

*Winter 2007*

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#### Recommended Citation

G. Edward White, *A Customary International Law of Torts*, 41 Val. U. L. Rev. 755 (2007).  
Available at: <https://scholar.valpo.edu/vulr/vol41/iss2/6>

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# A CUSTOMARY INTERNATIONAL LAW OF TORTS

G. Edward White\*

## I. INTRODUCTION

A nuclear-generated plant in India, owned by a German corporation, has a malfunction, releasing toxic waste that causes injuries to numerous persons. The Burmese government, in connection with foreign corporations located in Burma, allows Burmese children to perform menial labor under substandard working conditions. Agents employed by the Columbian government kidnap a Columbian citizen residing in the United States and subsequently torture and kill him in Columbia. The French ambassador to the United States is assaulted by a French citizen on a street in the District of Columbia. A messenger transferring funds from the government of Qatar to a New York bank is injured in an attempted robbery instituted by Syrian nationals. A cruise ship catering to Japanese citizens is highjacked by terrorists, causing severe emotional distress to many of its passengers before the terrorists are eventually subdued. The Queen of England, on a state visit to Boston, is accused of having made false and defamatory statements about a citizen of Northern Ireland.<sup>1</sup>

In each of these scenarios, a “tort” has arguably been committed. In all of them, the torts, assuming their requisite elements could be established, are actionable in most nations. But for approximately two hundred years after the framing of the Constitution, such cases, when

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<sup>1</sup> Some of these scenarios are versions of actual cases; others are versions of historical incidents or hypotheticals posed by commentators. I have changed the facts slightly to connect the incidents more closely to contemporary events. See *Respublica v. DeLongchamps*, 1 U.S. (1 Dall.) 111 (1784); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); *Doe v. Unocal Corp.*, 110 F. Supp. 2d 534 (S.D.N.Y. 2001); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 491-95 (1986) (discussing the “Marbois” and “Van Berckel” incidents involving violations of the safe conduct of ambassadors or persons connected to their households); Harold Honju Koh, Commentary, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1829 (1998) (discussing immunity of “heads of state” from tort suits); *Partial Justice for the Klinghoffers*, N.Y. TIMES, Aug. 13, 1997, at A22 (discussing financial settlement of lawsuit arising out of the October 7, 1985 highjacking of the Italian cruise ship, *Achille Lauro*, by Palestinian terrorists in which a passenger, Leon Klinghoffer, was killed).

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they involved parties who were not citizens of the United States, were almost never brought in American state or federal courts;<sup>2</sup> this despite the presence of a provision in the Judiciary Act of 1789 which stated that the federal district courts should “also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>3</sup>

The Alien Tort Statute’s (“ATS”) long years in limbo ended in 1980 when the United States Court of Appeals for the Second Circuit allowed it to be invoked in *Filartiga v. Pena-Irala*,<sup>4</sup> where two citizens of Paraguay sued a Paraguayan police official for allegedly torturing and killing one of their relatives in 1976. The plaintiffs originally pursued a criminal action against the defendant in Paraguayan courts, which was still pending in 1978, when the defendant sold his house in Paraguay and entered the United States under a visitor’s visa.<sup>5</sup> He was remaining there, beyond the terms of his visa, when his whereabouts were discovered by one of the plaintiffs, who informed the Immigration and Naturalization Service (“INS”).<sup>6</sup> The INS then arrested the defendant and detained him prior to a deportation hearing.<sup>7</sup> While he was in custody awaiting that hearing, the plaintiffs served him with a

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<sup>2</sup> Two tort cases involving aliens were entertained by United States federal courts between 1795 and 1980. In the first, *Bolchos v. Darrel*, a French privateer captured an enemy Spanish ship on the high seas and brought it into a South Carolina port. 3 F. Cas. 810, 810 (D.S.C. 1795). The ship was carrying slaves that a Spanish citizen had mortgaged to a British citizen. *Id.* Once the ship was in port, the British citizen’s agent, Darrel, seized and sold the slaves. *Id.* The privateer’s captain, Bolchos, claimed that the ship was a lawful prize and as such he was entitled to its cargo, including the slaves. *Id.* The South Carolina district court concluded that its jurisdiction over the case rested on admiralty and eventually held that the ship was a lawful prize and the privateer entitled to the proceeds. *Id.* at 811. In the course of its opinion, the court also suggested that the ATS “gives this court concurrent jurisdiction . . . where an alien sues for a tort, in violation of the law of nations. . . .” *Id.* In the second, *Adra v. Clift*, two aliens were involved in a child custody dispute in which a falsified passport had allegedly been obtained for the child. 195 F. Supp. 857, 859 (D. Md. 1961). The court held that falsifying passports was a violation of the law of nations that gave it jurisdiction under the Alien Tort Statute. *Id.* at 865.

<sup>3</sup> Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1350 (2000)). The term “also” refers to the fact that Section 9 of the Judiciary Act also dealt with the admiralty and criminal jurisdiction of the federal courts. The current version of the Alien Tort Statute (“ATS”) provides that “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).

<sup>4</sup> 630 F.2d 876, 878 (2d Cir. 1980).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 878-79.

<sup>7</sup> *Id.* at 879.

complaint, claiming that United States courts had jurisdiction over torts “in violation of the law of nations,” and that deliberate torture was an example of such a tort.<sup>8</sup>

The Second Circuit agreed.<sup>9</sup> After setting forth the ATS and noting that “the usage of nations, judicial opinions and the works of jurists” revealed that “official torture is now prohibited by the law of nations,”<sup>10</sup> it concluded that the plaintiffs had made a prima facie case for “a tort . . . committed in violation of the law of nations,”<sup>11</sup> and that their claim could be brought in an Article III court. “The constitutional basis for the Alien Tort Statute,” the Second Circuit stated, was “the law of nations, which has always been part of the federal common law.”<sup>12</sup>

The *Filartiga* decision made three assumptions, all of which would become controversial. The first was that the ATS required no enabling legislation because torts “in violation of the law of nations” were recognized in the common law when it was passed.<sup>13</sup> The second was that, although torture was not regarded in 1789 as so heinous a violation of human rights as to offend against principles of international law, it had come to be so recognized, and the law of nations is understood as evolving over time.<sup>14</sup> The third was that the “law of nations” in the ATS was regarded as “part of the federal common law.”<sup>15</sup>

All three of those assumptions were up for grabs in the 2004 Supreme Court case, *Sosa v. Alvarez-Machain*.<sup>16</sup> In the interval between the *Filartiga* and *Sosa* cases, commentators had given considerable attention to two issues the cases had in common. First, the content of “customary international law” — that portion of the “law of nations”

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<sup>8</sup> *Id.* at 878.

<sup>9</sup> *Id.* at 884.

<sup>10</sup> *Id.*

<sup>11</sup> 28 U.S.C. § 1350 (2000).

<sup>12</sup> *Filartiga*, 630 F.2d at 885.

<sup>13</sup> *Id.* at 885-86.

<sup>14</sup> *Id.* at 881, 884.

<sup>15</sup> *Id.* at 885.

<sup>16</sup> 124 S. Ct. 2739 (2004). In *Sosa*, a group of Mexican nationals, including Jose Francisco Sosa, was hired by the United States Drug Enforcement Administration (“DEA”) to seize another Mexican national, Humberto Alvarez-Machain, who was under indictment for participating in the torture and murder of Enrique Camarena-Salazar, a DEA agent who had been captured in Mexico. *Id.* at 2746. Sosa’s group abducted Alvarez-Machain from his house in Mexico, held him overnight in a motel, and subsequently brought him to El Paso, Texas, where he was arrested. *Id.* After eventually being acquitted of the torture and murder charges, Alvarez-Machain sued Sosa under the ATS, alleging that his seizure and overnight detention was a violation of the law of nations. *Id.* at 2747.

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which was not the product of formal acts of governments, such as treaties—was characterized in *Filartiga* as “the usage of nations, judicial opinions and the works of jurists.”<sup>17</sup> The other was the status of customary international law in United States courts.

The *Sosa* decision did not produce a resolution of either of those issues. It did, however, advance a reading of the ATS that seems to limit the *Filartiga* court’s understanding of it. After *Sosa*, it appears that whatever the sources of customary international law and whatever its status in American courts, the number of “tort[s] only, committed in violation of the law of nations” cognizable in American courts under the ATS is limited.<sup>18</sup>

This Article is not primarily about the *Sosa* decision, but about its connection to the current status of the customary international law of torts in American courts. The ATS is but one mechanism by which torts allegedly “in violation of the law of nations” might be the subject of litigation in federal or state courts in the United States. Other statutory mechanisms exist, such as the 1991 Torture Victim Protection Act,<sup>19</sup> which is designed to cover situations such as *Filartiga*. And, more fundamentally, American state or federal courts might conclude that customary international law doctrines should be incorporated into the corpus of their common law decisions. If that were the case, the number of litigants seeking to bring customary international tort suits in United States courts might not, given the *Sosa* decision, significantly increase. But the content of American state and federal tort law might well change. So it seems worthwhile at this juncture to look more closely into the content and status of a customary international law of torts.

That inquiry is intimately connected to an understanding of the effect of the Court’s 1938 decision in *Erie Railroad Co. v. Tompkins*<sup>20</sup> on the jurisprudential status of customary international law. *Erie*, which involved a domestic torts dispute, did not clarify whether its assertion that “[t]here is no general federal common law” was intended to apply to the law of nations.<sup>21</sup> The law of nations had clearly been thought of as “general common law” prior to *Erie* and was based on international

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<sup>17</sup> *Filartiga*, 630 F.2d at 884.

<sup>18</sup> *See Sosa*, 124 S. Ct. at 2770.

<sup>19</sup> Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992).

<sup>20</sup> 304 U.S. 64 (1938).

<sup>21</sup> *Id.* at 78.

customs and usages rather than state common law doctrines.<sup>22</sup> One commentator, writing shortly after the *Erie* decision was handed down, argued that because most cases applying international law were brought in the federal courts and because the federal government arguably had a far stronger interest in the resolution of disputes affecting international relations than the states, it made no sense to apply *Erie* to international law disputes.<sup>23</sup>

The issue is complicated by the fact that, after *Erie*, courts have recognized that the continuing existence of pockets of “federal common law” in areas governed by federal statutes whose terms require judicial interpretation.<sup>24</sup> Under this approach, the ATS could spawn, as it arguably did in *Filartiga*, some “federal common law” decisions interpreting its coverage. But this leaves open the question of the status of customary international law in cases not governed by the ATS. If, as appears likely,<sup>25</sup> *Sosa* anticipates a case-by-case determination of that question, that determination seems fated to eventually confront the issue of whether *Erie* should apply to international law cases.

Formulated more precisely, the status of a customary international law of torts in American courts would seem to turn on a threefold inquiry. First, *Filartiga* and *Sosa*, taken together, make it clear that the ATS creates jurisdiction in the federal courts to entertain cases brought by aliens for “tort[s] . . . in violation of the law of nations.” One might call the law applied in those cases “ATS federal common law” – that is, post-*Erie* federal common law derived from a congressional statute.

Second, the content of a customary international law of torts, as federal common law, would seem to be determined by a two-pronged test consisting of an inquiry into the original understanding of “tort[s] . . . in violation of the law of the nations” at the time of the framing of the ATS, coupled with attention to jurisprudential

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<sup>22</sup> See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 850 (1997).

<sup>23</sup> See Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740, 743 (1939).

<sup>24</sup> The contribution most often identified with the view that post-*Erie* federal law is “new federal common law” is Henry J. Friendly, *In Praise of Erie – And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

<sup>25</sup> 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, 95-96 (2005) (arguing that a six-justice majority in *Sosa* rejected the argument that Congressional authorization was necessary for the federal courts to apply customary international law in any case, citing language in the *Sosa* majority opinion).

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developments since the passage of the ATS, particularly the jurisprudential implications of *Erie*. As will be presented in more detail, the *Sosa* Court concluded that the content of ATS federal common law was not entirely limited to those torts in violation of the law of nations recognized in the late eighteenth century because the law of nations was described by eighteenth-century jurists as having an evolving character.<sup>26</sup> Nonetheless, the Court added that modern versions of “tort[s] . . . in violation of the law of the nations” should only include actions widely condemned by the present international community.<sup>27</sup>

Third, the *Sosa* decision apparently anticipated that a spate of potentially important issues remained open for investigation. Some of those issues involved the constitutional implications of the federal courts deciding customary international law cases, which are outside the scope of this Article.<sup>28</sup> Another set of issues relates more closely to the status of a customary international law of torts. Outside the parameters of the ATS, to what extent may federal or state courts invoke customary international law in torts suits, and what sort of “law” would that be? The conceptualization of torts in violation of the law of nations by the *Filartiga* and *Sosa* decisions suggests that some torts can be derived from widespread contemporary international norms censuring conduct, such as torture, that were not widely stigmatized in the late eighteenth century. If those definitions of torts in violation of the law of nations are applicable outside ATS cases, how much authority do federal and state courts have to draw upon customary international law in torts suits, and how should their decisions be treated?

The last question raises the thorniest issue left unresolved by *Filartiga* and *Sosa*. Once it becomes clear that both of those decisions were treating ATS customary international tort cases as post-*Erie* federal common law cases, it was evidence the cases leave open the status of other customary international law tort cases. For example, nothing prevents state courts from using international norms as a source of “general” common law in their jurisdictions. In addition, *Erie*, on its

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<sup>26</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004).

<sup>27</sup> *Id.*

<sup>28</sup> For example, if customary international law was not considered part of the “laws of the United States,” the federal courts would have no jurisdiction over cases such as *Sosa*, in which both parties were aliens. Dodge, *supra* note 25, at 101-08 (arguing that the law of nations was initially considered among the “laws of the United States” for the purposes of both Article III and the Supremacy Clause of Article VI of the United States Constitution, but both questions remain open).

face, binds federal courts to follow state common law decisions unless they involve issues governed by federal law.<sup>29</sup>

Here, the implications of *Sosa* appear to clash with the implications of *Erie*, creating a potential conundrum. Customary international law was, at the framing of the ATS and for many years thereafter, regarded as “general” law; that is, one of the sources for the common law rules handed down in federal and state courts, along with sources such as maritime law, the law merchant, and, at one point in the history of American jurisprudence, natural law. But it has been assumed that in the post-*Erie* jurisprudential universe there is no *general* federal common law, only the specific federal common law ancillary to the Constitution or to federal statutes such as the ATS. There remains, however, general *state* common law, including, hypothetically, a customary international law of torts derived from particular states. Nothing would seem to prevent a state court from going further, when defining the scope of a customary international law of torts within its jurisdiction, than the *Sosa* Court went in defining “tort[s] . . . in violation of the law of nations” under the ATS. Thus, if *Erie* governs customary international law decisions, a federal court might find itself bound to recognize a broader category of state customary international tort actions than the *Sosa* decision recognized under the ATS.

When one considers the source of most customary international law cases, this situation seems odd. One starts with widespread agreement that customary international law was treated in the framing generation as general common law. Over the years, the particular interests of the federal government in international relations and international norms, as opposed to those of the states, have broadened and deepened. By the 1930s and 1940s, the Court, in a trio of cases sandwiching the *Erie* decision, declared that the foreign affairs powers of the federal government were plenary and exclusive and that federal executive agreements with foreign nations trumped competing state law.<sup>30</sup> Meanwhile, the courts after *Erie* have identified areas in which federal courts are deemed to have continuing power to develop common law rules because the areas reflect unique and distinctive federal concerns.<sup>31</sup> Yet three members of the *Sosa* Court found that *Erie* precluded any use of

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<sup>29</sup> See Bradley & Goldsmith, *supra* note 22, at 870.

<sup>30</sup> *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

<sup>31</sup> The association of “federal common law” with instances in which the federal government had “unique” and “distinctive interests” first appeared in *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 508 (1988).



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current international norms, as opposed to those relied upon by the framers of the ATS in glossing of the statute by the federal courts.<sup>32</sup> The majority, for its part, conceded that such glosses should be rare.<sup>33</sup> At the same time, however, it is beyond cavil that a state court could invalidate the death penalty in its state on the ground that many nations have outlawed capital punishment.

Part I of this Article, using the Court's methodology in *Sosa* as a guide, will attempt to recover the content of a "customary international law" of torts at the time of the framing of the Constitution and to ascertain the meaning of the phrase, "a tort only, committed in violation of the law of nations" in the ATS. Part II, again following the Court's concerns in *Sosa*, will assess the effect of *Erie* on the original status of customary international law. Part III will consider what the status of customary international law in American courts might be if *Erie* were determined to have no binding effect on the reception of that law by either federal or state courts. This Article will conclude by addressing the potential implications of such a determination for the status of a customary international law of torts.

## II. THE ORIGINAL UNDERSTANDING OF THE CUSTOMARY INTERNATIONAL LAW OF TORTS

Both the *Filartiga* and *Sosa* decisions assumed that a first step in analyzing the meaning of the ATS was to determine what its framers understood to constitute a "tort . . . in violation of the law of nations." But the decisions seem, at first blush, to have adopted contrasting views as to how much weight should be given to that original understanding. Whereas *Filartiga* maintained that "it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today[,]"<sup>34</sup> *Sosa* concluded that "courts should require any claim based on the present-day law of nations to rest on a norm of international character . . . defined with a specificity comparable to . . . the 18th-century paradigms" for violations of the law of nations.<sup>35</sup> Both interpretations invoked lines of historical evidence for their conclusions.

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<sup>32</sup> *Sosa v. Alavarez-Machain*, 124 S. Ct. 2739, 2772-73 (2004) (Scalia, J., concurring in part).

<sup>33</sup> *Id.* at 2764-67 (majority opinion).

<sup>34</sup> *Filartiga v. Pena-Irala*, 630 F.2d. 876, 881 (2d Cir. 1980).

<sup>35</sup> *Sosa*, 124 S. Ct. at 2761-62.

## A. "Torts in Violation of the Law of Nations": Alternative Lines of Historical Evidence

## 1. The Blackstone Line: The ATS's Eighteenth-Century Paradigms

The *Sosa* decision presented a line of evidence from the founding generation suggesting that the language, "a tort . . . in violation of the law of nations" in the ATS referred to a specific set of civil wrongs that were seen as raising issues peculiar to the world of diplomacy and international relations. The dominant source for the "18th-century paradigms" included in that set was William Blackstone's *Commentaries on the Laws of England*. Since the *Sosa* Court relied so heavily on Blackstone, but provided an attenuated analysis of his treatise, it seems worthwhile to examine the *Commentaries* in somewhat greater detail.

No list of "torts in violation of the law of nations" appears in Blackstone's *Commentaries*. But it is nonetheless possible to extrapolate from the organization and structure of Blackstone's treatise the "paradigm" torts he had in mind. To find the paradigms, one matches up Blackstone's discussion of "offenses against the law of nations" (by which he meant criminal offenses) with his treatment of torts. This analysis reveals a category of civil offenses that are both cognizable as "torts" in Blackstone's typology and bear a close connection to the "offenses against the law of nations" he describes. That comparatively limited category of civil offenses, one can conclude, is what Blackstone meant by "torts in violation of the law of nations."

Next, one needs to make the assumption that Blackstone's understanding was generally shared by the framers of the ATS. Given the ubiquity of Blackstone as an authoritative source of law in late eighteenth-century America, this assumption is a comparatively easy one to make, and, as will be subsequently noted, there is additional evidence that the Congress that passed the ATS had an understanding of "offenses against the law of nations" comparable to that of Blackstone.

In volume four of the first (1769) edition of his *Commentaries*, Blackstone devoted a chapter to "Offences Against the Law of Nations," which he defined as "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world."<sup>36</sup> In England, Blackstone noted, the law of nations was "adopted in its full extent by the common law, and is held to be a part of the law of

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<sup>36</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND \*66.

the land.”<sup>37</sup> He indicated that in “mercantile questions” and “all marine causes,” the “law-merchant,” which was “a branch of the law of nations,” was “regularly and constantly adhered to,” and the law of nations was also understood as governing “all disputes relating to prizes, to shipwrecks, to hostages and ransom bills.”<sup>38</sup> The law of nations, he concluded, was a “great universal law, collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.”<sup>39</sup>

After these general remarks, Blackstone took up the more “narrow compass” of “offences against the law of nations.”<sup>40</sup> Since his chapter was contained in a volume devoted to “public wrongs” which devoted itself to criminal law, criminal procedure, and punishment,<sup>41</sup> it was clear that he meant the “offences” he discussed to be understood as crimes.

a. “Offenses Against the Law of Nations”

Blackstone began his treatment of “offences against the law of nations” by noting that they could “rarely be the object of the criminal law of any particular state.” This was because most violations of the law of nations were committed by “whole states or nations,” in which case “recourse can only be had to war.”<sup>42</sup> It was rare that “the individuals of any state” violated the law of nations, but when they did, it was “the interest as well as duty of the government” under which they lived “to animadvert upon them with becoming severity, that the peace of the world be maintained.”<sup>43</sup> It was incumbent, Blackstone suggested, on nations “injured” by the acts of individuals to “demand satisfaction and justice to be done on the offender by the state to which he belongs.” Otherwise that state became “an accomplice or abettor of his subject’s crime.”<sup>44</sup>

Blackstone then proceeded to list “the principal offences against the law of nations” that had been “animadverted on . . . by the municipal laws of England.” They were “[v]iolation of safe-conducts,” “[i]nfringement of the rights of ambassadors,” and “[p]iracy.”<sup>45</sup> His

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<sup>37</sup> *Id.* at \*67.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at \*67-68.

<sup>41</sup> *Id.* at \*1.

<sup>42</sup> *Id.* at \*68.

<sup>43</sup> *Id.* Blackstone used “animadvert upon” as a synonym for “censure.”

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* (emphasis omitted).

subsequent discussion of those offenses emphasized their close connection with the preservation of amicable intercourse among sovereign nations.<sup>46</sup>

“Safe-conducts,” or “passports,” by which foreign subjects were protected from being interfered with by the local population, were an essential ingredient of the maintenance of “intercourse or commerce between one nation and another.”<sup>47</sup> Blackstone noted that “one of the articles of [M]agna [C]arta” had been “that foreign merchants shall be entitled to safe-conduct and security throughout the kingdom” and that a series of statutes had made the breaking of truces or safe conducts high treason against the King.<sup>48</sup> Additional statutes allowed the Lord Chancellor to bring an action on behalf of a foreign subject whose safe conduct had been interfered with for restitution of goods or personal effects that had been seized in the process.<sup>49</sup> The offense reflected the fact that even though European nations had engaged in war with one another for centuries, no one nation could survive economically without regular commercial contacts with its neighbors, thus, some form of immunity for commercial travelers and foreigners engaged in diplomatic relations with their host nations was imperative. Blackstone’s discussion also stressed that when the safe conduct of a foreign citizen was threatened, the “honor” of the King was “particularly engaged,” because it might give rise to a diplomatic incident or disrupt commerce.<sup>50</sup>

Closely connected to the safe conduct of foreign citizens was the protection for “ambassadors” and members of their households.<sup>51</sup> Ambassadors were a class of persons formally afforded safe conducts and other protection because they were professionally engaged in the maintenance of civil relations between their respective nations and England. They were so vital to that process, in fact, that they were given immunity against civil or criminal redress for wrongs they might have committed against members of the local population.<sup>52</sup> As Blackstone noted, “the common law of England recognizes them in their full extent by immediately stopping all legal process, sued out through the ignorance or rashness of individuals, which may entrench upon the

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<sup>46</sup> *Id.* at \*68-73.

<sup>47</sup> *Id.* at \*68.

<sup>48</sup> *Id.* at \*69 (emphasis omitted).

<sup>49</sup> *Id.* at \*69-70.

<sup>50</sup> *Id.* at \*69.

<sup>51</sup> *Id.* at \*70.

<sup>52</sup> *Id.*

immunities of a foreign minister or any of his train.”<sup>53</sup> Not only was “all process whereby the person of any ambassador, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, . . . utterly null and void,” but “all persons” who had executed that process, once “being convicted, by confession or the oath of one witness,” were “deemed violators of the laws of nations and disturbers of the public repose.” They were amenable to “such penalties and corporal punishment” as judges saw fit to impose.<sup>54</sup>

The solicitude afforded ambassadors and their staff illustrates the widespread perception among eighteenth-century European nations that the regular presence of foreign diplomats within their borders was vital to successful international relations. As contacts with foreign powers, diplomats were important links in the chain of communication that fostered harmonious relations with those powers; and, as official representatives of a foreign nation stationed in a host country, diplomats personified the dignity of that nation. Injuries or embarrassments to them thus had the potential to be regarded as affronts to that dignity, and the “ignorance or rashness” of citizens of the host nation toward diplomats had the potential to reflect upon the reputation of the host. The potential for lawsuits against ambassadors or members of their households to become international incidents was felt so keenly, that those who brought such lawsuits were deemed to have committed offenses against the law of nations.<sup>55</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at \*70-71.

<sup>55</sup> *Id.* The perception that lawsuits involving diplomatic personnel would invariably be taken as affronts to the dignity of the nation with which the diplomats were connected goes far to explain the very wide scope given to diplomatic immunity in Anglo-American common law. At first blush, it would not seem to reflect adversely on a diplomat’s home nation if the diplomat was charged with riding a horse carelessly so as to injure someone, or with breaking into the home of a resident. But the reasoning behind wide-ranging diplomatic immunity seems to have been that when such incidents occurred, the honor of the diplomat’s home nation would inevitably be drawn into question, and the situation, from that nation’s perspective, would be worsened by the fact that the incident had occurred on foreign soil, outside the range of the nation’s authority. Thus, even accusing diplomats of committing torts or crimes was likely to cause international tension. Diplomats and their staffs were thus given immunities in order to prevent the occurrence of potentially embarrassing incidents involving them, and, to make doubly sure, punishments were accorded against those who rashly or ignorantly sought legal redress against diplomats. Wide-ranging diplomatic immunities in English law also had the effect of encouraging other nations to confer reciprocal privileges on English diplomats serving in those nations.

The last of Blackstone's offenses against the law of nations was piracy.<sup>56</sup> To grasp the enormity of the offense of piracy for Blackstone and his contemporaries, one must recall the fact that a very large portion of international commerce in the eighteenth century took place on ships in the high seas, and that many of the wars involved confrontations between navies on the ocean. Just as it had been vital for European nations to distinguish between war and commercial intercourse on land, it was equally important to maintain that distinction on sea. The international rules and customs of intercourse on the sea also reflected the fact that, as compared with land, the ocean was boundless and far more difficult to police. Consequently, the law maritime from the earliest origins of sea-faring commercial and naval ventures laid down universal rules affecting the conduct of sea-going vessels and their interaction with one another. Naval ships of belligerents, neutrals, privateers, and commercial vessels were expected to behave in conformity with those rules when their paths crossed on the high seas.

In this context, pirates were the equivalent of twenty-first century terrorists, who also function in a world that combines frequent international commercial exchange with regular wars and international understandings about the conduct of nations at war. The notoriety of pirates came not merely from the fact that they robbed or plundered or assaulted other ships and their personnel, but that they did not observe the rules of the law maritime or the rules of war. Some of those rules, such as the different obligations of belligerent ships toward other belligerent, neutral, or commercial vessels, were designed to preserve commercial exchange in the shifting context of international alliances and wars. Others, such as the requirement that ships of a nation eventually display their national flags before engaging in combat with an enemy, were designed to aid in the policing of the high seas and minimizing diplomatic tension. When pirates refused to follow those rules, most prominently by attacking other ships regardless of their status and by concealing their identity through the use of false flags or signals, they undermined the delicate balance between naval traffic as an instrument of war and naval traffic as a means of international commercial exchange. Blackstone had no hesitation in labeling a pirate as one who "has renounced all the benefits of society and government,

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<sup>56</sup> See 4 BLACKSTONE, *supra* note 36, at \*68. For a discussion of the great significance afforded to piracy by Americans in the late eighteenth and early nineteenth centuries, see G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 870-79* (Oxford Univ. Press 1991) (1988).

and has reduced himself afresh to the savage state of nature.”<sup>57</sup> “[B]y declaring war against all mankind,” pirates should expect that “all mankind must declare war against [them].”<sup>58</sup>

Blackstone’s discussion of piracy stressed the capacity of pirates to disturb the delicacies of high seas commercial intercourse. After defining piracy “by common law” as “those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there[,]” he noted that statutes had made “some other offenses piracy also.”<sup>59</sup> It was piracy for a subject to “commit[ ] any act of hostility upon the high seas against others of his majesty’s subjects under color of a commission from any foreign power.”<sup>60</sup> It was piracy for “any commander, or other seafaring person,” to run away with a ship, or ammunition, or goods, or to yield them up voluntarily to a pirate, or to conspire to do any of those acts.<sup>61</sup> It was piracy for anyone to confine the commander of ship to prevent his defending the ship.<sup>62</sup> It was piracy to trade with pirates or to furnish them with stores or ammunition. Finally, it was piracy to forcibly board a merchant vessel.<sup>63</sup>

Any version of piracy was punishable by death.<sup>64</sup> The supplemental list of “piracy” offenses signaled the obvious threats piracy posed to a high seas culture whose good order and harmony was predicated on the maintenance of a bright line between belligerency and commercial trafficking. Merchant vessels and neutrals were to be left alone on the high seas even when the ships of belligerents were attacking one another; to do otherwise was to invite chaos. Pirates were the symbol of that chaos. Thus, by not following the rules of the high seas strictly, one took the risk of being judged a pirate.

Blackstone assumed that violations of safe conduct, offenses against ambassadors, and piracy exhausted the category of offenses against the law of nations. As noted, his discussion of the offenses had taken place

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<sup>57</sup> 4 BLACKSTONE, *supra* note 36, at \*71.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at \*72.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

in the volume of his *Commentaries* devoted to criminal law.<sup>65</sup> His discussion, taken by itself, would not seem to provide guidance about the potential meaning of “a tort . . . in violation of the law of nations” in the ATS. But when Blackstone’s treatment of offenses against the law of nations is matched up with his treatment of “private wrongs” or torts, the meaning of the phrase can be seen as clarified.

*b. Torts*

In volume three of his *Commentaries*, Blackstone introduced a chapter on “[w]rongs, and their [r]emedies, respecting the rights of persons.”<sup>66</sup> As the introduction to a 1979 facsimile edition of the *Commentaries* pointed out, that chapter, despite being included in a book titled *Of Private Wrongs*, was not devoted to the substantive law of torts, but mainly to English civil procedure. A “few [other] thin chapters” in volume three, however, canvassed “the rudimentary tort law of the mid-eighteenth century.”<sup>67</sup> For our purposes, the salient chapter<sup>68</sup> is one in which Blackstone defined “the several injuries cognizable by the courts of common law,” which he divided into “actions *personal, real, and mixed*,”<sup>69</sup> and subdivided the personal actions into contracts and “*torts or wrongs*.”<sup>70</sup>

The torts that emerged from this classification process were of two sorts: injuries which “affect[ed] the personal security of individuals,”<sup>71</sup> and injuries which violated their “personal liberty.”<sup>72</sup> In the first category, Blackstone placed assault, battery, “*threats and menaces of bodily hurt*,” “*mayhem or wounding*,” “[i]njuries, affecting a man’s *health*,” and “injuries affecting a man’s *reputation*.”<sup>73</sup> His discussion of those torts was disjointed, alternating between descriptions of the

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<sup>65</sup> Blackstone’s discussion of offenses against the law of nations was included in a volume of his treatise labeled “public wrongs” and included mention of the criminal penalties for violations. *Id.* at \*1.

<sup>66</sup> 3 BLACKSTONE, *supra* note 36, at \*115-143.

<sup>67</sup> John H. Langbein, *Introduction*, in 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION iii (1979).

<sup>68</sup> Two other chapters, “Of Trespass,” and “Of Nuisance,” seem less relevant because Blackstone’s definitions of those torts, which hypothetically enabled them to be matched up with offenses against the law of nations (as where someone invaded the property of an ambassador or erected a smelting house adjacent to that land), do not seem as obviously connected to the criminal offenses against the law of nations Blackstone identified.

<sup>69</sup> 3 BLACKSTONE, *supra* note 36, at \*117.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at \*119.

<sup>72</sup> *Id.* at \*127.

<sup>73</sup> *Id.* at \*120-23.



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elements of the action and the appropriate form of writ for bringing it. Some of the torts he listed do not seem, on analysis, to have distinctive elements. For example, “threats and menaces of bodily hurt” would seem to be simply a species of assault, and “mayhem” would seem to be a species of battery. In addition, “injuries affecting a man’s health” was a category based on the nature of the injury and damages rather than on the elements of the action.<sup>74</sup>

Blackstone’s last example of a tort affecting the personal security of individuals was “injuries affecting a man’s reputation,” or slanders, libels, and malicious prosecutions.<sup>75</sup> His discussion of slander and libel suggested that the common law of defamation had, by the eighteenth century, taken on many of its conventional features, such as the distinction between general and special damages; the development of a category of slanders (so-called slanders per se) where recovery could be had without proof of special damages; the requirement, in some cases, that a plaintiff show the “innuendo” or defamatory meaning, in the words; and the role of truth as a defense.<sup>76</sup> His discussion of malicious prosecution noted that although plaintiffs needed to obtain copies of the indictments brought against them in order to show that they had been “made the engines of private spite and enmity” through a criminal prosecution, “in prosecutions for felony, it is usual to deny a copy of the indictment,” and such was justifiable when “any probable cause for preferring it” existed.<sup>77</sup>

Blackstone listed only one tort associated with “the violation of the right of personal liberty” – false imprisonment.<sup>78</sup> The incarcerations of persons in England who held dissident religious or political views was a sufficiently keen memory to Blackstone and his contemporaries that he took the opportunity to discuss the ways in which those falsely

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<sup>74</sup> *Id.* Blackstone included in the category injuries from “the exercise of a noisome trade, which infects the air in [a] neighborhood,” as well as injuries from “the neglect or unskillful management of [a] physician” or the “selling [of] bad provisions or wine.” *Id.* He may have introduced this category because many of the wrongs included in it produced injuries “unaccompanied by force,” so that injured persons filed suit in trespass on the case rather than in trespass. But if Blackstone meant his health injuries category to serve as a collection of wrongs based on negligent rather than intentional acts, his example of the exercise of a noisome trade did not serve that purpose.

<sup>75</sup> *Id.* at \*123.

<sup>76</sup> *Id.* at \*124-26. Blackstone occasionally misstated the law of defamation, as when he declared that “part of the definition of slander” was that words be “maliciously spoken.” *Id.* at \*125. In fact, an inadvertent error, so long as it was sufficiently damaging to someone’s reputation, was actionable.

<sup>77</sup> *Id.* at \*126-27.

<sup>78</sup> *Id.* at \*127.

imprisoned could be removed from their predicament as well as their compensation.<sup>79</sup> He listed four writs that imprisoned persons could use to obtain their freedom, emphasizing the writ of habeas corpus, “the most celebrated writ in the English law,” which he characterized as “the great and efficacious writ in all manner of illegal confinement,” and noted that “the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.”<sup>80</sup> After a lengthy paean to the great writ, Blackstone noted that when a person could show that he had been “detained,” and unlawfully so, he was then entitled to bring an action of trespass for false imprisonment and to “recover damages for the injury he has received.”<sup>81</sup>

Blackstone prefaced his discussion of civil injuries by noting that those involving “force and violence,” such as batteries or false imprisonment, “savour something of the criminal kind,” and invariably subjected their perpetrators to a public fine for disturbing the peace, as well as damages to those injured.<sup>82</sup> Thus, crimes and torts were sometimes indissolubly linked, even though they might spawn different remedies. This suggested that many criminal offenses were also actionable as torts, and that the offenses which had been identified as violating the law of nations might, depending on the circumstances in which they were perpetrated, give rise to tort actions as well.

*c. “Torts in Violation of the Law of Nations”*

One could imagine, for example, that in many situations when the safe conduct of foreigners or merchants was interfered with, assaults, batteries, and even false imprisonments might take place. “Ignorant” or “rash” individuals might also commit those torts on ambassadors or members of their staffs. And the acts of pirates would constitute an unending series of assaults, batteries, and false imprisonments. The negligent treatment of ambassadors or their staffs by physicians, or even the negligent sale to embassy personnel of spoiled food or beverages, might threaten to provoke international incidents. Finally, the reputations of persons given safe conduct, or ambassadors or their staffs, are subject to being falsely impugned, and slander or libel against a representative of a foreign nation—given that an incident leading to a defamation charge necessarily affects both the reputation of the person

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<sup>79</sup> *Id.* at \*127-38.

<sup>80</sup> *Id.* at \*129-33.

<sup>81</sup> *Id.* at \*137-38.

<sup>82</sup> *Id.* at \*118-19.

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being defamed and, implicitly, that of the defamer—could easily have international implications.

In short, an analysis of Blackstone's *Commentaries* suggests that given the widespread use of Blackstone as a source of legal authority in late eighteenth-century America,<sup>83</sup> the framers of the ATS might have had a relatively concrete understanding of "a tort . . . in violation of the law of nations." That conclusion is reinforced by the fact that shortly after the Constitution provided that Congress could "define and punish . . . Offenses against the Law of nations,"<sup>84</sup> the First Congress passed The Crimes Act of 1790, a statute punishing violations of safe conduct, assaults on ambassadors, and piracy.<sup>85</sup>

In a recent article, Thomas H. Lee reinforced this line of argument by demonstrating that The Crimes Act and the Judiciary Act of 1789, taken together, addressed piracy and assaults on ambassadors in some detail.<sup>86</sup> The Judiciary Act gave the federal courts jurisdiction over civil suits arising out of incidents involving piracy or disputes over captured prize ships, and also gave the Supreme Court original jurisdiction over civil cases brought by foreign ministers, ambassadors, or consuls.<sup>87</sup> The Crimes Act contained several provisions detailing penalties for piracy and violations of the persons and property of ministers or members of their household.<sup>88</sup> Lee maintains that this legislation, when placed alongside the ATS, reveals an "impressive, intricate scheme" designed by the framers to redress those crimes and torts that were understood at the time as violating international law norms.<sup>89</sup>

Lee then suggests that the statutory scheme he reconstructs clarifies the purpose of the ATS. Since piracy and assaults on ambassadors were addressed in some detail in other statutes, he argues that the "tort" focused upon in the ATS was likely that of violations of safe conduct.<sup>90</sup> This hypothesis, Lee believes, is reinforced by the fact that violations of

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<sup>83</sup> See Dennis Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976).

<sup>84</sup> U.S. CONST. art. I, § 8.

<sup>85</sup> An Act for the Punishment of Certain Crimes Against the United States, ch. 9, §§ 8-12, 28, 1 Stat. 112, 113-14, 117-18 (1790).

<sup>86</sup> Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

<sup>87</sup> See Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80; *id.* § 9, at 77; *id.* § 12, at 79 (quoted in Lee, *supra* note 86, at 866-67).

<sup>88</sup> See Crimes Act of 1790 (quoted in Lee, *supra* note 86, at 867-68).

<sup>89</sup> Lee, *supra* note 86, at 866.

<sup>90</sup> *Id. passim.*

the safe conduct of foreign citizens within the United States would commonly occur in the form of routine transgressions scattered over the country, making them difficult to redress by national authorities.<sup>91</sup> Although Congress could have criminalized such offenses, this would have had the effect of promulgating federal common law crimes, a highly sensitive issue in the late eighteenth- and early nineteenth-centuries. Finally, Lee suggests that the “safe conduct” theory of the ATS helps explain its use of the word “only” after “tort.”<sup>92</sup> The word was used to prevent aliens (typically British citizens) from using the *state* courts, with their lower jurisdictional amounts, to recover property or debts that had been guaranteed to them by the 1783 Treaty of Paris, which addressed the nullification of alien property and contract claims by post-Revolutionary War legislation in American states.<sup>93</sup> Aliens could bring “tort[s] only in violation of the law of nations” in state courts under the ATS; their contract or property claims could only be brought in the federal courts, which had a damage threshold of \$500.<sup>94</sup>

But all this evidence does not exhaust an inquiry into the meaning of the statute. For rather than particularizing the offenses that triggered it, the statute’s framers used the generic terms “tort only in violation of the law of nations” to describe the statute’s applicability.<sup>95</sup> Before one can

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<sup>91</sup> *Id.* at 896-99.

<sup>92</sup> *Id.* at 899.

<sup>93</sup> *Id.* at 896-99.

<sup>94</sup> *Id.* at 897-98. Lee puts a hypothetical to illustrate the concerns he believes animated the “tort only” language of the ATS. *Id.* Assume that after the ATS’s passage, a British creditor attempted to collect a legitimate \$500 debt owed him by a citizen of Virginia, and was met not only by the defense of a Virginia statute nullifying the debt but by the intervention of a Virginia sheriff, who assaulted him and temporarily incarcerated him. *Id.* at 898. Under the Treaty of Paris the creditor should have been entitled to a recovery of the debt, and the sheriff’s action was a prototypical violation of his safe conduct, giving rise to tort actions for assault, battery, and false imprisonment. *Id.* However, the ATS’s language did not permit the creditor to sue for the *debt* in federal court, and the amount of the debt did not meet the federal courts’ jurisdictional threshold of sums exceeding \$500. *Id.* at 899. Thus the ATS, Lee suggests, was designed to preserve the principle that the United States would continue to afford safe conduct to foreigners within its borders, but at the same time not allow aliens access to the federal courts for satisfaction of other than very substantial property or contract claims—those exceeding \$500. *Id.* The hypothesis also suggests that the ATS was intended to encompass torts “in violation of the law of nations” committed by aliens against other aliens within the borders of the United States. *Id.* at 899-900. The safe conduct principle protected aliens in America regardless of who violated their safe conduct: it amounted to a promise of protection by the United States itself. *Id.*

<sup>95</sup> Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (current version at 28 U.S.C. § 1350 (2000)). Commentators writing before Lee have also sought to explain the ATS’s inclusion of the word “only” between “tort” and “violation of the law of nations.” Two articles in the 1980s advanced one of Lee’s arguments, that the word was used to ensure that foreign (mainly British) creditors seeking to recover debts incurred to them by American citizens

settle on the proposition that the ATS referred only to those torts in existence at the time of its passage, and only to those which could be connected to the cognizable “offenses against the law of nations” at that time, one would have to conclude that the framers of the ATS understood that “offenses against the law of nations” would invariably be limited to those identified in Blackstone’s *Commentaries*.<sup>96</sup>

The difficulty with that conclusion is twofold. Not only has no evidence surfaced suggesting that the framers of the ATS believed that it

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would need to meet the jurisdictional requirements for suits in the federal courts, which included a requirement that the sum in question exceed \$500. Since the ATS gave the federal and state courts jurisdiction over *all* causes where an alien sues for a tort, the articles suggested that there was a concern that it might be used to evade the jurisdictional amount requirement in cases combining contract and tort claims. See Casto, *supra* note 1, at 507-08; Kenneth C. Randall, *Federal Jurisdiction over International Law Claims*, 18 N.Y.U. J. INT’L L. & POL. 1, 28-31 (1985). But see Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT’L & COMP. L. REV. 445, 446 (1995) (disputing this view). Sweeney stated that “I never could see why granting jurisdiction over a ‘tort’ should be read as implying a grant of jurisdiction over something other than a tort, thus creating a need to exclude the possibility.” *Id.* Sweeney argued that the ATS was designed to apply only to prize cases in which “the legality of a capture was not in issue, and the suit was ‘only’ for the reparation in damages of a wrong related to a capture.” *Id.* at 482. Sweeney’s criticism of the interpretation of “only” advanced by Randall and Casto seems appropriate. But his interpretation fails to explain why the ATS’s original language referred to “all” actions, why the ATS would have been necessary when the federal courts already had jurisdiction over prize cases under the Constitution, and why no early cases interpreting the ATS assumed that it referred only to a limited category of prize cases. See William S. Dodge, *The Historical Origins of the Alien Tort Statute*, 19 HASTINGS INT’L & COMP. L. REV. 221, 244-53 (1996) (internal quotations omitted). I am inclined to agree with Dodge’s and Lee’s explanation of the word “only” in the ATS: that it was designed to limit actions under the statute to tort remedies, thereby preventing suitors under the statute from waiving those remedies and seeking assumpsit or restitution. *Id.* at 254-55 (citing language in *Moxon v. The Fanny*, 17 F. Cas. 942, 948 (D. Pa. 1793) and *Bullard v. Bell*, 4 F. Cas. 624, 639 (C.C.D.N.H. 1817)). The *Sosa* Court made a version of this argument, stating that the word “only” “may have served the . . . purpose of putting foreigners on notice that they would no longer be able to prosecute their own criminal cases in federal court[.]” and citing a 1794 opinion of the U.S. Attorney General to that effect. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2758 n.12 (2004).

<sup>96</sup> This was the argument made by Judge Robert Bork in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). Lee does not agree with that argument. In attempting to show that the ATS was principally directed to violations of the safe conduct of aliens, he is not insisting, given the breadth of the ATS’s “tort only” language, that it must be read as exclusively directed to those violations. His purpose is rather to suggest that since protections against violations of the safe conduct of foreigners amounted to a unilateral promise by a sovereign nation rather than a consensual understanding that some conduct violated the standards of *all* civilized nations, ATS violations should be understood as requiring a “U.S. nexus,” that is, some connection between the tortfeasor and the United States. See Lee, *supra* note 86, at 901-04 (arguing that the ATS should apply when the tortfeasor had a “presence” in the United States, even if the tort occurred outside its boundaries).

would always be limited to “torts in violation of the law of nations” that could be identified by a reading of Blackstone, there is abundant evidence that they believed that “the law of nations” would evolve over time, and that, consequently, “offenses against the law of nations” and “torts in violation of the law of nations” might evolve as well.

## 2. The Evolving Law of Nations Line

We have seen that Blackstone had defined the “law of nations” as “a system of rules, deducible by natural reason,” which “must necessarily result from those principles of natural justice, in which all the learned of every nation agree.”<sup>97</sup> Since that passage presupposes that “the learned of every nation” were capable of deducing the “system of rules” that the law of nations represented, it follows that the law of nations might well not be a static entity. Given this conclusion, it is important to understand what Blackstone and his contemporaries meant by “natural reason” and “natural justice” in the passage, because “natural reason” and “natural justice” were among the sources from which the law of nations was to be derived.

Modern readers of Blackstone’s definition of the law of nations might be inclined to conclude that its content would change along with understandings of “natural reason” and “natural justice” in the international community. The law of nations would thus resemble Chief Justice Earl Warren’s standard for determining the meaning of “cruel and unusual punishment” in the Eighth Amendment: “the evolving standards of decency that mark the progress of a maturing society.”<sup>98</sup>

In one sense, this conclusion would be accurate. As Justice Joseph Story stated in an 1822 circuit court opinion, “every doctrine that may be fairly deduced by correct reasoning from . . . the nature of moral obligation may theoretically be said to exist in the law of nations.”<sup>99</sup> But “[i]t does not follow,” Justice Story maintained, “that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.”<sup>100</sup>

Justice Story’s statement captured the founding era generation’s dominant understanding of the law of nations. That law was partly

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<sup>97</sup> 4 BLACKSTONE, *supra* note 36, at \*66-67.

<sup>98</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>99</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822).

<sup>100</sup> *Id.*

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reflected in international customs and treaties, which could be expected to change over time. But at the same time, it was founded on the principles of “natural justice,” “natural reason,” and “the nature of moral obligation.” Those principles, being immanent and immutable, were always available as sources for the law of nations, whether or not a given principle had been codified in a custom or treaty.

Thus, it is important to place late eighteenth- and early nineteenth-century comments about the evolving quality of the law of nations in context. For example, in a 1796 Supreme Court opinion, Justice James Wilson stated that the United States was “bound to receive the law of nations” as part of the corpus of its common law, and that the law of nations was in a “modern state of purity and refinement.”<sup>101</sup> Earlier, Thomas Jefferson had written to Thomas Pickney that the “principles” of the law of nations “have been liberalized in latter times by the refinement of manners & morals.”<sup>102</sup> These statements, taken together with that of Justice Story, demonstrate that commentators expected the law of nations to evolve and to become more enlightened in the process.

But the critical phrase in Story’s dictum was, “may theoretically be *said to exist* in the law of nations.” By that phrase he meant that once “learned” members of the civilized world concluded that a certain practice was consistent with “natural reason” or “natural justice,” that practice was revealed as *already part of* the law of nations. A similar jurisprudential assumption can be found in Blackstone, who said, in discussing statutes implementing international law rules, “those acts of parliament, which have from time to time been made to enforce this universal law . . . are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom.”<sup>103</sup>

The idea that newly derived principles of the law of nations were actually declarations of pre-existing conceptions of natural reason and natural justice might not seem to have any effect on the question of whether the content of international law evolved over time. There is no evidence that Blackstone, Jefferson, Wilson, or Story found any inconsistency between an evolving definition of the content of the law of nations and a static, declaratory theory of the sources of common law. But they did not find the two conceptions inconsistent because they

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<sup>101</sup> Ware v. Hylton, 3 U.S. 199, 281 (1796).

<sup>102</sup> Letter from Thomas Jefferson to Thomas Pickney (May 7, 1793), in 7 THE WORKS OF THOMAS JEFFERSON (P. Ford ed., 1904).

<sup>103</sup> 4 BLACKSTONE, *supra* note 36, at \*67.

assumed that customary international law, like other elements of the common law, was part of a body of preexisting legal principles, many of which remained to be discovered, declared, and applied by judges. In such a universe, judges were regarded as learned savants rather than creative policymakers, and declaration of legal principles was treated as different from lawmaking. The fact that the content of customary international law changed over time as new principles were discovered and applied by judges was not thought to raise issues about the proper scope of the judicial function. In all areas of the common law, judges were given license to draw on a variety of sources, including “natural reason” and “natural justice,” in deriving the law’s corpus.<sup>104</sup>

So long as the principles that judges discovered and applied to cases were believed to be already in existence, the process of judicial discovery and application was not treated as willful or creative and issues of judicial lawmaking remained dormant. But in the early twentieth century, the declaratory theory of judicial decision-making came under attack as a fiction. It was premised, Justice Oliver Wendell Holmes stated in a 1928 case, on a conception of the common law as “a transcendental body of law outside of any particular state but obligatory within it.” There was, Holmes concluded, “no such body of law.”<sup>105</sup> By the 1930s, Holmes’s conclusion that the common law could no longer be regarded as independent of decisions rendered by judges had become orthodoxy. In *Sosa*, the Court took for granted that “the prevailing conception of the common law has changed since 1789,” and that there is now “a general understanding that the law is not so much found or discovered as it is either made or created.”<sup>106</sup> “[A] judge deciding in

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<sup>104</sup> For more detail on this understanding of judicial decision-making in common law cases by eighteenth and early nineteenth century American commentators, see WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, *supra* note 56, at 134-35, discussing the following passage from St. George Tucker’s 1803 edition of Blackstone’s *Commentaries*:

In short, as the matters cognizable in the federal courts belong . . . partly to the civil law; partly to the maritime law; . . . partly to the general laws and action of merchants; and partly to the municipal laws of any foreign nation, or of any state in the union . . . so, the law of nations, the common law of England, the civil law, the law maritime, the . . . law of the foreign nation, or state in which the cause of action may arise . . . must in their turn be resorted to as the rule of decision, according to the nature and circumstances of each case, respectively. So that each of these laws may be regarded, so far as they apply to such cases, . . . as the law of the land.

St. George Tucker, *Appendix E*, in 1 BLACKSTONE, *supra* note 36, at\*429-30.

<sup>105</sup> *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928).

<sup>106</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004).



reliance on an international norm," the Court added, "will find a substantial element of discretionary judgment in the decision."<sup>107</sup>

Further, after the *Erie* decision's use of Holmes's critique of the declaratory conception of common law to conclude that there was no "general" federal common law as such,<sup>108</sup> the modern orthodoxy is that the "common law" is the law of the states plus "havens of [federal] specialty" created by Congress or by the Court "in interstitial areas of particular federal interest."<sup>109</sup> The *Filartiga* decision's conception of the potential reach of the ATS seemed at odds, the *Sosa* Court would suggest, with a chastened, post-*Erie* understanding of the status of customary international law as "general" common law.

#### B. *Sosa's* Compromise

##### 1. *Sosa's* "Door Ajar"

Nonetheless, the *Sosa* majority did not endorse Justice Antonin Scalia's conclusion that modern theories of the sources of law, when coupled with the *Erie* decision, precluded federal courts "from recognizing any further international norms as judicially enforceable today, absent further congressional action."<sup>110</sup> Justice David Souter, for the majority, stated that although "we now tend to understand common law not as a discoverable reflection of universal reason but . . . as a product of human choice," and that after *Erie* "federal courts have no authority to derive 'general' common law,"<sup>111</sup> the Court was inclined to keep "the door . . . ajar" for recognition that the ATS applied to "a narrow class of international norms today."<sup>112</sup> "We think it would be unreasonable to assume," Justice Souter wrote, "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 way to modern realism."<sup>113</sup> Hence, the *Sosa* majority was willing to recognize claims under the ATS for violations of international law norms that had content as definite as, and an "acceptance among civilized nations" as widespread as, the norms

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<sup>107</sup> *Id.*

<sup>108</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

<sup>109</sup> *Sosa*, 124 S. Ct. at 2762.

<sup>110</sup> *Id.* at 2764.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 2765.

that prohibited violations of safe conducts, assaults on ambassadors, and piracy in the eighteenth century.<sup>114</sup>

As a practical solution, the *Sosa* decision seemed sensible enough. It gave meaningful content to the ATS as a jurisdiction-conferring provision, but at the same time limited the statute's reach. Although the *Sosa* Court suggested that the ATS might ultimately embrace some additional "tort[s] . . . in violation of the law of nations," the only ones that seemed to contain the requisite specificity and universal condemnation—torts related to the torture of humans—had already been connected to a criminal offense by the Torture Victim Protection Act of 1991.<sup>115</sup> In short, *Sosa* stood for the proposition that if a great many nations of the world condemn a particular offense, torts connected to that offense are very likely within the scope of the ATS. The door did not seem to have opened very wide.

## 2. *Sosa* and the Original Understanding of the Alien Tort Statute

The far more interesting dimension of *Sosa* was the interaction of its Originalist methodology with the jurisprudential implications of inquiring into the "original understanding" of the ATS after *Erie*. Whatever one concludes about the meaning of "a tort only in violation of the law of nations" within the ATS, it is clear that the framers of that statute anticipated that both state and federal courts would be treating "the law of nations" as part of the common law they declared and applied in their decisions. A "tort only in violation of the law of nations" was understood as a subset of a body of general law, the law of nations, which, like other bodies of general law such as the law merchant, helped make up the common law itself. Both state and federal courts declared this general law. The ATS allowed aliens to sue in either set of courts for torts in violation of the law of nations.

There was, therefore, what might be called a pre-*Erie* law of nations—part of the general law that both federal and state courts declared.<sup>116</sup> But after *Erie*, the status of that law of nations was apparently altered. To the extent that the law of nations, as part of the general law applied in the federal courts, was "federal common law," it was labeled illegitimate by *Erie*. And to the extent that the general law of nations continued to be applied in *state* courts, it was "state common law" after *Erie* and it continued in existence, being factored into the

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<sup>114</sup> *Id.* at 2744.

<sup>115</sup> *Id.* at 2763.

<sup>116</sup> See *Thirty Hogsheads of Sugar v. Boyle*, 9 Cranch 191 (1815).

corpus of international law decisions in a particular state's common law jurisprudence. Those consequences of *Erie* seemed perverse to some commentators because most cases involving applications of the law of nations tended to be brought in federal court and the federal government's interest in the adjudication of disputes involving the law of nations, many of which involved citizens of other nations as litigants, would seem to be stronger, as a general matter, than the interest of individual states.<sup>117</sup>

Further, courts and commentators recognized that it was possible, after *Erie*, for federal courts to "create federal common law rules in interstitial areas of particular federal interest."<sup>118</sup> This "new federal common law" was sometimes mandated by a Congressional statute that expressly authorized the federal courts to interpret it, but such express authorizations were not treated as absolute requirements for judicial activity. With respect to the ATS, its language, which employs the general term "tort . . . in violation of the law of nations" and refers to "any civil action," makes it hard for it to have any effect without judicial interpretation.

### 3. *Sosa* as a "New Federal Common Law" Decision

All of this suggests that the role of Originalist analysis in *Sosa* needs to be understood in a different way. After completing his historical analysis of the original understanding of the ATS ("we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses"),<sup>119</sup> Justice Souter pointed out, citing *Filartiga*, that "no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of [ATS] cases . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law. . . ." <sup>120</sup> By "common law," in that sentence, he could only mean post-*Erie*, interstitial, federal common law. Justice Souter then argued that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind," that is, one "based on the present-day law of nations."<sup>121</sup>

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<sup>117</sup> See, e.g., Jessup, *supra* note 23.

<sup>118</sup> *Sosa*, 124 S. Ct. at 2762.

<sup>119</sup> *Id.* at 2761.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

That last sentence, with its references to a “new” cause of action and “the present-day” law of nations, seems to suggest that the *Sosa* decision should be understood as an exercise in developing a “new” federal common law of the ATS. As the statute provided the implicit authorization for the judicial articulation of common law under it, its original meaning, with its comparatively limited conception of torts in violation of the law of nations, remained relevant. But the remaining reasons “for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute”<sup>122</sup> were post-*Erie* reasons. Justice Souter noted the collapse of the older, “transcendental” conception of the common law in the early twentieth century and the emergence of “new,” interstitial federal common law in the wake of *Erie*.<sup>123</sup> He emphasized the fact that the “common law” being expounded in *Sosa* was closely related to a statute, and thus courts should be slow to create private rights of action absent express legislative guidance.<sup>124</sup> He stressed the interest in the federal executive and legislative branches in discouraging “federal courts [from] craft[ing] remedies for the violation of new norms of international law” which might have “adverse foreign policy consequences.”<sup>125</sup> Additionally, he maintained that the federal courts “have no congressional mandate to seek out and define new and debatable violations of the law of nations,” and “the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law.”<sup>126</sup>

Taken together, Justice Souter’s reasons for “judicial caution” in interpreting the ATS emphasized the interstitial character of the new federal common law and its close connections to federal statutes and the federal interests reflected in them. When one thinks of *Sosa* as a new federal common law decision, Justice Souter’s search for the original understanding of the ATS becomes more explicable. The purpose of that search is not to carry over an older conception of the law of nations as general law into present ATS cases, but simply to follow the maxim, arguably given special urgency for federal courts by the *Erie* decision, that courts, in developing common law under a statute, should take special pains to recover the understanding of the reach of the statute’s terms by those who framed it. Thus, the primary conclusion of Justice

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<sup>122</sup> *Id.* at 2762.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 2762-63.

<sup>125</sup> *Id.* at 2763.

<sup>126</sup> *Id.*

Souter's effort to discern what was meant by torts in violation of the law of nations in 1789 is not that "the law of nations" was understood to be a "transcendental" body of general law, but that violations of the law of nations were understood as specific, limited, and universally condemned. It was that understanding that Justice Souter sought to carry over in analyzing the ATS in the twenty-first century.

### III. ERIE'S EFFECT ON CUSTOMARY INTERNATIONAL LAW

#### A. *Sosa and the Federal Courts' Posture Toward Customary International Law*

As a new federal common law case, *Sosa* asked the federal courts to interpret the meaning of the ATS's pivotal terms. This necessarily meant engaging in an effort to discern and apply customary international law. In pursuing that effort, the Court in *Sosa* gauged the claim that Alvarez-Machain's detention came within the ATS "against the current state of international law," looking to the traditional sources of that law in American courts.<sup>127</sup> These included treaties, "controlling executive or legislative act[s]," judicial decisions, and "the customs and usages of civilized nations," as evidenced in "the works of jurists and commentators."<sup>128</sup> No treaties or controlling acts of the executive or legislative branches affected the issues in *Sosa*, so the Court set out to determine whether, assuming that the defendant in the case had been unjustifiably and arbitrarily detained, "prohibition of arbitrary arrest has attained the status of binding customary international law" according to the "customs and usages of civilized nations."<sup>129</sup>

In looking to those sources, the Court noted "two well-known international agreements," an article surveying national constitutions, a case from the International Court of Justice, and "some authority drawn from the federal courts" that all provided some evidence of widespread international prohibitions against arbitrary detention and arrest.<sup>130</sup> It found that those sources, even treated cumulatively, fell well short of providing evidence of a "binding customary rule having the specificity we require" to be enforced in the federal courts.<sup>131</sup>

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<sup>127</sup> *Id.* at 2766.

<sup>128</sup> *Id.* at 2766-67.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 2767-68 & n.27.

<sup>131</sup> *Id.* at 2769.

Of the international agreements, one, the Universal Declaration of Human Rights, did not “of its own force impose obligations as a matter of international law” and the other, the International Covenant of Civil and Political Rights, had been ratified by the United States on the express understanding that it “did not itself create obligations enforceable in the federal courts.”<sup>132</sup> Consequently, neither of the agreements themselves established any binding international rule of law.

Nor did any of the other customary international law sources. *United States v. Iran*,<sup>133</sup> an effort by the United States to obtain relief for the “taking of its [Iranian] diplomatic and consular staff as hostages,” involved a “far longer and harsher” unauthorized detention than that in the *Sosa* case.<sup>134</sup> “[S]ome authority drawn from the federal courts” suggested that arbitrary detention violated customary international law, but that authority reflected “a more assertive view of federal judicial discretion over claims based on customary international law” than the position adopted by the *Sosa* Court.<sup>135</sup> And the article surveying national constitutions, which demonstrated that “many nations recognize a norm against arbitrary detention,” revealed that “consensus [was only] at a high level of generality.”<sup>136</sup> In sum, the detention at issue in *Sosa* “violate[d] no norm of customary international law so well defined as to support the creation of a federal remedy.”<sup>137</sup>

Once again the interesting feature of the *Sosa* case was not this conclusion, but its jurisprudential implications, especially in light of the *Erie* decision. Was the Court saying that international norms needed to be specific in their content and widespread in their application in *every* case in which the federal courts were considering the effect of customary international law on their decisions, or only in cases involving the ATS, which had the extraordinary feature of opening up American courts to aliens for torts committed outside the boundaries of the United States? If the latter interpretation was intended, *Sosa* should be seen as a case mainly about the reach of the ATS, with no particular implications for other customary international law cases. If the former interpretation controlled, the case should be seen as signaling that the Court was adopting a cautious view of federal judicial discretion over any claims based on customary international law.

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<sup>132</sup> *Id.* at 2767.

<sup>133</sup> 1980 I.C.J. 3, 42 (May 24).

<sup>134</sup> *Sosa*, 124 S. Ct. at 2768 n.27.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 2769.

Although language in the *Sosa* opinion is more supportive of the former view,<sup>138</sup> that view immediately raises some difficulties. If *Sosa* is intended not simply as a case about the reach of the ATS, but about the general discretionary use of customary international law by the federal courts, it would not seem particularly relevant that the ATS may well have been understood, in the 1790s, to encompass only a limited category of offenses against the law of nations. The narrow definition of “torts in violation of the law of nations” might inform an understanding of the statute, but would not seem to cast any light on the general question of how much discretion the federal courts have to incorporate customary international law in their decisions. That question would seem to depend, as both the majority and Justice Scalia’s partial dissent in *Sosa* recognized, on the question of whether, after *Erie*, federal courts are given *any* discretionary power to incorporate customary international law into their decisions.

*B. Customary International Law as Federal Common Law*

We have already encountered the apparent effect of the *Erie* decision on the status of customary international law in the federal courts. It was plain that at the time the ATS was framed that the “law of nations” was understood as “general law”—a source of common law decisions in federal as well as state courts—and that this “general law” had come to be understood by *Erie* as the illusory “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.”<sup>139</sup> *Erie* announced that there was no such body of law, and thus there was “no federal general common law.”<sup>140</sup> Consequently, unless *Erie* was not intended to apply to international law cases, it would seem to preclude federal courts from, as Justice Scalia put it, “creating . . . federal common law[ ] out of ‘international norms.’”<sup>141</sup>

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<sup>138</sup> See, e.g., *id.* at 2761-62. “[W]e think courts should require *any claim based on the present-day law of nations* to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.” *Id.* at 2765 (emphasis added). “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of *any* international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.” *Id.* (emphasis added).

<sup>139</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928)).

<sup>140</sup> *Id.* at 78.

<sup>141</sup> *Sosa*, 124 S. Ct. at 2772.

There would seem to be three ways out of this apparent predicament for courts that want to retain some opportunity for federal courts to consider customary international law in their decisions. One such possibility has already been discussed: to treat customary international law as new federal common law; law designed to fill in the interstitial spaces created by international policies declared by the other federal branches.<sup>142</sup> Under this approach, customary international law norms that reinforce the interests of those other branches might be drawn upon as sources for federal court decisions, but only in the context of existing federal laws or policies. Another possibility would be to assume that the status of the law of nations in the federal courts after *Erie* is akin to the status of admiralty and maritime law, which is regularly used as the basis of federal court decisions affecting vessels on the high seas and understood as a general body of law developed from “the custom among ‘seafaring men.’”<sup>143</sup> The third would be to attack the applicability of *Erie* to customary international law cases. All three approaches would, in the end, yield a conception of customary international law as at least containing elements of federal common law, but the conception would vary considerably with the approach.

#### 1. Customary International Law as New Federal Common Law

As noted, there are several reasons for thinking that the *Sosa* majority treated customary international law in the federal courts as an example of the new, post-*Erie* federal common law.<sup>144</sup> The cautious reading of customary international law sources by the majority, its invitation to Congress to provide the federal courts with guidance about possible federal “interests” affected by the reception of international norms by those courts, the allusions to federal court discretionary power to fashion common law rules after *Erie*, and the majority’s characterization of a “door” being left “ajar” for the federal courts to apply customary international norms in future cases each suggest that the majority saw *Sosa* as an interstitial, new federal common law case.<sup>145</sup>

Justice Scalia pointed out the difficulty with that approach: the *Sosa* majority opinion does not demonstrate what authorizes the federal courts to make customary international law a source of their decisions

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<sup>142</sup> See *supra* Part II.B.3.

<sup>143</sup> *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) (internal quotation marks omitted).

<sup>144</sup> See *supra* Part II.B.3.

<sup>145</sup> See *supra* Part II.B (discussing *Sosa*).



after *Erie*.<sup>146</sup> However one might characterize customary international law in the twenty-first century, it does not resemble post-*Erie* federal common law. It does far more than fill in the interstices of a federal statute, it does not necessarily reflect particular federal interests, and it is not typically the product of an invitation to the federal courts by Congress to help flesh out specific federal policies. On the contrary, it more resembles classic “general” law in the pre-*Erie* sense: a body of transcendent principles representing the customs and usages of civilized nations. It would seem to be the very sort of law that, when applied by the federal courts, represented the “general federal common law” *Erie* stated to be unintelligible.

So it would seem that if the *Sosa* majority conceptualized customary international law as new federal common law, it should have devoted more space to a demonstration of why the reception of customary international law by the federal courts furthers the distinctive “federal interests” that allegedly drive the formation of judge-made federal common law post-*Erie*. The majority, however, made no effort to provide such a demonstration. As such, its conception of customary international law as federal common law would seem open to the charge, as Justice Scalia put it, that federal courts “cannot possibly be thought to have been given . . . federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.”<sup>147</sup>

## 2. The Admiralty Analogy

Justice Scalia conceded in his *Sosa* concurrence that “[t]he rule against finding a delegation of [federal court] lawmaking power in a grant of jurisdiction is subject to exceptions,” of which “[t]he most firmly entrenched [was] admiralty law.”<sup>148</sup> It is clear that the development of admiralty law in the federal courts has been largely unaffected by *Erie*, even though the “law admiralty and maritime” was early identified as one of the sources of “general” law for the federal courts, and remains every bit as much a product of international custom and usage as customary international law.

Indeed the use of admiralty law in the federal courts explicitly contradicts the *Erie* generalization that there is no transcendent body of law outside the law of a state. In New York State, for many years, there

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<sup>146</sup> *Sosa*, 124 S. Ct. at 2772-73.

<sup>147</sup> *Id.* at 2774.

<sup>148</sup> *Id.* at 2771.

was no rule of comparative fault in tort cases: the contributory negligence of a plaintiff was a complete bar to recovery.<sup>149</sup> After *Erie*, tort suits in federal court that arose out of injuries in New York were governed by that rule until it was eventually changed by statute.<sup>150</sup> If, however, the torts suits in federal courts arose out of actions involving vessels in New York harbor or on other navigable waters within the state, they were decided by federal courts applying the “general” law of admiralty, which had adopted comparative fault.<sup>151</sup> With respect to those torts, there was a “transcendental body of law outside of any particular state” which was obligatory within it, even though for many years that body of law was contrary to the tort law of the state, and the law was based on the general customs and usages of the sea.

So perhaps one might imagine customary international law as retaining the status of admiralty law in the federal courts after *Erie*.<sup>152</sup> There would seem to be some difficulties with this approach as well. First, the history of admiralty and maritime law, when compared with the history of international law, suggests that admiralty law more closely resembled the paradigm of a specialized body of customs and practices, such as the law merchant, than the law of nations as it evolved. Admiralty law and the law merchant involved activities that repeatedly crossed territorial boundaries, but were at the same time ongoing and recurrent: accidents on the high seas, transnational insurance claims, and commercial transactions. Those activities were also engaged in by a specialized class of persons trained to deal with the distinctive subject matter of their vocations. In short, the idea of admiralty law or the law merchant reflecting specialized customs and usages—the products of longstanding, on-going practices in distinctive professions—seemed intuitively obvious, but with the exception of the offenses against the law of nations identified by Blackstone and anticipated in the ATS, one could not readily think of comparably widespread, on-going customs and practices in the law of nations. Indeed much of the law of nations, as

<sup>149</sup> See, e.g., *Martin v. Herzog*, 126 N.E. 214 (1920).

<sup>150</sup> 1975 N.Y. Laws ch. 69, § 1 (codified at N.Y. C.P.L.R. § 1411 (McKinney 1997)).

<sup>151</sup> See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Kuleza v. Scout Boats, Inc.*, No. CIV. A. 99-3488, 2000 WL 1201457 (E.D. Pa. 2000).

<sup>152</sup> That would seem to be the assumption governing Jessup, *supra* note 23. If one believed, by the 1930s, that the law of nations was likely to develop into a specialized body of customs and usages widely shared by civilized nations, the prospect of customary international law eventually approximating the law merchant or admiralty law might not have seemed remote. Moreover, as previously noted, the idea that American state courts, who remained free to incorporate customary international law into their decisions after *Erie*, would serve as comparable to the federal courts for disputes involving international law issues seemed extremely unlikely.

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Blackstone recognized, consisted of negotiated agreements among sovereign entities, reflecting the parochial interests and concerns of those nations.<sup>153</sup> Beyond that realm of treaties and executive agreements, the “law of nations” seemed very far from being a rich source of universal norms of conduct.

Moreover, Article III of the Constitution, taken together with the Judiciary Act of 1789, anticipated that the federal courts would apply a law of admiralty. Article III gave the federal district courts “exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,”<sup>154</sup> but Section 9 of the Judiciary Act “sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.”<sup>155</sup> This meant that in some cases that would qualify for the admiralty jurisdiction,<sup>156</sup> individuals could elect to sue in a state court. One purpose of the arrangement may have been to distinguish admiralty law, as handed down in the federal courts, from state common law,<sup>157</sup> and in a 1917 case the Court said that

There is no doubt that, throughout the entire life of the nation under the Constitution, state courts not only have exercised concurrent jurisdiction with the courts of admiralty . . . but that in exercising such jurisdiction they have . . . adopted as rules of decision their local laws . . . recognizing no obligation . . . to apply the law maritime.<sup>158</sup>

Whatever the law admiralty and maritime was, then it was *federal* law. The law of nations was not comparably treated.<sup>159</sup>

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<sup>153</sup> 4 BLACKSTONE, *supra* note 36, at \*66-67.

<sup>154</sup> 1 Stat. 76-77 (1789).

<sup>155</sup> *Id.*

<sup>156</sup> The “savings clause” of the Judiciary Act of 1789 was limited to *in personam* suits arising in an admiralty context. *In rem* suits, involving ships as opposed to their crews, could only be brought in admiralty courts.

<sup>157</sup> Another purpose may have been to allow litigants in cases that could qualify for the admiralty jurisdiction the opportunity to have their suits tried before juries, which were only available in common law courts.

<sup>158</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 254 (1917).

<sup>159</sup> One could argue that since the law of nations was originally thought of as “general” law that federal as well as state courts could draw upon, it should now be regarded as included within the “Laws of the United States” in Article III, § 2 of the Constitution and within the Supremacy Clause of Article VI. *See* Dodge, *supra* note 25, at 101-08. But this argument is not historically based, because it assumes that after *Erie*, law of nations decisions made by the federal courts would be “new” federal common law decisions, and

The admiralty analogy for customary international law, then, was surely not in place at the time *Erie* was decided, and despite the growing number of international conventions, protocols, and agreements that have emerged since, one can hardly say that customary international law has attained anything like the doctrinal thickness and specificity of admiralty or maritime law. Indeed there has been a noticeable trend on the part of the United States, in the late twentieth century, to enter into international conventions or agreements with the express reservation that their policies are not enforceable in American courts.<sup>160</sup>

### 3. Rethinking *Erie*

The application of customary international law by the federal courts would be much facilitated, of course, if the jurisprudential premise of the *Erie* decision—that there is no such thing as “general” federal common law independent of the common law of individual states—were rethought. It is apparent that both the *Sosa* majority and Justice Scalia regard *Erie* as significantly affecting the discretion of the federal courts to apply customary international law as common law. Justice Scalia, in fact, treats *Erie* as precluding that discretion, and the majority lists *Erie* as one of the principal reasons for adopting a cautious approach to the adoption of customary international law by the federal courts. But is the premise of *Erie* sound? Is there no such thing as general federal common law?

For a decision with such far-reaching effects (*Erie* overruled thousands of cases and has dramatically affected choice of law issues in the federal courts ever since its promulgation) the opinion in *Erie* is remarkably cryptic, assertive, and quite possibly wrong-headed as a matter of historical and jurisprudential analysis.

In *Erie*, a citizen of Pennsylvania was walking at night on a “commonly used beaten footpath,” which ran for a short distance alongside railroad tracks near Hughestown, Pennsylvania.<sup>161</sup> He was struck by an object that projected from one of the open cars of a moving freight train operated by the Erie Railroad. He brought a tort action for

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thus binding on the states. That does not seem consistent with nineteenth-century practice. See Koh, *supra* note 1, at 1830.

<sup>160</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (ratified by the United States on June 8, 1992) (1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DECEMBER 2005, at 297-98 (2006) provides a listing of the United States’ “declarations, understandings, and reservations” with respect to the covenant).

<sup>161</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 69 (1938).

his injuries in federal court in New York, alleging that the railroad had been negligent in allowing the object to project from the freight car, and that as a passenger on a railroad right of way of which “the public has made open and notorious use,” he was owed a duty of care by the railroad.<sup>162</sup> He received a jury verdict of \$30,000 for his injuries and the New York Circuit Court of Appeals upheld the verdict.<sup>163</sup> In doing so, that court declared that the Pennsylvania courts’ understanding of tort law, which treated persons using longitudinal rights of way near railroad tracks as trespassers who were owed no duty of ordinary care by railroads, did not govern the case even though the accident occurred in Pennsylvania. Instead, the case turned on the federal courts’ understanding of general law.<sup>164</sup> Under general law, as handed down in previous federal court tort decisions, pedestrians walking on longitudinal rights of way were not trespassers, and the railroad had a duty to refrain from negligently injuring them.<sup>165</sup>

As such, the *Erie* case presented a conflict between federal and state courts’ understandings of the applicable general law, one comparable to a conflict between the laws of two states that had different tort rules. Although that sort of conflict had been routine in the American legal system from its beginnings, the *Erie* case dramatized one feature of it, that cases involving citizens of different states might have different outcomes depending on whether they were filed in federal or state court.<sup>166</sup> The *Erie* case also underscored the strategic aspects of the difference between state and federal tort rules, which was highlighted by the fact that many industrial corporations did business in states in which they were not incorporated.<sup>167</sup> Had the plaintiff in *Erie* elected to file in Pennsylvania state court, he would have been deemed a trespasser and denied recovery. By having the good fortune to have been injured by an out-of-state corporation, he was able to file in a federal court with more favorable tort rules.

This phenomenon—“forum shopping”—was not in itself a product of the federal courts’ discretion to ground their common law decisions on “general law.” But when combined with the frequent diversity of citizenship cases produced by the increased number of lawsuits involving corporations engaged in interstate business, it provided

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<sup>162</sup> *Id.* at 69-70.

<sup>163</sup> *Id.* at 70.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *See id.* at 74-75.

<sup>167</sup> *Id.* at 75-77.

opportunities for blatantly strategic use of differing federal and state common law rules. An example of this was presented by a case involving two competing taxicab companies, both incorporated in Kentucky, who sought to do business at the Bowling Green, Kentucky station of the Louisville and Nashville Railroad.<sup>168</sup> The railroad sought to give the Brown and Yellow Taxicab Company, incorporated in Kentucky, the exclusive privilege of soliciting business at the Bowling Green station, which was illegal under the Kentucky courts' understanding of the applicable law.<sup>169</sup> In order to circumvent that Kentucky rule, the Brown and Yellow Company reincorporated in the state of Tennessee, executed an exclusive contract to do business with the railroad, and then filed suit in federal district court for the district of western Kentucky to enjoin its competitor, the Black and White Taxicab Company, from competing with it to do business at the Bowling Green station.<sup>170</sup> Exclusive contracts to do business were permitted under the federal courts' understanding of the general law, so the Brown and Yellow Company succeeded in obtaining the injunction, and the Supreme Court of the United States ultimately affirmed.<sup>171</sup>

*Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.* produced Justice Holmes's dictum about the nonexistence of a transcendental body of law apart from the law of the state.<sup>172</sup> But there was nothing about the forum-shopping aspects of the case that compelled the dictum. The Brown and Yellow Taxicab Company and the Louisville and Nashville Railroad had simply taken advantage of a favorable common law rule in one forum that had not been available to them in another. Nothing about the *federal* status of the rule was important: it was just a different rule about contracts restraining competition from the prevailing rule in Kentucky.

Nonetheless, Justice Brandeis's opinion for the Court in *Erie* concluded that the idea of federal common law was incoherent. He made three arguments for this proposition, one of them historical, another apparently prudential, and the third constitutional. Each of the arguments was of dubious validity.<sup>173</sup> Justice Brandeis's historical argument was an effort to read Section 34 of the Judiciary Act of 1789 as

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<sup>168</sup> *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928).

<sup>169</sup> *Id.* at 522-23.

<sup>170</sup> *Id.* at 523.

<sup>171</sup> *Id.* at 525-26.

<sup>172</sup> *Id.* at 533.

<sup>173</sup> For a detailed dissection of Justice Brandeis's role in the *Erie* case, see EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION* (2000).

a mandate to bind federal courts to the laws of the states in which they sat. The operative language of the section read,

The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the United States, in cases where they apply.<sup>174</sup>

In *Swift v. Tyson*, a case decided in 1842, Justice Story had interpreted the word “laws” in the section to refer only to state statutes, “long established local customs having the force of laws,” and some settled court decisions on questions of local law.<sup>175</sup> He gave two reasons for this conclusion. One was that “[i]n the ordinary use of language” the decisions of courts were not considered “laws,” but “only evidence of what the laws are.” Judicial decisions might be “re-examined, reversed, and qualified by the courts”; they were sometimes “defective,” “ill-founded,” or “incorrect.”<sup>176</sup> Justice Story’s reasoning presupposed a declaratory theory of judicial decision-making, in which “law” existed independent of the decisions of courts, which discerned it and applied it to particular cases. When judicial decisions discerned the law erroneously, the decisions were not law at all.

The other reason why Justice Story treated “laws” in the Judiciary Act of 1789 as referring to “the rules and enactments” promulgated by state legislatures, or “long-standing established local customs having the force of laws,”<sup>177</sup> is that such a reading was consistent with the Supreme Court’s jurisprudence in common law cases prior to *Swift*.<sup>178</sup> In its early nineteenth-century common law cases, such as those dealing with land title disputes, contracts, and commercial transactions, the Court tended to defer to state common law rules or customs only when the issues involved, as Story put it in *Swift*, “matters immovable and intraterritorial in their nature and character.”<sup>179</sup> The best example was land transactions. In other cases, especially in commercial law cases, the Court tended to ground its decisions “upon general reasoning and legal analogies,” drawing on “general principles and doctrines.”<sup>180</sup> Thus

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<sup>174</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73.

<sup>175</sup> 41 U.S. 1, 18 (1842).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 19.

“laws” in the Judiciary Act could not mean all state common law decisions, as in many cases the federal courts were free to disregard them.

Story did not advance a third reason which has assumed greater importance over the years. He, his early nineteenth-century contemporaries, and the framers of the Judiciary Act of 1789 understood the word “several” in the phrase “laws of the several states” not as a synonym for “separate,” but as a designation of a collective rather than an individual entity. “Several,” in late eighteenth- and early nineteenth-century usage, was used in contradistinction to “respective,” which meant in an individual capacity. Thus, the “several states” meant “the individual states taken as a unit,” and the phrase “laws of the several states” meant “the various local statutes and customs of those states, viewed collectively.” Even if the word “laws” in the Judiciary Act was meant to include common law decisions in addition to local statutes and customs, the phrase “several states” assured that in declaring “rules of decision,” the federal courts could peruse the common law decisions of *all* the states. When, over time, the word “several” came to take on the meaning of “separate,” commentators were tempted to read the Judiciary Act as requiring federal courts to consult the common law decisions of the “separate” (individual) states in which they sat, but this reading was anachronistic.<sup>181</sup> Justice Brandeis, however, declared Justice Story’s construction of the Judiciary Act to be “erroneous” and read the Act as meaning that “the federal courts . . . would apply as their rules of decision the law of the state, unwritten as well as written.”<sup>182</sup> That conclusion was historically defective.

Justice Brandeis’s next argument recited the facts of the *Taxicab Co.* case and then suggested that such forum-shopping engendered “mischievous results,”<sup>183</sup> which he blamed on Story’s assertion in *Swift v.*

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<sup>181</sup> Justice Brandeis relied on Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1926). Warren’s reading of the Judiciary Act failed to take into account the eighteenth-century use of “several” as being in contradiction to “respective.” See WILFRED J. RITZ, *REWRITING THE HISTORY OF THE JUDICIARY ACT OF 1789* (1990). Ritz’s interpretation of “several,” however, sometimes seems to preclude the application of the term to individual units in a collective mass. This seems implausible: consider Article I, section 2 of the Constitution, which states that the House of Representatives “shall be composed of Members chosen every second year by the People of the several States.” In that phrase “People” clearly refers to a collective entity, but nonetheless elections for the House are conducted on a state-by-state basis. I am indebted to Caleb Nelson for this example.

<sup>182</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 (1938).

<sup>183</sup> *Id.* at 74.



*Tyson* that the federal courts declared general law in many cases.<sup>184</sup> One result was that *Swift* “introduced grave discrimination by noncitizens against citizens.”<sup>185</sup> That statement was not exactly accurate. The privilege of initially selecting a jurisdiction in diversity cases went to plaintiffs, who might or might not be non-citizens.<sup>186</sup> But that privilege did not necessarily result in discrimination against citizens. For example, had the plaintiff in *Erie* been a citizen of a state with a favorable common law tort rule for passengers negligently injured while walking on longitudinal railroad rights of way, he might well have filed in state court. But if he had, and the Erie Railroad had not liked the rule, it could, under the applicable removal statutes,<sup>187</sup> have removed the case to a federal court. So in that example any difference between state and federal common rules engendered by *Swift* did not create any discrimination at all.

There was, however, a scenario in which non-citizens of the forum state were advantaged against citizens of that state. It came about when non-citizen plaintiffs preferred the forum state’s common law rule, and thus brought suit in state court against citizen defendants. In that instance defendants could not remove the case to federal court. The removal statutes thus clearly benefited non-citizens in some instances, but that was not a function of the *Swift* decision. Indeed had Congress been troubled by this “grave discrimination” against citizens in some diversity cases, it could simply have repealed the section of the applicable removal statute preventing citizen defendants from removing a diversity case to a federal court.

To be sure, *Swift* increased the possibility that plaintiffs in diversity of citizenship cases might have a choice between competing federal and state rules. But the choice itself was a function of the fact that the federal courts were available for diversity cases. Forum-shopping was not invariably a product of *Swift*. It existed whenever parties had the option of filing cases in multiple jurisdictions with different common law rules, a possibility that was enhanced with the growth in America of transactions and contacts that crossed state lines. A citizen of one state

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> PURCELL, *supra* note 171, at 162, states that Brandeis’s statement of the “discrimination” allegedly created by *Swift* was misleading, noting that, “As plaintiff, a citizen might sue a non-citizen in either federal or state court in the citizen’s home state, and a non-citizen had the same choice.”

<sup>187</sup> The applicable removal statutes are now codified at 28 U.S.C. § 1441 (2000).

suing a citizen of another state sometimes had a choice among competing state common law rules as well.

But Justice Brandeis concluded that the *Swift* doctrine “rendered impossible equal protection of the law.”<sup>188</sup> Despite that evocative language, he did not mean that *Swift* violated the Equal Protection Clause.<sup>189</sup> He meant that it “made rights enjoyed under the unwritten ‘general law’ vary according to whether enforcement was sought in the state or in the federal court,” as well as his claim that *Swift* favored non-citizens over citizens.<sup>190</sup> His statement that *Swift* itself affected “rights . . . under the unwritten ‘general law’” was no more accurate than his claim that it discriminated against citizens.

The “general law,” as understood from the time of the ATS up to the *Erie* decision, was simply a term for the aggregate of sources used by courts in making common law decisions. A state court, in common law cases, was free to consult the decisions of other states as well as its own, and was free to reject another state’s line of decisions, just as a federal court was free to follow or reject state decisions. Over time, under the *Swift* regime, federal courts tended to carve out their own doctrinal lines—that was why informed counsel forum-shopped in diversity cases—and their jurisprudence on particular common law issues tended to become as predictable as that of state courts.

But Justice Brandeis’s statement that *Swift* made common law rights vary depending on whether a party was in state or federal court was not correct. *Swift* merely allowed the federal courts to survey common law authorities from a variety of quarters in developing their common law jurisprudence. That freedom of choice was also enjoyed by state courts. Parties suing in a federal court in a particular state did not necessarily have different common law rights from parties suing in that state’s courts: their rights depended on the doctrinal lines of the respective courts. Once again, the choice between doctrinal lines afforded to some plaintiffs was a function of the diversity of citizenship jurisdictional

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<sup>188</sup> *Erie*, 304 U.S. at 75.

<sup>189</sup> He could not have intended the phrase “rendered impossible equal protection of the law” as a constitutional argument for three reasons. First, *Swift* was handed down in 1842, and there was no Equal Protection Clause of the Constitution until 1868. Second, after the passage of the Fourteenth Amendment, no constitutional challenges to *Swift*’s conception of general federal common law were advanced until *Erie* itself, and those challenges were advanced in response to a request by the Court. Third, the constitutional objections to *Swift* advanced in Brandeis’s opinion, as we will see, were based on separation-of-powers considerations, not on the Equal Protection Clause.

<sup>190</sup> *Erie*, 304 U.S. at 74-75.

rules, not of *Swift*. Justice Brandeis himself noted that “The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction.”<sup>191</sup>

Justice Brandeis’s prudential arguments against *Swift*—the “injustice and confusion” it had allegedly spawned<sup>192</sup>—may have seemed superficially attractive, especially as the interstate business of corporations gave them more opportunities to make choices between federal and state court doctrinal lines. But the arguments ignored the fact that so long as American common law was jurisdiction-specific, and so long as different state courts adopted contrasting doctrinal rules, strategic filings by lawyers, and even the choice of residency by individuals and corporations, were possible. Justice Brandeis, however, had a third argument to advance in *Erie*, a constitutional argument. Below is the heart of the argument he set out:

Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or “general,” be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. . . . The fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests on the assumption that there is “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,” that the federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts “the parties are entitled to an independent judgment on matters of general law”: . . . “[L]aw in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it

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<sup>191</sup> *Id.* at 77.

<sup>192</sup> *Id.*

is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. "The authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or its Supreme Court] should utter the last word." Thus the doctrine of *Swift v. Tyson* is, as Mr. Justice Holmes said, "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."<sup>193</sup>

Justice Brandeis's constitutional argument was a mixture of two propositions, neither of which was explicitly grounded in the Constitution itself, but both of which could arguably be inferred from its structure. The first proposition was that the federal government under the Constitution was one of limited powers, and that the powers of the departments of that government, such as Congress and the federal courts, were coextensive. The second was that the federal courts could not derive common law rulemaking authority from any source other than the powers of the federal government. Thus, Justice Brandeis reasoned, not only could the federal courts not declare common rules in areas where Congress had no power to act, they could not declare such rules in areas where Congress *had not acted*. Both propositions, on analysis, reveal themselves to be historically inaccurate and jurisprudentially anachronistic.<sup>194</sup>

In the early years of the American constitutional republic there was general agreement that the federal government was one of limited powers, although there were competing theories about the relationship between the states and the federal government, as well as competing theories about the power relationships among the judicial, legislative, and executive departments of the federal government. Moreover, some

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<sup>193</sup> *Id.* at 78-79.

<sup>194</sup> For efforts to defend the coherence or efficacy of the propositions driving Justice Brandeis's constitutional argument in *Erie*, see PURCELL, *supra* note 173, at 172-85; Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 404-32 (2002). Despite the high quality of those efforts, neither defends the historical accuracy of Justice Brandeis's argument, and both concede that the argument pivots on the jurisprudential assumption, not shared by the framers or, for that matter, mainstream American constitutionalists until the early twentieth century, that judicial interpretation needs to be seen as another version of lawmaking instead of the discernment and application of preexisting, immanent principles of law.

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constitutional theorists of the period assumed that the powers of departments of the same governmental body were coextensive, so that each time Congress conferred jurisdiction on the federal courts, it conferred power on them to declare common law rules, which Congress could then modify by statute.<sup>195</sup> Some theorists believed that the coextensive powers of departments of the federal government would enable it to become an effective unit of government, while others feared that they would lead to unlimited federal power and the eventual eradication of the influence of the states.<sup>196</sup> However, both sides in the debate took for granted that once Congress created federal courts, the jurisdiction of those courts gave them the power to declare common law rules.<sup>197</sup>

Few constitutional theorists of the early republican period, however, believed that the authority of the federal courts to declare common law rules was confined to Congress's authority to pass legislation.<sup>198</sup> They recognized jurisdictional and substantive limits on the power of the federal courts: the Constitution provided that Congress could expand or limit the jurisdiction of the federal courts as it saw fit, and Congress could alter the decisions of those courts by statute. But far from assuming that because "no clause in the Constitution purports to confer [the power to declare substantive rules of common law] upon the federal courts,"<sup>199</sup> those courts had no such power; early republican commentators made a sharp distinction between the jurisdictional and substantive rule declaration powers of the federal courts, and treated the

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<sup>195</sup> See WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 56, at 122-27; G. Edward White, *Recovering Coterminous Power Theory*, 14 NOVA L. REV. 155 (1989). Coterminous power theory of the early republican period also took for granted that if Congress acted to modify a rule of the federal courts by statute, those courts had jurisdiction to develop further rules in applying the statute in particular cases. The assumption that the powers of departments of the federal government were coextensive drove some commentators to the belief that "consolidation" of federal power would eventually take place, greatly reducing the powers of the states. For illustrations, see WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, *supra* note 56, at 124-27.

<sup>196</sup> For examples, see White, *Recovering Coterminous Power Theory*, *supra* note 195.

<sup>197</sup> Whatever the meaning of Section 34 of the Judiciary Act of 1789, it presupposed that the "courts of the United States" would declare "rules of decision."

<sup>198</sup> One can find occasional evidence of this view, as in Justice Samuel Chase's comment in the case of *United States v. Worrall*, that "the common law authority . . . has not been conferred upon the government of the United States, which is a government in other respects also of a limited jurisdiction." 2 U.S. (2 Dall.) 384, 395 (C.C.D. Pa. 1798) (emphasis omitted). But most commentators did not agree that the jurisdictional limitations on the federal courts limited their authority to declare substantive legal rules once jurisdiction had been given.

<sup>199</sup> *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

Constitution's language, which defined the "judicial power" of the federal courts as extending to "all Cases, in Law and Equity," as giving the federal courts power to declare substantive common law rules.<sup>200</sup>

Brandeis seemed to share the framing generation's view that the legislative and judicial powers of the federal government were coextensive. He also seemed to conclude that this meant that the federal courts could not declare rules on subjects which Congress could not constitutionally legislate.<sup>201</sup> However, that conclusion assumes that the only source of the federal courts' power to declare common law rules was Congress's comparable power to pass legislation.

That assumption was not shared by early republican constitutional theorists. They distinguished between the *constitutional* authority of Congress to legislate on certain subjects and the *jurisprudential* authority of courts—federal and state—to declare general law. Had there been a provision in the Constitution stating that "the law to be applied in all cases in the federal courts shall be the law of the respective States," Justice Brandeis's conclusion might have been warranted.<sup>202</sup> But there is no such provision. In the absence of such provision, one should look to the background assumptions of the framers and practice around the time of the Constitution's framing. Not only is there no evidence that constitutional theorists believed that the only common law that courts could declare was "the law of the State," but there is ample evidence, as we have seen, that federal courts regularly declared "general" common law rules.

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<sup>200</sup> See, e.g., *United States v. Coolidge*, 25 F. Cas. 619 (1813). Joseph Story stated, I admit in the most explicit terms, that the courts of the United States are courts of limited jurisdiction, and cannot exercise any authorities, which are not confided in them by the constitution and laws made in pursuance thereof. But I do contend, that once an authority is lawfully given, the nature and extent of that authority . . . must be regulated by all rules of the common law.

*Id.*; Harrison Gray Otis's argument in the Congressional debates over the constitutionality of the Alien and Sedition Act, 5th Cong., 2d. Sess. (1797-98), 2145-57; Tucker, *supra* note 104, at 429-30. "[T]he maxims and rules of proceeding [of the common law] are to be adhered to . . . in cases [where] the cognizance . . . is by the constitution vested in the federal courts." Tucker, *supra* note 104, at 429-30.

<sup>201</sup> See PURCELL, *supra* note 173, at 172-73.

<sup>202</sup> The "law of the respective States" might still be conceived as "general" law: that is, law discerned by appeal to "principle," which might include a survey of decisions in other jurisdictions, as well as law discerned by "authority," which would mean a canvass of relevant decisions in the state in question.

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The absence of historical or analytical support for Justice Brandeis's first proposition suggests that his constitutional argument actually turned on his second, which was as much jurisprudentially grounded as it was constitutionally. The logic of his second proposition was as follows. The idea of a "transcendental body of law outside of any particular state but obligatory within it" was a fiction. The "law" of a state consisted of the positivist enactments of courts or legislatures in that state: there was no body of law in existence in that state independent of those enactments. Federal courts could not derive their power to declare common law rules from any transcendental "general" law as it did not exist. Also, because the Constitution had not given the federal courts any express power to declare rules, they were, under *Swift*, often exceeding the powers of Congress or usurping the powers of state courts in fashioning "general" common law decisions.<sup>203</sup> This was an "unconstitutional assumption of powers by Courts of the United States," apparently violating both separation-of-powers and federalism principles.<sup>204</sup>

Let us trace out the logical implications of this argument. It would seem to rest on at least one of two premises. The first is that the allocation of authority between state legislatures and state courts is an issue of *state* constitutional law; there is no requirement in the federal Constitution that lawmaking needs to be vested in state legislatures rather than courts. As Justice Brandeis put it, "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern."<sup>205</sup> Thus, to the extent that *Swift's* interpretation of the Judiciary Act of 1789 permits federal courts to substitute their views for those of state courts on state common law issues, it is inconsistent with the principles of federalism and separation of powers. Stated more precisely, it is inconsistent with an understanding of the way in which restraints on the federal government mandated by the Constitution interact with separation of powers principles established by state constitutions.

The second premise is more openly jurisprudential: the idea that federal judges merely "declare" transcendental legal principles, as opposed to engaging in positivistic lawmaking, is jurisprudentially

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<sup>203</sup> As Brandeis stated in his *Erie* opinion, under *Swift* "[t]he federal courts assumed, in the broad field of 'general law,' the power to declare rules of decision which Congress was confessedly without power to enact as statutes." *Erie*, 304 U.S. at 72.

<sup>204</sup> *Id.* at 79-80 (quoting *Black & White Taxicab Co. v. Brown & Yellow Taxicab Co.*, 276 U.S. 518 (1928)).

<sup>205</sup> *Id.* at 78.

unsound. Justice Brandeis seems to have intended a constitutional basis for this premise as well, reasoning that because the Constitution created a federal government of limited powers, the scope of the federal courts' power to declare substantive rules needed to be commensurate with the scope of Congress's power to displace the authority of the states. He suggested that, in following *Swift*, the federal courts had "invaded rights which in our opinion are reserved by the Constitution to the several states."<sup>206</sup> By using the phrase "reserved" he was probably alluding to the Tenth Amendment, and certainly invoking the model of a federal government of limited, enumerated powers surrounded by states that could exercise supplemental, residual authority.<sup>207</sup> But there is not much evidence, from the framing generation and most of the nineteenth century, that the model of reserved powers was designed to constrain federal *judicial* power. A sharp distinction between judicial decision-making and lawmaking remained in place.<sup>208</sup> It is not at all clear that nineteenth-century interpreters of the Constitution, who took its combination of enumerated federal powers in Article I and the Tenth Amendment to limit the scope of federal legislative power, saw those provisions as affecting the scope of federal judicial power as well. Federal courts repeatedly made decisions, throughout the nineteenth century, in areas that were assumed to be outside the scope of Congress's regulatory authority.

Finally, it is hard to see how the string of jurisprudential assertions made by Holmes, which Justice Brandeis quoted in his *Erie* opinion, adds up to an authoritative constitutional argument. Holmes's claim that after *Swift v. Tyson* there was "a transcendental body of law outside of any particular state but obligatory within it unless and until changed by statute" was incorrect. State courts were not bound by federal common law decisions as they could reject them in the same manner that they rejected the common law decisions of other states. His other characterizations of *Swift*, that it stood for the propositions that federal courts could make common law rules and that parties in the federal courts were "entitled to an independent judgment on matters of general law,"<sup>209</sup> were correct, but unremarkable: that was the whole point of

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<sup>206</sup> *Id.* at 80.

<sup>207</sup> See PURCELL, *supra* note 173, at 178-80.

<sup>208</sup> For example, see the comment by Justice David Brewer in an 1893 address before the New York State Bar Association: courts "make no laws" and "establish no policy. . . . Their functions are limited to seeing that popular action does not trespass on right and justice as it exists in written constitutions and natural law." Brewer, *The Movement of Coercion*, 16 PROC.N.Y.ST. B.A. 37 (1893).

<sup>209</sup> *Erie*, 304 U.S. at 79.



allowing the federal courts discretion to fashion “general” or local rules, depending on the subject matter of a case.

Holmes next claimed, in the passage quoted by Justice Brandeis, that because “law in the sense in which courts speak of it today”<sup>210</sup> was the positivistic edicts of governmental authority, “[t]he common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State.”<sup>211</sup> But that statement was, before *Erie*, either a truism or incorrect.<sup>212</sup> If by the common law enforced in a state Holmes meant the precise rules articulated by the highest courts of that state, the statement was obvious. But if by the common law enforced in a state he meant the common law decisions handed down in courts, both federal and state, that sat within the state’s borders, that “law” could, and prior to *Erie* did, include “general” as well as state rules and principles.

Finally, Holmes asserted that since the “only authority” within states was “the State,” the “voice adopted by the State as its own,” whether that of state legislatures or state courts, “should utter the last word.”<sup>213</sup> This comment assumed, as modern commentators on the *Erie* decision have continued to assume, that when the framers of a state constitution create courts as well as a legislature for that state, they are treating the courts, as well as the legislature, as a lawmaking body; however, that is the very assumption Story denied in *Swift*. He treated the decisions of courts not as laws, but as mere evidence of the law, subject to correction and even negation. Assuming that Story’s views were conventionally accepted, the creation of a judiciary in state constitutions would have been seen, by their eighteenth- and early nineteenth-century framers, as equivalent to the creation of Article III federal courts by Congress. Those courts were empowered to hear cases and to apply common law principles in deciding those cases, but the power of judicial substantive rule declaration that resulted from such was not treated as the equivalent of lawmaking. There is no reason to suppose that the drafters of state constitutions reasoned any differently. However, Justices Holmes and Brandeis treated them as informed by the assumptions of legal realism.

Thus, it was hard to see how the *Swift* doctrine amounted to “an unconstitutional assumption of powers by courts of the United States.”

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<sup>210</sup> *Black & White Taxicab Co.*, 276 U.S. at 533.

<sup>211</sup> *Id.*

<sup>212</sup> *See Erie*, 304 U.S. at 64.

<sup>212</sup> *Id.*

<sup>213</sup> *Black & White Taxicab Co.*, 276 U.S. at 535.

It was equally hard to see how the idea of a “transcendental body of law outside of any particular state” was threatening or incoherent. That body of law was not obligatory within the state unless a state court chose to accept it; and, being little more than a canvass of the common law decisions of state jurisdictions, it was no more incoherent than those decisions.

In sum, not a single argument on which the *Erie* decision rested can be sustained on analysis. Even the prudential argument about the “injustice and confusion” engendered by forum-shopping, assuming that it amounts to more than the ordinary injustice and confusion resulting from different common law rules in different state jurisdictions, is not an argument against *Swift* or the idea of “general” federal common law. It may well be that the *Swift* doctrine, when combined with the expanding interstate business of corporations and the ease with which they could incorporate themselves in one state or another, increased the strategic dimensions of diversity jurisdiction suits.<sup>214</sup> However, the root cause of that problem was not *Swift*, but the changing nature of corporate enterprise in the twentieth century.<sup>215</sup> *Erie*, at bottom, seems to have been a determined effort to get the federal courts out of the business of fashioning their own common law rules.<sup>216</sup> Since the *Erie* opinion supplied no satisfactory historical, analytical, constitutional, jurisprudential, or even prudential reason for doing so, it reduces itself to a belief that somehow state courts would advance more felicitous outcomes in common law cases than the federal courts.

#### IV. RETHINKING THE STATUS OF CUSTOMARY INTERNATIONAL LAW AFTER *ERIE*

Despite the weakness of the arguments justifying the *Erie* decision, it seems unlikely that it will be overruled in the foreseeable future. In the several decades during which *Erie* has been in place, countless litigants have had an expectation that the federal courts would track state law decisions in most cases. Unsettling such expectation furnishes the strongest reason against modifying the *Erie* rules. But at the same time, it should be recognized that the combination of “new,” post-*Erie* pockets

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<sup>214</sup> See PURCELL, *supra* note 173, at 149 (indicating that “*Swift* and diversity jurisdiction . . . magnified the importance of forum control and helped stimulate a variety of rival techniques to secure and deny access to the national courts”).

<sup>215</sup> See *id.* at 142-43.

<sup>216</sup> Purcell’s *Brandeis and the Progressive Constitution*, *supra* note 173, can be seen as an extended effort to demonstrate that *Erie* was “animated by political and social considerations” and was “a product of Brandeis’s personal values and motives.” *Id.* at 133.

of federal common law and the choice-of-law decisions that remain in many cases involving citizens of different states has resulted in the post-*Erie* system not being as predictable, from the point of view of litigants, as might have been anticipated when *Erie* was decided. The fact remains, after *Erie*, that the federal courts often have opportunities to develop their own common law rules.

A. *Post-Erie Federal Common Law as General Law*

In this setting, the weakness of the historical, jurisprudential, and constitutional arguments undergirding *Erie* might be said to come into play even if *Erie*'s basic holding that federal courts are expected to track the common law of the states in which they sit remains in place. One might characterize *Erie* as standing for two propositions. The first, arguably more durable, proposition is that having the federal courts track state law reduces forum-shopping and helps eliminate the anomaly of two courts in the same jurisdiction declaring incompatible common law rules. The second is that the idea of a general federal common law is jurisprudentially incoherent and should not be perpetuated. As presented thus far, the arguments supporting the latter proposition seem dubious, and the proposition's significance is greatly reduced once the federal courts are conceded to have power to develop pockets of federal common law in areas where a congressional statute or other policy signals a discrete federal interest.

Because of the categorical statement in *Erie* that there is no "general federal common law," post-*Erie* efforts by the federal courts to develop common law rules to interpret a federal statute or policy have been characterized as being based on something other than "general" principles.<sup>217</sup> However, this would seem to rest on a misunderstanding of the concept of "general" law invited by *Erie*. "General law," as that concept evolved in the eighteenth and nineteenth centuries, rested on two quite different ideas. One was that courts, state or federal, could draw on a variety of sources, inside or outside a particular jurisdiction, to develop legal principle on which their decisions rested. The other was that those "general" principles had a preexisting, immanent jurisprudential status: they were "out there" in the legal universe for judges to discover and to apply to cases.

The latter meaning of "general" law was the meaning described as "transcendental," caricatured and abandoned in *Erie*'s dictum that "there

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<sup>217</sup> The typical characterization is "new federal common law." See Friendly, *supra* note 24.

is no general federal common law.” But in making that statement, the *Erie* decision did not abandon the former meaning of “general” law. Indeed the passages from Justice Holmes that Justice Brandeis quoted made it clear that the only authoritative common law that retained any intelligibility after *Erie*—the law of the states—could be “general” law. Nothing prevented a state from grounding its common law decisions on what was referred to in the nineteenth century as arguments from “principle,” that is, a canvass of relevant authorities inside or outside the state.

As such, it is a misnomer to think of post-*Erie* “federal common law” as other than “general” law in the former sense of that term. Indeed it is abundantly clear that in the areas of designated federal interest in which the federal courts are conceded power to develop post-*Erie* common law rules, they regularly canvass a variety of jurisdictional and academic sources in doing so.

One recent case can provide an illustration.<sup>218</sup> In *Wells v. Liddy*<sup>219</sup> the plaintiff sued G. Gordon Liddy for allegedly defamatory remarks he made about her in several speeches, including one on a cruise ship. Both Wells and Liddy were citizens of the United States, and Liddy’s speech on the cruise ship, whose national flag was not made part of the record, occurred when that ship was not within the navigable waters of any state. Under the circumstances, a federal district court took jurisdiction of the case, and the Fourth Circuit concluded that, first, principles of American defamation law applied to the action, and, second, that “general maritime law,” rather than “the specific law of a single state,” would govern it.<sup>220</sup> The Fourth Circuit then used the *Restatement (Second) of Torts* as its source of what it called the “general common law tort principles” relevant to the defamation claim.

*Wells v. Liddy* provides a reminder that not all the areas of designated federal interest that remain the province of federal courts after *Erie* are derived from statutes. The jurisdiction of the federal courts in that case was based on their authority over cases arising on navigable waters of the United States. Such “maritime” jurisdiction was not affected by *Erie*. Moreover, the “maritime” law in the case was American defamation law in a maritime setting, and therefore *federal* law. It was also “general” law in the sense that it was not based on the decisions of any particular state.

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<sup>218</sup> This case was brought to my attention by Caleb Nelson’s article. See Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503 (2006).

<sup>219</sup> 1 F. Supp. 2d 532 (D. Md. 1998).

<sup>220</sup> *Wells v. Liddy*, 186 F.3d 505 (4th Cir. 1999).

In making use of the *Restatement (Second) of Torts* as its primary source of defamation law principles, however, the Fourth Circuit was drawing upon the decisions of many states, as the Restatements are offered as compilations of the common law of multiple jurisdictions. "General law" in *Wells* was being used in the first of that term's original meanings, an extrapolation of defamation law principles based on a canvass of many sources. It was indisputably "general federal common law."

B. *Customary International Law as General Federal Common Law*

Is there any reason to think that the same analysis made in *Wells* could not apply to violations of customary international law in a maritime setting? Assume that instead of a passenger on a cruise ship being defamed, that ship was hijacked in the navigable waters of the United States by terrorists who temporarily seized control of her, held her passengers hostage in various stages of deprivation, and sought to bring her into a port friendly to their cause. The terrorists were eventually intercepted and arrested by authorities. Several passengers for the ship, some of them aliens and others U.S. citizens, brought tort claims in American federal courts as a result of the incident. Some were against the terrorists for piracy, false imprisonment, assault, and battery, amounting to torture and intentional infliction of emotional distress, while others were against the cruise line for negligence, resulting in emotional distress, and for not providing proper security against terrorist attacks.

Consider, first, claims by alien passengers against terrorists, which would be brought under the ATS. The *Sosa* decision makes it clear that federal courts can, in attempting to determine whether torts in violation of the law of nations have been committed, engage in the sort of canvass of sources from multiple jurisdictions traditionally associated with "general law" inquiries.<sup>221</sup> To determine "the current state of international law," they can look at the "customs and usages of civilized nations" and the work of commentators.<sup>222</sup> Indeed the approach endorsed by the *Sosa* Court appears identical to that described in a 1900 case, *The Paquete Habana*, in which the Court assumed that customary international law was a species of "general law."<sup>223</sup> So it seems fair to characterize the customary international law norms gleaned by federal

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<sup>221</sup> *Sosa v. Alvarez-Machain*, 124 S. Ct. 2766 (2004) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)).

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 2767.

courts in their efforts to define torts in violation of the law of nations under the ATS as sources of general federal common law principles.<sup>224</sup>

Now suppose that other passengers, American citizens, chose to sue terrorists in federal court for torts arising out of the incident. Some of their claims might be conceptualized as torts in violation of the law of nations because the action of the terrorists amounted to piracy or assaults that rose to the level of torture. *Sosa* did not definitively resolve the question of whether such claims could be brought in the federal courts without the benefit of the ATS; however, at one point in his *Sosa* opinion Justice Souter stated that violations of “international law norms” could form the basis for “private claims under federal common law.”<sup>225</sup>

It is hard to know what Justice Souter had in mind by that comment. In the hypothetical presented above, cruise ship passengers injured by the hijacking that were American citizens could seek recovery for torts directly under domestic tort law, in this instance “general” federal law. If the conduct of the hijackers resulted in assaults, batteries, and inflictions of emotional distress, those actions would be treated in the same manner as the defamation claim in *Wells*, through a canvass of “general” tort law by the federal court in question. Although torts “in violation of the law of nations” would doubtless occur in the course of a ship hijacking, they would spawn domestic torts. In addition to assaults and batteries, claims against the cruise ship company for negligence in providing security against terrorist attacks would fall in that category.

However, *Sosa* might nonetheless serve as a precedent under which federal courts, in “general common law” cases such as admiralty and maritime cases, might include international law sources in their canvass of sources. This might be what Justice Souter was anticipating in his comment about international law norms furnishing a basis for private damage claims in federal common law cases.

The principal conclusion to be drawn from the above discussion is not that *Sosa* can be expected to result in an outpouring of cases in which customary international norms form the basis for private damage claims outside the coverage of the ATS. Rather, it is that *Sosa* appears to acknowledge that even after *Erie*, customary international law, as applied by the federal courts, can still be a source of common law

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<sup>224</sup> It is clear that the *Sosa* Court was treating ATS-based inquiries into the scope and content of torts in violation of the law of nations as exercises in interpreting federal law. *Id.* at 2765.

<sup>225</sup> *Id.*

decisions, and as such, has the potential to function as *federal general common law*. However, this does not end the possible complexities lying behind the door *Sosa* chose to leave ajar. Because of the discernible federal interest in the adherence to and application of internationally accepted norms of conduct, decisions in which customary international norms are applied by federal courts might not only be conceptualized as federal common law decisions, but as binding on *state* courts as well.<sup>226</sup>

### C. Customary International Law as State Common Law

Thus, the question of whether customary international law decisions by the federal courts should be treated as not fully governed by *Erie* necessarily requires attention to the status of those decisions as state law. There is no question that state courts can take cognizance of disputes in which issues of customary international law are raised, and with globalization, one might expect that an increasing number of such disputes may appear in state courts in the future.<sup>227</sup> The question is how, in a post-*Erie* universe, those decisions should be regarded. Recently scholars have been sharply divided on this issue, with some arguing that customary international law decisions should, notwithstanding *Erie*, be regarded as federal law,<sup>228</sup> while others maintain that the *Erie* decision, separation-of-powers, and federalism concerns require that customary international law be regarded as state law, even if comparatively few state courts might be expected to pass on customary international law issues.<sup>229</sup>

This debate again highlights some of the concerns that led the *Erie* decision to declare the illegitimacy of a general federal common law that was independent of the common law decisions of the states. One concern was that the diversity jurisdiction of the federal courts, standing alone, did not give those courts power to make law in areas where Congress could not act. Another was that federal common law rules, where they did not follow the rules of the state in which the federal court

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<sup>226</sup> This issue has regularly been raised in commentary on the status of customary international law after *Erie*. See Young, *supra* note 194, at 382-83.

<sup>227</sup> For example, in construing a section of the Oregon Constitution as applied to the treatment of prisoners in state jails, the Oregon Supreme Court derived a norm of fair treatment from the United Nations' Standard Minimum Rules for the Treatment of Prisoners. See *Sterling v. Cupp*, 625 P.2d 123, 131 (Or. 1981).

<sup>228</sup> See, e.g., Koh, *supra* note 1, at 1825; Harold Hongju Koh, *The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004).

<sup>229</sup> See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *supra* note 22, at 815; Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997).

sat, would undermine uniformity in the application of state law. Neither of those concerns seems applicable to customary international law decisions.

At the time *Erie* was decided, the power of Congress to regulate areas of the economy under the Commerce Clause was hotly contested, and it was assumed that a significant number of intrinsically “local” activities existed that remained within the regulatory powers of the states.<sup>230</sup> Although Congress very likely did have power to make rules for right of ways near railroad tracks when the railroad traffic on those tracks crossed state lines (as was the case in *Erie*), Justice Brandeis’s assumption that large areas of state tort law remained outside the regulatory province of the federal government was probably accurate in 1938. However, five years later, *Wickard v. Filburn*<sup>231</sup> extended the reach of the federal government’s commerce powers to include the regulation of wheat designed for consumption by an individual farmer in his home. Recent Supreme Court decisions have signaled that some limits on the regulatory powers of Congress remain,<sup>232</sup> but it seems fair to say that Justice Brandeis’s concern that the federal courts might invade areas of state power where Congress could not is less likely to materialize.

Moreover, customary international law issues traditionally surfaced in federal rather than state courts, and the federal government, as opposed to the states, was typically seen as entrusted with foreign relations powers. Indeed the ATS was itself an example of the assumed power of Congress to pass statutes governing international law issues. Thus, even if the idea of certain “local” activities remaining immune from federal regulation retains some cogency, activities affecting international relations would seem to be far from intrinsically local.

If one assumes that international relations is an abiding concern of the federal government, the uniformity concern would appear to point in favor of federal courts retaining power to fashion rules of customary international law after *Erie*. Were *Erie* principles applied to customary international law cases, state courts would be free to develop their own customary international law rules, and federal courts would be bound by state decisions. This would hardly promote uniformity, especially because the state decisions would be unreviewable by the Supreme

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<sup>230</sup> A classic example is *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

<sup>231</sup> 317 U.S. 111 (1942).

<sup>232</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *United States v. Lopez*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).



Court of the United States. Such a result seems perverse in two respects. Courts not traditionally engaged with customary international law cases would end up being the primary decision-makers in the area, and the possibility for multiple, competing state rules might exist, making it more difficult for the federal government to maintain a uniform approach to customary international law issues.

A final concern, elegantly expressed by Curtis Bradley and Jack Goldsmith, is the risk that allowing the federal courts to develop customary international law rules through a broad canvass of the attitudes of international organizations and jurists will result in unelected officials imposing their will on the citizens of states.<sup>233</sup> In the death penalty area, for example, if a federal court were to find the death penalty inconsistent with international norms of conduct, the result would be a principle of “new” federal customary international law that bound the states, even if a majority of the citizens of a state had voted to retain the death penalty for certain crimes. This seems, at first blush, to raise issues of democratic theory.

But would making customary international law *state* law be responsive to the democracy concern? Some state judges are unelected, and even where a state elected its judiciary, the result of a state court’s invalidating the death penalty by appeal to international norms would, where the state’s legislature had approved the death penalty, raise similar democracy concerns. It would seem that the remedy would lie in a cautious interpretation by courts of international norms as the source of customary international law rules, something akin to the narrow view of “torts . . . in violation of the law of nations” advanced by the Court in *Sosa*. This would seem particularly true where the views of international jurists, conventions, or organizations seem to differ from those of American courts or legislatures, or where Congress has specified reservations in ratifying the United States participation in an international treaty or convention.

To summarize, the democracy concern does not seem to be alleviated by making state rather than federal courts the principal sources of customary international law rules, and the separation of powers, federalism, and uniformity concerns each seem better facilitated by retaining customary international law as a species of federal common law. Here the clumsiness of *Erie*’s attack on “general federal common law” seems most apparent. Not all the areas of a “unique and distinctive

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<sup>233</sup> See Bradley & Goldsmith, *supra* note 22, at 871-76.

federal interest” that remain after *Erie* have been created by federal statutes. Some, such as admiralty and maritime law, are survivors of the older regime of general federal common law. Whatever one thinks of the jurisprudential intelligibility of general law as a source of immanent principles to be found and applied by judges, the term has another meaning that retains its intelligibility, that of a canvass of rules embodied in the decisions of multiple sources. That seems to be the most accurate description of customary international law today: it is *general law*.

But it does not follow that customary international law should be regarded as exclusively federal common law. Its history more resembles that of the law merchant than that of admiralty or maritime law. Article III of the Constitution gives the federal courts jurisdiction over all cases of admiralty and maritime jurisdiction, anticipating that the common law of those subjects would be determined by federal judges.<sup>234</sup> There were, however, no “law merchant” or “law of nations” clauses in Article III, and in the nineteenth-century customary international law and law merchant cases were decided in both state and federal courts.<sup>235</sup> *Swift v. Tyson* suggested that most law merchant cases should be treated as “federal common law” cases, but it did not preclude state courts from deciding those cases. The analysis above suggests that, in many cases, customary international law disputes may implicate federal interests. As such, using *Erie* to prevent the federal courts from deciding customary international law cases on their own is not sensible. However, it is difficult to argue that customary international law cases are invariably ones in which the interests of the federal government are unique and distinctive. If a state court wanted to consider conditions in the state’s prison system against the backdrop of a state constitutional provision requiring “humane” treatment for prisoners, it seems difficult to imagine that a federal court’s interpretation of customary international norms about fair treatment should control that inquiry.

Thus, I think the proper way to conceive customary international law is as “general” law that might be the source of both federal and state common law rules.<sup>236</sup> Given the fact that an overwhelming number of

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<sup>234</sup> This was true even with the “savings clause” of the Judiciary Act of 1789. That clause distinguished between “common law” remedies (when the action involved persons connected with a ship) and “admiralty” remedies, which were not available in state courts.

<sup>235</sup> See Koh, *supra* note 1, at 1830.

<sup>236</sup> I do not take the *Sosa* Court’s statement, quoted at note 138, that violations of international norms can be made the basis of “private damage claims under federal common law” to have precluded any future state court adjudication of such claims. I

customary international law cases have been brought in the federal courts, and given the states' rudimentary interests compared to that of the federal government in international relations issues, it seems likely that if *Erie* were treated as not precluding independent customary international law decisions by federal courts, those decisions would dominate. But I would stop short of making those decisions preemptive of state law. Customary international law should remain a pocket of general law, both federal and state, on which *Erie* has no effect. As such, it would expose Justice Brandeis's dictum that there is no general federal common law as partially misplaced, but at the same time would not require that customary international law decisions, once made by the federal courts, be treated as "new," binding federal common law.<sup>237</sup>

#### V. CONCLUSION: THE STATUS OF A CUSTOMARY INTERNATIONAL LAW OF TORTS

The status of customary international torts actions outside the parameters of the ATS, although left open by the Court in *Sosa*, doubtless contributed to the *Sosa* Court's caution in defining torts in violation of the law of nations. The reasons for the Court's caution seem obvious: a fear of reviving pre-*Erie* "general" law in the form of the customs and practices of civilized nations, a fear of creating too broad a forum for tort actions involving aliens in American courts, and a fear of opening up changing international norms as too broad a source of law in domestic cases.

All of this suggests that customary international law is unlikely to be drawn upon very often as a source of tort rules for the federal courts. I do not lament that prospect. The increased globalization of the economy and the tendency of tort litigation to reflect the changing ways in which humans can injure themselves and others augurs a potentially dramatic

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interpret that statement as only stating that, in future ATS cases, courts can themselves look to international norms in determining the content of torts in violation of the law of nations. It seems clear that in the ATS context, the Court regards customary international law as "new" federal common law, but there is no indication that it regards customary international law as federal common law in all contexts.

<sup>237</sup> This position follows one advanced by Ernest Young. See Young, *supra* note 194, at 467-99. Young argues that there should be no "single appellate authority whose interpretations of customary [international] norms would bind the state courts." *Id.* at 497. It might be objected that this approach would introduce a proliferation of different federal and state customary international law rules. I doubt that this would occur for two reasons. First, I believe the overwhelming number of cases raising customary international law issues would continue to be brought in the federal courts. Second, I would hope (and perhaps expect) that other courts would follow the *Sosa* pattern of applying customary international law norms sparingly to disputes in American courts.

expansion of torts without borders. The growing interest on the part of international bodies in articulating universal norms of conduct might tempt the international community to broaden the definition of conduct condemned by civilized nations to encompass such torts. I do not think that the increased risk of injury that accompanies globalization should be treated as a mandate to infuse tort jurisprudence with the norms of customary international law. I especially do not think that American federal courts should hold themselves out as receptive to that prospect. There are enough fortuities in the process by which internationally based tort cases end up in the federal courts of the United States for those courts to be circumspect in their consultation of international sources.

As to state courts, commentators have noted that few customary international law cases of any kind have been brought in state jurisdictions. This situation might change with globalization, and I have argued that, to the extent that the content of customary international law as “general” law more resembles the law merchant than admiralty or maritime law, state courts can contribute to its development, whether in the area of torts or other common law areas, without having to follow the decisions of federal courts. Here again, prudence seems to be called for, especially if one anticipates that increased state court activity might foster a proliferation of diverse “parochial” state customary international law decisions.

However, the question of whether it would be prudent for American federal or state courts to begin to develop a customary international law of torts is different from the question of whether they are permitted to do so. Here it is a mistake to read *Erie* as a bar to the promulgation of “general” customary international law by the federal courts, and also a mistake to treat customary international law as “new” federal common law. In short, we have a customary international law of torts, a survival of “general” law in a post-*Erie* world. The federal courts have the capacity to develop rules in tort cases where norms of customary international law are implicated that might deviate from state tort rules. State courts also have a similar capacity.

But the very possibility that more torts cases can be expected to have an international setting, when combined with the increased political and cultural diversity of international contacts, cautions against too ready an acceptance in American courts of arguments that tortious conduct can be governed by international norms. It may have been this instinctive sense of getting into delicate and troubled waters that encouraged the Supreme Court to hold back in *Sosa*; and it may be that this prudential caution,

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rather than the historical and jurisprudential reasons advanced by the Court for its decision, will come to be understood as the principal message of the *Sosa* case. In any event, we need to get beyond the potential conundrum raised by the interaction of *Erie* and *Sosa*, and see a customary international law of torts for what it is, however narrow or spacious its domain might be.