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## Splitting the Baby: An Analysis of the Supreme Court's Take on Customary International Law Under the Alien Tort Statute in *Sosa v. Alvarez-Machain*

### I. INTRODUCTION

In 2004, the U.S. Supreme Court did something Solomon would never have done—the justices split the proverbial baby.<sup>1</sup> In June 2004, the Court decided *Sosa v. Alvarez-Machain*,<sup>2</sup> a case initiated by a Mexican national in a federal district court, partly based on claims allegedly arising under the Alien Tort Statute of 1789 (ATS). The complaints, based on the ATS's jurisdictional language,<sup>3</sup> forced the Court to decide whether customary international law (CIL)<sup>4</sup> could provide the basis for a private action brought by an alien under the ATS. Just as the baby in Solomon's court had only one true mother, the answer to whether CIL, within the framework of the ATS, provides a cause of action in federal court should have only one answer, "Yes" or "No." While the Court did not say "Yes," it also did not say "No." Although history, the Supreme Court's own decisions, and U.S. tradition all pointed to "No," the Court split the baby and said, "In this instance 'No,'

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1. See 1 *Kings* 3:16–28. The story goes that two women approached King Solomon, each claiming to be the mother of the same child. To solve the dispute, Solomon ordered that the baby be split in two and one half be given to each woman. The false mother agreed to the proposal. Rather than see her child killed, the true mother agreed to let the false mother have the baby. Instead, Solomon gave the child to the true mother because, in his wisdom, Solomon knew that the true mother would act so.

2. 542 U.S. 692 (2004).

3. The jurisdictional language of the ATS grants federal district courts "original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations." 28 U.S.C. § 1350 (2000).

4. Customary international law has been described as follows:

International law, or the law of nations, consists of those rules and principles which govern the relations and dealings of nations and of international organizations with each other, as well as with some of their relations with persons, whether natural or juridical. The "law of nations," which is also known as "international customary law," is formed by the general assent of civilized nations. Norms of the "law of nations" are found by consulting juridical writing on public law, considering the general practice of nations, and referring to judicial decisions recognizing and enforcing international law.

45 AM. JUR. 2D *International Law* § 1 (2005) (footnotes omitted).

but actually “Yes.”” As any parent can tell you, a split baby doesn’t last long.

The facts giving rise to the case are remarkable and reflect poorly upon the United States—a fact that may lend emotional, if not logical, credence to why the Court was willing to leave open the possibility of CIL applying to future cases.<sup>5</sup> In short, the case arose after U.S. Drug Enforcement Administration (DEA) agents, acting without authority, abducted Mexican national Humberto Alvarez-Machain (Alvarez) for his alleged involvement in the torture and eventual death of a DEA agent.<sup>6</sup> After returning to Mexico, Alvarez sought relief in U.S. federal courts by invoking the ATS.

The issues that survived by the time the case wound its way to the Supreme Court go to the heart of United States sovereignty. Alvarez forced the Court to confront at least three fundamental questions regarding the ATS’s stance on CIL: (1) What role, if any, does CIL play in private actions under the ATS in U.S. courts? (2) Does the language of the ATS granting that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”<sup>7</sup> incorporate CIL and create a fount of cognizable private actions? (3) May federal judges apply international standards that have not been adopted, either expressly or implicitly, by the United States?

This Note argues there are at least four reasons the Court should have unequivocally held in *Sosa v. Alvarez-Machain* that CIL cannot be used to create causes of action under the ATS. First, the Treaty and Offenses Clauses of the U.S. Constitution authorize only the President and Congress to recognize and incorporate CIL into U.S. law. Second, the ATS on its own terms merely grants jurisdiction and historically has not been interpreted to create private causes of action. Third, using the ATS to create such causes of action would violate the rule that there is no general common law as established by *Erie Railroad Co. v. Tompkins*.<sup>8</sup> Fourth, CIL may be arbitrarily and selectively used by judges wishing to advance pet causes. To make this thesis as clear as possible, this Note is divided into the following parts: Part II briefly describes CIL, the ATS,

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5. See Part IV for a full discussion of why sovereignty concerns, the text of the Constitution, and Supreme Court case law all militate against CIL being used as the basis for private causes of action under the ATS, regardless of how heinous the underlying behavior.

6. See Part III for a more detailed retelling of the facts.

7. 28 U.S.C. § 1350.

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

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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the Treaty and Offenses Clauses, and *Erie*; Part III recounts the facts of the *Sosa* case and the Court's justification for allowing CIL to remain a viable source of causes of action; Part IV analyzes *Sosa*'s take on CIL in light of the Treaty and Offenses Clauses, the historical understanding of the ATS, and *Erie*; and Part V addresses *Sosa*'s potential to alter the United States' fundamental constitutional sovereignty.

II. BACKGROUND OF CIL, THE TREATY AND OFFENSES CLAUSES, THE  
ATS, AND *ERIE V. TOMPKINS*

Although the underlying thesis of this Note is straightforward—that contrary to what the *Sosa* court allowed, CIL should not become a fount of cognizable private actions under the ATS—the four arguments that support it rely on the surprising interactions of CIL, the Treaty and Offenses Clauses, the ATS, and *Erie v. Tompkins*. Before analyzing the interactions of these arguments and their combined effect on the ATS, it is important to have a working understanding of those concepts.

A. *Customary International Law: Its Sources, Breadth, and Vagaries*

Customary international law stems from the generally accepted practices of countries in the international context—as recognized by judges. The *Restatement (Third) of Foreign Relations* defines CIL as the law that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>9</sup> It seems safe to view CIL as a type of meta-law: it is derived from many considerations, including the written laws of various countries, but no country's written law is determinative. Furthermore, it is not created by any legislature or governmental body vested with lawmaking authority; rather, it is judicially recognized and incorporated. This judicially recognized customary source separates it from express international agreement—treaty law—the other source of international law.<sup>10</sup>

Because CIL stems from informally created international custom, it has the potential to influence every type of law in every country that has

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9. 1 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987).

10. 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, 817 (1997) (“[T]here are two principal sources of international law: treaties and CIL. Treaties are express agreements among nations.”); see also Curtis A. Bradley, *Customary International Law and Private Rights of Action*, 1 CHI. J. INT'L L. 421, 422 (2000) (“There are two principal types of international law—treaties and customary international law.”).

international relations. CIL has already grown beyond its roots in diplomacy and international relations.<sup>11</sup> According to Professors Bradley and Goldsmith,

Today . . . CIL also regulates the relationship between a nation and its own citizens, particularly in the area of human rights. The scope of these customary international human rights norms is unclear. There is widespread agreement in the international community that CIL prohibits acts such as torture, genocide, and slavery. Many commentators argue that it also prohibits certain applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation. Others even contend that CIL confers various economic and social rights, such as the right to form and join trade unions and the right to a free primary education. The list of putative CIL norms keeps growing.<sup>12</sup>

Because of its internationally subjective sources, CIL may strike many U.S. lawyers as less-than-ideal grounds for a lawsuit; nevertheless, it must be remembered that CIL has always played a role in U.S. jurisprudence via the Treaty and Offenses Clauses. However, its traditional costume has not been the *Il Dottore* mask in which the Court dressed it in *Sosa*.<sup>13</sup>

#### *B. The Treaty and Offenses Clauses and the “Law of Nations”*

The Treaty and Offenses Clauses of the Constitution have traditionally allowed customary international law a role in U.S. constitutional jurisprudence. The Offenses Clause explicitly refers to CIL’s forerunner, the “law of nations.”<sup>14</sup> Inherent in the treaty power

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11. Bradley, *supra* note 10, at 422.

12. Bradley & Goldsmith, *supra* note 10, at 818.

13. *Il Dottore* is one of the famous stock characters of classical Italian Commedia Del’Arte. Dressed in black academician’s robes, *Il Dottore* was the hard-drinking, self-important, long-winded, pompous fool who convinced everyone he was intelligent because he used lots of big words and had an advanced degree. See *Il Dottore*, <http://www.american.edu/IRVINE/jenn/dottore.html>. As will be seen in Part IV, *Il Dottore* seems an apt analogy for CIL imported via the ATS—because of CIL’s potentially never-ending supply of arguments (“big words”), CIL can be used to justify anything.

14. “Modern CIL descended from the ‘law of nations.’” Bradley & Goldsmith, *supra* note 10, at 822. The term “law of nations” was used loosely by different eighteenth-century legal philosophers. According to Professor Stewart Jay,

In its broadest usage, the law of nations comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states. At times writers distinguished between the law of nations and the law merchant, but the law

1415] *Customary International Law in Sosa v. Alvarez-Machain*

granted in the Treaty Clause, is the power to enter into treaties on customary international legal grounds. Such explicit and implicit recognition of customary law was likely necessary for the fledgling nation, given the young country's involvement with Europe.

The language of both clauses is simple. The Offenses Clause states, "The Congress shall have power . . . [t]o define and punish . . . offenses against the law of nations."<sup>15</sup> The Treaty Clause states, "The President shall . . . have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur."<sup>16</sup> Although the clauses either explicitly or implicitly recognize power to ratify laws stemming from the "law of nations," it is important to understand what that term has historically meant.

The "law of nations" referenced in the Constitution was a limited field with known parameters and ascertainable precedent—it was a term of art referring to a discrete body of law. According to Blackstone's *Commentaries*, the "law of nations" as understood at the time of the founding referred to "mercantile questions, such as bills of exchange . . . in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills."<sup>17</sup> This largely merchant/nautical definition of the law of nations fits with the largely merchant/nautical import of the

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of nations always was understood to encompass what Justice James Iredell referred to as the law governing "controversies between nation and nation."

Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989) (citing *Charge to the Grand Jury for the District of South Carolina* (May 12, 1974), in GAZETTE OF THE UNITED STATES (Philadelphia 1794)) (footnotes omitted). Although it would appear from such definitions that the "law of nations" would not include customary law, Alexander Hamilton argued in 1795 that

[t]he common law of England which was & is in force in each of these states adopts the law of Nations . . . Ever since we have been an Independent nation we have appealed to and acted upon the modern law of Nations as understood in Europe. . . . 'Tis indubitable that the customary law of European Nations is a part of the common law and by adoption that of the United States.

19 PAPERS OF ALEXANDER HAMILTON 341–42 (H. Syrett ed., 1973). While it is likely that Hamilton might not have agreed with the extent to which modern CIL has left the realm of international relations and encroached upon the law defining personal liberties, *see infra* Part IV.D, his statement does seem to indicate that custom as a source of law was a recognized element of the law of nations. Thus, it is most likely that the Founders would have approved Congress using its power to base a law defining an offense on unwritten custom.

15. U.S. CONST. art. I, § 8, cl. 10.

16. *Id.* art. II, § 2, cl. 2.

17. WILLIAM BLACKSTONE, 4 COMMENTARIES \*67.

Offenses Clause.<sup>18</sup> Blackstone also commented that, in the criminal realm, the law of nations was limited to the crimes of piracy, infringement of ambassadorial rights, and violation of safe conduct of ambassadors.<sup>19</sup> Finally, the law of nations, according to Blackstone, was primarily concerned with offenses against entire states or nations, not individual nationals.<sup>20</sup>

Although *Sosa v. Alvarez-Machain* never referred to the Offenses or the Treaty Clauses, the history of these two clauses, particularly the Offenses Clause, sheds invaluable light on the question of whether CIL should be a source of rights of action under the ATS. Not only do these clauses arguably run directly counter to the Court's decision in *Sosa*, as Part IV will show, their history is vital in understanding the true nature of the ATS, the question that lay at *Sosa*'s heart.

### C. The Alien Tort Statute of 1789

Lying at the core of *Sosa v. Alvarez-Machain* was the question whether CIL could serve as the basis for private causes of action under the ATS. Part IV of this Note will analyze whether the Court answered this question correctly. Before that, it is important to know the text of the statute, a rough understanding of its history, and its place in modern law.

The First Congress enacted the Alien Tort Statute<sup>21</sup> as part of the first Judiciary Act. As originally drafted and adopted, section nine of the Act stated that federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, 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."<sup>22</sup> The statute went through various permutations, until in 2001 Congress codified it in its current form. The ATS now states that federal district courts "shall have original jurisdiction of any civil action by an alien for

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18. The entire clause reads, "The Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."

19. BLACKSTONE, *supra* note 17, at \*68.

20. *Id.*

21. The Act is also commonly known as the Alien Tort Claims Act. *See* Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1232 n.7 (11th Cir. 2004); Flores v. S. Peru Copper, Corp., 343 F.3d 140, 148 (2d Cir. 2003); *see also* Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587, 587 (2002).

22. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (current version at 28 U.S.C. § 1350 (2000)).

1415] Customary International Law in *Sosa v. Alvarez-Machain*

a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>23</sup>

The controversy that rages around this simple sentence has profound implications. Although this controversy will be explored in Part IV, it is important to understand the outline of the controversy in order to begin to understand the *Erie* implications of *Sosa*. If the ATS’s reference to the law of nations grants federal district courts power to entertain litigation based upon uncodified notions of CIL, then the ATS is indeed a formidable grant of common law power. However, if the ATS is merely jurisdictional, then the reference to the law of nations does not grant federal judges this power and they must wait for guidance from Congress or the President via the Offenses and Treaty Clauses.

*D. A Review of Erie v. Tompkins and General Common Law*

*Sosa v. Alvarez-Machain* has profound *Erie* implications. By allowing CIL to be a possible source of causes of action, the Court has arguably run afoul of one of the sacred truths of every first-year law school course in civil procedure—namely, there is no general federal common law. Although *Erie* is a classic case, a brief examination of its factual and analytical bases will aid discussion of the implications inherent in allowing CIL to serve as a basis of litigation under the ATS.

The Supreme Court’s decision in *Erie Railroad Co. v. Tompkins* was truly a sea-change—it invalidated an entire body of law and an entire method of analysis. Prior to *Erie*, federal courts were able to decide cases based on general common law.<sup>24</sup> In the absence of statutory direction, federal courts were allowed to deduce rules of law based on general notions of common law.<sup>25</sup> These notions included everything from the judges’ understandings of natural law theory and international custom to the judges’ personal predilections.<sup>26</sup> General common law was, as Justice

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23. 28 U.S.C. § 1350.

24. General common law included CIL. See Bradley & Goldsmith, *supra* note 10, at 823. Customary international law easily fit the general common law for one main reason—general common law derived from no clearly defined source. *Id.*

25. *Erie* overturned the line of cases that developed from *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). *Swift* and its progeny held that federal courts sitting in diversity could adhere at-will to state court cases involving areas of unsettled law. Federal courts were to decide the issue for the state using their own common law analysis. *Id.* at 18. The *Swift* analysis accepted the fiction that all common law judges would reach the same conclusion if they merely used the correct common law tools to discover the law.

26. As commentators have explained,

Holmes acerbically stated, “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>27</sup> It might not be too far off-target to compare the ill-conceived concept of general common law, given that it allowed federal judges to create law from the ether, with the concept of substantive due process typified in *Lochner v. New York*.<sup>28</sup> However, with *Erie*, the ethereal, transcendental, and politically powerful federal general common law ceased to exist in federal courts.

In 1938, the *Erie* Court began the unequivocal dismantling of general common law by stating 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.”<sup>29</sup> The case arose after an Erie Railroad Company freight train hit and injured Harry J. Tompkins. Tompkins was walking along a footpath that ran parallel with the tracks when he claimed to have been hit by something projecting from the train. Tompkins sued in diversity in Pennsylvania federal court, arguing that federal general common law should apply because there was no applicable Pennsylvania statute controlling the licensee/trespasser distinction. According to Tompkins, under principles of general common law, he was a licensee owed a higher duty of care because the railroad company knew that people walked along that stretch of track. The Railroad company argued that Pennsylvania case law applied and that Tompkins was a trespasser owed a lower duty of care.<sup>30</sup> Justice Brandeis, in three sentences, gutted Tompkins’ argument: “There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or ‘general’ . . .

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Several theories supported this practice. Some courts applied CIL [and common law generally] as an element of natural law. Others applied CIL as part of the common law inherited from England. Yet others applied CIL as part of ‘our law’ or the ‘law of the land’ without further explanation. Most decisions failed to identify any theory to support the application of CIL.

Bradley & Goldsmith, *supra* note 10, at 822–23 (citing *In re The Paquete Habana*, 175 U.S. 677, 700 (1900); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820); *In re The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815); *In re The Venus*, 12 U.S. (8 Cranch) 253, 297 (1814); *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.)).

27. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

28. 198 U.S. 45 (1905).

29. 304 U.S. 64, 78 (1938).

30. *Id.* at 69–70.

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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. And no clause in the Constitution purports to confer such a power upon the federal courts.”<sup>31</sup>

In short, in diversity cases courts could no longer deduce general notions of law in areas where state law was unresolved—they were to act according to the laws existing in the state in which they sat. If the state law was unresolved, they were to act as a state court would and resolve the case according to the entire law as then understood in that state.<sup>32</sup>

The gist of Brandeis’ argument was that the common law’s only valid source is the jurisdiction in which it is applied. Brandeis criticized the general federal common law because it created “mischievous results”<sup>33</sup> and “introduced grave discrimination by noncitizens against citizens.”<sup>34</sup> According to Brandeis, “The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”<sup>35</sup> Although this argument may render the common law in one jurisdiction different from the common law in another, under *Erie* the common law has to have a jurisdictionally correct and authoritative source.<sup>36</sup>

With this basic understanding of general common law, the problems with introducing CIL into U.S. law via the ATS should begin to become apparent. Customary international law, much as the defunct general common law, is judicially recognized. Justice Holmes’ statement that general common law was a “transcendental body of law outside of any particular State but obligatory within it,”<sup>37</sup> is entirely applicable to CIL if it is considered a legitimate source of U.S. causes of action.

With this background, it is now possible to turn to *Sosa v. Alvarez-Machain*.

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31. *Id.* at 78.

32. *Id.* (“Except 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. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.”).

33. *Id.* at 74.

34. *Id.* Allowing federal courts to ignore state law, coupled with the disparate bodies of law that developed, created great incentives for forum shopping. *See id.*

35. *Id.* at 79.

36. *Id.* (“[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it.” (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting))).

37. *Id.*

III. FACTUAL AND LEGAL HISTORY OF *SOSA V. ALVAREZ-MACHAIN*

There is an emotional element in Alvarez's favor. He lived through a nightmare that would enrage any U.S. citizen. He was forcefully abducted from his home in Mexico by U.S. agents acting outside of their authority. He was flown to the United States merely to get him within U.S. jurisdiction so that he could be criminally prosecuted.<sup>38</sup> In short, U.S. officers kidnapped him. However, the emotional desire to quickly punish and repay can lead to slipshod ideas with unexpected consequences.

*A. Historical and Procedural Facts Giving Rise to  
Sosa v. Alvarez-Machain*

*Sosa v. Alvarez-Machain* was the result of many parties acting rashly, if not illegally. The first bad actor was Mexican physician Humberto Alvarez-Machain. In 1985, Alvarez apparently helped kill Enrique Camerena-Salazar, a U.S. Drug Enforcement Administration agent. Camerena-Salazar was on assignment in Mexico when he was captured and tortured to death during a two-day interrogation. Alvarez reportedly worked to keep Camerena-Salazar alive during the torture.<sup>39</sup>

The second bad actor was the DEA. In 1990, a federal grand jury in Los Angeles properly indicted Alvarez for the murder and issued a warrant for his arrest.<sup>40</sup> However, after receiving the indictment, the DEA abandoned proper procedure and became more vigilante in its efforts to bring Alvarez to justice. The DEA contacted the Mexican government asking for help but never made a formal extradition request.<sup>41</sup> Mexico offered no aid. Despite the lack of extradition procedures, and despite the Mexican government's unwillingness to help, DEA headquarters in Washington D.C. approved a plan to hire Mexican nationals to abduct Alvarez and forcibly bring him to the United States.<sup>42</sup>

The third group of bad actors included Jose Francisco Sosa—a former Mexican police officer—and a group of hired guns. The DEA hired Sosa to lead the group in abducting Alvarez.<sup>43</sup> As part of the deal,

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38. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

39. *Id.* at 697; *see also* *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992).

40. *Sosa*, 542 U.S. at 697–98.

41. *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003).

42. *Id.*

43. *Id.* The unabbreviated chain of events leading to Sosa's involvement is somewhat more complicated:

1415] *Customary International Law in Sosa v. Alvarez-Machain*

the DEA even agreed to use its influence to ensure that Sosa would receive a position in the Mexican Attorney General's Office.<sup>44</sup> Under Sosa's leadership, a group of Mexican nationals abducted Alvarez from his house, held him overnight at a hotel, and flew him in a private plane to El Paso, Texas, where federal officers arrested him.<sup>45</sup> The court battles in the Ninth Circuit began soon after that.<sup>46</sup>

In his first court battle, waged while being held in the United States, Alvarez argued that the federal district court lacked jurisdiction to entertain the 1990 indictment against him.<sup>47</sup> He argued that his seizure was "outrageous governmental conduct" that violated the U.S.-Mexico extradition treaty.<sup>48</sup> Alvarez prevailed on this argument until the U.S. Supreme Court held that his abduction did not affect federal court jurisdiction.<sup>49</sup> He was eventually tried and acquitted in 1992 after the government failed to make its case against him.<sup>50</sup> He returned to Mexico after the trial.<sup>51</sup>

Alvarez then sought civil damages against his abductors. In 1993, he sued Sosa, various DEA agents, and other Mexican citizens in Ninth Circuit district court under the Federal Tort Claims Act (FTCA)<sup>52</sup> and the Alien Tort Statute (ATS).<sup>53</sup> The district court dismissed the FTCA claims, but it granted Alvarez summary judgment on his ATS claims and awarded him \$25,000 in damages.<sup>54</sup> In a three-judge panel decision, the Ninth Circuit reversed the FTCA dismissal and affirmed the ATS judgment.<sup>55</sup> An en banc court affirmed the panel decision.<sup>56</sup>

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The DEA agent in charge of the Camarena murder investigation, Hector Berellez . . . , with the approval of his superiors in Los Angeles and Washington, hired Antonio Garate-Bustamante ("Garate"), a Mexican citizen and DEA operative, to contact Mexican nationals who could help apprehend Alvarez. Through a Mexican intermediary, Ignacio Barragan ("Barragan"), Garate arranged for Jose Francisco Sosa . . . to participate in Alvarez's apprehension.

*Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *United States v. Alvarez-Machain*, 504 U.S. 655, 658 (1992).

48. *Id.*

49. *Id.* at 669–70.

50. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698 (2004).

51. *Id.*; *see also Alvarez-Machain*, 331 F.3d at 610.

52. 28 U.S.C. § 1346 (2000).

53. *Id.* § 1350 (2000).

54. *Alvarez-Machain v. United States*, 266 F.3d 1045, 1049 (9th Cir. 2001).

55. *Id.*

In affirming the panel decision, the Ninth Circuit held that the ATS created causes of action arising under CIL. Citing cases such as *Abebe-Jira v. Negewo*,<sup>57</sup> *Kadic v. Karadzic*,<sup>58</sup> *Xuncax v. Gramajo*,<sup>59</sup> and two of its own decisions, the Ninth Circuit stated that the ATS “creates a cause of action for an alleged violation of the law of nations.”<sup>60</sup> However, the Ninth Circuit was wary of the ramifications of this decision and attempted to limit actionable violations of CIL norms to those “that are ‘specific, universal, and obligatory.’”<sup>61</sup>

Thus, after the Ninth Circuit finished with *Alvarez-Machain v. United States*, it appeared the ATS was a source of CIL-based causes of action. The decisions of the Ninth Circuit in the various appeals had been consistent: Alvarez had been illegally hurt and must receive freedom and damages. In both the criminal and civil cases, the Ninth Circuit’s jurisdictional interpretations were fundamental in providing this aid: in the criminal case it found a lack of jurisdiction so that it could send Alvarez home,<sup>62</sup> while in the civil case, the court found jurisdiction enabling him to receive damages under the ATS.<sup>63</sup> The Ninth Circuit’s decision that the ATS granted jurisdiction, together with its application of CIL, caught the Supreme Court’s attention. In December of 2003, the Supreme Court granted certiorari to “clarify the scope of both the FTCA and the ATS.”<sup>64</sup> Central to this clarification was the determination of whether the ATS was merely a grant of jurisdiction, or whether its reference to the law of nations incorporated CIL norms from which plaintiffs could create original and hitherto unknown causes of action.

*B. The U.S. Supreme Court’s Decision in Sosa v. Alvarez-Machain*

*Sosa* sports conflicting personalities despite the fact that it is, for the most part, a unanimous decision. Although sections I and III garnered unanimous approval, section II received the support of seven justices, and six justices supported section IV. These numbers belie the decision’s schizophrenia. Section I is merely a restatement of the facts giving rise to

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56. *Alvarez-Machain*, 331 F.3d at 641.

57. 72 F.3d 844 (11th Cir. 1996).

58. 70 F.3d 232 (2d Cir. 1995).

59. 886 F. Supp. 162 (D. Mass. 1995).

60. *Alvarez-Machain*, 331 F.3d at 612.

61. *Id.* (citing *In re Estate of Marcos*, 25 F.3d 1467, 1475 (9th Cir. 1994)).

62. *United States v. Alvarez-Machain*, 504 U.S. 655, 658–59 (1992).

63. *Alvarez-Machain*, 331 F.3d at 611–12.

64. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 699 (2004).

1415] *Customary International Law in Sosa v. Alvarez-Machain*

the case.<sup>65</sup> Section II focuses on the scope of the FTCA and is irrelevant to the ATS question.<sup>66</sup> The confusion arises from section III, which received unanimous support, and section IV, which received the support of Justices Souter, Ginsburg, Breyer, Stevens, O'Connor, and Kennedy. These sections stand forcefully opposed to one another—section III clearly states that the ATS is merely jurisdictional and is not a source of causes of action, while section IV implies exactly the opposite.

*1. The unanimous section III*

After dealing with Alvarez's FTCA claims, the Court turned to Alvarez's ATS claims. At the heart of the Supreme Court's undertaking was the determination of whether the ATS was merely jurisdictional. In section III, the Court frequently stated that the ATS is merely jurisdictional. For example: "the statute is in terms only jurisdictional";<sup>67</sup> "As enacted in 1789, the ATS gave the district courts 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law";<sup>68</sup> "The fact that the ATS was placed in § 9 of the Judiciary Act . . . is itself support for its strictly jurisdictional nature";<sup>69</sup> and "[S]ection 1350 clearly does not create a statutory cause of action . . . ."<sup>70</sup> Thus, the history cited by the Court in section III supports the view that the ATS language regarding the "law of nations" is not a fount of liability based on CIL.

The Court grounded its interpretation of the ATS on the historical meaning of the "law of nations." Citing James Kent, the Court stated that the law of nations at the time the Constitution was drafted primarily "occupied the executive and legislative domains, not the judicial."<sup>71</sup> This was because the law of nations was, at the time of framing, concerned primarily with rights and duties that were part of international relations, not personal rights.<sup>72</sup> Judges had played an instrumental role in creating

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65. *Id.* at 697–99.

66. *Id.* at 699–712.

67. *Id.* at 712.

68. *Id.* at 713.

69. *Id.*

70. *Id.* (quoting William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 480 (1986)).

71. *Id.* at 714.

72. *See id.* at 714–15. The law of nations did recognize various personal rights, but these were inextricably bound up with the larger concerns regarding international relations. Individuals were punished for piracy, for infringement of the rights of ambassadors, and for violating safe conduct. BLACKSTONE, *supra* note 17, at \*68. Also, individual merchants could be held liable under

the law of nations regarding “the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”<sup>73</sup> In other words, judges created admiralty law as a part of the law of nations, together with the three Blackstonian torts previously mentioned: “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>74</sup> Thus, the law of nations was a definable, comprehensible body of law, the violation of which—with the concomitant inability of the confederacy to punish such violation—had caused the country great embarrassment under the Articles of Confederation.<sup>75</sup>

## 2. Section IV

In section IV, the Supreme Court began by arguing for judicial restraint, but ultimately abandoned the import of section III.<sup>76</sup> Implicit in the first paragraph of section IV is the assumption that federal courts may entertain new causes of action based on CIL when the federal court deems the asserted right important enough.<sup>77</sup> Five pages later, the implicit becomes explicit: “We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms . . . . [N]othing

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the law of nations “in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills.” *Id.* at \*67, quoted in *Sosa*, 542 U.S. at 715.

73. *Sosa*, 542 U.S. at 715.

74. *Id.*; see also *supra* note 72 (describing the Blackstonian torts).

75. The Supreme Court refers to the so-called Marbois incident. In 1784, a Frenchman by the name of Longchamps attacked Mr. Marbois, the Secretary of the French Legion, while Marbois was visiting Philadelphia. The Continental Congress called upon the states to address the issue but could do nothing directly to provide a legal remedy. *Sosa*, 542 U.S. at 716–17.

76. See *id.* at 724–38.

77. See *id.* at 724–25.

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.

*Id.*

1415] *Customary International Law in Sosa v. Alvarez-Machain*

Congress has done is a reason for us to shut the door to the law of nations entirely.”<sup>78</sup> According to the justices, the door could be opened when the justices believed the claim at issue violated an international law norm that was as definite and accepted among civilized nations as the historical Blackstonian torts.<sup>79</sup>

To justify their position in this section, the six justices had to grapple with *Erie*. Beginning with a laundry list of cases involving federal common law,<sup>80</sup> the six justices of section IV correctly recognized that “*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”<sup>81</sup> The Court proceeded to rely upon *The Paquete Habana*<sup>82</sup> and *The Nereide*<sup>83</sup> to justify the creation of federal common law under the ATS.<sup>84</sup> As will be argued later, these cases were inappropriate and impotent justification because they were based on notions of general federal common law that *Erie* eviscerated.<sup>85</sup>

As justification for its position in section IV of *Sosa*, the Supreme Court relied on three more sources that deserve mention. The first was the 1964 U.S. Supreme Court decision in *Banco Nacional de Cuba v. Sabbatino*.<sup>86</sup> The Court cited this case to support the proposition that CIL could be invoked in “appropriate cases” under various federal statutes, including the ATS.<sup>87</sup> The Court also invoked the Second Circuit’s *Filartiga v. Pena-Irala*.<sup>88</sup> In that decision, the Second Circuit held that “United States courts are ‘bound by the law of nations, which is a part of the law of the land.’”<sup>89</sup> Finally, the Supreme Court in *Sosa* relied on the statement in the *Restatement (Third) of Foreign Relations Law of the*

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78. *Id.* at 730–31.

79. *Id.*

80. *Id.* at 726.

81. *Id.* at 729.

82. 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).

83. 13 U.S. (9 Cranch) 388 (1815).

84. *See Sosa*, 542 U.S. at 729–30.

85. *See infra* Part IV.C.

86. 376 U.S. 398 (1964).

87. *Sosa*, 542 U.S. at 729–30.

88. 630 F.2d 876 (2d Cir. 1980).

89. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (citing *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

*United States* that a “state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention.”<sup>90</sup>

Thus, at the end of *Sosa*, Alvarez-Machain was denied relief under the ATS, but it is not exactly clear why. If the Court had stopped at the end of section III, it would have been clear that Alvarez lost because the ATS was merely jurisdictional and was not a fount of tort liability. Section IV destroyed this clarity by leaving open the possibility that Alvarez had lost because the Court could not agree that it was appropriate to allow CIL to be a base of tort liability in this case—i.e., five justices didn’t think what had happened to him was really, *really* bad. Section IV’s potential impact on U.S. jurisprudence should not be overlooked or brushed aside. Instead, section IV should be seriously critiqued for its *Erie* implications and for its potential to incorporate into U.S. tort law via the ATS international practices that may be distasteful to the U.S. populace.

#### IV. AN ANALYSIS OF *SOSA*’S TAKE ON CIL IN LIGHT OF THE TREATY AND OFFENSES CLAUSES, THE ATS, AND *ERIE*

*Sosa* is important because section IV leaves open the possibility of international customary norms becoming judicially created law. While the United States is a world power that cannot retreat to its old isolationist Monroe Doctrine<sup>91</sup> stance, it is its own nation with a distinct set of ideals and morals, many of which may clash with perceived international, or at least European, notions.<sup>92</sup> Fortunately, despite the Supreme Court’s reliance on cases such as *Filartiga* and *The Paquete Habana*, U.S. law prevents judicially created CIL intrusions. It is the

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90. *Sosa*, 542 U.S. at 737 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987)).

91. The Monroe Doctrine essentially required the United States to stay uninvolved with the politics of other countries until those countries brought their politics to U.S. soil. See James Monroe, *7th Annual Message* (Dec. 2, 1823), in A COMPILATION OF THE MESSAGES OF THE PRESIDENTS 778, 786–87 (James D. Richardson ed., 1911). Perhaps the most brilliant defense of the Monroe Doctrine was the famous Clark Memorandum, authored in 1928 by Calvin Coolidge’s undersecretary of state, J. Reuben Clark, Jr. J. REUBEN CLARK, U.S. DEP’T OF STATE, PUBL’N NO. 37, MEMORANDUM ON THE MONROE DOCTRINE I (1928).

92. The recent Iraq war is a prime example of how U.S. politics, ideals, and goals may differ drastically from the rest of the world—or at least Europe. This gap is illustrated clearly in a report conducted by the Pew Research Center in March 2004. See Pew Research Ctr. for the People & the Press, *A Year After Iraq War: Mistrust of America in Europe Ever Higher, Muslim Anger Persists* (Carroll Doherty ed., 2004), <http://people-press.org/reports/display.php3?ReportID=206>.

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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contention of this Note that *Sosa*'s take on CIL under the ATS (1) violates the history of the ATS's place in constitutional jurisprudence and (2) runs afoul of *Erie*.

At least four arguments support this thesis: First, under the Treaty and Offenses Clauses of the U.S. Constitution, historically only the President and Congress are authorized to recognize and incorporate CIL into U.S. law. Second, the ATS is purely jurisdictional. Third, using the ATS as a source of tort liability would be to create general federal common law violating *Erie*. Fourth, unscrupulous federal judges could use CIL to arbitrarily and selectively advance pet causes.

*A. CIL and the Constitutional History of the Treaty  
and Offenses Clauses*

The Supreme Court in *Sosa* gave short attention to the historical place of CIL in U.S. constitutional law. As noted earlier, CIL was incorporated under the name "Law of Nations," into the Offenses Clause.<sup>93</sup> Furthermore, implicit in the power granted the President by the Treaty Clause is the ability to enter treaties based on international custom. The basic argument is this: because the Treaty and Offenses Clauses grant to the President and Congress respectively the power to determine the role of CIL in the American legal landscape, absent some legislative or executive control, judicial implementation of CIL runs counter to traditional notions of separation of powers, federalism, and popular legal sovereignty in U.S. constitutional jurisprudence.<sup>94</sup> Professor T. Alexander Aleinikoff made this argument plainly when he

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93. See *supra* Part II.B.

94. By "popular legal sovereignty" this Note refers to the commonly held view that the law applied in a country is somehow created by the government of that country at the behest of the populace, free from the unwanted influence of foreign powers. Professor Richard H. Steinberg defined "legal sovereignty" as

a set of attributes that constitutes the legal personality of a state. As a legal concept, "sovereignty" is multidimensional. Domestically, law and philosophy have long recognized the right of a sovereign to *govern affairs within its territory and control its borders*. Internationally, recognized sovereignty has carried with it competence to participate in the international system, conclude treaties on the basis of consent among states, engage in international affairs on the basis of sovereign equality of states, and *exclude other states from interfering in internal affairs*. The international dimensions of legal sovereignty also imply a variety of corollary rights, and states vary in the ways their constitutions protect legal sovereignty. Yet the legal personality of all states is uniform and all states are legally sovereign.

Richard H. Steinberg, *Who is Sovereign?*, 40 STAN. J. INT'L L. 329, 330–31 (2004) (emphases added) (footnotes omitted).

stated, “CIL, after all, is law that is not ‘made in America.’ . . . To enforce CIL as a norm of the U.S. legal system is to subject Americans to laws not of their own making.”<sup>95</sup> However, although CIL is foreign-made law, the application of which may appear to be “un-American,” it does, and always has, played a role in our constitutional system. An examination of CIL’s historical place in the Constitution helps illuminate the drastically different position taken by the modern Supreme Court in *Sosa*.

### *1. Text and history of the Treaty and Offenses Clauses*

The Constitution gives power to Congress and the President to determine CIL’s place in U.S. jurisprudence.<sup>96</sup> The Offenses Clause gives Congress the power to define and punish offenses against the “Law of Nations”<sup>97</sup>—the forerunner of CIL.<sup>98</sup> Likewise, the Treaty Clause allows the President to make treaties, as ratified by the Senate, that explicitly adopt CIL norms.<sup>99</sup> Even though the text of the Constitution does not explicitly or implicitly give the judiciary power to hear offenses against CIL that Congress has not defined,<sup>100</sup> by granting the judiciary

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95. T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 101 (2004).

96. Whether Congress has plenary power to determine CIL’s place in U.S. jurisprudence is a fertile source of conflict. This dispute will be discussed *infra* Part IV.B.2. The President’s power to incorporate CIL into U.S. law via the treaty power has not spawned such conflict.

97. U.S. CONST. art. I, § 8, cl. 10.

98. See *supra* note 14 (quoting Alexander Hamilton and Professor Stuart Jay).

99. U.S. CONST. art. II, § 2, cl. 2.

100. See *infra* Part IV.B.2. Although Professor Jay is correct in stating that “no provision of the Constitution conclusively resolves any question about the extent of powers given by the Constitution to Congress or the executive over matters touching on the law of nations,” Jay, *supra* note 14, at 839, it seems clear, considering the historical records, that Congress and the executive were to have complete substantive and procedural control over the impact of the law of nations within the United States. For instance, Alexander Hamilton’s argument in THE FEDERALIST NO. 80, at 498–99 (Henry Cabot Lodge ed., 1902) shows that the Supreme Court was to have no power to recognize new causes of action based on the law of nations without congressional consent and direction. Hamilton clearly outlined the aspects of the law of nations that were critical to the Framers. *Id.* As Professor Jay clarifies, “[Hamilton] never explicitly stated that Article III encompassed the law of nations in its entirety. Moreover, Hamilton did not assert that the law of nations fell under Article III’s jurisdiction over cases arising under the ‘laws of the United States.’” Jay, *supra* note 14, at 830. The implication of this is that the law of nations had to be clarified and defined before a U.S. court was competent to apply it because such laws did not exist of their own force in the “laws of the United States.” Thus, if the law of nations was not part of the “laws of the United States” that the judiciary had independent competency to define and implement, some other body or bodies had to have the power to determine its place in the constitutional scheme. Congress,

1415] *Customary International Law in Sosa v. Alvarez-Machain*

jurisdiction over all cases involving “Ambassadors, other public Ministers and Consuls”<sup>101</sup> as well as “admiralty and maritime Jurisdiction,”<sup>102</sup> Article III confirms that the law of nations, including CIL, is a part of U.S. law. However, given the plenary control granted to Congress to define the law of nations and offenses against ambassadors and other foreign officials, it is clear that this Article III grant of power is dependent upon Congress’s definition of CIL—i.e., the Article III language allowing federal courts to hear cases involving CIL is merely a grant of jurisdiction, not substantive power.

The U.S. Constitution grants plenary control to Congress to “define and punish . . . Offenses against the Law of Nations.”<sup>103</sup> This grant of power did not spring full-grown into the Constitution. On August 6, 1787, the Committee of Detail presented a draft of the Constitution to the constitutional convention.<sup>104</sup> In that draft, Congress was allowed to “declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations.”<sup>105</sup> Importantly, Congress could only punish offenders of the law of nations, not define the law of nations. On August 17, James Madison argued that Congress be empowered to “define,” rather than “declare,” the law of piracies and felonies, because “felony” was too vague a term and “no foreign law should be a standard farther than is expressly adopted.”<sup>106</sup> Madison’s arguments prevailed, and the September 12 draft of the Constitution stated that Congress could “define and punish piracies and felonies committed on the high seas, and [punish] offences against the law of nations.”<sup>107</sup> Thus, the Constitution allows Congress only to *punish* “offences against the law of nations,”<sup>108</sup> and Madison’s argument regarding piracy and felonies reveals that Convention delegates were at

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by its structure, function, and textual grants, is the logical primary source with the executive coming close at its heels.

101. U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.”).

102. *Id.* art III, § 2, cl. 1.

103. *Id.* art. I, § 8, cl. 10.

104. *See* 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 176 (1966).

105. *Id.* at 182.

106. *Id.* at 316.

107. *Id.* at 595.

108. U.S. CONST. art. I, § 8, cl. 10.

least somewhat wary of transplanting international norms into U.S. criminal law.

The final debates shaping the Offenses Clause show that offenses against the laws of nations were to be defined solely by Congress. On September 14, Gouverneur Morris successfully argued that the word “punish” should be removed from before the phrase “offences against the law of nations.” Doing so, he argued, would ensure that Congress would be vested with plenary authority to both define and punish such offenses.<sup>109</sup> James Wilson argued, on the other hand, that doing so would be inappropriate because the law of nations depends “on the authority of all the Civilized Nations of the World,” and flouting those nations would “have a look of arrogance that would make us ridiculous.”<sup>110</sup> Morris defended his position by stating that “the law of nations [was] often too vague and deficient to be a rule.”<sup>111</sup> After this debate, the Convention approved Morris’s suggestion, and the Offenses Clause attained its current shape: “Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”<sup>112</sup> Commenting on the course of these debates, two commentators have stated that the debates outlined above provide the following insights:

First, Wilson’s objection demonstrates that members of the convention understood that the law of nation[s] was derived by the consent of all civilized nations, and was not created by a single country. . . . Second, it must be noted that Gouverneur Morris’s reply showed that the law of nations was considered to be too vague, and it was desirable to create a more definite method to define the law than merely relying on the consent of the “Civilized Nations of the World . . . . There was no doubt the United States would have to function under the law of nations, and it would therefore be necessary to have a clear definition of what the law of nations was in order to function and adjudicate under its terms.”<sup>113</sup>

The Convention’s understanding of the Offenses Clause was duly represented to the states during the ratification period via the Federalist

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109. FARRAND, *supra* note 104, at 614.

110. *Id.* at 615.

111. *Id.*

112. U.S. CONST. art. I, § 8, cl. 10.

113. Richard G. Wilkins & Suzanne H. Curley, *Defining Offenses Against the Law of Nations: A Statutory Solution To Determine the Binding Effects of International Law* 11–12 (unpublished manuscript, on file with author).

1415] *Customary International Law in Sosa v. Alvarez-Machain*

Papers. Beginning with the broad recognition that national security requires the federal government have plenary control over decisions regarding the law of nations,<sup>114</sup> the authors conclude that even members of the House of Representatives, who are not as involved in foreign affairs as Senators, “ought not to be altogether ignorant of the law of nations; for that, as far as it is a proper object of municipal legislation, is submitted to the federal government.”<sup>115</sup> Importantly, Madison described this power as being a “proper object of municipal *legislation*.”<sup>116</sup> Furthermore, Alexander Hamilton, who persuasively argued that federal courts should have jurisdiction over cases involving the law of nations, never intimated that the federal judiciary has any power to *define* the law of nations.<sup>117</sup> Thus, it seems relatively clear that the Framers of the Constitution intended for the law of nations to be defined through legislation. The Supreme Court would then apply the law as defined by Congress—a textbook example of separation of powers.

Aside from constitutional text, early court cases indicated that the law of nations has always been a part of U.S. law. In 1790, Chief Justice Jay, riding circuit, instructed a grand jury that “[w]e had become a nation—as such, we were responsible to others for the observance of the Law of Nations.”<sup>118</sup> Additionally, in 1987, the American Law Institute stated that “customary international law in the United States is federal law and its determination by the federal courts is binding on the State

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114. THE FEDERALIST NO. 3, at 14 (John Jay) (Henry Cabot Lodge ed., 1902). (“It is of high importance to the peace of America that she observe the laws of nations towards all [foreign] powers, and to me it appears evident that this will be more perfectly and punctually done by one national government than it could be either by thirteen separate States or by three or four distinct confederacies.”); THE FEDERALIST NO. 42 (James Madison) (Henry Cabot Lodge ed., 1902). (“The power to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, belongs . . . to the general government. . .”).

115. THE FEDERALIST No. 53, at 337 (James Madison) (Henry Cabot Lodge ed., 1902).

116. *Id.* (emphasis added).

117. THE FEDERALIST NO. 80, at 496 (Alexander Hamilton) (Henry Cabot Lodge ed., 1902) (“A distinction may perhaps be imagined between cases arising upon treaties and the laws of nations and those which may stand merely on the footing of the municipal law. The former kind may be supposed proper for the federal jurisdiction, the latter for that of the States. . . . So great a proportion of the cases in which foreigners are parties, involve national questions, that is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.”).

118. John Jay, *Charge to the Grand Jury of the Circuit Court for the District of New York* (Apr. 12, 1790), in Jay, *supra* note 14, at 821–22; see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”). However, as will be seen, such broad statements, made in the era of *Swift v. Tyson*, must be taken with an *Erie* grain of salt. See *infra* Part IV.C.

courts.”<sup>119</sup> Thus, as constitutional text and historical evidence make clear, CIL does, and always has, played a role in U.S. law. Although the statement by the ALI that CIL is federal law may be interpreted to mean that CIL has already been entirely incorporated into federal law, there are two reasons this interpretation runs aground: (1) as will be seen in the discussion concerning *Erie*, the ALI has rejected the notion of such whole-hog incorporation as set out in *Filartiga v. Pena-Irala*; therefore, (2) CIL can be incorporated only via the constitutionally approved method which would appear, at least textually, to be the method described above. In short, it cannot be doubted that some CIL norms are part of U.S. federal law, and that federal court judgments based upon those recognized norms are binding upon the states, but the CIL norms that federal courts do apply are defined by Congress. Therefore, CIL in its entirety is not part of U.S. law.<sup>120</sup> Only those parts explicitly adopted through the representative republican system can give rise to cognizable causes of action.

It seems most prudent, given the Supremacy Clause, that either the President or Congress be vested with the gate-keeping power over CIL—a position not allowed by the *Sosa* decision.<sup>121</sup> As stated by Professor Roger P. Alford, the traditionally appropriate methods for deciding constitutional questions are analysis of “text, structure, history, and national experience.”<sup>122</sup> “Including a new source [such as CIL] fundamentally destabilizes the equilibrium of constitutional decision making. Using international law as an interpretive aid . . . ignores the Supremacy Clause, which renders all of our laws subject to, and not source material for, our Constitution.”<sup>123</sup> Furthermore, if such a violation of the Supremacy Clause were allowed, federalism would likely become a word without meaning. If federalism means anything, it means that the individual states in the U.S. have retained plenary control over those areas they have not surrendered to the federal government via the

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119. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.3 (1987).

120. See *supra* note 100 (discussing FEDERALIST No. 80); see also *infra* note 149.

121. As will be discussed, the federal judiciary is poorly situated to play the gatekeeper in questions regarding CIL’s place in U.S. law. Aside from the persuasive historical arguments that appear to vest plenary control over determinations of CIL in U.S. law outside of the treaty context in Congress, if a federal court uses CIL to recognize a cause of action, it is arguably running afoul of the *Erie* doctrine. See *infra* Part IV.C.

122. Roger P. Alford, *Misusing International Sources To Interpret the Constitution*, 98 AM. J. INT’L L. 57, 57 (2004).

123. *Id.* at 57–58.

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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Constitution.<sup>124</sup> If all of CIL is incorporated without legislative consent,<sup>125</sup> and if it is correct that the constitutional text vests plenary authority to determine CIL's effect in the U.S. with Congress and the President, then the states have either been stripped of a significant piece of sovereignty without consent or have somehow consented to give it up. Although there are commentators and judges who argue that in drafting the Constitution the states did give up all sovereignty in areas controlled by CIL,<sup>126</sup> this argument is ultimately self-destructive. If the states have given up all control through the Constitution in areas affected by CIL, what would have been the purpose of drafting a Constitution? By allowing the possibility of future judicial incorporation of the entire corpus of CIL norms into ATS cases, the Supreme Court in *Sosa* either did not appreciate the magnitude of the potential infringement on federalist structures, or it did not care. By so doing, the ATS has become a potentially powerful tool for restructuring foundational constitutional structures.

## 2. *Sosa and the historical understanding of the ATS*

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124. See *Federal Government*, BLACK'S LAW DICTIONARY 740 (rev'd 4th ed. 1968).

In strict usage, there is a distinction between a confederation and a federal government. The former term denotes a league or permanent alliance between several states, each of which is fully sovereign and independent, and each of which retains its full dignity, organization, and sovereignty, though yielding to the central authority a controlling power for a few limited purposes, such as external and diplomatic relations. In this case, the component states are the units, with respect to the confederation, and the central government acts upon them, not upon the individual citizens. In a federal government, on the other hand, the allied states form a union—not, indeed, to such an extent as to destroy their separate organization or deprive them of *quasi* sovereignty with respect to the administration of their purely local concerns, but so that the central power is both external and internal—while the administration of national affairs is directed, and its effects felt, not by the separate states deliberating as units, but by the people of all, in their collective capacity, as citizens of the nation. The distinction is expressed, by the German writers, by the use of the two words “Staatenbund” and “Bundesstaat;” the former denoting a league or confederation of states, and the latter a federal government, or state formed by means of a league or confederation.

*Id.*; see also *Federal*, BLACK'S LAW DICTIONARY 625 (rev'd 7th ed. 2001) (defining the term *federal* as “[o]f or relating to a system of associated governments with a vertical division of governments into national and regional components having different responsibilities”).

125. As stated earlier, CIL has the potential to influence virtually every aspect of law, from business incorporation to speed limits. See *infra* Part IV.D. Although speed limits may not be within CIL's historical ambit, the modern trend in CIL usage would tend to allow it.

126. See Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT'L L. & POL'Y 787 n.71 (1998); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980) (“[I]nternational law has an existence in the federal courts independent of acts of Congress is the long-standing rule of construction.”).

Although this Note has not yet addressed whether the controversy regarding whether the ATS is purely jurisdictional,<sup>127</sup> it must be noted at this point that language in section III of *Sosa*, on its surface, appears to run counter to the argument that the “law of nations,” as invoked by the ATS, must be defined only by Congress. The Court states that “[t]here is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely”<sup>128</sup> and that

there 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.<sup>129</sup>

This Note contends that these statements do not legitimate federal court action in creating new causes of action based on CIL.

The Constitution fundamentally altered the method of creating the law of nations. While it is true that (1) the body of law known as the “law of nations” was a common law creation, (2) Congress would not likely have passed the ATS if it were to lie dormant indefinitely, and (3) early courts applied the law of nations, via the ATS, as part of the common law,<sup>130</sup> the law of nations that was applied was clearly limited and historically defined.<sup>131</sup> Although federal courts used the ATS to hear common law cases arising under the law of nations, such cases were strictly proscribed by the historical meaning of the term of art “law of nations.”

Thus, given that the “law of nations,” despite its partially judicial source, was a defined body of law,<sup>132</sup> once the Offenses Clause gave Congress the power to define it, the Constitution invalidated the common law method of expanding the law of nations. Furthermore, as the Court in

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127. See *infra* Part IV.B.

128. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 719 (2004).

129. *Id.*

130. The Supreme Court cites specifically to the admiralty cases of *Bolchos v. Darrel*, 3 F. Cas. 810 (No. 1607) (D.C.S.C. 1795), and *Moxon v. Fanny*, 17 F. Cas. 942 (No. 9895) (D.C. Pa. 1793). See *Sosa*, 542 U.S. at 720–21.

131. The law of nations as applied in this common law context did not include the ability to determine damages. For instance, in the decision of *Moxon v. Fanny*, the federal court decided that the ATS—and thus the law of nations—was “not the proper vehicle for suit because ‘[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for.’” *Sosa*, 542 U.S. at 720 (quoting *Moxon*, 17 F. Cas. 942).

132. See *supra* note 17 and accompanying text.

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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*Sosa* noted, “[W]e have found no basis to suspect [the First] Congress had any examples in mind beyond those torts corresponding to Blackstone’s three primary offenses . . . .”<sup>133</sup> Finally, even if the Constitution did not invalidate the common law method of creating the law of nations, given *Erie*, it would be inappropriate for any federal court to maintain that the early history of ATS litigation grants them the right to entertain hitherto unrecognized causes of action.<sup>134</sup>

In sum, as the Supreme Court correctly stated,

[A]lthough the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. [It] 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.<sup>135</sup>

At this point, the Court should have concluded its analysis. The case was decided—Alvarez lost. He had alleged that CIL forbade his “arbitrary detention.”<sup>136</sup> However, neither the original Blackstone torts nor congressional statutory law included this as an actionable offense. History, the Constitution, and *Erie* all favored stopping here, sending Alvarez home, and leaving the definition of further CIL offenses up to Congress. Prior to this point, the proverbial baby—i.e., the answer to the question whether federal courts had the power to create new causes of action under CIL—was whole.

In affirming the possibility that CIL may become a source of tort liability via the ATS, the Supreme Court in *Sosa* rejected the historical and textual view that Congress and the President have complete control over the implementation of CIL norms in U.S. law. The argument could be raised that Congress defined the law of nations by passing the ATS. However, as will be seen in a later Section, to infuse the ATS with such substantive meaning requires a torturous twisting of the ATS’s text.

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133. *Sosa*, 542 U.S. at 724.

134. *See infra* Part IV.C.

135. *Sosa*, 542 U.S. at 724.

136. *Id.* at 735–36.

B. *The ATS Is Purely Jurisdictional*

The Supreme Court should have taken a deep, slowing breath before investing the ATS with substantive powers. The ATS's two-hundred year existence belies its scanty use. According to Curtis A. Bradley, the ATS "was an insignificant source of federal court jurisdiction during most of its history."<sup>137</sup> In 1975 Judge Henry Friendly of the Second Circuit said that the ATS was "a kind of legal Lohengrin; although it has been with us since the first Judiciary Act . . . no one seems to know whence it came."<sup>138</sup> Given this dearth of instruction, the Court should have taken that steadying breath after reading the simple text of the ATS. The ATS does not grant substantive powers to determine tort liability; it merely grants jurisdiction. This position is supported by two arguments: (1) the ATS, on its own terms, is merely jurisdictional, and (2) the ATS was drafted by the same people who drafted the Offenses Clause. Thus, even if the language of the ATS is vague, it seems unlikely that the same people would grant to the federal judiciary via statute the power denied the judiciary by the Constitution.

1. *The ATS's jurisdictional language and ambiguity*

The relevant portion of section 9 of the ATS as drafted in 1789 states that "the district courts . . . shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, 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."<sup>139</sup> This apparently straightforward language, nestled in section 9's multiple grants of jurisdiction, has given rise to a heated debate concerning whether this language, which still stands largely unchanged today,<sup>140</sup> is as purely jurisdictional as the rest of the Section 9 grants.<sup>141</sup>

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137. Bradley, *supra* note 21, at 588.

138. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975); *see also Sosa*, 542 U.S. at 712 (citing *Vencap*, 519 F.2d at 1015).

139. Judiciary Act of 1789 § 9, available at [http://www.constitution.org/uslaw/judiciary\\_1789.htm](http://www.constitution.org/uslaw/judiciary_1789.htm).

140. 28 U.S.C. § 1350 (2000).

141. The entire text of section 9 of the 1789 statute reads as follows:

*And be it further enacted*, That the district courts shall have, exclusively of the courts of the several States, cognizance of all crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months,

1415] *Customary International Law in Sosa v. Alvarez-Machain*

The alleged ambiguity of the language has resulted in two divergent interpretations, both drawing on history for support: (1) the ATS is purely jurisdictional; and (2) the ATS implicitly recognizes the federal courts' ability to recognize torts arising from "violation of the law of nations." For ease of understanding, this Note will refer to proponents of the first interpretation as Jurisdictionalists, and proponents of the second interpretation as Expansionists.

Jurisdictionalists argue that the ATS merely grants jurisdiction over a separate legislatively defined group of claims.<sup>142</sup> This jurisdictional argument asserts that the term "law of nations" was a clearly understood term of art defined by Blackstone in his *Commentaries*. They argue that the term, in the civil realm, is limited to questions regarding "mercantile questions, such as bills of exchange . . . in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . [and] in all

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is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. *And shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, 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.* And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several States, of all suits against consuls or vice-consuls, except for offences above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

The Judiciary Act of 1789, available at [http://www.constitution.org/uslaw/judiciary\\_1789.htm](http://www.constitution.org/uslaw/judiciary_1789.htm) (emphases added).

142. Members of this camp include Justice Scalia, see *Sosa*, 542 U.S. at 743 (Scalia, J., concurring) ("The Court's detailed exegesis of the ATS conclusively establishes that it is 'a jurisdictional statute creating no new causes of action.'" (quoting the majority opinion, 542 U.S. at 724)); the Pacific Legal Foundation, see Brief for Pac. Legal Found. as Amici Curiae Supporting Petitioners, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), 2004 WL 177035, at \*2 n.2 [hereinafter Pac. Legal Found. Brief] ("Amicus agrees with Petitioner's arguments that the ATS does not provide a cause of action given the absence of an express grant in the statute."); and Robert Bork, see *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801 (D.C. Cir. 1984) (Bork, J., concurring) (arguing that reading statutes such as the ATS as creating causes of action is "fundamentally wrong and certain to produce pernicious results"). See also *Montana-Dakota Utilities Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951) ("The Judicial Code, in vesting jurisdiction in the District Courts, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions.").

disputes relating to prizes, to shipwrecks, to hostages, and ransom bills.”<sup>143</sup> In the criminal realm, the law of nations was limited to the crimes of piracy, infringement of ambassadorial rights, and violation of safe conduct of ambassadors.<sup>144</sup> This narrow definition of the “law of nations” primarily concerns offenses against entire states or nations.<sup>145</sup> Thus, because the term “law of nations” is clearly delineated in the common law, to give it any other meaning would be improper. Consequently, Jurisdictionalists argue that by using the term “law of nations” in the ATS, the First Congress intended only to grant jurisdiction over a discrete and limited body of law.

Proponents of this view argue that, on its face, the Constitution gives the legislative and executive branches all substantive power over both international relations<sup>146</sup> and the impact of international law in the United States.<sup>147</sup> Central to this argument is the language of the Offenses Clause granting Congress the power to “define and punish . . . Offenses against the Law of Nations.”<sup>148</sup> The Judiciary is granted no such substantive power in the Constitution.<sup>149</sup> Jurisdictionalists also rely upon the Supreme Court’s statement in *Oetjen v. Central Leather Co.* that questions of international law and relations are entirely “committed by the Constitution to the Executive and Legislative—‘the political’—Departments.”<sup>150</sup> Jurisdictionalists also point to *Erie* as support for their

143. BLACKSTONE, *supra* note 17, at \*67.

144. *Id.* at \*68.

145. *Id.*

146. Among its many duties, Congress is entrusted with the following powers, which have international scope: control import taxes, U.S. CONST. art. I, § 8, cl. 1.; regulate international commerce, *id.* cl. 3; control naturalization procedures, *id.* cl. 4; establish post offices, *id.* cl. 7.; declare war *id.* cl. 11.; raise armies *id.* cl. 12; and provide for a navy, *id.* cl. 13. The President is the commander in chief of the U.S. military, *id.* cl. 1; and, has the treaty making power, together with the Senate, *id.* cl. 2.

147. The President and Senate together have the power to bind America to international treaties. *Id.* art. II, § 2 cl. 2; *see also id.* art. I, § 8, cl. 10.

148. *Id.* art. I, § 8, cl. 10.

149. The closest Article III comes to giving the judiciary the power to determine the effect of international law within the United States is in section 2: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . .” *Id.* art. III, § 2, cl. 1. While it has been argued with some success that “the Laws of the United States” includes international law, *see, e.g.,* *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d. Cir. 1980); *Paquete Habana*, 175 U.S. 677 (1900); *Nereide*, 13 U.S. 388 (1815), these arguments fundamentally misunderstand the nature of federal common law as set out in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Under the *Erie* doctrine, it is much safer to take the Constitution at face value and vest Congress with complete control over defining such offenses. *See infra* Part IV.C.

150. *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918).

1415] *Customary International Law in Sosa v. Alvarez-Machain*

argument that using the ATS to recognize judicially created causes of action would amount to unconstitutional federal common law.<sup>151</sup> Furthermore, jurisdictionalists argue that, because questions of international law and relations are inherently political and “cannot with any accuracy be completely ascertained, and defined in any public code, recognized by the common consent of nations,”<sup>152</sup> courts are inherently ill-equipped to answer such questions. As the Pacific Legal Foundation argued in its amicus brief in *Sosa*, “[T]he ‘law of nations’ must be defined by someone. Both by explicit command and structural imperative, the Constitution compels the conclusion that only Congress should have this power.”<sup>153</sup>

Expansionists argue that the ATS implicitly recognizes the federal judiciary’s ability to recognize new causes of action. This position is clearly stated in *Sosa*.<sup>154</sup> In that opinion, the Court stated that “other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.”<sup>155</sup> Advocates of this viewpoint often refer to early Supreme Court decisions that interpreted the “law of nations” as including more than the original Blackstonian torts.<sup>156</sup> For instance, after making the assertion that the door is still open under the ATS for judicial recognition of previously unknown causes of action based on international norms, the Supreme Court in *Sosa* quoted its decisions in *The Paquete Habana*<sup>157</sup> and *The Nereide*.<sup>158</sup> In those decisions, dating from 1900 and 1815 respectively, the Court stated that the federal courts must hear and decide causes of action not defined by Congress but sounding in the law

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151. See *infra* Part IV.C.1.

152. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1163 (2d ed. 1851).

153. Pac. Legal Found. Brief, *supra* note 142, at \*3–4.

154. 542 U.S. 692.

155. *Id.* at 729. See generally Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Jordan J. Paust, *Domestic Influence of the International Court of Justice*, 26 DENV. J. INT’L L. & POL’Y 787 (1998). For more citations to works outlining the Expansionist view, see Bradley & Goldsmith, *supra* note 10, at 837 n.151.

156. See Brilmayer, *supra* note 155, at 301; Louis Henkin, *supra* note 155, at 1555.

157. 175 U.S. 677 (1900).

158. 13 U.S. 388 (1815). Although the Court also cited *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), this citation is particularly inapt in the ATS context because the ATS is concerned with alien tort claims and *Texas Industries* dealt with “international disputes implicating . . . our relations with foreign nations.” *Id.* at 641.

of nations.<sup>159</sup> As expressed by Curtis A. Bradley, proponents of this argument suggest

there would have been no reason for the First Congress to create a federal statutory cause of action for torts in violation of the law of nations. The law of nations was considered at that time to be part of the general common law, which could be applied by courts in the absence of controlling positive law to the contrary.<sup>160</sup>

Interestingly, Expansionists also rely on Blackstone. They contend that because Blackstone recognized international mercantile law to be a valid part of private civil actions under the English common law, to prohibit the courts from behaving as they traditionally behaved would be anachronistic and unjustified.<sup>161</sup> Because they believe Blackstone included the law of nations as part of the common law, Expansionists argue that courts do not need legislative approval to hear such cases.<sup>162</sup>

Thus, both sides look to history in support of their interpretation of the ATS, and the differing interpretations of the same history suggest that history alone is inconclusive. This Note now considers an additional factor to help explain the ATS: the Offenses Clause. Close examination of the Offenses Clause tends to show that Judge Friendly's statement that the ATS is a "legal Lohengrin"<sup>163</sup> with no apparent roots fails when considered in light of the events leading to the First Judiciary Act of 1789.

## 2. *The ATS in light of the Offenses Clause*

Because the Constitution and the 1789 Judiciary Act were passed within one year of each other, and because constitutional framers were also members of the First Congress, the debates regarding the Offenses Clause shed light on the question of whether the ATS is more than jurisdictional. It is difficult to believe that the views of the members of the First Congress had changed significantly in the intervening months

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159. *The Paquete Habana*, 175 U.S. at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.").

160. Bradley, *supra* note 21, at 595.

161. See Brief for Professors of Fed. Jurisdiction and Legal History as Amici Curiae Supporting Respondents, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (Nos. 03-339, 03-485), 2004 WL 419425 at \*12 (quoting Blackstone's *Commentaries* regarding the application of international mercantile law in private civil actions under the English common law).

162. See *id.* at \*13.

163. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975).

1415] *Customary International Law in Sosa v. Alvarez-Machain*

between drafting the Constitution and enacting the 1789 Judiciary Act. In short, looking at the historical understanding of the Offenses Clause, it seems unlikely that the ATS was intended to be anything other than jurisdictional.

The debates regarding the Offenses Clause, the Clause's final form, and the clarifications provided by The Federalist Papers, make it fairly clear that the Framers intended Congress to have sole power to define offenses against the law of nations.<sup>164</sup> If Congress was to have complete control over the definition of offenses against the law of nations, Congress would be constitutionally unable, absent an amendment, from vesting such authority in the Court.<sup>165</sup> Constitutional provisions cannot be altered by normal legislative action; such alteration comes only by amendment.<sup>166</sup> Because the ATS was normal legislation, it could not have altered the original meaning of the Constitution.

In passing the Judiciary Act of 1789, the First Congress was acting pursuant to its constitutional power to vest judicial power in "such inferior Courts as the Congress may from time to time ordain and establish."<sup>167</sup> The Judiciary Act created the first federal court system by establishing trial and appellate courts and jurisdictional bounds.<sup>168</sup>

In 1790, within a year of passing the ATS, Congress explicitly exercised its Offenses Clause power and, based upon the law of nations, passed a statute criminalizing piracy.<sup>169</sup> This early and explicit use of Offenses Clause power lends significant credence to the argument that the ATS was meant to be purely jurisdictional. If the ATS were more than purely jurisdictional, it would be unnecessary to pass a separate statute explicitly criminalizing piracy—an offense so clearly understood

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164. *See supra* Part IV.A.1.

165. Although Congress is allowed to vest limited legislative authority in executive administrative agencies, *see* *I.N.S. v. Chadha*, 462 U.S. 919, 955 (1983), Congress has no power to vest such authority in Article III courts.

166. U.S. CONST. art. V; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.").

167. U.S. CONST. art. III, § 1, cl. 1.

168. *City of Greenwood v. Peacock*, 384 U.S. 808, 836–37 (1966) (Douglas, J., dissenting).

169. *See* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113–14 (codified at 18 U.S.C. § 1651 (2000)).

to violate the law of nations that it is expressly mentioned in the Offenses Clause of the Constitution.<sup>170</sup>

The upshot of all of this is that in *Sosa*, the Supreme Court should have stopped after finishing section III. In that section, the Court correctly ascertained that the ATS was merely jurisdictional. History, text, and practice all required that the ATS remain a jurisdictional grant. However, even if the Court were able to prove that the ATS is substantive, it still should have denied the claim that the ATS is a viable fount of tort liability for the simple reason that *Erie* forbids it.

### C. *Sosa* and *Erie* v. *Tompkins*

Viewing the ATS as allowing courts to hear cases arising out of customary international law without congressional or executive guidance, as the Court did in *Sosa*, requires turning a blind eye to *Erie* v. *Tompkins*.<sup>171</sup> The trend during the mid-twentieth century appears to have been to allow federal courts to apply CIL as part of the federal common law, a valid body of law even under *Erie*.<sup>172</sup> However, according to *Erie*

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170. U.S. CONST. art. I, § 8, cl. 10.

171. 304 U.S. 64 (1938).

172. Although beyond the scope of this Note, it is important to be familiar with the basic justifications given for allowing federal courts to treat CIL as federal common law. The two most influential justifications come from a judicial decision out of the Second Circuit, and the American Law Institute's RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES.

In *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), the court held that "United States courts are 'bound by the law of nations, which is a part of the law of the land.'" *Id.* at 887 (citing *The Nereide*, 13 U.S. (9 Cranch) 388, 422 (1815)). While this decision, delivered forty-two years after *Erie*, would seem to disprove the thesis that CIL is not federal common law, the Second Circuit's decision is fundamentally flawed. The case arose out of a conflict between Paraguayan citizens. A group of Paraguayans sued another Paraguayan for acts of torture committed in Paraguay under color of Paraguayan law. *Id.* at 878. The plaintiffs sued the defendant in U.S. district court, claiming that CIL prohibited such torture. The plaintiffs argued that the ATS granted jurisdiction because the statute gave all federal district courts jurisdiction over "any civil action by an alien for a tort . . . committed in violation of the law of nations." *Id.* at 880. The Second Circuit's opinion turned on this threshold question of jurisdiction. The Second Circuit based its decision on *The Paquete Habana*, 175 U.S. 677 (1900). *Id.* ("The *Paquete Habana* . . . reaffirmed that where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations." (quoting *The Paquete Habana*, 175 U.S. at 700)). However, as will be seen, the reference to *The Paquete Habana* was inappropriate. *The Paquete Habana* was a decision based on notions of general common law that *Erie* conclusively rejected. In short, *The Paquete Habana* dealt with a now-extinct area of law and holds no modern precedential value.

The American Law Institute has also stated that "International law . . . [is] law of the United States and supreme over the law of the several States." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111(1) (1987). In the comments to section 111, the reporters note that "[c]ustomary international law is considered to be like common law in the United

1415] Customary International Law in *Sosa v. Alvarez-Machain*

and its progeny, incorporating CIL via the ATS would be an exercise not in valid federal common law, but in the invalid general federal common law. Thus, CIL would only be a viable source of tort law if the limitations placed on federal common law are reversed and the Court returns to the *Swift v. Tyson* days of general federal common law.

*1. General federal common law versus federal common law*

Although *Erie* gutted general federal common law, federal courts may apply federal common law interstitially. Because *Erie* requires that law come from a domestic sovereign source, federal courts may make common law only if authorized to do so.<sup>173</sup> Today, authorization exists for federal courts to create common law in areas including: ERISA litigation,<sup>174</sup> labor-management disputes,<sup>175</sup> litigation between states,<sup>176</sup> and in litigation involving the acts of foreign countries.<sup>177</sup> Although much of this federal common law stems from gaps in statutory language, the Court has explicitly held that federal common law cannot be used to create private rights of action absent affirmative evidence of congressional intent that the courts do so.<sup>178</sup>

No current law, constitutional or statutory, affirmatively grants federal courts free rein to create federal common law based on CIL. As has been argued before, Articles I and II grant to Congress and the

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States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State courts." *Id.* § 111 cmt. d. Thus, the Restatement states, in a roundabout manner, that CIL is federal common law binding on the states. Unfortunately, the ALI cited no authority for this position and seems to have "bootstrapp[ed]" its argument together based on similarly unsupported statements in essays written by the Chief Reporter. Bradley & Goldsmith, *supra* note 10, at 836. Furthermore, the ALI did not invoke *Filartiga* because it rested on inappropriate nineteenth-century precedent.

*Filartiga* and the RESTATEMENT (THIRD) have been referred to as the two pillars of the view that CIL is federal common law. *Id.* at 834. Interestingly, these two pillars conflict because the ALI specifically rejected the Second Circuit's reasoning. Nevertheless, they are the two most oft-invoked justifications for expanding federal court power under CIL. For an in-depth critique of these justifications, see *id.* at 831–37.

173. ERWIN CHEMERINSKY, FEDERAL JURISDICTION ch. 6 (4th ed. 2003); see also Bradley & Goldsmith, *supra* note 10, at 856 ("Courts and scholars generally agree that federal common law must be authorized in some fashion by the Constitution or a federal statute.").

174. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

175. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

176. *Kansas v. Colorado*, 206 U.S. 46 (1907).

177. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). For a more complete summary of areas in which federal courts are authorized to create federal common law, see CHEMERINSKY, *supra* note 173 at 362–89.

178. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

President sole power to determine CIL's position in U.S. law.<sup>179</sup> Congress and the President control the issue and have not been slack in using their constitutionally granted power.<sup>180</sup> However, neither the President nor "Congress [have ever] purported to incorporate all of CIL into federal law."<sup>181</sup> Furthermore, as Bradley and Goldsmith argue, "selective incorporation would be largely superfluous if CIL were already incorporated wholesale into federal common law."<sup>182</sup> Therefore, except for the specific cases when Congress through statute, or the President through duly ratified treaty, has granted federal courts common law power based on CIL, there is no evidence of a general grant of common law power in areas affected by CIL.

Finally, there is no case law consistent with the *Erie* doctrine that allows federal courts federal common law power regarding CIL. Relatively recent court decisions to the contrary, such as *Filartiga v. Pena-Irala*, which often invoke *The Paquete Habana*<sup>183</sup> and *The Nereide*<sup>184</sup> as justification for whole-sale incorporation of CIL into federal law, fail to consider that those cases made that determination based on a subsequently discredited system of law.<sup>185</sup> The impropriety of

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179. *See id.*

180. *See id.*

181. Bradley & Goldsmith, *supra* note 10, at 857.

182. *Id.*

183. 175 U.S. 677 (1900).

184. 13 U.S. 388 (1815).

185. The Supreme Court decided *The Paquete Habana* after the District Court for the Southern District of Florida condemned two Cuban fishing vessels, the *Paquete Habana* and the *Lola*, as prizes of war. Both vessels were unarmed fishing boats owned by Cuban nationals who were not aware of the naval blockade, and both ships lost their cargo of fish. *The Paquete Habana*, 175 U.S. at 678–79. The question, as framed by the Supreme Court, was whether "the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain." *Id.* at 686. Although the answer the Court reached appeared to be the only truly just decision (that the condemnations were wrong), the method the Court used to get there was only appropriate under a system countenancing general common law. The Court's answer to this question made liberal use of international sources such as 2 ORTOLAN, REGLES INTERNATIONALES ET DIPLOMATIE DE LA MER (4th ed.); 4 CALVO, DROIT INTERNATIONAL (5th ed.); BYNKERSHOEK, QAESTIONES JURIS PUBLICAE; and CLEIRAC, US ET COUTUMES DE LA MER, together with its personal exegeses of English fishing law under Henry IV in 1403 and French fishing law under Louis XVI in 1779. *The Paquete Habana*, 175 U.S. at 686–700. The only controlling U.S. precedent that appears to have influenced the Court were the decisions in *Jones v. United States*, 137 U.S. 202 (1890), and *Underhill v. Hernandez*, 168 U.S. 250 (1897). *See The Paquete Habana*, 175 U.S. at 696. However, these decisions deal with extending U.S. criminal jurisdiction over islands discovered by U.S. citizens and the power of a federal court to review the political acts of sovereign nations respectively. They were also decided under the general common law scheme. The Supreme Court's scant use of U.S. law in deciding *The Paquete Habana* can be justified only under a general common law system that allowed such rambling use of non-U.S. precedent. *See supra* note 27 and

1415] *Customary International Law in Sosa v. Alvarez-Machain*

a modern court relying on *The Paquete Habana* in cases involving alleged violations of CIL is almost indistinguishable from the impropriety of a modern court relying on *Dred Scott v. Sandford*<sup>186</sup> in cases involving racial categories—use of either decision is illogical, ill-conceived, and illegitimate in modern jurisprudence. Although *Dred Scott* and its issues stir up more visceral reactions than *The Paquete Habana*'s relatively dry jurisdictional concerns, the logical fallacies underlying both cases—such as a judge's unfounded personal “take” on the issue<sup>187</sup>—are similar and improper. Even the American Law Institute, one of the major proponents of CIL as federal common law, recognizes this.<sup>188</sup> Customary International Law cannot be federal common law unless we are willing to abandon *Erie* and return to the caprices of general common law.<sup>189</sup>

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accompanying text (regarding how general common law worked). Although the outcomes in *The Paquete Habana*, *Jones*, and *Underhill* may have been “right,” and although the current Court might decide similarly if the cases arose today, the method of reaching those outcomes—via some sort of grant of power from Congress or the President—would be fundamentally different.

186. 60 U.S. 393 (1856).

187. *Dred Scott* was nothing if not unfounded. In a futile attempt to justify racial classifications, Chief Justice Taney propounded the idea that the Constitution permitted creating two classes of human, one of which was not to receive the rights granted to the other. Although the Constitution (1) contains the infamous Fugitive Slave Clause, U.S. CONST. art. 4, § 2, cl. 3; (2) protected slavery until 1808, *id.* art. 1, § 9, cl. 1; and (3) counted slaves as three-fifths of white people for taxation and representation, *id.* art. 1, § 2, cl. 3. Taney's statement in *Dred Scott* that the Constitution creates multiple classes of citizens has gone down in history as unfounded and politically motivated. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 36–37 (1975) (“A majority of the Supreme Court seized on the concept of citizenship in the *Dred Scott* case, in a futile and misguided effort, by way of a legalism and an unfounded legalism at that, to resolve the controversy over the spread of slavery.”); Robert Meister, *Sojourners and Survivors: Two Logics of Constitutional Protection*, 3 U. CHI. L. SCH. ROUNDTABLE 121, 130 (1996) (criticizing the antebellum logic of John Codman Hurd, Meister states, “His treatise was thus an indirect answer to Lincoln's ‘house divided’ speech, and also to Taney's unfounded assumption in *Dred Scott* that to exist anywhere in the United States slavery must be recognized everywhere in the United States.”); Eric J. Mitnick, *Three Models of Group-Differentiated Rights*, 35 COLUM. HUM. RTS. L. REV. 215, 238 (2004) (“In virtue of some rather abrupt and tortured logic, Taney first equated the rarely invoked constitutional investitive standard of citizenship with the broader and clearly distinct investitive norm of personhood: ‘The words “people of the United States” and “citizens” are synonymous terms, and mean the same thing.’ . . . Taney, of course, concluded that constitutional rights, even those ostensibly afforded to ‘persons’ merely as such, did not apply to members of ‘that unfortunate race . . . so far inferior, that they had no rights which the white man was bound to respect.’ Hence, all individuals of African descent were ascriptively excluded from the class of ‘persons’ deemed competent to bear rights.”).

188. See *supra*, note 119 and accompanying text.

189. Interestingly, general common law was not binding upon the states and alone did not establish federal question jurisdiction. See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276–92 (1996). Thus, even if general common law

## 2. *Erie* as misapplied in *Sosa*

The Supreme Court's ability to overlook *Erie* in its analysis of *Sosa* is troubling. If the Court wants to overturn *Erie*, it should simply say so. If the Court is unaware of *Sosa*'s *Erie* implications, it is time for someone to enlighten the Justices. One can hope that the Court's analysis in *Sosa* was an innocent misstep. This hope is strengthened by the fact that the Ninth Circuit had previously taken the same misstep. Perhaps the Supreme Court was merely following California's lead.

By the time the Supreme Court decided *Sosa*, federal courts had a history of ignoring the Supreme Court's *Erie* implications. Most importantly, the Ninth Circuit's reasoning ran fatally afoul of *Erie*. The decisions upon which the Ninth Circuit relied are based on the Second Circuit's decision in *Filartiga v. Pena-Irala*. As has been discussed,<sup>190</sup> *Filartiga* was based on a body of general common law that *Erie* disemboweled. Thus, the Ninth Circuit's reliance on these cases was fundamentally misplaced. The Ninth Circuit seems to have realized this weakness because it cited other circuit decisions merely to establish that the ATS "has been invoked in a variety of actions alleging human rights violations,"<sup>191</sup> not to prove that the ATS gives rise to causes of action. On first reading, it appears that the court is citing these cases as support for its position, when, in fact, one of the cases, the D.C. Circuit's per curiam opinion in *Tel-Oren v. Libyan Arab Republic*,<sup>192</sup> refutes the Ninth Circuit's decision.<sup>193</sup>

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precedent such as *The Paquete Habana* were still good law, the argument could be made that CIL would be applicable only in the federal arena. Such an argument would probably not please advocates of applying CIL domestically because, given the personal rights that CIL potentially covers, proponents of nonfederal application of CIL would have to define what they believe to be the extent of state police powers. In order for international norms to give rise to personal nonfederal causes of action under this scheme, the Supreme Court would have to drastically prune traditional state police power. Such a decision would raise public outcry that would likely result in a stringent restriction of the domestic application of CIL norms—not the result proponents would like. However, such a situation is speculative and mostly academic for the simple reason that *Erie* invalidated the precedential value of general common law CIL cases, despite the Second Circuit's contrary assertions in *Filartiga*.

190. See *supra*, Part IV.C.1.

191. *Alvarez-Machain v. United States*, 331 F.3d 604, 611 (9th Cir. 2003).

192. 726 F.2d 774 (D.C. Cir. 1984).

193. Judge Bork's concurrence is particularly illuminating:

Appellants, seeking to recover for a violation of international law, might look to federal statutes either for a grant of a cause of action or for evidence that a cause of action exists.

These notions may be quickly dismissed. The only plausible candidates are the two jurisdictional statutes relied on by appellants, sections 1331 and 1350 [the ATS] of Title

1415] *Customary International Law in Sosa v. Alvarez-Machain*

Apparently taking its lead from the Ninth Circuit, the Supreme Court merely exacerbated the *Erie* problems. The Court inappropriately cloaked its analysis in section IV in the robes of *Erie* and fundamentally misinterpreted the law regarding the appropriate creation of federal common law. Beginning with a laundry list of cases involving federal common law,<sup>194</sup> cases that would tend to argue against the Court's ultimate decision in *Sosa*, the six justices of section IV correctly recognized that "*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."<sup>195</sup> Using this precedent as justification, the Court proceeded to rely upon *The Paquete Habana* and *The Nereide* to justify the creation of federal common law under the ATS.<sup>196</sup>

Furthermore, in its efforts to make its *Erie* position legitimate, the Court relied on and misconstrued *Banco Nacional de Cuba v. Sabbatino*.<sup>197</sup> In that case, the Court held that the act of state doctrine prevented prosecution *despite* violations of CIL. Consequently, the Court decided that it would not act without a guiding treaty or "other unambiguous agreement regarding controlling legal principles."<sup>198</sup> Although the language of *Sabbatino* does not explicitly state that a federal court may not invoke CIL under the ATS, the Court's unwillingness in *Sabbatino* to apply CIL absent a treaty runs counter to the Court's willingness to incorporate CIL via the ATS in *Sosa*. The Court acknowledged this fact in a footnote, arguing that *Sabbatino*, while

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28 of the United States Code. *Neither of those statutes either expressly or impliedly grants a cause of action.* Both statutes merely define a class of cases federal courts can hear; *they do not themselves even by implication authorize individuals to bring such cases.* As the Supreme Court has stated, "[t]he Judicial Code, in vesting jurisdiction in the District Court, does not create causes of action, but only confers jurisdiction to adjudicate those arising from other sources which satisfy its limiting provisions."

*Tel-Oren*, 726 F.2d at 811 (Bork, J., concurring) (emphases added) (quoting *Montana-Dakota Utils. Co. v. N.W. Pub. Serv. Co.*, 341 U.S. 246, 249 (1951)).

194. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 726 (2004).

195. *Id.* at 729.

196. *Id.* at 730.

197. 376 U.S. 398 (1964).

198. *Id.* at 428 ("[W]e decide only that the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.").

not ultimately applying federal law, did not “question the application of that law in appropriate cases.”<sup>199</sup> However, once again, the Court’s refusal in *Sabbatino* to apply CIL absent a treaty or other binding guidelines argues strongly against federal court application of CIL norms that Congress has not defined, no matter how “appropriate” it may be. Furthermore, the *Sosa* Court never supplied the standard of propriety for making the determination. Ad hoc judicial determinations of propriety are tricky things—just ask Joseph Lochner.

Aside from the subtle logical blunder of relying on *Sabbatino*, the Court made a more egregious blunder in its reliance on *Filartiga v. Pena-Irala*. Although this Second Circuit decision supports the Court’s decision and has been favorably cited in several other jurisdictions,<sup>200</sup> it is important to remember that the Second Circuit in *Filartiga*, like the Supreme Court in *Sosa*, relied on defunct precedent, including *The Paquete Habana*—precedent that *Erie* made inapplicable.<sup>201</sup> The Court confounds this problem by relying on the *Restatement (Third) of Foreign Relations Law of the United States* in its discussion of the validity of Alvarez’s arbitrary detention claims.<sup>202</sup> The Court seems to have conveniently ignored the fact that the Restatement has disavowed the reasoning of *Filartiga* as inappropriate in the post-*Erie* context.<sup>203</sup> Despite the fact that *Filartiga* and the Restatement proceed from drastically different and mutually exclusive underpinnings, the Court inexplicably invokes both as validation for its position.

Allowing a federal court to apply CIL when “appropriate” to create federal common law would give federal judges a potentially vast and arbitrary discretion. Determining just what constitutes a CIL norm is an inherently political decision that can easily, if not authoritatively, be justified by selective reference to international currents.<sup>204</sup> Furthermore, such power could be used in any area from whaling regulations to marriage rights.<sup>205</sup> Granting federal courts, and the Supreme Court in particular, such power would prove Justice Scalia right: the Supreme

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199. *Sosa*, 542 U.S. at 730 n.18.

200. *See supra* Part IV.C.1.

201. *See supra* Part IV.B.1.

202. *Sosa*, 542 U.S. at 737.

203. *See supra* note 167.

204. *See supra* Part II.A.

205. *See id.*

1415] *Customary International Law in Sosa v. Alvarez-Machain*

Court would have the logical ability to be involved in everything.<sup>206</sup> The fact that the Supreme Court held that Alvarez's claim ultimately was not a sufficiently established CIL norm to warrant creating a federal cause of action<sup>207</sup> is cold comfort to those who are concerned not only about outcome, but the process as well. The process the Court used in reaching its decision in *Sosa* is frightening.

*D. Potential Consequences of Incorporating CIL into U.S. Law  
via the ATS or Other Statutes*

Customary international law may be compared to Procrustes' bed:<sup>208</sup> advocates can, with enough violence, force any issue to fit within its confines. Because CIL evades clear definition, the United States should be careful in adopting CIL norms as grounds for causes of action unless those norms have been explicitly adopted by the U.S. Congress.<sup>209</sup> Given

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206. "This Court seems incapable of admitting that some matters—*any* matters—are none of its business." *Sosa*, 542 U.S. at 750 (Scalia, J., dissenting).

207. The standard the Court elucidated for determining if a CIL norm was sufficiently established as to constitute a judicially created cause of action required that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted." *Sosa*, 542 U.S. at 732. As a side note, it is interesting that the justices decided that only the actions of "civilized nations" should be taken into account when making this determination. What constitutes "civilized" behavior is relative and intimately tied to cultural understandings. However, the term "civilized" was more politically correct than what the Court desired to say. Based on what the Court used to determine whether "arbitrary detention" constituted a well-established CIL norm among "civilized" nations (U.S. case law, the European Commission's amicus brief, the Torture Victim Protection Act, the International Covenant on Civil and Political Rights, the Universal Declaration of Human Rights, the Restatement (Third) of Foreign Relations Law and various U.S. law review articles), what the Court really appears to have meant was, "[w]hat constitutes a well-established CIL norm among western/European countries?" However, if CIL is an appropriate analytical tool, we must forgive the Court for making such a Eurocentric decision—after all, determining what customary international (not just European) norms are is a difficult (if not impossible) determination to make.

208. In Greek myth, the hero Theseus had to defeat the villain Procrustes. Procrustes was famous for having a magical bed that perfectly fit anyone who slept on it. The "magic" was, to say the least, a let down. Procrustes would kidnap victims and force them to lie on the bed. He would then either stretch the unfortunate guest or cut off his limbs to make him fit the bed. See MAX J. HERZBERG, MYTHS AND THEIR MEANING 150 (1984).

209. See *supra* Part IV.C. Although the term "Customary International Law" does not appear anywhere in the Constitution, the Offenses Clause does give Congress the power to define and punish offenses against the "Law of nations." U.S. CONST. art. I, § 8, cl. 10. At the time of the founding, the term "law of nations" was the equivalent of the modern term "CIL." Bradley, *supra* note 10, at 422. As this Note has shown, the debates concerning the Offenses Clause during the Constitutional Convention show that Congress was to have complete control over implementation of CIL in U.S. law. See *supra* Part IV.A.

the breadth and vagaries of CIL, its incorporation into U.S. law should give those affected pause. If judges are deemed competent to hear cases arising from CIL that has not been defined by Congress or the President, the judges might use CIL as a thin legal pretext for having the final say in personal political issues—the power to define the contours of international customary law, not merely apply it, is inherently political. Examples of the United States Supreme Court using CIL as partial justification for its conclusions in politically charged decisions include *Atkins v. Virginia*<sup>210</sup> and *Lawrence v. Texas*.<sup>211</sup> In *Atkins*, the Court was faced with the question of whether it is constitutional to execute the mentally retarded.<sup>212</sup> The European Union filed an amicus brief, arguing that there was general global consensus against such punishment. The Court ultimately agreed, basing its opinion on what one commentator has called a “majoritarian paradigm” in determining if a punishment meted out in the U.S. is “cruel and unusual punishment.”<sup>213</sup> However, Justice Stevens did note the E.U.’s amicus brief as supporting authority.<sup>214</sup> In like manner, in *Lawrence*, Justice Kennedy referred to the values of a shared “wider civilization” that argued in favor of overturning *Bowers v. Hardwick*,<sup>215</sup> the Supreme Court decision upholding a state’s right to criminalize consensual sodomy.<sup>216</sup> Although this Note is not concerned with the correctness of either of these decisions, the procedural invocation of international norms in their decisions is cause for concern.

Using international norms to recognize hitherto unknown causes of action not approved by Congress raises at least three concerns.

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210. 536 U.S. 304 (2002).

211. 539 U.S. 558 (2003).

212. *Atkins*, 536 U.S. at 307.

213. Alford, *supra* note 122, at 60.

214. *Atkins*, 536 U.S. at 316 n.21 (“Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”).

215. 478 U.S. 186 (1986).

216. *Lawrence*, 539 U.S. at 576–77 (“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. See *P.G. & J.H. v. United Kingdom*, App. No. 00044787/98, ¶ 56 (Eur. Ct. H.R., Sept. 25, 2001); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (1993); *Norris v. Ireland*, 142 Eur. Ct. H.R. (1988). Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct . . . . The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”).

1415] *Customary International Law in Sosa v. Alvarez-Machain*

According to Professor Roger P. Alford, the first concern arises when global opinions thwart domestic opinions in constitutional interpretation.<sup>217</sup> Although there is debate over the propriety of using community value judgments in constitutional interpretation,<sup>218</sup> Professor Alford clearly states,

To the extent that value judgments are a source of constitutional understandings of community standards, the hierarchical ranking of relative values domestic majoritarian judgments should hold sway over international majoritarian values. Using global opinions as a means of constitutional interpretation dramatically undermines sovereignty by utilizing the one vehicle—constitutional supremacy—that can trump the democratic will reflected in state and federal legislative and executive pronouncements.<sup>219</sup>

Both *Lawrence* and *Atkins* are prime examples of this international countermajoritarian problem. In both cases, the Court used international opinions as partial justification for reaching decisions that arguably ran counter to the opinions of a large plurality, if not a majority, of Americans. Aside from the indeterminacy of CIL norms, constitutional interpretation based on a court's diagnosis of the international pulse is inappropriate because it strikes at the core of federalism by abusing federalism's underlying tenet that some powers are specifically reserved to the states.<sup>220</sup>

The second and third concerns that applying CIL norms without congressional direction create are related: (1) haphazard use, and (2) selective use. Although Justice Breyer may be correct in arguing that international law “cast[s] an empirical light on the consequences of different solutions to a common legal problem,”<sup>221</sup> the difficulty comes

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217. There are those who fervently believe that U.S. values that are out of sync with world opinion should be discarded. Professor Alford quotes Harold Hongju Koh who wrote, “The evidence strongly suggests that we do not currently pay decent respect to the opinions of humankind in our administration of the death penalty. For that reason, the death penalty should, in time, be declared in violation of the Eighth Amendment.” Alford, *supra* note 122, at 58 n.12 (quoting Harold Hongju Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085, 1129 (2002)).

218. *See id.* at 58 n.13.

219. *Id.* at 58.

220. *Compare id.* at 61 with Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 55 (2004). For an in-depth and enlightening rebuttal of the argument that using international opinions in constitutional interpretation is appropriate and does not weaken federalism, see Alford, *supra* note 122, at 61 n.30.

221. *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

in finding the right kind of light—a cave viewed with a single flashlight is a different experience from a cave viewed with full National Park Service illumination. According to Alford, “[i]n the international legal arena, where the Court has little or no expertise, the Court is unduly susceptible to selective and incomplete presentations of the true state of international and foreign affairs.”<sup>222</sup> Attempts to systematize the use of international norms have been made, but they ultimately fail for at least four reasons: (1) it is difficult, if not impossible to determine true international consensus on any point; (2) courts are structurally ill-equipped to research and make such determinations; (3) nations have noncommensurate legal values; and (4) putative international norms may be fundamentally repugnant to individual nations.<sup>223</sup>

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222. Alford, *supra* note 122, at 64.

223. For instance, Professor Michael D. Ramsey proposed a four-step system: (1) carefully define the legal theory at issue; (2) accept norms that restrict as well as enhance rights; (3) commit to rigorous research in an effort to “Get the Facts Right”; and (4) “Avoid False Shortcuts to World ‘Consensus.’” Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69, 72–80 (2004).

However, Professor Ramsey wisely admits that his system is inherently unstable. For instance, referring to the *Lawrence* decision’s citation to the European Court of Human Rights opinion in *Dudgeon v. United Kingdom*, Professor Ramsey states, “[A]s a matter of legal interpretation, there is no obvious connection between the U.S. Constitution and foreign court opinions, which address the interpretation of different documents, written in different times and different countries (and sometimes different languages).” *Id.* at 73. In the *Lawrence* decision, the Court was faced with a fundamental rights analysis under the Due Process Clause of the Fourteenth Amendment—an analysis incommensurate with the ECHR’s concern in *Dudgeon* of whether sodomy laws violate, and are not necessary to protect, the right to “privacy and family life” as outlined in the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, Ramsey’s first step (define the legal theory) is virtually impossible because the texts and rights to be compared will rarely be similar enough. *Id.* at 74. Furthermore, Ramsey’s analysis requires determinations of “importance”—a culturally bound determination with no logical answer. *Id.* at 75. Ramsey also realizes that “there is no unified ‘world community’ with a simple and easily accessible opinion to be had for the asking. There are only hundreds of societies, with diverse and conflicting national practices, and billions of individuals and entities, each with its own diverse and often inconsistent views.” *Id.* at 79. With all of these inherent weaknesses, Ramsey’s methodology seems doomed and impractical. Even Ramsey admits that “commitment to [these] guidelines

... will likely make the project unworkable in its broader applications.” *Id.* at 82.

Mark Tushnet has suggested another method of justifying the application of international norms, including CIL norms, into U.S. law. In *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999), Tushnet argues for a system he calls “bricolage.” Under this system, it is incumbent on lawyers to provide the judge with enough international justification for their position. The judge may then use what she is given to reach the outcome she desires. Professor Alford critiques this view by stating, “Under this theory, it is not that the Court is results oriented or utilitarian; it is that the Court fundamentally lacks the institutional capacity to engage in proper comparativism and unduly relies on advocacy at its peril.” Alford, *supra* note 122, at 65.

1415] *Customary International Law in Sosa v. Alvarez-Machain*

Selective use of international norms ultimately equates to illogical enhancement of rights.<sup>224</sup> The availability of abortion in the United States is an example of how international norms have not been used to limit rights. According to Alford,

Since abortion was constitutionally guaranteed by *Roe v. Wade* in 1973, the Convention on the Elimination of All Forms of Discrimination Against Women has been ratified by over 170 states without any provision for reproductive rights, and many countries have reaffirmed severe government restrictions on such rights, with only a minority of countries permitting abortion on demand.<sup>225</sup>

In short, the United States is arguably not in line with world consensus on abortion rights. If judges may apply international norms under CIL without congressional approval and if one of the purposes advanced for doing such is that it would bring us more in line with the world, then judges should also act to curtail abortion rights.

Given CIL's source and potential breadth, it could turn into a playground of judicial caprice if it were allowed to give rise to causes of action without congressional or executive definition and guidance. Judges are not trained to understand the laws of the entire world—we as

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Daniel Bodansky, in a peremptory essay, offers further justifications for recent Supreme Court invocations of international norms. He argues, ultimately unpersuasively, that the Constitution incorporates international law, including CIL, and that federal courts may apply it. Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421, 423 (2004). While it is true that CIL has a place in U.S. law, Congress and the Executive have complete control over its application. His argument that all courts in every nation are engaged in a "common legal enterprise" is true only at the surface. *Id.* at 424. As Ramsey pointed out in his article, apparently similar issues are fundamentally different and arguably incommensurate. Bodansky's third argument in favor of transplanting international norms into U.S. jurisprudence is that laws, particularly the Constitution, are open-ended and courts must apply community standards. *Id.* at 425. Once again, this argument is convincing only in broad generalities. Ultimately, this argument runs afoul of the federalism principle that states have retained some degree of ultimate sovereignty. Bodansky's fourth and final justification is that incorporating international norms helps avoid international friction. *Id.* at 427. While this is most likely true, it does not follow that courts should have the power to implement international norms willy-nilly. The Constitution comprehends this problem and gives power for averting it to the Legislature and the Executive. Unless we are willing to ascribe Epimethean ineptitude to the Legislature and Executive and Athenian wisdom to the judiciary, it seems unlikely that the Legislature will not consider relevant international norms in its deliberations—something the Legislature's multi-faceted voice is more well equipped to do in the first place.

224. Alford, *supra* note 122, at 67 ("Put simply, international sources are proposed for comparison only if they are viewed as rights enhancing. To the extent that a comparative analysis supports government interests in lessening civil liberties—or at least certain civil liberties—international sources will likely be ignored.").

225. *Id.*

humans can barely understand the laws of a single state or nation. As one commentator put it, “[T]here is no unified ‘world community’ with a simple and easily accessible opinion to be had for the asking. There are only hundreds of societies, with diverse and conflicting national practices, and billions of individuals and entities, each with its own diverse and often inconsistent views.”<sup>226</sup> If there were a federal judge with a pet economic or social grievance, he or she could easily find international support for their stance, no matter how absurd or abhorrent to the average American. If judges were allowed such rein, then Ambrose Bierce would be one step closer to being right—anything would be lawful so long as it is “[c]ompatible with the will of a judge having jurisdiction.”<sup>227</sup>

## V. CONCLUSION

In biblical times, Solomon was wise enough to know that some questions deserved a clear answer: For example, he knew that a child could not grow up under the care of two mothers who both claimed biological ties. Such an untenable situation would only create confusion and discord among competing “sovereigns” and irreconcilable rules. One mother—one “sovereign”—had to have control of the baby.

When faced with a similar situation, the U.S. Supreme Court did not have Solomon’s rare wisdom. The language of the Alien Tort Statute, when considered in its historical context and together with *Erie*, mandated that there be one sovereign controlling the implementation of customary international law. This sovereign was the U.S. Congress and the President.<sup>228</sup> Applying CIL-based norms to create federal common law is inappropriate because, as Justice Scalia noted, “The notion that a law of nations . . . can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.”<sup>229</sup> Although the Court finally rejected Alvarez’s CIL-based claim, it did so only after adopting an unstable method of analysis—a method of analysis that leaves the door wide open to future

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226. Ramsey, *supra* note 222, at 79.

227. AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 108 (Oxford University Press 1999).

228. “We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 750 (2004) (Scalia, J., dissenting).

229. *Id.* at 749–50.

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1415] *Customary International Law in Sosa v. Alvarez-Machain*

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CIL-based federal common law causes of action.<sup>230</sup> All that will be required is an artful attorney who can rustle up enough international opinion to soothe the five Supreme Court justices into feeling safe enough to impose international opinions on U.S. citizens.

It was in allowing the possibility of future CIL-based court-created causes of action that the Court split the proverbial baby. The Court has allowed the possibility of multiple sovereigns creating causes of action. Although legislative action would trump conflicting judicially created causes of action, the mere possibility of a federal court recognizing such a claim is cause for concern. Congress would be hard-pressed to correctly stay abreast of federal court pronouncements of new and evolving causes of action.

*Brinton M. Wilkins*

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230. Speaking of the Ninth Circuit's decision, Justice Scalia argued, "Endorsing the very formula that led the Ninth Circuit to its result in this case hardly seems to be a recipe for restraint in the future." *Id.* at 748.

