

FEDERAL COURTS ENFORCING CUSTOMARY
INTERNATIONAL LAW: THE SALUTARY EFFECT
OF *SOSA V. ALVAREZ-MACHAIN* ON THE
INSTITUTIONAL LEGITIMACY OF THE JUDICIARY

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I. INTRODUCTION

Instead of using guns, Americans go to our courts to resolve our disputes. Why do we, unlike many others in the world, use courts for this purpose? It is because we trust American courts to faithfully interpret the expression of the popular American will and to resolve our disputes fairly under the rule of law. It is this trust of the people, standing alone, that gives legitimacy to the courts' power of judicial review. Thus, in a constitutional republic which divides power among an executive, a legislature, and an independent judiciary, the continued legitimacy of democratic institutions rests in part upon an unelected judiciary's not usurping the power of the more politically accountable branches of government.

Concerns over such institutional legitimacy most recently have centered on Federal judges authoritatively citing transnational norms¹

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¹ The term "transnational" has a variety of meanings. So, for example, Transnational law has been defined by Philip C. Jessup as "the law which regulates actions or events that transcend National frontiers . . . including both . . . public and private international law," and other rules which do not wholly fit into the public/private law distinction. In recent times, the term "transnational law" has been used to describe another phenomenon—the

not promulgated pursuant to the popular will of the American people. By doing so, the argument goes, these judges arguably threaten legitimacy of judicial institutions and, consequently, the very foundation of the judicial power.²

For those concerned over such authoritative use of transnational norms³ and its attendant threat to the legitimacy of the judiciary, this

creation of law in the international context by governments, international organizations, and non-state actors (*e.g.*, business organizations). While this theory has been developed for public international law, it long has been advocated in the field of commercial law, where the global business community has created its own law, the so-called *lex mercatoria*.

Matthias Lehmann, LL.M. Comment: *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 COLUM. J. TRANSNAT'L L. 753, 753 (2004) (quoting PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956)).

However, in this article, the term transnational law will be used as it is by the transnationalist *movement*. Its emphasis is more on international human rights. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183 (1996). The transnationalist movement is pro-actively seeking to understand and commandeer the mechanisms by which nations "obey" international norms. As one of its key proponents has stated, "[t]ransnational legal process provides the key, in my view, to understanding the critical issue of compliance with international law." *Id.* Furthermore, "[t]ransnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law." *Id.* at 183-84.

² Transnationalists see their jurisprudence as being in direct conflict with a jurisprudence of nationalism, which is marked by a concern for national sovereignty. Harold Hongju Koh, *Agora: The United States Constitution and International Law: International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 52-53 (2004) [hereinafter Koh, *Part of Our Law*]. At best, transnationalism is hostile to nationalism as a jurisprudential approach—as the following mocking passage demonstrates:

In any event, *Lawrence* and *Atkins* may signal that the nationalists' heyday has finally passed. As Justice Breyer recently noted, "By now . . . it should be clear that the chicken has broken out of the egg." Like it or not, both foreign and international law are already part of our law. In time, I expect, those who continue to deny that reality will be remembered like those who "assumed the attitude once ascribed . . . to the British: when told how things are done in another country they simply say 'How funny.'"

Id. at 56-57 (citations omitted).

At worst, while acknowledging the on-going reality of the nation-state, transnationalism is often disdainful of or hostile to the very existence of the nation-state. See generally Gordon A. Christenson, *Federal Courts and World Civil Society*, 6 J. TRANSNAT'L L. & POL'Y 405 (1997).

³ As is obvious from the quotations in the preceding footnotes, there is still significant overlap in usage between the terms "international" and "transnational," and this article will use both, each where appropriate.

article explains why a new reason for optimism exists in light of recently clarified Alien Tort Claims Act jurisprudence. The Alien Tort Claims Act (ATCA) confers upon federal “district courts original jurisdiction [over] civil action[s] by an alien for a tort . . . committed in violation of the law of nations or a treaty of the United States.”⁴

Litigants bringing cases under the ATCA increasingly have employed a variety of international sources to determine what constitutes customary international law enforceable under the Act. In a 2004 case arising under the ATCA, the issue of federal court enforcement of international norms reached the United States Supreme Court in *Sosa v. Alvarez-Machain*.⁵ While the *Sosa* Court declined to set a bright line standard for ascertaining what constitutes customary international law enforceable under the Act, the Court expressly left the door “ajar subject to vigilant doorkeeping.”⁶ In this regard, the door remains open only to “violations of international law [that transgress] a norm that is specific, universal, and obligatory.”⁷

Thus, the *Sosa* decision sharply limits the international sources litigants may use to establish what constitutes customary international law.⁸ More importantly, the manner in which the Court reached its decision signals a retreat from the transnational law precipice that some on the Court had recently been edging toward.⁹ Thus, more than the nebulous standard established by the Court, it is *Sosa*’s express limitation that gives hope for a curtailment of the inappropriate use of transnational law in United States courts.

Despite criticism of the Court’s open-ended and malleable language, this article asserts that there is reason for optimism since *Sosa* established clear limits to the use of transnational legal resources in deciding cases under the law of nations. Part II of this article describes

⁴ 28 U.S.C. § 1350 (2005).

⁵ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

⁶ *Id.* at 2764.

⁷ *Id.* at 2766 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)); see also *id.* at 2776 (Scalia, J., concurring in part) (comparing the majority’s citation of the *Marcos* case standard to the *en banc* decision below reported at 331 F.3d 604, 621 (9th Cir. 2003)). Although sounding specific and objective, the subjectivity of the standard adopted by *Sosa* is ironically seen in *Sosa*’s reversal of the very circuit court which articulated the standard in the first place.

⁸ See *Sosa*, 124 S. Ct. at 2767. Some treaties or covenants, although binding on the United States as a matter of international law, do not of themselves create obligations enforceable in the federal courts. *Id.*

⁹ See, e.g., Tony Mauro, *Supreme Court Opening Up to World Opinion*, 26 LEG. TIMES, July 7, 2003, at 1, 8; Koh, *Part of Our Law*, *supra* note 2, at 53.

the landscape of the transnationalist agenda and the ideological divide it has created in the Court and scholarly writing. Part III discusses the early statutory background of the ATCA and the understanding of landmark cases leading up to *Sosa*. Based on the statutory background, the decision in *Sosa* should impact not only cases brought under the ATCA, but the use of transnational law generally.

In Part IV, this article examines *Sosa*'s holding and the explicit limits that it set forth to the use of transnational or customary international law in deciding cases. Part V describes the historical use of transnational law under the ATCA, compared in Part VI with later courts' use after *Filartiga* but before *Sosa*. Part VII analyzes the impact that *Sosa* should have on the use of transnational law in future federal court decisions. Part VIII examines the use of transnational law in light of the nature and meaning of the law of nations in the ATCA. In conclusion, Part IX posits that a middle ground has been struck in *Sosa*; while not accomplishing everything it could, it goes a long way toward reclaiming the Court's current jurisprudence from an unchecked transnationalist agenda.

II. THE PRE-SOSA LANDSCAPE

The legal, political, philosophical, and cultural debate over the use of international law by the federal courts was focused well before *Sosa* reached the high Court. For example, both the majority and dissenting opinions in *Atkins v. Virginia*¹⁰ and *Lawrence v. Texas*¹¹ reflect the sharp divide created by the willingness of some on the Court to use international law when addressing domestic issues.

¹⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002). *Compare id.* at 316 n.21 (finding that execution of the mentally retarded is "overwhelmingly disapproved" in the European Union) (Stevens, J., for the majority), *with id.* at 347-48 ("Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.") (Scalia, J., dissenting).

¹¹ *Lawrence v. Texas*, 539 U.S. 558 (2003). *Compare id.* at 573 (explaining how other authorities including a committee of the British Parliament and the European Convention on human rights point in a direction opposite to prior Court references to Western history and moral and ethical standards) (Kennedy, J., for the majority), *with id.* at 598 ("The Court's discussion of these foreign views (ignoring, of course, the many countries that have retained criminal prohibitions on sodomy) is therefore meaningless dicta. Dangerous dicta, however, since 'this Court . . . should not impose foreign moods, fads, or fashions on Americans.'") (Scalia, J., dissenting) (quoting *Foster v. Florida*, 537 U.S. 990, 991 n. (2002) (Thomas, J., concurring in denial of *certiorari*)).

The disagreement hardly stopped there. Justice O'Connor spoke publicly of the Court relying increasingly on "our international and foreign courts in examining domestic issues."¹²

Justice Breyer publicly invoked "one world" imagery and declared that, in that context, the challenge is "our Constitution and how it fits into the governing documents of other nations."¹³ He went on to enthuse that nothing could be "more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us."¹⁴

Justice Ginsburg pointedly cited international sources in her concurrence in *Grutter v. Bollinger*,¹⁵ confirming her publicly expressed intent to change "our 'island' or 'lone ranger' mentality" to "keep[] the United States in step with" the rest of the world by the "dynamic" interpretation of the Constitution.¹⁶

In response, many scholars are asking whether the Court has gone too far.¹⁷ Others have published books excoriating the Court for an anti-democratic, elitist use of international law designed to upset constitutional norms and impose its own secular virtues.¹⁸ Commentators continue to be divided sharply on the issue.¹⁹ In Congress, the United

¹² Lee Anderson, *U.S. Law or Foreign 'Law'?*, CHATTANOOGA TIMES FREE PRESS, Nov. 9, 2003, at F5 (quoting Justice O'Connor speaking to an international studies group, "we will rely increasingly—or take notice, at least—increasingly [sic] our international and foreign courts in examining domestic issues").

¹³ Interview with Justices O'Connor and Breyer, *This Week with George Stephanopoulos*, (ABC NEWS broadcast, July 6, 2003), available at http://www.white-noise.org/ABCthisweek_justices.htm (last viewed on Feb. 22, 2005) (quoting Justice Breyer that "it's becoming more and more one world" and that the challenge is "our Constitution and how it fits into the governing documents of other nations").

¹⁴ Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L. L. 57, 57 (2004) [hereinafter Alford, *Misusing International Sources*] (quoting Justice Breyer addressing an international law society meeting in 2003, that there is nothing "more exciting for an academic, practitioner, or judge than the global legal enterprise that is now upon us").

¹⁵ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

¹⁶ Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 40 IDAHO L. REV. 1, 5, 8-9 (2003) (citing Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1).

¹⁷ See, e.g., Symposium, *Has the Supreme Court Gone Too Far?*, COMMENTARY, Vol. 116, Issue 3, Oct. 1, 2003, at 25.

¹⁸ See, e.g., ROBERT H. BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* (2003).

¹⁹ Compare Richard Posner, *No Thanks, We Already Have Our Own Laws*, Aug. 2004 LEGAL AFFAIRS 40; Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L. L. 69, 82

States House of Representatives proposed resolutions to admonish the Court to refrain from using international law to determine domestic issues.²⁰

In contrast, a July 2003, *New York Times*' headline declared that the Court majority had momentarily remade the Court and the law,²¹ while the ACLU promoted the domestic use of international norms through a conference to which it invited sympathetic Supreme Court, circuit court, and district court jurists.²² The issue carries strong political, cultural, ideological, and philosophical overtones which the *Sosa* Court did not entirely avoid in its own opinions.²³

(2004) (threatens to undermine constitutional law) [hereinafter Ramsey, *International Materials*]; Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT'L L. 913, 925 (2004) [hereinafter Alford, *Federal Courts*] ("the Court is further unmooring itself from the traditional constitutional canon"); Alford, *Misusing International Sources*, *supra* note 14, at 58; John Leo, *Creeping Transnationalism*, U.S. NEWS & WORLD REPORT, July 21, 2003, at 58 (describing the problem with judges defying American law by spotting "emerging world consensus"); Donald E. Childress, III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193, 217, 219-20 (2003) (analyzing how international comparative analysis overturns American legal culture and constitutionalism), with Koh, *Part of Our Law*, *supra* note 2, at 53 ("[D]omestic courts must play a key role in coordinating United States domestic constitutional rules with rules of foreign and international law.").

²⁰ See, e.g., Constitutional Preservation Resolution, H.R. Res. 446, 108th Cong. (2003) ("[T]he Supreme Court should base its decisions on the Constitution and the Laws of the United States, and not on the law of any foreign country or any international law.").

²¹ Linda Greenhouse, *The Supreme Court: Overview; In a Momentous Term, Justices Remake the Law, and the Court*, N.Y. TIMES, July 1, 2003, at A1.

²² See Agenda, American Civil Liberties Union, Conference on Human Rights at Home: International Law in U.S. Courts (October 9-11, 2004) (on file with author); see also www.aclu.org/international/international.cfw (last viewed on Oct. 27, 2004). The ACLU invited Supreme Court Justice Stephen Breyer, Ninth Circuit Chief Judge Mary Schroeder, and District Judge Myron Thompson. Judge Thompson authored the opinion barring the Ten Commandments from Judge Roy Moore's Alabama Supreme Court room. *Glassroth v. Moore*, 278 F. Supp. 2d 1272 (M.D. Ala. 2003). These last described events occurred post-*Sosa* but represent a continuation of the previously described controversy.

²³ For example, Justice Souter labeled the Founding Fathers' adherence to natural law, see Declaration of Independence of 1776 ("the separate and equal station to which the Laws of Nature and of Nature's God entitle them") ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights"), as a mere "metaphysical cachet" properly displaced by today's "modern realism." *Sosa*, 124 S. Ct. at 2765.

III. THE STATUTORY BACKGROUND

Before determining how the *Sosa* opinion affects the broader transnational law debate, one must understand *Sosa*'s peculiar statutory context. Before *Sosa*, the Court's international norms furor centered on purely domestic issues like the death penalty in *Atkins*,²⁴ anti-sodomy laws in *Lawrence*,²⁵ and affirmative action in *Grutter*.²⁶ In *Sosa*, however, the issue arose in the context of the Alien Tort Claims Act.²⁷

Modified only slightly since its original enactment in 1789, the ATCA now reads in its entirety, "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."²⁸ According to one commentator, litigants brought only about twenty cases under the Act during the nearly 200 years prior to 1980.²⁹ In 1980, however, the Second Circuit's decision in *Filartiga v. Peña-Irala* breathed new life into the Act.³⁰

In *Filartiga*, the Second Circuit allowed a Paraguayan citizen to invoke the Act as the basis for a suit against a Paraguayan government official. The case involved an alleged act of murder and torture contrary to customary international law that had occurred in Paraguay.³¹ In determining the content of customary international law enforceable under the Act, the *Filartiga* court relied on the Supreme Court's 1900 decision in the admiralty war prize case *The Paquete Habana*, which briefly discussed the hierarchical relevance of custom to decide ATCA claims.³² The Second Circuit concluded that federal "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."³³ This statement opened the floodgates for imaginative lawyers and sympathetic judges to find many new forms of international law violations.

²⁴ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁷ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

²⁸ 28 U.S.C. § 1350.

²⁹ Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 437 (2002).

³⁰ *Filartiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980).

³¹ *Id.* at 879.

³² *The Paquete Habana*, 175 U.S. 677, 700 (1900).

³³ *Filartiga*, 630 F.2d at 881; see also *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 777 (D.C. Cir. 1984) (Edwards, J., concurring) (citing *Filartiga*'s discussion of *The Paquete Habana*).

Indeed, since *Filartiga*, litigants have filed over 100 new ATCA cases resulting in decisions.³⁴ In so doing, courts have used modern terminology of international law and modern conceptions for the proper application of ATCA.³⁵ In one case, an alien plaintiff alleged that the defendant's purchase of land from the Egyptian government violated international law because the expropriation of plaintiff's land constituted religious discrimination.³⁶ In another case, a plaintiff claimed damages from Argentina for bombing a British tanker in violation of international norms during the Falklands War.³⁷

In *Sosa*, the plaintiff-respondent Mr. Alvarez-Machain, a citizen of Mexico and an alien, alleged that his arbitrary abduction by United States agents—or transport into the United States for his subsequent arrest and trial for the murder of a DEA agent—violated a customary international law norm against abduction.³⁸

IV. AN EXAMINATION OF *SOSA*'S HOLDING

Justice Souter, writing for the majority in *Sosa*, rejected Alvarez-Machain's invitation to construe broadly the international norms under which aliens could bring Alien Tort Claims Act cases in the federal district courts.³⁹ While the Court left the door ajar, the Court's opinion should ensure that many of the more creative (that is to say, illegitimate) transnational law theories are dead on arrival at the federal district courts.⁴⁰

³⁴ Beth Stephens reported "approximately one hundred" in her 2002 article. Stephens, *supra* note 29, at 437-38. The number continues to increase.

³⁵ *Kadic v. Karadzic*, 70 F.3d 232, 238 (1995). "[T]he only disputed issue is whether plaintiffs have pleaded violations of *international law*." *Id.* (emphasis added).

³⁶ *Doe v. Islamic Salvation Front*, 993 F. Supp. 3 (1998). The court had subject matter jurisdiction under ATCA where a member of a political group allegedly committed war crimes against humanity during civil war. *Id.* at 8.

³⁷ *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 430-32 (1989). The international law norm alleged to be violated was "'attacking a neutral ship in international waters, without proper cause for suspicion or investigation . . .'" *Id.* at 433 (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 424 (2d Cir. 1987)).

³⁸ *Sosa*, 124 S. Ct. at 2747 (alleging that an arbitrary arrest violated the law of nations).

³⁹ *See id.* at 2754.

⁴⁰ *See id.* at 2764. Of course, our optimism is contingent upon *Sosa*'s standard being properly understood and applied by federal courts. Some renegade courts may seize upon the majority's suggestion that recognizing new violations of the law of nations is analogous to a type of common law development. *See id.* at 2764-65. Jus-

The Court specifically rejected Alvarez-Machain's claim that an international law custom existed against arbitrary abduction and detention.⁴¹ The Court supported its decision by adopting the standard that international norms cognizable under the Act must be "defined with a specificity comparable to the features of the 18th-century paradigms" that existed at the time of the Act's adoption.⁴² In support, the Court cited both its 1820 case, *United States v. Smith*,⁴³ and selective recent ATCA cases.⁴⁴ The Court cited *Smith* to illustrate the specificity with which the law of nations defined piracy.⁴⁵ The Court cited the selective recent cases for the proposition that jurisdiction under the Act should be limited to claims based on only a "handful of heinous actions" of "specific, universal, and obligatory" character.⁴⁶ Based upon these principles, the Court held that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATCA] was enacted."⁴⁷

In so holding, the Court expressly recognized the sharp debate over the Act's scope. Basing its decision on such considerations as the scope of the Act as debated in *Tel-Oren v. Libyan Arab Republic*,⁴⁸ the Court's reasons for sharply limiting claims under the Act included its blushing admission that given today's positivist/materialist jurisprudence, "a judge deciding in reliance on an international norm will find

tice Scalia's concurrence admonished that recognizing new violations should be left to Congress and not to the "discretionary power in the Federal Judiciary," in part "because the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century." *Id.* at 2769, 2773 (Scalia, J., concurring in part).

⁴¹ *Id.* at 2762.

⁴² *Id.* at 2761-62.

⁴³ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163-80 (1820).

⁴⁴ *Sosa*, 124 S. Ct. at 2766.

⁴⁵ *Id.* at 2765.

⁴⁶ *Sosa*, 124 S. Ct. at 2765 (quoting *Filartiga*, 630 F.2d at 890 ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.")); (quoting *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (describing how section 1350 should reach only "a handful of heinous actions—each of which violates definable, universal and obligatory norms")); (quoting *Marcos*, 25 F.3d at 1475 (cognizable "violations of international law must be of a norm that is specific, universal, and obligatory.")).

⁴⁷ *Sosa*, 124 S. Ct. at 2765.

⁴⁸ *Tel-Oren*, 726 F.2d at 777.

a substantial element of discretionary judgment in the decision.”⁴⁹ In other words, judges no longer find themselves constrained by the natural law principles inherited from Aristotle, Cicero, and Locke, and followed by the Founding Fathers in the 18th century when the ATCA was enacted.⁵⁰ Institutional legitimacy was the issue, especially where, according to *Sosa*, the Court’s “general practice has been to look for legislative guidance before exercising innovative authority over substantive law.”⁵¹

The Court also recognized that when federal courts “craft remedies for the violation of new norms of international law,” they “raise risks of adverse foreign policy consequences” and thus must act, “if at all, with great caution.”⁵²

Finally, the *Sosa* majority understatedly conceded that the Court has “no congressional mandate to seek out and define new and debatable violations of the law of nations,”⁵³ adding that recent “indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity.”⁵⁴ Indeed, the Court concluded its enumeration of reasons for caution by acknowledging that “Congress as a body has done nothing to promote such suits” under the Act based on customary international norms.⁵⁵

These final statements by the Court reflect its concession that limitations do exist on its power to consult international norms. They should provide a trustworthy guide to the Court’s attitude when faced with further disputes over of the applicability of ATCA.

⁴⁹ *Id.* at 2762; *see also id.* at 2764 (“As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice.”).

⁵⁰ *See, e.g.,* William R. Casto, *James Iredell and the American Origins of Judicial Review*, 27 CONN. L. REV. 329, 336, 350 (Winter 1995).

⁵¹ *Sosa*, 124 S. Ct. at 2762. The Court’s characterizing its own authority as “innovative” but generally subject to “legislative guidance” is not exactly its historical constitutional jurisprudence. Ghosts of even moderate constructionists would shudder. But then again this Court is not an historical Court. *Id.* at 2744.

⁵² *Sosa*, 124 S. Ct. at 2763 (citing *Tel-Oren*, 726 F.2d at 813 (Bork, J., concurring) (expressing doubt that “our courts [should] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens”)).

⁵³ *Sosa*, 124 S. Ct. at 2763.

⁵⁴ *Id.*

⁵⁵ *Id.*

Furthermore, though perhaps less hopefully,⁵⁶ these same statements may forecast a reluctant attitude by a majority of the Court toward the transnationalist agenda in general. Similarly open to prognostication is the likelihood of the lower federal courts' accepting *Sosa's* holding and rationale at face value. While the holding should be amply clear, one is faced again with the ability of creative litigants and activist courts to disingenuously force their way through *Sosa's* slightly ajar door. Nonetheless, based upon the analysis in this article, the overall effect of *Sosa* should be a salutary one.

As an aid to such prognostication and to understanding the general jurisprudential environment prior to *Sosa*, additional context is required.

V. USE OF CUSTOMARY INTERNATIONAL LAW PRIOR TO *SOSA*

Prior to *Sosa*, courts assumed that *Filartiga's* analysis of the admiralty war prize case, *The Paquete Habana*, justified use of customary international law.⁵⁷ That assumption, now proven erroneous by *Sosa*, led some federal courts down something of a slippery slope. One cannot understand *Filartiga*, and thus cannot understand the avalanche of litigation it precipitated, unless one carefully looks at the steps (or rather the mis-steps) of logic that *Filartiga* relied upon. Indeed, given *Filartiga's* logical nexus, it was almost inevitable that what the *Filartiga* court said about non-binding United Nations declarations, other courts would say about non-ratified treaties.⁵⁸

As noted above,⁵⁹ *Filartiga* first claimed that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."⁶⁰ The basis for this first premise is itself questionable. The *Filartiga* court derived this premise from the *Paquete Habana* Court's statement that

⁵⁶ Stephen Breyer & Antonin Scalia, Debate on the Constitutional Relevance of Foreign Court Decisions at the American University of Law (Jan. 13, 2005) (transcript provided by Federal News Service) [hereinafter Breyer & Scalia Debate].

⁵⁷ *Filartiga*, 630 F.2d at 881 (citing *The Paquete Habana*, 175 U.S. at 700); see also, e.g., *Flores v. S. Peru Copper Corp.*, 343 F.3d 140 (2d Cir. 2003); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Marcos Human Rights Litig.*, 978 F.2d 493 (9th Cir. 1992); *Tel-Oren*, 726 F.2d 774.

⁵⁸ See, e.g., *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd. on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

⁵⁹ See *supra* note 42.

⁶⁰ *Filartiga*, 630 F.2d at 881.

where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁶¹

However, the *Filartiga* court either failed to consider whether this principle has any application to the context of the case before it, involving as it did (in the *Filartiga* court's own words) a non-self executing and non-binding pronouncement of the United Nations, or it disingenuously ignored the *Paquete Habana* Court's resolution of this question in the negative.⁶² This seems especially egregious since the *Filartiga* court described "*Habana* [as] particularly instructive for present purposes."⁶³ Nonetheless, the *Filartiga* court somehow missed the import of the *Habana* Court's statement that settles the question—a statement that occurs a mere two paragraphs after the language it quoted.

In this latter passage, the *Habana* Court quoted Chancellor Kent as follows: "In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists, are regarded as of great consideration on questions not settled by conventional law."⁶⁴

This should have settled the issue. When the *Habana* Court wrote that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations," it must have been addressing those situations in which a country had not contemplated or had not yet ratified a treaty.⁶⁵ It could not have been addressing those situations in which a nation had (as in *Filartiga*) deliberately chosen to ratify a non-self executing treaty or (as in some of *Filartiga*'s progeny) proactively refused to ratify a treaty.⁶⁶

⁶¹ *Id.* at 880-81 (quoting *The Paquete Habana*, 175 U.S. at 700).

⁶² *Filartiga*, 630 F.2d at 881-82 n.9.

⁶³ *Id.* at 881.

⁶⁴ *The Paquete Habana*, 175 U.S. at 701 (quoting 1 Kent Com. 18).

⁶⁵ *Id.* at 700.

⁶⁶ While it may make for slightly more cumbersome reading in the following several paragraphs, this article will continue to discuss the *Filartiga* court's analysis,

The reason for this is two-fold. First, the negotiation and ratification of one type of treaty over another or the refusal to ratify a treaty would constitute a “controlling executive or legislative act.”⁶⁷ However, the second reason is perhaps even more clear-cut and controlling. The expression that Chancellor Kent used, and that the *Habana* Court adopted, was “conventional law.”⁶⁸ “Conventional law” is, of course, a term of art well known to students of the law of nations. While various writers had tackled the subject, Emmerich de Vattel was arguably (and perhaps unarguably) considered by the Framers to be *the* authority on this topic.⁶⁹ Conventional law means nothing other than the law established between some or all nations by treaty or convention.⁷⁰ Conventional law is one of the four sub-categories of the law of nations identified by Vattel, namely the necessary law of nations, the voluntary law of nations, the conventional law of nations and the customary law of nations.⁷¹

What Chancellor Kent and the *Habana* Court asserted was that resort may be had to the *customary* law of nations if the *conventional* law of nations does not provide an answer.⁷² Of course, what Chancellor Kent and the *Habana* Court knew (and what the *Filartiga* court either knew and ignored or should have known but did not) was that

both in terms of the facts before it (*i.e.*, non-binding, non-self executing pronouncements), as well as in terms of the facts of some of *Filartiga*'s progeny (*i.e.*, non-ratified treaties). Hopefully, the reader will agree that the benefit outweighs the burden, especially since this approach presages the discussion of non-ratified treaties occurring below. *See infra* text accompanying note 103, for just one example of a court declaring that a non-ratified treaty constitutes customary international law binding on United States courts.

⁶⁷ *The Paquete Habana*, 175 U.S. at 700.

⁶⁸ *Id.* at 701 (emphasis added).

⁶⁹ *See, e.g.*, PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD: THE LAW OF NATIONS IN AN AGE OF REVOLUTIONS, 1776-1814, at 11 (1993); Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1579 (2002); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1063 (2002); Douglas G. Smith, *Interstate Commerce and the Principles of the Law of Nations*, 2004 UTAH L. REV. 111, 112-13, n.3 (2004). This fact was realized, at least implicitly, by the *Sosa* Court when it cited Vattel three times. *Sosa*, 124 S. Ct. at 2756-57, 2761.

⁷⁰ EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS lxxv, Preliminaries § 23-24 (Joseph Chitty trans. and ed., Library of Congress Cataloging in Publication Data 1982) (1883) (originally published in 1758).

⁷¹ *Id.*

⁷² *The Paquete Habana*, 175 U.S. at 700.

no recourse to customary law is appropriate when a nation has ratified or refused to ratify a treaty.⁷³ If a nation ratifies a treaty, it is the content of that treaty and nothing else that is binding upon it. If a nation refuses to ratify the treaty, it is simply not binding upon it—surely an unremarkable proposition until very recent times. An important and germane corollary of customary international law is that customs are only binding upon those nations that have previously given their tacit approval to such customs—and they cease being binding upon those nations when they declare their intention not to be bound by them in the future. As Vattel wrote:

The several engagements into which nations may enter produce a new kind of law of nations, called Conventional, or of Treaties. As it is evident that a treaty binds none but the contracting parties, the conventional law of nations is not a universal but a particular law

. . . .

Certain maxims and customs, consecrated by long use, and observed by nations in their long use, and observed by nations in their mutual intercourse with each other as a kind of law form the Customary Law of Nations, or the Custom of Nations. This law is founded upon a tacit consent, or if you please, on a tacit convention of nations, that observe it towards each other. Whence it appears that it is not obligatory except on those nations who have adopted it, and that it is not universal, any more that the conventional law

. . . .

When a custom or usage is generally established, either between all the civilized nations in the world, or only between those of a certain continent, as of Europe, for example, or between those who have a more frequent intercourse with each other; if that custom is in its own nature [morally] indifferent, and much more, if it be useful and reasonable, it becomes obligatory on all the nations in question, who are considered as having given their consent to it, and are bound to observe it towards each other, as long as they have not expressly declared their resolution of not observing it in the future.⁷⁴

⁷³ *Id.*

⁷⁴ VATTEL, *supra* note 70, at lxxv, lxxvi (emphasis removed).

In summary, conventional law is law dealing in particularities. Furthermore, in order to *not* be bound by a treaty, a nation need do absolutely nothing. It need not make any declaration to the international community. Rather, it is only when a nation has previously participated in a custom that it must give notice that it no longer intends to do so. Also, should certain nations decide to elevate customary law to conventional law, a nation that refuses to ratify such a treaty has expressly declared its resolution of not observing that custom, at least in the immediate future.⁷⁵ Finally, both the conventional and the customary law of nations concern the interaction of nations *qua* nations. Neither involves the relationship between a nation and its own citizens.

Having either deliberately ignored or inexcusably overlooked the limitation on customary international law contained in *The Paquete Habana*, it seems as if the *Filartiga* court's second step of logic was a foregone conclusion. It declared that that "the Universal Declaration of Human Rights 'no longer fits into the dichotomy of "binding treaty" against "non-binding pronouncement," but is rather an authoritative statement of the international community."⁷⁶

Similarly, the Ninth Circuit in *Ma v. Ashcroft*⁷⁷ held that domestic federal statutes should be construed to avoid violating the International Covenant on Civil and Political Rights,⁷⁸ but, consistent with its contemporary practices, declared it to be non-self-executing.⁷⁹ *Ma* was decided much more recently, during the already brewing controversy over the transnationalist agenda.

A final step occurred when, citing *Ma*, the federal district court in *Beharry v. Reno* concluded that the non-ratified International Convention on the Rights of the Child constituted customary international law.⁸⁰ Despite noting that the Convention had been signed by the President but not sent to, nor ratified by, the United States Senate, the

⁷⁵ This situation, of course, is not relevant to *Filartiga*, but does apply to some of its progeny.

⁷⁶ *Filartiga*, 630 F.2d at 883 (quoting E. SCHWELB, HUMAN RIGHTS AND THE INTERNATIONAL COMMUNITY 70 (1964) (citations omitted)).

⁷⁷ *Ma v. Ashcroft*, 257 F.3d 1095, 1114 (9th Cir. 2001).

⁷⁸ International Covenant on Civil and Political Rights, *opened for signature*, Dec. 19, 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st. Sess., Supp. No. 16, at 54, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter ICCPR].

⁷⁹ *Ma*, 257 F.3d at 1095.

⁸⁰ *Beharry v. Reno*, 183 F. Supp. 2d 584 (E.D.N.Y. 2002), *rev'd. on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

court nevertheless held that the treaty was binding upon the United States Immigration and Naturalization Service.⁸¹ This is the fruit of *Filartiga*.⁸²

Furthermore, in *Grutter v. Bollinger*, Justice Ginsburg, in her concurrence, cited as obligatory on the United States the ratified but non-self-executing International Convention on the Elimination of All Forms of Racial Discrimination.⁸³ Some state courts have followed Justice Ginsburg's lead, despite the absence of legislative action. An Ohio trial court ordered *sua sponte* that a child's parents were not to smoke or allow others to smoke in the child's presence, in part because the International Convention on the Rights of the Child allegedly required state agencies to enforce the child's international human right not to be exposed to tobacco smoke.⁸⁴ The Massachusetts Supreme Judicial Court, in its homosexual marriage case, *Goodridge v. Department of Public Health*, relied on a foreign court's interpretation of a foreign constitution to overturn what it acknowledged was the common law based on centuries of experience.⁸⁵ Considering these

⁸¹ *Beharry*, 183 F. Supp. 2d at 596.

⁸² Other federal courts, however, disagreed and refused to grant authority to non-self-executing conventions. *See, e.g.*, *Beazley v. Johnson*, 242 F.3d 248, 263-68 (5th Cir. 2001) (ICCPR provisions regarding death penalty did not apply because covenant was non-self-executing); *Igartua De La Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994) (*per curiam*) (holding that voting rights claim could not be based in part on ICCPR). For enforcement purposes in federal courts, self-executing treaties are equivalent under U.S. CONST. Art. VI, cl. 2, to federal statutes whereas non-self-executing treaties are not. *See Foster v. Neilson*, 27 U.S. 253, 254 (1829).

⁸³ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (quoting the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature*, Mar. 7, 1966, art. 2(2), 660 U.N.T.S. 195, 212 (ratified by the United States Oct. 21, 1994, entered into force for the United States on Nov. 20, 1994, signed by the United States in 1992)).

⁸⁴ *In re Julie Anne*, 780 N.E.2d 635, 639 (Ohio Com. Pl. 2002). "Under the 1989 United Nations Convention on the Rights of the Child, which has been ratified by the United States, courts of law, state legislatures, and administrative agencies have a duty as a matter of human rights to reduce children's compelled exposure to tobacco smoke." *Id.*

⁸⁵ *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 965, 969 (Mass. 2003) (admitting that "[c]ertainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries," yet "[w]e concur with this remedy," referring to the Court of Appeal for Ontario which held unconstitutional under Canada's Federal Constitution the limitation of marriage to opposite sex couples). Admittedly, the Supreme Judicial Court looked to Canadian law only for its remedy. Nonetheless, invoking a foreign decision, even for this purpose, was arguably entirely gratuitous.

increasingly broad uses of international sources, the *Sosa* Court's frank recognition that federal judges had too much discretion to pick and choose among "international norms" was well timed.⁸⁶

VI. *SOSA*'S IMPACT ON CUSTOMARY INTERNATIONAL LAW

Sosa marks a significant departure from these broad uses of customary international law in recent American jurisprudence. The *Sosa* Court began by acknowledging, "[s]everal times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law."⁸⁷ As a prime example, the Court noted that in "its ratification of the International Covenant on Civil and Political Rights [the Senate] declared that the substantive provisions of the document were not self-executing."⁸⁸

Note the *Sosa* Court's clear implication that the non-self-executing status of an otherwise-ratified convention means that the federal courts are not to draw and enforce international norms from it.⁸⁹ In light of the discussion above, such an approach is clearly correct. Or to put a finer point on things, the approach of *Filartiga*,⁹⁰ to say nothing of its more radical progeny, such as the opinion in *Beharry v. Reno*,⁹¹ was clearly wrong.

The Court rejected Alvarez-Machain's reliance on the International Covenant on Civil and Political Rights, and did so expressly because it was not self-executing.⁹² "[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts."⁹³

The Court further rejected Alvarez-Machain's claim that the United Nation's 1948 Universal Declaration on Human Rights established an international norm on which he was entitled to rely: "[B]ut

Skeptics could certainly wonder whether the invocation was truly in defense of the remedy or whether it was part and parcel of the transnationalist agenda.

⁸⁶ *Sosa*, 124 S. Ct. at 2763.

⁸⁷ *Id.*; see also *supra* text accompanying note 49.

⁸⁸ *Sosa*, 124 S. Ct. at 2763 (citing 138 Cong. Rec. 8071 (1992)).

⁸⁹ *Id.*

⁹⁰ *Filartiga*, 630 F.2d at 876, 880-82, 887.

⁹¹ *Beharry*, 183 F. Supp. 2d at 586.

⁹² *Sosa*, 124 S. Ct. at 2763.

⁹³ *Id.* at 2767. The Court characterized the treaty as no more than "moral authority." *Id.*

the Declaration does not of its own force impose obligations as a matter of international law.”⁹⁴ The Court then rejected Alvarez-Machain’s argument that the Declaration and Covenant, together with a survey of national constitutions,⁹⁵ a decision of the International Court of Justice,⁹⁶ and decisions of the federal courts⁹⁷ “attained the status of binding customary international law” regarding the right he claimed.⁹⁸

Indeed, the Court clarified that the lower federal court case law which Alvarez-Machain had cited “reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today.”⁹⁹ The Court concluded that Alvarez-Machain “certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking.”¹⁰⁰ That, of course was exactly how many anti-transnationalists¹⁰¹ had felt about cases such as *Filar-tiga*,¹⁰² *Ma*,¹⁰³ and *Beharry*.¹⁰⁴

⁹⁴ *Id.*; The Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 49, U.N. Doc. A/810 (1948) [hereinafter Declaration].

⁹⁵ *Sosa*, 124 S. Ct. at 2768 n.27. The Court noted that Mr. Alvarez-Machain had cited “Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 DUKE J. COMP. & INT’L. L. 235, 260-61 (1993)[,]” which the Court noted, showed a consensus only “at a high level of generality.” *Id.*

⁹⁶ *Sosa*, 124 S. Ct. at 2768 n.27. The Court noted that Mr. Alvarez-Machain had cited “a case from the International Court of Justice, *United States v. Iran*, 1980 I.C.J. 3, 42,” which the Court determined “involved a different set of international norms and mentioned the problem of arbitrary detention only in passing” and moreover, involved a far longer and harsher detention. *Id.*

⁹⁷ *Sosa*, 124 S. Ct. at 2768 n.27. The Court noted that Mr. Alvarez-Machain had cited a collection of federal cases in his brief, including: “*Martinez v. City of Los Angeles*, 141 F.3d 1373, 1384 (9th Cir. 1998); *Siderman de Blake v. Argentina*, 965 F.2d 699, 717 (9th Cir. 1992); *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1395, 1397 (5th Cir. 1985); *Xuncax v. Gramajo*, 886 F. Supp. 162, 184-85 (D. Mass. 1995); *Paul v. Avril*, 901 F. Supp. 330, 335 (S.D. Fla. 1994); *Forti v. Suarez Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987).” Brief for Alvarez-Machain at 49 n.50, *Sosa*, 124 S. Ct. at 2768, available at 2004 WL 419421.

⁹⁸ *Sosa*, 124 S. Ct. at 2767-68.

⁹⁹ *Id.* at 2768 n.27.

¹⁰⁰ *Id.* at 2768.

¹⁰¹ From the transnationalist point of view, those who reject foreign legal borrowing are “nationalists.” Koh, *Part of Our Law*, *supra* note 2, at 52.

¹⁰² *Filartiga*, 630 F.2d 876; see also Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1580 n.108 (2003).

¹⁰³ *Ma*, 257 F.3d at 1114.

The *Sosa* Court's holding certainly contradicts and restricts the pre-*Sosa* practice of using as authoritative statements of customary international law approved but non-self-executing conventions like the International Covenant on Civil and Political Rights and the UN's Universal Declaration of Human Rights.¹⁰⁵

Furthermore, the holding appears to absolutely prohibit the reliance by federal courts on United States-rejected conventions, such as the International Convention on the Rights of Children.¹⁰⁶ Given that *Sosa* rejected, as customary international law, the Universal Declaration of Human Rights,¹⁰⁷ and the International Covenant on Civil and Political Rights,¹⁰⁸ it follows that rejected treaties and non-approved conventions certainly should not be considered authoritative.

Of course, the operative word here is *should*. Nonetheless, even in the midst of cautious optimism, one must admit that the strength of the decision continues to depend on lower court judges constraining themselves to *Sosa*'s limitations and on the composition of the Court to enforce them. While people on both sides of the issue may find this deplorable, the recent public debate between Justices Scalia and Breyer leaves little doubt that we live in the age of a jurisprudence of personal predilections.¹⁰⁹

VII. *SOSA* AND THE LAW OF NATIONS

Additional reasons exist to believe that *Sosa* might be more of a paradigm shift than an anomaly. The *Sosa* Court did more than restrict

¹⁰⁴ *Beharry*, 183 F. Supp. 2d 584; see also T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 93 n.17 (2004).

¹⁰⁵ *Cf. Filartiga*, 630 F.2d at 883 ("The Declaration, as an authoritative listing of human rights, has become a basic component of international customary law, binding on all states, not only members of the United Nations."); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), *certified to state appellate court*, 344 F.3d 154 (2d Cir. 2003).

¹⁰⁶ *Cf. Beharry*, 183 F. Supp. 2d at 593 (concluding that customary law includes, as expressed in the Convention on the Rights of the Child, a right to be free from arbitrary interference with family life, even despite Congress's rejection). "A treaty has been sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction." *Id.*

¹⁰⁷ Declaration, *supra* note 94 (which the United States had approved, but which was not a treaty).

¹⁰⁸ ICCPR, *supra* note 78 (which the United States had adopted, albeit without executing legislation).

¹⁰⁹ *Sosa*, 124 S. Ct. at 2769, 2782 (Scalia, J., concurring) (Breyer, J., concurring).

the nature of the contemporary materials to which the federal courts may turn for customary international law. It further defined customary international law in a way that returns it closer to its historical roots.¹¹⁰ Justice Souter began the majority's historical analysis by acknowledging that "[i]n the years of the early Republic, this law of nations comprised two principal elements" including only (1) "the general norms governing the behavior of national states with each other" as demonstrated by executive and legislative agreements, plus (2) "a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."¹¹¹

As to the latter judge-made laws, Justice Souter wrote that it was international law in this limited sense that the Court had intended in *The Paquete Habana* when it ruled that the status of offshore fishing vessels in wartime arose from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law."¹¹²

The *Sosa* Court's narrow reading of *The Paquete Habana* was significant. Alvarez-Machain had attempted to rely upon some of *Filar-tiga*'s more aggressive progeny.¹¹³ But, as noted, the *Sosa* majority did not hesitate to label the cases appropriately, noting that they took "a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today."¹¹⁴

Furthermore, the *Sosa* Court took great strides toward returning customary international law to its proper context by citing Vattel's *The Law of Nations*, as well as Blackstone's *Commentaries*.¹¹⁵ While

¹¹⁰ However, as mentioned before, the Court has expressly left the door open to "violations of international law [that transgress] a norm that is specific, universal, and obligatory." *Sosa*, 124 S. Ct. at 2766 (quoting *Marcos*, 25 F.2d at 1475). Indeed, the Court has left the door ajar, exposing the need for on-going vigilance. In his concurrence, Justice Scalia criticized the majority for leaving the door-keeping responsibly to lower courts' discretion. "For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained." *Id.* at 2776 (Scalia, J., concurring in part).

¹¹¹ *Sosa*, 124 S. Ct. at 2755-56.

¹¹² *Id.* at 2756 (quoting *The Paquete Habana*, 175 U.S. at 686).

¹¹³ See *Sosa*, 124 S. Ct. at 2768 n.27 (citing Brief for Respondent at 49 n.50, 124 S. Ct. 2739).

¹¹⁴ *Sosa*, 124 S. Ct. at 2768 n.27.

¹¹⁵ *Id.* at 2756. It is noteworthy as well that Blackstone and Vattel, like the Founding Fathers, placed all law, including customary international law, within

Sosa's definition of customary international law does not reflect Vattel's four categories of the law of nations—necessary, voluntary, conventional, and customary—the attempt to *wipe the slate clean* is significant.¹¹⁶

The *Sosa* Court also noted that the “two principal elements” overlapped to form the final sphere within which customary international law operated.¹¹⁷ Here, the Court's examples were drawn from Blackstone's and Vattel's discussions of piracy, the violation of safe conduct, and assault on an ambassador.¹¹⁸ “It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS [Alien Tort Statute] with its reference to tort,” the *Sosa* Court concluded.¹¹⁹

VIII. THE SALUTARY EFFECT OF *SOSA*

If *Sosa* is properly read in this limiting manner,¹²⁰ then it does much (though, again, not all) to restore the federal courts' legitimacy in this area. Or to state it more bluntly, if would-be activist courts are willing to be bound by the *spirit* of the *Sosa* opinion, then the fears of Justice Scalia's *Sosa* concurrence may be assuaged.¹²¹ While the *Sosa* majority did not get it all right, and while it may have left the door *ajar* too far, it certainly pushed the door a long way in the right direction.¹²²

Consider *Sosa* in light of the criticism of the pre-*Sosa* use of customary international law in domestic law cases. World judicial sys-

natural law confines. See generally VATTEL, *supra* note 70, at lxiv n.7; 4 WILLIAM BLACKSTONE, COMMENTARIES *66-80.

¹¹⁶ *Sosa*, 124 S. Ct. at 2761-62, 2768-69.

¹¹⁷ *Id.* at 2756.

¹¹⁸ *Id.* While it is beyond the scope of this article to document, this latter assertion by the *Sosa* Court constitutes an example of the progress yet to be made in fully re-discovering the true meaning of the term “law of nations.” For Vattel, the crimes cited by the *Sosa* Court fell under the voluntary law of nations rubric and not the customary law of nations rubric. See VATTEL, *supra* note 70, at lxv, lvxi, 463-65.

¹¹⁹ *Sosa*, 124 S. Ct. at 2756.

¹²⁰ See *id.* at 2764 (expressing an explicit desire for limited judicial power: “And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins* . . . , that federal courts have no authority to derive ‘general’ common law.”) (citations omitted).

¹²¹ See *supra* text accompanying note 110.

¹²² This favorable effect is certainly true for Alien Tort Claims Act jurisprudence but also hopefully for the use of transnational law generally.

tems are immensely varied, creating opportunities to cite authority for whatever proposition the court wishes.¹²³ Citation of foreign decisions becomes “one more form of judicial fig-leaving,” of which we have too much already, when the real influences on judicial decision-making have nothing whatsoever to do with the study of foreign decisions.¹²⁴ Indeed, foreign decisions “emerge from a complex socio-historico-politico-institutional background” of which federal judges “are almost entirely ignorant.”¹²⁵

American courts are not court interpreting the United States Constitution may not be doing anything all pursuing the same enterprise as foreign courts. A federal like that which a foreign court does interpreting different documents.¹²⁶ Stated more generally, constitutional law and international human rights law emerge from distinctly different source material.¹²⁷ Also, relying on foreign authority to declare new fundamental constitutional rights shatters prior prudential constraints on substantive due process theories.¹²⁸ It improperly elevates political documents like treaties and executive agreements (when used as interpretive sources) above the Constitution, contrary to the Supremacy clause.¹²⁹ Citation of foreign decisions is also undemocratic in that it is contrary to the popular will of the people.¹³⁰

In fact, citation of foreign decisions is often an express strategy of law professors and interest groups to find “a more sympathetic set of interpretive sources than existed domestically.”¹³¹ Courts do not have the institutional resources and skills to engage in their own compara-

¹²³ Posner, *supra* note 19, at 41.

¹²⁴ *Id.* at 42.

¹²⁵ *Id.*

¹²⁶ Ramsey, *International Materials*, *supra* note 19, at 73. Professor Ramsey gives the example that the *Dudgeon* European court cited by *Lawrence* was deciding whether the anti-sodomy provision was “necessary” within the terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (a European rather than a United States treaty), whereas the Supreme Court in *Lawrence* was deciding whether Texas’ anti-sodomy law was “reasonable” under the United States Constitution. *Id.* at 73-74 (referring to *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. (ser. A) (1982)).

¹²⁷ Alford, *Federal Courts*, *supra* note 19, at 919.

¹²⁸ *Id.* at 925, citing Robert Post, *Forward, Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003).

¹²⁹ Alford, *Misusing International Sources*, *supra* note 14, at 61-62.

¹³⁰ Posner, *supra* note 19, at 42; Alford, *Misusing International Sources*, *supra* note 14, at 57.

¹³¹ Ramsey, *International Materials*, *supra* note 19, at 70, citing Harold H. Koh, *Paying “Decent Respect” to World Opinion on the Death Penalty*, 35 U.C. DAVIS L.REV.1085, 1109-1129 (2002).

tive and empirical analysis, and so rely unduly on misshapen advocacy.¹³² Selection of foreign sources appears to be non-empirical and even arbitrary except in relationship to the desired outcome.¹³³

Moreover, the choice of when (*i.e.*, for which issues or cases) to use customary international law has appeared to be unprincipled and therefore seems directed to achieving predetermined ends.¹³⁴ “Gone are decisions that turn on objective facts or value judgments of others. What matters is the Court’s own conception of liberty.”¹³⁵ Or worse yet, as has been suggested by this article, courts may be participants in or the pawns of the transnationalist agenda. Enumeration of rights found only in international law not only abandons the Constitution’s text and history, but also the experience and history of the United States.¹³⁶

In light of these criticisms, a principled approach to the use of foreign authority would at least: (1) provide a neutral theory for their selection; (2) require even-handed use of foreign authority both to restrict as well as to expand claimed rights; (3) get the empirical facts correct as to world consensus; and (4) avoid the shortcut use of unrepresentative proxies.¹³⁷ By rejecting non-ratified treaties and non-approved conventions as sources of authority, *Sosa* appears to have begun to respond to these concerns.

IX. CONCLUSION: A MIDDLE GROUND

The concurring opinions in *Sosa* further confirm that the majority has discovered something of a middle ground in this furor. Although he concurred in *Sosa*’s result and further concurred in part in the ma-

¹³² See Alford, *Misusing International Sources*, *supra* note 14, at 64-65.

¹³³ Ramsey, *International Materials*, *supra* note 17, at 72-73. Professor Ramsey queries why the Robinson brief, on which the Court relied in *Lawrence*, cited the law of Israel rather than India, for instance. *Id.* at 73.

¹³⁴ See Alford, *Misusing International Sources*, *supra* note 14, at 67-68, citing MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 24-25, 145-54 (1987) (comparatively speaking, United States abortion policy is singular among all of the world’s countries).

¹³⁵ Alford, *Federal Courts*, *supra* note 19, at 925, citing Robert Post, *Forward, Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 96 (2003). Professor Alford also mentions Justice Harlan’s dissent in *Poe v. Ullman*, 367 U.S. 497, 542 (1961), writing of a jurisprudence “where judges . . . felt free to roam where unguided speculation might take them.” Alford, *Federal Courts*, *supra* note 19, at 925 n.78.

¹³⁶ Alford, *Federal Courts*, *supra* note 19, at 926.

¹³⁷ Ramsey, *International Materials*, *supra* note 19, at 69-70.

majority opinion, Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) accepted the majority's opinion as barely a palliative and certainly not a cure.¹³⁸ His concurrence voiced the concern that the Court's opinion had left the door too far ajar.¹³⁹

Justice Scalia pointed out that the majority's holding would in some instances still allow a private citizen to hold a sovereign liable for the treatment of its own citizen within its own borders under its own laws, based on an international consensus advocated by transnationalist law professors and human rights interests.¹⁴⁰ Justice Scalia highlighted the anti-democratic nature of the majority's position through the use of the equivalent of a grade school civics lesson on the American legislative process.¹⁴¹ He concluded, "[f]or over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained."¹⁴²

The Court's rejoinder was that though the door was indeed ajar, it was only "ajar subject to vigilant doorkeeping," "to a narrow class of international norms today" which the Court further characterized as "limited enclaves in which federal courts may derive some substantive law in a common law way."¹⁴³ The Court also sent a message to Congress, stating it "would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations"¹⁴⁴

Justice Breyer wrote his own concurrence on the opposite end of the spectrum in perspective to Justice Scalia's partial concurrence.¹⁴⁵ Citing the European Commission's amicus brief and its European Council regulation as well as a foreign convention, Justice Breyer

¹³⁸ *Sosa*, 124 S. Ct. at 2769 (Scalia, J., concurring) (noting that he agrees with all of Court's opinion except as to its "reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms").

¹³⁹ *Id.*

¹⁴⁰ *Sosa*, 124 S. Ct. at 2776, citing Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: Critique of the Modern Position*, 110 HARV. L. REV. 815, 831-37 (1997).

¹⁴¹ *Sosa*, 124 S. Ct. at 2770-72 (Scalia, J., concurring in part0).

¹⁴² *Id.* at 2776.

¹⁴³ *Sosa*, 124 S. Ct. at 2764.

¹⁴⁴ *Id.* at 2765.

¹⁴⁵ See generally *id.* at 2782-83 (Breyer, J., concurring). The Scalia-Breyer debate, as noted, has now continued in the public arena. See Breyer & Scalia Debate, *supra* note 56.

wrote that there were really no significant problems in “allowing every nation’s courts to adjudicate foreign conduct involving foreign parties in such cases” as the Court had set out under universal tort jurisdiction.¹⁴⁶ The Court’s majority opinion was thus neatly bracketed by opposing concurrences.

In sum, the effect of *Sosa*’s express limitations on the use of customary international law may prove modest or great, depending on both the extent to which the *Sosa* opinion influences the federal and state courts, and the extent to which the Court follows those limitations itself. But *Sosa* is clearly a sharp turn away from an international norms precipice. It is, therefore, a restorative first step toward regaining the people’s trust in the institutional legitimacy of the judiciary.

¹⁴⁶ *Sosa*, 124 S. Ct. at 2783.