Outsourcing American Law

Setting the Record Straight: Sosa v. Alvarez-Machain And the Debate Over Customary International Law

David H. Moore
Brigham Young University, J. Reuben Clark Law School

AEI WORKING PAPER #154
www.aei.org/paper/100036
Introduction

The status of customary international law (CIL) in the U.S. legal system has been an issue of substantial and heated debate. As a general matter, the debate is dominated by two positions: the modern position view and the revisionist view.\(^1\) The modern position, which has been endorsed to varying degrees by a majority of foreign relations scholars and adopted by the Restatement (Third) of the Foreign Relations Law of the United States, perceives the entire body of CIL as federal common law even in the absence of political branch incorporation.\(^2\) The revisionist view, by contrast, maintains that the political branches or Constitution must authorize federal courts to use CIL as a federal rule of decision before the courts may do so. The revisionist approach does not preclude a role for CIL in federal courts. Rather, it seeks to ensure that the scope and nature of that role is defined by the elected branches of government, who bear primary responsibility for lawmaking and foreign affairs.

The debate between the schools has been fueled by suits brought under the Alien Tort Statute (ATS). Adopted by the First Congress, the ATS in its current iteration provides the district courts with “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”\(^3\) Although the statute largely lay dormant following the nation’s founding, the Second Circuit resurrected it in the famous case of *Filartiga v. Pena-Irala*.\(^4\) In *Filartiga*, the Paraguayan relatives of a Paraguayan man who had been tortured to death by a Paraguayan police official in Paraguay sued the official in U.S. district court under the ATS for violation of the CIL prohibition against official torture.\(^5\) Although the district court dismissed the suit, the Second Circuit concluded that the federal courts had jurisdiction to hear such suits inasmuch as CIL was federal law for Article III purposes.\(^6\)

*Filartiga* produced a stream of ATS suits, first against foreign government officials for violations of the CIL of human rights, then against corporations for aiding foreign states in violating human rights, and most recently against U.S. officials and contractors for abuses

---


\(^4\) 630 F.2d 876 (2d Cir. 1980).

\(^5\) *Id.* at 878-79.

\(^6\) *Id.* at 880, 885-87.
committed in the war on terrorism. Not long after this stream of suits began, Judge Bork, in a splintered D.C. Circuit opinion, took issue with Filartiga’s suggestion that the ATS or common law authorized a cause of action for violations of the law of nations. In response to Judge Bork’s opinion, Congress entered the debate enacting the Torture Victim Protection Act (TVPA), which provided causes of action for torture and extrajudicial killing. The legislative history of the TVPA provided some support for the Second Circuit’s decision in Filartiga. Building on Filartiga, courts continued to hear ATS claims and debate continued over the propriety of doing so.

The Supreme Court finally stepped into the debate in Sosa v. Alvarez-Machain. Sosa involved a claim by Mexican national Humberto Alvarez-Machain who had been abducted and transported to Texas by Jose Francisco Sosa at the request of the U.S. Drug Enforcement Administration. After being released, Alvarez sued Sosa in U.S. federal court under the ATS claiming that he had been arbitrarily detained in violation of the law of nations. The district court awarded damages on Alvarez’s claim. Sosa appealed arguing that the award was improper because the ATS provided jurisdiction but not a cause of action under which Alvarez could recover. The Ninth Circuit, however, upheld the award. It found that the ATS “not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations.” Sosa appealed, contesting this finding.

The appeal gave the Supreme Court an opportunity to comment on the debate over the domestic status of CIL. Scholars have tended to conclude that Sosa endorsed the modern position view that CIL is federal common law in the absence of political branch authorization. Indeed, all three of my fellow panelists have taken this position to some degree. In his panel presentation, Professor William Dodge stated the position most forcefully in asserting that post-Sosa, the revisionist view is dead. Professors Beth Stephens and Julian Ku have taken related positions in their writings.

---

8 Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779, 801, 810-16 (Bork, J., concurring).
11 Id. at 697-98.
12 Id. at 698.
13 Id. at 699.
14 See id.
15 Id. (quoting Alvarez-Machain v. United States, 331 F.3d 604, 612 (9th Cir. 2003) (en banc)).
16 Id. at 712.
18 See Beth Stephens, “The Door is Still Ajar” for Human Rights Litigation in U.S. Courts, 70 BROOK. L. REV. 533, 547-50, 556 (2004-05) (Sosa confirmed that federal courts have discretion to recognize common law causes of action based on international law, and although the Court generally urged great caution in exercising this discretion, it “found in the ATS . . . congressional
Their positions are reflective of those taken by other commentators. Professor Ralph Steinhardt, for example, has written that the revisionist position only gained three votes in Sosa and therefore has “finally been laid to rest.” Others, such as Harold Koh, one of the principal proponents of the modern position view, have been less emphatic. Koh has argued that all circuit courts, and now the Sosa Court, have rejected the revisionist view, though Sosa only recognized “a federal common law, civil remedy for a very limited class of gross human rights violations.”


20 Harold Hongju Koh, The 2004 Term: The Supreme Court Meets International Law, 12 Tulsa J. Comp. & Int’l L. 1, 12-13 (2004); see also Julian G. Ku, Structural Conflicts in the Interpretation of Customary International Law, 45 Santa Clara L. Rev. 857, 862 (2005) (Sosa recognized “CIL as a [unique] form of federal law.’’); Luisa Antonioli, Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts, 12 Ind. J. Global Legal Stud. 651, 656, 658 (2005) (Striking “a middle ground,” the Sosa Court “recognized that courts can apply actionable international norms independently from statutory recognition, but at the same time . . . established very strict criteria for the exercise of this power,’’ “which leads to the conclusion that, as a rule, judicial creativity with regard to violations of international law is confined to areas where there is a congressional mandate.’’); Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 Cornell L. Rev. 97, 104 n.27, 182 n.438 (2004) (Sosa “settled part of [the] debate, recognizing that some CIL is federal common law,” but adopting “a fairly restrictive view of the types of international law violations that give rise to a federal common law cause of action.”); Gerald L. Neuman, The
Like Professors Steinhardt and Koh, the large majority of scholars have read *Sosa* as tipping the balance toward the modern position view of CIL’s domestic status. Only a few scholars have suggested that *Sosa* favors the revisionist view and several have done so only in passing.\(^{21}\)

This article challenges the accumulating conventional wisdom that *Sosa* adopted the modern position view. Through a detailed analysis of the *Sosa* opinion, the article demonstrates that *Sosa* endorsed the revisionist perspective, an endorsement supported by the Supreme Court’s decision in *Hamdan v. Rumsfeld*.\(^{22}\) The article concludes with a brief evaluation of that endorsement.

### I. *Sosa’s* Endorsement of the Revisionist View

---

*Abiding Significance of Law in Foreign Relations, 2004 SUP. CT. REV. 111, 119 (The *Sosa* majority rejected the revisionist position, “but accommodated some of its underlying concerns by emphasizing that the power [to provide private causes of action for CIL violations] should be exercised with caution.”); Recent Case, *Igartúa de la Rosa v. United States*, 119 HARV. L. REV. 1622, 1627 (2006) (*Sosa* “clearly rejected th[e] revisionist argument, adopting the language of the predominant view,” though the opinion was not without equivocation.); Ehren J. Brav, Recent Development, *Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming Filartiga for the Alien Tort Statute*, 46 HARV. INT’L L.J. 265, 272-78 (2005) (“*Sosa* suggests that [the modern position view] has prevailed,” though the Court adopted a “set of cautionary principles” to guide judicial incorporation of CIL.); Note, *The Offenses Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2383-85 (2005) (*Sosa* recognized that “federal courts have a narrow power to give legal force to substantive rights under modern” CIL even in the absence of “specific action” by Congress.); *Leading Cases: Federal Statutes and Regulations*, 118 HARV. L. REV. 446, 451-53 (2004) (“[I]t is clear that the Court rejected Justice Scalia’s revisionist view,” and “[m]uch of the majority’s analysis is consistent with the view that since *Erie* all [CIL] has been included within federal common law.”).\(^{21}\)

---

As noted above, Sosa argued before the Supreme Court that the ATS was merely jurisdictional. The Supreme Court ultimately accepted Sosa’s contention, but that conclusion did not resolve the case. The Court turned to consider whether, in spite of the jurisdictional nature of ATS, the federal courts could incorporate CIL in creating common law causes of action based on CIL.

In conducting this inquiry, the Court endorsed the revisionist view that federal courts cannot incorporate CIL as federal common law on their own authority, but must wait for authorization from the political branches. That endorsement is evident from (a) the Court’s pervasive focus on congressional intent and (b) the separation of powers concerns that bounded the Court’s holding.

A. The Focus on Congressional Intent

The dominant feature of all nine justices’ analysis was a focus on congressional intent. Congress’s intent not only drove the full Court’s determination of whether federal courts possessed authority to incorporate CIL, but also guided the majority’s conclusions regarding the scope of that authority.

1. Federal Courts’ Authority to Incorporate CIL into Common Law

The Court unanimously looked to Congress’s intent in enacting the ATS to determine whether federal courts could incorporate CIL as common law. Had the Court accepted the modern position view, there would have been no need to engage in a discussion of congressional intent at least to conclude that courts could treat CIL as federal common law. Under the modern position view, CIL is federal common law even in the absence of congressional action. As a result, the fact that Congress had enacted the ATS—regardless whether the ATS was merely jurisdictional—would have been irrelevant to CIL’s common law status. Indeed, the Court would not have had to rely on the ATS even for jurisdictional purposes. If CIL were common law, the general federal question statute would have been adequate to provide jurisdiction for CIL-based common law claims, as the Second Circuit tentatively acknowledged in the Filartiga decision itself.

The Court adopted none of these arguments, however. Instead, consistent with the revisionist view, the unanimous Court looked to congressional intent to evaluate federal judicial power to incorporate CIL. Discerning the First Congress’s intent in enacting the ATS was not an easy task. “There [was] no record of congressional discussion about private actions that might be subject to the jurisdictional provisions [of ATS], or about any need for further legislation to

---

24 Id. at 713-14.
25 For a response to the argument that Sosa merely addressed the creation of causes of action based on CIL and not the domestic status of CIL more generally, see Bradley, Goldsmith & Moore, supra note, at 909.
26 See Filartiga, 630 F.2d at 888 n.22 (“We recognize that our . . . [conclusion that CIL is federal common law] might also sustain jurisdiction under the general federal question provision.”); see also RESTATEMENT, supra note, § 111 & cmts. d-e, §112(2) & cmt. a; Beth Stephens, The Law of Our Land: Customary International Law as Federal Law After Erie, 66 FORDHAM L. REV. 393, 393-94 (1997); Note, An Objection to Sosa—And to the New Federal Common Law, 119 HARV. L. REV. 2077, 2094 (2006); Recent Case, supra note, at 1627-28.
create private remedies.” 27 In fact, there was “no record even of debate” on the ATS. 28 Nor was there any scholarly consensus on “what Congress intended” in passing the ATS. 29 The Court nonetheless concluded that the statute’s history “tend[ed] to support two propositions.” 30 First, Congress did not enact the ATS merely to provide jurisdiction in the event that future Congresses or state legislatures decided to create causes of action or delegate authority to the courts to do so. 31 Congress expected the ATS to have immediate traction. Second, Congress expected that the ATS would provide jurisdiction for only a small number of CIL-based claims that existed in general common law when the ATS was enacted. 32 As the Court summarized, “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 . . . [was] 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.” 33

While the Court unanimously concluded that congressional intent was the determinative consideration and agreed on what Congress intended, the Court fractured when it came to deciding the import of that intent. Some scholars have equated Justice Scalia’s resulting concurrence with the revisionist position and concluded that the Court rejected the revisionist view because Justice Scalia’s opinion failed to gather five votes. 34 These scholars have

27 Sosa, 542 U.S. at 718.
28 Id.
29 Id. at 719.
30 Id.
31 Id.; see also id. at 711, 721, 724.
32 Id. at 720; see id. at 724.
33 Id. at 724 (emphasis added); see also id. at 729. But cf. Ku & Yoo, supra note, at 179 (The Court may have transformed the purpose of ATS “from keeping the United States out of diplomatic incidents to keeping other nations to their international obligations.”).

Advocates of the modern position view might argue that the revisionist position was not vindicated to the extent that Sosa allowed CIL incorporation absent express authorization from Congress. See William S. Dodge, After Sosa: The Future of Customary International Law in the United States (Sosa “holds that [CIL] may be applied as federal common law even if not expressly incorporated by Congress.”). First, the revisionist position requires positive, but not necessarily express, authority. Second, it remains unclear after Sosa whether federal courts may incorporate CIL outside the ATS context without express authorization. The ATS presented the Court with a unique situation, a situation in which Congress had enacted a jurisdictional statute with the correct assumption that federal courts would be able to adjudicate certain CIL claims under the jurisdictional grant. Erie then intervened and rendered that assumption erroneous. The Sosa Court had to decide whether to implement the intent of a Congress that would not have seen the need to create a statutory cause of action. The majority ultimately found that it should implement Congress’s intent. However, it does not necessarily follow that the Court will or should imply intent to authorize common law incorporation of CIL from acts of post-Erie Congresses that know that federal courts need authorization to incorporate international law.

34 See Dodge, supra; see also Steinhardt, supra note, at 2254 (“By making the self-styled ‘revisionist’ approach central to his analysis, and by obtaining the votes of only two additional
misperceived and overstated the disagreement between the majority and Justice Scalia, however. Both majority and concurrence agreed that congressional intent was key for determining whether CIL could be incorporated as federal common law. They disagreed on whether the Court could translate the intent of the First Congress into a post-\textit{Erie} world that no longer recognized general common law.

Justice Scalia believed that \textit{Erie} made it impossible to fulfill Congress’s expectation that federal courts would be able to hear common law claims based on the law of nations under the jurisdictional grant of ATS.\footnote{Sosa, 542 U.S. at 729 (identifying the effect of \textit{Erie} on Congress’s intent as the point of disagreement between the majority and Justice Scalia).} Justice Scalia was convinced that the Court could not simply leave open the door that the First Congress intended.\footnote{See \textit{id.} at 744-46 & n.* (Scalia, J., concurring in part).} That is, the Court could not just continue to recognize certain general federal common law claims based on CIL.\footnote{See \textit{id.} at 746.} With the abolition of general common law in \textit{Erie}, the Court had to open a new door—the door of post-\textit{Erie} common law, which results in federal common law that is supreme federal law and creates federal question jurisdiction.\footnote{See \textit{id.} at 744-46 & n.*.} Scalia thought this inappropriate.\footnote{\textit{Id.} at 745-47.}

By contrast, the majority concluded that the First Congress’ understanding or intent could survive \textit{Erie} even if general common law did not. In reaching this conclusion, the majority again relied on congressional intent: “It would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”\footnote{\textit{Id.} at 730.}

To bolster this assumption, the majority invoked the understanding or intent of modern Congresses.\footnote{\textit{Id.} at 730-31.} Federal courts had assumed authority to recognize common law causes of action incorporating CIL in the wake of the 1980 \textit{Filartiga} decision, and opposition to that practice was aired only a few years later in the D.C. Circuit’s \textit{Tel-Oren} decision.\footnote{\textit{Id.} at 731.} “Congress, however, [had] not only expressed no disagreement with [the Sosa Court’s] view of the proper exercise of the judicial power, but [had] responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail.”\footnote{\textit{Id.}} Thus, “nothing Congress [had] done . . . [provided] a reason for [the Court] to shut the door to the law of nations entirely.”\footnote{\textit{Id.} at 725 (emphasis added).}

Nor was it impossible as a matter of precedence for federal courts to exercise some common law authority with regard to CIL. “[N]o development in the two centuries from the enactment of [the ATS] . . . [had] \textit{categorically precluded} federal courts from recognizing a claim under the law of nations as an element of common law.”\footnote{\textit{Id.} at 725 (emphasis added).} \textit{Erie} did not eliminate all federal justices, Justice Scalia effectively demonstrates that the revisionist critique of the ATS was unpersuasive and had finally been laid to rest.”.
judicial authority to create substantive common law. And the Supreme Court had long “affirmed that the domestic law of the United States recognizes the law of nations.” Indeed, in the famous Sabbatino decision, although the Court “did not directly apply international law,” it did not “question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that Erie should not preclude the continued application of international law in federal courts.” The Court thus could not conclude “that federal courts must avert their gaze entirely from any international law norm intended to protect individuals.” Instead, the Court found “that the limited, implicit sanction to entertain the handful of international law cum common law claims understood in 1789 supported a highly restrained “residual common law discretion.”

Adherents of the modern position view attempt to derive support for their position in this discussion of a role for CIL in domestic law. However, two observations are critical. First, the Court’s language falls short of endorsing common law status for all CIL. The fact that domestic law “recognizes” CIL is unsurprising. Under the relatively uncontroversial Charming Betsy canon, for example, courts try to interpret domestic statutes in ways that do not conflict with CIL, which, of course, involves “recognition” of CIL. The canon does not require that CIL qualify as federal common law, however. The Court’s acknowledgment that international law might apply in appropriate cases likewise does not mean that CIL is federal common law. A federal statute might explicitly incorporate a norm of CIL rendering CIL applicable in a case based on that statute. Further, the Court’s statements that neither Erie nor any other post-ATS development “preclude[s]” or “categorically preclude[s]” federal courts from applying international law as common law nor requires federal courts to “avert their gaze entirely from any international law norm intended to protect individuals” do not suggest common law status for all CIL.

Second, and perhaps more importantly, the discussion of the domestic status of CIL took place in the context of determining whether Congress’s intent with regard to the ATS could be implemented post-Erie. Congressional intent remained the foundational inquiry in determining whether the federal judiciary could incorporate CIL. The Court’s comments on CIL’s domestic role simply served to assure that nothing prevented Congress from authorizing federal courts to look to international law for a rule of decision. The notion that Congress could authorize the

46 Id. at 729.
47 Id.
48 Id. at 730 n.18 (emphasis added).
49 Id. at 730 (emphasis added).
50 Id. at 712.
51 Id. at 738.
52 See Bradley, Goldsmith & Moore, supra note at 905, 907-08.
53 See id. at 907, 910-24.
54 See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 114 (1987); see also Bradley, Goldsmith & Moore, supra note, at 921.
55 See Bradley, Goldsmith & Moore, supra note, at 921.
56 See id. at 907-09.
57 See id. at 919-20.
58 See id. at 905.
federal courts to look to CIL for rules of decision permitted the Court to conclude “that the [ATS] door [was] ajar subject to vigilant door keeping.”

2. Scope of Federal Courts’ Authority to Incorporate CIL into Common Law

Having concluded, based on congressional intent, that the federal judiciary possessed some authority to incorporate CIL through the creation of CIL-based common law claims, the Court turned to delimiting the scope of that authority. Again Congress’s intent, coupled with separation of powers considerations, guided the exercise. The majority found that in enacting the ATS, the First Congress did not provide a “mandate to seek out and define new and debatable violations of the law of nations.” Nor did “modern indications of congressional understanding of the judicial role in the field . . . affirmatively encourage[] greater judicial creativity.”

Although Congress had recently enacted the TVPA, providing an explicit federal cause of action for torture and extrajudicial killing, Congress limited itself to these claims, rather than adopting a general cause of action for CIL violations. Similarly, although the TVPA’s legislative history noted that the ATS “should ‘remain intact to permit suits based on other [CIL] norms. . . ,’ Congress as a body ha[d] done nothing to promote such suits.” Instead, the Senate had attached non-self-execution declarations to human rights treaties, preventing the courts from enforcing the norms in those treaties. As Congress did not intend to delegate broader authority, the Court concluded that the “residual common law” authority that Congress intended was “limited” and should be exercised with restraint.

To ensure that federal courts did not exceed the limited authority Congress approved, the Court imposed specific restraints that were derived again from congressional intent. The First Congress expected that the ATS would provide jurisdiction “for a relatively modest set of [CIL] actions,” namely, “offenses against ambassadors,” probably “violations of safe conduct,” and perhaps “individual actions arising out of prize captures and piracy.” Reflectively, the Court concluded that “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the[se] historical paradigms.” That is, federal courts could only exercise authority to incorporate norms like the ones Congress envisioned when it enacted the ATS. If a plaintiff advanced a claim that exceeded the law-making authority that Congress delegated, the Court explicitly stated that the plaintiff’s remedy was with Congress, not the courts, again

---

59 Sosa, 542 U.S. at 729.
60 Id. at 728.
61 Id.
62 Id.
63 Id. (quoting H.R. REP. NO. 102-367, pt. 1, at 4 (1991)).
64 Id.
65 Id.
66 Id. at 712.
67 Id. at 725.
68 Id. at 720.
69 Id. at 735; see also id. at 725.
emphasizing (consistent with the revisionist view) that the authority to incorporate CIL lies in the legislative powers of Congress not the common law powers of the federal courts.  

3. Response to Critics

Some might argue that *Sosa*’s pervasive focus on congressional intent results not from a conviction that judicial authority to incorporate CIL derives from Congress, but from the fact that *Sosa* involved a statute, the ATS. As a result, the Court naturally turned to congressional intent to understand the ATS where it would not have done so had the case been based on inherent judicial authority to incorporate CIL. This argument is difficult to make as it relies on the assumption that the ATS was intended as a limiting statute that would constrain otherwise broad judicial authority to incorporate CIL. Any notion that the ATS was a limiting statute is inconsistent with both the history of the ATS and the broader modern position view.

As the Supreme Court concluded, the ATS was enacted in response to the limited judicial authority of the central government under the Articles of Confederation. Under that document, the federal government lacked authority to punish violations of the law of nations. This was embarrassingly illustrated when the Secretary of the French Legion was assaulted. The Continental Congress had to call on the states to pass legislation addressing situations of this type, approve of state criminal proceedings against the assaulter, and direct “the Secretary of Foreign Affairs to apologize and to ‘explain to’” the French representative the difficulties of a federal union and the allowances that must be made for a young nation. In reaction, the First Congress crafted the ATS to expand federal judicial authority. The notion that the ATS was a limiting statute is thus inconsistent with its provenance.

The assumption is likewise inconsistent with the broader modern position view. Advocates of the modern position have variously maintained that CIL is federal common law and that the ATS creates a cause of action to enforce CIL. To argue that the ATS is instead a statute that attempted to limit federal courts’ authority would certainly be a new tack and one which the *Sosa* Court did not take. The *Sosa* Court ultimately concluded that the federal courts could do post-*Erie* what they otherwise would be unable to do—recognize common law claims based on CIL—because the Congress that enacted the ATS had understood that pre-*Erie* federal courts would have authority to hear similar general common law claims. As noted, not only did the Court locate the grounds for federal authority in congressional intent, but the Court also imposed specificity and broad acceptance requirements out of fidelity to that intent.

B. Separation of Powers Concerns

The specificity and broad acceptance limitations were not only required to conform to Congress’s intent, but were also inspired by separation of powers concerns. By demanding that any norm of CIL be specifically defined and widely accepted before it is incorporated, the Court sought to prevent the federal judiciary from exercising any improper law-making discretion that

---

70 Id. at 738 n.30 (Since Alvarez did not satisfy the specificity requirement, “[i]f [he] wishes to seek compensation . . . he must address his request to Congress.”).
71 Cf. Dodge, supra note 33, at n.46.
72 Sosa, 542 U.S. at 715-17 & n.11.
73 Id.
74 Id.
75 See Bradley, Goldsmith & Moore, supra note 21, at 887-88.
the ambiguous nature of CIL might otherwise permit. The Court’s concern for the proper separation of powers between the political branches and the courts was almost as prevalent in the Sosa opinion as the Court’s focus on the intimately related issue of Congress’s intent. The Court reasoned that the authority that remained in the federal judiciary as a result of the ATS was limited not only because the First Congress understood that it would be, but because modern understanding of separation of powers demanded that it be.

Modern understanding of the limited role of the federal judiciary derives in large part from Erie. Erie made clear that the application of federal common law was an exercise in discretionary law making rather than ministerial law discovery as had been thought under Swift’s general common law regime. This realization contributed to a “significant rethinking of the role of federal courts,” a rejection of general federal common law, and a general rule of looking “for legislative guidance before exercising innovative authority over substantive law.” Consistent with Erie’s realignment of the relative roles of Congress and the federal courts, the Supreme Court has emphasized “that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases.” Federal courts should exercise great restraint in recognizing common law claims.

That restraint is all the more necessary in suits implicating foreign affairs, as suits invoking CIL often will, inasmuch as the political branches, not the courts, are primarily responsible for the conduct of foreign relations. “Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.”

In short, the Court reasoned that even if Congress had expected federal courts to exercise some common law power under the ATS, that power should be highly circumscribed to conform to an appropriate separation of powers under which the political branches remain the primary domestic law–makers and take the lead in managing foreign relations.

Sosa did not leave lower courts without guidance on the breadth of the restraint required. Instead, the Court identified specific, though nonexhaustive, limitations to define that restraint. Thus, the Court stated that in determining “whether a norm [of CIL] is sufficiently definite to support a cause of action,” courts “should (and, indeed, inevitably must)” consider “the practical consequences” of creating such a cause of action. In other words, if recognition of a cause of action is going to produce a significant change, courts should wait for Congress to address the norm and decide whether to effect that change. Similarly, in appropriate cases, courts should consider any international law requirement that the claimant exhaust “remedies available in the domestic legal system, and perhaps in other fora such as international claims tribunals,” before

---

76 See Sosa, 542 U.S. at 738.
77 Id. at 725-26.
78 Id. at 726 (citing Erie R. Co v. Tompkins, 304 U.S. 64 (1938)).
79 Id.
80 Id. at 727 (“[T]he potential implications for the foreign relations of the United States of recognizing . . . causes [of action based on CIL] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs.”).
81 Id. at 727-28.
82 Id. at 732-33.
recognizing a domestic claim. Finally, “case-specific deference to the political branches” may be appropriate, as in the Apartheid Litigation where both the South African government and the U.S. executive agreed that U.S. litigation of claims based on the CIL prohibition of apartheid conflicted with South Africa’s policy of dealing with apartheid through truth and reconciliation rather than litigation. In such cases, the Court said, “there is a strong argument that federal courts should give serious weight to the executive branch’s view of the case’s impact on foreign policy.” Again, the Court recognized that the political branches possess principal authority over foreign affairs and that incorporation should not interfere with that authority.

In sum, the Court in Sosa sided with the revisionist view by basing both the existence of judicial authority to incorporate CIL and the scope of that authority on congressional intent. The Court reinforced its endorsement of the revisionist position by finding separation of powers reasons for limitations on judicial incorporation beyond what congressional intent required. The Court’s reliance on congressional intent as well as its separation of powers analysis and restrictions cannot be squared with the modern position view of common law status for all CIL. Instead, both comport with the revisionist view that Congress and the executive should take the lead in domestic-law making and foreign relations, with the courts acting only on delegated authority.

C. A Particularized View

Despite this evidence, Professors Dodge, Ku, and Stephens have all argued to one extent or another that Sosa rejected the revisionist position. Professor Dodge, and to a lesser extent Professor Ku, argue instead that Sosa treated CIL as federal common law for purposes of the ATS, but not as federal common law for purposes of the general federal question statute—section 1331. Professors Dodge and Ku extract this “particularized” approach to the domestic status of CIL from a brief exchange between the majority and concurrence involving two questions: (a) whether the ATS and section 1331 provide federal jurisdiction to adjudicate CIL-based common law claims and (b) whether the ATS and section 1331 authorize federal courts to create CIL-based common law claims. The conclusion that the Court adopted a particularized approach to CIL’s domestic status, however, results from the conflation of these two questions.

Justice Scalia, in concurrence, raised both questions. He suggested that the common law claims of which the majority approved “would ‘arise under’ the laws of the United States . . . for purposes of statutory federal-question jurisdiction,” rendering the ATS unnecessary for

83 Id. at 733 n.21.
84 Id.
85 Id.
86 See Moore, supra note, at 30-47 (discussing the various considerations the Sosa Court adopted to guide judicial incorporation of CIL and the motivation behind those considerations).
87 Justice Breyer would have added an additional consideration in ATS suits challenging “foreign conduct”—whether nations have reached a procedural consensus that the CIL norm in question is subject to universal jurisdiction such that the exercise of jurisdiction by federal courts would not violate principles of comity. Id. at 760-63 (Breyer, J., concurring in part). Such a requirement would have further restricted the federal judiciary’s role in the area of foreign affairs.
88 See Bradley, Goldsmith & Moore, supra note, at 902-09.
89 Dodge, supra note; Julian G. Ku, The President’s Unexamined Power to Interpret Customary International Law.
jurisdiction over CIL-based claims. He also argued that if a jurisdictional statute like the ATS could be “combined with . . . some residual judicial power . . . to create federal causes of action in cases implicating foreign relations, then” section 1331 “would give rise to a power to create international-law-based federal common law just as effectively as would the ATS.” Arguably, the majority did not respond to the first suggestion—that section 1331 would provide jurisdiction over common law claims created under the ATS—although the Supreme Court has elsewhere concluded that federal common law claims create arising under jurisdiction. The majority did address the second suggestion and concluded that section 1331 was not enacted on the same “Congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations” and that recognizing such authority might contravene “the division of responsibilities between federal and state courts after Erie.” The majority thus rejected the notion that section 1331, like the ATS, provides authority for federal courts to incorporate CIL as federal common law. In so holding, the Court did not take a particularized approach, treating CIL as common law under certain jurisdictional statutes but not others. It simply took the revisionist approach—that authority to incorporate CIL as common law derives from congressional authorization—and found congressional authorization present with the ATS but absent in the later-enacted federal question statute.

II. Revisionist View Confirmed in Hamdan

Since Sosa, the Court has bolstered its support for the revisionist position through its decision in Hamdan v. Rumsfeld. In Hamdan, the Court sustained a challenge to trial by military commission. In evaluating that challenge, the Court was scrupulous to tie the CIL of war, on which the Court relied, to congressional incorporation. Section 821 of the Uniform Code of Military Justice (UCMJ) stated that “[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by such military commissions.” The Hamdan Court found that Congress, through section 821, had required “that the President and those under his command comply with the law of war.” Although the Court assumed that the Geneva Conventions were not themselves judicially

90 Sosa, 542 U.S. at 745 n.* (Scalia, J., concurring in part).
91 Id.
92 See Illinois v. Milwaukee, 406 U.S. 91, 100 (1972) (“§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.”).
93 Sosa, 542 U.S. at 731 n.19.
94 126 S. Ct. 2749 (2006); see Bradley, Goldsmith & Moore, supra note, at 931-32.
95 See Bradley, Goldsmith & Moore, supra note at 931-32.
96 10 U.S.C.A. § 821 (emphasis added); see Bradley, Goldsmith & Moore, supra note at 932 n.331.
97 Hamdan, 126 S. Ct. at 2774 & n.23; see also id. at 2778 (“If nothing else, [section 821] of the UCMJ requires that the President comply with the law of war in his use of military commissions.”); id. at 2786 (quoting Ex parte Quirin, 317 U.S. 1, 28 (1942)) (“The UCMJ conditions the President’s use of military commissions on compliance . . . with the ‘rules and precepts of the law of nations’—including, inter alia, the four Geneva Conventions.”); Bradley, Goldsmith & Moore, supra note at 932.
enforceable, the Court found that the Conventions were “part of the law of war” and therefore a condition on Congress’s authorization of the use of military commissions. The Court thus applied CIL, not because CIL as reflected in the Geneva Conventions applied of its own force, but because Congress statutorily adopted that law in the UCMJ. The plurality and both Justice Breyer and Justice Kennedy in concurrence likewise grounded their reliance on the CIL of war in Congress’s explicit incorporation of that law. Moreover, the Court recognized that Congress could endorse a brand of military commission inconsistent with the CIL of war. Had the Court in Sosa concluded that CIL is federal common law, Hamdan’s solicitude for congressional authorization would have been unnecessary.

III. Sosa’s Endorsement of the Revisionist Position: An Evaluation

While it seems clear that the Court in Sosa endorsed the revisionist view of CIL’s domestic status, the question remains whether such an endorsement is wise. Two principal

---

98 Hamdan, 126 S. Ct. at 2794; see also id. at 2802-03 (Kennedy, J., concurring) (same); id. at 2850 (Alito, J., dissenting) (summarizing the Court’s incorporation analysis); Bradley, Goldsmith & Moore, supra at 932. Cf. Hamdan, 126 S. Ct. at 2844-46 (Thomas, J., dissenting) (concluding that the Geneva Conventions are not judicially enforceable either of themselves or as a result of section 821).

99 Id. at 2778 n.31 (plurality) (Section 821 “of the UCMJ requires that the President comply with the law of war in his use of military commissions.”).

100 Id. at 2799 (Breyer, J., concurring) (“Congress has denied the President the legislative authority to create military commissions of the kind at issue here.”).

101 Id. at 2799 (Kennedy, J., concurring) (The president in establishing the military commissions “exceed[ed] limits that certain statutes, duly enacted by Congress, have placed on the President’s authority to convene military courts.”); id. at 2799 (This “is a case where Congress, in the proper exercise of its power . . . , has considered the subject of military tribunals and set limits on the President’s authority.”); id. at 2802 (same); id. at 2799 (“[T]he requirement of the Geneva Conventions of 1949 that military tribunals be ‘regularly constituted’ . . . controls here, if for no other reason, because Congress requires that military commissions like the ones at issue conform to the ‘law of war.’”); id. at 2803 (same); id. at 2800 (“[D]omestic statutes control this case.”); id. at 2804 (Common Article 3 is “applied here in conformity with § 821.”); id. at 2800-01 (The UCMJ “provide[s] authority for certain forms of military courts, [but it . . . also impose[s] limitations, at least two of which control this case.”); id. at 2804 (noting “the congressional direction that the law of war has a bearing on the determination” of whether “departures from courts-martial practice” are justified); id. at 2807 (“[T]he commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress’s requirement that military commissions conform to the law of war.”); id. at 2808 (“Hamdan’s military commission exceeds the bounds Congress has placed on the President’s authority in §§ 836 and 821 of the UCMJ.”); id. at 2809 (“[T]he military commissions lack authorization under 10 U.S.C. § 836 and fail to be regularly constituted under Common Article 3 and § 821.”); see Bradley, Goldsmith & Moore, supra note, at 932 & n.332.

102 See Hamdan, 126 S. Ct. at 2775; id. at 2779, 2785, 2798 (plurality); id. at 2799 (Breyer, J., concurring); id. at 2800, 2807, 2809 (Kennedy, J., concurring); id. at 2824-25 (Thomas, J., dissenting).
reasons suggest that it is. First, adoption of the revisionist view is consistent with the basic separation of powers in which the political branches are the primary lawmakers and the primary conductors of foreign affairs. This separation of powers is beneficial, in part, because the political branches are better situated to make law and conduct foreign relations. Second, the revisionist view is able not only to protect the separation of powers and address the federalism concerns that lie at its foundation, but also to accommodate the concerns for protection of human rights that often motivate the modern position view. Endorsement of the revisionist position is therefore attractive under the theory that the position capable of accommodating the broadest concerns is the best position to adopt in practice.

A. Political Branches as Primary Lawmakers

Congress and the executive are better suited than the federal courts to identify the laws that should govern our nation for a number of reasons. Initially, the political branches are more directly and immediately accountable than the federal courts. While representatives, presidents, and senators are elected every two, four, and six years, federal judges are appointed for life. That is not to say that federal judges are not accountable. The courts are accountable to Congress because it can alter decisions regarding CIL that are based in common law and not constitutional law. In addition, lower courts are accountable to the Supreme Court. In both cases, however, the accountability is narrow. Out of respect for judicial independence if not simple inertia, Congress may be reluctant to oversee the federal courts aggressively. In addition, with all the issues Congress must confront, Congress may leave problems to the courts in hopes that they will self-correct. Similarly, the Supreme Court may defer correcting a lower court’s ruling due to an overcrowded docket or a desire to let other courts experiment with the issue before the Supreme Court provides a final resolution. As a result, the accountability to which the courts are subject is not as predictable or formalized as that to which the political branches are subject.

Not only are the political branches more accountable than the courts, but they are more transparent. In enacting laws, Congress holds public hearings and engages in and responds to public debates that allow both individual citizens and interest groups to provide input as well as to gauge the sense of Congress before Congress votes. The executive similarly engages in a process of public notice and comment. By contrast, while courts engage in public hearings, there is little room for third-party comment or at least third-party comment that will receive the same attention as the input of the parties to the suit. Indeed, courts are deliberately designed to remain aloof from public pressures that might influence their decisions. And while much speculation occurs about what judges might be thinking about a pending case, courts typically share their reasoning ex post rather than ex ante.

Moreover, federal courts are constitutionally designed to decide specific cases. While they may receive expert testimony regarding whether a CIL norm should be recognized in a particular case, they are ill-equipped to gather information on the broader implications of such a decision let alone to decide which of many competing interests should prevail as a matter of

---

103 For a more comprehensive comparison of the institutional strengths of the courts with those of the political branches with regard to the advancement of international law, see Ku & Yoo, supra note, at 181-99.
104 Cf. id. at 182-83 (describing barriers of access to courts relative to Congress and the executive).
105 U.S. CONST. art. III, § 2.
policy. The political branches, on the other hand, may conduct hearings and gather broad evidence before reaching a decision.

The political branches also possess greater discretion to decide whether the United States should follow emerging or established principles of CIL. International law recognizes that CIL norms will not bind states who have persistently objected to those norms from their inception. Similarly, international law acknowledges that CIL may evolve through violation of current norms and acquiescence and imitation by other states. At the domestic level, courts have recognized that Congress and at least high-level executive officials have the authority to violate norms of CIL. It is at least unclear whether courts possess that same authority to disregard CIL and, if so, how they would decide when to exercise it. As a result, the political branches are much better situated than the federal courts to decide which principles of CIL may be incorporated into domestic law and how.

Finally, making law based on CIL through the political branches is superior from a due process perspective. By its nature, CIL is imprecise and hard to identify. CIL arises, not from community or industry standards as the common law rules of contracts or torts often do, but from the more disparate and difficult to identify practices and opinions of the nations of the world. As a result, it may be difficult for entities potentially subject to CIL norms to ascertain and adjust behavior to comply with relevant norms. Political branch enactment of CIL norms, as through the TVPA, provides greater, albeit not absolute, notice and clarity of the types of behavior that potential defendants must avoid.

B. The Political Branches as Primary Conductors of Foreign Affairs

Some of the same limitations that render federal courts inferior lawmakers make federal courts improper institutions to make the foreign relations decisions that incorporation and application of CIL often entail. As with law making, the political branches are more accountable to the citizenry for their decisions affecting foreign affairs than are the courts, a fact illustrated by the regular monitoring of the president’s approval ratings regarding the war on terrorism. The executive is similarly more accountable to Congress with regard to its foreign affairs decisions than are the courts, not least because Congress can influence executive action through means short of actual legislation, such as through calling public hearings.

Moreover, the political branches are better situated to make foreign affairs decisions as an initial matter. As noted, federal courts’ ability to gather information is limited by the requirement that the courts decide actual cases and limit discovery not only to issues relevant to the resolution

---

107 See RESTATEMENT, supra note, § 102 cmt. d.
108 See Ku & Yoo, supra note at 199.
109 See, e.g., Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804); Garcia-Mir v. Meese, 788 F.2d 1446, 1454-55 (11th Cir. 1986). For a brief discussion of the debate regarding executive authority to disregard CIL, see Bradley, Goldsmith & Moore, supra note.
110 See Sosa, 542 U.S. at 727-28 (noting the foreign affairs implications of creating causes of action based on CIL).
111 Ku & Yoo, supra note, at 191.
112 Id. at 191-92, 196-97.
of those cases but to their duration as well. The conduct of foreign affairs, however, requires expansive and ongoing information including sensitive information obtained through covert means. Congress and the executive are better able to gather such information not only because they are not confined to addressing specific cases or to specific types of evidence, but because they possess permanent apparatuses through which such information is collected on a continuous basis.

Once information is gathered, the political branches are also arguably better able to process it. Individuals and institutions within Congress and the executive develop expertise in foreign affairs and its many subsidiary issues. Federal courts, by contrast, address foreign affairs issues only as they arise on dockets dominated by other matters.

Moreover, when the judiciary is called upon to address foreign affairs issues, it necessarily speaks with many voices. Until the Supreme Court has resolved an issue, federal courts may reach divergent results, a particularly deleterious outcome in the area of foreign affairs as experience under the Articles of Confederation demonstrated. To the extent mistakes are made in the decentralized process of adjudication, they can take years to correct, whereas the conduct of foreign affairs often requires immediate action. The political branches can speak with greater uniformity and alter foreign relations decisions more quickly, particularly if the political branches bear primary responsibility not only for conducting foreign affairs generally, but also for the more specific decision to incorporate norms of CIL. As a result, the political branches are institutionally superior when it comes to making decisions regarding foreign affairs.

C. Revisionist Position Accommodates Both International Human Rights Goals and Structural Protections

Notwithstanding the political branches’ institutional superiority with regard to law making and foreign relations, many resist Sosa’s endorsement of the revisionist position and its political branch primacy based on a perception that the position means less protection for international human rights. ATS suits since Filartiga, including Sosa, have typically been grounded in violations of the CIL of human rights, inasmuch as the United States has refused to ratify most international human rights treaties or has ratified them subject to a declaration of non-self-execution. Many of these suits have alleged unconscionable violations of human rights, such as fatal torture and genocide, that clearly merit condemnation and punishment.

113 See id. at 183.
114 See id. at 193-94.
115 Id. at 183, 194-95.
116 See id. at 194-95.
117 See id. at 186-87, 191-92.
118 See id. at 187, 192-93.
119 Id. at 187-88.
120 Id. at 188-89.
121 See id. at 192-94, 197-98.
123 See Filartiga, 630 F.2d at 878-79.
The goals of these suits are thus normatively desirable. Given the intent of the first and subsequent Congresses, *Sosa* does not disturb these suits to the extent they are based on specifically defined and widely accepted norms of CIL and are otherwise consistent with *Sosa*’s limitations. Yet *Sosa* puts a damper on more innovative suits based on CIL.

These suits, however, are not without their own problems. Suits based on judicial incorporation of CIL have, as a general rule, raised fundamental separation of powers concerns. For example, as in *Sosa*, so in many ATS suits the existence of a CIL norm has been alleged by reference to international human rights treaties, such as the International Covenant on Civil and Political Rights,125 the notion being that a treaty of general application that is widely ratified may be evidence that a principle has attained sufficient acceptance to be binding even on nonratifying states under the banner of CIL.126 While this logic may have some traction in international law, it presents problems when translated into domestic law. As noted, the United States has yet to ratify several international human rights treaties, and when it does ratify these treaties the Senate and president typically attach a reservation that the terms of the treaty will not be self-executing and thus will not be enforceable by private plaintiffs in U.S. courts. For the courts to decide that the terms of a treaty provide domestic rules of decision even when the political branches have chosen not to ratify the treaty, or to ratify only on the understanding that it will not generate new classes of litigation, disregards the political branches’ actual guidance and, more fundamentally, the branches’ constitutional dominance in the creation of domestic law and the conduct of foreign affairs.127 The potential breadth of this problem only expands as international law, which historically focused on inter-state relations, increasingly addresses intrastate relations between sovereigns and their citizens.128

International law’s expanding breadth raises an additional concern. To the extent international law swells to address issues that were typically left to state regulation, incorporation by the federal courts transfers power from the states to the federal government.129 As international law targets matters of family law,130 for example, incorporation effectively federalizes an issue historically within the states’ power.

As a result, while the expansion of international law potentially increases the good that international law may do, it also aggravates the federalism and separation of powers concerns that federal judicial incorporation presents. The modern position view’s response to this conundrum is to minimize or ignore separation of powers breaches and shifts in federalism in pursuit of the normative aims of international law. The modern position view offers no way both to achieve the aims of international law when it is desirable to do so and to preserve federalism and separation of powers protections.

By contrast, the revisionist position maintains that the constitutional separation of powers and federalism should not be sacrificed so freely, even for noble aims. Federalism and separation of powers were themselves designed to safeguard human rights and should be actively

---

125 See *Sosa*, 542 U.S. at 734; Bradley, Goldsmith & Moore, supra note, at 899.
126 See *ReSTATEMENT*, supra note, § 102(3) & cmt. i.
127 See Bradley & Goldsmith, *Illegitimacy*, supra note, at 327-31; Bradley, Goldsmith & Moore, supra note, at 886, 899; *Sosa*, 542 U.S. at 734-36.
129 See Bradley, Goldsmith & Moore, supra note, at 904-05; Bradley & Goldsmith, *Illegitimacy*, supra note, at 345-46.
The revisionist position recognizes that the desirable goals of international law can be achieved without sacrificing structural protections. By leaving federal incorporation of international law to the political branches, international human rights principles may be incorporated into domestic law, as occurred with the enactment of the TVPA, through more democratic and accountable processes. Similarly, absent conflicting incorporation by the federal government or perhaps other foreign relations concerns, the states are free to incorporate international law into state law as they see fit.

By adopting the revisionist position, the Sosa Court thus preserved both structural rights protections and CIL-based litigation. That litigation may expand to embrace additional norms of international human rights as the political branches enact further statutes incorporating or authorizing the incorporation of CIL. Absent such positive authorization, however, innovative human rights claims based on CIL cannot succeed in the post-Sosa world. Again, this does not mean that separation of powers and federalism have prevailed over human rights, as the modern position view of it might be. As Sosa itself indicated, a human rights plaintiff whose claim has not been authorized by the political branches is not left without recourse; her recourse is simply with the political branches where incorporation may occur, not with the federal courts.

Conclusion

Although the accumulating wisdom maintains that the Supreme Court in Sosa adopted the modern position view that all CIL is federal common law, the Sosa Court’s dispositive reliance on congressional intent and its adherence to a strict separation of powers in which the political branches remain the primary lawmakers and conductors of foreign relations are irreconcilable with that view. The Court’s analysis uncovers an adoption of the revisionist position that the federal judiciary has only limited law-making and foreign affairs authority and must rely on the political branches to incorporate actionable principles of CIL. This endorsement of the revisionist view is consistent with the reality that the political branches are best suited to

131 See, e.g., Clinton v. New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty”; “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers.”); id. (The Framers “used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.”)); DAVID MCCULLOUGH, JOHN ADAMS 375 (2001) (observing “that the people’s rights and liberties . . . can never be preserved . . . without separating the executive from the legislative powers”); THE FEDERALIST NO. 47, at 138 (James Madison) (Roy P. Fairfield ed., 1966) (describing separation of powers as an “essential precaution in favor of liberty”); THE FEDERALIST NO. 81, at 243-44 (Alexander Hamilton) (Roy P. Fairfield ed., 1966) (discussing the need to separate the legislative and judicial powers to check governmental authority).


133 See Bradley & Goldsmith, Illegitimacy, supra note, at 350-51.


135 Sosa, 542 U.S. at 738 n.30.
create federal law and to conduct foreign relations. Moreover, adoption of the revisionist position preserves both the individual rights protections afforded by separation of powers and by federalism and the judicial vindication of international human rights as authorized by the political branches. As a result, the Supreme Court’s endorsement of the revisionist view yields victory for the concerns underlying both the modern position and revisionist perspectives.