

2010

When Customary International Law Violations Arise Under the Laws of the United States

Gwynne Skinner

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Gwynne Skinner, *When Customary International Law Violations Arise Under the Laws of the United States*, 36 Brook. J. Int'l L. (2010).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol36/iss1/4>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

WHEN CUSTOMARY INTERNATIONAL LAW VIOLATIONS ARISE UNDER THE LAWS OF THE UNITED STATES

*Gwynne Skinner**

INTRODUCTION

One question that the United States Supreme Court has yet to decide is whether non-statutory, common law claims for violations of the law of nations, or customary international law,¹ arise under the “laws of the United States” for purposes of both general federal question jurisdiction (28 U.S.C. § 1331)² and Article III³ of the U.S. Constitution, the Article which sets the outer limits of federal judicial authority. A similarly unanswered question is whether, even if such claims fall within federal jurisdiction, federal courts can recognize and provide remedies for such claims as a matter of their common law power; in other words, whether a federal court can entertain a claim that is not based on a statutory cause of action. These questions are inextricably intertwined with another largely unsettled issue: the precise role of customary international law in our domestic legal system and, in particular, its specific status as federal common law. Scholars continue to debate whether federal

* Assistant Professor, Willamette University College of Law. M.St. (LL.M. equivalent) International Human Rights Law, Oxford University, with Distinction; J.D. University of Iowa, with High Distinction; M.A., American Studies, University of Iowa; B.A., Political Science, University of Northern Iowa, Highest Honors.

1. The terms “law of nations” and “customary international law” are used interchangeably in this Article. The “law of nations” is generally equated with customary international law. *The Estrella*, 17 U.S. (4 Wheat) 298, 307–08 (1819) (referring to non-treaty-based law of nations as the “the customary . . . law of nations”); *see also Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003).

2. 28 U.S.C. § 1331 (2010) (“The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”).

3. Article III of the United States Constitution sets forth the outer limits of federal judicial power. Section 1 provides, in relevant part: “The Judicial Power of the United States shall be vested in one supreme Court and in such inferior Courts as Congress may from time to time ordain and establish” U.S. CONST. art. III, § 2 (Federal judicial power shall extend to nine different categories, including: 1) to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; 2) all cases affecting Ambassadors, other public Ministers and Consuls; 3) to all cases of admiralty and maritime Jurisdiction; 4) to Controversies to which the United States shall be a Party; 5) to Controversies between two or more States; 6) between a State and Citizen of another State; 7) between Citizens of different States; 8) between Citizens of the same State claiming Lands under Grants of different States; and 9) between a State or Citizens thereof and foreign States, Citizens or Subjects.).

courts have the authority to incorporate customary international law as part of federal common law wholly, partially, piece-meal, or not at all.

This Article concludes that common law claims for violations of customary international law arise under the “laws of the United States” for § 1331 general federal question jurisdiction and within Article III, but only where such claims or defenses implicate uniquely federal interests, such as foreign relations. This position is not taken because the law of nations is, or historically has been, part of the “laws of the United States” for Article III and § 1331 purposes. On the contrary, the law of nations probably was *not* considered to be the “law of the United States” *per se* when Article III and § 1331 each were enacted.⁴ Rather, this position is taken for two reasons. First, certain enclaves of federal common law have developed over time to include certain norms and rules of customary international law, and federal courts have the judicial authority to continue to develop such law when uniquely national interests are at stake. This remains true even after *Erie v. Tompkins*.⁵ Second, federal common law has evolved to become “law of the United States” for purposes of both Article III and 28 U.S.C. § 1331.

Thus, it is not customary international law *per se* that is law of the United States for purposes of Article III and 28 U.S.C. § 1331. Rather, it is federal common law, which incorporates some aspects of customary international law, that is considered “law of the United States” for purposes of Article III and § 1331. This is an important distinction because federal common law is now arguably “law of the United States” as contemplated by Article III and § 1331, whereas customary international law is not. Hence, claims alleging violations of customary international law that affect uniquely federal interests are properly characterized as federal common law claims, giving rise to federal question jurisdiction under current Supreme Court precedent of *Milwaukee v. Illinois*⁶ and *Romero v. International Terminal Operating Co.*⁷

Additionally, this Article maintains that federal courts have the common law power to recognize and thus provide remedies for customary

4. That the law of nations *per se* was not considered to be the law of the United States for Article III and 28 U.S.C. § 1331 purposes at the time each was enacted does not provide an answer regarding whether the federal courts have the power to incorporate aspects of customary international law into federal common law, or to use their federal common law power to recognize tort claims for customary international law violations, where such claims affect uniquely federal interests.

5. See *Erie v. Tompkins*, 304 U.S. 64 (1938) (holding that federal courts did not have the judicial power to create general federal common law when adjudicating state law claims under diversity jurisdiction).

6. See *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

7. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).

international law violations where the same uniquely federal interests are involved, notwithstanding the lack of a statutory basis for such claims. This is because Congress implicitly authorized such private claims due to its understanding when it enacted § 1331 that federal courts would use their common law powers to provide remedies for federal common law claims. Though the Supreme Court has expressed skepticism regarding whether federal courts have jurisdiction over customary international law claims under § 1331 analogous to that provided by the Alien Tort Statute, this Article concludes that the Court's skepticism most likely relates to concerns about federal courts using their common law powers too broadly, thereby recognizing claims in a vast array of areas unrelated to uniquely federal interests or with regard to actions Congress never intended or understood when it enacted § 1331. Such broad and unintended use of federal common law powers would likely not be consistent with *Erie*. However, use of common law power to recognize and provide remedies only for those claims of customary international law violations that entail uniquely federal areas arguably would be consistent with *Erie*.

Part I of this Article provides an overview of the current debate regarding the role of customary international law within federal common law and whether customary international law is "Law of the United States" for purposes of Article III. This overview helps set the stage for the remainder of the Article. Part II of this Article addresses the unanswered question of whether claims for violation of customary international law "arise under" the Constitution or "laws" of the United States for purposes of Article III and § 1331. It concludes that Congress probably did not consider the law of nations *per se* to be law of the United States. However, federal common law, which did not exist when Article III was drafted and was only in its infancy when § 1331 was enacted in 1875, later developed to include aspects of customary international law.

Part III of this Article addresses a related, but ultimately distinct question regarding the common law power of federal courts to recognize private causes of action for customary international law violations consistent with the *Erie* decision.⁸ It also addresses the Supreme Court's skepticism articulated in *Sosa v. Alvarez-Machain*,⁹ regarding whether federal courts are authorized to recognize claims for customary international law

8. This issue overlaps and is intertwined with the issue addressed *infra* Part II. As such, it is difficult to address each issue separately. However, whether a court has jurisdiction over such causes of action is ultimately a separate, albeit intertwined, question from whether a court has the power to recognize the claim and provide a remedy absent statutory authorization.

9. See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

violations under § 1331 in the same manner as they would under the Alien Tort Statute.¹⁰

I. THE CURRENT DEBATE

Although near consensus has emerged in the lower federal courts that customary international law is “part of the federal common law,”¹¹ scholars disagree about its precise role in the U.S. legal system. In addition, although the Supreme Court in *Sosa* may have agreed with the proposition that certain customary international law norms are actionable through federal common law claims, it did not specify its views regarding the contours of customary international law in our federal judicial system. The Court indicated only that “domestic law of the United States recognizes the law of nations.”¹²

A. Role of Customary International Law within Federal Common Law

Two predominant schools of thought have emerged regarding the role of customary international law within the domestic law of the United States: those who advocate the so-called “modern” position, and those who support the so-called “revisionist” position. Although there are slight differences among the modernist scholars’ positions, their general view is that federal law incorporates customary international law.¹³ Most modernists agree with the revisionists that customary international law was considered general common law early in this country’s history (the

10. *Id.* at 731 n.19 (holding that although the federal courts could use their common law power to recognize aliens’ tort claims for a limited set of violations of the “law of nations” under the jurisdictional Alien Tort Statute (“ATS”), “a more expansive common law power related to 28 U.S.C. § 1331” might not be consistent with the division of responsibilities between state and federal courts after *Erie v. Tompkins*).

11. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 978 F.2d 493, 502 (9th Cir. 1992); *Igartúa-De La Rosa v. United States* 417 F.3d 145, 177–79 (1st Cir. 2005). In addition, “customary international law is considered to be like common law in the United States, but it is federal law.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 111 cmt. d (1987).

12. *Sosa*, 542 U.S. at 729 (emphasis added).

13. Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295 (1994); see also William Casto, *The New Federal Common Law of Tort Remedies for Violations of International Law*, 37 RUTGERS L.J. 635 (2006); William Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT'L L. 87 (2004) [hereinafter Dodge, *Bridging Erie*]; Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472 (1997); Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 435–36 (1997).

concept of *federal* common law did not exist at the time).¹⁴ However, modernists argue that federal common law later developed and came to incorporate customary international law, emerging as a clear enclave of federal common law after the *Erie* decision.¹⁵ They do not believe that Congress has to explicitly authorize the federal courts to incorporate customary international law into federal law because federal courts already have the common law power to do so.¹⁶

The revisionists argue that federal common law has never incorporated customary international law.¹⁷ They further claim that after *Erie*, customary international law can only become part of federal common law when Congress specifically authorizes its incorporation.¹⁸ The revisionists assert that the law of nations was historically part of the general common law, but unlike the modernists, they do not believe that the law of nations ever became part of federal common law.¹⁹ To the degree that it did, they argue that the *Erie* decision ended the ability of federal courts to incorporate customary international law without explicit congressional authorization.²⁰

After the *Sosa* decision, two of the best known revisionists, Professors Curtis Bradley and Jack Goldsmith, along with Professor David Moore, wrote an article in the Harvard Law Review, arguing that the Supreme Court in *Sosa* agreed with the revisionists' views.²¹ This was evidenced, they argued, by the Court's holding that either the legislative or the executive branch must authorize federal courts to apply customary international law before the courts can do so and that the Alien Tort Statute

14. See Goodman & Jinks, *supra* note 13; Stephens, *supra* note 13.

15. See, e.g., Goodman & Jinks, *supra* note 13, at 471–72; Stephens, *supra* note 13, at 436.

16. Goodman & Jinks, *supra* note 13, at 471–72; Stephens, *supra* note 13, at 436.

17. See, e.g., Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Customary International Law as Federal Common Law*]; Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and After Erie*, 26 DENV. J. INT'L L. & POL'Y 807 (1998) [hereinafter Bradley, *The Status of Customary International Law in U.S. Courts*].

18. See Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 817–20.

19. *Id.* at 823.

20. *Id.*

21. Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 873, 894 (2007) [hereinafter Bradley, Goldsmith & Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*].

(“ATS”)²² provides the requisite authorization, albeit on a limited basis.²³ Other scholars have been very critical of this position, claiming that *Sosa* held the opposite: that courts do not need explicit authorization to apply customary international law when adjudicating cases before them.²⁴

B. Whether Customary International Law is Part of the Laws of United States Under Article III of the U.S. Constitution

The revisionists argue that the framers did not intend Article III to include the law of nations, claiming that the law of nations was part of the general common law and not part of the “Laws of the United States” for purposes of Article III.²⁵ Moreover, the revisionists emphasize the omission of the phrase “law of nations” from Article III.²⁶ They compare this to the inclusion of the phrase in Article I, which states that Congress has the power to “define and punish . . . [o]ffences against the Law of Nations.”²⁷ The revisionists argue that this inclusion in Article I demonstrates that the framers did not intend the law of nations to be within the purview Article III.²⁸ They further note that Article III extends the federal judicial power to treaties and that Article VI declares treaties to be the supreme law of the land, though neither mentions the law of nations.²⁹ Finally, they point out that an early draft of Article III would have ex-

22. 28 U.S.C. § 1350 (2010) (stating that federal district courts have jurisdiction over tort claims brought by aliens for violations of the law of nations).

23. Bradley, Goldsmith & Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, *supra* note 21.

24. *See, e.g.*, Beth Stephens, *Sosa, the Federal Common Law and Customary International Law, Reaffirming the Federal Courts' Power*, 101 AM. SOC'Y INT'L L. PROC. 269 (2007). In my view, the modernists are correct. The Court made it clear that no specific authorization was required for federal courts to incorporate certain aspects of customary international law as federal common law. Instead, the Court suggested that the necessary element was the authorization, albeit implicit, for plaintiffs to be able to seek a remedy. Such implicit authorization can be granted through Congress's understanding that upon enactment of a jurisdictional statute, courts will use their common law power to recognize a claim and provide a remedy. *See* discussion *infra* Part III, pp. 37–39.

25. *See, e.g.*, Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 823, 824; Bradley, Goldsmith & Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, *supra* note 21, at 875; Bradley, *The Status of Customary International Law in U.S. Courts*, *supra* note 17, at 812.

26. Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 824–27.

27. *Id.* at 819–20; U.S. CONST. art. I, § 8.

28. *See* Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 819.

29. Bradley, *The Status of Customary International Law in U.S. Courts*, *supra* note 17, at 820.

tended federal court jurisdiction to cases arising under the “Law of Nations,” but that the reference was deleted (although without any apparent explanation).³⁰

The debate concerning whether customary international law is part of the “Laws of the United States” under Article III also arises in the context of the constitutionality of the ATS when the defendant is an alien.³¹ Revisionists, such as Professor Bradley, argue that claims for violations of the law of nations under the ATS do not fall under Article III’s “arising under” provision, but rather are encompassed under Article III’s alienage jurisdiction.³² This would mean that claims brought by an alien under the ATS against another alien would not be constitutional under Article III. Bradley argues that Congress either mistakenly believed that Article III’s alienage provision extended to any suit involving aliens even where both parties were aliens, or Congress intended to limit suits to those where the defendant was a U.S. citizen.³³ Although Bradley sets forth evidence that supports both possibilities, he favors the latter.³⁴

Modernists take the opposite position, agreeing with the Second Circuit in the ground-breaking ATS case, *Filartiga v. Pena-Irala*,³⁵ which held that claims for violation of the law of nations brought pursuant to the ATS arise under the “Laws of the United States” for purposes of Article III jurisdiction.³⁶ Professor William Dodge cites numerous documents and certain federalist papers in arguing that, at the time Article III was drafted, Congress viewed the law of nations as “Law of the United States” for purposes of Article III, albeit not through what we now recognize as federal common law.³⁷

30. *Id.* at 820 n.82 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 157 (Max Farrand ed. 1911) (other internal citations omitted)).

31. Claims brought pursuant to the ATS by an alien against a citizen would be constitutional under Article III given the alienage jurisdiction of Article III.

32. Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 590–92 (2002) [hereinafter Bradley, *The Alien Tort Statute and Article III*]; see also Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 835–40 (2006).

33. Bradley, *The Alien Tort Statute and Article III*, *supra* note 32, at 590–92.

34. *Id.* at 627–28.

35. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885–86 (2d Cir. 1980).

36. See, e.g., Dodge, *Bridging Erie*, *supra* note 13, at 102; Goodman & Jinks, *supra* note 13, at 475; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–60 (1984).

37. William Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687, 705–08 (2002) [hereinafter Dodge, *The Constitutionality of the Alien Tort Statute*].

Professor Dodge also emphasizes the language difference between Article III and the Supremacy Clause of Article VI, noting that the latter refers to “This Constitution, and Laws of the United States which shall be made in Pursuance thereof,” whereas the former only discusses “Laws of the United States” without reference to “in pursuance thereof.”³⁸ In addition, Professor Dodge argues that Congress deliberately struck the words “passed by the Legislature” from the text of Article III.³⁹ Given this, he suggests that there must be a category of laws that are not made by Congress “pursuant” to the Constitution and yet are “Laws of the United States.”⁴⁰ The most obvious candidate, he suggests, is the law of nations.⁴¹ Another leading scholar opines that the framers and early jurists believed that “all of the common law pertinent to the enforcement of the law of nations naturally attached to the federal government upon its creation.”⁴² Thus, the modernists clearly disagree with the revisionists about whether federal jurisdiction over claims for customary international law violations is consistent with Article III of the U.S. Constitution. The debate continues with no clear consensus on the horizon.

II. WHETHER COMMON LAW CLAIMS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW ARISE UNDER LAWS OF THE UNITED STATES FOR PURPOSES OF ARTICLE III AND 28 U.S.C. § 1331

A. *Whether the Founders Considered the Law of Nations to be Law of the United States Under Article III*

As described above, one major area of disagreement among scholars is whether members of the Constitutional Convention intended the “Laws of the United States” under Article III to include the law of nations. To be sure, compelling evidence exists to support both sides of this debate, suggesting there is no clear answer to this question.⁴³ While there is significant evidence to support the contention that the founders viewed the law of nations as “Laws of the United States,” a close look at judicial opinions and other historical material reveals that Congress probably did not consider the law of nations *per se* to be law of the United States when it drafted Article III.

38. *Id.* at 704.

39. Dodge, *Bridging Erie*, *supra* note 13, at 102.

40. Dodge, *The Constitutionality of the Alien Tort Statute*, *supra* note 37, at 705.

41. *Id.*

42. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 160 (Herbert A. Johnson ed., 1995) [hereinafter *CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC*].

43. *See* discussion *supra* Section II.A.

1. Evidence Supporting the Contention that the Founders Viewed the Laws of Nations as “Laws of the United States”

Early prosecutions of federal common law crimes demonstrate that many of the framers viewed the law of nations as part of the common law of the United States and, in fact, exclusive to the federal judiciary. From the late 1700’s until the early 1800’s, the federal government prosecuted citizens for violations of the law of nations, such as piracy, crimes on the high seas, breaches of neutrality, and attacks on diplomats under the common law of the United States.⁴⁴ In these cases, courts routinely stated that the law of nations was part of the law of the United States.⁴⁵ These prosecutions came to an end in 1812⁴⁶ amidst increasing criticism of the idea that certain federal common law crimes existed that were not codified under a statute.⁴⁷ The criticisms, however, were largely based on the concern that federal jurisdiction over federal common law crimes provided Congress with unlimited power over the states.⁴⁸ That federal law encompassed the law of nations was not the concern.⁴⁹

Three Attorney General Opinions issued in the 1800’s, all of which stated that the law of nations is part of the law of the United States, further support the proposition that the framers and early jurists viewed the law of nations as part of the law of the United States.⁵⁰ Moreover, federal courts throughout the 1800’s applied the law of nations when adjudicat-

44. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 136–38; *see, e.g.*, *Henfield’s Case*, 11 F. Cas. 1099 (C.C.D. Pa 1793) (No. 6360).

45. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 131; *Henfield’s Case*, 11 F. Cas. at 1117 (because the law of nations is part of the common law of the United States, *Henfield* and others like him are subject to common law prosecution in federal court).

46. *United States v. Hudson & Goodwin*, 11 U.S. 32, 34 (1812).

47. *See, e.g., id.* (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. But jurisdiction of crimes against the state is not among those powers.”).

48. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 135, 149–50, 160.

49. *Id.*

50. 1 Op. Att’y Gen. 566, 570–71 (1822) (stating that the law of nations is part of “the laws of the country” and “our laws”); 7 Op. Att’y Gen. 495, 503 (1855) (“The laws of the United States [include] the Constitution, treaties, acts of Congress . . . and the law of nations, public and private, as administered by the Supreme Court, and Circuit and District Courts of the United States”); 11 Op. Att’y Gen. 297, 299 (1865) (“That the laws of the nations constitute a part of the laws of the land is established from the face of the Constitution, upon principle and authority.”).

ing civil cases,⁵¹ often stating that the law of nations is “part of the law of the United States.”⁵² For example, the Supreme Court in the 1815 case of *The Nereide* states, “[T]he Court is bound by the law of nations which is part of the law of the land.”⁵³ In 1855, the Court in *Jecker, Torre & Co. v. Montgomery*, in deriving a rule from the law of nations in a prize case, also reinforces the view that the law of nations is part of the law of the United States.⁵⁴

Perhaps the most famous case discussing the law of nations as part of “our law,” is the 1899 case of *The Paquete Habana*, which states, “International Law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”⁵⁵ These cases, along with the three Attorney General Opinions, provide evidence that many jurists throughout the 1800’s believed that the law of nations was part of the law of the United States.

2. The Law of Nations, *Per Se*, was Likely Not Considered Part of the Laws of the United States When the Framers Drafted Article III

a. The Law of Nations was Perceived as a Transcendent Body of Law, Applied by Both Federal and State Courts When They Otherwise had Jurisdiction

The case decisions and opinions referenced above, however, do not confirm that the framers believed that the law of nations was law of the United States, especially with respect to Article III’s jurisdiction provision. Most of the aforementioned decisions and opinions are too far removed temporally to provide much insight about whether the framers specifically intended Article III’s “Laws of the United States” to include the law of nations, and the judicial opinions arise in cases where the Court otherwise had jurisdiction on different Article III grounds, such as admiralty. Moreover, none of the judicial opinions specifically address Article III’s reference to the “Laws of the United States” with respect to the law of nations. In fact, the first case that specifically addressed whether the “law of nations” arises under Article III’s “Laws of the Unit-

51. For a list of such cases, see Gwynne Skinner, *Federal Jurisdiction over U.S. Citizens’ Claims for Violations of the Law of Nations in Light of Sosa*, 37 GA. J. INT’L & COMP. L. 53, 102–07 (2008).

52. *Id.*

53. *The Neriede*, 13 U.S. (9 Cranch) 388, 423 (1815).

54. *Jecker, Torre & Co. v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855).

55. *The Paquete Habana*, 175 U.S. 677, 700 (1899).

ed States” did not occur until 1871,⁵⁶ and involved the Supreme Court’s appellate review (given that general federal question jurisdiction was not yet enacted).⁵⁷ Rather, these statements likely reflected the courts’ views that the law of nations was a transcendent body of law (i.e., a type of general common law) that all courts, federal and state, could apply.

For example, when the federal courts already had jurisdiction on some other basis, such as admiralty, they applied the law of nations without any specific authority from Congress.⁵⁸ Similarly, state courts throughout the 1800’s applied certain aspects of the law of nations to cases before them, typically tort cases that arose out of war.⁵⁹ In addition, an 1802 Attorney General Opinion (issued prior to the afore mentioned Attorney General Opinions supporting the position that the law of nations was seen as federal law) stated that a violation against the “law of nations” did not contravene any “provision in the Constitution [or] any law of the United States,” and that the “the law of nations is considered as part of

56. See *Caperton v. Bowyer*, 81 U.S. 216 (1871); see also discussion *infra* pp. 24–26.

57. General federal question jurisdiction was not enacted until 1875. Act of Mar. 3, 1875, Ch. 137, 18 Stat. 470.

58. See *Skinner*, *supra* note 51, at 57–58; see also *Thorington v. Smith*, 75 U.S. (8 Wall.) 1, 7–12 (1868) (where the Supreme Court applied the law of war, which it described as fitting within general principles of law, in holding that a contract for the payment of money in Confederate currency was valid because the contract at issue was used in the regular course of business and the currency was imposed on the community “by such irresistible force that the use of them had no purpose in furthering or aiding the rebellion.”); *Hanauer v. Woodruff*, 82 U.S. (15 Wall.) 439, 449 (1872) (although referring to the law of war, the Court again applied principles of what it called “public law” in finding that a bond issued by the state of Arkansas used to fund the insurgency could not be consideration as a matter of public policy); *Dainese v. United States*, 15 Ct. Cl. 64 (1879) (where the Court of Claims applied the law of nations to determine that a consul had judicial responsibilities, and thus was entitled to additional pay); *United States v. One Thousand Five Hundred Bales of Cotton*, 27 F. Cas. 325 (C.C. Tenn. 1872) (the Circuit Court applied the law of war to determine whether the proceeds from the sale of cotton used to aid the rebellion should be forfeited); *United States v. Wong Kim Ark*, 169 U.S. 649, 655–94 (1898) (applying international law to settle a question of immigration); *Willamette Iron-Bridge Co. v. Hatch*, 125 U.S. 1, 15 (1888) (where the Supreme Court did not apply international law *per se*, but noted that once a federal court has jurisdiction over the issue of whether states can erect bridges that obstruct waterways, it can apply international law. The Court cited *The Wheeling Bridge Case*, 54 U.S. (13 How.) 518 (1851), as an example where international law was applied. In addition, the Court distinguished between common law of the United States and international law, as separate rules of decisions or bodies of law to be applied.); *Williams v. Bruffy*, 96 U.S. 176, 185–90 (1877) (applying the laws of war extensively in holding that the Confederacy’s sequestering of a Pennsylvania citizen’s debts as alien enemy was void under the Constitution).

59. See *Skinner*, *supra* note 51, at 107–09.

the municipal law of each State.”⁶⁰ The state court opinions, applying the law of nations and the 1802 Attorney General Opinion, support the view that the law of nations was simply part of the general common law, applied by courts in appropriate circumstances when they otherwise had jurisdiction.

Thus, as Professors Bradley and Goldstein have stated, the assertions about the law of nations being part of the law of the land was “likely nothing more than a mimicking of earlier statements by Blackstone,” and are “perfectly consistent with the law of nations’ status as general common law.”⁶¹

b. In Article III, the Framers Provided for Federal Jurisdiction Over Specific Types of Cases That Would Implicate Foreign Affairs, not Wholesale Jurisdiction Over the Law of Nations

i. The Framers Agreed to Constitutional Limitations on Federal Jurisdiction

A close examination of the debate concerning federal jurisdiction that took place during the Constitutional Convention, combined with the omission of any reference to the “law of nations” in the final draft of Article III, suggests that the framers intended to provide federal jurisdiction over only those *specific areas* that they believed implicated federal interests, such as foreign relations. This decision was likely a product of the ongoing debate concerning the limits of federal power generally, as well as the limits of federal judicial power. Because the law of nations was perceived as transcendent, giving the federal judiciary jurisdiction over all cases involving the law of nations was likely viewed as an invasion of the states’ rights.

The drafting of the Constitution, as one might expect, was subject to controversy regarding the role of the federal government, including the federal judiciary. At the Constitutional Convention of 1787, the founding generation was contemplating both the constitutional and initial statutory scope of a federal judiciary.⁶² One of the most significant issues was the extent of the national courts’ constitutional authority to adjudicate cas-

60. 5 Op. Att’y Gen. 691, 692 (1802).

61. Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 850, 850 n.227 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) (stating that the “law of nations . . . is held to be a part of the law of the land”)).

62. *See, e.g.*, CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 42; HOWARD FINK & MARK TUSHNET, FEDERAL JURISDICTION: POLICY AND PRACTICE 5 (2d ed. 1984).

es—in one word, jurisdiction.⁶³ Some opposed a strong central government and thus opposed a strong federal judiciary.⁶⁴ Others wanted a strong central government and a strong federal judiciary, which they believed would not only offset tendencies toward “balkanization” of the states, but would guarantee that national interests would be protected and advanced.⁶⁵

One of the major points of disagreement at the Constitutional Convention was whether inferior federal courts should exist and limits on their jurisdictional scope.⁶⁶ Some framers believed that it was unnecessary and undesirable to have lower federal courts, arguing that as long as state courts were subject to appellate review by the Supreme Court, the interests of the national government would be protected.⁶⁷ Others, however, distrusted the “ability and willingness of the state courts to uphold federal law,” especially where there might be conflicting state and federal interests.⁶⁸ They did not believe that the Supreme Court’s review of certain state court decisions would be adequate because they feared the number of such appeals would exceed the Court’s limited capacity to hear and adjudicate each case.⁶⁹

After much debate, the framers reached a compromise with Article III of the Constitution mandating the existence of the Supreme Court, outlining its original and appellate jurisdiction, and defining the outer limits of the federal judiciary’s subject matter jurisdiction.⁷⁰ Congress could then later determine whether inferior courts would exist and the scope of their jurisdiction through enactment of statutes.⁷¹ As part of the compromise, the drafters also agreed to refrain from conferring the full extent of Article III jurisdiction—whatever that would be—to federal courts in their planned First Judiciary Act.⁷²

In outlining the constitutional limits on jurisdiction set forth in Article III, the drafters considered a variety of arrangements that would preserve local power and protect national interests.⁷³ All of the drafters, even those supporting limited federal power, sought to ensure that foreign affairs and national security issues were placed within the powers of the

63. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 5.

64. *See* FINK & TUSHNET, *supra* note 62, at 5.

65. *Id.*

66. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 3 (3d ed. 1999).

67. *Id.*

68. *Id.*

69. *Id.*

70. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 25–26.

71. *Id.*

72. *Id.* at 12–15.

73. FINK & TUSHNET, *supra* note 62, at 3.

federal government.⁷⁴ Thus, each of the draft judiciary plans, although significantly different in other areas, demonstrated a consensus to grant federal jurisdiction over cases involving foreign relations, which included admiralty,⁷⁵ prize cases,⁷⁶ and cases involving aliens.⁷⁷

After the Convention passed a resolution stating, *inter alia*, that “the jurisdiction of the national Judiciary shall extend to cases arising under the laws passed by the general Legislature, and to such other questions as involve National peace and harmony,”⁷⁸ a five-person committee worked out a compromise and drafted Article III.⁷⁹ The resulting draft of Article III created the Supreme Court and outlined nine different categories of cases that future federal courts could ultimately have jurisdiction over:

1) to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; 2) all cases affecting Ambassadors, other public Ministers and Consuls; 3) to all cases of admiralty and maritime Jurisdiction; 4) to Controversies to which the United States shall be a Party; 5) to Controversies between two or more States; 6) between a State and Citizen of another State; 7) between Citizens of different States; 8) between Citizens of the same State claiming Lands under Grants of different States; and 9) between a State or Citizens thereof and foreign States, Citizens or Subjects.⁸⁰

The compromise also granted the Supreme Court original jurisdiction over cases affecting diplomats as well as appellate jurisdiction over each of the nine types of cases outlined in Article III.⁸¹ Of course, these were the outer Constitutional limits, and Congress still needed to authorize federal jurisdiction through statutory enactments.

74. See *id.* at 3, 6–7; CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 42, at 6; Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1267–68, 1275 (1985).

75. See FINK & TUSHNET, *supra* note 62, at 6–7; see also CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 42, at 7.

76. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 42, at 7. Prize cases involved a court’s condemnation of property seized from commercial enemy vessels during time of war, and the court’s decision about whether such seizure was lawful. It was an important area of international law in the 18th century that was seen as implicating national security concerns.

77. *Id.*

78. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC, *supra* note 42, at 14 (emphasis added).

79. *Id.*

80. U.S. CONST. art. III, § 2.

81. *Id.*

ii. Pursuant to the Compromise, the First Judiciary Act of 1789 Provided Lower Federal Courts with Jurisdiction Over Specific Types of Cases that Could Affect Foreign Affairs

The resulting Judiciary Act of 1789,⁸² while reflecting the agreed-upon limits on federal jurisdiction, ensured that the federal judiciary would have jurisdiction over every type of case likely to impact foreign relations.⁸³ For example, the Judiciary Act reaffirmed the Supreme Court's original jurisdiction over suits involving diplomats.⁸⁴ With regard to the lower federal courts, Congress created alienage jurisdiction for claims over \$500,⁸⁵ provided exclusive jurisdiction of all civil cases involving admiralty and maritime matters,⁸⁶ and provided concurrent jurisdiction for cases in which aliens bring tort claims in violation of the law of nations.⁸⁷ The framers believed that it was critical to ensure federal jurisdiction over aliens' claims for torts in violation of the law of nations—which at the time likely included piracy, attacks on diplomats, and safe

82. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (codified as amended at 28 U.S.C.A. § 1257 (West 2010)).

83. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 27–31; *see also* Jay, *supra* note 74, at 1275.

84. Judiciary Act of 1789, ch. 20, § 13, 1 Stat. at 80–81.

85. Judiciary Act of 1789, ch. 20, §§ 11–12, 1 Stat. at 78–79 (The Act allowed for the removal of cases against an alien defendant for claims in excess of \$500 from state to federal court. The \$500 requirement for claims involving aliens was, like nearly everything else, the result of a compromise, which in this case involved the problem of British debt collections under the Treaty of Paris. By limiting jurisdiction over cases involving aliens to \$500, a large majority of such litigation would be forced to proceed in state courts, which were much more sympathetic to U.S. citizens); CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 9. This alienage provision did not comport with Article III's alienage provision, which required one party to be an alien and one party to be a citizen. *See, e.g.*, *Hodgson v. Bowerbank*, 9 U.S. (5 Cranch) 303, 304 (1809); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807); *Mossman v. Higginson*, 4 U.S. (4 Dall.) 12, 13–14 (1800). This section of the First Judiciary Act was soon deemed unconstitutional because it did not comport with Article III provisions. It has never been determined how and why Congress created this apparent inconsistency. *See also* Bradley, *The Alien Tort Statute and Article III.*, *supra* note 32, at 590–91 (suggesting that this inconsistency was likely a legislative oversight).

86. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. at 76–77 (for a variety of reasons, admiralty jurisdiction in particular was an area over which there was little controversy because of the need for federal courts to have jurisdiction over prize cases); CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC*, *supra* note 42, at 40.

87. *Id.* (now referred to as the Alien Tort Statute).

passage⁸⁸—because those types of violations potentially “threatened serious consequences in international affairs.”⁸⁹

However, the founders did not include within federal jurisdiction—either within Article III or the First Judiciary Act—claims alleging general violation of the law of nations. As mentioned above, the law of nations had been included in earlier drafts of Article III, but it was ultimately removed without an explanation.⁹⁰

c. The Federalist Papers Indicate That the “Laws of the United States” Likely Did Not Include the Law of Nations

Another important source in determining the framers’ intent are the Federalist Papers—a series of 85 articles and essays likely written by James Madison, Alexander Hamilton, and John Jay, advocating the ratification of the new Constitution and outlining its philosophy and interpretation.⁹¹ In the Federalist No. 80, Alexander Hamilton, discussing federal jurisdiction, outlines six areas to which the judicial authority of the Union ought to extend:

[First], to all those which arise out of the laws of the United States, passed in pursuance of their just and constitutional powers of legislation; [second], to all those which concern the execution of the provisions expressly contained in the articles of the Union; [third], to all those in which the United States are a party; [and fourth], to all those which involve the Peace of the Confederacy, whether they relate to the intercourse between the United States and foreign nations, or to that between the States themselves; [fifth], to all those which originate on the high seas, and are of admiralty or maritime jurisdiction; [and] lastly, to all those in which the State tribunals cannot be supposed to be impartial and unbiased.⁹²

After discussing each area in turn, Hamilton examines the draft Constitution, in particular Article III, arguing how each provision of the draft Constitution fits into the six areas outlined.⁹³ First, he addresses the provision, “To all cases in law and equity, arising under the Constitution and

88. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–15 (2004) (internal citations omitted).

89. *Id.* at 715.

90. Bradley, *The Status of Customary International Law in U.S. Courts*, *supra* note 17, at 820 n.82.

91. See THE FEDERALIST NOS. 1–85 (Alexander Hamilton, John Jay & James Madison), reprinted in A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES (Edward Mead ed., Random House 1937) [hereinafter FEDERALIST PAPERS].

92. THE FEDERALIST No. 80 (Alexander Hamilton); see also *id.*, at 520–22.

93. THE FEDERALIST No. 80 (Alexander Hamilton).

the laws of the United States.”⁹⁴ Hamilton states that this clause responds to the “two first classes of causes, which have been enumerated, as proper for the jurisdiction of the United States.”⁹⁵ He was clearly referring to the first two of the six areas that he outlined at the beginning of his paper. The first involves “all those which arise out of the *laws of the United States, passed in pursuance of their just and constitutional powers of legislation . . .*”⁹⁶ Thus, he was clearly referring to laws enacted by Congress, and not to a more broad conception of “law” that would include the law of nations.

It is also important to note that Hamilton did not find that the “laws of the United States” clause of Article III satisfied the fourth type of cases—those involving “the peace of the confederacy, whether they relate to the intercourse between the United States and foreign nations”⁹⁷ Had he concluded the opposite, a much stronger argument could be made that “law of the United States” was intended to include the law of nations. Rather, it was the provisions regarding all cases involving foreigners, as well as the cases involving treaties, that he believed satisfied the “keeping the peace” class of cases.⁹⁸ While the Federalist Papers clearly advocate that the federal judiciary should have jurisdiction over cases that might affect foreign affairs,⁹⁹ nowhere do the Federalist Papers suggest that Article III’s “Laws of the United States” language was intended to include, or viewed as including, the law of nations.¹⁰⁰

Taking into consideration Federalist No. 80, the final wording of Article III, the extensive areas in which the framers did ensure federal jurisdiction, and the predominant view that the law of nations was similar to the general common law which both federal and state courts applied, it is more likely than not that the framers did not intend that the “Laws of the United States” provision of Article III would include the law of nations. It is unlikely that the framers intended to provide for federal jurisdiction over any and all claims involving the law of nations, especially where national interests would not be implicated by such claims. This is also consistent with the framers’ desire to limit federal judicial power.

94. *Id.*

95. *Id.*

96. *Id.* (emphasis added).

97. *Id.*

98. *Id.*

99. *See supra* notes 88–95.

100. *See, e.g.,* FEDERALIST PAPERS, *supra* note 91. Notwithstanding the above, it is important to keep in mind that Federalist Paper No. 80 directly reflects the thinking of one man, Alexander Hamilton. It is possible that some of the framers intentionally removed the phrase, “passed by the Legislature” from Article III, knowing that it would leave room for future debate.

B. Whether Congress Considered the Law of Nations, Per Se, to be Law of the United States for Purposes of General Federal Question Jurisdiction

It is equally unclear whether Congress intended general federal question jurisdiction to include all cases involving the law of nations. There is little legislative history regarding 28 U.S.C. § 1331 and virtually no information about what types of claims Congress believed would arise “under the laws of the United States,” let alone whether the “laws of the United States” would include the law of nations or even federal common law.¹⁰¹ It does seem clear, however, that the manager of the bill establishing federal question jurisdiction and its likely author, Senator Matthew Carpenter,¹⁰² intended for § 1331 jurisdiction be the same as Article III’s jurisdiction provision.¹⁰³ He declared, “The [Judiciary] [A]ct of 1789 did not confer the whole [judicial] power which the Constitution conferred This bill does . . . [t]he bill gives precisely the power which the Constitution confers—nothing more and nothing less.”¹⁰⁴ He also stated that “[t]he present bill is intended to confer a jurisdiction just as it is conferred in the Constitution, without that limitation.”¹⁰⁵

There is no evidence that Senator Carpenter believed that Article III’s provisions *per se* included the law of nations. Moreover, it is improbable that he believed that the framers intended Article III to include “federal common law,” given that federal common law did not exist at the time that the Constitution was written. But, as discussed in the next Section of this Article, federal common law began to develop in the latter half of the 1800’s. As such, he and others in Congress probably understood the “arising under” provision of § 1331 to include claims involving certain aspects of the common law that implicated federal interests, such as foreign relations.

101. Donald L. Doernberg, *There’s No Reason For It; It’s Just Our Policy: Why the Well-Pleaded Complaint Rule Sabotages the Purposes of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 603 (1987); see also Jay, *supra* note 74, at 1315; CHEMERINSKY, *supra* note 66, at 265.

102. Senator Matthew Hale Carpenter of Wisconsin sponsored and managed the Act of March 3, 1875, ch. 137, 18 Stat. 470, which, *inter alia*, established federal question jurisdiction, and was its likely author. See *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 366 n.22 (1959), *superseded in part by statute on other grounds* 43 U.S.C.A. § 59 (West 2010); 7 RPTS. OF THE WIS. ST. BAR ASS’N 155, 186 (1906).

103. Skinner, *supra* note 51, at 69–72.

104. 2 Cong. Rec. 4986–87 (1874).

105. *Id.* at 4986.

C. Federal Common Law Now Includes Claims Involving the Law of Nations Where Such Claims Implicate Federal Interests

There is agreement among scholars on both sides of the debate that in the late 1700's and throughout most of the early 1800's, the law of nations was considered to be general common law, applied by both federal and state courts.¹⁰⁶ The concept of federal common law that we recognize today began to emerge in the late 1800's.¹⁰⁷

1. Development of Federal Common Law in the Late 1800's

Federal courts began developing their own common law in the 1800's, during the time that *Swift v. Tyson*¹⁰⁸ was decided in 1842.¹⁰⁹ The development of federal common law took place not only in areas of obvious national interest,¹¹⁰ such as admiralty,¹¹¹ but also in areas typically associated with state interests, such as contracts, agency, insurance, and torts.¹¹² As some scholars have noted, the motivation behind recognizing and developing this type of federal common law was largely economic, with a desire to create uniform national law to help facilitate commercial transactions.¹¹³

106. Bradley, *The Alien Tort Statute and Article III*, *supra* note 32, at 595; Jay, *supra* note 74, 1266, 1270; Stephens, *supra* note 13, at 410, 430–31.

107. Stephens, *supra* note 13, at 410, 430–31.

108. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In *Swift*, the Supreme Court held that in diversity cases, federal courts should apply “general principles and doctrines” where there was no state statutory or constitutional provision addressing the claim, thereby supplanting state common law. *Swift*, 41 U.S. at 12. In so finding, the Court held that the Rules of Decision Act (28 U.S.C. § 1652), which mandated that state law should apply unless the Constitution, a treaty, or an Act of Congress otherwise require, did not apply to claims involving contracts and commercial transactions. *Id.* In addition, the Court noted that “the true interpretation and effect” of the law in these cases should not be found in decisions of local courts, but in the “general principles and doctrines of commercial jurisprudence” as articulated by federal courts. *Id.* In effect, the Court ruled that the Rules of Decision Act, which stated that the laws of the state should apply in the absence of a federal constitutional provision, a treaty, or statute, did not apply to state common law. *Id.*

109. *See Skinner*, *supra* note 51, at 39–40.

110. Stephens, *supra* note 13, at 430–31.

111. *See Skinner*, *supra* note 51, at 41; *see, e.g., The Belgenland*, 114 U.S. 355, 365 (1885); *The Plymouth*, 70 U.S. 20 (1865) *superseded in part by statute*, Extension of Admiralty Jurisdiction Act, 62 Stat. 496 (1948), *as recognized in* *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972); *The Lamington*, 87 F. 752 (D.C.N.Y. 1898).

112. *Skinner*, *supra* note 51, at 40; *see also* CASTO, *supra* note 42, at 162.

113. CHEMERINSKY, *supra* note 66, at 309.

Notwithstanding the development of common law by the federal courts in these various areas, the Supreme Court stated on numerous occasions throughout the 1800's that there was no common law of the United States.¹¹⁴ However, it seems clear that those cases stand for the notion that the *common law of England* was not inherited by the federal government in the same way that it was inherited by each of the states. For example, in the 1798 case *U.S. v. Worrall*, the Supreme Court notes that the common law of England can be traced to the states but not to the United States as a national government.¹¹⁵ The Court continues, "The common law of England is the law of each State, [in] so far as each state has adopted it."¹¹⁶ The Court further explains in the 1834 case *Wheaton v. Peters* that when English citizens came to the U.S., they brought with them the English common law and while each state adopted English common law as it saw fit, the federal government did not.¹¹⁷

These cases indicate that the common law referred to in the opinions was the already-established common law of England. These opinions did not address whether the federal courts had power to develop common law in areas unique to the federal government. In fact, federal courts believed that they had the power to create their own common law to aid in interpreting the U.S. Constitution and federal statutes¹¹⁸ as well as other areas including commercial and immigration law.¹¹⁹

Despite the continued development of common law by federal courts, many criticized the *Swift* decision and its progeny. This criticism reflected a tension between the rights of state courts to develop and apply their own common law in matters of local concern and the recognition that certain types of common law questions, namely those affecting the nation as a whole, should be decided by federal courts.¹²⁰ This tension was on display in two U.S. Supreme Court cases in the 1870's: the 1871 case

114. See *Cunningham v. Neagle*, 135 U.S. 1, 89 (1890); *Bucher v. Cheshire R. Co.*, 125 U.S. 555, 583-84 (1888); *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 658 (1834) ("It is clear, there can be no common law of the United States."); *United States v. Worrall*, 28 F.Cas. 774, 779 (1798) (No. 16,766) ("the United States, as a Federal government, have no common law").

115. *Worrall*, 28 F.Cas. at 779.

116. *Id.*

117. *Wheaton*, 33 U.S. at 658-59.

118. See *Smith v. Alabama*, 124 U.S. at 478-79 (citing *Moore v. United States*, 91 U.S. 270 (1875)).

119. See, e.g., *U.S. v. Wong Kim Ark*, 169 U.S. 649, 655 (1898); *Oates v. Nat'l Bank*, 100 U.S. 239, 246 (1879); *Rice v. R.R. Co.*, 66 U.S. 358, 374-75 (1861); *Watson v. Tarpley*, 59 U.S. (18 How.) 517, 519-20 (1855); *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 12 (1842).

120. See, e.g., *Stephens*, *supra* note 13, at 430-31.

of *Caperton v. Bowyer*¹²¹ and the 1875 case of *New York Life Insurance Co. v. Hendren*.¹²² Both cases were more concerned with whether claims involving the law of nations provided for federal question jurisdiction rather than the development of federal common law *per se* in situations where the federal courts otherwise had jurisdiction.¹²³

However, these cases provided the Court an opportunity, in the context of the law of nations as jurisdiction-creating,¹²⁴ to hear debate about whether the law of nations was “law of the United States.”¹²⁵ The Court also addressed the issues of whether the common law of the United States exists separate from general common law and whether it includes the law of nations.¹²⁶ In *Caperton*, the Supreme Court was asked to decide whether international law, and in particular the law of war, was included in “laws of the United States” and, thus, presented a federal question for purposes of the Court’s appellate review.¹²⁷ Although the Court ultimately refrained from deciding the issue,¹²⁸ both parties presented strong views. The defendant, a confederate provost-marshal sued in tort by a man whom he had thrown into prison during the civil war (Bowyer), raised defenses under the law of war.¹²⁹ He proposed that his defenses gave rise to the Court’s appellate jurisdiction because “international law is a law of the United States, of the *nation*, and not of the several states.”¹³⁰ The defendant continued, “[t]his indeed must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts.”¹³¹

The plaintiff argued that *Caperton*’s defenses, even if based on international law, did not provide the Court with appellate jurisdiction as “laws of the United States.”¹³² He argued that although both federal and state

121. See *Caperton v. Bowyer*, 81 U.S. 216 (1871).

122. *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286 (1875).

123. *Id.*; *Caperton*, 81 U.S. at 216.

124. Both cases considered whether the law of nations was jurisdiction-creating under the Court’s appellate jurisdiction rather than general federal question jurisdiction.

125. *N.Y. Life Ins. Co.*, 92 U.S. at 286; *Caperton*, 81 U.S. at 216.

126. *N.Y. Life Ins. Co.*, 92 U.S. at 286; *Caperton*, 81 U.S. at 216.

127. See Judiciary Act of 1789 ch. 20, § 25, 1 Stat. 73 (The Act provided for Supreme Court appellate jurisdiction consistent with U.S. CONST. art. III, § 2, cl. 2, where “drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity”); see *Caperton*, 81 U.S. at 216.

128. *Caperton*, 81 U.S. at 216.

129. *Id.* at 217, 225.

130. *Id.* at 225.

131. *Id.* at 226.

132. *Id.* at 228.

courts “recognize the law of nations as binding upon them . . . the law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States.”¹³³ Notably, the plaintiff conceded that perhaps the Supreme Court should have appellate jurisdiction over cases affecting foreign relations because this is an area of responsibility for the federal government¹³⁴—a seeming concession that the development of jurisdiction-creating federal common law in the area of the law of nations affecting foreign relations might be appropriate. However, he argued that this particular case did not affect foreign relations.¹³⁵

In 1875, the Supreme Court directly considered whether a claim involving the law of nations presented a federal question for appellate jurisdiction and found that it did not. In *New York Life Ins. Co. v. Hendren*, the Supreme Court considered the effect of the Civil War upon insurance contracts.¹³⁶ The Court held that no federal question was presented where the question rested on the general law of nations, unless it was contended that the general rules had been “modified or suspended” by the laws of the United States.¹³⁷ The Court treated this question as one of general public law available to and applicable in all courts, but not as one creating a federal question.¹³⁸

The opinion drew a vigorous dissent by Justice Bradley, whose opinion supported an argument for the development of federal common law in the area of international law.¹³⁹ He stated that “international law has the force of law in our courts, because it is adopted and used by the United States.”¹⁴⁰ According to Justice Bradley:

[T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States . . . [whether these laws] be the unwritten international law . . . or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.¹⁴¹

133. *Id.*

134. *Id.* at 228–29.

135. *Id.*

136. *N.Y. Life Ins. Co.*, 92 U.S. at 286.

137. *Id.* at 286–87.

138. *Id.* at 287.

139. *Id.* at 287–88 (Bradley, J., dissenting).

140. *Id.*

141. *Id.*

Justice Bradley also noted the importance of ensuring uniformity and the finality of decision by the national government in these types of matters.¹⁴²

Although the majority in *Hendren* suggested that the law of nations is not jurisdiction-creating,¹⁴³ it did not address whether federal common law might exist in the area of foreign affairs. Nor did the Court address any issues that could affect foreign affairs. The majority viewed the case as wholly domestic.¹⁴⁴ Had the case impacted foreign affairs, one may wonder if the Court would have reached a different result.

Both the *Caperton* and the *Hendren* decisions demonstrate that whether the law of nations was included in the newly-developing federal common law was a live issue at the time Congress enacted federal question jurisdiction in 1875.¹⁴⁵ The *Caperton* case had been decided nearly four years earlier.¹⁴⁶ *Hendren* was decided in October of 1875,¹⁴⁷ just a few months after the enactment of § 1331 in March of 1875.¹⁴⁸ Although it is unclear when the oral argument was heard, certain members of Congress, including Senator Carpenter, were probably aware that the issue was presented before the Court. Senator Carpenter was recognized as one of the leading constitutionalists in the nation, having argued several significant constitutional cases before the Supreme Court.¹⁴⁹ Given this fact, it is difficult to believe that he was unaware of the arguments surrounding whether the law of nations was federal common law or gave rise to federal appellate jurisdiction under the “Laws of the Unites States.”

142. *Id.* at 288.

143. *Id.* at 286 (majority opinion).

144. *See id.*

145. *Id.*; *Caperton v. Bowyer*, 81 U.S. 216 (1871).

146. *See Caperton*, 81 U.S. 216.

147. *Id.* at 286 (noting that the case was decided during the October term).

148. *See* 28 U.S.C. § 1331 (2010).

149. Mathew Carpenter argued his first case before the U.S. Supreme Court in 1862. In 1868, he acquired nationwide recognition in *Ex Parte McCardle*, 74 U.S. 506 (1868), where he demonstrated his knowledge of complex jurisdictional issues, arguing that Congress had the power to remove the Supreme Court’s appellate jurisdiction over certain habeas corpus cases. His other well-known cases include his representation of the state of Louisiana in the famous *Slaughter-House Cases* 83 U.S. 36 (1872) (where the Supreme Court adopted his argument that the Fourteenth Amendment’s privileges and immunities clause did not restrict the police powers of the state to centralize all slaughterhouses within the city of New Orleans in order to prevent dumping of remains in waterways.). He was eventually acknowledged to be the leading legal advocate for reconstruction policies. *Dictionary of Wisconsin History, Carpenter, Matthew Hale*, WISCONSIN HISTORICAL SOC’Y, <http://www.wisconsinhistory.org/dictionary/> (follow “Browse People” hyperlink; then follow “Carpenter, Matthew Hale” hyperlink) (last visited Nov. 10, 2010).

Senator Carpenter gave no direct clues, but he indicated a belief that federal question jurisdiction should be interpreted broadly whenever uniquely federal or national interests were at stake. For example, a review of his speeches and writings at the time suggest that he opposed expansion of the federal government's jurisdiction over state-related matters.¹⁵⁰ However, he supported such expansion over the matters that could affect national interests, including foreign affairs.¹⁵¹ Thus, it is probable that he believed § 1331 should in fact include the developing federal common law, including the law of nations when foreign relations issues were involved. This is especially true given the likelihood of his knowledge and approval of the developing federal common law in areas of national interests.

2. Continued Development of Federal Common Law in the Area of International Law

Twenty years later, the courts addressed again the emergence of federal common law in the area of international law in the 1894 federal district court case *Murray v. Chicago & N.W. Ry Co.*¹⁵² *Murray* concerned an action to recover damages for freight transportation rates.¹⁵³ The court held that federal courts are empowered to develop common law principles governing "matters of national control."¹⁵⁴ It pointed to international law in particular, stating that "[t]he subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations . . . are committed to the national government."¹⁵⁵ In 1901, the Supreme Court cited *Murray* approvingly in *Western Union Telegraph Co. v. Call Publishing Co.*¹⁵⁶—a case in which the Court held that it had jurisdiction over claims involving pricing, applying emerging federal common law to the case.

The above cases reflect a time in the 1800's and early 1900's in which federal common law was being developed by the courts. The cases demonstrate a struggle to define the federal courts' proper jurisdiction and its power to create federal common law, especially after the trend toward strong federal power after the Civil War. The ultimate conclusion reached in 1938 by the Supreme Court in *Erie v. Tompkins* and its proge-

150. Skinner, *supra* note 51, at 94–95.

151. *Id.*

152. *Murray v. Chicago & N.W. Ry. Co.*, 62 F. 24 (C.C. N.D. Iowa 1894).

153. *Id.* at 25.

154. *Id.* at 31–33, 42.

155. *Id.* at 32.

156. *See W. Union Tel. Co. v. Call Publ'g Co.*, 181 U.S. 92 (1875).

ny now seems so obviously simple: in areas of state concern, federal courts do not have the authority to develop federal common law.¹⁵⁷ Thus, it naturally follows that in areas of uniquely federal interests, especially as set forth through the division of responsibilities of the Constitution, federal courts do have the ability to develop federal common law.

3. “General Federal Common Law” Came to an End with *Erie v. Tompkins*, but Enclaves Remain.

The 1938 Supreme Court decision of *Erie v. Tompkins*¹⁵⁸ ended the expansion of *general* federal common law. In *Erie*, the U.S. Supreme Court declared that federal general common law no longer exists, and, in diversity cases, federal courts should apply state law except in matters governed by the Federal Constitution or acts of Congress.¹⁵⁹ *Erie* insinuated, however, that enclaves of federal common law still exist by stating that judicial action is permissible in matters the Constitution specifically authorized or delegated to the United States.¹⁶⁰

Moreover, on the same day that the Court issued the *Erie* decision, it also issued another decision written by the same author, Justice Brandeis. The decision, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, states that the question of “whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law,’ upon which neither the statutes nor the decisions of either State can be conclusive.”¹⁶¹ *Hinderlider* recognized that, notwithstanding the *Erie* ruling, federal common law continues to exist in certain important areas.¹⁶² The Court acknowledged that prior Court decisions regarding whether controversies involving interstate boundaries, waterways, and compacts created a federal question were not uniform,¹⁶³ but ultimately found that such controversies were “federal common law” and should create a federal question.¹⁶⁴ In fact, as discussed below, this may be one of the very first cases that specifically lead to the notion that “federal common law” presents a federal question for jurisdictional purposes.

The *Hinderlider* decision confirmed what had been developing for some time: in matters affecting uniquely federal interests, federal courts can develop and apply their own common law—federal common law. It

157. See *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

158. See *id.*

159. *Id.* at 78.

160. *Id.*

161. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

162. *Id.*

163. *Id.* at 811 n.12.

164. *Id.* at 811.

since has been accepted that international law is one such area of federal common law.

4. Courts Recognize Aspects of the Law of Nations as an Enclave of Federal Common Law that Survived *Erie*.

Shortly after the *Erie* decision, Professor Philip Jessup wrote a well-known law review article in which he argued that customary international law should be treated as federal common law.¹⁶⁵ He stated:

Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. . . .

. . . .

It would be unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.¹⁶⁶

This prediction came to fruition in the 1964 case *Banco Nacional de Cuba v. Sabbatino*.¹⁶⁷ In *Sabbatino*, the Court applied the Act of State Doctrine—an international law rule—as a matter of federal common law when it dismissed a claim by an American commodity broker against Cuba for title to sugar.¹⁶⁸ The Court recognized that it had the authority to develop a common law rule because the doctrine is so important to foreign relations.¹⁶⁹ In so doing, the Court notes that the “United States courts apply international law as part of our own in appropriate circumstances”¹⁷⁰ The decision further states:

We are constrained to make it clear that an issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law. It seems fair to assume that the Court did not have rules

165. Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740 (1939).

166. *Id.*

167. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 (1964) (stating that the Act of State doctrine dictates, as quoted in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897): “Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.”).

168. *Sabbatino*, 376 U.S. at 426–27.

169. *Id.*

170. *Id.* at 423.

like the act of state doctrine in mind when it decided *Erie R. Co. v. Tompkins*.¹⁷¹

It also notes, with approval, Professor Jessup's proposition that rules of international law should not be left to divergent and perhaps parochial state interpretations, and that "[h]is basic rationale is equally applicable to the act of state doctrine."¹⁷² The *Sabbatino* case is especially important to the consideration of the issues addressed in this Article. There, the Court did not directly apply international law or the law of nations, but rather believed that it had the authority to develop federal common law where a case might impact foreign affairs.¹⁷³ In exercising this authority, it explored international law and recognized a customary international law rule in the development of federal common law.¹⁷⁴

Similarly, in the 1981 case of *Texas Industries, Inc. v. Radcliff Materials, Inc.*, the Supreme Court confirmed that "international disputes implicating . . . our relations with foreign nations" is an area of law that continues to exist as an enclave of federal common law.¹⁷⁵ According to the Court in *Texas Industries*, courts can create federal common law either where there is specific Congressional authorization to do so or where it is "necessary to protect uniquely federal interests," such as those areas "concerned with the rights and obligations of the United States" including "our relations with foreign nations."¹⁷⁶ The Court continues:

In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.¹⁷⁷

The U.S. Supreme Court in *Sosa* agreed that federal courts have the authority to create federal common law in certain areas.¹⁷⁸ The Court recognized that *Erie* allows "limited enclaves" in which federal courts may

171. *Id.* at 425.

172. *Id.*

173. *Id.* at 423 ("The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers.").

174. *Id.* at 421, 428–29.

175. *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981), *cited with approval* in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004).

176. *Id.* at 640–41.

177. *Id.* at 641 (citing *Illinois v. Milwaukee*, 406 U.S. 91, 92 (1972); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938)).

178. *See Sosa*, 542 U.S. at 692.

derive some substantive federal common law.¹⁷⁹ The *Sosa* Court indicated that the law of nations or areas of federal relations is one such area.¹⁸⁰

The cases discussed in this Part, including *Jecker*, *The Paquette Habana*, *Hinderlider*, *Sabbatino*, *Texas Industries*, and *Sosa*, all suggest that federal courts have the authority to develop law in areas of uniquely federal interests, such as in cases affecting foreign relations. Further, the cases suggest courts may look to customary international law and incorporate it into federal common law when appropriate. This is true whether a court is recognizing a private claim for violations of federal common law, as Court's decision in *Sosa* indicates is within federal court's power, or applying a rule of decision in diversity cases where a judicial opinion may impact foreign affairs.

A close analysis of these cases also leads to the conclusion that the law of nations *per se* is not part of the "laws of the United States," and customary international law is not wholly incorporated into our federal common law.¹⁸¹ Instead, when uniquely federal interests are involved, the federal courts have common law authority to adopt certain rules of customary international law, which in turn become federal common law.

D. Federal Common Law is Now Considered "Law of the United States" for Purposes of Article III and 28 U.S.C. § 1331.

If federal common law did not exist at the time when the Constitution was written, and was only coming into existence during the enactment of general federal question jurisdiction in 1875, the ensuing question is whether the "Laws of the United States" for Article III purposes include modern federal common law, which in turn incorporates some aspects of customary international law. A similar question is whether, given that Congress in 1875 probably intended to confer jurisdiction to federal courts through the enactment of federal question jurisdiction as expansively as allowed by Article III,¹⁸² arising under "laws of the United States" for purposes of § 1331 includes federal common law that incorporates, or recognizes, aspects of customary international law.

The Supreme Court has never clearly stated that federal common law can be the basis of "Laws of the United States" under Article III. How-

179. *Id.* at 729; *see also id.* at 729 n.18 (noting that *Sabbatino* "further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts.")

180. *Id.* at 729–30.

181. This is borne from the Court's opinion in *Sosa*, which stated, "our federal courts recognize customary international law." *Sosa*, 541 U.S. at 729 (emphasis added).

182. *See Skinner*, *supra* note 51, at 69–72.

ever, the Court in *Milwaukee v. Illinois* did clearly state that federal common law could be the basis for § 1331 jurisdiction.¹⁸³ Some commentators argue that *Milwaukee v. Illinois*, as well as two dissenting opinions in other cases written by Justice Brennan, lead to the logical conclusion that Article III's "Laws of the United States" includes federal common law.¹⁸⁴ The fact that the Court has accepted that § 1331 jurisdiction is more narrow than the jurisdiction provided for in Article III¹⁸⁵ strengthens this view. Thus, if federal common law can provide jurisdiction pursuant to § 1331, it necessarily means that it provides for jurisdiction under Article III as well.

Significantly, the Supreme Court in *Erie* found that the term "laws of the several states" found in § 34 of the First Judiciary Act (also known as the Rules of Decision Act)¹⁸⁶ included state common law when deciding what rules of decision should apply in diversity cases.¹⁸⁷ As such, it follows that "laws of the United States" in both, Article III and 28 U.S.C. § 1331 should also include common law of the United States, *i.e.*, federal common law.

Although the Supreme Court in *Sosa* did not address whether claims for violation of the law of nations under the ATS "arise under the Constitution or Laws of the United States" for Article III purposes, its decision indicates the Court's belief that such claims arise under Article III's "Laws of the United States" as federal common law. But because this issue was not raised or briefed by the parties, the Court did not have an

183. Illinois filed a lawsuit against four cities alleging that they were polluting Lake Michigan and creating a public nuisance, and asked the lower courts to abate the nuisance. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 100 (1972) (citing *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 393 (1959) (Brennan, J., concurring), which concluded that "laws" within the meaning of § 1331 embraced claims founded on federal common law).

184. See, e.g., Note, *Section 301(A) and the Federal Common Law of Labor Agreements*, 75 YALE L. J. 877, 886 n.9 (1966); Jack Garvey, *Repression of the Political Emigre—the Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78, 97 (1980); see also *Milwaukee v. Illinois*, 406 U.S. 91 (1972).

185. See, e.g., *Powell v. McCormack*, 395 U.S. 486, 515–16 (1969); *Verlinden v. Cent. Bank of Nig.*, 461 U.S. 480, 494–95 (1983); see also, Donald Doernberg, *There's No Reason For It; It's Just Our Policy: Why the Well Plead Complaint Rule Sabotages the Purpose of Federal Question Jurisdiction*, 38 HASTINGS L.J. 597, 608 (1987).

186. Federal Judiciary Act of September 24, 1789, ch. 20, 1 Stat. 73, 92 (codified at 28 U.S.C. § 725 (1940)) ("The laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.").

187. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

occasion to consider it directly. As noted in Part I,¹⁸⁸ when an ATS case is between an alien and a citizen, Article III's alienage provision provides for clear Article III constitutionality.¹⁸⁹ But when the case is between two aliens, as it was in *Sosa*, federal courts can exercise jurisdiction pursuant the ATS under Article III only if the claims meet the "arising under this Constitution, Laws of the United States" provision.¹⁹⁰ It appears that the Court assumed that the ATS was constitutional under Article III, even when the case involves an alien bringing suit against another alien. This is due, in part, to the *Sosa* Court's silence on this issue and its affirmation that federal courts have the power to recognize certain tort claims for violation of the law of nations. Moreover, the Supreme Court did not challenge the holding in the ground-breaking 1980 ATS case *Filartiga v. Pena-Irala*, which stated that the ATS was constitutional based on the "Laws of the United States" provision of Article III.¹⁹¹ Moreover, the Court cited *Filartiga* approvingly in other contexts.¹⁹² This silence with respect to the ATS's constitutionality, coupled with the Court's approval of *Filartiga* and its statement that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations,"¹⁹³ creates a fair assumption that the Supreme Court most likely agrees that the ATS is constitutional as between two aliens under Article III's "arising under the Laws of the United States" provision as federal common law.

Finally, as analyzed above,¹⁹⁴ federal courts have the authority to develop federal common law in areas of unique federal interest, given the ordering of the Constitution's division of powers. The Constitutional divisions of responsibility between federal and state government arguably provide for this implicit authorization. Where such implicit constitutional division of issues occurs (e.g., in areas of foreign affairs), federal courts should have the ability, when appropriate, to develop federal common law in those areas of federal responsibility. Where such occurs, federal common law should be considered law of the United States for purposes of Article III and § 1331.

188. See discussion *supra* Section I.B.

189. Article III also provides for federal judicial power when a case is between citizens of a state and citizens of a foreign state. Thus, for a case between two aliens to be constitutional under Article III, the case must arise under the Constitution or laws of the United States. U.S. CONST. art. III, § 2, cl. 2.

190. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 692 (2004).

191. *Filartiga v. Pena-Irala*, 630 F.2d 876, 885 (2d Cir. 1980).

192. *Sosa*, 542 U.S. at 725, 731–32.

193. *Id.* at 729.

194. See discussion *supra* Section II.C.4.–II.D.

III. PURSUANT TO 28 U.S.C. §1331, FEDERAL COURTS HAVE THE AUTHORITY TO USE THEIR COMMON LAW POWER TO PROVIDE REMEDIES BY RECOGNIZING PRIVATE CLAIMS FOR CERTAIN VIOLATIONS OF THE LAW OF NATIONS.

A. Congress Understood When it Enacted 28 U.S.C. §1331 that Federal Courts Would Use Their Common Law Power to Recognize Certain Common Law Claims.

To the degree that common law claims alleging a violation of customary international law arise under the laws of the United States for purposes of general federal question jurisdiction, federal courts can, and should, have the common law power to provide remedies by recognizing such private claims, even absent explicit statutory authorization. Although related to the question of whether claims involving the law of nations arise under the laws of the United States as federal common law, the courts' authorization to invoke their common law powers to provide a remedy through recognition of the claim for such violations is a different issue. Generally, there is a consensus that some type of authorization is necessary for a federal court to provide a remedy for a violation of law through the recognition of a private cause of action.¹⁹⁵ The issue is whether the authorization needs to be explicit, such as a statute, as some scholars suggest,¹⁹⁶ or whether it can be implicit in light of Congressional intent, Congressional understanding, or the Constitution's division of responsibilities.¹⁹⁷

In *Sosa*, the U.S. Supreme Court determined that the ATS was a jurisdictional statute that did not itself create a cause of action, but held that federal courts, through their common law power, could provide remedies by recognizing aliens' private claims for a limited set of violations of the law of nations¹⁹⁸ as a matter of federal common law.¹⁹⁹ In other words, the Court found that a private cause of action exists for certain international law violations but federal common law provides the claim in cases

195. See Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 853–56; Stephens, *supra* note 13, at 435–36.

196. Bradley & Goldsmith, *Customary International Law as Federal Common Law*, *supra* note 17, at 856–57.

197. Stephens, *supra* note 13, at 436–48.

198. The *Sosa* Court held that any claim brought today for violation of the law of nations under the ATS must “rest on a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th Century paradigms” recognized at the time—attacks on diplomats, safe conducts, and piracy. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).

199. *Id.* at 714, 724–25.

brought under the ATS.²⁰⁰ The Court found that Congress had implicitly authorized the federal courts to use their common law powers to recognize these private claims because when Congress enacted the ATS in 1789, it did so with an understanding “that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations.”²⁰¹

The analysis employed by the *Sosa* Court is consistent with the Supreme Court’s prior holdings recognizing private causes of action where the Court could ascertain that such was Congress’ intent, either expressly or by implication.²⁰² In addition, there have been occasions when the Court has recognized causes of action where it found that Congress *assumed* such remedies were available, or where the Court found an implied action existed because such private claims had been allowed previously.²⁰³ Although these occasions involved Congressional assumptions in enacting *statutes*, there is no reason the same analysis should not apply to common law claims. In fact, the analysis should be more applicable to claims arising from the common law. In those decisions where the courts found private claims to implicitly arise from the statutes, Congress had the opportunity when it drafted such statutes to create causes of action, but did not do so. With federal common law, Congress has had no similar opportunity.

The analysis regarding implicit authorization employed by the *Sosa* Court should also apply to § 1331, because it is a jurisdictional statute just like the ATS. Thus, the question of whether federal courts are authorized to recognize causes of action for common law claims brought under § 1331 should be whether Congress understood when it enacted the statute in 1875 that federal courts would use their common law power to recognize claims for common law tort violations.

Congress likely understood that federal courts would do so. As with the ATS, when Congress enacted 28 U.S.C. § 1331, it likely understood that federal courts would use their common law power to recognize tort

200. *Id.* at 724 (“The jurisdiction 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.”).

201. *Id.* at 714, 724, 731 n.19.

202. *See, e.g.*, *Karahalios v. Nat’l Fed’n of Fed. Emp.*, 489 U.S. 527, 536 (1989); *Canon v. Univ. of Chi.*, 441 U.S. 677, 688 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15–16 (1979); *J.I. Case Co. v. Borak*, 377 U.S. 426, 433 (1964); *see also* CHEMERINSKY, *supra* note 66, at 377–83.

203. *See, e.g.*, *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 380–82 (1982); *see also* CHEMERINSKY, *supra* note 66, at 383.

claims, including claims for violations of the law of nations where those claims implicated foreign relations.²⁰⁴ In fact, federal courts had been recognizing private, common law tort claims for nearly 100 years.²⁰⁵ Moreover, as the Supreme Court noted in *Sosa*, “torts in violation of the law of nations were recognized as part of the common law” even in the late 1700’s.²⁰⁶ Federal courts recognized private claims for violations of the law of nations in the late 1700’s,²⁰⁷ and in 1875, those cases were still good law. The *Sosa* Court cited two of these cases to support its position that Congress assumed that private claims alleging violations of the law of nations could be brought as part of the common law.²⁰⁸

A review of cases decided in the 1800’s demonstrates that during this time, federal courts recognized private claims for violations of common law generally, and law of nations specifically, without statutory authorization. The most common type of federal cases where private claims for violations of the laws of nations were recognized as a matter of common law was in the area of prize,²⁰⁹ over which the courts had jurisdiction in admiralty. Such cases included the 1855 case of *Jecker v. Montgomery*, where the Supreme Court entertained a private, common law claim,²¹⁰ as well as the 1862 *Prize Cases*, where the Supreme Court entertained four common law private claims in which the plaintiffs alleged that their ships’ capture and seizure as prize was unlawful.²¹¹

Other instances where federal courts recognized private claims for torts as a matter of common law occurred in cases against military officers and against civilians who were obeying the orders of military officers during times of armed conflict. For example, in the 1849 case of *Luther*

204. See discussion *supra* Section II.C.2–II.C.3.

205. Skinner, *supra* note 51, at 101–07.

206. *Sosa*, 542 U.S. at 714, 724.

207. See *Bolchos v. Darrel*, 3 F.Cas. 810, 811 (1795) (the court assumed it had jurisdiction under the ATS in suit for damages brought by a French privateer against the mortgagee of a British slave ship); *Talbot v. Janson*, 3 U.S. 133, 156–57 (1795) (holding that Talbot, a French citizen who had assisted Ballard, a U.S. citizen, in unlawfully capturing a Dutch ship had acted in contravention of the law of nations and was liable for the value of the captured assets); *Moxon v. Fanny* 17 F.Cas. 942, 948 (1973) (suggesting that the claim could otherwise be heard even though the ATS was not the proper jurisdictional statute in a case involving owners of a British ship seeking damages for its seizure in U.S. waters by a French privateer because the suit could not be called one for a “tort only.”).

208. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

209. The Prize Cases—an area of tort in violation of the law of nations—were routinely brought before federal courts during the 1800’s. See *Prize Cases*, 67 U.S. 635 (1862); see also *The Joseph*, 12 U.S. (8 Cranch) 451 (1814); *The Rapid*, 12 U.S. (8 Cranch) 155 (1814).

210. *Jecker, Torre & Co. v. Montgomery*, 59 U.S. (18 How.) 110, 112 (1855).

211. See *Prize Cases*, 67 U.S. at 635.

v. Borden,²¹² the Supreme Court ruled that when martial law was imposed in Rhode Island after an insurgent uprising to overthrow the government, an officer could be held civilly accountable for acts willfully done to an individual with more force than militarily necessary.²¹³ No specific authorization for a private claim was cited, rather, such appears to have been a matter of common law.

In the 1851 seminal case of *Mitchell v. Harmony*,²¹⁴ a U.S. citizen who traded in Mexico during the U.S.-Mexican War in an area under U.S. control, brought a claim in federal court for the common law torts of trespass and conversion²¹⁵ against an officer in the U.S. Army who had seized and converted for his own use the plaintiff's horses, mules, wagons, goods, chattels, and merchandise.²¹⁶ After rejecting defendants' arguments that he was justified to act under the law of war,²¹⁷ the Court allowed the private claim to go forward as a common law claim.²¹⁸

A review of the above cases, among others,²¹⁹ demonstrates that federal courts routinely recognized private claims, including claims for violations of the law of nations, without the need for any specific authorization during the era when Congress enacted federal question jurisdiction. It was assumed that the federal courts could use their common law power to recognize private, civil claims. Thus, when Congress enacted § 1331 in 1875, it understood that federal courts would use their common law powers to recognize private claims once they had jurisdiction over such claims. As argued above, Congress also likely understood that § 1331 would create jurisdiction over the newly-developing federal common law claims—*i.e.*, those common law claims affecting uniquely federal interests, including those invoking the laws of nations which could affect foreign relations.

B. Response to the Sosa Court's Skepticism Regarding § 1331

In response to Justice Scalia's concurring opinion that the Court's decision in *Sosa* would lead to federal question jurisdiction under § 1331 for claims of customary international law violations,²²⁰ the Court stated, "[o]ur position does not . . . imply that every grant of jurisdiction to a

212. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

213. *Id.* at 38.

214. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115 (1851).

215. In this case, the Court had jurisdiction due to diversity of citizenship. *Id.* at 137.

216. *Id.* at 115–16.

217. *Id.* at 133–35.

218. See generally *Harmony*, 54 U.S. (13 How.) at 115.

219. See *Skinner*, *supra* note 51.

220. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 745 (2004).

federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes of § 1350).”²²¹ Moreover, although the Court confirmed that “no development in the last two centuries has precluded federal courts from recognizing a claim under the law of nations as an element of common law,”²²² it stated that its opinion regarding the ATS was consistent with the division of responsibilities between federal and state courts after *Erie*,²²³ but that the same might not be true for “a more expansive common law power related to 28 U.S.C. § 1331.”²²⁴

The Court’s skepticism regarding whether customary international law claims fall under § 1331’s jurisdiction likely relates to concerns about federal courts using their common law powers too broadly, recognizing claims in a vast array of areas unrelated to uniquely federal interests, or for actions Congress may never have intended or understood when it enacted § 1331. Such use of federal common law powers would likely not be consistent with *Erie*. However, use of common law power is consistent with *Erie* if federal courts only use their common law powers to recognize and provide remedies for those claims of customary international law violations that entail uniquely federal interests, such as foreign relations.

Erie ultimately was about the tension between federal and state power. It contemplated and overturned the federal courts’ usurpation of state judicial power in matters of local (not federal) concern.²²⁵ But the *Erie* decision did not address whether federal courts could use their federal common law power to recognize claims in areas of clearly national interest. In fact, the *Erie* decision allows for certain enclaves of federal common law.

Federal courts can and should be able to use their common law power to recognize claims for violation of the law of nations where the recognition of such claims may affect foreign relations. Such claims should fall within the jurisdiction of federal courts, even where the claim is brought by a U.S. citizen, given that such claims might impact foreign affairs either through the recognition of the claim, a finding that the claim is non-justiciable, or through definitions of customary international law. *Erie* is not to the contrary.

221. *Id.* at 731 n.19.

222. *Id.* at 724–25.

223. *See generally* *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

224. *Sosa*, 542 U.S., at 731 n.19.

225. *See Erie*, 304 U.S. 64.

CONCLUSION

Claims alleging violations of customary international law that have the potential to impact foreign affairs or other national interests should fall within the jurisdictional grant of 28 U.S.C. § 1331 as federal common law claims, which arise under the “laws of the United States.” Similarly, such claims arise under the “Laws of the United States” for purposes of Article III, and thus, their justiciability is constitutional. Federal courts should also have the common law power to recognize and provide remedies for these claims, because Congress understood, when it enacted § 1331 in 1875, that federal courts would use their common law power to recognize newly-emerging federal common law claims, just as both federal and state courts routinely recognized common law tort claims. As long as this federal common law power is used to develop and recognize claims that affect uniquely federal interests, such as foreign affairs, and not claims affecting primarily state interests, this power is consistent with *Erie v. Tompkins* and its progeny.