

Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in *Sosa v. Alvarez-Machain*

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I. Introduction

When the Mexican drug cartel abducted, tortured, and murdered DEA undercover agent Enrique “Kiki” Camarena in Guadalajara, Mexico, in 1985, it set in motion a chain of events that culminated in the Supreme Court this term. Unable to obtain the assistance of the Mexican government in the extradition of one Dr. Humberto Alvarez-Machain, thought by U.S. officials to be implicated in the murder, the DEA in 1990 arranged for him to be kidnapped by Mexican bounty hunters and brought to the United States. The government’s subsequent prosecution of Alvarez-Machain failed spectacularly, whereupon he returned to Mexico to bring suit under the arcane and, until recently, long-dormant 1789 Alien Tort Statute, which is said to authorize aliens to sue for torts committed in violation of international law. Alvarez-Machain lost in the Supreme Court, but the issues he raised are far from settled.

Americans, as is often observed, have a decidedly ambivalent view of international institutions and international law. That division of mind has been with us since the founding, when state and federal courts alternated between praising and denouncing international law in equal measure. On the one hand, many early state courts treated international law as a species of “natural law,” quoting Vattel and Grotius alongside American reporters and common law treatises.¹ Justice Story, among the most learned of antebellum commentators, suggested that it is “no slight recommendation” that an

¹R.H. Helmholz, Relationships Among Roman Law, Common Law, and Modern Civil Law: Use of the Civil Law in Post-Revolutionary American Jurisprudence, 66 Tul. L. Rev. 1649, 1657–64, 1667, 1671–76 (1992) (discussing sources).

American law is “approved by the cautious learning of Valin, the moral perspicacity of Pothier, and the practical and sagacious judgment of Emerigon.”²

But others in the nation’s early years were less receptive. As legal historian Richard Helmholz has illustrated, early American law books are replete with examples of frontier lawyers’ disdain for international law—from the “Kentucky counsel who contrasted the purity of American institutions with the vice” of supposedly authoritarian civil law; to the “Indiana lawyer who stigmatized a law from *ius commune* as a product of ‘the gloomy times of popery’”; to the “counsel before the United States Supreme Court who described Bynkershoek’s treatment of the law of nations as ‘written in blood.’”³

*Sosa v. Alvarez-Machain*⁴ asks the Court to address our ambivalence by posing a deceptively simple question: To which branch of government did the Framers commit the decision to incorporate international norms into our domestic legal framework? The answer would seem to be settled by Article I, section 8, clause 10 of the Constitution (the “Define and Punish Clause”), which grants Congress the power to define and punish offenses against the law of nations.⁵ But the matter is not so simple. In the last two decades, a number of human rights lawyers have championed a radically different view—namely, that American federal courts have wide-ranging “common law” power to apply international law as a part of “our” law, without any further authorization by Congress. They base their argument on the 1789 “Alien Tort Statute,” which authorizes federal jurisdiction over “torts” for violations of international law. Forgotten by American lawyers for nearly two centuries, the statute has surfaced recently in a burgeoning number of innovative “human rights” tort suits.

In *Sosa*, the Court attempted to walk a narrow line: Based on a sketchy historical record, it ruled that the Alien Tort Statute authorizes federal courts to remedy offenses against “universal” and “definite” norms of international law, but warned that lower courts must

²*Id.* at 1681–82 (citing *Peele v. Merchants’ Insurance Co.*, 19 F. Cas. 98, 102 (C.C.D. Mass. 1822) (Story, J.)).

³Helmholz, *supra* note 1, at 1656 & notes 27–29 (citing sources).

⁴124 S. Ct. 2739 (2004).

⁵U.S. Const. art. I, § 8, cl. 10.

use this power with “great caution.”⁶ The decision leaves elaboration of the kinds of international norms that may be enforceable to future cases, ruling only that the discrete claims advanced in *Sosa* do not qualify for judicial recognition.

This article addresses the merits of the opinion and its likely implications. In Part II, I set forth in somewhat more detail the background of the *Sosa* litigation. In Part III, I examine the merits of the claim that the Alien Tort Statute permits courts to remedy offenses against international law, concluding that the argument is contrary both to the text and to the structure of the Constitution. In Part IV, I examine the Court’s opinion in the case: Although unlikely to result in a new wave of successful suits for violations of international rights, it nonetheless raises questions about the Court’s commitment to constitutional text and the separation of powers.

II. The Litigation Odyssey of Humberto Alvarez-Machain

In 1985, members of Mexico’s drug cartel abducted, tortured, and murdered DEA undercover agent Enrique “Kiki” Camarena in Guadalajara, Mexico.⁷ Camarena died in a vicious, cruel way: His captors tortured him over the course of two days with a cattle prod, a tire iron, and a broomstick.⁸ A Mexican farmer found his body a month after his abduction, still bound and gagged, eyes taped shut, in a shallow grave seventy miles outside of Guadalajara.⁹

Camarena’s death triggered a diplomatic crisis between the United States and the Mexican government. As then-DEA administrator Jack Lawn has recounted, “We determined that the individuals who at least took Camarena off the street were [Mexican] law enforcement personnel.”¹⁰ Worse, claims Lawn, “[e]very effort we made to pursue the investigation was halted by the government of Mexico.”¹¹ As the investigation developed, many DEA officials, including Lawn, suspected that “[t]he Mexican government knew what happened,

⁶*Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761–62, 2763, 2766 (2004).

⁷See *Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003).

⁸*Id.*

⁹*Id.*

¹⁰ *Drugs Wars: Interview with Jack Lawn*, Frontline, available at <http://www.pbs.org/wgbh/pages/frontline/shows/drugs/interviews/lawn.html> (last visited July 20, 2004).

¹¹*Id.*

and . . . that the government of Mexico indeed was covering up the assassination."¹²

Unable to apprehend the kingpins who ordered the killing, the U.S. government targeted lower-level alleged conspirators, including Dr. Humberto Alvarez-Machain, a medical doctor; some DEA officials believed that he had injected Camarena with Lidocaine, a heart medication, in order to keep Camarena alive and prolong his torture.¹³ The United States sought and received an indictment of Alvarez-Machain from a Los Angeles grand jury.¹⁴ Because Mexican officials proved unwilling to assist in his apprehension, or to grant an extradition request,¹⁵ the DEA hired Mexican nationals, unaffiliated with either the United States or the Mexican government, to apprehend Alvarez-Machain in Mexico and bring him across the border.¹⁶ On April 2, 1990, the bounty hunters kidnapped Alvarez-Machain outside of his office in Guadalajara and, within a period of less than twenty-four hours, carried him to El Paso, Texas, where DEA agents formally arrested him.¹⁷

After Alvarez-Machain's arrest, a decade-long legal battle ensued, including two trips to the U.S. Supreme Court.¹⁸ In 1992, he appeared

¹²*Id.*

¹³Elka Worner, Guilty Verdict in Camarena Case, United Press International, December 22, 1992 ("Alvarez Machain was accused of injecting Camarena with Lidocaine to keep him awake during a torture session."). See Br. for United States as Respondent Supporting Petitioner at 2, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (03-339) ("Eyewitnesses placed respondent Humberto Alvarez-Machain . . . at the house while Camarena-Salazar was being tortured DEA officials believe that respondent, 'a medical doctor, participated in the murder by prolonging Agent Camarena's life so that others could further torture and interrogate him.'").

¹⁴*Alvarez-Machain v. United States*, 331 F.3d 604, 609 (9th Cir. 2003).

¹⁵Br. for Petitioner at 2, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (03-339) ("The DEA attempted to obtain respondent's presence in the United States through informal negotiations with Mexican officials.").

¹⁶For details of the bounty-hunting agreement, see *Alvarez-Machain*, 331 F.3d at 609.

¹⁷Marjorie Miller and Jim Newton, Defendant Freed in Camarena Case Returns to Mexico, Los Angeles Times, Dec. 16, 1992, at A3. During subsequent interrogation in U.S. custody, Alvarez-Machain allegedly told DEA investigators that he served as a family doctor to drug kingpin Rafael Caro Quintero and also "gave authorities a statement in which he said he had been in a Guadalajara house where Camarena was being tortured." *Id.*

¹⁸For a comprehensive summary of the history of litigation, see *Alvarez-Machain*, 331 F.3d at 608-10.

before the Court for the first time, arguing that his abduction violated the U.S.-Mexico Extradition Treaty. The Court disagreed, ruling that the abduction did not violate the terms of the treaty (the Court also refused to intervene based on prudential considerations, including the “advantage of a diplomatic approach to the resolution of difficulties between two sovereign nations.”)¹⁹ On remand, the case proceeded to trial, where the U.S. government lost in spectacular fashion. The district court granted a motion of judgment of acquittal based on a lack of evidence, and pulled no punches: The government’s case, said the Court, was based on “suspicions and . . . hunches but . . . no proof.”²⁰ The government’s theories were “whole cloth, the wildest speculation.”²¹

The victory freed Alvarez-Machain to return to Mexico, where he commenced civil litigation against the United States. In 1993 he filed a civil action against the bounty hunters, the United States, and four DEA agents, seeking damages for kidnapping, false arrest, and false imprisonment. He sought relief against the United States based on a variety of ordinary tort claims.²² He also sought relief under international law against one of the bounty-hunters, Jose Francisco Sosa, pursuant to 28 U.S.C. § 1350, the Alien Tort Statute, based on allegations that his kidnapping on Mexican soil and twenty-four-hour detention in Mexico, prior to his formal arrest in El Paso, violated an international “norm” against arbitrary arrest and imprisonment.²³ The litigation dragged on for more than ten years, ending with a defeat for Alvarez-Machain in the Supreme Court—in *Sosa v. Alvarez-Machain*.

III. The Principles at Stake in *Sosa v. Alvarez-Machain*

Before examining *Sosa v. Alvarez-Machain* in detail, it will be useful to look briefly at the Alien Tort Statute, focusing on the thorny constitutional implications of this arcane provision.

¹⁹United States v. Alvarez-Machain, 504 U.S. 655, 670 (1992).

²⁰See *Alvarez-Machain v. United States*, 331 F.3d 604, 610 (9th Cir. 2003).

²¹*Id.*

²²28 U.S.C. § 1346(b).

²³*Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2747 (2004) (summarizing petitioners’ claims).

A. *A Brief History of the Alien Tort Statute*

The Alien Tort Statute, as amended, provides as follows:

The 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.²⁴

The statute is simultaneously one of the oldest provisions of American law and one of the most mysterious—a “kind of legal Lohengrin,” in the memorable phrase of Judge Henry Friendly, who noted, accurately, that “no one seems to know whence it came.”²⁵ This much we know: The provision was added by the first Congress to the first Judiciary Act,²⁶ which created the lower federal courts, only to be forgotten for nearly two centuries by federal litigants. Such was the obscurity of the statute in 1975, when Judge Friendly encountered it, that he had trouble locating reported federal cases involving a successful damage suit under its auspices.²⁷

But in 1980 the Alien Tort Statute gained a new purchase on American law when the Second Circuit decided *Filartiga v. Pena-Irala*,²⁸ a landmark decision that transformed federal courts’ understanding of international law’s role in U.S. federal courts.²⁹ The plaintiffs in *Filartiga*—Paraguayan citizens Dr. Joel Filartiga and his daughter Dolly Filartiga—actively opposed the dictatorial regime of then-president of Paraguay Alfredo Stroessner. Plaintiffs contended that Americo Pena-Irala, the police inspector general of the city of

²⁴28 U.S.C. § 1350. The original provision provided that federal courts “shall 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 in violation of the law of nations or a treaty of the United States.” See Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789).

²⁵*ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“This old but little used section is a kind of legal Lohengrin; although it has been with us since the first Judiciary Act, no one seems to know whence it came.”).

²⁶Judiciary Act of 1789, § 9, 1 Stat. 73, 77 (1789).

²⁷*Vencap*, 519 F.3d at 1015 (“We dealt with [the ATS] some years ago At that time we could find only one case where jurisdiction under it had been sustained, in that instance a violation of a treaty; there is now one more.”).

²⁸630 F.2d 876 (1980).

²⁹See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2366 (1991) (“In *Filartiga*, transnational public law litigants finally found their *Brown v. Board of Education*.”).

Asuncion, Paraguay, had ordered Dr. Filartiga's son kidnapped and tortured to death in retaliation for the family's anti-government views. The Filartigas fled to the United States and sued Pena-Irala in federal court under the Alien Tort Statute, seeking compensatory and punitive damages totaling \$10 million.³⁰

Dr. Filartiga did not seek redress based on a substantive U.S. statute or treaty. Rather, the Filartigas asserted their claims under "customary international law" (CIL), a strange creature in American jurisprudence. CIL is not derived from any positive U.S. law—such as a statute, a treaty, or the Constitution. The term is a label for a number of judge-made doctrines that some courts independently have developed to settle international disputes. As Professors Jack Goldsmith and Eric Posner put it, CIL is "unwritten; it is said to arise spontaneously from the decentralized practices of nations; the criteria for its identification are . . . unclear; and it is said to bind all nations in the world."³¹

The *Filartiga* plaintiffs argued that CIL regulates the conduct of foreign states toward their own citizens. Under their theory, modern CIL is composed of norms of such universality that they should be treated as "law" binding on state actors, regardless of the content of domestic state constitutions or legal enactments. Crucially, the Filartigas argued that the Alien Tort Statute provides "jurisdiction" for courts to enforce these "international" norms in U.S. courts.³²

Their theory supposed implicitly that the Alien Tort Statute authorizes federal courts to discover and apply new "customary" international legal rules, and to award damages to aliens whose "international rights" have been violated. In effect, under their theory, the Alien Tort Statute operates in the international realm in a fashion roughly similar to the Sherman Act: that is, as a standing order to U.S. courts to articulate the rules governing the conduct of foreign states, and to police the conduct of other states vis-à-vis their citizens, much as federal antitrust statutes delegate to judges the freewheeling power to police accumulations of economic power in the domestic marketplace.

³⁰Filartiga, 630 F.2d at 878–79.

³¹Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. Chi. L. Rev. 1113, 116 (1999).

³²Filartiga, 630 F.2d at 879.

The Second Circuit agreed on all counts: “It is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”³³ To make this determination, the Second Circuit provided that district courts may look to a number of sources as “evidence” of international norms, including (controversially) U.N. resolutions that were not independently enforceable in U.S. courts.³⁴ Most important, the Second Circuit construed the Alien Tort Statute (in particular, its grant of “jurisdiction” over “torts in violation of the law of nations”) to permit federal courts to enforce this “evolving . . . international law” as “our law.”³⁵

Filartiga was a watershed moment in the history of the Alien Tort Statute. As Professor Curtis Bradley has noted, “International human rights litigation in U.S. courts largely began in 1980, with the Second Circuit’s decision in *Filartiga*.”³⁶ Over the 1980s and 1990s, federal lawsuits under the Alien Tort Statute proliferated. Notable examples include claims against the Nigerian government and Royal Dutch Petroleum for persecution of the minority Ogoni people,³⁷ against South Africa for the extrajudicial killing of black dissidents during the apartheid regime,³⁸ and, most recently, against the Unocal Corporation for allegedly participating in the human rights abuses of Myanmar’s military junta.³⁹

B. Constitutional Problems with the Alien Tort Statute: An Overview

It is certainly true that the kinds of human rights abuses the *Filartiga* Court addressed deserve our attention and condemnation. But, under our constitutional system of separated powers, is the Alien Tort Statute a sufficient basis for federal courts of limited

³³*Id.* at 881 (citing *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)).

³⁴*Filartiga*, 630 F.2d at 884.

³⁵*Id.* at 885–88.

³⁶Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 *Chi. J. Int’l L.* 457, 457 (2001).

³⁷*Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000).

³⁸See, e.g., *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (J.P.M.L. 2002).

³⁹*John Doe I v. Unocal Corp.*, Nos. 00-56603, 00-57197, 00-56628, 00-57195, 2002 U.S. App. LEXIS 19263 (9th Cir. Sept. 18, 2002).

jurisdiction to define and enforce such rights? Surely, an interpretation of the Alien Tort Statute that gives courts that extraterritorial power in the first instance, without any further direction from the political branches, raises serious questions about constitutional structure and the principle that Article III courts are courts of limited jurisdiction.

1. *A Short Note on Interpretation*

At the outset, the Alien Tort Statute presents a “difficult” problem of statutory interpretation.⁴⁰ The statute, very old and little used, is a rarity. There is little or no legislative history concerning its enactment,⁴¹ and the history that does exist is conflicting and impressionistic.⁴² Similarly, there is little recorded discussion of international law in the records of the Constitutional Convention and no consensus among legal historians concerning the Founders’ views about the domestic judicial application of international law in U.S. courts.⁴³

⁴⁰David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 52 (1997).

⁴¹Br. of United States as Respondent Supporting Petitioner at 17, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (“Although a great deal has been written about the history of Section 1350 since the Second Circuit’s decision in *Filartiga*, not much is known for certain about the origins or original purpose of the law. Neither the record history of the Judiciary Act of 1789 nor the private writings of the Members of the First Congress expound in any depth on the provision.”).

⁴²Compare Br. of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents at 6–8, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (the Alien Tort Statute enacts the 1781 recommendations of Oliver Ellsworth, a leading proponent of creating a “tribunal . . . [to] decide on offences against the law of nations” that were not enumerated in the statutory code; Ellsworth played a principal role in drafting the Judiciary Act of 1789), with Br. of Professors of International Law, Federal Jurisdiction, and Foreign Relations Law in Support of Petitioner at 28, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (“Congress may have thought that what is now § 1350 was necessary to ensure that admiralty courts heard not only disputes over the ownership of property, including salvage, but also all torts, including personal injuries, occurring within the maritime jurisdiction of the United States.”).

⁴³Compare Br. of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Petitioner at 13, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (“As common law, the law of nations applied in both state and federal courts [B]ecause it was part of the common law, the law of nations required no legislative enactment to be effective.”), with Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *Fordham L. Rev.* 319, 332–33 (1997) (“[O]ne of the Framers’ primary concerns was the inability

Nevertheless, there are a number of interesting theories about the original understanding of the Alien Tort Statute. Perhaps the most compelling has been advanced by Bradley.⁴⁴ In barest outline, he notes that Article III of the Constitution enumerates a number of circumstances in which federal courts of limited jurisdiction may entertain a lawsuit. Some of those circumstances turn on the identity of the parties. The most common such basis is “diversity jurisdiction”—so-called because it arises when the plaintiff and defendant are citizens of different (“diverse”) states. Diversity jurisdiction, like all other sources of federal jurisdiction, is based on the text of Article III—specifically, its direction that the federal “judicial power” shall extend to “controversies” between “citizens of different states.”⁴⁵ Another party-specific source of federal jurisdiction is “alienage jurisdiction,” which is based on Article III’s proviso that federal courts may hear lawsuits “between a State, or the Citizens thereof, and foreign States, citizens, or subjects.”⁴⁶ Alienage jurisdiction exists when a citizen of the United States is on one side of a lawsuit and a citizen of a different country is on the other side.

It has been understood since the founding that federal courts may hear nonconstitutional cases only if they possess both constitutional jurisdiction under Article III and a statutory basis for jurisdiction.⁴⁷ According to Professor Bradley, the Alien Tort Statute was intended to provide the statutory basis for Article III “alienage jurisdiction.” As he hypothesizes:

of the federal government during the Articles of Confederation period to punish infractions of international law, and one of their primary aims was to establish a constitutional structure that would allow for uniform federal enforcement of CIL. But, as we noted . . . this uniformity was not guaranteed by the automatic incorporation of CIL into federal law. Rather uniformity was promoted by empowering the political branches to enact the federal law necessary to carry out international obligations.’’)

⁴⁴Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 *Va. J. Int’l L.* 587 (2002).

⁴⁵U.S. Const. art. III, § 2, cl. 7.

⁴⁶U.S. Const. art. III, § 2, cl. 9.

⁴⁷See, e.g., David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 *U. Chi. L. Sch. Roundtable* 161 (1982) (noting the first Judiciary Act “clearly reveals Congress’s conviction that nothing in the Constitution required it give federal trial courts jurisdiction over all the cases and controversies enumerated in Article III. For apart from civil and criminal cases brought by the Government, the district courts were to sit basically in admiralty, and the circuit courts in diversity and alienage cases involving more than \$500. There was no general grant of federal-question jurisdiction.”).

The alien tort statute in Section 9 [of the first Judiciary Act] can . . . be construed as referring implicitly to suits brought by aliens against U.S. citizens. Understood this way, the alien tort clause is a subset of the First Congress's general grant of alienage diversity jurisdiction in Section 11 [of the Judiciary Act], but without a jurisdictional amount requirement . . .

. . .

. . . [This] construction of the Statute is consistent with the law of international responsibility in the late 1700s . . . Blackstone . . . stated in his Commentaries that "where the individuals of any state violate this general law [of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity."⁴⁸

According to Bradley, the first Congress assumed that federal courts would apply the law of nations as a rule of decision under the Alien Tort Statute without further authorization from Congress. As he says, "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 As a result, for those situations in which the law of nations in 1789 regulated tortious conduct, the First Congress would not have perceived a need to supplement this law with a[n] [additional] federal statutory cause of action."⁴⁹

⁴⁸Bradley, *supra* note 44, at 629–30.

⁴⁹*Id.* at 596. Note that, if Bradley's theory is right, it means that disputes like that in *Filartiga*, which involve no U.S. citizens, are not proper subjects of federal jurisdiction under the Alien Tort Statute. It also suggests that the U.S. government, as an entity, is not a proper defendant under the Alien Tort Statute. *Id.* at 618.

While Bradley does not directly suggest the possibility, there is another, even more restrictive interpretation: During the Articles of Confederation period, a number of states enacted statutes authorizing causes of action for damages in cases where foreigners have been injured by another person on U.S. soil. See note 93 *infra*. The Alien Tort Statute arguably may have been enacted to ensure that litigants could prosecute these actions under these *state* statutes in *federal* courts, without regard to amount in controversy requirements imposed under the first diversity statute, and subject to subsequent supervening congressional enactments. Federal tribunals presumably would have been more amenable to foreign interests. That reading is consistent with a strict reading of the original Rules of Decision Act, which did not explicitly mention "the law of nations" as a basis for decision in diversity cases. Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (currently codified at 28 U.S.C. § 1652 (1976)). That interpretation, of course, assumes that Justice Story was wrong when he read an

Bradley's argument is compelling, and supported by solid evidence, but it is not conclusive. There appears to be some dissent from his view even among members of the founding generation. Take the opinion of Thomas Jefferson's attorney general, Levi Lincoln. As Bradley describes:

In [an 1802] opinion, Lincoln discussed the implications of an insult to the Spanish minister, which Lincoln described as involving "a high-handed breach of the peace, an outrageous riot, and an aggravated violation of the law of nations." Lincoln stated that he could "find no provision in the Constitution, in any law of the United States, or in the treaty with Spain which reaches the case." Rather, he said that the case was governed by the law of nations, which forms "part of the municipal body of each State." Lincoln *therefore* "doubted the competency of the federal courts, there being no statute recognizing the offence."⁵⁰

Lincoln's interpretation—200 years closer to the statute's enactment—would appear to be in some tension with Bradley's.⁵¹ But the problem is not simply that there is some contrary evidence: The evidentiary record as a whole is sparse, making the task of interpretation an exercise in educated guesswork. As Bradley himself notes, "there was essentially no discussion of the Statute in the recorded debates of the First Congress."⁵² Worse, the statute, soon after its passage, lapsed into desuetude (which is itself suggestive); as a result, there is almost no authoritative judicial interpretation of the

exception for "general common law" into the Rules of Decision Act in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18–19 (1842). See notes 69 to 93 *infra*.

⁵⁰Bradley, *supra* note 44, at 615 (emphasis added).

⁵¹While it is possible Lincoln may have only federal criminal prosecutions in mind, Lincoln's denial that any "statute" "reaches" the case is sweeping and appears on its face to embrace any federal remedial power. See generally 5 Op. Att'y Gen. 691 (1802). Given that the fact pattern—an "outrageous riot" that insulted the ambassador—sounds in tort, and may have been actionable at common law, (see J.H. Baker, *An Introduction to English Legal History* 504 (2d ed. 1990) (discussing treatment of insults under the eighteenth century tort of defamation)), the attorney general's silence about the availability of a federal civil remedy, coupled with his suggestion that the wrongdoers may be held "liable in law" in Pennsylvania, suggests it may have been Lincoln's view that federal civil intervention requires statutory authorization. *Id.*

⁵²Bradley, *supra* note 44, at 623.

statute.⁵³ Nor does the background legal “context” provide a sure clue. While it is true that early lawyers treated the “law of nations” as part of the general “common law,” the role of the *federal* government in “enforcing” the “law of nations” was a matter of great controversy. Here is Bradley again, describing the 1787 Constitutional Convention:

The Federalists argued that the federal courts should have jurisdiction over cases involving foreign citizens because of potential bias in state courts. So great was this concern that at least two proposed drafts of the Constitution—the initial Virginia plan and Hamilton’s plan—would have allowed the federal courts jurisdiction over any case concerning a foreign citizen.

. . . In response to these arguments, the Anti-Federalists had argued that state courts could be trusted with these cases and that foreign citizens should not have greater access to federal court than in-state citizens. For example, George Mason argued during the Virginia ratification debates: A dispute between a foreign citizen or subject, and a Virginian cannot be tried in our own Courts, but must be decided in the Federal Court. Is this the case in any other country? Are not men obliged to stand by the laws of the country where the disputes are? . . . [The Federalist proposal] will annihilate your State judiciary: It will prostrate your Legislature.⁵⁴

This evidence—drawn from Bradley’s piece—is offered not as a refutation of his historical argument, but to emphasize that the record with which scholars must work is materially incomplete.

The nature of the historical record is not a bar to scholarly investigation, but it does raise a practical question for courts: After two centuries of neglect, should courts interpret the statute based on speculation about the subjective original understanding of the first Congress? True, original understanding is an important interpretive source. However, in this case, while there is much fodder for learned

⁵³*Id.* at 588 (noting that before 1980, jurisdiction had been upheld under the Alien Tort Statute in only two reported cases).

⁵⁴*Id.* at 623.

speculation, there is relatively little in the way of direct source material. That makes the use of history as the guide to interpretation of the statute problematic. Are there any compelling alternatives?

Professor Randy Barnett suggests, without necessarily endorsing, one answer. When interpreting text, he says, sometimes we may be forced to look to “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*.”⁵⁵ Objective textualism makes the ambiguous text “the best it can be” by harmonizing our interpretation of the statute with our best understanding of the textual implications of the Constitution and its separation-of-powers framework. That approach may not be appropriate in every case, but arguably has a significant claim to guide interpretation here, where the historical record of an ancient, obscure, forgotten, and largely superfluous⁵⁶ statute is too spotty and conflicting to provide definitive guidance.

Viewed that way, the interpretive problem posed by the Alien Tort Statute is much less difficult than it first appears: As a textual matter, the Constitution is filled with evidence that Congress, not federal courts, is the preferred expositor of “international” law. That textual preference has interpretative implications: As the Supreme Court has repeatedly underscored, a robust commitment to separation of powers means that federal courts are courts of limited jurisdiction, and as such must narrowly interpret their statutory authority in areas constitutionally committed to Congress’s oversight in the first instance. That leads to one conclusion: That the long-dormant Alien Tort Statute depends on further direction from Congress before federal courts may affirmatively remedy specific violations of international law.⁵⁷

⁵⁵Randy Barnett, An Originalism for Non-Originalists, 45 *Loy. L. Rev.* 611, 620–21 (1999).

⁵⁶Congress, like courts and litigants, also seems to have forgotten the statute: Modern alienage jurisdiction now rests on another statutory provision, 28 U.S.C. § 1332(a) (1976).

⁵⁷In some cases, Congress has already provided that direction. See Torture Victims Protection Act, 28 U.S.C. § 1350 note (1992).

2. Objective Textualism and the Alien Tort Statute

a. The Define and Punish Clause

The Constitution is not silent about which branch is entrusted to define offenses against the law of nations. To the contrary, textual evidence suggests *Congress* has the primary power to incorporate international law into our domestic law. Here is an overview of the argument:

The “law of nations” makes only one appearance in the Constitution—in Article I, section 8, which enumerates the powers of Congress: Congress “shall have Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”⁵⁸ By contrast, Article III, which governs the federal judiciary, contains no corresponding reference to the law of nations. Indeed, on its face, Article III’s enumeration of federal sources of law appears to include only *domestic* sources—that is i.e., “cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority.”⁵⁹ Similarly, the Supremacy Clause of Article VI does not include a reference to the law of nations: It provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States” are alone part of the “supreme” federal law.⁶⁰ The explicit inclusion of the law of nations in Article I, and its absence in Articles III and VI, suggests the definitional power over the law of nations is committed to Congress in the first instance.⁶¹

This conclusion is bolstered by the rule that specific textual enumerations are evidence that “unmentioned, open-ended, ‘equitable’

⁵⁸U.S. Const. art I, § 8, cl. 10. While some scholars have suggested that the Define and Punish Clause is directed only to criminal “offences,” Professor Beth Stephens has made a compelling case that the clause also encompasses the power to regulate civil remedies. Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 *Wm. and Mary L. Rev.* 447, 523–32 (2000).

⁵⁹U.S. Const. art. III, § 2, cl. 1.

⁶⁰U.S. Const. art VI, cl 2.

⁶¹For a lengthy and convincing refutation of the argument that the “Laws of the United States” under Article III and VI implicitly include the law of nations, see Bradley, *supra* note 44, at 601–608.

exceptions” to that enumeration may not be implied.⁶² The Vesting Clause of Article I suggests that that canon is appropriate here: It provides that “all legislative Powers herein granted shall be vested” in Congress.⁶³ Because Article I, section 8’s reference to the law of nations takes the form of a grant, the Vesting Clause creates a strong presumption that that grant is a *legislative* power within the scope of the Vesting Clause, and that the *entire* quantum of that enumerated power (“all [of that] legislative power”) is vested in Congress, rather than shared among the branches.

The Supreme Court’s interpretation of the federal courts’ criminal common law power compels a similar conclusion. Article I enumerates a number of discrete and narrowly defined areas of federal criminal jurisdiction. The Supreme Court has long held that enumeration of *specific* areas of federal criminal jurisdiction in Article I implicitly bars federal courts from recognizing a general, unenumerated “common law” criminal jurisdiction over that same subject matter. As the Supreme Court put it in *United States v. Hudson & Goodwin*,⁶⁴ the natural implication of Article I, section 8’s treatment of federal crimes is that the “legislative authority of the Union . . . must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence,” before a Court can “punish” a person for a federal crime.⁶⁵

The Define and Punish Clause is similarly specific: It takes the form of a precisely delineated grant of power to “define” “offenses” and to “punish”—concepts ordinarily associated with courts. By carefully choosing those words to accomplish the grant, the Define and Punish Clause again suggests congressional primacy.

The textual implications of the Define and Punish Clause also are bolstered by a structural concern: It would make little sense for the Constitution to require agreement between political branches—the executive and the Senate—to ratify treaties, but to permit the judiciary *carte blanche* to incorporate the customary law of nations domestically, without any assent from either political branch. The Treaty Power strongly suggests that elaboration of international

⁶²*United States v. Brockamp*, 519 U.S. 347, 352 (1997).

⁶³U.S. Const. art I, § 1 (emphasis added).

⁶⁴11 U.S. (7 Cranch) 32 (1812).

⁶⁵*Id.* at 34.

legal obligations must be subject to structural checks and balances, and to democratic oversight.

Finally, the drafting history of the Define and Punish Clause, while far from clear, offers some further support for congressional primacy. As Bradley describes:

[S]ome of the proposed drafts of the Constitution would have included cases arising under the law of nations within the federal courts' jurisdiction. The Pickney Plan would have given the Supreme Court appellate jurisdiction over state court decisions "in all Causes wherein Questions shall arise . . . on the Law of Nations." Similarly, although the record is not entirely clear, there is evidence suggesting that the New Jersey Plan would have given the federal judiciary the authority to hear, on appeal, all cases "which may arise . . . on the Law of Nations, or general commercial or marine Laws." But that proposed language was never adopted. Instead, the draft that emerged from the Convention's Committee of Detail listed specific cases and controversies, some which, like admiralty cases and controversies involving ambassadors, would be likely to involve the law of nations. The Founders' delineation of these specific cases and controversies, combined with their decision not to adopt proposed language mentioning the law of nations, suggests that they were not implicitly granting a general law of nations jurisdiction in the "Laws of the United States" language in Article III.⁶⁶

To be sure, that history is consistent with the proposition that the Framers envisioned that the law of nations would serve as a source of decision in certain federal enclaves, including, it should be stressed, disputes between American citizens and foreign citizens. Nonetheless, the Framers' refusal to expressly authorize a *general* law of nations jurisdiction under Article III, and their corresponding decision to grant that general definitional power to Congress, reinforces the conclusion that Congress has a special claim to predominance. This is not a claim that Congress's power is exclusive, only that the interests of Congress deserve special attention when litigants ask

⁶⁶Bradley, *supra* note 44, at 598.

courts, as a matter of first impression, to take on the role of “defining” offenses against the law of nations.⁶⁷

b. Implications for Interpretation of the Alien Tort Statute

Congressional primacy over the law of nations has powerful interpretive implications. To see why it’s important, consider two sets of precedents—*Erie Railroad Co. v. Tompkins*⁶⁸ and the modern law of federal statutory interpretation. Both suggest that structural separation-of-powers concerns should militate against reading a broad federal judicial power under the Alien Tort Statute, absent congressional enactment of positive offenses against the law of nations.

Erie involved an ordinary domestic tort claim between Tompkins, a citizen of Pennsylvania, and the Erie Railroad, a corporate citizen of New York,⁶⁹ and so raised a choice-of-law question about the source of law applied by federal courts exercising diversity jurisdiction. In *Swift v. Tyson*, a century earlier, Justice Joseph Story held that federal courts exercising diversity jurisdiction over common law claims “need not . . . apply the unwritten law of the State as

⁶⁷There may be a number of cases where constitutional structure and history clearly indicate a “common-law-making” role in areas that implicate international law, regardless of *Erie* (see Section III.B.2.b *infra*). For example, the “law of nations” under Article I, section 8 clearly encompasses admiralty law, and the federal courts—based on a grant of admiralty jurisdiction in Section 9 of the federal Judiciary Act—did, and still do, exercise a federal common law power in admiralty despite the commitment of the power to “define” offenses against the law of nations to Congress. *American Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) (“there is an established and continuing tradition of federal common lawmaking in admiralty”). However, given its long history, and the relative lack of controversy surrounding its implementation, admiralty jurisdiction does not pose the same interpretive dilemma posed by the Alien Tort Statute, a statute given conflicting interpretations by early commentators, and then quickly forgotten. Given its unique history of controversy and neglect, the textual claims of Congress to predominance are unique and powerful in this context. And, as discussed in Section III.B.2.b below, that predominance has interpretive implications when federal courts, two centuries after its passage, belatedly take up the interpretive oar today. For discussion of discrete areas, besides admiralty, where there is sufficient countervailing evidence to support limited common-law power in the shadow of international law, see Bradford P. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1292–1306 (1996) (arguing that structural separation-of-powers considerations suggest reasons for a more vigorous judicial law-making role in the discrete areas of public international law—e.g., the act-of-state doctrine—and providing examples).

⁶⁸304 U.S. 64 (1938).

⁶⁹*Id.* at 69.

declared by its highest court.”⁷⁰ Instead, he said, “they are free to exercise an independent judgment as to what the common law of the State is—or should be.”⁷¹ *Erie* overturned *Swift*. “There is,” said the Court, “no federal 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,’ be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.⁷²

Erie is best understood as a separation-of-powers case. Quoting Justice Field, the Court warned that “[s]upervision over either the legislative or the judicial action of the States is in no case permissible except as to matters . . . authorized or delegated to the United States” by the Constitution.⁷³ Put another way, *Erie* redirected lower courts to *constitutional* restraints on judicial power—and, in particular, on the materiality of textual “authoriz[ations]” or “delegat[ions]” of constitutional authority.⁷⁴ *Erie*, understood this way, is an application of the principle that a branch cannot act to “increase its own powers” beyond that provided by the Constitution.⁷⁵ *Erie* is also a subsidiary affirmation that respect for the structure of checks and balances requires respect for the written-ness of the Constitution when resolving disputes about the proper scope of judicial authority.

It is important to note that *Erie*, on its face, is not inherently opposed to a robust judicial role, where appropriate. After all, *Erie*’s separation-of-powers analysis relies heavily on an earlier dissenting opinion by Justice Field,⁷⁶ who was a key dissenter in the *Slaughter-House Cases*,⁷⁷ where he argued that the Privileges or Immunities

⁷⁰*Id.* at 71 (discussing *Swift*).

⁷¹*Id.*

⁷²*Id.* at 78.

⁷³*Id.* at 78–79.

⁷⁴*Id.* at 79.

⁷⁵*Morrison v. Olson*, 487 U.S. 654, 693 (1988) (“the system of separated powers and checks and balances established in the Constitution was regarded by the Framers as ‘a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other’”) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

⁷⁶*Erie*, 304 U.S. at 78–79 (quoting *Baltimore & Ohio R. Co. v. Baugh*, 149 U.S. 368, 401 (1893) (Field, J., dissenting)).

⁷⁷*The Slaughter-House Cases*, 83 U.S. 36 (1873).

Clause of the Fourteenth Amendment authorizes federal courts to strike down positive laws that interfere with common-law rights of property and contract.⁷⁸ The principle that courts must look to constitutional text for their authority, properly understood, means only this: Constitutional text must be respected, both in cases where text authorizes courts to take an active role, and in cases where the text does not.

As discussed, the Define and Punish Clause suggests that application of the “law of nations” is one instance where the Constitution gives Congress a predominant role, while envisioning a more restrained role for federal courts. To be sure, the Alien Tort Statute grants federal courts “jurisdiction” over certain civil actions alleging violations of international law. But that should not be construed as a wholesale delegation to courts of Congress’s power to define and punish offenses against the law of nations. In *Erie*, after all, federal courts also had the benefit of a “jurisdictional” grant—of diversity jurisdiction. *Erie* implicitly suggests that, under our separation-of-powers framework, a legislative grant of jurisdiction—absent some source of authority (for example, *constitutional* authority)—does not authorize a general common-law power.

That reading is confirmed by the modern law of statutory interpretation, which has grown up in the shadow of *Erie*’s separation-of-powers concerns. The post-*Erie* Court has emphasized that courts, in cases where their authority rests on a statute and not on the Constitution, must construe their statutory authority narrowly. As the Court has put it: “Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.”⁷⁹

⁷⁸*Id.* at 89 (Field, J., dissenting) (“The question presented is, therefore, one of the gravest importance, not merely to the parties here, but to the whole country. It is nothing less than the question whether the recent amendments to the Federal Constitution protect the citizens of the United States against the deprivation of their common rights by State legislation. In my judgment the fourteenth amendment does afford such protection, and was so intended by the Congress which framed and the States which adopted it.”). See Kimberly C. Shankman and Roger Pilon, Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government (Cato Policy Analysis No. 326, 1998).

⁷⁹*Alexander v. Sandoval*, 532 U.S. 275, 287 (2001). Of course, this proviso should be qualified: Raising up causes of action where a statute has not created them is not a proper role for federal tribunals—*unless* the cause of action is for a violation of our *constitutional* rights.

The text of a statute is paramount when interpreting whether a statute authorizes courts to grant relief.⁸⁰ As the Court has directed, if the text clearly does not evidence any intent to create a private right of action, analysis can “begin . . . and end” with the “text and structure” of the statute interpreted.⁸¹ Arguments based on enacting Congress’s “expectation . . . formed in light of the ‘contemporary legal context’ ”⁸² are not dispositive: “We have never,” said the Court in *Alexander v. Sandoval*,⁸³ “accorded dispositive weight to context shorn of text.”⁸⁴

In the absence of a clear authorization, courts must decide whether that intent may be inferred. A court may infer a private right of action from a statutory creation of a “remedial scheme”—including provision for damages, and provisions governing statutes of limitations or affirmative defenses to liability.⁸⁵ The absence of a remedial scheme, however, is not necessarily dispositive. In some cases, the “substantive provisions” of a statute may suggest “legal consequences” at such a low level of specificity that the language a fortiori implies a power of judicial enforcement. For example, in *Transamerica Mortgage Advisors, Inc. v. Lewis*,⁸⁶ the Court held that a provision of federal securities law that declared certain contracts void “implic[e]d” a right to specific and limited “contractual relief that ordinarily attends contractual rescission.”⁸⁷

However, a simple *jurisdictional* provision that includes *no* remedial provision, *no* specific substantive proscriptions, and *no* announcement of a legal effect in discrete cases, categorically does *not* entitle a plaintiff to a remedy. In *Touche Ross & Co. v. Redington*,⁸⁸ the Court considered a plaintiff’s claim that Section 27 of the Securities Exchange Act of 1934, which creates “exclusive [federal] jurisdiction” over violations of the Exchange Act, did not implicitly authorize courts to remedy violations.⁸⁹ “Section 27,” said the Court,

⁸⁰*Id.* at 287.

⁸¹*Id.* at 288.

⁸²*Id.* at 287.

⁸³*Supra* note 79.

⁸⁴*Sandoval*, 532 U.S. at 288.

⁸⁵*Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979).

⁸⁶*Supra* note 85.

⁸⁷444 U.S. at 18.

⁸⁸442 U.S. 560 (1979).

⁸⁹See, e.g., 15 U.S.C. § 77a (1934).

“grants jurisdiction to the federal courts It creates no cause of action of its own force and effect”⁹⁰

The distinction between a decision on the merits and a decision on “jurisdiction,” while technical, is important. Separation-of-powers concerns dictate that courts must construe their statutory authority narrowly. Where the basis for judicial action comes from Congress, and not the Constitution, Congress’s grant of statutory jurisdiction alone is *limited* and does *not* (in the general run of statutory cases) include the power to grant relief. This distinction reflects the fact that federal courts are disciplined by the separation-of-powers framework.

These principles argue against recognition of judicial power to apply the law of nations under the Alien Tort Statute, absent further legislative direction. The statute does not contain remedial provisions. It does not contain any specific substantive proscriptions. It does not declare any legal outcome in a particular class of cases. It does not even create exclusive federal jurisdiction over claims arising under the law of nations.⁹¹ The statute creates only “jurisdiction” over a class of cases. In the words of *Touche Ross*, “If there is to be a federal damages remedy under these circumstances, Congress must provide it.”⁹²

Again, I am not making a broad claim that federal courts generally should be deferential to the legislature, or simply inactive. When the Constitution envisions a robust judicial role, as in many cases it does, that role must be respected. But here the text of the Constitution gives Congress primacy over the articulation of the law of nations. Respect for Congress’s role, and the separation-of-powers framework in which Congress and the courts operate, mandates that courts

⁹⁰*Touche Ross*, 442 U.S. at 577.

⁹¹See *supra* note 24 (quoting original text).

⁹²*Touche Ross*, 442 U.S. at 579 (internal quotations omitted). It is instructive to compare the Alien Tort Statute with early pre-1789 state statutes authorizing private remedies for violations of the law of nations under state law. Those statutes explicitly authorize liability and an award of damages. See, e.g., 4 *The Public Records of the State of Connecticut for the Year 1782*, at 156–57 (Leonard Woods Labaree ed., 1942): “That if any Injury shall be offered and done by any Person or Persons whatsoever, to any foreign Power, or to the Subjects thereof, either in their Persons or Property, by means whereof any Damage shall or may any ways arise, happen or accrue, either to any such foreign Power, to the said United States, to this State, or to any particular Person; the Person or Persons offering or doing any such Injury, shall be liable to pay and answer for all such Damages as shall be occasioned thereby.”

must wait for further legislative direction before they can make use of the long-dormant “jurisdiction” granted by the Alien Tort Statute.

Nor do I contend that cases like *Erie*, *Sandoval*, or *Touche Ross* provide insight into the subjective intent of the drafters of the Alien Tort Statute. The understanding of “jurisdiction” articulated above, while consistent with the objective implications of separated powers, may be anachronistic when applied over a gap of centuries. But, even so, the subjective intent of the statute’s drafters may be unrecoverable. If that is the case, we are left to make an objective interpretation of this forgotten statute. Weighed against the spotty historical record, the natural implications of constitutional text and separation of powers have a powerful claim to govern that interpretation.

IV. The Court’s Opinion in *Sosa v. Alvarez-Machain*: A Critique

In a 9–0 decision, with Justice Scalia in partial dissent, the Supreme Court purported to narrowly construe the Alien Tort Statute. The Court did so in a way that paid lip service to the structural restraints the Constitution, *Erie*, and canons of statutory interpretation place on judicial power. But the Court equivocated, leaving key questions unresolved.

A. What the Court Said

The Court’s opinion argues in two steps. First, it considers whether the grant of “jurisdiction” in the Alien Tort Statute implicitly authorizes federal courts to “define” offenses against the law of nations, answering in the affirmative. Second, it considers the degree of interpretive discretion federal courts possess when exercising that jurisdiction.

1. The Birth of the New Federal Common Law

The Court began promisingly enough. Justice Souter, writing for the Court, underscored that “[t]here is no record of congressional discussion about private actions that might be subject to . . . the provision”; that the statute’s historical use is nearly non-existent; and that the historical record is fodder for “radically different historical interpretations.”⁹³ Nonetheless, the Court ventured this: The argument of respondent *Alvarez-Machain* is “implausible.”⁹⁴ “*Alvarez* says that the ATS was intended not simply as a jurisdictional

⁹³*Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2755, 2758 (2004).

⁹⁴*Id.* at 2755.

grant, but as authority for the creation of a new cause of action for torts in international law."⁹⁵ Yet, "[a]s enacted in 1789, the ATS gave the district courts 'cognizance' of certain causes of action, and that term bespoke a grant of jurisdiction, not power to mold substantive law."⁹⁶

So far so good. But the opinion did not end there: "Holding the ATS jurisdictional," said the Court, "raises a new question" . . . to wit, whether "federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."⁹⁷ To answer that ultimate question, the Court looked to pre-*Erie* "history and practice."⁹⁸

Given the patchwork nature of sources illustrating the early understanding of the Alien Tort Statute, the Court relied on a motley assortment of authority, including:

- the views of Oliver Ellsworth, the member of Congress who chaired the committee that reported the 1789 Judiciary Act and, during the Articles of Confederation, had recommended that states enact statutes to authorize damage suits under the law of nations in cases affecting ambassadors;⁹⁹
- scattered statements of Blackstone, which the Court said demonstrated that the content of the early law of nations was "definite and actionable";¹⁰⁰
- the interpretation of the Alien Tort Statute by Attorney General William Bradford, who suggested the statute authorizes private actions in federal court for damages.¹⁰¹

Based on these sources, the Court concluded that "Congress did not intend the ATS to sit on the shelf."¹⁰² The statute, said Souter,

⁹⁵*Id.*

⁹⁶*Id.*

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.* at 2758.

¹⁰⁰*Id.* at 2759.

¹⁰¹*Id.*

¹⁰²*Id.* at 2761.

authorizes the Court to unilaterally remedy offenses against international law.¹⁰³

2. *The New Federal Common Law Defined*

Having decided that the Alien Tort Statute authorizes courts to apply at least part of the “law of nations” as a kind of federal common law, the Court faced another question: What part of the “law of nations” may federal courts apply as federal common law?

Here the Court turned to post-*Erie* precedent. “A series of reasons,” said the Court, “argue for judicial caution.”¹⁰⁴ The first reason? *Erie*. *Erie*, said the Court, reflects a “general understanding” that federal law “is not so much found or discovered as it is . . . made or created.”¹⁰⁵ That “understanding” entails a “general practice” of “look[ing] for legislative guidance” before “exercising innovative authority over substantive law.”¹⁰⁶

The second reason? The modern principles of statutory interpretation. “[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.”¹⁰⁷ Accordingly, said the Court, courts should be “reluctant” to infer the existence of a private cause of action “where the statute does not supply one expressly.”¹⁰⁸

The third reason? The “collateral consequences” that a private right of action to enforce international law may create: “It is one thing for American courts to enforce constitutional limits on our own State and Federal governments’ power, but” it is quite another to “consider suits under rules that would go so far as to claim a

¹⁰³Justice Scalia dissented from this part of the opinion, and would have harmonized the statute with the post-*Erie* understanding that jurisdiction alone does not permit courts to apply general common law. See, e.g., 124 S. Ct. at 2769, 2773 (Scalia, J., dissenting) (“The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. Federal common law is a new door. The question is not whether that door will be left ajar, but whether this Court will open it These considerations . . . are reasons why courts cannot possibly be thought to have been given . . . federal-common-law-making powers with regard to the creation of private rights of action for violations of customary international law.”).

¹⁰⁴*Id.* at 2762.

¹⁰⁵*Id.*

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 2762–63.

¹⁰⁸*Id.* at 2763.

limit on the power of foreign governments” under “modern international law.”¹⁰⁹

These considerations, said the Court, compel a single rule of recognition for enforceable international norms: “definiteness.” “Whatever the ultimate criteria for accepting a cause of action” under the Alien Tort Statute, said the Court, “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 the Alien Tort Statute “was enacted.”¹¹⁰ The Court added one further caveat: “[T]he determination whether a norm is sufficiently definite to support a cause of action should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of making that cause available to litigants in the federal courts.”¹¹¹

3. *Alvarez-Machain’s Suit Dismissed*

With this understanding of the Alien Tort Statute in hand, the Court ruled that the claims of Alvarez-Machain for “arbitrary arrest” must be dismissed. The Court reached that ruling for three reasons:

First, the Court rejected Alvarez-Machain’s contention that the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights were appropriate sources for recognizing a customary international norm. “[T]he Declaration does not of its own force impose obligations as a matter of international law. . . . And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding it was not self-executing and so did not itself create obligations enforceable in the federal courts.”¹¹²

Second, the Court reasoned that recognition of an international norm against arbitrary detention would supplant domestic law: The norm “would create a cause of action for any seizure of an alien in

¹⁰⁹*Id.*

¹¹⁰*Id.* at 2765.

¹¹¹*Id.* at 2766.

¹¹²*Id.* at 2767.

violation of the Fourth Amendment, supplanting actions under § 1983 and *Bivens v. Six Unknown Fed. Narcotics Agents*.¹¹³

Third, the Court noted that the nature of the injury was relatively slight: “It is enough to hold that a single illegal detention of less than a day, followed by transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support creation of a federal remedy.”¹¹⁴

B. Implications

Too often, a properly assertive judicial role is derided as “usurpation” of Congress’s “lawmaking” power. In many cases, an active judicial role is compelled by analysis of constitutional text, and consistent with the role of the judiciary in the system of checks and balances. Here, however, the charge has some force. Below I briefly outline what the Court’s analysis says about the method of the Court and then briefly consider some real-world consequences.

1. Method

Sosa v. Alvarez-Machain engages in a puzzling inversion: An ephemeral historical record is given enormous weight, while the tangible implications of constitutional text and separation of powers are given short shrift.

Indeed, the Define and Punish Clause makes no appearance in the opinion. *Erie* and the modern principles of statutory interpretation enter into the Court’s analysis only *after* the Court has established that the Alien Tort Statute implicitly authorizes courts to recognize “common law causes of action” for violations of international law. When those sources do enter the picture, they are unmoored from their origin in an articulated understanding of the Constitution’s text and its structure of checks and balances. Under *Sosa*, *Erie* is merely a “general understanding” of judicial power—rather like a habit of thought. Similarly, the modern canons of statutory interpretation are no longer linked to the constitutional principle that federal courts are courts of limited jurisdiction. Instead, the

¹¹³*Id.* at 2768.

¹¹⁴*Id.* at 2769.

Court appears to suggest that the canons reflect prudential judgments about legislative competence and the “collateral consequences” of statutory interpretation. Obscured in this analysis is the notion that federal courts, as courts of limited jurisdiction, must base their authority on a clear textual “authorization” or “delegation” contained either in the Constitution, or in legislation enacted pursuant to constitutional authority.¹¹⁵

In place of constitutional text and structure, the Court turns to a historical examination of ephemeral early judicial practice as it existed in a brief window of time at the very cusp of the founding. The Court never articulates why this history (or, in the Court’s words, the “ambient law of the era”)¹¹⁶ should trump constitutional text and structure. Indeed, the Court’s description of the record seems to present a compelling case for the *inconclusiveness* of the historical record. The Court itself admits that the historical record is “poor”;¹¹⁷ that contemporaneous legal sources are “sparse”;¹¹⁸ that there is no “congressional discussion about private actions that might be subject to jurisdictional provision”;¹¹⁹ that “there is no record even of debate on the section”;¹²⁰ and that the provision has “remained largely in the shadow for much of the prior two centuries.”¹²¹

Nor are the historical fragments upon which the Court relies probative. First, as the Court itself notes, historians have reached diametrically opposed interpretations of the Alien Tort Statue on the very same thin body of evidence. Moreover, the particular fragments of this record adduced by the Court are not new to the debate and shed no new light on the material questions here: that is, the views of the enacting Congress, and the intent of the Framers with respect to the key constitutional text at issue, the Define and Punish Clause.

For example, the statements of Oliver Ellsworth adduced by the Court concern the desirability of private damages actions in *state*

¹¹⁵*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938).

¹¹⁶124 S. Ct. 2739, 2755 (2004).

¹¹⁷*Id.* at 2758 (noting “poverty” of the drafting history of the Alien Tort Statute).

¹¹⁸*Id.* at 2759.

¹¹⁹*Id.* at 2758.

¹²⁰*Id.*

¹²¹*Id.* at 2762.

courts during the Articles of Confederation period; those statements were ventured nine years before the Alien Tort Statute was enacted into law; were directed at the role of international law under a different constitutional regime (the Articles of Confederation); and were made without consideration of the U.S. Constitution's subsequent commitment of the power to "define" "offenses" against the "law of nations" to Congress. The views of Attorney General Bradford are counterbalanced by those of Attorney General Levi Lincoln.¹²² The views of Blackstone about the "definite" nature of the early law of nations—while an authoritative statement of the law of nations under English law—do not shed any light on the locus of definitional power over international law posed by *our* constitutional text.

Sosa is, in effect, an anti-textualist opinion, in which history is used not to clarify, but to evade the implications of text and constitutional structure. This is the originalism of convenience, not of principle.

2. Consequences

Should we be alarmed by *Sosa*? At the most fundamental level, the case is troubling for what it reflects about the Court's fidelity to the rule of law. In *Sosa*, the written-ness of the Constitution—so central to a mature understanding of our separation-of-powers framework—seems to have evaporated as a meaningful source of judicial *self*-regulation. Nor is the Court's decision to downplay a structural interpretation of *Erie* an isolated hiccup. The Court's jurisprudence, with a few notable exceptions, generally has evidenced a disturbing trend away from text as a guide for courts: a trend evidenced in the textually *over*-broad reading of the Eleventh Amendment and the Necessary and Proper Clause this term, or the textually *under*-broad reading of the Equal Protection Clause last term. *Sosa*, which is inconsistent with a separation-of-powers reading of *Erie*, reinforces that trend—and is one more step in the wrong direction.

Like many methodologically problematic decisions, *Sosa* may also result in unpleasant policy consequences that could have been avoided by more disciplined analysis. Below, I identify three possible problems. The first is a false alarm; the other two are real.

¹²²See *supra* notes 50–51 and accompanying text.

Government Liability. Some conservative critics have claimed that *Sosa v. Alvarez-Machain* will unleash huge liability risks against the U.S. government when it takes vigorous action in defense of the United States abroad. That concern can be taken too far: There may be cases (like torture) in which we might favor *more* government liability than current law allows. Nonetheless, there is some reason to think that large liability risks under the Alien Tort Statute might translate into less vigorous protection of our security interests than we might want. Even so, on the face of the *Sosa* opinion, this concern is likely overblown.

Consider the record of Alien Tort Statute litigation following *Filartiga*: While claims against state actors have proliferated, few if any of these suits have proven successful.¹²³ Most of these suits are dismissed based on technical jurisdictional and venue concerns (including personal jurisdiction, forum non conveniens, exhaustion, standing, statute of limitations, and sovereign immunity). If the restrictive spirit of the *Sosa* opinion is honored in subsequent cases, those technical limitations may prove to be as much, if not more, of a barrier in post-*Sosa* litigation.¹²⁴

That is especially the case where litigation concerns the federal government and its agents. In particular, the Court appeared to suggest that the Alien Tort Statute cannot be used to “supplant” preexisting statutory causes of action, including 18 U.S.C. § 1983 (the statutory provision that provides a cause of action for official

¹²³See, e.g., Beth Stephens, *Upsetting Checks and Balances: The Bush Administration’s Efforts to Limit Human Rights Litigation*, 17 Harv. Hum. Rts. J. 169, 177 (2004) (“Most of the post-*Filartiga* cases have been dismissed, most often for failure to allege a violation of international [sic] recognized human rights, for *forum non conveniens*, or because of the immunity of the defendant.”).

¹²⁴That is not to say that these barriers could not be overcome. Professor Bradley has outlined some of the mechanisms for expansion. See Bradley, *The Costs of International Human Rights Litigation*, *supra* note 36, at 470–73. Moreover, the biggest litigation threat may be directed at multinational *corporate* defendants. While that problem is not addressed in this article, which focuses on liability for state actors, the prospect that the Alien Tort Statute, in conjunction with federal class action procedures, may abet the rise of extortionate “international mass tort” litigation in U.S. courts is substantial and worrisome. See generally Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. Chi. Legal F. 279 (2003) (discussing possibility of harnessing customary international law and class action procedures to compel settlements against corporate “human-rights” abusers).

deprivations of rights under color of U.S. law).¹²⁵ A natural implication of that ruling is that the statute must be applied with respect for the scope of *Bivens* and 18 U.S.C. § 1983: After all, if the Alien Tort Statute is applied in such a way that it provides a more liberal source of remedies against the government than *Bivens* or Section 1983, then litigants are likely to use the Alien Tort Statute as a remedial vehicle of choice, thereby “supplanting” these other sources of a remedy.¹²⁶

If true, that means *Sosa* is likely to have little immediate effect on government policy. Both the U.S. government as a legal entity and its agents may assert sovereign immunity and qualified immunity as defenses to *Bivens* litigation and under § 1983. If the Alien Tort Statute may not be used to preempt or supercede domestic law, then those same grants of immunity a fortiori will likely be found to apply to any Alien Tort Statute claims against the federal government or its agents, absent legislative direction otherwise. In practical terms, that grant of immunity is an effective bar, if not to litigation, then to any actual liability. In the *Bivens* context, for example, actual recovery for constitutional violations is “extraordinarily rare.”¹²⁷ To

¹²⁵While there are colorable arguments that violations of *jus cogens* norms (of which torture is likely one example) effectively repeal sovereign immunity as a matter of international law, the *Sosa* Court’s express holding that an Alien Tort Statute claim cannot be used to supercede American domestic law would appear to implicitly reject the notion that international rules of sovereign immunity may trump domestic sovereign immunity.

¹²⁶Use of the word “supplant” this way is similar to some interpretations of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011–15, which preempts federal laws that would “invalidate, impair, or supercede” state insurance laws. See, e.g., *Ambrose v. Blue Cross & Blue Shield of Virginia, Inc.*, 891 F. Supp. 1153, 1165 (E.D. Va. 1995) (federal statutes, like RICO, that provide greater remedies for insurance fraud than state law allows “supercede the state laws at issue”).

¹²⁷See Cornelia T.L. Pillard, *Taking Fiction Seriously: The Strange Results of Public Officials’ Individual Liability Under Bivens*, 88 *Geo. L.J.* 65, 65 (1999) (“[i]ndividual liability under *Bivens* is fictional”). Nor do the administration’s recent “torture memos” change that equation in the torture context. Those memos, which analyze the legal definition of torture under the restrictive definitional standards of the statute implementing the Geneva Convention Against Torture, may seem repugnant to moral sensibilities; but there is good reason to believe the memos will bolster the qualified immunity *defense* of federal officials accused of torture (indeed, that may have been among their principal purposes). Under qualified immunity doctrine, an official is entitled to immunity, even if he violated the law as declared by the court, only if the right the official is alleged to have violated is clearly established in the sense that the fact-specific application of the right is governed by a clear, definitive, analogous

be sure, the ineffectual nature of *Bivens* is not reason for celebration: In general, government should be held far *more* accountable for wrongs than it is. Nor should sovereign immunity be held out as an “answer” to an overbroad reading of the Alien Tort Statute: The proper answer to that problem is a proper reading of the statute, one that is consistent with separation of powers. But, even so, this analysis does underscore that it is possible to be too alarmist about the *Sosa* decision.

There are, however, at least two concrete reasons for immediate practical concern. I sketch each briefly below:

Transnational Jurisprudence. First, the decision may give impetus to judicial use of international law to construe the content of substantive constitutional, or statutory, rights. In recent years, Justices Breyer and Ginsburg have both advocated what Harold Hongju Koh calls a “transnationalist jurisprudence”—that is, a jurisprudence that looks to “developments internationally” when interpreting the Constitution.¹²⁸ For example, in last term’s *Grutter v. Bollinger*¹²⁹ decision, Justice Ginsburg, joined by Justice Breyer, argued that the International Convention on the Elimination of All Forms of Racial Discrimination is relevant to the interpretation of the Equal Protection Clause and supports upholding time-limited affirmative action programs.¹³⁰ Similarly, in *Printz v. United States*,¹³¹ Justice Breyer argued that

precedent that bars the action. See, e.g., *Jenkins by Hall v. Talladega City Board of Education*, 115 F.3d 821, 823 (11th Cir. 1997) (holding that clearly invasive strip searches, which were illegal under the Fourth Amendment, nonetheless did not rise to the level of a violation that obviates qualified immunity, because there was no specifically on-point factual precedent that “dictate[s], that is, truly compels” the conclusion). The torture memos—which, whatever may be said of them, engage in a careful interpretation of the strict letter of the Geneva Convention’s implementing statutes—may be used to show that, at this point in the development of American law, reasonable legal opinions may differ concerning the definition of torture, and therefore, perversely, may create a defense to liability—even if a court ultimately disagrees with their content. See, e.g., Memorandum for Alberto R. Gonzales Regarding Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340–2340A, Office of Legal Counsel, Department of Justice (August 1, 2002).

¹²⁸Harold Hongju Koh, *The United States Constitution and International Law: International Law as Part of Our Law*, 98 A.J.I.L. 43, 52–53 (2004).

¹²⁹539 U.S. 306 (2003).

¹³⁰*Id.* at 342 (Ginsburg, J., concurring).

¹³¹521 U.S. 898 (1997).

the international experience of European federated states supports broad federal power to direct the conduct of state officials:

At least some other countries, facing the same basic problem, have found that local control is better maintained through application of a principle that is the direct opposite of the principle the majority derives from the silence of our Constitution. The federal systems of Switzerland, Germany, and the European Union, for example, all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central “federal” body.¹³²

Judicial willingness to “harmonize” our domestic supreme law with international practice is problematic. As Richard Posner has noted:

[One] problem with citing foreign decisions in U.S. courts is that they emerge from a complex socio-historico-politico-institutional background of which our judges, I respectfully suggest, are almost entirely ignorant. (Do any of the Supreme Court justices know any foreign languages well enough to read a judicial decision that is not written in English? And are translations of foreign decisions into English reliable?)

...

To know how much weight to give to, say, the decision of the German Constitutional Court in an abortion case, you would want to know such things as how the judges of that court are appointed and how German constitutional judges conceive of their role.¹³³

Sosa gives “transnational jurisprudence” more, and not less, momentum. If courts have an institutional capacity to apply international law directly, then it is arguable courts also have authority to undertake the relatively more modest task of interpreting preexisting statutes with reference to international practice. To be sure, Souter’s opinion is suffused with cautionary language; but much of the cautionary language is narrowly targeted toward the collateral *political*

¹³²*Id.* at 976 (Breyer, J., concurring).

¹³³Richard A. Posner, “No Thanks, We Already Have Our Own Laws,” *Legal Affairs*, available at http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.html (last checked July 29, 2004).

consequences of creating a *direct* remedy for violation of international norms, not the indirect use of international law advocated by fans of “transnational jurisprudence.”

An expansion of “transnational jurisprudence” would be cause for concern. Many foreign governments are, indeed, far less inclined to entertain the concerns of civil libertarians than our own. The U.K., for example, has proven willing to dispense with many criminal procedural protections we consider fundamental in the name of security.¹³⁴ The U.K. operates, however, without a written constitution and under a government structure that is far more centralized than our own. Interpreting, say, the Fourth Amendment’s “reasonableness” requirement in light of U.K. practice, or that of an analogous state operating in a similarly permissive constitutional climate, surreptitiously denudes the Fourth Amendment from the written structural constitutional context in which it operates and must be interpreted.

Moral Hazard Problems. Second, *Sosa v. Alvarez-Machain* creates “moral hazard” problems for the enforcement of important human rights norms against U.S. officials. The textual commitment of the power to “define” offenses against the law of nations is, in part, an invitation—to us, as a democratic political community, to decide what kind of country we want to be in places where the Constitution may not reach. Part of the force of that invitation lies in the clarity of the Constitution’s commitment of ultimate responsibility. That is an invitation, and an assignment of responsibility, that may lose force, clarity, and momentum if Congress assumes private litigants and trial judges will take up its slack.

The administration’s response to the recent furor over the use of torture is instructive in this regard. Asked if the administration will abide by norms against torture, President Bush responded, “The instructions went out to our people to adhere to law. That ought to comfort you.”¹³⁵ In fact, as the Office of Legal Counsel’s memos

¹³⁴See, e.g., Michael P. O’Connor & Celia P. Rumann, Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland, 24 *Cardozo L. Rev.* 1657 (2003); Fionnuala Ni Aolain, The Fortification of an Emergency Regime, 56 *Alb. L. Rev.* 1353 (1996) (discussing history of emergency powers assumed by the British government in Northern Ireland).

¹³⁵See “Rules As Solid As Sand: Bush’s Legalistic Evasions Set A Dangerous Example For U.S. Forces And The World,” *AJC.com*, June 16, 2004, at www.ajc.com/opinion/content/opinion/0604/16torture.html.

on torture subsequently illustrated, the administration has taken a narrow view of what constitutes “torture,” based on a restrictive textual reading of the acts that constitute “severe” pain and suffering within the meaning of the statute implementing the Geneva Convention Against Torture.¹³⁶ The “torture memo” underscores that interpretation of international law is susceptible to highly formalistic legal constructions—a threat created in part by the diffuse and ephemeral nature of international legal “norms” themselves. The Define and Punish Clause reminds us that our international obligations aren’t something that lawyers can look up in a book. Rather, the act of “defining” international obligations, and our level of commitment to those norms, is something for which we as a political community must take *moral* responsibility—a responsibility that may require us to give those norms more force than the wranglings of government lawyers might permit. Unfortunately, *Sosa v. Alvarez-Machain* gives lawyers—and, presumably, government lawyers—a leading role in defining those obligations, and so risks diluting that message.

V. Conclusion

Of course, as with all Court decisions that reflect a shift in legal-thinking while leaving key details undefined, the ultimate endgame remains guesswork. As Justice Scalia said in his partial dissent, the majority opinion leaves the door “open” to mischief.¹³⁷ It has not yet pushed us through. But, given the *Sosa* Court’s lack of discipline, that is only a very small comfort.

¹³⁶See, e.g., Memorandum for Alberto R. Gonzales Regarding Standards of Conduct for Interrogations under 18 U.S.C. §§ 2340–2340A, Office of Legal Counsel, Department of Justice (August 1, 2002).

¹³⁷*Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2774 (2004) (Scalia J., dissenting).