Inferences of Judicial Lawmaking Power and the Law of Nations

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This Article explores the Supreme Court's inconsistent use of prescriptive inferences to justify the creation of federal common law in areas regulated by the law of nations. On the one hand, the court has employed an inference of lawmaking power from an unadorned grant of jurisdiction in the case of admiralty suits and tort claims brought by aliens and based on the law of nations. It has not done so with respect to the law merchant and private international law, even though jurisdictional grants to the federal courts exist. The Article shows that the modern development of the law merchant and private international law as State law, subject to federal legislative overrides as needed, demonstrates why prescriptive inferences in the field of foreign relations are unnecessary and perhaps even harmful.

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INTRODUCTION

This Article, like the others in this symposium, responds to and builds upon *The Law of Nations and the United States Constitution*, by Professors Anthony Bellia and Bradford Clark.[1] Bellia and Clark convincingly argue that the law of nations as understood at the Founding framed critical constitutional choices, and their book thus illuminates modern issues of constitutional interpretation. They maintain that the Framers understood the law of nations as including three branches: the law merchant, the law of state-state relations, and the law maritime.[2] The Framers intended the federal judiciary to apply and enforce these bodies of law in cases over which they had jurisdiction.[3] The Framers did not intend, however, for the federal courts to determine, on their own initiative, whether foreign states had violated the law of state-state relations.[4]

Bellia and Clark do not press a related claim, namely, that the law of nations at the time of the Founding also informs modern questions of statutory interpretation, at least those with structural constitutional implications. This Article steps into that gap. For one important statutory problem—namely, whether a court should make an inference of the authority to make federal common law from a grant of subject matter jurisdiction (what I henceforth will call a "prescriptive inference")—the legacy of the Founding era's law of nations still matters.

Bellia and Clark observe that the Supreme Court has twice invoked an inference of prescriptive power from an assignment of adjudicative authority to authorize the federal courts to make (their take on) international law into federal law. In 1917, the Court inferred congressional authorization for the federal courts to make federal common law based on international maritime law from the constitutional and legislative grants of admiralty jurisdiction.[5] In 2004, the Court inferred a power to develop a federal common law of international-law torts from the 1789 Judiciary Act's grant of jurisdiction over tort claims brought by aliens based on the law of nations.[6] Each of these moves frustrates a central goal that, Bellia and Clark argue, the Framers pursued.[7] Both increase the risk that the federal judiciary, acting without support or guidance from the political branches, may disturb the friendly relations of the United States with foreign states.

These instances of the prescriptive inference present at least two puzzles. First, why make the inference with respect to admiralty and alien torts, but not alienage

1. ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION (2017).

2. Throughout this Article, I follow a convention of capitalizing the word "State" when referring to one of the United States, while using lower case to refer to a state as a subject of international law, such as the United States, Russia, or France. *Cf. Introductory Note, in* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (AM. LAW. INST. 2018) (explaining capitalization convention).

3. BELLIA & CLARK, *supra* note 1, at 13–18.

4. *Id*. at 75.

5. S. Pac. Co. v. Jensen, 244 U.S. 205, 214–15 (1917).

6. Sosa v. Alvarez-Machain, 542 U.S. 692, 712 (2004).

7. BELLIA & CLARK, *supra* note 1, at 75–88, 115, 183.

jurisdiction, at least in cases invoking the law merchant? The Framers created federal alienage jurisdiction to get control over private-law disputes between Americans and foreigners, which State courts had mishandled to the harm of the nation.[8] Why recognize a judicial power to override aberrant State rules in cases of admiralty or alien torts, but not in other disputes involving aliens and one of the branches of the law of nations?

Second, where does private international law fit in all this? Did the Framers hope to promote the development of uniform rules of recognition of foreign law and judgments through the federal courts, just as they expected the courts to apply the international law merchant and maritime law? If the answer is yes, what explains the modern approach that allows States to disregard private international law whenever they choose?

I argue that prescriptive inferences are problematic and, in the case of international law, face strong reasons for their avoidance. Contemporary practice with the law merchant and private international law offers a model for a kind of federalism that tolerates State law affecting foreign relations, while reserving to Congress the power to intervene to suppress State misrule.[9] This model fits admiralty and human rights as much as international commerce and recognition of foreign law and judgments.

The argument is not simply that States generally behave well, and that Congress can intervene when they do not. What we have seen in the last few decades is the rise of a supposedly uniform federal common law that impairs, rather than promotes, good relations with other states. Court-made rules supposedly grounded in international law, forged in litigation where the participants have no particular reason to advance the general welfare, increase legal risk and can discriminate against outsiders, including those acting on behalf of foreign governments. As Bellia and Clark demonstrate, this is exactly the outcome that the Framers sought to forestall when they created the federal courts.[10]

I begin with a discussion of the practice of prescriptive inference. Before the twentieth century, U.S. judges assumed the right to develop substantive rules and remedies, once their jurisdiction to adjudicate was established. The emergence of progressive legislation that provoked judicial suspicion, the expansion of international commerce, and then the economic and political crises of the 1930s invited a comprehensive reconsideration of what distinguished the prescribing of rules from the determination of cases or the choice of remedies. While backing away from general prescriptive power wielded by federal courts, the judiciary developed several techniques to preserve limited authority to make federal common law. One was the prescriptive inference. This could function as a sword and a shield, both providing new rights to adjudicate and suppressing State legislation that affronted judicial sensibilities. By the end of the 1970s, however, the

8. *See id*. at 49.

9. *See generally* Paul B. Stephan, *Competing Sovereignty and Laws' Domains*, 45 PEPP. L. REV. 239, 266–91 (2018) (describing provisional deference to State law by federal lawmakers).

10. BELLIA & CLARK, *supra* note 1, at 75–88.

Supreme Court again began to rethink judicial prescription along many dimensions. The prescriptive inference became a casualty of a general push against liberal readings of federal statutes to expand the domain of judicial lawmaking.[11]

I then turn to prescriptive inferences in the field of foreign relations law. For many commentators, this field is exceptional. Arguments for a federal common law of foreign relations anchored to prescriptive inferences seem more plausible here than anywhere else. Yet in practice, invoking the inference is the exception, not the rule. The Supreme Court has endorsed the move only twice. In other areas where federalization of foreign relations law might have advanced the same ends and where federal courts have subject matter jurisdiction, the Court allowed the States to take the lead. Both the private law of international commercial transactions and the whole of private international law still belong largely to the States, a few piecemeal congressional enactments and self-executing treaties aside.

I conclude by linking the contention that prescriptive inferences should be disfavored in the law of foreign relations to Bellia and Clark's observation that the Framers did not intend the judiciary to enforce the law of state-state relations against foreign states absent supervision from the political branches. Wielding international law as a means of constraining and condemning foreign governments, their agents, and their subjects may promote justice, and the harm to friendly relations may prove only a short-term cost of bringing about a better world. But this is not a judgment that courts should make on their own, without either the support or guidance of the politically accountable branches of government. Nor is the creation of subject matter jurisdiction, without more, the kind of legislative act that should launch the federal judiciary on this mission.

I. PRESCRIPTIVE INFERENCES AND THE SUPREME COURT

This section traces the history of prescriptive inferences in the Supreme Court. It shows that the concept of general law—that is, a body of substantive and procedural law that federal courts could apply in the absence of express statutory authorization—made such inferences unnecessary. With the rise of federal common law as a more limited, but also more powerful, substitute for general law, the possibility of inferring judicial authority to create substantive law arose. The Court has invoked the inference, however, in only two areas of international law: in admiralty law and in (some) of the law of state-state relations.

The question whether a congressional assignment to federal courts of subject matter jurisdiction carries with it a power to develop the substantive law that applies to cases within that jurisdiction did not seem to arise before the twentieth century. During the nineteenth century, fraught debates played out over the scope of Congress's power to prescribe rules.[12] What a federal court was supposed to do when it had jurisdiction, however, attracted less controversy. Sufficient stability

11. On the general push, see Paul B. Stephan, Bond v. United States *and Information-Forcing Defaults: The Work that Presumptions Do*, 90 NOTRE DAME L. REV. 1465, 1474–76 (2015).

12. *See generally, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (denying Congress power to prohibit slavery in newly admitted States not part of Northwest Territories), *superseded by*

in private law, and a relative lack of grand projects in public law, freed judges to render judgment without systemic or widespread attacks on their authority to decide where to look for rules to apply or remedies to supply. In the absence of legislation, judges looked to general law to resolve issues not governed by legislation or tied to local interests, such as wills, title in land, or marital status.[13] In the mind of nineteenth-century judges, general law comprised rules of procedure and substance that courts normally invoke in the absence of a specific command of the legislator. It was shared among sovereigns, rather than dependent on the will of a particular lawmaker.

Swift v. Tyson epitomizes how general law functioned.[14] At issue was the commercially-important question whether a creditor in receipt of a bill of exchange qualified as a holder in due course. The Court held that the question fell under the general law, which belonged to no particular country. State court decisions could serve as evidence of that law, but they did not bind another court—including a federal court—faced with more compelling evidence of the content of that law.[15] In particular, international practice could outweigh the views of the State court that, but for federal diversity jurisdiction, would have heard the case.[16] Although general law as promulgated by the federal judiciary might not bind State courts, Justice Story believed that its elucidation would generate a beneficial judicial dialogue. Guided by generally accepted rules embedded in the law merchant, judges at all levels would gravitate toward outcomes that would drive out anomalies and sustain commerce.[17]

U.S. CONST. amend. XIII. One might even say that the prescriptive jurisdiction of Congress was a big part of what was at stake in the Civil War.

13. *See, e.g.*, Swift v. Tyson, 41 U.S. (16 Pet.) 1, 19 (1842) ("[T]he decisions of the local tribunals upon [the general principles and doctrines of commercial jurisprudence] are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 222–23 (1818) ("[T]he remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity . . . ."); Marine Ins. Co. of Alexandria v. Tucker, 7 U.S. (3 Cranch) 357, 393 (1806) (construing a commonly-held doctrine of marine insurance as the "law merchant of the land"); *see also* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1538–54 (1984) (detailing resolution of marine insurance cases under general law in federal courts during nineteenth century). On the broader historical and political dimensions of the general law project during this period, see DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 278–81, 286–93 (2005).

14. 41 U.S. (16 Pet.) 1 (1842).

15. *Id.* at 18–19. To reach this outcome, the Court had to work around section 34 of the Judiciary Act of 1789, which provided: "That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92. Writing for the Court, Justice Story reasoned that the "laws of the several states" did not extend to State court decisions on non-local matters, which served only as evidence of general law and did not function as positive law. Swift v. Tyson, 41 U.S. (16 Pet.) at 18–19. In the absence of a mandate to apply the State decisions, federal courts remained free to use their own, best judgment as to what the general law was.

16. *Id.* at 20–21.

17. *See* R. KENT NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC 339–41 (1985).

That there could exist a body of general law that all judges, federal and State, could develop and apply, with the decisions of neither binding on the other, reflected a particular view of what judges did. Standard judicial practice, whether developing the common law of commercial relations or designing remedies to enforce legal rights in civil cases, was specialized, esoteric, consensus-driven, and outside the bounds of normal political contestation. Judges, as fallible humans, could disagree on the content of the general law, as the New York State courts and the Supreme Court did in *Swift v. Tyson*, or as Marshall and Story did with regard to the status of slaves in admiralty.[18] But this did not detract from the conviction that the kinds of prescriptions that judges issued were fundamentally different from those enacted by legislators. Judges were disinterested and shared common methods and commitments, while legislators reflected interests more than wisdom and answered to their constituents. Judges also lacked the capacity or discretion to make political or diplomatic judgments.[19] The idea that judicial and legislative lawmaking were more alike than different simply did not occur to many jurists until the twentieth century.

Pinning down exactly why this view did not survive to the modern era need not detain us here. What is important is that, in the new century, the Supreme Court expressed a different understanding of what judges do: judges adopted rules based more on political judgment and perceived social need than on abstract principles shared within a hermetic guild.[20] With this understanding came an impulse to look more closely at the lawmaking credentials of particular courts in particular contexts. Only once this shift occurred was it possible to ask whether the assignment of subject matter jurisdiction to a federal court implied a license to make federal law, rather than simply to apply general law.

Some terms need clarification here. In the parlance of the law of federal courts, subject matter jurisdiction is a limited authorization to exercise adjudicative jurisdiction, that is, to decide cases that come within the scope of the authorization.[21]

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18. On the negotiable instruments issue, compare *Swift*, 41 U.S. (16 Pet.) at 16–19 (describing New York State court decisions holding that cancellation of a prior debt was insufficient to render creditor a holder in due course of the corresponding note), with *id.* at 22 ("[W]e entertain no doubt, that a bonâ fide holder, for a pre-existing debt, of a negotiable instrument, is not affected by any equities between the antecedent parties . . . ."). On slavery, compare The Antelope, 23 U.S. (10 Wheat.) 66, 121 (1825) (Marshall, J.) ("Slavery, then, has its origin in force; but as the world has agreed that it is a legitimate result of force, the state of things which is thus produced by general consent, cannot be pronounced unlawful."), with United States v. The La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) ("I am bound to consider the [slave] trade an offence against the universal law of society and in all cases, where it is not protected by a foreign government, to deal with it as an offence carrying with it the penalty of confiscation.").

19. The capacity perception underlay the conviction of the Framers, as well as of later generations, that courts should not take the initiative in enforcing the law of state-state relations against foreign states. *See* BELLIA & CLARK, *supra* note 1, at 111–12.

20. Consider, for example, the convergence of the jurisprudence of Justices McReynolds and Brandeis on this point, notwithstanding their deep political disagreements. *See infra* notes 45, 76 and accompanying text.

21. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421 (AM. LAW. INST. 2018).

What the *Erie* revolution wrought, in a nutshell, is the principle that the obligation to decide a case did not imply the authority to prescribe the rule to apply to the case.[22] The prescriptive authority, whether express or implied, must come from somewhere else. For federal courts, that somewhere else is the Constitution, a self-executing treaty, or an act of Congress.[23] Federal common law rests on reasonable interpretation of these positive enactments, including inferences that might be made from their provisions.

Moreover, one must appreciate the difference between general law, as understood in the nineteenth century, and federal common law, as recognized in *Erie*. As noted above, general law was not tied to any particular lawmaker. It was available as a resource for judges in any civilized nation to use in the absence of an ousting authority.[24] Federal common law, by contrast, functions like federal constitutional and statutory law. Whereas general law fails to override inconsistent State law, the federal common law, as part of the "Laws of the United States," does so under the Supremacy Clause.[25] For the same reason, it provides a constitutional basis for federal-court subject matter jurisdiction and, perhaps, legislation implementing that jurisdiction.[26] General law never did that.[27]

As long as judges accepted general law as a useful and legitimate source of rules of decision in cases over which federal courts had subject matter jurisdiction, prescriptive inferences were unnecessary. The need for federal common law, as opposed to general law, only arose once federal courts wished to override State rules that displaced general law. To achieve this end, they had to find a basis for constructing federal common law. Over the course of the twentieth century, the Supreme Court endorsed many such bases.[28] The prescriptive inference is

22. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("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. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.").

23. As to *Swift v. Tyson*'s reading of section 34 of the Judiciary Act of 1789, see supra note 15, the *Erie* majority explained that this interpretation was not only, from a modern perspective, mistaken, but, more importantly, unconstitutional. 304 U.S. at 77–78, 80.

24. The distinction between civilized and other nations pervaded the international law of the nineteenth century. It remains with us today, for example in the provision of the Statute of the International Court of Justice that directs that tribunal to apply as secondary rules of decision "the general principles of law recognized by civilized nations." Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, T.S. 993.

25. U.S. CONST. art. VI, cl. 2.

26. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States . . . ."); 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."). *But see infra* notes 44, 52 and accompanying text (discussing distinction between constitutional and statutory federal-question jurisdiction).

27. *Compare* Hilton v. Guyot, 159 U.S. 113, 228 (1895) (general law governing recognition of foreign judgments imposes a reciprocity condition), *with* Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926) (New York State law does not impose reciprocity condition).

28. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885–87 (1986) (describing cases); Henry J. Friendly, *In Praise of* Erie*—And of the New Federal*

only one, but it has played a special role in the federalization of the law of nations.

The possibility of a prescriptive inference arises when Congress has assigned to the federal courts the authority to decide a class of cases but has not indicated what rules of decision the courts should apply to them. One must distinguish a prescriptive inference from legislative endorsement of an open-ended rule of decision, such as the Sherman Act's proscription of conspiracies in restraint of trade.[29] In the latter instance, Congress has expressed its wish that courts develop a body of substantive law, guided, but not much constrained, by preexisting common law concepts or other statutory hints.[30] In the case of a possible prescriptive inference, by contrast, Congress has not indicated anything about the applicable substantive law. That the courts should create this body of rules is a permissible, but certainly not necessary, inference. If the inference were to be made, however, the rules that courts come up with would function the same as those found in federal legislation. As a result, they would trigger the Supremacy Clause and displace contrary or inconsistent State law.

The Court first used subject matter jurisdiction as a basis to authorize the creation of federal common law in *Southern Pacific Co. v. Jensen*.[31] The dispute raised the question whether a State statute imposing a workers-compensation (rather than a traditional tort-law) liability regime could apply to the employer of a stevedore employed in loading and unloading cargo from a ship engaged in interstate commerce. The case, although litigated in State court, also fell within the admiralty jurisdiction of the federal courts. As Bellia and Clark explain, the Framers extended federal judicial power to "all Cases of admiralty and maritime Jurisdiction" to permit the federal courts to address a class of disputes involving two different strands of the law of nations.[32] Prize cases, which involved ownership of ships and cargo taken in combat, implicated peaceable relations among states because a failure to observe the prevailing rules would constitute a wrongful seizure of the property of aliens that might justify retaliation and even war. The federal courts thus had exclusive power over them.[33] By contrast, disputes over the law of water transport, or maritime law, were governed by rules that states followed as a matter of policy—for example, the promotion of commerce and of international comity—but not out of obligation.[34]

Common Law, 39 N.Y.U. L. REV. 383, 408–21 (1964) (same); Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 798–801 (1957) (same).

29. *See* 15 U.S.C. § 1 (2012).

30. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50–51 (1911).

31. 244 U.S. 205 (1917).

32. BELLIA & CLARK, *supra* note 1, at 114 (quoting U.S. CONST. art. III, § 2, cl. 1).

33. The Judiciary Act gave the federal district courts "exclusive original cognizance" of all admiralty and maritime cases, excepting those coming within the "savings to suitors" clause, which did not encompass prize cases. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1333(1) (2012)).

34. BELLIA & CLARK, *supra* note 1, at 114.

Congress implemented this approach to the law maritime in the first Judiciary Act. It provided for parallel, rather than exclusive, federal jurisdiction over any admiralty dispute where there existed "the right of a common-law remedy, where the common law was competent to give it."[35] This language excluded prize cases from State jurisdiction, but allowed State courts to hear contract and tort cases, including claims brought by seamen or their representatives against their employers.[36] The Act thus distinguished application of the obligatory category of admiralty law that affected relations between states from the comity-based law of nations that governed shipment in international commerce. State courts had no right to hear cases implicating the former, but litigants could look to the States to employ the latter.

The *Jensen* majority held that the constitutional and statutory bestowal of admiralty jurisdiction on federal courts gave Congress "paramount power to fix and determine the maritime law which shall prevail throughout the country."[37] Furthermore, "in the absence of some controlling statute[,] the general maritime law[,] as accepted by the federal courts[,] constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."[38] As a result, the State statute, which departed from "general maritime law," was invalid as to interstate (and international) shipping.[39]

Two aspects of *Jensen* are remarkable. First, the general maritime law that the case required the federal courts to "recognize" ousted State law—something that did not happen with the general law that the federal courts applied under *Swift v. Tyson*.[40] Second, the ousting of State prescriptive authority rested on Article III, Section 2's definition of the judicial power, rather than by implication from Article I's specification of the enumerated powers of Congress.[41] Admiralty law

35. Judiciary Act of 1789, § 9.

36. The doctrine was more complicated than the generalization stated in the text may suggest. The Court also understood the in rem jurisdiction of courts with admiralty jurisdiction, expressed as a libel against a thing, as exclusively federal. *Jensen*, 244 U.S. at 250–51 (Pitney, J., dissenting) (describing doctrine). This understanding did not lead them to conclude that a plaintiff could not bring an in personam claim in State court on a legal theory that also would support a libel. Rather, libels created subject matter jurisdiction and a particular remedy, but not an independent basis for substantive law.

37. *Id*. at 215 (majority opinion).

38. *Id*. (citations omitted).

39. *Id*. at 217–18.

40. As Ernest Young has put it: "*Jensen* is a rule of *preemption*, not of federal admiralty practice." Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 293 (1999). Later decisions embraced the preemptive effect of the federal common law of admiralty to limit the effect of State law that, in the eyes of Justices with a different political orientation, unduly restricted workers' rights. Garrett v. Moore-McCormack Co., 317 U.S. 239, 244 & n.10 (1942) (describing preemptive effect of admiralty law); Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 250 (1941) (using *Jensen* to interpret and expand a federal statute preempting State law).

41. *Jensen*, 244 U.S. at 214–15. Another wrinkle in the federal status of admiralty jurisdiction arose many decades later. In *Romero v. International Terminal Operating Co*., the Court ruled that cases brought in admiralty, despite generating rules that preempted State law under the Supremacy Clause, failed to qualify under the statutory "federal question" federal-court jurisdiction that Congress had created in 1875. 358 U.S. 354, 375, 380 (1959) (construing the Jurisdiction and Removal Act of 1875, ch. 137, 18 Stat. 470 (codified as amended at 28 U.S.C. § 1331 (2012))). Not for the first time, the Court

prevailed over State law not because of the negative Commerce Clause, but because of a prescriptive inference drawn from the Constitution itself.

The significance of this distinction became clear three years later. In *Knickerbocker Ice Co. v. Stewart*, a majority of the Court held that its inference from Article III, Section 2 barred Congress from ceding back to the States prescriptive jurisdiction over workers' compensation.[42] The Court seemed to believe that when Congress exercises its authority under Article I to regulate commerce, it had greater leeway to delegate lawmaking power to the States.[43] Under the prescriptive inference drawn from constitutional admiralty jurisdiction, however, Congress could only adopt primary rules, and could not delegate to the States the authority to create those rules.[44]

Jensen was a pre-*Erie* case, and indeed, Justice Brandeis, the author of *Erie*, dissented from the majority's decision.[45] In one important sense, however, the decision did prefigure *Erie*. Both decisions treated the concept of general law, as postulated by *Swift*, as irrelevant. Both recognized a power on the part of the federal judiciary to create a kind of common law that triggered the Supremacy Clause. They diverged in their willingness to find a source for that power. *Jensen* found the power to make federal common law in Article III's provision for federal court jurisdiction over admiralty disputes, while *Erie* indicated that not all conveyances of subject matter jurisdiction bestowed this power.[46] What the two

held that a category of cases presented issues under the "Laws of the United States" for purposes of Article III, but did not fall within the corresponding subject matter-jurisdictional statute. For another illustration, see *Louisville & Nashville Railroad Co. v. Mottley*, 211 U.S. 149, 152 (1908).

42. 253 U.S. 149, 161, 163–64 (1920).

43. The Court had long recognized that States could not interfere unreasonably with interstate commerce, over which Congress has jurisdiction pursuant to Article I, Section Eight, without the blessing of Congress. *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). This led to a number of doctrines that walled off categories of commerce from State regulation. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 124–25 (1890) (original package doctrine). At the same time, the Court acknowledged the authority of Congress to remove some of these impediments to State regulation. *See, e.g.*, Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 326–27 (1917); *In re* Rahrer, 140 U.S. 545, 565 (1891). These cases had the effect of increasing the scope of State regulatory power, but the Court was careful not to characterize the legislation at issue as delegating to the States lawmaking authority that Congress otherwise could exercise. *See Clark Distilling*, 242 U.S. at 326–27; *In re Rahrer*, 140 U.S. at 565. A blanket endorsement of congressional power to bless State legislation that otherwise run afoul of the negative Commerce Clause came later. New York v. United States, 505 U.S. 144, 171 (1992); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 427–31 (1946).

44. For full discussion, see Barry Cushman, *Lochner, Liquor and Longshoremen: A Puzzle in Progressive Era Federalism*, 32 J. MAR. L. & COM. 1, 34–35 (2001). A mystery in *Jensen* is the Court's asserted constitutional basis for its preemptive interference, namely Article III, Section 2, Clause 1's extension of judicial power to admiralty cases, alongside the Necessary and Proper Clause of Article I. *See* 244 U.S. at 214–15. These provisions authorize Congress to enact laws regarding admiralty, but they do not compel Congress to do anything. Only section 9 of the Judiciary Act of 1789 gave legal effect to these constitutional provisions. *See supra* note 33 and accompanying text. If Congress had not adopted this law, would the States have lacked the authority to take up these cases? Put differently, did the inference of prescriptive authority rest only on the constitutional authority of Congress to adopt laws, or also on the legislative implementation of this authority?

45. *See* 244 U.S. at 255. Likewise, McReynolds, the author of *Jensen*, dissented from the Court's opinion in *Erie*. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 90 (1938).

46. *Compare Jensen*, 244 U.S. at 214–15, *with Erie*, 304 U.S. at 79–80.

decisions have in common, however, may be more important than what divided them: a distinctive concept of federal common law as authoritative and binding on the States.

As the *Erie* revolution got under way, the Court soon developed techniques for implying judicial authority to develop federal rules to address legislative gaps. The specific move made in *Jensen*, however, was used only once more during the twentieth century. In *Textile Workers Union v. Lincoln Mills of Alabama*, the Court inferred from a grant to the district courts of subject matter jurisdiction over contract disputes between unions and employers the authority to develop a body of federal contract law, including remedies, that ousted State law.[47] The holding rested largely on statutory history and policy judgments, in particular a view that injunctive remedies to enforce employee rights were a necessary quid pro quo for a contractual surrender of the right to strike.[48]

Lincoln Mills did not, of course, connect to the foreign relations law of the United States or any colorable claim of international law. However, half a century later, *Sosa v. Alvarez-Machain* revived the doctrine.[49] The case involved the authority of the federal courts to develop a federal common law to hold states and persons accountable in tort for violations of international law.[50] The majority cited *Lincoln Mills* as support for its holding that the 1789 Judiciary Act's grant to federal district courts of subject matter jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations" supported an inference of judicial authority to develop and apply a circumscribed body of federal common law based on "the law of nations."[51] Interestingly, the Court did not refer to *Jensen* as precedent for its inference. *Sosa*'s newly recognized federal common law satisfies constitutional "federal question" jurisdiction, but, like the maritime law inferred in *Jensen*, does not come within statutory federal question jurisdiction.[52]

Both *Jensen* and *Sosa*, then, employed a prescriptive inference to allow federal courts to create a circumscribed body of international law. *Jensen* involved that

47. 353 U.S. 448, 456–57 (1957).

48. *See id*. at 455.

49. 542 U.S. 692 (2004).

50. *See id*. at 701.

51. *Id*. at 698, 726; *see also id*. at 725–26 (interpreting 28 U.S.C. § 1350 (2012) (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77)). The Court held that the particular claim asserted against Sosa, a right to be free from arbitrary detention, did not arise to the kind of international law violation that the inference from 28 U.S.C. § 1350 encompasses. *Id*. at 736. Justice Scalia, joined by Chief Justice Roberts and Justice Thomas, concurred in the result but rejected the majority's prescriptive-inference analysis. *See id*. at 739–50 (Scalia, J., concurring).

52. *See id*. at 729–31 & n.19. Under the facts of *Sosa*, this last step was unnecessary. The district court had supplemental jurisdiction over Alvarez-Machain's claim against Sosa as a result of 28 U.S.C. § 1367(a) (2000). The claim against Sosa overlapped with that against the United States, for which subject matter jurisdiction existed. *See* William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 670 (2007). Federalization based on the prescriptive inference enabled the Court to apply a federal common law of international human rights that excluded Alvarez-Machain's claim, saving the Court from considering whether Mexican law might have provided an alternative rule of decision.

part of admiralty jurisdiction that did not include prize cases and which the authors of the 1789 Act, by creating only parallel federal jurisdiction, might have thought was general rather than federal law (although framing the question in that way probably would have confused them).[53] *Sosa* involved the rights of a subject against its own sovereign—a species of international law the authors of the 1789 Judiciary Act would have found inconceivable.[54] Each endorsed the creation and application by the federal courts of at least some kinds of international law.

II. PRESCRIPTIVE INFERENCES AND FOREIGN RELATIONS LAW GENERALLY

This short history of prescriptive inferences raises an interesting question. Once the general-law concept as applied in the early nineteenth century fell into desuetude, why did the courts not deploy the prescriptive inference outside admiralty to federalize other branches of the law of nations as it applied in U.S. courts? The jurisdictional hook would have been alienage or consul jurisdiction, which the 1789 Judiciary Act and all later legislation governing the subject matter jurisdiction of federal courts have endorsed, albeit with varying conditions and venue assignments.[55] Why not maintain that, where a federal court exercising alienage or consul jurisdiction is required to look to the law of nations (either the law merchant or private international law) to decide a case, the rules of decision that result should function as the law of the United States for purposes of the Supremacy Clause (although, as in *Jensen* and *Sosa*, not for purposes of statutory federal question jurisdiction)?

The *Jensen* majority's principal policy argument for federalizing admiralty law was the need for uniformity in the law applicable to international commerce.[56] Variation in State laws governing liability to stevedores and longshoremen would increase risk, instability, and ultimately the costs of shipping by water, which by 1917 had a greater impact on international than interstate commerce. Such barriers to trade would defeat one of the principal purposes of the Union, namely, to create a free market to promote foreign as much as domestic

53. *See* S. Pac. Co. v. Jensen, 244 U.S 205, 215 (1917).

54. 542 U.S. at 750. To be clear, they would not have found inconceivable that a subject might have rights against the sovereign—this was, after all, the whole point of the American Revolution—but rather that the law of nations would supply such rights.

55. Article III, Section 2 recognizes federal judicial power over, *inter alia*, "all Cases affecting Ambassadors, other public Ministers and Consuls" (consul jurisdiction), controversies "between Citizens of different States" (diversity jurisdiction), and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" (alienage jurisdiction). U.S. CONST. art. III, § 2. Section 11 of the 1789 Act, in implementing this authority, assigned alienage and diversity cases to the circuit rather than district courts, thus permitting a greater delay in vindicating the claim, and imposed a $500 amount-in-controversy requirement, thereby screening out all but substantial claims. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. The portion of section 9 applicable to alien torts instead invoked district court jurisdiction and had no minimum claim requirement. *Id.* § 9, 1 Stat. at 76–77. Section 9 also provided for exclusive federal court jurisdiction over cases in which accredited foreign diplomats ("consuls or vice-consuls") were defendants. *Id.* Section 13 assigned to the original but nonexclusive jurisdiction of the Supreme Court "all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party." *Id.* § 13, 1 Stat. at 80–81.

56. *See* Cushman, *supra* note 44, at 46 (citing *Jensen*, 244 U.S. at 217).

commerce. The *Jensen* majority counted on uniform federal laws to promote this purpose, and thus rejected piecemeal and disparate State enactments.[57]

If one buys into this uniformity argument, it is hard to see why only the rules governing water transport should qualify as federal law. The law governing the international sale of goods, commercial paper, security interests, and the many other dimensions of international business transactions cry out for nationwide uniformity just as much as admiralty law does. Justice Story, when treating the law merchant as general law in *Swift v. Tyson*, approached the uniformity problem in conceptual and doctrinal terms, but also signaled that he understood legal certainty as a means of promoting both international and national commerce.[58]

Much the same could be said for the rules of private international law, a field over which Justice Story towers. Knowing what substantive rules might apply to trans-jurisdictional business transactions would hardly matter if, when disputes arose and went to litigation, States had free rein to decide when and how to apply foreign rules of decision and when to allow the recognition and enforcement of foreign judgments. Indeed, the Framers, by adopting the Full Faith and Credit Clause, embraced the wisdom of federalizing the rules for recognizing and enforcing judgments emanating from other States.[59] Before *Erie*, litigation that invoked judgments from other nations gravitated to federal courts, which applied a uniform general law.[60] Once *Erie* ruled out that move, why did the federal courts, while awaiting action from Congress, not impose a federal common law of foreign judgments as a means of extending uniform law governing international commerce to private dispute resolution? And for that matter, why not do the same for international choice of law, thus protecting foreign business parties from various forum-specific, and perhaps unanticipated, choices as to governing law?[61]

The argument for federalizing the law of nations is superficially compelling. If the States were not to be trusted with experimenting with the law governing water-borne commerce, why could they be allowed to dabble with other aspects of the law of international business? If, for example, a contract of insurance on

57. *See* 244 U.S. at 217.

58. 41 U.S (16 Pet.) 1, 20 (1842) (Story, J.) (defending the rule embraced by the Court as the correct understanding of the general law as conducive to "the benefit and convenience of the commercial world"); *see also* HULSEBOSCH, *supra* note 13, at 291.

59. U.S. CONST. art. IV, § 1; *see also* 28 U.S.C. § 1738 (2012).

60. *See, e.g.*, Hilton v. Guyot, 159 U.S. 113 (1895).

61. This argument is essentially the inverse of that made by Doug Laycock. *See generally* Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992). He argued that the Full Faith and Credit Clause, understood in light of the constitutional commitment to forge a nationwide common market, provides a basis for federalization of choices of law involving State law, but not when the choice involves foreign law. *Id.* at 259–61. But the asserted need for the nation to address foreign relations and foreign commerce with one voice arguably makes the case for federal control over the use of foreign law stronger, even if the Full Faith and Credit Clause does not apply. For development of the argument for federalizing international conflicts law, see Donald Earl Childress III, *When* Erie *Goes International*, 105 NW. U. L. REV. 1531 (2011).

goods carried as cargo in international commerce falls under federal law, why not the sales contract or the letter of credit that facilitates payment for the sale? If a foreign court had decided a case under an insurance contract for cargo, why shouldn't federal law determine the legal effect of that court's judgment?

The case for federalization rests ultimately on a parade of horribles. Individual States may act selfishly in ways that can harm the nation as a whole. Balkanization of the law on a State-by-State basis might deter foreigners from engaging with the United States, whether in business or through civil society. Congress might be too distracted or disabled to address in a timely fashion the important problems generated by the increased pace and gravity of encounters between the United States and the rest of the world. The right response, the argument goes, is to empower the federal judiciary to occupy this field through the medium of federal common law. The Supreme Court, nested in the nation's capital and regularly engaged with the foreign relations establishment, can supervise what far-flung and perhaps parochial judges will do. Without some tool to empower the federal judiciary, too much necessary law will go unmade, or instead bubble up from the States in a haphazard and perhaps pernicious fashion. The prescriptive inference, unlike other strategies to federalize law that affects foreign relations, has the virtue of at least partial legislative endorsement. If Congress assigned to the federal courts the job of deciding specific classes of cases, surely Congress must have anticipated that the judges might construct rules of decision as needed.

These arguments were made by noted jurists in the wake of *Erie*, not just as a means of justifying federalization of rules of decision affecting international commerce, but to support a general approach to all rules with foreign-relations dimensions. The United States, these authorities argued, needs to present a single legal face to the outside world, to speak with one voice and to avoid confusion, if not worse, in legal transactions in which the subjects of foreign sovereigns have significant interests.[62] Some went so far as to suggest that any rule that enjoyed the status of international law (putting aside the possibility of the compartmentalization of that field) ought to enjoy the status of federal law.[63] As a result, any rule of international law, conventional or customary, would count as a law of the United States under the Supremacy Clause, absent displacement by congressional enactment.[64]

It is emphatically not my purpose to revisit the question whether international law might be characterized as the law of the United States for purposes of constitutional federal question jurisdiction and the Supremacy Clause. My focus is narrower. Where a prescriptive inference is permissible due to the existence of a

62. *See, e.g.*, Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 742–43 (1939).

63. *See, e.g.*, Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM L. REV. 805, 824–26 (1964).

64. Under the presumption that statutes should be interpreted so as to avoid violations of international law, such displacement would be hard to do. *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2374 & n.146 (1991) (making strong claim for this interpretive approach).

particular subject matter jurisdiction statute, why, in cases involving international law, is invoking the inference exceptional, rather than the norm? Why are *Jensen* and *Sosa* outliers, rather than widely used templates?

III. THE LAW MERCHANT, PRIVATE INTERNATIONAL LAW, AND THE AMERICAN COMMON MARKET

This section considers why the Supreme Court did not bestow the status of federal common law on other branches of international law, namely, the law merchant and private international law. Nothing fundamentally distinguishes the constitutional and statutory jurisdictional sources applicable to these branches from those invoked in *Jensen* and *Sosa*. Yet in the post-*Erie* era, the Court has repeatedly held that no federal common law arises in these areas. The prescriptive inference, although available as a conceptual matter, never did any work in these cases.

Bellia and Clark show that the Framers understood the law of nations to comprise the law merchant. This body of law governed transactions among sophisticated commercial actors and included finance and credit as well as the law of sales.[65] The Framers perceived the law merchant as well-developed and expressive of the expectations of sophisticated commercial practitioners, both domestic and foreign.[66] They assumed that the new federal judiciary would look to these rules to decide cases over which they had jurisdiction, although they did not think of the law merchant as part of the "the Laws of the United States" within the meaning of constitutional federal question jurisdiction or the Supremacy Clause.[67]

Bellia and Clark say almost nothing about private international law, presumably because Blackstone did not cover this branch in his discussion of the law of nations.[68] It fell to Joseph Story, a generation removed from the Framers, to promote and develop the American conception of private international law.[69] Like the law merchant, private international law was understood not to be obligatory, in the sense that a state risked sanctions if it failed to observe the rules, but rather to be followed out of comity, because it was useful and beneficial.[70] Private international law addresses the question of which rules apply to international commerce, not by supplying primary rules of decision as the law merchant did, but by

65. *See* BELLIA & CLARK, *supra* note 1, at 20, 23.

66. *See id*. at 24.

67. *See id*. at 24, 25 (explaining that the law merchant was adopted and applied as general—not federal—common law).

68. *See id*. at xv & n.4. Bellia and Clark consider Blackstone's *Commentaries on the Laws of England* and Emmerich de Vattel's *The Law of Nations* to have been the principal sources for the Framers' understanding of the law of nations. *See id*. at 3.

69. *See* JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS 19–38 (Boston, Hilliard, Gray & Co. 1834).

70. *See* William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2120–23 (2015).

clarifying which local laws and other legal acts would apply where the law merchant does not. Recognition and enforcement of foreign judgments—one of the subjects of private international law—particularly matter to business people, because these rules determine the existence and scope of judicial powers for the resolution of business disputes.[71]

As noted above, Story created the path for the federal courts to invoke the law merchant in *Swift v. Tyson*. It was not until 1895 that the Supreme Court, in another diversity case, laid down the rules for recognition and enforcement of foreign judgments, but its method came straight from *Swift*'s playbook.[72] *Hilton v. Guyot* held that private international law "is part of our law," to be determined by a court with jurisdiction over a matter by reference to the conventional sources for determining the content of this branch of the law.[73] A federal court with diversity jurisdiction would determine the preclusive effect of a foreign judgment by looking to foreign practice and scholarly accounts of this practice. Like the *Swift* Court in its treatment of the law of negotiable instruments, the *Hilton* Court regarded the rules governing foreign judgments as outside the "Law of the United States." Rather, they were general law—as opposed to local law—over which neither State nor federal courts have hierarchical superiority in their interpretation and application.[74]

As discussed above, the general-law construct had come under strain by the beginning of the twentieth century. States had begun to displace general law by enacting statutes that, for example, adopted workers-compensation regimes as a substitute for tort law. Some federal courts had begun to regard clear State judicial precedents as expressions of local law, even if they touched on subjects otherwise thought of as falling within the general law.[75] The Court had shifted its view on State regulation of commerce. States, rather than being obstacles to the free flow of goods and services that made up a common market, had become laboratories of democracy.[76]

Erie, of course, overturned *Swift* and thus left development of the law merchant to the States.[77] The Court soon made clear that the same regime applied to private international law. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, decided three years after *Erie*, required federal courts in diversity cases to "follow conflict

71. *See generally* STORY, *supra* note 69, at 491–515 (discussing foreign judgments).

72. *See* Hilton v. Guyot, 159 U.S. 113, 163–66 (1895).

73. *Id.* at 163.

74. *Id.* at 228. Indeed, even before *Erie* a leading State court rejected the principal holding of *Hilton* barring recognition of foreign judgments if the sovereign in question did not accord reciprocal treatment to U.S. judgments. Johnston v. Compagnie Générale Transatlantique, 152 N.E. 121, 123 (N.Y. 1926). As this case illustrates, the New York Court of Appeals had no duty to follow the lead of the Supreme Court of the United States on questions of general law.

75. *See* Friendly, *supra* note 28, at 386–87.

76. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Note that Justice Brandeis, dissenting in *New State Ice*, became the voice of the majority in *Erie*. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 69 (1938). Symmetrically, Justice McReynolds, the author of *Jensen*, joined Justice Sutherland's majority opinion in *New State Ice Co.* and dissented in *Erie*.

77. *Erie*, 304 U.S. at 79–80.

of laws rules prevailing in the states in which they sit."[78] *Klaxon* involved the law governing remedies for breach of contract, but no one had any doubt that the decision extended to all aspects of conflicts law, including the recognition and enforcement of foreign judgments.[79]

Why didn't the law merchant and private international law instead become federal common law after *Erie*? Both *Jensen* and *Lincoln Mills* expressed a belief in the efficacy of judicial prescriptive authority to advance a uniform national substantive law and to deter State obstructionism and opportunism. Justice McReynolds, the author of *Jensen*, saw uniformity in the law governing shipping as essential to commerce, and federal generation of that law as the best means of guaranteeing a coherent body of rules and practice.[80] Justice Douglas, although not commonly thought of as a jurisprudential follower of Justice McReynolds, similarly saw a compelling need in *Lincoln Mills* for a uniform federal regime protecting organized labor.[81] Justice Douglas distrusted the States to protect the interests of workers, and believed that the federal judiciary was up to the task of developing a federal common law of remedies to enforce labor contracts.[82] Why didn't the Court extend these arguments to the international law merchant and private international law, where the case for federally supervised uniform law seems equally compelling?

I consider and reject the argument that the doctrinal sources for the law merchant and private international law were different from those for admiralty and international law torts. These subjects are also not different in terms of coming within the enumerated powers of the federal government. Rather, by the time of *Erie*, the Court was confronting a global economy that had blurred the lines between international and local commerce and provided States with strong incentives to remove impediments to transnational commercial relations. Congress soon manifested its capacity to adopt such laws as were needed to displace piecemeal State regulation. *Sosa* aside, the Supreme Court in recent decades has manifested growing skepticism about the ability of federal courts to wield federal common law as an effective means of promoting needed legal uniformity and stability.

First, consider the doctrinal arguments that might distinguish the law merchant and private international law from admiralty law and international law torts. Both Article III of the Constitution and Section 9 of the Judiciary Act of 1789 identified maritime and admiralty cases as distinct subjects of federal court jurisdiction.[83] Section 9 also treated alien tort suits for violations of the law of nations as

78. 313 U.S. 487, 494 (1941).

79. *See* Childress, *supra* note 61, at 1545–46.

80. *See* Cushman, *supra* note 44, at 44–49.

81. *See* Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 455–57 (1957).

82. *Id.*

83. Article III, Section 2 of the Constitution extends the federal judicial power to "all Cases of admiralty and maritime Jurisdiction." U.S. CONST. art. III, § 2, cl. 1. Section 9 of the 1789 Act gives federal district courts original jurisdiction over "all civil causes of admiralty and maritime jurisdiction."

distinct from other claims brought by aliens.[84] One cannot find in these foundational jurisdictional instruments other references to the law of nations, and particularly not to the law merchant or private international law. Without an express and specific jurisdictional provision, one might argue, the federal courts lack a basis for inferring an authorization for judicial lawmaking. *Jensen* and *Sosa* are different, because the subject matter grant in question is clear, limited in scope, and thus more amenable to federalization.

The doctrinal argument, however, does not survive a closer look at Article III and the Judiciary Act. As to *Jensen*, an initial problem is that Article III's assignment of admiralty and maritime jurisdiction to the federal courts was not self-executing. Rather, Article III, Section 2 requires Congress to adopt a statute before the federal courts could exercise this power.[85] The statute adopted, the 1789 Judiciary Act, drew a distinction between that part of admiralty law that was exclusively federal (prize cases, plus in rem libels) and the part that could be heard in other courts pursuant to the "saving to suitors" clause.[86] This jurisdictional grant was hardly clear or specific.

Even the *Jensen* majority conceded that the jurisdictional grant that supported the prescriptive inference was muddy. It affirmed earlier decisions upholding State statutes that applied to maritime transactions. It asserted that New York's workers-compensation law intruded too far into the traditional province of admiralty, without explaining what distinguished permissible from excessive intrusions. In sum, the jurisdictional grant on which the majority relied to federalize the field did not define the affected class of cases, but rather stipulated the existence of a neighboring, often overlapping body of non-admiralty law that State and federal courts remained free to apply in maritime disputes.[87]

Nor does the portion of the 1789 Judiciary Act addressing alien torts create a special category of jurisdiction. To the contrary, the statute imposed a venue rule (district rather than circuit court), coupled with a specific waiver of the amount-in-controversy requirement.[88] The premise the *Sosa* Court used to support its presumption of a preexisting body of applicable law—that the Act created a special

Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (codified as amended at 28 U.S.C. § 1333 (2012)). Moreover, this jurisdiction is "exclusive," except for cases for a common law remedy "where the common law is competent to give it." *Id.* The scope of this "saving to suitors" clause was one of the issues that divided the majority and dissenters in *Jensen*. *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 219 (1917) (Holmes, J., dissenting).

84. § 9, 1 Stat. at 76–77. Civil suits brought by aliens not falling under the tort-in-violation-of-the-law-of-nations heading fell under section 11 of the 1789 Act, which assigned jurisdiction to the circuit courts (which sat less often than the district courts) and imposed a substantial amount-in-controversy requirement. *Id.* § 11, 1 Stat. at 78–79.

85. *See* U.S. CONST. art. III, § 2, cl. 1.

86. § 9, 1 Stat. at 76–77.

87. *See Jensen*, 244 U.S. at 215–18.

88. § 9, 1 Stat. at 76–77 (codified as amended in 28 U.S.C. § 1350 (2012)). The federal judiciary's current division of labor between district courts (exclusively first instance) and circuit courts (almost entirely appellate) came about mostly through the Evarts Act, ch. 517, § 2, 26 Stat. 826 (1891) (codified as amended in scattered sections of 28 U.S.C.). Until then, the circuit courts exercised the larger portion of the first-instance jurisdiction of the federal courts.

category of jurisdiction—seems entirely false.[89] What instead appears to underlie that case's holding is a felt urgency to federalize at least a limited range of human rights rules. The Court did not elaborate upon the basis of this feeling.

A second argument for treating *Jensen* and *Sosa* as unique is constitutional. Maritime law falls within the enumerated powers of the federal government, even in the conceptual world of the eighteenth and nineteenth centuries, because it regulates foreign and interstate commerce. Alien torts affect the foreign relations of the United States, in particular the international responsibility of the United States and the possibility of war and peace. The national government surely has the constitutional authority to prescribe rules in these areas. But as *Erie* argued, the prescription of rules of general law may go beyond the federal competence, and should not be done by federal courts any more than by Congress.[90] This suffices to explain why the general law and the rules of conflicts of law were not federalized by the Court. It does not, however, account for the law merchant, in the context of interstate and international transactions, or private international law, as it bears on non-domestic law. In both instances, the argument for the constitutional competence of the national government seems strong.[91] Whatever the reason for the failure of the federal courts to assume control over these bodies of law, it cannot be constitutional qualms about the federal government's enumerated powers.

It thus remains open to ask whether, even at this late date, *Jensen* and *Sosa* still might be extended to any aspect of the law of nations, as understood by the Framers, that could apply to a case coming within the alienage or consul jurisdiction of the federal courts. When the Framers and Congress assigned to the federal courts cases that turn on the law of nations as they understood it, did they put in place mechanisms that federal judges later might use to create federal law to ensure uniform rules for the law merchant and private international law? If so, why haven't the federal courts seized this opening?

The answer to these questions has three parts. First, the felt need to craft a unified body of rules based on federal law, including rules about rules to govern

89. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609, 617–19 (2015); *see also* Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (explaining the prescriptive inference adopted by the *Sosa* Court as inconsistent with the original meaning and purpose of the Alien Tort Statute). At least one Justice agrees. *See* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1412 (2018) (Gorsuch, J., concurring in the result).

90. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 77–80 (1938). I count myself as among those bemused by this part of *Erie*'s argument. It explains why creating federal common law exceeds the national government's powers, but not why application of general law by federal courts does so. This is not the place to pick at that problem, however.

91. The modern Court has had no qualms about enforcing private-international-law treaties governing noncommercial matters such as parental custodial rights. *See, e.g.*, Chafin v. Chafin, 568 U.S. 165 (2013) (applying a treaty to vindicate the rights of a custodial parent); Abbott v. Abbott, 560 U.S. 1 (2010) (same). For discussion and disposal of the constitutional issue regarding recognition and enforcement of foreign judgments, see RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 3–4 (AM. LAW INST. 2006).

international commerce, dissipated during the twentieth century. Rather than creating impediments to this commerce, the States took the lead in creating uniform law to govern it. Second, the Court came to doubt its ability to supervise and shape the development of federal common law by the lower courts. Third, the Court expressed a more general skepticism about interpretive practices that expanded the prescriptive power of the federal judiciary. All three forces push against the use of a prescriptive inference to federalize the law merchant and private international law.

The transformation of the world economy in the wake of the World Wars blurred, if it did not erase, the line between foreign and interstate commerce. A growing body of ordinary transactions acquired international dimensions as trans-border sales, shipments, and financial transactions grew in volume and significance. The States stepped up to the challenge of foreign commerce by adopting laws that facilitated these transactions. Some leading States, New York in particular, saw the benefits from becoming a world financial and business capital as exceeding those that might be gained by appropriating rents through locally biased laws. At the same time, the uniform law movement facilitated widespread adoption of State legislation that further expressed a commitment to facilitation instead of rent-seeking.[92]

Moreover, the federal government did provide some of the essential infrastructure for foreign commerce as needed. Perhaps the most significant of these acts was approving the New York Convention, which federalized the enforcement of arbitration agreements arising out of international commerce.[93] These federal laws, when paired with the tendency of the States to promote rather than hinder international transactions, tamped down anxieties about State-law-based clogs on commerce. Rather than guard the field from disruptive or predatory State laws, the federal courts could let traditional lawmaking processes proceed without their supervision, knowing that Congress would intervene when the need became compelling.

Consider as a concrete example of this process the law governing recognition and enforcement of foreign judgments. As noted above, *Erie* and *Klaxon* liberated the States to develop their own laws, regardless of the teachings of *Hilton*. In theory, States could have adopted restrictive regimes that withheld recognition of foreign judgments. By punishing international transactors in forcing them to relitigate their disputes, this approach might have pumped up the local market for dispute resolution services, to the profit of the State's bar. But this dog never

92. For a comprehensive record of the accomplishments of the uniform law movement at the State level, see the website of the Uniform Law Commission. *Uniform Law Commission*, NAT'L CONFERENCE OF COMM'RS ON UNIF. STATES LAWS, http://www.uniformlaws.org [http://perma.cc/JKD5-22XR] (last visited June 2, 2018).

93. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 84 Stat. 692, 21 U.S.T. 2517. An earlier treaty that also federalized an initially insignificant, but later important, body of international commercial law was the Warsaw Convention. Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934), *reprinted in note following* 49 U.S.C. § 40105 note (2000).

barked. Instead, States either adopted one of the two Uniform Laws on recognition and enforcement of foreign money judgments or embraced a more liberal version of *Hilton*.[94] Both as adopted and as applied, State law generally supported the resolution of disputes in foreign courts, even where those jurisdictions discriminated against U.S. judgments.

Over the last quarter-century, law reformers have sought to federalize this body of law, if only to eliminate the asymmetry between foreign and U.S. practice with respect to reciprocity. In 1992, representatives of the United States began negotiations in the Hague Conference on Private International Law to produce an international convention on the recognition and enforcement of foreign court judgments.[95] In part to bolster this project, the American Law Institute in 2006 adopted a proposed federal statute that would supplant existing State law and completely federalize the field.[96] The Hague negotiations, however, produced only a treaty limited to choice-of-court agreements, consent to U.S. ratification of which remains stalled in the Senate.[97] Rather than adopt a comprehensive law as the American Law Institute urged, Congress in 2010 adopted the SPEECH Act, which federalizes only the law governing foreign defamation judgments.[98] At least for now, the recognition and enforcement of foreign judgments remains mostly governed by State law.[99]

As noted above, one reason why State peculiarities and perversions in the law of foreign judgments may not be a great concern is that developments at the federal level enabled sophisticated parties mostly to avoid these problems. With the ratifications of the New York Convention and the corresponding amendment of the Federal Arbitration Act, the national government provided parties to transnational contracts a device that makes foreign litigation mostly irrelevant.[100] Federal law now governs the scope of arbitration agreements as well as the methods of their enforcement. Freed from the need to litigate in foreign courts (other than in suits to defend an arbitration agreement and to enforce an arbitral award),

94. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. IV, ch. 8, intro. note (AM. LAW. INST. 2018).

95. *See* Peter D. Trooboff, *Implementing Legislation for the Hague Choice of Court Convention*, *in* FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM 131, 132–34 (Paul B. Stephan ed., 2014).

96. *See* RECOGNITION AND ENFORCEMENT, *supra* note 91.

97. *See* Convention on Choice of Court Agreements, Jun. 30, 2005, 44 I.L.M. 1294. The Convention has entered into force as to the European Union, Mexico, and Singapore; the United States and Ukraine have signed but not yet ratified it. *HCCH | #37 - Status Table*, HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 [https://perma.cc/8C4L-CGU6] (last visited Feb. 15, 2018).

98. *See* SPEECH Act, Pub. L. 111-223, 124 Stat. 2380 (2010) (codified at 28 U.S.C. §§ 4101–4105 (2012)).

99. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (AM. LAW. INST. 2018).

100. *See* An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. 91-368, 84 Stat. 692 (1970); RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-3 cmts. b, d (AM. LAW INST., Tentative Draft No. 2, 2012).

the parties to these contracts need not worry about the legal effect of foreign judgments. The one category of foreign suits that still matters—suits contesting the validity of an arbitral award—is governed by a mix of federal and State law.[101]

But even if one accounts for its reduction through the swapping out of arbitration for litigation, State-based private international law seems not to present the threat to legal stability and international business that apparently drove the *Jensen* Court to federalize admiralty. For whatever reason, State law and State courts have not produced significant impediments to international commerce or threats to friendly international relations. In the modern era, of the few cases where judicial rulings seem to insult foreign judiciaries, and thereby threaten friendly relations with foreign states, all involve federal courts exercising what might be called judicial license in the application of State law.[102] There simply have not been any incidents where State views on private international law have created similar problems.

Second, the ability of the federal judiciary to develop stable rules of private international law in aid of international commerce has become, at least from the perspective of the Court, increasingly problematic. Riding herd on the federal judiciary as it produces common law has turned out to be more challenging than it appeared to Justices McReynolds and Douglas. Today the greater size of the federal judiciary, the entrenched dispersion of conflicting points of view within that body, and the capacity of private litigants to select among federal districts to increase the odds of prevailing converge to challenge the Supreme Court's capacity to manage judicial lawmaking. The next section of this Article discusses how, in the field of international law, this tendency has allowed the lower courts to reach outcomes that disturbs, rather than bolsters, the peaceful relations of the United States with other nations.

Moreover, on the rare occasion when the Court has tried to propound on the law merchant and private international law, it has struggled. A notorious example is *Citibank, N.A. v. Wells Fargo Asia Ltd.*,[103] arguably the Court's most important

101. The Federal Arbitration Act authorizes a U.S. court to refuse to recognize or enforce an arbitral award that a foreign court of competent jurisdiction has set aside. 9 U.S.C. § 201 (2012); *see also* RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-16(a) & cmt. a. (AM. LAW INST., Tentative Draft No. 2, 2012). A federal court may, however, refuse to recognize the foreign judgment setting aside the award if the law of the forum so permits or requires. *See id.* § 4-16 (b) & cmt. d. Except in defamation cases, the forum law would normally be State law. *Id.* § 4-16 reporters' note d; *see also* RESTATEMENT OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION § 1-2 & cmt. b (AM. LAW INST., Tentative Draft No. 6, 2018) (discussing scope of preemption of State law by the Federal Arbitration Act).

102. *See, e.g.*, DeJoria v. Maghreb Petroleum Expl. S.A., 38 F. Supp. 3d 805, 810 (W.D. Tex. 2014) (rejecting foreign judgment as a product of a judicial system that failed to meet standards of impartiality and fundamental fairness), *rev'd*, 804 F.3d 373 (5th Cir. 2015); Osorio v. Dole Food Co., 665 F. Supp. 2d 1307, 1326–42 (S.D. Fla. 2009) (rejecting foreign judgment as violating international standards of due process), *aff'd on other grounds sub nom.* Osorio v. Dow Chem. Co., 635 F.3d 1277 (11th Cir. 2011) (refusing to affirm district court on this point); Films By Jove, Inc. v. Berov, 250 F. Supp. 2d 156, 211–14 (E.D.N.Y. 2003) (rejecting the decisions of a foreign high court as a source of foreign law because of improper governmental interference in proceedings).

103. 495 U.S. 660 (1990).

private-international-law case in the last seventy years. The case concerned the liability of a U.S. parent bank for transactions into which its foreign subsidiary enters, but that the parent clears domestically.[104] Uncertainty over the applicable law cast a shadow over the enormous Eurodollar market, where banking transactions are denominated in dollars but undertaken outside the United States.[105] The Supreme Court, persuaded of the question's importance to international banking, took the case to decide the appropriate choice-of-law rule. The resulting opinion, however, was inconclusive and opaque, providing no guidance to anyone. The Court not only refused to endorse a choice of law, but declined even to indicate what choice-of-law methodology might apply.[106] The banks, needing resolution, sought out Congress.[107]

Third, a shift in the Supreme Court's take on statutory interpretation that expands the prescriptive power of the federal courts had implications for prescriptive inferences. The heady optimism over federal common law expressed in *Lincoln Mills* had dissipated by the end of the 1970s. The battleground largely was over private rights of action but, as *Sosa* itself says, the lessons learned there apply to the prescriptive inference.[108] Beginning in 1979, the Court began to question the idea that legislative provision of a public remedy for a statutory right necessarily supported an inference that a private remedy was also contemplated.[109] Two decades later, it had adopted the opposite inference: that a failure to provide for private enforcement implied a rejection of that option.[110] This new inference rested on a particular view of the relationship between legislative and judicial lawmaking, specifically, a belief in the importance of congressional accountability for costly and controversial policy judgments.[111] More broadly, the Court has turned to bright-line rules that disempower the lower courts as a substitute for leading by example in the wielding of judicial power implied by statutes.[112]

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104. *See id*. at 663–65.

105. *See generally* Peter S. Smedresman & Andreas F. Lowenfeld, *Eurodollars, Multinational Banks, and National Laws*, 64 N.Y.U. L. REV. 733, 744 (1989) (discussing European and American case law applicable to multinational banks).

106. *See Citibank*, 495 U.S. at 673–74. Among the many deficiencies of this remarkably unhelpful opinion, it fails to address whether the governing choice of law rests on federal or State law. Taking its lead from the Court, the Second Circuit on remand decided the case on its facts, avoiding definitively the provision of any general guidance. Wells Fargo Asia Ltd. v. Citibank, N.A., 936 F.2d 723 (2d Cir. 1991), *cert. denied*, 505 U.S. 1204 (1992).

107. *See* Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103-325, § 326(a), 108 Stat. 2160, 2229 (codified as 12 U.S.C. § 633 (2012)) (freeing parent from foreign subsidiary's liability due to foreign government's regulatory actions "unless the member bank has expressly agreed in writing to repay the deposit under those circumstances").

108. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004).

109. One can trace the strong version of this position to *Cannon v. University of Chicago*, 441 U.S. 677, 739–42 (1979) (Powell, J. dissenting).

110. *See* Alexander v. Sandoval, 532 U.S. 275, 293 (2001).

111. *See* Stephan, *supra* note 11, at 1474–76.

112. *See generally* Paul B. Stephan, *The Political Economy of Extraterritoriality*, 1 POL. & GOVERNANCE 92, 94–95 (2013) (describing Supreme Court supervision of lower courts).

The *Sosa* majority recognized that this general skepticism extended to inferences from allocations of adjudicative power, but argued that the special circumstances surrounding the creation of this particular instance of subject matter jurisdiction were enough to overcome the presumption.[113] The Court worried that, but for federal substantive law, the persons that Congress intended to protect through creation of this jurisdiction would have no rights to enforce. This argument is almost certainly mistaken, but that point by now is water under the bridge.[114] Of significance is the *Sosa* Court's recognition that, although it invoked a prescriptive inference for the first time in fifty years to justify its holding, such inferences are problematic.[115]

The broader point remains: since *Erie*, State law has done the heavy lifting for international business disputes that wind up in U.S. courts. This is true of the secondary rules provided by private international law as well as primary rules of contract and the like. Federal law provides a patchwork of mostly regulatory requirements, rather than supplying the elements for the design of transactions. The potential for State law to embrace disparate, confusing, and perhaps even predatory outcomes has not been realized. To the contrary, the Court has been willing to let the States take the initiative to provide the legal structure for international commerce, with Congress coming in as needed to address particular problems. It surely is no accident that this distribution of regulatory authority has coincided with sustained economic expansion and the rise of the United States as an international economic superpower.

IV. FEDERAL COMMON LAW AND FOREIGN RELATIONS RISK

The responsible behavior of the States in exercising their stewardship over the international law merchant and private international law, accompanied by the manifest ability of Congress to intervene as needed, might provide a sufficient explanation for the failure of the prescriptive inference to gain any traction in these areas. But another important development in international law has reinforced the reluctance of the Court to use this mechanism to federalize international law. The emergence in the 1970s of claims that international law imposes human rights obligations on states with respect to their own nationals as well as foreigners greatly expanded the opportunity for judicial imposition of liability on states and their officials, agents, and others acting under their authority. This development

113. 542 U.S. at 727.

114. As Bellia and Clark, as well as other scholars, have observed, Congress saw no need to federalize the customary international law of alien torts in 1789, and indeed would have found this concept incomprehensible. State and foreign law would have sufficed to provide a right of action to aliens victimized by U.S. persons as well as foreign diplomats attacked by any person, whether they be a U.S. national or an alien. What the 1789 Act did was ensure that these cases would be heard in a federal district court, rather than a circuit court, thus ensuring more timely relief regardless of the amount of damages claimed. *See, e.g.*, BELLIA & CLARK, *supra* note 1, at 186 & n.146.

115. Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004) ("A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.").

engages directly the concerns of the Framers about foreign relations risk in federal litigation. A majority of the present Court seems to appreciate this risk and acts accordingly.

Bellia and Clark remind us that the Framers designed the system that they did because arrangements under the Confederation exposed the United States to serious foreign relations threats. The particular problem that the Framers confronted was widespread defiance of the terms of peace with Great Britain. Rather than honoring the property and contract rights of British subjects, as the treaty required, State courts free of federal oversight were vindicating State efforts to favor locals at the expense of aliens. The creation of the federal courts and the adoption of the Supremacy Clause were meant to overcome this threat to prosperity and peace.[116]

In that context, it made sense to regard State autonomy as a source of mischief. State lawmakers, their courts included, had a clear incentive to favor locals, who benefited from the discharge of their debts and the seizure of the property of British subjects, even if these acts threatened the welfare of the nation as a whole. In modern terminology, the country faced a collective action problem, where particular actors (State officials) would gain from taking actions that impaired the value of the national project. The Framers intended the federal courts to overcome local biases as a means of grappling with this problem.[117]

As Bellia and Clark demonstrate, however, the Framers did not understand the constitutional distribution of power as giving the federal courts unfettered control over all aspects of that part of the law of nations that affected United States' relations with other sovereigns. Under the Supremacy Clause, the judiciary had the authority to bar the application of State laws that violated U.S. treaty obligations.[118] But this grant of prescriptive power was not absolute, and in particular did not convey to the courts the authority to determine whether a foreign state party to a U.S. treaty had failed to meet its obligations.[119] To save the national government from embarrassment and possible injury, the judiciary would not judge whether other sovereigns had breached that portion of the law of nations that governed state–state relations. Rather, federal judges measured the conduct of other sovereigns against the standards of international law only upon direction from the political branches in the form of an express legislative enactment.[120]

This pattern of judicial enforcement of international law against the States, combined with avoiding uses of international law in ways that would roil relations with foreign states, persisted into the modern era. Even as late as the 1960s,

116. *See* BELLIA & CLARK, *supra* note 1, at 48–50, 54, 68.

117. *See* JPMorgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd., 536 U.S. 88, 94–95 (2002) (explaining origins of federal court alienage jurisdiction in State defiance of Treaty of Paris).

118. *See* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 236–37 (1796) (opinion of Chase, J.).

119. *See id.* at 259 (Iredell, J.) ("The people of the United States, in their present Constitution, have devolved on the President and Senate, the power of making treaties; and upon Congress, the power of declaring war. To one or other of these powers, in case of an infraction of a treaty that has been entered into with the United States, I apprehend application is to be made.") (emphasis omitted).

120. *See* BELLIA & CLARK, *supra* note 1, at 61–63.

the general impulse to nationalize law that affected foreign relations seemed both important and consistent with a need not to embarrass the national government. First, it still made sense to see the States, including their courts, as posing a risk to the interests of the United States as it faced the rest of the world. The struggle for desegregation, for example, has an important foreign-relations dimension, and many States were on the wrong side of that fight, sometimes with the full-throated support of their judiciary.[121] Similarly, State interference with the world economy still provoked judicial intervention. As late as 1979, the Court would invoke the "one voice" concept to invalidate under the negative Commerce Clause State law that had the potential to burden foreign commerce, whether the threat had materialized or not.[122]

These uses of federal law to rein in the States gave the federal judiciary a role in creating and applying international law. They did not, however, enlist the courts in actions that might offend foreign governments. None involved sanctioning foreign states or otherwise disparaging their law-abiding character. Indeed, where necessary the Court created federal common law as a means of forestalling State actions—supposedly based on international law—that might antagonize foreign sovereigns.[123]

In the 1970s, however, there emerged a new legal trend that complicated this conception of the federal judiciary as a means of protecting the United States from international embarrassment. It was that decade which spawned the modern conception of international human rights law as a source of claims that subjects have on their sovereign.[124] Two aspects of this development had profound implications for the federal judiciary.

First, proponents of the new conception of international law argued that human rights, although immanent in treaties and other traditional forms of state actions that make international law, rest fundamentally on cultural and historical developments that transcend states. The demands of humanity provide the ultimate foundation for these rights, not the conduct of the imperfect and incomplete agents of humanity who wield state power. As a result, international human rights

121. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000).

122. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453–54 (1979). Later, however, the Court backed away from this ambitious take on the negative Commerce Clause. *See* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 324–31 (1994); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 74–76 (1993); RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 reporters' note 6 (AM. LAW INST. 2018).

123. The case that some have seen as most strongly supporting the federalization of international law, *Banco Nacional de Cuba v. Sabbatino*, forbade the federal courts from developing a body of international law that would complicate U.S. relations with a foreign state. 376 U.S. 398, 431–37 (1964). The Court wielded the Act of State doctrine to bar both federal and State courts from invoking a customary international law regulating the expropriation of alien property that, as of the date of decision, the political branches had not expressly endorsed.

124. *See* SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY 120–58 (2010) (describing the emergence of the international law of human rights).

law does not depend on state consent to take on binding force.[125]

Second, courts, as the organs of official power least likely to be beholden to the rulers of states, seemed to these jurists the best means for expounding and applying this body of law. Political actors located in executives and legislatures cannot be trusted fully to implement this new regime, which limits their freedom of action and creates legal risks for them as well as their foreign counterparts. Courts, by contrast, at least where they enjoy independence and have a manifest commitment to the rule of law, will recognize the importance of this new field and use their traditional powers to enforce it. A simple and straightforward means of doing so is to use international human rights law to craft rules of decision to apply to suits against persons who cause harm to persons protected by this law.

It is not my purpose here to question the validity of these moves as a matter of international law.[126] The point rather is that this form of lawmaking shifts to the judiciary responsibility for many choices that have the potential to antagonize foreign sovereigns. The broad conception of human rights law instructs courts to go it alone, at least until Congress steps into the fray, rather than wait for guidance from the political branches.

Wielding the new law of international human rights has two aspects. Domestically, it allows courts to bring to bear a new body of law to assess the conduct of the United States and the States, including officials acting under their authority. Courts can use it to defend individual interests from official abuse where the Constitution and other domestic law does not provide redress.[127] This inward-looking use of the new international law may provoke pushback from domestic actors, especially the States, but for the most part it does not produce any foreign relations problems. It would interfere with U.S. international commitments only in the event that a court interpreted an international human rights obligation as barring the United States from carrying out a commitment to another country.[128]

As applied to foreign actors, however, the new international law of human rights opens a path for U.S. courts to hold the conduct of foreign officials and foreign subjects to standards that these courts can determine and apply. Acting at the behest of litigants, but without the benefit of authoritative determinations by responsible political actors, courts may condemn foreign officials, companies, and

125. *See* Paul B Stephan, *The Political Economy of* Jus Cogens, *in* THE POLITICAL ECONOMY OF INTERNATIONAL LAW: A EUROPEAN PERSPECTIVE 75, 79–81 (Alberta Fabbricotti ed., 2016).

126. Not that I am uncritical of them. *See id.*; Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1616–17 (2011).

127. *See* Paul B. Stephan, *Courts, the Constitution, and Customary International Law*, 44 VA. J. INT'L L. 33, 46–47 (2003).

128. A human-rights rule might, for example, bar the United States from honoring an obligation under an extradition treaty. Although formally binding the United States, rather than the state seeking extradition, the effect of such a rule would be to frustrate (and perhaps disparage) the requesting state. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 428 cmt. c & reporters' note 11 (AM. LAW. INST. 2018).

other persons doing business with or in foreign states, and others linked to foreign governments, as culpable violators of international law.

For those wholeheartedly committed to the methods and goals of the new international law, this is a feature, not a bug. The interests of humanity come ahead of those of states, and courts are likely to be the best institutions to wield state power in the pursuit of this transcendent claim. Again, my point is not to challenge these assumptions as matters of moral or political principle. Rather, I mean only to note that whatever the force of this conviction, it reverses the role that the Framers meant the judiciary to have when applying the law of nations. Rather than awaiting instructions from the political branches before imposing obligations on foreign states, a court motivated by the interests-of-humanity argument must act on its own.

Perhaps, one might argue, the expectations of the Framers should not matter. The world has changed, and especially the role of the United States in that world. As a global hegemon, as the only superpower still standing at the dawn of the twenty-first century, the United States should care less about antagonizing other states. If its courts end up complicating U.S. foreign relations in the course of doing international justice and vindicating the demands of humanity, that price is no great cost. Better to dispose of U.S. power in furtherance of such a transcendent project than to leave the victims of abuse without any remedy.

The rejoinder is not that courts are unfit for such a project, but that they need the support of the political branches to do it properly. Misjudgments and mischaracterizations are inevitable, and may redound to the detriment of the courts. Yesterday's human rights abusers may become tomorrow's indispensable ally. Human rights claims might become a tool in some other, darker geopolitical conflicts.[129] It surely does not help that litigants have their own interests in bringing suits, which may not reflect either the general welfare or even the interests of justice. The dependence of judges on what the litigants tell them, in the absence of an authoritative canon illuminating the content and implications of international law, further complicates the enterprise.[130]

It is at this point in the argument that the prescriptive inference becomes critical. It connects a law produced by the political branches, namely a statutory grant of adjudicative jurisdiction, to the asserted power to prescribe rules of international law. The question is whether this is good enough. Is the inference sufficiently plausible to support a claim that, by assigning a class of cases to the federal courts to decide, the political branches have bought into any prescriptions of legality that might result?

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129. *Compare*, *e.g.*, *In re* Arab Bank, PLC Alien Tort Statute Litig., 808 F.3d 144 (2d Cir. 2015) (international human rights law claims by Israelis based on Palestinian acts), *aff'd sub nom.* Jesner v. Arab Bank, PLC, 138 S. Ct. 1386 (2018), *with*, *e.g.*, Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (international human rights law claims by Palestinians based on Israeli acts). It is noteworthy that in both cases the courts dismissed the complaints without reaching the merits.

130. *See* Stephan, *supra* note 112, at 95.

The distinction between adjudicative and prescriptive jurisdiction is technical, and there is some evidence that Congress does not always understand the difference. In some instances, the surrounding circumstances might indeed justify an inference that a change in subject matter jurisdiction was meant to alter substantive law.[131] An across-the-board inference, however, seems hard to sustain. And invoking the inference to empower federal courts to enforce international law against anyone other than the United States and its agents and instrumentalities seems especially problematic.

To appreciate how bestowals of subject matter jurisdiction need not come with substantive lawmaking power, one might consider the U.S. foreign sovereign immunity regime. In 1976, just as the international legal landscape was shifting on state human-rights obligations, Congress provided detailed and comprehensive rules governing foreign sovereign immunity in U.S. civil litigation.[132] The Foreign Sovereign Immunities Act expressly grants the federal district courts subject matter jurisdiction for suits against sovereign states, but also limits the scope of that jurisdiction, the procedures that apply, and the enforcement of resulting judgments. The detail and specificity of these rules seem to rule out any possibility of making a prescriptive inference from the creation of this category of adjudicatory jurisdiction.

At least one lower court tried to overcome this hurdle by making the reverse inference, arguing that the statute's limits on subject matter jurisdiction do not apply in areas where federal courts act pursuant to a prescriptive inference.[133] The Supreme Court, however, unanimously rejected the move.[134] The supposed power to prescribe rules of international law, the Court ruled, does not support an inference of subject matter jurisdiction, even though this outcome mostly leaves courts powerless to hold states (as distinguished from their officials and other persons acting in concert with states) responsible for international law violations. At least in this important body of foreign relations law, the Court has imputed to Congress a clear conceptual separation of adjudicative and prescriptive jurisdiction. Not incidentally, the result removes the federal courts from exactly the kinds

131. *See*, *e.g.*, Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P(b), 124 Stat. 1376, 1864–65 (2010) (codified at 15 U.S.C. §§ 77v(c), 78aa(b) (2012)) (amending the Securities Exchange Act of 1934 to modify the holding of *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), but addressing adjudicatory rather than prescriptive jurisdiction). *Compare* SEC v. Traffic Monsoon, LLC, 245 F. Supp. 3d 1275, 1291–93 (D. Utah 2017) (holding amendment provides prescriptive jurisdiction), *appeal filed*, No. 17-4059 (10th Cir. Apr. 17, 2017), *with* SEC v. Chi. Convention Ctr., LLC, 961 F. Supp. 2d 905, 910 n.1 (N.D. Ill. 2013) (expressing skepticism that the amendment provides prescriptive inference).

132. *See* Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. §§ 1330, 1602–1611 (2012)).

133. *See* Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421, 426–27 (2d Cir. 1987), *rev'd*, 488 U.S. 428 (1989).

134. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437–38 (1989). Later courts followed this decision even when the plaintiff alleged violation of profound international human rights norms. *See* Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009) (claim based on war crimes); Princz v. Fed. Republic of Ger., 26 F.3d 1166 (D.C. Cir. 1994) (same).

of conflicts that are most likely to disturb U.S. relations with foreign states, namely private lawsuits seeking to hold those states accountable for deeply offensive behavior.

There are wider lessons to be learned from this skirmish over sovereign immunity. Civil suits where foreign sovereigns are the named defendants are not the only cases that are likely to inflame foreign relations. Any dispute that has as a component the imputation of outrageous behavior to a foreign sovereign, its agents, or its subjects has the potential to create problems for the United States. The issue is not whether these problems are a fair price to pay for international justice. The point, rather, is whether courts should make that calculation on their own, or instead stay their hand in the absence of any legislative guidance.

If one were persuaded that the problem is too great to permit courts to go it alone, the next question is what kinds of legislative guidance should suffice. This Article explains why a prescriptive inference should not. Bestowal of subject matter jurisdiction does not convey intelligible information about what Congress expects about the content of substantive law. Nor, in other realms of international law, has the inference proven necessary to promote uniform law and to discourage State opportunism.

What, then, should one make of the two decisions where the prescriptive inference has served to authorize judicial creation of international law? What should remain of *Jensen* and *Sosa*? Perhaps they should be seen not even as outliers, but rather as detritus, as products of false fears and mistaken assumptions. The body of evidence provided by this Article supports their reconsideration of their holdings and rejection of the assumed power to make federal common law.

Arguments based on stare decisis and reliance might point the other way. *Jensen* is, of course, a century old, and Congress, once *Knickerbocker* no longer stood in the way, made no move to overturn it.[135] Instead, Congress adopted the Longshoremen's and Harbor Workers' Compensation Act, which supplanted *Jensen*'s federal common law with a uniform federal statute.[136] As recently as 1995, the Court in *American Dredging Co. v. Miller* treated *Jensen*'s constitutional holding as good law, albeit over the strong objections of Justice Stevens.[137] At the same time, *American Dredging* refused to extend *Jensen*, holding that there exists no federal law of forum non conveniens applicable in admiralty cases.[138] Perhaps *American Dredging* indicates *Jensen*'s future: it is a decision that enjoys the status of stare decisis but its underlying logic and assumptions no

135. The Court has not overruled *Knickerbocker*. Its constitutional foundations, however, almost certainly did not survive the New Deal revolution. *See supra* note 43.

136. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901–950). The Court upheld the Act as constitutional in *Crowell v. Benson*, 285 U.S. 22 (1932).

137. 510 U.S. 443, 458 (1994) (Stevens, J., concurring). In that case, only Justices Kennedy and Thomas would have followed, rather than distinguished, the principle of presumptive federalism articulated in *Jensen*. *Id*. at 462–63 (Kennedy, J., dissenting).

138. *Id*. at 447 & n.1, 450–53 (majority opinion).

longer have much force. It might be cited, but not followed.[139]

Sosa, a much more recent case, requires a different assessment. On the one hand, as a statutory rather than constitutional decision, the case for overturning this precedent is weaker. On the other hand, as a recent, and therefore less entrenched precedent, the argument that it has incurred much reliance is unpersuasive. It thus becomes easier to distinguish away, perhaps into oblivion.

Certainly *Kiobel v. Royal Dutch Petroleum Co.*, the Court's first revision of the scope of the prescriptive inference made by *Sosa*, leans in a different direction.[140] It limits the prescriptive mandate to the creation of rules applicable on U.S. territory, although it is less than clear in explaining what application on U.S. territory entails.[141] This outcome at least generally conforms to the Framers' goal of supporting judicial enforcement of international law to meet U.S. obligations to other nations, but not to challenge the actions of other states.

Jesner v. Arab Bank, PLC,[142] the Court's latest take on *Sosa*, underscores the majority's impatience with *Sosa*'s prescriptive inference. It removed from the scope of the prescriptive inference all cases against foreign private corporations.[143] This class of defendants is of particular interest to victims (and their lawyers) seeking more than moral vindication through litigation.[144] The case confirms that a majority of the Court worries about the prescriptive inference in the realm of international law and wishes the lower courts to wield the powers conveyed by *Sosa* with circumspection, if at all.

CONCLUSION

Bellia and Clark have shown that, in the beginning, the Framers of the Constitution meant the federal judiciary to enforce U.S. obligations under the law of nations, but not to act as an independent agent of the international order holding all sovereigns accountable for their acts. This insight illuminates what the constitutional references to the law of nations meant to those who drew them up, as well as how the first Judiciary Act was understood by the Congress that enacted it. Their evidence casts doubt on a range of modern claims by international law specialists that have become, if not orthodoxy, at least widely embraced.

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139. For a vision of uniform admiralty law without *Jensen*'s prescriptive inference, see Young, *supra* note 40, at 349–58 (arguing that maritime statutes, the dormant Commerce Clause, and the principles of conflict of laws provide an adequate basis for federal court development of uniform law).

140. 569 U.S. 108 (2013).

141. *Id.* at 124–25 ("On these facts, all the relevant conduct took place outside the United States. And even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.")

142. 138 S. Ct. 1386 (2018).

143. *Id.* at 1403.

144. *Jesner* does not determine whether plaintiffs still may bring claims against domestic corporations. As Justice Alito observed in his opinion concurring in the result, the prescriptive inference does little if any work in cases brought against this class of defendants. *Id.* at 1413 n.1. In most instances federal courts will have diversity jurisdiction over claims of violations of international human rights law brought by foreign victims, making the prescriptive inference redundant.

This Article shows how a rather technical aspect of the law of federal courts—the inference of prescriptive power from the creation of adjudicative jurisdiction—reflects these debates and implicates the same general concerns. To the extent one comes away from Bellia and Clark convinced that the federal judiciary, today as much as in the Founding era, should not get out in front of the political branches when it comes to holding foreign sovereigns and those associated with them to account under international law, restraint in the use of the prescriptive inference seems the wisest path. The evolution since *Erie* of the law merchant and private international law—two aspects of the law of nations that the Framers recognized and meant to operate within the U.S. legal system—gives comfort to those who would want the courts to wait on Congress to rein in the States. Those so inclined would also see the unhappy experience of the federal courts with the private international law applicable to international banking transactions and the construction of international human rights law as further evidence of the undesirability of broad judicial power over the creation and application of international law. The weight of the evidence indicates that federal common law is not the answer to the problem of State exceptionalism in international transactions. The prescriptive inference is not the right tool for the job of easing the path of international relations.