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RESPONSE

SOSA, FEDERAL QUESTION JURISDICTION, AND HISTORICAL FIDELITY

Anthony J. Bellia Jr.[*]

IN his paper "International Human Rights in American Courts," Judge Fletcher concludes that *Sosa v. Alvarez-Machain*[1] "has left us with more questions than answers."[2] *Sosa* attempted to adapt certain principles belonging to the "general law" to a post-*Erie* positivistic conception of common law while maintaining fidelity to certain historical expectations. "[I]t would be unreasonable," the Court thought, "to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism."[3] The Court was unwilling, however, out of concern for assuming a more expansive judicial role than the Alien Tort Statute ("ATS") justified, to hold that federal courts may hear any claim for a violation of customary international law. In an effort to maintain fidelity to the First Congress's expectations, the Court held in *Sosa* "that fed-

[*] Visiting Professor of Law, University of Virginia School of Law; John Cardinal O'Hara, C.S.C. Associate Professor of Law, Notre Dame Law School.

[1] 542 U.S. 692 (2004).

[2] William A. Fletcher, International Human Rights in American Courts, 93 Va. L. Rev. In Brief 1, 13 (2007), http://www..virginialawreview.org/inbrief/2007/03/22/fletcher.pdf.

[3] *Sosa*, 542 U.S. at 730.

eral 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 [the ATS] was enacted"[4]—specifically, "violation of safe conducts, infringement of the rights of ambassadors, and piracy."[5]

I will discuss here a problem that Judge Fletcher rightly observes *Sosa* did not discuss—"the subject matter jurisdiction problem." In particular, what constitutional power does Congress have to authorize federal court jurisdiction over claims based on customary international law?

The Court went to great lengths in *Sosa* to reconcile the ATS, a statute that presumes the existence of "general law," with *Erie*, the case that, in principle, rejects the very existence of that source of law. It is axiomatic that, to determine their jurisdiction, federal courts must assess not only whether Congress has given them jurisdiction, but whether exercising that jurisdiction is constitutional under Article III. If historical expectations matter, as they did to the *Sosa* Court, the Court should account for not only whether Congress expected certain claims to fall within the purview of a jurisdictional statute, but whether Congress has constitutional authority to give federal courts jurisdiction over those claims.

Sosa described the ATS, as originally enacted, to give federal courts jurisdiction over causes of action for violations of safe conducts, infringements of the rights of ambassadors, and piracy. The constitutionality of this jurisdictional grant would not have depended originally upon such causes of action being ones "arising under" the "Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."[6] Rather, Congress could have given federal courts jurisdiction over such causes as "Cases affecting Ambassadors, other public Ministers and Counsels," "Cases of admiralty and maritime Jurisdiction," or "Controversies . . . between a State, or the Citizens thereof, and

[4] Id. at 731–32.
[5] Id. at 724.
[6] U.S. Const. art. III, § 2.

foreign States, Citizens or Subjects."[7] Even though—if we accept a position Judge Fletcher endorses—such causes of action would not have been understood to be governed by federal law, there was a sufficient federal interest in their being adjudicated by a federal court that the Constitution extended the judicial power of the United States to them.

The suit that Alvarez-Machain brought under international law in *Sosa*, however, did not fall under any of these other Article III jurisdictional grants. He claimed that another foreign national unlawfully arrested him. Article III does not specifically authorize federal court jurisdiction over suits between foreign nationals. If a federal court constitutionally could exercise jurisdiction under the ATS over his claim, it was because the claim was one "arising under" federal law. The Court, of course, rejected Alvarez-Machain's claim as lying outside the purview that it ascribed to the ATS. But the Court explained that a federal court could hear a claim under the ATS that was as definite in content and acceptance as the three categories that it found the First Congress actually had in mind. The category of claims as "definite" as those the Court found the First Congress had in mind could include claims that, unlike the "original" three, would fall outside of Article III alienage, admiralty, or ambassador/public minister/counsel-affecting jurisdiction. In describing such definite customary international law as "federal common law," the Court implied that it constitutionally may exercise jurisdiction over such claims because they would be claims "arising under" federal law. This implication is fraught with difficulties. The *Sosa* Court's "updating" of the ATS was proper only if it defined a jurisdiction consistent with Article III.

It is not altogether surprising that the *Sosa* Court did not expressly consider whether its interpretation of the ATS comported with Article III's Arising Under Clause. The Court has long shied away from attributing a definitive scope to Article III "arising un-

[7] Id. See Curtis A. Bradley, The Alien Tort Statute and Article III, 42 Va. J. Int'l L. 587, 591 (2002) (arguing that the ATS "was intended simply to implement Article III alienage jurisdiction"); Michael G. Collins, The Diversity Theory of the Alien Tort Statute, 42 Va. J. Int'l L. 649, 651 (2002) (arguing that the ATS "was understood as enforcing those Article III provisions designed to implement the law of nations, including admiralty jurisdiction, the provision for jurisdiction over ambassadors, other public ministers and consuls, as well as the alienage diversity provision").

der" jurisdiction. In *Verlinden B.V. v. Central Bank of Nigeria*, the Court expressly declined to "decide the precise boundaries of Art. III jurisdiction."[8] In *Mesa v. California*, the Court noted the "grave constitutional problems" and "serious constitutional doubt" surrounding the meaning of Article III "arising under" jurisdiction.[9] The problems stem in part from the fact that the meaning of the Court's seminal opinion explaining Article III "arising under" jurisdiction—*Osborn v. United States*[10]—remains in doubt almost two hundred years after it was decided.

Surprisingly, *Osborn*, the most important case in American constitutional history on the meaning of Article III "arising under" jurisdiction, has factored little, if at all, in debates over the place of customary international law as a source of law in the American federal system. Scholars certainly have addressed whether, as an original matter, "Laws of the United States" in the Arising Under Clause encompasses customary international law.[11] Any analysis of this question, however, should account for *Osborn*, which speaks to the relationship between general principles of law and Article III "arising under" jurisdiction.

Judges and scholars tend to read *Osborn* in one of two ways today. On one reading, *Osborn* interprets Article III "arising under" jurisdiction to mean that "Congress may confer on the federal courts jurisdiction over any case or controversy that *might* call for the application of federal law."[12] If this reading is correct, it could be argued that Congress may give federal courts jurisdiction over cases "arising under" customary international law because, regardless of whether customary international law is among the "Laws of the United States" referenced in Article III, a case involving customary international law might in theory call for the application of the Constitution, a treaty, or a statute of the United States, if for no other reason than to assess the legitimacy of the rule of customary international law. On another reading, *Osborn* interprets Article III "arising under" jurisdiction to enable Congress to give fed-

[8] 461 U.S. 480, 492 (1983).
[9] 489 U.S. 121, 137 (1989).
[10] 22 U.S. (9 Wheat.) 738 (1824).
[11] See, e.g., Bradley, supra note 7, at 597–616 (addressing this question).
[12] *Verlinden*, 461 U.S. at 492 (emphasis added).

eral courts "protective jurisdiction" over claims that are not governed by federal law but that, as a matter of federal interest, federal courts should adjudicate. If this reading is correct, it could be argued that Congress may give federal courts jurisdiction over cases "arising under" customary international law because there is a federal interest in federal courts adjudicating such cases.[13]

As I argue in "The Origins of Article III 'Arising Under' Jurisdiction,"[14] neither of these readings fairly captures *Osborn*'s reasoning in historical context. In *Osborn*, the Marshall Court explicated the Arising Under Clause to mean that a federal court could hear cases in which the Constitution, a treaty, or a "Law[] of the United States" was determinative of a right or title asserted in the proceeding before it. The Marshall Court did not understand "general law" to be a "Law of the United States" under which a case could arise for purposes of Article III jurisdiction. The *Osborn* Court framed the jurisdictional question as whether the fact that "general principles of the law" were involved in the case *along with federal law* rendered the case *not* one "arising under" federal law.[15] The Court held that so long as a federal law "forms an ingredient" of the original cause, "it is in the power of Congress to give [inferior federal courts] jurisdiction of that cause, although other questions of fact or of law may be involved in it."[16] This holding implied that, absent a federal law forming an "ingredient" of the original cause, the operation of general law in the case would be insufficient to establish constitutional "arising under" jurisdiction. Because an "act" of Congress was "the first ingredient in the case," a federal court constitutionally could exercise jurisdiction over it.[17] Four years later in *American Insurance Co. v. Canter*, Chief Justice Marshall explained that a case arising under "the law, admiralty

[13] See William R. Casto, The Federal Courts' Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 472 (1986) (arguing for this position).

[14] Anthony J. Bellia Jr., The Origins of Article III "Arising Under Jurisdiction," 57 Duke L.J. (forthcoming Dec. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 970937.

[15] *Osborn*, 22 U.S. (9 Wheat.) at 819–21.

[16] Id. at 823.

[17] Id. at 825.

and maritime" (part of the law of nations) "does not, in fact, arise under the Constitution or laws of the United States."[18]

In light of these cases, then, how could general law, absent an independent federal "ingredient" in a case, historically have operated as a rule of decision in federal courts? First, general law could operate as a rule of decision in cases falling within other heads of Article III jurisdiction. Indeed, as Professor Michael Collins has explained, general law could operate in federal courts pursuant to Article III's extension of the federal judicial power to alienage, admiralty, and ambassador/public minister/consul-affecting cases.[19] Second, general law could provide the predicate for "arising under" jurisdiction if Congress properly adopted it as federal law.

I agree with Judge Fletcher that the Court implied in *Sosa* that Congress may give federal courts jurisdiction over cases governed by sufficiently definite rules of customary international law because such rules constitute federal common law.[20] This aspect of its opinion lies in tension with the Court's understanding in *Osborn* that general principles of law could not in and of themselves provide a predicate for constitutional "arising under" jurisdiction. The question is how to resolve the proposition that customary international law can qualify as a federal common law predicate for "arising under" jurisdiction with Supreme Court precedent that "Laws" in the Arising Under Clause excludes general law.

The answer may be that (absent another Article III jurisdictional basis) Congress may only give federal courts jurisdiction over cases governed by customary international law when Congress properly adopts customary international law as federal law. *Sosa*, of course, expressly held that the ATS did not create any federal cause of action but rather was merely jurisdictional. And the Court has explained that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law."[21] Perhaps at some point the Court will characterize *Sosa* as interpreting the ATS (albeit anachronistically) as an exceptional

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[18] 26 U.S. (1 Pet.) 511, 545–46 (1828).
[19] See Collins, supra note 7.
[20] Fletcher, supra note 2, at 7.
[21] Tex. Indus. v. Radcliff Materials, 451 U.S. 630, 640–41 (1981).

jurisdictional statute that authorized federal courts to adopt certain customary international law as federal law.

It might be argued that any requirement for "arising under" jurisdiction that Congress adopt customary international law as federal law (or authorize courts to do so) would rest on a mere formality: if Congress may adopt customary international law as federal law and use it as a predicate for "arising under" jurisdiction, Congress should be able to bypass the intermediate step and simply give federal courts "arising under" jurisdiction over cases governed by customary international law. The intermediate step, however, is not necessarily insubstantial. In a given instance, there may exist constitutional or political barriers to Congress actually adopting customary international law as federal law. In light of such barriers, congressional adoption of customary international law as federal law would not be a mere formality; rather, it would be the product of the process and politics that constrain any exercise of congressional lawmaking authority.

The point for now is that a congressional power under the Arising Under Clause to give federal courts jurisdiction over cases governed by customary international law is a power that the Court appears to have rejected in *Osborn*. At a minimum, the Court should not countenance the expansion of congressional and judicial power that its opinion implies without offering a reasoned justification for it. The Court thought it necessary in *Sosa* to reconcile *Erie*'s rejection of "general federal common law" with the expectations of the First Congress that federal courts could exercise jurisdiction over certain violations of general law. For the same legitimacy concerns that inhered in that analysis, the Court should reconcile its determination that the ATS gives federal courts jurisdiction over certain claims governed by customary international law with its understanding in *Osborn* that the Constitution does not empower Congress to give federal courts jurisdiction over cases governed by general law absent an actual federal "ingredient."

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