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Sosa v. Alvarez-Machain
U.S.,2004.

Supreme Court of the United States
Jose Francisco SOSA, Petitioner,
v.
Humberto ALVAREZ-MACHAIN, et al.
United States, Petitioner,
v.
Humberto Alvarez-Machain, et al.
Nos. 03-339, 03-485.

Argued March 30, 2004.
Decided June 29, 2004.

SOUTER, J., delivered the opinion of the Court, Parts I and III of which were unanimous, Part II of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., and Part IV of which was joined by STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post,* p. 2769. GINSBURG, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post,* p. 2776. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post,* p. 2782

I

We have considered the underlying facts before, *United States v. Alvarez-Machain,* 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992). In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture. *Id.,* at 657, 112 S.Ct. 2188.

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena-Salazar, and the United States District Court for the Central District of California issued a ***698** warrant for his arrest. 331 F.3d 604, 609 (C.A.9 2003) (en banc). The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. *Ibid.*

Once in American custody, Alvarez moved to dismiss the indictment on the ground that his seizure was "outrageous governmental conduct," *Alvarez-Machain,* 504 U.S., at 658, 112 S.Ct. 2188, and violated the extradition treaty between the United States and Mexico. The District Court agreed, the Ninth Circuit affirmed, and we reversed, *id.,* at 670, 112 S.Ct. 2188, holding that the fact of Alvarez's forcible seizure did not affect the jurisdiction of a federal court. The case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.

****2747** In 1993, after returning to Mexico, Alvarez began the civil action before us here. He sued Sosa, Mexican citizen and DEA operative Antonio Garate-Bustamante, five unnamed Mexican civilians, the United States, and four DEA agents. 331 F.3d, at 610. So far as it matters here, Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS, for a violation of the law of nations. The former statute authorizes suit "for ... personal injury ... caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1). The latter provides in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation ***699** of the law of nations or a treaty of the United States."§ 1350.

The District Court granted the Government's motion to dismiss the FTCA claim, but awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim. A three-judge panel of the Ninth Circuit then affirmed the ATS judgment, but reversed the dismissal of the FTCA claim. 266 F.3d 1045 (2001).

A divided en banc court came to the same conclusion. 331 F.3d, at 641. As for the ATS claim, the court called on its own precedent, "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." *Id.*, at 612. The Circuit then relied upon what it called the "clear and universally recognized norm prohibiting arbitrary arrest and detention,"*id.*, at 620, to support the conclusion that Alvarez's arrest amounted to a tort in violation of international law. On the FTCA claim, the Ninth Circuit held that, because "the DEA had no authority to effect Alvarez's arrest and detention in Mexico,"*id.*, at 608, the United States was liable to him under California law for the tort of false arrest, *id.*, at 640-641.

We granted certiorari in these companion cases to clarify the scope of both the FTCA and the ATS. 540 U.S. 1045, 124 S.Ct. 807, 157 L.Ed.2d 692 (2003). We now reverse in each.

II

[The Court's decision on the FTCA claim has been omitted].

III

Alvarez has also brought an action under the ATS against petitioner Sosa, who argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

A

[5] Judge Friendly called the ATS a "legal Lohengrin," ****2755***IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (C.A.2 1975); "no one seems to know whence it came,"*ibid.*, and for over 170 years after its enactment it provided jurisdiction in only one case. The first Congress passed it as part of the Judiciary Act of 1789, in providing that the new federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the ***713** law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.[FN10]

FN10. The statute has been slightly modified on a number of occasions since its original enactment. It now reads in its entirety: "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." 28 U.S.C. § 1350.

[Based on the original wording of the ATS and its placement within a jurisdictional section of the 1789 Judiciary Act, the Court holds that the statute is jurisdictional and does not create a new cause of action for torts in violation of the law of nations].

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. Brief for Vikram Amar et al. as *Amici Curiae.* We think history and practice give the edge to this latter position.

1

[6] "When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware v. Hylton,* 3 Dall. 199, 281, 1 L.Ed. 568 (1796) (Wilson, J.). In the years of the early ****2756** Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other…[t]his aspect of the law of nations …occupied the executive and legislative domains, not the judicial.

***715** The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry ...; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." *Id.,* at 67. ***

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. See Vattel 463-464. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

2

Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken ***716** shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, ... of hostility against such as are in amity ... with the United States, ... infractions of the immunities of ambassadors and other public ministers ...****2757** [and] infractions of treaties and conventions to which the United States are a party." 21 Journals of the Continental Congress 1136-1137 (G. Hunt ed.1912) (hereinafter Journals of the Continental Congress). The resolution recommended that the States "authorise suits ... for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.,* at 1137; cf. Vattel 463-464. Apparently only one State

acted upon the recommendation, see Public Records of the State of Connecticut, 1782, pp. 82, 83 (L. Larabee ed.1982) (1942 compilation, exact date of Act unknown), but Congress had done what it could to signal a commitment to enforce the law of nations.

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The Framers responded by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls." U.S. Const., Art. III, § 2, and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats, see 1 Stat. 80, ch. 20, § 13, created alienage jurisdiction, § 11, and, of course, included the ATS, § 9. See generally Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N.Y.U.J. Int'l L. & Pol. 1, 15-21 (1985) (hereinafterRandall) ***718**).

3

Although Congress modified the draft of what became the Judiciary Act, see generally****2758** Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L.Rev. 49 (1923), it made hardly any changes to the provisions on aliens, including what became the ATS, see Casto, Law of Nations 498. There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section…despite considerable scholarly attention, it is fair to say ***719** that a consensus understanding of what Congress intended has proven elusive.

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. ***

***720** The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, see *id.,* at 118; violations of safe conduct were probably understood to be actionable, *ibid.,* and individual actions arising out of prize captures and piracy may well have also been contemplated, *id.,* at 113-114. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court. 4 Commentaries 68.

4

The sparse contemporaneous cases and legal materials referring to the ATS tend to confirm both inferences, that some, but few, torts in violation of the law of nations were understood to be within the common law. [Justice Souter discusses two cases from the 1700s, where the ATS either provided or would have provided jurisdiction over such torts. He also quotes a 1795 opinion from Attorney General William Bradford suggesting that the ATS was understood to provide jurisdiction over torts in violation of the law of nations.]

B

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In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the

time.

IV

[7] We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the ***725** modern line of cases beginning with *Filartiga v. Pena-Irala,* 630 F.2d 876 (C.A.2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of ****2762** the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

A

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.,* 276 U.S. 518, 533, 48 S.Ct. 404, 72 L.Ed. 681 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created…a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), was the watershed in which we denied the existence of any federal "general" common law, *id.,* at 78, 58 S.Ct. 817, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly, *e.g., Textile Workers v. Lincoln Mills of Ala.,* 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957) (interpretation of collective-bargaining agreements); Fed. Rule Evid. 501 (evidentiary privileges in federal-question cases). Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. *E.g., United States v. Kimbell Foods, Inc.,* 440 U.S. 715, 726-727, 99 S.Ct. 1448, 59 L.Ed.2d 711 (1979).[FN17] And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, see *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 427, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

[8]***727** Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great ****2763** majority of cases. *Correctional Services Corp. v. Malesko,* 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001); *Alexander v. Sandoval,* 532 U.S. 275, 286-287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it

clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Cf. *Sabbatino, supra,* at 431-432, 84 S.Ct. 923. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation ***728** of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. Cf. *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 813 (C.A.D.C.1984).

[9] The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing, H.R.Rep. No. 102-367, pt. 1, p. 3 (1991). But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 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,"*id.,* at 4, Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992).

B

These reasons argue for great caution in adapting the law of nations to private rights. Justice SCALIA, *post,* p. 2769 (opinion concurring in part and concurring in judgment), concludes that caution is too hospitable, and a word is in order ***729** to summarize where we have come so far and to focus our difference with him on whether some norms of today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action beyond § 1350. All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least Justice SCALIA does not dispute, *post,* at 2770, 2772-2773, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. Justice Scalia concludes, however, that two subsequent developments should be understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action. As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), that federal courts have no authority to derive "general" common law.

Whereas Justice SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no

matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, *e.g.,* *Sabbatino,* 376 U.S., at 423, 84 S.Ct. 923; [FN18] *The Paquete Habana,* 175 U.S., at 700, 20 S.Ct. 290; *The Nereide,* 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.); see also *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981). It would take some explaining to say now that federal courts must avert ****2765** their gaze entirely from any international norm intended to protect individuals.

We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding bearing on this issue lying at the intersection of the judicial and legislative powers. The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses ***731** seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga v. Pena-Irala,* 630 F.2d 876 (C.A.2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774 (C.A.D.C.1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. See *supra,* at 2763 (discussing the Torture Victim Protection Act).

While we agree with Justice SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.[FN19]

C

[10] We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and ***732** for this action it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. See, *e.g.,* *United States v. Smith,* 5 Wheat. 153, 163-180, n. a, 5 L.Ed. 57 (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and ****2766** judges who faced the issue before it reached this Court. See *Filartiga, supra,* at 890 ("[F]or purposes of civil liability, the torturer has become-like the pirate and slave trader before him-*hostis humani generis,* an enemy of all mankind"); *Tel-Oren, supra,* at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions-each of which violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (C.A.9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action [FN20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of ***733** making that cause available to litigants in the federal courts.[FN21]

[11] Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.
734** "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations;*2767** and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted

with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana,* 175 U.S., at 700, 20 S.Ct. 290.

[12] To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration), G.A. Res. 217A (III), U.N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 16, 1966, 999 U.N.T.S. 171,[FN22] to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. See Humphrey, The UN Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (E. Luard ed.1967) (quoting Eleanor Roosevelt calling the Declaration " 'a statement of principles ... setting up a common standard of achievement for all peoples and all nations' " ***735** and " 'not a treaty or international agreement ... impos[ing] legal obligations' ").[FN23] And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. See *supra,* at 2763. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.

Alvarez…invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.[FN27] He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U.S.C. § 1983, and ***737***Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (1986), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones ... prolonged arbitrary detention." 2 *Id.,* § 702. Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear. Any credible invocation of a principle****2769** against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. *E.g., Groh v. Ramirez,* 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (2004).[FN28]

***738** Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[FN29] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.[FN30] It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

* * *

The judgment of the Court of Appeals is

Reversed.

***739** Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, concurring in part and concurring in the judgment.

There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. Accordingly, I join Parts I, II, and III of the Court's opinion in these consolidated cases. Although I agree with much in Part IV, I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it ****2770** is neither authorized nor suited to perform.

I

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At the time of its enactment, the ATS provided a federal forum in which aliens could bring suit to recover for torts committed in "violation of the law of nations." The law of nations that would have been applied in this federal forum was at the time part of the so-called general common law. See Young, Sorting out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365, 374 (2002); Bradley & Goldsmith,***740**Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L.Rev. 815, 824 (1997); Brief for Vikram Amar et al. as *Amici Curiae* 12-13.

[Justice Scalia argues that the *Erie* doctrine prohibits federal courts from developing common law without Congressional authorization. Given this, he disagrees with the majority's holding that courts can create a cause of action under the ATS for some violations of customary international law.]

Although I fundamentally disagree with the discretion-based framework employed by the Court, we seem to be in accord that creating a new federal common law of international human rights is a questionable enterprise. We agree that:

• "[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law [in the area of foreign relations]. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Ante,* at 2762.

• "[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution." *Ante,* at 2763.

• "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold ***747** that a foreign government or its agent has transgressed those limits." *Ibid.*

• "[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." *Ibid.*

• *"Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law." Ante,* at 2763.

These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of

action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, *ante,* at 2755, (2) that Congress understands that difference today, *ante,* at 2763, and (3) that the ATS itself supplies only jurisdiction, *ante,* at 2761. In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits. *Ante,* at 2765.

The Ninth Circuit brought us the judgment that the Court reverses today. Perhaps its decision in this particular case, ***748** like the decisions of other lower federal courts that receive passing attention in the Court's opinion, "reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today." ****2775***Ante,* at 2768, n. 27. But the verbal formula it applied is the same verbal formula that the Court explicitly endorses. Compare *ante,* at 2765 (quoting *In re Estate of Marcos Human Rights Litigation,* 25 F.3d 1467, 1475 (C.A.9 1994), for the proposition that actionable norms must be " 'specific, universal, and obligatory' "), with 331 F.3d 604, 621 (C.A.9 2003) (en banc) (finding the norm against arbitrary arrest and detention in this action to be "universal, obligatory, and specific"); *id.,* at 619 ("[A]n actionable claim under the [ATS] requires the showing of a violation of the law of nations that is specific, universal, and obligatory" (internal quotation marks omitted)). Endorsing the very formula that led the Ninth Circuit to its result in this action hardly seems to be a recipe for restraint in the future.

The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches. *Kadic v. Kar dzíc*, 70 F.3d 232 (C.A.2 1995), provides a case in point. One of the norms at issue in that case was a norm against genocide set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278. The Second Circuit held that the norm was actionable under the ATS after applying Circuit case law that the Court today endorses. 70 F.3d, at 238-239, 241-242. The Court of Appeals then did something that is perfectly logical and yet truly remarkable: It dismissed the determination by Congress and the Executive that this norm should *not* give rise to a private cause of action. We *know* that Congress and the Executive made this determination, because Congress inscribed it into the Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091*et seq.,* a law signed by the ***749** President attaching criminal penalties to the norm against genocide. The Act, Congress said, shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." § 1092. Undeterred, the Second Circuit reasoned that this "decision not to create a *new* private remedy" could hardly be construed as *repealing* by implication the cause of action supplied by the ATS. 70 F.3d, at 242 (emphasis added). Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is "no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section,"*ante,* at 2758, to override a clear indication from the political branches that a "specific, universal, and obligatory" norm against genocide is *not* to be enforced through a private damages action? Today's opinion leads the lower courts right down that perilous path.

Though it is not necessary to resolution of the present action, one further consideration deserves mention: Despite the avulsive change of *Erie,* the Framers who included reference to "the Law of Nations" in Article I, § 8, cl. 10, of the Constitution would be entirely content with the post-*Erie* system I have described, and quite terrified by the "discretion" endorsed by the Court. That portion of the general common law known as the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates). Those accepted practices have for the most part, if not in their entirety, been enacted into ****2776** United States statutory law, so that insofar as they are concerned the demise of the general common law is inconsequential. The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to ***750** control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates. See generally Bradley & Goldsmith, Critique of the Modern Position, 110 Harv. L.Rev., at 831-837. The Framers would, I am

confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty, see, *e.g.,* Tex. Penal Code Ann. § 12.31 (West 2003), could be judicially nullified because of the disapproving views of foreigners.

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We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

This Court seems incapable of admitting that some matters-*any* matters-are none of its business. See, *e.g., Rasul v. Bush, ante,* 542 U.S. 446, 124 S.Ct. 2686, 159 L.Ed.2d 548, 2004 WL 1432134 (2004);*INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then-repeating the same formula the ambitious lower courts *themselves* have used-invites them to try again.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal***751** actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

American law-the law made by the people's democratically elected representatives-does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.

[The concurring opinions of Justices Ginsburg and Breyer are omitted.]