THE BROAD JURISPRUDENTIAL SIGNIFICANCE OF SOSA V. ÁLVAREZ-MACHAIN: AN HONEST ASSESSMENT OF THE ROLE OF FEDERAL JUDGES AND WHY CUSTOMARY INTERNATIONAL LAW CAN BE MORE EFFECTIVE THAN CONSTITUTIONAL LAW FOR REDRESSING SERIOUS ABUSES

by PENNY M. VENETIS*

INTRODUCTION

In 2004, the United States Supreme Court decided Sosa v. Álvarez-Machain.1 Sosa is rightly credited with guaranteeing that human rights victims from other countries can seek justice against their abusers in U.S. courts through the use of the Alien Tort Claims Act (ATCA), also known as the Alien Tort Statute (ATS).2 In Sosa, the U.S. Supreme Court put its imprimatur on nearly twenty-five years of lower federal court human rights jurisprudence that began in 1980 withFilártiga v. Peña-Irala.3 On its eighth anniversary, the Sosa decision is receiving considerable attention. The U.S. Supreme Court has accepted certiorari to resolve a split in the U.S. Courts of Appeal over the issue of whether corporations can be sued in U.S. courts, under the ATS, for violating customary international law. The Sosa opinion left the corporate liability question unanswered. Ironically, the Second Circuit Court of Appeals, which paved the way for human rights litigation in the U.S. inFilártiga, initiated the circuit split, but now stands alone in its finding that the ATS does not permit lawsuits against corporations.4

* Clinical Professor of Law, Clinical Scholar and Co-Director, Rutgers Constitutional Litigation Clinic. I would like to thank Beth Stephens and Gwynne Skinner for their thoughtful comments on this Article. I would also like to thank my research assistants Isabel Chou and Yael Bromberg for their invaluable and tireless assistance.

2. Id. at 724-25, 738.
3. 630 F.2d 876 (2d Cir. 1980).
4. The Second Circuit was the first (and remains the only) Circuit Court of Appeals to hold that corporations cannot be held liable under ATCA for violating customary international law. Kiobel v. Royal Dutch Petrol. Co., 642 F.3d 268 (2d Cir. 2011); see also Liu Bo Shan v. China Constr. Bank Corp. (Liu Bo Shan I), No. 09 Civ. 8566 (DLC), 2010 U.S. Dist. LEXIS 63938, at *1-4 (S.D.N.Y. June 28, 2010), aff’d, Liu Bo Shan II, 421 F. App’x 89 (2d Cir. 2011). Since the Second Circuit’s decision in Kiobel, at least four Circuit Courts of Appeals have rejected the Kiobel analysis, holding that corporations may be sued under ATCA. See, e.g., Doe v. Exxon Mobil Corp., 654 F.3d 11, 39-57 (D.C. Cir. 2011); Romero v. Drummond Co., 552 F.3d 1303, 1315 (11th Cir. 2008); Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1017-21 (7th Cir. 2011); Sarei v. Rio Tinto, PLC, 2011 WL 5041927 (9th Cir. Oct. 25, 2011).
This newly-focused attention on *Sosa* is a good time to examine other parts of the opinion that have been largely overlooked and that remain intact. In addition to permitting U.S. courts to continue adjudicating gross human rights abuses, *Sosa* is significant in two ways that have not been explored sufficiently either by courts or in scholarship. First, *Sosa* is a clear affirmation by the U.S. Supreme Court that federal judges are, in part, common law judges who have both the power and the responsibility to “make law” in certain circumstances, including in the development of non-treaty-based customary international law.\(^5\) In practical terms, this means that federal judges are more than just ministers who look up settled legal principles and apply them in the same way to the cases that come before them. Federal judges, *Sosa* tells us, perform a much more vital function in shaping the law.

In that regard, *Sosa* is a huge vote of confidence by the Supreme Court for the abilities of lower federal courts. In recognizing that judges create common law in certain circumstances, the *Sosa* decision made very clear that lower federal courts are fully capable of creating new law, with some guidance from the U.S. Supreme Court, but without rigid bright-line tests.\(^6\)

The second reason *Sosa* is significant and merits attention is the Supreme Court’s recognition of the evolving nature of customary international human rights law. The Supreme Court made clear that human rights law is not stagnant. Because of its evolutionary nature, customary international law could offer victims of abuse faster and more comprehensive relief than challenges based on constitutional law. That is because many lawsuits concerning constitutional law become mired in the debate over whether the Constitution’s drafters intended for the Constitution to address issues not specifically enumerated in the document itself. That debate is inapplicable when applying customary international law.

This article will examine the text and implications of *Sosa*. Part I will put *Sosa* into context and will briefly discuss the history of customary international human rights litigation in federal courts. Part II will discuss the significance of the Supreme Court’s recognition that federal judges are common law judges who, in certain instances, can and should create law. This section will also discuss why customary international law provides a more direct and comprehensive approach

---

5. See *Sosa*, 542 U.S. at 729 (noting that while in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court denied the existence of a general federal common law, the Court said that it would not close the door “to further independent judicial recognition of actionable international norms” because post-*Erie* jurisprudence “has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations”).

6. See id. at 730-31 (“[I]t would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. . . . Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.”); see also Ralph G. Steinhart, *Laying One Bankrupt Critique to Rest: Sosa v. Álvarez-Machain and the Future of International Human Rights Litigation in U.S. Courts*, 57 Vand. L. Rev. 2241, 2259 (2004) (concluding that *Sosa* “turned on the proposition that the law of nations, as an enclave of federal common law, survived *Erie* and authorizes the federal courts to hear cases and frame remedies under the [ATCA] as they would any other common law cause of action, subject to a heightened burden of proof”).
than constitutional law for rights-based advocacy. Part III will then examine how and when customary international law can be applied to remedy purely domestic disputes. This Part will also identify existing obstacles to using customary international law domestically. Part IV will then consider recent Supreme Court decisions that have looked to international and foreign law, as well as public statements made by the justices, in an effort to determine whether the U.S Supreme Court might be willing to endorse the use of customary international law domestically in situations where the ATS does not apply.

I. KEY INTERNATIONAL HUMAN RIGHTS LAWSUITS IN U.S. COURTS

Sosa was the Supreme Court’s first and only case interpreting the ATS, which was enacted by the first U.S. Congress in 1789. The Alien Tort Statute, 28 U.S.C. § 1350, provides: “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.” As the Supreme Court noted, there is no legislative history for the statute; “‘[N]o one seems to know whence it came,’ . . . and for over 170 years after its enactment it provided jurisdiction in only one case.” The statute appears purely jurisdictional on its face. It appears in Section 9 of the Judiciary Act, which exclusively deals with federal court jurisdiction. This placement supports the interpretation that the statute is indeed just jurisdictional.

The statute lay dormant for nearly two centuries until creative lawyers from the Center for Constitutional Rights resurrected it and used it as a mechanism to redress human rights violations. In the 1980 landmark case Filártiga, the Second Circuit found that the ATS allows federal courts to hear damages claims brought by human rights victims (who are non-U.S. citizens) whose abusers violated non-treaty-based law of nations while inflicting abuses. More specifically, the Second Circuit held that the family of Joelito Filártiga could proceed with a federal court action against Américo Norberto Peña-Irala. Peña-Irala was Inspector General of Police in Asuncion, Paraguay. He tortured and killed Joelito because of his father’s political activities.

The Second Circuit found that, even though the ATS appeared to be jurisdictional, the statute was also a gateway for lawsuits alleging violations of the law of nations, also known as customary international law. Prior to Filártiga,

9. Sosa, 542 U.S. at 712 (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975)).
10. Id.
11. See generally Filártiga v. Peña-Irala, CTR. FOR CONSTITUTIONAL RIGHTS, http://ccrjustice.org/ourcases/past-cases/filartiga-v.-peñ-irala (last visited Dec. 3, 2011) (noting that the Center for Constitutional Rights (CCR) “explored the origin of the [little-used] act as a source of federal judicial power over matters of international dimension and its purpose in preventing the sanctuary this country offers to the persecuted from immunizing international criminals. Today’s torturers, CCR argued, are like eighteenth century pirates—enemies of all humanity”).
12. Filártiga, 630 F.2d at 878.
13. Id. at 878, 887.
14. Id. at 880.
customary international law had never been examined in the human rights context. Ironically, the ATS, which has been used to champion human rights since Filártiga, had been invoked by slave-ship merchants in 1795 to recover damages for theft of their human cargo.\textsuperscript{15}

Customary international law is defined in the Restatement (Third) of Foreign Relations as the law of the international community that “results from a general and consistent practice of states followed by them from a sense of legal obligation.”\textsuperscript{16} Although custom does not refer to a direct source or enactment of law, it is a legal notion that emerges from consent and the practices of states.\textsuperscript{17} Similar to the Restatement’s definition, Article 38 of the Statute of the International Court of Justice identifies two key elements in the formation of a rule of customary international law: “evidence of a general practice” which has been “accepted as law.”\textsuperscript{18} The first element examines the consistency and longevity of the practice.\textsuperscript{19} The second element examines the reasons why the rule has been followed, and, specifically, whether compliance is a result of a sense of legal obligation or necessity.\textsuperscript{20} In more colloquial terms, the notion of “custom” in international law is similar to the rules businesses formulate for conducting transactions (“usages of trade”), or the establishment of the standard of care exercised within a community as a relevant basis for determining negligence.\textsuperscript{21}

One of the earliest and most extensive Supreme Court discussions about customary international law was in \textit{The Paquete Habana}.\textsuperscript{22} That case resulted from the capture of two Cuban fishing boats by U.S. naval forces during the Spanish-American War.\textsuperscript{23} The boats were subsequently condemned as “prize[s]” of war.\textsuperscript{24} The question presented to the Supreme Court was whether such small coastal fishing boats were immune from capture under “customary international law.”\textsuperscript{25}

\textsuperscript{15} Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).
\textsuperscript{17} See \textit{id.} ch. 1, intro. note (“Modern international law is rooted in acceptance by states which constitute the system . . . . International law is made in two principal ways—by the practice of states (‘customary law’) and by purposeful agreement.”).
\textsuperscript{19} See \textit{The Paquete Habana}, 175 U.S. 677, 694 (1900) (describing the passage of one hundred years as enabling “what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law”).
\textsuperscript{20} See \textit{id.} at 711 (discussing the “universal obligation” of the law of the sea, resting “upon the common consent of civilized communities,” stemming from both “usages of navigation” and “ordinances of maritime states” (citation omitted)).
\textsuperscript{21} See \textit{David J. Bederman, International Law Framework} 16 (Foundation Press 2d ed. 2006).
\textsuperscript{22} 175 U.S. 677.
\textsuperscript{23} \textit{id.} at 678-79.
\textsuperscript{24} \textit{id.}
\textsuperscript{25} \textit{id.} at 686 (“We are then brought to the consideration of the question whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain. By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and
Drawing from a variety of sources, including medieval English royal ordinances, agreements between European Nations, orders issued to the U.S. Navy during earlier conflicts, and the opinions of treatise writers, the attorney for the Cuban boat owners successfully argued that customary international law barred the capture of small fishing boats, even during wartime.

The Supreme Court, ruling in favor of the boat owners, famously stated:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .

The Paquete Habana explicitly incorporated customary international law into U.S. law. As such, the Supreme Court recognized the authority of federal judges to apply norms of customary international law based on “the consent of nations reflected in their practice.”

Filártiga was the first case that applied this jurisprudence to the human rights context. After Filártiga, many successful human rights cases were brought under the ATS. ATS jurisprudence recognizes that both state and non-state actors can be held accountable for torture, genocide, war crimes, crimes against humanity, summary execution, arbitrary detention, and disappearance. ATS claims were upheld against military leaders, leaders of de facto governments, former crews, from capture as prize of war.”).

26. Id. at 690.
27. Id. at 687-91.
29. Id. at 701-08.
30. Id. at 708.
31. Id. at 700.
32. See William S. Dodge, Customary International Law and the Question of Legitimacy, 120 Harv. L. Rev. F.19, 23-24 (2007) (arguing that by the time Erie was decided, customary international law already rested upon definite authority: state practice and consent, as articulated, for example, by the Supreme Court in The Paquete Habana).
34. See, e.g., Forti v. Suarez-Mason, 672 F. Supp. 1531 (N.D. Cal. 1987) (denying former Argentine general’s motion to dismiss ATCA suit for actions allegedly committed by military and police personnel
presidents, and leaders of political parties. These ATS cases follow a similar pattern—the human rights abuses committed in violation of customary international law all took place far from U.S. soil, and both the victim and the human rights abusers were citizens of other countries.

Although some judges initially rejected the use of the ATS in the human rights context, the overwhelming majority of courts adopted Filártiga and its reasoning in full. One of the most notable cases, in the development of ATS jurisprudence is Doe v. Unocal Corp. Unocal was the first case in which a federal court found that U.S.-based corporations and their executives could be sued under the ATS when, acting in conjunction with governmental officers, they engaged in human rights violations. The case deviated from the pattern discussed above. While the plaintiffs were villagers from the developing country of Burma, unlike previous ATCA cases, the defendants included a U.S.-based corporation.

In Unocal, federal courts were faced with the difficult task of scrutinizing the acts of a U.S. corporation that was accused of being complicit in heinous acts under defendant’s authority and control against Argentine citizens; Xuncax, 886 F. Supp. at 169 (finding that a claim brought by Guatemalan citizens against former Guatemalan Minister of Defense under ATCA was sufficient to recover damages).

35. See, e.g., Kadie v. Karadžić, 70 F.3d 232 (2d Cir. 1995) (holding that the President of the self-proclaimed Bosnian-Serb republic of “Srpska” may be liable under ATCA for crimes committed under color of law by personally ordering a violent campaign designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats).

36. See, e.g., Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (affirming $2 billion ATCA class action claim against estate of former president of Philippines for gross human rights violations committed during his terms in office).

37. See, e.g., Doe v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998) (holding that a leading Algerian paramilitary political group, and the head of such an organization, could be held liable under ATCA for human rights violations such as assassination, torture, rape, sexual slavery, and the enforcement of sexual apartheid).

38. See, e.g., Forti, 672 F. Supp. 1531 (dispute between citizens of Argentina); Xuncax, 886 F. Supp. 162 (dispute between Guatemalan citizens).

39. See, e.g., Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 801 (D.C. Cir. 1984) (per curiam) (Bork, J., concurring) (rejecting Filártiga on the ground that § 1350 does not create a cause of action); id. at 826 n.5 (Robb, J., concurring) (rejecting Filártiga on the ground that it is “fundamentally at odds with the reality of the international structure and with the role of United States courts within that structure”).

40. See Sosa, 542 U.S. at 724-25 (“[N]o development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with Filártiga v. Peña-Irala has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. . . . [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 . . . .” (citation omitted)); Abebe-Jira, 72 F.3d 844 (holding that ATCA provides a private right of action to former prisoners in Ethiopia against an official of the former Ethiopian government for his responsibility in their torture while held captive); Doe, 993 F. Supp. 3 (holding that Algerian plaintiffs’ claims of alleged violations of international law against Algerian political group were actionable under ATCA).

41. 395 F.3d 932 (9th Cir. 2002), reh'g granted, 395 F.3d 978 (9th Cir. 2003), vacated, 403 F.3d 708 (9th Cir. 2005).

42. Id. at 945-47 (observing that forced labor is a jus cogens human rights violation that does not require state action to be actionable under ATCA).

43. Id. at 937.
abroad, including forced labor, mass murder, rape, and torture. The Ninth Circuit determined that the plaintiffs in *Unocal* had presented enough evidence to go to trial on ATS claims against the corporation for the aiding and abetting of forced labor, murder, and rape, but not torture.

After *Unocal*, a number of federal district and circuit courts across the country found that both domestic and foreign corporations could be held accountable under the ATS for human rights violations committed abroad. In 2010, the Second Circuit put the question of corporate liability under the ATS in flux with the *Kiobel* opinion. As discussed above, the issue of corporate liability in ATS cases will be resolved by the U.S. Supreme Court.

The *Unocal* case spawned *Jama v. U.S. Immigration and Naturalization Service*, which further expanded ATS jurisprudence. The *Jama* case arose out of serious abuses inflicted on immigrants stopped at the border—almost all of whom were political asylum seekers—who were being held on behalf of the federal government in a detention center run by the Esmor Corporation. The complaint alleged that the detention conditions for the political asylum seekers, who were mostly from Africa, violated their human rights. The immigrants were held in deplorable and unsanitary dormitories, where beds and eating areas abutted

---

44. *Id.* at 936-37.

45. *Id.* at 962. This standard was made more stringent in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, which articulated a higher standard derived from international law, under which “a claimant must show that the defendant provided substantial assistance with the purpose of facilitating the alleged offenses.” 582 F.3d 244, 247 (2d Cir. 2009) (emphasis added).

46. See, e.g., Abdullahi v. Pfizer, Inc., 562 F.3d 163 (2d Cir. 2009) (U.S. corporate defendant that engaged in non-consensual medical experimentation on humans abroad could be sued under ATCA); *Romero*, 552 F.3d at 1315 (holding that a Colombian company, which allegedly aided and abetted paramilitary operatives in the torture and assassination of union leaders abroad, could be sued under ATCA); *Sarei v. Rio Tinto*, PLC, 487 F.3d 1193 (9th Cir. 2007) (international mining corporation vicariously liable for actions in Papua New Guinea including alleged war crimes and crimes against humanity, for which it could be sued under ATCA), *en banc* reh’g granted, 499 F.3d 923 (9th Cir. 2007); Judgment, Chowdhury v. WorldTel Bangladesh Holding, Ltd., No. 08-cv-1659 (E.D.N.Y. Aug. 6, 2009), ECF No. 48 (granting $1.5 million compensatory damages jury verdict against Bangladeshi company for torture of U.S. legal resident while in Bangladesh), *appeal filed*, No. 09-4483-cv (2d Cir. 2009); *see also In re S. African Apartheid Litig.*, 2009 U.S. Dist. LEXIS 121559, at *11 (S.D.N.Y. 2009) (denying certification of appeal questioning whether U.S. and foreign multinational corporations may be liable under ATCA for alleged aiding and abetting harms related to South African apartheid); *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (granting $80 million judgment against corporation for human trafficking and forced labor); *Bowoto v. Chevron Corp.*, 557 F. Supp. 2d 1080, 1091 (N.D. Cal. 2008) (finding ATCA torture claim against multinational corporation actionable); *In re “Agent Orange” Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 58 (E.D.N.Y. 2005) (holding that chemical company was not immune from civil legal action based on international law).

47. *See supra* note 4.

48. See *id.; see also Kiobel*, 621 F.3d at 120 (holding that corporations could not be held liable for violating international norms in customary international law), *cert. granted*, 2011 WL 4905479 (U.S. 2011). The U.S. Supreme Court has consolidated the *Kiobel* case with *Mohamad v. Palestinian Authority* to determine whether corporate liability exists in lawsuits brought under the *Torture Victim Protection Act*.


50. *Id.* at 358.

exposed, filthy toilets and showers.52 Bright lights were left on twenty-four hours a day and the asylum seekers were not permitted to sleep.53 The immigrant detainees were denied essential hygiene products such as toilet paper, soap, shampoo, toothpaste, and sanitary napkins and were fed rotten food and spoiled milk.54 Muslim asylum seekers were served pork, and were denied the opportunity to pray.55 Guards conducted routine and unwarranted strip searches throughout the day, including with dogs, and filmed those searches.56 Guards also called the asylum seekers degrading names, the most common of which was “African Monkey.”57 Guards, while watching detainees shower, pointed at the detainees’ body parts and made lewd comments.58 The Jama plaintiffs sued corporate and individual defendants who they claimed were responsible for the abuse at the detention center.59

The Jama case extended the scope of ATS jurisprudence because it was the first case brought under the ATS where all of the human rights abuses were committed in the U.S.,60 and where all of the defendants were U.S. citizens or corporations.61 It was also the first case to successfully challenge U.S. domestic policy—the manner in which immigrants are detained—in a human rights context. Finally, Jama was unique because, in one of the many published opinions generated in the case, the court found that, even post-Sosa, conditions of confinement alone could rise to the level of human rights violations.62

Despite the overwhelming acceptance of ATS cases by federal courts, in nearly all those cases, both individual and corporate defendants argued that the ATS was purely jurisdictional and did not recognize a cause of action for violations of customary international law.63 This position originated with Judge Bork of the D.C. Circuit in Tel-Oren v. Libyan Arab Republic,64 one of the first ATS cases.65

52. Id. at ¶ 44.
53. Id. at ¶ 57.
54. Id. at ¶¶ 47, 51.
55. Id. at ¶¶ 92-94.
56. Id. at ¶ 75.
57. Amended Complaint at ¶ 67, Jama, 22 F. Supp. 2d 353 (97-3093).
58. Id. at ¶ 45.
59. Jama, 22 F. Supp. 2d at 357-58 (plaintiffs suing body of U.S. residents including individual INS officials, the Correctional Services Corporation, and some of its present and former employees).
60. See id. at 358 (the abuses and ATCA violations alleged occurred at an Esmor Correctional Services facility which was located in Elizabeth, New Jersey).
61. See id. at 357-58 (plaintiffs suing body of U.S. residents).
62. See Jama v. U.S. Immigr. & Naturalization Serv., 343 F. Supp. 2d 338, 360-61 (D.N.J. 2004) (“The law of nations . . . can be said to have reached a consensus that the inhumane treatment of a huge number of persons . . . held in confinement is a violation of the law of nations.”).
63. See, e.g., In re Estate of Ferdinand Marcos, Human Rights Litig. (Marcos II), 25 F.3d 1467, 1474 (9th Cir. 1994) (rejecting defendant’s challenge of the court’s subject matter jurisdiction under ATCA for alleged torture committed during Marcos’ presidency of the Philippines); Filártiga, 630 F.2d at 885 (rejecting defendant’s challenge of federal jurisdiction under ATCA in case of deliberate torture against citizens of Paraguay).
64. 726 F.2d 774.
65. Id. at 811 (Bork, J., concurring) (ultimately rejecting the argument that although the ATCA “cannot be read to provide a cause of action, [it] might conceivably provide evidence of Congress’ recognition . . . of one”).
However, most courts that addressed the issue post-\textit{Tel-Oren} and pre-\textit{Sosa} found that the ATS does indeed create a cause of action.\textsuperscript{66} During the twenty-four years between \textit{Filártiga} and \textit{Sosa}, the Supreme Court declined certiorari in all ATS cases.\textsuperscript{67}

II. \textit{Sosa}'s Broad Implications: Authority of Federal Judges to Make Law, and the Evolving Nature of Human Rights Law

On April 2, 1990, Dr. Álvarez-Machain, a Mexican national, was kidnapped by other Mexican nationals hired by the U.S. Drug Enforcement Agency (DEA), held in a motel room overnight, and flown to El Paso, Texas, the following morning where he was arrested by U.S. authorities.\textsuperscript{68} He sued under the ATS claiming that his right to be free from arbitrary detention, under customary international law, had been violated.\textsuperscript{69} The Ninth Circuit agreed and the Supreme Court granted certiorari.\textsuperscript{70} At issue in \textit{Sosa}, and of immediate concern to Dr. Álvarez-Machain, was whether DEA agents violated his human rights by authorizing his detention. The larger issue in the case, however, was whether the ATS was purely a jurisdictional statute or whether the ATS also recognized a cause of action for violations of customary international law.

Although several federal courts had addressed the jurisdiction issue,\textsuperscript{71} it was a matter of first impression for the U.S. Supreme Court. Defendants advocating that the ATS was purely jurisdictional certainly had a colorable argument. As discussed above, the statute’s plain language and its positioning within the Judiciary Act certainly could be interpreted to mean that the statute was solely jurisdictional.\textsuperscript{72} As such, when the U.S. Supreme Court granted certiorari to hear \textit{Sosa}, the concern among members of the U.S. human rights community was that the Court would overturn twenty-five years’ worth of laudable human rights jurisprudence.

\textsuperscript{66} See, e.g., Bodner v. Banque Paribas, 114 F. Supp. 2d 117, 133-34 (E.D.N.Y. 2000) (holding claims for aiding and abetting in conversion, looting, and plundering of plaintiffs’ assets are actionable under ATCA as violations of law of nations); \textit{Eastman Kodak Co.}, 978 F. Supp. at 1094 (holding alleged conspiracy to arbitrarily and inhumanely detain plaintiff was justiciable under ATCA); \textit{Abebe-Jira}, 72 F.3d at 848 (affirming judgment for damages to Ethiopian victims of torture and cruel, inhuman, and degrading treatment); \textit{Paul v. Avril}, 812 F. Supp. at 207 (S.D. Fla. 1993) (finding cruel, inhumane and degrading treatment to be a cause of action under ATCA); \textit{Forti}, 694 F. Supp. at 710-11 (recognizing disappearance as a cause of action under ATCA).

\textsuperscript{67} See Beth Stephens, \textit{Taking Pride in International Human Rights Litigation}, 2 CHI. INT’L L. 485, 489 (2001) (“[E]very court that has reached a decision on the ATCA has found the statute constitutional. . . . This consensus presumably explains why the Supreme Court has repeatedly denied petitions for certiorari in ATCA cases.”).

\textsuperscript{68} \textit{Sosa}, 542 U.S. at 698.

\textsuperscript{69} Id. at 692.

\textsuperscript{70} Id. at 699.

\textsuperscript{71} See, e.g., \textit{Bodner}, 114 F. Supp. 2d at 117 (holding plaintiff’s claims violated law of nations under ATCA); \textit{Eastman Kodak Co.}, 978 F. Supp. at 1078 (holding claim alleged was justiciable under ATCA); \textit{Abebe-Jira}, 72 F.3d at 844 (affirming judgment for damages under ATCA to Ethiopian victims of torture and cruel, inhuman and degrading treatment); \textit{Paul}, 812 F. Supp. at 207 (finding cruel, inhumane and degrading treatment to be a cause of action under ATCA); \textit{Forti}, 694 F. Supp. at 710-11 (recognizing disappearance as a cause of action under ATCA).

\textsuperscript{72} \textit{Sosa}, 542 U.S. at 713.
developed by lower federal courts to assist human rights victims. That was because Dr. Álvarez-Machain’s story was not as sympathetic or compelling when compared to cases such as Filártiga and much of its progeny. While Dr. Álvarez-Machain’s kidnapping must have been terrifying, his experience paled in comparison to the torture, rape and murder of plaintiffs in the many ATS cases which the Supreme Court had previously declined to hear.

In a 6-3 decision, the U.S. Supreme Court upheld the use of the ATS for violations of customary international law. The Court found that the ATS, although facially jurisdictional, “is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” The Court acknowledged that statutes today would be drafted differently if Congress wished to create both jurisdiction and a cause of action. But, that was not the case in the eighteenth century. The Court cited to the amicus brief submitted by professors of federal jurisdiction and legal history, which noted that when the ATS was drafted, “federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time.” The Court stated:

[Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.]

The Court also stated:

First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations

73. David C. Baluarte, Sosa v. Álvarez-Machain: Upholding the Alien Tort Claims Act While Affirming American Exceptionalism, 12HUM. RTS. BRIEF 11, 12 (2004) (“[H]uman rights lawyers gathered from around the country to hear the final arguments . . . which had lasted over a decade and had become part of their very consciousness. . . . [T]he principle concern was the future of the ATCA and human rights litigation in U.S. courts.”).
74. See, e.g., Abebe-Jira, 72 F.3d at 844 (involving torture); Kadic, 70 F.3d at 239 (involving torture, genocide, war crimes, and summary execution).
75. Sosa, 542 U.S. at 724.
76. Id. at 727.
78. Id. at 724.
actionable for the benefit of foreigners. . . . It would have been passing strange for . . . this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action.\textsuperscript{79}

It is this holding for which \textit{Sosa} is credited. As such, it is rightly cited as the case that permits human rights suits under the ATS to continue to be brought in U.S. courts.

There are other aspects of \textit{Sosa}, however, that have not been acknowledged adequately. These facets of the case deserve attention and will be discussed below. They are helpful in understanding both the Supreme Court’s position on the role of the judiciary and the role of international law in U.S. jurisprudence.

\textbf{A. Sosa recognizes that federal judges are common law judges who are authorized to make new law in certain circumstances.}

\textit{Sosa} is an affirmation that federal courts are also common law courts, and that, at least in the area of customary international law, federal courts can create new legal norms.\textsuperscript{80} Related to this is the Supreme Court’s trust in the capacity of lower federal courts to fashion common law, with some guidance, but without strict guidelines.\textsuperscript{81} These are significant findings that give a glimpse into the Supreme Court’s view of the role federal courts play in making law.

Once the Supreme Court found that the ATS was not purely jurisdictional, it could have taken one of three routes in determining what claims would be actionable under the ATS. The first is a very narrow approach in which the Court could have limited ATS suits to those that were actionable in 1789. By the Supreme Court’s own words, those claims are “modest,” and include offenses against ambassadors, violations of safe conduct, and piracy.\textsuperscript{82} But the Court flatly rejected that approach.\textsuperscript{83}

Alternatively, the Court could have limited ATS claims to only those that rose to the level of jus cogens violations. Jus cogens violations are a subset of customary international human rights norms that currently include torture, aggression, genocide, crimes against humanity, war crimes, piracy, and slavery.\textsuperscript{84} Adopting the jus cogens approach would have restricted the scope of ATS relief to a very thin band of the most gross human rights abuses. Jus cogens norms are “norm[s] from which no derogation is permitted and which can be modified only by a subsequent

\textsuperscript{79} \textit{Id.} at 719.
\textsuperscript{80} \textit{Id.} at 724.
\textsuperscript{81} \textit{See Sosa}, 542 U.S. at 725-28 (arguing for judicial caution in consideration of common law claims, but declining to create bright line rules).
\textsuperscript{82} \textit{Id.} at 720.
\textsuperscript{83} \textit{Id.} at 724-25.
\textsuperscript{84} \textit{See M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligatio Erga Omnes, 59 LAW \& CONTEMP. PROBS. 63, 68 (Autumn 1996) (defining jus cogens as “aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave related practices, and torture”).
norm of general international law having the same character.”

While the jus cogens route would have provided a clearer road map to future litigants and courts considering their claims, the Supreme Court did not adopt that approach either. Indeed, no lower court decision has ever explicitly required that actionable claims under ATCA meet the high standard of jus cogens. For example, the Ninth Circuit made it clear that any violation—regardless of whether it could be considered jus cogens—of “specific, universal and obligatory” international norms would be actionable under ATCA.” As such, a jus cogens violation is “sufficient, but not necessary, to state a claim” under the ATS.

The third approach available to the Supreme Court in Sosa is that which the Court adopted. This approach acknowledges that customary international law evolves over time and offers broad leeway to lower federal courts to adopt and interpret norms of customary international law. While the Court warned that caution was necessary in defining norms of customary international law actionable under the ATS, it also made clear that federal judges deciding ATS cases had the authority to use their judicial discretion to create and articulate new norms when necessary. “[A] judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.”

The Court also asserted that in recognizing “actionable international norms, . . . judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today.” The Court further held that “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” contemplated by the First Congress when it enacted the ATS. Some commentators have seized on these words to argue that Sosa limits ATS claims rather than endorsing them. The case’s language, however, does not support such a position.

To the contrary, the Court’s cautionary language to the lower federal courts is more guidance than warning. The majority’s opinion shows that it has great trust in the lower federal courts’ abilities to follow and apply Sosa correctly. For example, the Supreme Court stated:

85. Treaties Conflicting with a Peremptory Norm of General International Law (Jus Cogens), Vienna Convention on the Law of Treaties, art. 53, 1155 U.N.T.S. 331, 344; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102, cmt. k (1987) (stating that rules of international law that rise to the level of jus cogens are “recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them.”).

86. Unocal, 395 F.3d at 945 n.15 (quoting Marcos II, 25 F.3d at 1475).

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

88. Id. at 726.

89. Id. at 729.

90. Id. at 725.

91. See, e.g., Philip Mariani, Assessing the Proper Relationship Between the Alien Tort Statute and the Torture Victim Protection Act, 156 U. PA. L. REV. 1383, 1396 (2008) (noting that while the Sosa court left open the possibility for federal courts to create new ATCA rules, this interpretation of the ATCA was narrow).
No development in the two centuries from the enactment of [ATS] to the birth of the modern line of cases beginning with Filártiga v. Peña-Irala, . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended [ATS] or limited civil common law power by another statute.92

Indeed, if the Court wished to restrict the lower federal courts’ abilities to articulate customary international law norms, the majority would have chosen either the original intent route or the jus cogens route. This would have limited the scope of claims actionable under the ATS to those already recognized by either the First Congress or by the Supreme Court itself in Sosa.

Justice Scalia’s critical response to the majority’s decision supports the broad reading of Sosa posited in this article. Using blunt language, Justice Scalia’s concurrence characterizes the majority’s opinion as an invitation to a “judicial lawmaking role [that] would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.”93 Justice Scalia disputed the Court’s reasoning and argued that “creating a federal command (federal common law) out of ‘international norms,’ and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.”94 More specifically, in challenging the Court’s approach, Justice Scalia stated, “The question is not what case or congressional action prevents federal courts from applying the law of nations as part of the general common law; it is what authorizes that peculiar exception from Erie’s fundamental holding that a general common law does not exist.”95

The majority addressed Justice Scalia’s charges as unfounded. The Court did not give lower federal courts free license to create new common law in a willy-nilly fashion, or to ignore the Erie doctrine. Rather, it affirmed that the role of federal courts is to devise legal principles where appropriate. The majority, answering Justice Scalia’s concurring opinion, discussed why the Erie doctrine did not preclude the judiciary from developing new norms of customary international law:

Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. . . . It would take some explaining to say now that federal courts must avert their

92. Sosa, 542 U.S. at 724-25 (internal citations omitted).
93. Id. at 739.
94. Id. at 743.
95. Id. at 744.
gaze entirely from any international norm intended to protect individuals.96

This reasoning embodies the notable significance of Sosa. In refuting Justice Scalia, the majority makes very clear that federal judges have the authority to articulate new legal norms, and that they can be trusted to do so.

The majority’s discussion also shines light on various justices’ views on the role of federal judges. The role of judges has been very much in the news in the past ten years and is seen as part of the current “culture wars.”97 But the question of the proper role of judges has existed since the creation of the federal judiciary in the eighteenth century. Alexander Hamilton stated that the judiciary “may truly be said to have neither FORCE nor WILL, but merely judgment.”98 Blackstone viewed judges as “the depositories of the law; the living oracles.”99 More recently, conservatives, such as those in the Federalist Society and certain Republican members of Congress, have argued vociferously that judges must eschew their own views and “neutrally” assess any conflict by applying “the law” as it appears in a statute or in prior case law.100 Upon announcing his nomination of Chief Justice John Roberts, Jr., President George W. Bush made clear that he would nominate judges who “will strictly apply the Constitution and laws, [and] not legislate from the bench.”101 Subsequently, during his confirmation hearings, Chief Justice Roberts stated, “Judges are like umpires. Umpires don’t make the rules, they apply them.”102

Chief Justice Roberts’ analogy makes for a good sound bite. But as Professor Erwin Chemerinsky has noted, the “umpire” analogy is misleading:

Although both make decisions, it is hard to think of a less apt analogy. An umpire applies rules created by others; the Supreme Court, through its decisions, creates rules that others play by. An umpire’s views should not make a difference in how plays are called; a Supreme Court Justice’s views make an enormous difference.103

96. Id. at 729-30 (citations omitted).
99. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.
101. President George W. Bush, Address to the Nation Announcing the Nomination of John G. Roberts, Jr., to be an Associate Justice of the United States Supreme Court, in 41 WKLY. COMP. PRES. DOC. 1192, 1192 (July 19, 2005).
Such rhetoric, essentially dismissing judicial discretion, fails to acknowledge the realities of how Supreme Court justices—conservative or liberal—actually decide cases and thus shape the law. Moreover, despite his “umpire” analogy, since assuming the position as Chief Justice, Roberts has exercised tremendous influence on shaping constitutional law and moving the Court to the right.\textsuperscript{104}

Notably, during his confirmation hearings, Justice Samuel Alito acknowledged that “when a case involving discrimination comes before him, he thinks of his relatives who suffered anti-Italian discrimination. And when a case comes before him involving children, he cannot help thinking about his own kids.”\textsuperscript{105} Indeed, whether they acknowledge it or not, justices “vote almost all of the time in accordance with their own personal, political and religious views.”\textsuperscript{106}

In recognizing the ambiguity between “the role that judges actually play” and “the role they should play, which might be different,”\textsuperscript{107} Judge Richard A. Posner, of the U.S. Court of Appeals for the Seventh Circuit, identifies a “zone of reasonableness within which a decision either way can be defended persuasively, or at least plausibly, using the resources of judicial rhetoric.”\textsuperscript{108} Furthermore, “the zone can be narrow or wide—narrow when formalist analysis provides a satisfactory solution, wide when it does not,” and a decision made within this “zone” can be neither right nor wrong.\textsuperscript{109}

Judge Posner’s ideas reflect the reality of judicial decision-making, which requires judges to perform balancing tests and to use their judgment. Professor Chemerinsky observes: “In a recent case, Justice Scalia, writing for the Court, stressed that the application of the exclusionary rule depends on a weighing of its costs and benefits.”\textsuperscript{110} Thus, “[e]ven originalism, which presents itself as a theory of constitutional interpretation divorced from the values of individual judges, allows tremendous judicial discretion,” because judges must eventually choose among different choices when deciding to whom or how the protections of a law must apply.\textsuperscript{111}

Against this backdrop, \textit{Sosa} provides a more complete and candid assessment of a judge’s role. \textit{Sosa} charged the federal courts with determining and defining norms of customary law, and provided guidelines for recognizing those norms. The

\textsuperscript{104} See Adam Liptak, Roberts Court Shifts Right, Tipped by Kennedy, N.Y. TIMES, June 30, 2009, http://www.nytimes.com/2009/07/01/us/01scotus.html?pagewanted=1 ("The court took mainly incremental steps in major cases concerning voting rights, employment discrimination, criminal procedure and campaign finance. But the chief justice’s fingerprints were on all of them, and he left clues that the court is only one decision away from fundamental change in many areas of the law.").


\textsuperscript{106} Id.


\textsuperscript{108} Id. at 1053.

\textsuperscript{109} Id.

\textsuperscript{110} Chemerinsky, Seeing the Emperor’s Clothes, supra note 103, at 1072; see Hudson v. Michigan, 547 U.S. 586, 589-90 (2006) (explaining that the Court has held the exclusionary rule only to apply where its benefits of deterrence outweigh its social costs).

\textsuperscript{111} Chemerinsky, Seeing the Emperor’s Clothes, supra note 103, at 1072.
Supreme Court found that “no development in the two centuries from the enactment of [ATCA] to the birth of the modern line of cases ... has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.”

In doing so, the Supreme Court recognized that federal courts, at least when it comes to analyzing human rights violations, are not just “umpires” and that the U.S. jurisprudential system fundamentally requires judges to determine what the law is. As such, Sosa honestly recognized and articulated the important role that courts play in shaping the law, and consequently our very social fabric.

In bestowing the authority to define new norms of customary international law as they arise, the Supreme Court gave its seal of approval to lower federal courts making new law. This recognition of the important role federal courts play in shaping the law is a true and accurate assessment of what judges actually do and cuts through charged political debates about the role of judges.

B. Because Sosa recognizes that customary law is not stagnant, customary international law is the most effective tool in combating serious abuses

Sosa is also significant because it recognizes that customary international law is ever-evolving and not stagnant. The Supreme Court in Sosa drew on a long history of jurisprudence to find that customary international law is ever-evolving. The “boundaries of the law of nations in the late eighteenth century were different from those of customary international law today.” In fact, in the last few centuries, many private-law aspects of customary international law have been incorporated into domestic law, “while new rules of customary international law emerged in areas like human rights.” As such, the framers “understood that customary international law evolves and that the law of nations in their own time differed from that of Greece and Rome.”

As the Supreme Court acknowledged, the difficulty of defining customary international law stems from the fact that this area of law “does not lend itself to static definition.” That “[m]ost experts and judges agree that judges must assess whether a violation of the ‘law of nations’ has occurred according to current rather than past definitions of international law” should indicate that “what constitutes a violation therefore will constantly evolve as individual international practices gradually develop into customary international law.”

112. Sosa, 542 U.S. at 724-25.
113. See id. at 727-28 (discussing the significance for federal courts of new international norms and current issues in modern international law).
114. See, e.g., id. at 714-15 (reviewing the two principal elements of international law in existence during the early years of the United States).
115. Dodge, supra note 32, at 21.
116. Id. at 22.
117. Id.
119. Kedian, supra note 118 at 1406.
The Sosa Court, in finding that ATCA encompasses more than the claims contemplated by the First Congress,120 made clear that human rights law, like everything else, evolves with time. In doing so, the Court ensured that human rights law would remain a viable force to combat serious abuses in both the near and distant future. This includes types of abuses, that we cannot envision today. Just as the First Congress could never have conceived of basic elements of today’s world (such as computers, the Internet, or nuclear weapons), so too federal judges cannot foresee the future or conceive of the types of human rights abuses that might arise.

The fact that the majority of the U.S. Supreme Court recognized that a rights-oriented jurisprudence evolves to solve actual societal problems in the present is significant, particularly when contrasted with the Court’s views on constitutional law. Because customary international human rights law is ever-evolving, the question of original intent (that divides the justices in many important constitutional cases) is absent in determining whether a human rights norm exists or is violated. This means that human rights abuse victims can receive swifter adjudication of their claims if they focus exclusively on customary international human rights law, and by-pass constitutional claims.

1. Historical Divisions Among Justices on Constitutional Interpretation

There has been an ideological debate between members of the Supreme Court concerning the application of the Constitution to important social issues.121 One camp, the “Originalists,” believes that the Constitution is a document—frozen in time—that bestows only rights that are expressly stated or were contemplated by the framers and ratifiers in the eighteenth century.122 The other camp, the “Nonoriginalists” (or “Developmentalists”), believes that the Constitution is a living and breathing document, whose words are nimble and can be used to address social issues and situations that were not and could not have been contemplated by the framers.123 As Professor Chemerinsky explains:

Originalism is the view that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution.” In contrast, nonoriginalism is the “contrary view that courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document.”124

120. See Sosa, 542 U.S. at 724-25 (“[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations . . . . [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 . . . .”).
121. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 17 (3d ed. 2006) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW].
122. See id. (“Originalists believe that the Court should find a right to exist in the Constitution only if it is expressly stated in the text or was clearly intended by its framers.”).
123. See id. (“Nonoriginalists think that it is permissible for the Court to interpret the Constitution to protect rights that are not expressly stated or clearly intended.”).
124. Id. (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 1 (1980)).
While Originalists look to the subjective intent of the framers and ratifiers, Developmentalists interpret rights based on an evolving understanding of context.125

Professor Philip Bobbitt has identified six modalities of constitutional interpretation.126 These modalities fold within the Originalist-Developmentalist duality. For example, a contemporary analysis of reproductive freedom would lead an Originalist to look to the lack of textual acknowledgment or commitment of this right in the Constitution, while a Developmentalist would see this right encompassed by the word “liberty,” which includes a right to privacy.127

Ironically, two people could employ Originalist approaches to the Constitution and reach diametrically different results because these modalities (at least on their face) need be viewed through a political lens. For example, in the *Dred Scott v. Sandford* case,128 Chief Justice Roger Taney upheld the institution of slavery using an Originalist understanding of the Constitution noting that American blacks, even free blacks, were not considered U.S. citizens when the Constitution was ratified almost a century earlier.129 The Chief Justice found that the framers and ratifiers of the Constitution supported slavery and that there was a consensus at the time of ratification that slaves enjoyed no freedom.130

125. Whereas Chemerinsky defines the polarity as “originalism” and “nonoriginalism,” Ely uses the terms “interpretivism” and “noninterpretivism” and Bobbitt employs the terms “strict constructionists” and “reconstructionists.” Compare id. at 17 (employing the terms “originalism” and “nonoriginalism”), with Ely, supra note 124, at 1 (employing the terms “interpretivism” for the view that “judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution” and “noninterpretivism” for the view that “courts should go beyond that set of references and enforce norms that cannot be discovered within the four corners of the document”), and Philip Bobbitt, Constitutional Interpretation 33 (1991) (employing the terms “strict constructionists” as the thinkers who “assert that constitutional interpretation ought to be confined to determining the intentions of the framers” and “reconstructionists” as the thinkers who believe law “is not neutral. It is a mechanism for creating and legitimating configurations of economic and political power” (quoting Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L.J. 1, 6 (1984))).

126. Bobbitt, supra note 125, at 12-13 (explaining the six modalities as: “historical (relying on the intentions of the framers and ratifiers of the Constitution); textual (looking to the meaning of the words of the Constitution alone, as they would be interpreted by the average contemporary ‘man on the street’); structural (inferring rules from the relationships that the Constitution mandates among the structures it sets up); doctrinal (applying rules generated by precedent); ethical (deriving rules from those moral commitments of the American ethos that are reflected in the Constitution); and prudential (seeking to balance the costs and benefits of a particular rule”).

127. See Chemerinsky, Constitutional Law, supra note 121, at 17 (explaining that an Originalist will find a right to exist only if it is expressly stated in the Constitution or “clearly intended by its framers,” whereas a Developmentalist may interpret the Constitution to protect a right that is “not expressly stated or clearly intended”).

128. 60 U.S. 393 (1857).

129. Id. at 396.

130. See id. at 407 (“In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.”).
At the same time, the prominent figure and freed slave Frederick Douglass also called for a “strict construction” of the Constitution, a “plainly written document.”\textsuperscript{131} In his Glasgow Address, Douglass argued that the text of the Constitution did not use the words “slave” or “slavery,” nor did the Constitution support “oppression, cruelty, and wickedness.”\textsuperscript{132} Thus, slavery, according to Douglass, was unconstitutional.

Moreover, although the Originalist view today is more often associated with “conservative” justices while the Developmentalist approach is associated with “liberal” justices, this has not always been the case. As Professor Noah Feldman discusses in his recent book, Scorpions: The Battles and Triumphs of FDR’s Great Supreme Court Justices, Justices Black, Frankfurter, Douglas, and Jackson, who had started out as allies of each other and of President Franklin Delano Roosevelt, became “bitter enemies” after the “[wartime] bonds that connected them were broken.”\textsuperscript{133} Their hatred for each other magnified their differences in constitutional interpretation. The result was four divergent constitutional visions.\textsuperscript{134} Furthermore, “[t]o add constitutional insult to injury, two of the guiding constitutional philosophies these New Deal liberals ultimately produced—Frankfurter’s devotion to judicial restraint and Black’s fealty to ‘original intent’—are now the lodestars” of the conservative wing in today’s Supreme Court.\textsuperscript{135}


\textsuperscript{132} See Douglass, supra note 131 (“In all matters where laws are taught to be made the means of oppression, cruelty, and wickedness, I am for strict construction. . . . Law is not merely an arbitrary enactment with regard to justice, reason, or humanity. Blackstone defines it to be a rule prescribed by the supreme power of the State commanding what is right and forbidding what is wrong. The speaker at the City Hall laid down some rules of legal interpretation. These rules send us to the history of the law for its meaning. I have no objection to such a course in ordinary cases of doubt. But where human liberty and justice are at stake, the case falls under an entirely different class of rules. There must be something more than history—something more than tradition.”).

\textsuperscript{133} NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES 204, 306 (2010).

\textsuperscript{134} See id. at 306-07, 360-61, 362, 364-65 (explaining that Black’s philosophy was one of “text-based originalism;” that Frankfurter, rejecting originalism, looked at “practice and asserting that legality is constructed out of tradition;” that Douglas was a constitutional pragmatist focused on “what works in the real world;” and that Jackson, rejecting legal authority, judicial decisions, and the original intent of the framers, was in favor of the Court using its practical judgment to resolve the “contest between the different branches of government”).

\textsuperscript{135} Dahlia Lithwick, Egos on the Bench: The Unexpected Legacy of FDR’s Court Packing, SLATE (Nov. 17, 2010), http://www.slate.com/articles/arts/books/2010/11/egos_on_the_bench.html (reviewing FELDMAN, supra note 133).
2. Ideological Rift in the Supreme Court Today

It is no secret that sitting justices of the U.S. Supreme Court hold differing views of constitutional interpretation. Justices Scalia and Thomas, for example, adhere to the school of constitutional Originalism and have consistently criticized the notion that the Constitution is an evolving doctrine.\(^{136}\) As Justice Thomas has stated:

Let me put it this way; there are really only two ways to interpret the Constitution—try to discern as best we can what the framers intended or make it up. No matter how ingenious, imaginative or artfully put, unless interpretive methodologies are tied to the original intent of the framers, they have no more basis in the Constitution than the latest football scores. To be sure, even the most conscientious effort to adhere to the original intent of the framers of our Constitution is flawed, as all methodologies and human institutions are; but at least originalism has the advantage of being legitimate and, I might add, impartial.\(^{137}\)

Justice Stephen Breyer, on the other hand, holds a different view of the Constitution. While he too is concerned with the ability of the Court to interpret the Constitution in a manner that builds and maintains its legitimacy, his views on how that occurs are entirely opposite of those of Justices Scalia and Thomas.

In his recently released book, Making Our Democracy Work: A Judge’s View, Justice Breyer describes that the Originalist approach to constitutional interpretation “will reassure the public that the Court’s interpretation reflects what history shows to have been the framers’ detailed intentions, not the judge’s own.”\(^{138}\) However, Justice Breyer notes that there are serious problems with this interpretive approach:

For one thing, it is less “objective” than one might think. When courts consider difficult questions of constitutional law, history often fails to provide specific objective directions. The legal question at hand may be narrow. Relevant historical material may be difficult to find. As Justice Robert H. Jackson pointed out, “Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”\(^{139}\)

\(^{136}\) See André Douglas Pond Cummings, Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: “The Sun Don’t Shine Here in This Part of Town,” 21 HARV. BLACKLETTER L.J. 1, 13 (explaining that Originalists try to interpret the Constitution as closely as possible as the framers intended the Constitution’s text to be understood).

\(^{137}\) See Justice Clarence Thomas, Wriston in Opinion, WALL ST. J., Oct. 20, 2008, (arguing that Originalism is the only way to interpret the Constitution).

\(^{138}\) JUSTICE BREYER, supra note 131, at 76.

\(^{139}\) Id. at 76–77 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952))
Instead of relying on fixed concepts of constitutional interpretation, “politics,” or “subjectivity,” Justice Breyer suggests that in practice most judges rely on a pragmatic approach. As Justice Breyer explains, judges “must remain truthful to the text and ‘reconstruct’ past solutions ‘imaginatively’ as applied to present circumstances, at the same time projecting the purposes (or values) that inspired those past solutions to help resolve the present problem.” Thus, Justice Breyer contends that judges must interpret text in a manner that enhances the basic statutory or constitutional objectives.

Similarly, in the 2010 commencement speech at Harvard University, former Supreme Court Justice David Souter challenged the simplistic “fair reading model,” which advocates that constitutional cases be decided based on “a straightforward exercise of reading fairly and viewing facts objectively.” The former justice cautioned that constitutional judging goes beyond fair reading and any objective examination of the facts of a case. Instead, constitutional judging requires the recognition that constitutions contain general language specifically to remain relevant over time, that constitutional values may sometimes conflict, and that judges must first understand the contextual significance of a set of facts before they can interpret constitutional provisions.

To illustrate his point, Justice Souter referred to two Supreme Court cases, *Pentagon Papers* and *Brown v. Board of Education*. In *Pentagon Papers*, the government sought a restraining order to bar The New York Times from publishing classified government documents detailing U.S. political and military involvement in Vietnam from 1945 to 1967. While the Court found in that case that the government had not met the difficult burden to justify a prior restraint and that The New York Times could publish the documents, Justice Souter posited that the majority also acknowledged “that at some point the authority to govern . . . could limit the right to publish.” Justice Souter explained that, despite its plain language, the First Amendment fails as an absolute guarantee “because the Constitution has to be read as a whole, and when it is, other values crop up in potential conflict with an unfettered right. . . .” As a result, the Supreme Court, at

---

140. Id. at 80.
141. Id. at 81.
143. Id.
144. Id.
148. Id.; Justice Souter, supra note 142.
149. Justice Souter, supra note 142. Justice Souter noted that the government, though unsuccessful in *Pentagon Papers*, convincingly argued that “[t]he Constitution also granted authority to the government to provide for the security of the nation” as well as “authority to the president to manage foreign policy and command the military.” Id. He also declared that the Court conceded “that at some point the authority to govern that [the government] invoked could limit the right to publish.” Id.
times, must weigh competing constitutional rights and decide which one should prevail in the particular circumstance before the Court.\textsuperscript{150}

To explain the significance of constitutional facts, Justice Souter recalled \textit{Brown v. Board of Education} and its predecessor, \textit{Plessy v. Ferguson}.\textsuperscript{151} He noted that the Court’s divergent decisions in these otherwise factually similar cases were primarily due to the \textit{zeitgeist} in which each case was decided, and not to the Constitution itself.\textsuperscript{152} In 1896, when the Supreme Court decided \textit{Plessy}, it found that the newly-enacted Equal Protection Clause of the Fourteenth Amendment was satisfied by having “separate but equal” facilities for different races.\textsuperscript{153} The Court reached the exact opposite decision in its 1954 \textit{Brown} decision, holding that segregated schools were “inherently unequal.”\textsuperscript{154} Whereas the justices in 1954 “looked at enforced separation without the revolting background of slavery” and “found a meaning in segregating the races by law . . . ,” the justices in 1896 still had first-hand memories of lawful human slavery and did not consider the facts of \textit{Plessy} to be objectionable.\textsuperscript{155} It is important to remember that the Constitution itself did not change between 1896 and 1954. The language of the Fourteenth Amendment that the Court interpreted in 1896 was the same as the language interpreted in 1954. Justice Souter emphasized that the only thing that changed was how a court living in a different time period perceived nearly identical facts.\textsuperscript{156}

In the last ten years, acrimony among the justices concerning constitutional interpretation has become especially pronounced. This fundamental disagreement has led to a divided Court issuing five-to-four decisions in landmark cases.\textsuperscript{157}

\textsuperscript{150} Id. Justice Souter stated: “We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one.” Id.

\textsuperscript{151} 163 U.S. 537 (1896).

\textsuperscript{152} Justice Souter, supra note 142 (“[T]he best clue to the difference between the cases is the dates they were decided, which I think lead to the explanation for their divergent results.”).

\textsuperscript{153} \textit{Plessy}, 163 U.S. at 548; id. at 552 (Harlan, J., dissenting).

\textsuperscript{154} \textit{Brown}, 347 U.S. at 495.

\textsuperscript{155} Justice Souter, supra note 142.

\textsuperscript{156} Id.

\textsuperscript{157} E.g., \textit{Brown}, v. Plata, 131 S. Ct. 1910 (2011) (holding, by 5-4 margin, that California’s overcrowded prison conditions are a violation of prisoners’ Eighth Amendment rights); Citizens United v. Fed. Election Comm’n, 130 S. Ct. 876, 886 (2010) (declaring, by a 5-4 margin, that the First Amendment protects unlimited corporate and union funding of independent political speech); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (finding, by a 5-4 margin, that the Second Amendment protects right to carry firearms in one’s home and for other traditional purposes); Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding as unconstitutional, by a 5-4 margin, executions of defendants convicted of child rape); Roper v. Simmons, 543 U.S. 551, 568 (2005) (declaring unconstitutional, by 5-4 margin, executions of minors); see also Gerard J. Clark, \textit{An Introduction to Constitutional Interpretation}, 34 SUFFOLK U. L. REV. 485, 486-510 (2001) (detailing various interpretative schemes employed by Justices throughout history, which have led to split decisions).

Furthermore, a recent study on the rising practice of oral dissents from the bench emphasizes the increasing polarization of the court. See Adam Liptak, \textit{In a Polarized Court, Getting the Last Word}, N.Y. TIMES, Mar. 8, 2010, http://www.nytimes.com/2010/03/09/us/09bar.html (“Dissenting from the bench . . . may indicate that bargaining and accommodation have broken down irreparably.”); Jill Duffy and Elizabeth Lambert, Dissents from the Bench: A Compilation of Oral Dissents by U.S. Supreme Court Justices, Law Library Journal Vol 102:1 [2010-1], 7.
Recent cases reflecting this sharp divide include *Bush v. Gore*, District of Columbia v. *Heller*, and *Citizens United v. Federal Election Commission*, with concurring and dissenting opinions documenting an increasingly acerbic dynamic between the justices.

Justices now directly rebuke each other in their opinions, often expressing dissatisfaction with their colleagues’ reasoning in pointed footnotes. Additionally, there is an increasing trend of dissenting justices reading their opinions from the bench, demonstrating that the “bargaining and accommodation among ideologically proximate justices has broken down irreparably.”

*Bush*, a per curiam Supreme Court decision, resolved the highly-contested 2000 presidential election. The majority found that the Florida Supreme Court’s mandate for a recount violated the Equal Protection Clause of the Fourteenth Amendment. Three of the concurring justices further found that the Florida Supreme Court misinterpreted Florida election law and effectively substituted its own judgment for that of the Florida legislature.

In his dissent, Justice Stevens reprimanded the Court’s deviation from its “settled practice to accept the opinions of the highest courts of the States as providing the final answers” on state law issues. Justice Stevens continued that only on rare occasions may “either federal statutes or the Federal Constitution . . . require federal judicial intervention in state elections”—and this was “not such an occasion.” He concluded his dissenting opinion by saying: “Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly clear. It is the Nation’s

---

158. 531 U.S. 98 (2000).
159. 554 U.S. at 570.
160. 130 S. Ct. at 876.
161. In *Citizens United* and *Heller*, the majority and dissenting opinions took turns parsing out the language of the First and Second Amendments, and examining the historical, political, and plain meanings of the text while criticizing the approach undertaken by Justices who disagreed. *E.g.*, *Citizens United*, 130 S. Ct. at 906 (discussing the original understanding of First Amendment protections by the Founders); *id.* at 928 n.6 (Scalia, J., concurring) (criticizing the dissent’s conclusion by using a dictionary to interpret the “Freedom of the Press” clause in the First Amendment); *id.* at 936-38 (Stevens, J., concurring in part and dissenting in part) (pointing to three narrower grounds of decision that the majority failed to consider); *id.* at 950-51 (examining the original understanding of the First Amendment); *Heller*, 554 U.S. at 578-92 (discussing the historical meaning of “Right of the People” and “To Keep and Bear Arms” and criticizing the dissent’s interpretation of the phrases); *id.* at 644-52 (Stevens, J., dissenting) (interpreting the phrases “Right of the People” and “To Keep and Bear Arms” and criticizing the majority’s interpretation).
162. See infra notes 165-191 and accompanying text.
163. William D. Blake & Hans J. Hacker, “The Brooding Spirit of the Law”: Supreme Court Justices Reading Dissents from the Bench, 31 JUST. SYST. J., 1, 1 (2010); see also Liptak, supra note 157 (“Over the 36 years Warren E. Burger and William H. Rehnquist served as Chief Justices, there were on average three dissents read from the bench each term. In the first four years of the court under Chief Justice John G. Roberts Jr., the number rose by a quarter, to 3.75.”). In 2010, former Justice John Paul Stevens spent twenty minutes reading his dissent, rebutting the majority decision in *Citizens United*. *Id.* In fact, all but three of the sixteen oral dissents in the Roberts court were delivered by the court’s liberal wing. *Id.*
165. *Id.* at 123 (Stevens, J., dissenting).
166. *Id.*
confidence in the judge as an impartial guardian of the rule of law.”

Justice Ginsburg offered a more candid opinion, challenging the majority’s willingness to strike down a state high court’s own interpretation of state law. More specifically, Justice Ginsburg highlighted a certain level of hypocrisy by the majority, saying, “I would have thought the ‘cautious approach’ we counsel when federal courts address matters of state law and our commitment to ‘build[ing] cooperative judicial federalism’ demanded greater restraint.” Notably, Justice Ginsburg signed her dissent with “I dissent,” which some commentators note is a rare deviation from the traditionally used “I respectfully dissent.”

In *Heller*, the Supreme Court held that the Second Amendment protected a person’s right to possess firearms for private use within the home. Even though the Court cautioned that the right was not unlimited, the Court was so divided on the issues presented by the case that Justice Scalia’s majority opinion acknowledged the dissenters’ criticism and derision with particular frankness.

For example, in Footnote 4, Justice Scalia addresses Justice Stevens’ criticism of the majority’s discussion of the Second Amendment’s prefatory clause. In Footnote 14, Justice Scalia characterizes Justice Stevens’ argument as “bizarre.” Furthermore, in several other instances, Justice Scalia chose strong language to rebut the dissenters, stating, for example, that “Justice Stevens is dead wrong to think that the right to petition is ‘primarily collective in nature.’” He also called Justice Breyer’s interpretive approach inappropriately “judge-empowering.”

In his dissenting opinion in *Heller*, Justice Stevens called the Court’s majority decision “a feeble attempt . . . that places more emphasis on the Court’s decisional process than on the reasoning in the opinion itself.” Justice Breyer offered a more provocative criticism of the majority opinion, stating that he was “puzzled” and calling the majority’s reasoning “wrong” or “unsupported” on several occasions.

167. Id. at 128-29.
168. Id. at 139 (Ginsburg, J., dissenting) (citations omitted).
169. Id. at 144.
170. LAWRENCE S. WRIGHTSMAN, THE PSYCHOLOGY OF THE SUPREME COURT 166 (2006). However, not all commentators agree with that notion. Id.; see Linda Greenhouse, BUSH v. GORE: A Special Report; Election Case a Test and a Trauma for Justices, N.Y. TIMES, Feb. 20, 2001, http://www.nytimes.com/2001/02/20/us/bush-v-gore-a-special-report-election-case-a-test-and-a-trauma-for-justices.html?pagewanted=all&src=pm (“While Justice Ginsburg’s opinion drew considerable notice for its omission of the adverb ‘respectfully’ from the closing ‘I dissent,’ that was a choice, it was pointed out, that she frequently made for economy of style rather than to convey a particular level of anger.”).
171. *Heller*, 554 U.S. at 635.
172. See, e.g., id. at 634 (“[Justice Breyer] criticizes us for declining to establish a level of scrutiny for evaluating Second Amendment restrictions.”); id. at 635 (“Justice Breyer chides us for leaving so many applications of [the Second Amendment] in doubt. . . .”).
173. Id. at 578 n.4.
174. Id. at 591 n.14.
175. Id. at 579 n.5.
176. *Heller*, 554 U.S. at 634.
177. Id. at 639 (Stevens, J., dissenting).
178. E.g., *Heller*, 554 U.S. at 681 (Breyer, J., dissenting) (“The majority’s conclusion is wrong for two independent reasons.”); id. at 690 (“Contrary to the majority’s unsupported suggestion . . . .”); id. at 687 (“The majority is wrong when it says that the District’s law is unconstitutional. . . .”); id. at 692 (“I am puzzled by the majority’s unwillingness. . . .”); id. at 721 (“I am similarly puzzled by the majority’s
More recently, in *Citizens United*, the Supreme Court diverged from a century of precedent by extending First Amendment protections to allow corporate funding of political campaigns.\textsuperscript{179} In a footnote, Chief Justice Roberts protested the dissent’s accusation that the majority reached its conclusion “much too quick[ly]” by ignoring *Citizens United*’s arguments.\textsuperscript{180} Similarly, also in footnotes, Justice Scalia responded directly to the dissent’s assertions, and characterized the dissent’s reasoning as “sophistry.”\textsuperscript{181}

In a comprehensive partial dissent, Justice Stevens summarized his disapproval of the Court’s majority decision, describing that part of the decision as “profoundly misguided,”\textsuperscript{182} “backwards,”\textsuperscript{183} and “a dramatic break from [the Court’s] past”\textsuperscript{184} that “threatens to undermine the integrity of elected institutions across the Nation.”\textsuperscript{185} In particular, Justice Stevens charged the majority with “chang[ing] the case to give themselves an opportunity to change the law” simply because they were “unhappy with the limited nature of the case before [the Court].”\textsuperscript{186}

More markedly, Justice Stevens acknowledged the interpretive differences between the majority and the dissent, stating: “We do not share [the majority’s] view of the First Amendment. Our reading of the Constitution would not lead us to strike down any statutes or overturn any precedents in this case, and we therefore have no occasion to practice constitutional avoidance. . . .”\textsuperscript{187} Justice Stevens challenged Justice Scalia’s persistent loyalty to the “originalist methodology,” criticizing Justice Scalia for “adduc[ing] no statements . . . even to suggest that the contrary proposition better reflects the kind of right that the drafters and ratifiers of the Free Speech Clause thought they were enshrin[ing].”\textsuperscript{188} Justice Stevens admonished: “nothing in our constitutional history dictates today’s outcome. To the contrary, this history helps illuminate just how extraordinarily dissonant the decision is.”\textsuperscript{189} He then concluded his dissent with a strong condemnation of the majority:

> Today’s decision is backwards in many senses. It elevates the majority’s agenda over the litigants’ submissions, facial attacks over as-applied claims, broad constitutional theories over narrow statutory grounds, individual dissenting opinions over

\begin{footnotes}
\item[179] *Citizens United*, 130 S. Ct. at 886.
\item[180] Id. at 919 n.1 (Roberts, C.J., concurring).
\item[181] Id. at 928 n.7 (Scalia, J., concurring); see also, e.g., id. at 926 n.2 (“[I]t is surely fanciful to think that a consensus of hostility towards corporations was transformed into general favor at some *magical moment* between 1791 and 1796.” (emphasis added)).
\item[182] Id. at 929 (Stevens, J., concurring in part and dissenting in part).
\item[183] Id. at 979.
\item[184] *Citizens United*, 130 S. Ct. at 930.
\item[185] Id. at 931.
\item[186] Id. at 932.
\item[187] Id. at 938 n.16.
\item[188] Id. at 951.
\item[189] Id. at 952.
\end{footnotes}
precedential holdings, assertion over tradition, absolutism over empiricism, rhetoric over reality. Our colleagues have arrived at [their] conclusion . . . only after mischaracterizing both the reach and rationale of those authorities, and after bypassing or ignoring rules of judicial restraint used to cabin the Court’s lawmaking power. . . . At bottom, the Court’s opinion is thus a rejection of the common sense of the American people. . . .

Such rifts in the U.S. Supreme Court over constitutional interpretation are not new. Indeed, as discussed above, the Supreme Court in the Roosevelt era was extremely contentious, even referred to as “nine scorpions in a bottle.” But they are frequent today, and as demonstrated above, very contentious.

The very existence of this contentious dichotomy between Originalist and Developmentalist justices detracts from the actual examination and analysis of pressing societal and legal issues. Sosa is important because its definition of customary international law as ever-evolving bypasses the Originalist-Developmentalist debate completely. The Originalist-Developmentalist polemic is meaningless when one examines rights through a customary international law lens.

Sosa states clearly that human rights law is ever-evolving and that one cannot foresee what would fall under the rubric of customary international law in the future. This makes human rights law, particularly customary international human rights law, superior to civil rights law for pursuing any rights-based litigation. It allows judges to focus on the wrong alleged and to determine whether it can be legally redressed by either an already recognized norm of customary international law or by a new one.

Although the Sosa Court discussed the issue of statutory intent in the context of examining customary international law norms, the Court did so in a way that is very different in nature than the intent analysis proposed by the Originalists in constitutional interpretation. More specifically, the Sosa majority explicitly rejected limiting courts to a finite group of customary international human rights norms. Instead, the Court specified that in defining and recognizing new norms of customary international law, lower court judges should be guided by the severity of

190. Citizens United, 130 S. Ct. at 979.
191. See Feldman, supra note 133, at 437 n.1 (detailing information regarding the origin and meaning of the quote); cf. Lawrence M. Friedman, The Rehnquist Court: Some More or Less Historic Comments, in THE REHNQUIST COURT: A RETROSPECTIVE 143, 145 (Martin H. Belsky ed., 2002) (“There is a famous description of the Court, sometimes ascribed to Oliver Wendell Holmes, Jr., as nine scorpions in a bottle. [The Justices] may still be scorpions, but each one now seems to have his or her own bottle.” (footnote omitted)).
192. See Sosa, 542 U.S. at 724 (“The jurisdictional grant [of ATCA] is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).
193. Id. at 719-20.
194. See id. at 722 (“The notion that it would have been absurd for the Continental Congress to recommend that States pass positive law to duplicate remedies already available at common law rests on a misunderstanding of the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the ‘brooding omnipresence’ of the common law . . . .”).
the types of torts Congress had in mind in drafting the ATS—namely “violations of safe conduct, infringement of the rights of ambassadors, and piracy.” As such, the Court stated that the intent of the First Congress should be used as a guide in recognizing and identifying new legal norms. Implicit in the Court’s instruction is that lower federal courts can and should recognize new norms where appropriate.

As discussed above, although the Court could have limited all future ATS claims to those we know from the statute’s legislative history, it did not do so. Instead, it found that torture, which was not contemplated by ATS’s drafters, but rather was discussed nearly two centuries later in the Filártiga case, certainly fell within the ambit of serious human rights violations similar in gravity to the 1789 torts, and is actionable under ATS. Indeed, if torture had been actionable in 1789, slave-owners could have been hauled into court for abusing the enslaved. Furthermore, the Court also could have limited actionable customary international human rights law norms strictly to torture and other jus cogens norms, but it rejected that narrow approach to addressing human rights violations.

The Sosa flexible approach towards recognizing human rights norms is very different from the debate that take place between justices surrounding constitutional interpretation. That debate centers on the text of the Constitution itself. Originalist justices and scholars believe that the Constitution should be read narrowly, like a contract, where the presumed interpretation lies within the plain meaning of the document’s actual words. Developmentalists, on the other hand, believe that the Constitution is a more flexible document that can be interpreted to address issues that were not, and could not have been, contemplated by the Constitution’s drafters, such as reproductive rights, women’s rights, and gay rights.

The Supreme Court’s treatment and understanding of customary international law is more practical and fairer to litigants who seek redress for the most serious of wrongs. After Sosa, when considering whether the right to be free from cruel, inhumane, or degrading treatment was violated, a federal court need not spend any energy on the intent of any framers in establishing such a norm. Rather, it can focus

195. Id. (looking to what Blackstone deemed three principal offenses against the law of nations).
196. Id. at 730-31 (“We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism [and] later Congresses seem to have shared our view.”).
197. Id. at 725.
198. Sosa, 542 U.S. at 724-25 (“[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.”).
199. See, e.g., Citizens United, 130 S. Ct. at 896-99 (majority opinion interpreting the First Amendment); id. at 945-53 (Stevens, J., concurring in part and dissenting in part) (providing a different interpretation of the First Amendment than the majority); Heller, 554 U.S. at 576-600 (majority opinion interpreting the Second Amendment); id. at 640-53 (Stevens, J., dissenting) (providing a different interpretation of the Second Amendment than the majority).
200. See Chemerinsky, CONSTITUTIONAL LAW, supra note 121, at 17 (noting definitions of originalism and nonoriginalism).
201. Id.
on whether the right itself was violated. A court can evaluate whether a wrong was committed in the here and now and determine the appropriate remedy. Under Sosa, the wrong does not have to be analyzed through an eighteenth century lens that may not have even recognized the norm as a violation of the law. Eighteenth century norms only come into play in determining whether the current wrong is of the same severity as the original norms of customary international law recognized by the First Congress.\textsuperscript{202} As such, customary international law provides a much more flexible tool to address serious wrongs. It is a more efficient way to remedy human rights violations because it completely evades the “original intent” debate that so deeply divides the current Supreme Court.

### III. THE APPLICABILITY OF SOSA IN DOMESTIC CASES

Although using customary international law is more streamlined and efficient than using the Constitution in resolving disputes concerning our most basic rights, there are significant limitations to implementing the Sosa holding on a wide-scale basis in the United States. To date, customary international law protecting human rights has only been applied to aliens, through the ATS. Yet, there is nothing precluding U.S. citizens from bringing actions under customary international human rights law. Two possible ways to proceed are through 28 U.S.C. § 1331 or 42 U.S.C. § 1983. This section will discuss the benefits and the drawbacks associated with using each approach.

#### A. Availability of customary international human rights law for purely domestic disputes where federal jurisdiction is premised on 28 U.S.C. § 1331

28 U.S.C. § 1331 provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”\textsuperscript{203} The language of § 1331 does not specify that U.S. citizenship is a requirement for federal court jurisdiction. And indeed, the federal courts are filled with cases brought by both U.S. citizens and non-citizens.\textsuperscript{204} Federal courts must have both personal jurisdiction over each defendant\textsuperscript{205} and subject matter jurisdiction.
jurisdiction over the case.\textsuperscript{206} In \textit{Illinois v. City of Milwaukee},\textsuperscript{207} the Supreme Court held that § 1331 jurisdiction exists for claims brought under federal common law as well as federal statutory law: “[w]e see no reason not to give ‘laws’ its natural meaning, . . . and therefore conclude that § 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.”\textsuperscript{208}

The Supreme Court has made clear, beginning with \textit{The Paquete Habana}\textsuperscript{209} over a century ago, and as recently as \textit{Sosa},\textsuperscript{210} that customary international law is part of U.S. domestic law. Thus, customary international law violations “‘arise under’ the laws of the United States” for purposes of § 1331 jurisdiction.\textsuperscript{211} Citing these cases for support, the argument advanced in ATCA cases by plaintiffs is that because customary international law is part of U.S. law, federal courts have jurisdiction to hear the cases directly under § 1331.\textsuperscript{212}

In the human rights context, many courts have recognized the possibility of adjudicating violations of customary international law via § 1331 federal question jurisdiction, but ultimately chose ATCA as the jurisdictional gate.\textsuperscript{213} For example,
the Second Circuit in Filártiga “recognize[d] that [its] reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331.” Nevertheless, the Court instead rested its “decision upon the Alien Tort Statute, in light of that provision’s close coincidence with the jurisdictional facts presented in this case.” The Second Circuit did the same in Kadic v. Karadžić when it held that the leader of a de facto government of a self-proclaimed Bosnian-Serb Republic could be sued under ATCA for using torture, murder, and rape to destroy religious and ethnic groups of Bosnian Muslims and Bosnian Croats. In doing so, the court noted that it “need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction.”

The district courts of New York, New Jersey, and Massachusetts have similarly declined to reach the question of whether plaintiffs may pursue claims grounded in customary international law using § 1331 incorporates such claims into U.S. domestic law. For example, in Jama, Judge Debevoise of the United States District Court of the District of New Jersey determined that “[b]ecause the ATCA provides jurisdiction over plaintiffs’ claims based on international law, it is unnecessary to decide if 28U.S.C. §1331 (federal question jurisdiction) provides an independent basis for jurisdiction.”

Although the majority of courts have been reluctant to rely directly on §1331 jurisdiction when ATCA is available to provide jurisdiction, all federal courts that have granted relief under ATCA, including Sosa, have held that it is a “settled proposition that federal common law incorporates [customary] international law” and that “substantive international [human rights] law is incorporated into the law of the United States.” In the 1980s, the U.S. Government agreed with this

214. Filártiga, 630 F.2d at 887 n.22.
215. Id.
216. Kadic, 70 F.3d at 241-44.
217. Id. at 246.
218. See e.g., In re S. African Apartheid Litig., 346 F. Supp. 2d 538, 553-54 n.18 (S.D.N.Y. 2004) (dismissing claims under ATCA for failure to state a universally accepted violation of international law, and refusing to rule whether violations of international law could be brought under § 1331 generally); Presbyterian Church of Sudan v. Talisman Energy, Inc., 244 F. Supp. 2d 289, 319 (S.D.N.Y. 2003) (no need to determine whether § 1331 provides subject matter jurisdiction where jurisdiction provided by ATCA); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 273 (D.N.J. 1999) (where diversity of citizenship provides federal subject matter jurisdiction, court need not determine whether jurisdiction arises under § 1331 incorporation of international law); Jama, 22 F. Supp. 2d at 363 (finding that ATCA jurisdiction was sufficient to hear the claim, and citing § 1331 discussion in Kadic to find that the court need not address the issues under § 1331); Xuncax, 886 F. Supp. at 193 (“Because I find jurisdiction over the Xuncax plaintiffs’ claims under the Alien Tort Statute, and over plaintiff Ortiz’s claims under the TVPA, I need not definitively decide whether their claims would support the exercise of jurisdiction independently under the federal question statute.”).
220. Kadic, 70 F.3d at 246 (citing The Paquete Habana, 175 U.S. at 700; In re Estate of Ferdinand E. Marcos Human Rights Litig. (Marcos I), 978 F.2d 493, 502 (9th Cir. 1992); Filártiga, 630 F.2d at 866).
221. Doe v. Karadzic, 866 F. Supp. 734, 742 (S.D.N.Y. 1994), rev’d sub nom. Kadic, 70 F.3d 232 (citing Filártiga, 630 F.2d at 887); see Abebe-Jira, 72 F.3d at 848 (“[ATCA] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary
In its amicus brief in *Filártiga*, the United States argued that “customary international law is federal law” and “[a]n action for tort under international law is therefore a case ‘arising under . . . the laws of the United States’ within Article III of the Constitution.”

Using § 1331 as a gateway for citizens’ customary international law claims is consistent with the federal courts’ common law powers articulated in *Sosa*. Section 1331, which supports claims founded on federal common law as well as those of federal statutory origin, should be read as providing broad jurisdiction for U.S. citizens to sue for violations of the law of nations, in the same way that ATCA provides jurisdiction to aliens. Although courts have recognized that customary international law could perhaps be applied to adjudicate human rights claims through § 1331, only one federal court has explicitly done so.

In *Bodner v. Banque Paribas*, Judge Johnson of the Eastern District of New York merged two class action lawsuits in which plaintiffs were seeking recovery of assets seized during the Holocaust. The two cases were substantially identical and differed only in that one was filed by U.S. citizens, while the other was filed international law”); *Igarúa-de la Rosa v. United States*, 417 F.3d 145, 177-78 (1st Cir. 2005) (Torruella, J., dissenting) (“At least some components of customary international law are incorporated into United States domestic law as federal common law.” (citing *Sosa*, 417 F.3d at 729; *Kadic*, 70 F.3d at 246)), cert. denied, 547 U.S. 1035 (2006); see also *Bodner*, 114 F. Supp. 2d at 127 (holding federal district court had subject matter jurisdiction over claims of violations of international law as a matter of federal question, and subsequently finding supplemental jurisdiction over state law claims); *Eastman Kodak Co.*., 978 F. Supp. at 1095 (“Congress has conferred the jurisdiction in question, and the court must exercise it.”); Mushikiwabo v. Barayagwiza, No. 94 Civ.3627 (JSM), 1996 WL 164496, at *2 (S.D.N.Y. Apr. 9, 1996) (holding that court had § 1331 jurisdiction to hear claims over the Torture Victim Protection Act, a statute akin to ATCA which permits U.S. citizens to sue for human rights violations); *Martínez-Baca v. Suárez-Mason*, No. 87-2057, 1988 U.S. Dist. LEXIS 19470, at *5 (N.D. Cal. Apr. 22, 1988) (finding that former Argentine citizen who was victim of that state’s torture had valid claims that arose under customary international law and therefore “under the laws of the United States for purposes of federal question jurisdiction” and that international law also required corresponding remedies); *Forti*, 672 F. Supp. at 1544 (stating “a case presenting claims arising under customary international law arises under the laws of the United States for purposes of federal question jurisdiction,” and thus finding jurisdiction under both ATCA and § 1331, recons. granted in part by 694 F. Supp. 707 (N.D. Cal., 1988), superseded by statute, *Torture Victim Protection Act of 1991*, 28 U.S.C. § 1350, as recognized in *Xuncux*, 886 F. Supp. at 179. See generally Marcos I, 978 F.2d at 500 (affirming district court’s holding that jus cogens prohibiting official torture was a sufficient basis for jurisdiction) (citing Siderman de Blake v. Argentina, 965 F.2d 699, 715, 717-19 (9th Cir. 2003) (holding that official torture would be proper grounds for jurisdiction as a violation of jus cogens, but that it must come under FSIA exception to immunity for sovereign states, which it did not)).


223. See, e.g., *Filártiga*, 630 F.2d at 887 n.22 (noting international law likely falls under § 1331); *Forti*, 672 F. Supp. at 1544 (finding plaintiffs may plead and federal courts may hear claims founded on customary international law arising under § 1331).


by aliens.\textsuperscript{227} Without discussion, the \textit{Bodner} court granted jurisdiction for the citizens’ customary international law claims under § 1331 and jurisdiction for the aliens’ claims under ATCA.\textsuperscript{228} This decision is good law and has not been overturned. In a subsequent—and related—filing by the plaintiffs,\textsuperscript{229} the United States District Court for the Southern District of New York never reached the issue of whether § 1331 conferred jurisdiction over the customary international law claims of U.S. citizens. Instead, the court held that it lacked subject matter jurisdiction because subsequent negotiations between the United States and France provided an alternative venue for adjudicating Holocaust-related disputes against the banks.\textsuperscript{230}

In \textit{Igartúa-de la Rosa v. United States},\textsuperscript{231} Judge Juan Torruella of the First Circuit Court of Appeals echoed Judge Johnson in \textit{Bodner} and recommended in a dissenting opinion that the court “conclude that the jurisdiction conferred by 28 U.S.C. § 1331 can encompass claims [by U.S. citizens] arising under customary international law as incorporated into the federal common law.”\textsuperscript{232} A First Circuit panel sitting \textit{en banc} examined a customary international law claim brought by a U.S. citizen residing in Puerto Rico who challenged his limited right to vote in federal elections.\textsuperscript{233} Judge Torruella’s dissenting opinion, which advocated § 1331 jurisdiction for customary human rights claims of non-alien plaintiffs in the U.S.,\textsuperscript{234} requires further consideration because the majority opinion did not disagree with it in any way.

Judge Torruella’s dissenting opinion states:

Because the right to equal political participation by all citizens meets all of the elements required of an enforceable norm of customary international law, there should be no question that it is incorporated into the domestic law of the United States as federal common law to be applied by the federal courts. Moreover, it is clear that the United States is in violation of that norm with respect to the residents of Puerto Rico. Were we to

\textsuperscript{227} \textit{Benisti v. Banque Paribas} was the second class-action lawsuit before the court. \textit{Id.} \textit{Benisti} was “substantially identical” to \textit{Bodner}, except that the “\textit{Benisti} plaintiffs are aliens who assert their claims under the Alien Tort Claims Act.” \textit{Id.}
\textsuperscript{228} \textit{Id.} at 127-28.
\textsuperscript{229} \textit{Freund}, 592 F. Supp. 2d at 540.
\textsuperscript{230} \textit{Id.} at 548-49, 563-64. Specifically, the two nations stated in an Executive Agreement that “it is in the interest of both the [United States and France] to have a resolution of these issues that is non-adversarial and non-confrontational, and outside of litigation.” \textit{Id.} at 548-49. France promised to “enforce the banks’ promised contributions to [a separate fund] and to provide legal oversight” to the process, while the United States promised to inform courts in all pending and future cases that it would be “in the foreign policy interests of the United States for the Commission, the Foundation, and the Fund to be the exclusive remedies and fora for resolving . . . claims asserted against the Banks and that dismissal of such cases would be in its foreign policy interest.” \textit{Id.} at 549.
\textsuperscript{231} 417 F.3d at 145.
\textsuperscript{232} \textit{Id.} at 178 (Torruella, J., dissenting).
\textsuperscript{233} \textit{Id.} at 146 (majority opinion). Specifically, plaintiff claimed a constitutional right to vote for the office of President and Vice President of the United States. \textit{Id.}
\textsuperscript{234} \textit{Id.} at 178 (Torruella, J., dissenting).
avoid this conclusion, we would not just be “avert[ing] [our] gaze entirely from [an] international norm intended to protect individuals,” but would be placing our heads into the sand to avoid seeing the obvious.

In my view, the majority’s refusal to incorporate the clear and specific customary international law norm requiring equal political participation into federal common law contravenes both the specific language of the Constitution.235

The majority opinion did not address whether there was § 1331 federal question jurisdiction for the plaintiff’s customary international law claim. Rather, it dismissed the customary international law claim on the merits, finding that the norm articulated by the plaintiff was not “clearly established” under customary international law.236 Specifically, the majority found that customary international law does not require a particular form of representational government, and does not address whether the Electoral College should be enlarged or reapportioned.237

Other than Judge Johnson’s opinion in Bodner and Judge Torruella’s unchallenged dissent in Igartúa-de la Rosa, no other court has held that § 1331 provides jurisdiction for non-alien plaintiffs for violations of the law of nations. These cases, taken together with the Second Circuit’s and various federal district courts’ recognition that, in theory, customary international law claims could be adjudicated in federal court under § 1331, provide at least some support for domestic plaintiffs to test the waters by filing human rights lawsuits in federal court.

But, those plaintiffs should be aware of cases that have specifically rejected the use of customary international law for domestic human rights violations. To date, only four courts expressed their reservations about whether §1331 provides jurisdiction. Three of them, however, “rested their reservations on the assumption that federal common law does not recognize private causes of action under the law of nations, an assumption no longer valid under Sosa.”238 For example, in the 1984 case Tel-Oren v. Libyan Arab Republic, the District of Columbia Circuit panel dismissed the case challenging an assault by the Palestinian Liberation Organization (PLO) in Israel should be dismissed.239 The sixty-page “opinion,”

---

235. Igartúa-de la Rosa, 417 F.3d. at 179 (Torruella, J., dissenting) (citations omitted); see id. at 151-52 (majority opinion). The majority had the opportunity to reject the plaintiff’s customary international law argument on its face, but instead implied that petitioner’s claim failed for its lack of specificity and universality in the international norm he set forth. Id. at 151-52. (majority opinion)
236. Id. at 151-52 (majority opinion).
237. Id. at 148, 151.
239. Tel-Oren, 726 F.2d at 775.
However, is really three separate concurring opinions that present very different views on why jurisdiction should be denied under ATCA.240

*Tel-Oren* was one of the first cases to examine ATCA, and many courts are still informed by it. Yet, some of the questions the D.C. Circuit was tackling for the first time in *Tel-Oren* have since been addressed by *Sosa* and other courts. For example, Judge Bork notes that because common consent creates the foundation of the law of nations, the principal subjects of international law are States themselves. “This means that the law of nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.”241 However, since *Tel-Oren*, both state and non-state actors such as military leaders, leaders of de facto governments, former presidents, leaders of political parties, and even corporations have been sued successfully under ATCA for violating customary international law.242 Additionally, the scope of offenses actionable under ATCA and originally articulated by Blackstone has been expanded both by *Sosa* and by other federal court decisions.243

Notably, and most relevant to this article, the § 1331 discussion raised within *Tel-Oren* was only in dicta, and was limited to a pre-*Sosa* understanding of the means by which claims may arise under customary international law.244 Thus, *Tel-Oren* is no longer a firm foundation on which to support a proposition that customary international law is foreclosed to U.S. citizen litigants.

Another case finding that § 1331 does not provide jurisdiction for domestic customary international law claims was also decided pre-*Sosa*. In the 1985 California district court case *Handel v. Artukovic*,245 the court, relying heavily on *Tel-Oren*, held that jurisdiction was not available under § 1331 for customary international law claims brought by former Yugoslavian citizens who became naturalized American citizens.246 The plaintiffs in *Handel* sought damages against the former Minister of the Interior of Croatia who, in his official capacity, allegedly oversaw the implementation of “anti-Jewish legislation; the seizure of property owned by Croatian Jews; and the imprisonment and eventual execution of tens of thousands of Jewish men, women, and children.”247 Specifically, the plaintiffs sought relief for the murder of their Jewish relatives.248 While alien plaintiffs were

---

240. The long opinion is telling of the judiciary’s struggle to comprehend the bounds of ATCA at the time. In short, Judge Edwards did not believe that the law of nations imposed liability for non-state actors. *Id.* at 791-95 (Edwards, J., concurring). Judge Bork did not believe that ATCA provided any cause of action, or a “right to sue,” outside of the three offenses originally listed by Blackstone. *Id.* at 813-22 (Bork, J., concurring). Judge Robb believed that the issue was foreclosed by the political question doctrine. *Id.* at 824-27 (Robb, J., concurring in part and dissenting in part).

241. *Id.* at 817 (Bork, J., concurring) (quoting **ASSA OPPENHEIM, 1 INTERNATIONAL LAW: A TREATISE** 19 (H. Lauterpacht ed. 1955)).

242. *See supra* notes 220-221 and accompanying text.

243. *See, e.g., id.*

244. For a discussion of the pre-*Sosa* assumption that federal common law does not recognize private causes of action under the law of nations, *see supra* notes 238-240 and accompanying text.

245. 601 F. Supp. at 1421.

246. *Id.* at 1426-28.

247. *Id.* at 1424.

248. *Id.* at 1426.
given access to the federal courts through ATCA, the non-alien plaintiffs in this case were unable to seek relief under § 1331.\textsuperscript{249} The foreclosure of jurisdiction in \textit{Handel} for Holocaust-related customary international law claims by U.S. citizens stands in marked contrast to the 2000 finding in \textit{Bodner}, discussed earlier, which provided § 1331 jurisdiction for Holocaust-related claims.\textsuperscript{250} \textit{Bodner} demonstrates that the reasons in \textit{Handel}, which were based largely on \textit{Tel-Oren}, may no longer be persuasive.

The last word on the availability of § 1331 jurisdiction in domestic customary international law claims comes from the Ninth Circuit. Recently, the Ninth Circuit stated, in dicta, that § 1331 could not be used as a gateway for domestic disputes invoking customary international law.\textsuperscript{251} In \textit{Serra v. Lappin}, non-alien federal inmates in California challenged their low prison wages (ranging from nineteen cents to $1.34 per hour) as a violation of constitutional law, treaty law, and customary international law.\textsuperscript{252} The Ninth Circuit denied the constitutional claims, citing a plethora of cases that have held that low prison wages do not constitute constitutional violations.\textsuperscript{253} In addressing the international law claims, the court first dismissed the treaty-based claim, because the treaties and other sources relied upon by the inmates were not self-executing and, therefore, not binding.\textsuperscript{254} Then, the court dismissed the customary international law claims, finding, in dicta, that it did not have jurisdiction over those claims absent a separate statute, such as ATCA or TVPA.\textsuperscript{255}

The Ninth Circuit reasoned that § 1331 jurisdiction for customary international law claims was foreclosed “absent[1] a statute conferring jurisdiction over such claims.”\textsuperscript{256} The court recognized that while ATCA was the “only possible vehicle for a claim like Plaintiffs” it did not apply in \textit{Serra} because the plaintiffs were not aliens.\textsuperscript{257}  

\begin{itemize}
  \item \textsuperscript{249} See id. at 1427 (“[W]hile the ‘violation’ language of section 1350may be interpreted as explicitly granting a cause of action, the ‘arising under’ language of section 1331 cannot be so interpreted. Section 1331, standing alone, does not give the Court jurisdiction over plaintiffs’ claims.”).
  \item \textsuperscript{250} Bodner, 114 F. Supp. 2d at 138.
  \item \textsuperscript{251} Serra v. Lappin, 600 F.3d 1191, 1199 (9th Cir. 2010) (holding that domestic parties generally must rely on domestic law when they sue each other over domestic injuries in federal court).
  \item \textsuperscript{252} Id. at 1195.
  \item \textsuperscript{253} Id. at 1196; see Piatt v. MacDougall, 773 F.2d 1032, 1035 (9th Cir. 1985) (holding that forcing an inmate to work without pay is not a violation of a constitutionally-protected right); Draper v. Rhay, 315 F.2d 193, 197 (9th Cir. 1963) (holding that there is no issue of peonage or involuntary servitude when a person has been duly tried, convicted, sentenced, and imprisoned according to the law).
  \item \textsuperscript{254} Serra, 600 F.3d at 1197; see Sosa, 542 U.S. at 735 (holding that the International Covenant on Civil and Political Rights was ratified with the express understanding that it was not self-executing and therefore creates no obligations enforceable in federal courts).
  \item \textsuperscript{255} See Serra, 600 F.3d at 1197 (noting that absent a statute conferring jurisdiction on the courts to enforce private rights, the plaintiffs cannot prevail under customary international law); see also id. at 1197 n.7 (“If any plaintiff could bring any claim alleging a violation of the law of nations under federal-question jurisdiction, there would be no need for statutes such as the ATS and the Torture Victim Protection Act . . . which recognize or create limited causes of action for particular classes of plaintiffs (aliens) or particular violations (torture).”).
  \item \textsuperscript{256} Id. at 1197.
  \item \textsuperscript{257} Id. at 1198 (“The ATS admits no cause of action by non-alients.”).
\end{itemize}
But, the Ninth Circuit’s reasoning does not survive closer inspection. Serra cites one principal case, Princz v. Federal Republic of Germany,258 for its premise that the customary international law claim “fails because customary international law is not a source of judicially enforceable private rights in the absence of a statute conferring jurisdiction over such claims.”259 However, Princz stands for a quite different holding and does not even mention § 1331. In Princz, a Jewish U.S. citizen sued the Federal Republic of Germany for the severe atrocities he suffered during the Holocaust, while a prisoner at Nazi concentration camps.260 Princz attempted to hold the Republic of Germany accountable under an exception to the Foreign Sovereign Immunities Act of 1976 (FSIA), “in which the foreign state has waived its immunity either explicitly or by implication.”261 Princz argued that the Third Reich impliedly waived Germany’s sovereign immunity under FSIA by violating jus cogens norms of the law of nations.262 The majority disagreed with this argument, holding that “an implied waiver depends upon the foreign government’s having at some point indicated its amenability to suit.”263 The Court of Appeals for the District of Columbia Circuit held that because Princz did not maintain that the Third Reich had waived immunity for actions arising from the Nazi atrocities, the exception to sovereign immunity was inapplicable.264 The court held, “[w]e have no warrant, therefore, for holding that the violation of jus cogens norms by the Third Reich constitutes an implied waiver of sovereign immunity under the FSIA.”265

The Princz majority referenced the law of nations in a footnote but made no mention whatsoever of § 1331.266 The discussion in Princz is focused on whether

258. 26 F.3d 1166 (D.C. Cir. 1994).
259. See id. at 1174 n.1 (citation omitted).
260. Id. at 1168.
262. Princz, 26 F.3d at 1173.
263. Id. at 1174.
264. Id. at 1174-75.
265. Id. at 1174.
266. The relevant footnote in Princz that Serra relies upon for its assertion that customary international law cannot be adjudicated based on § 1331 jurisdiction states:

Our dissenting colleague Judge Wald suggests, in effect, that because the Congress has not expressly excluded suits for the violation of jus cogens norms from the scope of § 1605(a)(1), international law requires that we “construe the [FSIA] to encompass an implied waiver exception” for such suits, thus providing jurisdiction over Mr. Princz’s claims. While it is true that “international law is part of our law,” . . . it is also our law that a federal court is not competent to hear a claim arising under international law absent a statute granting such jurisdiction. Judge Wald finds that grant through a creative, not to say strained, reading of the FSIA against the background of international law itself.

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country’s diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.
FSIA should be informed by customary international law in order to exercise jurisdiction over the Third Reich for the plaintiff’s domestic claims of false imprisonment, assault and battery, and negligent and intentional infliction of emotional distress, and recovery quantum meruit for the value of his labor at concentration camps. 267

Princz does not provide support for the Ninth Circuit’s assertions in Serra concerning the lack of federal court jurisdiction over customary international law claims raised by U.S. citizens. Rather, Princz speaks to whether customary international law principles should expand the breadth of claims brought under the waiver to immunity by implication in the Federal Sovereign Immunities Act. 268 Indeed, Princz did not even raise any customary international law claims in his complaint. If Princz stood for the proposition that the Ninth Circuit attributes to it, then the D.C. Circuit could have simply bypassed the sovereign immunity discussion altogether to withhold jurisdiction over the Jewish-American citizen’s claims based solely on § 1331.

The Ninth Circuit’s analysis in Serra of whether domestic human rights cases can be heard as § 1331 federal question jurisdiction is also flawed in that the court incorrectly analyzed the Murray v. Charming Betsy 269 doctrine. Although the court could have used the Charming Betsy doctrine alone to dismiss the case, it instead contorted the doctrine to address the jurisdictional issue alone and missed the doctrine’s real application to the case. As Chief Justice Marshall originally penned in Charming Betsy, “[i]t has . . . been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” 270 This doctrine of statutory interpretation has been used to apply customary international law where congressional intent is ambiguous. 271 In determining the prison-wage claim, the Ninth Circuit easily could have applied the Charming Betsy doctrine to the merits of the case to find that customary international law was not applicable because the Inmate Work and Performance Pay Program 272 unambiguously authorized the Attorney General to determine wages of inmate-workers. 273

Serra is an unfortunate case for testing the boundaries of customary international law in a purely domestic sphere. The court would not allow customary international law to be used where well-established constitutional law directly

Id. at 1174 n.1 (citations omitted).

267. Id. at 1171-75.
268. Princz, 26 F.3d at 1173-75 (“[T]he amici argue that the Third Reich impliedly waived Germany’s sovereign immunity under the FSIA by violating jus cogens norms of the law of nations.”). 269. 6 U.S. (2 Cranch) 64 (1804). 270. Id. at 118.
271. See Serra, 600 F.3d at 1198 (“[W]here fairly possible, a United States statute is to be construed as not to conflict with international law or with an international agreement with the U.S.” (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (1987))). 272. 18 U.S.C. §§ 4121-29.
273. Serra, 600 F.3d at 1199-200; see 18 U.S.C. § 4125(d) (“[T]he Attorney General is authorized to provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, under such rules and regulations as he may prescribe.”).
conflicted with such claims.  

The best that can be said of Serra is that the court’s analysis might have been different if there were not well-established constitutional law that conflicted directly with the plaintiffs’ customary international law claims. Indeed, a successful customary international law claim would be one where the human rights law espoused is thoroughly consistent with well-established constitutional law. Serra is a reminder that customary international law claims brought by domestic plaintiffs must be consistent with well-established constitutional principles, as was the case in Jama.  

In Jama, the federal district court for the first time de-coupled the customary international law norms of the right to be free from torture and the right to be free from cruel, inhumane, or degrading treatment, finding that each is a separate norm of customary international law. In doing so, the court found that the complaint successfully articulated that conditions of confinement for political asylum seekers could rise to a violation of customary international law. The Jama court was able to do so, in part, because there was no conflicting constitutional principle that actually permitted the mistreatment of detained aliens.

While Jama was an ATCA case, where federal court jurisdiction was not in question, it provides a model for appropriate domestic customary international law test cases. The Jama lawyers actually cited to Fifth Amendment due process cases and Eighth Amendment “cruel and unusual punishment” cases to show that the conditions of confinement to which the asylum seekers were subjected would violate the U.S. Constitution, had the plaintiffs been U.S. citizens. Moreover, plaintiffs were able to show that all internal U.S. government documents dealing with detention of aliens supported their right to humane treatment and did not endorse the types of abuses inflicted upon them by their U.S. citizen jailers.

Based on the scant case law in this area, it is wholly possible that federal courts would indeed allow for purely domestic customary international human

---

274. Serra, 600 F.3d at 1198 (stating that when reasonably possible, a statute should be construed so as not to conflict with either an international agreement to which the U.S. is a party or with international law).

275. See Jama, 22 F. Supp. 2d at 365 (holding that the United States has not waived its sovereign immunity under the Alien Tort Claims Act); see also Canadian Transp. Co. v. United States, 663 F.2d 1081, 1092 (D.C. Cir. 1980) (holding that even if customary international law is able to be applied to sovereign nations under the Alien Tort Claims Act, it cannot be applied to the U.S. since there is no waiver of sovereign immunity).


277. Id. (“The mental and physical abuses which are alleged to have been inflicted upon plaintiffs violate the international human rights norm of the right to be free from cruel, inhuman and degrading treatment.”).

278. Id. at 371.

279. See Compl. No. 41(a), Jama v. U.S. I.N.S., 1997 WL 34640280 (D.N.J. June 16, 1997) (“The Contract required Defendant Esmor Corporation to treat asylum seekers humanely and to protect the asylum seekers’ physical well-being and mental health.”); see also Jama, 22 F. Supp. 2d at 362 (“Plaintiffs have included among their papers in opposition to the motion to dismiss nineteen treaties, charters on human rights, conventions and other international instruments articulating the rights of refugees and seekers of asylum and condemning or prohibiting in general or specific terms many of the kinds of abuses which are alleged in the complaint.”).
rights law claims where jurisdiction is based on § 1331. There are policy reasons for applying customary international law domestically. Failure to apply customary international law through § 1331 can lead to bizarre and unequal results. This is illustrated by comparing Bodner and Handel, the two Holocaust cases discussed above with the following two cases related to nonconsensual medical experimentation.

In White v. Paulsen, a 1998 case, former prisoners brought a human rights suit under § 1331 against physicians and state officials for radiation experiments allegedly conducted on them without informed consent while in the custody of the State of Washington. The United States District Court of the Eastern District of Washington held that nonconsensual medical experimentation on domestic prisoners was not a violation of § 1331 as a “crime against humanity” because the statute did not give rise to a private cause of action under customary international law. The Paulsen court listed factors that preclude relief under customary international law, including the existence of adequate domestic remedies based on the Eighth Amendment, the Federal Tort Claims Act, and state tort law. The Paulsen court also noted that in the Torture Victim Protection Act, Congress directly authorized relief from torture conducted under color of law of a “foreign” nation, but the authorization did not extend to the case of domestic incidents. The Paulsen court ultimately dismissed the prisoners’ claim for relief for “crimes against humanity.” It is unclear what became of these prisoners, as no subsequent case history is recorded of their challenge.

Juxtaposing the Paulsen holding with a Second Circuit decision highlights the inequity that results when customary international law cannot be used domestically. In Abdullahi v. Pfizer, the Second Circuit held that the same violation challenged in Paulsen did indeed violate a norm of customary international law—the right to be free of nonconsensual medical experimentation. In Abdullahi, pharmaceutical company Pfizer was found to have tested a new bacterial meningitis antibiotic,
which had not been FDA-approved in the U.S., on children in Nigeria without informed consent. In Abdullahi, the customary international law violation of nonconsensual medical experimentation was raised through ATCA. Thus, Nigerian children were granted relief for nonconsensual medical experimentation, but prisoners in the custody of the State of Washington were denied relief even though they argued that the same exact norm of customary international law had been violated.

Despite the undisputed general acceptance of an evolving nature of customary international law, Revisionist scholarship that challenges the availability of customary international law claims brought under either ATCA or §1331 has emerged. Revisionists attempt to excuse Filártiga as a Second Circuit misunderstanding of precedent. Furthermore, Revisionists endeavor to cleverly, but unconvincingly, recast the Supreme Court’s decision in Sosa as a rejection, rather than acceptance, of the use of customary international law.

Regardless of the Court’s actual affirmation of customary international law in Sosa, Revisionists interpret the Court’s language about the nature of claims available under ATCA as a denunciation of the use of customary international law. That interpretation does not hold water. Revisionists caution that using customary international law would create a floodgate of prohibitions ranging from acts of “torture, genocide, and slavery,” to “applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation,” and even “the right to form and join trade unions and the right to a free primary education.” In short, Revisionists are concerned that “[t]he list of putative [customary international law] norms keeps growing.” This, however, is not an honest analysis. It is clear that torture, genocide, and slavery are prohibited not only as violations of customary international law and domestic U.S. law, but also as jus cogens violations.

288. Id. at 168-70.
289. Id. at 187-88.
290. Compare Abdullahi, 562 F.3d at 166 (holding that the nonconsensual medical experimentation was a prohibition of the universally accepted norm of customary international law), with Paulsen, 997 F. Supp. at 1384 (holding that the plaintiffs had “access to an array of domestic remedies for the alleged wrongs that underlie Plaintiffs’ asserted international law cause of action . . . .”).
291. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 874 (1997) (“It is true that Filártiga and its ATS progeny have held that CIL is part of the ‘Laws of the United States’ for purposes of Article III, but Filártiga’s conclusion rested on a mistaken historical analysis rather than an analysis of modern constitutional principles. Filártiga’s conclusion generally has not spread beyond the Article III context, contrary to what the modern position would suggest.”).
292. See generally Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 Harv. L. Rev. 869, 873 (2007) (“Sosa cannot reasonably be read as embracing the modern position [that customary international law self-executes federal common law] and, indeed, is best read as rejecting it.”).
293. Id. at 900 (“[T]he Court in Sosa departed in many respects from the lower courts’ prevailing approach to recognizing [customary international law] causes of action in [Alien Tort Statute] cases.”).
295. Id.
296. See Bassiouni, supra note 84, at 68.
Moreover, the law is very clear that where a conflict arises between domestic law and customary international law, U.S. law prevails.\textsuperscript{297} “It has long been established that customary international law is part of the law of the United States to the limited extent that ‘where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.’”\textsuperscript{298} Customary international law would come into play in the U.S. only where there is a gap in our domestic laws—i.e., where domestic law is ambiguous or does not conflict with the norm being espoused.\textsuperscript{299} The Supreme Court has made clear that customary international law cannot replace clearly established and defined U.S. law that stands in direct opposition to the norm.\textsuperscript{300}

In a continued attempt to effectively neuter the evolution of customary international law, Revisionist scholarship has recently called into question the uncertainties surrounding it:

It is not clear how much state practice is required in order to generate a rule of CIL, although most commentators agree that there must be “extensive” or “widespread” practice among the states for which the practice is relevant. Nor is it clear how long nations must engage in the practice before it becomes a rule of CIL. Historically, CIL formation was thought to be an inherently slow process, but technological changes in communication, the rise of international institutions, and other developments are thought to have condensed the time period such that CIL can arise very quickly in some circumstances.\textsuperscript{301}

\textsuperscript{297} See United States v. Yousef, 327 F.3d 56, 93 (2d Cir. 2003) (“If a statute makes plain Congress’s intent . . . then Article III courts, which can overrule Congressional enactments only when such enactments conflict with the Constitution, . . . must enforce the intent of Congress irrespective of whether the statute conforms to customary international law.”).

\textsuperscript{298} Id. at 92 (emphasis in original) (quoting The Paquete Habana, 175 U.S. at 700).

\textsuperscript{299} See id. at 93 (“In the event that there is no ‘controlling executive or legislative act or judicial decision’ that the court must apply, . . . a court should identify the norms of customary international law . . . .” (quoting The Paquete Habana, 175 U.S. at 700) (citation omitted)); see also Charming Betsy, 6 U.S. (2 Cranch) at 118 (finding the use of customary international law by way of the Charming Betsy canon only comes into play where congressional intent is ambiguous); Sinclair Ref. Co. v. Atkinson, 370 U.S. 195, 215 (1962) (“In dealing with problems of interpretation and application of federal statutes, we have no power to change deliberate choices of legislative policy that Congress has made within its constitutional powers.”).

\textsuperscript{300} Yousef, 327 F.3d at 93 (“[W]hile courts are ‘bound by the law of nations which is part of the law of the land,’ Congress may ‘manifest [its] will’ to apply a different rule ‘by passing an act for the purpose.’” (quoting The Nereide, 13 U.S. (9 Cranch) at 423 (Marshall, C.J.))); see also McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963) (stating that congressional action may supersede customary international law by a clearly expressed affirmative intention); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 939 (D.C. Cir. 1988) (holding that statutes are not subject to challenge on the basis of a violation of customary international law); United States v. Pinto-Meja, 720 F.2d 248, 259 (2d Cir. 1983) (holding that Congress can legislate in excess of the limits imposed by international law); United States v. Howard-Arias, 679 F.2d 363, 371-72 (4th Cir. 1982) (holding that “the United States may violate international law principles . . . if international law and congressional statutes conflict”).

\textsuperscript{301} Curtis A. Bradley & Mitu Gulati, \textit{Withdrawing from International Custom}, 120 \textit{YALE L.J.} 202,
This range of scholarship may pose questions about the breadth and application of customary international law that need to be explored further; however, its concerns appear to be fixated on the legitimacy of adjudicating human rights violations that are widely accepted and clearly defined. In short, the Revisionist line of thought attempts to invalidate the longstanding principle that customary international law can be used to hold accountable hostis humani generis, enemies of all mankind. To support the notion suggested by Revisionists that customary international law should be restricted to the original three violations of piracy, violations of safe conduct, and crimes against ambassadors, 302 is to logically undermine the original thrust of customary international law, which is to hold accountable those who perform gross violations that undermine basic universal legal principles. It would open the door to having severe humanitarian harms go unpunished. It would have corporations and individuals alike be allowed to directly perform, or aid and abet, widely-cognizable wrongs such as torture, mass murder, forced labor, and mass rape. This violates the very jurisprudential principles underlying customary international law, which the Supreme Court upheld in Sosa.

In sum, there is some judicial support for § 1331 jurisdiction for customary international law claims in U.S. courts, regardless of the plaintiffs’ citizenship or alienage status. 303 Three out of four of the decisions denying such relief were from the pre-Sosa era. 304 The fourth, from the Ninth Circuit, is a case that could never have survived, given clear conflicting constitutional law addressing the exact issues raised in the case. 305

Litigants can attempt to use customary international law domestically, to adjudicate human rights violations on behalf of U.S. citizens. Such claims should be raised very carefully and after much consideration to ensure that bad case law is not created, which would harm potentially strong future cases. 306

210 (2010).

302. Bradley, Goldsmith, & Moore, supra note 292, at 935-36 (“CIL is incorporated into federal law, under the analysis in Sosa, only when its incorporation has been authorized either by the structure of the Constitution or by the political branches, and it is to be applied interstitially in a manner consistent with the relevant policies of the political branches. Nevertheless, . . . there are a number of plausible structural and statutory authorizations for the domestication of CIL in select areas . . . .”).

303. See Bodner, 114 F. Supp. 2d at 127 (involving citizens, the court stated that “[f]ederal courts have jurisdiction over claims involving violations of customary international law.”); Kadic, 70 F.3d at 246 (involving non-citizens, the court held that it “need not rule definitively on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on section 1331 jurisdiction”), cert. denied, 518 U.S. 1005 (1996).

304. See Handel, 601 F. Supp. at 1427 (“[Section 1331], standing alone, does not give the Court jurisdiction over plaintiffs’ claims.”); Tel-Oren, 726 F.2d at 775 (affirming the dismissal of the action for lack of subject matter jurisdiction).

305. See Serra, 600 F.3d at 1198 n.7. The court noted that there would be no need for statutes like the Torture Victim Protection Act or ATS if any plaintiff could file a claim “alleging a violation of the law of nations under federal-question jurisdiction,” because such statutes “recognize or create limited causes of action for particular classes of plaintiffs (aliens) or particular violations (torture).” Id.

306. Lawyers should also keep in mind that bringing customary international human rights claims solely under § 1331, without also invoking other relevant statutes, raises ethical concerns. Lawyers have obligations to their clients to raise all cognizable claims on their clients’ behalf. Failing to raise either ATCA (on behalf of aliens) or § 1983 claims (on behalf of U.S. citizens) while raising only human

Another possible way to sue for violations of customary international human rights norms in domestic jurisprudence is through 42 U.S.C. § 1983. Upon first inspection, using the plain language of 42 U.S.C. § 1983, as well as its legislative history and early cases interpreting the statute, this is doable.\footnote{See Maine v. Thiboutot, 448 U.S. 1, 4 (1980) ("The question before us is whether the phrase ‘and laws,’ as used in §1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.")} However, a spate of recent opinions raise doubts as to whether this course of action would be successful.\footnote{See Gonzaga Univ. v. Doe, 536 U.S. 273, 283 (2002) ("[I]t is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section."); Blessing v. Freestone, 520 U.S. 329, 340 (1997) ("In order to seek redress through §1983 . . . a plaintiff must assert the violation of a federal right, not merely a violation of federal law."); Livadas v. Bradshaw, 512 U.S. 107, 133 (1994) (stating that except for exceptional cases "[§ 1983] remains a generally and presumptively available remedy for claimed violations of federal law.").}

Section 1983 is not a source of substantive rights. It provides a method for redress where rights conferred in the Constitution and federal laws have been breached. Enacted in 1871, the statute sat relatively dormant until 1961 when the Supreme Court held in \textit{Monroe v. Pape}\footnote{365 U.S. 167, 170 (1961) ("[T]he history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation" like 18 U.S.C. § 241, which "embraced only rights that an individual has by reason of his relation to the central government, not to state governments.").} that a family who was subjected to an illegal search and seizure by the Chicago police could sue for money damages under the statute.\footnote{Id. at 172 ("Congress, in enacting [R.S. § 1979, 42 U.S.C. § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.").} Section 1983 states simply that:

\begin{quote}
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .
\end{quote}

rights claims under the federal question doctrine could compromise a client’s chance of succeeding. If a complaint is dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, a lawyer will be precluded from filing another lawsuit arising under the same facts but brought under a different legal theory.

\footnote{See Maine v. Thiboutot, 448 U.S. 1, 4 (1980) ("The question before us is whether the phrase ‘and laws,’ as used in §1983, means what it says, or whether it should be limited to some subset of laws. Given that Congress attached no modifiers to the phrase, the plain language of the statute undoubtedly embraces respondents’ claim that petitioners violated the Social Security Act.")); Monroe v. Pape, 365 U.S. 167, 170 (1961) ("[T]he history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation" like 18 U.S.C. § 241, which "embraced only rights that an individual has by reason of his relation to the central government, not to state governments.").}

\footnote{Id. at 172 ("Congress, in enacting [R.S. § 1979, 42 U.S.C. § 1983], meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official’s abuse of his position.").}

\footnote{42 U.S.C. § 1983.}
Commonly referred to as the “Ku Klux Klan Act,” the statute was enacted as part of the Civil Rights Act of 1871.\textsuperscript{312} One reason for its passage was to provide civil remedies against abuses being committed against former slaves in southern states.\textsuperscript{313}

The vehicle through which customary international human rights claims can be litigated through § 1983 is the “secured by the Constitution and laws” provision of the statute.\textsuperscript{314} Although it has been used primarily in civil rights suits, facially, § 1983 allows plaintiffs to invoke the statute if other federal “laws” are violated.\textsuperscript{315} Again, on its face, this would include violations of federal common law including customary international law. Early case law supports an expansive use of § 1983.\textsuperscript{316} However, the Supreme Court has continued to narrow the types of claims that fall within the “and laws” rubric.\textsuperscript{317} Given that narrowing, it is highly unlikely that any federal court would allow customary international human rights claims to proceed using § 1983.

The Supreme Court in \textit{Maine v. Thiboutot},\textsuperscript{318} the first decision to expound on the scope of “laws” covered by § 1983, did so quite matter-of-factly.\textsuperscript{319} The Court held that the word “laws” in § 1983 “means what it says,”\textsuperscript{320} insinuating that it was ludicrous for the Court to even address the question; furthermore, the Court claimed that “Congress was aware of what it was doing, and the legislative history [of § 1983] does not demonstrate that the plain language was not intended.”\textsuperscript{321}

The Court concluded that “any doubt as to [the meaning of the word “laws”] has been resolved by our several cases suggesting, explicitly or implicitly, that the

\begin{itemize}
\item \textsuperscript{312} See \textit{Monroe}, 365 U.S. at 204 (Frankfurter, J., dissenting) (“Petitioners base their claim to relief in the federal courts on what was enacted as § 1 of the ‘Ku Klux Act’ of April 20, 1871, ‘An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States’” that was codified with “insignificant rephrasing” at § 1983).
\item \textsuperscript{313} See \textit{id.} at 185 (majority opinion) (stating that the act “not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people . . . [that] may be deprived of rights”).
\item \textsuperscript{314} See \textit{Thiboutot}, 448 U.S. at 4 (“[A]ny doubt as to its meaning has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.”).
\item \textsuperscript{315} \textit{Id.}
\item \textsuperscript{316} \textit{Id.} (noting that because Congress did not attach modifiers to the phrase “and laws,” the “plain language” of § 1983 supports the claim that the petitioners violated the Social Security Act); \textit{Pape}, 365 U.S. at 170 (stating that “the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation” like 18 U.S.C § 241, which “embraced only rights that an individual has by reason of his relation to the central government, not to state governments.”).
\item \textsuperscript{317} See \textit{Gonzaga}, 536 U.S. at 283 (holding that “it is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section”); \textit{Blessing}, 520 U.S. at 340 (holding that a plaintiff must claim a violation of a federal right—as opposed to a mere violation of federal law—in order to seek redress under § 1983); \textit{Livas}, 512 U.S. at 133 (stating that except under exceptional circumstances, § 1983 is “generally and presumptively” available as remedy for “claimed violations of federal law”).
\item \textsuperscript{318} 448 U.S. at 1.
\item \textsuperscript{319} \textit{Id.} at 4 (“[A]ny doubt as to [the] meaning [of § 1983] has been resolved by our several cases suggesting, explicitly or implicitly, that the § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.”).
\item \textsuperscript{320} \textit{Id.} at 12.
\item \textsuperscript{321} \textit{Id.} at 8.
\end{itemize}
§1983 remedy broadly encompasses violations of federal statutory, as well as, constitutional law.”

Thus, according to Thiboutot, “laws” in § 1983 is its plain meaning.

In 1994, this straightforward textual approach was narrowed in Livadas v. Bradshaw. In Livadas, the Court stated that “we have given that provision the effect its terms require, as affording redress for violations of federal statutes, as well as of constitutional norms” and that “§ 1983 remains a generally and presumptively available remedy for claimed violations of federal law.” Since Livadas, the Supreme Court has twice recalibrated its distinction between “violation of a federal statute” and “violation of a federal right,” making it clear that only in the latter case can § 1983 sustain a federal statutory suit.

In Blessing v. Freestone, the Supreme Court held that a plaintiff “must assert the violation of a federal right, not merely a violation of federal law” for a claim to be actionable under § 1983. The respondents in Blessing were five mothers from Arizona whose children were eligible for state child support services under Title IV-D of the Social Security Act. Congress mandated, through Title IV-D, that all states must substantially comply with the requirements of the statute to receive federal funds for participants in the Aid to Families with Dependent Children program. The five mothers filed a § 1983 suit claiming that Arizona’s Title IV-D program violated federal law because Arizona’s scheme did not “substantially comply” with the federal requirements of Title IV-D.

The Supreme Court reversed a Ninth Circuit decision that held that “an enforceable individual right to have the State achieve ‘substantial compliance’ with the Title IV-D” existed. The Supreme Court held that the Ninth Circuit did not

322. Id.
323. Id.
324. 512 U.S. at 132 (“We have, it is true, recognized that even [§1983’s] broad statutory text does not authorize a suit for every alleged violation of federal law.”).
325. Id. at 132-33 (emphasis added). In fact, the Court took the opportunity to list exceptional circumstances under which § 1983 may not be available as a remedy for claimed violations of federal law:

A particular statutory provision, for example, may be so manifestly precatory that it could not fairly be read to impose a “binding obligation” on a governmental unit or its terms may be so “vague and amorphous” that determining whether a “deprivation” might have occurred would strain judicial competence. And Congress itself might make it clear that violation of a statute will not give rise to liability under § 1983, either by express words or by providing a comprehensive alternative enforcement scheme.

Id. (citations omitted).
326. See Gonzaga, 536 U.S. at 283 (“Section 1983 provides a remedy only for the deprivation of ‘rights, privileges, or immunities secured by the Constitution and laws’ of the United States. Accordingly, it is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.’); Blessing, 520 U.S. at 340 (“In order to seek redress through § 1983, however, a plaintiff must assert the violation of a federal right, not merely a violation of federal law.”) (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 106 (1989)).
327. Blessing, 520 U.S. at 340.
328. Id. at 332.
329. Id. at 333-35.
330. Id. at 332-33.
331. Id. at 329.
adequately distinguish “among the numerous provisions of [the Title IV-D program]” and held that the statutory scheme could not be “analyzed so generally.” Title IV-D was designed to guide the state in structuring an effort to support the obligations of the federal legislation, and the Court of Appeals erred by finding that a general enforceable right for state compliance existed within the federal statute. The compliance standard, the court held, is an example of an indirect benefit and not a federal right, even if other parts of Title IV-D contained federal rights.

Accordingly, the case was remanded to the district court with instructions to “construe the complaint in the first instance, in order to determine exactly what rights, considered in their most concrete, specific form, respondents are asserting.” Based upon factors framed in Wilder v. Virginia Hospital Association, the Supreme Court in Blessing put forward three factors to help the lower court make its determination:

1. whether the plaintiff is an intended beneficiary of the statute;
2. whether the plaintiffs’ asserted interests are not so “vague and amorphous” as to be beyond the competence of the judiciary to enforce; and
3. whether the statute imposes a binding obligation on the State.

Blessing made clear that in order to be able to bring suit under § 1983, a federal right must be explicit and not general.

The Supreme Court, in Gonzaga University v. Doe, further reframed and narrowed the definition of federal rights actionable under § 1983. The Court required nothing short of “an unambiguously conferred right to support a cause of action[,] . . . it is rights, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced under the authority of that section.” In Gonzaga, a student brought a suit under § 1983 against the university claiming a provision of the Family Educational Rights and Privacy Act (FERPA) of 1974 was violated.

After graduation, the student hoped to become an elementary school teacher. Under Washington law, an affidavit of good moral character is required

---

332. Id. at 333.
333. Blessing, 520 U.S. at 343 (“Far from creating an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance of a State’s Title IV-D program. Thus, the Secretary must look to the aggregate services provided by the State, not to whether the needs of any particular person have been satisfied.”).
334. Id. at 344.
335. Id. at 344-46.
336. Id. at 346.
339. Id. at 340-41; see also Gonzaga, 536 U.S. at 282-83 (noting the same three factors enumerated by the Court in Blessing).
340. 536 U.S. at 273.
341. Id. at 283.
342. See id. at 277 (Respondent John Doe alleged that Gonzaga University and Roberta League, Gonzaga’s “teacher certification specialist,” had violated FERPA by releasing his personal information to an “unauthorized person.”).
343. Id.
for prospective teachers from their graduating colleges. The official tasked with certifying such affidavits overheard a conversation where the sexual misconduct committed by the student was being discussed. She not only refused to certify an affidavit of good moral character, but also repeated the sexual misconduct rumor to the State. The student claimed this violated his confidentiality rights under FERPA which prohibits "the federal funding of educational institutions that have a policy or practice of releasing education records to unauthorized persons."  

The Supreme Court denied the claim, holding that the FERPA provision in question did not confer an individual right that would be actionable under §1983. Instead, FERPA spoke “in terms of institutional policy and practice, not individual instances of disclosure.” The provisions were found to “entirely lack the sort of ‘rights-creating’ language critical to showing the requisite congressional intent to create new rights.” As an example, the Gonzaga court explained that unlike Titles VI and IX, which state “no person . . . shall . . . be subjected to discrimination,” FERPA’s provisions direct the Secretary of Education to withhold funding of an educational institution that violates the statute. Accordingly, the provision of FERPA at issue in Gonzaga was found not aimed to proffer a right.

The Supreme Court has also narrowed the parameters of “and laws,” finding that it does not include federal statutes that include a remedial scheme: “[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.” In the § 1983 cases discussed above, the Supreme Court looked beyond the plain language of §1983. It asked not whether statutes were laws, but rather whether the particular statute being invoked for § 1983 redress created federal rights. In each case, the basic premise—that federal statutes were included within the term “and laws” of §1983—was taken as settled. But the court created an additional step in its analysis.

Given the Supreme Court’s continuous narrowing of the definition of “and laws” since its 1980 decision in Thiboutot and its ever-increasing focus on not

344. Id.
345. Id.
347. Gonzaga, 536 U.S. at 290.
348. Id. at 288.
349. Id. at 287 (citing Alexander v. Sandoval, 532 U.S. 275, 288-89 (2001); Cannon v. Univ. of Chi., 441 U.S. 677, 690 n.13 (1979)).
350. Id. at 287.
351. Id. at 290.
352. See id. at 273 (determining whether FERPA creates protected rights); Blessing, 520 U.S. at 329 (determining whether Title IV-D gives individuals a federal right); see also Suter v. Artist M., 503 U.S. 347, 347 (1992) (determining whether the Adoption Assistance and Child Welfare Act creates protected rights); Wilder, 496 U.S. at 498 (determining whether the Medicaid Act creates protected rights).
353. See Gonzaga, 536 U.S. at 284 ("[Section] 1983 generally supplies a remedy for the vindication of rights secured by federal statutes."); see also Blessing, 520 U.S. at 340 n.3 (declining to reconsider the Thiboutot Court’s holding that "§ 1983 provides a remedy for violations of federal statutes"); Thiboutot, 448 U.S. at 4 ("[T]he § 1983 remedy broadly encompasses violations of federal statutory as well as constitutional law.").
354. See Thiboutot, 448 U.S. at 4 (finding that “and laws” in §1983 should be given its plain
only statutory authorization from Congress but also on specific rights-creating statutory authorization, it is highly unlikely that § 1983 could be used as a vehicle to adjudicate international human rights claims based on customary international law. Customary international law, as Sosa makes clear, does not articulate a certain set of legal norms. Moreover, customary international law norms are defined by courts, not Congress. As such, customary international law does not create the type of specific enforceable rights that the Supreme Court has stated are needed to successfully sue under § 1983. Thus, while a possibility exists for bringing customary international law claims under § 1331, it does not appear, under the current case law that § 1983 can support customary human rights claims.

IV. LOOKING TO THE U.S. SUPREME COURT TO DETERMINE THE FUTURE OF PURELY DOMESTIC CUSTOMARY INTERNATIONAL LAW CLAIMS IN U.S. COURTS

As discussed above, although customary international law has not yet been applied by U.S. citizens to remedy human rights abuses committed in the United States, there are at least some cases that would support such claims. Additionally, several Justices of the U.S. Supreme Court, through recent rulings and public statements, have also given some indication that perhaps they too would sanction the use of customary international law in purely domestic cases. This section will examine the Supreme Court’s discussions of international law in an effort to determine whether the Court would be willing to embrace customary international law for domestic use.

A. Recent Supreme Court decisions suggest that the justices might be amenable to applying customary international law domestically

One hindrance to the use of international law in U.S. courts is the often-misunderstood distinction between international and foreign law. Unfortunately, politicians and the public often conflate the two bodies of law, making it difficult to advance the use of customary international law in human rights cases. While foreign law refers to the laws of other countries, including the decisions of foreign and international courts, international law refers broadly to legal instruments and practices agreed upon by two or more “civilized nations,” including treaties and

meaning).

355. See, e.g., Bodner, 114 F. Supp. 2d at 127 (granting jurisdiction for customary international law claims under 13 U.S.C § 1331 and the ATCA); Igartúa-de la Rosa, 417 F.3d at 177-78 (Torruella, J., dissenting) (arguing that claims arising under customary international law can be encompassed in federal common law through 13 U.S.C. § 1331).


357. See, e.g., Cindy G. Buys, Burying Our Constitution in the Sand?: Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation, 21 B.Y.U. J. PUB. L. 1, 2-4 n.5 (2007) (noting as an example of this conflation that several newspapers misconstrued comments that were actually critical of foreign law by former Attorney General Alberto Gonzales as being critical of the use of international law).
customary international law. In general, there is consensus among the Supreme Court justices that, unlike international law, foreign law has no binding effect in U.S. courts, since foreign precedents, constitutions, and statutory laws are not products of American democratic processes and are therefore irrelevant in the adjudication of issues in American society. Conversely, the Supreme Court has consistently recognized that international law can impose “binding legal obligations” on the United States.

As some scholars have posited, controversy over the use of foreign law in judicial decision-making arises when U.S. judges give “decisional effect” to foreign law by citing to foreign court opinions as the basis of their decisions. Such decisions, these scholars argue, create deference to foreign law that becomes “a problematic delegation of authority from the federal government to foreign courts.” This alleged improper delegation is why Justice Scalia consistently rejects the use of foreign law in judicial opinions, even when it is used comparatively to explore possible solutions to issues raised in domestic cases. Justice Scalia contends that rulings by foreign courts are irrelevant because foreign courts interpret the constitutions and laws, not of the United States, but of other countries.

This position is in stark contrast with the views of Justice Breyer, who insists that reading the decisions of foreign courts is a way for the justices to stay informed and to gain different perspectives on matters before the Supreme Court. Justice

358. See Statute of the International Court of Justice, 1946 I.C.J. Acts & Docs. 1 Statute of the Court art. 38 ¶ 1 available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0 (defining the function of the ICJ and identifying sources of authority). Other forms of international law include “the general principles of law recognized by civilized nations” and “judicial decisions and teachings of the most highly qualified publicists of the various nations.” Id.


362. Id. at 299; see also John C. Yoo, Treaty Interpretation and the False Sirens of Delegation, 90 CALIF. L. REV. 1305, 1325-33 (2002) (criticizing reliance on federal common law in interpreting treaties, and recommending deference to the executive branch in matters of foreign policy under the political question doctrine).

363. Delahunty & Yoo, supra note 361, at 295.

364. Id.; see Buys, supra note 357, at 7-9, 38-41 (explaining that Justice Scalia is one of the most vocal critics of using international and foreign law in U.S. judicial decision-making, because of the lack of clarity as to when foreign law should be consulted and when foreign legal systems are sufficiently similar to that of the U.S. that they merit consideration); see also U.S. Ass’n of Const. Law, supra note 359 (Justice Scalia explained in a debate with Justice Breyer: “One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is so that you can say . . . ‘Russia follows Miranda,’ but you don't know that Russia doesn't have an Exclusionary rule.”).

365. See U.S. Ass’n of Const. Law, supra note 359 (Justice Breyer, in discussing his majority opinion in an Establishment Clause case, observed: “[O]f course I had to face the fact in France they subsidize a religious school and it isn't the end of the earth. And the same thing is true in Britain, other
Breyer encourages U.S. judges to consult decisions of constitutional courts in other countries to inform—not bind—their own decisions:

[T]heir judges—persons who have jobs something like mine, who has a document something like mine, who has experience something like mine, who is facing a problem something like mine—write an opinion on a subject. Why not read it? It doesn’t bind me. Maybe I will learn something . . . . Other people have different points of view.366

Additionally, when the Supreme Court explicitly mentions a foreign decision or an interpretation of international law in its opinions, Justice Breyer has stated that such references lend credence to foreign justice systems, particularly those of developing democracies. These references could in turn help advance the overall development of globally important areas of law, including customary international human rights law: “After all, some of the countries have courts that have just developed its methods fairly recently. . . and they are trying to protect basic rights.”367 As such, since the U.S. court system is “a well-respected institution,” when U.S. courts refer to foreign cases, advocates in those countries can bring U.S. opinions to their legislatures to help achieve such objectives.368

In the last decade, the U.S. Supreme Court has issued several major decisions in which the justices considered foreign and international law in deciding cases with important social implications, including Atkins v. Virginia,369 Grutter v. Bollinger,370 Lawrence v. Texas,371 Roper v. Simmons,372 and Graham v. Florida.373

countries. So, should I be aware of that? Yes. Should I have—feel that conscientiously I might have to deal with that in my opinion? Yes. Is it something where I’m citing only things that favor me? Of course not. . . . [T]his is what I call opening your eyes, opening your eyes to things that are going on elsewhere, use it for what it’s worth.”

366. Interview by Due Process with Stephen G. Breyer, Justice, United States Supreme Court, at Rutgers Sch. of Law, Newark, N.J. (Apr. 28, 2011).

367. Id.

368. Id. However, there is evidence that this esteemed view of U.S. courts, particularly of the U.S. Supreme Court, is becoming increasingly precarious. While courts around the world have frequently cited to and followed the decisions of the U.S. Supreme Court, “American legal influence is waning.” Adam Liptak, U.S. Court Is Now Guiding Fewer Nations, N.Y. TIMES, Sept. 17, 2008, http://www.nytimes.com/2008/09/18/us/18legal.html. For example, from 1990 through 2002, the Supreme Court of Canada “cited decisions of the United States Supreme Court about a dozen times a year,” but by 2008 “the annual citation rate had fallen by half, to about six.” Id. Presently, instead of looking to U.S. Supreme Court decisions, “foreign courts in developed democracies often cite the rulings of the European Court of Human Rights in cases concerning equality, liberty and prohibitions against cruel treatment . . . .” Id. Significantly, the Supreme Court’s unwillingness to cite to foreign case law has resulted in it “losing the central role it once had among courts in modern democracies.” Id. (quoting Ahron Barak, former Chief Justice of the Supreme Court of Israel).

369. 536 U.S. at 316-17 n.21.


In referencing foreign or international law in each of these cases, the justices did not necessarily do so for “decisional effect.” Instead, they looked to foreign decisions and international legal instruments to try to determine whether there was international consensus on a particular issue.

In 2002, the Supreme Court banned the death penalty for mentally disabled offenders in *Atkins v. Virginia*. The Court not only examined the domestic legislative trend that was moving towards the prohibition of this type of punishment, but also discussed international consensus against executing the mentally ill. Specifically, Justice Stevens referenced an amicus brief filed by the European Union, which cited to numerous reports from the United Nations Commission on Human Rights and also urged the U.S. Supreme Court “to join with [the EU] in condemning the practice” of executing persons with mental retardation. In his opinion, Justice Stevens recognized that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”

In a scathing dissent that was joined by Chief Justice Rehnquist and Justice Thomas, Justice Scalia awarded what he called “the Prize for the Court’s Most Feeble Effort to fabricate ‘national consensus’” to the majority’s “appeal . . . to the views of . . . members of the so-called ‘world community,’” among other groups. Justice Scalia firmly opposed the reference to “the practices of the ‘world community,’” stating that such sources are “irrelevant” because they represent “notions of justice” which are “(thankfully) not always those of our people.” Then, quoting from one of his previous dissents, Justice Scalia reminded the Court:

---

374. See Delahunty & Yoo, supra note 361 and text (explaining “decisional effect”); and see, e.g., *Atkins*, 536 U.S. at 317 n.21 (referencing amicus brief of European Union as additional evidence bolstering U.S. consensus against execution of the mentally ill).

375. See, e.g., *Atkins*, 536 U.S. at 317 n.21 (referencing European Union amicus brief); *Roper*, 543 U.S. at 576-77 (describing U.N. Convention on the Rights of the Child and other international covenants to establish international norm against capital punishment of juveniles); *Lawrence*, 539 U.S. at 573 (citing case from the European Court of Human Rights to establish an international consensus that homosexual conduct is protected).

376. 536 U.S. at 321.

377. Id. at 316 n.21.

378. Id. The brief was originally submitted in *McCarver v. North Carolina*, No. 00-8727, a case “which had presented to the Court the identical question” presented in *Atkins v. Virginia*, Joint Motion of All Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their McCarver Amicus Briefs Considered in this Case in Support of Petitioner at 2, *Atkins*, 536 U.S. 304 (No. 00-8452).


381. Id. at 347 (Scalia, J., dissenting) (referring to the majority’s reliance on the European Union’s amicus brief).

382. Id. at 347-48 (Scalia, J. dissenting). However, some observers note that Justice Scalia embraces one foreign source of law—William Blackstone, the English jurist—“like a beloved old crony . . . .” See, e.g., Steve Sanders, *American Legal Conservatives Oppose the Citation of Foreign Law, But What About the Hallowed Practice of Citing to Blackstone?*, FINELAW (Oct. 10, 2008), http://writ.news.findlaw.com/commentary/20081010_sanders.html (noting irony and, perhaps, hypocrisy in the fact that many American jurists who balk at referencing international sources of law frequently cite to Blackstone).
that it “must never forget that it is a Constitution for the United States of America that we are expounding” and that “the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”

A year later, in a concurring opinion to Grutter v. Bollinger, upholding the affirmative action admissions policy of the University of Michigan Law School, Justice Ginsburg referenced the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which the U.S. ratified in 1994, and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which the U.S. has not ratified. In doing so, Justice Ginsburg observed that the majority decision mirrored “the international understanding of the office of affirmative action.”

Later that same year, the Court struck down Texas’s sodomy law in Lawrence v. Texas, reversing the Court’s 1986 decision in Bowers v. Hardwick. In the majority opinion, Justice Kennedy cited to Dudgeon v. United Kingdom, a decision from the European Court of Human Rights that was “[a]uthoritative in all countries that are members of the Council of Europe,” in considering the universal acceptance of an individual’s right to engage in private consensual conduct. In particular, Justice Kennedy acknowledged that the European decision was indicative of “our Western civilization.” In response, Justice Scalia, again joined by Chief Justice Rehnquist and Justice Thomas, dissented, characterizing Justice Kennedy’s reference to Dudgeon as “[d]angerous dicta” because the Court should not have been imposing “foreign moods, fads, or fashions on Americans.”

In 2005, the Court struck down the death penalty for crimes committed by offenders under the age of eighteen, in Roper v. Simmons. Writing for the majority and referencing an amicus brief filed by the Human Rights Committee of the Bar of England and Wales, Justice Kennedy recognized that while the opinion of the “world community” against the death penalty—as applied to juveniles—is

384. Id. at 344-46 (Ginsburg, J., concurring).
385. Id. at 344.
386. 539 U.S. at 579.
387. Id. at 578 (expressly overruling Bowers v. Hardwick, 478 U.S. 186 (1986), which upheld the constitutionality of a Georgia sodomy law criminalizing consensual sex in private between adults when applied to homosexuals).
389. Id. at 576 (“Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.”).
390. Id. at 573.
391. Id. at 598 (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).
392. 543 U.S at 578. In a 5-4 decision, Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer, penned the majority decision. Id. Justice O’Connor, joined by Justices Scalia, Rehnquist, and Thomas, dissented, questioning whether there was an actual national consensus among the states. Id. at 588 (O’Connor, J., dissenting).
“not controlling” on the Court’s decision, it nevertheless “provide[s] respected and significant confirmation for our own conclusions.” Once again, Justice Scalia called for the rejection of the “basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world,” citing the significant differences between the laws of other countries and those of the U.S.

In 2010, the Supreme Court found in *Graham* that the sentencing of juveniles to life imprisonment without the possibility of parole for non-homicide crimes violated the Eighth Amendment’s protection against cruel and unusual punishment. The majority opinion, authored by Justice Kennedy, considered the sentencing practice “beyond our Nation’s borders” and found “support for its independent conclusion that a particular punishment is cruel and unusual.” Justice Kennedy recognized that while “the United States adheres to a sentencing practice rejected the world over,” the observation “does not control [the Court’s] decision.”

Justice Kennedy states that “international opinion” is “not irrelevant.” The Court thus rejected the State of Florida’s amici, who urged the Court to reject a binding jus cogens norm and to ignore international consensus because the U.S. had not ratified, and was therefore not bound by, the United Nations Convention on the Rights of the Child. Instead, the Court affirmed the viability of international law in its decision-making process, stating:

> The Court has treated the laws and practices of other nations and international agreements as relevant to the Eighth Amendment not because those norms are binding or controlling but because the judgment of the world’s nations that a particular sentencing practice is inconsistent with basic principles of decency.

---

393. *Id.* at 578 (citing Brief for Human Rights Committee of the Bar of England and Wales et al. as Amici Curiae in Support of Respondent at 10-11, *Roper*, 543 U.S. 551 (No. 03-633), and stating, “It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.”).

394. *Id.* at 624 (naming such differences as the constitutionally-provided right to a jury trial and the exclusionary rule, the latter of which “has been universally rejected by other countries”).


396. *Id.* at 2033.

397. *Id.*

398. *Id.* (quoting *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (holding that the Eighth Amendment does not allow the application of the death penalty in cases where the convicted is a minor participant in a felony and does not attempt to kill, intend to kill, or kill)).

399. *See* Brief of Sixteen Members of the U.S. House of Representatives as Amici Curiae in Support of Respondent at 18, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621) (refuting the argument that Article 37 of the United Nations Convention on the Rights of the Child is a jus cogens norm binding on the U.S. because a number of nations have rejected its provisions and actual practice reveals non-compliance); Brief for Solidarity Center for Law and Justice et al. as Amici Curiae in Support of Respondent at 20-21, *Graham*, 130 S. Ct. 2011 (Nos. 08-7412, 08-7621) (claiming that apart from the “high-level” authority of Article 37, to which the U.S. was not a party, no international consensus exists about whether juveniles may be sentenced to life without parole, which is still a matter of progressive development of law).
demonstrates that the Court’s rationale has respected reasoning to support it.400

This clarification seems restricted to issues implicating the Eighth Amendment. But it leaves the door ajar for the Supreme Court’s consideration of customary international law in other contexts.

As many have commented, these opinions are notable in that they represent a culmination of the Supreme Court’s back-and-forth over the use of international and foreign law in constitutional interpretation. But they are also significant in that Justice Kennedy, once considered a “reliable conservative,” and now the Supreme Court’s swing vote, favors looking to foreign and international principles to decide constitutional issues that have significant legal and social impact in this country.401

B. The individual views of Supreme Court justices and their public statements outside of the courtroom shed light on the Court’s overall willingness to recognize international law

The debate among the Supreme Court Justices over international law has extended beyond the courtroom and into various public fora. Several justices have addressed their positions on the use of international law in U.S. courts in public speeches and in their confirmation hearings. Most recently, Justice Breyer has been expounding his thoughts on the Supreme Court’s use of foreign and international laws while promoting his book Making Democracy Work.402

Likewise, in a 2010 speech to the International Academy of Comparative Law at American University, Justice Ginsburg addressed the history and importance of foreign and international law in interpreting American constitutional law.403 She reminded her audience that “[f]rom the birth of the United States as a nation, foreign and international law influenced legal reasoning and judicial decisionmaking.”404 Citing to the influence of international sources used by the founding fathers, such as law treatises, the law merchant,405 and English

400. Graham, 130 S. Ct. at 2034.
402. Interview by Due Process, supra note 366; see The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, 3 INT’L J. CONST. L. 519, 521-22 (2005) (eliciting both Justice Scalia’s opinion that foreign law should never be used to interpret the Constitution and Justice Breyer’s opinion that law emerges from a variety of influences including foreign decisions); Kenneth Anderson, Foreign Law and the U.S. Constitution, POL’Y REV., June & July 2005, at 37 (describing public appearances when Justices O’Connor, Breyer, Ginsburg, and Kennedy favorably referenced the practice of using foreign law in constitutional adjudication).
403. Ruth Bader Ginsburg, Justice, United States Supreme Court, “A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address to the International Academy of Comparative Law (July 30, 2010).
404. Id.
405. The “law merchant” refers to a body of customary medieval European law that was adopted by merchants themselves to govern mercantile transactions. LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW 7-9 (1983).
constitutional law, Justice Ginsburg discussed the role of foreign and international law in the early formation of American jurisprudence.\textsuperscript{406} More importantly, Justice Ginsburg stated, the development of American constitutional law has continued to be informed by “how the law of nations is understood elsewhere.”\textsuperscript{407}

In her speech, Justice Ginsburg also discussed congressional concern over the influence of foreign and international law on American courts by using the confirmation hearings of then-Supreme Court nominee Elena Kagan as an example.\textsuperscript{408} In response to Kagan’s acknowledgment that “having an awareness of what other nations are doing . . . might be useful,”\textsuperscript{409} Justice Ginsburg recalled one senator expressing to her his trepidation that Kagan “believes we can turn to foreign law to get good ideas.”\textsuperscript{410} Justice Ginsburg juxtaposed this response with the view of the Constitution’s framers on the “high importance” to the new nation of our adherence to ‘the laws of nations’ in our commerce with other countries . . . [and how they] looked abroad for both positive and negative examples to guide their course.”\textsuperscript{411}

The question of whether U.S. courts could or should consider foreign and international laws was not posed to Justice Kagan alone. The issue was also raised in the Supreme Court confirmation hearings of Justices Roberts, Alito, and Sotomayor. In the 2005 confirmation hearings of Roberts, Senator Jon Kyl asked: “[W]hat, if anything, is the proper role of foreign law in U.S. Supreme Court decisions? Of course we are not talking about interpreting treaties or foreign contracts, but cases such as those that would involve interpretations of the U.S. Constitution?”\textsuperscript{412} Roberts responded by first raising the issue of accountability, explaining that because “no President accountable to the people appointed that [foreign] judge, and no Senate accountable to the people confirmed that [foreign] judge,” a decision from a foreign judge cannot bind the people in the U.S.\textsuperscript{413} Moreover, the Chief Justice warned of the danger in being able to pick and choose foreign law for support, thereby expanding a judge’s discretion and allowing the incorporation of personal preferences by “cloak[ing] them with the authority of precedent,” which would be a “misuse of precedent.”\textsuperscript{414} The Chief Justice further clarified that reliance on foreign precedent should not “confine judges . . . [nor]

\begin{footnotes}
\item[406] Justice Ginsburg, supra note 403 (explaining how Alexander Hamilton and John Adams used their knowledge of foreign and international law as advocates in legal contests).
\item[407] Id. (quoting an 1815 speech by Chief Justice John Marshall in which he clarifies that while the decisions of other countries’ courts are not binding authority on U.S. courts, these decisions nevertheless “merit respectful attention for their potential persuasive value”).
\item[408] Id.
\item[410] Justice Ginsburg, supra note 403 (quoting an unnamed senator).
\item[411] Id.
\item[413] Id. at 201 (statement of nominee John Roberts).
\item[414] Id.
\end{footnotes}
limit their discretion the way relying on domestic precedent does.”

Notably, Chief Justice Roberts was only addressing the use of foreign law and made no reference to the authority of international law or that of custom international law. Likewise in 2006, Senator Kyl, as a member of the Senate Judiciary Committee, asked then-nominee Judge Alito, “What is the proper role, in your view, of foreign law in U.S. Supreme Court decisions, and when, if ever, is citation to or reliance on these foreign laws appropriate?” In response, Judge Alito carefully stated that he did not believe that foreign law was helpful in constitutional interpretation, but acknowledged that while constitutional interpretation should be devoid of outside influence, there are certain “legal issues that come up in which . . . it is legitimate to look to foreign law,” including the “interpretation of a treaty that has been entered into by many countries” as well as when, in private litigation, “the rule of decision is based on foreign law.”

In the confirmation hearings for Justice Sotomayor, Senator Charles Schumer referenced Sotomayor’s speech on “whether it’s permissible to use foreign law or international law to decide cases[,]” and asked, “Just so the record is 100 percent clear, what do you believe is the appropriate role of any foreign law in the U.S. courts?” In response, Sotomayor stated, “American law does not permit the use of foreign law or international law to interpret the Constitution.” Indeed, in her speech, Sotomayor stated that “American analytic principles do not permit” American courts to use foreign laws to decide cases. However, she acknowledged that “there are situations in which American law tells you to look at international or foreign law.” Justice Sotomayor certainly signaled her understanding that foreign law and international law are different and that each may be applied for different purposes.

The questions posed by the Senate Committee on the Judiciary and the responses provided by the nominees have focused on the use of foreign and international law in constitutional interpretation—not in determining or applying norms of custom international law alone. This suggests that the controversy over the status of customary international law in U.S. courts is not over the independent legitimacy of customary international law itself, but over the impact such law would have on constitutional interpretation. Indeed, this view is also consistent with the current Restatement, which states: “[T]he modern view is that customary international law in the United States is federal law and its determination by the

415. Id.
417. Id. at 370-71 (statement of nominee Samuel Alito).
419. Id. (statement of nominee Sonia Sotomayor).
420. Id. (statement of Charles E. Schumer, United States Senator, quoting Sotomayor’s earlier speech).
421. Id. (statement of nominee Sonia Sotomayor).
federal courts is binding on the State courts." As such, as long as the use of customary international law is divorced from constitutional interpretation, the Supreme Court and other federal courts may indeed be willing to recognize international law as a legitimate source of U.S. law that can remedy human rights abuses domestically.

C. Increased emphasis on international law in legal education could influence the acceptance of international law by the U.S. Supreme Court and other federal courts

Since the mid-1990s, there has been a “marked increase in international law courses and non-course opportunities in law schools.” Some law schools are making these academic offerings mandatory, and integrating them into first-year curricula. Furthermore, law school deans are increasingly feeling pressure to ensure that students who graduate from their schools are prepared for the increasingly globalized world. As Dean Claudio Grossman of American University’s Washington College of Law explains, “[f]ew issues today are strictly ‘domestic’ or strictly ‘international,’ and the ‘interconnected’ nature of the world necessitates cooperation and collaboration with actors around the globe.” Justice Breyer agrees. In a recent public interview at the Rutgers School of Law, he stated:

Indeed, [judges] must look at [international law]. But it is the lawyers who have to tell us where to look. And the lawyers won’t know [what] to tell us unless they are taught themselves where to look in the law schools. And the law schools are unlikely to tell them that unless the bar and the bench indicate that that is an important matter.427

This trend in legal education has not gone unnoticed. In its 2007 rankings of graduate education institutions, U.S. News and World Reports added an “international law” category to its evaluation of law schools, “reflecting the increasing relevance of international law for domestic legal practitioners and the demand for international training from law schools.” Meanwhile, organizations like the International Law Students Association and the International Bar Association now boast a plethora of study abroad programs and international conferences, providing law students and seasoned practitioners plenty of

424. Soohoo, supra note 423, at 81.
426. Id. at 115.
427. Interview by Due Process, supra note 366.
428. Soohoo, supra note 423, at 81.
opportunities to further advance the development of international law.429

As law students become increasingly well-versed in international law, it becomes less “foreign” or “other.” Their participation in judicial decisions as law clerks and, eventually, as jurists may well lead to results very different from cases that outright reject the use of customary international law in purely domestic situations. The training of law students therefore becomes critically important in furthering the relevance and influence of customary international law in the not too distant future.

CONCLUSION

In Sosa, the U.S. Supreme Court discussed the active role that federal judges play in developing customary international law.430 As this article discusses, that recognition has far-reaching implications. Sosa recognizes that rights-based law, namely customary international human rights law, is not frozen in time, but rather evolves to address both contemplated and future human rights violations, which are currently inconceivable.431 As such, Sosa breathes eternal life into customary international law as an effective tool to solve serious societal ills.

Sosa also celebrates the role of the judiciary. Instead of limiting the role of courts in formulating new common law in the human rights arena, the Supreme Court gives its stamp of approval to the way our judiciary functions. The Sosa Court recognized that federal judges are not just “umpires,” but rather interpreters and shapers of the law. As such, the troublesome debate of “Originalism” versus “Developmentalism” that plagues constitutional interpretation is absent from situations involving customary international human rights law. This makes customary international law a more preferable body of law for the prompt resolution of lawsuits involving abusive practices that cause great harm.

Thus far, customary international law in the human rights context has been used successfully by alien plaintiffs in ATS cases. Therefore, the question remains open as to whether non-alien plaintiffs can use customary international law to seek redress for serious human rights violations. Only a handful of courts have addressed the issue with differing results. Thus, the issue of domestic application of customary international law is ripe for litigation, and may indeed be successful


430. Sosa, 542 U.S. at 732-34 (explaining that judgment is necessary to determine whether an international law norm is sufficient to support a cause for action and that judicial tribunals should consult international customs and usages when no controlling treaty, act, or decision exists (citing The Paquete Habana, 175 U.S. at 700)).

431. Id. at 724-25 (acknowledging that the First Congress had intended for claims to be recognized under the law of nations, but that claims based on present-day law of nations are probably not ones that Congress fathomed and should instead rest on the norms of international character defined and accepted by the civilized world).
under the right circumstances. Those circumstances must include only situations where customary international law does not in any way directly conflict with well-established constitutional law or principles.