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Supremacy and Diplomacy: The International Law of the U.S. Supreme Court

By
Harlan Grant Cohen *

I. INTRODUCTION

The reaction to the Supreme Court's opinion in *Roper v. Simmons*,¹ in which Justice Anthony Kennedy referenced both foreign and international law in holding the execution of minors unconstitutional, was swift and strong. The halls of Congress seemed to shudder with anger as congressmen and senators rushed to react. In a press release issued March 2, 2005, one day after the *Roper* opinion was published, Representative Tom C. Feeney (R-FL) called for the "removal of international influence in the United States court system."² "The Supreme Court has insulted the Constitution by overturning its own precedent to appease contemporary foreign laws, social trends, and attitudes,"³ Feeney fumed. In the Senate, Senator John Cornyn (R-TX) "[o]se to express concern over a trend that . . . may be developing in our courts, a trend regarding the potential influence of foreign government and foreign courts in the application and enforcement of U.S. law."⁴ In his view, the Court's internationalist tendencies

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1. 125 S. Ct. 1183 (2005).

2. *Supreme Court Ruling Reiterates Importance of Reaffirmation of American Independence Resolution*, U.S. FED NEWS, Mar. 2, 2005.

3. *Id.* Representative Bob Goodlatte (R-VA) agreed: "[I]t is high time that these justices be reminded that their duty is to interpret the Constitution, not to impose the will of foreign entities on the people of the United States." *Id.*

4. *Sen. Cornyn Introduces Legislation to Keep Foreign Influence Out of U.S. Courts*, U.S. FED NEWS, Mar. 21, 2005.

were endangering American sovereignty:

Step by step, with every case, the American people may be losing their ability to determine what their criminal laws shall be—losing control to the control of foreign courts and foreign governments. And if this can happen with criminal law, it can also spread to other areas of our government and of sovereignty. How about economic policy? Or foreign policy? Or our decisions about security and military strategy?⁵

Echoing these thoughts, an editorial in the *Washington Times* observed that the Court's logic is "the product of a movement that favors international law as an end in itself," and that "it is Congress' prerogative, not the Supreme Court's to decide whether the United States will accede to a given treaty or body of international law."⁶

Roper's critics were not alone in observing an internationalist trend in the Court's opinion.⁷ Harold Hongju Koh, Dean of Yale Law School and one of the strongest advocates of the use of foreign law and international law sources, observed that "Kennedy and Sandra Day O'Connor have joined Stephen Breyer, John Paul Stevens, Ruth Bader Ginsburg and David Souter in the 'transnationalist' camp of the court,"⁸ and called Republican-sponsored legislation prohibiting judges from citing foreign law in their decisions "outrageously ridiculous."⁹

Behind the rancorous war-of-words lay an assumption that, for better or for worse, the Court had in fact taken an "internationalist" or "transnationalist" turn and was increasingly willing to apply foreign and international law in reaching its decisions. What *Roper* and its reaction obscured, however, was that the assumption might not be true. *Roper* was only one of several recent Supreme Court decisions to touch upon issues of foreign law, international law, and the role of the Court in world affairs. A careful study of the 2003-2004 term—the term immediately preceding *Roper* and a term filled with cases of international import—yields a far more complex picture of the Supreme Court's international jurisprudence than that suggested by the war over *Roper*. In a wide range of opinions spanning topics as diverse as antitrust law and international human rights, the Justices struggled—both with the legal materials and each other—to define the relationship between United States and the world. Read together, those opinions begin to hint at a nascent Supreme Court theory of international law. That theory, far from adopting an internationalist or pro-international law position, reflects an unstable compromise between redressing *international*

5. *Id.*; see also *Budget Hearing: Justices defend judiciary against Hill*, NAT'L L. J., Apr. 18, 2005, at P14 (quoting Representative Todd Tiahrt (R-Kan.) as "express[ing] concern about *Roper v. Simmons*," and saying that "[i]nvoking international law went 'beyond the rule of law'").

6. *Other Nations' Laws*, THE WASHINGTON TIMES, Mar. 13, 2005, at B02.

7. Anupam Chander, a professor of international law at the University of California, Davis, wrote of "Justice Kennedy the Internationalist," and observed that "[c]onsidered alongside the Court's embrace of international law in *Sosa v. Alvarez-Machain*, [*Roper*] marks a strong transnationalist turn in the court's jurisprudence." Anupam Chander, *Justice Kennedy the Internationalist* (Mar. 1, 2005), <http://www.chander.com/2005/03/index.html>.

8. Harris Meyer, *Kennedy Wades Into International Waters*, THE LEGAL INTELLIGENCER, May 18, 2005, at 4.

9. *Id.*

wrongs and protecting *American* sovereignty—a compromise that is far more respectful of American legal independence than criticism of *Roper* might suggest and which demonstrates both the potential and pitfalls of international law arguments before the Court.

* * * *

Debates over the United States' role in the world, the relationship between international power and international justice, and American obligations under international law reached a fevered pitch in 2004. With American troops in Iraq and Afghanistan, a continuing threat of global terrorism, and an ongoing campaign for president of the United States, it was not surprising to hear these topics discussed in the Congress, at the White House, and on the campaign trail. Some of the deepest and most intense of those debates, however, took place somewhere far less obvious—the U.S. Supreme Court. The Court considered the Alien Tort Claims Act and the future of human rights suits in U.S. courts, the applicability of the Foreign Sovereign Immunity Act to claims involving Nazi-stolen artwork, the applicability of American antitrust law to foreign anticompetitive activity, and the legality of the Guantanamo detentions. The debate between the Justices ran far deeper than the particular claims at issue in those cases, scratching at the very meaning of international law and justice.¹⁰ 2004 may be remembered as the year the U.S. Supreme Court took on the rest of the world.

To a certain extent, the Supreme Court's interest in international law and affairs was neither surprising nor unexpected. In each of its previous two terms,

10. Notably, this debate was not confined to the Court's opinions. Several of the Justices had given recent high profile speeches on the topics and their verbal sparring over these issues seemed to be increasing. Thus, Justice Ginsburg, addressing the American Constitution Society, observed that "our 'island' or 'lone ranger' mentality is beginning to change," that "[n]ational, multinational and international rights charters and tribunals today play a key part in a world with increasingly porous borders," and that "[w]e are the losers if we do not both share our experience with, and learn from others." Justice Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, Address before the American Constitution Society 2-3, 24 (August 2, 2003), <http://www.acslaw.org/pdf/Ginsburg%20transcript%20final.pdf>. Justice Scalia, on the other hand, told the American Society of International Law that "[t]he men who founded our republic did not aspire to emulate Europeans, much less the rest of the world, and nothing has changed." *Supreme Court Increasing Use of References to Foreign Law in Decisions*, NATIONAL PUBLIC RADIO, July 13, 2004 (quoting Justice Scalia's address to the American Society of International Law). Justices Breyer and O'Connor have also made notable speeches over the past few years on the role of international law. Justice Breyer told the 2003 Annual Meeting of the American Society of International Law: "Ultimately, I believe the 'comparativist' view . . . will carry the day—simply because of the enormous value in any discipline of trying to learn from the similar experience of others." Steve Lash, *High Court Cites to Foreign Law Irk Scalia*, CHI. DAILY L. BULL., July 22, 2004, at 1. "Of course," explained Justice Breyer, "we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem." *Id.* Justice O'Connor addressed the 2002 Annual Meeting of the American Society of International Law, announcing that "Because of the scope of the problems that we face, understanding international law is no longer just a legal specialty. It is becoming a duty." Tony Mauro, *Supreme Court Opening Up To World Opinion*, LEGAL TIMES, July 7, 2003, at 1.

the Court had left tantalizing clues that its interest in international subjects was growing. In 2002, the Court referenced international legal sources in finding the execution of the mentally retarded unconstitutional.¹¹ The Court noted in *Atkins v. Virginia* that “within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved,” and that this fact supported its finding that the execution of mentally retarded offenders violates American society’s standards of decency.¹² In 2003 the Court went even farther, relying heavily on international precedent to invalidate a Texas state ban on consensual homosexual sodomy. In *Lawrence v. Texas*,¹³ the Court turned to European precedent to directly rebut the argument accepted in *Bowers v. Hardwick*¹⁴ that anti-sodomy laws were “firmly rooted” in Western tradition.¹⁵

These developments did not escape the notice of legal scholars and Court observers.¹⁶ The references to international sources seemed to augur a new turn

11. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

12. *Id.* The importance of this reference to international practice seemed to be confirmed by the vigorous dissent it achieved. Responding to the majority’s footnote, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, wrote that “we have . . . explicitly rejected the idea that the sentencing practices of other countries could ‘serve to establish the first Eighth Amendment prerequisite, that [a] practice is accepted among our people.’” *Id.* at 325. (Rehnquist, C.J., dissenting) (quoting *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989)), and that accordingly, “the viewpoints of other countries simply are not relevant.” *Id.*

13. 539 U.S. 558, 572-73, 574 (2003).

14. 478 U.S. 186 (1986). Chief Justice Burger wrote in his concurring opinion that “[d]ecisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judeo-Christian moral and ethical standards.” *Id.* at 196.

15. The Court pointed out that prior to the decision in *Bowers* “[a] committee advising the British Parliament recommended in 1957 repeal of laws punishing homosexual conduct.” *Lawrence*, 539 U.S. at 573. More importantly, the European Court of Human Rights held in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H. R. (1981) P 52, that laws proscribing consensual homosexual conduct were invalid under the European Convention on Human Rights. The Court pointed out that the European Court of Human Rights has consistently reaffirmed this position, *Lawrence*, 539 U.S. at 574, and that “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.” *Id.* at 574.

Notably, the Court cited to the amicus brief submitted by Mary Robinson, the United Nations High Commissioner for Human Rights from 1997 to 2002, Amnesty International, Human Rights Watch, Interights, The Lawyers Committee for Human Rights, and Minnesota Advocates for Human Rights for this proposition. That the Court relied so heavily on an amicus brief submitted by international human rights scholars and groups in deciding a question of American constitutional law is as much of an indication of the Court’s growing interest in international jurisprudence as its citation to international precedent.

16. See, e.g., Tony Mauro, *Supreme Court Opening up to World Opinion*, LEGAL TIMES, July 7, 2003, at 1, 8 (quoting Harold Koh as commenting that “[t]his was a breakthrough term. The veil has been lifted. The ostrich’s head came out of the sand,” and reporting that “[t]he trend toward citing foreign precedents is more than a high court oddity. It has provoked a sharp doctrinal debate inside the Court and in academia, and has political dimensions outside the Court as well”); Tim Wu, *Foreign Exchange*, SLATE, Apr. 9, 2004, <http://www.slate.com/id/2098559> (“The Scalia showdown illuminates a festering dispute that’s fast becoming the court’s own transatlantic divide: When is it appropriate for the Supreme Court to discuss foreign legal materials? And while Scalia’s answer is nearly never, other members of the court see comparative constitutionalism as enriching and uplifting. To a court already divided along every ideological position imaginable, add judicial foreign policy as the latest fault line.”).

outward in constitutional jurisprudence and immediately provoked considerable controversy.¹⁷

The Supreme Court's choice of cases for its 2003-2004 term seemed to evince further proof of a turn outward. Along with cases concerning the applicability of the Alien Torts Claim Act to foreign violations of international law¹⁸ and the legality of the Guantanamo detentions,¹⁹ the Court also granted certiorari in cases concerning the applicability of foreign sovereign immunity to claims arising out of Nazi-stolen art,²⁰ the applicability of American antitrust law to foreign anticompetitive activity,²¹ and the scope of discovery available for foreign adjudications.²² As the Editors-in-Chief of the American Journal of International Law observed,

[t]he Court's acceptance of quite a few cases raising a mixture of international and constitutional questions for decision in 2004 may signal that the Court is preparing for a new era of engagement with legal developments external to the United States, or, alternatively, that it seeks to limit (or in any event to delimit) the relevance of such developments for the U.S. legal system.²³

Current events, meanwhile, seemed to lend urgency to the Court's deliberation of international issues. The Bush administration's controversial policies in the war on terrorism and the war in Iraq, including the Guantanamo detentions, the declaration of American citizens as "enemy combatants," the USA PATRIOT Act, and the Abu Ghraib prison torture scandal, convinced many observers that the Supreme Court would have no choice but to comment on the lawfulness of

17. See Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43 (2004) (supporting reference to international sources in cases concerning American constitutional values); Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. DAVIS L. REV. 1085 (2002) (same); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82 (2004) (arguing that the Court's use of international sources in *Lawrence v. Texas* was proper); but see Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT'L L. 57 (2004); Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT'L L. 675 (2003); Curtis A. Bradley, *The Juvenile Death Penalty and International Law*, 52 DUKE L.J. 485, 555-56 (2002) (arguing that international norms cannot be used to invalidate the juvenile death penalty). See also Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT'L L. 69 (2004) (attempting to delineate guidelines for a more principled approach to the use of foreign sources). The use of foreign sources proved controversial enough to attract the attention of politicians and policy wonks. See, e.g., Wu, *Foreign Exchange*, supra note 16 ("House Republicans reacted angrily to last spring's *Lawrence v. Texas*, a decision that not only struck down a ban on homosexual sodomy but also had the nerve to cite a European case in the process. They began peppering their speeches with comments like 'The American people have not consented to being ruled by foreign powers or tribunals.'). A particularly notable exchange took place in *Foreign Policy* between Anne-Marie Slaughter, Dean of Princeton University's Woodrow Wilson School of Public and International Affairs, and two Republican Congressmen. See generally Bob Goodlatte, Ron Lewis, and Anne-Marie Slaughter, *Judges without borders; Letters; Brief Article; Letter to the Editor*, FOREIGN POLICY, July 1, 2004, at 12.

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

19. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

20. *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

21. *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

22. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

23. Lori Fisler Damrosch & Bernard H. Oxman, *Agora: The United States Constitution and International Law: Editors' Introduction*, 98 AM. J. INT'L L. 42, 42 (2004).

American foreign policy.²⁴

The result was an unusual “cluster” of Supreme Court opinions addressing issues of international concern. Although the Court carefully narrowed many of the issues decided in those cases and left many questions unanswered,²⁵ the resulting opinions marked a serious step forward in resolving many of the international issues that had been stewing in lower courts. The Court also made it clear that it would not grant the President a “blank check”²⁶ in the direction of foreign policy and the war on terror. A great deal can and will be written about the holdings in those cases.

But something less obvious, less expected, and with possibly far greater impact than the particular holdings lies below the surface of those opinions. On the surface, each opinion seems to deal with a discrete issue—a particular statute, a particular fact pattern. In fact, the Court is often quite careful to limit the decisions in that way.²⁷ Nonetheless, hiding beneath and within the Court’s discussion of the particular issues of each case are wide-ranging discussions of international law, international justice, and the role of U.S. law in the world.²⁸

24. See, e.g., Michael C. Dorf, *Justices didn't buy 'trust us' argument*, THE MIAMI HERALD, July 1, 2004, at A23 (“Although nowhere mentioned in either case, the scandalous treatment of Iraqi prisoners at Abu Ghraib and the revelations that high-level government lawyers prepared confidential memoranda authorizing torture, likely played a part in the justices’ reasoning I contend that their concern for world opinion—if that concern played the role that I am suggesting it did—was for their country, not for themselves.”); Peter S. Canellos, *War Without Limits May Be Nearing End*, THE BOSTON GLOBE, May 25, 2004, at A3 (“Every day that the Abu Ghraib prison scandal stays in the news, nine justices wake up each morning and read of dog collars and naked detainees stacked in pyramids, of forced masturbation and unexplained deaths. And then they prepare to consider whether to support the Bush administration’s right to hold ‘enemy combatants’ for as long as the Defense Department wishes.”); Angie Cannon & Chitra Ragavan, *A Big Legal Mess, Too*, U.S. NEWS & WORLD REPORT, May 24, 2004, at 29 (“One legacy of the scandal could be to push the Supreme Court to clarify the rights of detainees in four cases to be decided by June. The prison abuses could lead the high court to clip the administration’s wings in the war on terrorism, by limiting its powers to detain foreigners and U.S. citizens without beefed-up legal protections.”); Siobhan Roth, *Drawing the Line; Judges Start Blunting Some of the Government’s Tools Against Terror*, N. J. L. J., Dec. 29, 2003 (“Until this month, the courts showed great deference to the executive branch in terrorism matters. But recent rulings—including the U.S. Supreme Court’s decision to review two terror-related cases—suggest that the judiciary is unwilling to defer completely to the president, even during wartime.”).

25. See, e.g., Linda Greenhouse, *Justices Hear Case About Foreigners’ Use of Federal Courts*, N.Y. Times, June 30, 2004, at A21 (“[T]he result [in *Sosa*] was a sharp disappointment to international business interests The case before the court did not involve a corporate defendant, and the 6-to-3 decision did not conclusively resolve the status of such cases.”).

26. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). This seems to be the Court’s primary message in *Rasul* as well.

27. See discussion of each case, *infra* Part I.

28. I purposely avoid defining the parameters of this discussion too narrowly. Discussing only the Court’s views of “international law,” for example, would fail to capture much of their nascent thinking on the Court’s role in the world, leaving out its views of the extraterritorial reach of American law and its perception of foreign national laws. The subject of this Article might best be described as “transnational law,” which Philip Jessup described as “all law which regulates actions or events that transcend national frontiers.” PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956). See also Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI L. REV. 469, 473 n.11 (2005). This is not, however, a term used by the Court, and I accordingly, avoid using it or other labels.

Construction of the Alien Torts Claim Act, for example, elicits wide-ranging discussion—and considerable debate—over the character and binding nature of customary international law. The Court’s analysis of the Foreign Sovereign Immunities Act (“FSIA”) reveals significant disagreement between the Justices over what exactly international law is and where it comes from. The Court’s understanding of international comity plays a key role in discerning Congressional intent in enacting the Foreign Trade Antitrust Improvements Act of 1982. And the Court’s analysis of detainees’ rights to habeas corpus travels far beyond U.S. borders, as the Court rediscovers a worldwide history of British imperial habeas cases.

These discussions and debates rarely take center stage. Most of the time they appear as stray thoughts or bits of background information en route to the Court’s final decisions. Nonetheless, the discussions of international law and justice provide important glimpses into the Justices’ nascent thinking on those subjects. In this way, these opinions do not merely hint at how the Court may react to similar cases; they provide intriguing insights into the Court’s vision of the world and its own place within it, as well as the role for international and national law in effecting that vision. Hidden within the 2003-2004 term opinions lies the beginnings of a Supreme Court theory of international law.

This Article explores the Supreme Court’s international law discourse.²⁹ It does so by examining four cases from the Court’s 2003-2004 term: *Sosa v. Alvarez-Machain*,³⁰ *Republic of Austria v. Altmann*,³¹ *F. Hoffman-La Roche Ltd. v. Empagran S.A.*,³² and *Rasul v. Bush*.³³ The Article endeavors to look beyond the outcomes of each case and discover the bits of international legal theory and philosophy lurking within the opinions. Part I describes each of the cases and delineates the international aspects of the Court’s holdings. Part I.A looks at *Sosa*, the Court’s most direct debate over the meaning of international law. Part I.B and I.C look at *Altmann* and *F. Hoffman-La Roche* respectively, two cases focusing on statutory construction, but informed by international law concepts. Finally, Part I.D describes *Rasul*, an opinion that on its surface does not involve international law at all, but whose potential impact on world affairs and international justice may be most far-reaching.

These initial debates and discussions of international law are, of course, initial. The Justices clearly do not agree with each other on the nature and role of international law, or international sources, for that matter, and at times the nas-

29. Accordingly, this Article is very different from the current scholarship regarding the Court’s use of foreign sources in Constitutional adjudication. *See supra* notes 16-17 and accompanying text. Whereas that debate focuses on American constitutional law, this Article focuses on how the Justices approach international law. The two can be quite different. As will be discussed more deeply in Part II, those same Justices who have been labeled “internationalists” for their use of foreign sources are considerably more circumspect and xenophobic when the topic turns to international law.

30. 124 S. Ct. 2739 (2004).

31. 124 S. Ct. 2240 (2004).

32. 124 S. Ct. 2359 (2004).

33. 124 S. Ct. 2686 (2004).

cent theorizing seems hesitant or confused. Different voices—the U.S. government, international law scholars, foreign countries—are competing for the Court's ear on the subject, and the Court's willingness to listen to each seems dependant on the type of case before it. Part II seeks to tease out the trends running through the four opinions.

Part II.A examines the Justices' perspectives on the meaning, origin, and role of international law. It also identifies the various parties competing to be heard on issues of international concern and weighs their relative influence on the Justice's understanding of international law. For example, the Bush administration consistently argued for an extremely narrow, skeptical view of international law, and its arguments met with little success. Similarly, Part II.A explores how the type of case, for example, human rights, international business, foreign policy, or constitutional may affect the Court's views on the relevance of international law and materials.

Drawing on these insights, Part II.B attempts to weave these trends together to reveal the Court's ad hoc compromise on international law, human rights, and state sovereignty. Part II.B argues that despite an increased interest in international and foreign law and an increased willingness to assert itself in the world, the Court remains wary of any rule that might impinge upon either its own independence or that of the United States. As a result, the Court is far more likely to invoke international and foreign law to redress wrongs abroad than at home. It also appears to be far more comfortable with foreign and international law as persuasive authority or as an interpretive device which it can choose to apply, rather than as a rule of decision by which it would be bound. The Court is eager to engage international and foreign law, but only on its own terms.

Part III provides a postscript and looks at the consequences of the Court's recent decisions, both to the government and advocates of international law. The Court seems to be grappling with the meaning of international law in a twenty-first century characterized by globalization and terrorism. In its fractured discourse, the Court seems to be begging to be engaged in a serious conversation about international theory. Part III argues that the Court's obvious intent to consider matters of international concern obliges the U.S. government to take a more active role in directing that conversation, rather than avoiding it. It further argues that the Court's willingness to consider such matters also demonstrates the real opportunities for those who want the United States to be a more active participant in the construction, development, and articulation of the international legal order.

II.

INTERNATIONAL LAW ON TRIAL: FOUR CASES

A. World Court?: Sosa v. Alvarez-Machain

1. Background: The Filartiga Revolution

Sosa v. Alvarez-Machain brought international law directly before the Su-

preme Court. In *Sosa*, the Court was for the first time³⁴ considering the modern scope of the Alien Tort Statute (“ATS”),³⁵ an obscure but newly revitalized 1789 statute that grants the district courts “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.”³⁶ Since 1980, when the United States Court of Appeals for the Second Circuit held that the ATS granted a Paraguayan citizen the right to sue her brother’s torturer in federal court,³⁷ claims of human rights and international law violations abroad had proliferated in the lower federal courts.³⁸ ATS lawsuits have been brought against former Bosnian Serb leader Radovan Karadzic³⁹ and the estate of former Philippines President Ferdinand Marcos.⁴⁰ More recently, international corporations have been targeted.⁴¹ A lawsuit

34. See, e.g., Marcia Coyle, *Flexing Muscle and Wisdom*, NAT’L L. J., Aug. 2, 2004, at S1 (“*Sosa v. Alvarez-Machain* was the justices’ first substantive interpretation of the Alien Tort Statute of 1789.”)

35. 28 U.S.C. § 1350. The statute is often referred to as the Alien Tort Claims Act (“ATCA”), but for simplicity it will be referred to here as the Alien Tort Statute, the name used by the Court in *Sosa*.

36. *Id.*

37. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). See *Sosa*, 124 S. Ct. 2759, 2761 (2004) (referring to the “the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*”); *Id.* at 2772 (Scalia, J., concurring) (referring to the “modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala*”); Jennifer Senior, *A Nation Unto Himself*, N.Y. TIMES MAGAZINE, March 14, 2004, at 36 (“Since 1980, lawyers have made shrewd use of an obscure 1789 law called the Alien Tort Claims Act As a result, American judges have heard from Guatemalan victims of torture, from Haitian dissidents and from survivors of the Bosnian genocide.”).

38. Victims of human rights abuses, NGOs, and international lawyers have turned increasingly to U.S. federal courts to redress alleged violations of international law and human rights abuses abroad. See, e.g., David G. Savage, *Foreign Abduction Case Goes to Court*, L.A. TIMES, Mar. 30, 2004 (“What is at stake here is the right of survivors of human rights abuses to seek redress for their grievances, including torture, forced labor and sexual slavery,” said Paul Hoffman, former director of the ACLU of Southern California, who is representing Alvarez Machain in his lawsuit against the Mexican bounty hunter. “These cases send a message around the world that human rights abusers—including the U.S. government—are not above the law.”). This trend was not halted by the D.C. Circuit’s opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), in which the court implied that international causes of action should not be recognized in the absence of specific Congressional authorization.

39. *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995).

40. *In re Estate of Ferdinand Marcos*, 25 F.3d 1467 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995).

41. See, e.g., *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-100 (2d Cir. 2000) (accusing Royal Dutch Petroleum and Shell Transport of involvement in human rights abuses in Nigeria); *Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998) (accusing Texaco of environmental damage in Ecuador); Steve Sanders, *Alien Claims at Stake*, NAT’L L. J., June 14, 2004, at 27 (“A number of corporations have found themselves named as defendants in suits alleging that they abetted human rights abuses through their activities in countries governed by repressive regimes.”); Jonathan Birchall, *The Questions Over Aiding and Abetting*, FINANCIAL TIMES, Aug. 2, 2004, at 9 (“Some 20 Alien Tort cases have been brought against corporations; only five have survived a motion to dismiss, with eight more facing a motion to dismiss.”); David L. Hudson Jr., *Foreign Turf: Human Rights Suits Against Corporations Hinge on How Open the Door Is*, 90 A.B.A. J. 20, 20 (2004) (“Potentially riding on *Sosa* are a host of tort claims against U.S. corporations for alleged complicity with international human rights abuses, such as slavery or torture. Among the corporations named in the lawsuits are Unocal, ExxonMobil, Coca-Cola, Del Monte and DaimlerChrysler. In addition, suits have been filed in federal court in San Diego and the District of Columbia on behalf of Iraqi

brought by Burmese citizens against Unocal⁴² for alleged use of slave labor in the construction of a Burmese pipeline has drawn particular attention.⁴³

Bane of judicial conservatives and businesses, hope of international human rights advocates, the courts' recognition of a cause of action for violations of international law under the ATS had become quite controversial. Nonetheless, prior to *Sosa*, the Supreme Court chose to remain silent on these developments.⁴⁴ Nor had the U.S. government, although ambivalent about the statute's new uses,⁴⁵ actively sought High Court review. Both changed with *Sosa*. The Bush Administration, now a party to the lawsuit,⁴⁶ actively sided with opponents of the ATS's new scope and petitioned the Court for certiorari.⁴⁷ The Court, for the first time, chose to hear the case. *Sosa* was thus one of the most anxiously anticipated opinions on international law in years.⁴⁸

prisoners claiming two U.S. contractors conspired with U.S. officials to abuse detainees in the Abu Ghraib prison scandal.”).

42. See *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. Feb. 14, 2003) (granting rehearing en banc).

43. See, e.g., Jonathan H. Adler, *Sosa Justice*, NATIONAL REVIEW ONLINE, July 21, 2004 <http://www.nationalreview.com/adler/adler200407210842.asp> (“One of the first cases in which we will see the effects of *Sosa v. Alvarez-Machain* is *Doe v. Unocal*.”); *Supreme Court OKs Foreign Abuse Suits*, L.A. TIMES, July 4, 2004, at C2 (“The U.S. Supreme Court ruled that foreigners can file lawsuits in American courts to address some abuses overseas, a decision legal experts said might provide an opening for human rights cases filed against Unocal Corp. and other companies.”); Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 30, 2004, at A21 (noting, in particular, the effect of *Sosa* on the Unocal case); *Human Rights in Court*, WASHINGTON POST, April 6, 2004, at A20 (“Most famous is a suit by Burmese citizens against Unocal Corp., alleging that the company allowed the Burmese government to use forced labor during a gas pipeline project.”); *Policing Human Rights*, WASHINGTON POST, Aug. 14, 2003, at A18 (arguing for judicial restraint in Unocal case).

In December 2004, Unocal agreed to a settlement in the Alien Tort Statute litigation against it. See *Unocal Settles Rights Suit in Myanmar*, N.Y. TIMES, Dec. 14, 2004, at C6. It is likely that the Court's decision in *Sosa* played a significant role in both sides' decision to settle. See Anthony J. Sebok, *Unocal Announces It Will Settle A Human Rights Suit: What Is the Real Story Behind Its Decision?*, FINDLAW'S WRIT, Jan. 10, 2005, available at <http://writ.news.findlaw.com/sebok/20050110.html>.

44. Certiorari was denied, for example in *In re Estate of Ferdinand Marcos*, 513 U.S. 1126 (1995), *Karadzic v. Kadic*, 518 U.S. 1005 (1996), *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2000).

45. Larry Rohter, *Ex-Ruler of Haiti Faces Human Rights Suit in U.S.*, N.Y. TIMES, Nov. 15, 1991 at B10 (“The United States position on the Filartiga principle has varied.”).

46. As explained below, the United States was not a party to Alvarez-Machain's ATS claim, but instead his Federal Tort Claim Act (“FTCA”) claim arising out of the same events.

47. See Brief for the United States as Respondent supporting Petitioner, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339), at 1 n.1 (“The United States is a party to this action and filed its own petition for a writ of certiorari (No. 03-485) seeking review of the court of appeals' decision in this case, raising additional questions concerning respondent Alvarez-Machain's separate claims against the United States.”). Whether the U.S. government's decision to challenge the ATS here stems from its status as a party to the action or a larger philosophical opposition by the Bush administration to international law and judicial activism is open to speculation. Its opposition to the ATS certainly fits its apparent legal philosophy. See discussion *infra* Part II.A.

48. Both advocates and opponents of the lower federal courts interpretation of the ATS watched *Sosa* nervously. See, e.g., Marcia Coyle, *Justices to Hear Challenge Of Alien Tort Claims Act*, THE LEGAL INTELLIGENCER, Mar. 31, 2004, at 4 (“If business and the administration succeed in the high court, the doors to federal courthouses largely will be closed to these types of suits. Human

2. *Sosa v. Alvarez-Machain Reaches the Court*

In 1993, Humberto Alvarez-Machain, a Mexican citizen, sued Jose Francisco Sosa, another Mexican citizen, and the United States, among others, in the United States District Court for the Central District of California. He asserted a false arrest claim under the Federal Tort Claims Act ("FTCA") against the United States and an ATS claim against Sosa for unlawful detention in violation of customary international law ("CIL").⁴⁹

Alvarez's lawsuit concerned the circumstances of his 1990 arrest. The U.S. Drug Enforcement Agency ("DEA") believed Alvarez to have been involved in the torture of a DEA agent in Mexico. Following his indictment by a federal grand jury, a warrant was issued for his arrest. After negotiations with Mexico over Alvarez's extradition proved fruitless, the DEA authorized Sosa and others to seize Alvarez from his home in Mexico and bring him to the United States to stand trial. Sosa held Alvarez overnight in Mexico and then flew him to the United States. Federal officers arrested Alvarez when he reached El Paso, Texas. Alvarez was ultimately acquitted and after returning to Mexico brought this lawsuit against Sosa and the United States. When the case eventually reached the United States Court of Appeals for the Ninth Circuit, a divided en banc panel upheld Alvarez's claims. The court 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."⁵⁰ It also found a "clear and universally recognized norm [of international law] prohibiting arbitrary arrest and detention."⁵¹ The Ninth Circuit also upheld Alvarez's FTCA claim, finding that "the DEA had no authority to effect Alvarez's arrest and detention in Mexico,"⁵² and that the United States was liable for false arrest.⁵³

rights litigators say that would not only be an incorrect reading of the statute and a flouting of the First Congress' intent but a tragedy for foreign victims of rape, torture and other abuses."); Sanders, *supra* note 41, at 27 ("Legal conservatives, led by Judge Robert Bork, have inveighed against courts' use of the ATS, and the Sosa case represents their best chance for narrowing the law. Sosa and the government argue that the statute should be confined to purposes Congress might have imagined in 1789, such as punishing piracy and protecting foreign ambassadors. Using it to enforce modern norms of international law, Bork wrote last year in the Wall Street Journal, invites overreaching by 'imperialistic judges.'"); *Id.* ("It is about whether the American civil justice system can be used to hold accountable private parties-including rogue operatives, multinational companies and interrogators-for-hire-if they violate human rights. Though Abu Ghraib was not in the news when the justices agreed to hear Sosa, their decision will affect whether those to whom America outsources warfare remain outside U.S. and international law."). Had it not been overshadowed by events, such as the Guantanamo and enemy combatant cases, *Sosa* might have dominated coverage of the Supreme Court's 2003-2004 term.

49. Customary international law arises from international practice rather than treaty. It is recognized where states consistently follow a rule out of a sense of legal obligation ("*opinio juris*") rather than mere practicality. See Article 38 of the Statute of the International Court of Justice (recognizing as a rule of decision, "international custom, as evidence of a general practice accepted as law").

50. *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003).

51. *Id.* at 620.

52. *Id.* at 608.

53. *Id.* at 640-41.

On certiorari, the Court thus had before it some of the most basic questions about the relationship between international law, U.S. courts, and the U.S. Constitution. Does the ATS create a cause of action under international law or is it merely jurisdictional, granting U.S. courts jurisdiction over such international claims as Congress may choose to recognize? If the ATS is merely jurisdictional, do the courts nonetheless have the power to recognize certain claims? What is the status of customary international law under the Constitution and the courts' constitutional power to interpret it? What sources create binding international law? Are treaties signed by the United States self-executing or do they require congressional action to become binding as American law? Even if the ATS does grant U.S. courts jurisdiction over human rights claims abroad, are there considerations of foreign policy or international comity that caution restraint? Should the United States provide a human rights court for the world?

3. Justice Souter's Majority Opinion

Writing for the majority, Justice Souter labored through these questions. The language of the statute and its location in the wholly jurisdictional Judiciary Act of 1789 strongly indicated that the ATS was strictly jurisdictional.⁵⁴ The ATS did not create "a new cause of action for torts in violation of international law,"⁵⁵ Souter concluded. This, however, does not render the ATS useless. "[H]istory and practice," explained Souter, indicate "that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time."⁵⁶ Common law would thus have provided the cause of action for violations of international law. In particular, the first Congress would have recognized "three specific offenses against the law of nations"⁵⁷ mentioned by Blackstone: "violation of safe conducts, infringement of the rights of ambassadors, and piracy."⁵⁸ "It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on the minds of the men who drafted the ATS with its reference to tort."⁵⁹ "In sum," explains Justice Souter,

[A]lthough 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.⁶⁰

54. *Sosa*, 124 S. Ct. at 2755.

55. *Id.*

56. *Id.* See also *id.* at 2759 ("There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.").

57. *Id.* at 2756.

58. *Id.*

59. *Id.*

60. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2761 (2004).

But if the source of ATS causes of action were common law, could those causes of action survive the *Erie v. Tompkins* elimination of general federal common law?⁶¹ The answer, concludes Justice Souter, is yes.

[N]o development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (CA2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law.⁶²

Although *Erie* cautions judicial restraint in identifying common law international causes of action, “*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.”⁶³ International law, writes the Court, is just such an exception.

For two centuries we have affirmed that the domestic law of the United States recognizes the law of nation The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.⁶⁴

Scholars have long battled over the status of customary international law under the Constitution.⁶⁵ Justice Souter resolves the debate. Customary international law is federal common law.

61. As Justice Souter explains, “[w]hen § 1350 was enacted, the accepted conception was of the common law as ‘a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.’” *Id.* at 2762 (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)). “Now [after *Erie*], however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created.” *Id.*

62. *Id.* at 2761.

63. *Id.* at 2764.

64. *Id.*

65. See, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004) (arguing that customary international law is neither federal common law nor state law, but a special category of its own to be applied in appropriate cases); Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 372-463 (2002) (detailing this debate and arguing that customary international law should be applied based on choice of law rules); Harold Hongju Koh, *Commentary, Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998) (arguing that customary international law remains federal common law after *Erie*); 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) (arguing that customary international law is common law and that its use by federal courts did not survive *Erie*); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 183 FORDHAM L. REV. 319 (1997) (same); A. M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995) (arguing that customary international law is analogous to foreign law and should be applied based on choice of law rules); Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740 (1939) (suggesting that customary international law is one of the areas of federal concern that survives *Erie*).

However, this common law power to recognize international law causes of action is not unlimited. Justice Souter lists a number of factors that “argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.”⁶⁶ *Erie* advises judicial humility in “discovering” new causes of action.⁶⁷ So too does the absence of a Congressional mandate.⁶⁸ Issues of international comity and deference to the “Legislative and Executive Branches in managing foreign affairs”⁶⁹ also urge caution:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits 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.⁷⁰

Accordingly, Justice Souter narrows the discretion of federal courts to recognize new international causes of action. “[W]e are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.”⁷¹ ATS actions are not limited to cases involving “violation of safe conducts, infringement of the rights of ambassadors, and piracy,”⁷² but any new causes of action must derive from norms of international law as widely accepted and as definite in content as those three would have been in 1789. In a sense, ATS causes of action arise out of *very strong, very well accepted* international law. Justice Souter implies that torture, the issue in *Filartiga*, would violate such an international law norm and would be subject to liability under the ATS.⁷³

What about Alvarez’s claim of unlawful detention? Here, the Court finds no evidence of such a strongly recognized norm of international law. Justice Souter first notes that Alvarez cannot rely on any international treaty for binding law enforceable in U.S. Courts.⁷⁴ Although Alvarez points to both the Univer-

66. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2762 (2004).

67. *Id.*

68. *Id.* at 2762-64.

69. *Id.* at 2763.

70. *Id.* (“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.”).

71. *Id.* at 2765.

72. *Id.* at 2756.

73. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-66 (2004) (noting that “[t]his limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court,” and citing, among other opinions, *Filartiga*). See also *id.* at 2769 n.29 (citing *Filartiga*’s logic on the international illegality of torture with apparent approval).

74. See *id.* at 2767.

sal Declaration of Human Rights,⁷⁵ and the International Covenant on Civil and Political Rights,⁷⁶ as sources of an international norm against “arbitrary arrest,” neither creates international obligations in and of itself. The Declaration, explains Justice Souter, was intended as a statement of principles, not a law-creating treaty.⁷⁷ More importantly, with a dash of his pen, Justice Souter seems to settle the long open question of whether the Senate can impose its own conditions in ratifying a treaty.⁷⁸ “[A]lthough the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.”⁷⁹

Nor does Justice Souter see evidence of binding *customary* international law prohibiting the type of “arbitrary arrests” complained of by Alvarez. Alvarez, Justice Souter explains, “invokes a general prohibition of ‘arbitrary’ detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances.”⁸⁰ Leaving open the question of whether any arbitrary arrests violate customary international law, there is “little authority that a rule so broad has the status of a binding customary norm today.”⁸¹ Justice Souter finds the massive implications of such a broad rule particularly persuasive.

[I]ts implications would be breathtaking . . . His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the *Fourth Amendment* . . . It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might

75. G. A. Res. 217A (III), U. N. Doc. A/810 (1948).

76. Dec. 19, 1996, 999 U. N. T. S. 171 n.22.

77. *Sosa*, 124 S. Ct. at 2767.

78. See, e.g., Malvina Halberstam, *International Human Rights and Domestic Law Focusing on U.S. Law, with Some Reference to Israeli Law*, 8 CARDOZO J. INT'L & COMP. L. 225, 232-36 (2000) (discussing the positions of various scholars and arguing that a Senate declaration that a treaty is not self-executing violates the international law requirement that states act in good faith and Article VI of the U.S. Constitution); Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM J. INT'L L. 341, 346-48 (1995) (arguing that “as a general practice such a declaration [of non-self-execution] is against the spirit of the Constitution; it may be unconstitutional”); Stefan A. Riesenfeld and Frederick M. Abbott, *Foreword: Symposium on Parliamentary Participation in the Making and Operation of Treaties*, 67 CHI.-KENT. L. REV. 293, 296 (1991) (“We believe that the Senate lacks the constitutional authority to declare the non-self-executing character of a treaty with binding effect on U.S. courts.”); Lori Damrosch, *The Role of the United States Senate Concerning “Self-Executing” and “Non-Self-Executing” Treaties*, 67 CHI.-KENT. L. REV. 515, 527 (1991) (“A Senate declaration purporting to negate the legal effect of otherwise self-executing treaty provisions is constitutionally questionable as a derogation from the ordinary application of Article VI of the Constitution.”); Michael J. Glennon, *The Constitutional Power of the United States Senate to Condition its Consent to Treaties*, 67 CHI.-KENT. L. REV. 533, 540-46 (1991) (finding no constitutional obstacle to Senate declarations of non-self-execution).

79. *Sosa*, 124 S. Ct. at 2767. This may only be dicta. Alvarez did not assert that the Covenant created binding law, only that it was evidence of a growing consensus on the illegality of arbitrary detentions. Souter may only have been speculating about Alvarez’s strategy.

80. *Id.* at 2768.

81. *Id.*

place on the authority of its own officers to arrest.⁸²

“Creating a private cause of action to further that aspiration,” Justice Souter concludes, “would go beyond any residual common law discretion we think it appropriate to exercise.”⁸³ Judges can, under the correct circumstances, recognize new causes of action for international human rights violations in ATS cases. Alvarez’s claims simply do not present such a case.⁸⁴

Although Alvarez lost, the zigzagging opinion was largely seen as a victory for ATS proponents and the international human rights community.⁸⁵ The Court did not foreclose future human rights litigation in federal courts, as the U.S. government and ATS critics had requested,⁸⁶ and seemed to signal its general approval for the approach taken by the lower federal courts in *Filartiga* and its progeny.⁸⁷

The ambivalence and uncertainty manifested in Justice Souter’s opinion, however, should not be understated. Justice Souter carefully avoids identifying any rules of customary international law that do meet the standards of wide acceptance and definite content necessary for new causes of action in ATS cases. To this already unclear picture, he adds numerous other caveats and considerations.⁸⁸ For example, he specifically leaves open how this ruling should be applied to corporate defendants: “A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetra-

82. *Id.*

83. *Id.* at 2769.

84. It is hard not to see echoes of *Rasul v. Bush* in Justice Souter’s discussion of arbitrary arrest and detention. Having granted seemingly expansive habeas corpus rights to those held at Guantanamo Bay, *see infra* Part I.D, the Court seems now to be pulling back. The Guantanamo detainees may have habeas rights, but whether their detentions violate international law is an open question. *Rasul* may grant habeas corpus to those detained by the United States anywhere in the world, but some detentions, e.g. Alvarez’s, are simply too *de minimis* to raise international claims. *See Sosa*, 124 S. Ct. at 2769 (“It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.”). U.S. courts and U.S. law will take care of those under U.S. control.

85. *See, e.g.*, Linda Greenhouse, *Human Rights Abuses Worldwide Are Held to Fall Under U.S. Courts*, N.Y. TIMES, June 29, 2004, at A1 (“The decision interpreting the Alien Tort Statute came as a relief to human rights organizations that had feared the court would accept the Bush administration’s invitation to narrow the application of the 215-year-old law.”); Stuart Taylor Jr., *All Hail the Supreme Court*, LEGAL TIMES, July 19, 2004, at 68 (“The same day, the justices ruled 6-3 that federal courts may entertain lawsuits by foreigners claiming to be victims of severe human rights violations anywhere in the world.”). *See also* Jonathan Adler, *Sosa* Justice, NAT’L REV. ONLINE, July 26, 2004 (“While the spirit of Souter’s opinion is quite restrictive, there is little doubt that some lower courts—and many academics—will see the opinion as a green light to keep trying to bring ATS claims for all sorts of alleged international injustices.”).

86. *See* Marcia Coyle, *Justices Open Door With Alien Tort Case*, NAT’L L. J., July 5, 2004, at 1 (noting that Justice Souter “rejected the government’s ‘stillborn’ argument about the ATS”).

87. *See Sosa*, 124 S. Ct. at 2765-66 (“This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court.”); *Id.* (Scalia, J. concurring) (“But the verbal formula it applied is the same verbal formula that the Court explicitly endorses.”).

88. *Id.* at 2766 n.20 (“This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this case.”).

tor being sued, if the defendant is a private actor such as a corporation or individual.”⁸⁹ Another open question is whether plaintiffs must exhaust remedies available in their own or other legal systems before bringing a claim to U.S. courts under the ATS.⁹⁰

One exception, though, threatens to swallow the opinion’s entire rule. Justice Souter is clearly concerned about the implications of his opinion on the management of foreign affairs. As noted above, Justice Souter cited these concerns in the body of his opinion as one reason for judicial restraint in recognizing new causes of action.⁹¹ This statement was apparently insufficient to fully assuage his uneasiness. Footnote 21 makes these concerns explicit: “[a]nother possible limitation that we need not apply here is a policy of case-specific deference to the political branches,” Justice Souter writes.⁹² Specifically mentioning pending class actions against corporations for alleged connections to South Africa’s apartheid past, Justice Souter urges judicial caution.⁹³ The South African and U.S. governments had opposed the cases as interfering with South Africa’s Truth and Reconciliation process.⁹⁴ Without foreclosing those cases, Justice Souter nonetheless notes that “[i]n such cases, 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.”⁹⁵ Hidden in a footnote, Justice Souter thus installs a powerful emergency brake on the accelerating train of ATS lawsuits: opposition from the U.S. and foreign governments matters. For those turning to U.S. courts for vindication of rights unremedied or even violated by foreign governments, this is a significant qualification.⁹⁶

4. Justice Scalia’s Concurrence

Although Justice Scalia concurred in the result, he could not have disagreed more with Justice Souter’s opinion. Justice Scalia’s concurrence drips with vit-

89. *Id.*

90. *Id.* at 2766 n.21 (“We would certainly consider this requirement in an appropriate case.”). Notably, the European Commission urged this caveat upon the Court. Part II.A will look more closely at the impact of particular parties and their positions as *amici* on the Court’s analyses.

91. *Id.* at 2763.

92. *Id.* at 2766 n.21.

93. *Id.*

94. *Id.*

95. *Id.*

96. The Court’s opinion on Alvarez’s FTCA claim, although not directly related to international law, should also be noted. The Court held that Alvarez did not have a claim under the FTCA for false arrest. Noting that Alvarez’s claim arose out of his abduction and detention in Mexico, the Court held that his claim fell squarely within the exception to the FTCA’s waiver of sovereign immunity for claims “arising in a foreign country.” 28 U.S.C. § 2680(k). *See Sosa*, 124 S. Ct. at 2754 (holding that “the FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”). In particular, the Court noted that the foreign country exception “codified Congress’s ‘unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power.’” *Sosa*, 124 S. Ct. at 2751 (citing *United States v. Spelar*, 338 U.S. 217, 221 (1949)).

riol.⁹⁷ “This Court seems incapable of admitting that some matters—any matters—are none of its business,”⁹⁸ Justice Scalia fumes.

In today’s latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts themselves have used—invites them to try again.⁹⁹

First, Justice Scalia argues that, contrary to the majority belief, *Erie v. Tompkins* sounded an authoritative death-knell for the type of common-law lawmaking the majority describes: “General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties.”¹⁰⁰ “This Court’s decision in *Erie R. Co. v. Tompkins*,” writes Justice Scalia, “signaled the end of federal-court elaboration and application of the general common law.”¹⁰¹ After *Erie*, concludes Justice Scalia, federal courts do not have the power to recognize new international causes of action:

In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala*, 630 F.2d 876 (CA2 1980), a federal court must first create the underlying federal command. But “the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law.” In Benthamite terms, creating a federal command (federal common law) out of “international norms,” and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.¹⁰²

Justice Scalia shares Justice Souter’s concerns about *Erie*, the lack of a congressional mandate, the risks of interference in the management of foreign affairs, and issues of international comity.¹⁰³ But for Scalia these are not concerns cautioning judicial restraint. Rather, “[t]hey are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.”¹⁰⁴

But most importantly, explains Justice Scalia, granting federal courts power

97. Justice Scalia seems to have nothing but contempt for the Court majority and the lower federal courts that developed the modern ATS. See, e.g., *Sosa*, 124 S. Ct. at 2776 (Scalia, J. dissenting) (“But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.”). His concurrence at times takes on an almost apocalyptic tone. See, e.g., *id.* at 2775 (“The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches.”); *id.* (“Today’s opinion leads the lower courts right down that perilous path.”).

98. *Id.* at 2776.

99. *Id.*

100. *Id.* at 2770 (“Federal and state courts adjudicating questions of general common law were not adjudicating questions of federal or state law, respectively—the general common law was neither.”).

101. *Id.*

102. *Id.* at 2772 (citation omitted).

103. *Id.* at 2774.

104. *Id.*

to discover new causes of action under international law—to, in a sense, define international law and apply it to the parties before them—undermines the American system of democratic government and its lawmaking processes. “For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law,”¹⁰⁵ writes Justice Scalia. “American law—the law made by the people’s democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court.”¹⁰⁶

5. Justice Breyer’s Concurrence

Also of note is Justice Breyer’s concurrence. As in his own majority opinion in *F. Hoffman-LaRoche*,¹⁰⁷ to be discussed in Part I.C, Justice Breyer’s primary concern is comity.¹⁰⁸ His concurrence seems designed as a further note of caution¹⁰⁹ emphasizing the concerns of international comity already voiced by Justice Souter in the majority opinion.¹¹⁰

Since enforcement of an international norm by one nation’s courts implies that other nations’ courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.¹¹¹

ATS cases, cautions Justice Breyer, are particularly likely to raise comity issues: “These comity concerns . . . do arise, however, when foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.”¹¹² As a result, an extra level of caution is advised “to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.”¹¹³

As a matter of international comity, observes Justice Breyer, foreign courts, rather than U.S. courts, should generally be allowed to consider foreign claims. The international community has agreed, however, that some truly heinous in-

105. *Id.* at 2776.

106. *Id.*

107. 124 S. Ct. 2359 (2004).

108. “Comity,’ in a legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy or good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163-64 (1895).

109. *See Sosa*, 124 S. Ct. at 2782 (Breyer, J., concurring) (“I would add one further consideration.”).

110. *Id.* at 2763 (majority opinion).

111. *Id.* at 2782 (Breyer, J., concurring).

112. *Id.*

113. *Id.*

ternational crimes justify action by any court anywhere in the world.¹¹⁴ Looking to international sources, Justice Breyer identifies a “subset [of international law violations that] includes torture, genocide, crimes against humanity, and war crimes.”¹¹⁵ Before an American court intervenes and exercises jurisdiction, it should first determine that *universal jurisdiction* over a foreign claim is justified.¹¹⁶ Only where such agreement exists should they exercise ATS jurisdiction.

B. Making up for Lost Time: Republic of Austria v. Altmann

1. Background: The Case

Whereas *Sosa* was primarily about the future of international human rights law, *Altmann* was about redressing international abuses long past. *Republic of Austria v. Altmann*¹¹⁷ arose out of claims surrounding Nazi-stolen artwork. Maria V. Altmann’s uncle, Ferdinand Bloch-Bauer, had been a wealthy sugar magnate and art collector in pre-Nazi Austria. After the Anschluss, Bloch-Bauer, who was Jewish and had resisted Austria’s annexation, fled to Switzerland. The Nazi’s expropriated his property. Five of his six paintings by Gustav Klimt (including two portraits of his wife) ended up in the hands of a Nazi lawyer who sold four of them to the Austrian Gallery. The whereabouts of the sixth painting were long unknown, but eventually it was sold to the Gallery as well. After World War II, Austria passed legislation renouncing all Nazi property expropriations; Bloch-Bauer’s heirs, including Altmann, sought return of his stolen art from the Gallery. The Gallery informed their lawyer that the Klimts had been lawfully bequeathed to it by Bloch-Bauer and his wife.¹¹⁸ Faced with new Austrian legislation requiring official permission to remove artworks from the country, Bloch-Bauer’s heirs allowed the Gallery to keep the Klimts (and helped secure the fifth one for it) in return for permission to secure other pieces from Bloch-Bauer’s collection.¹¹⁹

In 1998, a journalist uncovered evidence that, at all relevant times, the Gallery knew that the Klimts had not been donated but instead passed to them through Nazi hands. Newspaper reports also exposed the Gallery’s postwar attempts to extort Jews to donate artworks in exchange for export permits. In response, Austria enacted new legislation allowing individuals to reclaim such extorted artworks, and Altmann, now an American citizen, brought an action in

114. *See id.* at 2783.

115. *Id.*

116. Courts considering whether there is universal agreement on a new norm of international law must thus also consider whether there is similar agreement on universal jurisdiction. *Id.*

117. 124 S. Ct. 2240 (2004).

118. In her will, Adele Bloch-Bauer asked her husband to bequeath the paintings to the Gallery after his death. The attorney for her estate advised the Gallery that Ferdinand owned the paintings and that Adele’s request did not bind him. Ferdinand never gave the paintings to the Gallery, and eventually he bequeathed all his belongings to his heirs, including Altmann. *Id.* at 2243-44.

119. *Id.* at 2243-45.

Austria for their recovery. A committee set up by the Austrian government returned some other pieces but denied return of the Klimts, finding that Bloch-Bauer and his wife had, in fact, bequeathed them to the Gallery.¹²⁰ Faced with extraordinarily high court costs in Austria,¹²¹ Altmann voluntarily dismissed her case there and instead brought suit in U.S. federal court alleging violations of Austrian, International, and California law by Austria and the Gallery and seeking return of the paintings.¹²²

2. Background: Foreign Sovereign Immunity Law

Over the more than 50 years between the Nazi seizure of the Klimts and Altmann's current lawsuit, American foreign sovereign immunity law went through an equally complicated history. The Supreme Court had long understood foreign sovereign immunity to be "a matter of grace and comity rather than a constitutional requirement."¹²³ The Court thus "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive branch—on whether to take jurisdiction' over particular actions against foreign sovereigns and their instrumentalities."¹²⁴ For most of the country's history, the policy of the Executive Branch was to seek immunity for all friendly sovereigns in actions brought against them.¹²⁵ In 1952, however, Acting Legal Adviser to the Secretary of State Jack B. Tate informed the Attorney General by letter that the State Department would henceforth follow the "restrictive theory" of foreign sovereign immunity:¹²⁶ "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)."¹²⁷

Over the next two decades, foreign sovereign immunity case law became increasingly confused. The State Department did not always comment on cases, forcing courts to guess how the State Department would have acted under the "restrictive theory." In other cases, states put pressure on the State Department to ask for immunity even where none would attach under the theory; the courts, deferring to the Executive Branch, found immunity in those cases.¹²⁸

In an attempt to reestablish order and consistency, Congress passed the Foreign Sovereign Immunities Act (FSIA) in 1976.¹²⁹ The FSIA was designed

120. *Id.* at 2243, 2245-46, 2257.

121. *Id.* at 2245 ("Austrian court costs are proportional to the value of the recovery sought (and in this case would total several million dollars, an amount far beyond respondent's means).").

122. *Id.* at 2245-46.

123. *Id.* at 2248.

124. *Id.* (quoting *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983)).

125. *Id.*

126. *Id.*

127. *Id.* (quoting Letter from Jack B. Tate, Acting Legal Adviser, U. S. Dept. of State, to Acting U. S. Attorney General Philip B. Perlman (May 19, 1952)).

128. *Id.* at 2248-49.

129. *Id.* at 2249; 28 U.S.C. § 1602.

as a “set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.”¹³⁰ The Act’s “preamble states that ‘henceforth’ both federal and state courts should decide claims of sovereign immunity in conformity with the Act’s principles.”¹³¹ The FSIA “codifie[d], as a matter of federal law, the restrictive theory of sovereign immunity.”¹³² It also introduced a new set of exceptions to foreign immunity, including one denying foreign sovereigns immunity in cases involving “rights in property taken in violation of international law.”¹³³

Altmann’s suit invoked this expropriation exception. She argued that the U.S. courts had jurisdiction over her claims against Austria and the Austrian Gallery, a state agency, because her property, the six Klimts, had been taken in violation of international law. The only question before the Supreme Court was whether Congress intended the 1976 FSIA exception to apply retroactively to acts of expropriation occurring decades before—in this case, in the 1940’s.¹³⁴ The result was a cacophony of concurring and dissenting opinions.

3. Justice Stevens’s Majority Opinion

Justice Stevens begins by brushing aside the Court’s usual retroactivity analysis. Under *Landgraf v. USI Film Products*,¹³⁵ the key question is whether giving a statute retroactive effect “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”¹³⁶ If applying a statute retroactively would have such an effect, the statute is presumed not to be retroactive unless it contains a clear statement that Congress intended otherwise.¹³⁷ There is no presumption against retroactivity, however, if the statute merely confers or restricts jurisdiction.¹³⁸

The FSIA, Justice Stevens readily admits, does not contain a clear congressional statement that it should be applied retroactively.¹³⁹ This absence is not

130. *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

131. *Altmann*, 124 S. Ct. at 2249.

132. *Id.*

133. *Id.* at 2246, 2249; 28 U.S.C. § 1605(a)(3). The exception only applies if the property or the property’s owner has a sufficient commercial connection to the United States. *Id.*

134. The Court was very careful to confine its holding to this issue. *See Altmann*, 124 S. Ct. at 2254 (“We conclude by emphasizing the narrowness of this holding.”). The Court did not consider whether Altmann’s claims actually fall within the expropriation exception or whether the “act of state” doctrine would nullify Austria and the Gallery’s liability. *See id.* at 2243, 2249, 2254.

135. 511 U.S. 244 (1994). Much of Justice Stevens’s opinion, as well as the concurrences and dissent, is devoted to interpreting the Court’s retroactivity precedent, in particular, its opinion in *Landgraf v. USI Film Products*. These precedents are quite complex and largely tangential to the purposes of this Article. Accordingly, this Article will not focus on the subtleties of the Court’s retroactivity analysis, but instead on the international theory embedded in the opinions.

136. *Id.* at 280.

137. *Id.*

138. *Altmann*, 124 S. Ct. at 2251.

139. *Id.* at 2251 (noting that “that statement by itself falls short of an ‘expres[s] prescri[ption] of] the statute’s proper reach.”); *Id.* at 2252 (explaining that the statement is “perhaps not sufficient to

conclusive, however, as Justice Stevens concludes that the FSIA does not fit either *Landgraf* paradigm.¹⁴⁰ On the one hand, although states may have had pre-FSIA expectations as to how the State Department and courts would act, immunity has always been within the discretion of the Executive—states have never had a “right” to immunity.¹⁴¹

[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts. Rather, such immunity reflects current political realities and relationships, and aims to give foreign states and their instrumentalities some present “protection from the inconvenience of suit as a gesture of comity.”¹⁴²

On the other hand, the Court has noted that when a statute creates jurisdiction where none before had existed, that statute “speaks not just to the power of a particular court but to the substantive rights of the parties as well.”¹⁴³ “Such a statute, even though phrased in ‘jurisdictional’ terms, is as much subject to our presumption against retroactivity as any other.”¹⁴⁴ Justice Stevens thus declares foreign sovereign immunity and the FSIA “*sui generis*.”¹⁴⁵

Having wiped the slate clean of any presumptions, Justice Stevens finds good reasons to apply the statute retroactively.¹⁴⁶ First, the FSIA’s preamble states that “[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”¹⁴⁷ Justice Stevens finds that “this language suggests Congress intended courts to resolve *all* such claims ‘in conformity with the principles set forth’ in the Act, regardless of when the underlying conduct occurred.”¹⁴⁸ Second, Congress enacted the FSIA to give the courts a clear standard for deciding immunity questions. Congress must have intended the FSIA to apply to all such claims.¹⁴⁹

The FSIA thus does apply to pre-enactment conduct, including the 1940’s expropriation of Altmann’s uncle’s paintings, and the court does have jurisdiction to hear Altmann’s claims. But Justice Stevens issues two caveats. First, the opinion makes no comment on whether the Act of State doctrine¹⁵⁰ shields Austria and the Gallery from liability.¹⁵¹ “Under that doctrine, the courts of one

satisfy *Landgraf*’s ‘express command’ requirement”).

140. *Id.* at 2251 (“Though seemingly comprehensive, this inquiry does not provide a clear answer in this case.”).

141. *Id.*

142. *Id.* (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

143. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997).

144. *Id.*

145. *Altmann*, 124 S. Ct. at 2252.

146. *Id.*

147. 28 U.S.C. § 1602.

148. *Altmann*, 124 S. Ct. at 2253.

149. *Id.* at 2253-54.

150. “Unlike a claim of sovereign immunity, which merely raises a jurisdictional defense, the act of state doctrine provides foreign states with a substantive defense on the merits.” *Id.* at 2254.

151. *Id.* at 2254-55.

state will not question the validity of public acts (*acts jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts.”¹⁵² Second, “should the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”¹⁵³

4. Justice Scalia’s Concurrence

Although Justice Scalia reaches the same conclusion, he does so without any reference to either the particulars of the FSIA or the nature of foreign sovereign immunity.¹⁵⁴ Instead, relying on his concurring opinion in *Landgraf*,¹⁵⁵ Justice Scalia explains that when a statute changes jurisdiction it does so “to permit or forbid the exercise of judicial power rather than to regulate primary conduct.”¹⁵⁶ Any effect such a change in jurisdiction might have on substantive rights is thus accidental.¹⁵⁷ Such changes in jurisdiction can be applied to actions involving pre-enactment conduct without any concerns about unfair retroactivity.¹⁵⁸

5. Justice Breyer’s Concurrence

Whereas Justice Scalia hoped the majority would say less, Justice Breyer, joined by Justice Souter, seems to wish the majority had said more.¹⁵⁹ In particular, Justice Breyer believes that the majority’s conclusion is supported by the nature of sovereign immunity, not only as it has been applied through American history, but as it has been applied more generally in international law. As Justice Breyer explains, “the legal concept of sovereign immunity, as traditionally applied, is about a defendant’s *status* at the time of suit, not about a defendant’s *conduct* before the suit.”¹⁶⁰ “[T]he objective of the ‘sovereign immunity’ doctrine,” Justice Breyer explains, “(in contrast to other conduct-related immunity doctrines) is simply to give foreign states and instrumentalities ‘some protec-

152. *Id.* at 2254.

153. *Id.* at 2255. Notably, this deference did not extend to the State Department’s interpretation of the FSIA: “While the United States’ views on such an issue are of considerable interest to the Court, they merit no special deference.” *Id.*

154. Not only does he not mention international law, he makes a point of the fact that “respondent’s substantive claims are based primarily on California law.” *Id.* at 2256 (Scalia, J., concurring).

155. *Landgraf v. USI Film Products*, 511 U.S. 244, 292 (1994) (Scalia, J., concurring).

156. *Altmann*, 124 S. Ct. at 2256 (Scalia, J., concurring) (internal quotation marks omitted).

157. *Id.*

158. *Id.*

159. *Id.* at 2256 (Breyer, J., concurring) (“I join the Court’s opinion and judgment, but I would rest that judgment upon several additional considerations.”).

160. *Id.* at 2259.

tion,' at the time of suit, 'from the inconvenience of suit as a gesture of comity.'"¹⁶¹ Applying the FSIA to a suit against Austria for its pre-FSIA conduct is thus completely consistent with how foreign sovereign immunity has generally been understood.

Intriguingly, Justice Breyer finds his strongest support in international precedent:

Thus King Farouk's sovereign status permitted him to ignore Christian Dior's payment demand for 11 "frocks and coats" bought (while king) for his wife; but once the king lost his royal status, Christian Dior could sue and collect (for clothes sold *before* the abdication). See *Ex-King Farouk of Egypt v Christian Dior*, 84 Clunet 717, 24 I. L. R. 228, 229 (CA Paris 1957) (Christian Dior "is entitled . . . to bring" the ex-King to court "to answer for debts contracted" before his abdication "when, as from the date of his abdication, he is no longer entitled to claim . . . immunity" as "Hea[d] of State").¹⁶²

Whereas Justice Stevens seems swayed by the inherently discretionary nature of foreign sovereign immunity, Justice Breyer focuses on the principles inherent in that concept. For Justice Breyer, the concept of foreign sovereign immunity has an existence and substance outside of how it is applied by U.S. courts, and that substance provides the answer to the question posed by *Altmann*.

Justice Breyer is also quick to point out the narrowness of the majority's holding. States sued under the FSIA have many other lines of defense; the Court is not opening a floodgate for suits against foreign countries. "For one thing, statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts."¹⁶³ "The number of lawsuits will be further limited," he continues, "if the lower courts are correct in their consensus view that § 1605(a)(3)'s reference to 'violation of international law' does not cover expropriations of property belonging to a country's own nationals."¹⁶⁴ Nor does the majority's opinion in any way affect Austria and the Gallery's defenses under the Act of State¹⁶⁵ doctrine.¹⁶⁶ Finally, "the United States may enter a statement of interest counseling dismissal. Such a statement may refer, not only to sovereign immunity, but also to other grounds for dismissal, such as the presence of superior alternative and exclusive remedies or the nonjusticiable nature (for that or other reasons) of the matters at issue."¹⁶⁷

6. Justice Kennedy's Dissent

Justice Kennedy, joined by Chief Justice Rehnquist and Justice Thomas, disagree with much of Justice Stevens's and Justice Breyer's analysis, including

161. *Id.* (quoting *Dole Food Co. v. Patrickson*, 538 U.S. 468, 479 (2003)).

162. *Id.*

163. *Id.* at 2262.

164. *Id.*

165. See *supra* notes 150-152 and accompanying text.

166. *Altmann*, 124 S. Ct. at 2262 (Breyer, J., concurring).

167. *Id.* (internal citations omitted).

their interpretation of *Landgraf* and their reading of the statute. One particular point of disagreement, however, stands out. Justice Kennedy takes issue with Justice Stevens's and Justice Breyer's contention that states do not rely on particular understandings of foreign sovereign immunity.¹⁶⁸ "This reasoning overlooks the plain fact that there are reliance interests of vast importance involved, interests surely as important as those stemming from contract rights between two private parties."¹⁶⁹ "The analysis begins with 1948, when the conduct occurred,"¹⁷⁰ argues Justice Kennedy. "The parties' expectations were then formed by an emerging or common law framework governing claims of foreign sovereign immunity in American courts,"¹⁷¹ and "[p]arties in 1948 would have expected courts to apply this general law of foreign sovereign immunity in the future."¹⁷² Moreover, those expectations are of consequence for American foreign policy.

As the Executive has made clear to us, these interests span a range of time after the conduct, even up to the present day. See Brief for United States as Amicus Curiae 8. For example, at stake may be pertinent treaty rights and international agreements intended to remedy the earlier conduct. These are matters in which the negotiating parties may have acted on a likely assumption of sovereign immunity, as defined and limited by pre-FSIA expectations: "[The] conduct at issue [has been] extensively addressed through treaties, agreements, and separate legislation that were all adopted against the background assumption [of the pre-FSIA foreign sovereign immunity regime]."¹⁷³

For Justice Kennedy, protecting foreign countries' reliance on foreign sovereign immunity paradoxically protects the power of the American government. Congress' attempt to bring clarity to the law through enactment of the FSIA "was in keeping with strengthening the Executive's ability to secure negotiated agreements with foreign nations against whom our citizens may have claims."¹⁷⁴ "Over time," explains Justice Kennedy, "agreements of this sort have been an important tool for the Executive."¹⁷⁵ The consequences of the majority's opinion could thus prove dire:

Uncertain prospective application of our foreign sovereign immunity law may weaken the Executive's ability to secure such agreements by compromising foreign sovereigns' ability to predict the liability they face in our courts and so to assess the ultimate costs and benefits of any agreement The Court . . . injects

168. "Lurking in the Court's and Justice Breyer's contrary suggestions is the implication that the expectations of foreign powers are minor or infrequent. Surely that is not the case." *Altmann*, 124 S. Ct. at 2271 (Kennedy, J., dissenting).

169. *Id.*

170. *Id.* at 2268.

171. *Id.*

172. *Id.*

173. *Id.* at 2271. *See also id.* ("By today's decision the Court opens foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago, including claims that have been the subject of international negotiation and agreement. There are, then, reliance interests of magnitude, which support the usual presumption against retroactivity.").

174. *Id.* at 2275.

175. *Id.*

great prospective uncertainty into our relations with foreign sovereigns.¹⁷⁶

C. *Minding Our Own Business: F. Hoffman-La Roche v. Empagran, S.A.*

At first glance, *F. Hoffman-La Roche* does not seem to invite deep international law theorizing. Whereas *Sosa* and *Altmann* had posed seemingly weighty questions of international justice, redressing human rights abuses, and the contours of state responsibility, *F. Hoffman-La Roche* looks like an ordinary business case. *F. Hoffman-La Roche* does not even involve the application of international law. Instead, the case asks only when American law should apply to international business activity. The Court's nearly unanimous opinion¹⁷⁷—devoid of the bitter disagreements in *Sosa* and *Altmann*—only seems to confirm the mundane nature of the case. Beneath the surface of the opinion, however, lie important assumptions about the nature of international law and the role of the United States in global governance.

In *F. Hoffman-La Roche*, the Court was asked to interpret the Foreign Trade Antitrust Improvements Act (FTAIA). Under the FTAIA, certain types of foreign anticompetitive activity are excluded from the reach of American antitrust law. The act creates a general rule that the Sherman Antitrust Act¹⁷⁸ “shall not apply to conduct involving trade or commerce . . . with foreign nations.”¹⁷⁹ The FTAIA makes an exception, however, where foreign anticompetitive activity has a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, and “such effect gives rise to a claim” under the Sherman Act.¹⁸⁰

In this case, vitamin distributors in the Ukraine, Australia, Ecuador, and Panama had filed a class-action lawsuit against a group of foreign and domestic vitamin manufacturers and distributors, whom they alleged had engaged in a price-fixing conspiracy. According to the plaintiffs, this anticompetitive activity had resulted in higher vitamin prices in the United States and other countries.¹⁸¹ The Court was faced with two questions. First, “does the price-fixing activity

176. *Id.* at 2275-76.

177. Justice Scalia did write a short one-paragraph concurrence joined by Justice Thomas, but it is unclear whether they actually disagreed with any of the points raised in Justice Breyer's majority opinion. See *F. Hoffman-La Roche v. Empagran S.A.*, 124 S. Ct. 2359, 2373 (2004). As far as Justice Breyer's reliance on international law principles is concerned, Justices Scalia and Thomas appear to be in complete agreement with the majority. See *infra* note and accompanying text. Justice O'Connor took no part in the decision. See *F. Hoffman-La Roche*, 124 S. Ct. at 2373.

178. See 26 Stat 209, amended by 15 U.S.C. § 1.

179. 15 U.S.C. § 6a (2005).

180. *Id.* §§ (1)(A), (2).

181. The actual class action included both American and foreign purchasers. See *F. Hoffman-La Roche v. Empagran S.A.*, 124 S. Ct. 2359, 2363 (2004). On defendants' motion, the District Court dismissed the foreign purchasers discussed above. See *id.* at 2363-64; *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, 2001 U.S. Dist. LEXIS 20910 (D.D.C., June 7, 2001). The Court of Appeals reversed. See *F. Hoffman-La Roche*, 124 S. Ct. at 2364; *Empagran S.A. v. F. Hoffman-Laroche, LTD.*, 315 F.3d 338 (2003). The Supreme Court granted certiorari resulting in the questions presented here. See *F. Hoffman-La Roche*, 124 S. Ct. at 2364. Thus, for the purposes of the Supreme Court, “the question presented assumes that the relevant ‘transactions occur[ed] entirely outside U.S. commerce.’” See *id.* at 2364.

constitute ‘conduct involving trade or commerce . . . with foreign nations,’” governed by the FTAIA?¹⁸² Second, if so, are the foreign distributors’ claims nonetheless covered by the Sherman Act as a result of the FTAIA’s “domestic injury” exception?¹⁸³

Justice Breyer, writing for the Court, expressed little doubt that the alleged conspiracy was governed by the Act.¹⁸⁴ The real question for the Court was when and whether the FTAIA’s exception extended the protections of American antitrust law to foreign plaintiffs suffering foreign harm.¹⁸⁵ The foreign vitamin purchasers were alleging a conspiracy with a “direct, substantial, and reasonably foreseeable effect” on domestic commerce, namely higher domestic vitamin prices. Higher *domestic* vitamin prices, moreover, would normally give rise to a claim under the Sherman Act. The question was whether Congress intended the FTAIA’s exception to apply where foreign plaintiffs were alleging completely independent foreign harm, namely higher *foreign* vitamin prices, resulting from the same anticompetitive conspiracy.

The question before the Court was thus one of statutory construction, not one of international law. The only question was what Congress intended in enacting the FTAIA. Nonetheless, the international implications of the case were impossible to ignore.¹⁸⁶ Germany, Canada, and Japan all submitted amicus briefs. At the most basic level, the Court was being asked to decide whose laws would govern an increasingly globalized business world.

The answer for the Court was comity.¹⁸⁷ International law and foreign affairs could inform statutory construction. As Justice Breyer explained, the “Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction re-

182. *F. Hoffman-La Roche*, 124 S. Ct. at 2363.

183. *Id.*

184. Plaintiffs had argued the FTAIA applied only to exports, and that their claims were wholly foreign. They pointed out that FTAIA covered only “conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations.” Conduct with foreign nations that was not “import trade or import commerce,” they argued, must be exports. The Court rejected this argument. *See id.* at 2366 (explaining that whether considering “the House Report’s account” or “the amendment itself and the lack of any other plausible purpose,” one “may reach the same conclusion, namely that the FTAIA’s general rule applies where the anticompetitive conduct at issue is foreign”).

185. *See id.* (referring to this issue as “the basic question presented”).

186. *See id.* (“No one denies that America’s antitrust laws, when applied to foreign conduct, can interfere with a foreign nation’s ability independently to regulate its own commercial affairs.”).

187. *See supra* note 108. *See also* *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984):

“Comity” summarizes in a brief word a complex and elusive concept—the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum . . . [T]he central precept of comity teaches that, when possible, the decisions of foreign tribunals should be given effect in domestic courts, since recognition fosters international cooperation and encourages reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations. The interests of both forums are advanced—the foreign court because its laws and policies have been vindicated; the domestic country because international cooperation and ties have been strengthened. The rule of law is also encouraged, which benefits all nations.

flects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow.”¹⁸⁸ Congress must have understood the potential international impact of the FTAIA, reasoned the Court, and must have sought to avoid unreasonable conflict with international law and foreign governments where it could. As the Court explained:

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.¹⁸⁹

These considerations counseled against the extension of American antitrust law to the foreign claims at issue here. “[A]pplication of our antitrust laws to foreign anticompetitive conduct is . . . reasonable, and hence consistent with principles of prescriptive comity,” observed the Court, “insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.”¹⁹⁰ It would not be reasonable, however, to apply those laws to *foreign* conduct causing independent *foreign* injury to a *foreign* party. Applying American antitrust law to such a situation risks “interference with a foreign nation’s ability independently to regulate its own commercial affairs,” and in such a situation, “the justification for that interference seems insubstantial.”¹⁹¹ The Court found one comment in an antitrust law treatise particularly persuasive.¹⁹² If the FTAIA’s exception were applied to foreign claims of independent foreign injury, observed the treatise,

a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member’s] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign’s provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U.S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have intended that result.¹⁹³

Moreover, amicus briefs submitted by the German, Belgian, British, Irish, Dutch, Canadian, Japanese, and United States governments¹⁹⁴ weighed heavily

188. *F. Hoffman-La Roche*, 124 S. Ct. at 2363 (internal citations omitted).

189. *Id.* at 2367.

190. *Id.* at 2366.

191. *Id.* at 2367.

192. *Id.* at 2367-68 (“We agree with the comment [in the treatise]. We can find no convincing justification for the extension of the Sherman Act’s scope that it describes.”).

193. *Id.* at 2367 (quoting PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* 273, 51-52 (Supp. 2003)).

194. *See generally* Brief for Amicus Curiae Government of Canada, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Governments of the Federal Republic of Germany and Belgium, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amicus Curiae Government of Japan, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae United

on the Justices' minds. Those governments' hostility to the extension of American antitrust law belied plaintiffs' claims that risks of "interference with the relevant interests of other nations [were] minimal."¹⁹⁵ "[S]everal foreign nations," observed the Court, "have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."¹⁹⁶ These briefs also noted "that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty."¹⁹⁷ These concerns counseled restraint: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in in significant part by Canadian or British or Japanese or other foreign companies?"¹⁹⁸

Thus relying on principles of international comity, the Court concluded that Congress could not have intended to extend the FTAIA's exception to such foreign claims. Asked to extend U.S. law to foreign business activity, the Court demurred. In a case where international law seemed to caution restraint rather than action, the Court readily accepted its guidance.¹⁹⁹

D. An Empire of Rights: Rasul v. Bush

Rasul v. Bush,²⁰⁰ based on petitions by 12 Kuwaiti and 2 Australian de-

Kingdom of Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amicus Curiae the United States, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724).

195. *F. Hoffman-La Roche*, 124 S. Ct. at 2368.

196. *Id.*

197. *Id.*

198. *Id.* at 2367.

199. It should be noted, that, despite the authoritative tone of the decision, the Court did have contrary opinions before it. Multiple amicus briefs not mentioned in the Court's opinion were submitted in support of the plaintiffs' positions. These briefs included two submitted by economists, one by Law and Economics professors, one by antitrust law professors, and one by international law professors. See generally Brief for Amici Curiae Certain Professor of Economics, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Economists Joseph E. Stiglitz and Peter R. Orszag, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Legal Scholars, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Law Professors Ralf Michaels, Hannah Buxbaum, and Horatia Muir Watt, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Professors Darren Bush, John M. Connor, John J. Flynn, Shubha Ghosh, Warren Grimes, Joseph E. Harrington, Jr., Norman Hawker, Robert Lande, William G. Shepherd and Steven Semeraro, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724).

200. 124 S. Ct. 2686 (2004).

tainees held at Guantanamo Bay,²⁰¹ is at once the most and the least international of the cases considered in this article. Both the circumstances of the case and the resulting opinion reflect the tense relationship between American law and the U.S. role in the world; *Rasul* reflects a deepening conflict over the boundaries of American law and American power.

Along with *Hamdi*²⁰² and *Padilla*,²⁰³ *Rasul* presented the Court with an opportunity to speak directly to the legality of the measures adopted by President Bush in the war on terrorism and the war in Iraq. Whereas *Hamdi* and *Padilla* fundamentally raised questions of American constitutional law—whether U.S. citizens could be held without trial or counsel as enemy combatants—*Rasul* raised questions that are undoubtedly international in scope. Brought by detainees captured during the war in Afghanistan, *Rasul* asked the Court to examine the Bush Administration's interpretation of the laws of war and its obligations under the Geneva Conventions. The case presented a direct challenge to the Bush administration's international policy.²⁰⁴

These larger questions, however, make almost no appearance in Justice Stevens's majority opinion. Instead, the opinion focuses on a narrow question of American statutory law: Do the U.S. courts have jurisdiction to hear petitions for a writ of habeas corpus brought by foreign, non-citizen, detainees held at Guantanamo Bay?²⁰⁵ Justice Stevens's turn inward to American law, however, is not a retreat from the international scene, and his focus on American law is not without international implications. Quite the contrary, Justice Stevens's answer to this domestic question, that habeas rights are based on the location of the custodian rather than the prisoner, may have a deeper international impact and may extend American law farther than any of the Court's other international decisions.

1. Justice Stevens's Majority Opinion

Rasul is a tale of two opinions—one in the body of the majority opinion and the other in the footnotes. On the surface, Justice Stevens's majority opinion granting habeas corpus rights to detainees at Guantanamo Bay is about statutory construction and untangling conflicting precedents. Justice Stevens dis-

201. *Id.* at 2690.

202. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004).

203. *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

204. As Justice Scalia points out in his blistering dissent, the administration specifically chose to house these detainees at Guantanamo Bay because it believed that it would be shielded from judicial review. *See Rasul*, 124 S. Ct. at 2706 (Scalia, J. dissenting) ("Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.").

205. *Id.* ("These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.").

misses *Johnson v. Eisentrager*,²⁰⁶ the 1950 Supreme Court decision holding that the Court did not have jurisdiction over German POWs held at Landsberg prison in American-occupied Germany, finding that it was based on a prior decision, *Ahrens v. Clark*,²⁰⁷ which has since been rejected.²⁰⁸ Justice Stevens explains that another, later decision, *Braden v. 30th Judicial Circuit Court of Kentucky*²⁰⁹ rejected the *Ahrens* court's position that the habeas statute granted jurisdiction based on the location of the petitioning prisoner.²¹⁰ Instead, explains Justice Stevens, *Braden* set a rule that the location of the custodian, not the prisoner, establishes habeas jurisdiction.²¹¹ *Eisentrager*, based on *Ahrens*, thus no longer controls. Accordingly, the Guantanamo detainees, whose custodian is in Washington, D.C., have habeas rights.²¹²

The potential implications of Justice Stevens's opinion are hard to overstate. Following Justice Stevens's winding stroll through precedent, one quickly finds herself on an adventurous journey in far-off lands. Under *Rasul*'s interpretation of the habeas statute, any prisoner held by American authorities anywhere in the world can petition U.S. courts for a hearing. Foreign prisoners held in Iraq, Afghanistan, and elsewhere may have the right to be heard in U.S. courts. The Abu Ghraib abuses, for example, which were first revealed as *Rasul* was being considered by the Court,²¹³ may now fall within U.S. courts' jurisdiction.

A different opinion entirely, however, lurks beneath the surface. Hidden within the footnotes is a deep discursion on the historical scope of habeas corpus under the British Empire. As Justice Kennedy demonstrates in his concurrence, Justice Stevens could have reached the same conclusion—that the detainees have habeas rights—on the far narrower grounds that the specific status of Guantanamo Bay places it within American sovereign jurisdiction.²¹⁴ Although not the basis of his opinion,²¹⁵ Justice Stevens does suggest some sympathy for

206. 339 U.S. 763 (1950).

207. 335 U.S. 188 (1948). *Ahrens* involved "the application of the habeas statute to the petitions of 120 Germans who were then being detained at Ellis Island, New York, for deportation to Germany." *Rasul*, 124 S. Ct. at 2694.

208. See *Rasul*, 124 S. Ct. at 2695 ("Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.").

209. 410 U.S. 484 (1973).

210. See *Rasul*, 124 S. Ct. at 2695 ("*Braden* thus established that *Ahrens* can no longer be viewed as establishing 'an inflexible jurisdictional rule,' and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all.>").

211. *Braden*, 410 U.S. at 494-95 (holding that "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody").

212. *Rasul*, 124 S. Ct. at 2699 (holding that "the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing").

213. David G. Savage, *Prison Scandal Could Sway High Court*, L.A. TIMES, May 11, 2004, at A8 (detailing how the Abu Ghraib story broke just as arguments in the Court had concluded and only days before votes were being cast).

214. See *Rasul*, 124 S. Ct. at 2701 (Kennedy, J., concurring) (finding jurisdiction "[i]n light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees").

215. See *id.* at 2698 (majority opinion) (holding that the habeas statute only requires juris-

this view. In what seems like a strangely extraneous section of his opinion, Justice Stevens dismisses an argument that the habeas statute should be presumed not to have extraterritorial effect.²¹⁶ Justice Stevens explains that the Guantanamo detainees *are* “within ‘the territorial jurisdiction’ of the United States,”²¹⁷ and that “[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.”²¹⁸

The footnotes make this odd diversion²¹⁹ particularly intriguing. Supporting Justice Stevens’s one paragraph on the historical scope of the writ are seven paragraphs spread across four footnotes.²²⁰ Buried there, in those footnotes, is a history of British imperial habeas practice and a silent nod to the *amici* legal historians.²²¹ The cases cited tell the story of eighteenth-century captured French privateers,²²² “a ‘native of South Africa’ allegedly held in private custody,”²²³ a British citizen held in Northern Rhodesia,²²⁴ and Chinese nationals held in the British controlled territory at Tientsin.²²⁵ Do these footnotes explain Justice Ste-

diction over the custodian and that the federal courts thus have jurisdiction over detainees claims). *See also id.* at 2707 (Scalia, J., dissenting) (observing that Justice Stevens “flatly rejected such an approach”).

216. *Id.* at 2696 (majority opinion).

217. *Id.*

218. *Id.*

219. *See, e.g., id.* at 2707 (Scalia, J., dissenting) (“Part IV of the Court’s opinion, dealing with the status of Guantanamo Bay, is a puzzlement.”).

220. *See id.* at 2696-97, 2697 n.11-14.

221. Although Justice Stevens does not mention their brief, Brief of Amici Curiae Legal Historians listed herein in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343), his argument concerning the historical scope of the writ and his citations to British imperial cases is evidence of its influence. The Court was presented with numerous amici briefs from international lawyers (Brief of Amici Curiae International Law and Jurisdiction Professors in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); international law professors (Brief of Amici Curiae International Law Professors in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), international law skeptics (Brief of Amici Curiae Law Professors, Former Legal Advisers of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and other International Law Specialists in support of respondents, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), former prisoners of war (Brief of Amici Curiae Former American Prisoners of War in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), Commonwealth lawyers (Brief of Amici Curiae Commonwealth Lawyers Association in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), members of the British parliament (Brief of Amici Curiae 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), former federal judges (Brief of Amici Curiae Hon. Nathaniel R. Jones, Hon. Abner J. Mikva, Hon. William A. Norris, Hon. Stephen M. Orlofsky, Hon. H. Lee Sarokin, Hon. Harold R. Tyler, Jr., Conrad K. Harper, Deborah L. Rhode and Jerome J. Shestack in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), Fred Korematsu (Brief of Amicus Curiae Fred Korematsu, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343)), and others. The fact that Justice Stevens chose not to cite to any of them, and to refer silently only to the legal historians brief, must be of some consequence, and is further discussed in Part II.A, *infra*.

222. *Rasul v. Bush*, 124 S. Ct. 2686, 2697 n.12 (citing *King v. Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759)).

223. *Id.* (citing *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810)).

224. *Id.* at 2697 n.14 (citing *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.)).

225. *Id.* (In re *Ning Yi-Ching*, 56 T. L. R. 3 (Vacation Ct. 1939)).

vens's adoption of such an expansive interpretation of the habeas statute? The footnotes appear to create an implicit analogy between the British Empire and the United States' new role in the world. Is Justice Stevens calling on the United States to recognize the great responsibility that comes with its growing power? Or are these footnotes meant to narrow Justice Stevens's opinion, providing examples of when habeas rights should and should not attach? Either way, the picture painted by this part of the opinion is the same: Rights are being spread around the world, not by international law, but by American law following American troops.²²⁶ Whether the U.S. government likes it or not, American Constitutional rights are marching in lockstep with American forces.²²⁷

2. Justice Scalia's Dissent

This unintended expansion of constitutional rights is precisely what worries Justice Scalia. Justice Scalia vehemently disagrees with Justice Stevens's interpretation of the precedent.²²⁸ But he is most angered by Justice Stevens's apparent (to Scalia) disregard for the concerns of the U.S. government and military.²²⁹ "Departure from our rule of *stare decisis* in statutory cases is always extraordinary,"²³⁰ writes Justice Scalia. "It ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war."²³¹ The Bush administration had relied on the Court's opinion in *Eisen-*

226. Interestingly, this view seems to echo a number of revisionist-Imperial histories that have come out in the past few years and that highlight the benefits, both in terms of rights and economics, that Empires bring their subjects. See generally, NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (2003); NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* (2004).

227. There is considerable irony in this picture. The Neo-Conservatives who helped plan and sell the wars in Iraq and Afghanistan justified those wars as efforts to spread democracy and rights to peoples crushed beneath the weight of totalitarian governments. In the face of U.S. government protestations that these detainees have no special rights under either the Geneva Conventions or the U.S. Constitution, Justice Stevens seems to be saying that the Neo-Conservatives succeeded beyond their wildest dreams. The detainees, many of who are from less-than-free countries, now enjoy not American-like rights, but actual rights under the U.S. Constitution. Ironically, they owe these rights to the actions of the U.S. military.

228. Scalia writes,

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisenstrager*; today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, and why *Eisenstrager* was wrong.

Id. at 2706 (Scalia, J., dissenting). See also *id.* at 2703 (Scalia, J., dissenting) ("*Eisenstrager*'s directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today.>").

229. Justice Scalia seems to go as far as saying that the Court should defer to the Bush administration's opinion that Guantanamo is not sovereign territory. See *id.* at 2708 ("[T]he Executive Branch—whose head is 'exclusively responsible' for the 'conduct of diplomatic and foreign affairs,' *Eisenstrager*, supra, at 789—affirms that the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States, see Brief for Respondents 21.>").

230. *Id.* at 2710.

231. *Id.*

trager with regard to habeas rights of detainees: “The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs.”²³² In Justice Scalia’s opinion, “For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders’ reliance upon clearly stated prior law, is judicial adventurism of the worst sort.”²³³

For Justice Scalia, the implications of the majority’s opinion go far beyond the particular case at bar: “The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense.”²³⁴ Justice Scalia foresees dire consequences for the American military:

Over the course of the last century, the United States has held millions of alien prisoners abroad. A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. . . . From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive’s conduct of a foreign war.²³⁵

Eisentrager, the decision brushed away by the majority, detailed these concerns. Nonetheless, thunders Justice Scalia, “[t]oday’s carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager*.”²³⁶ As the Court in *Eisentrager* explained and Justice Scalia recounts:

To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion highly comforting to enemies of the United States.²³⁷

These are overwhelming concerns for Justice Scalia, and in the absence of

232. *Id.* at 2710-11.

233. *Id.* at 2711.

234. *Id.* at 2706.

235. *Id.* at 2706-07.

236. *Id.* at 2707.

237. *Id.* (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 778-79 (1950)).

clear precedent or a clear statement by Congress to the contrary, they must control. Granting some detainees habeas rights under certain conditions, as suggested by Justice Kennedy's concurrence, is thus equally unacceptable. Although Justice Kennedy upholds the validity of *Eisentrager*, that decision does not, in his view, preclude jurisdiction over any habeas petition by a foreign detainee. Rather, jurisdiction depends on the particular circumstances, for example, the status of the location where detainees are being held, the length of the confinement, and whether any legal proceedings have been held.²³⁸ Justice Scalia ridicules this approach, writing that it "provides enticing law-school-exam imponderables in an area where certainty is called for."²³⁹

Nor does Justice Stevens's footnote-based digression go unnoticed.²⁴⁰ Although Justice Scalia is unsure of the purpose of Justice Stevens's discussion of British imperial habeas practice,²⁴¹ he is eager to rebut it.²⁴² Contrary to Justice Stevens's assertion, writes Justice Scalia, "[n]one of the authorities [the majority] cites come close to supporting the claim"²⁴³ that granting habeas jurisdiction over foreign detainees held abroad is "consistent with the historical reach of the writ."²⁴⁴ Responding to Justice Stevens's footnotes with a long rebuttal in the body of his dissent, Justice Scalia dissects each cited case and finds that none of the peculiarities they describe involve extension of the writ to non-British subjects outside British sovereign territory.²⁴⁵ "In sum," scolds Justice Scalia, "the Court's treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from precedent."²⁴⁶

III.

THE INTERNATIONAL LAW OF THE SUPREME COURT OR THE SUPREME COURT OF INTERNATIONAL LAW?

Can any clear voices on the role of international law be heard through this cacophony of opinions? Examining the four opinions together—*Sosa*, *Altmann*, *F. Hoffman-La Roche*, and *Rasul*—some clear themes do begin to emerge. Several of the Justices seem to be staking out their own positions on the meaning and role of international law. Particular voices, such as the U.S. government, foreign states, international law scholars, and NGO's, are consistently competing for the Court's ear(s), and general patterns can be seen in their success with

238. *Id.* at 2669-701 (Kennedy, J., concurring).

239. *Id.* at 2705 n.4 (Scalia, J., dissenting).

240. See discussion *infra* Part I.D.1.

241. See *Rasul*, 124 S. Ct. at 2707 ("Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. "); *Id.* at 2708 (referring that that section as an "irrelevant discussion").

242. Justice Scalia's extended discussion of this portion of the court's opinion seems to confirm its mysterious importance.

243. *Rasul*, 124 S. Ct. at 2708.

244. *Id.*

245. *Id.* at 2708-10.

246. *Id.* at 2710.

particular Justices and the Court as a whole. Still other patterns are discernible in the Court's approach to different types of cases: human rights versus business, cases involving foreigners versus cases involving U.S. citizens, cases involving acts occurring abroad versus cases involving acts occurring at home.

Out of all these smaller patterns, a larger picture becomes apparent. Seen together, the four cases seem to represent a general ad hoc compromise between the Justices (and between each one's competing impulses) on the future role of the Supreme Court in international cases. The net result of the 2003-2004 term seems to be a fragile and probably unsustainable balance between redressing international wrongs and protecting American independence, between engaging the world and hiding from it. The following section examines the patterns visible across the opinions in (1) the Justices' approach to international theory,²⁴⁷ (2) their responsiveness to the various advocates before them, and (3) their reactions to different types of cases and fact patterns. It also examines the Court's emerging compromise on international cases.

A. A Supreme Court Theory of International Law?

1. Theory: Man, State, and War

International law theory has generally been divided into three rough schools, Cosmopolitans, Positivists, and Hobbesians.²⁴⁸ Cosmopolitans argue that international law is based on universal human rights.²⁴⁹ These rights, which belong to individuals rather than states, are universal, and inalienable. Cosmopolitan international law thus stands as a body of rules outside of the state, constraining the state. State consent is irrelevant. Positivism, in contrast, focuses on states. For Positivists, international law is based on (1) the sovereign equality of all states in the international system and (2) state consent to individ-

247. In this context, I examine only the positions of those Justices, i.e., Justices Stevens, Breyer, Souter, Scalia, and Kennedy, who wrote opinions on the international aspects of the cases considered here. However, in discussing larger trends, I will discuss the directions in which a majority and a minority of the Court are headed.

248. There are, of course, other ways of understanding and categorizing international law, but these schools provide useful data points with which the Justices' views can be compared. For a discussion of the different schools of international law, see generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); Jianmeng Chen, *The Relativity and Historical Perspective of the Golden Age of International Law*, 6 INT'L LEGAL THEORY 15 (2000); see also Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 YALE J. INT'L L. 551 (2003).

249. This school of thought is often traced to the work of Immanuel Kant. See, e.g., IMMANUEL KANT, *IDEA FOR A UNIVERSAL HISTORY* (1784), reprinted in KANT'S POLITICAL WRITINGS 50 (Hans Reiss ed., 2d ed. 1990); IMMANUEL KANT, *PERPETUAL PEACE* (1795), reprinted in KANT'S POLITICAL WRITINGS, *supra*. This position is also sometimes identified as a "Naturalist" or "Liberal" position. See, e.g., Chen, *supra* note 246 *passim* (discussing "Naturalists"). Among those international legal theorists associated with "liberal" international are Anne-Marie Slaughter and Thomas Franck. See Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y INT'L L. PROC. 240, 249 (2000); Thomas M. Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988).

ual international laws, either through treaties or custom.²⁵⁰ Positivist international law can thus be seen as a series of explicit and implicit contracts between states. International law exists for the benefit of those states that have agreed to it, but once they agree, those laws become binding and enforceable. Hobbesians take a far more cynical view of international law. Like Positivists, Hobbesians focus on states. Unlike Positivists, however, they believe that international law is either irrelevant or a myth. States will make agreements and will abide by international law only when it suits their purposes. When international law stands in the way of a state's goals, however, a Hobbesian state will simply ignore it.²⁵¹

International theorists and actors do not necessarily belong solidly to one school or another. Rather, these three schools can be seen as points along a spectrum with Cosmopolitans at one end, Hobbesians at the other, and Positivists in the middle.

a. Justice Scalia: State of War

Of the Justices, Justice Scalia takes the most skeptical, Hobbesian view. Justice Scalia does not at any point disavow international law, and it would be an overstatement to say that he considers it a myth. It is clear from his opinions in these cases, however, that he rarely finds international law appropriate or relevant.

In *Sosa*, he lambasted the majority for opening the federal courts to suits by foreigners for violations of international law.²⁵² His criticism took two forms. First, modern international human rights law is a fantasy.²⁵³ Second, international law is not federal common law after *Erie*, and federal courts have no authority to apply it.²⁵⁴ When they do, they "usurp" the power of the American people and their democratically elected representatives.²⁵⁵ Justice Scalia makes

250. See, e.g., LASSA OPPENHEIM, 1 INTERNATIONAL LAW 4 (2d ed. 1912) ("[T]he law of Nations is a law for the intercourse of States with one another, not a law for individuals. As, however, there cannot be a sovereign authority above the several sovereign States, the Law of Nations is a law between, not above, the several States, and is, therefore, since Bentham, called 'International Law.'"); *Id.* at 20 ("Since the Law of Nations is based on the common consent of States as sovereign communities, the member States of the Family of Nations are equal to each other as subjects of International Law.").

251. In international relations theory, this view is termed "Realism." For a classic account of Realism, see KENNETH WALTZ, MAN, THE STATE, AND WAR: A THEORETICAL ANALYSIS (1959).

252. See *supra* Part I.A.4; *Sosa v. Alvarez-Machain*, 124 S. Ct. 2686, 2776 (Scalia, J., dissenting) ("This Court seems incapable of admitting that some matters—*any* matters—are none of its business."); *Id.* at 2772 (referring to the majority's theory as "nonsense upon stilts").

253. *Sosa*, 124 S. Ct. at 2776 ("The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates.").

254. See *supra* Part I.A.4; *Sosa*, 124 S. Ct. at 2774 ("[T]he *Erie* Court extirpated that law with its famous declaration that '[t]here is no federal general common law.'").

255. See *supra* Part I.A.4; *Sosa*, 124 S. Ct. at 2776 ("For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.").

his view quite clear: whatever international law is, it is powerless to create rights and obligations binding on American citizens or in federal courts. Only Americans, through their democratically-elected institutions, can do that.²⁵⁶

In matters of national security and foreign policy, Justice Scalia seeks to protect Executive authority and flexibility. Thus in *Rasul*, Justice Scalia seems particularly exasperated at the majority's "monstrous" dismissal of Executive military concerns.²⁵⁷ This does not mean that he would grant the Executive a blank check; in *Altmann*, Justice Scalia rejected the State Department's reading of the FSIA in finding that Altmann could sue Austria to recover Nazi-stolen artwork,²⁵⁸ and in *Hamdi*, he rejected the Bush administration's attempt to hold American citizens beyond habeas review.²⁵⁹ But for Justice Scalia, the boundaries of Executive authority are defined by American law and the American Constitution.²⁶⁰ In *Rasul*, the Bush administration not only followed what Justice Scalia believes is clear Supreme Court precedent, it relied on it.²⁶¹ In Justice Scalia's view, the Court should have stood out of its way.²⁶²

Justice Scalia's skepticism about international law is visible even in his *Altmann* concurrence. The concurrence makes no mention of international law or international affairs; it is based solely on Supreme Court retroactivity precedent.²⁶³ But in a case involving claims against the Nazis and the government of Austria, the definition of the Foreign Sovereign Immunity Act, and possible expropriations in violation of international law, this absence is notable. Justice Scalia even goes so far as to say that Altmann's claims arise primarily out of California law.²⁶⁴ As far as Justice Scalia is concerned, international law is simply irrelevant to the case.

b. Justices Stevens and Kennedy: Between Order and Chaos

Justices Stevens and Kennedy are less skeptical of international law. Although reaching different conclusions, both appear to be straddling the Hobbesian-Positivist divide, torn between state-centered international law and state freedom of action. In *Altmann*, for example, Justice Stevens emphasizes foreign

256. See *supra* Part I.A.4; *Sosa*, 124 S. Ct. at 2776 ("We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect.").

257. See *supra* notes 232-233 and accompanying text.

258. See *supra* Part I.B.4.

259. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2660-74 (2004) (Scalia, J., dissenting).

260. See *supra* note 256 and accompanying text.

261. *Rasul*, 124 S. Ct. at 2701 ("This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied."); See also *supra* note 231 and accompanying text.

262. See *Rasul*, 124 S. Ct. at 2701 ("This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field.").

263. See *supra* Part I.B.4.

264. See *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2256 (2004) (Scalia, J., concurring) ("[R]espondent's substantive claims are based primarily on California law.").

sovereign immunity's origins in comity.²⁶⁵ On the one hand, foreign sovereign immunity is based in tradition and international law. On the other hand, it is discretionary—a courtesy one state grants to another.²⁶⁶ His discomfort with limits on state action is also evident in his repeated narrowing of the opinion's scope.²⁶⁷

Justice Kennedy's dissent is similarly Janus-faced. Justice Kennedy dissents because he believes Justice Stevens's majority opinion underestimates states' reliance interest in foreign sovereign immunity.²⁶⁸ Foreign sovereign immunity is part of the international landscape and cannot so easily be uprooted. Paradoxically, however, he writes that this standard must be upheld to protect the Executive's foreign policy authority. Foreign sovereign immunity is the backdrop against which the Executive negotiates its treaties,²⁶⁹ a point pushed hard by the U.S. State Department.²⁷⁰

This tension also emerges in Justice Stevens's *Rasul* opinion. The case brought by the Guantanamo detainees was a direct challenge to the Bush administration's interpretation of the Geneva Conventions, its decision that the detainees were not prisoners of war, and its assessment that the Conventions were outdated and quaint.²⁷¹ Moreover, the case played out against the backdrop of the Abu Ghraib scandal, and the concomitant public outcry both at home and abroad.²⁷²

Notably, however, Justice Stevens makes no mention of international law, the Geneva Conventions, or the range of international actors who submitted amicus briefs in *Rasul*.²⁷³ The Court's decision is based solely on domestic precedent. And yet, Justice Stevens's opinion does seem to respond silently to the concerns of the international community. The United States cannot hold foreign detainees without process.²⁷⁴ In fact, detainees have the right to challenge the conditions of their confinement wherever they may be held, anywhere

265. See *supra* notes 123-124 and accompanying text.

266. See *supra* notes 141-142 and accompanying text.

267. See *supra* notes 150-153 and accompanying text.

268. See *supra* notes 168-172 and accompanying text.

269. See *supra* note 173 and accompanying text.

270. See Brief for the United States as Amicus Curiae Supporting Petitioners at 13, *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004) (No. 03-13) ("The United States and other foreign nations entered into those agreements against the background assumption that foreign states could not be sued in United States courts. The retroactive application of the FSIA to pre-1952 conduct therefore would introduce significant new issues that the negotiators of those instruments could not have foreseen.").

271. See *supra* note 24 and accompanying text.

272. See *supra* note 213 and accompanying text.

273. See *supra* note 221 and accompanying text.

274. See *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004) ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'").

in the world.²⁷⁵ Justice Stevens seems to give the advocates of international law everything they might want, except the basis for his opinion.²⁷⁶ American law rather than international law protects the rights of the detainees.

This oddly dichotomous result seems to demonstrate Justice Stevens's deep discomfort with international law. Although he recognizes the power of the international law advocates' arguments, he is uncomfortable allowing American power to be constrained by an external body of law. In fact, the opinion almost looks like an attempt to blunt the argument for international law. Justice Stevens recognizes that the United States must use its power in the world responsibly and recognizes that in this instance, that power may have been misused. Nonetheless, international law is unnecessary; U.S. law and the Supreme Court are sufficient to reign in any excesses. The copious citations to British imperial habeas practice²⁷⁷ can be seen as examples of hegemonic responsibility that, in Justice Stevens's opinion, the United States must follow.

c. Justices Souter and Breyer: Order v. Rights

Justices Souter and Breyer have a higher regard for international law, but they too seem to be caught between two positions. The two justices seem torn between Positivism and Cosmopolitanism—an international law based on state sovereignty and an international law based on human rights. This tension is evident in their opinions.

Unlike *Rasul*, *F. Hoffman-LaRoche* did not seem to require any discussion of international law; the case only involved questions of statutory construction and the reach of U.S. statutes. Justice Breyer, however, used the opportunity to speak favorably of international law, in this case, rules of comity. In his view, rules of comity, “help[] the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today’s highly interdependent commercial world.”²⁷⁸ Beseched by other countries to stay out of the international antitrust arena and confident that other nations could resolve these issues fairly, Justice Breyer saw in the rules of international comity support for restraint.²⁷⁹ The *F. Hoffman-LaRoche* opinion is thus highly Positivistic. International law is valuable, but it is purely the tool of states. International law allows states to coordinate action. It creates a structure that protects the sovereignty of states and allows them to act freely within their own spheres.

Although focused on state sovereignty, Justice Breyer's view of international law is nonetheless robust. First, as Justice Breyer's *Altmann* concurrence

275. See *supra* Part I.D.1.

276. All of those rights are based in U.S. law, not international law. Nonetheless, international law is the white elephant sitting in the courtroom, and it is impossible to deny its influence on Justice Stevens's domestic precedent oriented opinion.

277. See *supra* notes 219-225 and accompanying text; *Rasul*, 124 S. Ct. 2697 n.11-14.

278. *F. Hoffman-LaRoche v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004) (applying a “rule of construction [that] reflects principles of customary international law”).

279. See *supra* Part I.C.

makes clear, international law is more than just the voluntary acts of states in their own self-interest. International law is a body of established rules that rise above the states that make them. In his concurrence, Justice Breyer, joined by Justice Souter, looks not just to American foreign sovereign immunity jurisprudence (the basis for Justice Stevens's majority opinion), but also to the actual practice of international law.²⁸⁰ His citation to *Ex-King Farouk of Egypt v. Christian Dior*,²⁸¹ a French sovereign immunity case involving the status of Egypt's former king, is particularly illustrative. The citation implies a view that international rules have substance above and beyond their application by U.S. courts.

Moreover, Justice Breyer is not necessarily opposed to human rights law. In *Sosa*, he accepts that at least some human rights laws are part of American law and that American courts have some role in enforcing them.²⁸² But once again, as in *F. Hoffman-LaRoche*, Justice Breyer returns to comity.²⁸³ Any interpretation of the ATS must be constrained by those concerns.²⁸⁴ Justice Breyer is not willing to sacrifice either American sovereignty or international law's benefits of state coordination in order to fulfill human rights norms.

Justice Souter seems similarly conflicted. His opinion in *Sosa* is itself a dialectic on the role of human rights and the powers of states. Justice Souter is sympathetic to human rights claims, as well as granting the U.S. judiciary a role in their enforcement. But the facts of this case, in which U.S. actions were challenged, make him wary. The possibility that human rights claims could constrain American action and that Americans could be punished for their violation is very real. Similarly, he is clearly concerned about the cases pointed out in the amicus briefs, cases in which human rights litigation may not be in the best interests of international justice.²⁸⁵ The opinion thus vacillates between endorsing international law and rejecting it. Customary international law is American law,²⁸⁶ but the Senate can declare treaties non-self-executing.²⁸⁷ Courts can recognize causes of action gleaned from international law, but only the strongest

280. See *supra* notes 160-162 and accompanying text.

281. 84 *Clunet* 717, 24 *I. L. R.* 228, 229 (CA Paris 1957). See *Republic of Austria v. Altmann*, 124 *S. Ct.* 2240, 2259 (2004).

282. See *Rasul*, 124 *S. Ct.* at 2782 (Breyer, J., concurring) ("The Court says that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy I believe all of these conditions are important.").

283. See *supra* notes 110-114 and accompanying text.

284. See *Rasul*, 124 *S. Ct.* at 2782 ("Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote.").

285. See *supra* notes 91-95 and accompanying text; see also *Sosa v. Alvarez-Machain*, 124 *S. Ct.* 2739, 2766 n.21.

286. See *Sosa*, 124 *S. Ct.* at 2764-65 ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.").

287. See *id.* at 2767 ("And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts.").

international norms,²⁸⁸ none of which are listed in the opinion, qualify. Most of all, Justice Souter provides a safety-valve: courts should consider the opinion of the United States and foreign governments in determining whether to exercise jurisdiction over ATS claims.²⁸⁹

d. We Are All Positivists Now

As seen above, the various Justices hint at a wide variety of views on the nature of international law. Across different opinions, Justices hint at views informed by a Hobbesian focus on state autonomy,²⁹⁰ a Positivist focus on state consent and coordination,²⁹¹ and a Cosmopolitan focus on universally recognized human rights.²⁹² Remarkably, however, none of the Supreme Court Justices are willing to take a full-blown Cosmopolitan approach to international law. Citation to the briefs of human rights advocates, so noticeable in the previous terms, are notable for their absence in these opinions. One possible explanation for this omission seems to lie in the very different stakes involved in this term's decisions, an issue that will be explored in the following two sections. Another seems to lie in Justice Breyer's consistent invocation of comity, a clue to the Court's jurisprudence that will be explored in greater depth in the last part of this Section.

2. Sources: So Many Suitors

With such momentous questions of international politics before it, it was no surprise that the Court was mobbed by voices hoping to be heard. Various parties with particular interests made their case to the Court with varying levels of success. Three main groups of parties consistently sought the Court's ear: (1) the U.S. government, (2) international law and human rights advocates, and (3) foreign governments and foreign interests groups. One additional party, the legal historians, also had a notable and unusual impact on the Court's decision in *Rasul*. The relative influence each of these parties exerted over the Court's holdings provides illuminating insight into how the Court has framed the issues in the four cases considered here.

288. *See id.* at 2765 ("Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.")

289. *See id.* at 2766 n.21 ("Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches.")

290. *See supra* notes 252-264 and accompanying text (describing Justice Scalia's hints at Hobbesianism).

291. *See supra* notes 265-277 and accompanying text (describing Justices Stevens's and Kennedy's vacillation between Hobbesian and Positivist views on international law).

292. *See supra* notes 278-288 and accompanying text (describing Justices Breyer's and Souter's apparent struggles with Positivism and Cosmopolitanism).

a. The United States Government

The United States government submitted a brief in all four of these cases, either as a party—in *Sosa*²⁹³ and *Rasul*—or as an amicus—in *Altmann* and *F. Hoffman-LaRoche*. What is most notable about the participation of the U.S. government in these debates, however, is how rarely it convinced the Court to adopt its position. Commentators have noted “the Solicitor General’s ‘unmatched’ presence as the most frequent and successful litigant before the Supreme Court.”²⁹⁴ Nonetheless, a majority of the Court rejected the government’s arguments in *Rasul* and *Altmann*, and gave the government at best a Pyrrhic victory in *Sosa*.

The Court’s apparent lack of sympathy for the government’s arguments seems largely a result of the extreme positions taken by the government. In each case, the government took the most skeptical view of international law, its force in and over the United States, and the role of law and courts in foreign affairs. Thus the government argued that both the protections of the Geneva Conventions and American habeas corpus did not apply to the Guantanamo detainees,²⁹⁵ that individuals had no recourse against regimes that violated international law,²⁹⁶ and that the Court must avoid interfering with Executive authority, whether on the status of Guantanamo detainees,²⁹⁷ the resolution of international antitrust issues,²⁹⁸ or diplomatic efforts to redress wrongs.²⁹⁹ In *Sosa*, moreover, the government advanced each of a series of arguments advanced by international law skeptics. The government argued that the ATS is merely jurisdictional,³⁰⁰ that international law is no longer general common law

293. In *Sosa*, the government actually appeared as both a party and as amicus supporting *Sosa*. See generally Brief for United States as Respondent supporting Petitioner, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339) (hereinafter “U.S. *Sosa* Brief”); Brief for the Petitioner, *United States v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (03-485).

294. Book Note: *Probing the Role of the Solicitor General*, 106 HARV. L. REV. 504, 505 (1992) (reviewing REBECCA M. SALOKAR, *THE POLITICS OF LAW* (1992)). See also Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 CALIF. L. REV. 255, 323 (1994) (“The Solicitor General wins roughly three fourths of his cases because of his care in selecting cases, his experience in presenting them, and his reputation before the Supreme Court.”); John A. Jenkins, *The Solicitor General’s Winning Ways*, 69 A.B.A. J. 734, 734 (1983) (“The solicitor general has the winningest little law firm in Washington, D.C. They win two out of three cases they argue before the Supreme Court.”).

295. Brief for the Respondents at 18, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-34) (“The President, in his capacity as Commander in Chief, has conclusively determined that the Guantanamo detainees -both al Qaeda and Taliban-are not entitled to prisoner-of-war status under the Geneva Conventions.”).

296. See generally Brief of United States as Amicus Curiae Supporting Petitioners, *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004) (03-13).

297. Brief for the Respondents at 18, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (No. 03-34).

298. Brief of the United States as Amicus Curiae Supporting Petitioners at 20-25, *F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359 (2004) (03-724).

299. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n. 21 (2004); see generally Brief of United States as Amicus Curiae Supporting Petitioners, *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004) (03-13).

300. U.S. *Sosa* Brief at 13-14 (“Section 1350 is, as its plain and simple terms suggest, a jurisdictional provision—nothing more and nothing less.”).

after *Erie v. Tompkins*,³⁰¹ that Senate declarations of non-self-execution trump treaty language,³⁰² and that judicial recognition of international claims impermissibly interferes with the powers of the political branches.³⁰³ All of these positions are highly controversial.³⁰⁴ By taking these cases, the Court had signaled its intent to tackle these issues, its desire to be a part of the burgeoning world of international law, and its desire to play a role in the world. The Court had essentially rejected the government's positions when it chose to hear these cases.

Although the Court refused to adopt the government's extreme positions, the government's arguments were not completely without influence. At the very least, the government succeeded in making the Justices very uneasy about their decisions; wherever the Justices added a caveat or urged restraint, the government's influence can be seen. Thus although the majority was not willing to deny Altmann the right to sue Austria, the government's concerns about constraining American diplomacy struck a chord with dissenters.³⁰⁵ So too did the need for freedom in military affairs ring true with Justice Scalia in *Rasul*.³⁰⁶ In *Sosa* and *F. Hoffman-LaRoche*, the government counseled restraint so that other countries could take responsibility for their own affairs and so that diplomatic avenues could be explored.³⁰⁷ These arguments clearly had an impact on Justice Souter's uncertain *Sosa* opinion³⁰⁸ and Justice Breyer's comity-filled opinions in *F. Hoffman-LaRoche*³⁰⁹ and *Sosa*.³¹⁰

Justice Souter's *Sosa* opinion best demonstrates the subtle impact of the government's extreme arguments. Rejecting the government's arguments, a ma-

301. *Id.* at 29 ("Nor, especially given this Court's decisions on the role of federal courts since *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), and the text of Article I, § 8, Clause 10 of the Constitution, is there any basis for interpreting Section 1350 as authorizing courts to fashion a federal common law of the law of nations akin to admiralty.").

302. *Id.* at 26 (observing the Ninth Circuit looked to various sources "in spite of the countervailing expressions of the political branches in specifically declining to ratify or refusing to make self-executing various sources of international law").

303. *Id.* at 31-40 (detailing how recognition of "private rights of action based on customary international law norms directly contravenes settled separation-of-powers principles"). See also Linda Greenhouse, *Reviewing Foreigners' Use of Federal Courts*, N.Y. TIMES, Dec. 2, 2003, at A1 (quoting the Solicitor General telling the Court that "broad interpretation of the ATS" was "fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches").

304. Associated with a well-known coterie of international law skeptics, these positions have sparked considerable debate among international law experts. See *supra* note 65, 78; see also Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169 (2004) (describing the new group of skeptics and their opponents).

305. See *supra* notes 176-178 and accompanying text.

306. See *supra* notes 236-239 and accompanying text.

307. See U.S. *Sosa* Brief at 37-38; *F. Hoffman-LaRoche v. Empagran S.A.*, 124 S. Ct. 2359, 2368 (2004) (citing Brief for the United States).

308. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.21 (2004) (recognizing a "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").

309. See *F. Hoffman-LaRoche*, 124 S. Ct. 2363-73.

310. See *Sosa*, 124 S. Ct. at 2782-83 (Breyer, J., concurring).

jority of Justices agreed that federal courts should remain open to at least some human rights³¹¹ cases. Nonetheless, the particular case before them, involving a claim against the United States itself for a violation of international law, seems to have given them pause. Moreover, the claim before them seemed weak; Alvarez-Machain alleged a violation of international law based on one night of unlawful detention.³¹² The facts of the case thus made the Justices painfully aware of the dangers of an overbroad decision. Although the ATS could prove a powerful tool for bringing justice to the rest of the world, it could also plant the seeds for dangerous and potentially harassing suits against the United States. As a result, the opinion brims with anxiety.³¹³ Even as Justice Souter magnanimously opens the door of the federal judiciary to international human rights claims, he leaves numerous caveats to guard that door against undesirables.³¹⁴

Nonetheless, despite these influences, the outcome in these cases must be seen as an enormous defeat for the U.S. government. In only one case, *F. Hoffman-LaRoche*, did the majority of the Court adopt the position of the U.S. government, and arguably that was the case that concerned the government least. The Supreme Court is embarking in its own direction on international law, and the U.S. government is being left behind.

b. Foreign Governments

Ironically, foreign governments fared far better in the U.S. Supreme Court than did the U.S. government. Foreign governments or representatives of foreign governments filed briefs in each of the four cases considered here. In *Sosa*, the Court received amicus briefs from Australia and the European Union.³¹⁵ In *Altmann*, the court received a brief from Austria as petitioner and amicus briefs from Japan and Mexico.³¹⁶ In *F. Hoffman-LaRoche*, the court heard from Canada, Germany, Belgium, Japan, the United Kingdom, Ireland, the Netherlands, European Banks, and the International Chamber of Commerce.³¹⁷ Finally, in

311. *Sosa*, 124 S. Ct. at 2765-66. The ATS does not specifically refer to human rights cases as opposed to any other causes of action arising out of international law, but both recent application of the ATS and the Court's discussion of the sorts of claims covered focus on those types of claims.

312. See *supra* notes 82-84 and accompanying text.

313. See *supra* notes 89-96 and accompanying text.

314. See *id.*

315. Brief of Amicus Curiae European Commission in Support of Neither Party, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amici curiae Governments of Commonwealth of Australia, et al., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485). Australia notably also put forward the views of the South African government. See *Sosa*, 124 S. Ct. at 2766 n.21.

316. Brief of Amicus Curiae United Mexican States, Republic of Austria v. *Altmann*, 124 S. Ct. 2240 (2004) (03-13); Brief of Amicus Curiae Japan, Republic of Austria v. *Altmann*, 124 S. Ct. 2240 (2004) (03-13).

317. Brief for Amicus Curiae Government of Canada, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae Governments of the Federal Republic of Germany and Belgium, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amicus Curiae Government of Japan, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amici Curiae United Kingdom of

Rasul, the Court received an amicus brief from 175 members of the British Parliament.³¹⁸

These briefs met mixed results, and the Court's relative willingness to listen to these foreign supplicants in each of these cases provides important clues to the Court's burgeoning international philosophy. The outcomes of the four cases reveal a Court struggling to find a balance between its urge to redress wrongs and its conflicting urge to respect foreign sovereignty (and in turn protect that of the United States).

Foreign governments were most successful in *F. Hoffman-LaRoche*. In that case, the foreign governments argued that their laws were sufficient to handle foreign antitrust activity and that the intervention of U.S. courts was unnecessary.³¹⁹ The Court agreed. The Justices found no reason to doubt either these countries' ability or willingness to tackle these issues effectively, and in turn, saw no reason to get involved.³²⁰

Foreign governments were considerably less successful in *Altmann*. Although the dissenters were concerned about foreign states' reliance on foreign sovereign immunity,³²¹ the majority expressed no such sympathy.³²² Austria was being sued for its alleged involvement in Nazi-era confiscations. The majority found the argument that states rely on foreign sovereign immunity, in this case to commit war crimes and other heinous acts, ridiculous.³²³ Moreover, the majority rejected Austria's argument that it should be allowed to solve these problems itself. To a majority of the Court, it appeared that Austria had done a woefully bad job of doing just that. It denied Altmann justice in 1948 and continued to deny her justice now.³²⁴ Unlike the situation in *F. Hoffman-LaRoche*, the Court had no confidence that countries could redress these sorts of wrongs themselves. To the contrary, foreign states were themselves implicated in these

Great Britain and Northern Ireland, Ireland, and the Kingdom of the Netherlands, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724); Brief for Amicus Curiae the International Chamber of Commerce in Support of Petitioners, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004) (No. 03-724).

318. Brief of Amici Curiae 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343).

319. See *F. Hoffman-LaRoche*, 124 S. Ct. at 2368 (citing briefs of foreign governments).

320. See *id.* at 2367 (observing that "application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs[,] [b]ut, unlike the former case, the justification for that interference seems insubstantial.").

321. See *supra* notes 170-171 and accompanying text.

322. See *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2251 (2004) ("[T]he principal purpose of foreign sovereign immunity has never been to permit foreign states and their instrumentalities to shape their conduct in reliance on the promise of future immunity from suit in United States courts."); *id.* at 2260 (Breyer, J., concurring) ("What taking in violation of international norms is likely to have been influenced, not by politics or revolution, but by knowledge of, or speculation about, the likely future shape of America's law of foreign sovereign immunity?").

323. See *id.* at 2260 (Breyer, J., concurring) ("To suggest any such possibility, in respect to the expropriations carried out by the Nazi or Communist regimes, or any other such as I am aware, would approach the realm of fantasy.").

324. See *id.* at 2245 (repeating Altmann's allegation that the proceeding in Austria had been a "sham").

wrongs.

Sosa and *Rasul* seem to be balanced uneasily between these two opinions. In *Sosa*, the Court did not adopt the view that foreign human rights claims were nonjusticiable,³²⁵ but it did recognize limits on ATS litigation designed to recognize the concerns of foreign countries. Thus Justice Breyer mentioned the European Commission's point about the limits of universal jurisdiction,³²⁶ and Justice Souter recognized the value of allowing states serious about redressing these wrongs to find their own solutions.³²⁷ Similarly, in *Rasul*, the Court did not adopt all the arguments of 175 members of the British Parliament, but both their call for a remedy and their comparison of American and British jurisprudence seemed to strike a chord.³²⁸

c. International Law and Human Rights Advocates

International law professors, human rights activists, and international NGOs submitted amicus briefs in droves.³²⁹ Despite the brooding presence of international law in these cases, however, none of their briefs were cited by the Court and the international sources they referred to—for example, the Geneva Conventions, the Convention on Civil and Political Rights—received scant mention.

In some sense, this term's opinions represented a setback for international law advocates. After successfully bringing international law and foreign precedent into the debate over homosexual rights and the death penalty,³³⁰ the ab-

325. See *supra* Part I.A.3.

326. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2783 (2004) (Breyer, J., concurring) (citing Brief for European Commission).

327. See *id.* at 2766 n.20 (citing the European Commission's suggestion of an exhaustion requirement); *Id.* at 21 (recognizing the interest of South Africa in avoiding U.S. court litigation).

328. See *Rasul v. Bush* 2686, 2690-99 (2004).

329. See, e.g., Brief of Amici Curiae International Law and Jurisdiction Professors in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); Brief of Amici Curiae International Law Professors in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); Brief of the International Commission of Jurists and the American Association for the International Commission of Jurists, Amici Curiae, Supporting Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); Brief of Human Rights Institute of the International Bar Association as Amicus Curiae in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343); Brief of Amici Curiae Lawyers Committee for Human Rights and Rutherford Institute, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amici Curiae Professors of International Law, Federal Jurisdiction, and the Foreign Relations Law of the United States, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amicus Curiae National and Foreign Legal Scholars, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amicus Curiae International Jurists, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amici Curiae Center for Justice and Accountability, et al., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485); Brief of Amici Curiae International Human Rights Organizations and Religious Organizations, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2776 (2004) (No. 03-485).

330. See *supra* notes 11-17 and accompanying text. See also *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005) ("Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.").

sence of citations to international law, especially in the case of the Guantanamo detainees, must seem like a defeat. Moreover, the Court placed considerable restrictions on the types of human rights cases that can be heard in federal court.³³¹

This, however, only tells part of the story. Although invisible, the presence of the international law advocates in the opinions can be felt. Justice Souter's opinion in *Sosa* may not endorse the full spectrum of human rights claims then being brought in federal court, but the opinion must nevertheless be seen as a considerable triumph. Since the *Filartiga* decision in 1980, human rights advocates have brought ATS cases under a shadow of uncertainty.³³² It was always possible that the Supreme Court could enter the fray and hold, as a particularly vocal cadre of international law skeptics advocated,³³³ that federal courts did not have the power to recognize claims for violations of international law and worse, that customary international law is not binding in U.S. courts. Justice Souter removes this cloud of uncertainty: The *Filartiga* court was correct,³³⁴ and courts can, in at least some cases, recognize causes of action based on customary international law.³³⁵ Moreover, by leaving the exact parameters of the decision ambiguous, Justice Souter allows human rights advocates to continue pushing the boundaries of the ATS. The *Sosa* opinion opens numerous doors, while closing very few. Similarly, although Justice Stevens carefully avoids international law in his *Rasul* opinion, he makes it clear that the United States will be held accountable for its treatment of wartime detainees.³³⁶ Arguably, the *Rasul* opinion adopts a constitutional rule of accountability stronger than any dictated by international law.³³⁷

The Court seems to have drawn a distinction between international law and the goals of the international law advocates. A majority of the Justices are clearly sympathetic with those goals. Thus, they recognize and accept the power

331. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765-66 (2004) (limiting the ATS to those claims involving the most serious, most recognized violations of international law); *Id.* at 2766 n.20 (leaving open how the ATS will apply to individuals and corporations); *Id.* (recognizing that an exhaustion requirement might be warranted); *Id.* at 2766 n.21 (suggesting that Executive Branch views should be granted special weight).

332. See, e.g., Dolly Filartiga, *American Courts, Global Justice*, N.Y. TIMES, Mar. 30, 2004 (“[T]his remarkable legacy is now in jeopardy. Reversing almost three decades of executive-branch policy, the Bush Administration is asking the Supreme Court to eviscerate the Alien Tort Claims Act [T]he court will hear its arguments for a new reading of the . . . statute that would make it virtually impossible for human rights victims to sue.”).

333. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (arguing that customary international law is common law and that its use by federal courts did not survive *Erie*); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 183 FORDHAM L. REV. 319 (1997) (same).

334. See *Sosa*, 124 S. Ct. at 2765-66 (speaking favorably of the *Filartiga* decision).

335. See *supra* Part I.A.3. See also Flaherty, *supra* note 304, at 173 (“In so doing, the *Sosa* majority guaranteed that the federal judiciary’s duty to engage with international legal standards in ATS suits would continue.”).

336. See *supra* Part I.D.1.

337. See *id.*

of U.S. courts to protect human rights in the world and they recognize the need for some constraints on Executive authority in the treatment of foreign prisoners. They are very wary, however, of adopting any rule that may make them or the United States beholden to laws beyond their control. The absence of international scholars and sources seems to reflect an attempt to remedy international wrongs without incurring the constraints of international law. It is this attempt to find a third-way that implicates the legal historians.

d. Legal Historians

Like the international law advocates, the legal historians³³⁸ are not mentioned in any decision. Nonetheless, their impact on the *Rasul* opinion is clear. As noted above,³³⁹ Justice Stevens includes a seemingly unnecessary section on the historical reach of the writ of habeas corpus with copious footnotes regarding British imperial habeas practice.³⁴⁰ The presence of these footnotes and the absence of footnotes referring to the Geneva Conventions or principals of international law are telling. Essentially, the legal historians seem to have provided Justice Stevens a safer, alternative ground for his holding than that offered by international law. By referencing the history of British imperial habeas practice, Justice Stevens is able to recognize the gravity of American actions for world affairs and the United States' responsibility to act lawfully in its conduct of war. The citations to British imperial practice, however, also give Justice Stevens a constitutional ground for the holding. The United States must take responsibility for its actions, but it will do so on its own terms.

3. Case Types: Us vs. Them

These two trends, in international legal philosophy and in the relative influence of various parties, feed into a third. The Court seems to have taken starkly different views based on the nature and stakes of the cases before it. Thus in *F. Hoffman-LaRoche*, a private business case directly involving neither the United States nor any foreign states, the Court was happy to turn to international law principles suggesting judicial restraint and respect for other states.³⁴¹ In *Altmann*, however, the Court was far less eager to defer to other states.³⁴² The stakes in that case were very different; the case involved claims of Nazi-era violations of international law. Moreover, the case was against another state itself. Finding no other way to guarantee that the wrongs implicated would be remedied, the Court took hold of international law as a sword and intervened.

338. See Brief of Amici Curiae Legal Historians listed herein in Support of Petitioners, *Rasul v. Bush*, 124 S. Ct. 2686 (2004) (Nos. 03-334 and 03-343).

339. See *supra* notes 216-228 and accompanying text.

340. See *Rasul v. Bush*, 124 S. Ct. 2686, 2697 n.11-14 (2004).

341. See *F. Hoffman-LaRoche v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).

342. See *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2243-56 (2004); *id.* at 2256-63 (Breyer, J., concurring).

Cases implicating the United States as a party provoked a far different reaction. In both *Sosa* and *Rasul*, the claims involved alleged violations of basic human rights, although the Court found the plight of the Guantanamo detainees considerably more sympathetic than that of Alvarez-Machain.³⁴³ In those cases, the Court struggled to find a balance between redressing human rights abuses and protecting American sovereignty. In *Sosa*, a case involving the United States only indirectly and involving a less than sympathetic plaintiff, the Court was satisfied by rejecting Alvarez-Machain's claim,³⁴⁴ listing a plethora of caveats,³⁴⁵ but nonetheless endorsing the availability of U.S. courts for more serious violations of international law.³⁴⁶ *Rasul*, a case directly implicating the United States, Executive authority, and areas of military affairs usually relegated to the Political Question doctrine, was more difficult. The Court was clearly sympathetic to the plight of the detainees,³⁴⁷ but was wary to invoke international law. As a result, the Court avoided international law and crafted a wide-ranging remedy based on U.S. law.

B. Overall Observations: Good Fences Make Good Neighbors

In the wake of the Court's previous rulings on the use of foreign sources and a series of notable speeches on international topics by several of the Justices,³⁴⁸ some observers have described the Court as "internationalist" or "multilateralist."³⁴⁹ A closer look at the 2003-04 term opinions, however, demonstrate that that description misses the mark and oversimplifies the Court's view of its role in the world. The Court of *Sosa*, *Altmann*, *F. Hoffman-LaRoche*, and *Rasul* looks cautious and conflicted; it cannot be described as confidently inter-

343. Compare *Rasul*, 124 S. Ct. at 2698 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"), with *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2768 ("Alvarez thus invokes a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.").

344. See *Sosa*, 124 S. Ct. at 2768.

345. See *id.* at 2766 n.20-21.

346. See *id.* at 2765-66.

347. See *Rasul*, 124 S. Ct. at 2698 n.15 ("Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in Executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'").

348. See *supra* note 10 and accompanying text.

349. See, e.g., Dorf, *supra* note 24, at A23 ("In recent years, a majority of the justices of the Supreme Court have articulated a multilateralist view of U.S. law that stands in marked contrast to the unilateralism of the Bush administration."); Flaherty, *supra* note 304, at 175, 176 (referring to "the Court's creeping internationalism," and calling recent cases a "breakthrough" in the "internationalization of the law").

nationalist. Viewed together, the Justices' stray thoughts on international law, their responsiveness to different advocates, and their approach to different types of cases reveal a Court (and the Justices themselves) torn between two ideals: (1) providing a remedy for international wrongs and (2) protecting American sovereignty.³⁵⁰

On the one hand, the Court seems to be attracted to the principle of comity and its concomitant respect for state sovereignty and foreign courts. This principle underlies Justice Breyer's *F. Hoffman-LaRoche* opinion³⁵¹ and *Sosa* concurrence,³⁵² and it can also be seen influencing the myriad political caveats littered throughout Justice Souter's majority opinion in *Sosa*.³⁵³ Most interesting, it also seems to inform Justice Stevens's *Rasul* opinion. Rather than granting comity to other states' decisions, that opinion seems to be tacitly requesting comity for the United States from the rest of the world. The opinion recognizes that American actions have been at odds with international norms, but seeks room to remedy those failures through American law.

This attraction to comity is not necessarily in conflict with the Court's apparent readiness to look to foreign sources in constitutional adjudication,³⁵⁴ and it is no surprise that Justice Breyer seems to be a prime advocate of both comity and foreign sources.³⁵⁵ Rather, the 2003-04 term opinions place the earlier use of foreign sources in *Atkins*³⁵⁶ and *Lawrence*,³⁵⁷ along with their more recent use in *Roper*,³⁵⁸ in a new light. The Court's references to foreign sources in those cases seemed to reflect the Justices' desire to be engaged in a discussion with the rest of the world on the meaning of justice and rights. Out of respect for the work of foreign courts and judges, the Court looked to foreign sources to help illuminate American law. The Court did not, however, adopt foreign or international law as a rule of decision in American courts.³⁵⁹ In that sense, those

350. See Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 196 (2004) ("Sovereignty becomes the bulwark of constitutional autonomy.").

351. See *supra* Part I.C.

352. See *supra* Part I.A.5.

353. See, e.g., *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 n.20 (considering the European Commission's suggestion that an exhaustion requirement might be warranted); *id.* at 2766 n.21 (suggesting that the views of foreign states should be taken into account).

354. See *supra* notes 11-17 and accompanying text.

355. See Steve Lash, *High Court Cites to Foreign Law* *Irk Scalia*, CHI. DAILY L. BULL., July 22, 2004, at 1 (quoting Justice Breyer); Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer, American University Washington College of Law, Jan. 13, 2005 (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>).

356. *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002); see *supra* notes 11-12 and accompanying text.

357. *Lawrence v. Texas*, 539 U.S. 558, 572-73, 574 (2003); see *supra* notes 13-15 and accompanying text.

358. *Roper v. Simmons*, 125 S. Ct. 1183 (2005); see *supra* notes 1-9 and accompanying text.

359. Recognizing the controversy over its use of foreign sources, the Court seems to have made this point explicit in its recent juvenile death penalty decision, *Roper v. Simmons*, No. 03-633, slip op. at 21 (U.S. Mar. 1, 2005). Although the Court did, to the chagrin of Justice Scalia and others, cite international sources banning the imposition of the death penalty on juveniles, see *id.* at 21-

cases dovetail well with an international philosophy based on comity. The Court wants to create a dialogue between cultures; it grants respect for foreign law and hopes foreign countries will grant it respect in turn. The Court does not seek to subordinate itself to some greater, binding international law.

Comity is not enough, however. The Court wants to redress international wrongs and to do so, must at times overrun foreign state interests. Neither *Altmann* nor *Sosa*, despite scattered language about respect, can be seen as opinions based on comity. In both cases, the Court opened U.S. courts to adjudication of foreign claims arising out of violations of international law, whether by providing jurisdiction to hear decades-old claims of Nazi-era expropriations or by recognizing causes of action for egregious human rights abuses. Those cases endorse the notion that sometimes other states get it wrong, and that the American judiciary can and will get it right.

The Court's opinions thus seem to reflect an ad hoc compromise between these two ideals. What seems to mediate between them, and determine the ultimate weight given to each, is the location of the alleged wrong. Essentially, the Court seems to have placed cases of international import along two distinct tracks. On the first track are cases that do not directly implicate U.S. interests.³⁶⁰ In those cases, the Court's initial preference is for comity. When the Justices believe that other states can effectively deal with questions before them, as in *F-Hoffman La Roche*, they prefer to leave it to those states to craft appropriate remedies. When, however, the Justices are less confident that other states can fulfill the ideals of international law and justice, as in *Altmann*, the Court asserts itself to fill the vacuum.

On the second track are those cases directly implicating the United States. In those cases, international law is avoided, but its goals are upheld through the broad interpretation of constitutional principles. Thus in *Sosa*, the Court accepts a view of the ATS that would allow foreigners to sue other foreigners in U.S. courts for at least some violations of international law.³⁶¹ The Court is careful, however, to dismiss the particular claimed violation of international law at issue in *Sosa*, a claim that at least implicates the United States.³⁶² Similarly, in *Rasul*, the Court responds to concerns of international community and grants the Guantanamo detainees certain procedural rights; it does so, however, as a matter of American rather than international law and without reference to international sources.³⁶³

25, it was unambiguous that those sources were not the basis of its opinion. See *id.* at 21 ("This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.").

360. Of course, all cases of international import implicate U.S. interests in some way, as evidenced by the U.S. government's appearance as amicus in *Altmann* and *F. Hoffman LaRoche*. The Court does nonetheless seem to draw a distinction between cases directly affecting the U.S. and cases merely of interest to the U.S. government.

361. See *supra* notes 85-87 and accompanying text.

362. See *supra* notes 311-314 and accompanying text.

363. See *supra* notes 271-277 and accompanying text.

The Supreme Court thus finds itself striking a familiar position. It has been oft observed that the United States advocates human rights for the world and state sovereignty for itself.³⁶⁴ Although the Court reaches different conclusions than those suggested by the government, the compromise position it has taken on use of international and foreign law seems to reflect this same phenomenon.³⁶⁵ The Court appears eager to be a part of the debate over the role of the United States in the world, the impact of globalization, and the meaning of international law. The Court seems interested in the insights foreign courts and law may provide. The Court is not, however, willing to sacrifice either its own authority or U.S. sovereignty to international law. Far from succumbing to foreign influence and opinion as the Court's critics seem to suggest, the Court remains fiercely independent.³⁶⁶ International and foreign law provide tools the Court can choose to use, not rules by which it is bound.

IV.

POSTSCRIPT: WITH GREAT POWER COMES GREAT RESPONSIBILITY

This ad hoc compromise is not an international legal philosophy.³⁶⁷ Nor can it suggest predictable results. Rather, in any future international case, the parties will have to guess at how the Court's interests in redressing wrongs and protecting American sovereignty will balance out.³⁶⁸ Lower federal courts, where the vast majority of future cases will be brought, have been given little direction and accordingly will be free to balance these principles in their own ways. In fact, the narrowness of the Court's various decisions virtually guarantees that this will be the case even with regard to the issues the Court dealt with

364. See, e.g., JULIE A. MERTUS, *BAIT AND SWITCH: HUMAN RIGHTS AND U.S. FOREIGN POLICY* (2004) ("Through its self-perception as the morally and ideologically superior state, the United States advocates human rights for the world and state sovereignty for itself.").

365. Cf. William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1 (quoting Professor Jack Goldsmith remarking, "The United States loves to export our values, . . . but not if it gives other countries the power to review what we do").

366. This independence extends to its relationship with Congress and demonstrates why at least some Justices continue to cite foreign and international law, e.g., *Roper*, regardless of the reaction such citations seem to elicit.

367. As shown above, see *supra* Part II.A.1, this compromise is not the result of the Court speaking in one clear voice. It is instead the product of competing visions held by different Justices and sometimes by individual Justices themselves. This fact makes the compromise all the more unstable as neither the Justices nor the logic behind it can be counted on to come out the same way in the future. The recently announced retirement of two Justices only adds to that uncertainty.

368. It is easy to imagine cases, where the proper balance between these ideals will be difficult to ascertain. Two recent cases involving suits against Iraq demonstrate potential problems. In *Acree v. Snow*, 276 F. Supp. 2d 31 (D.D.C. 2003), *aff'd*, 2003 U.S. App. LEXIS 27789 (D.C. Cir. Oct. 7, 2003), the court was forced to decide a dispute between a group of former American POWs who had won a judgment against Iraq for their torture during the First Gulf War and the United States government, which sought to use Iraq's frozen assets for its war effort. A similar case arose in the Second Circuit, *Smith v. FRB*, 346 F.3d 264 (2d Cir. 2003), after plaintiffs won a judgment against Iraq in relation to the World Trade Center attacks. These case, involving claims by Americans of human rights abuses at the hand of a foreign state, opposed by the United States as a matter of executive authority, provide far more difficult facts than either *Altmann* or *Rasul*, cases that themselves split the Court.

this term.³⁶⁹

This uncertainty presents both challenges and opportunities. Both the U.S. government and the human rights community—the parties so often opposed in the term’s cases—must take responsibility for the future directions of Supreme Court international law jurisprudence and help shepherd the Court’s debate over international justice and national sovereignty.

First, the United States government must take a more constructive role in shaping the Court’s understanding of international law and judicial involvement in world affairs. In *Sosa*, *Altmann*, *F. Hoffman-LaRoche*, and *Rasul*, the U.S. government adopted a consistently obstructionist stance with regard to the Court’s involvement in world affairs. Its primary position in each case was that the Supreme Court had no role in resolving these disputes. This strategy was both unhelpful and apparently unappreciated,³⁷⁰ as the Court adopted the government’s position in only *F. Hoffman-LaRoche*. As Harold Hongju Koh, Dean of Yale Law School and one of the foremost proponents of international law, observed, “[t]elling U.S. courts not to evaluate international tort claims is like King Canute telling the tide not to come in.”³⁷¹ As a result, the government wielded little of its usual influence in these cases, and played less of a role in shaping their outcomes.³⁷²

As the U.S. government argued in each of these cases, both the government and society as a whole have an interest in predictable results.³⁷³ To the extent

369. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2766 (refusing to decide what norms of customary international law suffice); *Id.* n.20 (leaving open whether ATS can be applied to private parties and corporations); *Id.* (refusing to decide whether to include an exhaustion requirement); *Republic of Austria v. Altmann*, 124 S. Ct. 2240, 2254 (refusing to comment on impact of Act of State Doctrine); *F. Hoffman-LaRoche v. Empagran S.A.*, 124 S. Ct. 2359, 2372 (2004) (refusing to decide whether antitrust laws would apply where “the anticompetitive conduct’s domestic effects were linked to that foreign harm”); *Rasul v. Bush*, 124 S. Ct. 2686, 2690 (2004) (deciding only the “narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba”).

370. Notably, the strategy seems to have backfired completely in *Rasul*. Faced with the U.S. government’s opposition to the application of international law, Justice Stevens fashioned an American law remedy that throws the government’s entire regime for dealing with POWs, not just its Guantanamo policy, in doubt.

371. Jennifer Senior, *A Nation Unto Himself*, N.Y. TIMES MAGAZINE, March 14, 2004, at 36 (“I’m sorry, but the sun is coming up tomorrow, and it’s called globalization.”). See also Flaherty, *supra* note 304, at 173 (agreeing with Anne-Marie Slaughter that “‘judicial globalization’ marches on in almost the same inexorable fashion as its economic cousin”).

372. As noted above, the government was not wholly without influence. The government’s constant parade of horrors did convince the Court to narrow the scope of its decisions and introduce numerous caveats. As explained above, neither of these results brings certainty or predictability to these areas of law.

It would be wrong, moreover, to view this sort of influence as a victory for the U.S. government. In most of these cases, the Court rejected the actual positions taken by the government. The fact that some of the government’s arguments led the Court to independently adopt a more moderate position attests only the influence the government might have had had it adopted more constructive positions in the first place. The Court might have adopted compromises shaped by the government rather than ones of its own construction.

373. See, e.g., *Altmann*, 124 S. Ct. at 2275-76 (Kennedy, J., dissenting); *Rasul*, 124 S. Ct. at

that it wants to help the Court develop a predictable doctrine for international cases, the U.S. government must abandon its unshakeable opposition to the Court's involvement in these cases and develop its own theory of international justiciability. Rather than considering these cases on an individual basis, the U.S. government must begin to consider the overall direction of Supreme Court international jurisprudence and the place of each case within it. The government must make hard decisions about what it wants international law to look like and where it wants the Court's jurisprudence to be in ten or twenty years. It must engage the Court in a real discussion of international theory and provide the Court with reasonable ways to distinguish between those cases to get involved in and those cases to avoid. Only by accepting the basic realities of international law and "plaintiff's diplomacy,"³⁷⁴ will the government regain a role in shaping the resulting decisions and doctrines.³⁷⁵

The challenges and opportunities facing international law advocates are equally weighty. The Court's apparent unwillingness to apply international law in cases directly implicating the United States is a serious challenge for those seeking to expand the protections of international law and to enmesh the United States more deeply within it. But this challenge seems to be counterbalanced by the even greater opportunities the Court has provided to use the lower courts as laboratories of international law and by the Court's obvious concern for international justice. Despite caveats, the Court kept the door open to human rights litigation in *Sosa*, and expanded the expropriation exception to foreign sovereign immunity in *Altmann*. The Court also rejected the U.S. government's demand for total deference in its management of world affairs.

The real challenge for international law advocates is using these opportunities wisely and making responsible choices about how and when to bring international cases.³⁷⁶ The Court is clearly wary to open the lower courts to international claims, and its support for human rights cases seems shaky at best. International law advocates must thus choose ATS and human rights cases that help expand the scope of international law justiciable in U.S. courts without convincing the Court that such cases carry more dangers than benefits.³⁷⁷ In

2710-11 (Scalia, J., concurring). The government's argument for extreme judicial restraint in matters of world import would lead to predictable results, but it is clear that the Court is unwilling to take that position.

374. The term "plaintiff's diplomacy" is borrowed from Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, 79 FOREIGN AFF. 102 (September/October 2000).

375. One of the strongest criticisms of the Court's use of foreign sources in constitutional adjudication is that the Court's knowledge of international sources is derived solely from the amicus briefs of human rights advocates and is accordingly flawed. See Alford, *Misusing International Sources*, *supra* note 17, at 64-65 ("But, of course, for a Supreme Court justice uninitiated in the details of international and comparative law, the tools that will be 'at hand' will be the ones made available to him or her by international legal experts.") Remedying this flaw is as much a responsibility of the U.S. government as it is of the Court or human rights advocates. The U.S. government's consistent opposition to international law robs the Court of the ability to better understand its options and better craft solutions.

376. Undoubtedly, some international law advocates already think in precisely this way.

377. Cf. Spiro, *supra* note 350, at 215 (suggesting that Court will have to tread lightly to

Sosa, the Court seemed to take comfort in the lower courts' responsible management of ATS law. The majority based its decision to allow the continued use of customary international law in ATS litigation on the apparent success of the lower courts in managing this area of law.³⁷⁸ If international law advocates choose their cases wisely, they may, over time, be able to further familiarize the judiciary with international law and international norms. Lower courts, and in turn the Supreme Court, can become more comfortable with both, and the Court's concerns about threats to American sovereignty may begin to slip away.³⁷⁹

But international law advocates must also consider whether international law is the most appropriate vehicle for furthering international justice. Although the Court seems unwilling to subject the United States to the full force of customary international law, it is both sympathetic with values the international law advocates espouse and unafraid to check the Executive conduct of foreign affairs. The furtherance of international justice may thus be best achieved by appealing not to international law, but to the U.S. Constitution and American legal values.³⁸⁰ Comity and American law principles—rules of decision with which the Court is clearly most comfortable—may provide potent means for forwarding international law and justice. As American and International law are brought into closer alignment, many of the concerns expressed by both the Court and the American public may disappear.³⁸¹

The Court is struggling to find its place in the world. The U.S. government and the human rights community must help it find its way.

avoid "provoking anti-internationalist elements in Congress").

378. See *supra* Part I.A.3.

379. The manner in which such familiarization can happen is too complicated to develop here. For more on how domestic developments can help entrench international norms, see generally Koh, *supra* note 248 (discussing norm internalization); Spiro, *supra* note 350 (suggesting a strategy aimed at bringing particular sub-state actors, e.g., the judiciary, into compliance with international law norms). For a deeper discussion on how legal developments can transform concepts of law and justice, see Cohen, *supra* note 248, at 573-78.

380. Appealing to parochial state interests, values, and concerns may be the best and only way to create a foundation for a truly universal international law. See Cohen, *supra* note 248, at 573-78.

381. See generally Koh, *supra* note 248.