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ALIEN TORT CLAIMS AND THE STATUS OF CUSTOMARY INTERNATIONAL LAW

*By Carlos M. Vázquez**

Much of the recent debate about the status of customary international law in the U.S. legal system has revolved around the alien tort provision of the Judiciary Act of 1789,¹ currently section 1350 of Title 28.² In *Filártiga v. Peña-Irala*, the decision that launched modern human rights litigation in the United States, the Court of Appeals for the Second Circuit relied on the view that customary international law has the status of federal common law in upholding section 1350's grant of federal jurisdiction over a suit between aliens.³ The court's position that customary international law was federal law was the prevailing view at the time—a view that has subsequently been dubbed the “modern position.”⁴ It was the view set forth in the black letter of the *Restatement (Third) of Foreign Relations Law*.⁵ *Filártiga* triggered a revisionist challenge to the modern position, with revisionists arguing that customary international law has the status of federal law only if given that status through statute or treaty, or perhaps through sole executive action;⁶ in the absence of such incorporation, customary international law has, at best, the status of State law in our legal system.⁷

Much of the ensuing scholarly debate about the status of customary international law has focused on human rights litigation under section 1350. The debate continues in the currently pending *Kiobel v. Royal Dutch Petroleum Co.*, which, like *Filártiga*, concerns the applicability of section 1350 to litigation between two aliens based on human rights violations that occurred abroad.⁸

The focus on section 1350—by critics and defenders of the modern position alike—has unfortunately diverted attention from the key concerns driving the modern position. The core tenets of the modern position are that customary international law is binding on the States, that federal interpretations of such law are binding on State courts, and that State court decisions regarding such law are reviewable in the federal courts.⁹ The modern position is based on an important structural insight well articulated by Hamilton in *The Federalist*: “[T]he peace of

* Of the Board of Editors.

¹ 1 Stat. 73, 77.

² 28 U.S.C. §1350 (2012).

³ *Filártiga v. Peña-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980).

⁴ 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).

⁵ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111 (1987) [hereinafter RESTATEMENT (THIRD)] (“International law and international agreements of the United States are law of the United States and supreme over the law of the several States.”).

⁶ See Bradley & Goldsmith, *supra* note 4, at 863, 868, 870.

⁷ References herein to the States of the Union (such as California) will be capitalized; references to states in the international sense (such as the United States) will not be.

⁸ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S.Ct. 472 (Oct. 17, 2011) (No. 10-1491). A continually updating set of documents on the Supreme Court proceedings in *Kiobel* is available at <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum-et-al>.

⁹ On what the modern position does and does not entail, see generally Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1515–16, 1538–54 (2011).

the WHOLE ought not to be left at the disposal of a PART.”¹⁰ The costs of a violation of international law by a state are borne by the nation, yet the benefits are enjoyed by the state alone.¹¹ Though critics of the modern position have directed much of their fire at alien tort claims, these cases have never directly implicated the core of the argument for treating customary international law as federal law, and the fate of such claims does not depend on adopting or rejecting the modern position.

Until recently, scholars were sharply divided over the source of the cause of action in alien tort cases. For the reasons discussed in part I, however, a conclusion that customary international law is federal law is neither necessary nor sufficient to answer that question. It is not sufficient because customary international law does not entitle victims of violations of international law to a remedy against the individual who committed the violation. Thus, whether international law is federal or not, a damage action against an individual who has violated international law exists only if customary international law is supplemented by a domestic law entitling the victim to a remedy. The Supreme Court was thus right in *Sosa v. Alvarez-Machain*¹² in concluding that the cause of action in suits under section 1350 is supplied by our domestic law, not by customary international law itself. Nor is determining whether customary international law is federal law necessary to answer the cause-of-action question, as the domestic law providing the cause of action need not be federal law.

Whether customary international law is federal law might be thought important to resolving a second question that has divided scholars: whether alien-alien claims based on customary international law may constitutionally be brought in federal court. Because Article III’s diversity clauses do not authorize jurisdiction over suits between aliens, federal jurisdiction over such cases must be based on Article III’s grant of jurisdiction over cases “arising under” federal law. The conclusion that customary international law is federal law would be *sufficient* to uphold the constitutionality of section 1350’s grant of federal jurisdiction in such cases, as the Second Circuit held in *Filártiga*. But as discussed in part II, after the Supreme Court’s decision in *Sosa*, the Article III question can be easily resolved without concluding that customary international law is federal law. *Sosa* held that the cause of action in suits brought under section 1350 is supplied by federal common law.¹³ Suits asserting a federal common law cause of action clearly arise under federal law within the meaning of Article III, whether the underlying norm being remedied has the status of federal law or not.

After *Sosa* settled the cause-of-action issue and obviated the Article III question, customary international law has come to be invoked, including by some earlier critics of the modern position, as a basis for limiting the scope or availability of human rights suits under section 1350. In the run-up to the Supreme Court’s decision in *Samantar v. Yousuf*,¹⁴ prominent critics of the modern position relied on customary international law in arguing that defendants in such suits should be accorded foreign sovereign immunity.¹⁵ In *Kiobel*, some amici, including some represented by critics of the modern position, have relied on customary international law to

¹⁰ THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

¹¹ For elaboration of the structural case for the modern position, see Vázquez, *supra* note 9, at 1517–20.

¹² 542 U.S. 692 (2004).

¹³ *Id.* at 725–28.

¹⁴ 130 S.Ct. 2278 (2010).

¹⁵ See Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2d 9, 16 (2009).

argue that the cause of action recognized in *Sosa* should be unavailable for claims based on conduct that occurred abroad.¹⁶

Although the international law objections to such suits are overstated, the argument that the availability of such claims should be subject to limitations imposed by customary international law is compelling. This argument does not actually conflict with the revisionist view that customary international law does not preempt State law, as it merely seeks to ensure that *federal* power is not exercised in a manner that would contravene customary international law without adequate deliberation from the federal political branches. Critics of the modern position do not object to construing ambiguous federal statutes to avoid violations of customary international law. But, as discussed in part III, the reasons to avoid violations of customary international law by federal actors equally support the avoidance of violations of customary international law by State actors in the absence of authorization by the federal political branches. Acceptance of the revisionist position regarding the status of customary international law would leave the States free to instruct their courts to disregard international law or even to violate it whenever possible. Applying customary international law to limit the availability of State causes of action would be permissible under the modern, but not the revisionist, view.

I. THE MODERN POSITION AND THE CAUSE-OF-ACTION QUESTION

When the Court in *Sosa* recognized a cause of action for only some violations of customary international law, some revisionists claimed vindication.¹⁷ If the modern position were true and all of customary international law had the status of federal law, they reasoned, a cause of action would have existed for all violations of customary international law. This claim misconceives the role of customary international law in suits under section 1350. The violation of international law alleged in *Filártiga* was torture. Customary international law undoubtedly prohibits torture. It does not, however, afford an individual subjected to torture a damage remedy against the individual who tortured her. For the most part, international law recognizes the responsibility of *states*. In some circumstances (torture being an example) international law also recognizes the responsibility of individuals for violations of international law, but individual responsibility under customary international law is exclusively criminal.¹⁸ International law itself does not impose civil liability on individuals who commit torture or other violations of international law. Because customary international law by itself does not entitle the victim to a damage remedy from the perpetrator, establishing that customary international law is federal law (and thus, for example, preempts State law) does not answer the cause-of-action question. In any suit under section 1350 based on a violation of customary international law, the remedy must come from domestic law.¹⁹

¹⁶ Brief of Chevron Corp., et al. as Amici Curiae in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012) (Jack L. Goldsmith, Counsel of Record) [hereinafter Chevron Brief]; see also Brief of Amici Curiae BP America, et al. in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012) [hereinafter BP Brief].

¹⁷ See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 902–07 (2007).

¹⁸ I argue in part III that international law gives states the power to prescribe civil remedies as a matter of domestic law even for torture having no connection to the forum state. My point here is that international law *itself* imposes only criminal responsibility.

¹⁹ For the propositions in this paragraph, see Vázquez, *supra* note 9, at 1504–05.

For this reason, the Court in *Sosa* correctly characterized the legal basis of the cause of action in suits under section 1350 as domestic law. The Court's holding that the cause of action extends to only some violations of customary international law is entirely consistent with the view that customary international law more broadly has the status of federal common law. Just as some federal statutes establishing substantive norms do not provide a private cause of action for damages,²⁰ some norms of customary international law are not accompanied by a federal right of the victim to damages from the offender.

This insight helps to clarify the proper analysis of one of the key issues in *Kiobel*. The Supreme Court granted certiorari on the question whether corporations may be held liable in suits brought under section 1350. The U.S. Court of Appeals for the Second Circuit had given a negative answer to that question based on its conclusion that international law does not recognize corporate liability.²¹ As we have seen, however, international law does not even impose damage liability on *individuals* who commit human rights violations. *Sosa* establishes that the remedy in suits under section 1350 is supplied by federal common law, not international law. If the analysis presented here is correct, the Second Circuit answered the wrong question.

Some of the briefs supporting the defendant in *Kiobel* note that, unlike individuals, corporations are not subject to primary obligations under international law.²² This position is undoubtedly true in the sense that only the acts of individuals can give rise to violations of international law. Abstract entities, such as corporations (or states, for that matter) cannot act except through individuals. But it does not follow that only individuals may be liable for violations of international law as a matter of federal common law. It appears to be common ground among the parties in *Kiobel* that individual corporate officials who perform acts that violate international law may be subjected to damage liability, at least if the violated norm is one that applies to nonstate actors.²³ The defendant in *Kiobel* contends that the corporation for whom such officials act cannot be held liable unless international law can be said to operate on the corporation itself.²⁴ But even if the norms of international law that apply to individuals do not apply to corporations as such, nothing prevents the courts from recognizing, as a matter of federal common law, that violations of international law committed by individual corporate employees render the corporation itself liable in damages to the injured party. *Sosa* holds that the remedy is a matter of federal common law. Attributing liability to the offender's employer is properly viewed as a remedial matter and thus as a matter to be worked out by the courts as a matter of federal common law.²⁵

²⁰ See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001).

²¹ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 148–49 (2d Cir. 2010).

²² Brief of Amicus Curiae the Cato Institute in Support of Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012); Chevron Brief, *supra* note 16, at 17–21.

²³ Brief for Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, at 18–20, No. 10-1491 (Dec. 14, 2011); Brief for Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, at 2–3, No. 10-1491 (Jan. 27, 2012).

²⁴ Brief for Respondents, *Kiobel v. Royal Dutch Petroleum Co.*, at 20–23, No. 10-1491 (Jan. 27, 2012).

²⁵ Indeed, because one of the key purposes of the corporate form is to insulate shareholders from liability, refusal to recognize the corporate form in the context of violations of customary international law would threaten shareholders with liability under theories of agency, a result that the defendants in these cases would presumably not welcome. See Carlos M. Vázquez, *Direct vs. Indirect Obligations of Corporations Under International Law*, 43 COLUM. J. TRANSNAT'L L. 927, 944 (2005).

II. SECTION 1350 AND ARTICLE III

In *Filártiga*, the Second Circuit construed section 1350 to confer jurisdiction over a suit between Paraguayan citizens for a violation of customary international law that occurred in Paraguay. Personal jurisdiction presented no difficulty, as the defendant was living in Brooklyn at the time.²⁶ But the subject matter jurisdiction of the federal court was in question, as the alienage clause of Article III extends federal diversity jurisdiction only to controversies between an alien and a citizen.²⁷ As noted above, the court in *Filártiga* held that jurisdiction was proper under Article III's "arising under" clause because customary international law has the status of federal common law.²⁸ Although this view of the status of customary international law was black letter law at the time, revisionists have since disputed it.

The revisionist view has been endorsed in dissenting opinions,²⁹ but it has yet to be embraced by a majority of the Supreme Court. In *Kiobel*, some amici are pressing the revisionist view as the basis of an argument that section 1350 should be construed to extend only to suits brought by aliens against citizens.³⁰ The argument, as developed in greater depth by A. J. Bellia and Bradford Clark, is that section 1350 must be limited to suits by aliens against citizens in order to avoid a substantial constitutional question under Article III.³¹ However, even though *Kiobel* is, like *Filártiga*, a suit between aliens, the Court need not decide whether the customary international law is federal common law in order to uphold the applicability of section 1350 to suits between aliens.

Indeed, the Article III question is a simple one in light of the Court's holding in *Sosa* that the cause of action in suits brought under section 1350 is supplied by federal common law.³² Among the tests for determining whether a suit "arises under" federal law for purposes of the general federal question statute (28 U.S.C. §1331), the least controversial (at least as a rule of inclusion)³³ is that a suit arises under the law that creates the cause of action. This is known as the "Holmes test" because it finds its clearest expression in Justice Holmes's opinion in *American Well Works Co. v. Layne & Bowler Co.*³⁴ Since the general federal question statute is narrower in scope than the "arising under" clause of Article

²⁶ *Filártiga v. Peña-Irala*, 630 F.2d 876, 878–79 (2d Cir. 1980).

²⁷ U.S. CONST. Art. III, §2, cl. 1. ("The judicial Power shall extend to all . . . Controversies . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

²⁸ *Filártiga*, 630 F.2d at 885–86.

²⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739–50 (2004) (Scalia, J., concurring in part and dissenting in part).

³⁰ Brief for Amici Curiae Law Professors of Constitutional and Federal Civil Procedure Law in Support of Respondents, at 3–6, *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491 (Feb. 3, 2012).

³¹ See Anthony J. Bellia Jr. & Bradford R. Clark, *Kiobel, Subject Matter Jurisdiction, and the Alien Tort Statute*, 43 GEO. J. INT'L L. (forthcoming 2012), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2008254; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011). A similar argument was developed earlier in Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002). For responses, see Michael G. Collins, *The Diversity Theory of the Alien Tort Statute*, 42 VA. J. INT'L L. 649 (2002), and William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002).

³² See *Sosa*, 542 U.S. at 725–28.

³³ See *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964); RICHARD H. FALLON JR., JOHN F. MANING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 782 (6th ed. 2009) [hereinafter HART & WECHSLER].

³⁴ 241 U.S. 257, 260 (1916).

III,³⁵ any suit that satisfies the Holmes test necessarily falls within the scope of Article III.³⁶ It is also clear that a suit that arises under federal common law arises under the “laws of the United States” within the meaning of section 1331³⁷ and hence also within the meaning of Article III. It follows that section 1350 easily satisfies Article III insofar as it grants the federal courts jurisdiction over the federal common law cause of action recognized in *Sosa*.

Given *Sosa*’s recognition that the cause of action in suits under section 1350 has its source in federal common law, excluding alien-alien claims based on customary international law from the statute’s scope cannot be justified by the need to avoid a difficult constitutional question. It could alternatively be argued, however, that section 1350 should be read as not encompassing such cases because the U.S. Congress (First Congress) that enacted the section as part of the Judiciary Act of 1789 would have understood that federal jurisdiction over such cases was not authorized by Article III. This argument does not rely on any direct evidence of what the First Congress had in mind when it enacted section 1350 (there is no such evidence), but instead seeks to infer Congress’s likely intent from two propositions: (1) the First Congress understood that a suit would arise under federal law within the meaning of Article III only if the plaintiff’s cause of action was based on federal law, and (2) the First Congress understood that the law of nations lacked the status of federal law for purposes of Article III.

Before assessing this argument—namely, that the First Congress would have intended to exclude alien-alien claims from the scope of section 1350 in order to stay within the scope of Article III—I note that accepting the argument does not require rejecting the modern position regarding the status of customary international law. The argument does rely on the proposition that the law of nations was regarded at the time of the Founders as nonfederal. As discussed below, this claim is highly contestable. But even if the Founders did regard customary international law as nonfederal, it would not follow that customary international law should be regarded as nonfederal today. Indeed, the commentary to the *Restatement (Third)* notes that before *Erie Railroad v. Tompkins*,³⁸ customary international law was regarded by many as part of general common law,³⁹ yet the *Restatement*’s black letter states that customary international law today has the status of federal common law.⁴⁰ I have argued elsewhere that, although the pre-*Erie* general common law was neither federal nor State law, it resembled modern-day federal law more than modern-day State law.⁴¹ Because the category of general common law is no longer recognized, what was then regarded as general common law must today be accorded a status that it did not have pre-*Erie*—that is, it now must be treated either as State or federal law. It would be more faithful to history, and would make much more sense from the perspective of constitutional structure, to treat customary international law today as federal rather than

³⁵ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 495 (1983). In *Verlinden* the Court held that Congress had the power to create federal court jurisdiction, under the Foreign Sovereign Immunities Act, over suits by a foreigner against a foreign state.

³⁶ See Carlos M. Vázquez, *The Federal “Claim” in the District Courts: Osborn, Verlinden, and Protective Jurisdiction*, 95 CAL. L. REV. 1731, 1736 (2007).

³⁷ *Illinois v. Milwaukee*, 406 U.S. 91 (1972); HART & WECHSLER, *supra* note 33, at 783–84.

³⁸ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

³⁹ RESTATEMENT (THIRD), *supra* note 5, ch. 2, intro. note.

⁴⁰ *Id.* §111, cmt. d.

⁴¹ Vázquez, *supra* note 9, at 1501–02.

State law.⁴² This defense of the modern position is in no way undermined by the claim that customary international law was regarded at the time of the Founders as general common law.

In any event, the argument for the diversity reading of section 1350 fails because both of its premises are highly contestable. The first premise (proposition (1)) is that the First Congress understood that a case “arises under” federal law within the meaning of Article III only if the plaintiff’s cause of action was based on federal law. This assumption flies in the face of the Supreme Court’s early interpretation of Article III. Chief Justice Marshall (himself a member of the First Congress), writing for the Court in *Osborn v. Bank of the United States*, indicated that Article III authorized original jurisdiction over even State law claims, so long as there was a remote possibility that an issue of federal law might arise in the case.⁴³ This reading of Article III’s “arising under” clause would support jurisdiction in alien-alien cases alleging a violation of customary international law even if it were true, as the revisionists contend, that such law was not then regarded as federal law for purposes of Article III. Although there were fewer statutes relating to foreign relations at that early date than at present, various treaties were already in place, and Congress could have assumed that additional foreign relations statutes would be enacted. Moreover, suits based on customary international law could also have been expected to raise issues regarding the allocation of powers among the federal branches, and between the federal and state governments, regarding the conduct of foreign relations. The possibility that issues under treaties, federal statutes, or the Constitution might arise in suits by aliens for torts violating the law of nations was thus far from remote.⁴⁴

It is true that scholars have disputed whether Marshall really meant to adopt the “remote possibility” test.⁴⁵ Still, that is how the Supreme Court itself has read Marshall’s opinion.⁴⁶ It is also true that the Court has expressed some doubt about Marshall’s broad interpretation of Article III.⁴⁷ But the Court has yet to overrule *Osborn* or reject the “remote possibility” test. In any event, jurisdiction over alien-alien cases alleging customary international law violations would be proper under several of the alternative theories that scholars have proffered. Under Herbert Wechsler’s reading of Article III’s “arising under” clause, a suit would arise under federal law if Congress *could have* legislated the rule of decision in the case, even if it had not.⁴⁸ Wechsler’s test would be satisfied in any case alleging a violation of customary international law, as Congress has the power to “define and punish . . . Offences against the Law of

⁴² See *id.* at 1611.

⁴³ *Osborn v. Bank of U.S.*, 22 U.S. 738 (1824).

⁴⁴ Cf. THE FEDERALIST NO. 80, *supra* note 10, at 485 (“So great a proportion of the cases in which foreigners are parties involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals.”).

⁴⁵ See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777 (2004); Vázquez, *supra* note 36, at 1735–36.

⁴⁶ See *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492 (1983) (*Osborn* “reflects a broad conception of ‘arising under’ jurisdiction, according to which Congress may confer on the federal courts jurisdiction over any case or controversy that might call for the application of federal law”); *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 471 (1957) (Frankfurter, J., dissenting) (reading *Osborn* to hold that Congress may confer jurisdiction pursuant to Article III’s “arising under” clause “whenever there exists in the background some federal proposition that might be challenged, despite the remoteness of the likelihood of actual presentation of such a federal question”).

⁴⁷ See *Mesa v. California*, 489 U.S. 121 (1989), in which the Court interpreted 28 U.S.C. §1442 narrowly to avoid a difficult question about the scope of Article III’s arising under clause.

⁴⁸ Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948); see HART & WECHSLER, *supra* note 33, at 758–59; Vázquez, *supra* note 36, at 1749–50 (describing and defending Wechsler’s theory).

Nations.”⁴⁹ Under Paul Mishkin’s reading of the “arising under” clause, Congress can authorize jurisdiction over cases in a field in which there is an articulated and active federal policy, even if in the particular case the dispute is governed by State law.⁵⁰ The purpose of federal jurisdiction in such cases would be to protect the relevant federal policies.⁵¹ This test would apparently be satisfied in an alien-alien suit alleging a violation of customary international law, given the important federal policies implicated in such cases.

My point is not that Marshall’s interpretation of Article III, or any of the proffered alternatives, is the correct one. My point is that, if the proper scope of Article III remains uncertain even today, Congress can hardly be assumed to have had in mind any particular reading of Article III in 1789. It is, of course, impossible to know what particular interpretation of the “arising under” clause was held by members of the First Congress. But the claim that they were assuming that a case would arise under federal law only if the plaintiff’s cause of action was created by federal law is implausible, given that this interpretation conflicts with the Supreme Court’s early reading of the clause and that the Court has never embraced it.

The second premise (proposition (2)) upon which the diversity reading of section 1350 relies is that the First Congress understood that the law of nations was not federal law for purposes of Article III. As in the case of proposition (1), the law was too uncertain when the First Judiciary Act was enacted to permit attributing the claimed view to the First Congress. Revisionists have argued, and some defenders of the modern position have agreed, that before *Erie*, customary international law was regarded as part of general common law, and general common law was regarded as nonfederal for Article III purposes. It is true that both positions were widely held. But contrary views have also been widely held at various times in our history, including at the time of the Founding.⁵² Regarding the status of general common law, Bellia and Clark themselves have noted that it was once believed that all of the common law had been federalized by the Constitution.⁵³ This view was rejected in *United States v. Hudson & Goodwin*⁵⁴ a dozen years after the enactment of the First Judiciary Act, but the Supreme Court’s holding in that case “cut against the almost uniform view of prior circuit court precedents.”⁵⁵ In inferring the likely understanding of the First Congress on the status of the law of nations, understood as general common law, the “almost uniform” view of the lower courts before *Hudson & Goodwin* is at least as instructive as the view later espoused by the Supreme Court.

Even after *Hudson & Goodwin*, a narrower theory—namely, that the part of the law of nations regulating state-to-state relations preempted conflicting State law—continued to find voice in judicial opinions.⁵⁶ It is true that some Supreme Court cases suggested that the Court could not review state-court interpretations of the law of nations, but such suggestions appear to have been based on the particular wording of section 25 of the First Judiciary Act (which

⁴⁹ U.S. CONST. Art. I, §8, cl. 10.

⁵⁰ Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157, 189 (1953); see HART & WECHSLER, *supra* note 33, at 759–60.

⁵¹ For this reason, the theories propounded by Mishkin and others have come to be known as theories of “protective jurisdiction.” See HART & WECHSLER, *supra* note 33, at 759, 764–65.

⁵² See generally Vázquez, *supra* note 9, at 1520–38.

⁵³ Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 46–48 (2009).

⁵⁴ 11 U.S. (7 Cranch) 32 (1812).

⁵⁵ HART & WECHSLER, *supra* note 33, at 610 (citing cases).

⁵⁶ See Bellia & Clark, *supra* note 53, at 7, 17, 46; see also Vázquez, *supra* note 9, at 1522–38.

regulated the Court's appellate jurisdiction) and thus may not have reflected the Court's view about the status of the law of nations within the meaning of Article III.⁵⁷ In any event, these decisions all postdated the First Judiciary Act, and they generated dissents.⁵⁸ For these reasons, it is far from clear that the members of the First Congress were legislating on the assumption that the law of nations was nonfederal law for purposes of Article III.

There are, moreover, several reasons to believe that Congress did not mean to exclude cases against aliens from the scope of section 1350. First, it appears to be well accepted that, at a minimum, section 1350 was meant to permit the remediation of injuries that, if not remedied, would result in the United States being responsible to the state of the injured party's nationality.⁵⁹ To fulfill that purpose, the statute would have to cover not just injuries caused by U.S. citizens but also injuries caused by foreigners on U.S. soil (such as in the Marbois incident,⁶⁰ which the Supreme Court in *Sosa* suggested precipitated the enactment of section 1350)⁶¹ and some injuries caused by foreigners abroad (such as the injury caused by *Sosa* to Alvarez-Machain, which implicated U.S. responsibility because orchestrated by U.S. officials).⁶²

Second, the purpose of a statute granting jurisdiction to the federal courts is to allocate judicial business as between the State and federal courts. There would appear to be little reason for wanting suits alleging violations of customary international law to be maintained in the State courts rather than the federal courts just because the defendant was an alien. Bellia and Clark suggest that, even if alien-alien disputes based on conduct occurring on U.S. soil did potentially implicate the United States' responsibility under the law of nations,⁶³ the First Congress probably regarded the State courts as suitable adjudicators of such disputes.⁶⁴ But Hamilton's analysis in *The Federalist* supports the contrary conclusion:

As the denial or perversion of justice by the sentences of courts, as well as in any other manner, is with reason classed among the just causes of war, it will follow that the federal

⁵⁷ See Vázquez, *supra* note 8, at 1525–30.

⁵⁸ *New York Life Insurance Co. v. Hendren*, 92 U.S. 286, 288 (1875) (Bradley, J., dissenting) (dissent in *Hendren* discussed in Vázquez, *supra* note 9, at 1529–30).

⁵⁹ This is the thrust of the argument made in Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 507–10.

⁶⁰ See *Respublica v. De Longchamps*, 1 U.S. 111 (1784).

⁶¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 716–18 (2004).

⁶² See Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 47, UN Doc. A/56/10 (2001) (“The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”).

⁶³ Bellia and Clark do not quite concede that such disputes would implicate the responsibility of the United States, see Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 519–20, but they rely heavily on the work of Vattel, who writes that, when a sovereign admits aliens into his territory, “he engages to protect them as his own subjects, and to afford them perfect security, as far as depends on him.” EMER DE VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS*, bk. II, ch. viii, §104 (Joseph Chitty ed., 1883) (1758), available at http://www.constitution.org/vattel/vattel_02.htm. For a discussion of the influence of Vattel and contemporaneous scholars on the Founders, see Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AJIL 447 (2012).

⁶⁴ Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 520.

judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.⁶⁵

Of course, Hamilton here was defending Article III's alienage provision, apparently overlooking the fact that this provision authorized federal jurisdiction only over suits between aliens and citizens. But the First Congress made the very same mistake in extending federal jurisdiction to any action in which an alien was a party. It is highly unlikely that the Congress that conferred alienage jurisdiction in alien-alien cases despite Article III's limits on such jurisdiction intended to exclude alien-alien cases from a provision of the same statute not as clearly linked to the alienage clause of Article III. Bellia and Clark go on to argue that "adjudication of some [alien-alien] claims by US courts would have violated the law of nations by interfering with the territorial sovereignty of other nations."⁶⁶ If anything, that would be a reason why the First Congress would have wanted these claims to be brought in the federal courts, as it presumably would have regarded federal courts as more likely than the State courts to dismiss the cases on the basis of these sovereignty concerns.

Third, it is clear that section 1350 implements the "arising under" clause of Article III in at least some of its applications, as the section extends the federal courts' jurisdiction to cases brought by an alien for violating a treaty.⁶⁷ Defenders of the diversity interpretation do not claim that alien-alien cases brought for violation of a treaty would run afoul of Article III. Their argument is thus that section 1350 extends jurisdiction to all cases brought by aliens for violating a treaty but only some cases brought by aliens for violating the law of nations (that is, those against citizens). But the fact that section 1350 applies to cases brought for violating a treaty suggests, instead, that the First Congress (or at least some of its members) viewed section 1350 as implementing the "arising under" clause of Article III—which may, in turn, suggest that some or even many members of that Congress understood that the law of nations, or perhaps the common law as a whole, was part of the "law of the United States" within the meaning of Article III.

In any event, rather than read section 1350 as setting in stone the First Congress's presumed understanding of the scope of Article III and the status of customary international law, it would be more sensible to attribute to the First Congress an intent to confer jurisdiction over suits alleging violations of treaties or the law of nations *to the extent* that such jurisdiction would actually fall within the scope of Article III. As I have argued elsewhere, even if the First Congress regarded customary international law as general common law and general common law as non-federal, the better view today is that customary international law has the status of federal common law.⁶⁸ Even a revisionist, however, should have no trouble concluding that jurisdiction over alien-alien claims based on customary international law is valid today, given *Sosa*'s holding that the cause of action in such cases is supplied by federal common law. Thus, if section 1350 were read to confer jurisdiction over alien-alien claims to the extent consistent with Article III,

⁶⁵ THE FEDERALIST NO. 80, *supra* note 10, at 476; *see also id.* ("[I]t is at least problematical whether an unjust sentence against a foreigner, where the subject of controversy was wholly relative to the *lex loci*, would not, if unredressed, be an aggression upon his sovereign . . .").

⁶⁶ Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 519.

⁶⁷ 28 U.S.C. §1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.").

⁶⁸ *See Vázquez*, *supra* note 9.

it would clearly be constitutional as applied to alien-alien claims raising the federal common law cause of action recognized in *Sosa*.

Of course, a revisionist might well challenge *Sosa*'s characterization of the cause of action as federal common law, and the Court could revisit that question. As discussed above, the Court did not have to resolve the status of customary international law to answer the cause of action question in *Sosa*: whether such law had the status of federal law or not, it had to be supplemented by a domestic law affording a remedy. But the Court's holding that the cause of action was supplied by *federal* common law strongly suggests that the Court subscribed to the modern position that customary international law is a matter of federal, not State, law.⁶⁹ After all, the Court could have held that, post-*Erie*, the cause of action in law-of-nations cases exists only if afforded by State law. It is rare for federal law to provide a cause of action for violating non-federal law, whereas it is not unusual to relegate the remedies for violating federal substantive law to state remedial law.⁷⁰ If the Court had understood customary international law, post-*Erie*, to be a matter of State law, then presumably it would have held that the cause of action for violating customary international law had to be supplied by State law. That it did not entertain that possibility speaks volumes about the Court's views regarding the Constitution's allocation of responsibilities for customary international law as between State and federal governments.

Because *Sosa*'s conclusion that the cause of action is federal thus appears to reflect the modern position, it is understandable that critics of the modern position would resist it.⁷¹ As discussed in the next part, however, some critics of the modern position may be warming to the view that the courts should avoid violations of customary international law that have not been clearly authorized by the federal political branches.

III. INTERNATIONAL LAW AND THE EXTRATERRITORIAL APPLICABILITY OF *SOSA* ACTIONS

In the wake of the Supreme Court's virtual endorsement of the modern position in *Sosa*, customary international law has figured prominently in arguments—some advanced by critics of the modern position—seeking to limit the scope or availability of suits under section 1350. In *Kiobel*, the importance of compliance with customary international law has been invoked as a reason to restrict the statute to conduct that occurred within U.S. territory. The argument

⁶⁹ See *id.* at 1546–52.

⁷⁰ See *id.* at 1550–51.

⁷¹ Bellia and Clark never acknowledge that the Court in *Sosa* characterized the cause of action as having the status of federal common law. They state that “the Court did not conclude that the [Alien Tort Statute] created a *federal* common law cause of action,” Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 549, which is technically true because the Court held that the section 1350 was purely jurisdictional. But the Court did elsewhere clearly hold that the cause of action, as it exists today, is one that is “created” by the federal courts as a matter of federal common law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004). Bellia and Clark also argue that the majority “rejected Justice Scalia’s assertion that ‘a federal-common-law cause of action of the sort the Court reserves discretion to create would “arise under” the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction.’” Bellia & Clark, *The Alien Tort Statute and the Law of Nations*, *supra* note 31, at 549. But the Court did not disagree with Justice Scalia’s assertion that a federal common law cause of action would arise under federal law for purposes of Article III and the federal question statute (which is self-evidently true for the reasons discussed *supra* text accompanying notes 32–37). Rather, the majority merely denied that its holding implied that section 1331 could support the creation of federal common law in the same way that section 1350 can. *Sosa*, 542 U.S. at 731 n.19; see Vázquez, *supra* note 9, at 1508 n.64.

is that applying U.S. law to conduct taking place outside of the United States and having no effects there would contravene international law.⁷²

Although couched as an argument about the territorial scope of section 1350, this argument is better understood as one about the territorial scope of the federal common law cause of action recognized in *Sosa*. Section 1350 itself, being strictly jurisdictional, merely allocates judicial business between State and federal courts. There would appear to be no reason for Congress to want suits based on conduct occurring within the United States in federal court but suits based on conduct occurring abroad in State court. (As discussed in part II, Congress may have assumed that suits based on foreign conduct would often have to be dismissed altogether, but it would presumably have wanted federal courts to decide that question.) I will therefore assume that the argument is about the scope of the federal common law cause of action, not about the scope of section 1350 as such.

Sosa claims based on violations of customary international law occurring abroad do implicate principles of international law regarding jurisdiction to prescribe.⁷³ U.S. courts entertaining *Sosa* actions are not merely providing a remedy afforded to the plaintiff by international law. As noted above, international law rarely, if ever, provides individuals injured by a violation of international law the right to damages from the individual who caused the violation. Such liability comes from our domestic law—specifically, according to *Sosa*, from federal common law. Principles of international law concerning jurisdiction to prescribe limit the power of the United States to apply this federal common law extraterritorially. (Of course, Congress can override these limits for purposes of domestic law; I assume here that it has not done so.)

This does not mean, however, that international law prohibits the recognition of a *Sosa* action for conduct occurring on foreign territory. Territoriality is merely one of the bases recognized by international law as supporting a state's jurisdiction to prescribe. States also have the power to prescribe laws to regulate the conduct of their nationals, regardless of location.⁷⁴ Thus, there would be no problem under international law with recognizing a *Sosa* cause of action against U.S. nationals, including U.S. corporations, who violate international law abroad. States also have the power to regulate the conduct of aliens abroad "that is directed against the security of the state or against a limited class of other state interests."⁷⁵

Most relevantly, international law recognizes universal jurisdiction for certain offenses recognized by international law, such as genocide, torture, and some war crimes and crimes against humanity.⁷⁶ Some have argued that universal jurisdiction permits only the imposition of

⁷² See Chevron Brief, *supra* note 16, at 10–17; BP Brief, *supra* note 16, at 24–27.

⁷³ William Dodge has argued that suits under section 1350 do not implicate international principles of jurisdiction to prescribe because the defendant's conduct is already unlawful as a matter of international law. William S. Dodge, *Alien Tort Litigation and the Prescriptive Jurisdiction Fallacy*, 51 HARV. INT'L L.J. ONLINE 35 (2010), at http://www.harvardilj.org/2010/05/online_51_dodge/. I would say that suits under section 1350 represent a *lesser* exercise of jurisdiction to prescribe than when the state prescribes the primary rule of conduct. For this reason, the requirements imposed by international law in this context are arguably less demanding. But jurisdiction to prescribe is being exercised to some extent when domestic law supplies a remedy for conduct that is independently unlawful under international law. See Carlos M. Vázquez, *Jurisdiction and Human Rights: Two Puzzles*, in HUMAN RIGHTS AT THE CENTER: LES DROITS DE L'HOMME AU CENTRE 507 (Franz Werro, Samantha Besson & Michel Hottelier eds., 2006).

⁷⁴ RESTATEMENT (THIRD), *supra* note 4, §402(2).

⁷⁵ *Id.* §402(3).

⁷⁶ The *Restatement (Third)* notes:

criminal penalties.⁷⁷ It is true that, outside the United States, universal jurisdiction has mainly taken the form of imposing criminal responsibility on individuals. But the recognition that states have *prescriptive* jurisdiction over the relevant conduct would appear to mean very little if it did not include the power to determine the remedy. After all, international law itself recognizes that the conduct in question is criminal.⁷⁸ It is true that,

although the sanctionable conduct may be defined by international law, national law will inevitably influence enforcement—in the criminal sphere, for example, by the choice between lay juries and professional judges, and by the application of a national penalty regime; and in the civil sphere, for example, by the application of national law procedures, such as class actions, and remedies, such as moral or punitive damages.⁷⁹

But these are the sorts of influences that inhere in a state's jurisdiction to adjudicate or to enforce law. A state's jurisdiction *to prescribe*, by contrast, would appear to mean very little with respect to offenses already deemed criminal by international law if states do not also have discretion to prescribe noncriminal sanctions.

With respect to no other category of prescriptive jurisdiction does international law recognize a state's power to prescribe only criminal liability. To the extent that international law does distinguish between criminal and civil responsibility, it places *more* stringent limits on a state's ability to enforce its criminal law. For example, international human rights law imposes more stringent procedural requirements in criminal cases than in civil cases.⁸⁰ There is accordingly much sense in Justice Breyer's conclusion in *Sosa* that imposing civil liability was "no more threatening" to international comity than imposing criminal responsibility.⁸¹

Critics of universal civil jurisdiction note that criminal prosecutions are controlled by the government, whereas civil litigation is commenced by private parties.⁸² Governmental control over the prosecution provides a level of protection for the needs of the international system that is missing from civil litigation. But some civil proceedings are controlled by the government, and in some states private parties have a prominent role in initiating criminal prosecution, with the government having very constrained discretion to terminate a prosecution on "foreign policy" grounds.⁸³ Additionally, in federal systems, responsibility for criminal prosecution may be divided between federal and subfederal levels and thus does not necessarily rest with the same

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in section 402 is present.

Id. §404.

⁷⁷ *E.g.*, Chevron Brief, *supra* note 16, at 11–12.

⁷⁸ See RESTATEMENT (THIRD), *supra* note 4, §702.

⁷⁹ Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AJIL 142, 144–45 (2006).

⁸⁰ See, *e.g.*, International Covenant on Civil and Political Rights, Art. 9, Dec. 16, 1966, 999 UNTS 171.

⁸¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 760–63 (2004) (Breyer, J., concurring).

⁸² See Chevron Brief, *supra* note 16, at 16 (citing Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 347).

⁸³ See Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 433, 454–56 (2002); Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 311–12 (2001) (describing the privately initiated prosecution of Augusto Pinochet in Spanish court over the objection of the public prosecutors and the opposition of the country's executive branch);

governmental entities that are responsible for conducting foreign relations, while the latter have limited power to control criminal prosecutions initiated by the former.⁸⁴ In short, because international law permits a wide variety of governmental structures and systems of criminal and civil law, it is unlikely that international law would distinguish categorically between the criminal and civil enforcement of the norms subject to universal jurisdiction.⁸⁵

My main focus here, however, is not the content of the relevant principles of international law, but the reasons for construing federal common law in a way that conforms it to customary international law. One of the proffered reasons for taking customary international law into account is peculiar to the type of cause of action recognized in *Sosa*: the purpose of *Sosa* claims is to promote compliance with international law, the argument seems to go, so it would be ironic to permit such actions to proceed in circumstances in which the litigation itself would violate international law.⁸⁶ Ironic it may be, but it would be even more problematic, from the perspective of international law, to exceed the bounds of jurisdiction to prescribe in the service of purely domestic ends.⁸⁷

The case for limiting the extraterritorial scope of the *Sosa* action derives greater support from the *Charming Betsy* presumption, which counsels that federal statutes should generally be construed in a way that conforms them to international law.⁸⁸ The *Sosa* action is not a statutory one, but the rationale for the presumption would appear to be equally applicable in construing federal common law. It is worth noting, however, that *Charming Betsy* would operate differently in the latter context than in the former. With respect to statutes, *Charming Betsy* effectively requires Congress to speak clearly if it means to authorize a violation of international law. With respect to federal common law, by contrast, the *Charming Betsy* maxim does not tell the courts to speak clearly if they want to violate international law. In the latter context, customary international law operates not as a presumption, but as a firm constraint. In both contexts, one might understand *Charming Betsy* to reflect the idea that in our governmental system, the decision to violate international law is allocated to the federal political branches.

Even critics of the modern position recognize some scope for the *Charming Betsy* rule,⁸⁹ so applying the rule to limit the reach of the *Sosa* cause of action might be reconcilable with the revisionist view that customary international law does not preempt State law. But restricting the territorial scope of the *Sosa* cause of action would fall short of protecting the interest that

see also Máximo Langer, *The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes*, 105 AJIL 1, 10–41 (2011) (discussing various levels of executive branch control over criminal proceedings).

⁸⁴ This is certainly the case in the United States.

⁸⁵ This conclusion is in accord with the *Restatement (Third)*, which notes that, while “[i]n general, jurisdiction on the basis of universal interests has been exercised in the form of criminal law, . . . international law does not preclude the application of non-criminal law on this basis, for example, by providing a remedy in tort or restitution for victims of piracy.” RESTATEMENT (THIRD), *supra* note 4, §404, cmt. b.

⁸⁶ This seems to be the thrust of the *Chevron* Brief, *supra* note 16, at 4–5.

⁸⁷ If a state breaches international law limits on prescriptive jurisdiction in order to advance the substantive goals of international law, the advancement of the substantive goals might be thought to mitigate the violation of international law to some extent (although not entirely, as the jurisdictional limit, by its nature, takes precedence over the substantive one). By contrast, if a state exceeds those limits to advance purely domestic goals, there is nothing to mitigate its violation of international law.

⁸⁸ See *Chevron* Brief, *supra* note 16, at 29 (relying on *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”)).

⁸⁹ See, e.g., *Bradley & Goldsmith*, *supra* note 4, at 816.

underlies the push for a territorial limitation. Those seeking to limit the *Sosa* action to conduct occurring on U.S. territory seek to avoid violating international law principles of prescriptive jurisdiction. Limiting the scope of the *Sosa* action, however, would leave open the possibility that States might recognize the prohibited causes of action as a matter of State law. Of course, the States might themselves recognize a version of the *Charming Betsy* rule, but critics of the modern position contend that they are equally free to reject such a presumption and legislate in contravention of international law. States have increasingly been taking up the invitation to reject customary international law, enacting legislation that prohibits their courts from applying such law.⁹⁰ If States were to enact statutes imposing a liability on foreign individuals or corporations in violation of international law limits on jurisdiction to prescribe, on what basis could a revisionist scholar or judge find the statute invalid?

It would be difficult to argue that section 1350 itself preempts State causes of action that exceed the jurisdictional limits imposed by international law, as (1) that provision merely confers jurisdiction on the federal courts, and (2) the jurisdiction that it confers is concurrent with that of the state courts. To limit the scope of a State cause of action, the courts would have to import customary international law as a self-executing federal limit on the States, which is precisely what critics of the modern position claim that the Constitution disallows. Deciding on policy grounds that the federal common law action should be exclusive seems equally incompatible with the revisionist position, as the policy that would support such a decision is the policy that underlies the modern position: the impropriety of permitting the states to violate international law. The courts could instead rely on a theory of dormant foreign relations preemption, under which states are precluded from interfering with the federal government's conduct of foreign relations.⁹¹ But dormant foreign affairs preemption is based on similar concerns and is potentially even more broadly preemptive of State law than is the modern position; unsurprisingly, revisionists object to dormant foreign affairs preemption at least as much as they object to the modern position.⁹²

In short, it appears that revisionists are committed to permitting States to apply their laws extraterritorially in contravention of international limits on jurisdiction to prescribe absent affirmative prohibition by the federal political branches. But this conclusion is difficult to reconcile with the argument for construing federal statutes and federal common law to conform to customary international law in the absence of clear congressional authorization of a violation. If the interest in compliance with customary international law is strong enough to ground a rule prohibiting violations by federal actors (including federal courts in their lawmaking capacities) in the absence of clear, affirmative authorization by the federal political branches, then presumably it is also strong enough to require compliance by the States. If anything, for the reasons well stated by Hamilton,⁹³ there is *greater* reason to disable the States from violating customary international law. The *Charming Betsy* presumption, as applied to statutes and federal common law, is best understood to reflect the idea that in our governmental system, the decision to violate customary international law rests with the federal political branches. If so,

⁹⁰ For a description of Oklahoma's "Save Our State" Amendment and similar initiatives in other States, see Vázquez, *supra* note 9, at 1496–97.

⁹¹ See *Zschernig v. Miller*, 389 U.S. 429, 440–41 (1968).

⁹² See, e.g., Bradley & Goldsmith, *supra* note 4, at 861–70.

⁹³ See *supra* text accompanying note 10.

then it should also take a clear congressional authorization to permit States to violate customary international law.

A critic of the modern position might agree that the latter scheme would make more sense from the perspective of constitutional structure, yet insist that our Constitution cannot be read to establish it. This is not the place to explicate the textual and historical support for the modern position. But it is worth noting that, even if one accepted the revisionists' claim that the Founders and the pre-*Erie* courts understood customary international law as general common law and general common law as nonfederal, neither text nor history would compel the conclusion that our Constitution establishes the structurally dysfunctional system to which revisionists would relegate us. Because the category of general common law is no longer available, *we have no choice* but to accord to customary international law a different status than the Founders accorded it. For example, the pre-*Erie* cases that revisionists cite as recognizing that customary international law was understood to be nonfederal law also clearly affirm that such law was nevertheless binding on the States.⁹⁴ Because we no longer recognize a category of law that is nonfederal yet binding on the States, we must either reject the Founders' understanding that customary international law is nonfederal or reject their understanding that it is binding on the States. Pre-*Erie* history—even if the revisionists have correctly described it—provides no support for the latter option over the former. As I have shown elsewhere, history actually provides strong support for the former option, the one suggested by constitutional structure and common sense.⁹⁵

IV. CONCLUSION

It is ironic that the revisionist criticism of the modern position concerning the status of customary international law has focused on human rights litigation under section 1350. Because international law does not entitle victims of human rights violations to obtain damages from the perpetrator, recognition that customary international law is federal law does not establish that there is a federal cause of action in such cases. As the Court correctly held in *Sosa*, the cause of action in such cases is supplied by domestic law. For the same reason, the fact that the Court in *Sosa* recognized a federal common law cause of action for only some violations of customary international law does not show that it did not regard customary international law more broadly as federal common law. To the contrary, the Court's characterization of the remedy as federal common law rather than State law suggests strongly that it regarded customary international law as a federal, not State, matter. This characterization also answers the Article III question, as federal common law causes of action clearly arise under federal law.

The debate about the status of international law is more directly implicated by the argument that a cause of action should not be recognized for violations of international law by aliens abroad because recognizing such actions would exceed the United States' jurisdiction to prescribe. If customary international law is federal law, then it would directly preempt State causes of action that exceed the United States' jurisdiction to prescribe. But if international law were not federal law, States would be free to recognize such causes of action and place the nation in breach of its international obligations.

⁹⁴ See Vázquez, *supra* note 9, at 1527 (text accompanying note 151 (discussing *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440 (1924))), 1532 (text accompanying note 173 (discussing *Ker v. Illinois*, 119 U.S. 436 (1886))).

⁹⁵ See generally Vázquez, *supra* note 9.