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### ***RESPONSE***

#### SOSA AND SUBSTANTIVE SOLUTIONS TO JURISDICTIONAL PROBLEMS

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SUPPOSE that Copernicus, as a public service, had undertaken to manage a planetarium designed on geocentric principles. Being Copernicus, he no doubt would have done a superb job, whatever reservations he may have had about the theoretical soundness of the business.

Judge William Fletcher, when he was Professor Fletcher, brought to his field a change close to a revolution, restoring general law to the conceptual universe and demonstrating the historical and theoretical inadequacy of the unsophisticated version of the *Erie* doctrine that had become dominant.<sup>1</sup> By restoring the role of general law in the ontology of American jurisprudence, he both improved our understanding of earlier thinking and opened up possibilities that had been closed to those who thought that every legal norm must be the creation of some identifiable sovereign.

For example, recovering the general law, and the status of the law of nations as the pre-eminent example of general law, makes it possible to understand the framers' decision to constitute the Su-

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<sup>1</sup> Readers who are disturbed about the accuracy of the Copernican figure here, given that Professor Fletcher was in large measure a restorer of lost knowledge and insights, should note that the Greeks had heliocentric cosmologies that lost out to the geocentric model.

preme Court of the United States as a tribunal to decide cases between States of the Union, without granting Congress power to adopt the rules that would be applicable in such cases. That decision made sense to lawyers who believed that the Court would apply an existing set of legal norms, well known to them. Understanding the law that governs cases between States as general law, and not the law of any one sovereign, also makes unnecessary the post-*Erie* move of characterizing that law as federal in order to avoid the even more unreasonable result of calling it state law. Surely a boundary dispute between Massachusetts and Rhode Island should not be governed by the law of either contending party, but just as surely the Constitution provides no applicable rule, nor does it empower any federal lawmaking authority to create one. No federal law need be found, or invented, however, if the law of nations is available as general law.

Professor Fletcher is now Judge Fletcher, and as such his role is to operate the Supreme Court's planetarium, without regard to his private views of its accuracy in depicting the legal cosmos. Combining his scholarly past with his present role as public servant, Judge Fletcher now brings his unique insights to bear on the Supreme Court's latest encounter with general law turned federal common law, *Sosa v. Alvarez-Machain*.<sup>2</sup> In that case the new federal common law gobbled up yet another bit of the general law, the law of nations referred to in 28 U.S.C. § 1350, the descendant of the alien tort clause of Section 9 of the Judiciary Act of 1789. As Judge Fletcher explains with his characteristic lucidity, the Court's opinion answers some questions while leaving others open.

I will focus on one of the questions it leaves open, in an attempt to clarify the considerations that have driven the Court to conclude, in the face of text, structure, and history, that some unwritten norms are laws of the United States as that term is used in the Constitution. The question is whether this latest bit of the new federal common law, the bit that incorporates some of the law of nations, is federal law for purposes of Article VI as well as Article III.

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<sup>2</sup> William A. Fletcher, International Human Rights in American Courts, 93 Va. L. Rev. In Brief 1 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/fletcher.pdf>; *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

I will argue that it will have to be so regarded, and that the reasons for that conclusion help expose the complexities, not to say inanities, that follow from the Court's decision to deny the separate existence of general law and absorb much of it into federal law.

The events that gave rise to *Sosa* took place in Mexico. The Supreme Court asked, in effect, whether those events were governed by the law of California or the federal law of the United States. Having asked that question, it answered federal law, which is the better of the two choices. But the correct answer was none of the above. Seizures of persons in Mexico are governed by the law of Mexico, and perhaps applicable transnational law, but not by any law of this country. How did the Court come to be asking such an absurd question?

Suppose that instead the Court had asked the following question: if some court in this country is to decide a case involving Mexican law, or the application in Mexico of transnational law, should that be a state or a federal court? Reasonable people can differ as to the answer to that second question, but many reasonable people would say that it should be a federal court. With respect to jurisdiction to interpret law that is neither state nor federal, and in particular with respect to policies governing American judicial federalism, *Sosa* makes sense. As a rule about the source of the legal norms that apply to its facts, the case invites chuckling.

*Sosa*, a case about federal common law, is reasonable as a case about jurisdiction and risible as a case about substance for reasons fundamental to the new federal common law. That doctrine is a substantive law fix to a problem that the Court believes it must repair, but the problem is jurisdictional. The text of the Constitution provides a solution to that jurisdictional problem, but the Court has come to believe the Constitution's arrangement inadequate, in part because of the consequences of its own doctrine in *Erie*, and so it has undertaken to provide an improved solution.

As a matter of policy, there are often good reasons to have certain classes of legal issues decided uniformly and by tribunals sensitive to the interests of the nation as a whole. Those classes of legal issues extend beyond actual federal law. At the time of the framing, admiralty was a leading example. The law of admiralty was transnational, part of the law of nations. In principle it was sup-

posed to be uniform across nations, let alone within nations. Application of that law could seriously affect the foreign relations of the fledgling republic, a militarily weak country with extensive naval commerce. If an American court applied the law of prize in a way that offended one of the maritime powers, the consequences could be very bad. A state court might nevertheless misbehave, because the consequences would be spread across the country, not necessarily focused on the offending state. There was thus good reason to set up a judicial system in which that body of transnational law, which had most of its applications outside of this country, would be expounded by the federal courts.

That is probably why the Federal Convention included the admiralty jurisdiction in Article III. Federal courts could be given jurisdiction in some or all admiralty courts, and thereby increase uniformity while ensuring an administration of justice that would be responsive to the needs of the country as a whole. With this tool in its hands, the First Congress opted for substantial but not quite complete exclusivity for the federal admiralty jurisdiction, keeping the state courts away from the core *in rem* admiralty proceedings while saving their common law remedies for suitors when the common law could give a remedy.

Aware of the extreme sensitivity of any lawsuit between two States of the Union, the framers also arranged for jurisdiction in the nation's most eminent tribunal, the Supreme Court of the United States. As Judge Fletcher's scholarship indicates, the framers almost certainly expected that many interstate disputes would be governed by unwritten, transnational law, such as the law of nations concerning river boundaries. Through the state-party original jurisdiction, they arranged for a uniform adumbration of that law by the single court most associated with the nation as a whole.

Legally sophisticated participants in the framing also very likely expected that the federal courts' diversity jurisdiction would routinely be used to apply the general commercial law. Interstate and international business transactions that would give rise to diversity cases often involved questions of contract or commercial paper, for example, that in the eighteenth century were governed by a commercial law that was widely shared among European trading nations and their colonies. Federal courts were designed to provide

fair application of those rules, especially to foreign plaintiffs seeking to collect from Americans; foreign plaintiffs whose governments would vent their frustration on the entire nation were their citizens not to receive justice.

In all of these contexts, the need of the new nation was for expert, impartial tribunals that would be responsive to the interests of the country as a whole in the application of existing legal norms. American admiralty courts were not expected to draft their own novel code of prize or maritime law, one out of harmony with the much more powerful states with which the Americans conducted seaborne commerce. As for the law governing the States of the Union in their quasi-sovereign capacities as members of a confederacy, to some extent the Constitution changed prevailing norms of interstate relations and authorized Congress to do so; if its drafters had meant to do anything more than that, they would have. In much of its inter-State jurisdiction, then, the Supreme Court was probably expected to apply existing international law, with which the state governments were reasonably familiar.

The problem the framers confronted was thus not one that called for a power to make new substantive rules, but one about the courts that were to administer it, and in particular about possible shortcomings of the state courts. In a federal system that includes judicial federalism, with two systems of courts administering one system of laws, the respective roles of the two court systems pose tricky questions whether or not the substantive law involved is that of the federation as a whole. Confronted with jurisdictional problems arising from judicial federalism, then, the Constitution provided jurisdictional solutions by extending the authority of the federal courts, not additional authority to create new legal norms and certainly not such authority in the hands of courts as opposed to Congress. Indeed, given that much of the unwritten law that the federal courts were expected to apply fell into the broad category of the law of nations, one simple way to see that the Constitution did not give power to make substantive law in these areas is to ask whether the United States, newest and weakest member of the society of nations, was expecting to legislate its own version of that society's law. It was not (any more than the United States today is going to legislate the law of Mexico).

Article III is a system of rules, and rules only imperfectly achieve their purposes. Even at the time it was written, Article III did not extend the federal courts' jurisdiction to every case that turned on transnational law and that could implicate the foreign policy interests of the nation. For example, constitutional diversity jurisdiction does not extend to suits between two aliens under the general commercial law, even though such a suit could deeply interest both aliens' governments, causing them to hold the United States as a whole accountable for delivering impartial justice.

A court that felt itself called upon to improve on the framers' work might conclude that sometimes a lawsuit between two foreigners will find its way into an American court, as when one of the foreigners comes upon the other in this country, and that some of those lawsuits might be better decided by the federal courts, whatever the applicable substantive law. *Sosa* is quite plausibly such a case, in part because of the law involved and in part because of the facts. Alvarez-Machain stated claims against *Sosa* under international human rights law, the existence and content of which is a matter of dispute in the international arena. Anything an American court says on that topic can substantially affect the foreign relations of the United States. Moreover, the events that gave rise to the litigation involved international activities of the United States government that were highly controversial.

It then might well be a good thing for the federal courts, and if necessary ultimately the Supreme Court of the United States, to have jurisdiction over that and similar cases. But both parties were aliens, so there was no party-based jurisdiction. In addition to party-based and admiralty jurisdiction, Article III also authorizes the federal courts to decide cases arising under the Constitution, the laws of the United States, and treaties made under its authority. Mexican law and international law are of course none of those things, but if one of them were, there would be federal jurisdiction. And with Sections 1331 and 1442, there would be federal jurisdiction in the district courts at the option of either party.

Quite similar thinking very likely lies behind the creation of another now-familiar form of the new federal common law, the kind that applies to the contractual and property rights of the United States. Transactions to which the federal government is a party are

not, says the Court today, governed by state law; they are governed by federal law. Yet the federal contract law to which the Court refers is simply the general law of contract—the “law merchant” as Justice Douglas described it—as interpreted by the federal courts.<sup>3</sup> It is not a body of original and distinctive norms as would be a federal Uniform Commercial Code, and the Court did not justify federalization of this part of the law of contracts on the ground that commercial law needed to be razed and rebuilt by federal lawmakers. Rather, the justification was the need for uniformity and the possibility that state law, as administered by state courts, might be adverse to the interests of the United States. *Clearfield Trust* is really about which courts will interpret and apply the common law of contract. It was made necessary in large part by *Erie*. Had the Court allowed the federal courts to continue to interpret the common law of contract for themselves, they could have continued to do so in controversies involving the United States, all of which are within the Article III jurisdiction. Having eliminated the general law, the Court could not do without it, and had to fabricate its own ersatz version called federal law for constitutional purposes.

*Sosa* extended the reach of the new federal common law, but did so for the same underlying reasons, which are about judicial federalism and not the content of legal norms. Despite its attractions as a matter of judicial federalism policy, there are two serious difficulties with this approach. First, the laws of the United States, as the Constitution uses that term, are acts of Congress and only acts of Congress. Mexican law and customary international law are not acts of Congress, no more than are unwritten common law norms. Second, the laws of the United States, even if some of them are unwritten, do not apply in Mexico.

If one is prepared to put those difficulties aside, as the Court apparently was, then by calling Mexican law or customary international human rights norms “law of the United States,” it is possible to transfer to the federal courts the ultimate responsibility for interpreting it. In order to implement this program, it is obviously necessary for the relevant law—be it Mexican or international—to be treated as law of the United States for purposes of Article III. A

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<sup>3</sup> *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

more difficult question is whether it must be treated as law of the United States for purposes of Article VI. As indicated, I think that the answer is yes, but that the reasoning to that conclusion is somewhat circuitous.

Federal supremacy under Article VI enables federal lawmakers to displace policy choices of the States.<sup>4</sup> Customary international law is developed through the practice of nations, and not through any lawmaking process of the United States, so the rationale of Article VI does not apply to it. The rationale of federal common law, however, requires interpretive finality in the federal courts, as opposed to legislative finality of federal lawmakers.<sup>5</sup> Without some kind of preemptive effect for the non-federal law that the federal courts want finally to interpret, their interpretive finality could be avoided by the state courts.

After *Sosa*, a state court might reason as follows: The Supreme Court of the United States has concluded that there is unwritten law of the United States, within the meaning of Article III, that has the same content as customary international law. State courts are bound by what the Supreme Court says about that federal law. The Court in *Sosa*, however, did not purport to interpret customary international law considered, not as federal law at all, but as non-federal law. In any event, we are not bound by what the Supreme Court says about non-federal law, as a court of Maine is not bound by what the Supreme Court may be called upon to say about the law of Minnesota. And while the Supreme Court has found that Alvarez-Machain had no cause of action under the federal-law version of international human rights law, we may conclude to the contrary under non-federal international human rights law.

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<sup>4</sup>U.S. Const. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”).

<sup>5</sup>The reader may note that I am assuming that federal courts are not lawmakers. They are not, in the sense that Congress is or that the President and Senate are when the President makes a treaty. To be sure, courts often make policy, but as courts they do it in the process of interpreting and applying norms that they do not, in strictness, make.



That reasoning would defeat the purpose of *Sosa*, though the reasoning is perfectly sound. The problem is that the Court in *Sosa* did not really mean to say that customary international law is federal law. It meant to say that customary international law is to be finally interpreted by the federal courts, and the Court called it federal law in order to achieve that result. Fully to achieve that result, however, the Court will have to say that its federal law version of international human rights law occupies the field, as it were. To be more precise, the Court will have to hold that there is an unwritten federal law rule according to which any customary international law rule, or any state law version of a customary international law rule, the content of which differs from the federal law version of customary international law, is to be disregarded. That substantive rule of federal law, binding on state courts under Article VI, will keep a state court from developing its own state-law version of customary international law, and from following customary international law as it independently interprets it. Insofar as it displaces state law, that federal law rule will be preemptive. I am not sure what to call its effect on real customary international law.

Pursuing a jurisdictional goal with substantive tools leads to the highly complex maneuvers I have just described, and leads to truly implausible positions, like saying, first, that United States federal law applies to events in Mexico, and then—to make the first conclusion stick in the state courts—that genuinely transnational law does not. In similar fashion, attempting to explain the apparent motion of Mars, on the assumption that the sun and Mars both go around the earth, led to highly complex maneuvers that had their own plausibility problem. The new federal common law has led the Court to some epicycles already, and likely will lead to more, as long as the Court retains its own geocentric principles.

The trouble is that substantive norms provide problematic and imperfect solutions to jurisdictional problems, and more fundamentally there is no unwritten law of the United States. Judge Fletcher does not say this and perhaps would not want to, but I will: *eppur si muove*.

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