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CUSTOMARY INTERNATIONAL LAW, FEDERAL COMMON LAW, AND FEDERAL COURT JURISDICTION

Gwynne Skinner*

I. INTRODUCTION

One question that remains unresolved in our federal judicial system is whether federal courts have jurisdiction pursuant to 28 U.S.C. § 1331, the general federal question jurisdictional statute, to recognize private claims for violations of customary international law as a matter of federal common law; in other words, whether such private claims arise “under the Constitution, laws, or treaties of the United States.”¹ A threshold inquiry to this question is whether claims for violations of customary international law “arise under the Constitution or laws of the United States” for purposes of Article III of the United States Constitution,² which sets forth the constitutional outer limits of federal court jurisdiction that Congress is entitled to grant.³ These questions largely depend upon the status of customary international law in United States domestic law and particularly, federal common law. These issues are unsettled and continue to be the subject of contentious scholarly debate.

This essay addresses federal common law’s proper recognition of customary international law and the implications of that recognition for jurisdiction under § 1331. In the author’s view, customary international law itself is not wholly incorporated into federal law; rather, federal courts have common law power to incorporate rules of customary international law when developing federal common law in areas of federal interest, including in cases that might impact foreign affairs. In this way, it is federal common law, not customary international law

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¹ 28 U.S.C. § 1331 (2006). The statute reads, “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The statute was enacted in 1875. Act of Mar. 3, 1875, ch. 137, 18 Stat.

² 28 U.S.C. § 1331; U.S. CONST. art. III.

³ Article III, section 2, provides nine different categories to which federal judicial power extends, including “all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.” U.S. CONST. art. III, § 2, cl. 2.

itself, that is the “law of the United States” for purposes of Article III and 28 U.S.C. § 1331. Similarly, federal courts have the authority to recognize claims for violations of customary international law as part of this common law power.

A. *The Alien Tort Statute and Sosa v. Alvarez-Machain*

A different jurisdictional statute enacted in 1789 as part of the First Judiciary Act, the Alien Tort Statute⁴ (“ATS”), provides federal courts with jurisdiction over tort claims brought by aliens for violations of the “law of nations,” a term typically equated with customary international law.⁵ In the 2004 case of *Sosa v. Alvarez-Machain*,⁶ the U.S. Supreme Court found that the ATS is a jurisdictional statute that does not itself create a cause of action, but that federal courts can recognize aliens’ private claims for a limited set of violations of the law of nations⁷ as a matter of federal common law.⁸ In other words, it is federal common law that provides the cause of action for certain international law violations.⁹

The Court found that federal courts can use their common law power to recognize these private claims in the absence of a federal statute authorizing such claims on the basis that Congress enacted the ATS in 1789 with an understanding “that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.”¹⁰ The Court’s finding that Congress authorized a private cause of action based on congressional understanding is not new or radical; the Court has found implicit congressional authorization of

⁴ 28 U.S.C. § 1350, enacted as Section 9 of the Judiciary Act of 1789 (also referred to as the First Judiciary Act), 1 Stat. 73, 76–77 (1789). The statute reads, “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Id.*

⁵ *The Estrella*, 17 U.S. (4 Wheat) 298, 307 (1819) (referring to non-treaty-based law of nations as the “the customary . . . law of nations”); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003). From this point on, the term “law of nations” will be used to reference customary international law, and the terms will be used interchangeably.

⁶ 542 U.S. 692 (2004).

⁷ *Id.* at 725. The Court held that any claim brought today for a violation of the law of nations under the ATS must “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” recognized at the time—attacks on diplomats, safe conducts, and piracy. *Id.*

⁸ *Id.* at 714, 724, 725.

⁹ *Id.* at 724 (“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.”).

¹⁰ *Id.* at 714, 724, 731 n.19.

private causes of action on several occasions where Congress assumed such actions were available or where private claims had been allowed prior to a statutory enactment.¹¹

Specifically regarding the role of the law of nations in federal law, the Court stated that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.”¹² The Court cited several cases stating that, in appropriate circumstances, federal courts have applied international law as part of federal law.¹³ However, the Court refrained from describing its views on the exact role of customary international law within federal law and does not appear to have advocated for the wholesale incorporation of customary international law into federal common law. But the Court clearly indicated that federal common law can provide a cause of action for at least some violations of customary international law.

In response to Justice Scalia’s concurring opinion that the Court’s decision would lead to “arising under” federal question jurisdiction pursuant to § 1331 for claims of customary international law violations,¹⁴ the Court stated, “[o]ur position does not . . . imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes of § 1350).”¹⁵ The Court explained that the ATS was “enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”¹⁶ Moreover, although the Court opined that “no development in the two centuries . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law[,]”¹⁷ it also stated that its opinion was consistent with the division of responsibilities between federal and state courts after *Erie R. Co. v. Tompkins*¹⁸ whereas “a more expansive common law power related to 28 U.S.C. § 1331 might not be.”¹⁹

¹¹ See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380 (1982).

¹² *Sosa*, 542 U.S. at 729.

¹³ *Id.* at 729–30 (internal citations omitted).

¹⁴ *Id.* at 745.

¹⁵ *Id.* at 731 n.19.

¹⁶ *Id.*

¹⁷ *Id.* at 724–25.

¹⁸ 304 U.S. 64 (1938).

¹⁹ *Sosa*, 542 U.S. at 731 n.19.

Thus, in *Sosa*, although the Court did not decisively settle the question of whether claims for violation of customary international law could be brought under § 1331, it did indicate a skepticism about such claims. This means that while non-citizens may bring such claims under the ATS, citizens might not be able to do so under general federal question jurisdiction.

Finally, the *Sosa* Court did not address whether claims for violation of the law of nations under the ATS arise “under the Constitution or Laws of the United States” for purposes of Article III. The issue was not raised nor briefed, so the Court did not have occasion to consider it directly.

There are no Article III concerns when an ATS case is between an alien and a citizen because in that situation Article III’s alienage provision provides for clear Article III constitutionality.²⁰ However, when the case is between two aliens, as it was in *Sosa* (both were Mexican citizens), federal courts can exercise ATS jurisdiction under Article III only if the claims meet the “arising under the Constitution or Laws of the United States” provision. The Court, however, was silent as to whether the ATS was constitutional between two aliens. Moreover, the Supreme Court let stand the holding in the ground-breaking 1980 Second Circuit ATS case, *Filartiga v. Pena-Irala*,²¹ which determined that the ATS was constitutional based on the “laws of the United States” provision of Article III, and cited *Filartiga* approvingly for other propositions.²² This silence on the ATS’s constitutionality and the Court’s approval of *Filartiga*, combined with the Court’s statement that “[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations[.]”²³ creates a fair assumption that the Supreme Court most likely agrees that the ATS is constitutional because the law of nations, or at least federal common law that incorporates certain rules of the law of nations, is part of the “laws of the United States” for purposes of Article III.

It should also be noted that the Supreme Court has never clearly stated that federal common law can be the basis of “laws of the United States” under Article III. However, the Court in *Illinois v. City of Milwaukee* clearly stated that federal common law could be the basis for

²⁰ U.S. CONST. art. III § 2, cl. 2. Article III also provides for federal judicial power when a case is between citizens of a state and citizens of a foreign state. *Id.* Thus, for a case between two aliens to be constitutional under Article III, the case must arise under the Constitution or laws of the United States. *Id.*

²¹ 630 F.2d 876, 885 (2d Cir. 1980).

²² *Sosa*, 542 U.S. at 725, 731-32.

²³ *Id.* at 729.

§ 1331 jurisdiction.²⁴ *Illinois v. City of Milwaukee* does not directly address whether federal common law can be the basis for Article III's "arising under" provision. However, some commentators have argued that the opinion, as well as two dissenting opinions by Justice Brennan, leads to this conclusion.²⁵ The fact that the Court has found § 1331 jurisdiction narrower than the jurisdiction provided for in Article III²⁶ strengthens this view. Thus, if the federal common law can provide for arising under jurisdiction pursuant to § 1331, it almost necessarily means that it provides for jurisdiction under Article III as well.

II. CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW, AND THUS LAW OF THE UNITED STATES

A. *The Role of Customary International Law in the U.S. Domestic Legal System*

1. The Current Debate

Although federal courts are nearly uniform in their consensus that customary international law is "part of the federal common law[.]"²⁷ scholars disagree about the precise role of international law in the U.S. domestic legal system. The Court in *Sosa* agreed that certain customary international law norms are actionable through federal common law claims; however, it did not specify its views about the exact role of customary international law in our federal judicial system, indicating only that "domestic law of the United States recognizes the law of nations."²⁸

Two predominate camps have emerged regarding the role of customary international law in the domestic law of the United States:

²⁴ *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972) (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (concluding that "laws" within the meaning of § 1331 embraced claims founded on federal common law)). In the case, Illinois filed a lawsuit against four cities alleging that they were polluting Lake Michigan and creating a public nuisance, and asked the lower courts to abate the nuisance. *Id.* at 93.

²⁵ See, e.g., *Section 301(a) and the Federal Common Law of Labor Agreements*, 75 YALE L.J. 877, 886 n.9 (1966); Jack I. Garvey, *Repression of the Political Émigré-The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78, 97 (1980).

²⁶ See, e.g., *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 495 (1983); *Powell v. McCormack*, 395 U.S. 486, 515-16 (1969). See also Donald L. Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 608 (1987).

²⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980). See *Sosa*, 542 U.S. at 729; see also *infra* text accompanying notes 60-68. In addition, the RESTATEMENT (THIRD) OF FOREIGN RELATIONS, 111 cmt. D states that "[c]ustomary international law is considered to be like common law in the United States, but it is federal law."

²⁸ *Sosa*, 542 U.S. at 729 (emphasis added).

those who advocate the so-called “modern” position and those that advocate the self-described “revisionist” position. Although there are nuances between various scholars who advocate similar positions, generally, the view of the modernists is that federal law incorporates customary international law, either wholesale or in part, depending on the scholar.²⁹ Most modernists argue that while customary international law was general common law early in our country’s history (because the concept of federal common law did not exist at the time), customary international law became incorporated into federal common law as federal common law began to fully develop, emerging as a clear enclave of federal common law after *Erie*.³⁰ The modernists do not believe that Congress needs to specifically authorize the federal courts to incorporate customary international law because federal courts have common law power to incorporate customary international law themselves.³¹

The revisionist position is that federal common law does not incorporate customary international law and that since *Erie*, it can only become part of federal common law when Congress specifically authorizes its incorporation.³² Like the more recent modernists, they generally agree that, historically, the law of nations was part of the general common law, but they do not believe that the law of nations ever became part of federal common law.³³ To the degree it did, they argue *Erie* ended the ability of federal courts to incorporate customary international law without specific congressional authorization.³⁴

Professors Curtis Bradley and Jack Goldsmith are probably the best known “revisionists” who discount the “modern position” that the law of nations is part of our federal common law without the need for any

²⁹ Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295; William R. Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635 (2006); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87 (2004); Ryan Goodman & Derek P. Jink, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 435–36 (1997).

³⁰ See, e.g., Goodman & Jink, *supra* note 29, at 471–72; Stephens, *The Law of Our Land*, *supra* note 29.

³¹ Goodman & Jink, *supra* note 29, at 471–72.

³² See, e.g., Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts – Before and After Erie*, 26 DENV. J. INT’L L. & POL’Y 807 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

³³ Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 32.

³⁴ *Id.*

particular legislative act. After *Sosa*, they wrote an article that appeared in the 2007 Harvard Law Review, arguing that the *Sosa* Court aligned with their views by holding that the legislative or executive branch must authorize federal courts to apply customary international law before the courts can do so, and that the ATS provides the requisite authorization, albeit on a limited basis.³⁵ Other scholars have been very critical of this position, finding that *Sosa* did no such thing but in fact held the opposite—that courts do not need specific authorization to apply customary international law.³⁶ This is in accordance with my own views. Congress, through the ATS, authorized the federal courts to recognize private claims for violations of the law of nations as a matter of common law rather than the authorization to apply customary international law as domestic law.

I take this position because during and after the ATS enactment in 1789, federal and state courts were already applying customary international law when appropriate when they otherwise had jurisdiction over cases, and often recognized private claims for such violations.³⁷ The ATS simply gave the federal courts jurisdiction, concurrent with the state, over these claims. The authorization that took place with the enactment of the ATS was the authorization to recognize certain private causes of action, which occurred through Congress's understanding that courts would exercise their common law power to recognize these claims. In addition, the idea that the ATS served as authorization for incorporation of customary international law by federal courts does not comport with the understanding of the time; namely, that the law of nations was already a part of the common law, something Bradley agrees with.³⁸

The debate concerning whether customary international law is part of federal law also implicates the constitutionality of the ATS under Article III, given that claims between two aliens are only constitutional if the case arises under the Constitution or laws of the United States. Revisionists, such as Professor Bradley, have argued that the ATS falls under Article III's alienage jurisdiction and not Article III's "arising

³⁵ Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 873, 894 (2007).

³⁶ Beth Stephens, *Sosa*, *the Federal Common Law and Customary International Law: Reaffirming the Federal Courts' Power*, 101 AM. SOC'Y INT'L L. PROC. 261, 269 (2007).

³⁷ See *infra* text accompanying notes 59–63; see also *infra* notes 59, 63.

³⁸ Bradley, *The Status of Customary International Law in U.S. Courts*, *supra* note 32, at 812; Bradley & Goldsmith, *supra* note 32, at 824.

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under” provisions.³⁹ Modernists take the opposite position, agreeing with the Second Circuit in its ground-breaking ATS case, *Filartiga v. Pena-Irala*,⁴⁰ that claims arising under the law of nations arise under the “laws of the United States” for purposes of Article III jurisdiction.⁴¹

a. *Debate Regarding Historic Role of Customary International Law Within the United States*

Scholars on both sides of the debate widely agree that during the late 1700s and throughout most of the 1800s, the law of nations was considered general common law, applied by both federal and state courts in cases before them.⁴² The concept of federal common law had not yet taken hold, and a recognizable federal common law did not start emerging until the latter 1800s.⁴³ As the Court in *Sosa* confirmed, the domestic law of the United States “recognized” the law of nations in 1789 because it was seen as a type of common law that transcended each individual state, as well as being obligatory within each state.⁴⁴

One area of disagreement is whether the “law of the United States[,]” as that term is used in Article III, was meant to include the law of nations. As reflected in earlier discussion, this has two main implications: (1) whether the ATS is constitutional as applied to cases where the defendant is a non-citizen; and (2) whether there is general federal jurisdiction over any claim alleging the law of nations. The reason it is such a complicated question is because federal common law, at least as we know it today, did not exist at the time the United States was founded. Thus, the founders would not have perceived federal common law as the “law of the United States” as most courts do today. If customary international law is incorporated through federal common law, this presents an obvious problem to any sort of historical analysis.

Professor William Dodge, citing numerous documents, including some of the Federalist Papers, has made the argument that, at the time of the United States’ founding, Congress viewed the law of nations as law

³⁹ Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 590–92 (2002). See also Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 835–40 (2006).

⁴⁰ 630 F.2d 876, 885 (2d Cir. 1980).

⁴¹ See, e.g., Dodge, *Bridging Erie*, *supra* note 29, at 102; Goodman & Jink, *supra* note 29, at 475; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–60 (1984).

⁴² Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1266, 1270 (1985); Stephens, *supra* note 29, at 410, 430–31. See also Bradley, *The Alien Tort Statute and Article III*, *supra* note 39, at 595.

⁴³ Stephens, *supra* note 29, at 410, 430–31.

⁴⁴ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

of the United States, albeit not through what we now conceive of as federal common law, for purposes of Article III.⁴⁵ He also makes much of the difference in language between Article III and the Supremacy Clause of Article VI, noting that the latter refers to “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof[.]” whereas the former only discusses “laws of the United States” without reference to “pursuance thereof.”⁴⁶ He argues this was likely intentional, and that the Constitutional Convention deliberately struck the words “passed by the Legislature” from the proposed text of Article III reported by the Committee of Detail.⁴⁷ He suggests that there must be a category of laws that are not made “in pursuance” of the Constitution and yet are still “laws of the United States.”⁴⁸ The most obvious candidate, he suggests, is the law of nations.⁴⁹ Another leading scholar opines that the founders and early jurists believed that “all of the common law pertinent to the enforcement of the law of nations naturally attached to the federal government upon its creation.”⁵⁰ Other scholars, particularly those in the revisionist camp, argue that the law of nations was part of the general common law and was not “law of the United States” for purposes of Article III.⁵¹

To be sure, compelling evidence exists to support both sides of this debate, leading me to believe that there is no clear answer to the inquiry regarding whether the founders or early jurists as a group saw the law of nations as part of the “law of the United States” or not. Rather, based on my discussion below, it is likely that some did and some did not, leading to no clear consensus. In fact, the debate we see today likely existed throughout the late 1700s and 1800s among judges and lawyers. This is exemplified in the case I discuss later, *Caperton v. Bowyer*.⁵² Much of this discussion was driven by the continuous debate about the power of the federal government vis-à-vis the states.

There is much to support the contention that early jurists and lawmakers viewed the law of nations as law of the United States, even for purposes of Article III. Many of the arguments are laid out in the

⁴⁵ William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 705–08 (2002).

⁴⁶ *Id.* at 704.

⁴⁷ Dodge, *Bridging Erie*, *supra* note 29, at 102.

⁴⁸ Dodge, *The Constitutionality of the Alien Tort Statute*, *supra* note 45, at 705.

⁴⁹ *Id.*

⁵⁰ WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 160 (1995).

⁵¹ See, e.g., Bradley, *The Status of Customary International Law in U.S. Courts*, *supra* note 32, at 812; Bradley & Goldsmith, *supra* note 32, at 823; Bradley, Goldsmith & Moore, *supra* note 35, at 875.

⁵² 81 U.S. (14 Wall.) 216 (1871). See *infra* notes 64–68 and accompanying text.

article by William Dodge and others, as discussed above. In addition, early federal prosecutions of federal common law crimes demonstrate that many of the founders viewed the law of nations as part of the common law of the United States and exclusive to the federal judiciary. In the late 1700s and into the early 1800s, the federal government prosecuted citizens for violations of the law of nations (such as for piracy, crimes on the high seas, breaches of neutrality and attacks on diplomats) as part of the common law of the United States.⁵³ In these cases, courts routinely stated that the law of nations was part of the law of the United States.⁵⁴ These prosecutions came to an end in 1812⁵⁵ as criticism grew against the idea of federal common law crimes not being defined by statute. The criticism, however, was largely based on the concern that federal common law crimes provided Congress with unlimited power over the states, and not so much on prosecutions of the law of nations as part of federal law.⁵⁶

In addition, in a series of Attorney General Opinions throughout the 1800s—specifically in 1822, 1855, and 1865—the executive branch stated that the law of nations was part of the law of the United States.⁵⁷ However, these statements were likely a reflection of the fact that questions involving the law of nations during that period typically arose in cases over which the federal courts already had sole jurisdiction on some other basis—admiralty, prize, attacks on diplomats, and the like. Thus, the fact that the law of nations was said to be the “law of the United States” only demonstrates that federal courts applied the law of nations to cases already otherwise before them.

Of course, given the fact that general federal question jurisdiction had not yet been enacted,⁵⁸ this tells us nothing about whether federal courts in the 1700s and 1800s actually believed that the law of nations was the law of the United States for purposes of jurisdiction under Article III. The exception to this might be the federal common law crime prosecutions.

In addition, as I have written elsewhere, federal cases (including, but not limited to those early federal common law prosecution cases)

⁵³ *Id.* at 136–38. See, e.g., *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793).

⁵⁴ *CASTO*, *supra* note 50, at 1311; *Henfield’s Case*, 11 F. Cas. at 1117 (stating that because the law of nations is part of the common law of the United States, Henfield and others like him are subject to common law prosecution in federal court).

⁵⁵ *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812).

⁵⁶ *CASTO*, *supra* note 50, at 135, 149–50, 160.

⁵⁷ 11 Op. Att’y Gen. 297, 299 (1865); 7 Op. Att’y Gen. 495, 503 (1855); 1 Op. Att’y Gen. 566, 570 (1822).

⁵⁸ General federal question jurisdiction was not enacted until 1875. Act of Mar. 3, 1875, Ch. 137, 18 Stat.

throughout the 1800s applied the law of nations to cases, often stating that the law of nations is part of the law of the United States.⁵⁹ For example, the Supreme Court in the 1815 case of *The Nereide*, stated “the Court is bound by the law of nations which is part of the law of the land.”⁶⁰

Although perhaps too far removed temporally to provide insight into the minds of the founders, cases throughout the 1800s continued to refer to the “law of nations” as the law of the United States. For example, in 1855, the Court in *Jecker, Torre & Co. v. Montgomery*⁶¹ also confirmed that the law of nations was part of the domestic law of the United States when it used its common law power to derive a rule from the law of nations for a prize case.

Perhaps the most famous case that discussed the law of nations as part of “our law,” was the 1899 case of *The Paquete Habana*, which stated, “[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.”⁶²

These statements that the law of nations is part of United States law, however, do not definitively suggest that the early jurists saw the law of nations as jurisdiction-creating for purposes of Article III. Rather, they are an indication that when the courts otherwise had jurisdiction, they could apply the law of nations without any specific authority from Congress to do so. Moreover, state courts throughout the 1800s also applied various rules of the law of nations to appropriate cases before them, typically tort cases arising out of war.⁶³ Although these cases often do not employ the similar phrase that “the law of nations is part of the law of the United States,” their application of the law of nations indicates that, like the federal courts, they too believed they could apply the law of nations to cases already appropriately before them. This is consistent with the view that the law of nations was simply part of the general common law, applied by courts in appropriate circumstances when they otherwise had jurisdiction, just as stated by the Supreme Court in *Paquette Habana*.

The first time that the Supreme Court heard arguments about whether the law of nations was the “law of the United States” for

⁵⁹ See Gwynne Skinner, *Federal Jurisdiction over U.S. Citizens' Claims for Violations of the Law of Nations in Light of Sosa*, 37 GA. J. INT'L & COMP. L. 53, 102-07 (2008).

⁶⁰ 13 U.S. (9 Cranch) 388, 423(1815).

⁶¹ 59 U.S. (18 How.) 110, 112 (1855).

⁶² 175 U.S. 677, 700 (1900).

⁶³ See Skinner, *supra* note 59, at 107-09.

purposes of jurisdiction was in 1871, nearly one hundred years after the enactment of Article III. In the case of *Caperton v. Bowyer*,⁶⁴ the Supreme Court was asked to decide whether international law, and in particular the law of war, was included in the “law of the United States[,]” thus presenting a federal question for purposes of the Court’s appellate review.⁶⁵ Although the Court ultimately refrained from deciding the issue, both parties set forth strong views on the matter. The defendant was a confederate provost-marshal, who had raised defenses under the law of war when he was sued in tort by a man he had thrown into prison during the Civil War (Bowyer). He vehemently argued that his defenses to the suit under the laws of war gave rise to the Court’s appellate jurisdiction because “international law is a law of the United States, of the *nation*, and not of the several states.”⁶⁶ The defendant argued that “[t]his indeed must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts.”⁶⁷

The plaintiff argued that the defenses, even if based on international law, did not provide the Court with appellate jurisdiction as “laws of the United States” because the law of nations is not “embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States.”⁶⁸

Similar to *The Paquete Habana* and *Jecker*, the *Caperton* case is too far removed temporally from the enactment of Article III to give much guidance on whether the founders thought the law of nations was part of the laws of the United States for purposes of Article III jurisdiction. Rather, the case reflects the developing federal common law in the area of international law, a topic explored later in this essay. The *Caperton* case reflects on the on-going debate about the role of the law of nations within the law of the United States and demonstrates that there was no consensus on the issue. These debates, as one can see, have continued through today, and will likely continue for several more years to come.

Perhaps a better source to determine what was on the minds of at least some of the founders are the Federalist Papers. In the Federalist No. 80, Alexander Hamilton discusses federal jurisdiction in a fair

⁶⁴ 81 U.S. (14 Wall.) 216 (1871).

⁶⁵ The Judiciary Act of 1789 § 25, 1 Stat. 73 provided for Supreme Court appellate jurisdiction consistent with U.S. CONST. art. III, § 2, cl. 2, where there was “drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity.”

⁶⁶ *Caperton*, 81 U.S. at 225.

⁶⁷ *Id.* at 226.

⁶⁸ *Id.* at 228.

amount of detail.⁶⁹ At the very beginning of the paper, he outlines six types of cases to which the judiciary authority of the Union ought to extend:

1st, to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; 2d, to all those which concern the execution of the provisions expressly contained in the articles of the Union; 3d, to all those in which the Unites States are a party; 4th, to all those which involve the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; 5th, to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; and, lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.⁷⁰

After discussing each of these types, Hamilton then examines the draft Constitution, in particular Article III, to argue how each provision of the draft Constitution fits into the six types of cases he outlined. He first addresses the provision: "To all cases in law and equity, *arising under the Constitution and the laws of the United States.*"⁷¹ He states that this clause responds to the "two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States."⁷² He is clearly referring to the first two of the six types of cases he outlined at the beginning of his paper. The first involves "all those which arise out of the *laws of the United States, passed in pursuance of their just and constitutional powers of legislation.*" Thus, he is clearly referring to laws enacted by Congress, and not to a more broad conception of "law" that would include the law of nations.

It is also important to note that Hamilton did not find that the "laws of the United States" clause of Article III satisfied his fourth type of cases—those involving "the PEACE of the CONFEDERACY, whether they relate to the intercourse between the United States and foreign nations." Had he done so, a much stronger argument could be made that "law of the United States" did in fact include the law of nations. Rather, it was the provision that all cases involving foreigners, as well as cases

⁶⁹ THE FEDERALIST NO. 80, at 515–22 (Alexander Hamilton) (E.M. Earle ed., 1937).

⁷⁰ *Id.* at 515.

⁷¹ *Id.* at 520.

⁷² *Id.*

involving treaties, that he believed satisfied the keeping the peace class of cases.⁷³ Although the Federalist Papers clearly advocate that the federal judiciary should have jurisdiction over cases that might affect foreign affairs, nowhere do the Federalist Papers suggest that Article III's "laws of the United States" language was meant to include the law of nations.

Secondly, the founders could have added "law of nations" to Article III, but they did not. This could have been a result of compromise, as some federalists were worried that including the law of nations under Article III would give too much power to the federal courts. This concern would have been consistent with the concern of the federalists at the time.⁷⁴

Having said all of this, it is important to keep in mind that Federalist Paper No. 80 directly reflects the thinking of one man—Alexander Hamilton—or at the most, three men. It is quite possible that the founders knew exactly what they were doing when they removed the phrase "passed by the Legislature" from Article III,⁷⁵ namely, creating room for debate. Every time I read the Federalist Papers, I am struck over and over again by the brilliance of the founders, and of their political acumen, so this is certainly feasible.

2. The Founders Likely Did Not Intend Article III's Reference to "Laws of the United States" to Include the Law of Nations

Upon contemplating Federalist No. 80, the drafting and final wording of Article III, the extensive areas in which the founders did ensure federal jurisdiction, and the predominate view that the law of nations was something like general common law that applied to both the federal and state governments, the likely conclusion is that the founders did not intend for the "laws of the United States" provision under Article III to include the law of nations. Rather, they attempted to ensure that the federal judiciary would have jurisdiction in any case where the law of nations might arise, such as cases involving treaties, ambassadors, admiralty and maritime, and cases between citizens and foreigners.⁷⁶

If the founders did not intend the "laws of the United States" to include statutes or the law of nations, and given the fact that a recognizable federal common law did not exist at the time, the next question becomes this: Do "laws of the United States," for purposes of

⁷³ *Id.* at 517, 521–22.

⁷⁴ *See Skinner, supra* note 59, at 78–83.

⁷⁵ Dodge, *Bridging Erie, supra* note 29, at 102.

⁷⁶ *See* U.S. CONST. art. III, § 2.

Article III, include modern federal common law, or some aspects of such law, that incorporates customary international law, or some aspects of it? Similarly, given the fact that Congress, in 1875, likely intended to confer jurisdiction to federal courts through enactment of federal question jurisdiction, codified at 28 U.S.C. § 1331, to the extent allowed by Article III,⁷⁷ does arising under the “laws of the United States,” contained in the language of § 1331, include federal common law which incorporates, or at least recognizes, customary international law? I answer both questions in the affirmative.

3. Article III’s and § 1331’s References to the “Laws of the United States” Now Include Federal Common Law, Which Can Include Customary International Law

a. *Development of Federal Common Law*

Federal courts began developing their own common law in the 1800s, around the time of *Swift v. Tyson* in 1842, and continued doing so in areas such as contracts, agency, insurance and torts.⁷⁸ There was criticism of *Swift* and the federal courts’ development of federal common law, reflecting a tension between the rights of state courts to develop and apply their own common law in matters of local concern, and the desire that certain questions affecting the nation as a whole should be decided by federal courts.⁷⁹ In fact, federal courts began to develop common law in areas unique to federal interests.⁸⁰ Admiralty, for example, was an area where federal courts continued development of federal common law.⁸¹ However, in each of these situations, the courts were developing federal common law in areas over which they already had jurisdiction; they were not recognizing federal common law for purposes of jurisdiction given the fact that § 1331 was not enacted until 1875.

The case of *Caperton v. Bowyer* is perhaps the first example where lawyers argued that the law of nations should provide for jurisdiction, albeit appellate, based on the language “arising under the laws of the United States.” In *Caperton*, the defendant argued that the Supreme Court should have appellate jurisdiction over his case because it involved international law, and that if the Court did not take jurisdiction,

⁷⁷ See Skinner, *supra* note 59, at 69–72.

⁷⁸ See *id.* at 39–40.

⁷⁹ See, e.g., Stephens, *supra* note 29, at 430–31.

⁸⁰ *Id.*

⁸¹ See Skinner, *supra* note 59, at 41. See also, e.g., *The Belgenland*, 114 U.S. 355, 365 (1885); *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *The Lamington*, 87 F. 752 (E.D.N.Y. 1898).

issues involving foreign relations would be at the mercy of state courts.⁸² The plaintiff argued that the law of nations was not federal law and that the case did not affect foreign relations. However, he conceded that perhaps the Supreme Court should have appellate jurisdiction over cases that could affect foreign relations because that was an area the federal government was responsible for.⁸³

Another case reflecting the emergence of federal common law in the area of international law was the 1894 federal district court case, *Murray v. Chicago & N.W. Ry. Co.*⁸⁴ In *Murray*, the court held that federal courts are empowered to develop common law principles governing “matters of national control.”⁸⁵ The court pointed in particular to international law, stating, “[t]he subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations . . . are committed to the national government.”⁸⁶ In 1901, the Supreme Court approvingly cited *Murray* in *Western Union Telegraph Co. v. Call Publishing Co.*,⁸⁷ where the Court held that it had jurisdiction over claims involving pricing and applied emerging federal common law to the case.

In 1875, for the first time, the Supreme Court considered whether a claim involving the law of nations presented a federal question for appellate jurisdiction and held that it did not. In *New York Life Ins. Co. v. Hendren*,⁸⁸ a case involving the effect of the Civil War upon insurance contracts, the Court held that no federal question was presented where the question rested on the general law of nations unless it was contended that the general laws had been “modified or suspended” by the laws of the United States.⁸⁹ The Court treated the question as one of general public law available to and applicable in all courts, but not one creating a federal question.⁹⁰

The opinion drew a vigorous dissent by Justice Bradley, who stated that “international law has the force of law in our courts, because it is adopted and used by the United States.”⁹¹ He continued:

⁸² *Caperton v. Bowyer*, 81 U.S. (14 Wall.) 216, 226 (1871); *see also supra* notes 64–68 (discussing the *Caperton* case).

⁸³ *Caperton*, 81 U.S. (14 Wall.) at 228–29.

⁸⁴ 62 F. 24 (C.C.N.D. Iowa 1894). The case concerned an action to recover damages for freight transportation rates. *Id.*

⁸⁵ *Id.* at 31–33, 42.

⁸⁶ *Id.* at 32.

⁸⁷ 181 U.S. 92 (1901).

⁸⁸ 92 U.S. 286 (1875).

⁸⁹ *Id.* at 286–87.

⁹⁰ *Id.* at 287.

⁹¹ *Id.* (Bradley, J., dissenting).

[T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, . . . or the express regulations of the government. . . . [I]n both cases it is the law of the United States for the time being, whether written or unwritten.⁹²

In his dissent, he also noted the importance of ensuring uniformity and that the final word on these types of matters comes from the national government.⁹³

Although the majority in *Hendren* suggests that the law of nations was not jurisdiction-creating, it did not address the issue that federal common law might exist in the area of foreign affairs, nor did the majority address any issues that it viewed could affect foreign affairs. The majority viewed it as a wholly domestic case. Had the case been one that impacted foreign affairs, one wonders if a different result might have ensued. The dissent, however, reflects a continuation of the debate regarding the role of international law in domestic law that was highlighted in *Caperton* four years earlier and that still continues today.

These three cases in particular, in combination with the admiralty cases, reflect an emerging strain of thought among lawyers and jurists that, in cases involving or impacting foreign affairs, common law of the federal courts might appropriately exist, possibly even to create jurisdiction. This developing school of thought grew simultaneously with the expansion of federal common law in many areas, as discussed earlier.

The expansion of general federal common law ended with the 1938 Supreme Court decision of *Erie R. Co. v. Tompkins*,⁹⁴ in which the Court held that there was no longer general federal common law and that in diversity cases, state law should be applied, except in matters governed by the Federal Constitution or by acts of Congress.⁹⁵ However, *Erie* insinuated that certain enclaves of federal common law still existed,⁹⁶ and it since has been accepted that international law is one such area.

⁹² *Id.*

⁹³ *Id.* at 288.

⁹⁴ 304 U.S. 64 (1938).

⁹⁵ *Id.* at 78.

⁹⁶ *Id.*

b. *Courts Recognize Aspects of the Law of Nations as an Enclave of Federal Common Law that Survived Erie*

Shortly after the decision in *Erie*, Professor Philip Jessup wrote a famous law review article wherein he argued that customary international law should be treated as federal law, saying, “[a]ny question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . . It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.”⁹⁷

In the 1964 case *Banco Nacional de Cuba v. Sabbatino*,⁹⁸ the Supreme Court applied the Act of State Doctrine as a matter of federal common law in dismissing a claim against Cuba by an American commodity broker, recognizing that it still had authority to develop a common law rule because of its importance to foreign relations. In doing so, the Court noted that the “United States courts apply international law as a part of our own in appropriate circumstances.”⁹⁹ It further stated:

[W]e are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.¹⁰⁰

The Court also approved Professor Jessup’s proposition that rules of international law should not be left to divergent and perhaps parochial state interpretations, and that “[Jessup’s] basic rationale is equally applicable to the act of state doctrine.”¹⁰¹

The *Sabbatino* case is especially important for its consideration of the issues addressed in this article. The case did not directly apply

⁹⁷ Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939).

⁹⁸ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964). The Act of State doctrine dictates that “[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.” *Id.* at 416 (quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897)).

⁹⁹ *Sabbatino*, 376 U.S. at 423.

¹⁰⁰ *Id.* at 425 (italics added and footnote omitted).

¹⁰¹ *Id.*

international law or the law of nations; rather it held that it had the authority under the Constitution¹⁰² to develop federal common law in the area of foreign affairs. The Court insinuated that there is nothing that would prevent the incorporation or recognition of a customary international law rule in the development of federal common law; in fact, *Sabbatino* explored international law in deciding whether to adopt the Act of State doctrine to the case before it.¹⁰³

Similarly, in the 1981 case of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court confirmed that “international disputes implicating . . . our relations with foreign nations,” is an area of law that continues to exist as an enclave of federal common law.¹⁰⁴ The U.S. Supreme Court in *Sosa* agreed. The *Sosa* Court recognized that *Erie* allowed “limited enclaves” in which federal courts may derive some substantive federal common law.¹⁰⁵ The *Sosa* Court indicated that the law of nations, or areas of federal relations, is one such area.¹⁰⁶

c. Courts Have the Authority to Develop Federal Common Law and to Recognize Private Claims Where Such Could Impact Foreign Affairs

As the Court in *Texas Industries* noted, “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.”¹⁰⁷ However, according to the Court in *Texas Industries*, courts can create federal common law either where there is specific Congressional authorization to do so, or absent such specific authorization, where such is “necessary to protect uniquely federal interests,” such as those narrow areas “concerned with the rights and obligations of the United States,” including “our relations with foreign nations.”¹⁰⁸ The Court continued:

In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as

¹⁰² *Id.* at 423. “The act of state doctrine does, however, have ‘constitutional’ underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.” *Id.*

¹⁰³ *Id.* at 421, 428–29.

¹⁰⁴ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981). *See also* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (citing *Tex. Indus.* with approval).

¹⁰⁵ *Sosa*, 542 U.S. at 729. *See also id.* at 729 n.18 (noting that *Sabbatino* “further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts”).

¹⁰⁶ *Id.* at 729–30.

¹⁰⁷ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981).

¹⁰⁸ *Id.* (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.¹⁰⁹

Texas Industries makes it clear that even without specific Congressional authorization, the creation of federal common law is permissible in very narrow areas of federal interest, including any decision that might affect foreign affairs. Thus, federal courts may use their common law power to recognize claims for violations of the law of nations where the recognition of such claims, or aspects of them, might affect foreign relations. Even where the person bringing a claim for a violation of the law of nations is a United States citizen, jurisdiction for such claims should fall within the jurisdiction of federal courts, given that such claims might impact foreign affairs either through recognition of the claim, through a finding that the claim is non-justiciable, or through definitions of customary international law.

A reading of all these cases involving international law and federal common law leads to the conclusion that the law of nations, in and of itself, is not part of the laws of the United States, rather, the federal courts adopt certain rules of customarily international law which become federal common law. Similarly, a fair reading does not lead to the conclusion that customary international law is wholly incorporated into our federal common law. This is borne out by the Court in *Sosa*, which found that U.S. federal courts *recognize* customary international law.¹¹⁰ In addition, the Court in *Sosa* made it clear that not all claims for violations of customary international law fall under the federal courts common law power, only a certain number of them.¹¹¹ Thus, the Court's language and holding suggests that its view is that our federal common law does not wholly incorporate customary international law, but that federal courts have the power to recognize some customary international law, as well as the power to recognize some claims for violation of customary international law.

The *Jecker*, *The Paquette Habana*, *Sabbatino*, *Texas Industries*, and *Sosa* cases all suggest that the federal courts have the authority to develop law

¹⁰⁹ *Id.* (citing *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972); *Sabbatino*, 376 U.S. at 398 (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (issued on the same day as *Erie*)).

¹¹⁰ *Sosa*, 542 U.S. at 729.

¹¹¹ See *supra* note 7, discussing *Sosa's* requirement that any claim brought today for a violation of the law of nations under the ATS must "rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th Century paradigms" recognized at the time—attacks on diplomats, safe conducts, and piracy. *Sosa*, 542 U.S. at 725.

in areas of unique federal interests, especially in cases that could affect foreign relations, and that courts can look to customary international law to supply that law and incorporate it into federal common law. In fact, given the understanding and desire of the founders, federal courts should adopt customary international law when appropriate unless there are strong national interest reasons not to. This is true whether a court is recognizing a private claim for violations of federal common law, as permitted by the *Sosa* court, or in diversity cases which might impact foreign affairs.

4. Modern Federal Common Law as “Law of the United States” for Purposes of Article III and 28 U.S.C. § 1331

As stated in the very beginning of this article, the Supreme Court in *Illinois v. City of Milwaukee*,¹¹² found that “laws of the United States,” within the meaning of § 1331, embraces claims founded on federal common law. This strongly implies that claims founded on federal common law also meet the “arising under the laws of the United States” test for purposes of Article III jurisdiction based on the fact that the Supreme Court has found Article III’s grant of jurisdiction broader than § 1331. Moreover, the fact that the Court did not question the constitutionality of the ATS’s applicability between two aliens in *Sosa*, as well as its approval of the *Filartiga* case, both indicate that the Court has taken a similar view.

Congress itself appears to agree with this view, having explicitly based its constitutional power to enact the Torture Victim Protection Act¹¹³ on the premise that international law is part of the “law of the United States” for purposes of Article III jurisdiction, as well as on Congress’s authority to “define and punish . . . [o]ffenses against the Law of Nations.”¹¹⁴

5. Claims for a Violation of the Law of Nations Under 28 U.S.C. § 1331

The fact that § 1331 should embrace claims founded on federal common law, and that federal courts have the common law power to recognize some claims alleging violation of the law of nations does not in

¹¹² 406 U.S. 91, 100 (1972) (citing *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (Brennan, J., dissenting in part and concurring in part) (“laws” within the meaning of § 1331 embraces claims founded on federal common law)).

¹¹³ See S. COMM. ON THE JUDICIARY, REPORT ON THE TORTURE VICTIM PROTECTION ACT OF 1991, S. 102-249, 1st Sess., at 5 n.2 (1991) (citing 28 U.S.C. § 1350 (1988)).

¹¹⁴ *Id.* at 6 (citing *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (internal quotations omitted)).

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and of itself establish that the courts should recognize private claims under § 1331.

However, just as with the ATS, Congress, upon its enactment of 28 U.S.C. § 1331, likely understood that federal courts would use their common law power to recognize claims, as they had been doing for nearly a hundred years.¹¹⁵ Given the growing development of federal common law, of which Congress was surely aware, Congress likely understood that such claims included claims based on federal common law. Moreover, *Sosa* confirms that courts can use their federal common law power to recognize claims for violations of federal common law in appropriate circumstances and stated that “any international norm intended to protect individuals” as within this realm.¹¹⁶

Thus, common law claims for violation of customary international law, where such claims could impact foreign affairs, should be recognized as federal common law actionable under § 1331.

¹¹⁵ Skinner, *supra* note 59, at 101-07.

¹¹⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004).