Sosa, customary international law, and the continuing relevance of Erie

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Sosa, Customary International Law, and the Continuing Relevance of *Erie*

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[Abstract: Ten years ago, the conventional wisdom among international law academics was that customary international law (CIL) had the status of self-executing federal common law to be applied by courts without any need for political branch authorization. This "modern position" came under attack by so-called "revisionist" critics who argued that CIL had the status of federal common law only in the relatively rare situations in which the Constitution or political branches authorized courts to treat it as such. Modern position proponents are now claiming that the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* confirms that CIL has the status of self-executing federal common law. As this Article explains, the decision in *Sosa* did not in fact embrace 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 political branch authorization (i.e., 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), and 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.]

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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] At the outset of this period, the conventional wisdom among 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" came under attack by so-called "revisionist" critics who argued that CIL had the status of federal common law only in the relatively rare situations in which the Constitution or political branches authorized courts to treat it as such.[3]

A number of modern position proponents have argued that the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*[4] resolves 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 Beth Stephens similarly maintains that *Sosa* "recognized that post-*Erie* federal common law includes those aspects of the old general common law that are peculiarly within the power of the federal government, and that international law was and remains within that area of federal control."[7]

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[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) [hereinafter Restatement (Third)]; *see also* Statute of the International Court of Justice, art 38(1)(b) (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* Restatement (Third), *supra* note 1, § 111 cmt. d, § 115 cmt. e; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295, 304, 332 n. 109; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1846-47 (1998); Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995); In re Estate of Ferdinand E. Marcos Human Rights Litigation, 978 F.2d 493, 502 (9th Cir. 1992).

[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 U.C.L.A. L. REV. 665 (1986).

[4] 542 U.S. 692 (2004).

[5] Harold Hongju Koh, *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, 2254-61 (2004).

[7] Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOKLYN L. REV. 533, 548 (2004). *See also, e.g.*, Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004) (contending that *Sosa*'s "import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute"); Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of*

Both the pre- and post-*Sosa* debates largely turn on the implications of the Supreme Court's seminal decision in *Erie v. Tompkins*.[8] Modern position proponents either have dismissed *Erie* as irrelevant to the domestic status of CIL, or have suggested that *Erie* elevated CIL from general common law to a more robust federal common law.[9] Revisionists, by contrast, have insisted on the relevance of *Erie* for the domestic status of CIL, while denying that *Erie* leads to a more robust common law of CIL.

The debate over *Erie*'s relevance to the domestic status CIL has significant practical implications. If the emerging post-*Sosa* conventional wisdom is correct, CIL would provide a basis for federal question jurisdiction, and it would authorize courts 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* decision, and

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(International) Law Seriously, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005) ("The six-justice majority in *Sosa* rejected the revisionist view."); John M. Van Dyke, The *Role of Customary International Law in Federal and State Court Litigation*, 26 U. HAW. L. REV. 361, 374 (2004) ("This view has been rejected by numerous recent decisions, but it has continued to be put forward by its revisionist proponents with a spirited enthusiasm. With the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*, this revisionist position should finally be given its ultimate burial."); Recent Case, *Igartúa de la Rosa v. Puerto Rico*, 119 HARV. L. REV. 1622, 1627 (2006) ("In *Sosa*, the Court clearly rejected this revisionist argument, adopting the language of the predominant view."); *Leading Cases: Federal Statutes and Regulations*, 118 HARV. L. REV. 446, 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 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 they can be harmonized with other federal law").

[8] *See* Erie R.R. Co. v. Tompkins, 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 Reply 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 R.R. Co. v. Tompkins, and Swift v. Tyson"); 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), *supra* note 1, § 111(1); Brilmayer, *supra* note 2, at 303. For the view that it binds the Executive Branch, see 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); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1116-20 (1985); Restatement (Third), *supra* note 1, § 115 reporters' note 4. For the view that it might trump inconsistent prior federal law, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 876 (1987); *see also* Restatement (Third), *supra* note 1, § 115 reporters' note 4.

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 will 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 modern 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 a domesticated CIL.

Second, we will critique the emerging claim that *Sosa* constitutes an endorsement of the modern position view that CIL is incorporated wholesale into the U.S. legal system as federal common law. As we will show, the decision in *Sosa* clearly did not embrace 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 (i.e., 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 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."[11] 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 will explain, 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 will 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 will show, 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), and 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 CIL can be domesticated by the courts 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*.

[11] 28 U.S.C. § 1350.

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 pre-*Sosa* 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 pre-*Sosa* debates, and shows how it is best read as rejecting the modern position. Part V considers some of the many ways that 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 areas of likely debate during the next decade concerning the domestic status of CIL.

II. *Erie* and Modern Federal Common Law

In this Part, we briefly describe 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 are relevant to debates over the domestic status of CIL.

A. 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."[12] 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."[13] As Justice Holmes would eventually describe and criticize it, general common law was "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[14]

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, and claims arising under it did not fall within either Article III or statutory federal question jurisdiction.[15] Federal court interpretations of general common

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[12] *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 1798: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984); Stewart Jay, *Origins of Federal Common Law: Part Two*, 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. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

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

[14] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting). 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 quasi-sovereign that can be identified." Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

[15] *See* Fletcher, *supra* note 13, at 1521-25.

law were not binding on state courts, and federal and state courts sometimes adopted differing interpretations of this law.[16]

A famous early example of the application of general common law occurred in *Swift v. Tyson*,[17] 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. In support of its decision, the Court reasoned that the Rules of Decision Act, which requires federal courts to apply the "laws of the several states" in cases not governed by the Constitution, treaties, or federal statutes, applies only to "the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality," and not to state court decisions on "questions of a more general nature."[18]

Although relatively uncontroversial for much of the nineteenth century, the general common law regime became controversial 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 this forum shopping occurred in *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*[19] There, a Kentucky taxicab company reincorporated in Tennessee so that it could enter into an exclusive contract with a railroad and then sue another Kentucky taxicab company under diversity jurisdiction for interference with the contract, and thereby obtain a federal court ruling concerning the validity of its contract. The Supreme Court upheld the existence of diversity jurisdiction and proceeded to affirm 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."[20] Justice Holmes, along with two other Justices, dissented. He argued that the general common law regime rested on the "fallacy" that law can exist without some definite authority behind it. Once it is recognized that state court application of general common law receives 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

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[16] Restatement (Third), *supra* note 1, pt. 1, ch. 2, introductory note at 41.

[17] *See* 41 U.S. (16 Pet.) 1 (1842).

[18] *Id.* at 18.

[19] 275 U.S. 518, 529 (1928).

[20] *Id.* at 529.

assumption of powers by the Courts of the United States."[21]

B. Erie v. Tompkins

The specific issue in *Erie* was what law should be applied by a federal court, sitting in diversity, to determine the tort duties that a railroad owed to someone walking along the railroad's tracks. In holding that the common law of the state where the federal court sat should apply, the Court expressly overruled *Swift v. Tyson* and 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."[22] This is true, the Court explained, even when state law is reflected in judicial decisions. The Court made clear that, henceforth, "[t]here is no federal general common law."[23]

The Court gave both functional and constitutional justifications for its decision to overturn *Swift*. First, it noted that the general common law regime allowed by *Swift* had led to undesirable results. Among other things, the Court expressed concern about 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.[24]

Second, and more significantly, the Court described the general common law regime as being "unconstitutional." Quoting extensively from Justice Holmes' reasoning in *Black & White Taxicab*, the Court explained that when federal judges decline to follow state common law decisions they are in effect making law. Such law-making, the Court suggested, raised both federalism and separation of powers concerns. In terms of federalism, the Court noted that the disregard of state court decisions on commercial and tort law questions "invaded rights which . . . are reserved by the Constitution to the several States."[25]

The Court also linked its federalism analysis to considerations of separation of powers. The Court noted that even "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*."[26] The Court's observation about limited congressional power would become less significant as views about congressional power expanded in subsequent years. But the observation about a lack of general legislative power in the judiciary continued to apply. As Professor Merrill has noted, "the federalism principle identified by *Erie* still exists but has been silently

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[21] *Id.* at 533 (Holmes, J., dissenting).

[22] 304 U.S. at 78.

[23] *Id.*

[24] *See id.* at 74-75.

[25] *Id.* at 80.

[26] *Id.* at 78 (emphasis added).

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."[27]

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.[28] This "federal common law" is genuine federal law that binds the states under the Supremacy Clause and that potentially establishes "arising under" jurisdiction under Article III and the federal question jurisdiction statute.[29]

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 on issues of national importance.[30] 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,"[31] 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

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[27] Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14-16 (1985); *see also* George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENTARY 285, 288 (1993) (same); Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966) ("It is by no means clear enough [to justify federal common lawmaking] 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.").

[28] *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).

[29] *See, e.g.*, Illinois v. Milwaukee, 406 U.S. 91, 100 (1972) ("§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin."); *see also* Merrill, *supra* note 27, 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 an interstitial way. *See infra* __.

[30] *See, e.g.*, Tex. Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (recounting areas in which the Court has approved of federal common law); *see also* 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").

[31] Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 95 (1981).

or state law.[32] *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* federal common law: when the common law being developed by federal courts *did* have some federal law basis, then it had 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 reflects this requirement. In *Clearfield Trust Co. v. United States*,[33] 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."[34] To take another example, in *Banco Nacional de Cuba v. Sabbatino* the Court held that the act of state doctrine, pursuant to which courts will assume the validity of foreign government acts taken within their territory, is a rule of federal common law binding on the states.[35] The Court grounded its decision in two federal law sources: "constitutional underpinnings" relating to the separation of powers in conducting U.S. foreign relations, which the Court held "must be treated exclusively as an aspect of federal law," and numerous federal constitutional and statutory provisions suggesting that sensitive foreign relations questions were exclusive federal concerns.[36]

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 has advocated 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."[37] By contrast, Professor Field has argued 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."[38] The key point for present

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[32] *See supra* __.

[33] 318 U.S. 363 (1943).

[34] *Id.* at 366.

[35] 376 U.S. 398, 424-27 (1964).

[36] *See id.* at 425-26 & n. 25.

[37] Merrill, *supra* note 27, at 47.

[38] Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887 (1986). For a similarly broad view, see Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 288 (1992) (arguing that "federal judges must wait for Congress to take the first step," but "[o]nce Congress has acted . . . federal courts can make any common law 'necessary and proper' to implement the statute").

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 Henry Friendly, a particularly enthusiastic supporter of federal common law, tied federal common law to congressional intent.[39]

Second, because "[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,"[40] the post-*Erie* federal common law is interstitial. It is applied in a retail fashion to fill in the gaps, or interstices, of federal statutory or constitutional regimes. As Justice Holmes noted in a pre-*Erie* decision, "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[41]

Third, when developing federal common law, courts must act consistently with the policy choices reflected in extant federal law. As Justice Jackson explained, "federal common law implements the federal Constitution and statutes, *and is conditioned by them*."[42] This proposition follows from the fact that federal common law is a derivative form of lawmaking rather than an independent judicial power to make policy decisions.

Consistent with these principles, the Supreme Court has long stated that the instances in which it is appropriate to develop federal common law are "few and restricted."[43] In the last fifteen years or so in particular, the Court has been emphatic about the exceptional nature of federal common law.[44] 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.[45]

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[39] *See* Friendly, *supra* note 28, 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 slightly, an intention to that end.*") (emphasis added); *see also id.* at 422 (noting that "state courts must follow federal decisions on subjects within national legislative power *where Congress has so directed*") (emphasis added).

[40] City of Milwaukee v. Illinois, 451 U.S. 304, 312 (1981); *see also, e.g.,* United States v. Standard Oil Co. of California, 332 U.S. 301 (1947).

[41] Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

[42] D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 471 (1942) (Jackson, J., concurring). *See also* Wallis v. Pan American 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.").

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

[44] *See, e.g.,* Atherton v. FDIC, 519 U.S. 213, 218 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994). As we explain below, *Sosa* continues this trend.

[45] *See, e.g.,* Alexander v. Sandoval, 532 U.S. 275, 286-88 (2001); Correctional Services Corp. v. Malesko, 534 U.S. 61, 66-80 (2001).

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 Mexican nationals to abduct, in Mexico, Alvarez-Machain, another Mexican national, and transport him to the United States to stand trial for his alleged involvement in the torture of a DEA agent in Mexico. After he was acquitted, Alvarez-Machain sued Sosa under the ATS, alleging that he had violated a CIL prohibition on arbitrary arrest.[46] 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 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 will 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 the CIL so applied had the status of genuinely federal law, or whether it rather had the status of non-federal general common law. Proponents of the modern position argued that CIL was federal law and thus escaped *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, 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

[46] Alvarez-Machain also sued the U.S. government under the Federal Tort Claims Act (FTCA). *See* 542 U.S. at 697. While 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.* at 698-99.

it are duly presented for their determination."[47] 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."[48] And some of the constitutional Founders, speaking later as judges, maintained that the law of nations was part of "the law of the United States."[49]

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.[50] Harold Koh claimed, for example, that CIL's status as federal law has been accepted since "the beginning of the Republic," and reflects "a long-accepted, traditional reading of the federal courts' function."[51] 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 non-federal 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* (the first decision 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."[52]

By contrast, other courts and scholars, and the *Restatement (Third) of Foreign Relations Law*, concluded that CIL did not have the status of federal law during the pre-*Erie* period.[53] In support of this conclusion, they cited to pre-*Erie* decisions that

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[47] The Paquete Habana, 175 U.S. 677, 700 (1900).

[48] *See* The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); *see also* 11 Op. Att'y Gen. 297, 299-300 (1865) (same); 1 Op. Att'y Gen. 567, 570 (1822) (same); 1 Op. Att'y Gen. 26, 27 (1792) (same); Alexander Hamilton & James Madison, Letters of Pacificus and Helvidius on the Proclamation of Neutrality of 1793 at 15 (Richard Loss ed., 1976) (same).

[49] *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,760); United States v. Ravara, 2 U.S. (2 Dall.) 297, 299 (C.C.D. Pa. 1793); Henfield's Case, 11 F. Cas. 1099, 1100-01 (C.C.D. Pa. 1793) (No. 6360) (Grand Jury charge of Jay, C.J.); *id.* at 1117 (Grand Jury charge of Wilson, J.).

[50] *See* In re Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); Filartiga, 630 F.2d at 885; 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 6-7 (1996); 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; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1841, 1846 (1998); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1090-95 (1985); Steven M. Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOK. J. INT'L L. 289, 289-91 (1982).

[51] Koh, *supra* note 50, at 1841, 1846.

[52] Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980).

[53] *See* Restatement (Third), *supra* note 1, ch. 2, introductory note, at 41; Bradley & Goldsmith, *supra* note 3, at 822-27; Clark, *supra* note 12, at 1283; Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832-33 (1989); Arthur Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1309-11 (1988); Ernest A. Young, *Sorting Out the Debate*

suggested that CIL was not federal law for purposes of Article III or statutory federal question jurisdiction.[54] 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.[55] Moreover, they pointed out 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, but rather were phrases commonly used to refer to general common law. 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 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.

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.[56]

Over Customary International Law, 42 VA. J. INT'L L. 365, 368 (2002); *see also* Quincy Wright, The Control of American Foreign Relations 161 (1922); Charles Pergler, Judicial Interpretation of International Law in the United States 19 (1928).

[54] *See, e.g.*, American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828) (holding that a case involving application of the "law, admiralty and maritime" – elements of the law of nations – "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III); 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"); New York Life Insurance Co. v. Hendren, 92 U.S. 286, 286-87 (1875) (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"). 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").

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

[56] *See, e.g., Filartiga*, 630 F.2d at 887 n.20 (2d Cir. 1980) (expressing the view that CIL "has an existence in the federal courts independent of acts of Congress . . . ."); Henkin, *supra* note 4, 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"); Restatement (Third), *supra* note 1, § 111(3) ("Courts in the United States are bound to give effect to [customary] international law . . . ."); *id.* § 115 cmt. e ("Any rule

This claim rested in part on the historical proposition, outlined above, 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, which requires courts to treat as valid certain acts by foreign governments in their own territories, is a rule of federal common law binding on the states.[57] 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."[58] Supporters of the modern position argued that CIL similarly concerns the U.S. relationship with the international community.[59]

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.[60] 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.[61] Revisionists argued that this 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 is 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 where the

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of customary international law ... is federal law (111) [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 preempts state law").

[57] *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 Philip Jessup in an article arguing that, despite *Erie*, CIL should not be governed by divergent state interpretations. *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)).

[58] 376 U.S. at 425.

[59] *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).

[60] *See* Bradley & Goldsmith, *supra* note 3; Weisburd, *supra* note 3; *see also* Trimble, *supra* note 3.

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

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 operating as a source of domestic law.

An intermediate position that emerged prior to *Sosa* was that federal courts could continue to apply CIL after *Erie* as non-federal law.[62] Under the main variant of this position, CIL is akin to pre-*Erie* general common law: Federal and state courts can both apply it, but state courts do so pursuant to (or by analogy to) state choice-of-law rules, and are not bound by federal court interpretations of CIL.[63] A different intermediate position rejects this general common law approach and views CIL as federal law, but federal law of a sort that, like the Federal Rules of Civil Procedure, does not preempt state law.[64]

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 is 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.[65] 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 to this question.

One answer was that the ATS is a purely jurisdictional statute that authorized nothing with regard to substantive law.[66] This view rested primarily on the plain language of the ATS. Enacted as part of the Judiciary Act of 1789, a statute that regulated the jurisdiction and structure of the federal courts, not causes of action, the

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[62] *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 1 (2004); Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPPERDINE L. REV. 187, 196-97 (2001); Young, *supra* note 53; Weisburd, *supra* note 3. It is possible that this is what Philip Jessup had in mind. *See supra*.

[63] *See* Weisburd, *supra* note 3, at 49-55; Young, *supra* note 62, at 370-75. Professor Aleinikoff holds a similar view but resists the choice-of-law framework of Weisburd and Young. *See* Aleinikoff, *supra* note 62. Professor Ramsey suggests treating CIL as non-preemptive federal law, and he also resists a choice-of-law framework. *See* Ramsey, *supra* note 62. For additional criticism of approaching this issue through choice-of-law terms, see Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 522-27 (2002).

[64] *See* Ramsey, *supra* note 62.

[65] *See* Bradley & Goldsmith, *supra* note 3, at 872-873 & nn.352-54.

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

original language of the ATS 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."[67] "Cognizance" was a term of art referring to jurisdiction, and the First Congress used different language when it created statutory civil actions.[68] 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.

This jurisdictional reading of the ATS was consistent with the decision that reinvigorated the ATS in modern times, *Filartiga v. Pena-Irala.* *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 recognized by international law."[69] The Second Circuit there held 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 for purposes of Article III.[70] 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.[71]

A number of courts after *Filartiga*, however, including courts in 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.[72] The most prominent argument in support of this position was that the 1992 Torture Victim Protection Act (TVPA), particularly its legislative history, confirmed that Congress had authorized causes of action in ATS litigation.[73] 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.[74] The analogy for this latter position was the Supreme Court's

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[67] Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79.

[68] *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).

[69] *Filartiga*, 630 F.2d 887.

[70] *Id.* at 886-87.

[71] *Id.* at 889.

[72] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 241 (2d Cir. 1995); Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

[73] *See, e.g.*, Kadic v. Karadzic, 74 F.3d 377, 378 (2d Cir. 1996) (decision denying rehearing) ("Congress has made clear that its enactment of the Torture Victim Protection Act . . . was intended to codify the cause of action recognized by this Circuit in *Filartiga*, 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.

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

decision in *Lincoln Mills*, which implied federal common lawmaking powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts.[75]

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 litigation. Like the other debates discussed above, this debate over the scope and sources of CIL occurred against the backdrop of the narrow role for judicial lawmaking envisioned by *Erie*.

In terms of scope, the issue was whether plaintiffs could bring claims under *all* CIL norms relating to torts or only 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 United Nations General Assembly resolutions or should instead focus primarily on state practice.

On the scope issue, the court in *Filartiga* suggested that all CIL rules relating to torts were eligible for ATS litigation. The court relied on pre-*Erie* decisions applying CIL outside of the context of the ATS, such as *The Paquete Habana*, for guidance on the proper standard for determining rules of CIL. 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."[76] Although the court described this requirement as "stringent," it viewed this as a general requirement for CIL, not a requirement unique to the ATS context. 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,"[77] 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 non-binding Universal Declaration of Human Rights; another non-binding 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. 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 emphasized that it was not aware of any nation that verbally asserted that it had the right to engage in torture.[78]

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[75] *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957).

[76] 630 F.2d at 881.

[77] *Id.*

[78] *Id.* at 884 n.15.

After *Filartiga*, some courts suggested that only certain well-defined and widely accepted CIL norms could be brought in ATS litigation. The Ninth Circuit, for example, stated that "[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory."[79] Other courts suggested that the ATS was 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."[80] Some litigants and commentators suggested that ATS litigation be limited to violations of "*jus cogens*" norms.[81] 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."[82] In the Ninth Circuit opinion that the Supreme Court reviewed in *Sosa*, the court rejected such a *jus cogens* limitation, explaining that "[t]he notion of *jus cogens* norms was not part of the legal landscape when Congress enacted the ATCA 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]."[83]

With respect to the sources of CIL, the Second Circuit eventually pulled back from the approach in *Filartiga*, which, as noted above, had relied heavily on verbal statements and "consensus" and had downplayed actual practice. In particular, in *Flores v. Southern Peru Copper Corp.*, 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."[84] (In that case, the court rejected the claim that intra-national pollution violates CIL.) Other courts, by contrast, continued to rely on United Nations resolutions and other verbal evidence.[85]

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[79] Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994).

[80] Zapata v. Quinn, 707, F.2d 691, 692 (2d Cir. 1983) (per curiam); *see also* Beanal v. Freeport-McMoran, 197 F.3d 161, 167 (5th Cir. 1999) (endorsing this standard). 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. Southern Peru Copper Corp., 414 F.3d 233, 253 (2d Cir. 2003).

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

[82] Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 I.L.M. 679.

[83] Alvarez-Machain v. United States, 331 F.3d 604, 614 (9th Cir. 2003), *rev'd on other grounds*, 112 S. Ct. 2188 (2004).

[84] 414 F.3d at 250; *see also* United States v. Yousef, 327 F.3d 56, 103 (2d Cir. 2003).

[85] *See, e.g.,* Doe v. Unocal Corp., 395 F.3d 932, 945 (9th Cir. 2002) (relying on, among other things, the Universal Declaration of Human Rights), *vacated*, 395 F.3d 978 (9th Cir. 2003).

The following table (Table 1) illustrates the four pre-*Sosa* debates described above:

Table 1

	Conventional Wisdom	**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 U.S. Courts in ATS Litigation	all of CIL, derived from wide range of materials	narrow set of CIL norms tied to actual practice

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* clearly resolved two of the four debates. With respect to the first debate over the pre-*Erie* status of CIL, the Court made clear that CIL historically had the status of general common law, not federal 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 although the ATS was originally intended as only a jurisdictional statute, it nevertheless has 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 should discern and apply CIL more carefully and cautiously than many lower courts had done 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. While 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 law.

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."[86] 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.[87] Relatedly, the Court explained that the law of nations in the nineteenth century encompassed subjects such as the international "law merchant"[88] that were indisputably part of the pre-*Erie* general common law.[89] 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* decision] 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.'"[90] And

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[86] *See, e.g.*, 542 U.S. at 712 ("[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 720 ("[S]ome, but few, torts in violation of the law of nations were understood to be within the common law."); *id.* at 721 ("[T]he ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations."); *id.* at 729 ("[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.").

[87] *Id.* at 725 ("[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.' *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)"); *id.* at 721 (noting that argument that the Continental Congress would have 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") (quoting Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)).

[88] *Id.* at 715.

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

[90] 542 U.S. at 715 (quoting The Paquete Habana, 175 U.S. 677, 686 (1900)).

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.[91]

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 the Court referred to as the "watershed" decision in *Erie* and its implications, something that would have been largely unnecessary if CIL were federal law, rather than general law, prior to *Erie*. As a result, *Sosa* eliminates one of the two central pillars on which the modern position rested — the notion that CIL was historically federal law and therefore outside *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."[92] The Court reasoned that the original ATS provided that courts would have "cognizance" of certain causes of action, a term that referred to jurisdiction. It further noted that the ATS was placed in Section 9 of the Judiciary Act of 1789, "a statute otherwise exclusively concerned with federal-court jurisdiction."[93] In his concurrence, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) agreed with this analysis.[94] Thus, as the Court explained, "[a]ll Members of this Court agree that § 1350 is only jurisdictional."[95]

The Court in *Sosa* believed that its holding that the ATS is only a jurisdictional statute "raises a new question . . . about the interaction between the ATS at the time of its enactment and the ambient law of the era."[96] Exploration of this new question led the Court to conclude that, while the ATS does not itself create causes of action related to

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[91] 542 U.S. at 726. In addition, Justice Scalia's concurrence explained at length that CIL had the status of general common law before *Erie*. *Id.* at 740-41 (Scalia, J., concurring). The majority opinion disputed several aspects of Justice Scalia's concurrence, but not this aspect.

[92] *Id.* at 724; *id.* at 712 ("we agree the statute is in terms only jurisdictional"); *id.* at 713 (referring to ATS's "strictly jurisdictional nature"); *id.* ("we 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").

[93] *Id.* at 713.

[94] *Id.* at 743 (Scalia, J., concurring).

[95] 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. The latter title had been favored by those advocating a cause-of-action construction of the ATS. *See* Bradley, *supra* note 66, at 592-93.

[96] 542 U.S. at 714.

CIL, it does authorize 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 pre-existing law to apply, with the status of general common law, 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."[97] 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.[98] Rather, the historical materials persuaded the Court that "the statute was intended to have practical effect the moment it became law," and that Congress thought the practical effect would be guaranteed by pre-existing CIL-related causes of action available at common law.[99]

Second, the Court concluded that it should preserve the 1789 Congress's background expectation that there would be common law causes of action available to apply in cases 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."[100] 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 contemporary circumstances, including the circumstance that federal courts could apply common law after *Erie* only in specialized circumstances.[101] 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

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[97] *Id.*

[98] *Id.* at 719 ("[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.* ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely").

[99] *Id.* at 724; *see also 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.").

[100] *Id.*

[101] 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*, 79 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).

as an element of common law."[102] In particular, neither *Erie* nor Congress had categorically prohibited the judicial recognition of claims under CIL.[103]

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.[104] 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.[105] The Court did not explain how this conclusion was consistent with its description of the ATS as only jurisdictional, or its view that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."[106] But its description of the legitimate bases of post-*Erie* federal common law included a citation to *Textile Workers Union v. Lincoln Mills*,[107] a decision in which (as noted above) the Court implied federal common lawmaking powers from the Labor Management Relations Act's grant of federal jurisdiction to decide disputes under certain labor-management contracts. Presumably the common law powers recognized in *Sosa* were similar.[108]

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 must 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.[109] Second, the CIL norm in question must also be "defined with a specificity" comparable to the historic law of nations norms.[110] The Court added that the evaluation of whether a norm is sufficiently definite to support at 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."[111]

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[102] 542 U.S. at 725.

[103] *See id.*

[104] *Id.* at 724-30.

[105] *See id.* at 745 n. * (Scalia, J., concurring).

[106] Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981).

[107] 353 U.S. 448, 456-57 (1947)

[108] 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).

[109] 542 U.S. at 725. These norms involved violations of safe conducts, 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).

[110] 542 U.S. at 725.

[111] *Id.* at 732.

The Court made clear that this two-part test for domestic enforcement of CIL under the ATS was more demanding than the test for whether a CIL norm was internationally binding according to the traditional sources of CIL.[112] 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.[113] While 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 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.[114] Similarly, it found insufficient the *Restatement (Third) of Foreign Relations*' claim that a "state policy" of "*prolonged* arbitrary detention" was a violation of CIL, in part because the *Restatement* required "a factual basis beyond relatively brief detention in excess of positive authority."[115] The *Sosa* decision thus seems to limit causes of action in ATS cases to those whose content corresponds closely with the plaintiffs' sources.[116] 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."[117]

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[112] *Id.* at 736 ("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 . . . .") (footnotes omitted); *id.* at 737 ("Even the Restatement's limits [on the customary international law 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 738 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.* Meltzer, *supra* note 63, at 519 (noting that "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law").

[113] 542 U.S. at 734-38.

[114] *Id.* at 736 n. 27.

[115] *Id.* at 737.

[116] *Id.* at 736.

[117] *Id*. at 728.

The meaning of the "acceptance" prong of the *Sosa* test for recognizing a cause of action in ATS cases is less certain. As noted above, many pre-*Sosa* lower court decisions had downplayed the traditional state practice requirement for CIL and had emphasized instead state acceptance as reflected in instruments like General Assembly resolutions, multilateral treaties, national constitutions, and official pronouncements of international bodies.[118] *Sosa* appeared to render some of these sources irrelevant, minimized the significance of others, and reemphasized 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.[119] The Court declined to rely on this source as a basis for a CIL cause of action, noting correctly 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."[120] Although the Court went on to acknowledge that the Declaration had had a "substantial indirect effect on international law," 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 to warrant a cause of action in ATS cases.[121]

The Court reached a similar conclusion with respect to the International Covenant on Civil and Political Rights ("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, did bind the United States as a matter of international law, since it is a treaty and has been ratified by the United States. But the Court added that the ICCPR was "not self-executing and so did not in itself create obligations enforceable in the federal courts."[122] 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.[123] 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 "whether 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."[124] The

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[118] *See supra* __.

[119] 542 U.S. at 734; G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[120] 542 U.S. at 734-35.

[121] *Id.* at 734

[122] *Id.* at 735.

[123] *Id.*

[124] *Id.* at 736.

clear implication here is that, contrary to lower court practice prior to *Sosa*,[125] the presence of a norm in the ICCPR does not provide significant evidence of a CIL cause of action in ATS cases.[126]

The Court in *Sosa* also considered national constitutions that showed that "many nations recognize a norm against arbitrary detention."[127] This too was a source that lower courts had considered prior to *Sosa*.[128] 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.[129] But as explained above, the Court dismissed this source in this case because the consensus against arbitrary detention reflected in the constitutions was at a significantly higher level of generality than Alvarez-Machain's claim.[130]

Yet another source that the Court considered was the *Restatement (Third) of Foreign Relations*. Once again, lower courts had relied heavily and uncritically on the *Restatement* in developing federal common law causes of action under the ATS. Many courts viewed the *Restatement*'s list of customary international human rights norms to be actionable under the ATS.[131] The Court in *Sosa* rejected this approach. It said 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 the 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."[132] This passage implies that even if a CIL norm is included in the *Restatement* list, 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 concerned the extent of 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

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[125] Alvarez-Machain v. United States, 331 F.3d 604, 620-21 (9th Cir. 2003).

[126] *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).

[127] 542 U.S. at 736 n. 27.

[128] *Alvarez-Machain*, 331 F.3d at 620.

[129] 542 U.S. at 736 n. 27.

[130] *Id.*

[131] 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), *supra* note 1, § 702.

[132] 542 U.S. at 737.

its binding effect as a norm of international law."[133] 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."[134] Contrary state practice by itself will not disprove the existence of a rule of CIL or a private cause of action to enforce the rule under *Sosa*, but a large gap between actual state practice and the proposed rule or cause of action is relevant to whether courts should recognize such a rule or cause of action.

In sum, the Court in *Sosa* departed in many respects from the prevailing lower courts' approach to recognizing CIL causes of actions in ATS cases. Its "definition" requirement demands a tight connection between the plaintiff's allegations and the sources in support of a CIL cause of action. And its "acceptance" requirement contemplates a narrow conception of relevant sources of law. More specifically, as compared to pre-*Sosa* practice, the Court in *Sosa* rejected as irrelevant the Universal Declaration of Human Rights, it narrowed the relevance of national constitutions, the *Restatement*, and particularly the ICCPR, and it 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.[135]

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. Thus, 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* itself discounted or deemed irrelevant.[136] 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."[137] 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 remanded on the issue of governing law.[138] The Court's citations to *Filartiga* are all the more puzzling because the Court

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

[134] 542 U.S. at 738 n. 29.

[135] *Id.* at 725, 728.

[136] *See, e.g., id*. at 731, *citing* Filartiga, 630 F.2d at 884 (arguing that the ICCPR provided evidence that the international norm against torture commanded "international consensus").

[137] *Sosa*, 542 U.S. at 731.

[138] 630 F.2d at 889.

disapprovingly referred to other cases that had relied on the same sources for the identification of CIL as those relied on in *Filartiga*.[139] This leaves two possible explanations for the *Filartiga* references. The Court may have cited *Filartiga* and related decisions simply for the proposition that *some* 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.

D. Sosa and the Modern Position

We now turn to the issue concerning which we believe the commentators on *Sosa* have fallen into greatest error: the implications of *Sosa* for the modern position view that all of CIL, "whatever it requires," is automatically incorporated wholesale into the post-*Erie* federal common law.[140] 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*. We have already explained how *Sosa* expressly 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, and is best viewed as having implicitly rejected it.

In a nutshell, our argument is that the opinion in *Sosa* is preoccupied with the limitations that *Erie* imposes on the federal courts' common lawmaking powers, limitations that cannot be reconciled with the modern position. In particular, the Court's insistence in *Sosa* that any federal common law relating to CIL must 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-a-vis the federal political branches and even the states in cases involving CIL, simply cannot be reconciled with the modern position view 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."[141] Although the Court acknowledged that *Sabbatino* had recognized a

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[139] *See Sosa*, 542 U.S. at 736 n.27 (disapproving of cases cited in Brief for Respondent Alvarez-Machain at 49 n.50).

[140] Brilmayer, *supra* note 2.

[141] *Sosa*, 542 U.S. at 726.

"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."[142]

The Court in *Sosa* further suggested that these limitations on post-*Erie* federal common law had the following implications for judicial incorporation of CIL – three concerning separation of powers, and one concerning 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 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.[143] The historical section of the opinion was consumed by a search for the original understanding of what Congress authorized,[144] and the Court built on this historical understanding to ascertain what the ATS itself authorized in modern times. So for example, the Court rejected the claim that the 1789 statute "should be taken as *authority* to recognize the right of action asserted by Alvarez here," and 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."[145]

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 to the ICCPR as a reason not to rely on the ICCPR in developing domestic federal common law related to CIL.[146] It also noted that the

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[142] *Id.* at 750.

[143] This is also how Justice Scalia's concurrence understood the majority's approach, describing it as finding "authorization in the understanding of the Congress that enacted the ATS." *Id.* at 761 (Scalia, J., concurring).

[144] *See id*. at 712 ("at 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"); *id.* (ATS gave "limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789"); *id*. at 715 ("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."); *id.* at 720 ("Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations"); *id.* at 721 ("the ATS was meant *to underwrite* litigation of a narrow set of common law actions derived from the law of nations"); *id*. at 724 ("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"); *id*. ("the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations").

[145] *Id.* at 751.

[146] *Id.* at 728, 735.

"affirmative authority" in the Torture Victim Protection Act (TVPA) "is confined to specific subject matter" and would not support "judicial creativity" beyond its terms.[147] And it tethered modern recognition of CIL-based claims to the historical paradigms Congress anticipated in enacting the ATS.

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 actions in ATS cases] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[148]

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."[149] 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 view 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 authorization whatsoever for the application of all of CIL as federal common law. A wholesale incorporation of the federal common law 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. And finally, to the extent that the federal common law of CIL in the human rights context would address traditional domestic concerns like the domestic regulation of the death penalty,[150] it would be in tension with *Erie*'s federalism principles.

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[147] *Id.* at 728. The Court drew this conclusion even though the TVPA's legislative history endorsed ATS litigation, reasoning that "Congress *as a body* has done nothing to promote such suits." *Id.* (emphasis added).

[148] *Id.* at 727; *see also id*. ("the possible collateral consequences of making international rules privately actionable argue for judicial caution").

[149] *Id.* at 731.

[150] *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.").

Not only is the modern position inconsistent with the post-*Erie* approach articulated in *Sosa*, it is inconsistent with what the Court in *Sosa* stated that it was allowing. *Sosa* involved a situation, according to the Court, where the political branches *had* authorized the incorporation of CIL (through the ATS). But even here, 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* abrogated the domestic incorporation of CIL, the Court insisted only that "the door to further independent judicial recognition of actionable international norms" was not shut altogether, but rather was "still ajar subject to vigilant doorkeeping, and thus open to a *narrow class* of international norms today."[151] 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," and that *Erie* did not cause courts to lose "*all* capacity to recognize enforceable international norms," and that nothing Congress had done "shut the door to the law of nations *entirely*."[152] These passages assume that *Erie* significantly narrowed, but did not eliminate, the circumstances in which CIL could be applied domestically consistent with a political branch authorization. They 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 disputed 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.[153] But if CIL were automatically part of federal law, it is difficult to see why cases arising under that law would not fall within the jurisdiction provided for in the federal question statute, given that the Supreme Court has held that federal common law qualifies as part of the "Laws of the United States" for purposes of that statute.[154] Moreover, the Court denied that its reasoning would mean that law of nations claims could be created under other jurisdictional grants by observing that the ATS, unlike other jurisdictional statutes, "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations."[155]

In sum, the Court's reasoning in *Sosa* is inconsistent with the modern position claim that all of CIL is automatically federal law in the form of federal common law. The Court stated that *Erie* significantly narrowed the circumstances in which CIL could

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[151] 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.* at 729 (emphasis added).

[152] *Id.* at 731.

[153] *See supra* __.

[154] *See supra* __.

[155] 542 U.S. at 753.

apply as domestic law, and, consistent with the nature of the post-*Erie* federal common law, it grounded its recognition of a limited incorporation of CIL in the specific intentions of the framers of the ATS. *Sosa*'s careful, cautious, and narrow incorporation of CIL in a discrete jurisdictional context where there is specific evidence that the drafters expected CIL to apply cannot be reconciled with the modern position view that all of CIL is domestic federal law regardless of whether Congress or the President authorized its incorporation.

In addition to ruling out the modern position, *Sosa* also appears to rule out the "intermediate approach" that has been suggested by some scholars in the modern position debate, whereby U.S. courts would apply CIL law as general common law, as they did before *Erie.*[156] As we have already explained, the Court reiterated *Erie*'s assertion that federal courts could no longer apply general common law.[157] 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.[158] And, in referring to the causes of action that would be allowed under the ATS, it referred specifically to "federal common law," not general common law.[159] Finally, and most specifically, the Court observed that "we now adhere to a conception of limited judicial power first expressed in reorienting diversity jurisdiction [in *Erie*], that federal courts have no authority to derive 'general' common law."[160]

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[156] *See supra* __.

[157] Justice Scalia's concurrence similarly describes *Erie* as having categorically disallowed federal court application of general common law. 542 U.S. at 758-59 (Scalia, J., concurring).

[158] 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 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) (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.

[159] 542 U.S. at 732.

[160] *Id.* at 729. It would be theoretically consistent with *Sosa* for federal courts to apply CIL even in the absence of a federal authorization if there were a 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. An 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 which 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, 280 (1931). It is doubtful, however, that such receiving statutes authorize the incorporation of modern CIL, *see* Bradley and Goldsmith, *supra* note 3, at 870 n. 345, and no state court that we are aware of has construed a receiving statute in such a 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

2. Counterarguments

Commentators who have concluded that *Sosa* embraces the modern position tend to ignore the points discussed above 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, "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[161] As explained above, 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 states here that U.S. domestic law "recognizes" CIL, and does 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 is claiming here 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 this 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 the Court's references to *Sabbatino*.[162] 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."[163] The Court also observed in a footnote that *Sabbatino* endorsed the reasoning in a short essay published by Professor Jessup in 1939 that argued that the *Erie* doctrine should not be applied to CIL.[164] 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 notes in *Sosa*, the *Sabbatino* decision did not even involve the application of CIL.[165] Rather, *Sabbatino* involved the

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characterized as state law. It therefore would not support the "general common law" intermediate position outlined in the text.

[161] *Id.* at 729. *See* Dodge, *supra* note 7, at 95-96; Neuman, *supra* note 7, at 129; Steinhardt, *supra* note 6, at 2252.

[162] *See* Neuman, *supra* note 7, at 129-30.

[163] 542 U.S. at 730 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964)).

[164] *See id.* at 730 n.18 (citing Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939)).

[165] *See id.*

application of the act of state doctrine, which the Court in *Sabbatino* made clear was based on domestic separation of powers considerations and was not required by international law.[166] 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* relies on the language in *Sabbatino* only for the modest proposition that federal courts need not "avert their gaze entirely" from CIL norms protecting individuals.[167]

The Court's 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 citations occurred in the course of explaining why courts should exercise restraint in considering new causes of action based on CIL.[168] One of these two citations 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.[169] The Court in *Sosa* believed that similar restraint was required in ATS suits which involve attempts by aliens to enforce international law against their own governments and thus "raise risks of adverse foreign policy consequences."[170] 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* occurs in a discussion of *Erie*'s transformation of the role of federal courts and of the nature of federal common law.[171] In that context, the Court notes that, "although [it has] *even* assumed competence to make judicial rules of decision of particular importance to foreign relations," as occurred in *Sabbatino*, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law."[172] And then the Court immediately states, with reference 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."[173] This understanding of the import of *Sabbatino* simply cannot support the wholesale incorporation of CIL as federal common law.

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[166] *See* 376 U.S. at 421-23.

[167] *Sosa*, 542 U.S. at 728.

[168] *See id.* at 725-28.

[169] *See id.* at 727.

[170] *Id.* at 727-28.

[171] *See id.* at 726.

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

[173] *Id.* at 726.

The following table (Table 2) illustrates how *Sosa* resolved the four debates discussed in Part II:

Table 2

	Conventional Wisdom	**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 U.S. Courts	all of CIL, derived from wide range of materials	narrow set of CIL norms tied to actual practice	narrow set of CIL norms tied to actual practice

V. A Post-*Sosa* Approach to CIL as Federal Common Law

We argued in Part IV that *Sosa* rejected the modern position view 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 the 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 non-jurisdictional contexts in which it may be proper for courts to formulate federal common law rules relating to CIL, either as gap-filling relating to statutes or treaties, or as grounded in certain structural constitutional considerations. 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."[174] 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."[175] 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."[176] We now explain why two other jurisdictional provisions – the federal question statute and the diversity statute – do not confer federal common lawmaking 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

The most prominently invoked jurisdictional statute other than the ATS 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."[177] Prior to *Sosa*, commentators and litigants had argued that cases arising under CIL arose under the "laws of the United States" for purposes of Section 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

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[174] *Texas Industries*, 451 U.S. at 640-41.

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

[176] 542 U.S. at 731 n.19.

[177] 28 U.S.C. § 1331 (emphasis added).

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.

Prior to *Sosa*, most lower courts that had addressed the question had 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.[178] 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.[179] 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*."[180] 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 Section 1331 and the "ambient law of the era" at the time that it was written, shows that the framers of Section 1331 did not view CIL as part of the "laws of the United States." Section 1331 was enacted in 1875 without substantial debate.[181] It was designed to provide a statutory basis for the exercise of federal question jurisdiction provided for in Article III.[182] But in the nineteenth century when it 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.[183] This conclusion is consistent with the

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[178] *See, e.g.*, Princz v. Federal 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) (arguing, without analysis, that "claims [asserted] under international law" give "rise to federal subject matter jurisdiction under" § 1331); Forti v. Suarez-Mason, 672 F.Supp. 1531, 1544 (1987) ("[A] case presenting claims arising under [CIL] arises under the laws of the United States for purposes of federal question jurisdiction.").

[179] 542 U.S. at 731 n.19.

[180] *Id.*

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

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

[183] *See, e.g.*, American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511, 545-46 (1828) (holding that a case involving application of the "law, admiralty and maritime" – 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 generally* Bradley, *supra* note 66; *see also* Jay, *supra* note 13, at 1309-11; Weisburd, *Executive Branch*, *supra* note 53, at 1214-18; Bradley & Goldsmith, *supra* note 3, at 824.

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 Act, the Supreme Court held that the phrase "laws of the United States" in the statute regulating appellate jurisdiction over state law did not include the law of nations.[184] 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."[185] Many other decisions in the years after the 1875 statute and before *Erie* reached similar conclusions.[186] The same well-understood and uncontroversial reasons 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 non-federal general common law – would have applied to the original federal question jurisdiction statute.

As a result, unlike the ATS, Section 1331 was not enacted on the understanding that federal courts would be able to hear CIL-based claims pursuant to Section 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 then subject to a $500 amount in controversy requirement.[187] Nothing in the legislative history of the 1875 conferral of general federal question jurisdiction suggests that Congress had CIL on its mind in any way. Indeed, recorded legislative debate on the relevant bills did not focus on the conferral of general federal question jurisdiction at all.[188]

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[184] New York Life Insurance Co. v. Hendren, 92 U.S. 286 (1875).

[185] *Id.* at 286-87.

[186] *See, e.g.*, Ker v. Illinois, 119 U.S. 436 (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"); Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442-43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892); New York Life Ins. Co. v. Hendren, 92 U.S. 286, 286-87 (1875).

[187] *See* Act of March 3, 1875, 18 Stat. 470; *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 February 13, 1801, 2 Stat. 89; Act of March 8, 1802, 2 Stat. 132; FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 23-28 (1927); HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 34; S. Rep. No. 1830 (1958), at app. A (1958), U.S.C.C.A.N. 3099, 3124-25.

[188] *See* 2 Cong. Rec. 4300-04 (focusing on a proposed authorization of minimal, rather than complete, diversity); 2 Cong. Rec. 4979-88 (focusing on proposed service of process and venue rules); House Journal, 43 Cong., 2d Sess., Ser. No. 1633, at 611, 647-48; Sen. Journal, 43 Cong., 2d Sess., Ser. No. 1628, at 371-72; 3 Cong. Rec. 2168, 2240, 2275; FRANKFURTER & LANDIS, *supra* note 187, at 65-68 & n.34 (noting that the conferral of general federal question jurisdiction elicited little contemporary comment).

Congress's imposition of an amount in controversy requirement in the federal question statute further suggests that Congress did not intend to authorize the incorporation of CIL, as there is no reason to believe that claims based on CIL violations would typically exceed the required amount and qualify for federal adjudication. Nor have subsequent amendments to the federal question statute suggested any intent to incorporate CIL as federal common law. After 1875, Congress periodically increased the amount in controversy required to establish general federal question jurisdiction in order to relieve the workload of the federal courts by denying jurisdiction for monetarily insubstantial claims.[189] Along the way, Congress exempted many types of federal statutory claims from this requirement, but did not eliminate the requirement for claims arising under federal common law until 1980 when the amount in controversy requirement was dropped from the general federal question grant entirely.[190] At that point, the House Judiciary Committee noted that federal common law claims were among a relatively small number of claims to which the jurisdictional amount still applied and reasoned that the 1980 elimination of the monetary requirement would therefore not significantly affect the federal judiciary's workload.[191] Retention of the jurisdictional amount requirement for common law until the eventual repeal of the requirement altogether does not suggest an endorsement of federal judicial incorporation of CIL. Nor is there anything in the committee analysis behind the abandonment of the amount in controversy requirement suggesting any focus on CIL.

Second, as we have already seen, one reason why the Court in *Sosa* resisted the idea that the "laws of the United States" in Section 1331 included authority to develop CIL as federal common law was 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*."[192] It is one thing for federal courts to recognize a limited set of causes of actions 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, from the retail to the wholesale, in a way inconsistent with the limited common lawmaking powers of federal courts.

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[189] *See* Act of March 3, 1887, 24 Stat. 552 ($2,000); Act of Mar. 3, 1911, 36 Stat. 1087, 1091 ($3,000); Act of July 25, 1958, 72 Stat. 415 ($10,000); H.R. Rep. No. 96-1461, at 2 (1980); S. Rep. No. 1830 (1958), U.S.C.C.A.N. at 3100-01, 3120. *But cf. id.* at 3112-13, 3122 (Given the small number of federal law claims subject to the jurisdiction amount, increasing that amount for federal question cases would not "appreciably lessen the [workload] on the Federal courts.").

[190] *See* H.R. Rep. No. 96-1461, 126 Cong. Rec. 1, 2 & n.4 (1980) (noting many types of claims not subject to the jurisdictional amount); S. Rep. No. 1830 (1958), U.S.C.C.A.N. at 3103, 3121-22 (same, but also noting that "suits under the Jones Act and suits contesting the constitutionality of State statutes" were "the only significant categories of 'Federal question' cases [still] subject to the jurisdictional amount"); WHEELER & HARRISON, *supra* note 187,at 6 (noting that conferral of specific federal question jurisdiction began in 1790 with jurisdiction of certain patent claims).

[191] *Id.* at 2.

[192] *Sosa*, 542 U.S. at 731 n.19.

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 opposite conclusion: the framers of the federal question jurisdiction statute did not intend the statute to be an authorization for 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" at the time the ATS was written in 1789. The diversity statute was originally enacted at the same time as the ATS. Moreover, the framers of the diversity statute clearly contemplated that courts sitting in diversity 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 of translating the pre-*Erie* general common law that the ATS 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 genuinely federal common law in cases that have the diversity of citizenship and amount in controversy required under the statute.

For many reasons, we do not believe that this conclusion follows. The main reason is *Erie* itself, which *Sosa* relied on and affirmed, and which in overruling *Swift* clearly held that diversity jurisdiction was not a basis for the application of general common law, and could not be a basis for applying federal common law in the absence of some congressional authorization.[193] Thousands of post-*Erie* cases have applied what was formerly general common law as state law, not federal law.

Second, unlike with the ATS, there is no evidence that the framers of the diversity statute intended to authorize creation of a federal common law based on the public law of nations. Congress based diversity jurisdiction on the identity of the parties, not also on violations of the law of nations as in the ATS.[194] Consistent with that fact, the evolution of diversity jurisdiction repeatedly reveals that diversity jurisdiction was intended to side-step the perception and existence of local bias in state administered justice, not to

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[193] *See, e.g.*, *Erie*, 304 U.S. at 72-73 (citing scholarship for proposition that Congress enacted the Rules of Decision Act in 1789 "merely to make certain that, in all matters except those in which some federal law is controlling, the federal courts exercising jurisdiction in diversity of citizenship cases would apply as their rules of decision the law of the State, unwritten as well as written"); *see also Sosa*, 542 U.S. at 728 ("[W]e now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), that federal courts have no authority to derive 'general' common law.").

[194] *See generally* Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483 (1928).

accommodate a certain type of substantive law.[195] Moreover, the grant was crafted with an amount in controversy threshold to limit the authority of federal courts and (as an original matter) to protect citizens against the threat of distant litigation and protect the interests of U.S. debtors who could more easily avoid their debts to British creditors in state courts.[196] Congress thus intended to shield a class of party-based claims from federal review rather than grant broad federal authority to hear claims arising from any substantive body of law. Similarly, Congress directed federal courts to apply state law as the rule of decision "except where the constitution, treaties or *statutes* of the United States shall otherwise require or provide," suggesting that Congress did not anticipate that the federal courts sitting in diversity would develop or apply a body of federal common law.[197]

3. Interstate and Admiralty Disputes

In contrast to the federal question and diversity contexts, the Supreme Court has recognized that it is appropriate to exercise federal common lawmaking powers related to CIL in two other jurisdictional contexts in addition to the ATS. The same day that *Erie* was decided, the Supreme 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.[198] Similarly, the Court has made clear that when it develops common law in its admiralty jurisdiction, that law has the status of federal common law.[199]

In our view, the use of CIL in these jurisdictional contexts, whether or not ultimately appropriate, 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

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[195] *See id.* at 492-98, 501, 510; Hessel E. Yntema & George H. Jaffin, *Preliminary Analysis of Concurrent Jurisdiction*, 79 U. PA. L. REV. 869, 876 & n.13 (1931); John P. Frank, *Historical Bases of the Federal Judicial System*, LAW & CONTEMP. PROBS. 3, 22-28 (1948); Wythe Holt, *The Origins of Alienage Jurisdiction*, 14 OKLA. CITY U. L. REV. 547, 554-64 (1989). *Cf.* Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 312 (1999) (noting, but disputing, the standard explanation that the diversity and admiralty jurisdictional grants lead to very different common lawmaking authority because "the Framers intended the [admiralty] grant . . . to facilitate the development of a uniform law of maritime commerce, while they intended the Diversity Clause to provide an unbiased forum for out-of-state litigants").

[196] *See* Wythe Holt, *"To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of Federal Courts*, 1989 DUKE L.J. 1421, 1430-58, 1479-88, 1493-1500, 1515-1516, 1518.

[197] Rules of Decision Act, ch. 20, § 34 (1789).

[198] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106-107, 110 (1938); HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 738-39.

[199] *See, e.g.*, Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-10 (1953); *see also See* G. Edward White, *A Customary International Law of Torts* 44-45 (draft), available at http://law.bepress.com/uvalwps/uva_publiclaw/art34 (arguing that admiralty law was non-preemptive federal law pre-*Erie*); Young, *Preemption*, *supra* note 196, at 326, 347-38 (noting, and criticizing, that the Supreme Court has attempted "to 'translate' the Framers' conception of maritime law into . . . [the post-*Erie*] context" by transforming maritime law from general law into federal common law).

decision in these cases is that the uniquely federal interests derived from the structure of the Constitution demand a federal rule.[200] These cases are expressly contemplated by Article III, they fall within the Supreme Court's original jurisdiction,[201] they cannot practically be decided by the states or under state law given that the states themselves are parties,[202] they are relatively rare,[203] and they involve the resolution of disputes that are directly analogous to disputes between nations. Moreover, both in the First Judiciary Act and today, jurisdiction over interstate disputes is vested exclusively in the Supreme Court.[204]

Even with these limiting factors, the Supreme Court is cautious in stepping into interstate disputes, where the creation of common law may be required.[205] When the Court does craft common law to govern interstate disputes, the Court takes into account not only constitutional,[206] but congressional guidance relevant to the dispute.[207] Indeed,

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[200] *See* Henry P. Monaghan, *Constitutional Common Law*, 89 HARV. L. REV. 1, 14 (1975) ("The authority 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."); Texas v. New Jersey, 379 U.S. 674, 677 (1965).

[201] U.S. CONST. art. III, § 2; *see* Clark, *supra* note 12, at 1324-25 (recognizing, but disputing, the conventional notion that federal common lawmaking authority in interstate disputes derives from Article III's jurisdictional grant).

[202] *See Texas Industries*, 541 U.S. at 641 (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*, 139 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).

[203] *See* HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 279-80.

[204] Act of Sep. 24, 1789, § 13, 1 Stat. 80; 28 U.S.C. §1251(a).

[205] *See* Missouri v. Illinois, 200 U.S. 496, 521 (1906) ("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; New York v. New Jersey, 256 U.S. 296, 309 (1921) (citing and applying the high standard of *Missouri v. Illinois*); Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (citing *Missouri v. Illinois* and *New York v. New Jersey* 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"); *Illinois*, 406 U.S. at 93-94, 108 (denying Illinois' 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); HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 301-03 (noting 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).

[206] *See Connecticut*, 282 U.S. at 670 (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.'"); 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); Clark, *supra* note 12, at 1322 (noting that many of the rules

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 lawmaking.[208] 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 disputes to inform the federal common law that governs resolution of interstate boundary disputes.[209] 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.

There is an additional factor that distinguishes the interstate jurisdiction context 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 the diversity and federal question jurisdiction contexts. 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.[210] Claims of structural necessity as a basis for federal common law are more plausible if these claims have a long historical pedigree.

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developed in interstate disputes "appear to implement the constitutional equality of the states"); *id.* at 1323-25, 1328-31.

[207] *See City of Milwaukee*, 451 U.S. at 313-15, 317-23 (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 (Congress had neither prescribed nor prohibited the remedy Illinois sought, but the statutes Congress had enacted, while "not necessarily [defining] . . . the outer bounds of the federal common law," might "provide useful guidelines in fashioning such a rule of decision."); *Missouri*, 200 U.S. at 518-19 (citing Pennsylvania, 54 U.S., 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 AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 740 (noting the Court's use of congressional guidance in interstate water pollution disputes, one of few areas of interstate dispute where congressional guidance is available).

[208] HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 739; *see* Pennsylvania v. Wheeling and Belmont Bridge Co., 54 U.S. 518, 565-66 (1851) (noting that an interstate compact approved by Congress becomes a law enforceable by the Supreme Court).

[209] *See* Meltzer, *supra* note 63, at 540; HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, 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 12, at 1328-30 (In implementing the constitutional equality of the states through its interstate dispute common law, the Court in some cases may "borrow international law doctrines [which do not apply to interstate disputes "of their own force" but which were] . . . originally developed to implement the 'absolute equality' of sovereign nations."); 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.").

[210] *See* Connecticut v. Massachusetts, 282 U.S. 660, 670-71 (1931); Kansas v. Colorado, 206 U.S. 46, 97 (1907).

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.[211] Even the weak national government during the period of Confederation exercised some authority over admiralty disputes.[212] When it came time to craft the new Union, opposition to a broad federal judiciary was strong.[213] The proposed grant of federal diversity jurisdiction, for example, was bitterly opposed.[214] 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."[215] "When proposals to abolish Congress's Article III authority to establish federal courts were made in state ratifying conventions and in the First Congress, there was usually an exception for courts of admiralty."[216] 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.[217]

Finally, Congress has enacted various statutes to govern private admiralty issues. As a result, much of federal admiralty law today is found in statutes or treaties and not exclusively in the common law.[218] CIL is often used for interstitial gap-filling, an

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[211] HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 15; *see* David P. Currie, *Federalism and Admiralty: "The Devil's Own Mess,"* 158 SUP. CT. REV. 158, 163-64 (1960); Frank, *supra* note 196, at 14.

[212] *See* HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, 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 196, at 6-9 (describing admiralty courts during the colonial and Confederation periods).

[213] *See* HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, at 6-9.

[214] *See id.* at 17, 19; Holt, *supra* note 196, at 1468-71, 1477; Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 56 (1923). *Cf.* Frank, *supra* note 196, at 3 & n.1. Opposition to diversity jurisdiction survived the founding and continues to this day. *See, e.g.*, S. Rep. No. 691, 71st Cong., 2d Sess. (1930) (recommending passage of a bill to eliminate federal jurisdiction over suits between citizens of different U.S. states).

[215] WHEELER & HARRISON, *supra* note 187, at 6; *see also*; Friendly, *Diversity*, *supra* note 194, at 484 n.6; Holt, *supra* note 196, at 1428-30 & n.26; Frank, *supra* note 196, at 9; 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). *Cf.* Young, *Preemption at Sea*, *supra* note 196, 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).

[216] WHEELER & HARRISON, *supra* note 187, at 6; *see* Warren, *supra* note 214, at 119, 120 (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 courts of admiralty).

[217] *See* U.S. CONST. art. III, § 2.

[218] *See* Ernest A. Young, *It's Just Water: Toward the Normalization of* Admiralty, 35 J. MAR. L. & COM. 469, 477 & n.31 (2004); HART AND WECHSLER'S FEDERAL COURTS, *supra* note 181, 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 Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 374 & n.32, 405-06 (2000); Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990). *Cf.* Gutoff, *supra*, at 403-06, 417 (finding congressional delegation of authority to create a

uncontroversial use of federal common law 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.[219] Even on issues where Congress has not specifically legislated, the Supreme Court has tried to conform the common law of admiralty to Congress's intent behind related statutes.[220] In short, admiralty is only one small subset of CIL and, as with interstate disputes, is a subset that is used in a narrow fashion that is often consistent with the traditional approach to federal common law.

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, Executive branch pronouncements, and the Constitution – for a federal common law of CIL. As we will see, 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 provides 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

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federal common law of admiralty in Congress' reenactment and expansion of admiralty jurisdiction in 1948).

[219] *See* Young, *supra* note 196, at 477.

[220] *See Jensen*, 244 U.S. at 530 (bolstering 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"); 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); Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811, 820, 821 (2001) (majority and concurrence quoting American Dredging Co. v. Miller, 510 U.S. 443, 455 (1994), for the proposition that federal common lawmaking in admiralty should "harmonize with the enactments of Congress in the field"); *American Dredging*, 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 limited recovery sanctioned by Congress in related statutes). *Cf. Norfolk Shipbuilding*, 532 U.S. at 820 (majority) (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."); Northwest Airlines v. Transport 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.").

States, shall be imprisoned for life."[221] This statute clearly authorizes courts to ascertain and apply as federal law the CIL prohibition on piracy.[222] In this situation, it makes sense to talk about a federal law status for CIL. Similarly, the Foreign Sovereign Immunities Act (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."[223] 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.[224]

Sometimes courts will develop federal common law not pursuant to an express reference in a statute but rather in order to fill in gaps in the statutory scheme. Thus, 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.[225] Another example comes from the Supreme Court's decision in *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*.[226] In that case, the issue was what standard 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 for 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 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."[227] As noted above, this sort of statutory gap-filling, guided by congressional intent, is probably the most common (and uncontroversial) type of federal common law.

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[221] 18 U.S.C. § 1651.

[222] *See, e.g.*, United States v. Smith, 18 U.S. 153 (1820); United States v. Palmer, 16 U.S. 610 (1818).

[223] 28 U.S.C. § 1605(a)(3).

[224] *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."); Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 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."). *Cf.* 28 U.S.C. § 1350 Note (defining "extrajudicial killing" in 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); 109 P.L. 54; 119 Stat. 499, Section 201 (2005) (requiring EPA to regulate the use of human subjects in pesticide testing "consistent with . . . the principles of the Nuremberg Code with respect to human experimentation").

[225] *See, e.g.*, Aquamar S.A. v. Del Monte Fresh Produce N.A., 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.").

[226] 462 U.S. 611 (1983).

[227] *Id.* at 623.

The *Charming Betsy* canon of construction is another way in which courts may look to CIL in the statutory context. Pursuant to this canon, courts will construe ambiguous federal statutes to avoid conflicts with international law.[228] 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 federal courts would construe it (including by reference to the *Charming Betsy* canon where relevant) can be seen as the flip side of *Erie*.[229]

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, which sets forth a variety of general rules governing the formation, interpretation, and termination of treaties.[230] The United States has not ratified the Convention and thus it cannot bind the United States as a treaty. The U.S. government has stated, however, that at least many of the Convention's terms reflect CIL.[231] Perhaps not surprisingly, therefore, many courts often invoke the CIL of treaty law as embodied in the Vienna Convention.[232] Most often, they apply the principles of interpretation in Articles 31 and 32 of the Convention to construe treaties that the United States has

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[228] *See, e.g.*, F. Hoffman-LaRoche Ltd. v. Empagran, 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); Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). *See also* Restatement (Third), *supra* note 1, § 114 ("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.").

[229] *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEORGETOWN L.J. 479, 534 n. 305 (1998).

[230] *See* VIENNA CONVENTION ON THE LAW OF TREATIES, May 23, 1969, 1155 U.N.T.S. 331.

[231] *See* Restatement (Third), *supra* note 1, at 145 & n.2 (1987) (documenting Executive Branch statements); S. Exec. Doc. L, at I (1971) (noting that the Vienna Convention "is already generally recognized as the authoritative guide to current treaty law and practice").

[232] 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:

> 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, 80 n. 8 (2d Cir. 2005).

ratified.[233] Sometimes, courts look to principles of CIL as embodied in the Vienna Convention to ascertain whether a treaty exists.[234] 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.[235] 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 non-federal 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.[236] 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.[237] The Supreme Court never expressly tied its shift in 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, since *Erie* required all applications of law to

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[233] *See, e.g.*, Avero Belg. Ins. v. Am. Airlines, Inc., 423 F.3d 73 (2d. Cir. 2005); *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).

[234] Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301 (2d Cir. 2000).

[235] For more on Executive Branch authorization, see *infra* __.

[236] Thus, for example, in the 1812 *Schooner Exchange* decision, the Supreme Court applied the CIL of sovereign immunity without bothering to consider domestic authorization to do so. Similarly, in *Hatch v. Baez*, 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. *See generally* Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT'L L. 265 (2001).

[237] In *The Navemar*, 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. *See* 303 U.S. 68 (1938). Subsequently, in its 1943 *Ex parte Peru* decision, the Court squarely held that, because immunity determinations implicated important foreign relations interests, courts were bound to follow Executive suggestions of immunity. *See* 318 U.S. 578 (1943). Two years later, in *Republic of Mexico v. Hoffman*, 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]." 324 U.S. 30, 34 (1945). 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.* at 38. *See* Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129 (1999).

be grounded in a constitutional or political branch authorization, and there was no other plausible source of authorization.[238]

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.[239] This silence raised the question of whether a foreign head of state is entitled to immunity in U.S. courts after the FSIA, and if so, on what basis. Although courts have varied in their answers to this question, they have always grounded the application of head-of-state immunity in an authorization from the Constitution or the political branches.[240] Some courts view the FSIA as providing for head-of-state immunity, even though the text of the statute is silent on the issue.[241] Most courts, however, view the FSIA as inapplicable to a head of state and instead look to Executive Branch authorization to apply the doctrine.[242] 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.[243] Others rely on the lack of an Executive Branch suggestion simply as a factor weighing against immunity.[244] In all of these cases the courts are looking to 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

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[238] 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. 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. This shift to the restrictive theory, formally endorsed by the U.S. State Department in 1952, made the CIL of immunity much more complex and difficult to apply. It also meant that foreign sovereigns would be hailed 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.

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

[240] *See generally* Bradley & Goldsmith, *Pinochet*, *supra* note 237.

[241] *See, e.g.*, O'Hair v. Wojtyla, No. 79-2463 (D.D.C. Oct. 3, 1979), excerpted in State Territory, Jurisdiction, and Jurisdictional Immunities, 1979 Digest 7, at 897.

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

[243] *See, e.g.*, Jungquist v. Nahyan, 940 F. Supp. 312, 321 (D.D.C. 1996).

[244] *See, e.g.*, First American Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1121 (D.D.C. 1996).

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* had suggested that corporations could be held liable under the ATS for aiding and abetting human rights abuses committed by foreign governments.[245] 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, it would increase the number of ATS defendants subject to personal jurisdiction in the United States; corporations typically have more assets than individual defendants and thus are likely to be a more attractive target for plaintiffs and their lawyers; and 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.[246] This is true even of much of human rights law. The Torture Convention, for example, addresses only torture committed by "a public official or other person acting in an official capacity."[247] 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.[248] If such norms were also applicable to corporations (a questionable proposition),[249] a corporation could be subject to liability under the ATS for

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[245] *See, e.g.*, Doe v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacated*, 395 F.3d 978 (9th Cir. 2003).

[246] *See, e.g.*, ROBERT JENNINGS & ARTHUR WATTS, 1 OPPENHEIM'S INTERNATIONAL LAW 16 (9th ed. 1992); Restatement (Third), *supra* note 1, pt. II, Introductory Note; Carlos M. Vazquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927 (2005).

[247] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1).

[248] *See generally* STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001); *see also* Rome Statute of the International Criminal Court, art. 5; Statute of the International Criminal Tribunal for the Former Yugoslavia, arts. 2-5; Statute of the International Criminal Tribunal for Rwanda, arts. 2-4.

[249] *Cf.* Vazquez, *supra* note 246, at 943-44. It is noteworthy that none of the modern international criminal tribunals extend 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* 1 The Rome Statute of the International Criminal Court: A Commentary 778-79 (Cassese et al. eds., 2002); The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, Results 199 (Lee ed., 1999). Many scholars nonetheless believe that corporations can be liable under international criminal law. *See, e.g.*, Louis Henkin, *Keynote Address: The Global Market as Friend of Foe of Human Rights: The Universal Declaration at 50 and the Challenge of Global Markets*, 25 BROOKLYN J. INT'L L. 17 (1999); Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where from Here*, 19 CONN. J. INT'L L. 1 (2003); Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45 (2002).

directly violating one of these norms, assuming the other requirements in *Sosa* are satisfied.[250] 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.[251]

Corporations, however, do not typically commit, or even conspire to commit, genocide or war crimes. As a result, most of the ATS 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*.[252] 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.[253]

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.[254] The Court further counseled the lower courts to exercise "great caution" in recognizing new claims.[255] And the Court

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

[251] See 542 U.S. at 733 n. 21; *see also id.* at 760-63 (Breyer, J., concurring) (emphasizing importance of comity considerations in ATS cases). We thus disagree with the Ninth Circuit's 2-1 decision in *Sarei*, *supra* note 250, 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. Similarly, the ATS's authorization of civil claims for certain international law violations should also be read as incorporating international law limitations on such claims.

[252] *Compare* In re South African Apartheid Litigation, 346 F. Supp. 2d 538 (S.D.N.Y. 2004) (disallowing aiding and abetting liability), and Doe 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 (S.D.N.Y. 2005) (allowing aiding and abetting liability).

[253] *See* An Act for the Punishment of Certain Crimes Against the United States § 10, 1 Stat. 112 (1790).

[254] 542 U.S. at 724.

[255] *Id.* at 727, 728.

emphasized that "innovative" interpretations should be left to Congress.[256] As noted above, 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 – for example, in 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*,[257] the Court reasoned that allowing for aiding and abetting liability for securities fraud would expand the litigation in a way that would implicate policy tradeoffs best resolved by Congress.[258] 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 type of liability in the civil context.[259] Finally, the Court noted the substantial uncertainties associated with the standard for aiding and abetting.[260]

Nor does a claim for 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."[261] 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, that concept is applied in those tribunals only to individuals, not to corporations. Moreover, even with respect to individuals in these cases, the standards for aiding and abetting liability vary. For example, while the ICTY tribunal requires an aider or abettor to have mere knowledge that his acts assist in a crime, the ICC Statute is more demanding, requiring that the aider or abettor act with the purpose of facilitating the commission of the crime.[262]

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[256] *Id.* at 721.

[257] 511 U.S. 164 (1994).

[258] *See id.* at 188-89.

[259] *See id.* at 180-85, 190-91.

[260] *See id.* at 182 (noting that the "doctrine has been at best uncertain in application"); *id.* at 189 (noting that "the rules for determining aiding and abetting liability are unclear").

[261] 542 U.S. at 732.

[262] Rome Statute, *supra* note 248, art. 25(3)(c); *see also* 1 The Rome Statute of the International Criminal Court: A Commentary 801 (Antonio Cassese et al. eds., 2002). Some courts have expressed the view in *dicta* that a 1795 Attorney General opinion, which was referred to by the Court in *Sosa*, provides support for aiding and abetting liability under the ATS. *See, e.g., Sarei,* __ F.3d at __ n.5; Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1174 n.6 (C.D. Cal. 2005). The 1795 opinion observes that President Washington had 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* 542 U.S. at 721. The aiding and abetting language in the 1795 opinion, however, was not referring to the ATS or even to civil

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 States from arbitrarily detaining individuals was expressly included in the ICCPR, numerous other treaties, the *Restatement (Third) of Foreign Relations*, and 119 national constitutions.[263] 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.[264]

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.[265] And this litigation is also likely to be perceived as improperly extraterritorial, especially when directed at foreign companies.[266] Invoking these policy concerns, the Executive Branch has expressly opposed corporate aiding and abetting liability under the ATS.[267] Consistent with *Sosa* (and *Erie*), assessment of such policy issues is best left to the political branches.

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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.

[263] *See supra* __.

[264] *Cf. Sosa*, 542 U.S. at 738 n.29.

[265] *Cf.* Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) (emphasizing importance of political branch flexibility in managing sanctions and incentives).

[266] *See, e.g.*, Brief of the Governments of the Commonwealth of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland as *Amici Curiae* in Support of the Petitioner, Sosa v. Alvarez-Machain (Jan. 23, 2004), *available at* http://sdshh.com/Alvarez/ Sosa%20Brief%20Final.pdf.

[266] See, e.g., Supplemental Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp.http://sdshh.com/Alvarez/ Sosa%20Brief%20Final.pdf..

[267] See, e.g., Supplemental Brief for the United States of America as Amicus Curiae, Doe v. Unocal Corp. (Aug. 2004), *available at* http://sdshh.com/Unocal/UnocalBriefs/US-Supp-brief.pdf.

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.*"[268] Although cryptic, this statement suggests that it may be proper to limit ATS claims against private actors to situations in which the defendant itself violates the international law norm in question, which would preclude corporate aiding and abetting liability. The 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 said 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.[269] These statements, along with the more general points discussed above, suggest that corporate aiding and abetting liability is improper under the ATS after *Sosa*.

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.[270] 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,[271] or have sought remedies for interrogation techniques and conditions of confinement that allegedly violate CIL norms.[272] Individuals allegedly subject to detention or rendition elsewhere have likewise asserted violations of CIL norms against prolonged arbitrary detention, and torture and other cruel, inhuman, and degrading treatment.[273]

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[268] 542 U.S. at 733 n. 20 (emphasis added).

[269] *See id.* at 733 n.21.

[270] *See, e.g.*, Brief for Petitioner, Hamdan v. Rumsfeld, at 48-50 (U.S. Supreme Court, Jan. 6, 2006), *available at* http://www.hamdanvrumsfeld.com/petbriefhamdanfinal.pdf. Common Article 3 prohibits, among other things, "[t]he 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."

[271] *See* Khalid v. Bush, 355 F. Supp. 2d 311, 316-17, 328 (D.D.C. 2005); In Re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445, 453 (D.D.C. 2005).

[272] *See* Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006).

[273] *See* Complaint, El-Masri v. Tenet, No. 1:05cv1417, at 20-25 (E.D. Va. Dec. 6, 2005), *available at* http://www.aclu.org/images/extraordinaryrendition/asset_upload_file829_22211.pdf, *dismissed on state secret grounds*, __ F. Supp.2d ___, 2006 WL 1391390 (E.D. Va.), *appeal docketed*, No. 06-1667 (4th Cir.); Petition for Writ of Habeas Corpus at 2, 16, Omar v. Harvey, No. 1:05cv02374 (D.D.C. Dec. 12, 2005), *available at* http://www.burkepyle.com/Omar/Petition-for-Habeas-Corpus.pdf.

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 partially waives sovereign immunity, but it has an exception for claims "arising in a foreign country"[274] – an exception that the Court in *Sosa*, in a part of the opinion not discussed in detail above, construed favorably to the government.[275] This and related immunity doctrines impose a significant obstacle to ATS suits against the U.S. government and its officials.[276] 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. 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."[277] 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.[278] 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."[279] 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.[280] Although *Sosa* did not address the precise issue, its implicit rejection of the modern position, described above, would seem to preclude binding the President to CIL as a matter of domestic law in the absence of an

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[274] 28 U.S.C. § 2680(k).

[275] *See Sosa*, 542 U.S. at 733-741.

[276] *See* Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law: Cases and Materials 534-35 (2d ed. 2006).

[277] 542 U.S. at 727.

[278] *See* Essays, *Agora: May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986); Essays, *Agora: May the President Violate Customary International Law? (Cont'd)*, 81 AM. J. INT'L L. 371 (1987); *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); Glennon, *supra* note 10; Weisburd, *Executive Branch*, *supra* note 53.

[279] The Paquete Habana, 175 U.S. 677, 700 (1900). *But see* William S. Dodge, *The Story of* The Paquete Habana*: Customary International Law as Part of Our Law*, at 18-22, *in* INTERNATIONAL LAW STORIES (Dickinson et al. eds. forthcoming 2007) (arguing that *The Paquete Habana* should not be read to suggest that the President alone can disregard CIL).

[280] *See, e.g.*, Barrera-Echavarria v. Rison, 44 F.3d 1441, 1451 (9th Cir. 1995); Gisbert v. United States Attorney General, 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 Product Liability Litigation, 373 F. Supp. 2d 7, 109-110 (E.D.N.Y. 2005) (reasoning that CIL binds the President at least absent an official presidential proclamation to the contrary).

incorporating statute or treaty. If CIL is not automatically domestic federal law, then it is hard to see how it is part of the "Laws" that the President must faithfully execute under Article II.

Another likely obstacle for war on terror claims brought outside the ATS is 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 terror. For example, following September 11, Congress passed an "Authorization to Use Military Force" (AUMF) that broadly authorized the President to use "all necessary and appropriate force" against al Qaeda and related entities, but did not refer to CIL in its authorization, let alone domestic court application of CIL.[281] 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.[282]

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*.[283] 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 Third Geneva Convention.[284] Importantly, however, the Court repeatedly emphasized that it was applying these requirements because they had been incorporated into U.S. 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,"[285] but reasoned that it was nevertheless part of the international "laws of war," and that Congress in Section 821 of the Uniform Code of Military Justice had required the President to comply with the

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[281] *See* Authorization for Use of Military Force (Sept. 18, 2001).

[282] *See also* 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, Congress prohibited "cruel, inhuman, or degrading treatment or punishment" of anyone "in the custody or under the physical control of the [U.S.] Government." Detainee Treatment Act, 10 U.S.C. § 1003(a). 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 detainees at Guantanamo from raising this and other treatment-related claims in U.S. courts. *See* Detainee Treatment Act, 10 U.S.C. § 1005(e) (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 [U.S.] or its agents" by a current detainee or a former detainee who was "properly detained as an enemy combatant")).

[283] 126 S. Ct. 2749 (2006).

[284] *See id.* at 2793-98.

[285] *Id.* at 2794.

laws of war in establishing military commissions.[286] Justice Kennedy's concurrence further emphasized this congressional incorporation of Common Article 3.[287] This insistence on congressional authorization for domestic court application of a *treaty provision* that has 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.

None of the points made thus far imply 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 regulating 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 a draft 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 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."[288] This assertion is true, at most, only with respect to domestic law, not international law. The final version of the memorandum properly refined this assertion.[289]

3. International and Foreign Sources in Constitutional Interpretation

In recent years, the Supreme Court has cited and relied on in various ways international and foreign materials in the course of interpreting provisions of the U.S. Constitution.[290] This practice has generated significant controversy, both in the academy

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[286] *See, e.g.*, *id.* at 2774, 2786, 2794. Section 821 states that "the provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by statute *or by the law of war* may be triable by such military commissions." 21 U.S.C. § 821.

[287] *See id.* at 2799 ("[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.'"); *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.").

[288] Draft Memorandum from John Yoo, Deputy Assistant Attorney General, and Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, General Counsel, Department of Defense, "Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, " at 34 (Jan. 9, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf.

[289] *See* Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, "Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees," at 32 (Jan. 22, 2002) ("Customary international law . . . cannot bind the executive branch *under the Constitution* because it is not federal law.") (emphasis added), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.22.pdf.

[290] *See, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558, 572-73 (2003); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002).

and among policymakers.[291] There has been little discussion, however, of the relationship between this practice and the practice of applying CIL as domestic law.[292]

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 U.S. courts to grant relief in domestic courts not otherwise available under U.S. law. Moreover, both 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 CIL that preempted state juvenile death penalty laws.[293] These litigants were eventually more successful, however, in using nearly identical sources to convince the Supreme Court that the Eight Amendment, interpreted in light of these sources, prohibited the execution of juvenile offenders.[294]

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. It is generally understood that Congress can overrule any judicial domestication of CIL, a point emphasized in *Sosa*.[295] Constitutional interpretations, however, bind Congress and can be overturned only through a constitutional amendment. Whatever one thinks of this latter practice, the use of international and foreign materials in constitutional interpretation raises two levels of potential anti-majoritarian concern – unelected federal judges incorporate these 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.

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[291] For articles supporting this practice, see, for example, Sarah H. Cleveland, *Our International Constitution*, 21 YALE J. INT'L L. 1 (2006); Jeremy Waldron, *Foreign Law and the Modern* Ius Gentium, 119 HARV. L. REV. 129 (2005); 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); and Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004). For articles critical of this practice, see, for example, Ernest A. Young, *Foreign Law and the Denominator Problem,* 119 HARV. L. REV. 148 (2005); 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); and John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006). For examples of policy controversy, see Cleveland, *supra,* at 4 & nn. 14-19.

[292] A partial exception is Waldron, *supra* note 291, who discusses *Sosa* and *Roper* together, but does not analyze their relationship.

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

[294] *See* Roper v. Simmons, 543 U.S. 551 (2005).

[295] *See Sosa*, 542 U.S. at 753.

Whatever their similarities, an internationalized constitutionalism does not entail or even support the modern position view 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.[296] Moreover, the Supreme Court's constitutional decisions drawing on foreign and international sources have treated these sources, at most, as factors that may be 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.[297] 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."[298] 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 puzzles appear. The Supreme 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 *Sosa*. In *Roper v. Simmons*, for example, in which the Court held that the execution of juvenile offenders violates the Eighth Amendment to the Constitution, the Court cited, among other things, the Convention on the Rights of the Child, a treaty that had not been ratified by the United States, and the International Covenant on Civil and Political Rights (ICCPR), which the U.S. had ratified with a reservation declining to agree to the ban in that treaty on the juvenile death penalty.[299] By contrast, in *Sosa*, as discussed above, the Court described the ICCPR as having "little utility" in its analysis, even though, unlike in *Roper*, there was no relevant reservation there with respect to the issue before the Court.[300]

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

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[296] For examples, see Jackson, *supra* note 291, at 109-111; Cleveland, *supra* note 291.

[297] For the suggestion that the Supreme Court's citation of international and foreign materials has been only window dressing that has not significantly affected its constitutional decisions, see, for example, Alford, *supra* note 291, at 65-65.

[298] *Roper*, 543 U.S. at 578 (emphasis added). It might be thought 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 *Charming Betsy* canon be applied to constitutional interpretation). For arguments to the contrary, see Bradley, *Juvenile Death Penalty*, *supra* note 293, at 555-56; McGinnis, *supra* note 291, at 307 n.23.

[299] *See* 543 U.S. at 576.

[300] *See supra* __.

makes relevant the foreign and international materials, and the resulting legal conclusions reflect domestic U.S. law.[301] Nevertheless, the Supreme 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 *Sosa*.

VI. Conclusion

The Supreme Court's decision in *Sosa* resolves a number of the debates concerning the domestic status of CIL. The Court confirmed that CIL historically had the status of non-federal 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 part of U.S. domestic law, under the analysis in *Sosa*, only when its incorporation into domestic law has been authorized by either the structure of the Constitution or the political branches, and it is 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."

[301] *Cf.* Waldron, *supra* note 291, at 143 (noting that in its role in 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").