Sosa v. Alvarez-Machain and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?

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Sosa v. Alvarez-Machain\textsuperscript{1} and the Alien Tort Statute: How Wide Has the Door to Human Rights Litigation Been Left Open?

I. INTRODUCTION

Activists are pulling with all their might to open the door to human rights litigation in the United States federal courts.\textsuperscript{2} At the same time, the Bush administration, multinational corporations, and some members of the Supreme Court are leaning heavily against that door, summoning the weight of history and tradition to keep it shut.\textsuperscript{3} This struggle exists because of the near-dormant state of the Alien Tort Statute (ATS)\textsuperscript{4} since its enactment as a component of the Judiciary Act of 1789.\textsuperscript{5} Neither the Supreme Court nor Congress has made a thorough determination as to what claims aliens can bring for violation of the “law of nations”\textsuperscript{6} before

\begin{enumerate}
\item 542 U.S. 692 (2004).
\item Marcia Coyle, Justices Open Door with Alien Tort Case, THE RECORDER, July 8, 2004, at 1 (remarking that human rights proponents “lost the battle but won the war” with the Supreme Court’s decision in Sosa v. Alvarez-Machain and would persist with other pending Alien Tort Statute suits).
\item Warren Richey, When Can Foreigners Sue in US Courts?, THE CHRISTIAN SCIENCE MONITOR, March 30, 2004, at 2 (reporting that the outcome of the Sosa case is of “great interest to US-based multinational corporations” that are being increasingly named as defendants in human rights litigation). The suits brought against these multinational corporations under the ATS “allege that the companies are aiding and abetting the human rights abuses of the host government.” Id.
\item 28 U.S.C. § 1350 (2000). This legislation is known interchangeably as the Alien Tort Statute, the Alien Tort Claims Act and the Alien Tort Act; throughout this paper it will be referenced as the Alien Tort Statute, or ATS, as is consistent with the Supreme Court’s language in Sosa. See infra note 24 for both the modern and historical text of the ATS.
\item See infra notes 23-26 and accompanying text (providing the language of this Act and explaining its historical context). See also infra notes 39-53 and accompanying text (discussing the dormant period of the ATS, beginning shortly after its enactment and extending until the Second Circuit’s decision in Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980)).
\item Black’s Law Dictionary cross references “law of nations” to the definition of “international law.” BLACK’S LAW DICTIONARY 903 (8th ed. 2004). International law is “[t]he legal system governing the relationships between nations; more modernly, the law of international relations, embracing not only nations but also such participants as international organizations, multinational corporations, nongovernmental organizations, and even individuals (such as those who invoke their human rights or commit war crimes).” Id. at 835. The author will primarily refer to this body of law as the “law of nations” rather than “international law” throughout this Note, as it is the language used in the Alien Tort Statute, see infra note 24, and in the Supreme Court’s
\end{enumerate}
The Supreme Court’s decision in *Sosa v. Alvarez-Machain*\(^8\) neither threw the door open nor shut it firmly.\(^9\) Instead, this decision perpetuates the uncertainty surrounding the ATS by leaving the door slightly ajar, suggesting that the issue will be revisited frequently as human rights issues push to the forefront of the national conscience.\(^10\) *Sosa* acknowledges a remedy for violations of the modern day law of nations without enunciating exactly what that body of law entails.\(^11\) The Court gives hope to human rights activists that the ATS will provide a jurisdiction for the adjudication of severe international offenses, while acknowledging that not every international dispute will warrant a cause of action in the federal courts.\(^12\) The Court, cautiously tempering the ATS to a limited application, staves off a potential influx of alien claims to the federal court and, at least temporarily, appeases those corporations who might suffer an adverse effect.\(^13\) An analysis of the Court’s disposition in this case, then, is helpful to gauge the potential outcome of future human rights litigation and to explore the consequences that keeping the door ajar to alien claims might invite.\(^14\)

This Note will explore the Alien Tort Statute from its origin in 1789 to the present interpretation of the *Sosa* Court.\(^15\) Part II will focus

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\(^7\) Coyle, *supra* note 2, at 1. As the “first substantive high court decision on the ATS in the statute’s history,” *Sosa* is the Supreme Court’s first attempt to flesh out some of the ambiguous elements of the ATS. *Id.* Congress has yet to bring the scope of the ATS up for discussion. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789, 49 (2003) (encouraging review of the ATS by Congress) [hereinafter HUFBAUER & MITROKOSTAS, AWAKENING MONSTER]; Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 624 (2004) (suggesting the same) [hereinafter Hufbauer & Mitrokostas, *International Implications*].

\(^8\) 542 U.S. 692 (2004). See *supra* Section III for the statement of the case.

\(^9\) Justice Scalia, in his concurring opinion, urges that the door be firmly shut. *Sosa*, 542 U.S. at 739 (Scalia, J., concurring). The plurality leaves it open slightly. *Id.* at 746.

\(^10\) *See infra* notes 90-126 and accompanying text (discussing the plurality’s opinion which has this result).

\(^11\) *See infra* notes 90-126 and accompanying text (discussing the same).


\(^13\) *See infra* notes 90-126 and accompanying text (presenting the plurality’s opinion).

\(^14\) *See infra* notes 176-196 and accompanying text (discussing these consequences from three aspects: human rights activists, multinational corporations, and the foreign policy objectives of the United States).

\(^15\) *See infra* notes 23-66 and accompanying text (setting forth the history of the ATS).
on the Framers’ language and intent, discuss the long lull in the use of the ATS and the impact of *Erie R. Co. v. Tompkins*, and examine a line of cases that reawakened the ATS in the 1980s. Part III explores the elements of the Court’s decision in *Sosa v. Alvarez-Machain*: the facts that gave rise to an ATS claim, the plurality’s denial of jurisdiction, its dicta regarding potential application of the ATS, and Justice Scalia’s concurring opinion endorsing a very narrow and strict approach to the modern ATS. Part IV analyzes the possible interpretations and application of the Court’s decision, the efforts of human rights victims and activists to squeeze through the slightly ajar door of the ATS, the potential international and economic implications that may result from the Supreme Court’s failure to decisively shut the door on ATS litigation, and the role that Congress should play in redefining the purpose of the ATS.

II. THE EVOLUTION OF THE ALIEN TORT STATUTE

A. Formation by the First Congress

In 1789, two years after the ratification of the United States Constitution, the First Congress enacted the Judiciary Act. Among the
ways in which this Act expanded the federal judicial powers created in
the Constitution, the Act specifically provided jurisdiction for actions
brought by aliens for torts only.\textsuperscript{24} Although legislative history is
sparse,\textsuperscript{25} scholars suspect that Congress included such a provision in the
Judiciary Act to serve economic motives and bolster the United States’
fledgling presence on the international scene.\textsuperscript{26} The ATS was the
framers’ way of “show[ing] European powers that the new nation would
not tolerate flagrant violations of the ‘law of nations,’ especially when
victims were foreign ambassadors or merchants.”\textsuperscript{27}

\textsuperscript{24} First Congress, \textit{Judiciary Act of 1789}, supra note 23, at 76-77. The original language of
the Judiciary Act of 1789, Section 9 began: “[t]he district courts shall have, exclusively of the courts
of the States . . .” and then proceeded to specify instances in which the federal courts have exclusive
jurisdiction. \textit{Id.} The clause which would become known as the Alien Tort Statute (ATS) read:
“[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 cases where an alien sues for a tort only in violation of
the law of nations or a treaty of the United States.” \textit{Id.} at 77. The modern language of the ATS,
codified at 28 U.S.C. § 1350 states: “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.” 28 U.S.C. § 1350 (2000). Changes in phraseology were made at various redrafts of
the United States Code to reflect language used in the Federal Rules of Civil Procedure. \textit{See id.}
at “Historical and Statutory Notes” (noting the substitution of “civil action” for “suits” consistent with
the FRCP).

\textsuperscript{25} Casto, supra note 23, at 467 (calling the ATS, its origin and purpose, “obscure”). \textit{See also}
Richey, supra note 3, at 2 (nicknaming the Sosa case “The Case of the Inscrutable Statute” because
of the difficult task before the Supreme Court justices in interpreting a statute where “virtually no
information exists explaining why Congress passed the [ATS]”).

\textsuperscript{26} Dodge, \textit{Historical Origins}, supra note 23, at 222. \textit{See also} HUFBAUER \& MITROKOSTAS,
\textit{Awakening Monster}, supra note 7, at 3 (noting U.S. response to “flagrant violations” against
international figures as a precursor to the enactment of the ATS); John Haberstroh, \textit{The Alien Tort
POL’Y 231, 236-37 (2004) (calling the ATS an attempt by the “militarily weak [United States] . . . to
gain control over its voice in foreign relations”); Beth Stephens, \textit{Upsetting Checks and Balances:
The Bush Administration’s Efforts to Limit Human Rights Litigation}, 17 HARV. HUM. RTS. J. 169,
186 (2004) (identifying the crises between the United States and other nations over a series of
“notorious incidents” as the need for the ATS). “[D]espite considerable scholarly attention, it is fair
to say that a consensus of what Congress intended [by the enactment of the ATS] has proven

\textsuperscript{27} HUFBAUER \& MITROKOSTAS, \textit{Awakening Monster}, supra note 7, at 3. The impetus for
the ATS can be traced to a pair of assaults against foreign dignitaries while in the United States. \textit{Id.}
\textit{See also infra} note 28 (describing one of these triggering incidents, involving the French
Ambassador Marbois). The enactment of the ATS shortly following these incidents demonstrated
that even “[e]arly in the history of the republic, Congress was evidently anxious to display
The inclusion of the ATS in the Judiciary Act reflects the First Congress’ distrust of the state courts’ ability and willingness to properly adjudicate aliens’ claims involving the law of nations. Having been entrusted with this duty by the Continental Congress in 1781, the state courts were left to their own common law interpretations of the law of nations and with the freedom to punish violations as they saw fit. Out of concern for the United States’ tenuous international status, the First American leadership in defending international standards of good behavior.”

American leadership in defending international standards of good behavior.” HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 3. William Blackstone “explained that as a matter of municipal policy, a nation’s domestic law must implement the law of nations in order to preempt complaints by foreign sovereigns.” Casto, supra note 23, at 489. Economically speaking, the ATS granted a source of leverage to American merchants doing business internationally. Haberstroh, supra note 26, at 237. Suppressed by the “belligerent nations” of the mercantile world, American merchants (and other vulnerable nations) could fight the war for free trade “by means of moral persuasion.” Id.

28. See Casto, supra note 23, at 495 (surmising that the newly convened Congress “surely remembered the Continental Congress’ ill-fated law of nations resolution”); Dodge, Historical Origins, supra note 23, at 234-35 (attributing the passage of the ATS as a means of assuring the law of nations violations would be resolved “regardless of the vagaries of state law”). State courts had demonstrated their unwillingness to provide recourse for wronged aliens. Haberstroh, supra note 26, at 239. Among the torts encompassed in the law of nations was the violation of treaties. Id. See also First Congress, Judiciary Act of 1789, supra note 23, at 77 (creating jurisdictions for violation of the law of nations and treaties); infra note 35 (discussing the widely accepted understanding of what the “law of nations” encompassed). However, the state courts refused to grant justice for one such treaty violation by refusing to aid British creditors in recovering debt promised them in a treaty ending the Revolutionary War. Haberstroh, supra note 26, at 239. The ATS would ensure that hostile state courts did not put the nation’s security at risk by angering a recent enemy or hinder the economy by angering a world power.

29. Dodge, Historical Origins, supra note 23, at 226-27. The nation had, from its very start, become concerned with the need to “redress individual violations of the law of nations.” Id. at 226. See also Stephens, supra note 26, at 186 (citing the Continental Congress’ frequent attempts to encourage the states to punish these violations, both civilly and criminally, prior to the enactment of the ATS). With this in mind the Continental Congress passed a resolution in 1781 requesting that the states so litigate such law of nations claims. Dodge, Historical Origins, supra note 23, at 226.
Congress enacted the ATS as a definitive statement that an alien’s claim for a violation of the law of nations could be adjudicated in the federal courts, rather than being left to the uncertainty and hostility of the state courts. The ATS, while not destroying state common law causes of action for the law of nations, created a concurrent jurisdiction in the federal courts, thereby assuring aliens — and signaling to world powers — that violations of the law of nations would be redressed in American courts.

The “law of nations,” as the Founding Fathers understood the notion, can be traced to the teachings of William Blackstone. Blackstone theorized that “the law of nations is a system of rules, (describing the international status motives behind the enactment of the ATS). The potential for inconsistencies in the interpretation of the law of nations from state to state was distressing to the Founding Fathers who sought a consonant interpretation. Dodge, Historical Origins, supra note 23, at 235. The authors of the Federalist Papers pointed to the need for federal jurisdiction in this instance on the bases of national security and a vibrant economy. Id. at 235-36. James Madison blamed the hostility of state courts to the claims of aliens for the lack of “wealthy gentlemen . . . trading or residing among us.” Id. at 235 (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 583 (J. Elliot ed., 2d ed. 1881)). Alexander Hamilton considered the barring of access to courts for the adjudication of these claims “among the just causes of war” and therefore felt that “the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.” Id. at 236 (quoting THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). In practice, the resolution of the Continental Congress was ineffective; it appears only one state passed a law to this effect. Sosa, 542 U.S at 716 (citing FIRST LAWS OF THE STATE OF CONNECTICUT 82, 83 (J. Cushing ed. 1982) (1784 compilation; exact date of Act unknown)). In theory, however, “Congress had done what it could to signal a commitment to enforce the law of nations.” Id.


32. Dodge, Historical Origins, supra note 23, at 236. “The new Constitution gave Congress the authority to do what it could only recommend to the States in 1781.” Id. at 231. See also Curtis A. Bradley & Jack L. Goldsmith, III, The Current Illegitimacy of International Human Rights Litigation, 66 FORDHAM L. REV. 319, 360 (1997) (identifying the “major impetus” for the ATS as “unredressed attacks on ambassadors in the United States . . . that implicated the U.S. responsibility under international law”); Casto, supra note 23, at 481 (explaining that the judicial remedy provided by the ATS was “necessary in order to assuage the anger of foreign sovereigns”).

33. See Dodge, Historical Origins, supra note 23, at 225 (recognizing Blackstone’s influence in early American law). William Blackstone, a British lawyer and contemporary of the Founding Fathers, lectured on English law at Oxford in the 1750s. Greg Bailey, Blackstone in America, available at http://earlyamerica.com/review/spring97/blackstone.html (last visited 4/7/2006). The lectures were later published as Commentaries on the Laws of England. Id. The Framers discovered their inspiration for the founding documents of the United States in Blackstone’s scientific approach to the law. Id. But see Casto, supra note 23, at 505 and 505 n.210 (giving credit for the notion of law of nations to James Wilson, “an influential delegate to the Constitutional Convention”). Wilson lectured on three branches of the law of nations in 1790 and 1791. Id. He identified “the law of nations as applied to state” (or the “current international law”), the “law of merchants” (or those laws which governed “private international business transactions”) and the “law maritime” (which encompassed admiralty). Id. (internal quotations and footnotes omitted).
deducible by natural reason, and established by universal consent among
the civilized inhabitants of the world.”\textsuperscript{34} Blackstone suggested that
“[t]he principle offences against the law of nations . . . are of three
kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of
embassadors [sic]; and 3. Piracy.”\textsuperscript{35} An insight to the intentions behind
the ATS can be found in the language of the Continental Congress’
resolution issued to the states as a precursor to the enactment of the
Judiciary Act.\textsuperscript{36}

In words that echo Blackstone, the congressional resolution called
upon state legislatures to “provide expeditious, exemplary, and
adequate punishment” for “the violation of safe conducts or
passports, . . . of hostility against such as are in amity, . . . with the
United States, . . . infractions of the immunities of ambassadors and
other public ministers . . . [and] “infractions of treaties and conventions
to which the United States are a party.”\textsuperscript{37}

Consistent with Blackstone’s influence, the First Congress likely
intended the federal courts would have jurisdiction over these types of
violations by virtue of the ATS.\textsuperscript{38}

\textsuperscript{34} Dodge, \textit{Historical Origins}, supra note 23, at 225-26 (quoting 4 \textsc{William Blackstone},
\textit{Commentaries} *68).

\textsuperscript{35} Id. at 226. (quoting 4 \textsc{William Blackstone}, \textit{Commentaries} *68); Casto, supra note
23, at 490 (crediting Blackstone for establishing these primary violations of the law of nations).

\textsuperscript{36} Sosa v. Alvarez-Machain, 542 U.S. at 716 (2004). This resolution dates to 1781, eight
years before the drafting of the ATS. \textit{Id. See supra} notes 28-29 and accompanying text (discussing
the federal government’s urging of the states to adjudicate aliens’ claims).

\textsuperscript{37} Sosa, 542 U.S. at 716 (citing 21 \textsc{J. of the Cont. Cong.} 1136-37 (G. Hunt ed. 1912)).
The Resolution issued by the First Congress to the states also requested that the states “vest their
courts with jurisdiction ‘to decide on offences against the law of nations, not . . . enumerate[d].’”
Casto, supra note 23, at 490 (quoting 21 \textsc{J. of the Cont. Cong.} 1137 (1781) (penultimate resolve)).

\textsuperscript{38} Dodge, \textit{Historical Origins}, supra note 23, at 232. Blackstone’s law had already been
absorbed into the common law of the states which the ATS was enacted to centralize. \textit{Id.}

Violations of safe-conducts would typically involve assaults. Violations of the rights of
ambassadors could involve assault . . . or trespass and false imprisonment. Acts of
piracy could involve assault, trespass, and false imprisonment. Violations of treaties
could implicate a variety of torts, but it is apparent that assaults in violation of U.S.
neutrality could violate a treaty.

\textit{Id.} at 232-33.

That portion of the general common law known as the law of nations was understood to
refer to the accepted practices of nations in their dealings with one another (treatment of
ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high
seas hostile to all nations and beyond all their territorial jurisdictions (pirates).

\textit{Sosa}, 542 U.S. at 749 (Scalia, J., concurring).
B. Nearly 200 Years of Stagnancy

Despite apparently pressing reasons for the inclusion of the Alien Tort Statute in the Judiciary Act, the jurisdiction it extended for the tort claims of aliens went essentially unused for nearly 200 years following its enactment.\(^\text{39}\) Invoked just over twenty times between 1789 and 1980,\(^\text{40}\) the federal courts found jurisdiction under the ATS in only two of those cases.\(^\text{41}\) During this period, the ATS had effect as “principally a jurisdictional statute.”\(^\text{42}\) It was thought that “the ATS confided the power in federal district courts to hear tort cases brought by foreigners, but it did not (with limited exceptions) enumerate torts that could be the basis of a lawsuit.”\(^\text{43}\)

\(^{39}\) Haberstroh, supra note 26, at 236. “The ATS remained largely unnoticed and unused until 1980.” Hufbauer & Mitrokostas, Awakening Monster, supra note 7, at 3. Immediately following the 1789 passage of the ATS, a handful of events confirmed the need for such legislation.

Casto, supra note 23, at 501. Diplomat-related issues became especially pronounced with the outbreak of war between France and Great Britain in the early 1790s. Id. President Washington insisted on the neutrality of Americans toward the hostility, and proclaimed any assistance to either side a violation of the law of nations. Id. at 502.

\(^{40}\) Haberstroh, supra note 26, at 236; Hufbauer & Mitrokostas, International Implications, supra note 7, at 609. Two early cases broached the topic of the ATS, but neither relied on the ATS as the basis for jurisdiction. Dodge, Historical Origins, supra note 23, at 252. In both cases, the ATS “was asserted . . . as a supplement to the district courts’ admiralty and maritime jurisdiction.” Id. The 1793 case of Moxon v. The Fanny, 17 F. Cas. 942 (D. Pa. 1793) (No. 9895), involved the commandeering of a British ship in U.S. waters by a French privateer. Dodge, Historical Origins, supra note 23, at 252. The district court dismissed the case on other grounds, but did note parenthetically that the plaintiff’s claim under the ATS could not be maintained, despite its foundation in admiralty and maritime law, because it was not a suit for “tort only.” Id. In addition to damages, the claim also prayed for restitution of the ship. Id.

\(^{41}\) Hufbauer & Mitrokostas, International Implications, supra note 7, at 609. In Bolchos v. Darrel, 3 F. Cas. 810 (D. S.C. 1795) (No. 1607), the ATS served as the reserve jurisdictional basis for a claim involving another French privateer. Dodge, Historical Origins, supra note 23, at 253. In this case the French privateer brought an action for the proceeds of the sale of slaves from a Spanish vessel he had captured at sea. Id. An agent for the owner of the slaves later recovered the commandeered slaves and sold them. Id. The district court held that if it “should refuse to take cognizance of the cause, there would be a failure of justice.” Bolchos, 3 F. Cas. at 810. Jurisdiction in the federal courts was established in this case because it was an admiralty claim, id., but, the court also stated:

Besides, as the 9th section of the [J]udiciary [A]ct of [C]ongress gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt upon this point.


\(^{42}\) Hufbauer & Mitrokostas, Awakening Monster, supra note 7, at 3.

\(^{43}\) Id. Although many federal courts eventually began expanding the ATS to include a cause of action for the modern law of nations, most notably in Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) (holding that torture violated the law of nations such that the ATS provided
C. Customary International Law\(^\text{44}\) and Erie R. Co. v. Tompkins\(^\text{45}\)

When the First Congress enacted the ATS in 1789, the law of nations existed as part of the general common law.\(^\text{46}\) One-hundred-fifty-years later, in *Erie R. Co. v. Tompkins*,\(^\text{47}\) the Supreme Court struck down the concept of federal common law and required that federal courts use the law of the state in which they are situated.\(^\text{48}\) In theory, the decision in *Erie* should have had a significant impact on the ATS; the law of nations, as understood by the drafters of the ATS, was embodied in general common law.\(^\text{49}\) Likewise, any modern causes of action that the jurisdiction for an alien’s claim against another alien), see *supra* notes 54-66 (focusing on the *Filartiga* decision and related issues), some courts held true to the idea that the ATS did nothing more than “provid[e] a forum, but not a cause of action, for aliens suing in tort.” Patrick D. Curran, *Universalism, Relativism, and Private Enforcement of Customary International Law*, 5 *CHI. J. INT’L L.* 311, 313-14, 314 n.12 (2004). The supporters of this view would likely embrace the interpretation of the ATS as advanced by Judge Robert H. Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (U.S. App. D.C. 1984), *cert. denied*, 470 U.S. 1003 (1985). Judge Bork adhered to a very strict “originalist” interpretation of the ATS. Dodge, *Historical Origins*, *supra* note 23, at 237. Judge Bork’s decision, then, is in opposition to the *Filartiga* decision, on the basis of three principles: “(1) that an express cause of action is needed, which the Clause does not provide; (2) that the Clause should be limited to those torts that violated the law of nations in 1789; and (3) that the Clause should be limited to prize cases.” *Id.*

44. Customary international law “is one of the principal sources or building blocks of the international legal system.” *BLACK’S LAW DICTIONARY* 835 (8th ed. 2004). It is “[i]nternational law that derives from the practice of states and is accepted by them as legally binding.” *Id.*

45. 304 U.S. 64 (1938).

46. *Leading Case: B. Alien Tort Statute*, 118 *HARV. L. REV.* 446, 451 (2004) [hereinafter *Leading Case*]. The general common law was a “brooding omnipresence recognized rather than created by federal and state judges alike.” *Id.* (internal quotation and footnote omitted). The more formal definition of general federal common law is:

> [T]he judge-made law developed by federal courts in diversity-of-citizenship cases. Since *Erie*, a federal court has been bound to apply the substantive law of the state in which it sits. So even though there is a ‘federal common law,’ there is no longer a general common law applicable to all disputes heard in federal court. *BLACK’S LAW DICTIONARY* 293 (8th ed. 2004).

47. 304 U.S. 64 (1938) (holding that there is no federal common law).


49. Bradley & Goldsmith, *supra* note 32, at 331-32 (stating the position that there is “little doubt” that prior to the *Erie* decision, customary international law “had the status of general common law, not federal law”); see also Clark, *supra* note 48, at 1280-81 (noting the direct effect of
law of nations concept of the ATS could potentially accommodate would exist in customary international law, akin to the federal common law of the pre-\textit{Erie} courts.\footnote{See infra notes 90-136 and accompanying text for the Supreme Court’s debate on the modern law of nations; see infra section IV for the author’s analysis of the inclusion of customary international law in the reach of the ATS.} Customary international law, which “results from a general and consistent practice of states followed by them from a sense of legal obligation,”\footnote{\textsc{Restatement (Third) of the Foreign Relations of the United States} §102 (1987).} becomes part of the federal common law\footnote{\textit{Cf.} The Paquete Habana, 175 U.S. 677, 700 (1900) (holding “[i]nternational 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”); see also Donald J. Kochan, \textit{The Political Economy of the Production of Customary International Law: The Role of Non-Governmental Organizations in U.S. Courts}, 22 \textit{Berkeley J. Int’l L.} 240, 250 (2004) (recognizing \textit{The Paquete Habana} case as the controlling authority allowing international law to be applied in U.S. courts even when the international law has not been ratified as a treaty or similarly given status as a federal law).} if it becomes part of U.S. law at all.\footnote{See Bradley & Goldsmith, supra note 32, at 358 (supporting the view that customary international law should not be treated as substantive federal law). \textit{But see} T. Alexander Aleinikoff, \textit{International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate}, 98 \textit{Am. J. Int’l L.} 91, 91 (2004) (arguing a novel viewpoint that customary international law “has always – and properly – been viewed as . . . neither federal nor state law but, rather, law to be applied in appropriate cases by federal courts in instances where they otherwise possess jurisdiction.”).}

\textit{Erie} on the law of nations); see generally Curtis A. Bradley, \textit{The Status of Customary International Law in U.S. Courts - Before and After Erie}, 26 \textit{Denve. J. Int’l L. & Pol’y} 807, 810 (1998) (analyzing the effect of the \textit{Erie} decision on the use of customary international law by federal courts); Hoffman & Zaheer, supra note 48, at 55-59 (offering a discussion of \textit{Erie}’s impact on customary international law’s place in U.S. courts). \textit{But see} Gerald L. Neuman, \textit{Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith}, 66 \textit{Fordham L. Rev.} 371, 374-76 (1997) (refuting Bradley and Goldsmith’s contention that customary international law is embodied in federal common law and therefore destroyed with the \textit{Erie} decision). “The Supreme Court has repeatedly recognized disputes implicating foreign relations as one of the areas where the creation of federal common law is justified by an overriding federal interest.” \textit{Id.} at 377.
D. Filartiga v. Pena-Irala\(^{54}\) *Resurrects the Alien Tort Statute*\(^{55}\)

In 1980, the Second Circuit revived the ATS both as a jurisdictional basis and as creating a cause of action for a violation of the law of nations.\(^{56}\) The *Filartiga* decision gave life to the ATS in a way that many argue the Framers never intended.\(^{57}\) It was clear that the statute gave the federal courts jurisdiction over alien tort claims,\(^{58}\) but up to this point it was unclear whether the statute also had an embedded cause of action.\(^{59}\) *Filartiga* and the line of cases that followed it\(^{60}\) argued that

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\(^{54}\) 630 F.2d 876 (2d Cir. 1980). In 1976, Americo Noberto Pena-Irala (Pena), the Inspector General of the Police in Asuncion, Paraguay, allegedly kidnapped, tortured and killed a Paraguayan youth, Joeltio Filartiga, and displayed his corpse to his sister. *Id.* at 878. The Filartiga family was a pronounced opponent of the presidency of Alfredo Stroessner, who had controlled Paraguay since 1954. *Id.* While criminal actions were proceeding slowly in Paraguay, happenstance brought both the alleged offender, Pena, and the sister of the victim, Dolly Filartiga, to reside in the United States. *Id.* Dolly settled in Washington, D.C., and had applied for permanent political asylum after entering the United States on a visitor’s visas in 1978. *Id.* Pena and his companion also entered the United States on visitor’s visas in 1978 and moved to Brooklyn, New York. *Id.* After learning that Pena had entered the United States, Dolly notified Immigration and Naturalization Service (who subsequently arrested Pena and ordered his deportation) and commenced an action in the Eastern District of New York for the wrongful death of her brother. *Id.* at 879.

\(^{55}\) Gary Clyde Hufbauer and Nicholas K. Mitrokoskostas use more colorful language to refer to the ATS in the title of their work, *Awakening Monster: The Alien Tort Statute of 1789*, *supra* note 7. The economic impact that certain interpretations of the ATS – when it is invoked to sue multinational corporations – may warrant such a moniker for the ATS. *Id.* at 1. *See infra* notes 183-89 and accompanying text (analyzing the consequences of liberal ATS litigation for multinational corporations).

\(^{56}\) *Filartiga*, 630 F.2d at 890. The Second Circuit determined both that torture violated customary international law and that the law of nations of the ATS included this customary law. *Id.* at 883. Regarding torture, the court declared they “have little difficulty discerning its universal renunciation in the modern usage and practice of nations.” *Id.* The court proceeded to incorporate this customary international law into the “law of nations” language of the ATS. *Id.* at 884. “Having examined the sources from which customary international law is derived […] the usage of nations, judicial opinions and the works of jurists […] we conclude that official torture is now prohibited by the law of nations.” *Id.* The court thus reversed the lower court’s finding that the federal courts had no jurisdiction over the aliens’ claim. *Id.* at 890.

\(^{57}\) *Hufbauer* & *Mitrokoskostas*, *Awakening Monster*, *supra* note 7, at 4. The Second Circuit lent an interpretation to the ATS that updated the language from “law of nations” to “international law.” *See id.* at 3-4.

\(^{58}\) *See supra* note 24 (reciting the original language of the ATS and its modern counterpart). *But see Filartiga*, 630 F.2d at 885-87 (undertaking an analysis of whether Article III of the U.S. Constitution makes the First Congress’ authorization of jurisdiction over alien tort claims unconstitutional, and concluding that the ATS was an appropriate exercise of Congress’ ability to legislate the jurisdiction of federal courts).

\(^{59}\) *Stephens*, *supra* note 26, at 186. One school of thought is that the Framers understood the ATS to authorize a cause of action without requiring further legislation by Congress. *Id.* *See also supra* notes 39-43 (discussing the lack of attention given to the ATS by Congress and the courts and the corresponding lack of analysis of the cause of action issue); *supra* note 25 (discussing the lack of legislative history surrounding the ATS and reliance on contemporaneous events to determine the meaning of the ATS).
unless the ATS intended to authorize a cause of action for the law of nations, this clause of the Judiciary Act would have been pointless and powerless. 61 The Filartiga decision resolved that the law of nations as contemplated during the United States’ formative years would translate to the human rights violations of today. 62 “This is undeniably an action by an alien, for a tort only, committed in violation of the law of nations.” 63 Filartiga established a precedent in federal courts that “the ATS . . . enables foreigners to sue in U.S. courts for all torts committed in violation of international law, as international law may be contemporaneously interpreted.” 64 Following the Filartiga decision, “ATS litigation has proliferated in federal courts, embroiling U.S. courts in a broad array of international controversies and incidents ranging from alleged war crimes to terrorist attacks to environmental abuses.” 65

60. A representative sampling of the federal court cases which followed the reasoning of Filartiga finding in favor of ATS jurisdiction includes: Kadic v. Karadzic, 70 F.3d 232, 236 (2d Cir. 1995) (holding that the federal court had jurisdiction over claims of the alien plaintiffs against the defendant-Bosnian-Serb self-proclaimed leader “for genocide, war crimes, and crimes against humanity in his private capacity”), cert. denied, 518 U.S. 1005 (1996), aff’d sub nom. Doe v. Karadzic, No. 93 Civ. 1163 (S.D.N.Y. Dec. 3, 1997); De Blake v. Republic of Arg., 965 F.2d 699, 723 (9th Cir. 1992) (allowing aliens’ ATS claim for “anti-Semitic, government-sponsored tyranny” and torture to go forward by virtue of a waiver of sovereign immunity), cert. denied, 507 U.S. 1017 (1993); Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (holding that two Argentinians’ claims of torture, murder and prolonged arbitrary detention against an Argentinian general amounted to a cause of action under the ATS); Xuncax v. Gramajo, 886 F. Supp. 162 (D. Mass. 1995) (holding Guatemalan citizens’ allegations of torture, arbitrary detentions, summary executions, and disappearances were sufficient to sustain jurisdiction under the ATS); Abebe-Jira v. Negewo, 72 F.3d 844 (11th Cir. 1996) (holding that the claims of “torture and cruel, inhuman, and degrading treatment” of Ethiopian citizens against officials in the controlling dictatorship of Ethiopia were actionable under the ATS), cert. denied, 519 U.S. 830 (1996); Jama v. U.S. I.N.S., 22 F. Supp. 2d 353 (D.N.J. 1998) (holding that the poor and inhuman treatment given to alien asylum-seekers was actionable under the ATS). See also generally Donaldson, supra note 23 (“collect[ing] and analyze[ing] the federal court cases which have construed or applied [the ATS] since its enactment.”).

61. Stephens, supra note 26, at 187-88. An interpretation of the ATS that requires additional legislation for the individual claim of an alien, Stephens argues, is “ahistorical” because it would mean “that Congress intended that the [ATS] create a category of jurisdiction that would remain empty until filled with legislatively enacted claims.” Id. at 187.

62. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER supra note 7, at 3-4. “The core holding of Filartiga has been followed by courts around the country: an alien may sue for violations of ‘universal, definable and obligatory’ international law norms.” Stephens, supra note 26, at 174.

63. Filartiga, 630 F.2d at 887. In the time between the Filartiga decision and the Supreme Court’s ruling in Sosa, there has been “a near-unanimous consensus among federal courts” requiring that an alien’s tort claim “involve[d] a violation of the ‘law of nations,’” which is referred to as customary international law in modern terms. Hoffman & Zaheer, supra note 48, at 50.

64. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 4 (emphasis in original).

65. Gregory G. Garre, Coded Message, THE RECORDER, September 17, 2004, at 4 (explaining that Filartiga retrieved the ATS from “historical obscurity” and spawned numerous other ATS
It would not be until Sosa that any discussion by the Supreme Court addressed this interpretation of the statute by the federal courts.66

III. STATEMENT OF THE CASE

A. Statement of the Facts

In 1990, a federal grand jury indicted Humberto Alvarez-Machain (Alvarez), a Mexican physician, for the murder of Enrique Camarena-Salazar, an agent of the U.S. Drug Enforcement Agency (DEA).67 The United States District Court for the Central District of California issued a warrant for Alvarez’s arrest following the grand jury’s indictment, and the DEA sought the Mexican government’s help in bringing him to the United States.68 Because the Mexican government was either unwilling or unable to comply with the DEA’s request for Alvarez’s delivery, the DEA hired Mexican nationals to kidnap Alvarez and bring him to the United States where the DEA would have authority to arrest and try Alvarez.69 Among those the DEA engaged to seize Alvarez was the petitioner, Jose Francisco Sosa.70 In a DEA-approved action, Mexican nationals “abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers.”71

After being acquitted of his criminal charges by the District Court in 1993,72 Alvarez returned to Mexico and commenced a civil action in the U.S. District Court for the Central District of California for damages claims in the federal courts over the next twenty years). See also supra note 60 (detailing decisions following Filartiga).

66. Garre, supra note 65, at 4. The Sosa case “signals a new era in the Rip van Winkle life of the ATS.” Id.
67. Sosa, 542 U.S. at 697 (2004). Alvarez had allegedly been involved in Camarena-Salazar’s 1985 torture and death in Guadalajara Mexico. Id. (citing United States v. Alvarez-Machain, 504 U.S. 655, 657 (1992)). The Drug Enforcement Agency (DEA) gathered eyewitness testimony which led officials to believe that Alvarez was present at the place where Camarena-Salazar was killed, and that Alvarez had “acted to prolong the agent’s life in order to extend the interrogation and torture.” Id.
68. Id.
69. Id.
70. Id. at 698.
71. Id.
72. Id. Citing the outrageous nature of his arrest, Sosa moved to dismiss his indictment with a claim that the method of his arrest violated the extradition treaty between the United States and Mexico. Id. The District Court dismissed the criminal case, which the Ninth Circuit upheld. Id. The Supreme Court reversed and remanded. Id. In 1992, Alvarez was acquitted. Id.
suffered during his alleged false arrest.\textsuperscript{73} Alvarez asserted a claim for damages against the United States under the Federal Tort Claims Act (FTCA),\textsuperscript{74} and a claim against Sosa for a violation of the law of nations, invoking the Alien Tort Statute.\textsuperscript{75} The FTCA allows a suit against the Government for the negligent or wrongful acts or omissions of its employees.\textsuperscript{76} As an alien, Alvarez argued for both jurisdiction and a cause of action under the ATS for his claim against Sosa, also a Mexican national, alleging the nature of his arrest was a violation of the law of nations.\textsuperscript{77}

\textbf{B. Procedural History}

Holding that Alvarez’s apprehension in Mexico, including the state sponsored transborder abduction and the arbitrary detention, violated customary international law, the district court entered summary judgment against Sosa under the ATS.\textsuperscript{78} Both Alvarez and Sosa appealed to the Ninth Circuit.\textsuperscript{79} First, a three-judge panel, and then the court sitting \textit{en banc} affirmed the judgment and damages awarded on the

\begin{itemize}
\item \textsuperscript{73} \textit{Id.} Alvarez named the following defendants in this suit: Sosa, Antonio Garate-Bustament (both a DEA agent and a Mexican national), five unnamed Mexican nationals, the United States, and four DEA agents. \textit{Id.}
\item \textsuperscript{74} \textit{Id.} The relevant portion of the FTCA provides: \\
[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1) (2000).
\item \textsuperscript{75} \textit{Sosa}, 542 U.S. at 698. See 28 U.S.C. §1350 (2000); supra notes 24-66 and accompanying text (detailing the specific language of the ATS and its evolution over the 200-plus years of its existence).
\item \textsuperscript{76} See supra note 73 (detailing the liability of the Federal Government under the FTCA). There are numerous instances in which the government is exempt from such liability. See infra notes 87-88 (discussing the exceptions relevant to the Government’s liability in this case).
\item \textsuperscript{77} \textit{Sosa}, 542 U.S. at 698; see also supra notes 24-66 for the text of the ATS and a discussion of the evolution of this statute.
\item \textsuperscript{78} Alvarez-Machain v. United States, 331 F.3d 604, 610-11 (9th Cir. 2003), \textit{rev’d}, 542 U.S. 692 (2004). The district court limited Alvarez’s recovery to only the damages he suffered while detained in Mexico. \textit{Id.} at 611. Alvarez’s award totaled $25,000, calculated by federal common law as opposed to Mexican law. \textit{Id.}
\item \textsuperscript{79} \textit{Id.} Sosa argued that Alvarez should not have been permitted a cause of action under the ATS, and that the district court erred in not applying Mexican law for the award of damages. \textit{Id.} Alvarez appealed two issues irrelevant to Supreme Court’s decision: 1) the United States should not have replaced the DEA agents against whom he also had ATS claims, and 2) his damages should not have been limited to his Mexican arrest. \textit{Id.}
\end{itemize}
ATS claims. Under Ninth Circuit precedent, the court held that Alvarez had a cause of action under the ATS. The Ninth Circuit interpreted the ATS as not only establishing jurisdiction in federal courts for the tort claims of aliens, but also establishing “a cause of action for an alleged violation of the law of nations.” The Ninth Circuit further applied the requirement that the law of nations be “specific, universal, and obligatory” in nature broadly enough to encompass Alvarez’s arbitrary arrest and detention claims. The United States and Sosa appealed the Ninth Circuit’s decision, arguing that the ATS does nothing more than establish jurisdiction in the federal courts.

The district court, on the government’s motion, dismissed Alvarez’s FTCA claims. After a series of appeals and remands, the Ninth Circuit ultimately reversed the dismissal of the FTCA claims. The

80. Id. at 611.
81. See Trajano v. Marcos, 978 F.2d 493, 499 (9th Cir. 1992) (holding that “acts of official torture violate customary international law,” and concluding that the plaintiff, an alien, had “properly invoke[d] the subject-matter jurisdiction of the federal courts under the [ATS]” in a wrongful death action against Philippine President Ferdinand Marcos and his daughter for the torture and murder of a Philippine citizen); Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994) (holding that the ATS not only establishes jurisdiction in the federal courts, but also creates a cause of action for the violation of the law of nations).
82. Alvarez-Machain, 331 F.3d at 612.
83. Id. See also infra notes 150-165 and accompanying text (discussing the discretion federal courts use to determine these causes of action).
84. Alvarez-Machain, 331 F.3d at 619. The Ninth Circuit comments that the “specific, universal, and obligatory” test for law of nations violations is necessary to limit judicial review of international law to only those “that have achieved sufficient consensus to merit application by a domestic tribunal.” Id. at 612. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964), superseded by The Foreign Assistance Act of 1961, § 620(e)(2), 22 U.S.C.A. § 2370(e)(2). While arbitrary arrest and detention meet this threshold, Alvarez’s claim of transborder abduction does not rise to this level according to the Ninth Circuit. Alvarez-Machain, 331 F.3d at 620; see also infra notes 137-149 (discussing the standard proposed by the Supreme Court for the determination of international law use in federal courts).
86. Id.
87. Alvarez’s FTCA claims had a tumultuous journey through the district and circuit courts. Alvarez’s initial complaint was comprised of both conventional (kidnapping, torture, cruel, inhuman and degrading treatment or punishment, arbitrary detention, assault and battery, false imprisonment, intentional infliction of emotional distress, false arrest, negligent employment, and negligent infliction of emotional distress) and constitutional torts (under the Fourth, Fifth and Eight Amendments for kidnapping, torture, cruel and inhuman and degrading treatment or punishment, denial of adequate medical treatment, and arbitrary detention). Alvarez-Machain, 331 F.3d at 610. All of the DEA agents were replaced by the United States as defendant as to the conventional tort claims. Id. The District Court denied the United States’ defense that the FTCA claims were time-barred, which the Ninth Circuit affirmed. Id. On remand, the United States was granted summary judgment on all of the FTCA claims. Id. at 611. On appeal, the Ninth Circuit reversed the dismissal of the FTCA claims. Id.
88. Sosa, 542 U.S. at 699. 28 U.S.C. § 2680(k) restores sovereign immunity where the
government included an appeal of the FTCA ruling with its request for review of the ATS interpretation.89

C. Supreme Court’s Decision

1. Plurality

The Supreme Court reversed the Ninth Circuit.90 The Court overturned the finding of government liability under the FTCA for the arrest of Alvarez-Machain in Mexico, holding that “the foreign country exception [of the FTCA] bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”91

Government would otherwise be liable under § 1346(b), for those claims “arising in a foreign country.” 28 U.S.C. §2680(k) (2000). The court held that despite the language of the statute, the Government was still liable under the “headquarters doctrine,” which allows a claim to proceed “if harm occurring in a foreign country was proximately caused by acts in the United States.” Alvarez-Machain, 331 F.3d at 638. According to the Circuit Court, the “quintessential headquarters claim” is one in which government employees, from the locale of their U.S. offices, “guide and supervise actions in other countries.” Id. Because the DEA, from its office in Los Angeles, had coordinated the removal of Alvarez, giving “precise instructions” regarding who should be involved and how Alvarez should be handled, the court maintained the United States liability, stating that “Alvarez’s abduction fits the headquarters doctrine like a glove.” Id.

89. Sosa, 542 U.S. at 699. The Ninth Circuit had also explored a possible exception under the FTCA for intentional torts, as provided in 28 U.S.C. § 2680(h). Alvarez-Machain, 331 F.3d at 639. The Ninth Circuit agreed with the district court that Alvarez’s claim was not excluded by the intentional torts exception because the DEA agents are law enforcement officers within the scope of the FTCA. Id. The government did not appeal on this basis and the Supreme Court does not address it in its opinion. Sosa, 542 U.S. at 699. The Government also appealed the FTCA claim on the basis that the arrest was not tortious. Id. The Government argued that 21 U.S.C. § 878 grants arrest authority to the DEA. Id. The Supreme Court did not decide the FTCA issue on that ground. Id.

90. Sosa, 542 U.S. at 738. Justice Souter delivered the opinion of the court. Id. at 697. Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) filed a separate concurring opinion as to the issue of the ATS. Id. at 739. Justice Ginsburg filed a separate concurring opinion as to FTCA element of the decision (joined by Justice Breyer). Id. at 751. Justice Breyer filed his own concurring opinion. Id. at 760.

91. Id. at 712. The full extent of the Supreme Court’s decision regarding the FTCA claim will not be discussed in this Note, as the author’s focus is on Alvarez’s claims under the ATS. However, a brief consideration of the Court’s holding will be helpful as it is likely the Government will use the shield of the FTCA foreign country exception in the eventuality that a claim is permitted under the ATS and the United States is named as a defendant. See David C. Baluarte, Comment, Sosa v. Alvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism, 12 HUM. RTS. BRIEF 11, 13 (2004) (noting that the FTCA will protect the United States government from exposure to liability under the ATS).

The Court refused to apply the headquarters doctrine to this case, lest it “swallow the foreign country exception whole.” Sosa, 542 U.S. at 703. Employing a test of proximate causation, the Court examined the actions of the DEA agents in the United States, and determined that even if
The circuit court’s ATS holding – recognizing transborder arrest as a violation of the law of nations and an actionable tort under the ATS – led the Supreme Court to delve into the obscure background of the ATS.92 Using the available historical framework of the ATS, the plurality arrived at two conclusions concerning Congress’s original intentions for the ATS.93 Justice Souter reasoned that history supports the proposition that the ATS was intended to be a functional statute, which in turn meant the ATS must include some latent cause of action, in addition to the jurisdictional grant.94

[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.95

Beyond the jurisdictional provisions of the ATS, the Court concluded that history implies “that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging
violations of the law of nations." 96 It is these inferred causes of action that gave the ATS its limited practical effect. 97 "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 98

The Court, however, could not infer from the ATS’s history that the concept of the law of nations was meant to be an expanding one. 99 Justice Souter “found no basis to suspect that Congress had any examples in mind beyond those corresponding to Blackstone’s three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” 100 The plurality reasoned that the Court must be cautious in allowing alien tort claims to fall within the “law of nations” umbrella of the ATS. 101 They declined to accept the interpretation advanced by Alvarez – that the ATS was not only jurisdictional, but also a cause of action for wide-sweeping violations of modern international law – deeming such an interpretation “implausible.” 102 However, they also declined to adopt the interpretation that Sosa proposed. 103 Sosa’s view – that “there could be no relief

96. Id. at 720. The Continental Congress’ grappling with its inability to punish infractions of the law of nations is the basis for Justice Souter’s inference that at least some meager meat was stuck to the bones of the ATS. Id. at 716 (citing J. Madison, J OURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)). See supra notes 26-32 and accompanying text for discussion of the Continental Congress’ early attempts to enforce the law of nations.

97. Sosa, 542 U.S. at 724. “[T]he reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law.” Id.

98. Id.

99. Id. at 725. “[S]ome, but few, torts in violation of the law of nations were understood to be within the common law.” Id. at 720.

100. Id. at 724. The First Congress’ intention likely was shaped by Blackstone’s theory of the law of nations. Id. See supra notes 33-38 for a discussion of Blackstone’s influence on the Founding Fathers.

101. Sosa, 542 U.S. at 725. Justice Souter outlined five reasons for the Court’s caution: 1) the changed concept of common law since 1789; 2) the “rethinking of the role of the federal courts in making [common law]” (citing the Court’s decision in Erie R. Co. v. Tompkins, 304 U.S. 65 (1938) (denying the existence of federal common law), see supra notes 46-53 and accompanying text for a discussion of Erie’s impact on the ATS; 3) the Court’s insistence that private rights of action are better created by the legislature; 4) the potential impact on the foreign relations of the United States; and 5) the lack of a congressional mandate to “seek out and define new and debatable violations of the law of nations.” Id. at 725-28. See also infra note 198 (arguing that Justice Souter’s five concerns should be an incentive for Congress to legislate the ATS claims that can be actionable in U.S. courts).

102. Sosa, 542 U.S. at 713. When the ATS authorized “cognizance” over the law of nations to the district courts, “the term bespoke a grant of jurisdiction, not power to mold substantive law.” Id.

103. Id. “[H]istory and practice give the edge” to the position that “because torts in violation of the law of nations would have been recognized within the common law of the time,” the ATS
without a further statute expressly authorizing adoption of causes of action” – would, in the Court’s opinion, render the ATS “stillborn.” The Court settled that “the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned within a certain subject.”

The conclusion that a confined set of causes of action accompanied the ATS would direct the court to analyze those cases that have the good fortune of being actionable under the ATS. The Court began by examining the law of nations at the time of enactment of the ATS, and then referenced an historical text which treated the law of nations as “general norms governing the behavior of national states with each other.” Despite strong authority tending to limit the law of nations to application between states, the Supreme Court adopted Blackstone’s teachings and recognized limited situations in which the law of nations protects individual rights. The Court determined that the intent of the Judiciary Act was that the ATS’s jurisdictional strength be supplemented by causes of action which could arise under the common law. According to the Court’s interpretation of the ATS, the common law was not a moot statute because of the lack of additional legislation to attach causes of action. Id.

104. Id. at 714. “[T]here is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf.” Id. at 719. The Court found “it would have been passing strange” to hold that “Congress would have enacted the ATS only to leave it lying fallow indefinitely.” Id. Instead the Court summons what is available in the historical record to breathe life to the drafters’ intentions. Id. at 720. See infra notes 119-20 and accompanying text (citing the Supreme Court’s insistence that the ATS was meant to have a functional value immediately following its passage, thus requiring an interpretation that some causes of action were contained within the law of nations concept).

105. Sosa, 542 U.S. at 714. These cases were limited to a “modest set of actions alleging violations of the law of nations.” Id. at 720.

106. Id.

107. Id. For example, Blackstone formed a broad basis for this understanding. Id. See supra notes 33-38 and accompanying text for the impact of Blackstone’s writings on the drafters.

108. Sosa, 542 U.S. at 714. The law of nations was “the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those nations.” Id. (quoting E. DE VATTTEL, THE LAW OF NATIONS, PRELIMINARIES § 3 (J. Chitty et al. trans. ed. 1883)).

109. Id. at 720. Traditionally the offenses encompassed in the law of nations were only those that affected “whole states or nations’ and not individuals seeking relief in courts.” Id. The Court looked again to Blackstone to identify this class of potential plaintiffs under a law of nations claim and to exclude individuals from the traditional understanding. Id. However, the Court did not unilaterally preclude an individual’s use of the ATS and law of nations claims. Id.

110. Id. at 724. The “reasonable inference” was that the framers were relying on the common law to provide a cause of action “for the modest number of international law violations with a potential for personal liability at the time.” Id. The Court reaches this conclusion because of its belief that “the statute was intended to have practical effect the moment it became law.” Id.
also encompassed claims of individual aliens. The Court could point to no occurrence in the two centuries since the enactment of the ATS that “categorically precluded the federal courts from recognizing a claim under the law of nations as an element of common law.” To limit the scope of the claims that could be brought under the jurisdiction of the ATS, the Court relied on the “present-day law of nations,” and adopted a standard that required the claims 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.”

The Court declined to completely cease “judicial recognition of actionable international norms;” instead, “the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.” Relying on the precedent of The Paquete Habana and rejecting complete occlusion by Erie, the plurality recognized that certain claims could meet their standard. The Court preserved an

111. Id. The Court reaches this conclusion despite the absence of a “basis to suspect” that Congress had any specific claims in mind beyond those which would have been comprehended from Blackstone’s teachings: “violation of safe conducts, infringements of the rights of ambassadors, and piracy.” Id. See supra notes 33-38 and accompanying text for the background of Blackstone’s influence on the Framers.

112. Sosa, 542 U.S. 724-25. Justice Scalia argued that the plurality misunderstood Erie’s effect on the existence of a general federal common law. Id. at 744-45 (Scalia, J., concurring). See infra notes 127-36 and accompanying text for Justice Scalia’s position. See also supra notes 44-53 for background of the Erie decision and its effect on the general common law.

113. Id. See infra notes 141-49 and accompanying text (analyzing the application of this “international character” standard in federal courts).

114. Sosa, 542 U.S. at 729.

115. Id. See infra note 118 (addressing some of the international norms which the Court accepted as actionable under the ATS).

116. 175 U.S. 677, 700 (1900) (holding that “[i]nternational 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”). See supra note 52 (discussing The Paquete Habana precedent permitting international law in U.S. courts).

117. Sosa, 542 U.S. at 729 (“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.”). The common law, according to the Court, is not “a discoverable reflection of universal reason.” Id. The Court instead described common law in a “positivistic way, as a product of human choice.” Id.

118. Id. at 730-31. The Court accepts that some modern violations fit within the historic concept of the law of nations, such as in Filartiga, in which the district court drew a parallel between torturers and pirates, to couch a cause of action for torture into the ATS-enactment era law of nations. Id. at 732. “[F]or the purposes of civil liability, the torturer has become – like the pirate and the slave trader before him – hostis humani generic, an enemy of all mankind.” Id. (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980)). The Tel-Oren court, which rejected ATS jurisdiction for the claim before the court, see supra note 43 (briefly reciting the court’s holding in this case), also espoused a limitation on the ATS agreeable to the Sosa court. Id.
opportunity for the federal courts to apply international law via the common law; to decide otherwise, even given the decision in *Erie*, “would take some explaining to say now that the federal courts must avert their gaze entirely from any international norm intended to protect individuals.” Justice Souter argued that it was preposterous to think the Framers would have anticipated the death of the common law or that they would have allowed this modern shift to incapacitate the federal courts when it came to upholding international law.

The Court, therefore, looked to “historical antecedents” to determine if Alvarez’s claim might pass through the door. The Court determined that Alvarez’s claim for arbitrary arrest and detention did not violate any norm of international law, such that it could support a cause of action under the ATS. “We do not believe . . . that the limited, implicit sanction to entertain the handful of international *cum* common law claims understood in 1789 should be taken as authority to recognize

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That court suggested “the ‘limits of [the ATS]’s reach’ be defined by ‘a handful of heinous actions – each of which violates definable, universal and obligatory norms.’” *Id.* (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (U.S. App. D.C. 1984) (Edwards, J., concurring), cert. denied, 470 U.S. 1003 (1985)).

119. *Id.* at 730. “[O]ur holding today is consistent with the division of responsibilities between federal and state courts after *Erie.*” *Id.* at 731 n.19.

120. *Id.* at 730. Justice Souter wrote, “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 simply because the common law might lose some metaphysical cachet on the road to modern realism.” *Id.*

121. *Sosa*, 542 U.S. at 732. The Court quotes *The Paquete Habana* decision at length because it fully articulates the authority on which the courts can cull customary international law for application in their own courts. *Id.* at 733-34. *The Paquete Habana* instructs:

[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; and as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.]

*Id.* at 734 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

122. *Id.* at 738. The Court rejected Alvarez’s arguments that arbitrary arrest and detention is in fact a violation of an international law norm. *Id.* at 735-38. Alvarez cited the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which the Court held did not “create obligations enforceable in federal courts” and which could not be used by Alvarez to establish an applicable rule of international law. *Id.* at 735. The Court also rejected Alvarez’s argument that arbitrary detention is generally prohibited; the Court reasoned that if such an argument were accepted, “[h]is rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of any alien in violation of the Fourth Amendment.” *Id.* at 736.
The right of action asserted by Alvarez here.”

The standard adopted by the Court – based on “historical antecedents” – leaves a certain amount of discretion to the lower courts. The Court conditioned this discretion on an awareness of the ramifications of recognizing actionable violations of international law. “[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.”

2. Justice Scalia’s Concurring Opinion

Justice Scalia, joined by former Chief Justice Rehnquist and Justice Thomas, filed a concurring opinion to stress his opposition to the plurality’s “reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms.” Justice Scalia agreed with the plurality’s ATS analysis with respect to its determination that the statute is jurisdictional only and that the ATS at most authorizes causes of actions under the law of nations purely as understood by the 1789 drafters. Justice Scalia departed from the plurality, however, in insisting the Court find a case or statute that “authorizes” that peculiar exception from Erie’s fundamental holding.

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123. Id. at 712. Alvarez attempted to bolster his argument that arbitrary arrest and transborder abduction amounted to a violation of the law of nations by presenting non-binding United Nations covenants as an indicator of the widespread acceptance of these torts as violations of international law. Id. at 734-35. Despite the evidence produced by Alvarez, the Supreme Court rejected his claims. Id. at 738.

124. Id. at 732. See infra notes 151-165 and accompanying text (analyzing the dangers of the discretion left in the hands of the lower courts).

125. Sosa, 542 U.S. at 732. See supra note 101 (briefly outlining the reasons for Justice Souter’s warning to be aware of consequences attached to the courts’ discretion); infra note 198 (providing a more complete recitation of Justice Souter’s reasons and connecting those reasons to the foreign policy concerns of the political branches of the United States).

126. Sosa, 542 U.S. at 733.

127. Id. at 739 (Scalia, J., concurring). Where Justice Souter allowed the door to remain slightly ajar, Justice Scalia insisted it be firmly shut. Id. at 746.

128. Id. at 743. Justice Scalia insisted this would have been an appropriate stopping point. Id. The Court’s agreement that the ATS is jurisdictional only and does not provide for causes of action in international law would have been sufficient to decide the present case. Id.
that a general [federal] common law \textit{does not exist}.”

Justice Scalia would require “law of nations” in the ATS to mean “the accepted practices of nations in their dealings with one another” and on the high sea. Justice Scalia’s dissatisfaction with Justice Souter’s treatment of the ATS is fully embodied in his approach to federal common law and his insistence that the door to that body of law cannot be opened because it was closed in \textit{Erie}. “Because today’s federal common law is not our Framers’ general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law.”

Justice Scalia rejected the plurality’s invitation to the lower courts to “create rights where Congress has not authorized them to do so,” especially when the plurality has acknowledged that the ATS is jurisdictional only, and that this was understood both by the 1789 Congress and its modern counterpart. Drawing from the precedent already emanating from the federal courts, Justice Scalia predicted that the residual discretion left by the plurality would have “quite terrified” the 1789 drafters of the ATS. The “illegitimate lawmaking endeavor” will, in Justice Scalia’s opinion, empower the lower courts to be the “principal actors,” with only a “tiny fraction of their decisions” being reviewed by the Supreme Court.

This discretion troubled Justice Scalia because the democratically created American law “does not recognize a category of

\begin{itemize}
  \item \textit{Id.} at 744 (emphasis in original). The plurality, Justice Scalia complained, was instead looking for a case or statute that \textit{prevents} federal courts from applying the law of nations as part of the general common law.” \textit{Id.} (emphasis in original).
  \item \textit{Id.} at 749. Those common laws would encompass the treatment of ambassadors, sovereign immunity, and piracy. \textit{Id.} Justice Scalia noted that these specific law of nations have been incorporated into legislation such that these causes of action may survive despite the destruction of federal common law. \textit{Id.}
  \item \textit{Id.} at 746. This is where Justice Scalia disagreed with the plurality’s willingness to keep the door ajar. \textit{Id.} In his analysis, the door had already been shut by \textit{Erie}. \textit{Id.}
  \item \textit{Id.}
  \item \textit{Id.} at 747. Justice Scalia feared the consequences of this discretion that allows “judicial occupation of a domain that belongs to the people’s representatives.” \textit{Id.} “One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of ‘many of the courts and judges who faced the issues before it reached this Court.’” \textit{Id.} (quoting the plurality’s opinion at 732).
  \item \textit{Id.} at 749. Conversely, Justice Scalia is confident that the Framers would have been comfortable with his interpretation of the ATS in the post-\textit{Erie} judicial world. \textit{Id.}
  \item \textit{Id.} at 750. If all of the “future conversions of perceived international norms into American law would be approved by [the Supreme Court] itself,” Justice Scalia would still be troubled by the absence of the democratically elected representatives in the process. \textit{Id.}
\end{itemize}
activity that is so universally disapproved of by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal courts.\footnote{Id. at 751.}

IV. ANALYSIS

A. The Role of Customary International Law in Federal Courts

The ATS is in great need of a modern make-over. While Justice Souter and the plurality are comfortable with leaving the door open to re-examination as other international law claims come before the federal courts, Justice Scalia’s closed-door approach is more appropriate until Congress affirmatively legislates which international law and human rights violations – if any – will be actionable under the ATS.\footnote{Id. at 730 (rejecting the argument that the ATS did not include causes of action because such an interpretation would have rendered the statute non-functioning from its very start).} The current reality left by \textit{Sosa} results in three potential courses for the federal courts in ATS litigation: (1) following the spirit of the plurality’s decision by restricting the claims of aliens to those most closely resembling the laws contemplated by the First Congress when it included the phrase “law of nations” in the ATS;\footnote{This course would, as the Supreme Court ultimately did, reject claims for more novel human rights claims like the arbitrary arrest claims of Alvarez-Machain. \textit{See, e.g., Sosa}, 542 U.S. at 738. One commentator, however, argues that the Supreme Court erred in not recognizing transborder abductions as a violation of customary international law when Alvarez-Machain’s criminal case was before the Court in 1992. \textit{Aceves, supra} note 51, at 139. \textit{See also} Stephen Fohn, \textit{Do DEA Field Agents Have the Power to Unilaterally Execute a Trans-Border Abduction?: The Ninth Circuit’s Take on Alvarez-Machain v. United States}, 27 \textit{Hous. J. Int’l L.} 221, 233 (2004) (analyzing the circumstances and consequences of Alvarez-Machain’s arrest). The Ninth Circuit \textit{did} find Alvarez-Machain’s alleged abduction actionable under the ATS by relying on the precedent of Martinez v. City of Los Angeles, 141 F.3d 1373, 1384 (9th Cir. 1998) (holding that arbitrary arrest and detention was actionable under the ATS). \textit{Id.} at 233 n.79.} (2) liberally employing the discretion granted by the Supreme Court and squeezing through the slightly ajar door a multitude of human rights claims

\footnote{Id. at 750.}
recognized as customary law and read into the broad term “law of nations” (in the manner of Filartiga);139 or (3) recognizing the lack of common law to supply modern “law of nations” under the ATS, and rejecting all claims under the ATS until Congress legislates specific causes of action.140

1. A Norm of International Character, Specific, and Comparable to 18th Century Paradigms141

The Supreme Court preserved some opportunities for future ATS claims by deciding Sosa on the basis that the alleged customary international law that Alvarez-Machain relied upon did not achieve a standard of universal specificity and resemblance to the 1789 version of the law of nations.142 The slightly ajar door of the Sosa decision implicitly allowed federal courts to determine which claims might be included in the jurisdiction of the ATS; the plurality declined to establish a body of actionable claims with any precision.143 The Supreme Court did place some limitations on the federal courts’ discretion, requiring that those causes of action rest on a “norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th century paradigm.”144 Because the Court did

139. David L. Hudson, Jr., Foreign Turf: Human Rights Suits Against Corporations Hinge on How Open the Door Is, 90 A.B.A. J. 20 (2004). The Supreme Court’s ruling in Sosa “that potentially opened the door to suits against international corporations has left plenty of room to widen the entranceway.” Id. Cases against ExxonMobil, Coca-Cola, Del Monte and DaimlerChrysler “will determine exactly how much give is in the hinges.” Id. Cf. id. (presenting the alternative interpretation of the Supreme Court’s ruling that it “will dismiss virtually all of the existing cases”).

140. Leading Case, supra note 46, at 456.

141. Sosa, 542 U.S. at 725.

142. Id. at 738 (declining to acknowledge transborder abduction as a customary law that could be fitted inside the “law of nations” cause of action of the ATS).

143. Preserving the functionality of the ATS in this way might be considered consistent with the original purpose for the ATS. Anthony D’Amato, Comment, The Alien Tort Statute and the Founding of the Constitution, 82 AM. J. INT’L L. 62, 67 (1988). Although the “imperative security interests that animated” the young and relatively defenseless nation to enact legislation that would keep the stronger British and French from resorting to war when civil remedies were unavailable do not concern the United States presently:

[T]he perception that we will deal fairly and impartially with cases having foreign implications, and not make political bargaining chips out of them, is still significant in terms of our national ideals, which include a free economic market, basic political freedoms for all people and willingness to submit to the rule of law.

Id.

144. Sosa, 542 U.S. at 745. Those causes of action might “arguably now extend[] to ‘piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps terrorism.’” Casto, supra note 23, at 486 (quoting RESTATEMENT OF FOREIGN RELATIONS LAW (REVISED) § 404
not expound beyond merely announcing the standard that should apply, it is difficult to identify which claims the Supreme Court anticipates the federal courts should recognize.\textsuperscript{145} The list could include “genocide, extra-judicial killing, torture, war crimes, slavery, and extreme arbitrary detention.”\textsuperscript{146} Leaving this door ajar, as proposed by Justice Souter,\textsuperscript{147} would supposedly invite only the most widely accepted customary international law into federal courts.\textsuperscript{148} Only the closest adherence to this standard by the federal courts would allow the true intent of the ATS Framers to be realized.\textsuperscript{149}

\footnotesize{(Tent. Draft No. 6, 1985)). The current version of the Restatement of Foreign Relations (Third) includes an almost identical list where jurisdiction arises over “certain offenses recognized by the community of nations as of universal concern.” Restatement of Foreign Relations Law (Third) § 404 (2004). The important distinction here is that these “extensions” to the causes of action under the ATS “appear to be based on specific intentional covenants and agreements rather than customary law.” Casto, supra note 23, at 486; see generally Russell S. Kerr, U.S. Supreme Court Leaves “Door Ajar,” 46 Orange County Law. Mag. 22, 23 (2004) (discussing the standard imposed by the Court).

145. Eugene Kontorovich, Implementing Sosa v. Alvarez-Machain: What Piracy Law Reveals About the Limits of the Alien Tort Statute, 80 Notre Dame L. Rev. 111, 113 (2004). “Applying this test to a variety of purported new international norms will become a significant subject of litigation in the lower courts in the wake of Sosa, litigation that could result in conflicting decisions due to the Court’s scant description of the test it envisions.” Id. According to one human rights proponent, who suggests that multinational corporations should have no complaints regarding the new life given to the ATS by the Supreme Court, the violations that can be considered “specific, universal and obligatory” are a “short list.” Jonathan Birchall, The Limits of Human Rights Legislation: Alien Tort Statute: Jonathan Birchall on How Two Cases Have Tested the Scope of Law Allowing U.S. Companies To Be Sued for Wrongs Committed Overseas, Financial Times, January 20, 2005, at 13.


147. Sosa, 542 U.S. at 729.

148. Kerr, supra note 144, at 23 (predicting that “[o]nly a few international tort claims brought by foreigners will meet the ‘specificity’ criteria required of Sosa”). Drawing from the precedent set by the Filartiga court and subsequent decisions, the courts might continue to recognize the customary international laws that include “a universal abhorrence against torture, extra-judicial killings, genocide, prolonged arbitrary, [sic] detentions, disappearances, and slavery.” Id. at 24. But see Casto, supra note 23, at 475 (acknowledging the “serious doubt” as to whether international law, unassisted by domestic law, creates a tort remedy that may be invoked in domestic courts by private individuals”). A cause of action that the federal courts might recognize under the ATS and by virtue of the Sosa decision would be “an international remedy in name only.” Id. at 477. Because the remedy would be absorbed into U.S. law in this manner, “[t]o suggest that the remedy is based on international law would be disingenuous.” Id.

149. Bradley & Goldsmith, supra note 32, at 362. But see Kontorovich, supra note 145, at 155-56 (theorizing that only piracy can have a modern counterpart in customary international law because it is the only action from the law of nations that was not limited to a “specially protected classes of foreigners”). Following this line of reasoning, because “[m]odern human rights offenses are not substantially ‟comparable’ to piracy, the benchmark offense,” the new customary law norms cannot pass the standard set in Sosa. Id. at 161.
2. A Restrained Discretion? \(^{150}\)

More troublesome than the flexible standard discussed above is the residual, undefined discretion left to the federal courts by the *Sosa* decision to determine what claims to entertain under the ATS. \(^{151}\) Consistent with the Second Circuit’s *Filartiga* decision \(^{152}\) and the line of cases that followed, \(^{153}\) Justice Souter would allow the federal courts to continue to determine when U.S. courts have jurisdiction over various human rights infractions, exposing the U.S. to foreign policy complications long before these cases reach Supreme Court review. \(^{154}\) This discretion would authorize the “federal courts to define and enforce violations of the law of nations in suits invoking the jurisdiction of the federal courts under the ATS.” \(^{155}\) Because the *Sosa* Court did not definitively close the door to undefined tort claims permitted under the ATS (as Justice Scalia encouraged), \(^{156}\) the federal courts are now empowered to become the judicial branch of worldwide human rights litigation. By failing to articulate precisely the extent of the ATS’s absorption of customary international law, the Supreme Court required difficult determinations by the lower courts regarding the

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150. See supra note 101 and infra note 198 (identifying Justice Souter’s five reasons for the exercise of discretion by the lower courts).


152. See supra notes 54-65 and accompanying text (examining *Filartiga*).

153. See supra note 60 (listing the cases following *Filartiga* and their holdings).


156. See infra notes 166-175 and accompanying text (analyzing an interpretation of the ATS consistent with Justice Scalia’s concurring opinion). Justice Souter might have been indicating the level of discretion left to the federal courts with the language he used to reject Alvarez-Machain’s claim for arbitrary arrest and transborder abduction:

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require. Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise. It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

*Sosa*, 542 U.S. at 738.
appropriateness of ATS claims.\textsuperscript{157}

Tempered only by the Supreme Court’s standard that the customary
law at hand be “accepted by the civilized world and defined with a
specificity comparable to the features of the 18th-century paradigms,”\textsuperscript{158}
the federal courts will continue to produce a wide array of decisions that
stretch the concept of accepted customary international law.\textsuperscript{159} Because
the \textit{Sosa} decision failed to delineate a precise expectation of the
discretion to be used, conflicting decisions in the lower courts are
likely.\textsuperscript{160} The lower courts will undoubtedly produce erratic decisions
and will allow claims other than those that have genuinely reached the
level of customary law.\textsuperscript{161} In fact,

[\textit{E}xperience teaches that the discovery of a new or forgotten judicial
power is often marked by efforts to experiment with and, in some
cases, abuse that power. Indeed, as a practical matter, lower courts that
were willing to infer international law-based causes of action from the
pure jurisdictional language of the ATS before \textit{Sosa} may only be
emboldened by the court’s decision announcing that the federal courts
possess an inherent lawmaking authority when it comes to policing the
violation of customary international law norms the world over.\textsuperscript{162}

The fluidity of the “residual common law discretion” signals hope
for human rights advocates,\textsuperscript{163} threatens the deep pockets of
multinational corporations,\textsuperscript{164} and has elicited opposition by the

\begin{footnotes}
\textsuperscript{157} See \textit{Leading Case}, \textit{supra} note 46, at 446 (lamenting that “Sosa failed to articulate a clear
conception of the interaction between customary international law and domestic law, and offers
little guidance to lower courts both within ATS doctrine and beyond”). The “rhetoric” of the \textit{Sosa}
plurality cautioned against the expansion of the ATS to include claims arising from customary law,
but “fail[ed] to clarify one of the most important, and most opaque, elements in the opinion: its
articulation of the role of customary international law in U.S. law.” \textit{Id.} at 451.
\textsuperscript{158} \textit{Sosa}, 542 U.S. at 725. \textit{See supra} notes 113-26 and accompanying text (discussing the
Court’s advisement that the international norms adhere to this standard); \textit{see also supra} notes 142-49
and accompanying text (exploring the usability of the ATS when held strictly to that standard).
\textsuperscript{159} An indicator of this liberal trend is the line of cases that followed \textit{Filartiga} and preceded
\textit{Sosa}. \textit{See supra} note 60 (listing these cases and their holdings).
\textsuperscript{160} \textit{Kontorovich, supra} note 145, at 113.
\textsuperscript{161} \textit{Leading Case, supra} note 46, at 455; \textit{Kontorovich, supra} note 145, at 113 (predicting
“conflicting decisions” as a result of the “scant description” of the Supreme Court test in \textit{Sosa}).
\textsuperscript{162} \textit{Garre, supra} note 64, at 4.
\textsuperscript{163} \textit{See Kochan, supra} note 52, at 261-64 (suggesting that human rights organizations will
embrace the discretion given to the courts and capitalize on this leeway by increasing “customary
law outputs” that will bring additional human rights claims under ATS jurisdiction). \textit{See infra} notes
178-182 and accompanying text (discussing the efforts of human rights activists).
\textsuperscript{164} \textit{See infra} notes 183-189 and accompanying text (discussing the effect ATS litigation will
have on multinational corporations).
\end{footnotes}
executive branch of the U.S. government. 165

3. “[T]he deed was done in Erie”166

The federal courts would be giving the ATS its most accurate interpretation by recognizing that the extinction of federal common law also destroyed any causes of action that arise from the customary international law suggested by the “law of nations” in the ATS. 167 Limiting the ATS’s substantive reach would be consistent with the Supreme Court’s other efforts to restrict the “extraterritorial scope” of the courts, which can interfere with the policy considerations of the political branches. 168 This approach would reduce the ATS to a statute

165. Brief for the United States as Respondent Supporting Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339). The Solicitor General echoed Justice Souter’s wariness regarding the federal courts continued interference in the lawmaking realm of the political branches, but issued a stronger warning in his brief to the Supreme Court in support of the petitioner Sosa. 166. Sosa, 542 U.S. at 746 (Scalia, J., concurring). Justice Scalia argued that there is no ““door to further independent judicial recognition of actionable international norms’ . . . ‘still ajar subject to vigilant doorknocking’” because Erie had already closed the door to general common law. 167. See Casto, supra note 23, at 477 (warning that an attempt to develop this type of international common tort law “would lead the federal courts down a path similar to the one rejected in Erie). But see Leading Case, supra note 46, at 452 (rejecting this position because it ignores “the federal interest in vindicating international law norms as part of a unified foreign policy” and “downplays the extent to which the intent behind the ATS was to empower the federal government to act on such matters”). Justice Scalia might, in the opinion of one observer, be “confiat[ing] a skepticism of the courts’ capacity to recognize modern customary norms with his views of the effects wrought by Erie on judicial authority.” Id. Justice Scalia’s position that Erie precludes customary international law from being a cause of action under the ATS is also flawed in that it is inconsistent with his willingness to recognize claims for the “law of nations” as they existed in 1789. 168. Bradley & Goldsmith, supra note 32, at 362. “The plan of the Constitution counsels hesitation.” Casto, supra note 23, at 482. The exclusive foreign policy role of the presidency and the congress’s responsibility for ratifying treaties and declaring war leaves little room for the judiciary to enjoy a “policymaking role in matters concerning foreign policy.” Id. Considering the Court’s other decisions to limit the extraterritorial scope of the courts, Bradley & Goldsmith, supra note 32, at 362 n. 233, it seems incongruous that the plurality did not concur with Justice Scalia’s wish to shut the door to international policy making by the courts. See id. The ATS invites such a limit on extraterritorial scope in light of these other limiting decisions, and also because the
allowing the claims of aliens only for law of nations violations embedded in the original intent of the Framers: “Violations of safe conduct, infringement of the rights of ambassadors, and piracy.” To do otherwise would perpetuate a modern trend of the federal courts to impinge on the duties more appropriately handled by the other branches of government: in this case making foreign policy decisions better left to the Executive. It is unlikely that the First Congress ever intended the ATS to create “federal substantive rights” or the “federal common law making” that the plurality’s decision authorizes. Giving the statute an interpretation that is inconsistent with *Erie* is “a structurally objectionable step.” The ATS should have new life as a viable international subject matter particularly infringes on the political branches’ role in creating foreign policy. *Id.* Additionally, the 1789 drafters of the ATS would never have considered such liberal discretion in the courts. *Id.*

169. Bradley & Goldsmith, *supra* note 32, at 359. Customary international law cannot be incorporated into the ATS “law of nations” because the eighteenth century understanding of international law would not have included the modern concept of human rights issues that encompasses “the way a foreign nation treats its citizens.” *Id.* Despite the obscure origins of the ATS, there is a strong consensus that the ATS “does not create a statutory cause of action. The statute is purely jurisdictional and the first Congress undoubtedly understood this to be the case.” Casto, *supra* note 23, at 479 (internal footnotes omitted). An alternative school of thought, however, is that customary international law exists outside of the federal common law, and is instead a separate body of substantive law that can be applied in appropriate cases where the court has jurisdiction over an international issue. Aleinikoff, *supra* note 53, at 97.

170. *See supra* note 168 (setting forth the authority which supports this contention).

171. Bradley & Goldsmith, *supra* note 32, at 359. While conceding that there are multiple constructions of the ATS, some of which are “more plausible than others,” these authors suggest that focusing on the original language of the ATS reveals precisely what the First Congress intended: that the district courts have “cognizance” – or jurisdiction – over the claims of aliens, but stops short of granting the courts the power of substantive law making. *Id.* at 358-59. This jurisdiction-only interpretation is bolstered by the modern codification of the ATS at 28 U.S.C. §1350 where jurisdiction is substituted for “cognizance.” Casto, *supra* note 23, at 479. *See generally* Kenneth C. Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Statute*, 18 N.Y.U. J. INT’L L. & POL. 1 (1985) (discussing the jurisdictional aspects of the ATS). But see William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. INT’L L. 687, 689-90 (2002) (arguing that the First Congress could not have realized the need to articulate anything further than jurisdiction because “cause of action” as we understand it today did not exist in the early American legal consciousness) [hereinafter Dodge, *Constitutionality*]. “The First Congress assumed that torts in violation of the law of nations would be cognizable at common law, just as any other tort would be.” *Id.* at 690; see also Haberstroh, *supra* note 26, at 249. Courts that do not recognize a cause of action in the ATS give the statute an “ahistorical” interpretation. Dodge, *Constitutionality*, *supra*, at 690. The federal courts that do “read the [ATS] as granting a cause of action,” such as the Filartiga court, do so “precisely to eliminate this anachronism.” *Id.*

172. J. Harvey Wilkinson, III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1694 (2004). “[I]n breaching the line between prescriptive and interpretive power, the Court risked a retreat to the [pre- *Erie* era], which assigned to the judiciary, under the guise of federal common law, an impermissible prescriptive task.” *Id.* But see Ralph G. Steinhardt, *The Alien Tort Claims Act: Theoretical and Historical Foundations of the Alien Tort Claims Act and Its Discontents: A Reality
jurisdictional statute in U.S. courts only after Congress codifies those international law causes of action for which jurisdiction can apply.\footnote{Leading Case, supra note 46, at 456. The “nebulous” decision in \textit{Sosa} could very well be a “cry for congressional help.” \textit{Id}.} If a lack of authority for the federal courts to create federal common law were properly acknowledged,\footnote{Sosa v. Alvarez-Machain, 542 U.S. 692, 741 (Scalia, J., concurring).} the courts could not recognize any causes of action under the ATS, even as extrapolation from the core conceptual basis of the Founder’s “law of nations.”\footnote{This focused interpretation of the ATS would render the statute practically worthless until Congress initiates legislation to expand the statute. \textit{See infra} note 197 (suggesting that Congress does so). Justice Scalia would likely be unwilling to allow ATS as the jurisdictional basis for an alien’s claim in federal court unless the famous pirate Blackbeard were named as a defendant.}

\textbf{B. The Alien Tort Statute’s Modern Importance}

Regardless of the interpretation given to the ATS, the efforts of litigators have already resurrected the statute, and it will play a pivotal role in the United States approach to human rights violations, cooperation with multinational corporations, and its own foreign policy.\footnote{See infra notes 178-196 and accompanying text (outlining each of these ways in which the ATS will be implicated). To briefly illustrate the pronounced presence the ATS will have in the coming years, consider one potential alien plaintiff relying on the ATS for jurisdiction in a U.S. federal court: Osama Bin Laden. Jamie Shapiro, \textit{Note and Comment, Aliens’ Redress of Grievances Against the United States for International Human Rights Violations}, 10 SW. J. OF L. & TRADE AM. 195, 217 (2003/2004). If ever captured, the number one enemy of the United States could have a claim nearly analogous to the one posited by Alvarez-Machain. \textit{Id}.} Observers can glean the potential consequences of \textit{Sosa} from the range of amicus curiae briefs filed in the case.\footnote{The organizations that filed briefs are as varied as the potential post-\textit{Sosa} ATS litigation. Writing briefs in support of the Petitioner were: The Pacific Legal Foundation (a nonprofit public interest group providing “a voice in the courts for thousands of Americans who believe in constitutionally grounded government, including adherence to the principles of separation of powers, democratic consent, and limited federal judicial powers.”) Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 1, \textit{Sosa} v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339); Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States (a group of law professors with noted expertise in those disciplines), Brief for Professors of International Law, Federal Jurisdiction and the Foreign Relations Law of the United States as Amici Curiae in Support of Petitioner at 1, \textit{Sosa}, 542 U.S. 692 (No. 03-339); the
Washington Legal Foundation (a nonprofit public interest group devoted to issues “involving national security, civil-justice reform and federalism and opposes the expansion of federal-court jurisdiction beyond appropriate statutory and constitutional limits”), the National Fraternal Order of Police (a 310,000 member law enforcement labor organization), and the Allied Education Foundation (a charitable foundation engaged in promoting “education in diverse areas of study, such as law and public policy”), Brief of Washington Legal Foundation, National Fraternal Order of Police, and Allied Educational Foundation as Amici Curiae in Support of Petitioner at 1-2, Sosa, 542 U.S. 692 (No. 03-339); the National Association of Manufacturers (“the nation’s largest broad-based industrial trade association,” with many of its members having operations abroad), Brief for the National Association of Manufacturers as Amicus Curiae in Support of Reversal at 1, Sosa, 542 U.S. 692 (No. 03-339); and the National Foreign Trade Council (“the premier business organization advocating a rules-based world economy” with over 300 member companies), USA*Engage (a broad-based coalition “concerned about the proliferation of unilateral foreign policy sanctions at the federal, state, and local levels”), the Chamber of Commerce of the United States of America (“the world’s largest business federation” with over three million members doing business in the United States and around the world), the United States Council for Organization in International Investment (“a business advocacy and policy development group” serving as the “American affiliate of the International Chamber of Commerce and International Organization of Employers), the International Chamber of Commerce (the world business organization which represents the chambers of commerce and other business associations of 130 countries, with a goal to “promote multilateral trade among nations in the interest of global prosperity”), the Organization for International Investment (“the largest business association in the United States representing the interests of U.S. subsidiaries of international companies”), the Business Roundtable (“an association of CEOs of leading U.S. corporations . . . committed to vigorous economic growth, a dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness”), the American Petroleum Institute (a 450 member group from “all aspects of the petroleum industry . . . operat[ing] throughout the world as part of their commitment to meet America’s energy needs”), and the US-ASEAN Business Council (“America’s leading private business organization dedicated to promoting increased trade and investment between the United States and the member nations of the Association of Southeast Asian Nations”), Brief for the National Foreign Trade Council, USA*Engage, the Chamber of Commerce of the United States of America, the United States Council for Organization in International Investment, the International Chamber of Commerce, the Organization for International Investment, the Business Roundtable, the American Petroleum Institute, and the US-ASEAN Business Council as Amici Curiae in Support of Petitioner at 1-3, Sosa, 542 U.S. 692 (No. 03-339)[hereinafter NFTC et al. Brief].

Those organizations and groups filing briefs in support of the Respondent Alvarez-Machain were: National and Foreign Legal Scholars (75 scholars from nations around the world, “including Australia, Canada, Ireland, Mexico, the Netherlands, New Zealand, the United Kingdom, and the United States”), Brief of Amici Curiae National and Foreign Legal Scholars in Support of Respondents at 1, Sosa, 542 U.S. 692 (No. 03-339); Hungarian Jews (plaintiffs in a pending U.S. District Court case alleging claims against the United States under the ATS for failure to return “personal possessions and family heirlooms . . . accepted into protective custody”) and Bougainvilleans (plaintiffs in an ATS case alleging claims of “genocide, war crimes, and crimes against humanity” against a private corporation), Brief of Amici Curiae Alien Friends Representing Hungarian Jews and Bougainvilleans Interests in Support of Respondent at 1, Sosa, 542 U.S. 692 (No. 03-339); Professors of Federal Jurisdiction and Legal History (a group of professors with expertise in the relevant areas interested in the “proper understanding and interpretation of the [ATS]”), Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents at 1, Sosa, 542 U.S. 692 (No. 03-339); Corporate Social Responsibility Amici (a collection of international groups working “to develop, implement or support mechanisms to improve corporate compliance with human rights standards in the global economy”), Brief of Amici Curiae Corporate Social Responsibility Amici in Support of Respondent at 1, Sosa, 542 U.S. 692
1. Human Rights Activists Emboldened

By not seizing the opportunity to forever banish international human rights claims from federal courts, the Supreme Court sustained hope for numerous human rights victims and their supporting organizations.\(^{178}\) The ATS, when given the interpretation of the

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\(^{178}\) Baluarte, supra note 91, at 13. While criticizing the Court for “miss[ing] an opportunity to promote international norms that apply to all countries,” Baluarte urges that activists should not be deterred. Id. See also Elizabeth F. DeFoeis, Litigating Human Rights Abuses in United States Courts: Recent Developments, 10 ILSA J. INT'L & COMP. L. 319, 319 (2004) (suggesting that the ATS is “[t]he most utilized legislative device for reaching human rights abuses” and inferring that favorable interpretation of the ATS would preserve this important avenue for addressing human rights issues). But see Wynne P. Kelley, Comment, Citizens Cannot Stand For It Anymore: How
Filartiga court or Justice Souter’s “ajar door” approach, is “a basic tool to apply limited – but binding – standards to corporations in their international operations.” The accessibility of federal courts to human rights victims has numerous positives. However, in order to preserve judicial resources and prevent abuse of the federal court system by litigious aliens, the courts must restrict this access by recognizing only those victims of the most widely accepted customary international law violations. Human rights activists will seize on to the ATS as a means to redress the violations of the host nations where multinational

The United States’ Environmental Actions in Afghanistan and Iraq Go Unchecked by Individuals and Non-Governmental Organizations, 28 FORDHAM INT’L L.J. 193, 227 (2004) (lamenting the narrowness of the Sosa decision for its implied preclusion from ATS litigation of potential environmentally related human rights claims with potential damages over $20 billion).


180. Human Rights Organizations Brief, supra note 177. The human rights organizations’ argue in support of a liberally construed ATS because the ATS provides a means of enforcement that is otherwise hard to come by. Id. at 2.

Despite the universal condemnation of these human rights violations, perpetrators all too often escape punishment. Finding means to hold perpetrators accountable is a key priority for governments, including the U.S. government, as well as for international and nongovernmental organizations around the world. Domestic and international actors have undertaken varied initiatives, including criminal prosecutions initiated both by public prosecutors and by private individuals, civil litigation, and assorted administrative proceedings. Each state chooses mechanisms appropriate to its local legal system. Civil litigation under the [ATS] is part of a global effort to address impunity and to hold perpetrators of egregious abuses accountable for their actions.

Id.

181. While encouraging a modernized “law of nations” and the use of the ATS for the human rights claims of aliens, one observer warns that enthusiastic human rights activists “may actually threaten the statute, when they attempt to use [ATS] to attack wrongs, such as the softer shades of third-party complicity, which a world consensus has not decided are in violation of customary international law.” Haberstroh, supra note 26, at 271. Additional concerns surround the economic viability of nations that might be saddled with large damages from ATS litigation. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 13. Those countries include Saudi Arabia, Abu Dhabi, Ecuador, Indonesia, Nigeria, Burma, Egypt, Germany, Papua New Guinea, Japan, Guatemala, Colombia, Peru, Sudan, and South Africa. Id. Japan and Germany were included in this list because they were exposed to ATS litigation on the basis of their egregious human rights violations during World War II. Id. A corollary exists between poverty-stricken nations and a “low regard for human rights, measured against US standards, coupled with limited political and economic freedom.” Id. Monetary liability in U.S. courts could therefore severely impede these impoverished nations from ever improving their economic situation and, in turn, contribute to their failure to rectify their almost unavoidable (although inexcusable) violations of human rights. Id. at 13-14.
corporations are often immersed in human rights predicaments.  

2. Multinational Corporations Threatened

The potential litigation against multi-national corporations under the ATS raises concern for American businesses and their continued competitiveness in the global economy. Despite activists’ strong support for federal jurisdiction over human rights violations, concerns emerge as to the impact this course could have on major U.S. corporations, specifically those with multinational operations.

182. See supra note 60 (detailing the numerous human rights cases brought in federal courts using Filartiga’s liberal ATS interpretation); see also Hufbauer & Mitrokostas, International Implications, supra note 7, at 607 (postulating that thousands of Chinese citizens could invoke the ATS – “organized by plaintiffs’ attorneys and supported by international human rights groups” – against multinational corporations for “abetting” China’s alleged human rights violations); Paul Magnusson, A Milestone for Human Rights, BUSINESS WEEK, January 24, 2005, at 63 (listing the major U.S. corporations who are, or will likely be, defending ATS suits). “Other defendants include Coca-Cola, Drummond, Occidental Petroleum, and Del Monte Foods.” Magnusson, supra. See generally Mark J. Leavy, Note, Discrediting Human Rights Abuse as an “Act of State”: a Case Study on the Repression of the Falun Gong in China and Commentary on International Human Rights Law in U.S. Courts, 35 RUTGERS L. J. 749 (2004) (examining the pending companion cases of Chinese plaintiffs directly against the government officials of the People’s Republic of China and relying on the ATS for jurisdiction in U.S. courts). See also Oscar Gonzales, Attacking the ATS: Prison Abuse Scandal Highlights Need for Access to U.S. Courts, 20 TX L. W., July 12, 2004 (identifying the already-filed claims of Iraqi prisoners using the ATS as the basis for their jurisdiction for their claims against U.S. private contractors of torture and executions at the infamous Abu Ghraib prison and other Iraqi detention facilities).

183. U.S. companies with direct ties to countries with human rights issues are prone to ATS litigation. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 37; see supra note 181 (listing the foreign states that are categorized as nations with human rights issues). This includes companies engaged in oil and mineral imports from foreign nations, but also those exporting U.S. goods to the same nations. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 16. Even institutions which lend money to those nations may be susceptible. Id. at 17. “It is no exaggeration to say that every major international bank is exposed to ATS liability.” Id. “[T]he ATS has been transformed from its intended role as a jurisdictional provision applicable to a small class of cases into a serious impediment to companies engaged in international trade, investment, and operations, and a major irritant to the United States in its dealing with other nations.” NFTC et al. Brief, supra note 177, at 5. But see CSR Amici Brief, supra note 177, at 6 (arguing that the multinational corporations exaggerate the effect the ATS will have on their profits and accusing these corporations of interfering with the “substantial precedent demonstrating that the U.S. has been a leader in applying the rule of law to human rights violations”). “The [ATS]’s very limited scope poses absolutely no threat to foreign investment by U.S. companies.” Id.  

184. See HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 1-2 (outlining a “nightmare scenario” if the ATS interpretation can reach multinational corporations and warning that “trial lawyers will seek to expand the scope of the ATS . . . to such an extent that investment and trade in developing countries will be seriously threatened”). Because the ATS has only in recent years been suggested as a litigation tool against corporate defendants, it is difficult to ascertain the “potential scope of ATS litigation.” Hufbauer & Mitrokostas, International Implications, supra note 7, at 615. The possible breadth of claims is comparable to the asbestos
Multinational corporations risk exposure to human rights litigation by virtue of doing business in a country that perpetrates, sponsors, endorses, or even tolerates human rights abuses. If these multinational corporations are subject to alien tort claims, the magnitude of the damages would be noticeable in the U.S. economy. The erroneous interpretation and expansion of the [ATS] . . . wreaks economic damage.

Corporations are already settling suits to avoid litigation of the late 20th century. "Asbestos spawned the largest mass tort litigation in legal history," Id. at 614, with over 300 corporate defendants named and damages at $54 billion and growing. Id. at 614 n.41.

Multinational corporations are sued for "aiding and abetting" human rights violations, particularly when sovereign immunity precludes the alien plaintiffs from suing the offending foreign state itself. Id. The circuit courts have permitted these aiding and abetting claims against multinational corporations, requiring only that the corporation gave “knowing practical assistance or encouragement which has a substantial effect on the perpetration of the crime.” Id. (quoting Doe v. Unocal Corp, 395 F.3d 932, 947 (9th Cir 2002)). The claims against corporations range from “environmental torts, expropriated property claims, and human rights violations committed by host governments.” Konrad L. Cailteux and B. Keith Gibson, “Alien Tort Statute” Shakedown: Court Must Arrest New Attempt to Expand Mischievous U.S. Law, 20 LEGAL BACKGROUNDER, January 14, 2005. See generally Ronen Shamir, Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility, 38 LAW & SOC’Y REV. 635, 637-43 (2004) (laying out the general background of ATS cases against multinational corporations). The claims against corporations are “based on dubious theories of vicarious liability.” Cailteux & Gibson, supra. The claims significantly affect the operations of these corporations because “[a]lthough most courts have recognized the impropriety of these suits, and have dismissed the claims, this influx of cases has cost United States corporations significant, unnecessary legal fees, discovery costs, and lost employee time.” Id. But see Gonzales, supra note 182 (arguing that corporations should have had fair warning “all along about the importance of ATS compliance”). Gonzales argues that, rather than focusing their energies on improving human rights conditions, “all corporate America’s energies are focused on advancing anti-ATS arguments that are, generously speaking, suspect.” Id.

The multi-national corporations mobilized to assert their opposition to the inclusion of customary law in the ATS for the Supreme Court’s decision for Sosa because they recognized the potential economic impact exposure to ATS litigation would cause them. See generally HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 37-43 (hypothesizing on the economic impact ATS legislation will have in the United States). But see Collingsworth, supra note 179, at 670 (criticizing the business community because it “simply could not resist going after the [ATS] at full bore at the first opportunity to nip in the bud any prospect that the U.S. companies could possibly be held accountable for human rights violations committed in the course of their international operations”). By “collectively seeking the repeal of the [ATS],” suggests one human rights proponent, “the U.S. multinational business community has repudiated the public trust.” Id. at 671.

The culprits, in the eyes of these business associations, are the human rights activists lobbying for a liberal interpretation of the ATS. "Foreign plaintiffs and the lawyers and organizations supporting them – often pursuing thinly disguised political agendas – have adopted the statute as a vehicle to embarrass foreign governments and to pressure businesses to abandon operations in targeted nations.” Id. However, the expense of ATS litigation might be a positive component. Emeka Duruigbo, The Economic Cost of Alien Tort
the escalating litigation successfully squeezed through the door for alien tort claims against multinational corporations in U.S. federal courts – suggesting that Justice Souter’s slightly ajar door could easily be thrown open. 189

3. U.S. Foreign Policy Implications

The political branches of the U.S. government have much to consider after the Court’s decision in Sosa. 190 The continued use of the

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188. Magnusson, supra note 182, at 63. The most notable of recent ATS suits was settled in early 2005. Id. The suit arose from the following summary of events:

In the mid-1990s, reports emerged out of Burma that villagers in the remote Yadana region had been forced by the military to clear jungle for the construction of a $1.2 billion natural gas pipeline. The allegations were horrendous: To round up workers for the project, the Burmese military had resorted to torture, rape, and murder to enslave villagers, even throwing one woman’s baby in a fire after killing her husband. Before long, U.S. human rights groups had filed suit against Unocal Corp., based in El Segundo, Calif., one of the four pipeline partners, on behalf of 15 unnamed Burmese villagers. Id. Unocal has allegedly (court gag orders are still in place) settled the suit for $30 million in damages. Id. The settlement is significant because it hints at U.S. corporations accepting responsibility for their involvement in human rights violations. Id.; see Doe v. Unocal Corp., 248 F.3d 915 (9th Cir. 2001); see also Shannon O’Leary, Human Rights Case Sounds Alarm for U.S. Multinationals, CORPORATE LEGAL TIMES, December, 2004 (similarly summarizing the Doe v. Unocal Corp. case and connecting the settlement to other ATS litigation).

189. See generally HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 13 (anticipating litigation of the same magnitude as multi-billion dollar damages of the asbestos cases); Hufbauer & Mitrokostas, International Implications, supra note 7, at 615 (predicting the same). One observer offers a plan of action for corporations “to mitigate potential backlash while not curbing growth.” Pinilla, supra note 179, at 719.

This primarily involves thorough self-assessment and evaluations of local business practices. Once this first step is taken, companies must try to influence partners abroad to meet international human rights standards, much like quality control standards imposed on foreign supply chain partners. If emerging markets prove too enticing and immune from influence, corporations should take steps to create walls clearly separating themselves from irresponsible conduct and players while at the same time reducing the appearance that the commission of these violations is of benefit to corporate entities.

Id. ATS litigation is being lauded for raising awareness of human rights violations in the minds of corporate decision makers. Shamir, supra note 185, at 660-61. The ATS, “by forcing the issue of corporations and human rights into the open, already shapes corporate behavior because it forces corporations to reflect upon, if not to institutionalize, human rights-related issues.” Id.

190. Although it was initially suggested that the United States itself would be exposed to litigation under the ATS because of the door left open by the Supreme Court, the combination of the ATS issue and the FTCA issue decided in Sosa likely will prohibit future claims that directly target the U.S. government. Baluarte, supra note 89, at 11; see also supra note 90 (outlining the Court’s outcome on the FTCA claim).
ATS in its modern context conflicts with its original purpose such that it may threaten the status of international relations. The current administration views the interpretation of the ATS advanced by the Filartiga line of cases as dangerous. For an administration that has made considerable attempts to protect businesses and bolster the economy, it follows that it would encourage a narrow and literal interpretation of the ATS. But, beyond this business-friendly administration’s goal of preserving the economy and nurturing a receptive home for large players in that economy, the executive branch seeks to ensure that ATS litigation does not compromise its foreign policy strategies. The “War on Terror” presents additional concerns.

191. Reply Brief for the United States as Respondents Supporting Petitioner, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339). The discretion given to the circuits “would grant authority to the courts to engage in a function that the Constitution vests in the political branches” and “would permit the courts effectively to nullify the actions of the political branches in the realm of foreign affairs.” Id. at 9. Rather than serving as “a shield to protect foreign governmental officials from torts committed in the United States” – the original impetus for the ATS, see supra notes 25-30 and accompanying text (discussing the motives for the enactment of the ATS in 1789), – the ATS becomes “a sword to hold them civilly liable for tortious acts that took place abroad.” Bradley and Goldsmith, supra note 32, at 361. This modern application of the ATS will not, for the most part, “promote amicable inter-national [sic] relations.” Id. If ATS litigation unfolds as estimated, “the United States will be widely castigated for imposing its brand of justice worldwide.” Hufbauer & Mitrokostas, International Implications, supra note 7, at 625. The civil suits would entail the “American-style justice” of punitive damages and class actions. HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 48. There is also the distinct possibility that the courts’ judgments will misrepresent to the international community the United States’ stance on controversial topics because

In ATS litigation, U.S. courts are called on to lay blame for international controversies. The entry of judgment in an ATS case may create the impression to citizens of other countries that the U.S. government has taken sides in an international dispute, which may interfere with the efforts of the executive branch and Congress to calibrate an appropriate foreign policy concerning a particular dispute. Garre, supra note 65 at 4. The judicial branch’s “judgment on the actions of a foreign state . . . may well jeopardize sensitive negotiations.” HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 48.

192. Stephens, supra note 26, at 173. In opposition to the ATS, the White House has sought “to shield human rights abusers from accountability in U.S. Courts and to grant the executive branch the sole power to pick and choose who should be held liable and in what forum.” Id.; see also Leavy, supra note 182, at 818 (noting the Bush administration’s challenge of jurisdiction in the Sosa case).

193. Stephens, supra note 26, at 178. Business organizations suggest that ATS litigation will not only disrupt the foreign policy agendas of the United States, but also interfere with its trade policy because the threat of ATS litigation discourages businesses from conducting trade as normal. NFTC et al. Brief, supra note 177, at 4. “[T]he Bush Administration [has] argued that companies shouldn’t be held to a ‘vicarious liability’ standard but should instead be held blameless unless involved directly in the crimes.” Magnusson, supra note 182, at 63; see also O’Leary, supra note 188, at 68 (suggesting that U.S. corporations “have a powerful ally on its side” in the present presidential administration).

194. Defeis, supra note 178, at 322 (2004) (referring to the government position taken in a brief it filed on behalf of another ATS defendant “stating that if the case were allowed to go to trial,
for the Bush administration; in particular, its approach to the handling of prisoners has been highly controversial. Justice Souter was conscious of the fact that ATS litigation would elicit some foreign policy-making by the courts, advising that “[s]ince many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”

4. Action by Congress

Perhaps the only way to truly remedy the cloudiness of the ATS is for Congress to address it. Justice Souter aptly cautioned against it would interfere with American foreign policy, and may disrupt the war on terrorism”). See supra note 190 (describing some of the potential interference in U.S. foreign affairs).

195. Richey, supra note 3, at 2. “[T]he Alien Tort Statute could complicate the Bush administration’s war on terror by subjecting foreign individuals assisting in the detention and questioning of Al Qaeda suspects to potential liability in US courts for alleged human rights abuses conducted in overseas jails and interrogation chambers.” Richey, supra note 3, at 2. See generally Juan E. Mendez, Review of David Cole’s Enemy Aliens: Double Standards and Constitutional Freedoms in the War on Terrorism, 30 J.C. & U.L. 493 (2004) (book review) (highlighting the United States’ obligations under international law specifically related to the detainees of the War on Terror); Ronald J. Riccio, Court Rules on Power to Detain Prisoners of the War on Terror and on the Limits of the ‘Bush Doctrine,’ 177 N.J.L.J. 321 (2004) (discussing the Sosa decision as it relates to the detention of terrorist prisoners). But see supra note 190 (discussing the only remote likelihood of the United States becoming directly subject to liability for its own human rights violations under the ATS as a result of the protection afforded by the FTCA). But see Gonzales, supra note 182 (criticizing the attempt of the government and corporations to immunize themselves “from their misdeeds in foreign lands”). “[I]f we lose sight of the weightiness of underlying ATS claims, all we need to do is glance at those damned Iraqi prisoner photos.” Id.

196. Sosa v. Alvarez-Machain, 542 U.S. 692, 727-28 (2004). The federal courts, Justice Souter warned, should be “particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.” Id. at 727. It is interesting to note that, while Justice Souter advised caution when the courts tread on the ground of foreign policy-making, he did not specifically instruct the courts to avoid the area altogether. Wilkinson, supra note 172, at 1694. Nevertheless, the Court “admonished the federal judiciary to exercise this power in a manner that would not trespass unduly upon the powers of the political branches in foreign affairs. Id. One recent scholar suggests that there is a history of judicial presence in foreign affairs. Ariel N. Lavinbuk, Note, Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court’s Docket, 114 YALE L.J. 855, 886 (2005). Analyzing the types of international issues in which the courts involved themselves might be helpful in identifying “[t]he proper role for courts in foreign affairs.” Id. at 896.

197. Hufbauer & Mitrokostas, International Implications, supra note 7, at 624. “Whatever the result, only the creator of the beast may put it to proper purpose.” Id. “[I]t may prove difficult for the federal courts to arrest the sprawling sweep of ATS litigation in a timely fashion. Hence our core recommendations are addressed to the Congress: legislation can most efficiently correct the unlimited sweep of ATS claims.” HUFBAUER & MITROKOSTAS, AWAKENING MONSTER, supra note 7, at 49. At the least, Congress should specify whether the jurisdictional grant of the ATS also “allows for the creation of common law causes of action.” Leading Case, supra note 46, at 456. “More specifically, Congress might step in to clarify the scope of its hoary grant of jurisdiction over
policy-making by the courts and recognized that the more appropriate action would be for Congress to make the ATS functional in today’s courts without requiring that the federal courts became international legislators. Rather than asking the courts to decide what the international law is, lobbyists of both human rights groups and multinational corporations could more appropriately devote their energies toward Congress to enact protective legislation.

V. CONCLUSION

The unique history of the ATS warrants its preservation in the modern structure of our judiciary. The accepted interpretation of the Founding Fathers’ impetus for creating jurisdiction over the claims of aliens for certain international violations is not as prevalent today, but the spirit of their concern continues to resonate in present time.

Alien tort claims, sparing courts a difficult and uncertain inquiry in every ATS case.” Id. A proponent of the incorporation of customary international law into the U.S. legal system reminds us “that Congress has the authority to adopt legislation that would make [customary international law] applicable in federal courts” and proposes that Congress does so. Aleinikoff, supra note 53, at 91-92. See also Bruce Zagaris, U.S. Supreme Court Overturns Alvarez-Machain Claim, But Upholds Alien Tort Law, INT’L ENFORCEMENT LAW REPORTER, September, 2004, (recognizing the most effective way to limit ATS litigation is for Congress to enact legislation to that effect).

198. Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004). Justice Souter presented five deterrents to the federal courts’ recognition of causes of action under the ATS. Id. at 725-728. “First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms.” Id. at 725. “Second, along with, and in part driven by that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it.” Id. at 726 (citing Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)). “Third, this 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 plurality of cases.” Id. at 727.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications of foreign relations of the United States of recognizing such causes should make courts particularly wary of imposing on the discretion of the Legislative and Executive Branches in managing foreign affairs. Id. Lastly, Justice Souter could find “no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.” Id. at 728.

199. See supra note 177 for a list (in the form of those that filed amici brief in Sosa) of many organizations that would likely join this effort.

200. See generally Gonzalez, supra note 182 (discussing the focus of energy put into pro- and anti-ATS decisions by the courts).

201. See supra notes 23-66 and accompanying text (discussing the historical context of the ATS).

202. See supra notes 23-66 and accompanying text (discussing the historical context of the ATS). The United States continues with increasing frequency to be involved in international
However, the long period of stagnancy has raised several issues as to the proper scope of ATS litigation, along with issues that only became cognizable in our modern era: the impact of ATS litigation on multinational corporations and the growing need for adjudication of human rights violations. Until the ATS is definitively contained or fully expanded, human rights victims will continue to find novel arguments to employ the ATS, and multinational corporations will endeavor to shield themselves from litigation by arguing for Justice Scalia’s strict interpretation of the statute. So long as the door to the ATS remains even slightly ajar, numerous attempts to establish jurisdiction in federal courts under the ATS can be expected, as well as great opposition seeking to firmly shut the door to modern ATS claims.

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