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A FOREST WITH NO TREES: THE SUPREME COURT AND INTERNATIONAL LAW IN THE 2003 TERM

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* Professor of Law, University of Virginia School of Law. David Martin provided me with written comments that were the very model of lawyerly probing and probity. Paul Stephan's written comments defended the virtue of contrarians and saved me from several howling omissions. Richard Schragger's verbal and written comments reflected the same keen moderation and normative focus displayed in his article, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv. L. Rev. 1810 (2004). Tom Lee's work in progress on the Alien Torts Statute infused my analysis of that enactment with more history than I could retain. Caleb Nelson and John Harrison generously allowed me to amble into their offices for tutorials on the federal habeas corpus scheme as it is, was, or might be. Any errors remaining are of course my own; if I had listened harder to all of these generous scholars, however, there might not be any.

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INTRODUCTION

IN recent Terms, the Justices of the United States Supreme Court have repeatedly referred to the opinions of foreign or international courts while resolving high-profile cases of domestic law. In *Lawrence v. Texas*,¹ which invalidated a Texas anti-sodomy law as applied to a homosexual couple, the Court's opinion seamlessly integrated into its discussion an opinion of the European Court of Human Rights—not once but twice, and of a court not merely foreign but actually international.² Similarly, in *Atkins v. Virginia*,³ which barred the execution of mentally retarded individuals as cruel and unusual punishment, the Court discussed the

¹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

² *Id.* at 576 (“To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*.”); see *id.* at 573 (discussing the earlier European Court of Human Rights case, *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), in some detail).

³ 536 U.S. 304 (2002).

rarity of such executions “in the world community” with a citation to an amicus brief filed by the European Union—an international organization characterizing international opinion.⁴ In *Grutter v. Bollinger*, a case about affirmative action in university admissions, Justice Ginsburg’s concurrence actually began with an explicit reference to international law: “The Court’s observation that race-conscious programs ‘must have a logical end point,’ . . . accords with the international understanding of the office of affirmative action.”⁵ Justice Ginsburg then quoted two different international treaties, one that the United States has adopted and one that the United States has not.⁶ The Court’s abolition of the juvenile death penalty in its current Term continues the trend.⁷

Outside the pages of the *United States Reports*, various Justices made remarks consistent with an increased interest in international

⁴ Id. at 317 n.21 (citing the Brief for the European Union as Amicus Curiae at 4, *McCarver v. North Carolina*, 533 U.S. 975 (2001) (No. 00-8727), incorporated by motion in *Atkins v. Virginia*, 534 U.S. 1053 (2001) (“[W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”)).

⁵ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

⁶ Id. (Ginsburg, J., concurring) (citing the International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 212, 5 I.L.M. 352, which has been ratified by the United States, see U.S. Dep’t of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on Jan. 1, 2004* (2004), at 466, and the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 14, which has not yet been ratified by the United States).

⁷ *Roper v. Simmons*, No. 03-633 (U.S. Mar. 1, 2005). The Court’s opinion devotes its entire final section to an analysis of law outside the United States. See id. slip op. at 21–25. The Court twice emphasizes, however, that international opinion is “not controlling.” Id. at 21 (“This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility.”); id. at 24 (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”). Justice Scalia’s dissent takes direct issue with the Court’s use of foreign and international law; he is especially incensed that the Court *ignores* such law when deciding cases on abortion or religion. Id. at 21 (Scalia, J., dissenting) (“The Court should either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting foreigners’ views as part of the *reasoned basis* of its decisions.”). Justice Scalia’s other statements, as well as his use of the subtly hostile word *foreigners*, indicate that he is not indifferent to which form of consistency the Court should take. Justice O’Connor emphasizes that international and foreign law is worthy of consultation when confirming a domestic consensus, id. at 18–19 (O’Connor, J., dissenting), but she disagrees with the Court’s blanket conclusion that *no* seventeen-year-old could ever exhibit sufficient culpability to deserve capital punishment, id. at 12–16.

and foreign law. Justice Ginsburg remarked, “Our island or lone ranger mentality is beginning to change.”⁸ In addressing a non-partisan international-affairs center on the intertwined effects of globalization, democratization, and the rule of law, Justice O’Connor concurred cautiously with her colleague:

I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decision of foreign courts.⁹

Justice Breyer gave a keynote address to the American Society of International Law—not an isolationist group—and noted five different ways in which foreign and international law was having a greater impact on his own professional life.¹⁰

The wider world, or at least the world within the Beltway but outside of the Supreme Court building, took note of these developments. The *Washington Post* declared, “The Supreme Court is going global.”¹¹ The *Washington Times* found the Court’s internationalism “disturbing.”¹² Judge Robert Bork called the Court’s recent citations to foreign and international law “risible,” “absurd,” and “flabbergasting.”¹³ Meanwhile, members of Congress intro-

⁸ Associated Press, Ginsburg: Court Is No Longer “Lone-Ranger” in Decision-making, USA Today, Aug. 3, 2003, at http://www.usatoday.com/news/washington/judicial/2003-08-03-ginsburg_x.htm.

⁹ Sandra Day O’Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003) (transcript available at http://www.southerncenter.org/OConnor_transcript.pdf).

¹⁰ Stephen Breyer, The Supreme Court and the New International Law, Address at the Ninety-Seventh Annual Meeting of the American Society of International Law (Apr. 4, 2003) (transcript available at http://www.supremecourtus.gov/publicinfo/speeches/sp_04-04-03.html).

¹¹ Charles Lane, Thinking Outside the U.S., Wash. Post, Aug. 4, 2003, at A13.

¹² Editorial, Danger From Foreign Legal Precedent, Wash. Times, Mar. 25, 2004, at A20.

¹³ Robert H. Bork, Whose Constitution Is It, Anyway?, Nat’l Rev., Dec. 8, 2003, at 37, 37 (risible and absurd); Robert H. Bork, Has The Supreme Court Gone Too Far?, Comment., Oct. 2003, at 25, 32 (flabbergasting). Hewing to true originalism, Bork also warned of the evil lessons taught by the post-Founding Chief Justice, John Marshall: “I have heard alarming reports that European judges are earnestly inquiring how Chief Justice John Marshall managed to centralize power in the federal government in order to learn how they could better diminish the remaining independence of the

duced a non-binding resolution regarding the phenomenon. A member of the U.S. House of Representatives found seventy co-sponsors for House Resolution 568, the Reaffirmation of American Independence Resolution, which stated:

Resolved. That it is the sense of the House of Representatives that judicial determinations regarding the meaning of the laws of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements are incorporated into the legislative history of laws passed by the elected legislative branches of the United States or otherwise inform an understanding of the original meaning of the laws of the United States.¹⁴

The drafters of the resolution stated in its preface that “inappropriate judicial reliance on foreign judgments, laws, or pronouncements [sic] threatens . . . the separation of powers.”¹⁵ The resolution’s sponsor suggested that a Justice’s failure to heed such a congressional admonition could be grounds for impeachment.¹⁶

One might have imagined that the Supreme Court’s passing citations, in a handful of plainly domestic legal disputes, to a few sources of international law as persuasive authority relevant to various secondary considerations would create little stir. One would have been wrong. Some observers, therefore, must have been concerned, while others must have been excited, that the Court’s docket during the 2003 Term included full arguments in seven cases directly presenting questions of international law. Three—*F. Hoffman-La Roche v. Empagran*,¹⁷ *Olympic Airways v. Husain*,¹⁸ and *Republic of Austria v. Altmann*¹⁹—focused on essen-

European Union’s more fractious member states.” Bork, *Whose Constitution Is It, Anyway?*, *supra*, at 37–38.

¹⁴ H.R. Res. 568, 108th Cong. (2004); Press Release, Rep. Tom Feeney, Reaffirmation of American Independence Resolution Approved (May 13, 2004) at http://www.house.gov/apps/list/press/fl24_feeney/ResConstitutionSubPassage.html.

¹⁵ H.R. Res. 568.

¹⁶ Tom Curry, A Flap Over Foreign Matter at the Supreme Court, MSNBC, Mar. 11, 2004, at <http://www.msnbc.msn.com/id/4506232/>.

¹⁷ 124 S. Ct. 2359 (2004).

¹⁸ 124 S. Ct. 1221 (2004).

¹⁹ 124 S. Ct. 2240 (2004).

tially commercial matters. *Empagran* addressed the scope of the Foreign Trade Antitrust Improvements Act (“FTAIA”) and the Sherman Act; *Olympic Airways* decided the liability of an airline for the death of a passenger under the Warsaw Convention; and *Altmann* raised issues of the international law of expropriation, the immunity of a foreign sovereign from suit, and the degree of deference owed to the executive branch’s determinations about the effect of litigation on U.S. foreign policy. Four other cases—*Rumsfeld v. Padilla*,²⁰ *Hamdi v. Rumsfeld*,²¹ *Rasul v. Bush*,²² and *Sosa v. Alvarez-Machain*²³—involved issues of human rights. *Padilla*, *Hamdi*, and *Rasul* all concerned the status of individuals taken prisoner in the course of the war on terror; they thereby raised important issues of national security, deference to executive conduct in the war on terror, and the treatment of prisoners of war under the Geneva Convention. *Sosa* concerned a statute authorizing suits to redress “a tort . . . committed in violation of the law of nations”—about as explicit an incorporation of international law into U.S. law as one could imagine. The stakes were high and the international components of the cases far more salient than in the cases from previous Terms referring to international law.

The Supreme Court’s resolution of these seven cases should be deeply disappointing to anyone who hoped that the Court would embrace international law. The “principle” of international law endorsed in *Empagran* is so vague that even the least inventive U.S. courts should feel utterly unconstrained by it. *Olympic Airways* ignored the decisions of foreign courts with sufficient flagrancy to annoy even Justice Scalia, who has elsewhere advanced the arguably inconsistent principle that “the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”²⁴ The Court resolved *Altmann* by treating it as a case about statutory interpretation and, in particular, about the retroactive application of statutes. As to the human-rights cases, the Court in *Sosa* sandwiched its crabbed interpretation of a substantive inter-

²⁰ 124 S. Ct. 2711 (2004).

²¹ 124 S. Ct. 2633 (2004).

²² 124 S. Ct. 2686 (2004).

²³ 124 S. Ct. 2739 (2004).

²⁴ *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting).

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national legal question between an extensive journey of statutory interpretation (and historiography) and a laundry list of the various issues that the Court did not decide at all. The Court resolved *Padilla* and *Rasul* as purely procedural cases about the allocation within the federal system of jurisdiction over habeas corpus cases, although doing so in *Rasul* did involve the Court's interpretation of a treaty rather than only domestic law. The Court split so badly in *Hamdi* that the implications of the holding for courts below are difficult to divine, but all of the Court's opinions viewed the case as about statutory authority and executive discretion. No Justice saw *Hamdi* as raising an issue of international law that the Court needed to resolve. The Geneva Convention, so potentially important given the facts of *Hamdi* and *Rasul*, and perhaps even *Padilla*, proved to be far from decisive in the Court's actual resolution of those cases.

Only *Sosa* and *Rasul*, therefore, deployed international law as a meaningful component of the Court's opinions; even then, *Sosa* took a repeatedly narrowing approach to international law, and *Rasul* implemented a traditional conception of sovereignty. One looks in vain for *any* expansionist approach to international law in *any* of the seven cases, but one may find repeated examples of the Court's cramping, ignoring, or defanging international law.

The Court's actual resolution of the cases was highly traditional and domestically orientated. Every case except *Olympic Airways* struck the Court as presenting an important issue of domestic statutory interpretation; *Olympic Airways* was to the Court a straightforward reading of its own precedent. *Altmann* and the four human-rights cases each had an important jurisdictional element, which the Court resolved by reference to various doctrines of habeas jurisdiction and immunity; these cases all involved a potential conflict between the judiciary and the Executive, which the Court resolved (in favor of the judiciary in four of the five cases) by discussing traditional balancing of areas of expertise. Even when the Court was ineluctably confronted with an issue of international law, as it was in *Sosa* and *Olympic Airways*, the Court favored a common-law methodology over prospective rule-making—a choice that favors older, customary-law methodologies of making international law over the new, more threatening system of treaties and international courts. The Court was also more comfortable with

old-fashioned issues about sovereignty than it was with new-fangled issues of international human rights.

The Court in these seven cases thereby stayed on familiar, domestic legal ground. It interpreted statutes, assessed jurisdiction, chastised the executive branch, and plumbed the minds of the Founders. The Court did not rush to incorporate international law into its jurisprudence despite the fact that, in contrast to the cases from the 2002 and 2003 Terms that had garnered so much attention, international law was often directly at issue. International law in the Court's most recent Term proved to be an ignorable elephant in the room even if it may also have been a dog that didn't bark.²⁵

²⁵ For the origin of this last phrase to denote that silence can speak volumes, see A. Conan Doyle, *Silver Blaze*, in 1 *The Complete Sherlock Holmes*, at 27 (1930) ("The Simpson incident had shown me that a dog was kept in the stables, and yet, though someone had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was someone whom the dog knew well."). Four current Justices have employed this metaphor in dissent. See *United States v. Am. Library Ass'n*, 539 U.S. 194, 239 (2003) (Souter, J., dissenting) ("This take on the postwar years is confirmed by evidence of the dog that did not bark."); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 360 n.1 (1999) (Stevens, J., dissenting) ("To its credit, and unlike the District Court, the Court does not rely on our reference to the watchdog that did not bark in *Chisom v. Roemer*. . . ."); *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) ("As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. . . . We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie."); *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting) ("I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."). Justice Stevens has also employed the phrase in an opinion of the Court and in a concurrence. See *Martinez v. Ct. App. of Cal., Fourth App. Dist.*, 528 U.S. 152, 159 (2000) (Stevens, J.) ("Such negative historical evidence was meaningful to the *Faretta* Court, because the fact that the [dog] had not barked' arguably demonstrated that early lawmakers intended to preserve the 'long-respected right of self-representation' at trial." (footnote omitted)); *Jenkins v. Anderson*, 447 U.S. 231, 245 n.8 (1980) (Stevens, J., concurring) ("A dog's failure to bark may be probative whether or not he has been trained as a watchdog.").

Faculty members at the University of Virginia School of Law are among those taken with the metaphor. See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 *Mich. L. Rev.* 2275, 2330 (2003) ("We also need to look at the genocides and wars that did *not* happen. These are harder to identify, since they are the dogs that did not bark in the night, but South Africa and Czechoslovakia both come to mind."); John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 *Yale L.J.* 87, 96 n.37 (1999) ("To my mind, the lack of legislative concern with the impact of the statute in the North is a very big dog that did not bark."); John Norton Moore, *Beyond the Democratic Peace: Solving the War*

This Article is about how the Supreme Court avoided the analysis or application of international law in the 2003 Term. (It is not about exactly what holdings the Supreme Court would or should have reached if it had analyzed or applied international law to its opinions; many articles and amicus briefs already provide answers of that sort.) The remainder of this Article will examine the seven “international law” cases—*Empagran*, *Olympic Airways*, *Altmann*, *Padilla*, *Hamdi*, *Rasul*, and *Sosa*—in more detail. The Article first will examine *Altmann*, in which the Court interpreted the Foreign Sovereign Immunities Act to be “retroactive.” In doing so, the Court avoided the plainly present international legal issue of whether the statutory requirement that the controversy involve “property taken in violation of international law” had been met. The Court also avoided a holding based on the general notion of reciprocity in international relations and the specific fact that Austria would not have given the United States sovereign immunity in Austrian courts in a situation symmetrical to *Altmann*. The Article will then examine *Empagran* and *Olympic Airways*. In *Empagran*, the Court appears to take its course from the rules of international law, but a cursory examination of the relevant “law” reveals it to be more *ignis fatuus* than guiding light. In *Olympic Airways*, the Court relegates decisions of two foreign courts to a footnote despite the fact that those decisions are arguably inconsistent with the Court’s own ruling on a matter of international law common to all three nations.

The Article then will turn to the four international human-rights cases before the Court. It will examine, as a trio, the cases in which the Court examined the claims of those detained in the war on terrorism: *Padilla*, *Hamdi*, and *Rasul*. In all three of these cases, the

Puzzle, 44 Va. J. Int’l L. 341, 401 (2004) (“Non-war settings, or ‘the dogs that did not bark,’ also seem generally consistent with the hypothesis.”); Jeffrey O’Connell & Geoffrey Paul Eaton, Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law, 78 Neb. L. Rev. 858, 873 (1999) (“Less visible, but perhaps more disturbing, are the dogs that do not bark—producers of goods and services who, fearing liability and inability to predict exposure, decline to enter the marketplace at all.”); Glen O. Robinson, The Electronic First Amendment: An Essay for the New Age, 47 Duke L.J. 899, 924 (1998) (“As Holmes (Sherlock, not Oliver Wendell) reminds us, the absence of a dog’s bark can be important evidence that there is nothing to bark at.” (footnote omitted)).

Court interpreted the federal habeas jurisdiction statute.²⁶ The Court's interpretation in *Padilla* obviated the need to consider any substantive law at all, whether domestic or international. The Court's interpretation in *Hamdi* required a due-process analysis, but the Court did not examine the plainly relevant Geneva Convention. The Court's interpretation in *Rasul* again avoided any substantive consideration of the Geneva Convention, but the holding did depend importantly upon the Court's conception of sovereignty over Guantanamo Bay, a conception crucially informed by the Court's examination of a treaty between the United States and Cuba. The Court's view of sovereignty was consistent with a pragmatic rather than formalistic conception of sovereignty, much as international law itself has come to treat sovereignty. Finally, the Article will examine *Sosa*, the last case decided in the Court's 2003 Term. In *Sosa*, the Court at every turn took the interpretive path that gave the narrowest possible scope to international law, both in terms of its refusal to give treaties due consideration and in terms of the constrictions that the Court repeatedly imposed upon the statutory phrase, the "law of nations." The Article will conclude with some speculations about why the Court treated international law as it did in the cases under examination here.

I. ALTMANN AND AVOIDANCE

A. International Law: Sovereign Immunity

Republic of Austria v. Altmann involved a claim of sovereign immunity, a concept close to the heart of public international law. Classically, public international law is the set of legal rules governing interactions among co-equal, sovereign states. Classically, sovereignty defines an internal territorial realm of absolute authority and an external realm in which, short of war, a state must exercise its sovereignty so as not to interfere with the sovereignty of other states. Sovereign immunity in U.S. courts is a matter of comity rather than of international legal obligations in the form of treaties or customary international law,²⁷ but sovereign immunity as re-

²⁶ 28 U.S.C. § 2241 (2000).

²⁷ The seminal case is *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), which contains a great deal of rhetoric discussing sovereign immunity as a widespread practice of states in the international system and implies a view that sov-

flected in any domestic legal system grows naturally, and crucially, from the fundamentals of international law. The courts of a given nation-state are the creation of that state, and so the (superior) sovereign is immune from their reach. Domestically, then, a state may not be sued in its own courts without that state's consent. Internationally, one sovereign is the equal of any other sovereign, and so the courts of one sovereign may not exercise jurisdiction over another sovereign without the latter's consent.

Although this system functioned well for hundreds of years, the international environment of the twentieth century, and especially of the Cold War, produced two forces that challenged the traditional conception of sovereign immunity. First, governments—especially socialist and communist governments—expanded their activities well beyond the traditional realm of domestic government to include the ownership and management of economic activities once reserved to the private sector. This meant that governments began to undertake activities distinct from the broad but familiar sphere circumscribed by taxation, national defense, currency creation and regulation, public works, and the administration of the legal system. In so doing, their activities not only came more frequently into conflict, and thus into litigation, than had been the case historically, but also occurred on fields of conflict far removed

foreign immunity is an obligation of the United States *via* the law of nations. The case nonetheless also states that “[w]ithout doubt” the United States could override the strong presumption of sovereign immunity attaching to a foreign warship exhibiting no belligerent behavior, *id.* at 146, which implies a view that sovereign immunity is a matter of governmental generosity rather than governmental obligation. Federal courts are now certain that then-Chief Justice Marshall was speaking about “grace and comity,” despite the ambiguities in the case’s rhetoric and the fact that neither the word “grace” nor “comity” appears anywhere in *The Schooner Exchange*. See, e.g., *Altmann*, 124 S. Ct. at 2248 (The Court has consistently deferred to political branches on sovereign immunity matters “[i]n accordance with Chief Justice Marshall’s observation that foreign sovereign immunity is a matter of grace and comity. . . .”); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983) (“As *The Schooner Exchange* made clear . . . foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution.”); see also Paul B. Stephan III, *International Law in the Supreme Court*, 1990 Sup. Ct. Rev. 133, 154 (stating that *The Schooner Exchange* is an early manifestation of an “essentially contractual,” “contingent-norm approach” to international law in which *The Schooner Exchange* Court was engaging in dialogue with other civilized nations to “bid” for various norm formulations in a complex, generally reciprocal fashion).

from traditional governmental activities and close to the heart of what had previously been seen as the private sector.

Second, governments on opposing sides of the capitalist-communist divide came to see themselves as uniquely and profoundly antagonistic towards one another. The recognition of property rights, and indeed of the entire international legal system as then constituted, was an article of faith to one side and self-evident apostasy to the other. Expropriation therefore hovered over much international economic activity undertaken by capitalist-country firms in socialist or communist countries, while governmental ownership stood behind much international economic activity undertaken by communist-country firms in capitalist countries.

To relieve the pressure created by ideological clashes and governmental expansions, the capitalist countries moved from the “absolute” model of sovereign immunity towards a “limited” or “restrictive” model. The chief limit on sovereign immunity was the so-called “commercial exception.” This exception to absolute immunity applied to entities undertaking traditionally commercial activities even if a government owned and operated the entity. State-owned oil-extraction facilities or trading companies were examples of entities that were immune from suit under the absolute conception of sovereign immunity but subject to suit under the limited conception.

As with many rules of international law, the limited model of sovereign immunity has enjoyed neither universal adoption, nor a single authoritative formulation of its rules and exceptions, nor even a definitive method for determining whether a given state even putatively adheres to its general conception. Its adoption in the United States, for example, is a saga spanning many years and all three branches of the federal government. In 1812, the Supreme Court decided the fountainhead of sovereign-immunity jurisprudence in the United States, *The Schooner Exchange v. McFaddon*.²⁸ In response to a suit over the ownership of a French warship, Chief Justice Marshall asserted that the jurisdiction of the United States was unlimited but that, as a matter of comity, the Court would infer a waiver of that jurisdiction with respect to the property at is-

²⁸ 1 U.S. (7 Cranch) 116 (1812).

sue²⁹—a slide from a bold assertion of *potential* jurisdiction to a refusal *actually* to exercise that jurisdiction that should be familiar to readers of *Marbury v. Madison*. Subsequent federal courts, apparently abandoning the determination of their own jurisdiction that is sometimes alleged to be their right and requirement as Article III courts, deferred to the executive branch whenever the latter requested immunity for a party on the basis that a party was a sovereign or an instrumentality thereof.³⁰

The executive branch followed the rule of absolute immunity until 1952, when it adopted a form of the commercial exception. Federal courts nonetheless continued their jurisdictional recumbency, although they were sometimes forced to make determinations of sovereign immunity when a foreign nation did not request protection from the State Department. In such cases, the judiciary would then do its best to determine what the State Department would have done if the State Department had received such a request and had followed the State Department's own rules—a determination complicated by the fact that the State Department sometimes, for political reasons, granted sovereign immunity even in cases involving commercial activity.³¹

Into this thicket strode the U.S. Congress, which set matters more or less aright in 1976 by enacting the Foreign Sovereign Im-

²⁹ Id. at 145–47.

³⁰ See *Altmann*, 124 S. Ct. at 2248–49 (stating that the United States always requested immunity for sovereigns until the State Department's Tate letter of 1952 set forth the restrictive theory); Michael D. Murray, *Stolen Art and Sovereign Immunity: The Case of Altmann v. Austria*, 27 Colum. J.L. & Arts 301, 302 (2004) (“Many courts and scholars have traced the official adoption [by the U.S. of restrictive immunity] to 1952, by what has come to be called the Tate Letter.”); Andrzej R. Niekrasz, *The Past Is Another Country: Against the Retroactive Applicability of the Foreign Immunities Act to Pre-1952 Conduct*, 37 John Marshall L. Rev. 1337, 1342 (2004) (“In 1952, the restrictive theory of foreign sovereign immunity officially replaced the old absolute doctrine in the United States.”). But see also Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 Am. J. Int'l L. 741, 753 (2003) (“[I]t is a myth that states ever enjoyed absolute immunity from foreign jurisdiction.”); Murray, *supra*, at 302–03 (“[T]here is a fundamental misconception in some United States courts that the Tate Letter effected a complete turnabout from a system of absolute sovereign immunity to one of restrictive sovereign immunity.”).

³¹ See generally M. Mofidi, *The Foreign Sovereign Immunities Act and the “Commercial Activity” Exception: The Gulf Between Theory and Practice*, 5 J. Int'l Legal Stud. 95, 100–01 (describing Tate-letter regime).

munities Act (“FSIA”).³² The FSIA sets forth the general rule of sovereign immunity that “a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States,” except as provided by the FSIA.³³ The exceptions provided by the FSIA track the limited theory of immunity, and they do so with a generally well-defined intricacy that perhaps only domestic statutes can achieve. Is immunity withdrawn, one might wonder, because a state runs a commercial enterprise or because the state engages in a commercial act? The FSIA answers this question: The commercial activity to which immunity does not extend may be “either a regular course of commercial conduct or a particular commercial transaction or act.”³⁴ Is immunity withdrawn only when the participants intend the act to further a commercial enterprise or also when a non-commercial enterprise merely enters the stream of commerce for a given transaction? The FSIA answers this question as well: Whether an activity is “commercial” is a determination made “by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”³⁵ In a globalized economy, one might wonder how direct the connection between the activity in question and the United States must be for the commercial-activity exception to apply. The FSIA answers this question as well, although the answer is somewhat complex: The activity must involve “substantial contact with the United States” if the activity occurs within the United States³⁶ or “a direct effect in the United States” if the activity occurs outside the territory of the United States.³⁷

The FSIA exempts from sovereign immunity more than simply commercial activity, however. In addition to the relatively traditional idea that immovable property inherited by or conveyed to a foreign state is subject to suit,³⁸ the FSIA’s narrowing of sovereign immunity also allows tort suits to proceed against foreign sover-

³² Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C. (2000)).

³³ 28 U.S.C. § 1604 (2000).

³⁴ *Id.* § 1603(d).

³⁵ *Id.*

³⁶ *Id.* § 1603(e).

³⁷ *Id.* § 1605(a)(2).

³⁸ *Id.* § 1605(a)(4).

eigns³⁹ as well as suits for compensation from injuries resulting from state-sponsored terrorism.⁴⁰ Finally, and of particular relevance to *Altmann*, § 1605(a)(3) of the FSIA states that no immunity shields a foreign state from suits filed by those seeking to recover “property taken in violation of international law” (so long as the property either is in the United States in connection with commercial activity of a foreign state, or is property outside the United States but operated by a state entity engaging in commercial activity in the United States, or is property that has been exchanged for property falling into either of the above two categories).⁴¹

B. The Altmann Case and the Supreme Court’s Opinions

The facts alleged in *Republic of Austria v. Altmann*⁴² contain many cinematic elements: Nazis (including one Dr. Führer), priceless art, the travails and fractiousness of a wealthy family, governmental and institutional perfidy, a heroic investigative journalist, and even, at the end of a long legal road, the possibility of a happy ending.

Maria Altmann’s uncle, Ferdinand Bloch-Bauer, was a Jew who fled Vienna as Nazi Germany forcibly incorporated Austria into the Greater German Reich. He left behind a thriving sugar business and an extensive art collection, including six paintings by Gustav Klimt, an Austrian artist whose works are now in the collections of some of the most prestigious museums in the world. Two of the six paintings were of Bloch-Bauer’s wife, Adele, who had died in 1925 and who had, through her will, asked that he donate all of their Klimt paintings to the Austrian Gallery upon his death. He was not legally obliged to do so (although allegedly the Gallery later falsely stated that he was) and did not do so (although allegedly some Gallery publications later implied that he did). When he died, he left his estate to Ms. Altmann and two other family members. Negotiations with the Gallery in 1948 involving Ms.

³⁹ Id. § 1605(a)(5).

⁴⁰ Id. § 1605(a)(7).

⁴¹ Id. § 1605(a)(3).

⁴² 124 S. Ct. 2240 (2004).

Altmann's putative agent resulted in an agreement that appeared to give ownership of the paintings to the Gallery.⁴³

In 1998, an investigative journalist uncovered various deceptions and other misdeeds by the Gallery. Ms. Altman argued that the Gallery's perfidy invalidated the 1948 agreement, especially because Ms. Altmann's agent had exceeded his authority. After Ms. Altmann unsuccessfully attempted to obtain the Klimt paintings through an Austrian proceeding, she sued the Gallery in a U.S. District Court to recover the paintings under various theories involving the laws of California, Austria, and the international community. The Gallery moved to dismiss the case on the grounds that it was an instrumentality of the Austrian government that would have been entitled to absolute sovereign immunity at the time of the 1948 negotiations, and that the FSIA did not revoke that immunity.⁴⁴

The District Court disagreed and allowed the case to proceed. Applying the retroactivity analysis set forth by the Supreme Court in *Landgraf v. USI Film Products*,⁴⁵ the District Court held that the Gallery was not immune to suit, especially because the Gallery's activity fell within the FSIA's Section 1603(a)(3) exception to immunity for property taken in violation of international law and because the Gallery engaged in wrongdoing well after 1948.⁴⁶ The United States Court of Appeals for Ninth Circuit affirmed, noting that the Gallery had no reasonable expectation of immunity even if one were to apply the sovereign-immunity standards extant at the time of the Gallery's wrongdoing.⁴⁷

The Supreme Court granted certiorari with a focus on the question of whether the FSIA was retroactive. In an opinion joined by five other members of the Court, Justice Stevens affirmed the Ninth Circuit's judgment. After a review of the Court's general sovereign-immunity jurisprudence, Justice Stevens explained that *Landgraf*, "[t]hough seemingly comprehensive, . . . does not pro-

⁴³ Id. at 2243–45.

⁴⁴ Id. at 2246.

⁴⁵ 511 U.S. 244 (1994).

⁴⁶ *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1199–1203 & n.16 (C.D. Cal. 2001), aff'd, 317 F.3d 954 (9th Cir. 2002), rev'd, 124 S. Ct. 2240 (2004).

⁴⁷ *Altmann v. Republic of Austria*, 317 F.3d 954, 965–67 (9th Cir. 2002), rev'd, 124 S. Ct. 2240 (2004).

vide a clear answer in this case.”⁴⁸ The correct conclusion nonetheless remains that the FSIA is retroactive because Congress, although it had not “expressly prescribed” retroactivity for the statute and thereby altogether obviated the need for serious judicial inquiry,⁴⁹ had provided “unambiguous”⁵⁰ “clear evidence”⁵¹ that it intended the statute to apply retroactively. Retroactivity is consistent with the preamble to the FSIA,⁵² with the “overall structure” of the FSIA, and with “two of the Act’s principal purposes: clarifying the rules that judges should apply in resolving sovereign immunity claims and eliminating political participation in the resolution of such claims.”⁵³

The majority opinion then concludes with a section “emphasizing the narrowness of [the] holding.”⁵⁴ The Court did not review the determination of both courts below that Section 1605(a)(3) applied and did not “have occasion to comment on the application of the so-called ‘act of state’ doctrine.”⁵⁵ The Court also emphasized, in some tension with its desire for fidelity with one of two purposes of the FSIA previously discussed by the Court, that it was *not* eliminating political participation in the resolution of sovereign-immunity claims. “[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”⁵⁶

Justice Scalia expressed “a few thoughts” in a solo concurrence—thoughts echoed in a concurrence by Justice Breyer, joined by Justice Souter. Jurisdictional statutes, according to both concurring opinions, depend in their operation upon the state of the world at the time a suit is brought; the FSIA is for these purposes a jurisdictional statute, and so a concern for “retroactivity” is mis-

⁴⁸ *Altmann*, 124 S. Ct. at 2251.

⁴⁹ *Id.* at 2250 (citing *Landgraf*, 511 U.S. at 280).

⁵⁰ *Id.* at 2252.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 2253.

⁵⁴ *Id.* at 2254.

⁵⁵ *Id.*

⁵⁶ *Id.* at 2255 (footnotes omitted).

placed.⁵⁷ If one conducts the appropriate analysis, then one concludes that the FSIA was in effect when this suit was *filed*, and so the FSIA obviously sets forth the appropriate rules to judge claims about sovereign immunity. Justice Breyer, in contrast to Justice Scalia, also at least mentioned that the case appeared to meet Section 1603(a)(3)'s prerequisites concerning takings in violation of international law:

Is this a “case in which rights in property taken in violation of international law are in issue”? Altmann claims that Austria’s 1948 actions (falsely asserting ownership of the paintings and extorting export permits in return for acknowledge [sic] of its ownership) violated either customary international law or a 1907 Hague convention.⁵⁸

A dissent, authored by Justice Kennedy and joined by Chief Justice Rehnquist and Justice Thomas, disagrees with the majority’s interpretation of the word “henceforth” in the statutory preamble, citing examples in which Congress specified retroactivity with greater clarity.⁵⁹ According to the dissent, the expectations upset by a holding of retroactivity in this case are of long standing and are well justified, even against the backdrop of the State Department’s particular practices in 1948. Additionally, the majority’s encouragement of executive intervention in determinations of sovereign immunity undercuts the purposes of the FSIA.⁶⁰

C. Analyzing Altmann

The paths *not* taken in *Altmann* are both numerous and less sinuous than those actually trod by the Court. The Supreme Court might have seen it as a case about expropriation in international law, but the majority opinion skitters away from reaching this issue, even though the Court cleared away so many other questions

⁵⁷ Id. at 2256 (Scalia, J., concurring); id. at 2259 (Breyer, J., concurring).

⁵⁸ Id. at 2258 (Breyer, J., concurring). Justice Breyer goes on to quote the Hague Convention: “All seizure of . . . works of art . . . is forbidden, and should be made the subject of legal proceedings.” Id. (quoting Hague Convention (IV) on the Laws and Customs of War on Land, Oct. 18, 1907, art. 56, 36 Stat. 2277, 2309, 1 Bevans 631, 653).

⁵⁹ Id. at 2265–66 (Kennedy, J., dissenting).

⁶⁰ Id. at 2268–69, 2274 (Kennedy, J., dissenting).

in its grant of certiorari, and even though the only remaining question presented highlights expropriation as the generative phenomenon in the case.⁶¹ The Court might have followed through on its own initial emphasis on immunity as a matter of comity—and thus, naturally if not inevitably, a matter of reciprocity—by noting that Austria had itself already abandoned the absolute theory of sovereign immunity by World War II.⁶² The Court might have reconstructed the mind-set of the executive branch, to which courts defer so frequently and extensively in foreign-relations cases, at the relevant time by examining the State Department’s nearly contemporaneous, categorical rejection of immunity for Nazis. The Court might have built upon an FSIA case from only the previous Term and seen *Altmann* as an easy case about the snapshot status of foreign sovereigns, but the majority opinion elides the facts relevant to this issue. The Court might have avoided statutory interpretation altogether by holding that the Gallery’s post-1948 behavior was sufficient to allow the cause of action to go forward without worrying about events long in the past. The Court might even have seen the case as a straightforward application of its retroactivity doctrine as expressed in *Landgraf* and let that “seemingly comprehensive”⁶³ scheme govern the case. Instead, the Court rushed past a variety of tools readily at hand to engage in complex statutory interpretation, etching a new corbel below the *Landgraf* cornice that itself decorates the space below the strong presumption of non-retroactivity announced in so many other cases about statutory interpretation.

Expropriation. Section 1605(a)(3) of the FSIA strips immunity from a foreign sovereign “in any case . . . in which rights in property taken in violation of international law are in issue.”⁶⁴ The Court did not seem to want to address this “expropriation exception” to the usual grant of immunity. Indeed, the Court was so eager to avoid discussing expropriation that, in the opinion, it repeat-

⁶¹ See *Altmann v. Republic of Austria*, 539 U.S. 987 (2003) (granting certiorari “limited to Question 1 presented by the petition”).

⁶² See *Altmann v. Republic of Austria*, 317 F.3d 954, 966 (9th Cir. 2002) (“[B]y the 1920s, Austria itself had adopted the restrictive theory, which recognizes sovereign immunity ‘with regard to sovereign or public acts of a state . . . but not with respect to private acts . . .’”). The court quotes the Tate letter itself for this proposition. *Id.*

⁶³ *Altmann*, 124 S. Ct. at 2251.

⁶⁴ 28 U.S.C. § 1605(a)(3).

edly takes a rather narrow view of the question presented. In an early footnote, the Court declares: “The Court of Appeals also affirmed the District Court’s conclusion that FSIA § 1605(a)(3) covers respondent’s claims. We declined to review that aspect of the panel’s ruling.”⁶⁵ Later, the Court states:

The District Court agreed with respondent that the FSIA’s expropriation exception covers petitioners’ alleged wrongdoing, and the Court of Appeals affirmed that holding. As noted above, however, we declined to review this aspect of the courts’ opinions, confining our grant of certiorari to the issue of the FSIA’s general applicability to conduct that occurred prior to the Act’s 1976 enactment, and more specifically, prior to the State Department’s 1952 adoption of the restrictive theory of sovereign immunity.⁶⁶

In the concluding section of the opinion, the Court similarly avers: “[A]lthough the District Court and Court of Appeals determined that § 1605(a)(3) covers this case, we declined to review that determination.”⁶⁷

The Court *did* strike some of the suggested Questions Presented by the certiorari petition,⁶⁸ but the remaining question presented appears to be an agreement to review the Section 1605(a)(3) aspect of the panel’s ruling, or at least to be a rather broader question than the descriptions of the Court quoted above:

Does the expropriation exception of the Foreign Sovereign Immunities Act of 1976 (“FSIA”), 28 U.S.C. § 1605(a)(3), afford jurisdiction over claims against foreign states based on conduct that occurred before the United States adopted the restrictive theory of sovereign immunity in 1952?⁶⁹

One reading of this question is that the applicability of the expropriation exception to the particular facts at hand will be assumed, but another plausible reading is surely that the Court may determine whether the expropriation exception applies to this case

⁶⁵ *Altmann*, 124 S. Ct. at 2247 n.8 (citations omitted).

⁶⁶ *Id.* at 2249 (internal citations omitted).

⁶⁷ *Id.* at 2254.

⁶⁸ See 539 U.S. 987 (2003).

⁶⁹ Petition for a Writ of Certiorari at i, *Altmann* (No. 03-13).

before deciding whether the expropriation exception is retroactive. Similarly, the Court's descriptions of the question presented in the final *Altmann* opinion omit or downplay the existence of the phrase, "the expropriation exception," in comparison to the actual text of the question presented.

The thesis of this Article, of course, is that the Court shrank from deciding the applicability of the expropriation exception because that decision would have required the Court to decide a matter of international law. The so-called "expropriation exception" actually covers "rights in property taken in violation of international law."⁷⁰ What characterizes a taking "in violation of international law" obviously requires a consideration of international law.

Admittedly, the parties had failed fully to engage one another on the expropriation exception in their briefs on the merits before the Court. Austria maintained that *Altmann* was attempting to hold the defendants liable for mere possession of expropriated property, when Congress had instead intended to withdraw the grant of immunity only from defendants who had actively taken the property in question from its rightful owner (rather than merely taking possession of property that had, at some point in the past, been wrongfully expropriated).⁷¹ *Altmann* herself believed that the correctness of the Ninth Circuit's ruling that she had suffered an expropriation was not under review.⁷² This proved prescient if, as discussed just above, not logically inevitable. Austria also asserted in its petition for a writ of certiorari that there was a circuit split over the pre-1952 retroactivity of the FSIA.⁷³ If the Court was interested only in resolving this split, then its inattention to expropriation makes more sense. *Altmann*, however, disputed the existence of such a division among the circuits.⁷⁴ Additionally, Austria's brief on the merits does not raise the split, and the Court's opinion does not discuss it.

Reciprocity. Sovereign immunity is a logical perquisite of statehood in the traditionally conceived system of international rela-

⁷⁰ 28 U.S.C. § 1605(a)(3).

⁷¹ Reply Brief at 7–8, *Altmann* (No. 03-13).

⁷² Brief for Respondent at 17, *Altmann* (No. 03-13).

⁷³ Petition for a Writ of Certiorari at 10–11, *Altmann* (No. 03-13).

⁷⁴ Brief in Opposition to Petition for a Writ of Certiorari at 14–16, *Altmann* (No. 03-13).

tions. No sovereign is above any other. No country, therefore, may haul a foreign sovereign into that country's courts without the consent of the foreign sovereign. The commercial exception makes some sense, even in the traditional system, because the sovereign is not truly acting in a state capacity if it indulges in mere commerce. Jealous of jurisdiction, however, this Supreme Court (like many prior Courts) has treated sovereign immunity as a matter of comity, not right. Even in *Altmann*, however, it would have been straightforward for the Court to have adopted an enlightened internationalism and reached exactly the same conclusion that it eventually did. Austria was among the world's innovators in revoking state immunity for liability arising from commercial activity. By the 1930s, Austria clearly no longer extended such immunity to other states.⁷⁵ If the Court in *Altmann* had adopted a strict notion of reciprocity, therefore, the Court could simply have said that Austria was not entitled to immunity in U.S. courts because the United States would not have been granted such immunity by Austrian courts.⁷⁶ Such a ruling would in the long run encourage the sort of strict reciprocity that may be the foundation of international cooperation in general.⁷⁷ Less grandiosely, such a ruling would have

⁷⁵ See supra note 62 and accompanying text.

⁷⁶ Although the Court did not use reciprocity as the ground for its decision in this case, considerations of reciprocity are often prominent in the Court's international legal jurisprudence. See, e.g., *Boos v. Barry*, 485 U.S. 312, 323 (1988) (“[t]he concept of reciprocity . . . governs much of international law in this area [of diplomatic immunity]”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 411 (1964) (reciprocity between United States and a foreign nation is typically required for enforcement of that nation's judgments in domestic courts). But see *id.* at 412 (reciprocity does not govern judgments about a nation's standing to sue in domestic courts). The notion of comity is similar enough to that of reciprocity that Justice Breyer moved easily from one concept to the other in *Sosa*. See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2782 (2004) (“Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement.”) (Breyer, J., concurring in part and concurring in the judgment).

⁷⁷ See John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 *Harv. Int'l L.J.* 139, 176–89 (1996) (discussing international cooperation as tit-for-tat reciprocity); see also John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 *Va. L. Rev.* 1, 27–32 (1997) (discussing how some rules governing release from treaty obligations in the wake of a breach allow reciprocity);

involved a legalistic test with a strong appeal to principles of fundamental fairness.

Such a ruling, however, would have required the Court to determine the state of international law at various times in the past. The Court's skittishness on all matters of international law presumably extends to such a determination, even if such a determination might be relatively straightforward in the particular case before the Court. Additionally, such a rule threatens, at least in the abstract, some inconsistency with the statutory framework (and its interpretation) privileged by the Court. A traditional view of the statutory scheme would both give it primacy and assume a temporal consistency with respect to "retroactivity," but a rule oriented towards strict reciprocity in sovereign immunity would challenge the statutory scheme and likely lead to temporally complex results (if, for example, one country gave the United States immunity in its own courts for commercial activities in a given year while some other country did not reciprocate in the same year).

State-Specific Non-Immunity Derived from Contemporaneous Statements of the State Department. As the Court's opinion itself notes, the State Department made clear in public communications in the 1940s that it would not support a grant of immunity to states where the actions of Nazi governments gave rise to the claim.⁷⁸ Given the Court's frequent deference to the executive branch in situations where no statute clearly governs, and because the FSIA was not enacted until well after 1948 and without a clear mandate on "retroactivity," it would not have been out of character for the Court to have focused on the State Department's contemporaneous statements on non-immunity for the actions of Nazi governments. The Court's failure to take this path does not by itself demonstrate an aversion to international law—indeed, its bowing to the State Department's contemporaneous statements would ob-

John K. Setear, *The Barrister and the Bomb: The Dynamics of Cooperation, Nuclear Deterrence, and Discovery Abuse*, 69 B.U. L. Rev. 569, 601–10 (1989) (describing nuclear deterrence and technological requirements thereof as tit-for-tat reciprocity); cf. *id.* at 615–23 (discussing discovery abuse in terms of reciprocity); John K. Setear, Note, *Discovery Abuse Under the Federal Rules: Causes and Cures*, 92 Yale L.J. 352 (1982) (same).

⁷⁸ *Altmann*, 124 S. Ct. at 2247 (discussing reliance by the Court of Appeals on the State Department's policy, as of 1949, of revoking sovereign immunity for actions by Nazi officials).

viate the need for the Court to consider international law on its own—but it does demonstrate the Court’s powerful affinity for statutory interpretation.

Immunity as a Snapshot at the Time of Filing a Complaint. In *Dole Food Co. v. Patrickson*,⁷⁹ decided the Term before *Altmann*, the Court wrestled with the definition of a state “instrumentality” under the FSIA. Importantly, however, the Court also analyzed the relationship between the timing of the case and the application of the law—the same issue that the Court viewed as “retroactivity” in *Altmann*. The Court explicitly rejected the test that it seems later to have applied in *Altmann*:

The Dead Sea Companies urge us to administer the FSIA like other status-based immunities, such as the qualified immunity accorded a state actor, that are based on the status of an officer *at the time of the conduct giving rise to the suit*. We think its comparison is inapt

. . . Foreign sovereign immunity . . . is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business but to give foreign states and their instrumentalities some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.⁸⁰

The Court concluded in *Dole Food* “that instrumentality status is determined at the time of the filing of the complaint.”⁸¹ If the Court had merely done the same in *Altmann*, then it might have concluded matters quite a bit more rapidly. As with the Court’s unwillingness to rely on the State Department’s contemporaneous statements, its aversion to its own precedent is in part simply curious and in part presumptive evidence of the Court’s love of statutory interpretation above all else.

The Gallery’s Post-1948 Behavior. On the allegations of Ms. Altmann’s complaint, the Gallery’s actionable misbehavior did not cease with its 1948 misrepresentations. A Court that wished to avoid both international legal determinations and complex statutory questions could plausibly have stated that the case was not

⁷⁹ 538 U.S. 468 (2003).

⁸⁰ Id. at 478–79 (emphasis added).

⁸¹ Id. at 480.

about retroactivity at all, since both new and ongoing actions or concealments of the Gallery occurred after the Tate letter and even after the passage of the FSIA. The Court, however, declined to take this course.⁸²

Landgraf as Controlling Precedent. It may be no coincidence that Rodney Dangerfield died in the Ninth Circuit, for neither institution gets much respect.⁸³ The Ninth Circuit must have thought that the dispute between Austria and Ms. Altmann was, at least in one aspect, an easy case: When analyzing the retroactivity *vel non* of a statute, a court should apply *Landgraf v. USI Film Products*.⁸⁴ *Landgraf* was less than a decade old when the Ninth Circuit considered *Altmann*. *Landgraf*, a Supreme Court case about retroactivity, sets forth that classic formula of jurisprudence, the presumption followed by a three-pronged test.⁸⁵ The three-pronged test in *Landgraf* is, in the words of the Supreme Court itself in *Altmann*, “seemingly comprehensive.”⁸⁶

Regrettably for the self-esteem of the Ninth Circuit, the Court granted certiorari in *Altmann* with little apparent purpose *except* to impose a new test for retroactivity. The twists and turns of the Court’s analysis are not directly relevant here, but that analysis depends in part upon the difference between “express” and “unambiguous,”⁸⁷ and in part on how moving from a regime in which a party is immune from liability, to a regime in which a party is not immune from liability for the same act, does *not* create “a new obliga-

⁸² *Altmann*, 124 S. Ct. at 2246 n.7.

⁸³ Compare Rodney Dangerfield, *It’s Not Easy Bein’ Me: A Lifetime of No Respect but Plenty of Sex and Drugs* (2004), with Jeff Chorney, *Ninth Circuit Dominates Top Docket*, *The Recorder*, June 30, 2004, at 1, at <http://www.law.com/jsp/article.jsp?id=1088439705222> (stating that “for many, the [Ninth Circuit is the] black-robed embodiment of crazy West Coast liberalism”), and 143 Cong. Rec. 3626–27 (1997) (statement of Sen. Kyl) (citing reversal statistics in first half of the 1990s and arguing that Senate needs to take more care in its confirmations of judges for nation’s largest circuit).

⁸⁴ 511 U.S. 244 (1994).

⁸⁵ *Id.* at 280 (setting up a presumption to be tested against three inquiries: “whether [the new statute] would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed”).

⁸⁶ *Altmann*, 124 S. Ct. at 2251.

⁸⁷ Compare *id.* (describing the FSIA preamble as not an “express prescription” of statute’s reach), with *id.* at 2252 (“Though perhaps not sufficient to satisfy *Landgraf*’s ‘express command’ requirement, . . . this language is unambiguous . . .”).

tion, . . . a new duty, or . . . a new disability.”⁸⁸ For purposes of this Article, the important point is that *Landgraf* appears to be comprehensive and clear, but the Court distinguished the situation in *Altmann* from that in *Landgraf* and created an additional (or perhaps alternative) set of tests. The Ninth Circuit therefore suffered that unkindest cut of all: “We . . . now affirm the judgment of the Court of Appeals, though on different reasoning.”⁸⁹

* * *

Holding aside the Court’s contumelious treatment of *Landgraf* fits into the general theme of *Altmann*: The Court wishes to undertake its innovative analysis of statutory interpretation as applied to questions of retroactivity, and neither apparently adequate precedents, nor contemporaneous statements of non-immunity, nor general notions of international reciprocity, nor international legal grounds for resolving the opinion shall stay the Court from the completion of its self-appointed task.

Having dispensed with the substance of the case in five sections, the Court adds a postscript with an entire section devoted to explaining what the Court does not do in its opinion. The irrelevance of international legal questions, and of the opinion on the part of government charged with interpreting international legal questions between nations, is the theme:

We conclude by emphasizing the narrowness of this holding. To begin with, although the District Court and Court of Appeals determined that § 1605(a)(3) covers this case, we declined to review that determination. Nor do we have occasion to comment on the application of the so-called “act of state” doctrine to petitioners’ alleged wrongdoing. . . . Under that doctrine, the courts of one state will not question the validity of public acts (*acts jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts. . . .

Finally, while we reject the United States’ recommendation to bar application of the FSIA to claims based on pre-enactment

⁸⁸ Id. at 2250 (quoting *Landgraf*, 511 U.S. at 269).

⁸⁹ Id. at 2247.

conduct, nothing in our holding prevents the State Department from filing statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity.⁹⁰

Taken as a whole, *Altmann* stands as significant, but not unmitigated, support for the thesis of this Article. Consistent with the thesis of the Article, the Court had before it in *Altmann* a variety of international legal pathways that it might have taken, but avoided them assiduously. The Court could have examined Austrian policy on sovereign immunity, and from that constructed a reciprocal theory of sovereign immunity, but the Court did not. The Court could have examined whether Ms. Altmann successfully made out a claim that Austria's actions called into play the expropriation exception, including a discussion of Austria's counterargument that mere possession is insufficient to violate international law, but the Court did not. The Court might have tackled the act of state doctrine, but it did not.

However, there are also a number of *non*-international pathways that the Court might have taken to resolve the case but did not. Most prominently, the Court might have made use of its own precedent—whether the “snapshot” approach of *Dole Foods* or the pre-existing retroactivity doctrine of *Landgraf*—but the Court eschewed such precedent in favor of creating a new (or supplemental) test for retroactivity. Less directly relevant in this case where a statute clearly occupies much of the relevant terrain, the Court might have deferred to the executive branch's view of the case, whether a view expressed long ago or today, but the Court did not. *Altmann*, therefore, stands as support for the proposition that the Court in its October 2003 Term avoided international legal analysis even when directly presented with international legal questions. Yet, *Altmann* does not stand only for this proposition, since the Court also avoided other, non-international pathways for resolving the case.

⁹⁰ Id. at 2254–55 (citations omitted).

II. AVOIDED BY VAGUENESS?: *EMPAGRAN*

In *F. Hoffman-La Roche v. Empagran*, the Court appears to embrace international law enthusiastically in a search for a principle of statutory interpretation to resolve a case on the Sherman Act's extraterritorial application. In reality, however, the principle, derived from customary law, is so vague that it is meaningless.

A. *Empagran and the "Principle" of Respect for Foreign Laws*

In *Empagran*, the Court interpreted the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") to bar an antitrust claim "that [was] in significant part foreign, that cause[d] some domestic antitrust injury, and that independently cause[d] separate foreign injury."⁹¹ The FTAIA states that the Sherman Act does *not* apply to foreign commerce, *unless* the relevant conduct has "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce "and such effect gives rise to a claim under the" Sherman Act.⁹² The question before the Court was, in essence, whether "a claim under" the Sherman Act should be read as requiring the plaintiff in the instant case to have a domestic-effects-based claim or whether the existence of such a claim by *anyone* was sufficient.

All the members of the Court chose the first interpretation—that is, the Court read the statute as if the FTAIA's text had required that "such effect gives rise to a claim *by the plaintiff* under the" Sherman Act. The Court did so by relying on two principles. First, "this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations,"⁹³ and it would be unreasonably intrusive to allow those who suffer harms exclusively from foreign commerce to sue under U.S. antitrust laws. Second, "the FTAIA's language and history suggest that Congress designed the [Act] to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce,"⁹⁴ and a review of the pre-FTAIA case law shows that courts did not allow plaintiffs to proceed if

⁹¹ 124 S. Ct. 2253, 2363 (2004).

⁹² *Id.* at 2364–65 (quoting 15 U.S.C. § 6a (2000)).

⁹³ *Id.* at 2366.

⁹⁴ *Id.* at 2369.

their injuries stemmed exclusively from foreign commercial activity.

The Court's treatment of the unreasonable-interference rationale included significant references to international law and concerns of comity. The Court stated: "This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."⁹⁵ The avoidance of unreasonable interference with the domestic laws of other sovereigns "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."⁹⁶ Some conflict with foreign laws may permissibly occur when the legislature allows the redress of "*domestic* antitrust injury that foreign anticompetitive conduct has caused," but only an "insubstantial" justification exists when the "*foreign harm alone gives rise to the plaintiff's claim.*"⁹⁷ "Congress sought to release domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes [only] foreign harm."⁹⁸ Remedies differ dramatically from nation to nation, after all, and foreign nations that grant amnesty from prosecution if wrongdoers come forward voluntarily would see such programs undercut.⁹⁹ A case-by-case determination of when considerations of comity require a narrow scope for the Sherman Act would be too complex for courts to administer.¹⁰⁰

The Court's second rationale depended upon giving effect to Congress's desire, inferred from the relevant House Report, in enacting the FTAIA to shrink, rather than to expand, the reach of the Sherman Act. In light of the fact that the Court also "found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances,"¹⁰¹ the plaintiff's claim was unsustainable. The Court then examined three of its cases in which "the defendants included both American companies and foreign companies jointly engaged

⁹⁵ Id. at 2366.

⁹⁶ Id.

⁹⁷ Id. at 2366–67.

⁹⁸ Id. at 2367.

⁹⁹ Id. at 2368.

¹⁰⁰ Id.

¹⁰¹ Id. at 2369.

in anticompetitive behavior having both foreign and domestic effects.”¹⁰² In all of these cases, however, the plaintiff was the U.S. government, who “must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm” and “has legal authority broad enough to allow it to carry out [such a] mission.”¹⁰³ Cases granting relief to the U.S. government as plaintiff “tell[] us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.”¹⁰⁴ Furthermore, the Court in those cases did not “focus explicitly . . . on a claim that the remedies sought to cure only independently caused foreign harm,” and so those cases “tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.”¹⁰⁵ As to the three lower-court cases of potential relevance, one did not involve independent foreign injury and the other two did not discuss the role of independence of injury in the relevant ruling. “The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume.”¹⁰⁶

The Court also noted that the plaintiffs’ argument that the statute refers to “a claim” rather than “the plaintiff’s claim” is not dispositive. It makes “linguistic sense” to infer, as the Court did, the additional language. The plaintiffs’ reading of the statute might be the more natural reading, but it was not the only possible reading, and considerations of comity and history make it clear that the FTAIA’s “basic intent” was inconsistent with the plaintiffs’ reading of the statute.¹⁰⁷

Justice Scalia, ever vigilant against the application of legislative history, wrote a one-sentence concurrence, joined by Justice Thomas:

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with

¹⁰² *Id.*

¹⁰³ *Id.* at 2370.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2370–71.

¹⁰⁷ *Id.* at 2371–72.

the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.¹⁰⁸

B. Analyzing F. Hoffman-La Roche v. Empagran

At first glance, the Court's reference to a "principle of international law" and to its desire to respect the sovereignty of other nations would appear to be evidence of the Court's desire to embrace international law. Unfortunately for those who might wish for such an embrace, a closer look at the relevant language demonstrates only that the Court is willing to endorse international law when doing so imposes no meaningful constraint.

The "rule of construction" that "construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" is said by the Court to "reflect[] principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow."¹⁰⁹ A general problem with citing such a rule in the context at issue is that the relevant statute in fact authorizes any and all "interference[s] with the sovereign authority of other nations" *so long as* a plaintiff has suffered some injury from the violation in the United States. As the Court itself says, "No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs."¹¹⁰ Any conduct by a potential defendant that has both domestic and foreign effects on a potential plaintiff will give rise to the availability of U.S. remedies even as to the purely foreign effects.

Second, one should note that the Court believes its rule of construction reflects "*principles* of customary international law" rather than any particular rule. The standard actual set forth—"to avoid unreasonable interference with the sovereign authority of other nations"—is almost without content. As the jurisprudence of the Sherman Act's "rule of reason" shows, any "rule" that bans only

¹⁰⁸ Id. at 2373 (Scalia, J., concurring).

¹⁰⁹ Id. at 2366.

¹¹⁰ Id.

“unreasonable” conduct likely generates specific applications that resist general formulation.¹¹¹

More particularly, the *Restatement (Third) of Foreign Relations Law* that the Court cites as the source for the “rule” sets forth a truly daunting variety of circumstances that a court is to balance when deciding whether particular regulations are “unreasonable” infringements of foreign sovereignty:

Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

¹¹¹ Richard A. Posner, *Antitrust Law* 38–40 (2d ed. 2001).

(h) the likelihood of conflict with regulation by another state.¹¹²

Note that, as the chapeau to this laundry list states, even these eight factors are just a subset of “all” potentially relevant factors. A rule with so many factors affecting its application is unlikely to be a rule tightly constraining any court.

The dizzying variety of cases—and outcomes—discussed in the *Restatement* is testimony to the vagueness of the relevant “rule.” Indeed, the Court itself held in *Hartford Fire Insurance Co. v. California* that regulation of a foreign market by the Sherman Act is *not* an unreasonable interference with foreign laws.¹¹³ In a case where both foreign and domestic effects were alleged, the Court stated that comity did *not* require it to forbear exercising jurisdiction over either claim. This single difference, despite the welter of factors supposedly relevant under the “unreasonableness” rule, is all that is necessary to explain the different holdings.

Note also that the shift in the status of the relevant principle from a question of comity (as the question was presented in *Hartford Fire Insurance*) to a presumably weightier matter of customary international law (as in *Empagran*) did *not* lead the Court in *Empagran* to revisit its holding in *Hartford Fire Insurance* in any way.

III. FOREGONE BY FOOTNOTE?: *OLYMPIC AIRWAYS*

In *Olympic Airways*, the task before the Court was interpreting a specific word from a particular treaty. The Court did not, however, employ any method of interpreting that word except to read one of its previous opinions and consult a number of dictionaries. Two opinions of foreign courts that appear relevant garnered no more attention from the Court than a footnote.

A. Olympic Airways

In *Olympic Airways v. Husain*,¹¹⁴ the Court considered the meaning of the word “accident” under Article 17 of the Warsaw Convention, a treaty that sets out the grounds for airline liability in

¹¹² Restatement (Third) of Foreign Relations Law § 403(2)(a)–(h) (1987); see *F. Hoffman-La Roche*, 124 S. Ct. at 2366.

¹¹³ 509 U.S. 764 (1993).

¹¹⁴ 124 S. Ct. 1221 (2004).

connection with injuries and losses to passengers and their baggage. An asthmatic passenger with a “history of recurrent anaphylactic reactions”¹¹⁵ took a smoking flight and died after exposure to ambient cigarette smoke. Before takeoff, a flight attendant twice refused the passenger’s wife’s request to reseat her husband further from the smoking section and incorrectly stated that the plane was “totally full.” After takeoff, the flight attendant said that the passenger could switch seats with someone, but the flight crew would not assist with the switch in any way.¹¹⁶

The Warsaw Convention’s Article 17 provides:

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger . . . if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.¹¹⁷

In *Air France v. Saks*,¹¹⁸ the Court had examined the meaning of “accident” in the context of a case where normal operation of the pressurization system of an aircraft cabin had left a passenger permanently deaf in one ear. Holding against recovery, the Court in that case had defined “accident” as an “unexpected or unusual event or happening that is external to the passenger.”¹¹⁹ “But when the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft,” the *Air France* Court said, “it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.”¹²⁰

In *Olympic Airways*, as in *Air France*, the chain of events leading to the passenger’s death included an unusual susceptibility of the passenger to normal operation of the flight, since only an unusual individual faces immediate life-threatening consequences from cigarette smoke, and the flight was a smoking flight. The chain of events leading to the passenger’s death also included a set of inter-

¹¹⁵ Id. at 1224.

¹¹⁶ Id. at 1224–25.

¹¹⁷ Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018, 137 L.N.T.S. 11, 23; see also *Olympic Airways*, 124 S. Ct. at 1225.

¹¹⁸ 470 U.S. 392 (1985).

¹¹⁹ Id. at 405.

¹²⁰ Id. at 406.

actions clearly external to the passenger and in contrast to *Air France*, not part of the normal operation of the flight since the flight attendant's unwillingness to accommodate the passenger and misrepresentation about the flight's fullness were not in line with standard airline policy.

The defendant argued that the ambient smoke was the only injury-producing event. To the Court, however, "the very fact that multiple events will necessarily combine and interrelate to cause any particular injury makes it difficult to define, in any coherent or non-question-begging way, any single event as *the* 'injury producing event.'"¹²¹ The Court also concluded that "the flight attendant's *failure* to act" could still constitute an "accident" for purposes of the Warsaw Convention.¹²² *Saks*'s definition of accident as an "unexpected or unusual event or happening" implied, according to the *Olympic Airways* Court, "the rejection of an explicit request for assistance would be an 'event' or 'happening' under the ordinary and usual definitions of those terms."¹²³ The fact that Article 25 lifts the usual liability cap for "willful misconduct" or for "default," and that Article 20(1) penalizes the *failure* to take measures to avoid damage, also tend to show that inaction may give rise to liability for an "accident" under the Warsaw Convention.¹²⁴

Justice Scalia, joined for the most part by Justice O'Connor, dissented. Foreign courts in Great Britain and Australia, both "sister signatories" to the Warsaw Convention, had held specifically that a *failure* to act (or an omission) *cannot* be an "accident"; such non-events therefore do not give rise to liability under the Warsaw Convention.¹²⁵ "We can, and should," wrote Justice Scalia, "look to decisions of other signatories when we interpret treaty provisions," since such decisions are "evidence of the original shared understanding of the contracting parties."¹²⁶ Attention to such decisions also contributes to consistency of interpretation of an international agreement and fulfills "the courtesy of respectful consideration"

¹²¹ *Olympic Airways*, 124 S. Ct. at 1228.

¹²² *Id.* (emphasis added).

¹²³ *Id.* at 1229.

¹²⁴ *Id.* at 1229–30.

¹²⁵ *Id.* at 1231 (Scalia, J., dissenting).

¹²⁶ *Id.* at 1232 (Scalia, J., dissenting).

owed to one court by another.¹²⁷ The pair of foreign courts considered relevant U.S. law, after all. Indeed, one of them quite specifically addressed the U.S. Court of Appeals decision in the *Olympic Airways* case and distinguished it on the grounds that the U.S. case involved an action *rather* than an omission by the flight attendant—a distinction that the Court in *Olympic Airways* concluded was irrelevant.¹²⁸ More consideration for the opinions of these foreign courts is necessary than the dismissive footnote allotted to them by the Court.¹²⁹ “Tragic though Dr. Hanson’s death may have been, it does not justify the Court’s putting us in needless conflict with other signatories to the Warsaw Convention.”¹³⁰ Nonetheless, the complexities of the interaction between the proper standard (as seen by Justice Scalia) and the fact-finding of the District Court required a remand on some of the particulars.¹³¹

B. Analyzing Olympic Airways

The *Olympic Airways* Court does not shy away from the need to interpret an international legal document, i.e., the Warsaw Convention. In this sense, *Olympic Airways* is the apogee of the Court’s willingness to confront and apply international law in the 2003 Term. Regrettably, the Court in *Olympic Airways* still falls short of embracing international law in two ways. Rather than engaging in the broad-ranging inquiry that might strike an international lawyer as appropriate to the interpretation of a treaty, the Court simply consults a few dictionaries and a pre-existing precedent—although the precedent in question did itself engage in perhaps the most contextual interpretation of an international treaty in the Court’s recent history. Additionally, the Court limits its consideration of foreign courts’ rulings on the relevant treaty to a

¹²⁷ Id (Scalia, J., dissenting).

¹²⁸ Id (Scalia, J., dissenting).

¹²⁹ The Court’s footnote, id. at 1229 n.9, notes that the two foreign courts were only intermediate appellate courts. Justice Scalia cites to a page in *Air France* that discusses (in one sentence) a French case apparently from an intermediate appellate court. Id. at 1233 n.2 (Scalia, J., dissenting) (citing *Air France*, 470 U.S. at 404). Justice Scalia also notes that the British case “was no ordinary decision. It was authored by the Master of the Rolls, the chief judge of England’s civil appellate court” Id. (Scalia, J., dissenting).

¹³⁰ Id. at 1236 (Scalia, J., dissenting).

¹³¹ Id. at 1235 (Scalia, J., dissenting).

footnote rather than elevating such considerations to an extended textual analysis.

The *Olympic Airways* Court limits its interpretive repertoire to a close reading of *Air France* and of a variety of English-language dictionaries. The Court does not refer to the legal history that gave rise to the Warsaw Convention, the debates immediately preceding its adoption, the relationship between the Convention and any subsequent related documents, or the conduct of the parties since the Convention's adoption. All of these are potential topics in a thoroughgoing analysis of a treaty.¹³² Instead, the Court undertakes what could serve as an exemplar of common-law reasoning. It carefully recounts the relevant facts of the case, sets out the relevant text of the Convention, identifies the Convention's use of the word "accident" as the fulcrum of the case, discusses the meaning of "accident" in a crucial precedent and in a variety of dictionaries, uses a series of hypothesized factual settings to elaborate the rationale behind the particular meaning of "accident" chosen by the Court on the basis of its linguistic analysis, and then notes that the implications of other portions of the relevant text are consistent with its chosen interpretation. The legal text at issue could have been from any of a nearly limitless variety of forms—a contract, a statute, an administrative regulation, or a constitutional provision. Nothing about the Court's inquiry is sensitive to the fact that a treaty is before it.

The Court's completely traditional approach to the treaty text is in part a reflection of the fact that the crucial precedent—*Air France*—was so intensely focused on the fact that the Warsaw Convention is a treaty. The *Air France* Court examined a wide variety of international and comparative legal factors.¹³³ The Court in *Olympic Airways*, standing on the shoulders of giants, need hardly lift its own head beyond a precedent and a pile of dictionaries.

One source for interpreting the Warsaw Convention not available to the *Air France* Court, however, and not much consulted by the *Olympic Airways* Court, are the two foreign court decisions. The *Olympic Airways* Court diminished the significance of these cases as not coming from the highest court of their respective lands

¹³² See infra notes 313–16 and accompanying text (discussing treaty interpretation).

¹³³ See infra note 314 (discussing *Air France* in context of treaty interpretation).

and as factually distinct from the case at hand. The treatment is brief, however. Apparently only the goading of the dissent prompted the Court to address the cases at all, which it did only in a footnote. This unwillingness to address foreign cases that have interpreted precisely the same text in front of a U.S. court, as well as the Court's adherence to strictly domestic methods of legal interpretation, display the same reluctance to confront international legal methods directly that the Court displayed more flagrantly in the other half-dozen international law cases before it in the 2003 Term.

IV. HEMMING AND HAWING AND HABEAS:
PADILLA, HAMDI, AND RASUL

A. The Habeas Cases and the Supreme Court's Opinions

On June 28, 2004, the Supreme Court handed down opinions in three habeas cases involving individuals detained in connection with the war on terrorism. The Court effectively dismissed without prejudice one petition as filed in the wrong district (in *Padilla*), reversed a lower court's dismissal of another petition on procedural grounds (in *Rasul*), and took up the substance of one petition (in *Hamdi*).

1. Padilla

Jose Padilla is a U.S. citizen, apprehended in the United States, and detained first as a material witness in federal criminal custody in New York and then as an "enemy combatant" in military custody in South Carolina. The latter designation and detention were pursuant to a presidential order (itself citing the Authorization for Use of Military Force Joint Resolution) that set forth comprehensive if conclusory factual determinations that Padilla presented various threats to the national security of the United States.¹³⁴ Padilla filed for habeas corpus in the Southern District of New York, naming as defendants the President, the Secretary of Defense, and the commander of the South Carolina facility.

Padilla's case involved important procedural and substantive elements. With respect to the procedural aspect of the case, the

¹³⁴ *Rumsfeld v. Padilla*, 124 S. Ct. 2711, 2730 (2004).

District Court held that the Secretary's "personal involvement" in the case made him a suitable defendant and that New York state law allowed long-arm jurisdiction over the Secretary.¹³⁵ On the merits, the District Court ruled that the President had sufficient authority to detain Padilla, and thus the court refused to grant the petition immediately (although it did order Padilla to be given access to counsel and held open the possibility that a later evidentiary hearing would lead to granting the petition).¹³⁶ The United States Court of Appeals for Second Circuit affirmed the District Court's procedural holding but granted the habeas petition on the grounds that the President lacked authority to detain a U.S. citizen apprehended on U.S. soil.¹³⁷

The Supreme Court resolved Padilla's case on procedural grounds. The *only* proper defendant in the case, said the Court, was the commander of the South Carolina facility currently holding Padilla, because that person had physical custody of Padilla.¹³⁸ The habeas statute requires a filing in the custodian's district, so the proper jurisdiction in which to file suit was the District of South Carolina. The Court therefore dismissed Padilla's petition for habeas without reaching the merits.

A concurrence by Justice Kennedy, joined by Justice O'Connor, urged a less definitive holding.¹³⁹ Justice Kennedy argued that habeas rules of this sort had some aspects of rules about personal jurisdiction and some aspects of rules about venue, as a survey of the Court's opinions revealed. The case did not involve exceptional circumstances such as non-physical custody, dual custody, or governmental waiver. Governmental abuse of the usual rules, such as the failure to tell an attorney where his or her client actually is, might also lead to an exceptional treatment of a case, but there had been no indication here of such abuse. Thus, Justice Kennedy wrote, the habeas jurisdictional rules might be less definitive than the majority suggested, but the general rule was stated correctly by the

¹³⁵ *Padilla v. Bush*, 233 F. Supp. 2d 564, 581, 587 (S.D.N.Y. 2002), aff'd, 352 F.3d 695 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004).

¹³⁶ *Id.* at 588, 599.

¹³⁷ *Padilla v. Rumsfeld*, 352 F.3d 695, 698–99 (2d Cir. 2003), rev'd, 124 S. Ct. 2711 (2004).

¹³⁸ *Padilla*, 124 S. Ct. at 2721–22.

¹³⁹ See *id.* at 2728 (Kennedy, J., concurring).

the majority and no potential exceptions were relevant to the facts of this case.

A dissent by Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, emphasized the governmental secrecy surrounding the government's transfer of Padilla from civilian to military custody.¹⁴⁰ Justice Stevens felt that, in the absence of such secrecy, the petition would have been filed in an indisputably proper forum, and that the government should gain no advantage from its "departure from the time-honored practice of giving one's adversary fair notice."¹⁴¹ Padilla had been neither charged nor allowed counsel. "At stake in this case is nothing less than the essence of a free society" in preventing arbitrary executive detention, and Padilla was plainly entitled to "a hearing on the justification for his detention."¹⁴²

2. Hamdi

Yaser Hamdi is a U.S. citizen, apprehended in Afghanistan during hostilities there, and detained as an "enemy combatant" in military custody, first in Virginia and later in South Carolina. As evidence of the propriety of Hamdi's designation and detention, the U.S. government offered a declaration, from a Special Adviser to the Undersecretary of Defense for Policy, stating that Hamdi was a combatant with Taliban forces and had engaged in armed conflict with U.S. forces in Afghanistan, where he was captured on the battlefield.

Hamdi's father, as next friend, filed a habeas corpus petition on his son's behalf in the Eastern District of Virginia, naming the Secretary of Defense and others as defendants. The District Court held the government's declaration insufficient and ordered the U.S. government to turn over a wide variety of documents associated with Hamdi.¹⁴³ The Fourth Circuit reversed, holding that the "undisputed" fact that Hamdi "was captured in a zone of active combat in a foreign theater of conflict" was sufficient to allow his

¹⁴⁰ Id. at 2731–32 (Stevens, J., dissenting).

¹⁴¹ Id. at 2732 (Stevens, J., dissenting).

¹⁴² Id. at 2735 (Stevens, J., dissenting).

¹⁴³ *Hamdi v. Rumsfeld*, 243 F. Supp. 2d 527, 535–36 (E.D. Va. 2002), rev'd 316 F.3d 450 (4th Cir. 2003), aff'd, 124 S. Ct. 2633 (2004).

detention.¹⁴⁴ The Authorization for Use of Military Force (“AUMF”) Resolution granted the President the ability to use “necessary and appropriate force” against the Taliban in Afghanistan and thus implicitly allowed for the detention of hostile forces.¹⁴⁵ The AUMF Resolution thereby overrode any barrier to detention presented by 18 U.S.C. § 4001(a)’s mandate that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁴⁶ The Geneva Convention was likewise no bar, since it was not a self-executing treaty and thus gave Hamdi no private rights.¹⁴⁷ Furthermore, said the Fourth Circuit, even if the Convention had given Hamdi such rights, his detention until the end of hostilities would be proper under the Convention.¹⁴⁸

The Supreme Court agreed with the Fourth Circuit that the AUMF Resolution was sufficient legislative action to override concerns about 18 U.S.C. § 4001(a) in light of an assumption that Hamdi was a combatant, not to mention one allegedly “captured in a *foreign* combat zone.”¹⁴⁹ The Court stated, “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.”¹⁵⁰ Just as the Fourth Circuit had concluded, the Court held that an authorization by Congress in the AUMF Resolution of the use of “necessary and appropriate force” carried with it the authority to detain, at least until the cessation of active hostilities, the hostile combatants of any country of origin. There were some limitations to this authority, but they were not here, or at least not yet here, relevant.

The Court noted that, unlike the petitioner in *Ex parte Milligan*¹⁵¹ where the civilian was arrested at home, Hamdi was allegedly a combatant captured on the battlefield.¹⁵² Moreover, the

¹⁴⁴ Hamdi v. Rumsfeld, 316 F.3d 450, 459 (4th Cir. 2003), *aff’d*, 124 S. Ct. 2633 (2004).

¹⁴⁵ Authorization for Use of United States Armed Forces, Pub. L. No. 107-40, 115 Stat. 224 (2001).

¹⁴⁶ 18 U.S.C. § 4001(a) (2000).

¹⁴⁷ *Hamdi*, 316 F.3d at 468.

¹⁴⁸ *Id.* at 469.

¹⁴⁹ Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2643 (2004).

¹⁵⁰ *Id.* at 2640.

¹⁵¹ 71 U.S. (4 Wall.) 2 (1866) (involving a habeas petition by a U.S. citizen detained during the Civil War).

¹⁵² *Hamdi*, 124 S. Ct. at 2642.

Hamdi Court noted that *Ex parte Quirin*,¹⁵³ which postdated *Milligan*, plainly allowed the trial and punishment by a military tribunal of a U.S. citizen, and the President therefore had the power to categorize individuals as enemy combatants and to detain them.¹⁵⁴

The President's ability to detain hostile U.S. citizens captured on the battlefield was not the end of the analysis for the *Hamdi* Court, however: "Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status."¹⁵⁵ In the view of the Court, some process was in fact due to Hamdi. No one in the case argued that Congress has actually suspended the writ of habeas corpus. Additionally, the Court said that the Fourth Circuit erred in characterizing the assertion that Hamdi was captured in a combat zone as "undisputed," if only because Hamdi has not been allowed to dispute anything himself or through an attorney. The habeas petition that Hamdi's father filed stated that his son resided in Afghanistan but not that he had been captured on the battlefield.¹⁵⁶

Second, said the Court, the Fifth Amendment requires the Court to balance the executive branch's "weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States" with "the most elemental of liberty interests—the interest in being free from physical detention by one's own government."¹⁵⁷ "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them," but the deference due to the Executive does not erase the fact that "history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse."¹⁵⁸ The proper balance requires more than the government provided in this case (although, as the Court did not ex-

¹⁵³ 317 U.S. 1 (1942).

¹⁵⁴ *Hamdi*, 124 S. Ct. at 2640.

¹⁵⁵ *Id.* at 2643.

¹⁵⁶ *Id.* at 2644–45.

¹⁵⁷ *Id.* at 2646–47.

¹⁵⁸ *Id.* at 2647.

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pressly note, it requires a good deal less process than provided in many other contexts): “We . . . hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”¹⁵⁹

The government, continued the Court, may benefit from a presumption that the classification of an individual as an enemy combatant is correct, for example, but the presumption must be rebuttable.¹⁶⁰ It is also possible that the necessary standards for due process “could be met by an appropriately authorized and properly constituted military tribunal.”¹⁶¹ The government’s assertion that “some evidence” is sufficient to continue to detain a citizen is incorrect,¹⁶² however, and Hamdi “unquestionably has the right to access to counsel in connection with the proceedings on remand” despite the fact that the government had denied him such counsel before the grant of the writ of certiorari.¹⁶³

3. Rasul

Shafiq Rasul is a British citizen who, along with one other Briton, two Australians, and twelve Kuwaitis, was detained at the U.S. Naval Base at Guantanamo Bay—allegedly after their capture in connection with armed combat, presumably in Afghanistan, between U.S. military forces and the Taliban.¹⁶⁴ Rasul and the others filed a petition of habeas corpus contesting their detention. (After the Court granted certiorari, Rasul and the other British citizen were released from custody, but the others still remained in custody when the Court issued its opinion in *Rasul v. Bush*.) The petitioners contested the factual basis for their status, protested their lack of access to counsel or the charges against them, and decried the fact that no tribunal of any sort had ever evaluated their status.

¹⁵⁹ Id. at 2648.

¹⁶⁰ Id. at 2649.

¹⁶¹ Id. at 2651.

¹⁶² Id.

¹⁶³ Id. at 2652.

¹⁶⁴ *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), aff’d sub nom. *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003), rev’d sub nom. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

They included claims under the Alien Tort Statute in their petitions.¹⁶⁵

The District Court for the District of Columbia construed the relevant pleadings as requests for writs of habeas corpus and denied all of the petitions for want of jurisdiction,¹⁶⁶ and the Court of Appeals affirmed.¹⁶⁷ Both courts rested their decisions on the Supreme Court's opinion in *Johnson v. Eisentrager*,¹⁶⁸ which they interpreted to deny the right of habeas to aliens held outside of the sovereign territory of the United States.¹⁶⁹

The Supreme Court reversed, however, holding that, even in light of *Eisentrager*, the ambit of the writ extended to Guantanamo Bay despite Guantanamo Bay's unusual legal status and the alienage of the petitioners.¹⁷⁰ The statutory, as opposed to constitutional, grant of authority to the federal courts for writs of habeas corpus states: "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."¹⁷¹ (Although the Court mentions it only implicitly, *no* federal district court in fact has Guantanamo Bay within its jurisdiction. Nonetheless, the Court held that developments in the case law interpreting the statute required reversal of the opinions below.)

After noting the proud history and long expansion of the habeas writ, the Court turned to *Eisentrager*. The *Rasul* Court quoted the *Eisentrager* Court's six-characteristic description of "prisoner of our military authorities": (a) an enemy alien (b) who had never been or resided in the United States, (c) was captured outside U. S. territory and there held in military custody, (d) was there tried and convicted by the military (e) for offenses committed there, and (f) was imprisoned there at all times.¹⁷² The petitioners in *Rasul*, by contrast, are aliens but not enemy aliens (since neither Australia

¹⁶⁵ 28 U.S.C. § 1350 (2000).

¹⁶⁶ *Rasul*, 215 F. Supp. 2d at 73.

¹⁶⁷ *Al Odah v. United States*, 321 F.3d 1134, 1145 (D.C. Cir. 2003), rev'd sub nom. *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

¹⁶⁸ 339 U.S. 763 (1950).

¹⁶⁹ See *Rasul*, 215 F. Supp. 2d at 65; *Al Odah*, 321 F.3d at 1145.

¹⁷⁰ *Rasul*, 124 S. Ct. at 2693–95.

¹⁷¹ 28 U.S.C. § 2241(a) (2000). Habeas extends not only to constitutional or statutory grounds for release but also to "treaties of the United States." Id. § 2241(c)(3).

¹⁷² 124 S. Ct. at 2693 (quoting *Eisentrager*, 339 U.S. at 777).

nor Kuwait are engaged in hostilities against the United States). They had “never been afforded access to any tribunal, much less charged with and convicted of wrongdoing,” and “for more than two years . . . ha[d] been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.”¹⁷³ (Only with respect, therefore, to their apparently never having been in the United States and to their alleged offenses having occurred outside of the United States are the petitioners in *Rasul* similar to the petitioners in *Eisentrager*.)

Additionally, the *Rasul* Court noted, the *Eisentrager* case involved the constitutional rather than the statutory availability of habeas corpus review.¹⁷⁴ With regard to habeas review grounded in 28 U.S.C. § 2241, the Court’s opinion in *Braden v. 30th Judicial Circuit Court of Kentucky* held: “[T]he prisoner’s presence within the territorial jurisdiction of the district court is not ‘an invariable prerequisite’ to the exercise of district court jurisdiction under the federal habeas statute.”¹⁷⁵ Only the presence of the custodian within the territorial jurisdiction of the District Court (including a constructive presence attained via service of process) is necessary,¹⁷⁶ said the *Rasul* Court, and “[n]o party question[ed] the District Court’s jurisdiction over petitioners’ custodians.”¹⁷⁷ *Braden* therefore, in the words of the *Rasul* Court, “overruled the statutory predicate to *Eisentrager*’s holding,” so the habeas petitioners here could proceed despite their detention in an area outside the jurisdiction of a federal district court.¹⁷⁸

One might imagine that this outcome would end the Court’s analysis, but the *Rasul* Court then considered whether the habeas jurisdiction statute should nonetheless not apply to Guantanamo Bay because of the usual presumption in statutory interpretation against extraterritorial application. As its name implies, however, the extraterritoriality presumption applies when one is considering an area outside of the territorial jurisdiction of the United States. The Court held that Guantanamo Bay is not extraterritorial in this

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 2693–94.

¹⁷⁵ *Id.* at 2695 (quoting *Braden v. 30th Jud. Cir. Ct. of Ky.*, 410 U.S. 484, 495 (1973)).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 2698.

¹⁷⁸ *Id.* at 2695.

sense: “By the express terms of its agreements with Cuba, the United States exercises ‘complete jurisdiction and control’ over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.”¹⁷⁹

The government, according to the *Rasul* Court, had conceded at oral argument that U.S. citizens detained at Guantanamo Bay could file habeas petitions in federal court under the habeas jurisdiction statute, and the Court concluded that there is no reason to distinguish aliens from citizens when the language of the statute does not mention such a distinction.¹⁸⁰ An interpretation of the writ of habeas as running to Guantanamo Bay, despite its differences with typical U.S. territory, is also consistent with the broad historical reach of the habeas petition to areas not within the core sovereignty of a nation.¹⁸¹ The variety of non-habeas claims filed by the petitioners in this case, concluded the Court, are not barred from federal courts merely because of the petitioners’ alienage or their detention at Guantanamo Bay, and the Court of Appeals was incorrect to interpret *Eisentrager* to the contrary.

B. Analysis

In *Padilla*, the petitioner is a U.S. citizen apprehended in the United States, while the petitioners in *Rasul* are aliens captured in an overseas war zone, and the petitioner in *Hamdi* is a U.S. citizen taken into custody in Afghanistan. The trio lacks only an alien detained in the United States to be a perfect quartet spanning all possible combinations of citizen/alien and domestic/overseas apprehensions.¹⁸² In all three cases, the United States asserted national

¹⁷⁹ *Id.* at 2696.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2696–97.

¹⁸² For such a fact pattern, see *al-Marri v. Rumsfeld*, 360 F.3d 707 (7th Cir. 2004). In *Hamdi*, Justice Souter’s opinion addressed this possible fact pattern. 124 S. Ct. at 2659 (Souter, J., concurring in the judgment). He noted that the relevant portion of the USA PATRIOT Act, 8 U.S.C. § 1226a(a)(5) (Supp. 2001), limited detention of, in his words, “alien terrorists on home soil” to seven days. He drew from this the inference that Hamdi, a U.S. citizen apprehended and detained on home soil, could not be detained indefinitely unless the government clearly justified its detention. 124 S. Ct. at 2659 (Souter, J., concurring in the judgment). Justice Souter ignored, however, that the Attorney General may detain an alien terrorist for at least six months so long as “the release of the alien will threaten the national security of the United States or the safety of the community or any person.” 8 U.S.C. § 1226a(a)(6). Indeed, indefinite de-

security concerns related to the global war on terror as its reason for imprisoning the petitioner. In all three cases, the fact that the petitioners were all prisoners of war might suggest that the Geneva Convention Relative to the Treatment of Prisoners of War (“Geneva Convention”), to which the United States is a party, would be applicable. The Geneva Convention gives prisoners of war certain substantive rights, such as the right to deny interrogators any information except the prisoner’s name, rank, date of birth, and serial number.¹⁸³ It also makes available certain procedures, such as a competent tribunal’s determination of the prisoner’s status if there is a controversy as to whether, for example, the individual is a combatant or merely a civilian caught up in the tides of war. The customary laws of war more generally include additional requirements, including some that bear on whether an individual is a “lawful” combatant entitled to the protections of the Geneva Convention or an “unlawful” combatant (such as a spy) who may be tried and punished.¹⁸⁴

The Court treats *Padilla* and *Rasul*, however, as purely procedural cases about habeas jurisdiction and therefore reaches no substantive issues related to the detention of the petitioners. None of the opinions in *Padilla* and *Rasul* even mentions the Geneva Convention. In *Hamdi*, the plurality opinion, authored by Justice O’Connor and joined by three other Justices, does reach the substance of the petitioner’s case. That plurality opinion mentions the Geneva Convention in connection with the length of detention allowable¹⁸⁵ and also notes the Convention’s incorporation into U.S. military law by way of illustrating what sort of tribunals might meet the plurality’s standard for sufficient process.¹⁸⁶ A concurrence in *Hamdi*, by Justice Souter and joined by Justice Ginsburg, uses the

tention seems clearly contemplated by the statute. See *id.* (alien may be “detained for additional periods of six months”); see also *id.* § 1226a(a)(7) (requiring the Attorney General to review detention criteria “every 6 months,” and allowing an alien to request recertification “each 6 months”). Of course, the USA PATRIOT scheme for detaining alien terrorists also explicitly allows judicial review via habeas corpus petitions. See *id.* § 1226a(b).

¹⁸³ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 17, 6 U.S.T. 3316, 3330, 75 U.N.T.S. 135, 148.

¹⁸⁴ *Id.*

¹⁸⁵ *Hamdi*, 124 S. Ct. 2633, 2641 (2004).

¹⁸⁶ *Id.* at 2651.

standards of the Geneva Convention as an important part of its reasoning¹⁸⁷—although even in this case, the applicability of the Geneva Convention depends in important part upon the government's failure to contest the applicability of the Geneva Convention. Of the twenty-seven total opportunities in the three cases for a Justice to author or join an opinion employing the Convention, therefore, only *two* (Justices Souter and Ginsburg in *Hamdi*) do so in a manner important to the outcome of their opinion, while four others (the plurality in *Hamdi*) bolster their fundamentally constitutional argument with references to the Geneva Convention.

1. Padilla

Aside from the potential applicability of the Geneva Convention, *Padilla* is not necessarily a case about international law at all, except in the shadow of its juxtaposition with the other habeas cases, *Rasul* and *Hamdi*, which are at least potentially cases about international law. The Court treats *Padilla* as a case purely about habeas jurisdiction and thereby manages to show its discomfiture with making judgments about matters of foreign policy. Both the District Court and the Circuit Court found Padilla's habeas petition to be properly filed against Secretary of Defense Rumsfeld, with respect to whom New York was able to exercise long-arm jurisdiction, thus giving the courts personal jurisdiction over the case. The Supreme Court disagreed with both lower courts on this procedural issue. As described above, the Court held that Padilla's current custodian, who along with Padilla was in South Carolina at the time of filing, was the only proper defendant. The Court therefore did not need to reach the more difficult and substantive foreign-relations question of whether the President had the authority to detain a U.S. citizen in the circumstances at issue. (The District

¹⁸⁷ Justice Souter's opinion in *Hamdi* is actually a concurrence in part, a dissent in part, and a concurrence in the judgment. He agrees with the plurality opinion that the Court may review the President's detention of a U.S. citizen characterized as an "enemy combatant," but does not agree with the plurality that the AUMF Resolution authorizes presidential detention of U.S. citizens. *Id.* at 2653 (Souter, J., concurring in part, dissenting in part, and concurring in judgment); see also *id.* at 2660 (Souter, J., concurring in part, dissenting in part, and concurring in judgment) ("[T]he need to give practical effect to the conclusions of eight members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose.").

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Court had held that the President did have such authority under the statutory state of affairs obtaining shortly after September 11, 2001, while the Circuit Court had held that the President lacked such authority.) The Court thereby saved itself its usual assertions of judicial humility, evident in *Sosa* and implicit in *Altmann*, in the face of executive assertions of foreign-policy authority wherever legislation did not plainly control.

2. Hamdi

Concentrating on procedural matters to the exclusion of substance in *Padilla* allowed the Court to avoid passing judgment on the President's authority to detain U.S. citizens apprehended in the United States. Similarly, in *Rasul*, the Court took jurisdiction only over the question of habeas jurisdiction, thereby again avoiding the need to consider substantive issues, whether of international law or anything else.

In *Hamdi*, however, the plurality opinion chose a case that placed it directly in the path of passing such a judgment with respect to a U.S. citizen captured overseas. No procedural complexities surrounded the habeas petition, neither in terms of the proper defendant (as in *Padilla*), nor of the status of the place of petitioner's detention (as with Guantanamo Bay in *Rasul*), nor of the alienage of the petitioner (as in *Rasul*).

As is the Court's habit, the plurality opinion gives the President a good deal of leeway to make a decision related to foreign policy, but the plurality opinion does not steer entirely clear of the issue. The plurality opinion's analysis of the AUMF Resolution leads to the deferential conclusion: the President may, in light of the AUMF Resolution, detain U.S. citizens despite the non-detention presumption of 18 U.S.C. § 4001(a). The plurality opinion's further analysis, however, does not take the most deferential possible tack, which would have been to affirm the Fourth Circuit's decision. Instead, the plurality opinion chastises the Fourth Circuit for considering the factual assertions about Hamdi's capture to be "undisputed," and then requires the President to provide a modicum of process in connection with Hamdi's detention: Hamdi "must receive notice of the factual basis for his classification, and a fair op-

portunity to rebut the Government's factual assertions before a neutral decisionmaker."¹⁸⁸ More than that the plurality does not say—except to give the executive branch a compendium of fairly specific hints implying that the plurality's floor of procedure might well be the ceiling, to state outright that "an appropriately authorized and properly constituted military tribunal" could provide the necessary process (and that some already do),¹⁸⁹ and to note that "indefinite" detention "for the purpose of interrogation" would not fall within the space that the AUMF Resolution creates around 18 U.S.C. § 4001(a)'s barriers to detention.¹⁹⁰

The plurality opinion therefore hardly requires the President to bend over backwards before detaining U.S. citizens for the definite time of his choice, but Hamdi should at least receive some hearing at which the government must present more than "some evidence" to keep him incarcerated.¹⁹¹ Additionally, in what is technically dictum, but which a prudent predictor would regard as future fact, the plurality states that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand."¹⁹²

The plurality gave Hamdi the right to "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"; it notes as well that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one."¹⁹³ The Geneva Convention requires that, "[s]hould any doubt arise," a prisoner shall be entitled to the protections of a prisoner of war "until such time as their status has been determined by a competent tribunal."¹⁹⁴ One formulation seems at least a rough transposition of the other, and the plurality opinion seems aware of the echo: "Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any

¹⁸⁸ Id. at 2638, 2648.

¹⁸⁹ Id. at 2651.

¹⁹⁰ Id. at 2641.

¹⁹¹ Id. at 2651.

¹⁹² Id. at 2652. The statement is dictum partly because the proceedings in question had not yet occurred and partly because the government granted Hamdi access to counsel after the Court granted certiorari in the case.

¹⁹³ Id. at 2648–49.

¹⁹⁴ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 3322, 3324, 75 U.N.T.S. 135, 140, 142.

treaty guarantees him similar access to a tribunal for a determination of his status.”¹⁹⁵

Although the plurality does not mention the Geneva Convention by name, its use of the words “tribunal” and “status”—both words that appear in the relevant portion of the Geneva Convention, but that the plurality does not use elsewhere in the opinion—indicates that the plurality had the Geneva Convention in mind. The plurality cannot actually bring the phrase “Geneva Convention” to its lips, however, even while doing nothing more disrespectful of domestic law than proclaiming the Geneva Convention’s irrelevance. Apparently, one might take even the thought of the utterance for the deed.

Despite the fact that the plurality opinion says it need not “address” the implications of “any treaty,” the sentence quoted above is either illogical or disingenuous unless the plurality has in fact considered the substance of the Geneva Convention. *Because* the plurality gives Hamdi constitutional process, it says, it need not *decide* whether the Geneva Convention gives him similar process. But if the Constitution gives Hamdi *less* process than the Geneva Convention, then the plurality opinion would give Hamdi fewer rights than he might deserve. The Court could not say, for example, that because the President has the inherent authority as commander in chief to allow U.S. troops to disarm hostile forces who have just surrendered on the battlefield, the Court need not decide whether the AUMF Resolution gives the President the authority to detain the disarmed forces indefinitely.

Perhaps the plurality meant to say “identical” rather than “similar,” in which case its statement would at least make sense. Hamdi should not care whether the particular package of rights to which he is entitled comes from the Constitution or the Geneva Convention. But in order to know either that the Constitution gives Hamdi more rights than the Geneva Convention, or exactly the same rights as the Geneva Convention, the plurality must know *what* rights the Geneva Convention gives to Hamdi. At least in its own internal decisionmaking, therefore, a court operating under the plurality’s standard must in fact address what rights both the Constitution *and* the Geneva Convention might provide. Additionally,

¹⁹⁵ *Hamdi*, 124 S. Ct. at 2649 n.2.

the plurality's decision to analyze the Constitution but not the Geneva Convention appears to turn on its head the canon of "constitutional avoidance," which counsels analysis of the Constitution only if no reasonable interpretation of a statute or treaty can insulate the relevant text from questions about its constitutionality.¹⁹⁶

The plurality's failure to address explicitly what rights the Geneva Convention gives to Hamdi is especially conspicuous in light of its earlier reliance upon the "law of war." The plurality first infers that the detention of hostile combatants for the duration of a war is "so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has [in the AUMF Resolution] authorized the President to use."¹⁹⁷ The opinion then notes: "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'"¹⁹⁸ The opinion then quotes a number of sources stating that the purpose of detaining hostile combatants is simply to prevent them from taking up arms against their captor's forces until the end of the conflict and that neither revenge nor punishment is among the objects of such detention.¹⁹⁹ The plurality opinion concludes that citizens as well as aliens may be the subject of such detention if they are hostile combatants, whether or not they are also accused of violations of the laws of war.²⁰⁰ Such detentions must end at the conclusion of hostilities.²⁰¹

The plurality's reticence to engage the provisions of the Geneva Convention contrasts to some degree with its implicit reference to

¹⁹⁶ I am indebted to my colleague David Martin for this last point. The "constitutional avoidance" canon derived from *Hooper v. California*, 155 U.S. 648, 657 (1895), holds in its most typical formulation that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (internal quotation marks and citations omitted). Since the Constitution is presumably superior to treaties just as it is superior to statutes, the interpretation of a treaty to avoid constitutional violation seems as prudent as does employing the constitutional avoidance doctrine. For a discussion of cases on this point, see Cong. Research Serv., *Treaties and Other International Agreements: The Role of the United States Senate* 71–72 (2001).

¹⁹⁷ *Hamdi*, 124 S. Ct. at 2640.

¹⁹⁸ *Id.* (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942) (alteration in original)).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 2640–41.

²⁰¹ *Id.* at 2641.

a general notion of the customary “laws of war.” First, the plurality bases its fundamental inference—that Congress authorized the detention of prisoners when it authorized the use of military force—on the idea that detention of captured hostile combatants is a “fundamental and accepted . . . incident to war.”²⁰² This is not an express adoption of the phrase “law of war,” but the plurality opinion’s repeated citations to sources discussing prisoner-of-war status and permissible lengths of detention has a definite air of attention to customary international law.

Second, the plurality opinion distinguishes “lawful” from “unlawful” combatants by referring to the “trial” of the latter, and its reference to such a trial in *Quirin* is a trial for violation of the customary laws of war (apparently including at least some of the standards of the Geneva Convention), as incorporated into the U.S. Military Code by an act of Congress.²⁰³

Third, and most clearly, the plurality opinion incorporates the law of war (including the Geneva Convention) in discussing the potential length of Hamdi’s detention. Hamdi argued that Congress did not intend to allow “indefinite detention” in enacting the AUMF Resolution.²⁰⁴ The plurality responds that Hamdi’s detention is, as matters now stand, neither indefinite in the sense of being impossible to predict nor indefinite in the sense of being perpetual. The plurality opinion cites the Geneva Convention as support for its own statement about the definiteness of the trigger that would release Hamdi: “It is a clearly established principle of the law of war that detention may last no longer than active hostilities.”²⁰⁵ As to whether the plurality’s interpretation of the AUMF Resolution allows Hamdi’s detention in perpetuity, the plurality expresses clear discomfort with the possibility, but decides in the end to rely on the general framework of the laws of war to provide

²⁰² Id. at 2640.

²⁰³ Id. The Fourth Circuit had held that the Geneva Convention’s provisions were not available for the benefit of petitioner. Id. at 2638. The Court explored the potential applicability of the Geneva Convention to *Rasul* at oral argument for that case, see Transcript of Oral Argument in *Rasul v. Bush*, 124 S. Ct. 2686 (2004), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/03-334.pdf. Such arguments were not incorporated into its opinions in *Rasul*.

²⁰⁴ *Hamdi*, 124 S. Ct. at 2641.

²⁰⁵ Id.

a current solution and the inapplicability of the laws of war to an unprecedented solution:

[W]e agree [with petitioner] that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and *our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.* But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan.²⁰⁶

One should probably hesitate from betting the ranch on the plurality's future reliance on the law of war, even as required by this paragraph, to release a detainee. First, one should note that the plurality agrees that "indefinite detention *for the purpose of interrogation* is not authorized."²⁰⁷ The plurality's sentence therefore leaves open the possibility that indefinite detention for some other purpose—such as detention prior to a trial, potential prisoner exchange, or even simple confinement—will be authorized. Additionally, the plurality might later read its second sentence above as only lightly qualified, simply by emphasizing that the *Hamdi* opinion did not release Hamdi and that the case did hold that the President has the "authority to detain for the duration of the relevant conflict." Furthermore, the plurality gives no guidance as to what length of detention would be excessive (beyond whatever such length might in the future follow from a re-raveled understanding of the laws of war). Finally, the plurality opinion employs only the language of possibility, not necessity, when it says the understanding "may" unravel, and its requirement that the current conflict be "entirely unlike" previous conflicts is likely to be a difficult standard to meet (especially since the conflicts that spurred the development of the more recent Geneva Conventions have included unconventional conflicts).

²⁰⁶ Id. at 2641–42 (emphasis added).

²⁰⁷ Id. at 2641.

Still, the plurality opinion does say in black and white that one of its crucial understandings in the case depends upon the operation of longstanding law-of-war principles and that “practical circumstances . . . entirely unlike those of the conflicts that informed the development of the law of war” might change that understanding and with it the plurality’s view of indefinite detention. The law of war is thus presently important to the plurality’s decision in a case of great significance.

It is also important to note that the plurality opinion in *Hamdi* is just that: a plurality (of four Justices). Justices Souter and Ginsburg provided the necessary additional votes for a majority on the judgment, but they believed that the President did *not* have the right to detain Hamdi *at all*. This pair of Justices believed that the AUMF Resolution was much too vague to overturn the presumption against detention expressed in a statute that, according to them, was quite expressly designed to prevent the detention of citizens even when the security of the United States was generally at risk. Importantly, this concurrence in the judgment also depended quite explicitly upon the government’s failure to follow the terms of the Geneva Convention:

In a statement of its legal position cited in its brief, the Government says that “the Geneva Convention applies to the Taliban detainees.” Hamdi . . . would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party.

By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. This treatment appears to be a violation of the Geneva Convention provision that even in cases of doubt, captives are entitled to be treated as prisoners of war “until such time as their status has been determined by a competent tribunal.”²⁰⁸

²⁰⁸ Id. at 2657–58 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (internal citations omitted) (quoting Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), at <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html>).

The government's claim that the President's unilateral, aggregated determination about the Taliban made Hamdi's status without doubt (and thereby obviated the need for a tribunal) did not persuade Justice Souter. The government's own regulations, said Justice Souter, in fact set forth detailed procedures to allow the determination of prisoner-of-war status, incorporating the Geneva Convention's tribunal requirement. "Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority."²⁰⁹ Justice Souter closed this portion of his concurrence in the judgment with a direct linkage between the laws of war and the resolution of the case at hand:

[T]he Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord *with the laws of war* authorized to be applied against citizens by the [AUMF Resolution]. I conclude accordingly that the Government has failed to support the position that the [AUMF Resolution] authorizes the described detention of Hamdi for purposes of § 4001(a).²¹⁰

3. Rasul

In *Rasul*, the Court does not take the pathway that would avoid international legal questions entirely. In fact, the Court confronts quite directly the fundamental legal question of state sovereignty, i.e., the sovereign status of Guantanamo Bay for purposes of federal habeas jurisdiction.

The *Rasul* Court could have resolved the case as a matter of statutory interpretation and thereby have avoided the need to consider the international legal topics at issue in the case. The habeas statute provides:

Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*. The order of a circuit judge shall be

²⁰⁹ Id. at 2658 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

²¹⁰ Id. at 2659 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (emphasis added).

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entered in the records of the district court of the district wherein the restraint complained of is had.²¹¹

Neither the Court's opinion nor Justice Kennedy's concurrence says so plainly, but Guantanamo Bay is not within the jurisdiction of any district court.²¹² The statute gives courts habeas jurisdiction within their respective jurisdictions and Guantanamo is within no district or circuit court's jurisdictions; therefore, no habeas jurisdiction would lie as a result of the habeas statute. This line of reasoning resolves the case, and it does so without resort to any methodology, except interpretation of the relevant statutory text. (The dissent, a relatively restrained effort by Justice Scalia, adopts just this viewpoint, as does Justice Kennedy's concurrence with respect to the proper reading of the statute.²¹³)

The Court's opinion hints at another, equally direct line of reasoning that would reach the same result as the Court: The government conceded that "the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base" and that "the statute draws no distinction between Americans and aliens held in federal custody"²¹⁴ This line of argument would have reached, by a straight path, the same outcome as the Court's more convoluted reasoning.

The Court instead takes a course almost directly into the wind, tacking many times to do so. First, the Court indulges in an historical review of habeas corpus that implies a broad reach for the writ. Next, the Court changes course to argue that *Eisentrager* is irrelevant because it was a case about constitutional habeas, while the current case is about statutory habeas. The Court then argues that the permissible scope of statutory habeas has expanded since *Eisentrager* to allow jurisdiction to depend not upon the petitioner's location, but rather upon the petitioner's custodian's location. On its penultimate leg, the Court argues that the presumption against extraterritorial application of a statute is irrelevant because Guan-

²¹¹ 28 U.S.C. § 2241(a) (2000) (emphasis added).

²¹² The Court's opinion makes this statement obliquely, well after its statement of the facts, by noting that "persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review." *Rasul*, 124 S. Ct. at 2695.

²¹³ *Id.* at 2699 (Kennedy, J., concurring in the judgment).

²¹⁴ *Id.* at 2696.

tanamo Bay is not an extraterritorial location. Finally, returning to its historical analysis, the Court notes that extending habeas jurisdiction to a portion of the United States not squarely within traditional concepts of territorial jurisdiction is consistent with the historically broad scope of habeas review.

The point is not so much where the Court tacks, or the steadiness of its course within each leg, but rather that the Court engages in various gyrations to reach the question of Guantanamo Bay's status and then resolves that question in favor of a traditional, broad-reaching, control-based view of sovereignty. The Court describes the factual status of Guantanamo Bay:

The United States occupies the Base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the Agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas." In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."²¹⁵

It describes its holding that the habeas statute applies there with a similar emphasis on the relevant international treaty and the breadth of U.S. control over Guantanamo Bay:

Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo

²¹⁵ *Id.* at 2690–91 (alterations in original).

Bay Naval Base, and may continue to exercise such control permanently if it so chooses.²¹⁶

One might first clear away any notion that the Court is basing its decision on clear precedent. *Foley Brothers*, cited by the Court in the passages above, was about whether a statute authorized application of the Eight Hour Law in foreign countries in the Middle East, and thus was neither about habeas nor about territory arguably part of the United States' territorial jurisdiction. Additionally, the *Foley Brothers* Court held that Congress did *not* intend to apply the (different) statute at issue extraterritorially.

The *Rasul* Court instead rests its notion of jurisdiction on some inherent notion of "territorial jurisdiction" as the exercise of "complete jurisdiction and control," especially when such jurisdiction and control may be permanently exercised at the option of the United States. This notion reflects a broad, basic application of sovereignty in several senses. First, sovereignty as an area of control, rather than an area of historical claims or merely formal authority, is a basic notion of sovereignty. Second, the Court broadens the area within the territorial jurisdiction of the United States from inarguably sovereign areas (such as, say, Florida) into an arguably sovereign area (Guantanamo Bay). Third, the Court extends the habeas jurisdiction of the federal courts beyond their inarguable limits (within the jurisdiction of the district courts) into an arguable area (beyond the jurisdiction of the district courts). Sovereignty follows control, and the courts follow sovereignty.

This view of sovereignty is entirely consistent with modern international legal views of sovereignty, although the Court does not itself analyze international legal sources in rendering this crucial portion of its decision. Controversies about sovereignty in international law can arise in at least two contexts. First, there may be a question as to which nation-state is sovereign over a given slice of territory. When the former Yugoslavia dissolved into armed conflict and ethnic cleansings, the issue of whether, for example, there was now a sovereign state, "Croatia," and what territory belonged to it, became prominent. Second, there may be little controversy over which state is sovereign over a particular area, but still a live controversy over which set of actors within that state—which gov-

²¹⁶ *Id.* at 2696.

ernment—has legally legitimate control over all of the territory of that state. When active fighting ended in the Chinese Civil War in 1949, for example, the question of whether the government in Beijing or the government in Taipei was the ruling government of China for international legal purposes became a matter of controversy that engaged the United States for decades and that still echoes in U.S. foreign policy. Generally speaking, the entity exercising effective control over the territory in question is the sovereign for international legal purposes in both of these contexts. “Under international law,” as the *Restatement (Third) of Foreign Relations* puts it, “a state is an entity that has a defined territory and a permanent population, under *the control* of its own government”²¹⁷ As to governments, “[a] state . . . is required to treat as the government of another state a regime that *is in effective control* of that state.”²¹⁸

In contrast to the complex blend of history and treaty interpretation undertaken by the majority, Justice Kennedy’s concurrence in *Rasul* took a straightforward, common-law approach. He simply distinguished *Rasul* from *Eisentrager* by examining each of what he took to be the half-dozen important factual aspects of *Eisentrager* and concluding that too few of them were also present in *Rasul* for the *Eisentrager* outcome to apply to *Rasul*:

The facts here are distinguishable from those in *Eisentrager* in two critical ways First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. . . .

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status.²¹⁹

As Justice Scalia’s dissent notes, the Court’s pragmatic emphasis on “complete jurisdiction and control” raises some questions as to how far such areas might extend:

²¹⁷ Restatement (Third) of Foreign Relations, § 201 (1987) (emphasis added).

²¹⁸ Id. § 203 (emphasis added).

²¹⁹ *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring in the judgment).

The Court does not explain how “complete jurisdiction and control” without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since “jurisdiction and control” obtained through a lease is no different in effect from “jurisdiction and control” acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if “jurisdiction and control” rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisen-trager* detainees.²²⁰

Holding aside the fact that the Court holds only that habeas jurisdiction extends to the relevant area, rather than “our domestic laws” in their entirety, Justice Scalia makes a point that the Court does not address quite as directly as one hopes: What exactly makes Guantanamo Bay, but not the rest of the planet where the United States exercises some physical control, part of the territorial jurisdiction of the United States?²²¹ Justice Kennedy’s concurrence addresses the point with an emphasis on pragmatism and practicality:

Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. . . . [T]his lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the “implied protection” of the United States to it.²²²

²²⁰ *Id.* at 2708 (Scalia, J., dissenting).

²²¹ For an argument that foreign locations housing detainees under U.S. control should be subject to limited federal habeas review showing significant deference to initial determinations made by military tribunals, see David A. Martin, *Offshore Detainees and the Role of Courts after Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. Third World L.J. 125 (2005).

²²² *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring in the judgment) (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 777–78 (1950)).

Although one might be hard pressed to distill from this series of observations a precise formula, Guantanamo Bay does on these criteria seem to be quite a different place from, for example, Iraq. The latter is close to hostilities, not “far removed”; U.S. jurisdiction and control in Iraq is as of this writing neither complete nor unchallenged; far from planning to stay there indefinitely, one gets the impression that the United States will leave as soon as practically possible, if not sooner; and U.S. control and jurisdiction over Iraq has not been “long exercised” there.

International law, for its part, readily distinguishes traditional sovereignty from mere occupation even though both involve control, which includes the administration of laws. In fact, one of the Geneva Conventions devotes itself to the legal responsibilities of an occupier, which would hardly be necessary if either every occupier was permanently sovereign over the territory or if the occupier lacked jurisdiction to administer the laws over the occupied territory.

Furthermore, occupation of Iraq and Germany’s Landsberg Prison immediately followed armed invasions displacing entirely the previously sovereign government. The U.S. control over Guantanamo Bay, in contrast, flows from the voluntary surrender by an independent Cuba of only a portion of its powers—although the Guantanamo lease followed by only a few years a U.S. invasion of Cuba that displaced the Spanish government as master of the island. This distinction translates readily into an international legal criterion: Does a valid, voluntary treaty transfer jurisdiction and control from one sovereign state to another?

The “ultimate” sovereignty of the agreements between Cuba and the United States may also represent a temporal, rather than a hierarchical, notion. The United States will be effectively the sovereign of Guantanamo Bay until it surrenders that sovereignty, in which case control will ultimately revert to Cuba. In other words, Guantanamo Bay is not a territory that the United States may consider freely alienable, in contrast to areas over which the United States exercises its core sovereignty. Again, an international legal concept is useful in delineating the borders of U.S. sovereignty in terms of jurisdiction and control, and thus habeas jurisdiction.

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4. Conclusion

The habeas cases well illustrate the strong tendency of the Supreme Court to avoid consideration of international legal issues. In two of the three cases, the Court's focus on purely procedural issues meant that it did not reach the merits—including, among international legal issues, the Geneva Convention. In *Hamdi*, the Court reached the domestic legal merits but used the Geneva Convention and other customary international laws of war only glancingly. In *Rasul*, the Court did not reach the merits but did interpret a treaty and did, in judging the status of Guantanamo Bay, adopt the pragmatic, international legal viewpoint that control is crucial. The Court, however, did so without any direct reference to any international legal materials.

V. SOSA AND THE SQUEEZING OF INTERNATIONAL LAW

A. *The Case and the Supreme Court's Opinion*

*Sosa v. Alvarez-Machain*²²³ serves as continuing proof that Hamlet was correct in including “the law's delay” among life's travails, for *Sosa* was not only the very last case decided by the Supreme Court in its most recent Term, but also a case in which the underlying actions occurred twenty years ago:

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.²²⁴

²²³ *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

²²⁴ *Id.* at 2746.

Acting upon their belief, the DEA officials eventually ordered the abduction of Alvarez from Mexico after a federal grand jury had indicted him in 1990 for torture and murder.

The Supreme Court took its first bite at the *Alvarez* apple in 1992, when the Court reversed the decisions of the courts below, which had held that Alvarez could not be indicted in the United States because the DEA's actions violated domestic and international law.²²⁵ The subsequent trial resulted in Alvarez's acquittal even before he presented his own case. Alvarez returned to Mexico and filed a civil suit in U.S. courts against a variety of defendants on a number of grounds stemming from his cross-border abduction in 1992.

The Supreme Court heard this case in the 2003 Term, and again ruled against Alvarez, on the grounds that the Federal Tort Claims Act ("FTCA") gave the United States sovereign immunity for suits "arising in a foreign country"²²⁶ and that the length of Alvarez's detention in the United States was insufficient to create jurisdiction under the Alien Tort Statute's allowance for cases where "an alien [sues] for a tort only, committed in violation of the law of nations"²²⁷

The FTCA claim was, for the Court, a straightforward matter of statutory interpretation. Generally, the FTCA selectively waives the sovereign immunity of the United States and makes the federal government liable in tort as if it were a private party.²²⁸ There is no waiver, however, for "[a]ny claim arising in a foreign country."²²⁹ Alvarez could only have based his claim on the fact that his arrest and initial detention occurred in Mexico, since, on the facts of this case, the DEA was only authorized to make an arrest within the United States. Since his claim arose in a foreign country and was thus not subject to the waiver of sovereign immunity ordinarily effectuated by the FTCA, Alvarez's civil suit was barred.

In the view of the Court, the Ninth Circuit's analysis included an impermissible gloss upon the crystal clarity of the FTCA. The Court objected to the Ninth Circuit's reliance on the "headquarters

²²⁵ *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

²²⁶ *Sosa*, 124 S. Ct. at 2754.

²²⁷ *Id.* at 2755 n.10, 2765 (citing 28 U.S.C. § 1350 (2000)).

²²⁸ *Id.* at 2747.

²²⁹ *Id.* at 2748 (quoting 28 U.S.C. § 2680(k) (2000)).

doctrine,” which allows a court to focus on the place where the planning for the tortious activity occurred rather than on the place where the injury occurred. The Court devoted significant effort to sanding off the headquarters-exception gloss from FTCA doctrine. The Court noted that the headquarters doctrine was an exception that threatened to swallow the rule: almost any claim against the United States would allow the plaintiff the opportunity to assert with some plausibility that some of the planning or policy at issue originated in the United States.²³⁰ Further, while an assertion of proximate causation with respect to that planning or policymaking may almost always be plausible, the actual necessity is to show a *dominant* chain of causation.²³¹ Additionally, the Court found evidence from legislative history, as well as from the complex interaction of torts and choice-of-law doctrine with the FTCA at the time of its enactment, that Congress used the phrase “arising in” a foreign nation to mean “when the injury occurred in” a foreign land.²³² Changes in choice-of-law doctrine occurring since the FTCA’s enactment may have reduced, but did not render nugatory, the relevance of this historical analysis to the Court.²³³

The Court then moved to consider—and ultimately to dismiss—that portion of Alvarez’s claim derived from the Alien Tort Statute (“ATS”). The ATS is derived from one sentence of the Judiciary Act of 1789 and currently reads: “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.”²³⁴ With respect to whether its import is substantive or jurisdictional, this provision has a somewhat hermaphroditic quality. Since it rests among provisions creating the lower federal courts, the context of the statute is jurisdictional. But a statutory provision setting out a corresponding private right of action for a violation of the law of nations does not exist. If, therefore, the pro-

²³⁰ Id. at 2749.

²³¹ Id. at 2750.

²³² Id. at 2750–52.

²³³ Id. at 2752–54.

²³⁴ 28 U.S.C. § 1350 (2000). The Judiciary Act of 1789 contains the original provision. Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73. See *Sosa*, 124 S. Ct. at 2755.

vision is not to be a nullity—at least as of its enactment—then it must have some substantive content.²³⁵

The Supreme Court made use of the implicit omnipresence of the common law to split the substantive baby while aligning itself superficially with a jurisdiction-only interpretation of the ATS:

[W]e think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject. . . . *Amici* professors of federal jurisdiction and legal history [argue] 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. . . . We think history and practice give the edge to this . . . position.²³⁶

Historically, international law included three categories of rules, according to the Court. There were rules governing interaction among nations, which were the domain of non-judicial actors. There were rules governing exclusively private or commercial interaction among citizens of different nations, which were com-

²³⁵ For a summary of the relevant case law and much of the relevant scholarship, see Jason Jarvis, A New Paradigm for the Alien Tort Statute Under Extraterritoriality and the Universality Principle, 30 *Pepp. L. Rev.* 671, 673–98 (2003). Scholarship on the issue before the Court in *Sosa* is voluminous and diverse. See, e.g., Curtis A. Bradley, The Alien Tort Statute and Article III, 42 *Va. J. Int'l L.* 587, 591 (2002) (“[T]he evidence suggests that the law of nations portion of the Alien Tort Statute was intended simply to implement Article III alienage jurisdiction [that is, a suit involving an alien as plaintiff but not as defendant.]”); Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 *Am. J. Int'l L.* 461, 464, 490–93 (1989) (stating that the ATS is in part “a source of pride, a badge of honor” addressing a broad, positive conception of international law potentially allowing suits concerned with a broad range of international human rights law); Michael G. Collins, The Diversity Theory of the Alien Tort Statute, 42 *Va. J. Int'l L.* 649, 651 (2002) (“I do not read the ATS, as Bradley does, as requiring ‘alienage diversity’ in all cases, [but ATS cases that] would pit one alien against another . . . would likely not have been thought of as arising under federal law.”); William S. Dodge, The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,” 19 *Hastings Int'l & Comp. L. Rev.* 221, 224, 256 (1996) (concluding on the basis of history that the ATS should be available to victims of all torts of the law of nations); Joseph Modeste Sweeney, A Tort Only in Violation of the Law of Nations, 18 *Hastings Int'l & Comp. L. Rev.* 445, 447 (1995) (concluding on the basis of history that the ATS should be available only in prize cases). The Court in *Sosa* manages to navigate with sufficient subtlety to adopt *none* of these positions.

²³⁶ *Sosa*, 124 S. Ct. at 2755 (citation omitted).

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fortably the domain of judicial suit. And there were hybrid rules involving both individuals and nations. Citing Blackstone, the Court noted with respect to this last category:

[T]hree specific offenses against the law of nations [were] addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. . . . It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort.²³⁷

Those minds had, in many instances, passed through the Continental Congress, which had admonished the states to recognize judicial remedies for various violations of the law of nations. Only one state—Connecticut—did so.²³⁸ The Court could find nothing to illuminate the role of the law of nations in federal courts in the debates surrounding either the Constitution or the Judiciary Act of 1789.²³⁹ Congress did criminalize the three specific offenses mentioned by Blackstone, however, and Attorney General William Bradford did state in an official opinion issued in 1795—using the exact language of the ATS, although not mentioning it by name—that aliens injured by Americans plundering a British slave colony in Sierra Leone could obtain a remedy in tort.²⁴⁰ In light of these factors (and a few others not recounted here), the Supreme Court concluded that the ATS was a jurisdictional provision that gave the courts jurisdiction over something:

[T]here 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, some day, authorize the creation or causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners.²⁴¹

²³⁷ Id. at 2756 (citation omitted).

²³⁸ Id. at 2757.

²³⁹ Id. at 2757–58.

²⁴⁰ Id. at 2758–59.

²⁴¹ Id. at 2758.

And what was the something over which the ATS gave courts jurisdiction? The Court's set of enabled claims matched Blackstone's trio—or, at least, included that trio and not much else:

Uppermost in the legislative mind appears to have been offenses against ambassadors; violations of safe conduct were probably understood to be actionable, and individual actions arising out of prize captures and piracy may well have also been contemplated. 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.²⁴²

As the Court noted, Congress had not since changed the ATS or related law in a manner that changes the relevant criteria,²⁴³ nor had courts limited such developments,²⁴⁴ despite the tension between a modern federal common law and the *Erie* doctrine.²⁴⁵ The relevant determination for the Court was therefore historically grounded and, in at least some sense, unchanged since the First Congress:

[C]ourts 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 the 18th-century paradigms we have recognized.²⁴⁶

The Court was leery of granting private rights of action without clear legislative guidance, especially when delicate issues of foreign

²⁴² Id. at 2759 (citations omitted).

²⁴³ Id. at 2761 (“Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute.”); id. at 2765 (“The position we take today has been assumed by some federal courts for 24 years” and “Congress . . . has not only expressed no disagreement with our view of the proper exercise of the judicial power [in light of *Erie* and the development of a federal international common law], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail [citing the Torture Victim Protection Act].”).

²⁴⁴ Id. at 2761 (“We assume . . . that no development in the two centuries from the enactment of § 1350 to the birth of the modern line of cases beginning with *Filartiga v. Pena-Irala*, [630 F.2d 876 (2d. Cir. 1980)], . . . has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law . . .”).

²⁴⁵ Id. at 2762, 2764.

²⁴⁶ Id. at 2761–62.

policy were potentially at stake.²⁴⁷ And while Congress had not pared back its express grant of jurisdiction set against the implicit causes of action available at common law, “Congress as a body has done nothing to promote such suits.”²⁴⁸ Amidst the brambles of legal realism, *Erie*, and legislative ambivalence or indifference, courts had to exercise “great caution in adapting the law of nations to private rights.”²⁴⁹

What of Alvarez’s particular claim that he was the victim of a violation of the law of nations? “[F]ederal 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.”²⁵⁰ Other courts had set forth implicit standards: The action of the perpetrator must make him an enemy of all mankind, or be a violation of “definable, universal and obligatory norms,”²⁵¹ or breach “a norm that is specific, universal, and obligatory.”²⁵² In the future, though not necessary to the resolution of Sosa’s case, courts might also consider the need to exhaust remedies in other domestic legal systems before coming to the United States, or might show deference to case-specific determinations of the executive branch based upon the impact of the case upon U.S. foreign policy.²⁵³

What sources of international law did Alvarez present on behalf of his claim that the United States violated the law of nations in its treatment of him? He argued that he was the victim of an “arbitrary arrest,” and that the Universal Declaration of Human Rights,²⁵⁴ as well as the International Covenant on Civil and Political Rights,²⁵⁵ prohibited such arrests.²⁵⁶ The Declaration is expressly

²⁴⁷ Id. at 2762–63.

²⁴⁸ Id. at 2763.

²⁴⁹ Id. at 2764.

²⁵⁰ Id. at 2765.

²⁵¹ Id. at 2766 (quoting *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring)).

²⁵² Id. (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994) (citations omitted)).

²⁵³ Id. at 2766 n.21.

²⁵⁴ G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71-77, U.N. Doc. A/810 (1948).

²⁵⁵ Dec. 19, 1966, 999 U.N.T.S. 171.

²⁵⁶ Id. at 2767.

an aspirational statement that does not purport to set forth binding law, however, and the Senate gave its advice and consent to the Covenant “on the express understanding that it . . . did not itself create obligations enforceable in the federal courts.”²⁵⁷ Without any authority derived from treaties, Alvarez had to rest his claim on customary international law. The Court allowed for the possibility that prolonged, arbitrary detention might violate customary international norms, but there was no persuasive evidence that any customary norm barred an arrest that, as in Alvarez’s case, resulted in a detention of less than twenty-four hours.²⁵⁸

B. Analysis

Like *Altmann*, *Sosa* is a case in which the Court bends over backwards to avoid interpreting international law, although in *Sosa* the Court does so by engaging in intricate interpretations of the Founders’ collective state of mind rather than that of the Ninety-Fourth Congress. Stared in the face by the plain language of the statute that it is was interpreting—which gives federal courts jurisdiction over those suing in “tort only, committed in violation of the law of nations or a treaty of the United States”—the Court narrowed its conception of the applicable international law at every possible turn. The Court limited its attention to the law of nations (customary international law) rather than to the statute’s joint treatment of the law of nations and treaty law. The Court focused on only a piece of the international legal landscape that the Court said existed at the time of the drafting of the statute (as part of the Judiciary Act of 1789). The Court based its holding on only what it inferred the drafters actually had in mind at the time as violations of the law of nations, even though the drafters used much broader language. The Court, like the circuit courts before it, applied the drafters’ inferred view of particular violations of the law of nations to imply a narrower view of permissible contemporary suits than a typical reading of current customary international law would allow. The Court even avoids discussing that globalist aspect of the ATS that gives the greatest pause to many who encounter the relevant cases for the first time, which is that the statute gives the federal

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 2768–69.

courts jurisdiction over a suit by an alien against another alien based solely on events occurring entirely outside of the United States.

* * *

The Court in *Sosa* first deals with an issue of (domestic) sovereign immunity. The Court limits the applicability of the FTCA in cases involving extraterritorial aspects, but the FTCA issue provides only a limited opportunity to indulge in international legal interpretation—except in the most general sense that any trans-border activities of the United States are international, and thus any law governing such activities affects international relations. Limiting the extraterritorial application of U.S. law should, in a general way, reduce opportunities for friction between nations and show greater respect for foreign sovereigns, as the Court noted in *Empagran*. On *Sosa*'s particular facts, however, one imagines that Mexico will hardly consider the U.S. legal system to have shown laudable respect for its sovereignty by allowing a Mexican national to be kidnapped, tried, and acquitted without the possibility that litigation will force the U.S. officials responsible to pay a financial penalty for their actions.

Once the Court moves from the FTCA claim to the ATS, the Court squarely faces the need to give some meaning to an international legal standard: a suit meeting its jurisdictional prerequisite as a result of the ATS must be “a tort only, committed in violation of the law of nations.” A modern court interpreting a statute still in force might in such a situation discuss the contemporary law of nations. The Court hesitates to do so, however. Instead, it looks back to the Founding—or more precisely, to the legislation and states of mind of the members of the First Congress. Even then, the Court hesitates to rush into substantive international law. Rather, it discerns a congressional intent that the ATS was to be nothing more than a jurisdictional statute creating no causes of action on its own. A literalist court, or a court that sees itself as operating in an age of statutes, would presumably end its examination of the ATS at this point. *Sosa* provides no substantive statute (beyond the FTCA already judged inadequate by the Court) from which to derive a claim. With no FTCA, no cause of action provided by the ATS, and no alternative statute, *Sosa* would presumably be out of luck.

The Court takes a different tack, however. Despite the perception that the Court in recent years has been anti-federalist in interpreting modern law, the Court leans importantly upon the notion that the members of the First Congress had lived through the excessive decentralization resulting from the Continental Congress and the Articles of Confederation, and thus would not be willing to rely solely on the states to conduct themselves in accord with the national interest in foreign policy. The same mistrust of provincialism in the several states that led the First Congress to create diversity jurisdiction presumably applied a fortiori to the states' potential mistreatment of aliens. The First Congress must therefore have intended for the ATS to result in *some* suits in federal court, infers the Court. Long accustomed in its role as constitutional interpreter to filling many a Founding gap, and perhaps preferring the familiarity of a common-law methodology to the uncertainties of inferring customary international law from the complexities of state behavior, the Court then sniffs out from the Founding's ambience a trio of causes of action that stem from a common law of nations, as it were. There, amidst the tea leaves of Blackstone and the Swiss regularities of Vattel, the Court identifies the violation of safe conduct, ambassadorial privilege, and the freedom of navigation as the torts that the members of the First Congress had in mind when enacting the ATS. This divination is impressive international legal analysis in the always-thorny area of customary international law, or more precisely, impressive international legal historiography of the U.S. view of customary international law in the Founding period.

This divination nonetheless shies away from international law in at least two important ways. First, the Court concentrates on the customary "law of nations" set out in the ATS to the utter exclusion of the equally prominent reference to "a treaty of the United States." Second, and more subtly, the Court adopts a relatively narrow, originalist conception of customary international law rather than a broader, internationalist conception that would, in some ways, be at least as defensible as the pathway chosen by the Court. The Court does so partly by taking a narrow rather than broad view of which customary laws within the intra-territorial law of nations are included within the ATS. The Court also does so by more generally limiting its discussion of rules falling within the

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ambit of the ATS to intra-territorial matters rather than also including rules governing extraterritorial and state-to-state activities. Additionally, the Court shies away not only from international legal doctrine but also from what is in some ways the most internationalist, as well as the most counterintuitive, aspect of the ATS as modern courts have read it: the statute allows an alien to sue an alien in U.S. courts based on events occurring entirely outside the United States.

1. Ignoring Treaties

The ATS was originally one sentence in one section of the Judiciary Act of 1789, reading in full:

[The 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 law of nations or a treaty of the United States.²⁵⁹

The phrase, “a treaty of the United States,” is not only of equal prominence with the customary law of the “law of nations” but also of great prominence in the very disputes, occurring early in the history of the Republic, that the Court cites as relevant to determining the scope of the jurisdictional grant relating to the “law of nations.” The resolution of the Continental Congress that unsuccessfully pleaded with the states to allow suits for violation of safe conducts and ambassadorial privilege (though not piracy, the third component of the Court’s trinity) also asked the states to allow suits for “infractions of treaties and conventions to which the United States are a party.”²⁶⁰ The “sparse contemporaneous cases and legal materials referring to the ATS” cited by the Court for the proposition that “some, but few, torts in violation of the law of nations were understood to be within the common law” number exactly three.²⁶¹ Each of them in fact involves an important, and sometimes dispositive, role for treaty law. Their relevance in cabin-ing the relevant customary law of nations is therefore suspect.

²⁵⁹ Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 76–77.

²⁶⁰ *Sosa*, 124 S. Ct. at 2756–57 (quoting Resolution of the Continental Congress (Nov. 23, 1781) in 21 Journals of the Continental Congress 1774-1789, at 1132, 1136–37 (Gaillard Hunt ed., 1912)).

²⁶¹ *Id.* at 2759.

The first of the three sources is *Bolchos v. Darrel*,²⁶² which the Court cites for the proposition that “the District Court’s doubt about admiralty jurisdiction over a suit for damages brought by a French privateer against the mortgagee of a British slave ship was assuaged by assuming that the ATS was a jurisdictional basis for the Court’s action.”²⁶³ The opinion in *Bolchos* seems to support the Court’s reading:

[A]s the original cause arose at sea, every thing dependent on it is triable in the admiralty. . . . If, indeed, I should refuse to take cognizance of the cause, there would be a failure of justice, for the court of common law of the state has already dismissed the cause as belonging to my jurisdiction in the admiralty. Besides, as the 9th section of the judiciary act of congress [i.e., the Judiciary Act of 1789] gives this court concurrent jurisdiction with the state courts and circuit court of the United States where an alien sues for a tort, in violation of the law of nations, or a treaty of the United States, I dismiss all doubt [as to jurisdiction] upon this point.

Bolchos demands restitution of these negroes, by virtue of the 14th article of our treaty with France. . . . But the question of property [created by the treaty] is here of little consequence; for the mortgagor is a Spanish subject, and the mortgagee a subject of Great Britain.

It is certain that the *law of nations* would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the 14th article of the treaty with France alters that law, by stipulating that the property of friends found on board the vessels of an enemy shall be forfeited. Let these negroes, or the money arising from the sale, be delivered to the libellant.²⁶⁴

As the District Court’s opinion makes equally clear, however, the case at hand is about a treaty violation—indeed, as the final paragraph makes clear, the treaty in question *overrides* the customary “law of nations” on the relevant point. A treaty is therefore

²⁶² 3 F. Cas. 810 (D.S.C. 1795) (No. 1607).

²⁶³ *Sosa*, 124 S. Ct. at 2759.

²⁶⁴ *Bolchos*, 3 F. Cas. at 810–11 (emphasis added).

both the basis for jurisdiction *and* the determinant of the outcome. The *Sosa* Court, however, does not mention these factors.

The second of the Court's three sources is another case involving privateers, *Moxon v. The Fanny*.²⁶⁵ While the French Revolutionary Wars raged in Europe, *The Fanny* was set upon and captured in the territorial waters of the non-belligerent United States by the more seditiously monikered *Sans Culotte*. Asserting wrongful capture, the British owners of *The Fanny*, which had been brought to Philadelphia by the French privateer, sued in the District Court of Pennsylvania for the return of their vessel and for damages for the detention. The District Court's opinion is complex, with long discussions of judicial opinions that even it describes as rendered in "antiquity," of the difference between maritime trespass and an in rem action, and of a variety of non-doctrinal justifications and apologies.²⁶⁶ Indeed, the opinion shows that the various concerns on matters of international law faced by the Supreme Court in 2004 are not so very different from those faced by the Pennsylvania district judge in 1793. The court in *Moxon*, for example, spends a good deal of time attempting to work out the proper boundary between the Executive and the judiciary in matters with an impact upon foreign policy (including, reminiscent of *Altmann*, what the view of the United States might be if it had spoken to the issue at hand, in this case by being a party to the litigation). The *Moxon* court also struggles to define the precise contours of the rules of customary international law, such as when a prize is deemed captured, the boundary between territorial waters and the high seas, and the relationship between neutrality and belligerence in prize law.

Of special import to the current topic, the *Moxon* court also spends much more time discussing a treaty as opposed to the ATS, which is discussed in only two sentences later described by the *Sosa* Court as dictum. In *Moxon*, that treaty is the Treaty of Amity and Commerce²⁶⁷ between France and the United States, signed the

²⁶⁵ 17 F. Cas. 942 (D. Pa. 1793) (No. 9895).

²⁶⁶ *Id.* at 947.

²⁶⁷ Treaty of Amity and Commerce, Feb. 6, 1778, U.S.-Fr., art. 19, 8 Stat. 12, 22-23, 7 Bevens 763, 769. Articles 11 and 12 of the original Treaty were suppressed, Bevens at 775-76; the quotation above was cited by the *Moxon* court as Article 17, meaning that the court is presumably citing to the suppressed version. See *Moxon*, 17 F. Cas. at 947.

same day as the Treaty of Alliance between the two countries (the United States' only formal alliance treaty until the North Atlantic Treaty in 1949). Article 19 of the Treaty of Amity and Commerce, cited by the *Moxon* court as Article 17, provides that:

It shall be lawful for the Ships of War of either Party & Privateers freely to carry whithersoever they please the Ships and Goods taken from their Enemies, without being obliged to pay any Duty to the Officers of the Admiralty or any other Judges; nor shall such Prizes be arrested or seized, when they come to and enter the Ports of either Party; nor shall the Searchers or other Officers of those Places search the same or make examination concerning the Lawfulness of such Prizes, but they may hoist Sail at any time and depart and carry their Prizes to the Places express'd in their Commissions²⁶⁸

Given the existence of an agreement between France and the United States that treated privateering and prizes, and given that the case involved Frenchmen bringing a captured ship to a U.S. port, one can certainly imagine that the treaty would be relevant to the Court's disposition of the case. Indeed, if the Supreme Court is correct in calling the ATS-related grounds for dismissing the case mere "dictum," then the Treaty of Amity probably provides the actual holding of the case.

The *Moxon* court dismissed the case, "the plea to the jurisdiction being relevant,"²⁶⁹ after stating that the British parties could effectively only be asking for an impermissible prize court. An alternative action for marine trespass would invariably involve determination of whether *The Fanny* was a prize, and so would merely be another way of attempting to obtain a prize court. Furthermore, as the *Sosa* Court discusses, the *Moxon* court stated that an ATS action could not lie on the facts of the case since the plaintiffs were asking not only for damages from trespass (a tort) but also for return of the vessel itself (restitution or in rem) and thus were not

The Treaty of Alliance between the United States and France was also signed on February 6, and the *Moxon* court actually refers to the treaty of concern as "Treaty of Alliance with France, § 17," *id.*, but the Treaty of Alliance has only thirteen articles. See Treaty of Alliance, Feb. 6, 1778, U.S.-Fr., 8 Stat. 12, 7 Bevens 777-80.

²⁶⁸ Treaty of Amity and Commerce, *supra* note 267, 8 Stat. at 22-23, 7 Bevens at 769.

²⁶⁹ *Moxon*, 17 F. Cas. at 948.

bringing suit “for a tort only,” as required by the ATS. It is Article 19 of the treaty with France that eliminates the option of sitting as a prize court, not any common law of nations. Although the *Sosa* Court cites *Moxon* in its discussion of the customary law of nations, *Moxon* is at least as much a case founded on treaty as on custom.

Both cases cited by the Court in its discussion of the law of nations are therefore primarily about a treaty. So too with the third source cited by the Court in *Sosa*, an opinion by Attorney General William Bradford rendered in 1795 concerning, as the *Sosa* court put it, “whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone.”²⁷⁰ Bradford, in responding to the inquiry, was unsure about criminal prosecution but used the exact wording of the ATS to express his certainty about the availability to Britons of a civil remedy in U.S. courts.²⁷¹ The *Sosa* Court infers:

Although it is conceivable that Bradford . . . assumed that there had been a violation of a treaty that is certainly not obvious, and it appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action.²⁷²

That Bradford assumed a treaty violation is not only conceivable, but plainly true: on the page cited by the Court, Bradford notes that the actions at issue were “in violation of a treaty.”²⁷³ Additionally, as the Court itself quotes, Bradford did not limit his opinion to what might amount to domestic common-law causes of action, but rather told the British that civil jurisdiction lay “where an alien sues for a tort only, in violation of the laws of nations, or of a treaty of the United States.”²⁷⁴

All three of the sources that the Court uses to justify the availability of suits for a breach of the common law of nations are therefore more naturally read as suits about breach of a treaty. This does not mean that the Court’s entire analysis is entirely without

²⁷⁰ *Sosa*, 124 S. Ct. at 2759. One can only imagine trying to resolve *this* case under current choice-of-law principles.

²⁷¹ Breach of Neutrality, 1 Op. Att’y Gen. 57, 59 (1795).

²⁷² *Sosa*, 124 S. Ct. at 2759 (citing 1 Op. Atty. Gen. at 58).

²⁷³ 1 Op. Att’y Gen. at 58.

²⁷⁴ *Sosa*, 124 S. Ct. at 2759 (quoting 1 Op. Att’y Gen. at 59).

merit, of course. The three sources cited by the Court each also involve customary international law, although the common law of nations is typically much less prominent in the substantive discussion of the cited sources, or in the discussion of non-ATS grounds for jurisdiction, than is treaty law. Nonetheless, the Court's case that the customary law of nations is limited by these cases weakens as the prominence of treaty law in the cited sources grows.

The Court may be downplaying the role of treaties for a number of reasons. First, as occurs from time to time in other cases before the Court, the use of a treaty in a cause of action where jurisdiction lies as a result of the ATS raises a potentially difficult question: Does the treaty in question give rise to a private cause of action for its violation? Treaties in the United States are not "self-executing"—a phrase that is generally considered coincident with whether a treaty automatically gives rise to a private right of action—in the absence of a clear indication of self-execution either in the treaty itself or in congressional legislation.²⁷⁵ Sometimes there is not only an absence of indication that a treaty is self-executing but also a plain congressional statement that a treaty does *not* give rise to any private rights of action. When Congress has spoken plainly one way or the other, courts have little difficulty in deciding what to do. Many cases are more difficult, however, and a Court that generally avoids international legal questions will wish as well to avoid the specific question of whether a particular treaty conveys a private right of action.

Furthermore, now treaties, rather than customary international laws, serve as the primary vehicle for international legal cooperation in modern international politics. At the time of the Founding, treaties existed almost entirely to mark the coming of peace after a war, to incorporate vague promises of amity or increased trading, or to serve as the functional equivalent of a real-estate contract in exchanges of territory between sovereigns. Even these treaties were almost always bilateral affairs. In the modern era, treaties have come to the forefront. Trade, arms control, and environmental cooperation are subjects regulated almost entirely in their international legal aspects by complex, multilateral treaties rather

²⁷⁵ *Id.* at 2762–63 (discussing private rights of action arising under international norms).

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than by customary international law. Additionally, many areas once the domain of customary law—diplomatic immunity, the law of the sea, and the procedural rules governing the status of treaties themselves—are now the subjects of treaties codifying those customary rules. A Court that wishes to stick to traditional subjects of international law, narrowly considered, would do well to push treaties to the background wherever possible.

Additionally, the fact that Bradford is sure that civil suits are available for a cause of action, but not sure that a criminal action is available, undercuts the Court's inference that the criminalization in England of only its favored trinity of activities means also that those activities were only what the members of the First Congress had in mind when enacting the Judiciary Act of 1789. If the Court were correct in its drawing of equivalencies, then every fact pattern giving rise to a civil suit under the ATS should plainly be criminal as well.

Furthermore, the *Moxon* case is to a significant extent a case neither about a treaty nor about piracy (and obviously not about safe conduct or ambassadorial privilege); it is potentially, and thus for jurisdictional purposes must be at least in part analyzed as, a case about a prize lawfully captured in the course of a war. Prize law, as opposed to piracy, is not among the Court's three favored common laws of nations at all. The Court instead places prize law among the "law merchant,"²⁷⁶ which did not "threaten[] serious consequences in international affairs."²⁷⁷ As *Moxon* shows, however, prize law can in fact threaten such consequences in international affairs. The *Moxon* court was loathe to intrude into the important executive sphere of general sovereignty and notes that the activities of the French privateer could under certain circumstances in fact be a legitimate cause of war between France and the United States.²⁷⁸ *Bolchos* is likewise a case about prize law, not just piracy. The gravamen of the British dissatisfaction discussed in the Bradford

²⁷⁶ *Id.* at 2756.

²⁷⁷ *Id.*

²⁷⁸ *Moxon*, 17 F. Cas. at 946 ("If th[e] demand for restitution [for a captured ship] is refused, [the neutral sovereign] may obtain what he requires, by reprisals or war—modes of redress far beyond the reach of judiciary tribunals."); see also *id.* at 943 (describing arguments of party that "[i]f the property is not restored . . . it is a cause of war, as it also is if neutral territory is invaded by the [privateer]").

opinion was that “certain American citizens . . . voluntarily joined, conducted, aided, and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast,” which at least on its face does not sound like piracy—an activity, after all, that more commonly occurs on the high seas than on dry land.²⁷⁹

2. Narrowly Interpreting “the Law of Nations”

The Court’s interpretation of “the law of nations” is a surprisingly narrow one for a Court that favors giving effect to unambiguous statutory language. The ATS does not, after all, state that jurisdiction lies “for a tort only, committed in violation of the laws of ambassadorial privilege, safe conduct, and freedom from piracy.” The ATS states that jurisdiction lies for torts committed “in violation of the law of nations,” a much broader phrase even if, as discussed momentarily, the Court limits the “law of nations” to one of the three kinds of international law that the Court identifies as extant at the Founding. The Court is therefore rather stingy with its statutory interpretation right from the start. This is perhaps especially surprising in light of the fact that the Court gives the First Congress a good deal of credit for understanding the subtleties of then-extant international law, and for enshrining that understanding in an intertwined set of statutes, yet does not judge the First Congress to have meant to allow a broad set of laws giving rise to jurisdiction when the First Congress chose a broad term to describe those laws.

Additionally, the Court chooses to read the phrase “the law of nations” as including only one of the three types of international law that the Court identifies as extant at the time of the Founding. The Court begins its discussion of the law of nations by quoting *Ware v. Hylton*: “‘When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.’”²⁸⁰ One part of that law of nations involved “the general norms governing the behavior of national states with each other,” and, in the *Sosa* Court’s view, “occupied

²⁷⁹ 1 Op. Att’y Gen. at 58.

²⁸⁰ Id. at 2755 (quoting *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J.)).

the executive and legislative domains, not the judicial.”²⁸¹ Another part of the law of nations was “more pedestrian” and “did fall within the judicial sphere . . . regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor.”²⁸² The Court cites the law merchant, as well as “the status of coast fishing vessels in wartime.”²⁸³ Third, there was “a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships,”²⁸⁴ including most prominently Blackstone’s trio mentioned above. According to the *Sosa* Court, “[i]t was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on [the] minds of the men who drafted the ATS with its reference to tort.”²⁸⁵

This last conclusion—that the law of nations had multiple parts, but that the ATS includes only the last-mentioned, narrow set of violations—is something of a leap. Certainly, it is a leap that results in the narrowest possible interpretation of the law of nations, whether compared to the broadest interpretation, which would include all three categories of the law of nations within the ambit of the ATS, or an interpretation of intermediate breadth, which would include both the law-merchant category and the Blackstone’s trio. Including both the law merchant and Blackstone’s trio, in particular, would involve only matters within the judicial domain. One might also note that the Court’s particular law-merchant example of the status of fishing vessels in wartime seems quite close to the issues in *Moxon*, with its privateers and merchantmen in neutral waters during wartime, and the *Sosa* Court cites *Moxon* as an example of a case where the ATS is relevant.

A more general point is that the First Congress chose the general phrase “law of nations,” which the *Sosa* Court itself says covers much more than the trio of violations that the Court concludes the drafters of the First Judiciary Act had in mind when they

²⁸¹ Id. at 2756.

²⁸² Id.

²⁸³ Id.

²⁸⁴ Id.

²⁸⁵ Id.

drafted the statute. Perhaps they had only these violations in mind, but they wrote a much broader phrase with their pens.

The narrowness of the Court's reading of "the law of nations" affects the Court's definition of currently viable claims under the ATS as well. The Court moves from its historical understanding of what Congress had in mind in the eighteenth century to a contemporary definition of viable claims as those that "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the eighteenth century paradigms we have recognized."²⁸⁶ To those familiar with international legal standards, the vagueness of this standard flows not only from the Court's use of the word "comparable" without much clear prior discussion of how to make the relevant comparison, but also from the divergence of the first portion of the Court's standard from the canonical contemporary formulation of what constitutes customary international law. The Court seeks a "norm of international character accepted by the civilized world." Modern international lawyers, abandoning the implicit Eurocentrism of "civilized world" and more generally building on traditional notions of customary law, would likely advance a definition of the law of nations much like that of the *Restatement (Third) of Foreign Relations*: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."²⁸⁷ The Court's definition appears neither plainly the same as, nor plainly intended to be different from, the canonical definition. The result is unnecessary ambiguity. Furthermore, the Court's definition is in turn different from various (non-canonical) definitions used by other courts in determining what constitutes the

²⁸⁶ Id. at 2761–62; see id. at 2765 ("[F]ederal 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.").

²⁸⁷ Restatement (Third) of Foreign Relations Law of the United States § 102(2) (1987); see also Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 stat. 1055, 1060, 3 Bevens 1153, 1187 (defining law of nations as "international custom, as evidence of a general [state] practice accepted as law"). For a discussion of customary law that emphasizes the drawbacks of the concept as a whole, and thus of *any* definition of it, see John K. Setear, Treaties, Custom, Iteration, and Public Choice, 5 Chi. J. Int'l L. 715, 718–22 (2005).

“law of nations” for purposes of the ATS.²⁸⁸ Federal courts might instead have taken advantage of the canonical definition of customary law to adopt as a standard phrasing in the relevant test. Alternatively, if a court consciously wished to adopt a different test, then a court might at least use the canonical definition as the backdrop against which to illuminate the distinctiveness of its own test.

3. The Silence of the Court on the Apparent Reach of the ATS

The Alien Tort Statute unsurprisingly involves the eponymous non-citizens in some fashion. An alien plaintiff is obviously within the contemplation of the statute, since the original phrasing covered “causes where an alien sues for a tort.”²⁸⁹ The statute makes no further reference to aliens or citizens, nor any reference at all to the location where the cause of action may or must arise. Many find it surprising that lower federal courts have allowed claims under the ATS to proceed where not only are both plaintiff and defendant aliens but also where the cause of action arose overseas. Indeed, the paradigmatic ATS case, *Filartiga v. Pena-Irala*, presented just such an all-alien constellation of plaintiff, defendant, and place of tort.²⁹⁰ Obtaining personal jurisdiction can be a challenge to the plaintiffs in such a situation, as can reaching the defendant’s assets in the event of a successful verdict; a claim on the part of the defendant of *forum non conveniens* or of the plaintiff’s failure to exhaust his remedies in his home court may prevent the case from reaching its conclusion in a U.S. court as well. Nonetheless, a plaintiff may satisfy the requirements of subject-matter jurisdiction under the ATS regardless of the nationality of the defendant or the location of the tort.

Indeed, *Sosa* itself fits this pattern. *Sosa* is a Mexican national; Alvarez-Machain is a Mexican national; and the event that gave

²⁸⁸ For a summary of the various standards and an argument in favor of a relatively unrestrictive test, see Joshua Ratner, *Back to the Future: Why a Return to the Approach of the Filartiga Court Is Essential To Preserve the Legitimacy and Potential of the Alien Tort Claims Act*, 35 Colum. J.L. & Soc. Probs. 83 (2002).

²⁸⁹ Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 73, 77. The modern version similarly refers to “any civil action by an alien.” 28 U.S.C. § 1350.

²⁹⁰ 630 F.2d 876 (2d Cir. 1980). The plaintiff and defendant were Paraguayan nationals; the tort in question was torture conducted in Paraguay. *Id.* at 878. The *Sosa* Court calls this case “the birth of the modern line of cases.” *Sosa*, 124 S. Ct. at 2761.

rise to Alvarez's lawsuit was his abduction by Sosa in Mexico.²⁹¹ Indeed, the Court expressly stated that Alvarez's "claim does not rest on the cross-border feature of his abduction"²⁹² but only on what happened in Mexico itself. The Court rejects the claim that the arbitrary arrest and detention of Alvarez in Mexico violated a norm of the law of nations possessing sufficient clarity and breadth of adherence to satisfy the requirements of the ATS.

The Court thereby appears implicitly to validate the all-alien constellation of plaintiff, defendant, and place of occurrence. Certainly if the all-alien constellation gave rise to jurisdictional problems, the Court should have addressed the issue. Given the Court's extensive mining of the historical record surrounding the statute, it is also implausible that the Court simply forgot to address any substantive or interpretive issues stemming from the minimal connection between Alvarez's claim against Sosa, on the one hand, and the citizens or territory of the United States, on the other. The Court's actual discussion of the historical background focuses on events that arise on U.S. soil as a result of the actions of U.S. citizens, but nowhere does the Court hint that such a constellation of factors is relevant to its analysis.

One might also note that, in two cases decided in the same Term as *Sosa*, the Court extensively analyzed the dangers of allowing actions to go forward when their factual predicate occurs on foreign soil, and concluded that the doctrine facilitating such actions was invalid. The notion that the Court ignored this difficulty out of mere negligence is therefore additionally implausible. One case conducting such an analysis was *Empagran*. The other, of course, was *Sosa v. Alvarez-Machain*. The FTCA analysis undertaken in the *first* half of *Sosa* laments exactly the situation that the *second* half of the case allows to occur. Indeed, the second half of the case not only involves occurrences on foreign soil but also a foreign defendant, in contrast to that all-American defendant in the FTCA portion of the case, the United States itself.

²⁹¹ *Sosa*, 124 S. Ct. at 2746.

²⁹² *Id.* at 2767; see also *id.* at 2768 n.24 (rejecting Alvarez's attempt to raise issue of cross-border abduction by incorporating by reference arguments he made before the Court of Appeals).

C. Conclusion

The Court in *Sosa* demonstrates its aversion to international law in a number of ways. It ignores the role of treaties in the ATS scheme. It also distorts the prominence of treaties in the early history of the ATS by implying that cases and opinion letters were only about the law of nations when in fact the cases and opinion letters were as much about treaties as about custom. The Court repeatedly takes the narrowest possible view of the phrase, “the law of nations,” as interpreted for purposes of the ATS. The Court pares away two out of three categories of the law of nations from the beginning, including a category that the Court elsewhere describes as within the judicial domain, and then takes three specific examples of law from the remaining category without acknowledging the breadth of the phrase actually chosen by the drafters of the Judiciary Act of 1789. Finally, the Court simultaneously ignores but validates what is in some ways the most surprising aspect of the ATS as currently interpreted, which is that it allows an alien to sue an alien in U.S. courts for a tort committed outside of the United States. (This last phenomenon is not so much an aversion to international law, however, as it is an unwillingness to face the potential breadth of the ATS in international relations while, in the same case, narrowing the ATS in domestic law by narrowing the scope of the applicable international law as much as possible.)

VI. WHY DID THE COURT AVOID INTERNATIONAL LAW?

The forest of “international law” cases in the 2003 Term of the Supreme Court proves not to have much in the way of trees actually applying international law to particular situations. In *Altmann*, the Court avoids passing on the definition of takings of property “in violation of international law,” and it avoids as well a criterion for deciding the case—that Austria would not have granted sovereign immunity to the United States in a reciprocal situation at the time in question—that would require international legal analysis. In *Empagran*, the Court advances only a non-rule and protects from U.S. antitrust laws only the tiniest corner of foreign sovereignty. In *Olympic Airways*, the Court—aided by a precedent that did undertake a great deal of international legal analysis—stuck to the traditional judicial knitting of following precedents, reading

dictionaries, and generating hypotheticals. In *Padilla*, the Court's purely procedural resolution of the case eschews substantive analysis, including international legal analysis, altogether. In *Hamdi*, the plurality opinion employs the customary law of war, including the Geneva Convention, in its evaluation of what length of detention for prisoners of war is permissible. The plurality opinion likewise refers to military procedures that appear to satisfy the Geneva Convention, but the procedures are incorporated by U.S. statute into military law, and the plurality does not state that satisfying the Geneva Convention would otherwise have any weight. (The concurrence in *Hamdi*, however, does employ the Geneva Convention.) In *Rasul*, the Court's purely procedural approach to the case again renders the Geneva Convention irrelevant, but the Court does decide an international legal issue—sovereignty—as an important part of the opinion. The Court does so without reference to international legal doctrine, however, even if its holding is consistent with the modern, control-oriented view of sovereignty in international law. In *Sosa*, the Court repeatedly takes the more constricted view of international law in deciding what the Judiciary Act of 1789 means by “the law of nations,” whether that constriction occurs by ignoring treaties or by interpreting narrowly the statute's use of “the law of nations”—as only part of what “the law of nations” meant at the time more generally, as only part of those norms governing both nations and individuals, and as only what the drafters actually had in mind at the time in terms of particular causes of action rather than what “the law of nations” might have meant to them.

The bulk of this Article is dedicated to establishing the proposition that the Court repeatedly avoids considering relevant international law rather than to asking why the Court does so. Nonetheless, inquiring minds will want to know: What is the Supreme Court's problem with international law? This Article now considers, but disposes, in turn, of a number of related answers before settling on the unportentious conclusion that international law makes the Court uncomfortable.

Several potential explanations for the Court's aversion to international law flow from the kerfuffle surrounding the Court's scattered citations to foreign and international law in plainly domestic cases in 2002 and 2003. What the Court did in those earlier terms

was to cite a few scattered international legal opinions in the course of assaying such nebulous concepts as the “values we share with a wider civilization,”²⁹³ or whether “one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action.”²⁹⁴ Scattered pundits and legislators, however, reacted as if the Court had mulled mandating political union with Myanmar, or even France. The media, therefore, almost certainly would have drawn significant attention to any weight given to international law in the Court’s 2003 Term. If the Court does not like all of this media attention, this argument runs, then the Court might downplay international law out of its aversion to the hot glare of publicity. Perhaps the Court might especially desire not to fan any fires that might lead to the passage of the Reaffirmation of American Independence Resolution²⁹⁵ and then embroil the Court in passing on the resolution’s constitutionality.

This sort of pyrophobic explanation does not, if you will, hold water. First, the Court does not shy from confronting a huge range of politically controversial issues every Term. The Court has entangled itself repeatedly in recent years in cases about abortion, affirmative action, assisted suicide, capital punishment, homosexuality, punitive damages, racial prejudice in jury instructions, religious instruction, and three-strikes laws. Second, the attention paid to international law recently may be a great deal more intense than attention paid to international law a decade ago, but, in the broad scheme of things, domestic issues like those just listed seem likely to dominate the public impression of the Court even in comparison to the ever-momentous consequences of globalization. Indeed, one need only whisper three little words—*Bush v. Gore*²⁹⁶—to remind oneself that domestic issues can bring the Court more public attention in a week than the Court seems likely to garner from a lifetime of decisionmaking about international law.²⁹⁷ Third, a minimally

²⁹³ *Lawrence v. Texas*, 539 U.S. 558, 576 (2003).

²⁹⁴ *Grutter v. Bollinger*, 539 U.S. 306, 346 (2003) (Ginsburg, J., concurring). The author does not, by this quotation, endorse the use of “sunset” as a verb.

²⁹⁵ See *supra* notes 14–15 and accompanying text.

²⁹⁶ 531 U.S. 98 (2000).

²⁹⁷ I am not arguing that the Court relishes the attention.

foresighted Court would know that the media was likely to focus public attention on the Court's decisions in the "international law" cases *whatever* the Court actually did.²⁹⁸ Given the Court's willingness to confront politically sensitive issues time and again, the minimal relative prominence of international legal issues, and the media's mulline predictability in covering the issue, it is implausible to assert that the Court avoided the consideration of international law in the 2003 Term because it was afraid of public attention.

A related, more narrowly political version of the publicity-phobic rationale would explain the Court's aversion to international law as a desire to avoid unwanted attention from either the executive branch or from Congress. Such a rationale does not hold water, either. The President does have a great deal of power in foreign affairs²⁹⁹ but certainly this does not seem to be a Court afraid of presidential reaction. Indeed, the cases that are the focus of this Article themselves demonstrate that the Court was unusually unafraid, or at least undeferential towards, the President in its last Term. Despite a long tradition of judicial supineness in the face of executive requests for deference grounded in national security or

²⁹⁸ Such a minimally foresighted Court would in retrospect have been correct. NPR aired a piece just after the end of this most recent Term on "the accelerating use of foreign and international law in high court decisions." Supreme Court Increasing Use of References to Foreign Law in Decisions (NPR Morning Edition, July 13, 2004). The pages of the *Harvard Law Review*, which is not part of the media as typically conceived but which nonetheless reflects from time to time a certain conventional wisdom, recently included a similar observation: "[M]ore than ever before, there is a growing acceptance of foreign influence in constitutional justice, particularly with regard to human rights." Ruti Teitel, Comparative Constitutional Law in a Global Age, 117 *Harv. L. Rev.* 2570, 2572 (2004) (reviewing *Comparative Constitutionalism: Cases and Materials* (Norman Dorsen et al. eds., 2003)).

²⁹⁹ For a description of the President's expansive powers over the approval of treaties (and of the Court's contribution to that power), see John K. Setear, *The President's Rational Choice of a Treaty's Preratification Pathway: Article II, Congressional-Executive Agreement, or Executive Agreement?*, 31 *J. Legal Stud.* S5, S5-S8, S33-S37 (2002). For an analysis of a policy arena in which a series of presidents have been able to turn aside the attentions of those seeking to use international politics, domestic legislation, and domestic litigation to influence the President's foreign-policy decisions, see John K. Setear, *Can Legalization Last?: Whaling and the Durability of National (Executive) Discretion*, 44 *Va. J. Int'l L.* 711, 738-55 (2004). But cf. Setear, *supra* note 287, at 724, 729-30, 735-36 (arguing that with respect to choice between customary law and treaty law, presidents have not chosen customary law despite incentives and abilities to do so).

even merely foreign policy,³⁰⁰ the Court handed the Executive a clear defeat both in *Rasul*, by refusing to consider Guantanamo Bay to be an extraterritorial enclave, and in *Hamdi*, by requiring at least some process for some detainees.³⁰¹ The Court in *Altmann* pointedly mentioned that its decision was based purely on the inferred wishes of the legislature, not on the expressed wishes of the Executive. The Court's opinion in *Sosa* certainly leaves open the door to innumerable headaches for the State Department as various ATS suits, including those suing U.S. corporations operating in states alleged to be human-rights violators, wend their way through the lower courts amidst the mists of *Sosa*. The executive branch's victory in *Padilla* was clear but purely procedural. To be sure, presidential power in foreign policy remains quite significant, but the Court's willingness in the cases discussed in this Article to limit that presidential power is quite inconsistent with explaining the Court's hesitancy to apply international law as a reflection of the Court's general hesitancy to confront the Executive.

As to the Court's fear of the legislative branch, the opinions of the Court that are the focus of this Article show significant deference to Congress. Indeed, a profound desire to engage in interpreting properly the output of Congress is the single thickest strand running through *Altmann*, *Padilla*, *Hamdi*, *Rasul*, and *Sosa*. The Court engages in statutory interpretation in every case. It frequently prefers such a methodology over other, often-handier strategies for resolving the case before it. Nonetheless, in many cases, this methodology often pays only indirect homage to the *current* Congress. *Altmann* involved a statute authored in the 1970s,

³⁰⁰ See, e.g., *Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979) (refusing to resolve whether the President may “unmake” a treaty without Senate participation); *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing wartime internment of U.S. citizens based on national ancestry); see also *Schenk v. United States*, 249 U.S. 47, 52 (1919) (stating, where violation of a statute is involved, that “clear and present danger” of insubordination in wartime justifies jailing an individual for political speech).

³⁰¹ The “some” process in question, although of unclear contours at the moment, appears in an important way to have been enough process, as the government has recently announced that it will release Hamdi and fly him to Saudi Arabia, the land where he was raised though not born, without ever having charged him. See Jerry Markon, U.S. to Free Hamdi, Send Him Home, *Wash. Post*, Sept. 23, 2004, at A1. It is also possible that the executive branch concluded, independently of the Court's judgment and opinion, that it had obtained all the information from Hamdi that it could expect to obtain.

while *Sosa*, of course, addressed a statute enacted in the 1780s. Additionally, statutory interpretation is the province of courts—at least those operating in good faith—only when Congress has failed to cover clearly the situation at hand.

The most direct congressional threat to the Court, of course, would appear to be the House Reaffirmation of American Independence Resolution discussed in the Introduction to this Article. Rumors of its life, however, may have been exaggerated. Although the resolution was voted out of subcommittee, Congress adjourned at the end of 2005 without taking any action on it (and thus the resolution died). Perhaps more importantly, the Resolution, styled as a House Resolution, would have been without binding force of law even if it had passed by a vote of the full House; in fact, as a House Resolution rather than a Joint or Concurrent Resolution, the Reaffirmation of American Independence Resolution would not have even expressed the sense of the Senate on the same issue.³⁰² Finally, lurking in the background of any struggle between Congress and the Court on the Resolution is the fact that the Court itself would ultimately determine whether the legislation unduly impinged on the constitutionally mandated separation of powers among branches.

Another difficulty with the public-phobic explanation stems from the important differences between the relevance of foreign and international law in cases addressing traditionally domestic issues in the 2002 and 2003 Terms and the relevance of such law to the seven cases discussed at length here. In those earlier terms, a review of foreign and international law served only as a low-angle illumination of U.S. constitutional law. In the 2003 Term, however, the cases *directly* raised issues of international law. If the Court were to have avoided the use of international legal sources in cases where those sources were only peripherally relevant, then one *might* imagine that the Court had undertaken a sensible calcula-

³⁰² H.R. Res. 568, 108th Cong. (2004); see Congressional Quarterly, *The Legislative Process*, in 1 *Guide to Congress* 469, 479 (5th ed. 2000) (“[S]imple resolutions . . . are designated as H Res or S Res . . . [and] deal[] with matters entirely within the prerogative of one house of Congress, such as . . . expressing the opinion of that house on a current issue, and is acted on only by that chamber. A simple resolution . . . does not require action by the president. Like a concurrent resolution, it does not have the force of law.”).

tion: for a small benefit in the 2002 and 2003 Terms, we cited international legal sources and there was a significant cost in terms of public controversy, so this Term we will refrain from such citations. In the cases under analysis here, however, a similar calculation and outcome implies something akin to a dereliction of duty: Given the public controversy over our use of international law when it was only indirectly relevant, we will ignore such laws even though they bear directly upon our cases. One might accuse the Court of cold feet, which would be a fair characterization of the former calculation, but this Article is unwilling to accuse the Court of cowardice, which would be a fair characterization of the latter calculation.

Why, then, did the Court display such an aversion to international law in the 2003 Term? This Article's answer emphasizes discomfort, not fear. The Court does not routinely wrestle with international legal issues. International law is not only substantively different from U.S. law but also brings in its train a different (and discomfiting) system of interpretation. Congress and the courts provided the Supreme Court with domestic legal pathways better-trodden than the thickets of international law. Additionally, a reliance on more traditional, more domestically oriented sources of law may provide the Court with greater flexibility in the future—and, to the degree that the Court is a politically conservative institution and international law is politically liberal, with a more ideologically amenable source of legal outcomes. The Court, in short, took the less laborious path from its own perspective, even if those steeped in international law might well wish to guide the Court down what seems to them to be the more natural course.

This Article does not attempt to measure trends in the types of substantive law before the Supreme Court. Nonetheless, it seems safe to say that the Court does not routinely address issues of international law. (If it did, then there would have been little of which to take note, after all.) One might take the ATS as an example. The Judiciary Act of 1789 enacted the relevant provision, which persisted almost without change until 2004. The Court took 215 years to get around to it. Perhaps the relevant measure, given the dormancy of the ATS during the time between John Marshall's and Thurgood Marshall's service on the Court, should actually be from the *Filartiga* decision in 1980, which resuscitated the ATS, until 2004. That is still a span of nearly a quarter of a century, how-

ever. Furthermore, international legal interpretation is a different kettle of fish from domestic legal interpretation. Indeed, the frequently asked question, “Is international law really ‘law?’” implies that there may not even be a kettle. Enforcement of international law does not occur through a centralized governmental body with a monopoly on the legitimate use of proactive, coercive power. While international courts are growing in number and breadth of jurisdiction, it would be absurd to compare the network of international legal courts to the state-federal system of the United States in volume, tradition, or aggregate sophistication of legal opinions. The International Court of Justice has jurisdiction only with the consent of the states-parties and does not even issue opinions that possess formal precedential value.

Specific interpretive endeavors not only occur against this dramatically different general backdrop, but also are distinct from domestic legal interpretation on a smaller scale. Treaty interpretation bears a good deal of superficial resemblance to the interpretation of statutes (and perhaps of contracts as well). There are nonetheless important differences.³⁰³ The relevance of the analog to legislative history—the so-called *travaux préparatoires*—is uncontroversial; the subsequent conduct of the parties is frequently an important guide to interpretation and the existence of an authoritative text in a variety of languages can be relevant.³⁰⁴ Potential prin-

³⁰³ For an argument that courts using traditional domestic-law principles of interpretation improperly reach results different from those that would obtain by using international legal principles of interpretation, see Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 *Va. J. Int'l L.* 431 (2004). For an argument that the complex interaction of domestic legal and political concerns with international legal principles can lead U.S. actors to make a hash of treaty interpretation, see John Norton Moore, *Treaty Interpretation, The Constitution and the Rule of Law*, 42 *Va. J. Int'l L.* 163 (2001).

³⁰⁴ See *Air France v. Saks*, 470 U.S. 392, 396 (1985) (“[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.”) (alterations in original; internal citations omitted); *id.* at 399–400 (examining meaning in French of term “accident”). One commentator has suggested paying attention not merely to subsequent conduct between nations regarding a particular treaty, but also to whether a given treaty exists as part of their ongoing political dynamic regarding the subject matter of the treaty. See Jared Wesel, Note, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties vs. Dynamic Obligations*, 60 *N.Y.U. Ann. Surv. Am. L.* 149 (2004).

ciples of interpretation abound.³⁰⁵ A party may even be obliged to refrain from defeating the “object and purpose” of a treaty but not be obliged to comply with any of its individual terms.³⁰⁶ The interpreter of treaties can hardly resort simply to the “plain meaning” of the text.

The interpretation of customary international law, a task that constituted a significant share of the international legal work before the Court in its previous Term, is especially emblematic of international law as a distinct enterprise from domestic law. Customary law, which is not even written down, depends instead upon the long-standing practice of the independent states of the world, so long as that practice is motivated significantly by “*opinio juris*,” the idea that a state behaves as it does not merely out of convenience but also out of a sense of legal obligation. As with almost all international law, a state must consent to its subjection to a rule. Given the importance of both consent and behavior to customary law, *one* state’s behavior with respect to a given rule of customary international law may plausibly be characterized as violation or dissent or even innovation. The difficulties of interpreting customary law make even the challenges of interpreting treaty law seem relatively unproblematic.³⁰⁷

Another potential, essentially methodological, difficulty with international law may be the perception that its supposedly external nature strips the Court, and the federal government more generally, of the opportunity to redress any mistakes made in its interpretation. In statutory interpretation, for example, the Court is forever stating that Congress may correct any mistakes made by the Court. Even constitutional determinations may be subject to an implicit, extended dialogue between various components of the polity, as the Court’s extensive examinations of “consensus” in its

³⁰⁵ See Ian Brownlie, *Principles of Public International Law* 602, 604 (6th ed. 2003) (setting forth “ordinary meaning” principles of integration, contemporaneity, special words, *expressio unius est exclusio alterius*, restrictive interpretation, effective interpretation, and teleological interpretation).

³⁰⁶ See John K. Setear, *Law in the Service of Politics: Moving Neo-Liberal Institutionalism from Metaphor to Theory by Using the International Treaty Process to Define “Iteration,”* 37 *Va. J. Int’l L.* 641, 678–79 (1997) (discussing obligations of signatories to treaty before treaty enters into force).

³⁰⁷ See Setear, *supra* note 287, at 718–19.

death-penalty cases imply. International law appears to flow from a source outside the democratic dialogue.

The force of such an argument is easy to overstate, however. International law is nothing if not consent-based. The relevant consent is that of the nation-state. The United States, by way of the President and the Senate under the Constitution's Treaty Clause,³⁰⁸ consented to the Warsaw Convention at issue in *Olympic Airways* and to the Geneva Convention potentially at issue in *Hamdi, Rasul*, and *Padilla*; the United States, by way mostly of the President, may opt out of almost all the customary law at issue in *Sosa*; and the "international" legal rules at issue in *Empagran* and *Altmann* were in their details purely creatures of U.S. statutory law. If the Court fears that its own enthusiasm for international law might lead to a loss of the country's control over its own destiny, then the Court is overly anxious.

Note, however, that a Court that fears the loss of its *own* power to shape the laws of the United States might more rationally be anxious about international law. Even with the limitations placed by the Court on the executive branch's judgments about sovereign immunity or the detention of suspected terrorists, the Executive will continue to have primary responsibility for the formulation of the international law binding the United States, especially with respect to customary law. This is a bed that the Court itself has made with a long line of cases giving the executive branch extraordinary freedom to conduct foreign policy free of constitutional restraints, but the Court may still be averse to sleeping there.

When the Supreme Court could avoid international legal interpretation in favor of the much more familiar ground of statutory interpretation, one should not be so surprised that the Court did. The Court was *not* afraid to make decisions, or to challenge presidential prerogatives, or to take on thorny questions of originalism. The Court was simply uncomfortable with international law.

One might also note that, in all of the "international law" cases before the Court this past Term, the Court in fact *had* a statute before it to interpret. The eagerness of legislatures to make legislation may have served as an important inspiration for the Founders' system of checks and balances, but the modern Congress has in fact

³⁰⁸ U.S. Const. art. II, § 2, cl. 2.

spoken on a wide variety of issues on which the Congress of earlier centuries had not. Sovereign immunity is now a statutory matter, not a matter of either purely international law or executive grace. Habeas corpus has a jurisdictional statute (with a thick layer of judicial interpretation). Even *Sosa* was a case about statutory interpretation, albeit an interpretation that turned crucially on what its drafters meant by the “law of nations.” In addition to a legislatively generated infrastructure of interpretation, of course, the Court also operates with the support of a dense web of its own precedent and with the benefit of a wide variety of lower-court opinions.

Furthermore, the Court did not demonstrate active hostility towards international law so much as aversion. The Court did not go out of its way to grasp international legal nettles only to fling them back into the ocean. In *Sosa*, for example, the Court did *not* state that the ATS was a jurisdictional statute without any corresponding causes of action, even though Congress had not explicitly provided any statutory guidance, in that statute or anywhere else, as to what torts in violation of the law of nations existed in the eighteenth century. Nor did the Court say that *Erie*’s prohibition of “general federal common law” rendered the ATS nugatory. Prominent legal scholars have discussed both of these positions,³⁰⁹ but the Court did not adopt them. The Court did not declare international law completely irrelevant in *Olympic Airways*, even if the Court gave foreign decisions the back of its hand. The Court went out of its way to declare international law relevant in *Empagran*, even though the rule did not constrain the Court very much.

One might also note that a Court that itself leaned towards political conservatism might be reluctant to embrace an international legal community that tends to be more politically liberal. Compared to Europe, for example, the United States is a conservative, God-fearing country. Justice Scalia’s references to “foreigners”

³⁰⁹ See Bradley, *supra* note 235, at 591 (stating that ATS was merely a jurisdictional effort to implement alienage jurisdiction); Curtis A. Bradley & Jack L. Goldsmith III, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815 (1997) (arguing that customary international law is not law in the United States without congressional enactment); 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, 810 (1998) (arguing that considering customary international law as federal law for purposes of, *inter alia*, ATS, “is at least in tension with *Erie*”).

and “members of the so-called ‘world community,’ . . . whose notions of justice are (thankfully) not always those of our people,”³¹⁰ capture the relevant concern with his usual, undiplomatic flair. Careful attention to the votes in the Supreme Court cases citing foreign and international courts discussed at the beginning of this Article will show that the Court’s most politically liberal members tend to be the most comfortable with international and foreign law. As Justice Scalia implies, some in the middle of the Court may well be uncomfortable with using foreign standards on abortion or freedom of religion. More generally, it tends to be political conservatives who fear that international agreements and international institutions will erode U.S. sovereignty; paradoxically, those who are most suspicious of international law appear to believe most fervently in its power.

The Court, therefore, does not appear plausibly to be afraid of international law because of public outcry over previous citations to international legal sources. The Court does not appear plausibly to be bent upon the destruction of international law. The Court should not fear that international law will lead the United States down a path of lawlessness or shanghai our national sovereignty in the service of foreigners, although the Court might more rationally be cautious about embracing international legal interpretation as a methodology if it is jealous of its own interpretive prerogatives. The Court, faced with a new and troublesome source of law while simultaneously having available to it familiar sources and methods of legal interpretation, *does* seem to have chosen the deep peace of statutory and common-law interpretation over the hurly-burly of international law.³¹¹ Perhaps denizens of international law or of the even broader notion of “globalization” are disappointed as a result at the Supreme Court’s repeated silence on international legal issues. Not being talked about may in fact be worse than being

³¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 347–48 (2002) (Scalia, J., dissenting).

³¹¹ See *The Oxford Dictionary of Quotations* 182 (Elizabeth Knowles ed., Oxford Univ. Press, 5th ed. 1999) (quoting Mrs. Patrick Campbell on her recent marriage: “The deep, deep peace of the double-bed after the hurly-burly of the chaise-longue”) Mrs. Campbell is also the source of a quotation sometimes mentioned in connection with one of the Supreme Court’s 2002 Term cases citing international law: “It doesn’t matter what you do in the bedroom as long as you don’t do it in the street and frighten the horses.” *Id.*

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talked about.³¹² Nonetheless, worse things than either also exist—as survivors of terrorist attacks, as well as potentially innocent individuals detained for years at a time without benefit of counsel or a charge, both know.

³¹² “There is one thing in the world worse than being talked about, and that is not being talked about.” *Id.* at 818 (quoting Oscar Wilde).