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THE U.S. CONSTITUTION AND INTERNATIONAL LAW: FINDING THE BALANCE

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> Our country! In her intercourse with foreign nations, may she always be in the right; but our country, right or wrong.[1]

I. INTRODUCTION

In the summer of 1989, Francis Fukuyama declared the "end of history."[2] To him, the emergence and success of liberal democracy as a system of government — conquering rival ideologies like monarchy, fascism, and communism — marked "the end point of mankind's ideological evolution" and the "final form of human government."[3] That seemingly prescient prediction received much attention,[4] but while optimistic, it is one that nonetheless has been largely discredited. The fact that Fukuyama lamented a future void of a "willingness to risk one's life for a purely abstract goal, [a] worldwide ideological struggle that call[s] forth daring, courage,

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1. Stephen Decatur, Toast at a Dinner in Norfolk, Virginia (Apr. 1816), *in* ALEXANDER SLIDELL MACKENZIE, LIFE OF STEPHEN DECATUR 295 (1848).

2. Francis Fukuyama, *The End of History?*, NAT'L INT., Summer 1989, *available at* http://www.wesjones.com/eoh.htm#source.

3. *Id.*

4. *See* Guyora Binder, *Post-Totalitarian Politics*, 91 MICH. L. REV. 1491, 1494 n.9 (1993) (book review).

imagination and idealism"[5] is short-sighted in hindsight, as terrorist groups such as al-Qaida, whose aim is to establish a pan-Islamic caliphate throughout the world,[6] surely demonstrate.[7] Not only does al-Qaida provide an alternative to the "unabashed victory of economic and political liberalism,"[8] it challenges liberal democracies to remain dedicated to their core principles and, most importantly for this paper, tests the permanence and strength of international law.

Of course, Fukuyama wrote as the Cold War was coming to an end. At that time, the triumph of liberalism over communism was certainly something to celebrate, as that outcome was not necessarily assured. The thaw that followed the fall of the Iron Curtain was promising, as the threat of mutually assured destruction abated and the hope of economic and political liberalism spread across Eastern Europe. It has not, however, reached all corners of the globe, and it is from these historical laggards that the most recent threat — terrorism — originates. Terrorism and specifically the events of September 11, 2001 have been described as "the failure of the ideology of the open society,"[9] and they challenge liberal democracies to balance security while ensuring that individual liberties are protected.

To the extent that Fukuyama sees liberalism, as defined by Kant, as the ultimate form of governance, I agree that this outcome will bring an end to history or, in Kantian terms, perpetual peace. I am just not convinced that time has come. To ensure that the liberal trend continues, governments must ensure that the ideals upon which they are based are not sacrificed. Among the pillars of an open, liberal society are respect for fundamental human rights, limited and balanced government, and respect for the rule of law. But perhaps the greatest offspring of the liberal success is the emergence of the international rule of law. To some, international law is only a restraint to U.S. hegemony and a catalyst to the erosion of its sovereignty.[10] This characterization is misplaced; instead, I argue that by following a policy of measured acceptance of international

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5. Fukuyama, *supra* note 2.

6. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM: 2000 app. G (2001).

7. Fukuyama does devote one paragraph of his essay to the possibility of religious fundamentalism as an alternative, but he swiftly dismisses this possibility.

8. Fukuyama, *supra* note 2.

9. THE ECONOMIST, Apr. 20, 2002, at 24.

10. One professor has dubbed those who base their anti-internationalism on notions of sovereignty "New Sovereigntists." Peter J. Spiro, *The New Sovereigntists: American Exceptionalism and Its False Prophets*, FOREIGN AFF., Nov.-Dec. 2000. The new sovereigntists base their arguments on three lines of attack, which will be discussed *infra* Part V. The first questions the emerging legal order as vague and illegitimately intrusive on domestic affairs; the second sees international lawmaking as unaccountable and unenforceable; the third assumes the U.S. can choose to ignore legal norms as a matter of power or legal right. *Id.*

norms, the United States can secure a lasting peace, no doubt the goal of all policy makers, irregardless of political persuasion.

Divergence and disagreement among liberal democracies concerning the weight of authority of international law could be yet another chapter in mankind's ideological evolution. The United States has reacted most aggressively in pursuing terrorists, testing the limits of international law, most notably with its policy of preemptive warfare and for its treatment of detainees. To some extent seen as a pariah among liberal democracies for its lack of respect for international law, the United States struggles to balance effectively prosecuting the war on terrorism while abiding by international standards. Yet the attacks of September 11, 2001 and the U.S. response have highlighted the role that international law plays in American foreign relations. This leads to a fundamental question: To what extent does the Constitution bind the United States to norms of international law? Until recently, the role of international law within the constitutional structure had been unclear and hotly debated. With its recent decision in *Sosa v. Alvarez-Machain*, the Supreme Court finally, although not definitively, explained the Constitution's requirements.

In this paper, I discuss the Court's recent decision and its impact on the role of international law within the constitutional scheme. Part II begins by detailing the two building blocks to understating: the evolution of both international law and constitutional common law. Part III then discusses the scholarly debate surrounding the Constitution's requirements, particularly in light of the change in federal court's common law making power. Part IV details the Supreme Court's decision, *Sosa v. Alvarez-Machain*. Part V outlines the concerns of those who argue that the U.S. should not pursue an internationalist, human rights agenda, but it proceeds in explaining why pursuing an active role in shaping and following international norms is in the United States' interest. In concluding in Part VI, this paper acknowledges that the political branches must determine the extent to which the United States will follow international norms, but I posit that it should be done in a way that respects the carefully crafted constitutional scheme yet advances the international rule of law.

II. THE BUILDING BLOCKS

To understand the recent debate surrounding the role of international law in general and the specifics of customary international law, one must first understand the nature of international law and its recent evolution. International law has historically involved the relations among states. However, there is now a shift in emphasis,

which occurred during the end of World War II, to the relationship between states and their citizens. The Constitution, explicit in its treatment of treaties, one source of international law, is virtually silent on the subject of customary international law, the second source. While customary international law has historically been considered part of the general common law, that body of law too has changed dramatically. In the early 20th century, general common lawmaking powers of the federal courts were abolished (save a few specialized areas), and all judicial pronouncements required a definite source, be it the Constitution or a federal statute. This change engendered a fierce academic debate concerning customary international law, as it has no positivist source, instead relying on the conduct on nations. The following sections describe the evolution of both international law and constitutional common law, so as to provide background for understanding the recent debate and the Supreme Court decision.

A. General Concepts

1. *International Law*

International law[11] does not enjoy the respect that other areas engender. While no one questions the existence of family law or contracts law, international law does not have the firm footing that most bodies of law have.[12] Historically, international law has concerned the behavior of nation states, defining the rights and responsibilities of those principal international actors.[13] Beginning in 1919, concepts developed that allowed for restrictions to sovereign rights and a heightened awareness of individual human rights.[14] The ultimate decline of the "objective theory" of international law, in which the individual was only an object of international regulation, to the rise of the human rights movement were profound developments in the mid- to late-20th century.[15] The complementary development of institutionalization of international law, through organizations like the United Nations, the GATT-WTO, and International Court of Justice also highlights the evolution.

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11. Throughout this paper, international law and the law of nations will be used interchangeably. MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 1 (4th ed. 2003) ("Nowadays, the terms the law of nations and international law are used interchangeably.")

12. This is exemplified by the first chapter in ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT, called "Is International Law Really 'Law'?".

13. JANIS, *supra* note 11, at 2.

14. *Id.*

15. Otto Kimminich, *History and the Law of Nations: Since World War II*, *in* 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 849, 857 (1995).

Modern international law has two sources: international agreements, or treaties, and customary international law. The Supremacy Clause is clear that treaties "shall be the supreme law of the land,"[16] but there is no mention of customary international law. Customary international law is that which "results from a general and consistent practice of states followed by them from a sense of legal obligations."[17] This two-part definition contains both an objective and subjective component. The "practice of states" is the objective element, and it usually encompasses diplomatic acts, public measures, and other official governmental acts and statements of policy.[18] To be "general and consistent," a practice need not be universally followed; rather, that a few significant nations fail to adopt the practice can prevent it from becoming general customary law.[19] The subjective "sense of legal obligation," or *opinion juris*, is described as the "conception that the practice is required by, or consistent with, prevailing international law."[20]

The status of customary international law within the constitutional framework has never enjoyed the clarity that the treaties have. Although a primary purpose of the Constitution was to divide among the branches the foreign relations powers of the United States, and its allocation of treaty-making power is clear, the Constitution's treatment of customary international law is limited. While there are several references to the treaty-making power of the federal government,[21] customary international law is only mentioned once.[22] That the Supremacy Clause does not explicitly declare that the law of nations has prominence in the hierarchy of applicable law does not mean that international law has no place in the constitutional scheme. Exactly where within that scheme remains a hotly debated question. Some view customary international law as a fundamental incident of state sovereignty, just as the law of treaties (*pacta sunt servanda*), the concept of treating foreign nationals in accordance with international principles of justice, and

16. U.S. CONST. art. VI.
17. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2).
18. *Id.* cmt. b.
19. *Id.*
20. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 8 (6th ed. 2003).
21. U.S. CONST. art. 1, § 10 (denying states the power to enter into treaties); art. II (granting the President the power to enter into treaties with the advice and consent of the Senate); art. III (granting federal courts the power to adjudicate cases arising under treaties); and art. IV (making treaties the supreme law of the land).
22. U.S. CONST. art. I, § 8, cl. 10 (authorizing Congress to "define and punish . . . Offenses against the Law of Nations"). Louis Henkin has suggested that this dichotomy does not reflect the Framers' judgment about the comparative constitutional significance of the two forms of international law. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 237 (2d ed. 2002).

the freedom of the seas, among others, are.[23] In fact, less than a decade after the Constitution was ratified, the Supreme Court unequivocally pronounced that upon independence, the United States was "bound to receive the law of nations, in its modern state of purity and refinement."[24] Despite this declaration, the law of nations is a term of art whose meaning and role has transformed throughout constitutional history. This transformation has given rise to the current debate, because while the traditional customary norms involved diplomatic practices with virtually no judicial remedy available, 21st century customary international law contemplates adjudication of claims in domestic courts.

2. *General and Federal Common Law*

The transformation from general to federal common law is at the heart of the current debate surrounding the proper role of customary international law, as it was historically thought to fall within the realm of general common law. A "useful definition [of general common law] is the federal law created by a court 'when the substance of that rule is not clearly suggested by federal enactments.'"[25] Thus it is not derived from a particular text, namely the Constitution or a federal statute; rather, it can be seen as purely judge-made law. Federal diversity jurisdiction, authorized by Article III, provided federal courts with the biggest opportunity to announce federal common law principles, and the Supreme Court gave the courts almost unrestrained power to do so following *Swift v. Tyson*.[26] In deciding which law to apply in the diversity suit, the Supreme Court announced that, just as states look to general common law principles to decide disputes, so too can the federal courts.[27] There are some rare instances of federal common law competence granted by the Constitution, such as admiralty jurisdiction, but these are limited.[28]

For almost a century this paradigm went unchallenged. Justice Holmes, in a sardonic dissent, famously questioned the ability of

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23. HENKIN, *supra* note 22, at 232. *Pacta sunt servanda* refers to the concept that treaties create obligations that must be observed. *Id.* Douglas J. Sylvester, *International Law as Sword or Shield? Early American Foreign Policy and the Law of Nations*, 32 NYU J. INT'L L. & POL. 1, 10 (1999). Many such principles have later been codified in by treaty. *See, e.g.*, HENKIN, *supra* note 22, at 506 n.2 (noting the law of the seas conventions, among others).

24. Ware v. Hylton, 3 U.S. 199, 3 Dall. 281, (1796) (Wilson, J.)

25. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL Law § 3-23 n.1 (quoting Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 890 (1986)).

26. 41 U.S. (16 Pet.) 1 (1842).

27. *Id.* at 18.

28. *See* U.S. CONST. art. III, § 2; *Swift*, 41 U.S at 18.

federal courts to impose their views of general common law on the states:[29]

> The prevailing doctrine has been accepted upon a subtle fallacy that never has been analyzed. If I am right the fallacy has resulted in an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.[30]

Regarding the general common law, Holmes says there is no "transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute. The fallacy and illusion [of its existence] consist in supposing that there is this outside thing to be found." Noting this criticism, the Supreme Court in 1938 overruled *Swift* in *Erie Railroad Co. v. Tompkins*.[31] In that decision, the Court recognized that "in performing their common law functions, state courts do not truly look to 'general' law as contemplated by *Swift*, but rather persist 'in their own opinions on questions of common law.' "[32] The result was a disconnect between the federal courts' version of common law and that of the various states.[33] Accordingly, the Supreme Court changed course and essentially removed federal courts' ability to make common law doctrines, which was not a " 'brooding omnipresence in the sky,' but rather 'the articulate voice of some sovereign' that could be identified.' "[34] The common thread among those few areas remaining reflect principle that the "federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as a sovereign are intimately involved or because the interstate or international nature of the controversy make it inappropriate for state law to control."[35]

The *Erie* Court "ruled that federal court development of general common law was illegitimate not because it was a form of judicial lawmaking per se, but rather because it was *unauthorized* lawmaking not grounded in a sovereign source." This "grounding" in a sovereign allows the new federal law fall "within the meaning of Arti-

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29. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532 (1928) (Holmes, J., dissenting).
30. *Id.* at 532-33.
31. 304 U.S. 64 (1938).
32. TRIBE, *supra* note 25, at 470.
33. *See Id.*
34. *Id.* at 472 (quoting S. Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917)).
35. Texas Industries Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

cle II ('take care' clause), Article III (arise under jurisdiction), and Article VI (Supremacy Clause)."[36] Because the only legitimate sovereigns in the U.S. constitutional scheme are either the federal government or the states, all law applied by federal courts must come from either source. Hence, the debate: Where does customary international law fit? With a general understanding of the fundamental concepts, the development of the two is discussed next.

3. *Constitutional History*

*(a) Pre-*Erie *cases*

The following quotes are offered merely as evidence that the Supreme Court had, prior to *Erie*, regularly relied on and was not reluctant to invoke principles of international law where appropriate. Chief Justice Marshall wrote that "the Court is bound by the law of nations which is part of the law of the land."[37] In another case, discussing various areas of federal jurisdiction, the Supreme Court said that such areas, like maritime and admiralty, "belong to national jurisdiction" because they "are regulated by the law of nations and treaties."[38] Finally, citing relevant international treaties, a unanimous Supreme Court upheld constitutionality of an act of Congress regarding territorial acquisition, saying that "the law of nations, recognized by all civilized States . . . affords ample warrant for the legislation of Congress."[39]

Often dubbed a cannon of construction and citied to support the proposition that the United States is bound to international law, the *Charming Betsy* principle holds that acts of Congress should not be construed to violate the law of nations. This case arose from events surrounding the undeclared war with France during which the Nonintercourse Act of 1880 was passed.[40] To enforce this Act, which prohibited a U.S. resident from trading with France or its territories, the U.S. Navy was charged with seizing any vessel suspected of violating the statute.[41] The schooner *Charming Betsy* was seized pursuant to the Act, but the owner argued that because he was a citizen of a neutral country (Denmark), the seizure violated the international law rules of neutrality.[42] The Court construed the

36. CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 439 (2003).
37. The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).
38. Chisholm v. Georgia, 2 U.S. (2 Dallas) 419 (1793).
39. Jones v. United States, 137 U.S. 202, 212 (1890).
40. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 64-65 (1804).
41. *Id.* at 65-67.
42. *Id.*

Act as inapplicable to the owner, as a non-U.S. resident.[43] In doing so, the Marshall stated that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[44]

The Paquete Habana, an oft-quoted decision written by Justice Gray, deals with the ancient concept of prize of war, in which a coastal fishing vessel pursuing normal activities is exempt from capture.[45] As a result of the Spanish-American War, the United States imposed a blockade around Cuba.[46] In enforcing the blockade, a U.S. naval squadron seized two Cuban vessels engaged in catching fish and transporting them to Havana.[47] The owners of the vessels challenged their capture, and after a federal district court condemned the fishing vessels as prizes of war, an appeal to the Supreme Court was made.[48] After describing the history of prize of war doctrine, the Court famously states, "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . ."[49] Finding the exception of true fishing vessels from prize of war capture, the Supreme Court ruled that the seizure was unlawful.[50]

*(b) Post-*Erie *Cases*

The next decision, although its holding is narrow, illuminates the Court's difficulty with the subject. The facts surrounding *Banco Nacional de Cuba v. Sabbatino* involve multiple parties to a sugar sale and are unnecessarily confusing; therefore, a truncated version is supplied here. In response to a reduction in the United States' sugar quota, the Cuban government expropriated property of C.A.V., whose stock was principally owned by U.S. residents.[51] When a suit was brought to recover the property, the government of Cuba claimed that the act of state doctrine prevented U.S. courts from ruling on the legitimacy of the expropriation.[52] Both the dis-

43. *Id.* at 120
44. *Id.* at 118.
45. 175 U.S. 677 (1900).
46. *Id.* at 678.
47. *Id.* at 678-79.
48. *Id.* at 678.
49. *Id.* at 677.
50. *Id.* at 714.
51. BRADLEY & GOLDSMITH, *supra* note 36, at 62.
52. *Id.*

trict court and court of appeals held that the expropriation violated international law and that title of the expropriated property had not validly passed to Cuba.[53] The Supreme Court first decided that neither international law nor the text of the Constitution itself require the act of state doctrine.[54] Instead, its constitutional underpinnings arise from the concept of separation of powers.[55] The Court then noted that it could avoid deciding whether federal or state law is applicable, as the state law of New York, where the case was raised, is similar to the federal decisions regarding the act of state doctrine.[56]

However, the Court went on to stress that "an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law."[57] The Court noted the difficulty of applying the decision in *Erie* to problems affecting international relations, and it recalled that there were areas protecting "uniquely federal interests" for which a "a national body of federal-court-built law" has been controlling.[58] It gave both a statutorily guided example and areas where positive sources were not available: boundary disputes between states and apportionment of interstate waters.[59] The Court then narrowly held that in the absence of a treaty, the act of state doctrine prevents U.S. courts from ruling on the validity of a foreign government's expropriation.[60]

In the first decision after *Erie* to contemplate the nature of customary international law within the American legal framework, Judge Learned Hand in *Bergman v. De Sieyes* explained that the interpretation of New York state courts "was controlling upon [the federal courts],"[61] which seems to mean that customary international law had the status of state law. The federal court heard the diversity case to decide whether a French minister enjoyed diplomatic immunity from service of process.[62] En route to the Republic of Bolivia, the French minister was served with process while passing through New York.[63] He claimed that as a diplomat, he was ex-

53. *Id.*
54. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-23 (1968).
55. *Id.* at 423.
56. *Id.* at 424-25.
57. *Id.* at 425.
58. *Id.* at 426.
59. *Id.*
60. *Id.* at 428.
61. Bergman v. De Sieyes, 170 F. 2d 360, 361 (2d Cir. 1948).
62. *Id.* at 361.
63. *Id.*

empt from personal service.[64] After analyzing New York state law, which the Judge Hand found to be unclear, the court used various international sources to determine that "the courts of New York would today hold" that the diplomat in transit deserved immunity.[65]

Over three decades later, the same federal court held that the constitutional basis for federal jurisdiction in diversity suits where principles of international law are dispositive "is the law of nations, which has always been part of the federal common law."[66] The Second Circuit Court of Appeals' decision in *Filartiga v. Pena-Irala* marked a watershed moment for the debate. The *Filartiga* decision reversed a district court's dismissal of a complaint for lack of federal jurisdiction. The Filartigas were citizens of Paraguay who brought a cause of action in the Eastern District of New York against Alerico Norberto Pena-Irala (Pena), another citizen of Paraguay, for the wrongful death of Joelito Filartiga.[67] The Filartigas alleged that Pena, who was Inspector General of Police in Asuncion at that time, participated in the kidnapping and torture of Joelito, in retaliation for his father's political leanings.[68] The criminal proceedings in Paraguay were fruitless, as the confessed killer had never been brought to justice.[69] Eventually, Pena moved to the United States, but after a Filartiga relative learned of his presence, Pena was arrested for violating his visa after a tip from the relative.[70] Shortly thereafter, Pena was served with a summons and complaint by the Filartigas for wrongful death, in contravention of customary international law.[71] Pena moved that the complaint be dismissed for lack of subject matter jurisdiction; it was granted.[72] An appeal to the Second Circuit followed.

The circuit court found that "an act of torture committed by a state official against one hold in detention violates established norms of the international law of human rights, and hence the law of nations."[73] Because the ATS requires a violation of the law of nations, the court was satisfied that torture was such a violation, noting that this finding was established using appropriate sources of international law and citing *The Paquete Habana* for the proposition that courts should interpret international law as it presently

64. *Id.*
65. *Id.* at 363.
66. Filartiga v. Pena-Irala, 630 F. 2d 876, 885 (2d Cir. 1980).
67. *Id.* at 878.
68. *Id.*
69. *Id.*
70. *Id.* at 878-79.
71. *Id.* at 879.
72. *Id.*
73. *Id.* at 880.

exists.[74] The court then dismissed the claim that federal jurisdiction was inconsistent with Article III, stating that "[t]he constitutional basis for the Alien Tort Statute is the law of nations, which has always been part of the federal common law."[75] The court concluded that its decision to give effect to a two-centuries-old jurisdictional statute is a "small but important step," heralding the "true progress" that has been made on ushering in an era that respects fundamental human rights.

In a suit similar to *Sosa*, discussed below, plaintiffs used the ATS in a claim of violation of the law of nations. In *Tel-Oren*, several Israeli citizens brought an action for damages for tortuous acts occurring on March 11, 1978.[76] On that day, members of the Palestinian Liberation Organization (PLO) entered Israel via boat and terrorized civilians along the highway between Haifa and Tel Aviv.[77] Several vehicles were seized, and passengers were taken hostage, tortured, and murdered.[78] In all, 22 adults and 12 children were killed, and 73 adults and 14 children were seriously wounded.[79] A suit later followed to recover damages for the barbarous acts. The district court dismissed the action for, *inter alia*, lack of subject matter jurisdiction.[80] The D.C. Circuit affirmed, with three separate concurring opinions.[81]

Judge Edwards found the reasoning in *Filartiga* controlling; however, the factual distinctions in the present case, specifically the fact that the law of nations does not impose the same liability on nonstate actors like the PLO, required dismissal for lack of subject matter jurisdiction.[82] Judge Edwards continued, however, articulating his understanding of the ATS. He disagreed with Judge Bork's belief that the ATS requires a victim to assert an actionable claim granted by the law of nations, because "the law of nations never has been perceived to create or define civil actions."[83] Judge Edwards further observed that the violations of the law of nations are not limited to those articulated in the 18th century; instead, he used a more liberal approach, allowing for new violations to be actionable.[84]

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74. *Id.* at 880-85.
75. *Id.* at 885.
76. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775-76 (D.C. Cir. 1984).
77. *Id.* at 776.
78. *Id.*
79. *Id.*
80. *Id.* at 775.
81. *Id.*
82. *Id.*
83. *Id.* at 777.
84. *Id.* at 789.

Judge Bork's concurrence, while reaching the same conclusion that the complaint must be dismissed,[85] differs vastly in its reasoning. Bork's principal argument rests on separation of powers, whereby the concerns of foreign relations are best left to the political branches.[86] In addition, Judge Bork also discussed his disagreement with the argument advanced by the victims that international law is part of the common law of the United States.[87] He did not distinguish between the pre- and post-*Erie* differences in common law. Rather, Judge Bork merely refuted the appellant's assertion that because international law is part of the common law, it creates a cause of action.[88] He also felt that Judge Edwards and the Second Circuit's construction of the ATS is overly broad, as it would effectively make all treaties self-executing and it would authorize vindication for any international violation.[89] Judge Robb's concurrence rested solely on his belief that the issue was a nonjusticiable political question.[90]

As evident by this final decision, it is clear that the matter remained unsolved and was in need of explanation. Indeed, as judge Edwards exclaimed in 1984, this area of law "cries out for clarification by the Supreme Court."[91] Judge Edwards received that elucidation twenty years later, though a fierce debate raged in the meantime.

III. THE DEBATE BEFORE *SOSA*

There are two schools of thought regarding the proper role of customary international law in the constitutional scheme: one dubbed the modern view and other the revisionist view. That customary international law has the status of federal common law is the crux of the modern position. Two important implications of this view are (1) that a case arising under customary international law arises under federal law for purposes of Article III jurisdiction and (2) that customary international law preempts inconsistent state law according to the Supremacy Clause.[92] A recent challenge to this paradigm has come from Curtis A. Bradley and Jack L. Goldsmith, who argue that customary international law should not be treated

85. *Id.* at 799.
86. *Id.* at 801-08.
87. *Id.* at 811.
88. *Id.*
89. *Id.* at 811-12.
90. *Id.* at 823.
91. *Id.* at 775.
92. BRADLEY & GOLDSMITH, *supra* note 36, at 439-41. A third implication is that customary international law would bind the President under Article II, Section 3, the Take Care Clause. *Id.*

as federal common law.[93] There is a consensus among most participants in this debate that prior to *Erie*, customary international law held the status of general law.[94] As such, it was neither state nor federal; thus, it did not create federal question jurisdiction or preempt state law.[95] With this as their only agreement, however, the two camps divide. And even among those who espouse the modern position, opinion is divided on the basis for that position.[96]

1. *The Modern Position*

The modern position holds that customary international law is federal common law. Of course, prior to *Erie*, all agreed that CIL was general law.[97] The post-*Erie* status of CIL is the cause for debate. Some have stressed the intent of the Framers to support their position. Using *Sabbatino*'s announcement that foreign affairs was an enclave of federal common law, others argue that the modern position received implicit support from this reasoning.[98] Finally, Professor Henkin argues that while like federal common law in some respects, it is not identical; it is not made by judges, instead it is interpreted from state action.[99]

In Beth Stevens' defense of the modern position, she particularly highlights the intent of the Framers that the United States respect international law.[100] Stevens asserts that "the framers drafted a Constitution that empowered the national government to enforce [the law of nations], by assigning to the federal government

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93. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique*]; Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*]; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*].

94. Ernest A. Young, *Sorting Out the Debate over Customary International Law*, VA. J. INT'L L. 365, 374 (2002).

95. *Id.* at 374-75.

96. There are several authors who support this position. For the purposes of this paper, I will focus on Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984); and Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371 (1997). For a more complete list of articles endorsing the modern position, see Goodman & Jinks, *supra*, 474 n.55.

97. *See supra* note 94 and accompanying text.

98. Goodman & Jinks, *supra* note 96, at 472-73.

99. *See generally* Henkin, *supra* note 96.

100. Beth Stevens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997). She also discusses the enclaves left open by *Erie* and how customary international law is but one of them, but her discussion on this point adds little to what is discussed *supra*, so I focus solely on the historical argument.

control over issues touching upon foreign affairs."[101] Others have echoed that same sentiment, saying the Founders "clearly expected" that the law of nations was "the supreme law of the land" and would be used in federal court.[102] Although the Framers accepted aspects of the law of nations as part of the constitutional structure, its precise role would not be fully understood until the judicial power evolved.[103] Yet, while the Constitution clearly delineates certain foreign affairs responsibilities, obviously it does not charge one branch with ensuring that international law, in general, is respected. It is evident, though, that this was a concern. For example, Attorney General Edmund Randolph recognized that "although not specially adopted by the constitution," the law of nations is "essentially part of the law of the land [whose] obligation commences and runs with the existence of a nation."[104] John Jay, writing in support of the Constitution's ratification, felt that "[i]t is of high importance to the peace of America that she observe the laws of nations . . . and to me it appears evident that this will be more perfectly and punctually done by one national government" than by separate states.[105] Unfortunately, the Framers' silence on the role of international law within the constitutional framework speaks loudly, so despite the obviousness it was assumed that the United States would be bound by the law of nations, the failure to specifically incorporate it into the final draft of the Constitution does not help to settle the debate.

According to Goodman & Jinks, *Sabbatino* provides "a sound conceptual basis" for the modern position.[106] The two features of federal common law discussed in *Sabbatino* — "unique federal interests and the need for national uniformity" — are certainly found in CIL. And the "sliding scale" regarding how federal courts can find actionable claims arising from customary international law allows for only a limited number of norms to be incorporated.[107] This might seem odd, at first glance, since the holding in *Sabbatino* appears to preclude judicial judgment regarding the validity of an act of a foreign sovereign. However, the more nuanced position is not that the act of state doctrine precludes all judgment on an act of a sovereign; rather, it is only where an issue is disputed (like the validity of a government's ability to seize an alien's private property)

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101. *Id.* at 399-400.

102. *See, e.g.*, JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7 (2d ed. 2003); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1952-1953).

103. Dickinson, *supra* note 102, at 55-56

104. *Id.* at 400 (quoting 1 Op. Att'y Gen. 26, 27 (1792) (Edmund Randolph)).

105. *Id.* at 404 (quoting THE FEDERALIST NO. 3 (John Jay)).

106. *Id.* at 484.

107. *Id.* at 480-84.

that courts should defer to the sovereign.[108] However, if the law is settled, courts may and should apply it.[109] Thus, courts are to distinguish between areas of international law around which an agreement has been built and areas about which there is still division; "the greater the degree of codification and consensus supporting a CIL norm, the more allowance courts have in finding attendant claims actionable."[110] They conclude that federal law includes "universally recognized human rights norms."

A slightly different view is offered by Professor Louis Henkin. He asserts that "to call international law federal common law is misleading."[111] He notes that neither the Constitution nor an act of Congress explicitly said or even implied that the law of nations was incorporated as domestic law.[112] Even so, both state and federal courts at the inception of the United States applied customary international law, not as sate or federal law, but rather as common law.[113] Henkin then reads *Sabbatino* as "rejecting the applicability of *Erie* to international law," which allows for cases arising under international law to be within Article III.[114] However, international law is only *like* federal common law in that it is supreme to state law, but dissimilar in that "it is not made and developed by federal courts independently and in the exercise of their own lawmaking judgment."[115] Instead, judges applying that law are merely interpreting law that exists as a result of the political actions of nation states.[116] Henkin is not disturbed by the fact that the Supremacy Clause fails to mention customary international law expressly because he asserts that the Clause was for the states, "designed to assure federal supremacy."[117] In concluding, Henkin feels that courts should continue to apply well-established norms of international law to which the United States has agreed, unless Congress decides to reject them as domestic law.[118]

2. *Challenging the Modern Position*

The modern position was widely held until recently, when Curtis Bradley and Jack Goldsmith challenged it with *Customary In-*

108. *Id.* at 482-83.
109. *Id.* at 484.
110. *Id.* at 482.
111. Henkin, *supra* note 96, at 1561.
112. *Id.* at 1557.
113. *Id.*
114. *Id.* at 1559-60.
115. *Id.* at 1561.
116. *Id.* at 1562.
117. *Id.* at 1565-66.
118. *Id.* at 1569.

ternational Law as Federal Common Law: A Critique of the Modern Position. According to the authors, the modern view that customary international law holds the status of federal common law is based on flawed arguments and creates untenable implications.[119]

Bradley and Goldsmith first trace the rise of the modern position. They start by noting that pre-*Erie* courts applied customary international law in a various contexts, usually without statutory or constitutional authorization.[120] As general common law, such law "was not part of the 'Laws of the United States' within the meaning of Articles III and VI of the Constitution," meaning states were not bound by federal court interpretation and federal question jurisdiction was not established.[121] These two conclusions form the crux of the authors' critiques of the modern position and their own view.

As described above, *Erie* essentially ended federal court creation of general common law. However, for almost twenty-five years, the issue of *Erie*'s effect on customary international law remained unexplored, save an essay by Philip Jessup and the Second Circuit decision, *Bergman v. De Sieyes.*[122] However, following the Supreme Court's decision in *Banco Nacional de Cuba v. Sabbatino*,[123] where the Court, in Bradley & Goldsmith's view, "*stated*" rather than "*held*" that the act of state doctrine was a rule of federal common law, attention soon shifted.[124] Bradley and Goldsmith label this decision as the "catalyst for the scholarly argument that customary international law should be treated as federal common law."[125] That case spawned "isolated academic support" for the modern position, which was further bolstered by two events in 1980.

The first event has been described as "the *Brown v. Board of Education* for customary international law."[126] The Second Circuit in *Filartiga v. Pena-Irala* first upheld federal jurisdiction in "an action by an alien, for a tort . . . in violation of the law of nations," then it claimed that the law of nations has always been part of the

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119. Bradley & Goldsmith, *Critique*, *supra* note 93, at 820.

120. *Id.* at 822. Courts applied customary international law as natural law, part of the English-inherited common law, or simply part of the "law of the land" without explaining the source. *Id.*

121. *Id.* at 823.

122. *Id.* at 827-28. Jessup first posited that were *Erie* applied to customary international law, a state's ruling about the law would be final. *Id.* Jessup found it "unsound" and "unwise" that *Erie* not be interpreted this way. *Id.* (quoting Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939). The *Bergman* court followed Jessup's advice, as described in text accompanying notes 62-66, *supra*.

123. 376 U.S. 398 (1964).

124. Bradley & Goldsmith, *Critique*, *supra* note 93, at 829 (emphasis added).

125. *Id.* at 830.

126. *Id.* at 832 (citing Harold Hongjo Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2366 (1991)).

federal common law, thus under Article III.[127] In doing so, the authors complain that the court mistakenly relied on pre-*Erie* precedents, ignored *Bergman*, and failed to understand *Erie*'s implications.[128] The two authors then credit the *Restatement (Third) of Foreign Relations* with furthering the modern position. Although the *Restatement (Second)* merely mentioned it in a reporter's note,[129] the newer version, "without citing any authority . . . [explained] that '*courts have declared* that . . . interpretations of customary international law are . . . supreme over state law.'"[130] In other words, customary international law, "while not mentioned explicitly in the Supremacy Clause, [is] also federal law [in addition to treaties] and as such is binding on the States."[131] Bradley and Goldsmith credit these two events for allowing the prevailing, modern position to take root.

Bradley and Goldsmith then discuss the implications of the modern position and next offer their critiques. As already mentioned, the modern position's reliance on pre-*Erie* assertions that customary international law is "part of our law" and thus federal law is misplaced, as it was merely *general* common law.[132] Related are *Erie*'s theoretical underpinnings, which require that future federal common law be grounded in positive law, with some authority behind it.[133] In essence, *Erie* requires that the authority come from a domestic source.[134] Applying laws that were created outside the American political process violates this fundamental *Erie* requirement.[135] Bradley and Goldsmith dismiss *Sabbatino* as irrelevant, distinguishing the act of state doctrine with its constitutional underpinnings related to the separations of powers.[136] Finally, Bradley and Goldsmith dismiss the argument that the foreign relations enclave suggested by *Sabbatino* can allow courts to bind the political branches to interpretations of customary international law.[137] The two professors dismiss with less conviction the federalism argument, which they dub the dormant foreign relations preemption, as unnecessary because most state law competencies do not conflict with customary international law; when they do, it is usually the

127. *Id.* at 833 (quoting Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980)).
128. *Id.* at 834.
129. *Id.* at 830.
130. *Id.* at 835 (citing RESTATEMENT (THIRD) FOREIGN RELATIONS § 111 note 2).
131. RESTATEMENT (THIRD) FOREIGN RELATIONS § 111 cmt. d.
132. Bradley & Goldsmith, *Critique*, *supra* note 93, at 849-52.
133. *Id.* at 853-55.
134. *Id.* at 856.
135. *Id.* at 857-58.
136. *Id.* at 859.
137. *Id.* at 861.

result of a democratic process.[138] In any event, the value of preemption is not seen as strong by the authors.

IV. *SOSA*'S ANSWERS

In a recent decision, the Supreme Court somewhat clarified the murky jurisprudence regarding the role of customary international law within the constitutional structure. In analyzing a claim using the Alien Tort Statute (ATS) as a jurisdictional grant and customary international law as substantive law, the Court answered three fundamental questions: What is the nature of the Alien Tort Statute? Deciding that the ATS was jurisdictional in nature, how are causes of action to be defined? Finally, given the present state of federal common law, how are new norms of international law incorporated into U.S. law?

A. Facts of Sosa

While on assignment in Mexico in 1985, Drug Enforcement Administration (DEA) agent Enrique Camarena-Salazar was captured and tortured during a two-day interrogation.[139] He was eventually murdered.[140] According to eyewitness testimony, DEA officials learned that Humberto Alvarez-Machain ("Alvarez"), a Mexican physician and the respondent in the present case, helped to keep the agent alive in an attempt to extend questioning.[141] Alvarez was indicted, and a warrant was issued for his arrest in the United States. After failing to persuade the Mexican government to aid in bringing Alvarez to the United States to answer the charges, the DEA hired Mexican nationals to capture him and bring him to the United States.[142]

The plan was executed by a group of Mexicans, including petitioner Jose Francisco Sosa, who abducted the physician from his house, held him in a hotel, and brought him to El Paso, Texas, where he was arrested.[143] Alvarez sought to dismiss the indictment because his seizure had violated the extradition treaty between the United States and Mexico.[144] The district court agreed with Alvarez, as did the Ninth Circuit which affirmed the lower court's decision, but the Supreme Court reversed, holding that the nature of Alva-

138. *Id.* at 861-66.
139. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* (citations omitted).

rez's seizure had no bearing on the jurisdiction of the federal court. The case was subsequently tried, and Alvarez moved for a judgment of acquittal following the close of the government's case.[145] The district court granted the motion.[146]

After returning to Mexico, Alvarez began a civil suit. He sued several individuals involved in his abduction, as well the United States.[147] Sosa sought damages from the United States under the Federal Tort Claims Act (FTCA) for false arrest and from Sosa under the ATS for a violation of the law of nations.[148] The district court dismissed the FTCA claim following the government's motion, but it awarded Alvarez $25,000 in damages on the ATS claim. The Ninth Circuit affirmed the ATS judgment but reversed the dismissal of the FTCA claim.[149] In an en banc decision, the Ninth Circuit held that under the FTCA, because the DEA lacked authority to arrest and detain Alvarez in Mexico, the United States was liable to him for the tort of false arrest.[150] The Supreme Court reversed, holding that the foreign country exception of the FTCA bars all claims based on any injury suffered in a foreign country.[151] As to the ATS claim, the Ninth Circuit held that the ATS provide federal courts with subject matter jurisdiction *and* created a cause of action for a violation of the law of nations.[152] The Supreme Court reversed this ruling as well,[153] for the reasons discussed below.

B. Jurisdiction

The Supreme Court wisely did not step into the historical debate about the Founder's intent regarding the law of nations and the federal courts' ability to hear cases based on it. Instead, the Court recognized that the Alien Tort Statute, passed by the first Congress as part of the Judiciary Act of 1789, merely granted jurisdiction. The Supreme Court begins its substantive law analysis by recalling that upon independence, the United States "w[as] bound to receive the law of nations, in its modern state of purity and refinement."[154] The majority distinguishes between two elements of the law of nations: norms governing the behavior of nation states with each other and norms that regulate an individual outside of

145. *Id.*
146. *Id.*
147. *Id.* at 2747.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 2754.
152. *Id.* at 2747.
153. *Id.*
154. *Id.* at 2755 (citing Ware v. Hylton, 3 U.S. 199 (1796)).

his "domestic boundaries."[155] The legislative and executive branches are thought to be constrained by the norms governing the interactions among nation states, while a body of judge-made law regulated those individuals operating outside the domestic "sphere of influence," such as law merchant.[156] The majority noted that in the late eighteenth century, a sphere of overlap existed, whereby some rules that sought to control individual behavior for the benefit of other individuals coincided with the norms that governed nation state interaction.[157] Violation of safe conducts,[158] infringement on the rights of ambassadors,[159] and piracy[160] are the noted examples.[161]

The Souter-led majority then described the history of the "distinctly American preoccupation" with the overlapping norms.[162] Similar to Beth Stevens' historical analysis, the Court noted that the early years of the American experience were fraught with a weak central government. In fact, it was the inability of the Continental Congress to compel the individual states to vindicate violations of the law of nations, exemplified by the Maribos Incident, which led to the Framers' vesting the Supreme Court with original jurisdiction over certain matters and to the first Congress' enacting the ATS.[163] Specifically, the Constitution gives the Supreme Court original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Counsels," and the Judiciary Act grants the federal judiciary the power to hear claims brought by aliens for violations of international law.[164] After providing this brief historical

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155. *Id.* at 2756.

156. *Id.* The law merchant, or lex mercatoria, was originally a body of rules and principles laid down by merchants themselves to regulate their dealings. It consisted of usages and customs common to merchants and traders in Europe, with slightly local differences. *Law Merchant*, WIKIPEDIA, http://en.wikipedia.org/wiki/Law_Merchant (last visited Dec. 9, 2005).

157. *Id.*

158. "A 'safe-conduct' is a written permit given by a belligerent in an armed conflict to a person (of enemy character or not) allowing him or her to proceed to a given place for a certain purpose." Rolf Stödter, *Safe-Conduct and Safe Passage*, *in* 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 277, 277 (2000).

159. "The duty to give special protection to the envoy who bore messages [has been] observed and enforced by sanctions" for over three thousand years. *Diplomatic Agents and Missions, Privileges and Immunities*, *in* 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 1040, 1040 (1990). This grew into immunity from civil jurisdiction for ambassadors. *Id.* This was eventually codified into a complete listing of privileges and immunities in the Vienna Convention. *Id.*

160. "A pirate is one who roves the sea in an armed vessel without any commission or passport from any government, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, whatever ships or vessels he may choose to plunder." 61 AM. JUR. 2D *Piracy* § 1 (2002).

161. Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2746 (2004).

162. *Id.*

163. Sosa, 124 S. Ct. at 2756-57.

164. *Id.* at 2756 (citing U.S. CONST. art. III,§ 2 and 1 Stat. 80, ch. 20, § 9).

background in attempting to explain the impetus for the ATS, the Supreme Court resigns itself to acknowledging that there is no consensus as to the original intent of the first Congress creating the ATS.[165]

Nonetheless, the majority was able to draw two conclusions upon which it continued its analysis, both of which seem plausible. Souter wrote that first, Congress could not have enacted the ATS "only to leave it lying fallow indefinitely."[166] In other words, it seems reasonable that the first Congress enacted the Alien Tort Statute to address specific violations of international law. Second, the number of specific violations envisioned by the drafters of the Statute was likely confined to the three hybrid causes of action discussed above. Thus, the Supreme Court unanimously agrees that:

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.[167]

The agreement between the majority and the Scalia-led concurrence ends here. Because nothing precludes the federal courts from recognizing new claims arising from the law of nations based on common law, the majority reasoned that such power rests with the federal judiciary. It then discussed reasons why creating new causes of action must be done with caution. Scalia, on the other hand, took umbrage with the majority's willingness to exercise its discretion in creating new causes of action. He argued that by framing the issue in terms of *discretion*, the majority neglects to determine the prerequisite question of *authority*.[168]

C. Closed, Ajar, or Wide Open?

The difference between the majority and Scalia concurrence mirrors the debate between those advocating the modern position and those challenging it, as it centers on the difference between general common law and federal common law.

The majority simply "assume[s] . . . that no development in the two centuries from the enactment of [the ATS] to the birth of the modern line of cases beginning with *Filartiga* . . . has categorically

165. *Id.* at 2758.
166. *Id.* at 2758-59.
167. *Id.* at 2761.
168. *Id.* at 2772.

precluded the federal courts from recognizing a claim under the law of nations as an element of common law."[169] The majority sees the few remaining judicial "enclaves in which federal courts may derive some substantive law in a *common law way*" as evidence that not all judicial creation of actionable international norms is forbidden.[170] It stresses that for two hundred years the Court has accepted the law of nations, and it finds comfort in the Torture Victim Protection Act, enacted by Congress to supplement judicial decisions.[171] Using this assumption, the majority calls for "judicial caution" when deciding what new claims should be recognized.[172]

The first two reasons cited by the majority draw the most criticism from Scalia. The majority was first concerned with the "substantial element of discretionary judgment" utilized when a judge creates a new common law doctrine.[173] This is because of the way the common law has changed, such that when a new common law principle is espoused, "there is a general understanding that the law is not so much found or discovered as it is either made or created."[174] In other words, new laws cannot be based merely on reason; instead, they require a positive choice. Related to this theoretical development of common law and, in fact, a manifestation of this development, the *Erie* decision "was the watershed in which [the Supreme Court] denied existence of federal 'general' common law."[175] Though it noted that some enclaves of judicially created common law principles like the act of state doctrine created in *Sabbatino* are acceptable, the Court preferred legislative guidance before "exercising innovative authority over substantive law."[176]

The remaining three issues relate to the judiciary's ability to create a new cause of action absent legislative approval. First, the majority reiterated its reliance on the legislature to create a private right of action.[177] Second, the matter is compounded with a cause of action for an international law violation, as the repercussions on the political branches with respect to foreign relations could be harmful.[178] Finally, the majority notes that the legislature has not

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169. *Id.* at 2761.
170. *Id.* at 2764 (emphasis added).
171. *Id.* at 2765.
172. *Id.* at 2762.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 2763. In a somewhat related topic that deserves brief mention, Justice Breyer in his concurring opinion asks courts considering a claim like Alvarez's to take into account the principle of comity. *Id.* at 2782 (Breyer, J., concurring). "Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching on the

enthusiastically encouraged the judiciary to be creative in defining questionable violations of the law of nations; in fact, the Senate, when ratifying human rights-related treaties, has expressly withheld the ability of injured parties to pursue a claim based on a violation of such treaties.[179] The aforementioned reasons mandate judicial caution if a new private right is to be created from the law of nations.

Whereas the majority views *Erie* as leaving the door to federal common law creation slightly ajar, the Scalia-led concurrence sees it as slamming the door shut.[180] The majority bases this view on additional factors. It recognizes that *Erie* was not absolute in barring judicial creation of rules, that "the domestic law of the United States recognizes the law of nations," and that since the *Filartiga*, Congress has not expressed displeasure at the federal judiciary's exercise of power.[181]

According to Scalia, the majority errs by simply assuming it has discretion to create a cause of action because nothing has precluded it, rather than relying on explicit authorization, as required by *Erie*.[182] Citing Young and Bradley & Goldsmith, Scalia states that the law of nations envisioned to be applied in the forum created by the ATS would have been known as general common law.[183] He then recalls the *Erie* decision that repudiated the holding of *Swift*, essentially declaring the "death" of general common law.[184] From its ashes rose "a new and different common law pronounced by federal courts." By citing Holmes, Scalia stresses the theoretical difference between the two, noting that the new common law is "made" and requires a positivistic source, whereas the old was merely "discovered."[185] He too notes admiralty as an exception.[186] But Scalia finds no exception to the general post-*Erie* rule that this situation calls for judicial lawmaking power.[187] (It should be noted that Scalia fails to mention *Sabbatino*, arguably the closest exception available.) He then lampoons the majority's creation of a federal common law command out of international norms and con-

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laws and interests of other sovereign states." Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 543 n.27 (1987).

179. *Id.*

180. *Id.* at 2764.

181. *Id.* at 2764-75.

182. *Id.* at 2772-73.

183. *Id.* at 2769-70 (Scalia, J., concurring) (citing Young, *supra* note 94 and Bradley & Goldsmith, *Critique*, *supra* note 96).

184. *Id.* at 2770.

185. *Id.*

186. *Id.*

187. *Id.*

structing a cause of action to enforce it based on the ATS' jurisdictional grant as "nonsense upon stilts."[188]

Scalia then considers the consequences of the Court's decision. Whereas the majority "welcomes congressional guidance" in its exercise of this power, Scalia sees the judiciary's actions as an invasion of the legislature's domain.[189] That misfortune is compounded in Scalia's eyes, and in other's as will be discussed below, by the fact that the laws created come not from the American constitutional process, but instead are an "invention of internationalist law professors and human-rights advocates."

D. Standard for New International Law Norms

With the caution discussed above in mind, the majority articulated a standard for recognizing new private claims under federal common law for violations of international law norms. Any new causes of action should be of "definite character and acceptance among civilized nations than the historical paradigms familiar" when the ATS was enacted.[190] Citing *The Paquete Habana*, the Court offered as possible sources of evidence of a new norm the works of jurists and commentators.[191] The Supreme Court also recognized several limitations on the power of courts even if such a norm were found to exist: remedies in a domestic legal system and perhaps international forum must be exhausted and in some circumstances deference to the political branches must be exercised.[192]

With this framework in mind, the majority then analyzes the alleged law of nations violation claimed by Alvarez. He couches his claim in terms arbitrary arrest.[193] The Court finds Alvarez's citation to the Declaration of Human Rights and the International Covenant on Civil and Political Rights is inconsequential, as the former is merely a statement of principles and the latter was ratified with the understanding that it was not self-executing.[194] The Court then reclassifies his claim as arbitrary detention but again finds no support that the claim is a "binding customary rule having the specificity we require."[195] Thus, Alvarez had not suffered a violation of a customary international norm.[196]

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188. *Id.* at 2772.
189. *Id.* at 2774.
190. *Id.* at 2765.
191. *Id.* at 2766-67.
192. *Id.* at 2766.
193. *Id.* at 2767-68.
194. *Id.* at 2767.
195. *Id.* at 2769-69.
196. *Id.* at 2769.

V. U.S. POLICY GOING FORWARD

Some lament that the *Sosa* decision went too far, while others fear it did not go far enough. Many who are hostile to international law in general see the incorporation of customary international law into federal law, by the judiciary no less, as only one symptom in a growing problem in the attempt to restrict American sovereignty. Writing before *Sosa* but commenting on and criticizing *Filartiga*, Robert Bork derides the "campaign" to impose international standards on "an entirely different battlefront where there is even less democratic involvement."[197] This next part will address the concerns of those who fear the *Sosa* decision will unnecessarily open the United States to an erosion of sovereignty and eventually a weakening of the country's dominance or hegemony. I am sympathetic to the questioning of the way in which international norms are incorporated into U.S. law, but I disagree with critics who argue shortsightedly that the sovereignty of the United States is unreasonably threatened and its hegemonic position vulnerable if the U.S. accedes to international norms.

A. The Inarguable Foreign Policy Goal

To Fukuyama's credit, he does imagine the Kantian perpetual peace; he just assumes incorrectly that it has been achieved. Although Kant first envisioned this path over two centuries ago, the vision is shared by many today, including the current President of the United States. Kant begins with the premise that the fundamental purpose of international law is peace.[198] He asserts that international law — and eventual perpetual peace — requires an alliance of republican states, by which he means a liberal democracy, or "a form of political organization that provides for full respect for human rights."[199] Kantian theory provides two arguments for the thesis: one empirical and one normative. The empirical argument relies on the tendency of liberal states to maintain peace among themselves, whereas nonliberal states have a propensity to go to war.[200] In his second inaugural address, President George W. Bush implicitly acknowledged this Kantian concept: "The survival of liberty in our land increasingly depends on the success of liberty in other lands. The best hope for peace in our world is the expansion of

197. Robert H. Bork, *The Limits of 'International Law,'* NAT'L INT., 1, 6 (Winter 1989-1990).
198. FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW 9 (1998).
199. *Id.* at 3.
200. *Id.*

freedom in all the world."[201] The normative argument rests on Kant's categorical imperative, that human beings have inherent worth.[202] Again, President Bush acknowledges this as well: "[E]very man and woman on this earth has rights, and dignity, and matchless value."[203] Kant bases his belief on their rationality, while Bush does so because of their creation by God is his image.

Surely no one argues that the U.S. policy should not ultimately result in the spread of peace and democracy throughout the world. It is our current Administration's stated goal. Of course, there are differing opinions on how best this is achieved. Two competing rationales are often simplistically divided into two camps: idealists and realists. Idealists are portrayed as advocating human rights and global governance while realists are depicted as stressing *realpolitik* and state sovereignty.[204] This remaining Part attempts to offer a middle road, whereby both camps' concerns can be incorporated into a sound policy.

VI. WHERE WE ARE NOW

The United States' international law record, particularly in the human rights realm, is inconsistent at best, hypocritical at worst, but clearly incoherent. The row over the United States' detention policy and its possible torture of detainees is clearly a stain on the U.S. record. The United States struggles with this. For example, John McCain recently introduced amendments to the Defense appropriations bill which would "prohibit cruel, inhuman, and degrading treatment of persons in the detention of the U.S. government."[205] But the Bush Administration has threatened to veto the bill, arguing it would be "unnecessary and duplicative and it would limit the President's ability as Commander in Chief to effectively carry out the war on terrorism."[206] This dispute represents just one issue in the recent spate of picking and choosing which international standards to abide by and enforce, and which to ignore.

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201. President George W. Bush, Second Inaugural Address (Jan. 20, 2005).

202. TESÓN, *supra* note 1988, at 14-15.

203. President George W. Bush, Second Inaugural Address, *supra* note 2011.

204. *See* Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1259-66 (2005) (book review).

205. Press Release, John McCain, McCain Statement on Detainee Amendments (Oct. 5, 2005), *available at* http://mccain.senate.gov/index.cfm?fuseaction=NewsCenter.ViewPress Release &Content_id=1611.

206. *The World Today: U.S. Senate Rebuffs Bush* (ABC radio broadcast Oct. 7, 2005), *available at* http://www.abc.net.au/worldtoday/content/2005/s1476966.htm. McClellan's argument is unbelievable. If the language were duplicative, thus the President is bound already, how would the addition of the words limit the President?

Other examples of inconsistency are offered below, as is one author's plausible explanation for this incoherence.

The most recent National Security Strategy and National Defense Strategy offer further examples. The National Security Strategy defines one characteristic of a rouge state as "display[ing] no regard for international law" and "callously violat[ing] international treaties to which they are a party."[207] Yet the National Defense Strategy cites as one U.S. vulnerability challenges "by those who employ a strategy of the weak using international fora, judicial process, and terrorism."[208] By definition, the nonrouge state has respect for international law and the treaties to which it has agreed to. But then how does that non-rouge state's presumable use of an international forum or judicial process to solve a dispute challenge the United States? And how does the United States explain its use of the International Atomic Energy Agency and threat of referral to the Security Council to deal with Iran's nuclear ambitions? Even more amazing is the likening of those who use terrorism to those who use an available judicial remedy. The comparison is outrageous.

Yet, while dismissing the use of international institutions and international law as a tool of the weak, the United States has increasingly used humanitarian concerns in its foreign interventions;[209] for example, the no-fly zones trifurcating Iraq were rationalized by the need to protect the civilian population[210] and the Kosovo intervention in 1999 was validated by referencing the "humanitarian catastrophe."[211] Surprisingly, the United States even relied on legal scholars and international jurists to justify its newest foreign policy — preemption.[212] And once the primary reason justifying preemption (threat of weapons of mass destruction) failed to mate-

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207. NAT'L SEC. COUNCIL, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 17-18 (2002) [hereinafter NATIONAL SECURITY STRATEGY]. Of course, there are several other distinguishing characteristics, like threatening neighbors, brutalizing its own people, using natural resources for the personal gain of rulers, sponsoring terrorism, etc. *Id.* at 18.

208. *Id.* at 5.

209. Nico Krisch, *Imperial International Law* 24-25, 41 (Global Law, Working Paper No. 04/01), *available at* http://www.nyulawglobal.org/workingpapers/papersKrisch_appd_0904.pdf.

210. *See Iraq No-Fly Zones*, WIKIPEDIA, http://en.wikipedia.org/wiki/Iraqi_no-fly_zones (last visited Dec. 9, 2005) (noting that no U.N. resolution specifically authorized the no-fly zones but that they were established on a basis of Security Council Resolution 688, which condemned "the repression of the Iraqi civilian population").

211. President Bill Clinton, Speech by the President to the Nation on Kosovo (Mar. 24, 1999), *available at* http://www.clintonfoundation.org/legacy/032499-speech-by-presIdent-to-the-nation-on-kosovo.htm ("We act to protect thousands of innocent people in Kosovo from a mounting military offensive."); *see also* John R. Bolton, *Is There Really "Law" in International Affairs?*, 10 TRANSNAT'L L. & CONTEMP. PROBS. 1, 38 (2000).

212. NATIONAL SECURITY STRATEGY, *supra* note 2077, at 19.

rialize,[213] the United States turned to humanitarian grounds to justify its actions.[214]

The most often-cited contradiction though rests with the U.S. refusal to directly incorporate international human rights instruments.[215] This is accomplished by attaching reservations, understandings and declarations to most treaties and by making most non-self-executing.[216] Despite its checkered record on acceding to human rights treaties and norms, the United States has actively pursued norm internalization, whereby it "incorporates international law concepts into [its] domestic practice."[217] Harold Koh has argued that this process is a critical in convincing nations to obey international law.[218] The most widely used tool of internalization, especially by the United States, is employing economic sanctions.[219] Sanctions contribute to norm solidification in two ways: they attract attention both in the domestic political process and in the international community to the human rights-violating country.[220] The formal incorporation of the promotion of human rights into U.S. foreign policy is the Foreign Assistance Act of 1961, which in relevant part provides, "The United States shall . . . promote and encourage increased respect for human rights and fundamental freedoms throughout the world . . . . Accordingly, a principle goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all coun-

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213. President George W. Bush, Remarks by the President in Address to United States General Assembly (Sept. 12, 2002), *available at* http://www.un.int/usa/02_131.htm (noting in one substantive paragraph the humanitarian violations in Iraq but in ten others either U.N. resolution violations or possession of weapons of mass destruction).

214. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Feb. 2, 2005), *available at* http://www.c-span.org/executive/ transcript.asp?cat=current_event&code=bush_admin&year=2005 (praising Iraqi freedom, democracy, human rights and liberty while failing to mention any failure to find weapons).

215. M. Shah Alam, *Enforcement of International Human Rights Law by Domestic Courts in the United States*, 10 ANN. SURV. INT'L & COMP. L 27, 29 (2004); *see also* Michael Ignatieff, *No Exceptions?*, LEGAL AFF., May-June 2002 at 59 (arguing the hypocritical approach may not deserve the criticism it receives).

216. Alam, *supra* note 2155, at 29; Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 93, at 328.

217. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 6 (2001).

218. *Id.* (citing Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

219. Repeal of foreign sovereign immunity for state sponsors of terrorism is another example. *Id.* at 4. Economic sanctions have been credited with prompting change in places like Brazil, Uganda, Nicaragua, South Africa and Burma. *Id.* at 5. In addition to promoting democracy and human rights, the U.S. has used sanctions to slow nuclear proliferation and drugs and weapons trafficking, to combat terrorism, to destabilize hostile regimes, and to punish territorial aggression. *Id.* at 31.

220. *Id.* at 7.

tries."[221] Critics argue America has imposed these sanctions inconsistently[222] and that unilateral imposition of sanctions undermines multilateral regimes.[223] However, they are still an active attempt to spread respect for human rights.

One persuasive explanation of the United States' behavior, characterized by a reluctance to join treaties and readiness to disregard inconvenient legal rules is that "international law is *both* an instrument of power and an obstacle to its exercise; it is always apology *and* utopia."[224] To that end, it is loath to adopt new international human rights obligations and subject itself to international supervision, but it is proactive in using domestic means to enforce human rights abroad.[225] Perhaps criticisms would remain mild were the United States only failing to accede to international treaties but following norms nonetheless and otherwise participating in international institutions. Yet the United States is perceived as running roughshod over those norms it finds inconvenient and as engaging international fora only as a charade. To some, these criticisms are inconsequential, as international law is only an attempt to impede U.S. foreign policy.

VII. REALIST CRITIQUES

Several prominent scholars,[226] a former judge,[227] and politicians[228] have vehemently argued that international law is currently

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221. *Id.* at 32 (quoting Foreign Assistance Act § 502(b), 22 U.S.C. § 2304(a)(1) (1994)). There are several implementing statutes with authorize the various economic sanctions. *Id.*

222. *See, e.g.*, LOUIS HENKIN, THE AGE OF RIGHTS 66-73 (1990).

223. Cleveland, *supra* note 2177, at 69. Four criticisms are that U.S. sanctions "(1) enforce against other states rights that are not binding on the United States; (2) fail to apply international standards regarding human and labor rights; (3) neglect available multilateral mechanisms; and (4) selectively and hypocritically enforce human and labor rights." *Id.* While these arguments may have merit, they are will not be discussed further in this paper. Nevertheless, Professor Cleveland concludes that "unilateralism is not inherently hegemonic, and unilateral measures which are crafted with proper respect for international law principles can complement, rather than compete with, with development of a multilateral system." *Id.*

224. Krisch, *supra* note 2099, at 1-2.

225. *Id.* at 49-50.

226. JEREMY RABKIN, IN DEFENSE OF SOVEREIGNTY (2004).

227. Robert H. Bork, *The Soul of the Law: Judicial Hubris Wreaks Havoc, Both Here and Abroad*, WSJ.com. (lamenting the dominance of liberalism in the law and the new international law that threatens our sovereignty); *see also* Bork, *supra*, note 196.

228. *See, e.g., Hearing on the International Criminal Court Before H. Comm. on International Relations* 105th Cong. 37-38 (2000), *available at* 2000 WL 1130039 (statement of Rep. Christopher Smith, Member, House Comm. on International Relations) (saying that by acceding to the ICC, the U.S. would be ceding sovereignty); *Hearing on the United Nations Convention on the Law of the Sea Before the S. Armed Servs. Committee* (2004), *available at* 2004 WL 766860 (statement of Sen. James Inhofe, Member, Sen. Armed Servs. Comm.) (acknowledging that by agreeing to UNCLOS, the United States is giving up sovereignty); Representative Bob Barr, *Protecting National Sovereignty in an Era of International Med-*

hampering the United States. Those holding this view have been labeled "new sovereigntists."[229] Former Assistant Secretary of State for International Organization Affairs and current U.S. Ambassador to the United Nations has stated that "'[i]nternational law' today is very much about binding, restricting and limiting the United States."[230] He adds, "The 'agenda' of constraining the United States through international law is neither carefully planned nor entirely coherent, but it an unmistakably discernible tendency."[231] Judge Bork asserts that "[t]he new international law threatens our sovereignty and domestic law as well." The United States seems to have adopted this attitude somewhat, as the National Defense Strategy proclaims that the U.S. has "a strong interest in protecting the sovereignty of nation states." Encouragingly, however, it also warns that nations have a responsibility to exercise sovereignty "in conformity with the customary principles of international law, as well as with any additional obligations that they have freely accepted."[232]

Just as both international and constitutional common law have evolved, one must understand the notion of sovereignty has evolved over the centuries as well. Once seen as absolute, where all political power was centered in one authority figure, sovereignty now incorporates democratic precepts, such as suffrage and representative governance.[233] As will be discussed below, many who are weary of the current trends in international law use the concept of sovereignty as "an emotional flag"[234] to counterbalance the internationalist movement. In any event, the notion of sovereignty has been belittled by some,[235] and its permanence has been questioned of late.[236]

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dling: An Increasingly Difficult Task, 39 HARV. J. ON LEGIS. 299, 299 (2002) (warning that international organizations "are shifting rapidly towards an activist, internationalist agenda that comes at the cost of the United States' traditional freedoms and independence"). Some have even gone so far as to call for the United States' withdrawal from the United Nations. *Id.* at 322 n.142 (discussing Representative Ron Paul's legislation seeking U.S. withdrawal of American participation in the U.N.).

229. See *supra* note 229.

230. Bolton, *supra* note 2111, at 30.

231. *Id.* at 48.

232. DEP'T OF DEFENSE, NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 1 (2005).

233. *See* Jenik Radon, *Sovereignty: A Political Emotion, Not a Concept*, 40 STAN. J. INT'L L. 195, 195-99 (2004). *See generally* John D. van der Vyver, *Sovereignty and Human Rights in Constitutional and International Law*, 5 EMORY INT'L L. REV. 321 (1991) (tracing the meaning of sovereignty in both constitutional and international law).

234. Radon, *supra* note 2333, at 202.

235. *See, e.g.*, Louis Henkin, *That "S." Word: Sovereignty, and Globalization, and Human Rights*, 68 FORDHAM L. REV. 1, 1 (1999) ("I don't like the 'S word.' Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values.").

236. STEPHEN D. KRASNER, SOVEREIGNTY: DISORGANIZED HYPOCRISY (1999).

It is important to question the arguments offered by the new sovereigntists why the United States should not be bound by international law.[237] The first problem is that the international lawmaking process is unaccountable and unreasonably intrusive on domestic affairs, and international norms are sometimes even unconstitutionally grafted into domestic law. The other concern is with international law itself: international law norms, especially in the human rights arena, are vague, malleable, and imprecise, and because it is unenforceable, the United States has the duty to opt out of many international regimes, as a matter of power and legal right. The first concern is valid but is overcome if the appropriate constitutional actors are the ones actually binding the United States. This is exactly what the Supreme Court in *Sosa* required. The other two concerns can also be minimized with a careful, measured approach.

Borrowing the emotion flag analogy, it is perfectly respectable, in fact ideal, to invoke the patriotism of America's constitutional, democratic process — a system of checks and balances coupled with political accountability.[238] This has been identified a core American value: "deep attachment to popular sovereignty."[239] It has best been summed up best by Ambassador Bolton when he said that "democratic theory and sound constitutional principles, from our perspective, require that laws that bind American citizens be decided upon by our constitutional officials — the Congress and the president — not derived by abstract discussions in academic circles and international bodies."[240] This contrasts the view of those who are pessimistic about U.S. failure to adopt international standards using formal means, such as treaties, and who are much more hopeful about the potential of customary international law, which "ipso facto becomes supreme federal law and hence may regulate activities, relations or interests within the United State."[241]

Most modern critics who detest international law echo the concerns of nineteenth century critic John Austin, who argued that because there was no international sovereign to ensure rules were followed, it would never gain the same respect as other areas of positive law.[242] This deep-rooted criticism still rings true today: without

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237. Professor Spiro organizes these complaints somewhat differently, *see* Spiro, *supra* note 10, at 10; however, I feel this arrangement is better.

238. Radon, *supra* note 2333, at 202.

239. Ignatieff, *supra* note 2155, at 60.

240. *Hearing on the Nomination of John Bolton to Be U.S. Representative to the United Nations, Part 2 Before the S. Foreign Relations Comm.*, 109th Cong. (2005) (statement of John Bolton, Nominee to be U.S. Rep. to the U.N.), *available at* 2005 WL 827844.

241. Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851, 856 (1989).

242. JANIS, *supra* note 11, at 2-3.

an international legislature to codify international norms, an international judiciary[243] to consistently interpret these norms, and an executive to ensure they are enforced, norms remain vague. To solve this problem, further "legalization" must continue.[244] Legalization is characterized by "(1) increasingly obligatory norms; (2) increasingly precise norms; and (3) the delegation of authority to supranational bodies to interpret, implement, and apply these norms."[245] This strengthens human rights norms by increasing credibility of and compliance with international norms.[246] As legalization is an obvious trend (otherwise the new sovereigntists would not be concerned), why would the United States resign itself to the sidelines as norms are crystallized? Would it not be better to take an active role — even the lead — in ensuring that its valued norms are furthered? Stronger international institutions enforcing increasingly transparent rules could help spawn religious freedom in China and women's rights in the Middle East, diminish or even prevent genocide or ethnic cleansing in Africa, and slow or halt the proliferation of nuclear weapons to rouge states, all goals currently pursued by the United States. Realists often contend that these outcomes materialize only in an idealist's world, but as norms become universal, effective pressure can be put on rights abusers to conform, credible threat of punishment will dissuade those who might commit crimes against humanity, and promise of a more peaceful world will reduce need to acquire deadly weapons.

In addition and related to international law's feeble and ineffective nature, new sovereigntists argue that the United States has the legal right and power avoid international restrictions. The legal right is based on the constitutional concerns discussed above, especially concerning customary international law. Arguably, however, they would not contend that the United States *can* legally breach a treaty properly entered into by the President with the advice and consent of the Senate, as required by the Constitution. Of course, it is assumed that United States *could* do so without consequence, as few have the power to challenge its ability to do that. Ironically though, the United States has used international legal principles to its seeming advantage when making reservations, understandings and declarations, much to the internationalists' chagrin.[247] And as

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243. Though the International Court of Justice is arguably an international judiciary body, as is the International Criminal Court, both courts do not have world-wide acceptance.

244. Derek P. Jinks, *The Legalization of World Politics and the Future of U.S. Human Rights Policy*, 46 ST. LOUIS U. L.J., 357, 360 (2002).

245. *Id.*

246. *Id.*

247. *See supra* note 216 and accompanying text.

the "sole superpower," the United States clearly has the power to avoid and even break international law without fear of direct reprisal. But, as the Untied States has undoubtedly learned, there are limits to its power, both in its ability to prevent international terrorist attack and to project its will abroad. Policies, like ignoring international obligations, that breed isolation and resentment will only further limit America's power, whereas those that foster international cooperation will strengthen America's hand.

Advocating resistance to and avoidance of the international rule of law is short cited. New sovereigntists recognize the trend of increasing legalization of international norms, yet by advocating laissez-faire approach to stifle the progress, they limit United States ability shape norms at this early stage of development.[248] In addition, this policy betrays our history as a human rights leader. "Not only have American concepts of freedom shaped the rise of constitutionalism in Europe and elsewhere,"[249] Americans have also been pivotal in shaping recent developments in international law, including the United Nations and international financial institutions, as well as human rights, as illustrated by the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.[250]

American hegemony is unquestionably something to preserve. It hinges on the spread of Kantian principles, which in turn depends on the spread of the international rule of law. Supremacy also requires an embrace and unrelenting defense of American democratic principles. Furthermore, American sovereignty needs to be defended, but it need not remain absolute. A careful and measured sacrifice of sovereignty by acceding to reasonable agreements and norms, reciprocated by other nations, will strength the international legal system and the United States. This policy requires political leaders to recognize the promise of peace, to persuade Americans that it is one worth pursuing, and to carefully safeguard constitutional values while pursuing these norms. The result could be the ultimate manifestation of American exceptionalism — the notion that the United States is destined for greatness — to be the superpower that benevolently accedes its own sovereignty for the good of the world.

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248. Spiro, *supra* note 10, at 15.

249. Lillich, *supra* note 240, at 852 (quoting Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 537 (1988).

250. HENKIN, *supra* note 2222, at 65; Cleveland, *supra* note 2177, at 30; Krisch, *supra* note 208, at 16; Lillich, *supra* note 240, at 852.

VIII. Conclusion

The rise of international law, particularly human rights, and the weakening of absolute state sovereignty are undeniable historic trends. Recognizing these trends, the United States must decide either to actively resist, sit idly by, or shape the way in which they continue. The Supreme Court has recently held that the United States is bound by only the most concrete of customary international norms, but further incorporation requires action by the political branches. The current Administration has a checkered record, and though the President speaks in idealistic, internationalist terms, he seems to ignore the international community in practice and policy. Though the United States might be restrained in the short term, such restraints will occur less often and with less detrimental affects as the number of liberal democracies grows. Those democracies, also committed to the international rule of law, will ensure their values are advanced using international law and institutions to mandate that all nations offer some minimal respect to human rights. As human rights abuses lessen and liberal and economic democracy continue to spread, the Kantian hope of perpetual peace will be achieved, and Fukuyama's prediction of the end of history will be realized.