standard for determining whether alleged conduct constitutes a violation of international law." Flores v. S. Peru Copper Corp., 414 F.3d 233, 253 (2d Cir. 2003).

[111] *See, e.g.*, Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 495 (1997).

[112] Vienna Convention on the Law of Treaties art. 53, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[113] Alvarez-Machain v. United States, 331 F.3d 604, 614 (9th Cir. 2003) (citation omitted), *rev'd on other grounds sub nom.* Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[114] 414 F.3d 233 (2d Cir. 2003).

[115] *Id.* at 250 (emphasis omitted); *see also* United States v. Yousef, 327 F.3d 56, 103 & n.37 (2d Cir. 2003) (favoring "formal lawmaking and official actions of States" over scholarly opinions as proper bases for determining states' practices). In *Flores*, the court rejected the claim that intranational pollution violates CIL. *See Flores*, 414 F.3d at 255.

scholars, too, began to criticize reliance on verbal statements and "consensus" as a basis for CIL, and to argue for a renewed emphasis on state practice.[116]

Table 1 illustrates the four pre-*Sosa* debates described above:

TABLE 1

	Conventional Wisdom in 1990s	Revisionist View
Pre-*Erie* Status of CIL	Federal law	General law
Post-*Erie* Status of CIL	Wholesale incorporation as federal common law	Selective incorporation based on constitutional or political branch authorization
Nature of ATS	Either creates federal causes of action or authorizes courts to create them	Only jurisdictional
Scope and Sources of CIL to be Applied by Courts in ATS Litigation	All of CIL, derived from wide range of materials	Limited set of CIL norms, based primarily on the practice of nations

IV. *SOSA*, THE ATS, AND THE MODERN POSITION

In this Part, we analyze *Sosa*'s implications for the four debates discussed above. As we demonstrate, *Sosa* directly resolved two of the four debates. With respect to the first debate over the pre-*Erie* status of CIL, the Court clearly understood that CIL historically had the status of nonfederal general common law. With respect to the third debate over whether the ATS authorizes the federal courts to create common law causes of action based on CIL, the Court concluded that even though the ATS was originally intended as only a jurisdictional statute, Congress's expectations in enacting the ATS have the effect today of authorizing courts to develop a narrow set of federal common law causes of action. In addition to resolving these debates, the Court in *Sosa* strongly suggested that, with respect to the fourth debate over the scope and sources of CIL to be applied in ATS litigation, courts

116 *See, e.g.*, J. Patrick Kelly, *The Twilight of Customary International Law,* 40 VA. J. INT'L L. 449 (2000).

should discern and apply CIL more carefully and cautiously than many lower courts did prior to *Sosa*. Finally, although the Court in *Sosa* did not specifically address the second debate over whether CIL is automatically part of the post-*Erie* federal common law, the Court's reasoning and conclusions are incompatible with the claim that CIL has this status. We assess *Sosa*'s implications for this second debate last because these implications are the most complex and are related to the ways in which *Sosa* resolved the other debates.

*A. CIL's Pre-*Erie *Status*

In *Sosa*, the Supreme Court dismissed Alvarez-Machain's CIL claim on the basis of a complicated chain of reasoning. A critical link in that chain concerned the pre-*Erie* status of CIL. Although the Court acknowledged that U.S. courts had applied CIL since the Founding, it made clear that before *Erie* the CIL they applied had the status of general common law, not federal common law. This conclusion, in turn, led the Court to consider carefully the implications of *Erie* for the domestic status of CIL.

The Court repeatedly described the few law of nations claims that it thought could have been brought historically under the ATS as part of the pre-*Erie* "common law."[117] The Court also invoked two famous Holmesian descriptions of general common law in the context of referring to the pre-*Erie* domestic status of the law of nations.[118] Relatedly, the Court explained that the law of nations in the nineteenth century encompassed subjects such as the international "law merchant"[119] that

---

[117] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2754 (2004) ("[A]t the time of enactment the jurisdiction [conferred by the ATS] enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."); *id.* at 2759 ("[S]ome, but few, torts in violation of the law of nations were understood to be within the common law."); *id.* ("[T]he ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations . . . ."); *id.* at 2764 ("[T]he jurisdiction [conferred by the ATS] was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority.").

[118] *Id.* at 2762 ("[T]he prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as 'a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.'" (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))); *id.* at 2760 (noting that the argument that the Continental Congress would have had no reason to recommend that States enact statutes to duplicate international law remedies already available at common law "rests on a misunderstanding of the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the 'brooding omnipresence' of the common law then thought discoverable by reason" (footnote omitted) (quoting S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting))).

[119] *Id.* at 2756.

were indisputably part of the pre-*Erie* general common law.[120] The Court then stated that "it was the law of nations in this sense" — the same general common law sense as the law merchant — "that our precursors spoke about when the Court explained [in *The Paquete Habana*] the status of coast fishing vessels in wartime grew from 'ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law.'"[121] And the Court noted the change in the prevailing conception of the "common law" brought about in *Erie*, thus further linking the pre-*Erie* status of the law of nations with general common law.[122]

These passages show that the Court in *Sosa* understood CIL as having general law, rather than federal law, status prior to *Erie*. This conclusion is reinforced by the Court's extensive consideration of what it referred to as the "watershed" decision in *Erie* and its implications — consideration that would have been largely unnecessary if CIL were federal law, rather than general law, prior to *Erie*. As a result, *Sosa* repudiated a central historical claim made by many proponents of the modern position — that is, that CIL historically had the status of federal law and thus lay outside of *Erie*'s reach.

B. Sosa *and the ATS*

Sosa, and the U.S. government acting as amicus curiae, argued that the ATS was simply a jurisdictional statute that did not create a cause of action for violations of CIL. Alvarez-Machain, by contrast, argued that the ATS did create CIL causes of action, including a cause of action for arbitrary arrest.

The Court unanimously concluded that "the ATS is a jurisdictional statute creating no new causes of action."[123] The Court reasoned that the original ATS provided that courts would have "cognizance" of certain causes of action, a term that referred to jurisdiction.[124] It further noted that the ATS was placed in § 9 of the Judiciary Act of 1789, "a statute otherwise exclusively concerned with federal-court jurisdiction."[125] In his concurrence, Justice Scalia (joined by Chief Justice

---

120 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).

121 *Sosa*, 124 S. Ct. at 2756 (quoting The Paquete Habana, 175 U.S. 677, 686 (1900)).

122 *See id.* at 2762. In addition, Justice Scalia's concurrence explained at length that CIL had the status of general common law before *Erie*. *Id.* at 2769–71 (Scalia, J., concurring). The majority opinion disputed several aspects of Justice Scalia's concurrence, but not this one.

123 *Id.* at 2761 (majority opinion); *see also id.* at 2754 ("[W]e agree the statute is in terms only jurisdictional . . . ."); *id.* at 2755 (referring to the ATS's "strictly jurisdictional nature"); *id.* ("[W]e think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.").

124 *See id.* at 2755.

125 *Id.*

Rehnquist and Justice Thomas) agreed with this analysis.[126] Thus, as the Court explained, "[a]ll Members of this Court agree that § 1350 is only jurisdictional."[127]

The Court in *Sosa* believed that its holding that the ATS is only a jurisdictional statute "raise[d] a new question . . . about the interaction between the ATS at the time of its enactment and the ambient law of the era."[128] Exploration of this new question led the Court to conclude that, although the ATS was not intended to create causes of action related to CIL, it has the effect today of authorizing federal courts to recognize post-*Erie* federal common law causes of action for a limited number of CIL violations. The Court reached this conclusion in three steps.

First, the Court reasoned that the Congress that enacted the ATS in 1789 assumed that there would be preexisting law, with the status of general common law, to apply in cases within ATS jurisdiction. As the Court explained, "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."[129] The Court rejected Sosa's argument (and the executive branch's argument as amicus curiae) that the 1789 Congress believed that the law of nations component of ATS jurisdiction would lie fallow unless and until Congress separately enacted statutory causes of action to be applied in ATS cases.[130] Rather, the historical materials persuaded the Court that "the statute was intended to have practical effect the moment it became law"[131] and that Congress thought the prac-

---

126 *See id.* at 2772 (Scalia, J., concurring).

127 *Id.* at 2764 (majority opinion). It is also worth noting that all nine Justices in *Sosa* referred to 28 U.S.C. § 1350 as the "Alien Tort Statute," not the "Alien Tort Claims Act," despite disagreement in the briefs over the proper title for the statute. *Compare* Brief of Petitioner at i, *Sosa*, 124 S. Ct. 2739 (No. 03-339) (referring to the "Alien Tort Statute" in identifying the questions presented), *with* Brief for the Respondent at i, *Sosa*, 124 S. Ct. 2739 (No. 03-485) (referring to the "Alien Tort Claims Act" in identifying the questions presented). The latter title had been favored by those advocating a cause-of-action construction of the ATS. *See* Bradley, *supra* note 89, at 592–93.

128 *Sosa*, 124 S. Ct. at 2755.

129 *Id.*

130 *See id.* at 2758 ("[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."); *id.* at 2758–59 ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.").

131 *Id.* at 2761.

tical effect would be guaranteed by preexisting CIL-related causes of action available at common law.[132]

Second, the Court concluded that it should preserve the 1789 Congress's background expectation that there would be common law causes of action available for judicial application under the ATS. The Court acknowledged that the common law applied in 1789 differed significantly from the common law that federal courts applied after *Erie*. But the Court thought "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[133] In effect, the Court attempted to "translate" the First Congress's expectations about the effect of the ATS, which rested on a pre-*Erie* understanding of general common law, into the contemporary context in which federal courts apply nonstate common law only in specialized circumstances.[134] In justifying this conclusion, the Court noted that "no development in the two centuries from the enactment of § 1350 to the birth of the modern line of [ATS] cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[135] In particular, neither *Erie* nor Congress had categorically prohibited the judicial recognition of claims under CIL.[136]

Third, the Court concluded that the best translation of the original ATS in the post-*Erie* world is that the ATS authorizes the judicial creation of a domestic remedy, in the form of a cause of action, for a narrow set of CIL violations.[137] Thus, as Justice Scalia's concurrence explained (and criticized), the Court inferred, from a jurisdictional statute that enabled courts to apply CIL as general common law, the authorization for courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-*Erie* federal common law.[138] The Court did not explain how this conclusion was consistent with its description of the ATS as only jurisdictional or with its view that "[t]he vesting of jurisdiction in the federal courts does not in and of itself

---

[132] *See id.* ("The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

[133] *Id.* at 2765.

[134] For discussion of a similar idea of translation in the constitutional context, compare Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993), with Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997). *See also* Lawrence Lessig, Erie-*Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785 (1997).

[135] *Sosa*, 124 S. Ct. at 2761.

[136] *See id.* at 2761–62.

[137] *See id.* at 2761–65.

[138] *See id.* at 2773 n.* (Scalia, J., concurring).

give rise to authority to formulate federal common law."[139] But its description of the legitimate bases of post-*Erie* federal common law included a citation to *Textile Workers Union v. Lincoln Mills*,[140] a decision in which (as we noted earlier) the Court implied federal common law–making powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.[141] Presumably, the common law powers recognized in *Sosa* were similar.[142]

We should make clear that we are merely describing the Court's reasoning here, not defending it. The idea of "translating" law to fit with changed circumstances is controversial even in constitutional law, where formal amendment of the law is much more difficult than with a statute like the ATS. Moreover, even assuming translation is sometimes appropriate with respect to statutes, it can reasonably be argued that the substantial changes in both the nature of the common law and the content of international law make translating the "law of nations" prong of the ATS too difficult. (This was, essentially, Justice Scalia's position.) There is also tension, if not outright contradiction, in the Court's construction of the ATS as both purely jurisdictional and an authorization for creating causes of action. Full exploration of this potential problem in the Court's analysis is beyond the scope of this project. The key point for present purposes is simply that the Court based its allowance of CIL claims under the ATS on its understanding of Congress's intent in enacting the ATS.

C. Scope and Sources of CIL in ATS Litigation

The Court in *Sosa* limited its holding that the ATS authorizes federal courts to recognize federal common law causes of action based on CIL by requiring that any such recognition satisfy at least two requirements. First, the CIL norm in question must be "accepted by the civilized world" to the same degree as the few law of nations norms that the First Congress would have expected to be enforceable through private claims in 1789.[143] Second, the CIL norm in question must be "defined with a specificity" comparable to the historic law of nations norms.[144] The Court added that the evaluation of "whether a norm is

---

[139] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981).

[140] 353 U.S. 448 (1957).

[141] *See id.* at 456–57.

[142] For criticism of the Court's reasoning on this issue, see Note, *An Objection to* Sosa *— And to the New Federal Common Law*, 119 HARV. L. REV. 2077 (2006).

[143] *Sosa*, 124 S. Ct. at 2761. These norms involved violations of safe conduct, infringement of the rights of ambassadors, and piracy. For discussion of the right of safe conduct, see Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

[144] *Sosa*, 124 S. Ct. at 2761.

sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts."[145]

The Court made clear that this test for domestic enforcement of CIL under the ATS is more demanding than the test for whether a CIL norm is internationally binding according to the traditional standards for CIL.[146] It made clear, in other words, that the CIL violations Congress made actionable in ATS cases are a subset of all CIL violations. Applying this two-part test, the Court concluded that Alvarez-Machain did not allege a violation of a norm of CIL so well defined and accepted as to support the creation of a federal cause of action.[147] Although this conclusion is easy to state, the Court's analysis of the sources and scope of the CIL available in ATS cases raises a number of questions. In what follows, we explore these questions, and explain why, despite ambiguities in some places, the opinion is best read as significantly limiting the causes of action available in ATS cases.

Consider first the Court's "clear definition" requirement. Many lower courts prior to *Sosa* had not required a close correspondence between the content of the CIL sources relied on by plaintiffs and their causes of action. The Supreme Court in *Sosa* took a stricter approach. For example, the Court maintained that the recognition by national constitutions of a prohibition on arbitrary detention reflected a consensus at too "high [a] level of generality" to support Alvarez-Machain's claim for relief for a one-day detention not authorized by law.[148] Similarly, it found insufficient the *Restatement of Foreign Relations Law*'s claim that a "state policy"[149] of "*prolonged* arbitrary detention"[150] was

---

145 *Id.* at 2766 (footnote omitted).

146 *See id.* at 2768 ("Alvarez cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit . . . ." (footnote omitted)); *id.* at 2769 ("Even the *Restatement*'s limits [on the CIL rule concerning arbitrary detention] are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses."); *id.* at 2769 n.29 ("[T]hat a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed."); *cf.* Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 519 (2002) (noting that "the fact that a rule has been recognized as CIL, by itself, is not an adequate basis for viewing that rule as part of federal common law").

147 *See Sosa*, 124 S. Ct. at 2766–69.

148 *Id.* at 2768 n.27.

149 *Id.* at 2768 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

a violation of CIL, in part because the *Restatement* required "a factual basis beyond relatively brief detention in excess of positive authority."[151] The *Sosa* decision thus seems to limit causes of action in ATS cases to those for which the content of the CIL norm corresponds closely with the plaintiff's sources.[152] This conclusion is consistent with the Court's insistence, in another part of the opinion, that it had "no congressional mandate to seek out and define new and debatable violations of the law of nations."[153]

The meaning of the "acceptance" prong of the *Sosa* test for recognizing a cause of action in ATS cases is less certain. As we noted earlier, many pre-*Sosa* lower court decisions downplayed the traditional state practice requirement for CIL and emphasized instead state acceptance as reflected in instruments like General Assembly resolutions, multilateral treaties, national constitutions, and official pronouncements of international bodies.[154] *Sosa* appears to render some of these sources irrelevant, minimize the significance of others, and reemphasize the importance of looking to state practice in ATS cases.

The Court in *Sosa* first looked to the Universal Declaration of Human Rights, a U.N. General Assembly resolution outlining fundamental human rights norms that pre-*Sosa* courts had relied on heavily in identifying causes of action in ATS cases.[155] The Court declined to rely on this source as a basis for a CIL cause of action, noting correctly that the "Declaration does not of its own force impose obligations as a matter of international law" and concluding that the Declaration did not itself "establish the relevant and applicable rule of international law."[156] Although the Court went on to acknowledge that the Declaration had a "substantial indirect effect on international law,"[157] it also noted that the Declaration had "little utility under the standard set out in this opinion," and the Court did not consider the Declaration further in its analysis of whether Alvarez-Machain's proposed norm of arbitrary detention had become so well accepted as to warrant a cause of action in ATS cases.[158]

---

150 *Id.* (emphasis added) (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702).

151 *Id.* at 2769.

152 *See id.* at 2768.

153 *Id.* at 2763.

154 *See supra* section III.D, pp. 888–91.

155 *See Sosa*, 124 S. Ct. at 2767; *see also* Universal Declaration of Human Rights, *supra* note 106, at 71.

156 *Sosa*, 124 S. Ct. at 2767.

157 *Id.* at 2767 n.23.

158 *Id.* at 2767.

The Court reached a similar conclusion with respect to the International Covenant on Civil and Political Rights[159] (ICCPR). Like the Universal Declaration, the ICCPR was widely relied upon in pre-*Sosa* ATS cases for the identification of CIL causes of action. The Court in *Sosa* noted that the ICCPR, unlike the Universal Declaration, was a ratified treaty and therefore bound the United States as a matter of international law. But the Court added that the ICCPR was "not self-executing and so did not itself create obligations enforceable in the federal courts."[160] For this reason, the Court concluded that the ICCPR, like the Universal Declaration, had "little utility" under the *Sosa* standard for identifying CIL causes of action.[161] Although the Court did mention the ICCPR in its subsequent analysis of CIL, it did so only in a negative way. After describing Alvarez-Machain's claim that the CIL prohibition on "arbitrary detention" extended to any brief detention not sanctioned by domestic law, the Court added that "[w]hether or not this is an accurate reading of the [ICCPR], Alvarez cites little authority that a rule so broad has the status of a binding customary norm today."[162] The clear implication is that, contrary to lower court practice prior to *Sosa*,[163] the presence of a norm in the ICCPR no longer provides significant evidence of a CIL cause of action in ATS cases.[164]

The Court in *Sosa* also considered national constitutions, which showed that "many nations recognize a norm against arbitrary detention."[165] This too was a source that lower courts had considered prior to *Sosa*.[166] In contrast to the Universal Declaration and the ICCPR, the Court implied that this source might be influential in establishing that nations had accepted the norm in question.[167] But as explained earlier, the Court dismissed this source because the consensus against arbitrary detention reflected in the constitutions was at a significantly higher level of generality than Alvarez-Machain's claim.[168]

Yet another source the Court considered was the *Restatement of Foreign Relations Law*. Once again, lower courts had relied heavily and uncritically on the *Restatement* in developing federal common law causes of action under the ATS. A number of courts viewed the *Re-*

---

159 Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

160 *Sosa*, 124 S. Ct. at 2767.

161 *Id.*

162 *Id.* at 2768.

163 *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d 604, 620–21 (9th Cir. 2003).

164 *See, e.g.*, Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1247 (11th Cir. 2005) (disapproving pre-*Sosa* district court decisions that had relied on the ICCPR).

165 *Sosa*, 124 S. Ct. at 2768 n.27.

166 *See, e.g.*, *Alvarez-Machain*, 331 F.3d at 620.

167 *See Sosa*, 124 S. Ct. at 2768 n.27.

168 *See id.* at 2768.

statement's list of customary international human rights norms as actionable under the ATS.[169] The Court in *Sosa* rejected this approach. It explained that whether a norm was included in the *Restatement* list was:

> only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses.[170]

This passage implies that even if a CIL norm is included in the *Restatement*, the norm might not be sufficiently well defined to support a cause of action under the ATS.

Another way in which the Court limited the sources that had been relied on in pre-*Sosa* cases was by shrinking the allowable gap between actual state practice and the proposed CIL cause of action. The Second Circuit in *Filartiga* had reasoned that "[t]he fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law."[171] While acknowledging that "violations of a rule [do not] logically foreclose the existence of that rule as international law," the Court in *Sosa* observed: "that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed."[172] Contrary state practice by itself does not disprove the existence of a rule of CIL or a private cause of action, but courts will be less likely to recognize the rule or cause of action when there is a large gap between it and actual state practice.

In sum, the Court in *Sosa* departed in many respects from the lower courts' prevailing approach to recognizing CIL causes of action in ATS cases. Its "definition" requirement demands a tight connection between the plaintiff's allegations and the sources supporting a CIL cause of action. And its "acceptance" requirement contemplates a nar-

---

[169] *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 789, 795 (9th Cir. 1996); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 305 (S.D.N.Y. 2003). The *Restatement* provides that a state violates CIL if:

> as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

[170] *Sosa*, 124 S. Ct. at 2769.

[171] Filartiga v. Pena-Irala, 630 F.2d 876, 884 n.15 (2d Cir. 1980).

[172] *Sosa*, 124 S. Ct. at 2769 n.29.

row conception of relevant sources of law. More specifically, as compared to pre-*Sosa* practice, the Court in *Sosa* gave little weight to both the Universal Declaration of Human Rights and the ICCPR, narrowed the relevance of national constitutions and the *Restatement*, and reduced the allowable gap between a CIL norm's aspiration and the actual practice of states. It is no surprise, in this light, that the Court in *Sosa* envisioned that, under its approach, only a modest number of claims would be recognized under the ATS.[173]

It remains unclear, however, precisely how far *Sosa* went in this regard. The lack of clarity results from the Court's favorable citation to prior lower court opinions that had embraced the very methods and sources of CIL identification that the Court in *Sosa* appeared to discount. For example, the Court stated that its definition and acceptance limitations were "generally consistent" with the reasoning in *Filartiga*, even though *Filartiga* relied on sources — General Assembly resolutions, unratified or non-self-executing treaties, and a survey of national constitutions — that the Court in *Sosa* discounted or deemed irrelevant.[174] The Court also cited *Filartiga* for the proposition that its position on recognizing CIL causes of action "has been assumed by some federal courts for 24 years."[175] But *Filartiga* did not view the ATS as authorizing the development of federal common law causes of action. Instead, *Filartiga* assumed for the purposes of its analysis that the ATS was a purely jurisdictional statute and was constitutional for suits between aliens because CIL was federal common law; it did not consider the cause of action question and indeed the court remanded on the issue of governing law.[176] The Court's citations to *Filartiga* are all the more puzzling because the Court disapprovingly referred to other cases that had relied on the same sources for the identification of CIL as those relied on in *Filartiga*.[177] This leaves two possible explanations for the *Filartiga* references. The Court may have cited *Filartiga* and related decisions simply for the proposition that *some* aspects of CIL could be domesticated in ATS cases, a point on which *Filartiga* and *Sosa* clearly agree. Or it may have cited *Filartiga* and related decisions not because it agreed with their use of sources, but because it agreed with their ultimate conclusions about particular rules of CIL. Regardless of what one makes of these citations, ultimately they must bear less weight than the Court's own treatment of controversial sources of CIL, which, as discussed above, was significantly restrained.

---

[173] *See id.* at 2761, 2764.

[174] *See id.* at 2765–66.

[175] *Id.* at 2765.

[176] *See Filartiga*, 630 F.2d at 889.

[177] *See Sosa*, 124 S. Ct. at 2768 n.27 (disapproving of cases cited in Brief for Respondent Alvarez-Machain at 49 n.50, *Sosa*, 124 S. Ct. 2739 (No. 03-339)).

*D. CIL's Post-*Erie *Domestic Status in the Absence of Political Branch Authorization*

We now turn to the implications of *Sosa* for the modern position that all of CIL, "whatever [it] requires," is automatically incorporated wholesale into post-*Erie* federal common law.[178] Recall that the modern position rests on two principal arguments: first, the historical claim that CIL was part of federal law rather than general law prior to *Erie*; and second, the doctrinal claim that CIL was incorporated wholesale into federal common law after *Erie*.[179] We have already explained how *Sosa* rejected the modern position's historical claim. In this section, we explain why the Court's reasoning in *Sosa* cannot be reconciled with the modern position claim about CIL's post-*Erie* status.

Our basic argument is that the opinion in *Sosa* is preoccupied with the limitations that *Erie* imposes on the federal courts' common law–making powers — limitations that are inconsistent with the modern position. In particular, the Court's insistence in *Sosa* that any federal common law relating to CIL be grounded in, conform to, and not exceed the contours of what the political branches have authorized; its recognition that the ATS authorizes courts to enforce only a very small subset of CIL; and its limited view of judicial power vis-à-vis the federal political branches and even the states in cases involving CIL simply cannot be reconciled with the modern position that all of CIL is automatically part of judge-made federal common law even in the absence of political branch authorization. After making these points, we consider counterarguments.

1. Inconsistencies Between Sosa *and the Modern Position.* — The Court in *Sosa* embraced a conventional understanding of the nature of post-*Erie* federal common law. It noted that *Erie* significantly narrowed the common law powers of federal courts to "havens of specialty," or "interstitial areas of particular federal interest."[180] Although the Court acknowledged that *Sabbatino* had recognized a "competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine," the Court explained that even in the foreign relations context "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[181]

The Court in *Sosa* further suggested that these limitations on post-*Erie* federal common law had certain implications for judicial incorporation of CIL — three concerning separation of powers and one con-

---

178 Brilmayer, *supra* note 2, at 324 (emphasis omitted).

179 *See supra* section III.A, pp. 882–85; section III.B, pp. 885–87.

180 *Sosa*, 124 S. Ct. at 2762.

181 *Id.*

cerning federalism. First, and most fundamentally, in deciding whether the federal courts could incorporate CIL even though the ATS was merely a jurisdictional statute, all nine Justices engaged in a search for positive authority for the incorporation. That is, the Court unanimously turned not to a discussion of powers inherent in the federal courts or of the broad common law status of CIL, but rather to Congress's intent in enacting the ATS. Indeed, the entire thrust of the *Sosa* opinion was an attempt to ground its holding about the incorporation of CIL in what Congress intended and authorized.[182] The historical section of the opinion was consumed by a search for the original understanding of what Congress authorized,[183] and the Court built on this historical understanding to ascertain what the ATS authorized in modern times. So, for example, the Court rejected the claim that the ATS, with its "limited, implicit *sanction*"[184] of judicial recognition of CIL claims, "should be taken as *authority* to recognize the right of action asserted by Alvarez here."[185] Rather, it stated as a reason for judicial caution in creating new causes of action under the ATS that "[w]e have no *congressional mandate* to seek out and define new and debatable violations of the law of nations."[186]

Second, and related to the authorization requirement, the Court made clear that the development of a domestic federal common law of CIL must proceed interstitially and conform to the wishes of the political branches. The Court twice invoked the non-self-execution declaration attached by the United States to its ratification of the ICCPR as a reason not to rely on the ICCPR in developing domestic federal common law related to CIL.[187] It also noted that the "affirmative authority" in the Torture Victim Protection Act, which Alvarez-Machain

---

[182] Justice Scalia's concurrence understood the majority's approach in this way, describing it as finding "authorization in the understanding of the Congress that enacted the ATS." *Id.* at 2773 (Scalia, J., concurring).

[183] *See id.* at 2754 (majority opinion) ("[A]t the time of enactment the [ATS] *enabled* federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." (emphasis added)); *id.* (noting that the ATS gave "limited, implicit *sanction* to entertain the handful of international law *cum* common law claims understood in 1789" (emphasis added)); *id.* at 2756 ("It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably *on minds of the men who drafted the ATS* with its reference to tort." (emphasis added)); *id.* at 2759 ("Congress *intended* the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations." (emphasis added)); *id.* ("[T]he ATS *was meant to underwrite* litigation of a narrow set of common law actions derived from the law of nations . . . ." (emphasis added)); *id.* at 2761 ("[The ATS] is best read *as having been enacted on the understanding* that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." (emphasis added)).

[184] *Id.* at 2754 (emphasis added).

[185] *Id.* (emphasis added).

[186] *Id.* at 2763.

[187] *See id.* at 2763, 2767.

invoked in support of his claim, "is confined to specific subject matter" and would not support "judicial creativity" beyond its terms.[188] And it tethered modern recognition of CIL-based claims to the historical paradigms Congress anticipated in enacting the ATS. Finally, the Court specifically mentioned the possibility of "case-specific deference to the political branches" in deciding whether to allow particular suits under the ATS.[189]

Third, the Court emphasized that the separation of powers limitations on the common law powers of federal courts were especially forceful in foreign relations cases. As the Court noted, "the potential implications for the foreign relations of the United States of recognizing [federal common law causes of action in ATS cases] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[190]

Fourth, the Court explained that *Erie*'s federalism concerns were relevant even to a federal common law of CIL. In disputing Justice Scalia's contention that the Court's analysis would mean that the federal question jurisdiction statute, like the ATS, would carry "with it an opportunity to develop common law," the Court noted that "our holding today [about the ATS] is consistent with the division of responsibilities between federal and state courts after *Erie* as a more expansive common law power related to 28 U.S.C. § 1331 might not be."[191] Even with regard to CIL, the Court made plain, the federalism justification for a narrow reading of the common law powers of federal courts remains.

This approach to judicial incorporation of CIL is fatal to the modern position that all of CIL is federal common law. As an initial matter, the application of all of CIL as federal common law is inconsistent with the requirement that federal common law be interstitial. There is also no political branch authorization for the application of all of CIL as federal common law. A wholesale incorporation of the CIL of human rights in particular would defy the wishes of the political branches, which have consistently ratified human rights treaties on the condition that they not apply as domestic law. The wholesale *judicial* incorporation of CIL into domestic federal law is also at odds with the proposition that federal courts must act cautiously in this area. Finally, to the extent that the federal common law of CIL in the human

---

188 *Id.* at 2763. The Court drew this conclusion even though the TVPA's legislative history endorsed ATS litigation, reasoning that "Congress *as a body* ha[d] done nothing to promote such suits." *Id.* (emphasis added).

189 *Id.* at 2766 n.21.

190 *Id.* at 2763; *see also id.* ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.").

191 *Id.* at 2765 n.19 (citation omitted).

rights context would address traditional domestic concerns like the domestic regulation of the death penalty,[192] it would be in tension with *Erie*'s federalism principles.

Not only is the modern position inconsistent with the post-*Erie* approach articulated in *Sosa*, but it is also inconsistent with what the Court in *Sosa* stated it was allowing. *Sosa* involved a situation, according to the Court, in which the political branches *had* authorized the incorporation of CIL (through the ATS). Even so, the Court made clear that it was authorized to incorporate only a small portion of CIL. In response to Justice Scalia's claim that *Erie* precluded the domestic incorporation of CIL in ATS cases, the Court insisted only that "the door to further independent judicial recognition of actionable international norms" was not shut altogether,[193] but rather was "still ajar subject to vigilant doorkeeping, and thus open to a *narrow class* of international norms today."[194] The Court repeatedly made the point that it was not embracing the wholesale incorporation of CIL. Instead, it was simply defending the possibility that federal courts, consistent with what Congress has authorized, need not "avert their gaze *entirely* from any international norm intended to protect individuals,"[195] that *Erie* did not cause courts to lose "*all* capacity to recognize enforceable international norms,"[196] and that nothing Congress had done "shut the door to the law of nations *entirely*."[197] These passages assume that *Erie* significantly narrowed, but did not eliminate, the circumstances in which CIL could be applied domestically, consistent with political branch authorization. The passages are difficult to square with the modern position claim that all of CIL applies as federal common law in the absence of political branch authorization.

Finally, the Court's disclaimer concerning the federal question jurisdiction statute further supports the view that it rejected the modern position. The Court disagreed with Justice Scalia's claim that under the majority's approach every grant of jurisdiction — most notably the federal question statute, 28 U.S.C. § 1331 — would carry with it the opportunity to develop federal common law related to CIL.[198] The

---

[192] *Cf.* William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) ("While it is still premature to declare the death penalty prohibited by customary international law, it is clear that we are somewhere in the midst of such a process, indeed considerably close to the goal.").

[193] *Sosa*, 124 S. Ct. at 2764.

[194] *Id.* (emphasis added). The Court made the same point in noting that its dispute with Justice Scalia's approach was over "whether some norms of today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action beyond § 1350." *Id.*

[195] *Id.* at 2764–65 (emphasis added).

[196] *Id.* at 2765 (emphasis added).

[197] *Id.* (emphasis added).

[198] *Id.* at 2765 n.19.

Court observed that in contrast to its conclusion that the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," it had "no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption."[199] The reason there was no comparable congressional assumption was that — as *Sosa*'s historical analysis suggests, and as we further explain below[200] — CIL was not considered federal law and thus was not covered by § 1331.

In addition to ruling out the modern position, *Sosa* also appears to rule out the "intermediate approach" that has been suggested by some scholars, whereby U.S. courts would apply CIL as a form of nonfederal or nonpreemptive law, akin to the pre-*Erie* general common law.[201] As we have already explained, the Court reiterated *Erie*'s assertion that federal courts could no longer apply general common law.[202] The Court specifically observed that "we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction [in *Erie*], that federal courts have no authority to derive 'general' common law."[203] In addition, the Court's narrow allowance of an incorporation of CIL in discrete circumstances authorized by the political branches differs substantially from the automatic, unauthorized incorporation of CIL that took place under the general common law regime.[204] Finally, in referring to the causes of action

---

[199] *Id.*

[200] *See infra* section V.A.1, pp. 911–14.

[201] *See supra* pp. 886–87.

[202] Justice Scalia's concurrence similarly described *Erie* as having categorically disallowed federal court application of general common law. *See Sosa*, 124 S. Ct. at 2770–71 (Scalia, J., concurring).

[203] *Id.* at 2764 (majority opinion). It would be theoretically consistent with *Sosa* for federal courts to apply CIL even in the absence of federal authorization if there were pertinent state law authorization. Such an authorization would not likely flow, as some have suggested, *see, e.g.*, Weisburd, *supra* note 3, at 52–55, from state choice-of-law rules, which in general look to foreign law rather than international law. Authorization might conceivably flow from state receiving statutes, which incorporate into state rules of decision at least part of the common law of England and might thereby include CIL. *See* Bradley & Goldsmith, *supra* note 3, at 870 n.345; Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 282–85 (1932). It is doubtful, however, that such receiving statutes authorize the incorporation of modern CIL, *see* Bradley & Goldsmith, *supra* note 3, at 870 n.345, and no state court that we are aware of has construed a receiving statute in that fashion. The important point for present purposes is that any CIL applied by a federal court pursuant to a state receiving statute would not be general common law, but rather would be properly characterized as state law. It therefore would not support the "general common law" intermediate position.

[204] A subtle constitutional point also confirms this reading of the majority opinion. In citing favorably to *Filartiga* and in declining to close the door entirely on suits involving foreign government conduct, the majority appeared to envision that some cases between aliens could properly be maintained under the ATS. If CIL were merely general common law, however, and if (as the Court unanimously concluded) the ATS is simply a jurisdictional statute, then there would be

that would be allowed under the ATS, it referred specifically to "federal common law," not general common law.[205]

2. Counterarguments. — Commentators who have concluded that *Sosa* embraced the modern position tend to ignore the points we have just discussed and rely instead on two other aspects of the *Sosa* decision. We consider these aspects below and conclude that they do not contradict our conclusions.

First, commentators have emphasized the Court's statement that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[206] As we have explained, the Court in *Sosa* understood that CIL did not have the status of federal law before *Erie*, so this historical statement cannot be a claim about CIL's status as federal common law. Indeed, it is telling that the Court merely stated that U.S. domestic law "recognizes" CIL and did not claim that CIL is automatically incorporated into U.S. law, let alone into U.S. federal law. Instead of endorsing the modern position, the Court was claiming only that U.S. law can take account of CIL, which is clearly correct independent of the modern position. There were many instances prior to *Erie* in which federal courts incorporated or took account of CIL, and, as we explain in Part V, there are many post-*Erie* examples in which federal courts, consistent with the Court's statement, borrow from, or "recognize," CIL in select instances, something far short of the wholesale incorporation of CIL into U.S. federal law posited by the modern position.

Second, commentators have emphasized two references by the Court to *Sabbatino*.[207] In a parenthetical, the Court quoted the following dictum from *Sabbatino*: "[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances."[208] The Court also observed in a footnote that *Sabbatino* endorsed the reasoning of a short essay published by Professor Philip Jessup in 1939 that argued that the *Erie* doctrine should not be ap-

---

no basis under Article III of the Constitution for hearing claims between aliens based upon CIL. *See* Mossman v. Higginson, 4 U.S. (4 Dall.) 12 (1800) (stating that suits between aliens do not fall within the Article III Diversity Clause). This Article III problem is addressed, however, if the claim has the status of federal common law, because federal common law (unlike general common law) is considered part of the "Laws of the United States" for purposes of Article III. As for the intermediate position pursuant to which courts would apply CIL as federal law only for purposes of jurisdiction, *see supra* pp. 886–87, we would simply note that the Supreme Court even before *Erie* did not view CIL as having this status, *see supra* note 74.

[205] *Sosa*, 124 S. Ct. at 2765.

[206] *Id.* at 2764; *see also* Dodge, *supra* note 7, at 95–96; Neuman, *supra* note 7, at 129; Steinhardt, *supra* note 6, at 2252.

[207] *See, e.g.*, Neuman, *supra* note 7, at 129–30.

[208] *Sosa*, 124 S. Ct. at 2764 (alteration in original) (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)) (internal quotation marks omitted).

plied to CIL.[209] Whatever their precise import, these references are not an endorsement of a wholesale federalization of CIL. The quotation from *Sabbatino* refers to the application of CIL "in appropriate circumstances," and the Jessup essay merely argues that CIL should not be treated under *Erie* as state law, not that it should be treated as post-*Erie* federal common law (the conception of which was still in its infancy in 1939). Moreover, as the Court noted in *Sosa*, the *Sabbatino* decision did not even involve the application of CIL.[210] Rather, *Sabbatino* involved the application of the act of state doctrine, which the Court made clear was based on domestic separation of powers considerations and was not required by international law.[211] While the receiver in *Sabbatino* raised a CIL argument (concerning a prohibition on the expropriation of alien property), the Court declined to consider that argument and indeed declined to apply CIL at all. It is not surprising, therefore, that the Court in *Sosa* relied on the language in *Sabbatino* only for the modest proposition that federal courts need not "avert their gaze entirely" from CIL norms protecting individuals.[212]

The Court's two other references to *Sabbatino*, which have not been emphasized by modern position proponents, further confirm that the Court did not view *Sabbatino* as support for the modern position. These references occurred in the course of explaining why courts should exercise restraint in considering new causes of action based on CIL.[213] One of these references approved *Sabbatino*'s use of the act of state doctrine to prevent foreign relations problems that would have resulted from applying CIL as a rule of decision.[214] The Court in *Sosa* believed that similar restraint was required in ATS suits that involve attempts by aliens to enforce international law against their own governments and thus "raise risks of adverse foreign policy consequences."[215] This reliance on *Sabbatino* as a restraint on the consideration of international claims contradicts the argument that the Court viewed *Sabbatino* as supporting the unrestrained incorporation of CIL into federal common law.

The other reference to *Sabbatino* occurred in a discussion of *Erie*'s transformation of the role of federal courts and of the nature of federal common law.[216] In that context, the Court noted that, "although [it has] *even* assumed competence to make judicial rules of decision of

---

209 *Id.* at 2765 n.18 (citing Jessup, *supra* note 80).
210 *See id.*
211 *See Sabbatino*, 376 U.S. at 421–23.
212 *Sosa*, 124 S. Ct. at 2764–65.
213 *See id.* at 2762–63.
214 *See id.* at 2762.
215 *Id.* at 2763.
216 *See id.* at 2762.

particular importance to foreign relations," as it did in *Sabbatino*, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[217] The Court next stated, referring to the incorporation of CIL in ATS cases, that it would "be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[218] This understanding of the import of *Sabbatino* simply cannot support the wholesale incorporation of CIL as federal common law.

A final counterargument against our interpretation of *Sosa* might be that the Court's reasoning is relevant only to whether CIL supports a domestic cause of action, but has no implications for CIL's domestic status in other contexts, such as its ability to preempt state law or serve as a basis for federal question jurisdiction. This argument is not open to those who believe that *Sosa* addressed, and embraced, the modern position. In any event, we do not believe that it is a fair reading of the *Sosa* opinion. The Court's elaborate analysis of *Erie* and the nature of post-*Erie* federal common law would have been largely unnecessary if the Court had been simply speaking to the circumstances under which courts may imply a cause of action from existing domestic law, an issue generally governed by different precedent. Indeed, the Court referred to limits on implied rights of action as only one of many reasons for judicial caution in allowing claims under the ATS.[219] Moreover, for all the reasons discussed earlier, the Court's view of post-*Erie* federal common law is inconsistent with the proposition that CIL automatically and in a wholesale fashion has the status of federal law, even outside the context of causes of action.

---

[217] *Id.*
[218] *Id.*
[219] *See id.* at 2763.

Table 2 illustrates how *Sosa* resolved the four debates discussed in Part III:

TABLE 2

	Conventional Wisdom in 1990s	Revisionist View	*Sosa*
Pre-*Erie* Status of CIL	Federal law	General law	General law
Post-*Erie* Status of CIL	Wholesale incorporation as federal common law	Selective incorporation based on constitutional or political branch authorization	Selective incorporation based on constitutional or political branch authorization
Nature of ATS	Either creates federal causes of action or authorizes courts to create them	Only jurisdictional	Only jurisdictional, but nevertheless has the effect today of authorizing courts to create some federal causes of action
Scope and Sources of CIL to be Applied by Courts in ATS Litigation	All of CIL, derived from wide range of materials	Limited set of CIL norms, based primarily on the practice of nations	Limited set of CIL norms, with increased emphasis on the practice of nations

V. A POST-*SOSA* APPROACH TO CIL AS FEDERAL COMMON LAW

We argued in Part IV that *Sosa* rejected the modern position that CIL is incorporated wholesale into domestic federal common law. It does not follow, however, that CIL is irrelevant to federal common law outside the context of the ATS. The essential problem with the modern position is that it ignores the significance of *Erie* and the requirements and limitations of post-*Erie* federal common law. As *Sosa* made clear, however, CIL can be incorporated into, or inform, federal common law consistent with the requirements of *Erie*. In this Part, our goal is to sketch a general account of the federal common law of CIL that is more faithful to the premises of post-*Erie* federal common law than the overbroad modern position.

We begin by considering possible jurisdictional bases for applying CIL as federal common law. We next consider a variety of nonjurisdictional contexts in which it may be proper for courts to formulate federal common law rules relating to CIL, either as gap filling for statutes or treaties, or as the result of certain structural constitutional con-

siderations. We conclude by considering several areas of likely debate during the next decade concerning the domestic application of CIL.

A. Possible Jurisdictional Bases for CIL as Federal Common Law

The Supreme Court has made clear that, as a general matter, "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."[220] There are exceptions to this rule. In *Lincoln Mills*, the Court (controversially) interpreted a statute conferring federal jurisdiction over suits involving violations of labor contracts to authorize federal courts to develop substantive federal common law "fashion[ed] from the policy of our national labor laws."[221] And, in *Sosa* itself, the Court interpreted congressional expectations relating to a jurisdictional statute (the ATS) as authorizing courts to develop limited federal common law causes of action related to CIL. Nonetheless, consistent with the general rule, the Court in *Sosa* made clear that its interpretation of the ATS did not "imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law."[222] We now explain why two other jurisdictional provisions — the federal question statute and the diversity statute — do not confer federal common law–making power, and we distinguish them from two jurisdictional clauses in Article III — for interstate disputes and admiralty disputes — that have been construed as conferring such authority.

1. Federal Question. — Aside from the ATS, the statute most often invoked as a basis for federal common law related to CIL is the federal question statute, 28 U.S.C. § 1331, which provides district courts with "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."[223] Prior to *Sosa*, commentators and litigants had argued that cases based on CIL arose under the "laws of the United States" for the purposes of § 1331. Notice that the argument here is different than under the ATS. *Sosa* addressed whether the ATS authorized federal courts to develop federal common law causes of action under CIL. The argument under the federal question jurisdiction statute, by contrast, is that CIL is part of the "laws of the United States" within the meaning of that statute. If this latter claim is true, then CIL not only gives rise to federal jurisdiction, but is itself also part of federal law with potential implications under the Constitution's Take Care and Supremacy Clauses.

---

[220] Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–41 (1981).

[221] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957). For criticism of the decision, see, for example, Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The* Lincoln Mills *Case*, 71 HARV. L. REV. 1 (1957).

[222] *Sosa*, 124 S. Ct. at 2765 n.19.

[223] 28 U.S.C. § 1331 (2000).

Before *Sosa*, most lower courts that had addressed the question concluded that CIL was not part of the "laws of the United States" for purposes of the federal question jurisdiction statute and thus could not be a basis for federal jurisdiction under that statute.[224] The Court in *Sosa* itself stated that, in contrast with the ATS, there was "no reason to think that" Congress intended the federal question jurisdiction statute to authorize courts to apply CIL as federal common law.[225] The Court added that the incorporation of CIL as federal common law under the federal question jurisdiction statute might not be consistent with "the division of responsibilities between federal and state courts after *Erie*."[226] For two reasons, such skepticism about CIL and the federal question statute is warranted.

First, an analysis similar to the one that the Court in *Sosa* performed on the ATS, as applied to § 1331 and the "ambient law of the era" at the time that it was enacted, shows that the framers of § 1331 did not view CIL as part of the "laws of the United States." Section 1331 was enacted in 1875 without substantial debate.[227] It was designed to provide a statutory basis for the exercise of federal question jurisdiction provided for in Article III.[228] But in the nineteenth century, when § 1331 was enacted, Article III's reference to judicial power over cases arising under the laws of the United States was not viewed as including the law of nations.[229] This conclusion is consistent with the proposition, confirmed in *Sosa*, that CIL in the pre-*Erie* period was viewed as general common law, not federal law.

Relatedly, in the same year as the enactment of the 1875 statute, the Supreme Court held that the phrase "laws of the United States" in

---

[224] *See, e.g.*, Princz v. Fed. Republic of Germany, 26 F.3d 1166, 1176 (D.C. Cir. 1994); Xuncax v. Gramajo, 886 F. Supp. 162, 193–94 (D. Mass. 1995); Handel v. Artukovic, 601 F. Supp. 1421, 1426 (C.D. Cal. 1985). *But see* Deutsch v. Turner Corp., 324 F.3d 692, 718 (9th Cir. 2003); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

[225] *Sosa*, 124 S. Ct. at 2765 n.19.

[226] *Id.*

[227] *See* RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 857–58 (5th ed. 2003) [hereinafter HART & WECHSLER'S FEDERAL COURTS].

[228] The most widely quoted (and indeed, the only) contemporary statement about § 1331's original meaning came from Senator Matthew Carpenter, who asserted that although "[t]he [Judiciary Act] of 1789 did not confer the whole power which the Constitution conferred . . . [the Act of March 3, 1875 (later, § 1331)] does. . . . [It] gives precisely the power which the Constitution confers — nothing more, nothing less." 2 CONG. REC. 4986 (1874). The Supreme Court later held that § 1331 did not confer all of the jurisdiction provided for in the Article III federal question provision. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149 (1908).

[229] *See, e.g.*, Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 545–46 (1828) (holding that a case involving application of admiralty and maritime law — elements of the law of nations — "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III); *see also* Bradley & Goldsmith, *supra* note 3, at 824; Jay, *supra* note 13, at 1309–11; Weisburd, *supra* note 73, at 1214–17. *See generally* Bradley, *supra* note 89.

the statute regulating appellate jurisdiction over state court decisions did not include the law of nations.[230] The Court reasoned that it lacked appellate jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case" because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States."[231] Many other decisions in the years between the 1875 statute and *Erie* reached similar conclusions.[232] The same well-understood and uncontroversial reason why the law of nations was not part of the "laws of the United States" for statutory appellate jurisdiction — namely, the law of nations' status as nonfederal general common law — would have applied to the original federal question jurisdiction statute.

As a result, unlike the ATS, § 1331 was not enacted on the understanding that federal courts would be able to hear CIL-based claims pursuant to § 1331's jurisdictional grant. Nor is there any indication that Congress intended to confer authority to incorporate CIL as federal common law through the general federal question statute. As with the ATS, probative legislative history surrounding conferral of general federal question jurisdiction is sparse. General federal question jurisdiction was not conferred with any permanence until 1875 and was then subject to a $500 amount in controversy requirement.[233] Nothing in the legislative history of the 1875 conferral of general federal question jurisdiction suggests that Congress even considered CIL. Indeed, recorded legislative debate on the relevant bills did not focus on the conferral of general federal question jurisdiction at all.[234]

Second, as we have already seen, one reason why the Court in *Sosa* resisted the idea that the "laws of the United States" in § 1331 included authority to develop CIL through federal common law–making was

---

[230] *See* N.Y. Life Ins. Co. v. Hendren, 92 U.S. 286 (1875).

[231] *Id.* at 286–87.

[232] *See, e.g.*, Ker v. Illinois, 119 U.S. 436, 444 (1886) (holding that the question whether forcible seizure in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review"); *see also* Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442–43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892).

[233] Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (1875); *see also* RUSSELL R. WHEELER & CYNTHIA HARRISON, CREATING THE FEDERAL JUDICIAL SYSTEM 6 (3d ed. 2005) (noting that Congress started to grant federal jurisdiction over specific types of cases in 1790 but did not confer "general federal-question jurisdiction until 1875"). Broad federal question jurisdiction was conferred in 1801 by the outgoing Federalist Party but was repealed the following year. *See* Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (1801), *repealed by* Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (1802); *see also* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 23–28 (1928).

[234] *See* 3 CONG. REC. 2168, 2240, 2275 (1875); H.J., 43d Cong., 2d Sess. 611, 647–48 (1875); S.J., 43d Cong., 2d Sess. 371–72 (1875); 2 CONG. REC. 4300–04, 4979–88 (1874); FRANKFURTER & LANDIS, *supra* note 233, at 65 & n.34, 66–68.

that the assertion of such broad federal common law powers might not be "consistent with the division of responsibilities between federal and state courts after *Erie*."[235] It is one thing for federal courts to recognize a limited set of causes of action in suits brought by a narrow class of plaintiffs based on a statute that references the law of nations, as the Court did in *Sosa*. But when federal courts incorporate CIL wholesale into domestic law — including those aspects of CIL that increasingly regulate functions formerly regulated by states — they move from the molecular to the molar, in a manner inconsistent with the limited common law–making powers of federal courts.

In sum, if one performs the same type of analysis under the federal question jurisdiction statute that the Court in *Sosa* performed with respect to the ATS, one reaches the conclusion that the framers of the federal question statute did not intend to authorize the application of CIL.

2. Diversity. — The ATS analysis in *Sosa* also raises a question about whether CIL can be applied as federal common law in diversity cases under 28 U.S.C. § 1332. The Court in *Sosa* tried to recapture in the post-*Erie* world the relationship between the ATS and the "ambient law of the era" when the ATS was written.[236] The diversity statute was originally enacted at the same time as the ATS. Moreover, the framers of the diversity statute clearly contemplated that courts exercising diversity and alienage jurisdiction would apply the law of nations in some cases, at least in the sense in which the law of nations included the law merchant and other aspects of the general law related to commercial transactions. (This was, after all, what *Swift v. Tyson* was all about.) If *Sosa*'s analysis, translating the pre-*Erie* general common law that the ATS's framers thought would apply in ATS cases into post-*Erie* federal common law, applied to the diversity statute as well, then one might argue that the diversity statute should constitute authorization for the application of modern CIL as genuine federal common law in cases that have the required diversity of citizenship and amount in controversy.

For two reasons, we do not believe that this conclusion follows. The main reason is *Erie* itself, which *Sosa* relied on and affirmed. In overruling *Swift*, *Erie* held that diversity jurisdiction was not a basis for the application of general common law (even general common law, like the law merchant, that was part of the law of nations) or for otherwise displacing state common law rules.[237] Thousands of post-*Erie*

---

[235] Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 n.19 (2004).

[236] *Id.* at 2770.

[237] *See supra* section II.B, pp. 876–77.

cases have applied what was formerly general common law as state law, not federal law.

Second, unlike the diversity statute, the ATS provides jurisdiction over claims arising from a specific body of law — the law of nations — that was historically part of the general common law. The diversity statute, by contrast, provides only party-based jurisdiction and evinces no intent to facilitate particular legal claims. Rather, diversity jurisdiction was intended to secure a certain type of forum for nonresidents and aliens, independent of the source of the underlying claim.[238] The diversity statute does not pose the post-*Erie* translation issue addressed in *Sosa* since the provision of an unbiased forum to qualifying parties is unaffected by *Erie*'s shift in the understanding of substantive law.[239]

3. Interstate and Admiralty Disputes. — The Supreme Court has recognized that it is appropriate to exercise federal common law–making powers related to CIL in two jurisdictional contexts other than the ATS. The same day that *Erie* was decided, the Court drew on principles of CIL to resolve a boundary dispute between Colorado and New Mexico and made clear that its rule of decision, drawn from CIL, had the status of federal common law.[240] Similarly, the Court has indicated that when it develops common law in its admiralty jurisdiction, that law has the status of federal common law.[241]

In our view, the use of CIL in these jurisdictional contexts is easier to justify under traditional principles of federal common law than the use of CIL in the diversity and federal question contexts. Consider interstate disputes first. The best argument for the development of federal common law as a rule of decision in these cases is that uniquely federal interests derived from the Constitution demand a federal rule.[242] These cases are expressly contemplated by Article III, they fall

---

[238] *See* Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 554–64 (1989).

[239] To the extent alienage jurisdiction was intended to secure a forum in which treaty obligations (such as those under the Treaty of Peace with Britain) would be enforced, respect for the Supremacy Clause in state courts and general federal question jurisdiction over claims arising under treaties now assist in achieving that intent. *See id.* at 554–64.

[240] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106–07, 110 (1938); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 738–39.

[241] *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409–10 (1953); *see also* G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. (forthcoming 2007) (manuscript at 26–27, on file with the Harvard Law School Library) (arguing that admiralty law was nonpreemptive federal law pre-*Erie*); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 326, 347–48 (1999) (noting, and criticizing, the Supreme Court's attempt "to 'translate' the Framers' conception of maritime law into . . . [the post-*Erie*] context" by transforming maritime law from general law into federal common law).

[242] *See* Texas v. New Jersey, 379 U.S. 674, 677 (1965); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14 (1975) ("[T]he au-

within the Supreme Court's original jurisdiction,[243] they cannot practically be decided by the states or under state law given that the states themselves are parties,[244] they are relatively rare,[245] and they involve the resolution of disputes that are directly analogous to disputes between nations. Moreover, both in the Judiciary Act of 1789 and today, jurisdiction over interstate disputes has been vested exclusively in the Supreme Court.[246]

Even with these limiting factors, the Supreme Court is cautious in stepping into interstate disputes where the creation of common law may be required.[247] When the Court does craft common law to govern interstate disputes, it takes into account not only constitutional[248] but

---

thority to create federal common law springs of necessity from the structure of the Constitution, from its basic division of authority between the national government and the states.").

243 U.S. CONST. art. III, § 2, cl. 2; *see also* Clark, *supra* note 13, at 1324–25 (recognizing, but disputing, the conventional notion that federal common law–making authority in interstate disputes derives from Article III's jurisdictional grant).

244 *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (noting that, in interstate disputes, "our federal system does not permit the controversy to be resolved under state law . . . because the interstate or international nature of the controversy makes it inappropriate for state law to control"); *see also* Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1607–08 (1990) (citing Hamilton's understanding that federal jurisdiction over suits involving states is grounded in the principle that no man should judge his own case).

245 *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 279–80.

246 28 U.S.C. § 1251(a) (2000); Judiciary Act of 1789, § 13, 1 Stat. 73, 80.

247 *See* Illinois v. City of Milwaukee, 406 U.S. 91, 93–94, 108 (1972) (denying Illinois's motion to invoke the Court's original jurisdiction while noting that "[i]t has long been [the Supreme] Court's philosophy that '[its] original jurisdiction should be invoked sparingly'" and that the exclusive grant of interstate dispute jurisdiction is read as "obligatory only in appropriate cases," though stating that the Court's restrictions on its original jurisdiction stem, at least in part, from a desire to ease the Court's docket (quoting Utah v. United States, 394 U.S. 89, 95 (1969))); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (citing Missouri v. Illinois, 200 U.S. 496 (1906), and New York v. New Jersey, 256 U.S. 296 (1921), in explaining that "[t]he governing rule is that this Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence"); *New York*, 256 U.S. at 309 (citing and applying the high standard of *Missouri v. Illinois*); *Missouri*, 200 U.S. at 521 ("Before this court ought to intervene [in interstate disputes] the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side."); *id.* at 517–21; HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 301–03 (noting the Supreme Court's exercise of discretion to refuse to hear even cases within the Court's exclusive jurisdiction); *see also* Oklahoma v. Texas, 258 U.S. 574, 580 (1922) (adjudicating conflicting claims by Oklahoma, Texas, and the United States that had led to efforts to mobilize both states' militias).

248 *See* Colorado v. New Mexico, 459 U.S. 176, 183 (1982) (respecting the constitutional sovereignty and equality of states in developing the doctrine of equitable apportionment); *Connecticut*, 282 U.S. at 670 (noting that in suits regarding the competing water rights of states, "principles of right and equity shall be applied having regard to the 'equal level or plane on which all the States stand, in point of power and right, under our constitutional system'" (quoting Wyoming v. Colorado, 259 U.S. 419, 465, 470 (1922))); Clark, *supra* note 13, at 1322 (noting that many of the rules developed in interstate disputes "appear to implement the constitutional equality of the states"); *id.* at 1323–25, 1328–31.

also congressional guidance relevant to the dispute.[249] Indeed, when the Court decides issues arising from interstate compacts approved by Congress, the Court in effect interprets a congressional act, a task well within the traditional scope of federal common law–making.[250] Moreover, to the extent the Court looks to CIL in creating common law in these cases, it does not directly incorporate CIL into U.S. domestic law, but rather draws on the narrow component of CIL that governs, for example, international boundary or water rights to inform the federal common law that governs resolution of interstate disputes.[251] In this sense, the federal common law developed in interstate cases is doubly narrow: the occasions in which the Court develops federal common law are rare, and CIL informs domestic federal law in a limited fashion.

An additional factor distinguishes interstate jurisdiction from the federal question and diversity contexts. For over 200 years, courts have not perceived a structural need to apply CIL as federal common law in diversity and federal question jurisdiction cases. By contrast, even before *Erie*, the interstate jurisdiction clause was understood to authorize federal courts to make federal law in the absence of any legislative guidance, subject to subsequent congressional revision.[252]

---

[249] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313–15, 317–23 (1981) (noting that Congress may by subsequent legislation displace federal common law regarding interstate disputes and holding that Congress had done just that in enacting the comprehensive Federal Water Pollution Control Act Amendments of 1972); *id.* at 316–17 (explaining that the standard for finding congressional preemption of federal common law is lower than for finding congressional preemption of state law); *Illinois*, 406 U.S. at 101–04 & n.5 (finding that Congress had neither prescribed nor prohibited the remedy Illinois sought but that the statutes Congress had enacted, while "not necessarily [defining] the outer bounds of the federal common law," might "provide useful guidelines in fashioning such rules of decision"); *Missouri*, 200 U.S. at 518–19 (citing Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518 (1851), in which the Court relied on related but not controlling congressional acts and a congressionally approved interstate compact to resolve an interstate nuisance dispute); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 740 (noting the Court's use of congressional guidance in interstate water pollution disputes, one of few areas of interstate dispute in which congressional guidance is available).

[250] *See Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) at 565–66 (noting that an interstate compact approved by Congress becomes a law enforceable by the Supreme Court); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 739.

[251] *See* Meltzer, *supra* note 146, at 540; *see also* New Jersey v. Delaware, 291 U.S. 361, 378–85 (1934) (applying the international law doctrine of the Thalweg to resolve a boundary dispute between New Jersey and Delaware); *Connecticut*, 282 U.S. at 670 ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require."); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 287 ("The Court draws on federal, state and international law, as appropriate, in fashioning the[] common law rules [that govern interstate disputes]."); Clark, *supra* note 13, at 1328–30 (noting that in implementing the constitutional equality of the states through its interstate dispute common law, the Court in some cases may "borrow international law doctrines [that were] originally developed to implement the 'absolute equality' of sovereign nations" despite the fact that these doctrines do not apply to interstate disputes "of their own force").

[252] *See Connecticut*, 282 U.S. at 670–71; Kansas v. Colorado, 206 U.S. 46, 97 (1907).

Claims of structural necessity as a basis for federal common law are more plausible if these claims have a long historical pedigree.

The same basic analysis applies to admiralty jurisdiction. Admiralty is, of course, a traditional component of the law of nations that was important to the prosperity of the infant United States.[253] Even the weak national government during the period of Confederation exercised some authority over admiralty disputes.[254] When it came time to craft the new Union, opposition to a broad federal judiciary was strong.[255] The proposed grant of federal diversity jurisdiction, for example, was bitterly opposed.[256] By contrast, even those who opposed the federal judicial system contemplated by the Constitution and established by the Judiciary Act agreed on the need for "national admiralty courts."[257] "When proposals to abolish Congress's Article III authority to establish federal courts were made in the state ratifying conventions and in the First Congress, there was usually an exception for courts of admiralty."[258] As a result, and in notable contrast with the treatment of the law of nations more generally, the Constitution explicitly extended federal judicial authority to include admiralty.[259]

Further, Congress has enacted various statutes to govern private admiralty issues. Thus, much of federal admiralty law today is found in statutes or treaties and not exclusively in the common law.[260] CIL

---

[253] *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 15; David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158, 163–64; John P. Frank, *Historical Bases of the Federal Judicial System*, 13 LAW & CONTEMP. PROBS. 3, 14 (1948).

[254] *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 6 & nn.32–33 (describing the Continental Congress's authority "to 'appoint' state courts for the trial of 'piracies and felonies on the high seas'" and Congress's establishment of a national tribunal to hear appeals in capture cases); Frank, *supra* note 253, at 6–9 (describing admiralty courts during the colonial and Confederation periods).

[255] *See* HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 6–9.

[256] *See id.* at 17, 19; Wythe Holt, *"To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1468–71, 1477; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923).

[257] WHEELER & HARRISON, *supra* note 233, at 6; *see also* Michael G. Collins, *The Federal Courts, the First Congress, and the Non-Settlement of 1789*, 91 VA. L. REV. 1515, 1520–21, 1523–30, 1539–40, 1555, 1565, 1570–71 (2005); Frank, *supra* note 253, at 9; Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 484 n.6 (1928); Holt, *supra* note 256, at 1428–30 & n.26; Young, *supra* note 241, at 277–80 & nn.41–42, 314–17, 348 (noting a consensus in favor of federal admiralty jurisdiction, though disputing the suggestion that the Framers intended to federalize all substantive admiralty law).

[258] WHEELER & HARRISON, *supra* note 233, at 6; *see also* Warren, *supra* note 256, at 119–20 (describing such a proposal in the First Congress); *cf. id.* at 123 & n.166 (noting a similar attempt to amend what became the First Judiciary Act to limit lower federal courts to acting as courts of admiralty).

[259] *See* U.S. CONST. art. III, § 2, cl. 1.

[260] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990); HART & WECHSLER'S FEDERAL COURTS, *supra* note 227, at 735; Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1370–77, 1382–84 (1999); Jonathan M. Gutoff, *Federal Common*

is often used for interstitial gap-filling, an uncontroversial use of federal common law[261] that is a far cry from the wholesale incorporation of CIL contemplated by those who advocate the use of the federal question statute or the diversity statute as a basis for treating CIL as federal common law. Even on issues with respect to which Congress has not specifically legislated, the Supreme Court has tried to conform the common law of admiralty to Congress's intent behind related statutes.[262] In short, admiralty is only one small subset of CIL, and it is a subset in which federal common law is used selectively to promote the policies adopted by the political branches.

B. Possible Substantive Bases for CIL as Federal Common Law

We now turn from an examination of possible jurisdictional authorizations to possible substantive authorizations — in statutes, treaties, and executive branch pronouncements — for a federal common law of CIL. As we explain, there continues to be a robust role for CIL in the U.S. legal system even if one rejects the modern position.

1. Statutes. — Some statutes specifically reference CIL and thus invite courts to incorporate and interpret CIL as part of the statutory scheme. An oft-cited example is the federal piracy statute, which pro-

---

Law and Congressional Delegation: A Reconceptualization of Admiralty, 61 U. PITT. L. REV. 367, 374 & n.32, 405–06 (2000); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 477 & n.31 (2004); *cf.* Gutoff, *supra*, at 403–06, 417 (finding congressional delegation of authority to create a federal common law of admiralty in Congress's reenactment and expansion of admiralty jurisdiction in 1948).

[261] *See* Young, *supra* note 241, at 477.

[262] *See* Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820 (2001) (citing American Dredging Co. v. Miller, 510 U.S. 443 (1994), for the proposition that federal common law–making in admiralty should "harmonize with the enactments of Congress in the field"); *id.* at 821 (Ginsburg, J., concurring in part) (same); *Am. Dredging Co.*, 510 U.S. at 456–57 (following the Jones Act's lead in finding that state forum non conveniens rules may apply to general maritime claims); *Miles*, 498 U.S. at 27 ("In this era [in which Congress has legislated extensively on admiralty matters], an admiralty court should look primarily to these legislative enactments for policy guidance."); *id.* at 32–37 (limiting recovery under general maritime law to coincide with the limited recovery sanctioned by Congress in related statutes); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 390–402 (1970) (noting that legislative "policy carries significance beyond the particular scope of . . . the statutes involved" and should "be given its appropriate weight . . . in matters of . . . decisional law" and relying on the policies behind related, but not controlling, federal statutes to recognize a wrongful death remedy in general maritime law); S. Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917) (bolstering the conclusion that New York's Workmen's Compensation Act did not apply to a maritime accident by noting that the workmen's compensation remedy would be inconsistent "with the policy of Congress to encourage investments in ships" as manifested in two acts "which declare a limitation upon the liability of [ship] owners"); *cf. Norfolk Shipbuilding*, 532 U.S. at 820 ("[Given] Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes have seen fit to allow, to leave further development to Congress."); Nw. Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 97 n.40 (1981) ("[E]ven in admiralty we decline to fashion new remedies if there is a possibility that they may interfere with a legislative program.").

vides that "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."[263] This statute clearly authorizes courts to ascertain and apply as federal law the CIL prohibition on piracy.[264] In this situation, it makes sense to talk about a federal law status for CIL. Similarly, the Foreign Sovereign Immunities Act[265] (FSIA) provides an exception to foreign governmental immunity for certain situations in which "rights in property taken in violation of international law are in issue."[266] The phrase "international law" in this exception refers primarily to the CIL governing the expropriation of alien property. When courts apply a CIL standard under this jurisdiction, they are best understood as doing so under a federal common law rationale.[267]

Sometimes courts develop federal common law not pursuant to an express reference in a statute, but rather in order to fill gaps in a statutory scheme. For example, some courts have looked to CIL in interpreting aspects of the FSIA, even where CIL is not expressly incorporated, based on indications in the FSIA's legislative history that this is what Congress intended.[268] Another example comes from the Supreme Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*.[269] In that case, the issue was what body of law should apply in determining whether to pierce the veil between a foreign government and its state-owned corporation for purposes of attributing the government's actions to the corporation (and thereby allowing a counterclaim of expropriation to be brought against the corporation). The FSIA, which provided the basis for subject matter jurisdiction and the potential abrogation of sovereign immunity, did

---

263 18 U.S.C. § 1651 (2000).

264 *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818).

265 Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified in scattered sections of 28 U.S.C.).

266 28 U.S.C. § 1605(a)(3) (2000).

267 *See, e.g.*, West v. Multibanco Comermex, S.A., 807 F.2d 820, 831 n.10 (9th Cir. 1987) ("It is appropriate to look to international law when determining whether [an action] constitutes a 'taking' for purposes of FSIA."); *cf.* 28 U.S.C. § 1350 note (2000) (defining "extrajudicial killing" in the Torture Victim Protection Act as not including a killing "that, *under international law*, is lawfully carried out under the authority of a foreign nation" (emphasis added)); Department of the Interior, Environment, and Related Agencies Appropriations Act, Pub. L. No. 109-54, § 201, 119 Stat. 499, 531 (2006) (requiring the EPA to regulate the use of human subjects in pesticide testing "consistent with . . . the principles of the Nuremberg Code with respect to human experimentation").

268 *See, e.g.*, Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc., 179 F.3d 1279, 1294–96 (11th Cir. 1999); *cf. In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 497–98 (9th Cir. 1992) ("Congress intended the FSIA to be consistent with international law . . . ."); Tex. Trading & Milling Corp. v. Fed. Republic of Nig., 647 F.2d 300, 310 (2d Cir. 1981) ("[The FSIA's] drafters seem to have intended rather generally to bring American sovereign immunity practice into line with that of other nations.").

269 462 U.S. 611 (1983).

not address this issue. In resolving the question, the Supreme Court developed federal common law based on what it described as "principles . . . common to both international law and federal common law, which in these circumstances is necessarily informed both by international law principles and by articulated congressional policies."[270] As we noted earlier, this sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law.

Applying the *Charming Betsy* canon of construction is another way in which courts may look to CIL in the context of statutory construction. Pursuant to this canon, courts construe ambiguous federal statutes to avoid conflicts with international law.[271] CIL is not applied as a rule of decision under this canon, but rather as a relevant consideration in discerning Congress's intent. This canon almost certainly has the status of federal common law because a state court interpreting a federal statute would be bound to follow it. Indeed, the obligation of state courts to construe a federal statute in the same way that the Supreme Court would construe it (including by reference to the *Charming Betsy* canon where relevant) can be seen as the flip side of *Erie*.[272]

2. Treaties. — When U.S. courts apply treaties, they sometimes look to CIL principles to resolve ambiguities and fill in gaps. In doing so, they often rely on the Vienna Convention on the Law of Treaties,[273] which sets forth a variety of general rules governing the formation, interpretation, and termination of treaties. The United States has not ratified the Convention and thus it cannot bind the United States as a treaty, but the U.S. government has stated that many of the Convention's terms reflect CIL.[274] Perhaps not surprisingly, therefore, courts sometimes invoke the CIL of treaty law as embodied in the Vienna Convention.[275] Most often, they apply the principles of interpretation

---

[270] *Id.* at 623.

[271] *See* Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2366 (2004); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); Weinberger v. Rossi, 456 U.S. 25, 32 (1982); Lauritzen v. Larsen, 345 U.S. 571, 578 (1953); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987) ("Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.").

[272] *See* Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 534 n.305 (1997).

[273] *Opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

[274] *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 n.2 (documenting executive branch statements); S. EXEC. DOC. NO. L, at 1 (1971) (noting that the Vienna Convention "is already generally recognized as the authoritative guide to current treaty law and practice").

[275] The Second Circuit recently explained why (and how) it believed it could apply CIL based on the Vienna Convention even though the United States had not ratified the Convention:

in Articles 31 and 32 of the Convention to construe treaties that the United States has ratified.[276] Sometimes, courts look to principles of CIL as embodied in the Vienna Convention to ascertain whether a treaty exists.[277] It is unclear whether the authorization for courts to apply the CIL of treaty law in these contexts is best thought of as coming from the ratified treaty in question or from the executive branch. But in any event, as in the statutory authorization cases, these gap-filling and interpretive uses of CIL are similar to the federal common law that has been applied in the domestic realm, and these uses are closely tied to the actions and policies of the political branches.

3. Executive Branch Authorization. — In some circumstances, the executive branch can provide the authorization for courts to draw upon CIL in developing federal common law. A particularly good example is the way in which courts have addressed head-of-state immunity. For most of our nation's history, head-of-state immunity was viewed as a component of foreign sovereign immunity. Prior to *Erie*, and consistent with the view that CIL was treated as nonfederal general common law, federal and state courts alike applied the CIL of foreign sovereign immunity on the domestic plane without authorization from Congress or the Executive.[278] Around the time of *Erie*, the Supreme Court stopped applying the CIL of immunity on its own authority, as it had done under the general common law regime, and began to justify its application on the basis of executive branch authorization.[279] The Supreme Court never expressly tied its shift in

> Although we have previously recognized the Vienna Convention as a source of customary international law, it bears underscoring that the United States has never ratified the Convention. Accordingly, the Vienna Convention is not a primary source of customary international law, but rather one of the secondary sources "*summarizing* international law," that we rely upon "only insofar as they rest on factual and accurate descriptions of the past practices of states."

Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73, 79 n.8 (2d Cir. 2005) (citations omitted) (quoting Flores v. S. Peru Copper Corp., 414 F.3d 233, 251 (2d Cir. 2003); United States v. Yousef, 327 F.3d 56, 99 (2d Cir. 2003)).

[276] *See, e.g.*, Gonzalez v. Gutierrez, 311 F.3d 942, 949 & n.15 (9th Cir. 2002). *See generally* Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431 (2004).

[277] *See, e.g.*, Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 307–08 (2d Cir. 2000).

[278] Thus, for example, in the 1812 decision *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), the Supreme Court applied the CIL of sovereign immunity without bothering to consider domestic authorization to do so. Similarly, in *Hatch v. Baez*, 14 N.Y. Sup. Ct. 596 (Gen. Term 1876), a New York court relied on an English precedent but no domestic authorization in holding that the former President of the Dominican Republic was entitled to immunity for his official acts. *Id.* at 599–600. *See generally* Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265, 307–22 (2001).

[279] In *Compania Espanola de Navegacion Maritima S.A. v. The Navemar*, 303 U.S. 68 (1938), decided just three months before *Erie* and issued the day *Erie* was argued, the Court intimated for the first time that courts were bound by executive suggestions of immunity. *Id.* at 74. Subsequently, in its 1943 decision *Ex parte Republic of Peru*, 318 U.S. 578 (1943), the Court squarely

treatment of foreign sovereign immunity doctrines to *Erie*. But the shift took place at approximately the same time as *Erie*, and it is easy to understand why *Erie* was pivotal: *Erie*'s positivism required all applications of law to be grounded in a constitutional or political branch authorization, and there was no other plausible source of authorization.[280]

In 1976, the FSIA transferred the political branch authorization for judicial application of foreign sovereign immunity from executive suggestion to congressional statute. The FSIA did not specify whether its immunities extend to heads of state, either current or former.[281] This silence raised the question of whether a foreign head of state was entitled to immunity in U.S. courts after passage of the FSIA, and if so, on what basis. Although courts have varied in their answers to this question, they have almost always grounded the application of head-of-state immunity in an authorization from the political branches.[282] Some courts view the FSIA as providing for head-of-state immunity, even though the text of the statute is silent on the issue.[283] Most

held that, because immunity determinations implicated important foreign relations interests, courts were bound to follow executive suggestions of immunity. *Id.* at 587. Two years later, in *Republic of Mexico v. Hoffman*, 324 U.S. 30 (1945), the Court went further, stating that even in the face of executive branch silence, U.S. courts should look to "the principles accepted by the [executive branch]." *Id.* at 35. As a result, the Court explained that "it is . . . not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize." *Id.*; *see also* Curtis A. Bradley & Jack L. Goldsmith, Pinochet *and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

[280] This posture was especially appropriate because, at the time of *Erie*, the CIL of immunity was in the midst of a transformation that rendered it less amenable to independent judicial determination. During the nineteenth century, the United States, like many other countries, adhered to the "absolute" theory of sovereign immunity, under which foreign governments were entitled to immunity for essentially all of their acts, even those that were purely commercial in nature. *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 547–50 (4th ed. 2003). In the early twentieth century, however, a number of countries began embracing the "restrictive" theory, under which foreign governments were entitled to immunity for their public or sovereign acts, but not for their private or commercial acts. *See id.* at 550–52. This shift to the restrictive theory, formally endorsed by the U.S. State Department in 1952, *see* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Attorney Gen. (May 19, 1952), *reprinted in* 26 DEP'T STATE BULL. 984 (1952), made the CIL of immunity much more complex and difficult to apply. It also meant that foreign sovereigns would be haled into court more often, thereby heightening the foreign policy stakes associated with immunity determinations. In this environment, it made sense that unelected judges with no foreign relations expertise would seek political branch guidance on whether and how to apply foreign sovereign immunity.

[281] The FSIA defines "foreign state" to include a "political subdivision" or an "agency or instrumentality" of a foreign state, 28 U.S.C. § 1603(a) (2000), but neither the statute nor its legislative history mentions head-of-state immunity.

[282] Bradley & Goldsmith, *supra* note 279, at 2166.

[283] *See, e.g.*, O'Hair v. Wojtyla, No. 79-2463 (D.C. Cir. Oct. 3, 1979), *excerpted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1979, at 897 (Marian Lloyd Nash ed., 1983).

courts, however, view the FSIA as inapplicable to a head of state and instead look to executive branch authorization to apply the doctrine.[284] Among the courts that seek executive branch authorization, some recognize head-of-state immunity only in the face of an explicit suggestion of immunity by the Executive.[285] Others rely on the lack of an executive branch suggestion simply as a factor weighing against immunity.[286] In all these cases, the courts are looking, at least to some degree, for political branch authorization.

C. CIL as Federal Common Law: Future Debates

In this section, we examine three contexts in which CIL's status as domestic law is likely to be most debated during the next decade. The first involves corporate liability for alleged human rights violations, the second involves the war on terrorism, and the third involves the Supreme Court's use of foreign and international materials to inform constitutional interpretation.

1. Corporate Aiding and Abetting Liability. — Some courts prior to *Sosa* suggested that corporations could be held liable under the ATS for aiding and abetting human rights abuses committed by foreign governments.[287] If this proposition were legally correct, it would substantially increase the number and scope of potential ATS cases as compared with the first wave of ATS cases brought against state officials. Among other things, the number of ATS defendants subject to personal jurisdiction in the United States would expand; corporations typically have more assets than individual defendants and thus are likely to be a more attractive target for plaintiffs and their lawyers; and private corporations, unlike foreign governments, are not protected by sovereign immunity. For a variety of reasons, we believe that the best reading of *Sosa* is that ATS liability cannot be extended to corporations based on an aiding and abetting theory absent further action by Congress.

Most international law — both treaty-based and customary — imposes obligations only on States.[288] This is true even of much of hu-

---

[284] *See, e.g.*, Ye v. Zemin, 383 F.3d 620, 624–25 (7th Cir. 2004); United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); Doe v. Roman Catholic Diocese, 408 F. Supp. 2d 272, 277–78 (S.D. Tex. 2005); Lafontant v. Aristide, 844 F. Supp. 128, 137 (E.D.N.Y. 1994).

[285] *See, e.g.*, Jungquist v. Nahyan, 940 F. Supp. 312, 321 (D.D.C. 1996), *rev'd on other grounds*, 115 F.3d 1020 (D.C. Cir. 1997).

[286] *See, e.g.*, First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1120–21 (D.D.C. 1996).

[287] *See, e.*g., Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

[288] RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 2, introductory note (1987); 1 OPPENHEIM'S INTERNATIONAL LAW § 6 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 932 (2005).

man rights law. The Convention Against Torture,[289] for example, addresses only torture "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."[290] There are a few norms of international law, such as prohibitions on genocide and war crimes, that apply to individuals, at least for the purpose of criminal prosecution.[291] If such norms were also applicable to corporations (a questionable proposition),[292] a corporation could be subject to liability under the ATS for directly violating one of these norms, assuming the other requirements in *Sosa* are satisfied.[293] Even if a direct liability claim were appropriate, *Sosa* suggests that it may be necessary for courts to apply limiting doctrines designed to promote international comity, such as the act of state doctrine and a requirement of exhaustion of local remedies.[294]

Corporations, however, do not typically commit, or even conspire to commit, genocide or war crimes. As a result, most of the ATS claims

---

[289] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 108 Stat. 382, 1465 U.N.T.S. 85.

[290] *Id.* art. 1(1).

[291] *See* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90; Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, arts. 2–5, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, arts. 2–4, U.N. Doc. S/RES/955 (Nov. 8, 1994). *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW (2d ed. 2001).

[292] *Cf.* Vazquez, *supra* note 288, at 943–44. It is noteworthy that none of the modern international criminal tribunals extends criminal liability to corporations and that the state parties to the relatively recent International Criminal Court negotiations considered and rejected international criminal liability for corporations. *See* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 198–200 (Roy S. Lee ed., 1999); 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 778–79 (Antonio Cassese et al. eds., 2002). Many scholars nonetheless believe that corporations can be liable under international criminal law. *See, e.g.*, Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here?*, 19 CONN. J. INT'L L. 1 (2003); Louis Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOK. J. INT'L L. 17 (1999); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

[293] This direct liability might even extend to some situations involving conspiracy, joint venture, or vicarious liability. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069 (9th Cir. 2006) (allowing suit against a corporation to proceed on the theory that it was vicariously liable for human rights abuses allegedly committed by a foreign government on its behalf).

[294] *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2766 n.21 (2004); *see also id.* at 2782–83 (Breyer, J., concurring) (emphasizing the importance of comity considerations in ATS cases). We thus disagree with the Ninth Circuit's 2–1 decision in *Sarei*, in which the court declined to apply an exhaustion requirement to corporate ATS suits, even though it acknowledged that there was international law support for such a requirement. That decision also appears to be inconsistent with *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). In *Hamdan*, the Court held that a statute that allowed for trial of offenses under international law also implicitly incorporated international law limitations on such trials, including procedural limitations. *See id.* at 2794. The ATS's authorization of civil claims for certain international law violations should also be read as incorporating international law limitations on such claims.

brought against corporations have alleged that they were indirectly liable for human rights abuses committed by foreign government actors as a result of their acts of aiding and abetting, such as providing the perpetrators with financial support or materials. There is already a division in the courts over whether such a common law claim is consistent with *Sosa*.[295] We agree with the courts that have found that it is not.

As an initial matter, it is important to recall that the text of the ATS refers to torts "committed" in violation of international law. There is no suggestion in this language of third-party liability for those who facilitate the commission of such torts. By contrast, just a year after the enactment of the ATS, Congress enacted a criminal statute containing specific provisions for indirect liability — for example, for aiding or assisting piracy.[296]

The analysis in *Sosa* suggests a number of reasons why aiding and abetting liability should not be read into the ATS. The Court repeatedly emphasized that, consistent with the limited nature of the ATS and the separation of powers constraints on the federal courts, only a "modest number" of claims could be brought under the ATS without further congressional authorization.[297] The Court further counseled the lower courts to exercise "great caution" in recognizing new claims.[298] And the Court emphasized that "innovative" interpretations should be left to Congress.[299] As we noted earlier, however, allowing corporate aiding and abetting liability would significantly expand ATS litigation. It would also require courts to exercise significant policy judgment normally reserved to the legislature, such as fashioning the precise standards for what constitutes aiding and abetting.

For similar reasons, the Supreme Court declined to imply aiding and abetting liability in civil cases brought under the securities fraud statute. In *Central Bank of Denver v. First Interstate Bank of Denver*,[300] the Court reasoned that allowing aiding and abetting liability for securities fraud would expand litigation in a way that would implicate policy tradeoffs best resolved by Congress.[301] The Court also reasoned that Congress's authorization of aiding and abetting liability in the criminal context did not suggest a general acceptance of that

---

[295] *Compare In re* S. African Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004) (disallowing aiding and abetting liability), *and* Doe I v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) (same), *with* Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F. Supp. 2d 331, 337–38 (S.D.N.Y. 2005) (allowing aiding and abetting liability).

[296] *See* Act of Apr. 30, 1790, ch. 9, § 10, 1 Stat. 112, 114.

[297] *Sosa*, 124 S. Ct. at 2761.

[298] *Id.* at 2763.

[299] *Id.* at 2762.

[300] 511 U.S. 164 (1994).

[301] *See id.* at 188–89.

type of liability in the civil context.[302] Finally, the Court noted the substantial uncertainties associated with the standard for aiding and abetting.[303]

Nor does a claim of corporate aiding and abetting appear to meet the requirement in *Sosa* that norms, to be actionable under the ATS, must have at least the same "definite content and acceptance among civilized nations [as] . . . the historical paradigms familiar when [the ATS] was enacted."[304] There is little evidence that civil liability for corporate aiding and abetting is widely accepted around the world. While the concept of aiding and abetting liability is recognized as a general matter in international criminal tribunals, it is applied in those tribunals only to natural persons, not to corporations. Moreover, even with respect to individuals in these cases, the standards for aiding and abetting liability vary. For example, while the International Criminal Tribunal for the Former Yugoslavia requires an aider or abettor to have mere knowledge that his acts assist in a crime, the International Criminal Court Statute is more demanding, requiring that the aider or abettor act with the purpose of facilitating the commission of the crime.[305]

A comparison between the claim rejected in *Sosa* and the argument for imposing aiding and abetting liability on corporations is revealing. The Court in *Sosa* rejected an arbitrary detention claim under the ATS even though a norm prohibiting nations from arbitrarily detaining individuals was expressly included in the ICCPR, numerous other treaties, the *Restatement of Foreign Relations Law*, and 119 national

---

[302] *See id.* at 180–85, 190–91.

[303] *See id.* at 181 (noting that "[t]he doctrine has been at best uncertain in application"); *id.* at 188 (noting that "the rules for determining aiding and abetting liability are unclear").

[304] *Sosa*, 124 S. Ct. at 2765.

[305] *Compare* Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* note 291, art. 7(1), *with* Rome Statute of the International Criminal Court, *supra* note 291, art. 25(3)(c). *See also* 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 292, at 801. Some courts have expressed in dicta the view that a 1795 Attorney General opinion, which the Court referred to in *Sosa*, provides support for aiding and abetting liability under the ATS. *See, e.g.*, Sarei v. Rio Tinto, PLC, 456 F.3d 1069, 1078 n.5 (9th Cir. 2006); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1173 n.6 (C.D. Cal. 2005). The 1795 opinion observes that President Washington declared in his 1793 neutrality proclamation that individuals "committing, aiding, or abetting hostilities" would "render themselves liable to punishment under the laws of nations." 1 Op. Att'y Gen. 57, 59 (1795) (opinion of William Bradford). In *Sosa*, the Court cited to different language in this opinion that specifically referred to jurisdiction under the ATS as support for the proposition that some common law causes of action could historically be brought under the ATS. *See Sosa*, 124 S. Ct. at 2759 (quoting 1 Op. Att'y Gen. at 59). The aiding and abetting language in the 1795 opinion, however, was not referring to the ATS or even to civil liability; rather, it was referring to potential criminal liability. Moreover, the opinion obviously provides no evidence that aiding and abetting liability is *currently* an accepted international law norm in the civil context.

constitutions.[306] The gap between international aspiration and enforceable ATS claims that was too large in *Sosa* is significantly larger with respect to corporate aiding and abetting liability for human rights abuses. There is no relevant treaty that embraces aiding and abetting liability for corporations, the *Restatement* says nothing about such liability, and there is no widespread state practice of imposing liability on corporations for violations of international human rights law. To paraphrase *Sosa*, that a rule of corporate liability is so far from full realization is evidence against its status as binding law and even stronger evidence against the creation by judges of a private cause of action to enforce the aspiration behind the rule.[307]

The "practical considerations" adverted to by the Court in *Sosa* also weigh against judicial recognition of corporate aiding and abetting liability. These suits entail assessments of foreign government conduct that is otherwise immune from U.S. jurisdiction under the Foreign Sovereign Immunities Act. They also pose a risk of interfering with political branch management of U.S. relations with the relevant countries — for example, in choosing whether to promote or restrict investment in these countries.[308] And this litigation is likely to be perceived as improperly extraterritorial, especially when directed at foreign companies.[309] Invoking these policy concerns, the executive branch has expressly opposed corporate aiding and abetting liability under the ATS.[310] Consistent with *Sosa* (and *Erie*), assessment of such policy issues is best left to the political branches.

Finally, the Court in *Sosa* made two specific references to corporate ATS litigation, and neither reference was supportive of aiding and abetting liability. The Court stated in a footnote that, in considering whether a norm is sufficiently definite to support a cause of action under the ATS, "[a] related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor *such as a corporation or individual*."[311] Although cryptic, this statement suggests that courts should not broaden the "scope of liability" under international law through concepts such as aiding and abetting. The

---

306 *See supra* pp. 897–900.

307 *See Sosa*, 124 S. Ct. at 2769 n.29.

308 *Cf.* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 374 (2000) (noting that Congress thought the Executive needed flexibility in managing sanctions and incentives aimed at improving human rights in Burma).

309 *See, e.g.*, Brief for the Gov'ts of the Commonwealth of Austrl., the Swiss Confederation, & the U.K. of Gr. Brit. & N. Ir. as Amici Curiae Supporting Petitioner, *Sosa*, 124 S. Ct. 2739 (No. 03-339).

310 *See, e.g.*, Supplemental Brief for the U.S. of Am. as Amicus Curiae Supporting Appellants, Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002) (Nos. 00-56603, 00-56628).

311 *Sosa*, 124 S. Ct. at 2765 n.20 (emphasis added).

Court also referred at length in another footnote to a pending ATS case brought against corporations that had done business with South Africa during the apartheid regime and wrote that there was a "strong argument" that courts should defer to the executive branch's view that this litigation would interfere with U.S. foreign relations.[312] These statements, along with the more general points discussed earlier, suggest that corporate aiding and abetting liability is improper under the ATS after *Sosa*. Whether corporations should be liable for aiding and abetting violations of customary international law is an issue that will need to be addressed in the first instance by the political branches.

2. The War on Terrorism. — In the wake of the September 11 attacks and the ensuing "war on terrorism," many of the alleged enemy combatants in U.S. custody have, in various ways, invoked CIL as federal law that, in their view, limits the Executive's discretion to conduct the war. Detainees at Guantanamo have argued, for example, that even if they are not directly covered by the Geneva Conventions, the standards reflected in Common Article 3 of the Conventions are binding on the United States as a matter of CIL and that these standards preclude trial by military commission.[313] They have also argued that their ongoing detention violates CIL prohibitions on arbitrary and prolonged detention that bind the President as part of U.S. federal common law[314] and have sought remedies for interrogation techniques and conditions of confinement that allegedly violate CIL norms.[315] Individuals allegedly subject to detention or rendition elsewhere have likewise asserted violations of CIL norms against prolonged arbitrary detention, as well as torture and other cruel, inhuman, and degrading treatment.[316]

It is highly unlikely that such claims can be brought against the government in an ATS suit after *Sosa*. As an initial matter, the U.S. government is presumptively immune from suit in U.S. courts. The Federal Tort Claims Act[317] (FTCA) partially waives sovereign immu-

---

312 *Id.* at 2766 n.21.

313 *See, e.g.*, Brief for Petitioner Salim Ahmed Hamdan at 48–50, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (No. 05-184), 2006 WL 53988. Common Article 3 prohibits, among other things, "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War art. 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

314 *See, e.g.*, *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445, 453 (D.D.C. 2005); Khalid v. Bush, 355 F. Supp. 2d 311, 316–17, 328–29 (D.D.C. 2005).

315 *See, e.g.*, Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

316 *See, e.g.*, Complaint at 20–25, El-Masri v. Tenet, 437 F. Supp. 2d 530 (E.D. Va. 2006) (No. 1:05-cv-01417); Petition for Writ of Habeas Corpus at 2, 16, Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) (No. 1:05-cv-02374).

317 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000).

nity, but it has an exception for claims "arising in a foreign country"[318] — an exception that the Court in *Sosa*, in a part of the opinion not discussed in detail earlier in this Article, construed in favor of the government.[319] This and related immunity doctrines impose a significant obstacle to ATS suits against the U.S. government and its officials.[320] Even if the immunity obstacle could be overcome, any ATS claim against the government would need to satisfy the requirements imposed by *Sosa*, including the requirement that the CIL norms in question be widely accepted and specifically defined. Post-*Sosa*, it is difficult to say in the abstract whether any given norm would satisfy these requirements. The Court in *Sosa* also made clear that, in deciding whether to allow a CIL claim, courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[321] This separation of powers consideration is especially strong with respect to claims directed at the executive branch's management of a war.

War-on-terror claims brought outside the ATS raise additional issues. One fundamental issue is whether courts can apply CIL to override presidential action in the absence of some affirmative authorization in a treaty or statute. Whether CIL binds the President as a matter of domestic law has been the subject of significant academic debate.[322] In *The Paquete Habana*, the Supreme Court stated that it was appropriate to apply CIL "where there is no treaty, and no controlling executive or legislative act or judicial decision."[323] In light of this statement, most lower courts have held that CIL cannot be applied to override the "controlling executive acts" of the President and other high-level executive officials.[324] Although *Sosa* did not address the precise issue, its implicit rejection of the modern position, de-

---

318 28 U.S.C. § 2680(k) (2000).

319 *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2749–54 (2004).

320 *See* CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW 534–35 (2d ed. 2006).

321 *Sosa*, 124 S. Ct. at 2762.

322 *See* Essays, *Agora: May the President Violate Customary International Law?* (pts. 1 & 2), 80 AM. J. INT'L L. 913 (1986), 81 AM. J. INT'L L. 371 (1987); Glennon, *supra* note 10; Panel Session, *The Authority of the United States Executive To Interpret, Articulate or Violate the Norms of International Law*, 80 AM. SOC'Y INT'L L. PROC. 297 (1986); Weisburd, *supra* note 73.

323 The Paquete Habana, 175 U.S. 677, 700 (1900); *see also* William S. Dodge, *The Story of* The Paquete Habana*: Customary International Law as Part of Our Law*, *in* INTERNATIONAL LAW STORIES (Dickinson et al. eds., forthcoming 2007) (manuscript at 18–22, on file with the Harvard Law School Library) (arguing that *The Paquete Habana* should not be read to suggest that the President can unilaterally disregard CIL).

324 *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. U.S. Attorney Gen., 988 F.2d 1437, 1448 (5th Cir. 1993); Garcia-Mir v. Meese, 788 F.2d 1446, 1454–55 (11th Cir. 1986). *But see In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 109–10 (E.D.N.Y. 2005) (reasoning that CIL binds the President at least absent an official presidential proclamation to the contrary).

scribed earlier, would seem to preclude binding the President to CIL as a matter of domestic law in the absence of an incorporating statute or treaty. If CIL is not automatically domestic federal law, then it is hard to see how it is binding on the President as part of the "Laws" that he must faithfully execute under Article II.

Another likely obstacle for war-on-terror claims brought outside the ATS is the lack of congressional authorization. Even in the context of a claim against a private foreign citizen, the Court in *Sosa* searched for congressional authorization for the application of CIL. It is difficult to find any congressional authorization, however, for the judicial application of CIL to regulate the war on terrorism. For example, following September 11, Congress passed the Authorization for Use of Military Force[325] (AUMF), which broadly authorized the President to use "all necessary and appropriate force" against al Qaeda and related entities,[326] but did not refer to CIL, let alone domestic court application of CIL, in its authorization. While the customary laws of war may inform the powers that Congress has implicitly conferred on the President in the AUMF, there is no suggestion that Congress intended to impose affirmative CIL constraints on the President, much less judicially enforceable CIL constraints.[327]

The need for courts to find congressional authorization to apply international law to the war on terrorism is illustrated by the Supreme Court's decision in *Hamdan v. Rumsfeld*.[328] In *Hamdan*, the Court held that the military commissions that President Bush had established after the September 11 attacks were not properly constituted because, among other things, they failed to comply with requirements in Common Article 3 of the Geneva Conventions.[329] Importantly, however,

---

[325] Pub. L. No. 107-40, 115 Stat. 224 (2001) (to be codified at 50 U.S.C. § 1541 note).

[326] *Id.* § 2(a), 115 Stat. at 224.

[327] *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2091–2100 (2005). More recently, in the Detainee Treatment Act of 2005, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2739 (to be codified in scattered sections of 10, 28, and 42 U.S.C.), Congress prohibited "cruel, inhuman, or degrading treatment or punishment" of anyone "in the custody or under the physical control of the United States Government." *Id.* § 1003(a), 119 Stat. at 2739. This statute purported to incorporate a treaty obligation, not a CIL obligation. In addition, Congress did not provide an enforcement mechanism for the prohibition and in the same statute appeared to preclude or at least limit the Guantanamo detainees' ability to raise this and other treatment-related claims in U.S. courts. *See id.* § 1005(e), 119 Stat. at 2742 (to be codified at 28 U.S.C. § 2241) (authorizing the D.C. Circuit to evaluate "whether the status determination of the Combatant Status Review Tribunal with regard to [a current detainee] . . . was consistent with the standards and procedures specified by the Secretary of Defense" and whether those procedures and standards are consistent with any applicable provisions of the U.S. Constitution and laws, but eliminating both habeas corpus review for detainees and jurisdiction over "any other action against the United States or its agents" by a current detainee or a former detainee who was "properly detained as an enemy combatant").

[328] 126 S. Ct. 2749 (2006).

[329] *See id.* at 2793–97.

the Court repeatedly emphasized that it was applying these requirements because they had been incorporated into U.S. domestic law by Congress. The Court assumed for the sake of argument that Common Article 3 could not be invoked "as an independent source of law"[330] but reasoned that it was nevertheless part of the international "laws of war" and that Congress in § 821 of the Uniform Code of Military Justice had required the President to comply with the laws of war in establishing military commissions.[331] Justice Kennedy's concurrence further emphasized this congressional incorporation of Common Article 3.[332] This insistence on congressional authorization for domestic court application of a *treaty provision* that had already been expressly ratified by the political branches suggests, a fortiori, that there is such a requirement for domestic court application of the unwritten norms of CIL, which may arise internationally without the express endorsement of the political branches.

None of the points made thus far implies that the United States lacks an *international* obligation to comply with norms of CIL relevant to the war on terrorism or that the political branches should not take account of those obligations in conducting the war. Even when CIL is not enforceable by U.S. courts, it still binds the United States on the international plane. This point was obscured in an early draft of an Office of Legal Counsel memorandum concerning the applicability of the Geneva Conventions to the war on terrorism, in which the authors asserted that "any customary international law of armed conflict in no way binds, as a legal matter, the President or the U.S. Armed Forces concerning the detention or trial of members of al Qaeda and the Taliban."[333] This assertion is true, at most, only with

---

[330] *Id.* at 2794.

[331] *See id.* at 2774, 2786, 2794. At the time of this decision, § 821 provided that "the provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute *or by the law of war* may be tried by military commissions." 10 U.S.C.A. § 821 (West 1998 & Supp. 2006) (emphasis added).

[332] *See Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring) ("[This] is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."); *id.* ("[T]he requirement of the Geneva Conventions of 1949 that military tribunals be 'regularly constituted' . . . controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the 'law of war.'" (citation omitted)); *id.* at 2802 ("Common Article 3 is part of the law of war that Congress has directed the President to follow in establishing military commissions.").

[333] Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. 34 (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

respect to domestic law, not international law. The final version of the memorandum properly refined this assertion.[334]

3. International and Foreign Sources in Constitutional Interpretation. — In recent years, the Supreme Court has cited and relied on international and foreign materials in the course of interpreting provisions of the U.S. Constitution.[335] This practice has generated significant controversy in the academy, among policymakers, and among members of the Court.[336] There has been little discussion, however, of the relationship between this practice and the practice of applying CIL as domestic law.[337]

We begin with the relationship between an internationalized constitutionalism and the modern position. The two practices bear certain similarities. Both modern position advocates and those advocating an internationalized constitutionalism invoke the same basic sources — treaties (sometimes non-self-executing or unratified ones), foreign laws and decisions, U.N. resolutions, the writings of jurists, and the like — in an effort to persuade domestic courts to grant relief not otherwise available under U.S. law. Moreover, the modern position and internationalized U.S. constitutionalism are complementary strategies for achieving domestic legal change. A good example of this is the juvenile death penalty. For years, litigants argued, largely unsuccessfully, that an alleged CIL prohibition on the execution of juvenile offenders was binding domestic law that preempted state juvenile death penalty laws.[338] These litigants were eventually more successful, however, in using nearly identical sources to convince the Supreme Court that the

---

[334] *See* Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, U.S. Dep't of Def. 32 (Jan. 22, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf ("Customary international law . . . cannot bind the executive branch *under the Constitution* because it is not federal law." (emphasis added)).

[335] *See, e.g.*, Roper v. Simmons, 125 S. Ct. 1183, 1198–1200 (2005); Lawrence v. Texas, 539 U.S. 558, 572–73 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

[336] For articles supporting this practice, see, for example, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004); and Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005). For articles critical of this practice, see, for example, Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL'Y 291 (2005); John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); and Ernest A. Young, *Foreign Law and the Denominator Problem,* 119 HARV. L. REV. 148 (2005). For examples of controversy among policymakers, see Cleveland, *supra*, at 4 & nn.14–19.

[337] A partial exception is Professor Waldron, who discusses *Sosa* and *Roper* together but does not analyze their relationship. *See* Waldron, *supra* note 336.

[338] For examples, see Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 490 n.14 (2002).

Eighth Amendment, interpreted in light of these sources, prohibited the execution of juvenile offenders.[339]

Despite these similarities, there are significant differences between the modern position and the use of international and foreign materials in constitutional interpretation. From one perspective, the use of international and foreign materials in constitutional interpretation raises more significant normative concerns than the modern position. While Congress can overrule any judicial domestication of CIL, a point emphasized in *Sosa*,[340] constitutional interpretations bind Congress and can be overturned only through a constitutional amendment. Thus, the use of international and foreign materials in constitutional interpretation raises two levels of potential antimajoritarian concern: unelected federal judges incorporate foreign materials into U.S. law, and they do so in a way that permanently displaces the political branches from their usual role in this regard.

Whatever their similarities, an internationalized constitutionalism does not entail or even support the modern position that all of CIL is domestic federal law. Courts have drawn on foreign and international sources in interpreting the Constitution throughout U.S. history, including during the first 150 years of the nation when CIL clearly did not have the status of domestic federal common law.[341] Moreover, the Supreme Court's constitutional decisions drawing on foreign and international sources have treated these sources, at most, as potentially relevant to the interpretation of vague or uncertain constitutional provisions, not as sources of law that have direct and binding application in the U.S. legal system. The Court has emphasized, for example, that "[t]he opinion of the world community, *while not controlling our outcome*, does provide respected and significant confirmation for our own conclusions."[342] By contrast, under the modern position, CIL is not merely an interpretive tool but is binding of its own force in U.S. courts in a way that is not tethered to any extant federal law.

When we compare the trend towards internationalized constitutionalism with the Supreme Court's analysis in *Sosa*, further contrasts appear. The Court has been much less rigorous with respect to foreign and international materials in its constitutional interpretation cases than it was with respect to these sources in the context of the ATS in

---

339 *See Roper*, 125 U.S. at 1198–1200.

340 *See* Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004).

341 For examples, see Cleveland, *supra* note 336; and Jackson, *supra* note 336, at 109–11.

342 *Roper*, 125 S. Ct. at 1200 (emphasis added). Some might think that internationalized constitutionalism is akin to the interpretive use of CIL under the *Charming Betsy* canon of construction. *Cf.* Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421 (2004) (arguing that the *Charming Betsy* canon should be applied to constitutional interpretation). For arguments to the contrary, see Bradley, *supra* note 338, at 555–56; McGinnis, *supra* note 336, at 307 n.23.

Sosa. In *Roper v. Simmons*,[343] for example, in which the Court held that the execution of juvenile offenders violates the Eighth Amendment, the Court cited, among other things, the Convention on the Rights of the Child,[344] a treaty that had not been ratified by the United States, and the ICCPR, which the U.S. had ratified with a reservation declining to agree to the ban in that treaty on the juvenile death penalty.[345] By contrast, in *Sosa*, as we discussed earlier, the Court described the ICCPR as having "little utility" in its analysis, even though, unlike in *Roper*, there was no relevant reservation with respect to the issue before the Court.[346]

It is difficult to know what to make of the Supreme Court's differing treatment of foreign and international sources in the constitutional and ATS contexts. The application of foreign law in both contexts might be viewed as consistent with *Erie*'s positivism because in both contexts the Court relies on a domestic sovereign source that purportedly makes relevant the foreign and international materials, and because the resulting legal conclusions reflect domestic U.S. law.[347] Nevertheless, the Court has a more developed theory of the relevance of foreign and international law sources in the ATS context than in the constitutional context — a theory that, consistent with *Erie*, severely limits judicial discretion in relying on foreign and international sources. If the Court begins to place more significant weight on these materials in its constitutional decisions, it will need to pay greater attention to the limitations of these materials, just as it did in the ATS context in *Sosa*.

VI. CONCLUSION

The Supreme Court's decision in *Sosa* resolved a number of the debates concerning the domestic status of CIL. The Court confirmed that CIL historically had the status of nonfederal general law. The Court also made clear that any evaluation of CIL's modern status must operate against the background of *Erie* and the limitations of the post-*Erie* federal common law. Most importantly, the Court's reasoning and conclusions are incompatible with the modern position claim that CIL is automatically part of U.S. federal law. CIL is incorporated into federal law, under the analysis in *Sosa*, only when its incorporation has

---

[343] 125 S. Ct. 1183.

[344] *Opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3.

[345] *See Roper*, 125 S. Ct. at 1199.

[346] *See supra* pp. 899.

[347] *Cf.* Waldron, *supra* note 336, at 143 (noting that in its role of informing the development of domestic law, "it is not necessary that *ius gentium* be understood positivistically; it need only be seen as a source of normative insight grounded in the positive law of various countries and relevant to the solution of legal problems in this country").

been authorized either by the structure of the Constitution or by the political branches, and it is to be applied interstitially in a manner consistent with the relevant policies of the political branches. Nevertheless, because there are a number of plausible structural and statutory authorizations for the domestication of CIL in select areas, this body of international law will continue to play an important role in U.S. judicial decisionmaking and therefore will continue to be, in the words of *The Paquete Habana*, "part of our law."