AN EMERGING UNIFORMITY FOR INTERNATIONAL LAW

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The status of international law in the U.S. legal system has been hotly contested. Most international law scholars maintain that customary international law (CIL) is federal common law immediately applicable in federal courts. A minority of scholars has responded that CIL may be applied by federal courts only when authorized by the political branches. The Supreme Court's decision in Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004), stoked the debate. In* Sosa*'s wake, scholars have overwhelmingly concluded that the Supreme Court endorsed the majority view that CIL is federal common law.*

This Article asserts that Sosa *has been both misperceived and underappreciated.* Sosa *not only supports the minority position that federal judicial authority to incorporate CIL hinges on congressional intent, but* Sosa *startlingly suggests that federal incorporation is governed by the same considerations that determine whether treaties are self-executing and immediately applicable in U.S. courts: namely, the intent of the political branches, specific definition, mutuality, practical consequences, foreign relations effects, and alternative means of enforcement.* Sosa *thus manifests the emergence of a uniform doctrine that governs the federal status of both treaties and CIL. This emerging doctrine, which serves to police the distribution of lawmaking and foreign affairs authority between the judiciary and the political branches, has significant implications. It suggests that reigning confusion over the domestic status of international law is being replaced with doctrinal clarity and coherence, reveals that the collective wisdom on the domestic status of international law is out of step with Supreme Court jurisprudence, results in more appropriate treatment of CIL relative to treaties, and suggests that efforts to incorporate international law as federal law should focus on the political branches, not the courts.*

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INTRODUCTION

The status of international law in the U.S. legal system has long been murky.[*] Debate over the issue has reached feverish pitch in recent years.[†] Writers have clashed over such issues as whether customary

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[*] *See* Ralph G. Steinhardt, *Laying One Bankrupt Critique to Rest:* Sosa v. Alvarez-Machain *and the Future of International Human Rights Litigation in U.S. Courts*, 57 VAND. L. REV. 2241, 2243 (2004) (referring to the "decades-old battles over the constitutional status of international law"); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365, 367-68 (2002) (noting that the debate over the domestic status of customary international law was precipitated by the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, as well as the increase in scope of, and litigation based on, international law in the latter 1900s) [hereinafter Young I]; *see also* Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995); Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295; Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205 (1988); Phillip Trimble, *A Revisionist View of Customary International Law*, 33 U.C.L.A. L. Rev. 665 (1986).

[†] *See* Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 153-54; Young I, *supra* note

international law[*] (CIL) is federal or state law and whether CIL may be applied by federal courts absent incorporating legislation.[†]

Recently in *Sosa v. Alvarez-Machain*,[‡] the Supreme Court stepped into the debate, commenting on the import of the Alien Tort Statute (ATS),[§] a founding era jurisdictional statute that has been used to bring suits based on CIL in federal courts.[**] The Court concluded that federal

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*, at 366.

[*] CIL is traditionally defined as the "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) [hereinafter RESTATEMENT]; *see also* Statute of the International Court of Justice, Jun. 26, 1945, art. 38, 59 Stat. 1055, 1060, *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (identifying "general [state] practice accepted as law" as a source of international law).

[†] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816 (1997) (arguing that CIL is not federal common law and must be incorporated by the federal political branches before it may be applied as a federal rule of decision by federal courts) [hereinafter Bradley & Goldsmith, *CIL as Federal Common Law*]; Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (defending the traditional position that CIL is federal law subject to common law incorporation by federal courts); Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); 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); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law*, 66 FORDHAM L. REV. 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Young I, *supra* note *.

[‡] 124 S. Ct. 2739 (2004). The facts of *Sosa* are discussed in conjunction with this Article's analysis of *Sosa*'s reasoning. *See infra* Part III.

[§] 28 U.S.C. § 1350 (2000). The ATS currently provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Id.*

[**] While the ATS had largely gone unnoticed since its inclusion in the original Judiciary Act of 1789, the Second Circuit's 1980 decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), brought the ATS out of obscurity and opened the door for federal courts to hear suits by aliens based on violations of CIL. A variety of such suits were brought following *Filartiga*. *See, e.g.*, *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002), *vacated and reh'g en banc granted*, 395 F.3d 978 (9th Cir. 2003), *district court opinion vacated by* 403 F.3d 708 (9th Cir. 2005); *Bigio v. Coca-Cola Co.*, 239 F.3d 440 (2d Cir. 2000); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Hamid v. Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995); *In re Est. of*

courts may recognize certain common law causes of action based on CIL under the ATS.[††] In the wake of this decision, scholars have begun to discuss *Sosa*'s import for the status of CIL in federal courts.[‡‡] However, scholars have failed to recognize what *Sosa* suggests about the status of international law more generally in federal courts.

CIL is one of two primary sources of international law; treaties constitute the other.[§§] In *Sosa*, the Supreme Court–without acknowledging it and perhaps unknowingly–started to close a circle the Court began to draw nearly 200 years ago when it adopted the self-execution doctrine for treaties. In *Sosa*, the Supreme Court suggested that whether treaties and CIL may be applied as rules of decision by federal courts is governed by the same doctrine–what might be called the implied incorporation doctrine.[***] This Article identifies the emergence of this doctrine and discusses its implications.

Part I provides context for this discussion by briefly recounting the debate regarding the domestic status of international law both prior to and following *Sosa*. As this Part reveals, the academic discussion of *Sosa* has failed to recognize the apparent emergence of a uniform approach to the federal status of treaties and CIL. Part II provides the backdrop for perceiving this emerging doctrine by outlining the analysis courts employ to determine whether treaties may be invoked as rules of decision in U.S. courts. Against this background, Part III analyzes the Court's opinion in *Sosa*, identifying the test the Supreme Court developed for determining when CIL may be applied as federal law in federal courts. Part IV renders explicit what Parts II and III suggest–that the same doctrine that governs the status of treaties also governs the status of CIL in federal courts. Part IV identifies the substance of this doctrine of implied incorporation and provides a brief discussion of its implications, opening the door for scholarly debate on this emerging, and surely controversial, doctrine.

Marcos, Human Rights Litig., 25 F.3d 1467 (9th Cir. 1994).

[††] *Sosa*, 124 S. Ct. at 2761-62.

[‡‡] *See infra* Part I.

[§§] *See* RESTATEMENT, *supra* note *, § 102; Statute of the International Court of Justice, *supra* note *, at art. 38.

[***] The doctrine the Supreme Court suggested is uniform for treaties and CIL to the extent that CIL is domesticated based on implied congressional intent. Whether CIL might also be domesticated on unique federal interest grounds is beyond the scope of this Article. However, at least one commentator has argued that the wholesale incorporation of CIL as common law cannot be justified on federal interest grounds. *See* Young I, *supra* note *, at 436-50.

I. DEBATE OVER THE STATUS OF INTERNATIONAL LAW IN FEDERAL COURTS

As noted, the status of international law in the U.S. legal system, and particularly federal courts, has long been contested. The debate has been somewhat less feverish with regard to treaties than with CIL. The question whether treaties may be applied in U.S. courts as federal law has been relatively settled by the self-execution doctrine.[†††] However, this doctrine has been the subject of academic criticism. Scholars have criticized the self-execution doctrine as inconsistent with treaties' status as supreme federal law and have challenged the political branches' practice of attaching non-self-executing declarations to U.S. ratification of treaties.[‡‡‡] A minority of scholars has sought to defend the self-execution doctrine.[§§§]

By contrast, the status of CIL in federal courts has remained uncertain as a matter of doctrine.[****] Broad references by the Supreme Court to international law's domestic status have failed to supply clear

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[†††] *See infra* Part II. This is not to suggest that the doctrine itself is clear, *see* Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 695 (1995) [hereinafter Vazquez], but that the doctrine governs the questions whether and when treaties may be applied by U.S. courts as federal law. If a treaty is found to be self-executing, then it is immediately applicable by U.S. courts, whereas a non-self-executing treaty requires implementing legislation before courts may enforce the substance of its terms. *See infra* note †††††††† and accompanying text.

[‡‡‡] *See* Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760, 760 (1988) (asserting that the self-execution doctrine "is a judicially invented notion that is patently inconsistent with" the Supremacy Clause); Yuji Iwasawa, *The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis*, 26 VA. J. INT'L L. 627, 635 (1986); *see also* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1 (2002) (challenging the Restatement position on self-execution as inconsistent with the Constitution).

[§§§] *See* John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999); John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218 (1999). For responses to Professor Yoo's position, see Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and "Supreme Law of the Land"*, 99 COLUM. L. REV. 2095 (1995); Carlos M. Vazquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154 (1999).

[****] *But cf.* Koh, *supra* note †, at 1824-27, 1830-41 (arguing that federal court incorporation of CIL as federal common law has been the established practice at least since the U.S. founding).

guidance,[††††] and lower courts have treated CIL as federal common law for some purposes but not others.[‡‡‡‡] Scholars have likewise split on the issue.

Prior to *Sosa*, the prevailing view was that CIL was applicable in federal courts as federal common law without a need for incorporation by the political branches.[§§§§] Thus, Professor Koh argued that "[o]nce customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives."[*****] This view was challenged, however, by a minority of scholars who claimed that CIL should not qualify as federal common law

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[††††] See, for example, the famous statement in *The Paquete Habana*, 175 U.S. 677 (1900), that "[i]nternational 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." *Id.* at 700. For divergent views on the import of *The Paquete Habana*, compare Ku & Yoo, *supra* note †, at 172-73 (arguing that "if anything, [*The Paquete Habana*] undermine[s] the idea that federal courts have power to enforce CIL as federal law"); Young I, *supra* note *, at 451 (noting, *inter alia*, that international law was part of general common law when *The Paquete Habana* was decided); Young II, *supra* note §§§§§, at 519 (same); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 849-50 (same); John M. Rogers, INTERNATIONAL LAW AND UNITED STATES LAW 135-39 (arguing "that international law is part of our law . . . in the same way that 'justice' or 'fairness' or 'sound policy' is a part of our law": "it forms the basis for decision when no other dispositive source controls"), and Koh, *supra* note †, at 1830-41 (citing *The Paquete Habana* to support the contention that "[b]oth before and after *Erie*, the federal courts issued rulings construing the law of nations."). *See also* Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L. J. 855, 858-60, 865-66 (2005) (noting selective scholarly reliance on prior cases to support divergent views of the courts' role in foreign affairs).

[‡‡‡‡] *See* Young I, *supra* note *, at 379, 381-84 (Although some courts have endorsed the view that CIL is federal common law for purposes of arising under jurisdiction, generally courts have not adopted the view that CIL trumps inconsistent state law as federal common law would.); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 821, 845 & n.199, 851, 873 ("Although the lower federal courts have endorsed the [majority] position, they have done so mostly in jurisdictional contexts and have not generally considered its broader substantive implications"; for example, courts have generally not found that CIL binds the President, nor have they held that CIL is supreme over state law.).

[§§§§] Koh, *supra* note †, at 1824-26, 1835 & n.61, 1841; Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 816-17, 820; Young I, *supra* note *, at 366, 375. CIL as common law would trump state law and create arising under jurisdiction. *See, e.g.*, Young I, *supra* note *, at 377-78.

[*****] Koh, *supra* note †, at 1835.

post-*Erie* and thus could not provide a federal[†††††] rule of decision absent incorporation by the political branches.[‡‡‡‡‡] The crux of the minority position was that the political branches must take the lead in rendering CIL domestic law. While others views were advanced,[§§§§§] these two framed the discussion. Each raised persuasive arguments[******]; neither was the clear winner.[††††††]

Sosa provided additional fodder for the debate between the two positions. In *Sosa*'s wake, commentators have tended to conclude that the Supreme Court has vindicated the majority position that federal courts possess the authority to incorporate CIL as federal common law even in the absence of congressional authorization.[‡‡‡‡‡‡]

[†††††] State incorporation of CIL would provide a state rule of decision for federal courts sitting in diversity. *See* Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 870.

[‡‡‡‡‡] *See id.* at 817, 870; Koh, *supra* note †, at 1840 n.84; Young I, *supra* note *, at 369, 463-64 & n.505 (summarizing, and collecting support for, the minority position).

[§§§§§] *See, e.g.*, Young I, *supra* note *, at 370-71, 467-68, 511 (advocating a return to CIL's pre-*Erie* status as general law that would make CIL available to both federal and state courts pursuant to conflict of law principles); Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. Mar. L. & Com. 469, 507-09 (2004) (same) [hereinafter Young II]; *id.* at 471, 517 (arguing that foreign affairs law ought to be normalized; i.e., that we should "[a]ccept broad legislative authority [in the area of foreign affairs], but insist that federal [foreign affairs] law be made according to constitutionally prescribed processes," not through exceptional incorporation of CIL as federal common law); ROGERS, *supra* note ††††, at 139-68 (arguing that federal courts may apply CIL to preempt state law violations of international law where (a) there is no federal statute authorizing the violation, (b) the federal government would have power to legislate that the state comply with international law, and (c) the executive agrees, and the court confirms, that the relevant norm of CIL binds the U.S.).

[******] See Young I, *supra* note *, for one commentator's assessment of the strengths and weaknesses of each position. Young I concludes, *inter alia*, that the majority position is inconsistent with *Erie*, but that the minority view leaves too little room for the application of CIL in federal courts. *See id.* at 372, 410-14, 462, 464-67, 510-11.

[††††††] *See* Ku & Yoo, *supra* note †, at 154 (noting "that neither side has convinced the other" and that "formalist arguments over the interpretation of the ATS" had reached a stalemate prior to *Sosa*).

[‡‡‡‡‡‡] *See* Anupam Chander, *Globalization and Distrust*, 114 YALE L.J. 1193, 1205, 1206 (2005) (*Sosa* "sided definitively with the" majority position and "represents a . . . catastrophe" for the minority view.); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004) (*Sosa*'s "import is to confirm that international custom was part of judicially enforceable federal law even in the absence of a statute."); Harold Hongju Koh, *The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1, 12-13 (2004) (All circuit courts, and now the *Sosa* Court, have rejected the minority position, though *Sosa* only recognized "a federal common law, civil remedy for a very limited class of gross human

Sosa's significance, however, has been both misperceived and underappreciated. Far from endorsing the majority view of CIL, the Court nodded support for the minority position by demonstrating that the application of CIL in federal courts turns on congressional intent. More significantly for current purposes, the Court took this position in the course of making a broader statement about the status of international law in federal courts; that is, the Court not only reaffirmed the self-execution doctrine with regard to treaties, but also indicated that the substance of that doctrine governs the application of CIL in federal courts.[§§§§§§] The Court thus set a trajectory toward the emergence of a uniform doctrine of

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rights violations."); Ku & Yoo, *supra* note †, at 170, 199, 204, 206, 219 (*Sosa* endorsed the majority position on the federal courts' authority to apply CIL.); *see also* Leila Nadya Sadat, *An American Vision for Global Justice: Taking the Rule of (International) Law Seriously*, 4 WASH. U. GLOBAL STUD. L. REV. 329, 342 (2005); William S. 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, 88, 95, 100 (2004); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 104 n.27, 182 n.438 (2004); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 119 [hereinafter Neuman, *Law in Foreign Relations*]; Steinhardt, *supra* note *, at 2251, 2253-55, 2259, 2272; Beth Stephens, *Corporate Liability Before and After* Sosa v. Alvarez-Machain, 56 RUTGERS L. REV. 995, 1000 (2004); Beth Stephens, *"The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 547-50, 556 (2004-05) [hereinafter Stephens II]; J. Harvie Wilkinson III, *Our Structural Constitution*, 104 COLUM. L. REV. 1687, 1694 (2004); Ehren J. Brav, Recent Development, *Opening the Courtroom Doors to Non-Citizens: Cautiously Affirming* Filartiga *for the Alien Tort Statute*, 46 HARV. INT'L L.J. 265, 266, 273-78 (2005); Note, *The Offenses Clause After* Sosa v. Alvarez-Machain, 118 HARV. L. REV. 2378, 2383-85 (2005); *Leading Cases: Federal Statutes and Regulations*, 118 HARV. L. REV. 446, 451-53 (2004) [hereinafter *Leading Cases*]. *But cf.* Christiana Ochoa, *Access to U.S. Federal Courts as a Forum for Human Rights Disputes: Pluralism and the Alien Tort Claims Act*, 12 IND. GLOBAL LEGAL STUD. 631, 639, 648 (2005); Luisa Antoniolli, *Taking Legal Pluralism Seriously: The Alien Tort Claims Act and the Role of International Law Before U.S. Federal Courts*, 12 IND. J. GLOBAL LEGAL STUD. 651, 656, 658 (2005); Eric A. Posner, *Transnational Legal Process and the Supreme Court's 2003-2004 Term: Some Skeptical Observations*, 12 TULSA J. COMP. & INT'L L. 23, 28 (2004); Steinhardt, *supra* note *, at 2272-74; Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1528 (2004); Young II, *supra* note §§§§§, at 521.

Commentators have also lamented the number of questions *Sosa* leaves unresolved regarding the status of CIL. *See, e.g.*, Ku & Yoo, *supra* note †, at 176; Benjamin Berkowitz, Sosa v. Alvarez-Machain*: United States Courts as Forums for Human Rights Cases and the New Incorporation Debate*, 40 HARV. C.R.-C.L. L. REV. 289, 290 (2005); *Leading Cases*, *supra*, at 446, 451, 454.

This paper takes issue with both assessments: that *Sosa* tends to support the majority position and that *Sosa* failed to provide significant guidance on the status of CIL in domestic law.

§§§§§§ Thus, in substance, the Court rejected prior assertions that "the self-executing treaty doctrine does not apply to [CIL]." Paust, *supra* note ‡‡‡, at 782.

implied incorporation governing the application of both sources of international law in federal courts. To perceive this broader point in *Sosa*, one must understand in some detail the self-execution doctrine that courts use to determine whether treaties are immediately applicable as federal law. Part II discusses the necessary contours of that doctrine.

II. TREATIES IN U.S. COURTS

In contrast to CIL, treaties boast a prominent place in the Constitution. Not only does Article II allocate the authority to make treaties,[*******] but the Supremacy Clause states that "all Treaties made or which shall be made under the Authority of the United States, shall[, like the Constitution and federal statutes,] be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[†††††††] On its face the Supremacy Clause suggests that treaties could and should be applied as U.S. law in U.S. courts whenever they are at issue. However, since early in U.S. history, the enforcement of treaties in U.S. courts has been limited by the doctrine of self-execution.

In 1828, the Supreme Court in *Foster v. Neilson* explained that while the "[C]onstitution declares a treaty to be the law of the land" and therefore equivalent in status to federal statutes, not all treaties may be applied by U.S. courts.[‡‡‡‡‡‡‡] Some treaties resemble contracts by which states agree to undertake certain acts. The performance of these acts is entrusted "to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."[§§§§§§§] As a result, only self-executing treaties provide domestic law enforceable in U.S. courts; non-self-executing treaties, while still binding on the United States internationally,[********] require implementing legislation before their provisions may be judicially enforced.[††††††††] When treaties

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[*******] U.S. CONST. art. II, § 2, cl. 2 (The President "shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur.").

[†††††††] *Id.* at art. VI, cl. 2.

[‡‡‡‡‡‡‡] *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1828).

[§§§§§§§] *Id.*; *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1988).

[********] *See, e.g.*, RESTATEMENT, *supra* note *, § 111 cmt. h, Rep.'s Note 5, § 321 & cmt. a; *Head Money Cases*, 112 U.S. 580, 598 (1884); *Diggs v. Richardson*, 555 F.2d 848, 850 (D.C. Cir. 1976); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 871.

[††††††††] *See Foster*, 27 U.S. at 314; *see also Ogbudimka v. Ashcroft*, 342 F.3d 207, 218

are invoked as a rule of decision, then, courts must determine whether they are self-executing.[‡‡‡‡‡‡‡‡]

Courts do not always make this determination explicitly or after significant analysis.[§§§§§§§§] As a result, the content of self-execution analysis has not always been clear and requires extended discussion of several opinions.[*********] In those opinions the Supreme Court and several circuit courts have provided helpful guidance on how to determine whether a treaty is self-executing and immediately applicable in U.S.

(3d Cir. 2003).

[‡‡‡‡‡‡‡‡] *But cf.* Vazquez, *supra* note †††, at 716 & n.99 (noting that while "the lower courts in recent years have treated [an expansive, abstention-like version of] self-execution as a threshold issue to be addressed in every treaty case," the Supreme Court has resolved countless cases "without even mentioning the self-execution issue"); Paust, *supra* note ‡‡‡, at 772-73 & nn.83-90 (positing that two lines of Supreme Court cases exist with regard to self-execution: "one line . . . accepted the general distinction between self- and non-self-operative treaties, while the other seems simply to have ignored it"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 158-59, 183, 187(1993) (obviating any need to address self-execution in concluding that the treaty invoked did not guarantee the right plaintiffs claimed); *Maiorano v. Baltimore & Ohio R. Co.*, 213 U.S. 268, 273-75 (1909) (same); *United States v. Lee Yan Tai*, 185 U.S. 213, 222-23 (1902) (avoiding any need to address self-execution by concluding that a treaty and statute did not conflict and therefore did not raise any question of the treaty's superseding effect).

[§§§§§§§§] For example, courts have repeatedly found, without conducting an express self-execution analysis, that treaty provisions guaranteeing rights to aliens are enforceable. RESTATEMENT, *supra* note *, § 111 Rep.'s Note 5 (citing cases from the 1700s, 1800s, and 1900s); *see Head Money Cases*, 112 U.S. at 598. To illustrate, the Supreme Court in *Hauenstein v. Lynham*, concluded that an 1850 treaty between the U.S. and Switzerland allowed a Swiss heir to recover the value of U.S. real estate owned by a deceased Swiss citizen notwithstanding any provision of Virginia law. *Hauenstein v. Lynham*, 100 U.S. 483 (1879). In arriving at that conclusion the Supreme Court did not expressly ask whether the treaty was self-executing, although the Court did cite evidence that would support a conclusion that it was: namely, that the treaty clearly intended to create specific rights in alien heirs and explicitly contemplated adjudication by U.S. courts, albeit under U.S. law, if disputes arose among those claiming interests in U.S. property. *Id.* at 486-88. Other cases that fail to engage in an explicit self-execution analysis could be cited. *See, e.g.*, *Clark v. Allen*, 331 U.S. 503, 507-08, 517-18 (1947); *Nielsen v. Johnson*, 279 U.S. 47, 49-58 (1929); *Ford v. United States*, 273 U.S. 593 (1927); *Asakura v. Seattle*, 264 U.S. 332, 340-41 (1924); *Chew Heong v. United States*, 112 U.S. 536, 539-43 (1884). In other cases, the self-execution analysis is summary. *See, e.g.*, *TWA, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *Fok Young Yo v. United States*, 185 U.S. 296, 303 (1902); *U.S. v. Rauscher*, 119 U.S. 407, 419 (1886).

[*********] *See United States v. Postal*, 589 F.2d 862, 876 (1979) (noting that "[t]he self-execution question is perhaps one of the most confounding in treaty law" and, in practice, is difficult to answer); Vazquez, *supra* note †††, at 695, 722; Carlos Manuel Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1121 (1992) [hereinafter Vazquez II].

courts.

A. *Intent of the Political Branches*

Most importantly, the courts have indicated that whether a treaty is self-executing is a question of intent.[†††††††††] Whose intent–whether that of the parties to the treaty or that of the United States political branches–has been a matter of debate.[‡‡‡‡‡‡‡‡‡] Historically, the Restatement of the Foreign Relations Law of the United States suggested that the intent of the parties to the treaty governed.[§§§§§§§§§] Over the years, courts have likewise invoked this rule.[*********] However, the trend has been to turn to the intent of the United States political branches.[††††††††††] Even courts that have cited the parties' intent as the governing guidepost have relied, in practice, on U.S. intent in analyzing self-execution.[‡‡‡‡‡‡‡‡‡‡]

[†††††††††] Vazquez, *supra* note †††, at 704.

[‡‡‡‡‡‡‡‡‡] *Id.* at 704-08. Compare, for example, *Richardson*, 555 F.2d at 851 ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties . . . ."), with the Supreme Court opinions discussed in the text.

[§§§§§§§§§] *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 141 cmt. a (1965) ("Whether a particular treaty is self executing depends on the interpretation of the treaty under the rules stated in §§ 147 and 154.") [hereinafter RESTATEMENT (SECOND)]; *id.* § 147 ("International law requires that the interpretative process ascertain and give effect to the purpose of the international agreement which, as appears from the terms used by the parties, it was intended to serve."); *id.* § 154 cmt. a ("[A]n international agreement may involve a commitment by the parties that its provisions will be effective under the domestic law of the parties at the time it goes into effect. Under the law of the United States such an agreement would normally be interpreted as self-executing . . . .").

[*********] *See Frolova*, 761 F.2d at 373; *Tel-Oren*, 726 F.2d at 778 n.2 (Edwards, J., concurring); *Diggs*, 555 F.2d at 851. *But cf. Comm. of U.S. Citizens*, 859 F.2d at 938 (quoting *Diggs* for the proposition that the parties' intent, as revealed by a treaty's language, governs "'whether a treaty is self-executing' in the sense of its creating private enforcement rights").

[††††††††††] *See* BARRY E. CARTER, PHILLIP R. TRIMBLE & CURTIS A. BRADLEY, INTERNATIONAL LAW 175 (4th ed. 2003) ("[I]t is arguable that, despite what courts have said, they end up looking primarily to the actual or likely intent of the U.S. treatymakers rather than to the intent of all the ratifying parties."); Vazquez, *supra* note †††, at 705 ("Lower courts in recent years . . . have sought to discern the intent not of the parties to the treaty, but of the U.S. negotiators of the treaty, the President in transmitting it to the Senate for its advice and consent, and the Senate in giving its advice and consent."); *id.* at 705 n.47 (collecting cases).

[‡‡‡‡‡‡‡‡‡‡] *Cf. Frolova*, 761 F.2d at 376 (citing President Ford's statement that the Helsinki Accords were "'neither a treaty nor . . . legally binding on any particular state'" as "forceful evidence that the parties did not intend the Accords to be self-executing") (quoting 73 DEPT. OF STATE BULL. 204, 205 (1975)).

For example, the Fifth Circuit in *United States v. Postal* explained that the self-execution analysis is an "attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose."[§§§§§§§§§§] Nonetheless, in conducting its analysis, the court repeatedly invoked the U.S.'s intent as the critical consideration. "[T]he question we must answer," the court said, "is whether by ratifying the Convention on the High Seas the United States undertook to incorporate the restrictive language of Article 6 [of the Convention], which limits the permissible exercise of jurisdiction to those provided by treaty, into its domestic law and make it available in a criminal action as a defense to the jurisdiction of its courts."[**********] In answering this question, the court looked to such indications of U.S. intent as the U.S.'s failure to clearly manifest a unilateral desire to treat the agreement as self-executing when other parties to the agreement did not recognize self-executing agreements,[††††††††††] substantial U.S. legislation and practice that would be automatically altered by a self-executing interpretation of Article 6 and no evidence of intent to effect such a sea change through ratification,[‡‡‡‡‡‡‡‡‡‡] legislative testimony from the chairman of the U.S. treaty negotiation team and the State Department indicating that the treaty was non-self-executing,[§§§§§§§§§§] and the presumed U.S. preference to enforce the treaty by foregoing prosecution of defendants seized in violation of Article 6 only when the state of the defendants' nationality protested the violation rather than whenever a violation technically occurred.[**********] Based on these considerations, the Fifth Circuit did "not believe that the United States intended to limit its traditionally asserted jurisdiction over foreign vessels on the High Seas by adopting article 6 of the High Seas Convention" and held that "[t]he determination of this intent must be the touchstone of our interpretation."[††††††††††] Although the opinion had indicated early on that self-execution hinged on the parties' intent, the court's ultimate conclusion that Article 6 of the High Seas Convention was not self-executing was based on the intent of the United States. Other circuit courts have likewise looked to evidence of the United States' intent

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§§§§§§§§§§ *Postal*, 589 F.2d at 876.

********** *Id.* at 878.

†††††††††† *Id.*

‡‡‡‡‡‡‡‡‡‡ *Id.* at 878-81.

§§§§§§§§§§ *Id.* at 881-83.

********** *Id.* at 883-84.

†††††††††† *Id.* at 884.

in analyzing self-execution.[‡‡‡‡‡‡‡‡‡‡‡‡]

Consistent with these decisions, the Restatement now explicitly takes the view that "the intention of the United States determines whether an agreement is to be self-executing . . . ."[§§§§§§§§§§§§] This is so because "[i]n the absence of special agreement, it is ordinarily for the United States to decide how it will carry out [the] . . . international obligations" it has assumed.[**********]

Although the Supreme Court has not been entirely uniform in its approach,[††††††††††††] the Court appears to have favored U.S. intent as its guiding star as well.[‡‡‡‡‡‡‡‡‡‡‡‡] As early as the decision in *Foster v. Neilson*, which often is cited as the foundation for the self-execution doctrine,[§§§§§§§§§§§§] the Court turned to evidence from Congress to support

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[‡‡‡‡‡‡‡‡‡‡‡‡] *See Cornejo-Barreto*, 379 F.3d at 1086-87 (relying on the Senate's non-self-execution declaration and the executive's analysis in concluding that the Convention Against Torture is not self-executing); *In re Comm'r's Subpoenas*, 325 F.3d 1287, 1291 (11th Cir. 2003) (citing statements by the President and State Department in concluding that a Mutual Legal Assistance Treaty with Canada was self-executing because it would be effectuated under existing legislation); *Dutton*, 37 Fed. Appx. at 53 (relying on the Senate's non-self-execution declaration and the executive's intent in proposing such a declaration in concluding that the International Covenant on Civil and Political Rights is not self-executing).

[§§§§§§§§§§§§] RESTATEMENT, *supra* note *, § 111 cmt. h.

[**********] *Id.* *But cf.* Vazquez, *supra* note †††, at 707-08 (criticizing the Restatement's reasoning and conclusion that U.S. intent governs self-execution).

[††††††††††††] *Cf. Clark*, 340 U.S. 523, 526-28; *id.* at 531 (Frankfurter, J., dissenting) (majority and dissent concluding that a provision of the Shipowners' Liability Convention was executed by general maritime law although evidence from the political branches indicated that implementing legislation was required); *Bacardi Corp. v. Domenech*, 311 U.S. 150, 159 (1940) (quoting a provision of the General Inter-American Convention for Trade Mark and Commercial Protection that "the Convention 'shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs'" in concluding that the Convention was self-executing); *Fok Young Yo*, 185 U.S. at 303 (arguably analyzing the parties' implicit intent in finding that the treaty provision at issue was self-executing because, inter alia, it manifested assent to the continuance of applicable U.S. regulations).

[‡‡‡‡‡‡‡‡‡‡‡‡] In addition to the opinions cited in text, see *TWA, Inc.*, 466 U.S. at 276 n.5 (Stevens, J., dissenting) (noting, in a case where both the majority and the dissent found the Warsaw Convention to be self-executing, that the Solicitor General had taken that position as well); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 738 (1943) (Stone, C.J., dissenting) (citing a letter to the President from the Secretary of State in concluding, consistent with that letter, *see Warren v. U.S.*, 340 U.S. 523, 526 n.2 (1951), that part of the Shipowners' Liability Convention was self-executing, while part was executory).

[§§§§§§§§§§§§] *See, e.g.*, Paust, *supra* note ‡‡‡, at 766-67 (asserting that the concept of

its self-execution analysis.[**********] In *Foster*, the plaintiff sought to recover property on the authority of a grant made by Spain.[††††††††††††††] The defendant argued that the grant was invalid as it was made after Spain had ceded the land to France who in turn ceded it to the United States.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡] A U.S.-Spain Treaty of Amity, Settlement, and Limits provided that all grants made by Spain prior to a certain date and within territory since ceded to the United States "shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of" Spain.[§§§§§§§§§§§§§§] This provision potentially resolved the dispute.[**********] The Court, however, concluded that this provision was not self-executing and therefore could not be applied as a rule of decision.[†††††††††††††††] The Court based this conclusion, in large part, on the fact that the treaty provided that the Spanish grants "shall be ratified and confirmed," rather than "shall be valid" or "are hereby confirmed," and thus contemplated confirmation through legislative enactment.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] The Court bolstered its conclusion that the provision was not self-executing by inferring that Congress also understood the treaty to be executory and thus had established a means for confirming grants "embraced by the treaty" within territory not at issue in *Foster*.[§§§§§§§§§§§§§§§]

Interestingly, in the later case of *United States v. Percheman*, the Court was presented with the equally authoritative Spanish version of this same treaty, which provided that grants "shall remain ratified and confirmed."[**********] In light of this language, the Court switched tack and found the provision to be self-executing.[†††††††††††††††] In so

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non-self-execution was "invented" in *Foster*).

[**********] *See Foster*, 27 U.S. at 315-17.

[††††††††††††††] *Id.* at 299.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.* at 299-300.

[§§§§§§§§§§§§§§] *Id.* at 310 (quoting U.S.-Spain treaty).

[**********] *Id.* at 310-14.

[†††††††††††††††] *Id.* at 314.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.* at 314-15.

[§§§§§§§§§§§§§§§] *Id.* at 315. Congress enacted no such statute for the territory in which the disputed land was located and thus left that territory subject to an earlier statute that annulled grants of land the title to which had been held by Spain at the time Spain arguably ceded the territory to France. *Id.* at 300, 315-17.

[**********] *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 88 (1833).

[†††††††††††††††] *Id.* at 88-89.

doing, one might argue that the Court disregarded the intent of Congress inferred in *Foster*. However, as in *Foster*, the Court in *Percheman* looked to the intent of the political branches to support its conclusion regarding the provision's self-executing character. Thus, the Court noted that "the United States could have [had] no motive" in insisting on implementing legislation where the law of nations would have secured prior Spanish grants even in the absence of the treaty with Spain.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ In both these early cases, then, the Court turned to U.S. intent to bolster its self-execution analysis. Since *Foster* and *Percheman*, the Court has given an even more prominent place to the intent of the political branches in the self-execution inquiry.

In a 1913 case, the Supreme Court was called upon to decide whether a 1900 treaty–the treaty of Brussels–trumped a prior federal statute and extended the life of a patent issued under that statute.§§§§§§§§§§§§§§§ Key to that question was whether the treaty was self-executing.********** In analyzing that issue the Supreme Court found that Congress' enactment of legislation to carry the treaty into effect provided almost certain evidence of "the sense of Congress and those concerned with the treaty[--presumably the Secretaries of State and Interior†††††††††††††††††--]that it required legislation to become effective."‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Moreover, the member of Congress in charge of the proposed implementing legislation said that the bill "was to carry [the treaty] into effect."§§§§§§§§§§§§§§§§ The Court thus focused on the U.S.'s intent in analyzing self-execution. That is not to say that the Court ignored the intent of the other parties to the treaty. The Court relied on the fact that many of the other treaty parties had enacted, or intended to enact, legislation to effectuate the treaty, but did so to bolster its finding that the unequivocal "sense of Congress" was that the treaty required an implementing act.**********

The Supreme Court similarly focused on the intent of the political

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§ *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 41 (1913).

********** *Id.* at 44.

††††††††††††††††† As the Supreme Court noted, the Secretary of the Interior had drafted a bill to implement the treaty and the Secretary of State had relied on that fact to assuage international concern about the United States' lack of implementing legislation. *Id.* at 49.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§§ *Id.* at 49-50.

********** *Id.* at 50.

branches when, in 1933, it was called upon to decide whether the Prohibition-era Convention for the Prevention of Smuggling of Intoxicating Liquors ("Smuggling Convention") between the U.S. and Britain trumped a prior provision of the U.S. Tariff Act.[††††††††††††††††††] In determining that the Convention was self-executing, the Court relied on the following evidence of the political branches' intent: a letter from the Secretary of State to the Chairman of the House Committee on Foreign Affairs expressing that view, the Treasury Department's issuance of amended instructions to the Coast Guard following ratification of the treaty that treaties of this type should be followed notwithstanding the Tariff Act, and the Solicitor General's representation that the Coast Guard Commandant had been instructed to conduct seizures of British vessels consistent with the treaty.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Again, the intent of the political branches carried the day.

Last term in *Sosa*, the Court again suggested that it is the U.S.'s intent that governs the self-execution question. The plaintiff in *Sosa* argued that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is a party, created a private cause of action for arbitrary detention.[§§§§§§§§§§§§§§§§§§] The Court replied that the ICCPR could not itself create rights enforceable in federal courts because the Senate had ratified the ICCPR subject to a declaration that the ICCPR's substantive terms were non-self-executing.[**********] If the parties' intent were the controlling inquiry, the Senate's declaration may have been relevant to, but not determinative, of the issue. As it was, the

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[††††††††††††††††††] *Cook*, 288 U.S. at 107.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.* at 119 & n.19; *see also Maul v. U.S.*, 274 U.S. 501, 530 & n.39 (1927) (citing Congress' perception that implementing legislation was unnecessary and a communication from the Secretary of State in suggesting that a treaty was self-executing). The *Cook* Court's conception of self-execution appears to have been slightly different than the traditional conception, perceiving self-execution as a precondition to executive, rather than judicial, action based on the treaty. *Id.*; *see also United States v. Best*, 304 F.3d 308, 314 (3d Cir. 2002) (quoting *Cook* for the proposition that "[w]hen a treaty is self-executing, 'no legislation [is] necessary to authorize executive action pursuant to its provisions.'").

[§§§§§§§§§§§§§§§§§§] *Sosa*, 124 S. Ct. at 2767.

[**********] *Id.* at 2763, 2767; *see also Raffington*, 399 F.3d at 903 (stating that the Convention Against Torture "[a]s ratified by the United States . . . is a non-self-executing treaty"); *Cornejo-Barreto*, 379 F.3d at 1086 (citing the Senate's non-self-execution declaration as evidence that the Convention Against Torture is non-self-executing); *Dutton*, 37 Fed. Appx. at 53 (citing the Senate's non-self-execution declaration as evidence that the International Covenant on Civil and Political Rights is not self-executing).

Supreme Court found the Senate's declaration dispositive for self-execution purposes.[††††††††††††††††††††]

The touchstone of the self-execution analysis, then, appears to be the intent of the federal political branches.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Sometimes this intent will be obvious from the agreement itself. In easy cases, an agreement will "expressly provide for legislative execution" of its provision, rendering the agreement executory,[§§§§§§§§§§§§§§§§§§§§] or clearly stipulate that implementing legislation is not necessary as the treaty is self-executing.[**********] In the absence of contrary U.S. intent, courts

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[††††††††††††††††††††] *Cf.* Vazquez, *supra* note †††, at 706-07 (noting that "[i]f the intent of the U.S. treaty makers were dispositive, unilateral statements reflecting the views of the President and two-thirds of the Senate that the treaty is not self-executing would effectively make the treaty non-self-executing").

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] That the intent of the United States' political branches is the relevant standard does not mean that the courts will simply defer to executive statements made in litigation regarding the nature of the treaty. *See Medellin*, 2005 WL 1200824 (O'Connor, J., dissenting) (noting, in discussing whether Article 36 of the Vienna Convention created private rights, that the executive's "understanding of our treaty obligations" deserves "considerable weight," but "is not beyond debate"); RESTATEMENT, *supra* note *, § 111 cmt. h, § 154(1) (Courts must decide the self-execution issue when it is presented in litigation.).

[§§§§§§§§§§§§§§§§§§§§] *Postal*, 589 F.2d at 876-77 (citing provisions from the Convention on the High Seas that begin "'Every State shall take the necessary legislative measures to . . .'" as examples of provisions that are expressly executory); *see Aguilar*, 318 U.S. 737-38 & n.24 (Stone, C.J., dissenting); *Fok Young Yo*, 185 U.S. at 303, 305; *Foster*, 27 U.S. at 314; *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 630 (1857) (Curtis, J., dissenting); *Tel-Oren*, 726 f.2d at 809 (Bork, J., concurring); *In re Rath*, 402 F.3d 1207, 1210 (Fed. Cir. 2005); *Frolova*, 761 F.2d at 376. *Cf. People of Saipan v. Dept. of Interior*, 502 F.2d 90, 96 & n.6, 103 n.7 (9th Cir. 1974). *But cf.* Vazquez, *supra* note †††, at 709-10 (arguing that a treaty provision obliging states to take the necessary measures to ensure the treaty's application should not render the treaty non-self-executing in the United States); Paust, *supra* note ‡‡‡, at 774 n.97 (same); *TWA, Inc.*, 466 U.S. at 247, 252, 254 nn.25-26, 261, 276 n.5.

Similarly, to the extent that a treaty "purports to do what is within the exclusive lawmaking power of Congress," it is easy to conclude that the treaty was intended to be non-self-executing. Vazquez, *supra* note †††, at 718; *see* RESTATEMENT, *supra* note *, § 111(4)(c) & cmt. I; Paust, *supra* note ‡‡‡, at 777-82 (agreeing with this principle, but arguing that the war power is Congress' only exclusive power). Finally, if a treaty merely requires a state to refrain from acting, some have suggested that it is likely to be considered self-executing. *See* RESTATEMENT, *supra* note *, § 111 Rep.'s Note 5; *Commonwealth v. Hawes*, 76 Ky. (13 Bush) 697, 702-03 (1878). *But see* Vazquez, *supra* note †††, at 703 n.41.

[**********] *See Bacardi Corp.*, 311 U.S. at 159 (quoting a provision of the General Inter-American Convention for Trade Mark and Commercial Protection that "the Convention 'shall have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs'" in

will likely follow the lead of these express provisions. However, in many cases, intent will not be so obvious. Other factors will bear on deciphering implied intent[††††††††††††††††††††] and on the outcome of the self-execution analysis.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

B. *Specific Definition*

The first such factor might be called specific definition. Courts considering whether a treaty is self-executing often look to the language of the treaty[§§§§§§§§§§§§§§§§§§§§] to determine whether it defines specific obligations that would be capable of judicial enforcement.[**********] In *Frolova v. Union of Soviet Socialist*

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concluding that the Convention was self-executing). *Cf. Percheman*, 32 U.S. at 88-89 (concluding that a treaty provision was self-executing where the equally authoritative Spanish version provided that "grants 'shall remain ratified and confirmed'" rather than "shall be ratified and confirmed" as had been supposed).

In both these situations, one might argue that it is the parties' intent that is controlling. Indeed, in the absence of evidence of contrary U.S. intent, the parties' intent may be the best evidence of the U.S.'s intent. Or, put differently, the parties' intent controls to the extent it is consistent with U.S. intent. The ultimate standard, however, is U.S. intent.

[††††††††††††††††††††] *Cf.* Vazquez, *supra* note †††, at 711 (arguing that courts' consideration of these additional factors yields "a purely constructive [or imputed] intent (which is to say, not intent at all)"). As noted below, whether these additional factors are perceived as tools for identifying congressional intent or judicial constructs for maintaining the proper allocation of authority between the political and judicial branches, they form, in connection with the focus on the political branches' intent, a coherent separation of powers analysis. *See infra* note §§§§§§§§§§§§§§§§§§§§§§§§§§§§ and accompanying text.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Occasionally, courts cite a fairly standardized list of factors that may be considered in conducting a self-execution analysis: "(1) the language and purposes of the agreement as a whole; (2) the circumstances surrounding its execution; (3) the nature of the obligations imposed by the agreement; (4) the availability and feasability of alternative enforcement mechanisms; (5) the implications of permitting a private right of action; and (6) the capability of the judiciary to resolve the dispute." *Frolova*, 761 F.2d at 373; *see People of Saipan*, 502 F.2d at 97; *Postal*, 589 F.2d at 877; *see also Richardson*, 555 F.2d at 851. The factors this paper identifies do not parrot this list, but seek to repackage the list to better reflect the issues courts actually consider in analyzing whether a treaty is immediately enforceable and to reveal similarities to the factors the *Sosa* Court imposed for applying CIL in federal courts.

[§§§§§§§§§§§§§§§§§§§§] *See Frolova*, 761 F.2d at 373 (going so far as to assert that "if the parties' intent is clear from the treaty's language courts will not inquire into [other] factors").

[**********] *See Tel-Oren*, 726 F.2d at 809 (Bork, J., concurring) (Articles 1 and 2 of the U.N. Charter "contain general 'purposes and principles,' some of which state mere aspirations and none of which can be sensibly thought to have been intended to be judicially enforceable at the behest of individuals."); *Richardson*, 555 F.2d at 851 (A U.N.

Republics, for example, the Seventh Circuit was required to decide whether U.N. Charter Articles 55 and 56 and the Helsinki Accords were self-executing.†††††††††††††††††††† Article 55 identifies goals, such as "higher standards of living" and "universal respect for . . . human rights," that the United Nations will promote.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ In Article 56, U.N. member states "pledge . . . to take joint and separate action in cooperation with the [U.N.] for the achievement of the purposes set forth in Article 55."§§§§§§§§§§§§§§§§§§§§ The Court found these articles to be "phrased in broad generalities, suggesting that they are declarations of principles, not a code of legal rights."********** Their broad language did not "indicate[] an intent to prescribe 'rules by which private rights may be determined,' or to provide a means by which citizens of the signatory nations could enforce the lofty, but too often unrealized, principles expressed in the Charter."†††††††††††††††††††† The general language of these provisions thus undercut a finding that they were self-executing.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡

The court likewise found that the language of the Helsinki Accords rendered the Accords executory.§§§§§§§§§§§§§§§§§§§§ While the relevant language of the Accords was more specific than that of the U.N. Charter, it was still "phrased in generalities."********** In addition, it reaffirmed principles of state sovereignty and non-intervention and provided the signatory states with significant discretion that belied an intent to define specific, judicially enforceable rights.††††††††††††††††††††

By contrast, the language of the U.S.-Japan treaty before the Supreme Court in *Asakura v. Seattle* was specific, detailed, and

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Security Council Resolution was not self-executing where it did not "confer rights upon individual citizens," "provide specific standards," or even establish standards typical of "conventional adjudication," but rather called on governments to take action and invoked standards that were "rooted in diplomacy and its incidents."); Vazquez, *supra* note †††, at 712-15 (discussing courts' consideration, in the self-execution context, of whether a treaty creates obligations or aspirations, and whether it provides determinate standards).

†††††††††††††††††††† *Frolova*, 761 F.2d at 373.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ U.N. Charter, art. 55.

§§§§§§§§§§§§§§§§§§§§ *Id.* at art. 56.

********** *See Frolova*, 761 F.2d at 374.

†††††††††††††††††††† *Id.* (quoting *Dreyfus*, 534 F.2d at 30).

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§§§§§§ *Id.* at 375-76.

********** *Id.* at 375.

†††††††††††††††††††† *See id.* at 375-76.

imperative, guaranteeing that:

> [t]he citizens or subjects of each of the high contracting parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale or retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡

While the Supreme Court did not expressly discuss the quality of this language, or any other factor, in concluding that this provision was self-executing and trumped a discriminatory municipal ordinance, the specific, detailed nature of the language certainly supported a finding of self-execution.§§§§§§§§§§§§§§§§§§§§§§§§

Similarly, Article 6 of the Convention on the High Seas at issue in *Postal v. United States* "[o]n its face . . . [bore] a self-executing construction because it purport[ed] to" define the specific situations under which foreign states may and may not exercise jurisdiction over vessels on the high seas.********** While the Fifth Circuit ultimately held

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Asakura*, 265 U.S. at 340 (quoting U.S.-Japan Treaty, 37 Stat. 1504, proclaimed Apr. 5, 1911).

§§§§§§§§§§§§§§§§§§§§§§§§ *See also TWA, Inc.*, 466 U.S. at 247, 252 (concluding that the Warsaw Convention is self-executing without specifically relying on the specific, detailed, and mandatory nature of the liability limits the Convention imposes for air carriers); *Bacardi Corp.*, 311 U.S. at 158-61 (tersely concluding that the General Inter-American Convention for Trade Mark and Commercial Protection is self-executing after, among other things, quoting, but not expressly emphasizing, the specific, detailed, and imperative text of the Convention); *Aguilar*, 318 U.S. at 737-38 & n.24 (Stone, C.J., dissenting) (concluding, without specifically referring to the specific, detailed, and imperative nature of a provision of the Shipowners' Liability Convention, that the provision was self-executing); *cf. Clark*, 331 U.S. at 507-08, 514-15, 517 (quoting the specific, detailed, imperative language of U.S.-Germany treaty provisions guaranteeing rights to each states' nationals in the course of concluding, without a self-execution analysis, that the provisions, if applicable, trumped California law); *Nielsen*, 279 U.S. at 50 (quoting the specific, detailed, and imperative language of a U.S.-Denmark treaty, guaranteeing equal treatment to aliens from the other state party, that the Court applied without specifically addressing the self-execution issue); *Chew Heong*, 112 U.S. at 542-43 (same with regard to a U.S.-China treaty guaranteeing equal treatment to Chinese aliens).

********** *Postal*, 589 F.2d at 877. Article 6 provides, "Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas." Convention on the High Seas, art. 6, Apr. 29, 1958, 13 U.S.T. 2312, 2315.

that the context of Article 6 rendered it executory, the Article's specificity pointed toward self-execution.††††††††††††††††††††††††

Article 6 of the Trusteeship Agreement for the Former Japanese Mandated Islands likewise was found to be self-executing where the Agreement was a more detailed embodiment of the general and presumably‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ non-self-executing trusteeship provisions of the U.N. Charter.§§§§§§§§§§§§§§§§§§§§§§§§ While "the substantive rights guaranteed through the . . . Agreement [were] not precisely defined," they nonetheless "require[d] little legal or administrative innovation in the domestic fora" and were not "too vague for judicial enforcement," particularly because there were other sources to which a court might look to give the rights content and because the Agreement was the constitutional document for the Trust Territory.**********

As these examples reflect, specific definition is a key consideration in the self-execution analysis.†††††††††††††††††††††††† Treaties that speak in terms of specific obligations are more likely to be found self-executing than treaties that embody more ethereal commitments.

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†††††††††††††††††††††††† *Postal*, 589 F.2d at 877-78.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ While the majority "assume[d] without deciding that" the relevant articles of the U.N. Charter did not "create affirmative and judicially enforceable obligations," *People of Saipan*, 502 F.2d at 96-97, Judge Trask, concurring, thought it clear "that the Charter of the United Nations is not self-executing and does not in and of itself create rights which are justiciable between individual litigants," *id.* at 100 (Trask, J., concurring).

§§§§§§§§§§§§§§§§§§§§§§§§ *Id.* at 96-97.

********** *Id.* at 97, 99. The Ninth Circuit's willingness to find the Trusteeship Agreement judicially enforceable without more specificity stretches of the concept of specific definition. *See id.* at 103 & n.7 (Trask, J., concurring) (arguing that the language of the Trusteeship Agreement was insufficiently precise to be self-executing). The Ninth Circuit's willingness seems justified, however, by the unique position of the Trusteeship Agreement. The Agreement had been "codified into the law of the Trust Territory" by the Trust Territory government and was "the plaintiffs' basic constitutional document." *Id.* at 98; *see id.* at 103 (Trask, J., concurring). Judicial enforcement of constitutional texts routinely requires interpretation of rather vague terms. *See id.* at 99. As a result, the court seemed more willing to find the Agreement judicially enforceable notwithstanding some lack of specificity. *See id.* Had the Trusteeship Agreement been a stand-alone treaty that had not been codified as domestic constitutional law, greater specificity presumably would have been required to find the Agreement self-executing.

†††††††††††††††††††††††† *See also Fok Young Yo*, 185 U.S. at 303 (finding a treaty provision dealing with alien transit to be self-executing where it, among other things, "dealt with the subject specifically").

C. *Mutuality*

A related consideration is mutuality. In *United States v. Postal*, the Fifth Circuit indicated that when a treaty is multilateral and involves states parties who do not recognize self-executing treaties, greater evidence is required that the U.S. nonetheless intended the treaty be self-executing in its courts.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ The reason, it seems, is that when the U.S. enters treaties with states that do not permit self-execution, the U.S. may be offering a self-executing commitment in exchange for an executory promise, a skewed bargain that should not, as a rule, be presumed.§§§§§§§§§§§§§§§§§§§§§§§§ The skewed bargain does not result merely because a treaty is multilateral, as multilateral treaties may only involve states in which treaties are or may be self-executing. Thus, whether a treaty is bi- or multilateral is not determinative. Nor does an

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Postal*, 589 F.2d at 878. *But cf.* RESTATEMENT, *supra* note *, § 111 cmt h ("Whether an agreement is or is not self-executing in the law of another state party to the agreement is not controlling for the United States.").

§§§§§§§§§§§§§§§§§§§§§§§§ *See Postal*, 589 F.2d at 878, 882-83 (expressing concern for "mutuality" and "reciprocal obligations"). The assumption that the commitments of states that do not recognize self-execution are less valuable has been criticized as a factual matter on two grounds. First,

> in many (if not most) of such states there exists a cabinet form of government in which executive and legislative powers are merged. In such situations, the government in power is in practice able to get the necessary parliamentary implementation almost as surely and as efficiently as if the agreement were self-executing. In states where the ratification process requires general legislative approval, implementing legislation is introduced as a part of the ratification process.

RESTATEMENT (SECOND), *supra* note §§§§§§§§§, § 154 Rep.'s Note 1. Second, "whether or not a treaty or provision will be self-executing for a particular state party, and any lack of mutuality in this respect, have generally not been considerations when states enter into treaty obligations." RESTATEMENT, *supra* note *, § 111 Rep.'s Note 5.

The view that U.S. courts should be more reluctant to find a treaty self-executing where it involves states that do not permit self-execution has also been criticized as a conceptual matter. *See id.* (arguing that such a rule is misguided because self-execution facilitates U.S. compliance with its treaty obligations and because another state's material default on its obligations would entitle the U.S. to terminate or suspend its obligations); Vazquez, *supra* note †††, at 704 (arguing that the Supremacy Clause does not prevent a treaty from being "'self-executing' in the United States even if it is 'non-self-executing' for other nations" and that the parties to a treaty should be required to clearly state any "intent to alter [that] principle"). Notwithstanding these criticisms, the concept of mutuality has played a role in the self-execution analysis of U.S. courts, supporting a finding of self-execution where mutuality of commitment exists.

unbalanced bargain arise in every instance involving a state that does not permit self-execution. As the court in *Postal* recognized, a bilateral treaty with Britain, which typically does not recognize self-execution,********** could be self-executing in the U.S. where the treaty nonetheless involved "mutual rights and obligations."†††††††††††††††††††††††††††† Thus, the Smuggling Convention was self-executing where it secured for the U.S. authority to board British vessels outside U.S. territorial waters and provided British vessels the right to bring "liquor into the United States under seal in certain specified circumstances" as well as "a mechanism for settling claims" arising from the U.S.'s improper use of its treaty powers.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ At the heart of this consideration, then, is concern for mutuality of obligation. A treaty is more likely to be found self-executing in the U.S. when other states parties have also accepted self-executing obligations.

D. *Practical Consequences*

Likewise, a treaty is more likely to be found self-executing when such a finding would not trigger broad or untoward consequences. The consequences of finding Article 6 of the High Seas Convention self-executing led the Fifth Circuit in *U.S. v. Postal* to conclude that the U.S. did not intend such consequences to result from ratification.§§§§§§§§§§§§§§§§§§§§§§§§§ Article 6 provides that ships on the high seas "shall be subject to [the] . . . exclusive jurisdiction" of the state under whose flag they sail, "save in exceptional cases expressly provided for in international treaties or in these articles."********** As the Fifth Circuit recognized, the United States had, since inception, asserted jurisdiction on the high seas beyond the limits imposed by Article

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********** *Postal*, 589 F.2d at 878 n.24; Vazquez, *supra* note †††, at 697 & n.12.

†††††††††††††††††††††††††††† *Postal*, 589 F.2d at 882.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.* at 882-883.

§§§§§§§§§§§§§§§§§§§§§§§§§ *Id.* at 878-81; *see also Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring) (concluding that the Hague Conventions on the Laws of War were non-self-executing and not available to private plaintiffs, as a contrary finding "could create perhaps hundreds of thousands or millions of lawsuits by" victims of "large-scale war" that might overreach "the capacity of any legal system" and present "an obstacle to the negotiation of peace and the resumption of normal relations between nations"); *cf. Sale*, 509 U.S. at 177 (reasoning that the United States did not silently assume an obligation to aliens outside its borders in ratifying the United Nations Protocol Relating to the Status of Refugees given the broad consequences of assuming such an obligation).

********** *Postal*, 589 F.2d at 869 (quoting Convention on the High Seas, *supra* note §§§§§§§§§§§§§§§§§§§§§§§§§, art. 6.).

6.[†††††††††††††††††††††††††††] In 1790, the United States enacted a statute that authorized the boarding of foreign vessels outside U.S. territorial waters but within 12 miles of the U.S. coast.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] This statute, upheld by the Supreme Court, spawned similar succeeding statutes that have continued to the present and that have also been reviewed by U.S. courts.[§§§§§§§§§§§§§§§§§§§§§§§§§§] Other statutes, both preceding and succeeding the High Seas Convention, have authorized U.S. jurisdiction even beyond 12 miles for certain purposes.[**********] Recognizing Article 6 as self-executing would invalidate all these statutes to the extent they conflicted with Article 6 and were enacted before the Convention was ratified.[†††††††††††††††††††††††††††] The consequences of finding Article 6 to be self-executing were therefore broad and inconsistent with historical and modern U.S. policy.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡]

Had the consequences been more narrow, as was the case with the Smuggling Convention which affected "the jurisdiction of the United States only [with regard to] . . . seizures of British vessels engaged in smuggling liquor," the court may have reached a different result, as it did with the Smuggling Convention.[§§§§§§§§§§§§§§§§§§§§§§§§§§] As it was, Article 6 of the High Seas Convention amounted to "a sweeping prohibition on the exercise of jurisdiction against foreign vessels on the high seas,"[**********] and the court found Article 6 to be non-self-executing.[††††††††††††††††††††††††††††]

[†††††††††††††††††††††††††††] *Id.* at 879. To be sure, Article 6 would permit some, but not all, of the control the U.S. has exerted outside its territorial waters. *See id.* at 880-81 & n.30.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.*

[§§§§§§§§§§§§§§§§§§§§§§§§§§] *Id.* at 879-80 & nn.28-29; *see* 19 U.S.C. §§ 1401(j), 1709(c) (1999); 19 U.S.C. § 1581 (1999); 19 U.S.C. § 1586 (1999).

[**********] *Id.* at 880 & n.30.

[†††††††††††††††††††††††††††] *See id.* at 878 & n.25.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *See id.* at 880-81 & n.30, 883.

[§§§§§§§§§§§§§§§§§§§§§§§§§§] *Id.* at 883.

[**********] *Id.*

[†††††††††††††††††††††††††††] *See id.* at 880-82. By contrast, the fact that the treaty provision at issue in *People of Saipan* dealt with "the local economy and environment, not [the more sensitive, far-reaching, not to mention discretionary, issue of] security" supported a finding that the provision was self-executing. *People of Saipan*, 502 F.2d at 97; *see id.* at 96 (noting the Trusteeship Agreement's broad grant of discretion to the United States with regard to military activity in the trust territory).

E. *Foreign Relations Effects*

While the practical consequences of self-execution may be varied, one consequence has played a particular role in self-execution analysis: the foreign affairs effects of self-execution. Relevant effects include the impact on relations with other states, on the political branch's discretion to conduct foreign affairs, and on the distribution of authority to conduct foreign affairs. The relevance of the first effect–the impact on relations with other states–is illustrated in *Frolova v. Union of Soviet Socialist Republics* as well as in the Supreme Court's opinion in *Asakura v. Seattle*. In *Frolova*, the plaintiff, a U.S. citizen, argued that Articles 55 and 56 of the U.N. Charter as well as the Helsinki Accords were self-executing and prevented the Soviet Union from claiming sovereign immunity in plaintiff's damage suit arising from the Soviet Union's failure to permit her husband, a Soviet citizen, to emigrate to the United States.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ The Soviet Union had twice refused the husband's emigration application due to "'bad relations with the United States'" and because his "departure was 'not in the interest of the Soviet State.'"§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§ In deciding whether Articles 55 and 56 and the Helsinki Accords were self-executing, the Seventh Circuit noted that "judicial resolution of cases bearing significantly on sensitive foreign policy matters . . . might have serious foreign policy implications which courts are ill-equipped to anticipate and handle."* *Frolova* was just such a case.† "Soviet emigration policies [had] been the subject of a long-running battle between American policymakers and the Kremlin, often generating conflict between the White House and Congress. Judicial intervention into [a case involving this] delicate political issue would be ill-advised and could have unforeseen consequences for American-Soviet relations."‡ As a result, the court declined to find Articles 55 and 56 or the Helsinki Accords self-executing and privately enforceable.§

This is not to suggest that any impact on foreign affairs renders a treaty executory in U.S. courts. In *Asakura*, the Supreme Court noted that

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Frolova*, 761 F.2d at 371, 373.

§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§ *Id.* at 371.

* *Id.* at 375.

† *Id.*

‡ *Id.*

§ *See id.* The result was that plaintiff had to resort to "diplomatic channels and the court of world opinion," rather than U.S. courts, if she wished to pursue her claim. *Id.*; *see also id.* at 376.

"[t]reaties for the protection of citizens of one country residing in the territory of another are common and make for good understanding between nations"; indeed, the treaty the U.S. and Japan entered along these lines "was made to strengthen friendly relations between [them]."[**] The Court thus suggested that the foreign affairs benefits of these treaties supports finding them self-executing, at least when the self-executing nature of the treaty is otherwise clear and when the self-execution issue is forced by state or local legislation that undercuts the treaties' foreign affairs benefits.[††]

The foreign affairs benefits of self-execution may also justify such a finding when self-execution would both improve relations with other states and, consistent with the second foreign affairs concern courts consider, not unduly infringe on U.S. discretion to conduct foreign affairs. To illustrate, the court in *Postal* noted that the United States entered the Smuggling Convention with Great Britain to validate seizures of foreign vessels outside U.S. territorial waters, but also "to avoid the repeated [and inevitable] protests that the British . . . lodged against . . . seizures" of British vessels outside those waters.[‡‡] Absent these protests, U.S. law, under the doctrine of *Ker v. Illinois,*[§§] might have sanctioned U.S. jurisdiction over defendants so seized even if a treaty violation technically had occurred.[***] As a result, the United States would retain foreign affairs discretion whether to seize British vessels. However, where British objection appeared inevitable and where objection raised the possibility that U.S. law would not permit jurisdiction resulting from seizures in violation of a treaty, finding the Smuggling Convention to be self-

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[**] *Asakura*, 265 U.S. at 341.

[††] *See id.* at 339-40. *Cf. Chew Heong*, 112 U.S. at 540 (suggesting that concern for the U.S.'s reputation for treaty compliance supports a presumption that federal legislation was not intended to abrogate a treaty).

[‡‡] *Postal*, 589 F.2d at 883.

[§§] 119 U.S. 436 (1886). *Ker*, together with the decision in *Frisbie v. Collins*, 342 U.S. 519 (1952), established the rule that unlawful seizure of a defendant ordinarily does not affect the court's authority to try the defendant; however, an exception to the rule has been recognized where the seizure occurs in violation of a self-executing treaty. *See, e.g.*, *United States v. Best*, 304 F.3d 308, 311-14 (3d Cir. 2002).

[***] *Postal*, 589 F.2d at 883; *see* RESTATEMENT, *supra* note *, § 432 cmt. c (If a state abducts a person in the territory of another state without consent, and "[i]f the state from which the person was abducted does not demand his return, under the prevailing view the abducting state may proceed to prosecute him under its laws."). More recently, the Supreme Court has said that "it would appear that a court must enforce [a self-executing treaty] on behalf of an individual regardless of the offensiveness of the practice of one nation to the other nation." *U.S. v. Alvarez-Machain*, 504 U.S. 655, 667 (1992).

executing both improved U.S. foreign relations with Great Britain and did not limit the political branches' foreign affairs discretion more than U.S. law might have.[†††] Both the concern for relations with other states and the concern over limiting the U.S.'s foreign affairs discretion permitted a finding that the Smuggling Convention was self-executing.

In contrast to Britain's inevitable protest of U.S. seizures outside territorial waters, the court noted that some states might not object to U.S. seizures in violation of Article 6 of the High Seas Convention.[‡‡‡] Indeed, the record in *Postal* disclosed no protest from the Grand Cayman Islands over the high-seas seizure of a vessel registered in the Islands that was transporting multiple tons of marijuana.[§§§] Finding Article 6 to be executory would allow the U.S. to engage in seizures in such situations (where seizure would not sour foreign relations), whereas a conclusion that Article 6 was self-executing would automatically divest the U.S. of jurisdiction to conduct the seizure and resulting prosecution even in the absence of a protest.[****] Preserving the U.S.'s discretion to engage in non-controversial seizures in violation of Article 6 led the court to find Article 6 executory.[††††]

In addition to preserving foreign affairs discretion and maintaining positive relations with other states, at least one other foreign affairs concern influences courts' self-execution analysis: the concern for the distribution of foreign affairs authority. The D.C. Circuit, for example, concluded that a U.N. Security Council resolution, which restricted states' interactions with South Africa due to its occupation of Namibia, was executory in part because the terms of the resolution dealt "with the conduct of our foreign relations, an area traditionally left to the executive branch."[‡‡‡‡] To the extent that enforcement of a treaty would lead the courts to overstep the proper distribution of authority between the judiciary and political branches, a court is more likely to find the treaty executory.

F. *Alternative Enforcement Mechanisms*

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††† *See Postal*, 589 F.2d at 883.

‡‡‡ *Id.* at 883-84.

§§§ *Id.* at 884-85; *see id.* at 865-68, 872.

**** *Id.* at 884.

†††† *See id.*

‡‡‡‡ *Richardson*, 555 F.2d at 851.

Finally, several courts have mentioned "the availability and feasability of alternative enforcement mechanisms" as a factor to consider in self-execution analysis.[§§§§] Typically, this factor has received little consideration. In *People of Saipan*, the Ninth Circuit noted in passing that the plaintiffs' alternative forum for pressing their treaty claim against the United States–the Security Council–"would present to the plaintiffs obstacles so great as to make their [treaty] rights virtually unenforceable."[*****] Because the court "refuse[d] to leave the plaintiffs without a forum which [could] hear their" claim, the absence of adequate alternative means of enforcing the treaty supported a finding of self-execution.[†††††] By contrast, the availability of viable alternative enforcement would tend to render a treaty executory.

In sum, in determining whether a treaty is self-executing and therefore applicable in the absence of implementing legislation, U.S. courts consider the intent of the political branches, specific definition, mutuality, practical consequences, foreign relations effects, and alternative means of enforcement. If these factors point toward a finding of self-execution, courts take the lead in applying a treaty as U.S. law. If, instead, a treaty is non-self-executing, courts must wait for Congress to render the treaty enforceable through implementing legislation. As a result, some, but not all, treaties are immediately enforceable in U.S. courts.

III. THE SUPREME COURT'S TREATMENT OF CIL IN *SOSA*

In contrast to this variable approach to judicial enforcement of treaties, the scholarly majority has maintained that CIL is automatically enforceable in federal courts as federal common law. As noted, this view has been contested by a minority of scholars who believe that the political branches must take the lead in incorporating CIL. As noted, the Supreme Court in *Sosa v. Alvarez-Machain* waded into this debate, providing guidance on CIL's status in federal courts. The guidance provided bears a striking resemblance to the analysis, just discussed, that U.S. courts use to determine whether treaties are judicially enforceable. The result of this confluence is the apparent emergence of a unified, but as yet unnoticed, doctrine governing whether treaties and CIL may be applied by federal courts absent implementing legislation from Congress. The relief of this

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§§§§ *Frolova*, 761 F.2d at 373; *People of Saipan*, 502 F.2d at 97; *Postal*, 589 F.2d at 877 (quoting *People of Saipan*).

***** *People of Saipan*, 502 F.2d at 97-98.

††††† *Id.* at 100.

doctrine becomes visible as this section charts the analysis of *Sosa* against the background of the self-execution analysis outlined above.

In *Sosa*, the Supreme Court was faced with the cross-border abduction of Mexican citizen Humberto Alvarez-Machain (Alvarez).[‡‡‡‡‡] The abduction, approved by the U.S. Drug Enforcement Agency (DEA) in order to bring Alvarez to trial in the U.S. for his alleged role in the murder of a DEA agent in Mexico, was effected by Jose Francisco Sosa, also a Mexican citizen, who kidnaped Alvarez in Mexico and delivered him to federal authorities in Texas.[§§§§§] After Alvarez was tried and acquitted in the U.S., he returned to Mexico and brought suit against Sosa in U.S. district court under the Alien Tort Statute to recover for Sosa's alleged violation of the law of nations.[******] The lower courts granted and upheld a damage award on Alvarez's ATS claim, the Ninth Circuit asserting "that [the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations."[††††††] The accuracy of this assertion was at the heart of the ATS case before the Supreme Court.[‡‡‡‡‡‡] The Supreme Court ultimately agreed with Sosa and the government that the ATS was a jurisdictional statute only.[§§§§§§] However, this conclusion opened the door for the Court to consider another question: whether federal courts nonetheless had authority to recognize causes of action based on CIL.[*******]

A. *Intent of Congress*

The Supreme Court answered this question by explaining that, as a general rule, federal courts' authority to recognize causes of action based on CIL turns on congressional intent. Historically, CIL was treated as general common law,[†††††††] part of the brooding omnipresence[‡‡‡‡‡‡‡]

[‡‡‡‡‡] *Sosa*, 124 S. Ct. at 2746.

[§§§§§] *Id.*

[******] *Id.* at 2746-47.

[††††††] *Id.* at 2747 (quoting *Alvarez-Machain v. United States*, 331 F.3d 604, 612 (9th Cir. 2003) (en banc)).

[‡‡‡‡‡‡] *Id.* at 2754. The appeal to the Supreme Court also raised and resolved a Federal Tort Claims Act issue that is not material to the subject of this paper. *Id.* at 2746-54.

[§§§§§§] *Id.* at 2754, 2761. *Cf. Tel-Oren*, 726 F.2d at 810, 812 (Bork, J., concurring) (concluding that the ATS "is merely a jurisdiction-granting statute and not the implementing legislation required by non-self-executing treaties to enable individuals to enforce their provisions").

[*******] *Sosa*, 124 S. Ct. at 2755.

[†††††††] *See Sosa*, 124 S. Ct. at 2770 (Scalia, J., concurring in part); Young I, *supra* note

equally discoverable by federal and state courts and derivative of neither authority.[§§§§§§§] As a result, in the pre-*Erie* era in which the ATS was enacted, federal courts were free to recognize causes of action based on CIL, and the ATS assured that they had jurisdiction to hear those claims.[********] Today, federal courts' authority is significantly different.

As the Court explained (in a primer on post-*Erie* federal common law), "the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms."[†††††††††] Today it is clear that common law "is not so much found or discovered as it is either made or created."[‡‡‡‡‡‡‡‡] In part as a result of this new understanding of the nature of common law, the authority of federal courts to create common law, and to apply CIL as common law, is fundamentally different than it once was.[§§§§§§§§] Now, although there exist "limited enclaves in which federal" common law may be made,[*********] "the general practice . . . [is] to look for legislative guidance before exercising innovative authority over substantive

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*, at 374 & n.43, 393-94 & n.143 (collecting and discussing authorities).

‡‡‡‡‡‡‡ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

§§§§§§§ *See* Ku & Yoo, *supra* note †, at 202 ("Prior to the seminal case of *Erie*, most scholars agree that CIL formed part of the general common law" and, as a result, neither state nor federal courts were bound by the interpretations of the other.); Dodge, *supra* note ‡‡‡‡‡‡, at 89 & n.14 ("There is widespread agreement that, when the Constitution was adopted and the First Judiciary Act was passed, the law of nations was understood to be general common law, which was binding on both federal and state courts.") (footnote omitted); *Leading Cases*, *supra* note ‡‡‡‡‡‡, at 451 ("In 1789, the law of nations clearly was considered part of the general common law, that 'brooding omnipresence' recognized rather than created by federal and state judges alike.") (footnote omitted); Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 823-24, 852 (Prior to *Erie*, CIL was part of the transcendental general common law "that did not emanate from a particular sovereign authority" and that was applied independently by state and federal courts.); *Sosa*, 124 S. Ct. at 2770 (Scalia, J., concurring in part) ("[T]he general common law was neither" state nor federal law.); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (Holmes, J., dissenting) (criticizing the notion undergirding the general common law that there exists "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute").

******** *Sosa*, 124 S. Ct. at 2761; *see also* Ku & Yoo, *supra* note †, at 202.

††††††††† *Sosa*, 124 S. Ct. at 2762.

‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§ *Id.*

********* *Id.* at 2764; *see also id.* at 2761, 2764-65 & n.18 (noting that CIL is not "categorically precluded" from incorporation as federal common law).

law."[††††††††††] This rule has been repeatedly recognized in the context of fashioning common law causes of action.[‡‡‡‡‡‡‡‡‡] In that context, the rule serves to ensure that important policy decisions, such as the proper means of enforcing a law regulating primary conduct, are left to the legislature.[§§§§§§§§§] More generally, the rule serves to preserve a separation of powers in which Congress retains principal lawmaking authority within the federal government.

The Court made clear that this general rule applies even when the common law cause of action to be created is based on CIL as evidenced by its focus on whether the legislature had authorized federal courts to create common law causes of action to be heard pursuant to ATS jurisdiction. Had the Court believed that the federal judiciary possessed unlimited authority to incorporate CIL into domestic law, this focus on congressional authorization would have been unnecessary. The Court simply could have stated that federal courts (a) have common law authority to create causes of action based on CIL and (b) jurisdiction to hear such claims under either the ATS (on the theory that the scope of ATS jurisdiction did not change merely because federal courts now incorporate CIL as federal common law rather than as general common law)[**********] or the general federal question statute.[††††††††††] Indeed, Justice Scalia explicitly suggested that the general federal question statute would work as well as the ATS not only as a basis for jurisdiction,[‡‡‡‡‡‡‡‡‡‡]

[†††††††††] *Id.* at 2762; *see also id.* at 2774 (Scalia, J., concurring in part).

[‡‡‡‡‡‡‡‡‡] *Id.* at 2762-63. *Cf.* Stephens, *supra* note ‡‡‡‡‡‡, at 999 (reasoning that "[i]f the Supreme Court considered the [ATS] as if it were enacted today, the Court would likely hold that it" creates jurisdiction but not a cause of action as "[t]he Court today does not infer causes of action, but rather requires Congress to give specific authorization for such claims").

[§§§§§§§§§] *Sosa*, 124 S. Ct. at 2763.

[**********] *Cf. Leading Cases*, *supra* note ‡‡‡‡‡‡, at 453-54 (*Sosa* provided some support for the view that CIL was "not necessarily incorporated within post-*Erie* federal common law," but courts retain CIL "lawmaking authority because the process of 'recognizing' (rather than creating) federal general common law before *Erie* was the same as the process of 'recognizing' norms of [CIL] since then.").

[††††††††††] *See* Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 847-48 & nn.210-11; RESTATEMENT, *supra* note *, § 111(2); *Sosa*, 124 S. Ct. at 2773 n.* (Scalia, J., concurring in part).

[‡‡‡‡‡‡‡‡‡‡] *Sosa*, 124 S. Ct. at 2773 n.* (Scalia, J., concurring in part); *see also* Stephens II, *supra* note ‡‡‡‡‡‡, at 542 (recognizing that if CIL is federal law, the general federal question statute would provide jurisdiction for CIL claims, rendering the ATS unnecessary). The *Sosa* majority apparently did not respond to Justice Scalia's assertion that section 1331, the general federal question statute, would be an equally good fount of

but also for the creation of common law based on CIL, if there were "some [post-*Erie*] residual power . . . to create federal causes of action in cases implicating foreign affairs."§§§§§§§§§§ But the Court rejected the suggestion that federal courts may incorporate CIL under the general federal question statute and explained that the federal courts' authority to create new causes of action based on CIL derived from Congress' unique intent in enacting the ATS.********** This unique intent was discerned through an extensive analysis of the motives of both the first and subsequent Congresses.††††††††††

The first Congress included the ATS within the Judiciary Act of

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jurisdiction for common-law causes of action created under the congressional authorization implied from the ATS. *Compare Sosa*, 124 S. Ct. at 2773 n.* (Scalia, J., concurring in part), *with id.* at 2765 n.19. Although Professor Dodge has suggested that the majority did hold that section 1331 would not provide jurisdiction for CIL-based causes of action, that conclusion seems to have resulted from conflation of two questions: (a) whether the general federal question statute authorized the creation of CIL-based common law (to which the majority responded in the negative as there was no indication of congressional intent to authorize such power pursuant to section 1331), and (b) whether the general federal question statute can provide jurisdiction for common-law causes of action authorized by Congress' intent behind the ATS (which the majority seemed to ignore). *See id.*; Dodge, *supra* note ‡‡‡‡‡‡, at 96-97. This conflation leads to Professor Dodge's novel suggestion that CIL "may be federal common law for purposes of the ATS, but not for the purposes of [section] 1331." Dodge, *supra* note ‡‡‡‡‡‡, at 97; *see also id.* at 100. Understanding the majority's focus on congressional intent as the source of authority to create CIL-based common law prevents the need to recognize such a unique form of federal common law.

§§§§§§§§§§ *Sosa*, 124 S. Ct. at 2773 n.* (Scalia, J., concurring in part).

********** *Id.* at 2765 n.19; *see* Swaine, *supra* note ‡‡‡‡‡‡, at 1528 (*Sosa*'s holding was based on congressional delegation to the federal courts of "modest authority to reckon [CIL]."). *Cf. Tel-Oren*, 726 F.2d at 812 (Bork., J., concurring) (suggesting that, had Congress so intended, the ATS could "authorize tort suits for the vindication of any international legal right"). Thus, although the Court recognized that in *Erie*'s wake there are "limited enclaves" of acceptable federal common law making and that Supreme Court precedent treating international law as part of U.S. law does not "preclude" federal courts from ever recognizing as federal common law "international norms intended to protect individuals," *Sosa*, 124 S. Ct. at 2764-65 & n.18; *see also id.* at 2761, the Court did not suggest that federal courts have independent authority to incorporate CIL as common law. Rather, the Court indicated that the authority to engage in such common law making derives, as a rule, from Congress.

The Court's reliance on the unique intent behind the ATS does, however, raise questions about when a jurisdictional grant may evidence an intent to confer common law making authority. *See Leading Cases*, *supra* note ‡‡‡‡‡‡, at 455-56.

†††††††††† *See* Stephens II, *supra* note ‡‡‡‡‡‡, at 544 ("The Supreme Court resolved the debate [regarding the ATS' import] by working carefully through the available information about the intent of those who enacted the statute."); *id.* at 549.

1789.‡‡‡‡‡‡‡‡‡‡‡ As originally enacted, the ATS provided federal district courts "cognizance, concurrent with the courts of the several States, or the circuit courts, . . . of all the causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."§§§§§§§§§§§ The ATS's inclusion in the Judiciary Act which otherwise exclusively addressed federal jurisdiction; the use of the term "cognizance" which "bespoke a grant of jurisdiction, not power to mold substantive law"; and the fact that the first Congress would have been aware of "the distinction between jurisdiction and a cause of action" all led to the easy conclusion that the ATS "was intended as jurisdictional."**********

That conclusion did not preclude an implied intent that federal courts recognize causes of action based on CIL, however.†††††††††††† The Court therefore turned to assessing whether Congress impliedly authorized federal courts to create common law causes of action based on CIL.‡‡‡‡‡‡‡‡‡‡‡‡ The history surrounding the ATS was sparse and equivocal, but permitted the Court to draw two inferences regarding Congress' intent.§§§§§§§§§§§§ First, Congress did not intend the ATS to lie fallow until some future Congress or state provided or authorized the creation of a cause of action that could be heard pursuant to the ATS's jurisdictional grant.********** Second, "Congress intended the ATS to furnish jurisdiction for a relatively modest set of [common law] actions alleging violations of the law of nations."‡‡‡‡‡‡‡‡‡‡‡‡‡

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

§§§§§§§§§§§*Id.* (quoting Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79).

********** *Id. Cf. Tel-Oren*, 726 F.2d at 810 (Bork, J., concurring).

†††††††††††† This is where the majority and Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) part company. While the majority believed that the implied intent of the first and subsequent Congresses empowered federal courts to recognize new, though limited, causes of action based on CIL consistent with post-*Erie* federal common law making, Justice Scalia believed that *Erie* precluded a finding that the first Congress authorized federal courts to create federal common law now that general common law is extinct. *Id.* at 2761, 2764-65; *id.* at 2773-74 (Scalia, J., concurring in part). *Cf.* Dodge, *supra* note ‡‡‡‡‡‡, at 95-96.

‡‡‡‡‡‡‡‡‡‡‡‡ *See Sosa*, 124 S. Ct. at 2755.

§§§§§§§§§§§§ *See id.* at 2758 (noting that "[t]here is no record of congressional discussion about private actions that might be subject to" ATS jurisdiction "or about any need for further legislation to create private remedies," and that scholarly debate has yielded no "consensus understanding of what Congress intended").

********** *Id.* at 2758-59; *see also id.* at 2761.

†††††††††††††† *Id.* at 2759; *see id.* at 2761. The historical evidence supporting these inferences included the following: (a) at the time the ATS was enacted, the law of nations recognized three offenses that could be judicially enforced against individuals–"violation

The first Congress' intent that federal courts recognize a limited number of common law causes of action based on the law of nations was easy to achieve at the time the ATS was enacted, as federal courts could legitimately apply CIL as general federal common law.‡‡‡‡‡‡‡‡‡‡‡‡‡ As previously noted, in light of *Erie*, federal courts no longer enjoy that authority.§§§§§§§§§§§§§ *Erie*'s restriction of federal judicial authority, however, did not defeat the first Congress' intent.********** The Court concluded that that intent continued to provide authority for limited recognition of CIL-based common law, particularly given the intent of more recent Congresses.†††††††††††††††

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of safe conducts, infringement of the rights of ambassadors, and piracy"–which were probably what the ATS drafters had in mind when they referred to suits by aliens for torts in violation of the law of nations, *id.* at 2756; (b) these violations had been of special concern in America because the lack of a centralized government authorized to provide judicial remedies for these violations had given rise to foreign relations concerns in the period following independence through the Articles of Confederation, *id.* at 2756-57 & n.11; (c) as a result of this lack of authority and to ameliorate its consequences, the Continental Congress twice called on states to enforce rights based on the law of nations; (d) the concern over the centralized government's inability to enforce the law of nations persisted in the Constitutional Convention which drafted a Constitution "vesting the Supreme Court with original jurisdiction over 'all Cases affecting Ambassadors, other public ministers and Consuls,'" *id.* at 2757 (quoting U.S. CONST. art. III, § 2); (e) similarly, the first Congress not only enacted the ATS, but also recognized the three offenses above as criminal, reinforced the Supreme Court's "original jurisdiction over suits brought by diplomats," and authorized alienage jurisdiction, *id.* at 2757, 2758; (f) the presumed principal drafter of the ATS had both been in the Continental Congress that first called for state enforcement of the law of nations and been in the one state legislature that responded to the call; *id.* at 2756-58; (g) the Attorney General in 1795 opined that the ATS opened the federal courts to a tort suit, presumably based on common law causes of action, "against Americans who had taken part in the French plunder of a British slave colony in Sierra Leonne," *id.* at 2759; and (h) a district court decision from the same year suggested that some torts in violation of the law of nations fell within the common law and were subject to ATS jurisdiction, while a district court decision in 1793 held that the ATS could not provide jurisdiction for a suit not based on tort only, but did not suggest that additional legislation would be necessary to confer jurisdiction in a suit seeking only tort recovery, *id.* Some have criticized the Court's historical evidence as very weak. Ku & Yoo, *supra* note †, at 171.

‡‡‡‡‡‡‡‡‡‡‡‡‡ *See* Stephens, *supra* note ‡‡‡‡‡‡, at 999 ("It seems . . . clear that, during the late eighteenth century, members of Congress would not have seen any need to explicitly create a cause of action for international law violations because they understood that such claims could be based on common law.").

§§§§§§§§§§§§§ *See supra* note §§§§§§§ and accompanying text.

********** *See Sosa*, 124 S. Ct. at 2765.

††††††††††††††† *Id.*; *see also* Stephens, *supra* note ‡‡‡‡‡‡, at 999 (noting that the Court in *Sosa* tried to effectuate the intent of the first Congress despite intervening changes in

More recent Congresses, like the first Congress, have implied an intent to allow federal courts to recognize limited causes of action that fit within the ATS's jurisdictional grant.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Federal courts have assumed the authority to recognize causes of action based on the law of nations since 1980, when the Second Circuit in *Filartiga* first sustained an ATS suit grounded in the CIL prohibition on official torture.§§§§§§§§§§§§§§ Judicial disagreement with the Second Circuit's position was joined in 1984 when Judge Bork, in the D.C. Circuit's fractured opinion in *Tel-Oren v. Libyan Arab Republic*, concluded that the ATS was a jurisdictional statute and did not create a cause of action.********** In the two decades since these opinions, Congress has never expressed disagreement with the decisions arising from *Filartiga*.†††††††††††††††† Instead, in the wake of the D.C. Circuit's dismissal of the ATS suit in *Tel-Oren*, Congress enacted the Torture Victim Protection Act (TVPA),‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ which explicitly created federal causes of action for extrajudicial killing and torture.§§§§§§§§§§§§§§§ The legislative history to the TVPA states that the ATS "should 'remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.'"**********

While this history suggests that modern Congresses intended to allow some federal common law incorporation of CIL, the Supreme Court did not find a "congressional mandate to seek out and define new and debatable violations of the law of nations" or that modern Congresses had provided affirmative encouragement of "greater judicial creativity" in incorporating CIL.†††††††††††††††† Indeed, the Court noted that in spite of the encouraging statement in the TVPA's legislative history, "Congress as a body has done nothing to promote" ATS suits based on CIL norms

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our legal system).

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *See Sosa*, 124 S. Ct. at 2765.

§§§§§§§§§§§§§§ *Id.*; *see supra* note **.

********** *Sosa*, 124 S. Ct. at 2765; *Tel-Oren*, 726 F.2d at 810, 811 (Bork, J., concurring). *But cf. id.* at 811, 813-816 & n.22 (suggesting that Congress in enacting the ATS may have recognized that the three paradigm offenses discussed in *Sosa* carried "with them a private cause of action for which" the ATS provided federal jurisdiction).

†††††††††††††††† *Sosa*, 124 S. Ct. at 2765.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Torture Victim Protection Act, Pub. L. No. 102-256, 106 Stat. 73 (1992), *codified at* 28 U.S.C. § 1350 note (1999).

§§§§§§§§§§§§§§§ *See Sosa*, 124 S. Ct. at 2763.

********** *Id.* (quoting H.R. REP. NO. 102-367, pt. 1, at 3 (1991)).

†††††††††††††††† *Id.*

beyond the prohibitions on torture and extrajudicial killings.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Moreover, the Senate has several times "expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when" it ratified the International Covenant on Civil and Political Rights subject to a declaration "that the substantive provisions of the document were not self-executing."§§§§§§§§§§§§§§§§

The Court welcomed further guidance from Congress, recognizing that Congress could entirely prohibit federal courts from incorporating CIL as federal common law "(explicitly or implicitly by treaties or statutes that occupy the field) just as [Congress could] modify or cancel any judicial decision so far as it rests on recognizing an international norm as such."********** However, the Court had to decide *Sosa* based on the evidence of congressional intent before it. Given the available evidence of the first and modern Congresses' intent, the Court held that federal courts could continue to recognize limited CIL-based causes of action that coincide with the ATS's jurisdictional grant.††††††††††††††††

The broader and more critical point, however, is that the Court required a finding of congressional intent before permitting the common law incorporation of CIL. *Sosa* thus stands for the proposition that, as a

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§§ *Id.*; *see also id.* at 2774 (Scalia, J., concurring in part).

********** *Id.* at 2765.

†††††††††††††††† *See id.* at 2754 (Based on the first Congress' "limited, implicit sanction" of federal courts' authority "to entertain the handful of international law *cum* common law claims understood in 1789," the Court found little legislative authority to recognize broader common law causes of action now.); *id.* at 2761-63. *Cf.* Charles W. Brower, II, *Calling All NGOs: A Discussion of the Continuing Vitality of the Alien Tort Statute as a Tool in the Fight for International Human Rights in the Wake of* Sosa v. Alvarez-Machain, 26 WHITTIER L. REV. 929, 941-42, 944, 946-48 (2005) (acknowledging that the *Sosa* Court found congressional authorization to recognize CIL-based causes of action, while arguing that Congress' authorization was broader than what the Court actually found).

As the *Sosa* opinion illustrates, "[i]t may not always be easy to determine whether the political branches have authorized the development of a federal common law rule concerning CIL." Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 869. Congress, of course, may provide clarity by expressly enacting causes of action based on CIL, as it did in the TVPA, rather than merely delegating authority to do so. *See supra* note ‡‡‡‡‡‡‡‡‡‡‡‡‡ and accompanying text; Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J.1, 33-34 (2004) (Congress' creation of a private right of action for victims of human trafficking eliminates concerns raised by *Sosa*.).

rule, congressional intent is the touchstone of federal judicial authority to apply CIL as federal law,‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ just as the intent of the political branches is the touchstone of judicial authority to apply a treaty as federal law. Moreover, as with self-execution, other considerations besides evidence directly probative of congressional intent bear on the courts' authority to incorporate CIL. The Court in *Sosa* identified several such factors.

B. *Specific Definition and Mutuality*

In obvious parallel to self-execution analysis, the first two factors the Court identified were specific definition and mutuality.§§§§§§§§§§§§§§§§§ The Court held "that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content[, i.e., specific definition,] and acceptance among civilized nations[, i.e., mutuality,] than the historical paradigms familiar when [the ATS] was enacted": offenses against ambassadors, violation of safe conduct, and piracy.********** These specificity and mutuality requirements proved fatal to Alvarez's ATS claim.††††††††††††††††††

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Even scholars who would continue to assert that "[r]ecognition and enforcement of international law as a matter of federal common law without specific legislative authorization does not overstep the proper judicial role" should acknowledge that "the existence of the ATS and the history of congressional activity and inactivity in relation to the growth of ATS litigation provided at least some legislative countenance to the federal common law role" approved in *Sosa* and limit *Sosa*'s value as an endorsement of federal authority to create CIL-based common law in the absence of congressional authorization. Neuman, *Law in Foreign Relations*, *supra* note ‡‡‡‡‡‡, at 129; *see also id.* at 132-33, 135, 152. *But cf.* Chander, *supra* note ‡‡‡‡‡‡, at 1205-07 (arguing that *Sosa* definitively endorses federal courts' authority to incorporate CIL as federal common law, while acknowledging that *Sosa* "carefully moors the elaboration of federal common law in the authorization of the" ATS); Steinhardt, *supra* note *, at 2253-55, 2259, 2272-74 (arguing that Congress authorized creation of CIL-based common law pursuant to the ATS, even while asserting that *Sosa* rejected the minority view that CIL was not federal common law); Stephens II, *supra* note ‡‡‡‡‡‡, at 548-50 (to the same effect). This Part has demonstrated that the *Sosa* Court's focus on legislative intent was far more than empirical happenstance, however. Congressional intent was central to the Court's assessment of the propriety of common law incorporation.

§§§§§§§§§§§§§§§§§ Although these are separate factors, the Court treated them as interlocking requirements, *see id.* at 2761-62, and they raise common concerns that may be addressed together. Accordingly, I discuss them together in this part.

********** *Id.* at 2765; *see also id.* at 2761-62. *Cf. Tel-Oren*, 726 F.2d at 805-08 (Bork, J., concurring) (The fact that the international law norms on which plaintiffs relied were "anything but clearly defined" or well accepted counseled against recognition of a cause of action.).

††††††††††††††††††† *Sosa*, 124 S. Ct. at 2766 n.21, 2769 & n.29.

Alvarez, according to the Court,‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ relied on "a general prohibition of 'arbitrary' detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances" of detention.§§§§§§§§§§§§§§§§§ Alvarez could only demonstrate, however, acceptance of "a norm against arbitrary detention . . . at a high level of generality."********** To the extent the Restatement provided support for a more specific rule–a rule against "'prolonged arbitrary detention'" "'as a matter of state policy'"–such a rule would require something more than Alvarez's "relatively brief detention in excess of positive authority" and would not sufficiently specify when a policy of prolonged arbitrary detention would render its enforcers "enemies of the human race."†††††††††††††††††† Thus, "the broad [norm of CIL] Alvarez advance[d]" was at present "an aspiration" lacking the required specificity.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Absent specificity and mutuality, the federal courts could not provide a common law remedy. As with treaties, then, specific definition and mutuality served to cabin federal courts' authority to apply CIL as a federal rule of decision.

One might argue that the specific definition and mutuality limitations on the federal application of CIL (a) are born of the historical context in which the ATS was enacted and (b) only apply to ATS claims.§§§§§§§§§§§§§§§§§§ There is some basis for the former contention, as the specificity and mutuality limitations might be seen as emanating from Congress' intent in enacting the ATS. The paradigm offenses, according to the Court, were accepted as part of the law of nations at the time the ATS was enacted and were likely the offenses the ATS drafters had in mind when providing jurisdiction for torts in violation of the law of nations.********** The first Congress only intended to provide federal jurisdiction to hear these three claims or at least a narrow set of such claims.†††††††††††††††††††† Modern Congresses have approved of federal courts' recognition of other causes of action but that recognition

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ Commentators have argued that the Court's characterization of Alvarez's claim was miserly at best. *See* Steinhardt, *supra* note *, at 2253, 2281-82.

§§§§§§§§§§§§§§§§§ *Sosa*, 124 S. Ct. at 2768.

********** *Id.* at 2768.

†††††††††††††††††† *Id.* at 2769 (quoting RESTATEMENT, *supra* note *, § 702).

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§§§§ *See* Steinhardt, *supra* note *, at 2250 (The three paradigm offenses "clearly inform[] the rule of evidence that [governs] future ATS proceedings.").

********** *Sosa*, 124 S. Ct. at 2756.

†††††††††††††††††††† *Id.* at 2759.

has been subject to limiting standards consistent with those the *Sosa* Court adopted.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Thus, one might conclude that the specificity and mutuality standards that *Sosa* imposed, as informed by the paradigm offenses, were simply mandated by congressional intent. To the extent that is true, the Court's adoption of these standards is a further manifestation that congressional intent is the touchstone of CIL incorporation.

However, congressional intent is only part of the story behind the Supreme Court's imposition of the specific definition and mutuality considerations. Indeed, had the Supreme Court felt obliged to impose limitations solely to respect the intent of (at least the first) Congress, the Court presumably would have permitted recognition only of causes of action in situations where a failure to do so would strain U.S. relations with other countries (again with the three specified offenses as paradigms),[§§§§§§§§§§§§§§§§§§§§] for it was the national government's inability to respond to international law violations damaging foreign relations that motivated enactment of the ATS.[**********] But the specificity and mutuality standards do not derive solely from the ATS. They are part of a broader analysis that applies to the incorporation question generally, as is evidenced by the fact that these standards (a) derive from separation of powers concerns that are independent from the ATS and (b) serve to

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[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.* at 2765-66; *see id.* at 2774-76 (Scalia, J., concurring in part) (criticizing the Court for using the same standards that "ambitious lower courts have used"); Stephens II, *supra* note ‡‡‡‡‡‡, at 534-35, 551-55 (The tone and standard adopted by *Sosa* mirror the approach of Filartiga and most of its progeny.); Steinhardt, *supra* note *, at 2245, 2250-51 (asserting that the limitations imposed by the *Sosa* Court were consistent with those employed by lower courts); Brower, *supra* note †††††††††††††††, at 939 ("The rule stated in *Sosa* is essentially no different than the rule stated in *Filartiga* over twenty years prior."); Dodge, *supra* note ‡‡‡‡‡‡, at 87, 94 ("[T]he restraint imposed by the *Sosa* Court, was no more than the lower courts had already been exercising in cases under the ATS."). *Cf.* Brav, Recent Development, *supra* note ‡‡‡‡‡‡, at 266, 272 (arguing that *Sosa* endorsed "a slightly more restricted version of *Filartiga*").

[§§§§§§§§§§§§§§§§§§§§] *See* Ku & Yoo, *supra* note †, at 178 ("While [the *Sosa* Court] looked to the diplomatic problem that had beset the national government under the Articles of Confederation, [the Court] rejected the idea that the ATS should be so limited" and, indeed, transformed the purpose of the ATS "from keeping the United States out of diplomatic incidents to keeping other nations to their international obligations."). *But cf.* Memorandum for the United States as Amicus Curiae, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 604 (1980) (When "there is a consensus in the international community that [a] . . . right is protected and that there is a widely shared understanding of the scope of this protection. . . . there is little danger that judicial enforcement will impair our foreign policy efforts.").

[**********] *See Sosa*, 124 S. Ct. at 2756-59; *Tel-Oren*, 726 F.2d at 812, 816 (Bork., J., concurring).

address those concerns whenever common law incorporation is at issue.

The specificity and mutuality considerations arose, not only from the history of the ATS, but from the Supreme Court's concern, rather extensively detailed in its opinion, for maintaining fidelity to the post-*Erie* distribution of law-making authority between Congress and the federal courts.[††††††††††††††††††††] Indeed, the Supreme Court decided against Alvarez precisely because "[c]reating a private cause of action to further [the broad norm Alvarez advanced] would go beyond any common law discretion [the Court] thought it appropriate to exercise."[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] In addition, the Court explained that *Erie* concerns provided "good reasons" for restraining "the discretion a federal court . . . exercise[s] in considering a new cause of action" based on CIL.[§§§§§§§§§§§§§§§§§§§§] Those concerns, which arise whenever CIL is incorporated as federal common law, are met by the specific definition and mutuality requirements.[**********]

At a basic level, specific definition and mutuality serve to ensure that federal courts do not incorporate norms that have not yet qualified as CIL.[††††††††††††††††††††] But these requirements do more than that; they also serve to limit the discretion courts may exercise even when the traditional definition of CIL is arguably satisfied. CIL results from the

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[††††††††††††††††††††] *See Sosa*, 124 S. Ct. at 2761-63. While the *Sosa* Court focused on the proper distribution of federal law-making authority, the specificity and mutuality concerns also serve to police the distribution of foreign affairs authority among the federal branches. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) ("[T]he greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since courts can then focus on the application of an agreed principle . . . rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.").

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Sosa*, 124 S. Ct. at 2769; *see also id.* at 2769 n.29 (Lack of specificity is a clear "point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed."); *id.* at 2766 n.21 (Specific definition requirement is dispositive of Alvarez's claim.).

[§§§§§§§§§§§§§§§§§§§§] *Id.* at 2761.

[**********] *See id.* at 2761-62.

[††††††††††††††††††††] *See id.* at 2769 n.29 (Lack of specificity "is evidence against [a norm's] status as binding law."); Steinhardt, *supra* note *, at 2267, 2274 ("[T]he 'specific, universal, and obligatory' standard enables courts to distinguish genuinely customary norms from merely idiosyncratic or aspirational norms"); Neuman, *Law in Foreign Relations*, *supra* note ‡‡‡‡‡‡, at 131 (The limitations imposed by *Sosa*, including the specificity requirement, suggest that "federal courts should be followers, not leaders, in the development of [CIL].").

"general and consistent practice of states followed by them from a sense of legal obligation."[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] The inherent difficulty of identifying norms that satisfy this definition leaves room for significant discretion in identifying CIL norms.[§§§§§§§§§§§§§§§§§§§§] Requiring widespread acceptance of specifically defined norms reduces the scope of that discretion.[**********] Specific definition helps to ensure that the norms courts incorporate provide judicially enforceable standards rather than allow courts to fill abstract principles with their own content. Similarly, mutuality ensures that courts do not take the lead in enforcing norms that as yet remain under-recognized by other states. Certainly there are situations where the United States should endorse as CIL and adopt as domestic law standards that have not yet achieved extensive acceptance internationally. But the decision to bind the U.S. without mutuality of commitment from other states is a judgment best left to the political branches.[††††††††††††††††††††††] As with treaties, it is less controversial for a

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[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] RESTATEMENT, *supra* note *, § 102(2).

[§§§§§§§§§§§§§§§§§§§§] *See, e.g.*, Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 854-55 (rejecting the notion "that judges 'find' rather than 'make' CIL," given "CIL's 'soft, indeterminate character'") (quoting LOUIS HENKIN, INTERNATIONAL LAW: POLITICS & VALUES 29 (1995)); Swaine, *supra* note ‡‡‡‡‡‡, at 1526-28 & n.134 ("Those assigned to construe [CIL] have so many sources from which to draw, and so few constraints, that the task of discovery and application is hard to distinguish from lawmaking."); Ku & Yoo, *supra* note †, at 184-86 (detailing numerous difficulties in identifying CIL); Steinhardt, *supra* note *, at 2245, 2251, 2264 (describing the process by which courts identify CIL as "irreducibly impressionistic" and "inherently discretionary"); Young I, *supra* note *, at 385-91, 396-98 (discussing concerns with CIL that undercut the notion that judges merely discern established norms of CIL); J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 451, 459 (2000) (arguing, *inter alia*, that CIL is "a matter of taste," a servant of "many masters because its elements, state practice and opinio juris, have no ascertainable meaning and are routinely ignored"). *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (recognizing the "awesome duty" placed on federal courts attempting "to derive from an amorphous entity–*i.e.*, the 'law of nations'–standards of liability applicable in concrete situations"). *But cf.* Chander, *supra* note ‡‡‡‡‡‡, at 1209 (arguing that the judiciary is the branch of government best suited to "review the difficult plethora of legal materials that constitute international law"); Koh, *supra* note †, at 1853 (arguing that when federal courts make common law based on CIL they "exercise less judicial discretion than when making other kinds of federal common law, as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of [CIL] rules").

[**********] These requirements would, as one example, prevent courts from applying a norm of CIL to an innovative defendant without assurance that such application had become well-accepted in CIL. *See Sosa*, 124 S. Ct. at 2766 & n.20.

[††††††††††††††††††††††] *Cf.* Note, *The Offenses Clause*, *supra* note ‡‡‡‡‡‡, at 2391-92, 2395-98 (arguing that Congress, under the Offenses Clauses, possesses legislative authority to incorporate norms of CIL that fall short of the specificity and mutuality required for common law incorporation).

court to bind the United States to international norms that have been mutually recognized as obligatory by a broad number of other states.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡

In short, the specificity and mutuality considerations the Supreme Court adopted are not exclusive to ATS litigation. While they are critical to ATS litigation and were key to resolving Alvarez's ATS claim, the reason the Court imposed them and their general utility suggest that they are intended to guide incorporation of CIL by a federal court whether pursuant to the ATS or otherwise.

The specificity and mutuality considerations imposed on CIL incorporation mirror the considerations involved in self-execution analysis. Morever, as in self-execution analysis, specificity and mutuality were not the only considerations the Court adopted to guide incorporation of CIL. Because specificity and mutuality concerns were sufficient to dispose of Alvarez's claim, the *Sosa* Court did not discuss these other cnsiderations in great detail, but did identify them and gave some sense of their content.§§§§§§§§§§§§§§§§§§§§§§§§

B. *Practical Consequences*

The Court held that in deciding whether it is appropriate to incorporate CIL as federal common law--as in deciding whether to apply a treaty as self-executing--federal courts must consider the practical consequences of doing so.********** Indeed, the *Sosa* Court

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Cf. Filartiga*, 630 F.2d at 888 ("It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the [ATS].").

This is not to suggest that courts may incorporate all CIL norms that have reached a certain level of specificity and acceptance. Courts' incorporation authority still depends on congressional intent and the other considerations detailed in this Part. But, in cases where congressional intent may be implied and other considerations do not militate against incorporation, incorporation would raise fewer separation of powers concerns where the norm incorporated is both specifically defined and mutually accepted by a large number of states.

§§§§§§§§§§§§§§§§§§§§§§§§ *See Sosa*, 124 S. Ct. at 2766 n.21 (The "requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of [CIL], though it disposes of this case.").

********** *See id.* at 2763, 2766; *id.* at 2774 (Scalia, J., concurring in part). *Cf. Tel-Oren*, 726 F.2d at 812 (Bork, J., concurring) (rejecting as "too sweeping" an interpretation of the ATS that "would authorize tort suits for the vindication of any international legal right").

noted that consideration of practical consequences is inevitable in analyzing specificity.[†††††††††††††††††††††††††] Thus, the Court concluded that Alvarez's claimed norm was insufficiently specific in part because "its implications [were] . . . breathtaking."[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] If the Court recognized, as Alvarez urged, a cause of action for "officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances" attending the detention, that cause of action would encompass "any arrest, anywhere in the world" that was "unauthorized by the law of the jurisdiction in which it took place."[§§§§§§§§§§§§§§§§§§§§§§§§] "It would create an action in federal courts for arrests by state officers who simply exceed their authority"--"the reckless policeman who botches his warrant."[********************] It would create a claim "for the violation of any limit that the law of any country might place on the authority of its own officers to arrest."[†††††††††††††††††††††††††] And if the cause of action were interpreted to cover detentions by non-governmental actors, the consequences would be even more far-reaching.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] The expansive consequences of incorporating Alvarez's alleged norm of CIL persuaded the Court that such lawmaking by the federal judiciary would be improper.

D. *Foreign Relations Effects*

As in self-execution analysis, one practical consequence plays a particular role in CIL incorporation analysis: The *Sosa* Court emphasized that "the potential implications for the foreign relations of the United States of recognizing [private claims for violations of CIL] should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs."[§§§§§§§§§§§§§§§§§§§§§§§§]

[†††††††††††††††††††††††††] *Sosa*, 124 S. Ct. at 2766 ("[T]he determination whether a norm is sufficiently definite to support a cause of action should (and indeed inevitable must) involve an element of judgment about the practical consequences of making that cause available to litigants in federal courts.") (footnote omitted). While the Court in *Sosa* analyzed these practical consequences as a subset of the specific definition requirement, practical consequences bears independent weight in the incorporation analysis, as even a specifically defined norm might produce consequences that would counsel against incorporation absent clearer congressional intent.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *Id.* at 2768.

[§§§§§§§§§§§§§§§§§§§§§§§§] *Id.*

[********************] *Id.* at 2768, 2769.

[†††††††††††††††††††††††††] *Id.* at 2768.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *See id.*

[§§§§§§§§§§§§§§§§§§§§§§§§] *Id.* at 2763; *see also id.* at 2774 (Scalia, J., concurring in part);

As this statement intimates, CIL incorporation could negatively impact U.S. relations with other states, the political branches' range of discretion to conduct foreign affairs, and the distribution of foreign affairs authority between the political branches and the judiciary. Courts should be aware of these concerns in deciding whether to incorporate norms of CIL, just as courts weigh these concerns in conducting self-execution analysis.

Consistent with this principle, the *Sosa* Court took specific note of the foreign relations impact of incorporating CIL in ATS suits by aliens. Incorporation in such suits involves federal courts in identifying limits "on the power of foreign governments over their own citizens, and" in holding "that a foreign government or its agent has transgressed those limits."********** Notwithstanding the potential good done by these suits, they "raise risks of adverse foreign policy consequences."†††††††††††††††††††††††††† As a result, federal courts should undertake these suits, "if at all, with great caution" and sensitivity to their foreign relations impact.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡

The *Sosa* Court also indicated that federal courts might have to defer to the political branches' foreign affairs assessment in appropriate cases.§§§§§§§§§§§§§§§§§§§§§§§§ For example, the U.S. executive has agreed with the Government of South Africa that ATS class action suits pending in the United States against corporations allegedly complicit in apartheid interfere with the response to apartheid that South Africa has chosen: an approach emphasizing confession and forgiveness rather than judicial penalties.********** "In such cases, [the Court explained,] there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy."††††††††††††††††††††††††††††

While the Court suggested that this deference was a separate consideration, it appears simply to be a manifestation of the foreign

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Tel-Oren, 726 F.2d at 805 & n. 12, 806 (Bork, J., concurring) (arguing that potential negative impact on foreign affairs counseled against both judicial recognition of a private cause of action and the existence of a private cause of action under international law).

********** *Sosa*, 124 S. Ct. at 2763; *see also id.* at 2774 (Scalia, J., concurring in part).

†††††††††††††††††††††††††† *Id.* at 2763.

‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *Id.*

§§§§§§§§§§§§§§§§§§§§§§§§ *Id.* at 2766 n.21.

********** *Id.*

†††††††††††††††††††††††††† *Id.*

relations concerns, noted above, that figure into incorporation analysis: in particular, the proper distribution of foreign affairs authority between the political branches and the courts. Because the political branches are often more competent at assessing foreign relations' impact and in order to preserve the political branches' authority to conduct foreign affairs as they see fit, the court must sometimes defer to those branches' assessment of foreign relations implications and their decisions on whether our foreign policy should respond to those implications.‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ In the South African context, this would mean deferring to the executive's assessment of the impact the litigation would have on our relations with South Africa and to the executive's conclusion that such an impact would not be in our interest.

E. *Alternative Enforcement Mechanisms*

In addition to identifying foreign relations considerations as part of the incorporation analysis, the Court concluded that federal courts might restrict incorporation in cases where international law requires exhaustion of remedies in local and perhaps international tribunals before a plaintiff raises "a claim in a foreign forum."§§§§§§§§§§§§§§§§§§§§§§§§§§§§ On one level, respect for an international exhaustion requirement might be a manifestation of the specific definition requirement. That is, courts should only recognize claims that are sufficiently specific and then should only recognize them as specified. If a claim is subject to an exhaustion requirement in international law, it should not be incorporated without that limitation. On another level, the Court's solicitude toward an international exhaustion requirement manifests an independent consideration in the incorporation analysis: the availability of alternative means of enforcement. If CIL claims are capable of enforcement in another forum, the federal judiciary would be less justified in incorporating them for enforcement in federal courts, just as federal courts would be less justified in applying a treaty as self-executing if the treaty contemplated enforcement through alternative means.

IV. UNIFORMITY AND ITS IMPLICATIONS

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‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡ *But cf.* Stephens II, *supra* note ‡‡‡‡‡‡, at 561-67 (suggesting that courts must not simply defer to the executive's foreign affairs assessment when it is counterfactual and asserting that "the *Sosa* opinion makes no mention at all of the executive branch's views of the case or of its overwrought description of the supposed danger that ATS cases pose to U.S. foreign policy").

§§§§§§§§§§§§§§§§§§§§§§§§§§§§ *Sosa*, 124 S. Ct. at 2766 n.21.

As the above discussion acknowledges, the Supreme Court in *Sosa* did not explicitly state that common law incorporation of CIL is governed by the same standards as self-execution of treaties. Indeed, the Court's somewhat scattered identification of the considerations that constrain judicial incorporation of CIL suggests that the Court may not have been aware that it was prescribing the same factors that have guided self-execution analysis. However, even a cursory comparison of the considerations involved in self-execution analysis and those imposed by *Sosa* to guide CIL incorporation reveals almost perfect correlation. In both cases, the political branches' intent is the keystone of the analysis. Considerations of specific definition, mutuality, practical consequences, foreign relations effects, and alternative enforcement mechanisms also factor in. It appears, then, that the Court has discovered and outlined the elements of a uniform doctrine of implied incorporation that applies to both sources of international law.

True, there are some differences between the analyses for treaties and CIL. For example, Congress' intent is paramount in determining whether CIL may be incorporated as federal common law, while both Congress' and the executive's intent are regularly relevant in determining whether an international agreement is self-executing. But this difference merely reflects the allocation of U.S. law-making authority with respect to the two primary sources of international law. The Constitution and historical practice assign a role to both Congress and the executive in fashioning international agreements as federal law,[**********] while Congress possesses primary authority to incorporate CIL via federal statutes, either under its power to define and punish violations of the law of nations or its other legislative powers.[††††††††††††††††††††††††††††] Consequently, the focus on the intent of one versus both of the political branches ultimately is a distinction without a difference.

At heart, the implied incorporation analysis for both treaties and CIL serves the same purpose: to safeguard the authority of the political branch(es) charged with primary responsibility for enacting federal law and conducting foreign affairs.[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] Thus, whether the

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[**********] *See* U.S. CONST. art. II, § 2, cl. 2; CARTER ET AL., *supra* note [††††††††††], at 209-10.

[††††††††††††††††††††††††††††] *See* U.S. CONST. art. I, §§ 1, 8.

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] *See Sosa*, 124 S. Ct. at 2761-69; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) (stating that the conduct of U.S. foreign affairs is constitutionally assigned to the political branches); Vazquez, *supra* note [†††], at 695-96, 712-15, 717 & n.102, 722-23 (noting the "domestic allocation-of-powers function" of the

additional factors that inform implied incorporation are perceived as evidence of, or presumptions regarding, Congress' intent, or simply as analytical safeguards to prevent federal courts from overstepping their authority, the factors at bottom seek to police the proper distribution of power between the federal judiciary and the relevant political branches.§§§§§§§§§§§§§§§§§§§§§§§§§§§§

Because the motive behind the analysis governing application of treaties and CIL in federal courts includes preservation of a proper separation of powers, it is not surprising that the Court turned to the same considerations in both contexts, even if unknowingly.********** Indeed, perhaps what is more surprising is that the Court did not explicitly acknowledge the parity of concerns that underlie judicial application of treaties and CIL and expressly adopt the same analysis for both. What the Court failed to do in terms, however, it did in practice, laying the groundwork for recognition of a uniform doctrine of incorporation for both treaties and CIL.

The implications of this emerging uniformity are significant. At a basic level, uniformity promises to simplify the status of international law

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self-execution doctrine generally, and of specific considerations in the self-execution analysis).

§§§§§§§§§§§§§§§§§§§§§§§§§§§§ Thus, the Court's concern for both congressional intent and the additional considerations is not merely a schizophrenic attempt to bridge past and present, to "give effect to the expectations of the First Congress while also taking seriously more modern concerns" of the U.S. legal system, as has been asserted. Dodge, *supra* note ‡‡‡‡‡‡, at 99; *see id.* at 88-89, 97-100. Nor are the additional factors inconsistent with the concern for intent. *But cf.* Vazquez, *supra* note †††, at 711, 715-16 (decrying courts' consideration of factors beyond intent in analyzing self-execution). Instead, consideration of the political branches' intent as well as the other factors identified yields a more comprehensive attempt to police the proper separation of powers between the political branches and the judiciary.

Whether considerations beyond intent might be better assessed under a separate doctrinal banner is beyond the scope of this Article. For one commentator's views on this issue, see *id.* at 711-12, 714, 722-23; Vazquez II, *supra* note *********, at 1119-22.

********** These considerations, of course, can lead to different conclusions, depending on one's conception of the appropriate separation of powers. In *Sosa*, for example, while considerations such as the intent of modern Congresses and the potential foreign affairs effect of recognizing a private cause of action led the majority to find limited authority to create common law claims based on CIL, those considerations convinced Justices Scalia, Rehnquist and Thomas that federal courts lacked that authority altogether. *See id.* at 2761, 2763-65; *id.* at 2774 (Scalia, J., concurring in part). In Justice Scalia's view, the majority's position was inconsistent with the method "[w]e Americans have . . . for making the laws that are over us," which is the ultimate issue raised by CIL incorporation. *Id.* at 2776 (Scalia, J., concurring in part).

in federal courts. As noted, international law's status in federal courts has been the subject of much debate and confusion. *Sosa* suggests that we may be on the eve of greater clarity and simplicity. Soon, it seems, we might speak in terms of the federal status of international law generally, rather than the separate status of treaties and CIL, and have resort to a uniform doctrine to guide our discussion. This is not to say that the implied incorporation doctrine is fully developed.[††††††††††††††††††††††††††††††] To the contrary, many questions remain,[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] but the basic contours of this unifying doctrine have emerged in *Sosa*.

Perhaps as important, the emerging uniformity suggests that academic commentary on the domestic status of international law is significantly out of step with Supreme Court jurisprudence. While academic commentators have questioned the self-execution doctrine, the Supreme Court not only affirmed that doctrine in *Sosa*[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] but extended its core considerations to CIL. In so doing, the Court emphasized Congress' primacy[*] in CIL incorporation. As noted above, the crux of the minority position in legal scholarship was that federal courts' authority to apply CIL as common law derived from Congress. While the Supreme Court did not adopt the narrow rule that Congress must confer common law making authority

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[††††††††††††††††††††††††††††††] Indeed, the Court in *Sosa* suggested that additional, but unidentified, factors may be relevant in evaluating claims for incorporation of CIL. *See Sosa*, 124 S. Ct. at 2766 n.21. The Court, however, rejected the suggestion that whether international law recognizes universal jurisdiction over the CIL norm advanced is such a factor. *See id.* at 2782-83 (Breyer, J., concurring in part).

[‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡‡] For example, the relative weight of the factors guiding implied incorporation analysis requires development. Similarly, the type and amount of evidence that will establish congressional intent to authorize common law incorporation is uncertain. The historical and contemporary context of the ATS was sufficient in *Sosa*. *See id.* at 2755-61, 2765. But would, say, congressional enactment of a private right of action for CIL violations in the U.S. provide sufficient proof of intent to authorize a common law remedy for similar violations abroad? *See* Kim & Hreshchyshyn, *supra* note †††††††††††††††, at 34 (arguing that, post-*Sosa*, Congress' creation of a private right of action for persons trafficked to the United States might bolster the chance of a successful ATS claim by individuals trafficked outside the United States). Many such questions remain.

[§§§§§§§§§§§§§§§§§§§§§§§§§§§§§§] *See* Steinhardt, *supra* note *, at 2283 (arguing that the Supreme Court's "decision [in *Sosa*] to ignore the provisions of the ICCPR because it is understood to be self-executing is a careless expansion of a dubious doctrine").

[*] For one commentator's defense of congressional primacy in incorporating CIL, see Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in* Sosa v. Alvarez-Machain, 2004 CATO SUP. CT. REV. 209, 210, 216-17, 222-31.

expressly,[†] the Court did endorse the minority position that federal courts' power to incorporate CIL derives from congressional authorization. Similarly, in identifying other considerations to guide the incorporation analysis, the Court necessarily rejected the majority position that all CIL qualifies as federal common law, or even that all specific and widely accepted norms of CIL qualify as federal common law.[‡] The Court thus rebuffed the majority position on the domestic status of CIL.

The Court undercut scholarly international law commentary in a more fundamental sense as well. Commentators have noted the Supreme Court's inability to develop a coherent jurisprudence with regard to international law. Decades ago, Louis Henkin stated that in the area of foreign affairs "the cases are few; the Supreme Court does not build and refine steadily case by case; it develops no expertise or experts; [and] the justices have no clear philosophies."[§] A similar view has carried forward into contemporary assessment of the Supreme Court term in which *Sosa* was decided. John Setear has argued that the Supreme Court avoided recourse to international law in the 2003 term out of a discomfort with international law that arises in part from the fact that "[t]he Court does not routinely wrestle with international legal issues."[**] This Article suggests that skepticism about the Court's ability to develop a coherent approach to international law might begin to dissipate, at least with regard to the federal status of international law. The Court has laid the groundwork for a coherent doctrine governing the status of treaties and CIL in federal courts and the perceived avoidance of international law in *Sosa* results not from discomfort, but from adoption of that doctrine, a doctrine which restrains judicial incorporation as a result of separation of powers concerns.

That doctrine not only creates a uniform analysis for treaties and CIL, it coheres with other domestic tenets of international law. In U.S. law, both treaties and CIL norms are subject to constitutional restraints.[††]

[†] *Sosa*, 124 S. Ct. at 2755 (rejecting, based on "history and practice," Sosa's argument that "there could be no claim for relief without a further statute expressly authorizing adoption of causes of action").

[‡] *See* Young I, *supra* note *, at 457 ("[T]o the extent that post-*Filartiga* courts have applied only a selective subset of customary international norms, those decisions do not support the categorical position that all customary norms are federal law.").

[§] Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 831 (1964).

[**] Setear, *supra* note ‡‡‡‡‡‡‡, at 669.

[††] *See* RESTATEMENT, *supra* note *, § 115(3) (for both treaties and CIL); *Postal*,

For example, a U.S. court would not apply a treaty provision that was inconsistent with the speech protections of the First Amendment.[‡‡] The doctrine emerging from *Sosa* emphasizes that not only do the individual rights guarantees of the Constitution limit federal court application of international law, but the structural provisions of the Constitution do as well.[§§] The federal courts' competence to apply treaties and CIL is limited by the constitutional separation of powers which vests the political branches with primary authority to conduct foreign affairs and to fashion domestic law through statute and treaty. That separation of powers is most forcefully protected by the prominence of the political branches' intent in the implied incorporation analysis. The prominence of the political branches' intent in turn comports with the notion that Congress and the executive can, under domestic law, violate CIL,[***] and Congress can enact legislation that trumps a prior treaty.[†††]

Not only does the implied incorporation doctrine cohere with international law's domestic status more generally, but it leads to more appropriate treatment of CIL and treaties in federal courts. The majority view that CIL was federal common law applicable by federal courts without congressional authorization led to the strange suggestion that treaties, which are written; negotiated and approved by the political branches; and specifically mentioned in the Constitution as the supreme

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589 F.2d at 877 (citing RESTATEMENT (SECOND), *supra* note §§§§§§§§§, § 141(3), for this rule with regard to treaties).

‡‡ *See* Vazquez, *supra* note †††, at 718; *see also Reid v. Covert*, 354 U.S. 1, 16-18 (1957).

§§ *See* Vazquez, *supra* note †††, at 695-96, 712-15, 717 & n.102, 722-23 (noting the separation of powers function served by various iterations of the self-execution doctrine).

*** *See Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986), *cert. denied* 479 U.S. 889 (1986) (holding that Congress and at least high level executive officials may act contrary to CIL); *Comm. of U.S. Citizens*, 859 F.2d at 938-40 (recognizing that Congress can enact laws inconsistent with principles of CIL); *U.S. v. Georgescu*, 723 F. Supp. 912, 921 (E.D.N.Y. 1989) (same); RESTATEMENT, *supra* note *, § 115(1)(a), cmt. a, Rep.'s Note 3 (noting Congress' authority to enact laws that conflict with international law and acknowledging authority suggesting that the President may also exercise his constitutional authority in disregard of international law).

††† *See, e.g.*, *Reid*, 354 U.S. at 18 (noting that the Supreme Court has repeatedly recognized this last-in-time rule); RESTATEMENT, *supra* note *, § 115(1)(a), cmt. a, Rep.'s Note 1 (setting forth the last-in-time rule); Vazquez, *supra* note †††, at 696 (noting that, as a result of the last-in-time rule, "the legislature ultimately has the power to control the judiciary's role in enforcing even self-executing treaties"). The President may also be able to disregard a treaty "when acting within his constitutional authority." RESTATEMENT, *supra* note *, § 115 Rep.'s Note 3.

law of the land, could only be applied by federal courts if they were self-executing, while norms of CIL, which are unwritten, amorphous, not specifically referenced in the Supremacy Clause, and only indirectly controlled by the political branches, were automatically applicable as federal common law.[‡‡‡] Subjecting CIL norms to the same analysis as treaties not only puts the two sources on the same footing doctrinally,[§§§] but likely means that treaties will qualify for application in federal courts more easily than their more nebulous counterpart, CIL. Whereas evidence of congressional authorization to incorporate CIL norms must be sought outside these norms, treaties provide their own evidence of political branch intent. As a result, treaties may be more susceptible to application by federal courts than norms of CIL under the emerging incorporation doctrine.

One final implication of the doctrine arising from *Sosa* may not seem as welcome. The doctrine might be perceived as hampering efforts to incorporate and enforce international law domestically.[****] The

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[‡‡‡] Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 858-59; *cf.* Moller, *supra* note **********, at 224 ("It would make little sense for the Constitution to require agreement between political branches–the executive and Senate–to ratify treaties, but to permit the judiciary carte blanche to incorporate the customary law of nations domestically, without any assent from either political branch.").

[§§§] This is true at least as a general rule. *See supra* note ***.

[****] Some have perceived *Sosa* as a set-back for human rights litigation in the United States, though the overall evaluation has been mixed. *See* Donald J. Kochan, *No Longer Little Known But Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 104 (2005) (noting mixed evaluations of *Sosa*); Ochoa, *supra* note ‡‡‡‡‡‡, at 640 (*Sosa* "limited the scope of viable ATCA claims," but preserved "a limited set of claims" that aliens may bring); Stephens II, *supra* note ‡‡‡‡‡‡, at 535 (*Sosa* disappointed those who saw federal courts' role under the ATS as either expansive or improper, but "is a clear victory for those . . . who view the statute as a means to hold the most egregious perpetrators accountable for the most egregious violations of international law."); Berkowitz, *supra* note ‡‡‡‡‡‡, at 290 ("The *Sosa* decision was a victory for human rights advocates because it affirmed a private enforcement mechanism to encourage foreign parties to observe human rights overseas and upheld the existence of a forum for victims to confront their abusers," though *Sosa* failed to provide a sufficiently detailed and administrable standard for identifying common law CIL norms.); Steinhardt, *supra* note *, at 2246 ("[H]uman rights activists may consider [*Sosa*] a victory in the sense that escaping a fire is a victory . . . , but the impact of the decision on future litigation remains a matter of reasoned speculation."); Brower, *supra* note ††††††††††††††††, at 940 (The limits the Supreme Court imposed on judicial discretion to recognize new causes of action will make it harder to succeed in ATS litigation.); Stephens, ‡‡‡‡‡‡ , at 995, 1003 (The *Sosa* decision, in which "the Court provided a cautious endorsement of the *Filártiga* doctrine," "delighted supporters of federal court human rights litigation.").

doctrine is certainly a step (or more) away from the majority position that CIL is immediately applicable in federal courts as common law.[††††] The practical consequences consideration alone suggests that international law may be least available through federal courts where advocates feel it is most needed: where it would change U.S. practice. However, the perception that the implied incorporation doctrine undercuts international law enforcement largely results, it seems, from a reflexive and narrow focus on the courts to accomplish goals. *Sosa* suggests the need for a broader approach. In addition to pressing claims appropriate for judicial incorporation, international law advocates need to turn to Congress and treaty negotiators in the executive to translate treaties and custom into domestic law. The effort to do so may yield significant gains as incorporation through the political branches serves to distill the charge that international law, as well as judicial incorporation, suffer from a democratic deficit.[‡‡‡‡]

CONCLUSION

After decades of debate regarding the status of international law in federal courts, a coherent resolution has begun to emerge. Though unacknowledged by the Supreme Court and, prior to this Article, by scholars, the recent opinion in *Sosa* suggests that federal court application of the primary sources of international law–treaties and custom–is

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[††††] This does not mean that support for the implied incorporation doctrine translates into opposition to, or distaste for, international law. Kochan, *supra* note **, at 109. The implied incorporation doctrine addresses the proper procedure for incorporating international law into domestic law, not the value of substantive international laws.

[‡‡‡‡] *See* Bradley & Goldsmith, *CIL as Federal Common Law*, *supra* note †, at 871 ("In the long run . . . the requirement of political branch authorization may actually enhance the enforceability of these norms. In general, CIL norms incorporated into federal statutes possess the virtues of being clearer, more concrete, and more democratic than uncodified CIL. These characteristics may alleviate concerns in this country about the legitimacy and content of these CIL norms."); *see also id.* at 857-58 (discussing the incompatibility of treating CIL as federal common law with "American representative democracy"); Young I, *supra* note *, at 398-400 (discussing the argument that incorporation of CIL as federal common law is undemocratic both due to the discretion involved and the foreign source of CIL); Kochan, *supra* note **, at 107 (noting the democratic deficit in deriving CIL-based common law from nonbinding resolutions and international instruments the political branches rejected); Brav, Recent Development, *supra* note ‡‡‡‡‡‡, at 276 (noting arguments and counter-arguments regarding the democratic deficit in judicial incorporation of CIL). *But see* Chander, *supra* note ‡‡‡‡‡‡, 1203 (invoking the thinking of John Hart Ely to argue that the fluid transnational legal process undergirding international law is "a possible buttress[, rather than a rival,] to democracy").

governed by a uniform implied incorporation doctrine that assimilates the considerations of self-execution. This development contradicts the preponderance of academic wisdom on the subject but yields a relatively straightforward symmetry of treatment for treaties and CIL in federal courts that does not, like the majority position before it, elevate custom over treaties, nor the courts over Congress.