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BEYOND FORMALISM IN FOREIGN AFFAIRS: A FUNCTIONAL APPROACH TO THE ALIEN TORT STATUTE

For almost a quarter century, courts and judges, government officials and law professors have argued over the place of international law within the American legal system. Today, the "modern position" accepted by several courts of appeals and many leading international and foreign relations law scholars maintains that the federal courts can interpret and enforce customary international law (CIL) as federal common law. Incorporation of CIL as federal law formally occurs through the Alien Tort Statute (ATS), a previously obscure and largely ignored subsection of the Judiciary Act of 1789, whose text allows aliens to seek damages for torts in violation of the law of nations in federal court.[1] According to its supporters, the ATS allows the United States to play an important role in the development and enforcement of CIL generally, and human rights law specifically.[2]

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[1] 28 USC § 1350.

[2] Two of the ATS's most prominent academic supporters along these lines are Deans

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Critics, however, respond that standard approaches to the federal common law as well as the Constitution's formal allocation of the foreign affairs power deprive the courts of any authority to assimilate substantive CIL as federal law.[3] Rather, the ATS vested the federal courts with jurisdiction to hear cases between aliens and, presumably, American defendants—provided that Congress has also created a specific cause of action. Thus was launched one of the sharpest and most bitter debates in recent international legal scholarship, featuring an outpouring of articles even though ATS suits reaching the courts of appeals have numbered no more than two dozen. It is fair to say that neither side has convinced the other.

In last Term's *Sosa v Alvarez Machain*, the Supreme Court waded into this debate for the first time.[4] The decision reflected the stalemate in formalist arguments over the interpretation of the ATS. Drawing upon the textual and structural insights provided by the modern position's critics, the Court concluded that the ATS is merely a jurisdictional statute. Nonetheless, with little explanation, the Court also refused to stop the lower courts from allowing aliens to seek damages in federal court for CIL violations. Why? We believe that the Court was reluctant to end federal judicial participation in the development and enforcement of CIL for unstated functional, policy, or pragmatic reasons, which have also been unexplored in the academic debate.

We use the Court's under-theorized conclusion as an opportunity to take a different approach. Rather than reexamine the ATS's text, structure, and history, we conduct a comparative institutional analysis of the role of the courts in foreign affairs. This approach takes two steps. First, it seeks to define the purpose or social goal of the ATS. Without a definition of the statute's purpose, we cannot de-

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Harold Koh and Anne-Marie Slaughter (formerly Burley). See, for example, Harold Hongju Koh, *Transnational Public Law Litigation*, 100 Yale L J 2347 (1991); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 Am J Intl L 461 (1989).

[3] The most prominent of the critics have been Professors Curtis Bradley and Jack Goldsmith. See, for example, Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv L Rev 815 (1997).

[4] 124 S Ct 2739 (2004). A number of authors have already discussed the *Sosa* case. See, for example, Eugene Kontorovich, *Implementing Sosa v. Alvarez-Machain: What Piracy Reveals About the Alien Tort Statute*, 80 Notre Dame L Rev 111 (2004); Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in Sosa v. Alvarez-Machain*, 2004 Cato Sup Ct Rev 209 (2004); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 Colum L Rev 1492 (2004); J. Harvie Wilkinson III, *Our Structural Constitution*, 104 Colum L Rev 1687 (2004).

termine whether judicial participation is the most effective institutional tool. Second, we compare the institutional capabilities of the judiciary and the executive in implementing foreign policy in general, and in applying CIL in particular. Both a macro- and micro-assessment of the federal courts reveals significant institutional weaknesses in the implementation of foreign policy and CIL. We conclude that the executive branch can more effectively achieve the purpose behind the ATS.

Defenders of the modern position have argued that a jurisdictional approach to the ATS would disrupt American foreign relations by allowing the states, rather than a single federal judiciary, to make and enforce CIL. Recent changes, recognized by the Supreme Court, in the relationship between the executive branch and the states in foreign relations address this concern. The Court has recognized the functional superiority of the President in managing foreign affairs by permitting presidential declarations of international policy to preempt state law. Thus, CIL could continue as part of the common law of the states—enforceable in state court or through diversity jurisdiction in federal court—subject to federal preemption by the President. Under this system, courts would continue to adjudicate CIL cases, while at the same time allowing a functionally superior executive branch to oversee and unify the interpretation of CIL when necessary.

Part I discusses the development and widespread embrace of the modern position on the question of CIL's status as federal law. It then describes the formalist challenge, which generated several responses built on arguments of statutory and constitutional text and history. Part II describes *Sosa*'s conflicted nature: its adoption of the recent critique of the modern position, but also its preservation of a federal court role in developing and enforcing CIL through the ATS. This outcome represents an unspoken recognition of the power of the policy goals behind the modern position.

Part III offers a functional assessment of the statutory purpose of the ATS and of the institutions best positioned to carry it out. We define the ATS's policy as one designed to promote the development and enforcement of CIL generally, and human rights more specifically. We argue that the *Sosa* Court's reading of the ATS assumes that Congress has delegated authority in this area to the courts. Part III concludes that the federal courts have few institutional advantages, and many disadvantages, in the interpretation

and application of CIL. We contend that the executive branch is institutionally superior to the courts in achieving national policy goals in this area.

Conflict between the executive and courts, or disruption in national control over the implementation of CIL, will not occur under the proposal unveiled in Part IV. We argue that the interpretation and enforcement of CIL has long been treated as common law independently interpreted and applied by the state courts. State control of CIL does not create harmful decentralization of foreign policy because of federal preemption by the President. Strong functional reasons support a state-led system of CIL development, supervised by the executive branch, over the system endorsed in *Sosa*.

I

More than two decades of vigorous debate over the ATS among international and foreign relations law scholars preceded *Sosa*. After the Second Circuit's 1980 decision in *Filartiga v Pena-Irala*,[5] scholars widely hailed the ATS as a vehicle for the incorporation of international law into U.S. domestic law and as an important mechanism for the development of international law generally. In the last decade, however, critics have raised serious questions about *Filartiga*'s consistency with the statute's history, its original meaning, and the Constitution's structure. Because of the ATS's brevity and the paucity of historical evidence, the academic literature has reached a stalemate.

A. FILARTIGA AND THE ACADEMY

Filartiga was the first modern decision to enforce CIL in federal court through the ATS. It held that the ATS granted federal courts jurisdiction over lawsuits brought by aliens seeking damages for violations of international human rights law. The Second Circuit endorsed two principles that would become the subject of substantial academic discussion. First, *Filartiga* held that the exercise of jurisdiction over a lawsuit alleging violations of CIL was consistent with Article III's limitations on federal subject matter jurisdiction.[6] Even though the suit, between two aliens, did not fall

[5] 630 F2d 876 (2d Cir 1980).

[6] Id at 885.

under diversity jurisdiction, *Filartiga* held that subject matter jurisdiction existed because the case involved "the law of nations, which has always been part of the federal common law."[7] Second, *Filartiga* held that the Constitution did not require Congress to incorporate the law of nations by statute, despite Congress's power to "Define and Punish Offences against the Law of Nations."[8] "This extravagant claim," *Filartiga* observed, "is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress."[9] Although conceding that federal courts could not "make" new causes of action, *Filartiga* nonetheless concluded that the federal courts were authorized to enforce rights widely recognized and accepted as CIL, even where Congress had not specifically defined such CIL. Such lawsuits could even be brought against alien defendants for acts that occurred abroad.

Prior to *Filartiga*, some leading international legal scholars had advocated the use of domestic courts to incorporate international law into domestic U.S. law.[10] But *Filartiga* gave the idea new life. Rather than focusing on state practice and international relations, scholars could point to a growing number of new judicial decisions that demonstrated both the reality and efficacy of international law.[11] Professor Henkin's article from 1984 was representative:

> As a result, there is now general agreement that international law, as incorporated into domestic law in the United States, is federal, not state law; that cases arising under international law are "cases arising under . . . the Laws of the United States" and therefore are within the judicial power to the United States under article III of the Constitution; that principles of international law as incorporated in the law of the United States are "Laws of the United States" and supreme under article VI; that international law, therefore, is to be determined independently by the federal courts, and ultimately by the United

[7] Id.

[8] US Const, Art I, § 8.

[9] *Filartiga*, 630 F2d at 886.

[10] See, for example, Richard Lillich, *The Proper Role of Domestic Courts in the International Legal Order*, 11 Va J Intl L 9 (1970); Richard Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse, 1964).

[11] The status of international law as law has been a long-standing preoccupation of international legal scholars. For a discussion of the international law academy's struggle with critics of the "lawness" of international law, see Anne-Marie Slaughter Burley, *International Law and International Relations: A Dual Agenda*, 87 Am J Intl L 205, 207–20 (1992).

> States Supreme Court, with its determination binding on the state courts; and that a determination of international law by a state court is a federal question subject to review by the Supreme Court.[12]

On the doctrinal front, *Filartiga* also achieved wide acceptance. The American Law Institute's 1986 *Restatement (Third) of U.S. Foreign Relations Law*, which reflected the views of the leading international law scholars of the day, departed from past views and endorsed *Filartiga*. It held that "[c]ustomary international law is considered to be like common law in the United States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State courts."[13] The *Restatement (Third)* followed *Filartiga*'s analysis of the judicial enforceability of CIL in federal courts. It commented that "there is no reason to treat claims arising under international law any differently from those arising under other federal law."[14] More explicitly, the *Restatement (Third)* endorsed *Filartiga*'s grant to individuals of a cause of action in federal courts for violations of international human rights law.[15]

As Professor Stephan has observed, these doctrinal shifts wrought a "revolution in U.S. foreign relations law. . . ."[16] The adoption of the *Restatement* meant that,

> [t]he construct called customary international law existed not as a locus of scholarly debate and speculation, but as an independent source of judicial power to pronounce norms and punish wrongdoers. Any person injured by a violation of customary international law could seek redress against any subject of international law, foreign or domestic, state or private. Labeling a desired outcome customary international law provided federal court jurisdiction and ousted prior rules based on common law or statute.[17]

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[12] Louis Henkin, *International Law as Law in the United States*, 82 Mich L Rev 1555, 1559–60 (1984) (footnotes omitted).

[13] Restatement (Third) of the Foreign Relations Law of the United States § 111 (1986).

[14] Id at § 111 n 4.

[15] Id at § 703 n 7.

[16] Paul B. Stephan, *Courts, the Constitution, and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 Va J Intl L 33, 47 (2003).

[17] Id.

B. FILARTIGA'S FORMALIST CRITICS

Filartiga was not accepted without dissent. In 1986, Professor Philip Trimble wrote an early critique of the idea that CIL constituted federal law,[18] and two years later Professor Arthur Weisburd expanded the challenge to the domestic legal status of international law.[19] Academic discussion, however, did not flare up into a full-fledged controversy until the 1997 publication in the *Harvard Law Review* of an article by Professors Curtis Bradley and Jack Goldsmith criticizing what they called the "modern position" that CIL enjoyed the status of federal common law.[20] These critics offered a two-pronged formalist critique challenging *Filartiga*'s interpretation of the text and purpose of the ATS.

They argued that Congress must specifically enact a cause of action to incorporate specific international norms. This argument drew upon Judge Robert Bork's concurrence in a 1984 case, *Tel-Oren v Libyan Arab Republic*, in which the D.C. Circuit refused to permit an ATS suit seeking damages for a terrorist attack.[21] According to Judge Bork, the *Filartiga* approach "would authorize tort suits for the vindication of any international legal right."[22] This "result would be inconsistent with the severe limitations on individually initiated enforcement inherent in international law itself, and would run counter to constitutional limits on the role of federal courts."[23]

Scholars expanded upon Judge Bork's critique by turning to the ATS's history.[24] In the most detailed of these investigations, Professor Bradley concluded that the ATS's drafting history largely (although not entirely) supported Judge Bork's reading. According to Professor Bradley, there was no evidence that Congress intended the ATS to create a federal statutory cause of action for

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[18] Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L Rev 665, 669–70 (1986).

[19] See Arthur Weisburd, *The Executive Branch and International Law*, 41 Vand L Rev 1205, 1239–40 (1988); see also Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 Yale J Intl L 1, 38–44 (1995).

[20] Bradley and Goldsmith, 110 Harv L Rev 815 (cited in note 3).

[21] *Tel-Oren v Libyan Arab Republic*, 726 F2d 774 (DC Cir 1984).

[22] Id at 812.

[23] Id.

[24] See, for example, Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 Va J Intl L 587 (2002); Joseph M. Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 Hastings Intl & Comp L Rev 445 (1995).

violations of CIL.[25] Nonetheless, there was evidence that Congress expected that alien plaintiffs could bring lawsuits under the ATS because federal courts were authorized to apply CIL as part of the general common law.[26] But in order to satisfy Article III's restrictions on federal court jurisdiction, Professor Bradley argued that the ATS required any such lawsuits to be brought against a U.S. citizen defendant.[27] *Filartiga*-style lawsuits involving two alien parties would not be permitted, although more modern lawsuits against U.S. corporate defendants or U.S. government actors themselves would be—whether or not modern CIL forms part of the federal common law.

This last question, however, has proved the most controversial. According to the critics, giving CIL the status of federal common law is unjustified as a matter of historical practice and doctrine.[28] Prior to *Erie v Tompkins*,[29] CIL had constituted part of the general common law, which was independently interpreted by federal and state courts. It never enjoyed the status of the "Laws of the United States" under Articles III and VI of the Constitution which were supreme over inconsistent state law. Since *Erie* famously divested federal courts of their general common lawmaking powers, the federal courts also lost their power to apply CIL as general common law.[30] If *Erie* rejected general federal common law, then it also rejected most *Filartiga*-style lawsuits because they usually involve alien-versus-alien lawsuits.[31] Such suits, lacking diversity, would not satisfy any of the requirements of Article III federal subject matter jurisdiction.[32] Suits between aliens and U.S. defendants would, after *Erie*, simply become diversity lawsuits that apply state common law.[33]

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[25] See Bradley, 42 Va J Intl L at 592–97 (cited in note 24).

[26] Id at 619–37.

[27] Id.

[28] See, for example, Bradley and Goldsmith, 110 Harv L Rev 815 (cited in note 3).

[29] 304 US 64 (1938).

[30] Bradley and Goldsmith, 110 Harv L Rev at 817 (cited in note 3).

[31] Curtis A. Bradley and Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 Fordham L Rev 319, 311 (1997).

[32] Id at 357–63.

[33] Bradley and Goldsmith, 110 Harv L Rev at 817 (cited in note 3). Of course this would depend on whether the state in question has recognized CIL as part of its common law.

C. THE FORMALIST DEFENSE

This critique provoked an energetic response from *Filartiga*'s defenders in the legal academy. Much of it has taken the form of formalist rebuttals plumbing the historical origins, text, and statutory purpose of the ATS and the historical status of CIL in domestic law. First, scholars argued that the requirement that Congress create an explicit cause of action is ahistorical, because the first Congress presumed that CIL lawsuits could be brought under the general common law.[34] Thus, the first Congress fully expected that the ATS would be used by aliens to bring lawsuits in federal courts without any separate statutory authorization from Congress. Such a reading is bolstered by historical materials, later cited by the Court in *Sosa*, suggesting that Congress enacted the ATS in response to violence against foreign ambassadors stationed in the United States.[35] Second, *Filartiga*'s defenders cited various Founding-era materials suggesting that CIL was understood to have been incorporated as federal law by the Constitution's use of the phrase "Laws of the United States" in Article III.[36] As a matter of the original meaning, and as a matter of subsequent judicial practice, CIL was always understood to be a question of federal law controlled by federal courts.

Third, *Filartiga*'s defenders argued that whatever the original meaning of the ATS, the federal legislative and executive branches had both ratified *Filartiga*'s reading of the ATS.[37] For instance, when enacting the Torture Victim Protection Act (TVPA)[38] amending the ATS, Congress had the opportunity to register its disapproval of *Filartiga*. Instead, Congress added a cause of action for torture explicitly designed to reject Judge Bork's concurrence in *Tel-Oren*. Moreover, the TVPA's legislative history suggested that Congress agreed with *Filartiga*'s conception of the status of

[34] See, for example, William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the Originalists*, 19 Hastings Intl L & Comp L Rev 221 (1996).

[35] See text accompanying notes 66–69.

[36] See, for example, Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 Fordham L Rev 393 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 Fordham L Rev 371 (1997).

[37] See Ryan Goodman and Derek Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Law*, 66 Fordham L Rev 463 (1997).

[38] PL 102-256, 106 Stat 73 (March 12, 1992).

CIL as federal law.[39] And the State Department had approvingly cited the post-*Filartiga* ATS litigation in the context of reports to international institutions on compliance with U.S. obligations under international law.[40]

D. THE FORMALIST STALEMATE

At the very least, this debate within the legal academy established that the *Restatement (Third)* had prematurely embraced *Filartiga*. As even *Filartiga*'s formalist defenders have admitted, the text of the ATS does not, by itself, establish a cause of action. *Filartiga*'s defenders and critics appear to agree on this point.[41] Despite exhaustive investigations, however, neither side has been able to fill in the textual gaps left by the ATS, nor have they produced direct evidence on the intent of the ATS's drafters. For instance, *Filartiga*'s defenders routinely cite general statements by the Founders about the problems of state violations of the law of nations.[42] But none of these statements was made in the context of the ATS's enactment, and it remains impossible to link those statements directly to the intentions of the its drafters.[43] Critics have fared somewhat better by examining letters from members of the first Congress discussing the ATS.[44] But even this evidence, while more persuasive than the general statements cited by *Filartiga*'s defenders, has not proven conclusive.[45]

Neither side has been able to provide a concrete textual or historical resolution of the question of CIL's status as federal or

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[39] See Torture Victim Protection Act of 1991, S Rep 102-249, 102d Cong (Nov 19, 1991).

[40] See, for example, *Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: Report of the United States of America*, UN Comm Against Torture, Addendum, P277, UN Doc CAT/C/28/Add.5 (2000) (emphasis in original).

[41] See, for example, Bradley, 42 Va J Intl L at 592–97 (cited in note 24); Dodge, 19 Hastings Intl L & Comp L Rev at 238–40 (cited in note 34).

[42] See, for example, Dodge, 19 Hastings Intl L & Comp L Rev at 226–30 (cited in note 34).

[43] Id. Dodge describes the 1781 Continental Congress Resolution seeking state action to punish violations of the law of nations, the Marbois affair involving a 1784 attack on the French ambassador, and an essay from the Federalist Papers by John Jay about the Constitution. None of these materials discuss the actual ATS nor do they even specifically propose a statute like the ATS.

[44] See Bradley, 42 Va J Intl L at 620–21 (cited in note 24).

[45] See, for example, Dodge, *The Constitutionality of the Alien Tort Statute*, 42 Va J Intl L 687, 697–98 (2002) (pointing out that ATS drafters' correspondence did not describe any limits on the scope of ATS).

state common law. The constitutional text mentions international law only once, in allocating the power to "define and punish offences" against the law of nations to Congress.[46] *Filartiga* and the *Restatement* hold that CIL forms part of the "Law of the United States" in Articles III and VI and, therefore, exists as federal law.[47] Critics have pointed out that although there are some general statements on the importance of maintaining national control over CIL, there are also many general statements relegating CIL to nonfederal status.[48] Thus, while both sides can point to some historical evidence that supports their view, the evidence is again inconclusive (though the critics have again provided more persuasive evidence).[49]

Despite the *Filartiga* critics' more persuasive arguments, it is not possible to conclude with confidence that they are correct. More importantly, even in areas where the critics and defenders agree, formalist analysis provides little guidance on how to treat the ATS after *Erie*'s abolition of "general common law." Formalist arguments have proven unable to establish a consensus on the proper reading of the ATS. They also have little to say about the ATS in a post-*Erie* era where CIL now includes international human rights law.[50]

Stalemate between formalist supporters and critics of *Filartiga* should shift the focus to functional arguments. *Filartiga*'s defenders have celebrated *Filartiga*'s policy benefits as the development of CIL in U.S. domestic law *and* international law. Dean Koh, for example, has called *Filartiga* "the *Brown v Board of Education* of" the movement to bring international and foreign law into the

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[46] US Const, Art I, § 8.

[47] 630 F2d at 886–87; Restatement (Third) at § 111 comment d; § 111(2) and comment e; § 112(2) and comment a; § 326 comment d.

[48] See, for example, Bradley and Goldsmith, 110 Harv L Rev at 824–27 (cited in note 3).

[49] Compare Bradley, 42 Va J Intl L at 597–619 (cited in note 24); Dodge, 42 Va J Intl L at 702–11 (cited in note 45).

[50] Professor Michael Ramsey, for instance, has argued that the text of the Constitution supports treating CIL as "non-preemptive" federal law. Professor Ernest Young reaches a similar conclusion. Professor Aleinikoff has recently advocated congressional action to codify CIL along these lines. See Michael D. Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 Pepperdine L Rev 187 (2001); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 Va J Intl L 365 (2002); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 Am J Intl L 91 (2003).

domestic U.S. system.[51] As he noted, *Filartiga* opened the door for a wave of litigation in U.S. federal courts by plaintiffs seeking to vindicate rights under CIL, especially international human rights law. Such litigation did not merely vindicate the rights of victims of human rights abuses; it served a larger systemic role in the development of CIL. In Dean Koh's conception, ATS litigation allows individuals to use the "transnational public law litigation process" to initiate, develop, and solidify norms of CIL.[52] Dean Slaughter (formerly Burley) argues that modern ATS lawsuits represent a "badge of honor" for the United States.[53] The "badge" demonstrates a deep commitment to the enforcement and development of international human rights law. Dean Slaughter explicitly argues in favor of the modern use of the ATS even while conceding that "definitive proof of the intended purpose and scope of the [ATS] is impossible."[54]

Koh and Slaughter's arguments lead to the conclusion that whether or not the ATS was actually intended to permit *Filartiga*-style lawsuits as a formal matter, its present benefits for U.S. foreign policy in generating respect and compliance with international law should prevail. In contrast, critics such as Professors Bradley and Goldsmith have challenged *Filartiga*'s interpretation of the ATS as "illegitimate" after *Erie*,[55] but have not offered a functional assessment of ATS litigation. As we explain in the next part, the lack of analysis of the ATS's functional implications likely influenced the *Sosa* Court's decision to preserve the doctrine, if not the rationale, behind *Filartiga*.

II

This part analyzes the Supreme Court's first and only effort to come to grips with the ATS's meaning in last Term's *Sosa v Alvarez-Machain*. It criticizes the grounds on which the Court chose to preserve the holding of *Filartiga* despite recognizing that decision's serious problems under conventional federal common law and statutory interpretation doctrines. Once stripped of its

[51] Koh, 100 Yale L J at 2366 (cited in note 2).

[52] Id.

[53] See, for example, Burley, 83 Am J Intl L 461 (cited in note 2).

[54] Id at 463.

[55] See, generally, Bradley and Goldsmith, 66 Fordham L Rev 319 (cited in note 31).

fairly unpersuasive formalist arguments, *Sosa* instead shows that the Court was reluctant to withdraw the federal judiciary from the making and enforcement of CIL or to impose any meaningful limitations on federal court lawmaking for unstated policy reasons. Part III will then assess these policy reasons on institutional grounds by comparing the costs and benefits of federal judicial participation in the making and enforcement of CIL.

A. SOSA

Advocates for the modern position could not have chosen a less propitious case for the Court to review than *Sosa*. *Sosa* marked Dr. Alvarez-Machain's second trip to the Supreme Court; his first was notably unsuccessful.[56] In 1985, members of a Mexican drug cartel allegedly kidnapped an agent of the Drug Enforcement Agency, Enrique Camarena-Salazar, and tortured him to death. From 1984 to 1985, Agent Camarena-Salazar had proven extremely successful in frustrating the operations of the cartel, with one raid alone seizing billions of dollars worth of marijuana.[57] Dr. Alvarez-Machain allegedly prolonged Agent Camarena-Salazar's life to extend the torture and interrogation.[58] Five years later, a United States grand jury indicted Dr. Alvarez-Machain and a warrant was issued for his arrest. After efforts to persuade the Mexican government to hand over Dr. Alvarez-Machain failed, the DEA hired Mexican bounty hunters—including the ultimate defendant in the case, Jose Francisco Sosa—who abducted him and then transferred him for arrest by American officials.[59]

Alvarez-Machain's first trip to the Supreme Court challenged his abduction as a violation of the United States–Mexico extradition treaty. Writing for a 6–3 majority, Chief Justice Rehnquist held that the agreement did not explicitly forbid abductions that occurred outside the extradition process. Instead, the Court applied the *Ker-Frisbie* doctrine, which holds that a federal court can exercise jurisdiction over a criminal defendant brought before it through a forcible abduction, and that due process is satisfied so

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[56] *United States v Alvarez-Machain*, 504 US 655 (1992).

[57] These additional facts can be found in *United States v Zuno-Arce*, 44 F3d 1420 (9th Cir 1995).

[58] *Sosa*, 124 S Ct at 2746.

[59] Id.

long as the defendant receives a fair trial on the substantive charges.[60] The Court reversed the Ninth Circuit's holding that the treaty applied to Alvarez-Machain's abduction and permitted his prosecution to proceed.[61]

Upon remand, the district court tried Alvarez-Machain and ultimately granted a motion for acquittal. Alvarez-Machain then brought a suit under the ATS against Sosa for arbitrary arrest, which he claimed constituted a violation of the law of nations.[62] The district court granted summary judgment in favor of the plaintiff and awarded him $25,000. He found a sympathetic hearing before a panel of the Ninth Circuit and a subsequent en banc court, which agreed that Alvarez-Machain's arbitrary arrest violated CIL and created an ATS cause of action.[63] Reversing, the Court ruled that the ATS did not provide a cause of action for Alvarez-Machain's claim, with Justice Souter adding to his growing roster of majority opinions in foreign affairs cases.[64]

In winning the battle, however, opponents of the ATS may well have lost the war. First, the Court rejected the argument that the ATS merely granted jurisdiction to the federal courts. This was a surprising outcome, because Justice Souter at times declared that the ATS was, indeed, jurisdictional in nature and did not *sua sponte* create any new causes of action. "All Members of the Court agree that § 1350 is only jurisdictional," Justice Souter remarked at one point.[65] But the ATS must do more because of the Framers' concerns about the national government's inability to enforce inter-

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[60] 504 US at 661–63. The doctrine takes its name from *Ker v Illinois*, 119 US 436 (1886), and *Frisbie v Collins*, 342 US 519, rehearing denied, 343 US 937 (1952).

[61] *Alvarez-Machain* was decided the same Term as the better-known *United States v Verdugo-Urquidez*, which involved similar facts. 494 US 259 (1990). Verdugo-Urquidez was a co-conspirator in the death of Camarena-Salazar; while DEA officials succeeded in obtaining his transfer by Mexican police, they also searched his properties without a search warrant. Verdugo-Urquidez challenged his prosecution on the ground that the searches violated the Fourth Amendment. The Court held that the Fourth Amendment does not apply to aliens who have no significant link to the United States when they are the subject of government action outside the United States.

[62] He also brought a claim for a tort under the Federal Tort Claims Act against the United States, which the Court dismissed and we do not discuss here. *Alvarez-Machain*, 124 S Ct at 2747–54.

[63] 255 F3d 1045 (2001), aff'd by 331 F3d 604, 641 (9th Cir 2003) (en banc).

[64] See, for example, *American Insurance Association v Garamendi*, 539 US 396 (2003); *Crosby v National Foreign Trade Council*, 530 US 363 (2000).

[65] 124 S Ct at 2764.

national law within the United States.[66] As several historical studies have shown, one of the problems that beset the Articles of Confederation was that the Continental Congress possessed no domestic legislative or funding powers to implement treaties.[67] In particular, the Court referred to the Continental Congress's 1781 appeal that states punish violations of international law, and a well-known 1784 incident in which no federal remedy was available for an attacked French diplomat.[68] This history led Justice Souter to conclude that "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, some day, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners."[69] The Court, however, could not provide any direct historical evidence to support this point, as conventional legislative history from this period is almost nonexistent. Rather, Justice Souter relied on what he called "[t]he anxieties of the preconstitutional period" in rejecting the idea "that the statute was not meant to have a practical effect."[70]

Second, the Court reached back to historical sources to give substantive content to its jurisdictional-but-not-jurisdictional interpretation of the ATS. Justice Souter argued that the law of nations, as it existed in the late eighteenth century, regulated private individual conduct by guaranteeing safe conducts, prohibiting attacks on ambassadors, and outlawing piracy.[71] According to the Court, Congress would have intended the ATS to provide jurisdiction for this limited set of violations.[72] But how does this work with the Court's observation that the ATS does nothing more than simply create jurisdiction for torts in violation of the law of nations? According to Justice Souter, the ATS created jurisdiction for a limited set of torts under international law, and those torts

[66] Id at 2757.

[67] For one such review of the history of this period, see John Yoo, *Globalism and the Constitution: Treaties, Legislative Power, and the Original Understanding*, 99 Colum L Rev 1955 (1999).

[68] 124 S Ct at 2756–57.

[69] Id at 2758.

[70] Id.

[71] Id at 2756 (citing 4 Blackstone, Commentaries *68).

[72] Id.

would be supplied by the common law. "In sum, 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."[73]

Despite opening the door (to borrow the Court's metaphor) to a reading of the ATS as enforcing substantive norms itself, the Court appeared determined to limit the possible causes of action. As Justice Souter wrote, "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we 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."[74] But what are those "good reasons"? They are the ones, it seems, that have been put forward by the ATS's formalist critics. First, the Court acknowledged that the nature of the common law has changed between 1789 and today—it is no longer transcendental law "discovered" by the state and federal courts. Second, the foundational *Erie Railroad Company v Tompkins*[75] in 1938 changed the role of federal courts by denying the existence of a general federal common law and permitting only interstitial federal common lawmaking. As the Court observed, "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries."[76] Third, the Court in recent years has made clear that it will not infer a private cause of action for violations of a domestic statute unless Congress clearly so intended.[77]

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[73] Id at 2761.

[74] Id at 2761–62.

[75] 304 US 64 (1938).

[76] 124 S Ct at 2762.

[77] Id at 2762–63 (citing *Correctional Services Corp. v Malesko*, 534 US 61, 68 (2001); *Alexander v Sandoval*, 532 US 275, 286–87 (2001)).

These concerns reflect the federal courts' general reluctance in the wake of *Erie* to engage in lawmaking. They are certainly familiar to the scholars who have explored the scope and processes of federal common law over the last decades, several of whom have come to doubt the modern case for the place of CIL as federal law.[78] The Court, however, added two more reasons, specific to the foreign affairs context. First, because of changes in international law, ATS suits now can call upon federal courts to declare that foreign governments have violated the rights of their own citizens. This, according to Justice Souter, risks "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[79] Second, to the extent that the political branches have addressed the issue, they have generally refused to make human rights treaties self-executing or to create new statutory causes of action to enforce international law.[80]

Despite these concerns, the Court refused to "close the door" on the notion that the ATS gives rise to some causes of action, or that new substantive standards could emerge as international law evolved. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, argued in concurrence that the ATS was *only* jurisdictional and could not even permit claims based on the substantive norms recognized in the late eighteenth century. Justice Souter responded that federal common lawmaking could continue, albeit cautiously and reluctantly. "[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."[81] In applying this test, the Court found that Alvarez-Machain's claim of arbitrary detention did not rise to the level of universal recognition, binding obligation, and specificity that characterize only the highest norms of CIL. In part, the Court clearly was troubled by the practical implications of recognizing such a cause of action, which would

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[78] See, for example, Young, 42 Va J Intl L 365 (cited in note 50); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 Va J Intl L 513 (2002).

[79] 124 S Ct at 2763.

[80] With one notable exception, the Torture Victim Protection Act of 1991, Pub L No 102-256, 106 Stat 73.

[81] 124 S Ct at 2765.

require the federal courts to review "any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place."[82] In part, the Court considered Alvarez-Machain's purported norm to be aspirational in nature, to lack a specific definition, and to be lacking in the universal acceptance by civilized nations sufficient to qualify as a binding rule of customary law.

Although Alvarez-Machain lost his case, supporters of the modern position could gain a great deal of succor from the decision. Justice Souter's opinion essentially left intact much of existing ATS case law, as developed primarily by the Second and Ninth Circuit Courts of Appeals. Alvarez-Machain's fault was not that he sought a remedy through the ATS, but that he failed to show that a right against arbitrary detention had truly become a rule of CIL.

B. SOSA'S INTERNAL FAULTS

The debate between the *Sosa* majority and minority took place on fairly straightforward formalist grounds. No one doubted that if Congress, under its Article I, Section 8 power to define offenses under the law of nations, had decided to incorporate international law through a statute, it could have. The only question was whether the ATS ought to be interpreted as doing so. The Court could not bring itself to shut the door completely on any federal judicial role in the enforcement of CIL. The Court's reasons, however, were anything but convincing. Justice Souter relied on three pieces of historical evidence, but those historical materials fail to show that the members of the first Congress understood the ATS to create substantive causes of action.

First, Justice Souter believed it significant that Oliver Ellsworth had drafted the ATS, because Ellsworth had also been both a member of the Continental Congress in 1781 when it requested that states enact laws punishing attacks on ambassadors and violations of safe passage and a member of the Connecticut legislature when it complied with that request. Second, the first Congress had enacted criminal statutes prohibiting violation of safe conducts, piracy, and attacks on ambassadors,[83] which Justice Souter believed showed that Congress would not have enacted a civil

[82] Id at 2768.

[83] An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat 113–14; id § 28 at 118.

statute that waited upon further action to become effective.[84] Third, international law authorities at the time, most notably Vattel, declared that states should not only criminally punish those who attack ambassadors but provide for compensation as well.[85]

To put it charitably, these pieces of historical evidence are weak. Ellsworth's membership in the Continental Congress and the Connecticut legislature tells us virtually nothing about the intentions of the first Congress in enacting the ATS. The Court provides no statements from Ellsworth or any of his contemporaries about the ATS, nor does it show any consistent train of thought on Ellsworth's part on the question of enforcement of CIL. This stands in sharp contrast, for example, to the clear public positions that leading Framers, such as James Madison and Alexander Hamilton, took on the question of the enforcement of another species of international law, treaties, both before and after the ratification.[86]

Justice Souter's second piece of evidence undermines his own conclusion. If Congress were capable of enacting specific criminal statutes addressing the problem, why would it then turn around and enact a civil statute that most everyone concedes is ambiguous and unclear to address the very same conduct? A third odd historical inference is made in regard to Vattel's comments. While Vattel does believe that states should compensate victims of attacks that violate international law, he does not address whether such compensation should come about as a matter of civil suits.

In response to Justice Scalia's concurrence, the Court sought further support in two precedents, *Banco Nacionale de Cuba v Sabbatino*,[87] and *The Paquete Habana*.[88] In the former, Justice Souter observed, the Court had commented that "it is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances,"[89] while in the latter the Court declared: "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

[84] 124 S Ct at 2758–59.

[85] Id at 2761 (citing Vattel, at 463–64).

[86] Yoo, 99 Colum L Rev at 2010–21, 2078–82 (cited in note 67).

[87] 376 US 398 (1964).

[88] 175 US 677 (1900).

[89] 376 US at 423.

duly presented for their determination."[90] From these cases, Justice Souter drew the conclusion that "the domestic law of the United States recognizes the law of nations," and has done so for 200 years, and issued the rejoinder that "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."[91]

Neither of these cases, however, has anything to do with the ATS; if anything, they undermine the idea that the federal courts have power to enforce CIL as federal law. *Sabbatino*, for example, applied the act of state doctrine in an action arising out of the nationalization of foreign assets by the Cuban government. An American middleman purchased sugar that had been owned by a Cuban firm, C.A.V., whose assets had been expropriated; after it took possession of the goods, the American company paid the proceeds to C.A.V. rather than the Cuban government.[92] Invoking diversity jurisdiction, Banco Nacional sued under state law in federal district court for the money, and claimed that the legality of the expropriation could not be reviewed because of the act of state doctrine.

In applying the act of state doctrine, the Court rejected the notion that its use was compelled by international law. Instead, as Justice Harlan wrote for the Court, the act of state doctrine "arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[93] While the Court observed that *Erie Railroad* did not apply to the act of state doctrine, it emphasized that the rule was necessary to promote judicial restraint, or "a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community."[94] Thus, to the extent *Sabbatino* enshrined the act of state doctrine

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[90] 175 US at 700. The Court also cited *The Nereide*, 13 US (9 Cranch) 388, 423 (1815) (Marshall, CJ) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); and *Texas Industries, Inc. v Radcliff Materials, Inc.*, 451 US 630, 641 (1981) (recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist).

[91] 124 S Ct at 2764–65.

[92] 376 US at 401.

[93] Id at 423.

[94] Id at 425.

as federal common law, this was not because federal courts had a mandate to incorporate international law norms as federal law. Not only does *Sabbatino* ignore the ATS, but, if anything, its separation of powers core militates against Justice Souter's reading and toward judicial abstention.

The Paquete Habana voyages even farther from the ATS. During the Spanish-American war, American warships captured two coastal fishing vessels off Cuba.[95] After a federal district court condemned the ships as prizes, their crew appealed to the Supreme Court on the ground that the American navy had captured the ships in violation of CIL. They claimed, and the Court agreed after a lengthy historical analysis of state practice from the 1400s, that CIL prohibited the seizure of such civilian vessels during wartime. Several factors distinguish *The Paquete Habana* from *Sosa*. First, the rule of the case is not simply the oft-quoted "[i]nternational law is part of our law." Rather, the Court continues, courts should consult "the customs and usages of civilized nations" when "there is no treaty, and no controlling executive or legislative act or juridical decision."[96] Thus, an executive order standing alone could override the application of CIL, which could not happen with judicial interpretation of a federal statute such as the ATS. Second, the case arose in prize jurisdiction, where, like the admiralty jurisdiction, the courts had developed and applied federal common law rules. There was no "tort" as the phrase is used in the ATS; rather, the cause of action arose under the laws of war. Third, in *The Paquete Habana* itself, the President had ordered the military to carry out its blockade in Cuba in accordance with the international laws of war—just the "controlling executive" action required.[97] There was no conflict between executive policy and international law, and thus no occasion for the judiciary to examine whether CIL independently applied.[98]

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[95] 175 US 677.

[96] Id at 700.

[97] Id at 712; see also Bradley and Goldsmith, 66 Fordham L Rev at 353 n 191 (cited in note 31); Michael J. Glennon, *May the President Violate Customary International Law? Can the President Do No Wrong?* 80 Am J Intl L 923, 923 n 6 (1986).

[98] Despite this, *The Paquete Habana* and *Sabbatino* are routinely cited for the more tenuous proposition that federal courts have the power to incorporate CIL as federal law directly, without the intervention of a statute (or executive policy). See, for example, Goodman and Jinks, 66 Fordham L Rev at 481 (cited in note 37). The reasoning must run, we suppose, that if federal courts can directly incorporate international law as federal law, much in the way that the judiciary creates rules to govern interstate disputes and federal

Lastly, the Court relied on a series of questionable assumptions about congressional approval of previous ATS decisions. According to the Court, Congress's silence must signify some level of implicit agreement with the lower courts' expanded application of the ATS over the last two decades. Put aside for the moment that, even accepting the Court's argument at face value, legislative silence today could only inform us about the current Congress's preferences, not the intentions of the first Congress that enacted the ATS in 1789. Also put to one side that the Supreme Court does not employ a strong form of stare decisis in statutory interpretation cases.[99] Justice Souter assumes that ATS cases are sufficiently important to outweigh other important items on Congress's limited agenda (a doubtful proposition these days), that silence reflects the wishes of a majority (rather than, perhaps, the opposition of filibustering minority or a President and one-third of the Senate), and that Congress regularly overrides judicial interpretations with which it disagrees. The accuracy of these assumptions depends on facts for which no conclusive empirical data exist,[100] and there are certainly plausible arguments that run in the other direction.

It is possible that the Court had a more subtle reason in mind for applying what is essentially a strong form of statutory stare decisis. Some have argued that refusing to reverse erroneous precedents has the effect of promoting democracy by forcing the legislature to make its preferences known.[101] Again, this depends on speculative assumptions about the operations of Congress. Professor Vermeule, however, has put forward the more nuanced argument that, in the presence of empirical uncertainty, adopting a

instrumentalities, then doing so pursuant to the ATS is a far smaller step. This certainly seems to have been the reasoning of the lower courts, most prominently the Second Circuit in *Filartiga. Filartiga v Pena-Irala*, 630 F2d 876, 887 (2d Cir 1980).

[99] See, for example, *Hubbard v United States*, 514 US 695, 715 (1995); William N. Eskridge, Jr., *The Case of the Amorous Defendant: Criticizing Absolute Stare Decisis for Statutory Cases*, 88 Mich L Rev 2450, 2462 (1990).

[100] In the leading empirical study on this question, William Eskridge concluded that Congress does monitor judicial decisions involving statutory interpretation and will override "textualist" decisions more often than those that rely on legislative history or congressional purpose. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L J 331 (1991). Adrian Vermeule, however, has raised significant doubts about whether Eskridge's data actually support that conclusion. See Adrian Vermeule, *Interpretive Choice*, 75 NYU L Rev 74, 104–06 (2000).

[101] See, for example, Larry Marshall, *Let Congress Do It: The Case for an Absolute Rule of Stare Decisis*, 88 Mich L Rev 177, 208–15 (1989).

rule of absolute stare decisis in statutory interpretation cases will at least produce a reduction in decision costs—litigants will no longer seek the overrule of statutory precedents, judges will not have to expend resources reevaluating them, and the legal system will gain in stability.[102]

It is doubtful, however, whether those benefits apply in the ATS context. *Sosa* brought no stability gains because the Supreme Court had not yet addressed the validity of the ATS's modern interpretation; one could also just as easily argue that it was the Second Circuit's decision in *Filartiga*, followed most vigorously by the Ninth Circuit in the cases leading up to *Sosa*, that had introduced instability to the legal system. In the context of decision costs, courts will probably face few to zero efforts seeking to reverse the Court's reading of the ATS. But it is unclear at best whether a contrary result would have had any disruptive effect on the overall stability of statutory precedents.[103] Permitting ATS suits to continue, however, may well increase decision costs. ATS cases are difficult. They require the acquisition of costly information: legal rules are derived from unfamiliar materials, namely, signs of state practice and foreign and international legal materials, and facts come from events that occurred outside the territorial United States. *Sosa* provided a far from simple test for distinguishing between enforceable and nonenforceable CIL norms. Additionally, ATS cases often involve multipolar disputes in which multiple potential parties raise legal claims, and chains of events are complex and multifaceted. They frequently involve delicate matters of international relations that are the focus of policies managed by the political branches. In the past, cases went undefended as foreign leaders accused of violations of human rights refused to appear in U.S. courts. As cases have begun to involve corporations and elements of the federal government, however, more vigorous defenses have begun.

Sosa purported to settle the ATS question using standard formalist tools of text, history, structure, and precedent. None of these arguments proved convincing. Indeed, as Justice Scalia's con-

[102] Vermeule, 75 NYU L Rev at 143–45 (cited in note 100).

[103] In other words, if the Court applies only a soft canon of statutory decisis to all statutory precedents, a decision to apply the precedent with regard to a single statute will likely make no difference in the overall number of challenges brought to precedents in other statutory areas.

currence pointed out, the formalist arguments, if anything, should have led the Court to the opposite holding. The academic stalemate may have contributed to the odd nature of the Court's decision in *Sosa*, which seems to acknowledge both sides of the debate, but could not really choose between them. While the Court seems to admit the compelling nature of the formalist arguments against federal common lawmaking in general and incorporation of CIL in particular, it would not adopt their conclusion. At the same time, the Court could not develop any convincing reasons of its own, based in the text, structure, or history of the ATS, to allow judicial development of substantive causes of action under the ATS. It settled upon a muddled, tentative decision that kept the door open for federal court recognition of certain CIL causes of action, but failed to explain how far open that door should remain or why that door should be open in the first place.

III

The Court did not consider the ATS from a functional perspective, even though it might well have done so given its unsatisfactory formalist rationales. A functional analysis seeks to determine whether, from a normative perspective, judicial implementation of international law through the ATS is the more effective method to achieve the government's desired policies. This approach asks two questions. First, what are the goals or purposes of the ATS? In other words, what end is the government seeking to achieve? Second, does a comparative analysis show that the courts or the executive would more effectively achieve those goals or purposes in this area?[104] This analysis seeks to move beyond the formalist stalemate over whether the ATS authorizes federal courts to enforce and develop CIL to the second-order question whether other institutions, in particular the executive branch, are better suited to carrying out the purpose that the *Sosa* Court assigns to federal courts.

[104] Scholars such as Neil Komesar, Cass Sunstein, and Adrian Vermeule have undertaken a similar approach to questions ranging from statutory interpretation to regulatory decision making. See, for example, Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (Chicago, 1994); Cass Sunstein and Adrian Vermuele, *Interpretation and Institutions*, 101 Mich L Rev 885 (2003).

A. STATUTORY PURPOSE

The starting point for evaluating the Court's approach to the ATS is to define its purpose. We do not mean "purpose" in the sense used in the legislative history debate, in which "purposivism" suggests an approach that gives courts greater discretion to interpret statutory language to achieve the "purpose" of a statute.[105] Rather, before we can address the effectiveness of the *Sosa* Court's interpretation of the ATS, we first must identify the national policy sought. We would conduct a similar inquiry to determine whether any institutional mechanism can be regarded as better or worse in comparison with another. We cannot judge, for example, whether the independent counsel statute was superior to the pre- and post-Act system of appointment of special counsels by the Attorney General, unless we first have defined the problem that Congress sought to address.[106] This will give us the necessary context within which to judge whether courts are the best institutional option to achieve national policy.

1. *Sosa and statutory purpose.* *Sosa* proved a disappointment in identifying the purpose of the ATS. Justice Souter began his inquiry with an examination of the ATS's historical context. The first Congress's silence has left scholars in the position of arguing over levels of generality. Critics of the modern position have argued for a fairly low level of generality, and so have looked to the specific placement of the ATS within the overall structure of the Judiciary Act of 1789.[107] As the Judiciary Act of 1789 generally created the basics of the federal court system and established federal subject matter jurisdiction, it would be odd to read the ATS as pursuing a different purpose. Section 1350 only sought to recognize the basis for a type of party-based jurisdiction—suits by aliens—that Congress subsequently could use in enacting specific causes of action. ATS defenders have described the purpose of the ATS at a fairly high level of generality. According to them, the United States wanted to take its place among the nations of the

[105] See, for example, John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum L Rev 1, 3, 7 (2001) (criticizing purpose-based approach to statutory interpretation); William N. Eskridge, Jr. and Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan L Rev 321 (1990) (arguing that courts should make policy judgments in implementing statutory purpose).

[106] Compare *Morrison v Olson*, 487 US 654 (1988) (discussing benefits of independent counsel statute).

[107] Bradley, 42 Va J Intl L at 593 (cited in note 24).

world, and the Framers believed that this required the United States to enforce and obey the law of nations.[108] In fact, one can understand the academic debate over the ATS as a failure to come to agreement on the appropriate level of generality to use in interpreting the statute.

The Court, however, followed neither of these approaches. While it looked to the diplomatic problem that had beset the national government under the Articles of Confederation, it rejected the idea that the ATS should be so limited. Justice Souter also looked to the opinion of Framing-era legal authorities that such attacks required a damages remedy, but then rejected that purpose as too narrow. Given that Congress has enacted statutory crimes to address these violations, such a reading would render the ATS effectively meaningless.

Sosa concludes that the ATS's purpose is to provide a remedy for CIL violations that have achieved universal consensus.[109] Unlike its earlier discussion of the framing-era context, however, *Sosa* fails to explain what purpose this broader reading serves. It is easy to understand, for example, why the ATS's statutory purpose might extend beyond providing jurisdiction for subsequent statutory causes of action. Attacks on foreign diplomats had disrupted American foreign relations, national law provided no remedy, so Congress sought to fill the gap by creating a damages action. But *Sosa* reads the ATS to go beyond Blackstone's trio of offenses that were aimed chiefly at prohibiting CIL violations by American private parties. Moreover, Congress has already fulfilled this goal by enacting federal statutes implementing the very international law obligations—prohibitions on torture, genocide, and war crimes—that *Sosa* identified as cognizable ATS claims.[110]

Sosa's broader reading of the ATS, therefore, encompasses fundamentally different CIL norms and contemplates more than simply preventing U.S. citizens from violating international law. As the *Sosa* Court noted, the most significant uses of the statute have included actions by aliens against officials of their own governments, as with the *Filartiga* case against a Paraguayan officer for

[108] See, for example, Burley, 83 Am J Intl L 461 (cited in note 2).

[109] The Court did not address the ATS's additional language permitting torts for violations of treaties.

[110] See, for example, Torture Statute, 18 USC § 2340 (2000); War Crimes Act, 18 USC § 2441 (2000); Genocide Convention Implementation Act, 18 USC § 1091 (2000).

torture, the *Trajano* suit in the Ninth Circuit against former Filipino dictator Ferdinand Marcos, or the *Karadzic* litigation against a Serb warlord.[111] These cases did not involve the failure of the United States to enforce international law against its own citizens; they did not involve American citizens as defendants; nor did the events at issue have any significant nexus with the United States at the time of their commission. Rather than preventing Americans from causing offense to foreign nations, *Sosa* allows aliens to sue other aliens, corporations, foreign governments, and perhaps even the United States government for violations of international law. The ATS's purpose has been transformed from keeping the United States out of diplomatic incidents to keeping other nations to their international obligations.

In fact, the ATS may play only a marginal role in achieving what the *Sosa* Court believed to be its original purpose: to ensure the United States and its citizens comply with international law. So far, the United States government has enjoyed sovereign immunity to ATS suits, as it would to other causes of action unless specifically overridden.[112] Criminal laws already exist to prosecute Americans who commit serious violations of international law of the kind that concerned Blackstone.[113] The *Sosa* Court's refusal to limit enforceable CIL norms to those supporting the statute's original purpose embraces a broader statutory purpose—enforcing international law against foreign nations on behalf of that nation's citizens. But *Sosa* nowhere explains (*a*) what problem Congress (of 1789 or of today) seeks to address, or (*b*) why or how the ATS might be a means to solve the problem. This is a serious defect in the Court's opinion.

2. *Possible statutory purposes.* Academic supporters of the ATS have suggested a number of possible statutory purposes. None of them, however, are linked in any significant way to traditional signs of congressional purpose, such as other parts of the U.S. Code or legislative history:

- the ATS could be designed to allow the United States to speak

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[111] *Filartiga v Pena-Irala*, 630 F2d 876 (2d Cir 1980); *In re Estate of Ferdinand Marcos*, 25 F3d 1467 (9th Cir 1994); *Kadic v Karadzic*, 70 F3d 232 (2d Cir 1995).

[112] See, for example, *Sosa*, 124 S Ct at 2747–48; *Al Odah v United States*, 321 F3d 1134, 1149–50 (DC Cir 2003) (Randolph, J, concurring), reversed on other grounds; *Rasul v Bush*, 124 S Ct 2686 (2004).

[113] See sources cited note 83.

with one voice in foreign affairs by centralizing control over international law in the federal courts;[114]
- the ATS could have as its purpose to prevent American states, corporations, and individuals from violating international law;[115]
- or the ATS could be intended to promote the development and enforcement of international law itself.

The first two purposes seem especially unlikely. There does not seem to be any firm evidence that these are systematic problems. Even if they were, Congress has ample tools at its disposal that are less blunt than incorporating CIL wholesale. Congress, for example, has enacted criminal laws prohibiting the commission of torture, genocide, and war crimes, the three most significant norms recognized as jus cogens.[116] It has also specified particular conditions under which plaintiffs can bring civil suits alleging torture or injuries from terrorist acts into federal courts.[117]

That leaves the third purpose. Such a broad, open-ended goal evokes the liberal internationalism of a Woodrow Wilson or Jimmy Carter, and may explain why the *Sosa* Court shied away from stating it clearly. We do not seek to criticize this purpose. Congress has sufficient authority under Article I, Section 8 to enact a statute that created a cause of action to achieve it. We also do not dispute that international human rights recently has played an important role in recent American foreign policy, from President Reagan's criticism of the "evil empire" of the Soviet Union to President Clinton's decision to wage war in Kosovo. We need only consider whether this is indeed the ATS's purpose, or at least that the *Sosa* Court believes this to be its purpose, to discuss whether the ATS actually makes sense as a tool to achieving its goals.

Although the *Sosa* Court did not explicitly embrace this view, its endorsement of lower federal court decisions expanding the scope of the ATS supports this broader purpose. As *Sosa* itself more or less admits, the lower federal courts clearly have expanded the ATS beyond its original purpose. What is important, however,

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[114] Harold H. Koh, *Is International Law Really State Law?* 111 Harv L Rev 1824, 1832 (1998).

[115] Id at 1840, 1850.

[116] Torture Statute, 18 USC § 2340 (2000); War Crimes Act, 18 USC § 2441 (2000); Genocide Convention Implementation Act, 18 USC § 1091 (2000).

[117] Torture Victim Protection Act, 28 USC § 1350; 18 USC § 2333.

is not whether this is consistent with the intentions of the first Congress, on which little historical evidence exists, but whether that purpose is in line with the preferences of current Congresses. While it is unlikely that the Congress at the time of *Sosa*'s decision would have delegated such authority, it is possible that it would have met with congressional approval at the time of *Filartiga*. Those decisions cannot be overturned by Congress today, even if the President and the median member of Congress disagree, unless they can put together enough votes to override a filibuster in the Senate. So today we can say, after *Sosa*, that the ATS promotes a national policy in favor of the development and enforcement of international law. It remains unusual, however, in foreign affairs because it is delegated to the federal courts, rather than the political branches.

B. INSTITUTIONAL COMPETENCE: A COMPARATIVE ANALYSIS

Now that we have determined the statutory purpose most consistent with the *Sosa* decision, we can analyze whether the delegation of power to the federal courts is the most effective means of policy implementation. This section argues that the design and operation of the judiciary give it a comparatively weak institutional vantage point from which to achieve foreign affairs goals of the sort envisioned by the ATS. This is not to say that federal courts cannot play a role in the development and enforcement of CIL. Instead, we are making the more modest second-order argument that as a matter of institutional competence, the federal judiciary suffers significant disadvantages in such a role compared to the executive branch. We necessarily base our institutional assessment on certain generalizations and assumptions about how these institutions work because it is difficult to imagine a sufficiently rigorous empirical test of these functional claims. Even conceding these limitations to our approach, in light of the formalist stalemate over the proper interpretation of the ATS, identifying these institutional disadvantages tips the scale against the *Sosa* Court's reading of the ATS.

1. *Judicial competence.* It is important to distinguish between both micro- and macro-level characteristics of the judiciary. Several characteristics of the federal courts at the micro level—the operation of individual judges in individual lawsuits—limit the information that flows to courts and the options available to them.

At a macro level, certain system-wide features of the Article III judiciary may poorly equip it to carry out national policy on a global scale.

a) Micro-institutional factors. Defining features of the Article III courts make them superior to other branches in performing certain functions, but also make them comparatively less well suited to playing a leading foreign relations role. Federal courts are designed to be independent from politics, to passively allow parties to drive litigation, and to receive information in highly formal ways. These characteristics may make courts more neutral in their decision making and fairer in their attitude toward parties. But they also may render them less effective tools in achieving national goals in international relations. Comparison of courts with other institutions may make these points more salient.

An initial difference between courts and other institutions is access. Compared with other institutions, courts have high barriers to access.[118] Congress has somewhat moderately difficult barriers—it is generally thought that interest groups must provide campaign contributions or political support in order to obtain access to political leaders.[119] The executive branch has lower barriers than Congress; it is probably easier for individuals and groups to provide information to, and make requests of, agencies, although perhaps with no greater chances of success.

By contrast, courts have numerous doctrines that limit access. Under standing doctrine, for example, plaintiffs must have suffered an actual injury in fact which is traceable to conduct on the part of a defendant who can remedy the harm.[120] The timing of the case must be just right, neither too early and therefore unripe nor too late and therefore moot.[121] It cannot raise political questions whose determination is constitutionally vested in another branch.[122] The plaintiff must actually be able to claim to benefit from a cause of action created under federal law. Litigation itself

[118] Komesar, *Imperfect Alternatives* at 125 (cited in note 104).

[119] See Robert Cooter, *The Strategic Constitution* 51–74 (Princeton, 1999) (discussing interest group theory of politics). Other studies, however, show that members of Congress are responsive to public pressure as reflected through the media and constituents.

[120] See, for example, *Lujan v Defenders of Wildlife*, 504 US 555 (1992).

[121] See, for example, *DeFunis v Odegaard*, 416 US 312 (1974) (mootness); *United Public Workers v Mitchell*, 330 US 75 (1947) (ripeness).

[122] *Nixon v United States*, 506 US 224 (1993).

demands significant resources, at least in comparison with means of accessing the executive or legislative branches.

There are also significant differences in the way courts acquire and process information. Courts gather knowledge through a painstaking and expensive process of discovery, conducted by the contending parties. That information must satisfy the federal rules of evidence—it must survive tests for relevance, credibility, and reliability—and the parties must present it to the court in accordance with formal courtroom procedures. By contrast, the executive branch collects information through agency experts, a national and global network of officials and agents, and links with outside groups and foreign governments. Congress can acquire information from the executive branch or outside groups via relatively inexpensive hearings. Also, a court generally cannot update its information except in the context of a new case. Thus, if a court has made a decision based on information available to it at time 1, it generally will not continue to gather information thereafter—even if it would lead it to change its decision—until another case raising the same issue appears.[123]

Article III creates significant limitations on the ability of federal courts to dynamically integrate its actions with national foreign policy. Once the President and Congress have enacted a statute or the President and the Senate have approved a treaty, the judiciary's constitutional responsibility is to execute those goals in the context of Article III cases or controversies. Federal judges cannot alter or refuse to execute those policies, even if the original circumstances that gave rise to the statute or treaty have changed.[124] If a federal court, for example, finds that a defendant has violated the Helms-Burton Act by "trafficking" in property confiscated by the Cuban government, it must render judgment for an American plaintiff who once owned that property.[125] Article III requires a federal court to reach that decision even if the effects of the judgment in that particular case would actually harm the national interest or conflict with other countries' view of CIL.

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[123] See, for example, Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 NC L Rev 643 (2000).

[124] For a contrary view, see Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard, 1985).

[125] See John Yoo, *Federal Courts as Weapons of Foreign Policy: The Case of the Helms-Burton Act*, 20 Hastings Intl & Comp L Rev 747 (1997).

A last micro difficulty arises from the substantive challenge presented by CIL. CIL is a very different subject than that usually encountered by federal courts. Many observers admit that the very concept of CIL—law that "results from a general and consistent practice of states followed by them from a sense of legal obligation" rather than through positive enactment[126]—is fraught with difficulty.[127] It is unclear whether CIL should prevail because of actual state consent to a rule, or because state practice reflects international consensus on a rule.[128] It is unclear how widespread state practice must be, how long it must continue, and how consistent it must be to qualify as CIL.[129] It is not even clear what counts as state practice, whether it should be limited to actions or declarations, and whose practice—that of the great powers, that of the leading nations of each region in the world, that of every nation in the world—matters.[130] It is not clear when state practice can be said to arise out of a sense of legal obligation rather than through coincidence or expedient coordination.[131] It is also controversial whether the views of other actors, such as law professors and judges, should have weight in determining international law.[132]

Even if the very nature of CIL were not so uncertain and ambiguous, it is likely that the federal courts either would experience a high error rate or high decision costs in determining its content. CIL involves sources that are not often encountered by federal judges or American lawyers. The very source of CIL—state practice—is not easily discovered. State practice may not even be reflected in publicly available documents, but may more often lie in the archives of the State Department and foreign ministries, or

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[126] Restatement (Third) at § 102(2) (cited in note 13).

[127] Compare Anthony A. D'Amato, *The Concept of Custom in International Law* at 4 (Cornell, 1971), with Ian Brownlie, *Principles of Public International Law* at 5–6 (Oxford, 4 ed 1990).

[128] Compare Prosper Weil, *Toward Relative Normativity in International Law?* 77 Am J Intl L 413, 433 (1983).

[129] These well-known problems with CIL are discussed in D'Amato, *The Concept of Custom* 6–10 (cited in note 127).

[130] See Patrick Kelly, *The Twilight of Customary International Law*, 40 Va J Intl L 449, 500–501 (2000) (describing lack of agreement on sources of state practice for purposes of determining CIL).

[131] Jack Goldsmith and Eric Posner, *A Theory of Customary International Law*, 66 U Chi L Rev 1113, 1176–77 (1999).

[132] This practice has been criticized by Bradley and Goldsmith, 110 Harv L Rev at 872–76 (cited in note 3).

may rest in the preserve of unwritten custom. American-trained judges—almost all of them generalists—would have to survey the actions of governments over the course of dozens if not hundreds of years, and make fine-grained judgments not just about what states have done, but why they did it. Take the most prominent example of a federal court attempting to divine CIL: the *Paquete Habana* case itself. Justice Gray surveyed centuries of policies, declarations, and naval actions to determine the legal status of coastal fishing vessels. It appears that he may have gotten the record of state practice wrong—states did not consistently refrain from seizing small fishing vessels during wartime.[133] Even if Justice Gray had accurately described practice, he failed to show that the protection of coastal fishing vessels had arisen out of a sense of legal obligation, rather than out of an interest by states in coordinating their activities or because of a fear of retaliation.[134]

A useful analogy can be made here to the arguments about the use of legislative history. Whether courts should consult legislative history has become one of the focal points for broader debates about the nature of legislation, judicial competencies, and the purpose of interpretation. To summarize briefly, many who believe that courts should seek out Congress's "intent" or broader "purpose" find reliance on legislative history, along with other policy considerations, generally acceptable.[135] A minority argue that legislative history ought not be used, either because there is no such thing as a collective intent or because consulting legislative history evades the formal separation of powers.[136] Professor Vermeule makes a similar argument to the one made here: even if courts should seek legislative intent, their "limited interpretive competence" suggests that they "might do better, even on intentionalist grounds, by eschewing legislative history than by consulting it."[137]

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[133] Goldsmith and Posner, 66 U Chi L Rev at 1148 n 101 (cited in note 131).

[134] Id.

[135] See, for example, William N. Eskridge, Jr., *Textualism, the Unknown Ideal?* 96 Mich L Rev 1509 (1998) (reviewing Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton, 1997)); Daniel A. Farber and Philip P. Frickey, *Legislative Intent and Public Choice*, 74 Va L Rev 423 (1988); Eskridge and Frickey, 42 Stan L Rev (cited in note 105).

[136] See, for example, John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum L Rev 673 (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv J L & Pub Pol 61, 68 (1994).

[137] See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 Stan L Rev 1833 (1998).

Judges may have limited abilities to understand and properly use legislative history, leading to high decision costs in conducting extensive reviews of legislative history without any corresponding reduction (and perhaps even an increase) in error costs.

If this is true with legislative history, these costs will only be compounded with CIL. The sources of legislative history at least rest within the general bounds of American public law, and so will be familiar to most judges. While expensive to gather and analyze in relation to other forms of American legal research,[138] legislative history may well be cheap to use in comparison to sources of CIL, which comes in different languages, involves not just texts but practices, and is recorded in sources that are often not publicly available. Even the use of more conventional public sources, such as multilateral treaties and the resolutions of the United Nations General Assembly, has serious interpretive problems. It is highly questionable, for example, that nations that refuse to sign treaties, for example, should be held to the same norms because they have "ripened" into custom, or that CIL should be read to go beyond the standards set by a widely joined treaty. Decisions by organs of the United Nations, particularly of the General Assembly, have no formal authority to declare CIL, if by definition that law represents the practice of *states*, not the opinions of international organizations.[139] The most pertinent evidence of state practice will be the most expensive to come by, and there is no empirical showing yet that federal courts will perform better in their use than any other institution.

b) Macro-institutional factors. The organization of the federal judiciary as an institution perhaps has even more significant effects on the comparative ability of the courts to achieve foreign policy goals. First, the federal judiciary is a generalist institution composed of generalist judges. Members of the judiciary are not usually chosen because of any expertise in any particular subject, unlike, say, the way in which scientists may be hired for work at the

[138] See, for example, Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 Duke L J 371, 377; Eskridge, 96 Mich L Rev at 1541 (cited in note 135); Vermeule, 50 Stan L Rev at 1868–69 (cited in note 137).

[139] The legitimacy of this "new" CIL is debated by Prosper Weil, 77 Am J Intl L 413 (cited in note 128), and Alain Pellet, *The Normative Dilemma: Will and Consent in International Lawmaking*, 12 Australian YB Intl L 22 (1992), and is summarized in Antonio Cassese and Joseph H. H. Weiler, eds, *Change and Stability in International Lawmaking* (De Gruyter, 1988).

Department of Energy, the Environmental Protection Agency, or the Food and Drug Administration. This is even more so the case in foreign affairs. Judges are not chosen because of any background in specific regions or areas, nor are they selected because they have experience in national security issues. As an institution, the judiciary is unlikely to have great facility with international legal, political, or economic theories or materials, and its members are more likely to be chosen because of their prominence as litigators or as public officials. It is difficult to recall more than a handful of judges who had significant foreign affairs experience before their appointment to the federal bench.

Second, of the three branches of government, the judiciary is the most decentralized. The front line of the judiciary is composed of 94 district courts, which are staffed by more than 667 judges.[140] Until appellate courts have ruled on a legal issue, the judges in these district courts can hold 667 different interpretations of the law. There are 13 federal courts of appeals, with 179 judges.[141] The Supreme Court currently hears between 70 and 85 cases per year, while about 60,000 cases a year are filed in the Courts of Appeals and about 325,000 cases are filed a year in the district courts.[142] Given the other demands on the Supreme Court's caseload, it is doubtful that the Court could devote a significant portion of its docket to correcting erroneous interpretation of international law, mistaken interference with foreign policy, or misapplications of the ATS. Unless this happens, the geographic organization of the federal courts may well produce disharmony on questions of foreign policy and a diversity of possible applications of international law.

In some areas, this level of decentralization might not pose such a problem. Geographically organized courts may better tailor national policies to local conditions, allow for diversity and experimentation in federal policies, and provide a more effective voice for local communities in federal decision making. These are not positive values, however, in foreign affairs. The Constitution

[140] History of Federal Judgeships, US District Courts, at http://www.uscourts.gov/history/tableh.pdf.

[141] History of Federal Judgeships, US Courts of Appeals, at http://www.uscourts.gov/history/tablec.pdf.

[142] Judicial Caseload Indicators 2003, at http://www.uscourts.gov/caseload2003/front/Mar03Txt.pdf.

sought to centralize authority over foreign affairs to provide the nation with a single voice in its international relations, so as to prevent other nations from taking advantage of the disarray that had characterized the Articles of Confederation.[143] Indeed, in cases such as *Crosby* and *Garamendi*, the Court recently has preempted state efforts to influence foreign nations precisely because of the need for a uniform foreign policy set by the Congress or President.[144] This rationale, however, offered to justify national preeminence over the 50 states, applies with force to a federal judiciary of 94 district courts and 13 appellate courts. Judicial implementation of foreign policy promises disharmony where uniformity is supremely important.

Third, institutional structure suggests that judicial activity in foreign policy may be slow, in terms of both implementation and self-correction. Lawsuits can often take years to complete. Even when cases are expedited, they require many months from time of filing to final judgment and appeal. To use *Sosa* as an example, eleven years passed between the filing of his ATS claim in federal district court and the Supreme Court's decision last Term. While they did not reach extensive discovery or trial proceedings, recent Supreme Court cases on Massachusetts's efforts to sanction Burma and California's efforts to provide remedies for Holocaust victims still took several years to adjudicate.[145]

Delay also affects not just initial decisions, but also monitoring and feedback. Slowness obviously impedes the swift and effective execution of foreign policy. Delay infects the judiciary's institutional systems for communicating between its different units and for correcting errors. While the federal courts have an appeals court system for detecting and correcting errors, it can take months if not years to run its course. Even if a district or circuit judge acts in defiance of established circuit or Supreme Court precedent, litigation is needed to correct the error. Standards of review concerning fact-finding may even render some decisions immune from appellate review despite contrary or conflicting re-

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[143] See, generally, Frederick Marks, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (LSU, 1973).

[144] *Garamendi*, 539 US 396 (2003) (cited in note 64); *Crosby v National Foreign Trade Council*, 530 US 363 (2000).

[145] The lawsuit in *Garamendi* began in 1999 and was not finally decided by the Supreme Court until 2003. 539 US at 512. *Crosby* began in 1998 and was not decided by the Supreme Court until 2000. 530 US at 371.

sults reached by different trial courts in similar cases. Transmission of information identifying and correcting errors may become garbled within the system, which helps explain the repeated cycles of repeal and remand that can occur in the context of a single case.[146] Judicial errors or deviations from policy may take years to reverse or may even go entirely uncorrected.

The judiciary's institutional characteristics render it superior to other institutions for certain kinds of decisions. It can address issues more fairly, with less interference from the political branches, and it can implement federal policy over a wide number of cases throughout the country. It can help solve political commitment problems between interest groups or between branches of government due to its high level of insulation from outside control. Its virtues, however, also create its problems as an institutional actor in foreign affairs. Its evenhandedness and passivity create problems in effectively gathering and processing information and in coordinating its policies with other national actors. Its procedural fairness and geographic decentralization prevent it from acting swiftly in a unified fashion, and it lacks effective tools for the rapid assimilation of feedback and the correction of errors.

Even if the statutory purpose of the ATS is the development and enforcement of international law generally, and human rights more specifically, the courts are by no means the most effective institutional mechanism. ATS suits require courts to acquire information about events that usually have occurred abroad and that involve parties outside their jurisdiction. They demand that courts interpret and apply norms whose sources can be difficult to discover and discern. They often involve sensitive judgments that may impact broader, ongoing relations with other nations. This is not to say that courts could not perform this function if need be; courts have interpreted open-ended clauses of the Constitution and have attempted to manage institutions ranging from schools to prisons.[147] Rather, the central question is, from a comparative institutional perspective, whether there is reason to think that courts would be *equal or superior* to other branches of government in achieving national policy on international law or human rights.

2. *Executive branch competence and comparative institutional ad-*

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[146] Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J Legal Stud 125, 125–34 (1972).

[147] See John Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Power of the Federal Courts*, 84 Cal L Rev 1121 (1996).

vantage. To complete our study, we must conduct a comparative analysis. As Professors Sunstein, Vermeule, and Komesar have argued with regard to allocating decisions among courts, agencies, and markets, simply deciding on a social goal is not enough.[148] We must also make comparative judgments on the ability of different institutions to achieve those goals. Such comparative institutional judgments have been applied in both constitutional and statutory interpretation.[149] Even if the judiciary would perform poorly at enforcing national policy in the human rights area, it still may be the best institutional mechanism available. A comprehensive analysis of the effectiveness of the ATS at promoting international law and human rights requires a judgment of the relative ability of the judiciary and the institution most likely to replace it: the executive.

a) Deference and foreign affairs. Evaluation of the comparative advantages and disadvantages of the judiciary versus the executive in implementing foreign affairs goals parallels arguments surrounding the review of agency interpretations of law.[150] In *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*,[151] the Court established a well-known two-part test for reviewing executive branch interpretation of ambiguous statutes. First, the courts ask whether Congress has clearly addressed the interpretive question at hand. If not, then judges are to defer to the agency interpretation if it is based on a reasonable or permissible reading of the statute.[152]

We are not so much interested in whether *Chevron* establishes the correct rule as we are in the comparative institutional considerations that motivated the Court's thinking. *Chevron* itself iden-

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[148] Sunstein and Vermeule, 101 Mich L Rev at 917–19 (cited in note 104); Komesar, *Imperfect Alternatives* (cited in note 104).

[149] Constitutional scholars such as John Hart Ely and Jesse Choper, for instance, have applied such comparative institutional analysis to defend their theory of constitutional interpretations. Choper's defense of political safeguards for federalism relied heavily on his assessment of the comparative institutional advantages of judicial versus political branch enforcement of federalism. Jesse Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago, 1981).

[150] Curtis Bradley has also sought to draw upon *Chevron* in the foreign affairs context. His inquiry concerned whether *Chevron* principles support judicial deference to executive branch interpretation of different forms of international law. Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 Va L Rev 649 (2000). Our approach is different: we seek to learn from *Chevron*'s observations on the relationship between agencies and courts to reach judgments about the institutional abilities of each branch.

[151] 467 US 837 (1984).

[152] Id at 842–43.

tified two reasons of judicial policy that supported this approach. First, judicial deference to reasonable agency interpretations assumes that agencies usually possess expertise in administering regulatory statutes superior to that of the judiciary. Second, deference recognizes that the executive branch can claim greater political accountability than the judiciary, implying that interpretation ought to pursue present policy goals and that the electorate ultimately could change unwanted interpretations.[153]

Scholars have debated in great detail the relative virtues and defects of the *Chevron* regime, and the Court recently has demarcated the limits of deference to agency interpretation at rule making and formal adjudication.[154] Agency expertise and accountability, however, continue to remain central justifications for judicial deference, and it is useful to understand them through an institutional lens. *Chevron* locates interpretation in the institution that has the superior level of technical competence. Unlike federal judges, agency personnel are experts at their subject, who often have received their training and devoted their careers to policymaking in a discrete specialty, and have access to technical experience and information accumulated by a wide bureaucracy.

To be sure, agency decision making does not depend solely on technical decisions, but rather requires officials to reach decisions involving a mixture of factual determinations and value judgments.[155] And agencies are not just run by civil servants, but are managed by a thin crust of political appointees chosen by the President. But executive branch officials are more politically accountable than federal judges, and mistakes of agency interpretation are more likely to be corrected. Congress also has any number of formal and informal tools for placing political pressure on agencies to reverse unwanted actions. Congress can hold hearings, refuse to confirm nominees to the agency, and reduce agency budgets for enforcement. Congress can use interest groups and the media to generate public opposition to executive policy.

By contrast, the federal judiciary is designed to be outside the

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[153] On this point, see Laurence H. Silberman, *Chevron—The Intersection of Law and Policy*, 58 Geo Wash L Rev 821 (1990).

[154] *United States v Mead Corp.*, 533 US 218 (2001).

[155] There is a wide literature, for example, on whether cost-benefit analysis should be used by agencies and whether they are capable of following it properly. See, for example, Matthew D. Adler and Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 Yale L J 165 (1999); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 Yale L J 1981 (1998).

reach of normal politics. Federal judges have life tenure and a permanent salary, and for the most part have reached the end of their official careers so they are not beholden to political groups for their advancement. Because of its internal system of precedent, the federal courts generally do not reverse a decision simply because of political opposition or pressure. In order to change a judicial decision, Congress generally can resort only to the single formal process set out in Article I, Section 7 for the enactment of legislation. Because of the hurdles of bicameralism and presentment, this makes it far more difficult for Congress to correct mistakes in policy by the federal courts.[156]

In terms of comparative institutional advantage, it may be useful to express these values in terms of error and decision costs. We can make the reasonable assumption that deference to agencies is likely to lead to lower error costs in decision making. Their technical competence in specialized areas is less likely to produce incorrect decisions because agencies may be more familiar with the meaning of Congress's instructions in the context of a heavily regulated, factually complex field. Their expertise and knowledge also make it more likely that they will set the appropriate technical standard within the parameters set by Congress. At the same time, however, agencies may well incur higher decision costs than courts. They reach their judgments after gathering broader amounts of information than judges, although they do not do so within the context of litigation. Their decisions follow the pure standard of acting reasonably under the totality of the circumstances, rather than following clear ex ante rules. Error correction by the political branches, however, seems superior to that of courts. Holding oversight hearings and threatening budget cuts present a far less difficult method to change incorrect agency interpretations than does the enactment of specific override legislation.

A third justification for judicial deference did not appear in *Chevron*, but implicates core questions of institutional design. A President provides a single policy vision that sets a uniform regulatory policy throughout the nation. Federal courts, by contrast, are organized into thirteen different circuit courts of appeals organized by geography. Because of the Supreme Court's limited docket, the decisions of the circuit courts represent the final word

[156] See, for example, Cooter, *The Strategic Constitution* (cited in note 119).

of the Article III judiciary in 99 percent of all cases. *Chevron*, in essence, promotes national uniformity in administrative law by ensuring that statutes will not be interpreted differently in different regions.[157] If federal courts could review agency interpretations de novo or under a less deferential regime, it is likely that administrative rules would be applied differently in different circuits.

b) The executive branch's institutional advantages. These institutional considerations bear significantly on the choice between courts and executives in foreign affairs. First, consider the factor of institutional structure. Putting aside for the moment the formal question of where the President's foreign affairs power comes from, the executive branch seems much better structured for the conduct of foreign relations than the courts. As Alexander Hamilton argued in *Federalist No. 70*, the executive is structured for speed and decisiveness in its actions, and is better able to maintain secrecy in its information gathering and its deliberations. "Decision, activity, secrecy, dispatch will generally characterize the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[158] In the years leading up to World War II, the Supreme Court made a similar observation. *United States v Curtiss-Wright Export Corporation* famously observed: "In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation." Quoting from a Senate report, the Court further explained that "[t]he nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch."[159] As Dean Koh describes it, "[h]is decision-making processes can take on degrees of speed, secrecy, flexibility, and efficiency that no other governmental institution can match."[160] If anything, national security and

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[157] Peter Strauss, *One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum L Rev 1093 (1987).

[158] Federalist 70 (Hamilton) in Merrill Jensen, John P. Kaminski, and Gaspare J. Saladino, eds, 16 *The Documentary History of the Ratification of the Constitution* 397 (State Historical Society of Wisconsin, 1986).

[159] 299 US 304, 319 (1936).

[160] Harold Koh, *National Security Constitution* 119 (Yale, 1990).

foreign policy demands since World War II have led to even more concentration of authority in the executive branch. The history of American foreign relations has been the story of the expansion of the presidency thanks to its structural abilities to wield power quickly, effectively, and in a unitary manner—a fact bemoaned by critics of the "imperial presidency."[161]

Institutional design leads to advantages in specialized competence. The United States operates large bureaucracies designed to develop and implement foreign policy. For fiscal year 2005, for example, the Bush administration's budget request for the State Department and other foreign affairs agencies totaled $31.5 billion.[162] The State Department employed 32,997 officials and civil servants.[163] That does not include the budget and personnel figures for the Defense Department, the Central Intelligence Agency, the Treasury Department, the Justice Department, and the White House staff, all of which have significant roles in developing foreign policy. These agencies employ experts in specific subjects, such as arms control or human rights, or certain nations and regions, such as State's Asia or Africa desks. Many of the staff who work on these issues have developed their areas of expertise by spending their careers immersing themselves in local cultures, learning languages, or gaining experience in the international politics of a region. The federal judiciary, by contrast, operates on a budget of roughly $5.42 billion with 34,399 employees, who must devote their efforts to the adjudication of disputes involving federal law.

Executive branch agencies have access to broader forms of information about foreign affairs than those available to a court. In regard to classes of information, the executive branch has access to certain types of information, such as that produced by clandestine agents or electronic eavesdropping, which cannot be publicly disclosed. Even though such information cannot be produced in an open court, it can provide invaluable data on the plans and intentions of other governments and the possible effects of American foreign policy. In terms of receiving and processing that information, the executive branch is not restricted by the structures

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[161] Id at 118–23; see generally Arthur M. Schlesinger, Jr., *The Imperial Presidency* (Houghton Mifflin, 1973).

[162] Fact Sheet, at http://www.state.gov/r/pa/prs/ps/2004/28709.htm.

[163] Table, at http://www.opm.gov/feddata/html/2004/march/table2.asp.

that limit the information that a court may consider.

By contrast, the very nature of courts as decision-making institutions may impede their ability to perform a role in foreign affairs. As work on structural injunctions has shown,[164] courts are relatively poor at gathering information, especially when a case extends beyond the pure historical facts behind a single transaction or accident to broader political, economic, and social events and trends. Courts experience difficulty in weighing policy alternatives and in calculating costs and benefits. Courts have been shown to be unable to gather and to absorb the sort of sufficient, objective data required to make considered decisions when more than just historical fact and causation are involved.

In addition to gathering and processing information, the executive branch has broader tools at its disposal to achieve foreign policy goals. In the field of foreign affairs, the discretion and authorities available to the President generally go beyond those enjoyed by agencies in domestic affairs. The President is the sole organ of the nation in its diplomatic relations, commander-in-chief of the military, and director of the clandestine services. These inherent authorities could be used in a variety of ways to achieve foreign policy goals such as the promotion of international human rights. In the diplomatic realm, they range from negotiating and drafting international agreements to pressuring other nations to follow human rights norms to seeking to isolate states with poor human rights records. Intelligence agencies could take covert action to destabilize nations that abuse human rights or even capture war criminals. As commander-in-chief, the President could issue orders to the military to restore order in states where central authority has collapsed, as in Somalia or Haiti, or ultimately to use force to end human rights abuse by states, as in Kosovo, or to produce regime change, as in Iraq.

The executive branch can also make significant progress toward foreign policy goals without having to rely on inherent constitutional authority.[165] Under the International Economic Emergency Powers Act (IEEPA), the President can impose sanctions

[164] Peter Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 394–404 (Yale, 1983); Donald L. Horowitz, *The Courts and Social Policy* 156–61 (Brookings, 1977).

[165] For an overview of the statutory law in the area of economics and national security, see Harold Koh and John Yoo, *Dollar Diplomacy/Dollar Defense: The Fabric of Economics and National Security Law*, 26 Intl Law 715 (1992).

against entities ranging from individuals to nations.[166] If these nations pose a threat to U.S. national security and foreign policy, the President may declare a national emergency that then triggers the authority to freeze foreign assets in the United States and to restrict all commercial contacts with a foreign nation.[167] Under the Export Administration Act, the President can place restrictions on exports to a nation that poses a threat to American national security or foreign policy.[168] The President can deploy these powers as a scalpel or as a hammer. They can be used in a fine-grained manner when aimed at a particular individual, such as apprehending Slobodan Milosevic. They can be used more broadly to try to coerce a nation to change its treatment of its own citizens, as with South Africa in the 1980s or with the former Yugoslavia and Iraq in the 1990s.

In comparison, courts have few effective tools to enforce compliance with their decisions, and those tools use sanctions or the punishment of individuals to leverage broader policy or institutional changes. Again drawing from the structural injunction context, courts possess imperfect tools for communicating their decrees, and they must rely upon other institutions and personnel to disseminate and implement their orders. Courts have few resources to compel compliance on the part of defendants or to create positive incentives to encourage adherence to judicial orders. Aside from a contempt order, judges generally rely upon the moral persuasiveness and the institutional legitimacy of their decisions to encourage compliance. These problems are only compounded with regard to foreign affairs. Parties will often be outside the United States and outside the reach of a federal district court or federal marshals. In most ATS suits, for example, plaintiffs have failed to collect any of the money they have been awarded by ATS judgments.

Third, executive policy in foreign affairs is subject to greater political accountability. One advantage of the courts, in certain situations, is their relative insulation from political control. Delegation to courts may help preserve a legislative majority's vic-

[166] 50 USC § 1701 et seq.

[167] Id at § 1702.

[168] Id at § 2401 et seq.

tories by making them more difficult to reverse in the future,[169] or provide a means to overcome a commitment problem.[170] Cost, however, is the flip side of the benefit of locking in policies or making a credible commitment. In order to achieve these ends, Congress must accept a loss of flexibility in policy implementation, a reduction in institutional expertise, and less ability to reflect changing legislative wishes. Many of these arguments have been brought to bear on the study of delegation of authority to agencies; the primary insight is that bureaucracies can be "inefficient by design" because of the desire of groups in the legislature to insulate agencies that share their views from being overturned or influenced by later winning coalitions in the legislature.[171]

As a matter of comparative institutional analysis, it would seem that delegation to the courts would experience these costs and benefits more intensely than delegation to executive branch agencies. Delegation of international law and human rights decisions to courts would lock in policies such that only overriding legislation could change national goals. Compared to the executive branch, courts are relatively impervious to oversight hearings, budget controls, and other informal political controls. They are also less subject to the formal political control of elections. Except for the long-term use of the appointment power of federal judges, only a statute would allow the President and Congress to force a change of direction in policy. While this gives courts greater political insulation, it also deprives them of the flexibility to adjust policy in light of changes in preferences, new circumstances, or new information and expertise.

Delegation to the executive branch, rather than the courts, in the area of CIL and human rights also may make more sense because of the President's enhanced constitutional role in foreign affairs. As the sole representative of the nation in its international relations, the President develops foreign policy, communicates with other nations, and reaches international agreements. By custom, presidents also make a variety of informal commitments with other nations. As commander-in-chief, the President can use force

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[169] See, for example, Rui J. P. de Figueiredo, Jr., *Electoral Competition, Political Uncertainty, and Policy Insulation*, 96 Am Pol Sci Rev 321 (2002).

[170] Vesting a foreign affairs decision in the courts can provide the political branches with a costly signal that they intend to abide by an international agreement.

[171] Id at 322–23 (discussing sources).

to achieve foreign policy, but he can also make use of less violent forms of persuasion or coercion as well. Human rights, of course, have constituted an important element in American foreign policy. Presidents have used human rights to undermine antagonistic regimes, as President Reagan did with the Soviet Union, or have pursued them as a goal in themselves, as did President Carter.

Effectiveness would arguably be enhanced if the same institution exercised control over international law and human rights as well as broader foreign policy. Otherwise, the United States might send conflicting signals to other nations about its policies. To take an extreme case, suppose the United States sought to wage a war to promote humanitarian goals, such as the end of a genocidal conflict. Such a war would arguably violate the prohibition on the use of force contained in the U.N. Charter.[172] Indeed, the International Court of Justice has held that this rule is not just a positive rule of the Charter, but a rule of CIL.[173] Suppose an alien harmed by American military action in the war brought an ATS suit against the U.S. government and its officials alleging the war violated CIL. A judicial decision to promote CIL through the ATS could conflict with the decision of the executive branch to use force in the same case, to the point of even frustrating the substantive improvement of human rights conditions in the area of conflict.

In light of these considerations, it seems that the executive branch is superior to the courts for achieving the ATS's statutory purpose. The executive branch has better means for developing information on foreign affairs, has far more tools to bring to bear against violators of human rights or international law, and can display more flexibility in responding to changing international conditions while remaining more accountable politically. Congress, however, might still delegate authority in these areas to the courts rather than agencies depending on the propensity of the executive branch to violate CIL itself. If the executive branch were to prove more likely to violate CIL than the courts, then Congress might choose to vest the authority for its enforcement in the latter.

Two considerations make it unlikely that this is the case. First, the ATS currently does not operate to prevent the United States

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[172] For a discussion of the international legal rules governing the use of force, see John Yoo, *Using Force*, 71 U Chi L Rev 729 (2004).

[173] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, 1986 ICJ 14, 146.

from violating CIL because it does not override sovereign immunity. Second, even if Congress had chosen the ATS to provide a means for the courts to control executive branch violations of CIL, the courts' own doctrines permit the President to violate CIL. *The Paquete Habana* itself recognizes that CIL may be overridden by a "controlling executive" action.[174] This makes sense, because in order to change CIL the President may need to violate CIL—one of the ways to change a rule of CIL is to engage in state practice that establishes a different rule.[175] Presidents also may need to violate CIL in order to vindicate other foreign policy goals, such as using force to protect human rights (as in Kosovo) or to prevent the proliferation of weapons of mass destruction. It does not appear that Congress intends to limit the President's flexibility in protecting national security or promoting foreign policy goals by imposing CIL standards on his actions through the ATS.

IV

Even if one agrees with our functional critique of the *Sosa* Court's reading of the ATS, we would still have to offer an alternative reading of the statute that is consistent with both the statutory text and with existing doctrine but which also incorporates our conclusions about the functional superiority of the executive branch over the federal courts in the development of CIL. Our functional analysis supports reading the ATS as a jurisdictional statute that does not authorize federal courts to engage in the development and enforcement of any kind of CIL as part of their common lawmaking powers. As a doctrinal matter, however, we recognize that many courts, including the *Sosa* Court, follow *The Paquete Habana*'s declaration that "international law is part of our law" and must exist in some part of the domestic legal system cognizable by courts even when Congress has not acted to implement such norms by statute.

For this reason, in addition to reading the ATS as a pure jurisdictional statute providing a basis for subsequent congressional

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[174] *The Paquete Habana*, 175 US at 712.

[175] See, for example, *Authority of the Federal Bureau of Investigation to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities*, 13 Op Office Legal Counsel 163, 170–71 (1989) (discussing whether Congress and the executive can override CIL).

implementation of CIL, our functional analysis suggests that modern CIL should be treated like the rest of the pre-*Erie* general common law: as part of the common law of the states. As we explain, unlike the federal common law approach adopted by the *Sosa* Court, treating uncodified CIL as state common law will result in active participation by the institution best positioned to assess and enforce CIL: the federal executive.

A. THE JURISDICTIONAL READING OF THE ATS

Our jurisdictional reading is at least as consistent with the text, structure, and history of the ATS as the *Sosa* Court's quasi-jurisdictional reading, if not more so. Indeed, the *Sosa* Court admitted as much when it also concluded that the ATS's text and structure did not create a statutory cause of action. But the *Sosa* Court nonetheless decided to keep the door "ajar" for federal court development and enforcement of certain universally accepted norms of CIL. Neither the *Sosa* Court, nor its academic supporters, have offered a functional justification for giving federal courts a central role in the development and enforcement of CIL. This is perhaps not surprising because a functional analysis of the institutional consequences of the *Sosa* Court's reading of the ATS leads us to conclude that federal courts are not the best positioned institution to develop and enforce CIL. Rather, a functional analysis supports a jurisdictional reading of the ATS that leaves CIL enforcement either to Congress or to the common law of the several states.

Ironically, the perceived functional implausibility of the jurisdictional reading of the ATS has been one of the chief arguments for maintaining the federal status of CIL endorsed by *Sosa*. As Dean Koh has argued, treating CIL as state law could result in fifty different state interpretations of CIL and would be inconsistent with the traditional "one voice" conception of U.S. foreign relations law.[176] Moreover, treating CIL as state common law appears on its face to resemble the *Sosa* Court's reading in preserving a role for functionally inferior courts in the development and enforcement of CIL.

We agree that these are serious objections to the reading of the ATS we propose here. Indeed, they are the only objections that have any force. These objections, however, can both be answered

[176] See Koh, 111 Harv L Rev at 1824, 1841 (cited in note 114).

by recognizing the power of the President to supervise and independently preempt divergent interpretations of CIL. Thus, reading the ATS as a jurisdictional statute only and removing CIL from the federal courts' common lawmaking powers does not leave CIL to the whims of fifty different state court systems that might be even less functionally competent than the federal judiciary. Rather, our jurisdictional reading of the ATS places CIL in the state and federal courts under the direct supervision of the federal executive.

Although the *Sosa* Court also contemplates a role for the executive branch, its suggestion that "in appropriate cases" the executive branch's views be given "strong deference" still assumes that federal courts, rather than the executive branch, will hold the final determination on how and whether to apply a CIL norm.[177] Indeed, as we explain below, under the *Sosa* Court's implicit recognition of CIL as federal law, giving the executive the final word would threaten federal judicial independence. This problem does not, however, arise if CIL is treated as a type of state common law.

Thus, unlike the *Sosa* Court's reading of the ATS, the institution most responsible for the development and enforcement of CIL under our reading of the ATS will be the federal executive. As we have explained, the executive has substantial institutional advantages over courts in the development and enforcement of CIL. In the next two sections, we demonstrate that, in addition to the functional advantages of relying on executive supervision of CIL that we identified in Part II, treating CIL as state common law with active presidential supervision is also well grounded as a matter of historical practice and strengthened by the Court's recent decision in *American Insurance Association v Garamendi*.[178]

B. STATE COURTS AND CIL

As the *Sosa* Court pointed out, the Supreme Court has long "affirmed that the domestic law of the United States recognizes the law of nations."[179] But the *Sosa* Court failed to acknowledge that, prior to *Filartiga*, this affirmation of CIL has been as much

[177] *Sosa*, 124 S Ct at n 21.

[178] 123 S Ct 2374 (2003).

[179] Id at 2764.

the task of state courts operating independently and without the supervision of the federal courts.

1. *CIL as general common law.* Prior to the seminal case of *Erie*, most scholars agree that CIL formed part of the general common law.[180] In contrast to the post-*Erie* system, federal courts were not bound by state court interpretations of general common law and state courts were not bound by federal court interpretations of general common law. Thus, when cases involving the application of CIL fell within the jurisdiction of state courts, those courts applied CIL independently without the possibility of appeal to the federal courts or the Supreme Court. Similarly, federal courts applied CIL without being bound by state court interpretations. Each system, therefore, applied CIL independently of the other.[181]

The Supreme Court consistently confirmed this understanding of the pre-*Erie* status of CIL, holding that CIL "is one of those questions of general jurisprudence" or general common law.[182] On a number of occasions, the Court also confirmed that it had no appellate jurisdiction over state court interpretations and applications of CIL. Thus, in 1875, the Court refused to accept appellate jurisdiction over a state court decision applying the "general laws of war, as recognized by the law of nations" because such a case did not involve the "Constitution, laws, treaties, or executive proclamations of the United States" under the contemporary version of today's federal question jurisdiction statute.[183]

Less than a decade later, the Court similarly refused to review a state court decision affirming the legality of an abduction of a criminal defendant overseas in violation of CIL because "the decision of that question is as much within the province of the state court as a question of common law, or of the law of nations . . . ."[184] Although some commentators have simply rejected these and other decisions reach-

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[180] See, for example, Restatement (Third), pt I, ch 2, introductory note at 41; Young, 42 Va J Intl L at 365, 374 (cited in note 50); Neuman, 66 Fordham L Rev at 373 (cited in note 36); Stephens, 66 Fordham L Rev at 400 and n 34 (cited in note 36); see also *Sosa*, 124 S Ct at 2770.

[181] For the leading account of the operation of the general common law system, and its difference from the modern, positivistic understanding of federal and state common law, see William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv L Rev 1513 (1984).

[182] *Huntington v Atrill*, 146 US 657, 683 (1892).

[183] See *New York Life Insurance v Hendren*, 92 US 286 (1875).

[184] *Ker*, 119 US at 444 (cited in note 60).

ing the same result as wrongly decided,[185] the fact remains that no Supreme Court decision in the pre-*Erie* regime ever held that the state court interpretations of CIL could be reviewed by federal courts.[186]

After *Erie*, some courts followed the logic of *Erie*'s holding and treated CIL as a form of state common law. In 1948, Judge Learned Hand interpreted CIL to grant diplomatic immunity from civil suit to a French diplomat accredited as a minister to Bolivia. Applying *Erie*, Hand held that the suit was governed by the law of New York, "and although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves."[187] Judge Hand then surveyed both New York state court cases and general international law authorities to resolve the case in favor of the foreign diplomat.

2. *Case study in CIL development: foreign sovereign immunity.* A review of one particular doctrine of CIL, foreign sovereign immunity, illustrates two important practical aspects of the CIL-as-general-common-law system relevant to our jurisdictional reading of the ATS. First, state courts, both before and after *Erie*, interpreted the CIL of foreign sovereign immunity independently of federal courts, even in matters directly implicating foreign relations, by adjudicating sensitive litigations against foreign sovereigns. Second, the executive branch, rather than federal courts, served as the chief mechanism for deciding how to deal with the sensitive foreign policy implications of such cases.[188]

Although the doctrine of foreign sovereign immunity for foreign governments was first announced in the United States by Chief Justice Marshall in 1812,[189] this doctrine of CIL was independently

[185] See Neuman, 66 Fordham L Rev at 374 n 14 (cited in note 36); Restatement (Third) § 111 n 4.

[186] Indeed, one of the interesting aspects of the scholarly debate is that while there is virtually no judicial precedent prior to *Filartiga* supporting federal court control over the interpretation and application of CIL, leading scholars managed to achieve wide acceptance for this view. See, for example, Restatement (Third) § 111. This consensus was achieved despite the fact that the only federal court to directly consider the question of CIL after *Erie* prior to *Filartiga*, Judge Learned Hand in the Second Circuit, essentially followed *Erie* and past practice and treated CIL as part of New York's common law. See *Bergman v De Sieyes*, 170 F2d 360 (2d Cir 1948).

[187] *Bergman*, 170 F2d at 361 (cited in note 186).

[188] For a longer and more detailed review of the pre-*Erie* system's treatment of CIL, see Julian G. Ku, *Customary International Law in State Courts*, 42 Va J Intl L 265 (2001).

[189] *Schooner Exchange v McFaddon*, 11 US 116 (1812).

developed by both state and federal courts. As early as 1857, the Supreme Court of New York began modifying the absolute theory of immunity outlined by Marshall by refusing to dismiss the government of Nicaragua from being joined to lawsuit on the grounds that "joinder" was not "necessarily derogatory to the character or independence of a state. . . ."[190] Much later, a New Jersey court expanded this modification of strict absolute immunity by outlining a restrictive theory of foreign sovereign immunity limited to those "acts done under color of the authority conferred upon it," and not "in excess of that authority and without legal justification."[191]

One interesting example of how states and federal courts operated independently in the development of this CIL doctrine may be seen in judicial development of the foreign sovereign immunity waiver doctrine. In 1922, a complicated litigation involving a state-owned Portuguese company proceeded simultaneously in New York state and federal courts. Curiously, while the New York state court found that the company, which claimed sovereign immunity, had not waived this immunity by answering the U.S. plaintiffs' complaints on the merits, the Second Circuit reached the exact opposite conclusion twelve days later in the federal side of the action.[192] Plaintiffs then returned to the New York state court seeking reversal, but the New York state court simply refused to follow the Second Circuit's interpretation of CIL.[193] The New York state court thus rejected the Second Circuit's interpretation of CIL as applied to the exact same set of facts.

The possibility that federal and state courts could reach inconsistent results, even in cases involving the same facts, highlights the major flaw in the pre-*Erie* system of CIL. Because CIL was part of the general common law, there was no basis for seeking federal or Supreme Court action to unify the interpretation or application of CIL, even doctrines such as foreign sovereign immunity that directly implicated foreign sovereign interests. Unlike the modern position endorsed by the *Sosa* Court's reading of the ATS, the Supreme Court could not overrule state court interpretations of CIL.

On the other hand, the pre-*Erie* system did have a mechanism

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[190] *Manning v Nicaragua & Accessory Transit Co.*, 14 How Pr 517 (New York, 1857).

[191] *Pliger v United States Steel Corp.*, 130 A 523 (NJ 1925).

[192] *De Simone v Transportes Maritimos De Estado*, 191 NYS 864, 867 (App Div 1922); *The Sao Vicente*, 281 F 111, 114 (2d Cir 1922).

[193] *De Simone v Transportes Maritimos de Estado*, 192 NYS 815, 181–19 (App Div 1922).

for handling the sensitive foreign policy consequences of cases that involved foreign sovereigns: the federal executive branch. For instance, the executive, through an appearance amicus curiae by a United States Attorney, convinced a New York state court to grant Mexico sovereign immunity in a lawsuit seeking remedies for an alleged default of its sovereign bonds.[194] This practice continued two decades later in a subsequent litigation over a later Mexico default of a different set of sovereign bonds. A U.S. attorney appeared in New York state court on behalf of Mexico to advocate giving Mexican assets immunity from seizure by bondholders.[195] While some courts hesitated to require absolute deferral to the President, the Supreme Court eventually recognized the executive's final authority on determinations of sovereign immunity in 1945.[196] Thus, "if the Executive announced a national policy in regard to immunity generally, or for the particular case, that policy was law for the courts and binding upon them, regardless of what international law might say about it."[197]

As a result, the executive, rather than federal courts, served as the institution responsible for assessing the effect of a court's application of the CIL of foreign sovereign immunity on U.S. foreign policy and, perhaps, the content of CIL itself. During this period, the executive branch would receive petitions from foreign governments, hold administrative hearings, and then issue letters to courts stating the position of the U.S. government on a foreign government's sovereign immunity request.[198] While some have argued that the President cannot determine CIL for the courts and can only order courts to disregard CIL,[199] for our purposes this is a distinction without a difference. Under either view, the executive, and not

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[194] *Hassard v Mexico*, 61 NY 939 (1899).

[195] *Gallopin v Winsor*, 251 NY 48 (1931).

[196] *Mexico v Hoffman*, 324 US 30 (1945). Curiously, despite the holding in this case requiring courts to defer to the executive branch's views, the State Department continued to claim that "a shift in policy by the executive cannot control the courts . . . ." See Letter from Acting Legal Adviser, Jack B. Tate, to Department of Justice, May 19, 1952, 26 Dept State Bull 984 (1952).

[197] See, for example, Louis Henkin, *Foreign Affairs and the U.S. Constitution* 56 (Oxford, 1996).

[198] For a description of this quasi-administrative process, see Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 Yale Stud World Pub Order 1, 12–13 (1976).

[199] See id at 56 n 68.

the federal courts, has the final word on how to resolve an issue of CIL for purposes of U.S. domestic law.

Interestingly, this practice of executive control over the application of foreign sovereign immunity was applied to both state and federal courts even after *Erie* supposedly unified (at least in the view of the *Sosa* Court) federal court control over CIL. Thus, in 1940, a New York court refused to give immunity to a Polish state-owned bank after noting the executive branch's refusal to appear in court.[200] In 1941, Maine's highest court granted such immunity solely on the basis of the executive's appearance in its court.[201] As the Pennsylvania Supreme Court noted in 1945:

> When the Department of State makes known its determination with respect to political matters growing out of or incidental to our Government's relations with a friendly foreign state, it is the duty of the courts to abide by the status so indicated or created and to refrain from making independent inquiries into the merit of the State Department's determination or from taking any steps that might prove embarrassing to the Government in the handling of its foreign relations.[202]

This executive lawmaking regime continued until 1975, when Congress intervened to codify the law of foreign sovereign immunity as federal statutory law.[203]

Congress's intervention changed the role of the executive branch in the oversight of the CIL of foreign sovereign immunity but it did not eliminate it. Questions of sovereign immunity for heads of state and former heads of state remained uncodified and continued to be tightly supervised by the executive.[204] As for the areas of foreign sovereign immunity that Congress did codify, Congress did not act due to any doubts about the executive's authority to engage in this kind of lawmaking. Instead, it acted, among other reasons, "in order to free the Government from the case-by-case diplomatic pressures."[205] For our purposes, it is worth noting that when the

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[200] *Ulen & Co. v Bank Gospodarstwa Krajowegao*, 24 NYS2d 201 (App Div 1940).

[201] *Miller v Gerrocarrill Del Pacificio de Nicaragua*, 18 A2d 688, 690 (Me 1941).

[202] *FW Stone v Petroleous Mexicanos*, 42 A2d 57, 59–60 (Pa 1945).

[203] Foreign Sovereign Immunities Act, 28 USC §§ 1330, 1602–11.

[204] See, for example, *United States v Noriega*, 117 F3d 126 (11th Cir 1997) (rejecting sovereign immunity for Panamanian leader on grounds that executive branch "has manifested its clear sentiment that Noriega should be denied head-of-state immunity.").

[205] *Verlinden BV v Central Bank of Nigeria*, 461 US 480, 488 (1983).

executive administration of the CIL of foreign sovereign immunity proved imperfect, Congress did not simply return such determinations to the common law powers of the courts, which it might well have done if the federal courts had the kind of central role in the administration of CIL contemplated by the *Filartiga* and *Sosa* courts. Rather, it created "a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities"[206] that placed the federal courts under strict statutory limitations. Indeed, subsequent courts later understood Congress' action to require courts to adhere to Congress' legal standards, even if such standards differed or came into conflict with changing notions of the CIL of foreign sovereign immunity.[207]

C. EXECUTIVE SUPERVISION OF CIL: THE GARAMENDI OPTION

While the pre-*Erie* regime of CIL as general common law persisted for a substantial period of time, in some cases the system resulted in inconsistent interpretations or applications of CIL. Such inconsistencies have fueled critics of Judge Hand's suggestion that CIL has become part of the common law of the several states after *Erie*. After all, adopting Judge Hand's view would result in fifty different interpretations of CIL doctrines such as foreign sovereign immunity with chaotic implications for the ability of the United States to maintain a unified voice on foreign affairs.[208]

As the practice of state courts with respect to foreign sovereign immunity recounted above suggests, however, there is no reason to believe that granting federal courts broad authority over CIL development, as the Court did in *Sosa*, will result in a superior system. Indeed, as we have pointed out, federal courts suffer from many disabilities that make them less than ideal arbiters of CIL, especially in matters implicating sensitive issues of foreign relations. Rather, we believe both the historical record and functional considerations support reading the ATS as merely jurisdictional, thus leaving to the executive branch, rather than the federal courts, the power to supervise CIL development as a matter of domestic

[206] Id.

[207] *Argentine Republic v Amerada Hess Shipping Corp.*, 488 US 428 (1989) (holding that Congress did not authorize federal courts to interpret Foreign Sovereign Immunities Act to exempt any violations of international law that Congress did not specifically identify).

[208] Koh, 111 Harv L Rev at 1841 (cited in note 114).

law. The Supreme Court's recent decision in *American Insurance Association v Garamendi*[209] confirms and strengthens this belief.

1. *Garamendi.* In *Garamendi*, the Supreme Court considered the constitutionality of the Holocaust Victim Insurance Relief Act (HVIRA), a California statute requiring insurance companies to disclose information about World War II–era insurance policies held by Holocaust victims.[210] An association of insurance companies, including foreign insurance companies who bore the brunt of the disclosure requirements, challenged HVIRA on the grounds that the state law impermissibly intruded into the federal government's exclusive authority over foreign affairs. The United States government, as well as the German government, filed briefs in support of the insurance companies. By a 5–4 majority, the Court agreed that the state law was preempted.[211]

What makes *Garamendi* important for our purposes is not that the Court decided to preempt a state law, but the basis for the supposed preemption. A trial court had invalidated HVIRA on the grounds that it interfered with the federal government's exclusive control over foreign affairs.[212] The trial court had relied on the Supreme Court's decision in *Zschernig v Miller*,[213] which authorized federal courts to preempt state laws that intruded into foreign affairs even without a direct conflict with a federal statute, treaty, or executive agreement.[214] *Zschernig*'s conception of a "dormant foreign affairs preemption" power for federal courts had been sharply criticized by commentators and sparingly applied by courts.[215]

The *Garamendi* Court did not reject *Zschernig*. On the other hand, it also did not extend *Zschernig*'s endorsement of an independent federal court power to supervise foreign relations. Instead,

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[209] 539 US 396 (2003) (cited in note 64).

[210] See Cal Ins Code §§ 13800–07.

[211] 539 US 396.

[212] See, for example, *Gerling Global Reinsurance Corp. of Am. v Quackenbush*, 2000 US Dist LEXIS 8815 (June 9, 2000).

[213] 389 US 429 (1968).

[214] *Gerling Global*, 2000 US Dist LEXIS 8815, *19.

[215] See, for example, *Gerling Global v Low*, 240 F3d 739 (9th Cir 2001) (noting that *Zschernig* has been applied sparingly). For critical commentary, see Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 Va L Rev 1617, 1643–58 (1997); Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 Notre Dame L Rev 341 (1999).

the Court found the California law preempted because the law created a clear conflict with a "consistent Presidential foreign policy."[216] Importantly, the Court did not rely on a treaty, statute, or executive agreement to find preemption. Rather, it gleaned this "consistent Presidential foreign policy" by reviewing statements made by U.S. officials responsible for negotiating settlement agreements with foreign governments and insurers.[217] Because these statements by executive branch officials indicated a national policy to encourage voluntary repayment of insurance policies rather than mandatory disclosures, "state law must give way where, as here, there is evidence of clear conflict between the policies adopted" by the "federal executive authority" and the states.[218]

Thus, the *Garamendi* Court neatly sidestepped the main criticism of *Zschernig*, which attacked *Zschernig*'s empowerment of federal courts to preempt independently state laws in the complete absence of any input from (or indeed in opposition to) the wishes of the President or Congress. By relying on executive "statements" of national policy, the *Garamendi* Court avoided the problem of unchecked federal courts by empowering the executive branch to settle future disputes over state interference with foreign affairs by issuing statements of national policy.

As Justice Ginsburg argued in her dissent, the Court's reliance on statements by individual members of the executive branch "places the considerable power of foreign affairs preemption in the hands of individual sub-Cabinet members of the Executive Branch."[219] Even if the officials faithfully represented the executive's policy, the dissent argued that the decision might result in giving such officials "the power to invalidate a state law simply by conveying the Executive's views on matters of federal policy."[220]

2. *Garamendi and CIL.* Although the decision did not involve state court interpretations of CIL, *Garamendi* matters because the power of the federal courts to independently oversee state activities in foreign affairs is deeply intertwined with federal courts' powers over the development of CIL. As suggested above, supporters of the *Sosa* Court's reading of the ATS have argued that control over

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[216] *Garamendi*, 539 US 396, 399–400.

[217] Id.

[218] Id.

[219] Id at 442.

[220] Id.

CIL must remain under the authority of the federal courts because only federal courts can unify disparate and inconsistent interpretations of CIL.[221] In this view, CIL is simply one part of the larger foreign relations law controlled and developed by federal courts. Just as states cannot intrude on matters involving foreign relations by enacting laws like HVIRA, states cannot be allowed to intrude on foreign relations by developing and interpreting CIL independently.

Although *Garamendi* might be understood as a defeat for "foreign relations federalism" and state participation in matters relating to foreign affairs,[222] it is hardly an unqualified endorsement of *Zschernig*'s reliance on *federal courts* to police state activities. Rather, *Garamendi*'s reliance on the statements and actions of executive branch officials to discern a "consistent Presidential foreign policy" in conflict with the state law affirms that the federal *executive*, rather than the federal *courts*, holds the primary responsibility for determining which state laws and policies unduly interfere with national policies.

This reliance on the executive to oversee the states on matters implicating foreign affairs is hardly radical. Nor is this authority limited to executive supervision of state activities that offend foreign governments such as HVIRA. If anything, the tradition of executive supervision of states is stronger and deeper in the context of the development of CIL. As explained above, the federal executive has long exercised the right to intervene in lower state and federal court decisions implicating the CIL of foreign sovereign immunity.

Thus, while federal and state courts differed on the application of the CIL of foreign sovereign immunity, the federal executive's statements were treated as authoritative. Nor was this executive power limited to the question of recognizing governments. Thus, for example, the executive's independent decision to recognize a restrictive theory of foreign sovereign immunity in the famous State Department Tate Letter[223] was followed by courts, including

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[221] See, for example, Koh, 111 Harv L Rev 1824, 1841 (cited in note 114).

[222] For the most prominent academic defenders, see Goldsmith, 83 Va L Rev at 1643–58 (cited in note 215); Ramsey, 75 Notre Dame L Rev 341 (cited in note 215); Peter J. Spiro, *Foreign Relations Federalism*, 70 U Colo L Rev 1223 (1999).

[223] Letter from Jack B. Tate, Acting Legal Adviser for the State Department, 26 Dept State Bull 984 (1952).

the Supreme Court, even though this interpretation of CIL did not directly implicate the recognition of any particular foreign government.[224] Moreover, despite Justice Ginsburg's criticism of the *Garamendi* Court's reliance on "statements by sub-Cabinet officers,"[225] the CIL of foreign sovereign immunity has long been controlled by actions (such as the Tate Letter) of sub-Cabinet officers in the State Department's Legal Advisor's office or the Department of Justice.[226]

For this reason, *Garamendi* only serves to strengthen the executive's already well-established role in the supervision of CIL. *Garamendi*'s preference for using statements by sub-Cabinet officials to determine whether a state law conflicts with national policy reaffirms the ability of such officials to control the development of CIL in lower courts as well. *Garamendi* reminds us that the federal court–centered system endorsed by *Sosa* is not the only system capable of providing a coherent national approach to the development of CIL. Indeed, given our functional analysis of federal courts, the system endorsed by *Sosa* is not even the best system for achieving uniformity in the development of CIL.

Under this understanding of *Garamendi* and consistent with past practice, the President controls CIL in three different ways.

- The President has the authority to declare, on behalf of the United States, adherence, rejection, or interpretations of CIL on the international plane. Most CIL requires state consent and most scholars agree that the President holds the primary authority to issue or withhold such consent for the United States. One of the more uncontroversial examples of this practice is President Truman's 1945 proclamation declaring that the United States would subject the underwater continental shelf abutting the coasts of the U.S. as part of U.S. territory.[227] A more controversial example of this practice is President

[224] See, for example, *Isbrandtsen Tankers v President of India*, 446 F2d 1198 (2d Cir 1971) (following Tate Letter).

[225] *Garamendi*, 539 US at 442 (cited in note 64).

[226] The executive's practice with regard to foreign sovereign immunity was somewhat controversial in the academy but it persisted without much controversy in the courts until Congress's codification in 1975. See, for example, Philip C. Jessup, *Has the Supreme Court Abdicated One of Its Functions?* 40 Am J Intl L 168 (1946).

[227] Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Presidential Proclamation 2667, Sept 28, 1945, 10 Fed Reg 12303 (1945).

Bush's 2001 determination that al Qaeda and Taliban detainees captured in Afghanistan are not subject to the full protections of the customary laws of war.[228]

- The President may declare a national policy to adhere, reject or interpret a principle of CIL that preempts the entire field of CIL from state common law development. For example, in the aforementioned laws-of-war example, any presidential determination on the limited rights of unlawful combatants under the laws of war would likely completely preempt any independent state adjudication of CIL of those rights, including lawsuits by such individuals seeking to challenge the President's interpretation. Thus, if an unlawful combatant (say from Guantanamo Bay) sues for violations of the law of war, the whole field would be controlled by presidential determinations of the applicability of the CIL of war to such combatants.[229]
- The President may declare a national policy to accept, reject, or interpret a principle of CIL that comes into conflict with a specific interpretation of CIL under a state's common law. If a state adopts an interpretation of CIL, for instance, that foreign sovereign immunity protects a particular head of state, the President can override that particular interpretation while still leaving the state the authority to interpret other related forms of CIL such as whether head-of-state immunity applies to former heads of state.[230]

Both the majority and the dissent in *Garamendi* accepted an independent role for the executive in the preemption of state activity. Instead, the dispute centered on the exact form of executive intervention, with the dissent demanding a "formal" authoritative act by the President himself while the majority was content to rely upon statements made by sub-Cabinet officers as long as those statements accurately expressed the conflict between state and national policy.[231] For our purposes, we believe the President and his subordinates are authorized to use a variety of legal mecha-

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[228] See, for example, John Yoo and James Ho, *The Status of Terrorists*, 44 Va J Intl L 207 (2003).

[229] This would not prevent such an individual from bringing a suit on other grounds, however, including violations of constitutional or other domestic law rights.

[230] Compare *Republic of Austria v Altmann*, 124 S Ct 2240, 2254 (2004).

[231] *Garamendi*, 539 US at 442 (Ginsburg, J, dissenting) (cited in note 64).

nisms to express national policy ranging from presidential declarations to Tate-Letter-like statements by sub-Cabinet officials to statements of interests filed in the context of particular litigations. As long as there is no dispute within the executive branch as to what the national policy requires with respect to CIL, we believe any of the above mechanisms will suffice.

Of course, the President's authority to issue such declarations or interpretations is not exclusive. Rather, it is subject to congressional override for matters falling within the shared powers of Congress and the President. In the absence of congressional intervention, however, the President's interpretation of CIL would be the final word.[232]

Our proposal results in a substantially different role for the executive than the *Sosa* Court envisions. While the *Sosa* Court noted that "there is a strong argument to give serious weight"[233] to executive branch views of the impact of an ATS suit on foreign policy, it did not issue the same kind of absolute rule of deference to executive determinations that it required in the context of foreign sovereign immunity. Indeed, despite paying lip service to the importance of leaving much control over CIL to the political branches, the *Sosa* Court showed surprisingly little regard for the opinions of either the President or the Senate in its resolution of the *Sosa* case itself.

For instance, while conceding that the political branches of the U.S. government had, through its non-self-execution declarations, refused to give judicial effect to treaty norms prohibiting arbitrary detention, it nonetheless conducted its own independent analysis of the CIL issues raised by *Sosa*. It not only failed to give any deference to the executive branch's views on the subject, but it did not consider the Senate's decision to make such norms non-self-executing as a limitation on its ability to revive such a norm through the common lawmaking process.[234]

Under the reading of the ATS we have suggested, the question of whether Alvarez-Machain's abduction violated CIL would be a

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[232] We limit our argument to the President's ability to interpret CIL in absence of congressional action and do not address the related, but distinct question of the President's authority to interpret treaties. For a detailed discussion of this issue, see John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 Cal L Rev 1305 (2002), and Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 Cal L Rev 1263 (2002).

[233] *Sosa*, 124 S Ct at 2767.

[234] See, for example, id at 2768–69.

matter of state common law. If the executive intervened in the same or similar manner that it did in Alvarez-Machain, the court hearing the case would give absolute deference to the executive's determination as a matter of national policy, assuming of course that Congress (or the treaty makers) have not codified this particular CIL norm by treaty or federal statute.

D. POSSIBLE OBJECTIONS

While *Garamendi* provides doctrinal support for our proposal for state court control over CIL (supervised by the federal executive), critics are likely to offer a number of objections. We consider each in turn.

1. *The inadequacy of state courts.* Perhaps the most counterintuitive component of our jurisdictional reading of the ATS is the idea that CIL will form part of the common law of the states rather than federal law. As proponents of the modern position have argued, CIL seems to logically fall within the purview of the federal government because foreign affairs is clearly a national rather than a state matter. Moreover, as we have pointed out in our functional analysis of the ATS, CIL needs to be unified.

The first response, of course, is that under our proposal CIL would form part of the common law of the states but it will be the President that is responsible for unifying the treatment of CIL for the United States as a whole. As we have explained in Part III, the executive branch has many more resources at its disposal for assessing and interpreting CIL. Unlike federal courts, which rely on private litigants to remove cases to its jurisdiction and private litigants to properly brief the issue before it, the executive branch can intervene wherever and whenever it chooses to by the simple expediency of issuing a document similar to the Tate Letter. If diplomatic or administrative pressures prove too burdensome, the executive can seek congressional codification of the substantive CIL standards it has adopted as it did in the case of foreign sovereign immunity.

Moreover, even if one accepted the idea that state governments have no role in the administration and interpretation of CIL, an idea one of us has disputed at length elsewhere,[235] our proposal

[235] Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 NC L Rev 457 (2004).

will almost certainly result in most CIL litigation returning to federal courts. The difference will be that such litigation must satisfy federal diversity jurisdiction requirements and will be governed by the common law of the state where the federal court resides. Thus, even if state courts and institutions were deemed somehow inferior, as a functional matter, to federal courts, our proposal does not preclude plaintiffs from going to federal courts anyway (assuming they can satisfy diversity requirements).

Additionally, treating CIL as state common law helps to avoid conflicts between courts and the executive over control of the interpretation of federal law. Under the current system, if the executive seeks to stop a court from adhering to a principle of CIL, a court empowered by the *Sosa* decision to interpret CIL might reject the President's views on a question of CIL on the grounds that the court's power to independently interpret federal law is being threatened. For instance, some courts have resisted analogous efforts by the executive to require courts to defer to the executive's interpretation of a treaty, suggesting that if "[t]he Government equates deference to submission," then it "would conflate" giving the executive's views deference "with surrendered judicial independence."[236] Presumably, courts might raise similar concerns in the context of executive views on CIL if such views were absolutely binding on federal courts.

Such concerns may be misguided, especially in the context of treaty interpretation.[237] Even so, this continuing tension between judicial independence and executive competence could be largely avoided if state (or federal courts sitting in diversity) are merely applying CIL as a doctrine of state common law. Absolute deference by state or federal courts to executive statements of CIL would not threaten the separation of powers since courts still retain their judicial power over federal law. Moreover, the Court's own precedents consistently permit greater presidential leeway over state law as opposed to the other branches of the federal government. As *Garamendi* illustrates, the Court has determined that the President, who holds the "vast share of responsibility for foreign affairs," already has the unilateral ability to preempt state law based on his determination of a "clear conflict" with a "consistent na-

[236] *Tachiona v Mugabe*, 186 F Supp 2d 383 (SDNY 2002).

[237] See Yoo, 90 Cal L Rev 1305 (cited in note 232).

tional policy."[238] And as we have explained above, this doctrinal result has sound functional benefits given the President's numerous institutional advantages over federal courts in the determination of national policy toward CIL and international human rights law. Just as importantly, it also helps to preserve the role of federal courts as fair institutions relatively independent of political manipulation.

2. *The dangers of presidential authority over CIL.* The second main objection to our jurisdictional reading of the ATS is that it would confer too much power on the President with respect to the interpretation and application of CIL. It is true that our proposal gives the President the discretion to interpret, apply, and even violate CIL. But we do not find this objection problematic for the following reasons.

First, it is well settled that the United States, as a sovereign, has the authority to violate CIL. U.S. courts, for instance, have long recognized that Congress has the power to violate treaties and CIL for purposes of domestic law. Hence, courts will enforce statutes passed later in time even if they conflict with treaties, and courts will also enforce statutes that violate CIL (although they will try to interpret both to avoid conflict).[239] Similarly, the Supreme Court has recognized that even though international law is "part of our law," it is subject to preemption by a "controlling executive act."[240]

Second, the President is the best-positioned institution to determine whether and how the United States as a whole should adhere to a particular rule or interpretation of CIL. As we have explained, much of CIL is determined by state practice and, under the U.S. system, the President is the chief interlocutor with foreign nations and international institutions. As such, the President is well positioned to assess various possible interpretations of CIL and harmonize those interpretations with the foreign policy goals of the United States. The President can also assess the continuing validity of a previously accepted CIL rule given changed foreign

[238] *Garamendi*, 539 US at 399–400.

[239] *Whitney v Robertson*, 124 US 190 (1888); *Murray v The Schooner Charming Betsy*, 6 US 64 (1804). For a discussion of the issues raised by conflicts between treaties and federal statutes, see Julian G. Ku, *Treaties as Laws: A Defense of the Last in Time Rule for Treaties and Federal Statutes*, 80 Ind L J (forthcoming Winter 2005).

[240] *The Paquete Habana*, 175 US at 712.

policy circumstances or changes in state practice. Moreover, the question from a functional perspective is not whether the President is likely to incorrectly interpret or violate CIL. The proper question is whether the President is better positioned than federal courts in determining how and whether to apply a rule of CIL. As we have argued, federal courts have few if any institutional advantages in the interpretation and enforcement of CIL, especially in the harmonization of CIL rules with the broader foreign policy goals which they have no ability to assess. Notably, neither the *Sosa* Court nor other defenders of the modern position have offered a defense of federal court control over CIL on anything other than formal grounds.

Third, under our view, Congress has the authority to override most presidential interpretations of CIL as well as presidential decisions to violate CIL. After all, Congress has the power to "define and punish offences against the Law of Nations."[241] Moreover, it has been delegated a number of specific powers to regulate foreign commerce and the military.[242] While there are some matters allocated by the Constitution to the President exclusively, many CIL questions do not fall within that category and can be regulated by Congress if it chooses. Additionally, as we explained above, Congress exercises substantially more influence over the executive branch than it does over the courts because it does not have to rely solely on its legislative power to override a decision. It can hold oversight hearings, change budget allocations, and block the appointment of executive officers, to name just a few of these nonlegislative mechanisms that would enable it to oversee executive interpretations of CIL. If Congress chooses not to act, either formally or informally, we believe the President rather than the federal courts should retain the authority to determine U.S. policy toward CIL.

3. *The end of foreign relations federalism?* Finally, our proposal will likely be criticized, in the same way that *Garamendi* has already been attacked, for transferring excessive authority to the President at the expense of the states.[243] Professors Denning and Ramsey have recently argued, for instance, that principles of federalism

[241] US Const, Art I, § 8.

[242] Id.

[243] Brannon P. Denning and Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 Wm & Mary L Rev 325 (2005).

and separation of powers require formal preemption by the statute or treaty over state activities implicating foreign affairs.[244] Indeed, the expansive nature of modern CIL encompassing traditionally state law areas such as family and criminal law might allow a President to wield CIL aggressively to unilaterally override state policies.[245] While we are more sympathetic to these objections than the others we have addressed, we nonetheless find them unconvincing.

It is true that states have historically interpreted CIL as part of their common law, but such interpretations or applications of CIL have never been considered strong candidates for protection under principles of federalism. For instance, state interpretation of the CIL respecting foreign sovereign immunity may implicate some traditional state interests, but very weak ones, if at all. This is probably why states welcomed executive interventions in this area of CIL. Their interest in maintaining an independent interpretation of the CIL of human rights is probably just as weak given that they have legislative authority to guarantee many of the same substantive results without relying on CIL. Thus, allowing the President to override state judicial interpretations of CIL or state statutes purporting to implement CIL will be unlikely to threaten basic state autonomy since the states could simply accomplish the same goals through other means. It is also worth pointing out that under our view, Congress will have the power to repeal the President's actions against the states because presidential determinations of the effect of CIL on state law fall squarely within Congress's traditional powers to define CIL.

The most difficult case occurs when existing non-CIL state law comes into conflict with CIL. For instance, the juvenile death penalty as administered by the states may violate CIL.[246] Under our view, however, the President cannot exercise his CIL interpretive power over the states unless the state is explicitly interpreting CIL. In other words, unless the state adopts an interpretation of CIL that permits such executions, there is no basis for the President to intervene. Even if a criminal defendant raises an argument based upon CIL in order to challenge his sentence, the

[244] Id.

[245] Id.

[246] See, for example, William A. Schabas, *Is the United States Death Penalty System Inconsistent with International Human Rights Law?* 67 Fordham L Rev 2793 (1999).

President could not necessarily exercise the *Garamendi* power to preempt the state's death sentence. If the state is merely applying its non-CIL statutory or common law on a matter within its traditional legislative competence, a presidential intervention might not satisfy *Garamendi*'s requirement of balancing among the national policy interest, the strength of the state's interest, and the clarity of the conflict.

To be sure, the *Garamendi* framework counsels deference to the executive branch and undoubtedly strengthens the President's ability to wield CIL against the states. Even so, the proper question for supporters of federalism is whether the President is *more* likely than a federal court to preempt of state laws on the basis of CIL. While the President is not constrained by the same political process constraints that scholars have relied upon to enforce principles of federalism, the President is still politically accountable, at least when compared to federal courts. Moreover, a review of historical practice demonstrates that the President is often hesitant to undermine state autonomy in order to ensure compliance with international law, even where his constitutional authority seems undisputed.[247] Not only have past presidents relied on state governments to independently ensure compliance with international law, but recently, presidents have even permitted state governments to openly defy international law obligations out of deference to state autonomy and federalism (and perhaps political calculation).[248] For this reason, we doubt that injudicious executive use of the power to preempt state laws by declarations of national policy will occur very frequently or more frequently than it might occur with federal courts holding this power.

Conclusion

Sosa represents the culmination of nearly 25 years of debate over the status of CIL in U.S. courts. As we have explained, it can be fairly read to endorse the majority view of international legal scholars of the importance of preserving an independent federal court role in the interpretation and enforcement of CIL. Though *Sosa* recognized the force of the formalist critique, the

[247] See Ku, 82 NC L Rev at 495–97 (cited in note 235) (discussing executive's reluctance to intervene into state activities that injure alien residents).

[248] See id at 510–21 (discussing executive's reluctance to intervene in state criminal punishment on the basis of international court judgments).

Court was ultimately persuaded that the ATS litigation was necessarily a job for the federal courts. It refused to accept that "federal courts must avert their gaze from CIL" and that it was required by the formalist critique to remove "independent judicial determination" of CIL.[249]

While we disagree with the Court's reading of the ATS, especially its unpersuasive attempt to marshal historical sources for its conclusion, we believe that the real flaw in its decision lies in a failure to seriously consider the functional difficulties of maintaining the existing system of ATS litigation. While scholars and judges have widely celebrated the ATS as a mechanism for developing and enforcing international law and human rights, they have not examined whether the federal courts are the most appropriate institution for achieving those goals.

Our main goal here has been to provide the functional analysis that has generally been missing from the ATS debates. We conclude that the modern position's view of the ATS cannot be justified either as a reflection of congressional intent in the enactment of the ATS or as a matter of superior institutional competence on the part of federal courts. Federal courts suffer from many institutional shortcomings, especially when compared to the executive branch, in achieving national goals in foreign relations.

We also believe that the *Sosa* Court may not have fully understood that there is a doctrinally sound and functionally superior alternative system to the modern position. If federal courts are divested of their jurisdiction over ATS litigation, CIL litigation may still be entertained as part of the common law of the states. We believe this system is superior to the existing one because unlike current ATS litigation, the President has the independent authority to preempt state law interpretations of CIL. Thus, the executive branch would replace federal courts as the domestic institution responsible for developing, unifying, and interpreting U.S. obligations under CIL. We hope that our discussion can shift the terms of the ATS debate away from its largely inconclusive battles over the historical origins of the statute to a more broad-based analysis of the consequences of the modern position and to a deeper consideration of the possible alternatives.

[249] *Sosa*, 124 S Ct at 2764–65.