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The Consistency of Sosa: A Comparison of the Supreme Court’s Treatment of Customary International Law with Other Types of Federal Common Law

Dana Howard

INTRODUCTION

Recently, the Supreme Court accepted the opportunity in Sosa v. Alvarez-Machain to extinguish a heated debate that brewed among international law scholars since the Court’s 1938 landmark decision in Erie Railroad Co. v. Tompkins. Erie cast doubt on the status of customary international law (CIL) in the federal court system by nullifying the existence of federal general common law and declaring that federal courts could only create new law pursuant to express legislative authorization. Prior to Erie, federal courts considered international law a part of federal law and recognized claims involving violations of CIL as part of their general common law authority. Because Erie involved a purely domestic matter, post-Erie scholars divided into two schools of thought regarding the effects of Erie on the status of CIL. The majority of scholars contended that because violations of CIL implicated foreign relations, CIL remained a federal matter to which Erie’s grasp did not reach. A minority of scholars, opposing this view, claimed that federal courts could only recognize violations of CIL when the legislative branch expressly authorized them to do so.

1 J.D. expected 2007, University of Kentucky College of Law.
3 Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).
4 Id at 78.
5 The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”).
In 1980, the United States Court of Appeals for the Second Circuit fueled the debate when it recognized a claim between two Paraguayan citizens involving alleged violations of an international norm against torture in *Filartiga v. Pena-Irala.* Without much analysis, the court in *Filartiga* based its jurisdiction to hear the case on an apparent grant of legislative authority in the Alien Tort Statute (ATS). The ATS was a part of the Judiciary Act of 1789 and had remained dormant until the court in *Filartiga* revived it. For nearly a quarter of a century, the decision to revive the ATS in *Filartiga* provoked debate in the lower federal courts regarding the extent to which the ATS granted authority to create causes of action based upon CIL. Unlike the court in *Filartiga,* other lower federal court judges argued that the ATS was purely jurisdictional and thus did not provide authority to recognize new claims based on CIL.

In 2004, the Supreme Court in *Sosa* responded to the long standing debate by agreeing, in part, with both sides. In its holding, the Court agreed that the ATS was purely jurisdictional and that the First Congress probably intended that it apply to only a narrow group of already well-established rules of CIL. The Court continued to rule, however, that federal courts retained authority to recognize new causes of action based on CIL subject to a few stringent limitations. Rather than silence the debate, the Court's decision to allow the door to remain open to such claims "subject to vigilant doorknocking," sparked both criticism and differing interpretations about the current status of CIL. While the majority of scholars have asserted that *Sosa* supports the contention that CIL is federal law, critics have alleged that the analysis the Court developed to determine whether federal courts could incorporate CIL as federal common law is inconsistent with the way the Court normally treats post-*Erie* federal common law and that it provides little guidance for lower federal courts.

8 *Filartiga v. Pena-Irala,* 630 F.2d 876 (2d Cir. 1980).
9 *See id.* at 880–81, 887.
10 An example of this disagreement can be found in *Tel-Oren v. Libyan Arab Republic.* In *Tel-Oren,* the D.C. circuit dismissed an ATS suit concerning a terrorist attack in Israel. In the concurring opinion Judge Bork asserted that neither the ATS nor customary international law provided a private right to sue for human rights violations. *Tel-Oren v. Libyan Arab Republic,* 726 F.2d 774, 798 (D.C. Cir. 1984). In a separate concurrence, Judge Edwards disagreed with Judge Bork's conclusion that the ATS was purely jurisdictional. *Id.* at 775.
13 *See Kontorovich,* *supra* note 12, at 114.
These critics, however, have neglected to fully consider the restrictiveness of the approach adopted in Sosa and how it compares to the federal common law doctrine that has evolved since Erie. This Note reveals that the analysis developed in Sosa for the treatment of CIL remains consistent with the restrictive approach the Court has utilized in creating other types of federal common law.

Part I of this Note defines customary international law and details the debate surrounding its incorporation into federal law since Erie. Part II reviews the Sosa decision and the substance of critiques which followed it. As this part indicates, criticisms that the Court acted inconsistently with historical notions of federal common law and separation of powers issues consist of nothing more than conclusory statements with little to no comparative analysis to support them. Part III examines the federal common law analysis that has developed since Erie and provides the background for which to compare the analysis of the Court in Sosa. Part IV analyzes the Sosa decision in light of the evolution of the federal common law doctrine discussed in Part III. This part demonstrates that Sosa’s restrictive limitations for determining whether to incorporate CIL as federal common law prove not only consistent with the way in which the federal courts have treated other federal common law but actually provide more guidance than the Court has given for other areas of federal common law.

I. Setting the Stage for Sosa: The Post-Erie Controversy Surrounding Customary International Law

Two primary types of international law, treaties and CIL, exist to govern the relationships between nations and more recently between individuals and nations. Treaties involve agreed-upon rules of law, and like other contracts, bind only the parties involved. Whereas the domestic status of treaties is constitutionally based and well developed, the law governing the domestic status of CIL does not have such a clear basis. The lack of clarity results partly because of the difficulty in defining CIL. Rather than explicitly agreed upon rules, CIL refers to the general and consistent practices in which nations engage based on a sense of obligation. In other words, CIL is derived implicitly from well-accepted, well-established practices of nations. For example, international rules regarding the treatment of ambassadors are largely derived from CIL.

CIL did not play a supporting or background role in Erie, yet the potential implications of Erie on CIL aroused interest among international law

14 Restatement (Third) of Foreign Relations Law, supra note 6, at § 111 cmt. a-j (restated in Reporter Notes 1-3).
15 Restatement (Third) of Foreign Relations Law, supra note 6, at § 102(2).
scholars almost immediately. *Erie* held that “except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”16 *Erie* ended the notion that a federal general common law existed where federal courts were free to discover and apply rules of decision to cases based upon diversity jurisdiction. Instead, *Erie* reasoned that federal common law was created, not found.17 Unlike pre-*Erie* general common law which only bound the parties to the suit, *Erie* explained that federal common law was binding on the states.18 As such, *Erie* stood for the proposition that federal courts could only create federal common law pursuant to a grant of legislative authority.19

If the holding of *Erie* extended to cases involving the application of CIL, then states could incorporate CIL into their common law systems and recognize new claims based on CIL without regard to how other states were adopting and interpreting CIL. Moreover, unless federal legislation existed which addressed the specific CIL, federal courts would be obliged to apply varying state common law interpretations of CIL in diversity suits.20 Because the potential for inconsistent interpretations of international law implicates sensitive foreign affairs issues, Philip Jessup,21 an international scholar, asserted that the *Erie* holding had “no direct application to international law.”22 Jessup rationalized that “any question of applying international law in [federal] courts involve[d] the foreign relations of the United States and [could] thus be brought within a federal power.”23 The majority of scholars as well as the Restatement (Third) of Foreign Relations Law24, adopted Jessup’s view that CIL remained a part of federal common law.

Until *Sosa*, federal court decisions indicated support for the majority view as well. For example, in upholding the “state doctrine”25 as a rule of federal common law, the 1964 Supreme Court, in *Banco Nacional de Cuba v. Sabbatino*, utilized Jessup’s argument that “rules of international law should

16 *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)
17 *Id.*
18 *Id.*
19 *Id.*
20 *See supra* note 16 and accompanying text.
21 Philip Jessup, in addition to being a scholar, later served as a judge on the International Court of Justice.
23 *Id.* at 743.
24 *Restatement (Third) of Foreign Relations Law, supra* note 6, at § 111 cmt. d (“Customary international law is considered to be like common law in the United States, but it is federal law.”).
not be left to divergent and perhaps parochial state interpretations." Because the state doctrine was neither congressionally nor constitutionally mandated, the Court could only apply it pursuant to its authority to create federal common law. In concluding that the state doctrine was part of federal common law and binding upon the states, the Court emphasized that "if state courts were left free to formulate their own rules the purposes behind the doctrine would be as effectively undermined as if there had been no federal pronouncement on the subject."

Although facing a situation that it considered "diametrically opposed to the conflicted state of law that confronted the Sabbatino Court," the United States Court of Appeals for the Second Circuit, in 1980, not only indicated support for the majority approach but fully endorsed it when it recognized a private cause of action between two Paraguayan citizens based on a violation of a CIL prohibition against the use of torture. The court in Filartiga, however, did not analyze what source provided the authority to incorporate CIL as federal common law other than to conclude that international law was a part of federal common law. The Filartiga court based its jurisdiction to hear the case solely on the ATS, a provision of the Judiciary Act of 1789 which provides that "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." This revival of the ATS sparked debate among scholars and the federal courts over the extent to which the ATS was jurisdictional versus the extent to which it permitted the federal courts to create new causes of action.

In the mid-1990s, as a response to this growing debate, Curtis Bradley and Jack Goldsmith, Law Professors at the University of Colorado and University of Virginia respectively, espoused a minority view that, absent some explicit action by Congress or state legislatures, CIL was merely a matter

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26 *Sabbatino*, 376 U.S. at 425. *Sabbatino* involved a claim of conversion by an agent of a Cuban instrumentality against an American commodity broker which arose after the Cuban government expropriated the property rights of a Cuban corporation largely owned by U.S. residents. The commodity broker had contracted with the corporation to buy sugar. Although the broker accepted the bill of lading and sight draft from the Cuban government agent and received payment for the sugar from its customer, it refused to turn over the proceeds to the agent. The commodity broker urged the Court to consider the illegality of the Cuban government's expropriation of the corporation's title to the sugar. *Id.*

27 *Id.*

28 *Id.* at 424.

29 *Filartiga v. Pena-Irala*, 630 F.2d 876, 884 (2d Cir. 1980).

30 *Id.* at 885.

31 *Id.* at 887

32 The Alien Tort Statute provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C § 1350 (2000).

33 *See supra* note 12 and accompanying text.
In addition to this minority view, an intermediate approach, proposed by Ernest Young in 2002, argued that CIL belonged to a third category of "general law," a category which returned CIL to its pre-Erie status. Under this status, federal courts could continue to import CIL as a rule of decision in a particular case, and while that rule would be binding upon the parties within the suit, it would not bind the states.

Questions regarding the status of CIL and the extent of federal courts' authority under the ATS remained unanswered until the Supreme Court accepted the opportunity to grapple with them in Sosa.

II. TAKING CENTER STAGE: THE SOSA DECISION

A. The Climax

In Sosa, the Supreme Court faced the issue of determining whether the ATS authorized federal courts to entertain a cause of action between two foreign nationals based on an alleged violation of an international norm against arbitrary detention. The issue arrived to the Supreme Court from a Ninth Circuit decision recognizing such a claim and ruling in favor of the plaintiff-respondent in the case.

B. The Actors

The dramatic facts which gave rise to the issue in Sosa deserve brief attention not only as background information but also because they may contribute to some criticism that the Court's decision was results oriented. The unique series of events began with the murder of a United States Drug Enforcement Administration (DEA) agent in Mexico. After failed attempts to extradite the respondent Alvarez-Machain, a Mexican physician that the DEA believed to be involved in the torture of its agent, the DEA arranged to have a group of Mexican nationals, including the petitioner Sosa, kidnap Alvarez and bring him to the United States. Once in the United States, federal officers arrested him. He was subsequently indicted for the torture and murder of the DEA agent, but for various reasons, unrelated to the scope of this Note, the United States District Court for the Central District Court of

34 See Bradley & Goldsmith, supra note 7, at 845.
36 Id.
38 Id.
39 See Kontorovich, supra note 12, at 123.

Faced with this unique sequence of events, the Ninth Circuit’s ruling in favor of the respondent Alvarez, and the U.S. government’s support of the petitioner Sosa, the Court set out in its attempt to clarify the heated debate regarding the domestic status of CIL.

C. The Finale

The Supreme Court divided its holding which denied Alvarez a cause of action into three parts. First, the Court held that the ATS “was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject,” as opposed to creating causes of action based upon international law. Second, after conducting a lengthy discussion of the historical context in which the statute was drafted, the Court concluded that “although the ATS [was] a jurisdictional statute creating no new causes of action ... the grant [was] best read as having been enacted on the understanding that the common law would provide a cause of action for [a] modest number of international violations[].” These involved three historical actions that Blackstone considered to be crimes against international law at that time and included offenses against ambassadors, violations of safe conduct, and piracy. Lastly, the Court found that despite holding that the ATS was jurisdictional, federal courts maintained some authority to create private causes of action based on CIL subject to stringent limitations.

The Court fully agreed that Alvarez’s claim against Sosa for arbitrary detention should be dismissed but divided in its reasoning. The Court acted unanimously in the first two parts of its holding that the ATS was jurisdictional and probably intended to encompass only a few offenses against international law recognized at the time of its enactment. Had the majority dismissed Alvarez’s claim on the basis of the first two parts of its holdings and reasoned that arbitrary detention was not in the minds of the First Congress when it granted jurisdiction under the ATS, the Court would have remained unanimous. However, against the wishes of Chief Justice Rehnquist and Justices Scalia and Thomas, the majority based its dismissal of the claim on the third part of its holding which outlined the

40 Sosa, 542 U.S. at 697–99.
41 Id. at 698.
42 Id. at 714.
43 Id. at 724.
44 Id.
45 See id. at 744 (Scalia, J., concurring).
circumstances and limitations on which federal courts could recognize new causes of action based on CIL.\textsuperscript{46}

First, the Court emphasized the importance of legislative intent, after cautioning that courts should exercise serious judicial restraint in recognizing such actions because there had been “no congressional mandate to seek out and define new and debatable violations of the law of nations.”\textsuperscript{47} It stated that the “general practice [of creating federal common law] has been to look for legislative guidance before exercising innovative authority over substantive law.”\textsuperscript{48} As an example of a demonstration of legislative intent, the Court referred to the explicit grant of authority provided by Congress in the Torture Victim Protection Act to recognize a cause of action for violations of CIL prohibitions against torture.\textsuperscript{49}

Other than looking toward legislative intent, the Court outlined three other potential limitations: (1) the degree of specificity and acceptance of the international norm; (2) whether the plaintiff exhausted remedies; and (3) a case-specific deference to the legislative and executive branches of government.\textsuperscript{50} With regard to specificity and acceptance, the court declared that “any claim based on the present-day law of nations” should “rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to [Blackstone’s three above-mentioned claims].”\textsuperscript{51} In order to merit such a claim, the norm must be “specific, universal and obligatory” and not possess “less definite content and acceptance than the historical paradigms familiar when [the ATS] was enacted.”\textsuperscript{52} In making this determination, the Court suggested that federal courts evaluate the practical consequences of recognizing such a cause of action.\textsuperscript{53}

In addition to specificity, the Court discussed a second limitation requiring an inquiry into whether the plaintiffs had exhausted remedies in their domestic legal systems as well as those available in international claims tribunals.\textsuperscript{54} Lastly, the Court required federal courts to defer to the political branches on a case-by-case basis.\textsuperscript{55}

After developing this analysis of determining when federal courts may incorporate CIL to create a new cause of action, the Court applied it to the facts of\textit{Sosa}. The Court did not proceed beyond a discussion of the specific-

\textsuperscript{46} See id. at 738.
\textsuperscript{47} Id. at 728.
\textsuperscript{48} Id. at 726.
\textsuperscript{49} See id. at 731.
\textsuperscript{50} Id. at 732-33.
\textsuperscript{51} Id. at 725.
\textsuperscript{52} Id.
\textsuperscript{53} See id. at 732-33.
\textsuperscript{54} See id. at 733, n.21.
\textsuperscript{55} Id. at 733.
ity limitation, though, because the Court found that the international norm against “arbitrary detainment” had not reached a level of acceptance and definiteness comparable to that of Blackstone’s three historical offenses. In reaching this determination, the Court considered the practical effects that recognizing such a claim would have. After rationalizing that recognition of such a claim “would create an action in federal court for arrests by state officers who simply exceed[ed] their authority,” the Court rejected Alvarez’s claim without addressing the other factors.

D. The Critics

Since the Court’s decision in June 2004, Sosa has generated strong interest and mixed views among scholars. It has received praise from those scholars who adhere to the majority opinion and believe that Sosa stands for the proposition that CIL is federal common law. On the other hand, critics who hold the minority viewpoint and believe that the opinion endorsed the majority view, attack the opinion as being inconsistent with the post- Erie federal common law doctrine. These scholars also criticize the opinion as lacking guidance for the lower federal courts to follow in determining when to incorporate CIL into federal common law.

Also criticizing the majority opinion in Sosa as lacking in guidance, Justice Scalia quipped in his concurrence that the only restraint the majority placed on federal courts to create new causes of action was the use of their own discretion. He further dismissed the specificity limitation as hardly “a recipe for restraint in the future.” Believing that the majority confused pre- Erie general common law with post- Erie federal common law, Justice Scalia attacked the majority’s claim to have left the door open to new causes of action. According to Justice Scalia, Erie closed that door in 1938, and federal common law was a door best left shut.

Scalia’s viewpoint gained support of other scholars. For example, basing his conclusion on the notion that “federal courts have been incapable of creating common law” since Erie, Eugene Kontorovich, an assistant professor at George Mason University School of Law, criticized the opinion for

56 Id. at 736–38.
57 Id. at 736.
58 See Dodge, supra note 12, at 88.
59 See Kontorovich, supra note 12, at 114.
60 See Brav, supra note 12, at 275.
61 Sosa, 542 U.S. at 745 (Scalia, J., concurring).
62 Id. at 748.
63 See id. at 731 (majority opinion) (“[N]othing Congress has done is a reason for us to shut the door to the law of nations entirely.”).
64 Id. at 746 (Scalia, J., concurring).
65 Kontorovich, supra note 12, at 122.
the "fundamental inconsistency in its treatment of changes in the nature of [CIL] and federal common law since the enactment of the [ATS]."66 He characterized the majority's analysis as preserving "the federal courts' common lawmaking power as it stood in the eighteenth century, while allowing the scope and subjects of that power to keep pace with the organic growth of [CIL] norms."67 Other scholars, asserting similar claims, fault the majority for giving lower courts little guidance in determining when to create causes of action under the ATS.68

These criticisms ignore the evolution of the federal common law doctrine since Erie. Both Justice Scalia's concurrence and critics who followed rely on Erie's basic propositions that there is no federal general common law, and that when authorized to do so, the courts do not find or discover such law but create it. While true, these critics fail to take the next step and explore the analysis that the federal courts have developed for creating federal common law in the sixty-plus years since Erie. They have also not considered the implications of the Courts' guidelines as a whole. Parts III and IV of this Note demonstrate how these critics have overlooked the evolution of federal common law doctrine since Erie. When compared to the approaches that the federal courts have utilized in their treatment of other types of federal common law, the majority's approach proves consistent.

III. PROVIDING A BACKDROP FOR COMPARISON: AN OVERVIEW OF FEDERAL COMMON LAW

In order to provide context for the Sosa analysis, a review of the modern federal common law doctrine is necessary. Since Erie, the Court has essentially developed two approaches for creating federal common law.69 The first approach involves the federal courts' creation of federal law to protect important federal interests.70 The second category of federal common law consists of those rules of federal law that have been created in order to effectuate congressional intent.71

66 Id. at 114.
67 Id. at 123.
68 Bray, supra note 12, at 275.
70 Id.
71 Id.
A. Protecting Federal Interests

The Court first undertook the role of creating rules of federal law to protect an important federal interest in *Clearfield Trust Co. v. United States.* That case involved a question of whether, under a Pennsylvania state law, the government's failure to provide Clearfield Trust Company prompt notice of a forgery would bar it from recovering funds that the company erroneously dispersed to an unknown person. In resolving this issue, the Court announced that "in the absence of an applicable Act of Congress," the federal courts could "fashion the governing rule of law according to their own standards" when the decision involved a "choice of a federal rule designed to protect a federal right." Although the Court did not elaborate on what types of rights would merit a choice of rule, the Court's rationale for determining that such a right existed provided some insight. The Court considered such factors as whether a federal source for the right existed and whether leaving the rule of decision to the state courts would "subject the rights and duties of the U.S. to exceptional uncertainty" and "lead to [a] great diversity in results."

The Court revisited the *Clearfield* doctrine in *United States v. Kimbell.* *Kimbell* involved a determination of whether liens arising from federal loans take precedence over private liens. The Court determined that the issue sufficiently implicated a federal interest, which warranted the protection of

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72 *Clearfield Trust Co. v. United States,* 318 U.S. 363, 366-67 (1943). *Clearfield* concerned a check that had been issued by the federal government. An unknown person intercepted the check before it reached its intended recipient and forged the signature of the intended recipient at a J.C. Penney retail store. Not aware of the forgery, J.C. Penney deposited the check with Clearfield Trust Co. and received funds for it. Subsequently, the federal government reissued the check. The government then sued Clearfield Trust for reimbursement of the funds from the first check. *Id.* at 364-66.

73 *Id.* at 365-66.

74 *Id.* at 367.

75 The Court did not suggest that a federal source was mandatory or that the source must explicitly supply such a right. For example, in this case, the Court found a sufficient federal source in the fact that the check was issued for services performed under the Federal Emergency Relief Act (FERA) and that the authority to issue such checks had its origin in the Constitution and other statutes. *Id.* at 366.

76 *Id.* at 367.


78 See *id.* at 718. *Kimbell* actually represented a consolidation of two cases. The first case involved a priority dispute between two competing liens—one executed by a grocery wholesaler and the other stemming from a loan guaranteed by the Small Business Association (SBA). *Id.* at 718-19. The other case involved a dispute between a federal contractual security interest derived from loans given by the Farmers Home Administration (FHA) and a repairmen's lien. *Id.* at 723. In both suits, the application of state priority rules would result in the federal loan programs having a security interest junior to that of the private security interest. *Id.* at 719, 723.
federal law.\textsuperscript{79} True to the \textit{Clearfield} doctrine, the Court identified a federal source from which important federal rights were derived.\textsuperscript{80} Unlike \textit{Clearfield} though, \textit{Kimbell} did not end its examination by creating its own rule of federal law. Instead, it expanded the analysis to include a second-tier inquiry into the content of the rule and in particular whether to adopt a state law or fashion a nationwide federal rule to protect the federal interest.\textsuperscript{81} In making this determination, the Court considered whether specific federal interests necessitated uniformity of decisions and whether the application of state law would frustrate specific objectives of federal programs.\textsuperscript{82} Then, the Court balanced those factors against the disruption that a federal rule would cause to commercial relationships predicated on state law. After conducting this balancing test, the Court concluded by adopting the state rule of law to protect the federal interest involved.\textsuperscript{83}

In sum, \textit{Clearfield} and its progeny reveal a two-tier inquiry into whether federal courts may adopt a rule of decision as part of federal common law to protect a federal interest. The first tier involves considering whether a significant federal interest warrants such a rule. In making this determination, courts have looked to whether a federal source exists to support the interest.\textsuperscript{84} After determining the presence of a federal interest, courts engage in a second inquiry regarding the content of the rule. In deciding whether to base the federal law on existing state law or develop a new rule, courts balance the need for uniformity and the degree that state law would frustrate federal objectives against the potential disruption to commercial relationships predicated on state law. Federal courts will only adopt a rule of decision as federal common law after they conclude that a sufficient federal interest exists, such that the factors of the balancing test weigh in favor of creating a new rule to protect it.

\textsuperscript{79} \textit{Id.} at 727.

\textsuperscript{80} The Court found that a sufficient federal source existed in the Acts of Congress which authorized the two federal loan programs, the SBA and FHA, to effectuate loan transactions. The Court reasoned that the constitutional function which Congress exercised in passing such acts transcended to the loan programs such that important federal rights were implicated in the execution of their liens. \textit{Id.} at 726.

\textsuperscript{81} See \textit{id.} at 728.

\textsuperscript{82} See \textit{id.} In \textit{Kimbell}, the Court reasoned that since federal lending programs must follow state law in conducting many of their other daily activities, the federal interest involved in the case did not necessitate a high degree of uniformity. The Court further found that adopting a state rule of law would not interfere with the course of the agencies' operations or frustrate federal objectives. \textit{Id.} at 729-30.

\textsuperscript{83} \textit{Id.}

\textsuperscript{84} See supra note 75 and accompanying text.
A second category of federal common law consists of that common law developed by federal courts to fulfill Congress' purpose in adopting a particular statute. Situations involving this type of federal lawmaking may arise in two situations—where a statute includes express authorization for federal courts to create a body of common law rules and where the courts create private right of action under a federal statute. Since the second situation occurs without an express authorization from the legislature, it has naturally necessitated a more detailed analysis. Since Erie, three different analyses have developed for determining when federal courts may create a private cause of action under a federal statute. Although each has been progressively more restrictive, none has been overruled.

The analysis developed in J.J. Case Co. v. Borak represents the least restrictive approach. In Borak, the Court allowed a stockholder of a company to bring suit against the company to enjoin it from merging with another corporation and to recover monetary damages from violations of the Securities Exchange Act. Although the Act did not provide for a private right of action, the Court determined that “among [the Act's] chief purposes is ‘the protection of investors,” and reasoned that because of this, the Act “implie[d] the availability of judicial relief where necessary to achieve that result.” As a result, Borak allows federal courts to create a private action if damage suits would help accomplish the legislative purpose for a statute.

Almost ten years after Borak, the Court was confronted with another opportunity in Cort v. Ash to create a cause of action by a stockholder against corporate directors based on a violation of a criminal statute prohibiting corporations from making “a contribution or expenditure in connection with any election....” The Court responded by engaging in a four-part inquiry. First, the court questioned whether the plaintiff belonged to the class “for whose especial benefit the statute was enacted.” Second, the Court considered the intent of the legislature, explicit or implicit, to create such a cause of action. Third, the Court examined whether recognizing a

85 See CHEMERINSKY, supra note 69, at §§ 6.2-6.3, at 368, 376.
86 See id. at 380-88.
87 See id. at 388 (“When the court uses the third approach, it cites cases decided under earlier approaches and no decisions have been expressly overruled.”).
89 Id. at 429-30.
90 Id. at 432 (quoting the Securities Exchange Act of 1934, 15 U.S.C. § 78(a)).
91 Id.
93 Id. at 78.
94 Id. (quoting Texas & Pacific Ry. Co. v. Rigsby, 241 U.S. 33, 39 (1916)).
95 Id.
remedy would be consistent with the underlying purposes of the statute.96 Lastly, the Court ascertained whether the cause of action was one traditionally relegated to state law.97 The Court did not provide any guidance as to how the federal courts should weigh each factor.

Only four years after Cort v. Ash, the Court implemented yet another more restrictive approach to determining whether federal courts could create a cause of action pursuant to legislative intent. In Touche Ross & Co. v. Redington, the Court confronted another request to create a private cause of action for a violation of the Securities Act.98 However, rather than engage in the Cort v. Ash four-step analysis, the Court instead declared that the individual factors were irrelevant to the facts in that case and emphasized that the central inquiry remains to be "whether Congress intended to create, either expressly or by implication, a private cause of action."99 Applying the four factors of Cort v. Ash, the dissent stated that the plaintiffs were entitled to bring a cause of action.100

Since Touche Ross, the Court has considered a variety of factors when discerning whether the legislature explicitly or by implication intended to create a cause of action including whether the statute provided for other remedies101 and legislative silence.102 Although the Court has consistently exercised restraint in creating causes of action, the Court has created private rights of actions where the same types of remedies have been recognized by the courts in the past.103

IV. SHINING A NEW LIGHT ON SOSA: A COMPARISON OF SOSA WITH MODERN FEDERAL COMMON LAW DOCTRINE

Critics fault Sosa’s treatment of CIL as being both inconsistent with post-Erie federal common law and providing little guidance for lower federal

96 Id.
97 Cort, 422 U.S. at 78.
99 Id. at 575-76.
100 Id. at 580 (Marshall, J., dissenting).
101 See Transamerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11 (1979) (reasoning that the existence of other remedies in the statute reflected a lack of intent to allow private actions); Alexander v. Sandoval, 532 U.S. 275 (2001) (implying that the provision of other methods of enforcement reflects an intent to preclude all others).
102 See Karahalios v. National Federation of Federal Employees, 489 U.S. 527 (1989) (emphasizing that Congress knew "that such issues [judicially created private rights of action] were being resolved by a straight-forward inquiry into whether Congress intended to provide a private right of action").
courts to follow. However, in light of the federal common law doctrine that has developed since *Erie*, the *Sosa* analysis proves consistent with those restrictive approaches developed by the federal courts for creating federal common law. Further, the *Sosa* analysis provides lower courts more guidance than other approaches. This section demonstrates *Sosa*’s consistency by first comparing the *Sosa* analysis to how the courts have applied the *Clearfield* doctrine. Then, it examines the consistency of *Sosa* with the approaches that the federal courts have utilized to create federal common law in order to effectuate legislative intent.

A. Protecting Federal Interests

In applying the *Clearfield* doctrine and its progeny, federal courts have been reluctant to create rules of federal law in litigation involving private parties. This reluctance, however, may result from the Court’s own sense of judicial restraint than anything inherently restrictive about the analysis. Examining how the federal courts have applied the two tiers of the *Clearfield-Kimbell* analysis separately provides a greater appreciation of both the level of discretion involved in this approach, as well as its consistency with the built-in restrictiveness of the *Sosa* analysis.

1. Determining Whether a Federal Interest Exists that Necessitates the Incorporation of CIL as a Rule of Federal Law. — As *Clearfield* establishes, the first tier of the analysis entails discovering whether a sufficient federal interest needs protection. Other than requiring a federal source to support the interest, *Clearfield* and its progeny offer no further guidance regarding when such an interest exists. Two cases in particular, *Miree v. DeKalb County* and *Boyle v. United Technologies Corp.*, illustrate how the result of a case may turn more on the creativity of the court in finding a federal interest than in the adherence to the *Clearfield* doctrine.

*Miree* presented the question of whether the federal courts could create a rule of federal law that would allow a third-party suit against a local county government based on an alleged breach of its contract with the Federal

104 See *supra* notes 58–68 and accompanying text.


Aviation Administration (FAA). The third parties represented survivors of deceased passengers of an airplane crash. The survivors alleged that the County violated provisions of its contract with the FAA and contributed to the airplane crash by allowing a garbage dump to be placed adjacent to the airport. Although voluminous aircraft regulations provided a source from which the Court could derive a federal interest, the Court rejected the opportunity to create such a rule on the basis that "no substantial rights ... hinged on [the outcome of the case]."

Boyle involved an analytically similar situation. A father of a deceased military helicopter pilot successfully brought a diversity suit in a federal district court against a helicopter manufacturer and a military contractor, under state tort law. The plaintiff's claim alleged that the manufacturer had negligently designed the escape hatch of the helicopter to open out instead of in so that when submerged in water the escape hatch could not open because of the pressure. On appeal, the Supreme Court had to choose whether to create a rule of federal law that would subsume state tort law and provide military contractors a defense to state tort liability.

The Court could have found as it did in Miree that where the government may have an interest in aircraft safety, it did not have any substantial rights which hinged on the outcome of the case. Alternatively, as the dissent discussed, the Court could have concluded that state tort actions promoted government interests in saving military lives by encouraging safer aircraft designs.

The majority, however, per Justice Scalia, declined that route, and instead carved a federal defense for military contractors from the discretion exception of the Federal Torts Claims Act (FTCA). This exception of the FTCA excuses government officials from tort liability when claims are based on a discretionary action or function of their duties as government officials. Although the Act only pertains to government officials and not military contractors, the Court found it relevant by reasoning that the government officials who contracted with the manufacturer had exer-

108 Miree, 433 U.S. at 29.
109 Id. at 26.
110 Id. at 27.
111 Id. at 31 (emphasis added).
112 Boyle, 487 U.S. at 502-03.
113 Id. at 503.
114 Based on a mixture of both state law and federal law grounds, the Court of Appeals reversed the jury verdict in favor of the plaintiff and remanded the decision with directions to enter judgment in favor of the defendant manufacturer. Id.
115 Boyle, 487 U.S. at 530 (Brennan, J., dissenting).
116 Id. at 511.
117 Id. (citing the Federal Torts Claim Act, 28 U.S.C § 2680(a)).
118 Id. at 511-12.
cised discretion in contracting for that particular design of the helicopter. The Court further explained that a federal rule was needed to protect the federal government from price increases that would result when military contractors "rais[ed] their prices to cover ... contingent liability for the government-ordered designs."120

Another example demonstrating the amount of judicial discretion involved in detecting the presence of a sufficient federal interest occurred when the federal source itself was not very clear. For example, Sabbatino121 required the Court to decide whether to incorporate the Act of State Doctrine (ASD) into federal common law.122 The doctrine precludes courts from inquiring into the validity of an official act of a foreign state's government.123 The Court recognized that the ASD was neither constitutionally required nor compelled by international law.124 But, because cases in which the doctrine would apply implicated foreign affairs, the Court concluded that the ASD protected an important federal interest which had its source in the doctrine's "constitutional underpinnings" and the "basic relationships between branches of government in a system of separation of powers."125

The analysis of these cases does not serve as criticism of the federal courts for inconsistencies in applying the Clearfield doctrine, but rather to highlight the discretionary nature of the inquiry and the difficulty of applying it to varying fact patterns. Although courts have found substantial federal interests in issues which concerning federal pecuniary interests and foreign affairs, they have not provided any clarity for determining which pecuniary interests or foreign affairs warrant the creation of a federal rule of decision. On the other hand, Sosa has not only determined that a federal interest exists in matters implicating CIL126 but has also delineated factors to determine the particular types of CIL claims that warrant the creation of federal common law.127

Sosa derives a federal interest in incorporating CIL into federal common law from the ATS.128 The Court explains that since the

Framers [] assumed that federal courts could properly identify some international norms as enforceable in the exercise of [jurisdiction under the ATS] ... it would be unreasonable to assume that the First Congress would

119 Id.
120 Boyle, 487 U.S. at 511–12.
121 For the facts of Sabbatino, see supra note 25 and accompanying text.
123 Id.
124 Id.
125 Id.
127 See supra notes 47–55 and accompanying text.
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. 129

Justice Scalia criticizes this reasoning by analogizing that if this reasoning holds true "then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS." 130 However, the Court's reasoning reflects no more attenuation than the Court's reasoning in Boyle and Sabbatino. 131

More importantly, Sosa makes clear that the mere existence of a federal source does not give rise to the creation of federal common law based on CIL as it did in Boyle and Sabbatino. 131 Instead, the Court further restricts the instances which will give rise to the courts' authority to create federal common law through stringent limitations. First, courts must ascertain whether any legislative intent exists to support the incorporation of CIL as federal common law. 132 Second, the offense giving rise to the incorporation of CIL must pass the high threshold of specificity that the original Blackstone offenses exhibited, and courts must view this in light of the practical consequences that would result from recognizing such a claim. 133 Even if the CIL at issue survives those inquiries, a federal interest may not exist if the parties asserting the claim have not exhausted their remedies through other courts of justice or international tribunals. 134 Lastly, Sosa requires a case-specific deference to the legislative and executive branches. 135

Although the Sosa analysis will inevitably entail some level of discretion throughout each of the inquiries, the analysis can hardly be labeled a "discretion-only analysis," 136 as Justice Scalia describes it. At the very least, the level of discretion involved in conducting the Sosa analysis compares to that utilized in Boyle, Miree, and Sabbatino and certainly provides more guidance than Clearfield in determining which instances give rise to a federal interest.

2. Whether Federal Courts should Fashion a Federal Rule of Law to Protect Federal Interests. — The way in which the federal courts have determined whether state law would conflict with federal objectives further demonstrates the degree of judicial discretion inherent in the Clearfield-Kimbell

129 Id. at 730.
130 Id. at 745 (Scalia, J., concurring in part and concurring in the judgment).
131 Id. at 731 ("We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises . . . .").
132 Id. at 726.
133 Id. at 732–33.
134 Id. at 733 n.21.
135 Id. at 733.
136 Id. at 745 (Scalia, J., concurring in part and concurring in the judgment).
analysis. *Boyle* serves as such an example. After finding a sufficient federal interest, the Court continued to conduct the second part of the analysis in which it determined that a federal rule of law was needed to avoid a conflict with federal objectives. The Court asserted that the state tort law which assessed liability to the manufacturer for not designing a safety latch which opened inward directly conflicted with the federal duty imposed on the contractor to manufacture a hatch that opened outward. In creating this defense, the Court also ignored some indication from Congress that it did not intend to extend this defense to military contractors. By contrast, the *Sosa* analysis explicitly requires courts to both consider legislative intent generally and conduct a case-specific deference to both the legislature and the executive. Under the *Sosa* analysis, courts would have more difficulty disregarding evidence of legislative intent than the Court in *Boyle* did.

In addition to finding that state law would conflict with federal pecuniary interests, the *Sabbatino* Court also recognized that federal objectives are frustrated by state law when a case implicates foreign affairs. In determining that allowing state rules of law to control would frustrate the federal government’s need for uniformity and would “hinder . . . [the] country’s pursuit of goals both for itself and for the community of nations as a whole,” *Sabbatino* emphasized that if “state courts [were] left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.” This same argument can be extended to apply to cases involving CIL since both implicate foreign affairs. However, *Sosa* further specifies when state law regarding CIL would frustrate federal objectives. Under *Sosa*, that occurs when the international norm for which the claim is based has reached the level of specificity and acceptance that the original Blackstone offenses did.

138 Id. at 505–06 (“We think the reasons for considering these closely related areas to be of ‘uniquely federal’ interest apply as well to the civil liabilities arising out of the performance of federal procurement contracts.”).
139 Id. at 507-12.
140 Id. at 502-03, 511-12.
141 Id. at 516 n.1, 518 (Brennan, J., dissenting).
144 Id.
145 Id. at 424.
146 See supra notes 51–53 and accompanying text.
B. Effectuating Legislative Intent

When a legislative act expressly provides for a private cause of action, federal courts have little trouble allowing such an action to proceed. The more difficult situation occurs when the courts are asked, as was the Sosa Court, to recognize a private cause of action based on a statute that does not explicitly create one. Although not occurring often, courts have allowed such an action to proceed when doing so would effectuate the congressional intent of the statute on which the claim is based. Just as any court's determination that a federal interest exists to support creating a private cause of action under Clearfield and its progeny involves some level of discretion, the determination to allow a private cause of action to effectuate congressional intent also necessitates judicial discretion. The three progressively more restrictive approaches developed by the Supreme Court in Borak, Ash, and Touche Ross evidence the discretionary nature of making such a determination. Consistent with these approaches, the analysis developed in Sosa provides guidance to lower courts in determining whether a cause of action based on CIL would effectuate the legislative intent behind the ATS and further offers a level of restrictiveness similar to or higher than that demonstrated in the above-mentioned approaches.

Because none of the three approaches for determining when allowing a cause of action would effectuate legislative intent have been expressly overruled, the lower federal courts do not enjoy a heightened level of clarity in this area of federal common lawmaking. As a result, criticism that Sosa fails to provide the same type of guidance in the area of CIL law that the Court has provided in other areas of federal common law is unfounded. Further assertions that the level of discretion involved in the Sosa analysis is inconsistent with the federal common law doctrine in this area cannot be reconciled when the factors in the Sosa analysis are compared to those involved in the other three approaches.

In short, Sosa stands for the proposition that allowing a cause of action based on CIL only effectuates the legislative intent of the ATS when (1) there is legislative intent, (2) the international norm has achieved the level

147 See, e.g., Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989) ("[C]ourts are to develop a federal common law of rights and obligations under ERISA plans.")
149 Borak, 377 U.S. 426 (1964).
152 See supra notes 72–84 and accompanying text.
153 See CHEMERINSKY, supra note 69, at § 6.3, at 388 ("[W]hen the Court uses the third approach, it cites cases decided under earlier approaches and no decisions have been expressly overruled.")
of specificity and acceptance comparable to Blackstone's three historical offenses, (3) the plaintiff has exhausted all other remedies, and (4) the legislative and executive branches have not indicated they should refrain from doing so. These factors provide for more guidance and allow for less discretion than the *Borak* analysis which, without stating any factors for consideration, simply advises lower federal courts that they may create a private cause of action if damage suits would help accomplish the legislative purpose for the statute.

Similarly, *Sosa* offers more guidance and less discretion than the analysis under *Cort*. Although the four factors that the Court developed in *Cort* provide more guidance and allow for less discretion than *Borak*, the *Cort* Court did not specify how much weight should be given to each factor. Unlike the balancing test in *Cort*, the *Sosa* Court gave no indication that its limiting factors may be balanced. Instead, the absence of one factor appears to be the death knell for a cause of action as it was for Alvarez in *Sosa*. After determining that the international norm against unlawful detainment did not meet the specificity requirement, the Court in *Sosa* did not proceed to balance it with the other factors. Instead, the Court ended its analysis and dismissed the cause of action.

Of the three approaches, the restrictiveness of the analysis developed in *Sosa* compares most to the analysis developed in the line of cases beginning with *Touche Ross*. Rather than legislative intent serving as one factor in a balancing test as in the *Cort* analysis, the Court in *Touche Ross* makes discerning the legislative intent the central focus. In discerning legislative intent, subsequent courts adhering to *Touche Ross* have considered whether the statute in question provides for other remedies. Similarly, under the *Sosa* analysis, legislative intent is a decisive factor, the absence of which would lead to the dismissal of a cause of action. Also, like *Touche Ross*

154 *See supra* notes 42–55 and accompanying text.
157 *Id.* at 738.
159 *See* Transamerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11, 18–22 (1979) (reasoning that the existence of other remedies in the statute reflected a lack of intent to allow private actions); Alexander v. Sandoval, 532 U.S. 275, 290 (2001) (implying that the provision of other methods of enforcement reflects an intent to preclude all others).
160 Although the Court in *Sosa* does not state this explicitly, several aspects of its opinion lead to this conclusion. First, the Court explains that "the general practice has been to look for legislative guidance before exercising innovative authority over substantive law," and that "it would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Sosa*, 542 U.S. at 726. Second, the Court expressly provides that even when other limiting factors—specificity and exhaustion of remedies—are satisfied, a case-by-case deference to both the legislative and executive branches must be given. *Id.* at 733. Finally, by dismissing the cause of action proposed by Alvarez on the
and its progeny, the Sosa Court provides for the consideration of whether other remedies exist for the cause of action in determining congressional intent. The court in Sosa, however, may have provided an even more restrictive analysis than Touche Ross by requiring a case by case deference to the executive branch and an analysis into the specificity of the norm from which the cause of action is derived. Although the Court did not explore the parameters of this requirement, the presence of this factor suggests that courts may be unable to recognize private causes of actions in instances where the legislature has manifested intent to create a cause of action but the executive has expressed a contrary intent.

**CONCLUSION**

In 2004, the Supreme Court in Sosa v. Alvarez-Machain created controversy when it determined that federal courts, pursuant to their federal common law making authority, may recognize a private cause of action based upon CIL in certain circumstances. This Note has examined the analysis developed in Sosa for the lower federal courts to follow when determining whether to create these causes of action and compared it to other types of federal common law. Despite criticisms to the contrary, the analysis developed by the Court in Sosa proves consistent with other types of federal common law. As discussed, the restrictiveness of the Sosa analysis has been underappreciated. The Sosa analysis provides a similar, and sometimes higher, degree of restrictiveness and guidance than previous approaches developed by the Court to determine when lower federal courts may exercise their federal common law making authority and permit private causes of action.

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sole basis that the international norm of arbitrary detainment lacks the degree of specificity its analysis requires, the Court demonstrates that it has not created a balancing test in which the presence of one factor may outweigh the absence of another to allow a cause of action. See id. at 737–38.

161 Id. at 733, n.21.

162 Id. at 733.

163 Id. ("[T]here is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy.").