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and detention. The ATS provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” *Ibid.* The challenge posed by this case is to ascertain (in the Court’s felicitous phrase) “the interaction between the ATS at the time of its enactment and the ambient law of the era.” *Ante*, at 19. I begin by describing the general principles that must guide our analysis.

At the time of its enactment, the ATS provided a federal forum in which aliens could bring suit to recover for torts committed in “violation of the law of nations.” The law of nations that would have been applied in this federal forum was at the time part of the so-called general common law. See Young, *Sorting out the Debate Over Customary International Law*, 42 *Va. J. Int’l L.* 365, 374 (2002); Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* 815, 824 (1997); Brief for Vikram Amar et al. as *Amici Curiae* 12–13.

General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties. U. S. Const., Art VI, cl. 2. Federal and state courts adjudicating questions of general common law were not adjudicating questions of federal or state law, respectively—the general common law was neither. See generally Clark, *Federal Common Law: A Structural Reinterpretation*, 144 *U. Pa. L. Rev.* 1245, 1279–1285 (1996). The nonfederal nature of the law of nations explains this Court’s holding that it lacked jurisdiction in *New York Life Ins. Co. v. Hendren*, 92 U. S. 286 (1876), where it was asked to review a state-court decision regarding “the effect, under the general public law, of a state of sectional civil war upon [a] contract of life insurance.” *Ibid.* Although the case involved “the general laws of war, as recognized by the law

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of nations applicable to this case,” *ibid.*, it involved no federal question. The Court concluded: “The case, . . . having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction.” *Id.*, at 287.

This Court’s decision in *Erie R. Co. v. Tompkins*, 304 U. S. 64 (1938), signaled the end of federal-court elaboration and application of the general common law. *Erie* repudiated the holding of *Swift v. Tyson*, 16 Pet. 1 (1842), that federal courts were free to “express our own opinion” upon “the principles established in the general commercial law.” *Id.*, at 19, 18. After canvassing the many problems resulting from “the broad province accorded to the so-called ‘general law’ as to which federal courts exercised an independent judgment,” 304 U. S., at 75, the *Erie* Court extirpated that law with its famous declaration that “[t]here is no federal general common law.” *Id.*, at 78. *Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the “law merchant,” then a subset of the law of nations. See Clark, *supra*, at 1280–1281.

After the death of the old general common law in *Erie* came the birth of a new and different common law pronounced by federal courts. There developed a specifically federal common law (in the sense of judicially pronounced law) for a “few and restricted” areas in which “a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law.” *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981) (internal quotation marks and citation omitted). Unlike the general common law that preceded it, however, federal common law was self-consciously “made” rather

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than “discovered,” by judges who sought to avoid falling under the sway of (in Holmes’s hyperbolic language) “[t]he fallacy and illusion” that there exists “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute.” *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (dissenting opinion).

Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it. “Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.” *Milwaukee v. Illinois*, 451 U. S. 304, 312 (1981).

The general rule as formulated in *Texas Industries*, 451 U. S., at 640–641, is that “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.” This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute. Indeed, *Texas Industries* itself involved the petitioner’s unsuccessful request for an application of the latter sort—creation of a right of contribution to damages assessed under the antitrust laws. See *id.*, at 639–646. See also *Northwest Airlines, Inc. v. Transport Workers*, 451 U. S. 77, 99 (1981) (declining to create a federal-common-law right of contribution to damages assessed under the Equal Pay Act and Title VII).

The rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction is subject to exceptions, some better established than others. The most firmly entrenched is admiralty law, derived from the grant of admiralty jurisdiction in Article III, §2, cl. 3, of the Constitution. In the exercise of that jurisdiction federal

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courts develop and apply a body of general maritime law, “the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men.” *R. M. S. Titanic, Inc. v. Haver*, 171 F. 3d 943, 960 (CA4 1999) (Niemeyer, J.) (internal quotation marks omitted). At the other extreme is *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), which created a private damages cause of action against federal officials for violation of the Fourth Amendment. We have said that the authority to create this cause of action was derived from “our general jurisdiction to decide all cases ‘arising under the Constitution, laws, or treaties of the United States.’” *Correctional Services Corp. v. Malesko*, 534 U. S. 61, 66 (2001) (quoting 28 U. S. C. §1331). While *Bivens* stands, the ground supporting it has eroded. For the past 25 years, “we have consistently refused to extend *Bivens* liability to any new context.” *Correctional Services Corp., supra*, at 68. *Bivens* is “a relic of the heady days in which this Court assumed common-law powers to create causes of action.” 534 U. S., at 75 (SCALIA, J., concurring).

## II

With these general principles in mind, I turn to the question presented. The Court’s detailed exegesis of the ATS conclusively establishes that it is “a jurisdictional statute creating no new causes of action.” *Ante*, at 30. The Court provides a persuasive explanation of why respondent’s contrary interpretation, that “the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law,” is wrong. *Ante*, at 18. Indeed, the Court properly endorses the views of one scholar that this interpretation is “‘simply frivolous.’” *Ibid.* (quoting Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 Conn. L. Rev. 467, 479, 480 (1986)).

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These conclusions are alone enough to dispose of the present case in favor of petitioner Sosa. None of the exceptions to the general rule against finding substantive lawmaking power in a jurisdictional grant apply. *Bivens* provides perhaps the closest analogy. That is shaky authority at best, but at least it can be said that *Bivens* sought to enforce a command of our *own* law—the *United States* Constitution. In modern international human rights litigation of the sort that has proliferated since *Filartiga v. Pena-Irala*, 630 F. 2d 876 (CA2 1980), a federal court must first *create* the underlying federal command. But “the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law.” Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int’l L. 513, 519 (2002). In Benthamite terms, creating a federal command (federal common law) out of “international norms,” and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.

## III

The analysis in the Court’s opinion departs from my own in this respect: After concluding in Part III that “the ATS is a jurisdictional statute creating no new causes of action,” *ante*, at 30, the Court addresses at length in Part IV the “good reasons for a restrained conception of the *discretion* a federal court should exercise in considering a new cause of action” under the ATS. *Ibid.* (emphasis added). By framing the issue as one of “discretion,” the Court skips over the antecedent question of authority. This neglects the “lesson of *Erie*,” that “grants of jurisdiction alone” (which the Court has acknowledged the ATS to be) “are not themselves grants of law-making authority.” Meltzer, *supra*, at 541. On this point, the Court observes

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only that no development between the enactment of the ATS (in 1789) and the birth of modern international human rights litigation under that statute (in 1980) “has categorically *precluded* federal courts from recognizing a claim under the law of nations as an element of common law.” *Ante*, at 30 (emphasis added). This turns our jurisprudence regarding federal common law on its head. The question is not what case or congressional action *prevents* federal courts from applying the law of nations as part of the general common law; it is what *authorizes* that peculiar exception from *Erie*’s fundamental holding that a general common law *does not exist*.

The Court would apparently find authorization in the understanding of the Congress that enacted the ATS, that “district courts would recognize private causes of action for certain torts in violation of the law of nations.” *Ante*, at 30. But as discussed above, that understanding rested upon a notion of general common law that has been repudiated by *Erie*.

The Court recognizes that *Erie* was a “watershed” decision heralding an avulsive change, wrought by “conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it.” *Ante*, at 31–32. The Court’s analysis, however, does not follow through on this insight, interchangeably using the unadorned phrase “common law” in Parts III and IV to refer to pre-*Erie* general common law and post-*Erie* federal common law. This lapse is crucial, because the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. Post-*Erie* federal common lawmaking (all that is left to the federal courts) is so far removed from that general-common-law adjudication which applied the “law of nations” that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to

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enable the latter.\* Yet that is precisely what the discretion-only analysis in Part IV suggests.

Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us is that we would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power "on the understanding that the door is still ajar

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\*The Court conjures the illusion of common-law-making continuity between 1789 and the present by ignoring fundamental differences. The Court's approach places the law of nations on a federal-law footing unknown to the First Congress. At the time of the ATS's enactment, the law of nations, being part of general common law, was *not* supreme federal law that could displace state law. *Supra*, at 2–3. By contrast, a judicially created federal rule based on international norms *would be* supreme federal law. Moreover, a federal-common-law cause of action of the sort the Court reserves discretion to create would "arise under" the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction. See *Illinois v. Milwaukee*, 406 U. S. 91, 99–100 (1972).

The lack of genuine continuity is thus demonstrated by the fact that today's opinion renders the ATS unnecessary for federal jurisdiction over (so-called) law-of-nations claims. If the law of nations can be transformed into federal law on the basis of (1) a provision that merely grants jurisdiction, combined with (2) some residual judicial power (from whence nobody knows) to create federal causes of action in cases implicating foreign relations, then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS. This would mean that the ATS became largely superfluous as of 1875, when Congress granted general federal-question jurisdiction subject to a \$500 amount-in-controversy requirement, Act of Mar. 3, 1875, §1, 18 Stat. 470, and entirely superfluous as of 1980, when Congress eliminated the amount-in-controversy requirement, Pub. L. 96–486, 94 Stat. 2369.



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subject to vigilant doorkeeping.” *Ante*, at 35. The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. *Supra*, at 3. Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it.

Although I fundamentally disagree with the discretion-based framework employed by the Court, we seem to be in accord that creating a new federal common law of international human rights is a questionable enterprise. We agree that:

- “[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law [in the area of foreign relations]. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.” *Ante*, at 32.
- “[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution.” *Ante*, at 33.
- “It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits.” *Ibid*.
- “[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences.” *Ibid*.
- “Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law.” *Ante*,

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at 34.

These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, *ante*, at 18, (2) that Congress understands that difference today, *ante*, at 34, and (3) that the ATS itself supplies only jurisdiction, *ante*, at 30. In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits. *Ante*, at 38.

The Ninth Circuit brought us the judgment that the Court reverses today. Perhaps its decision in this particular case, like the decisions of other lower federal courts that receive passing attention in the Court's opinion, "reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today." *Ante*, at 42–43, n. 27. But the verbal formula it applied is the same verbal formula that the Court explicitly endorses. Compare *ante*, at 38 (quot-

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ing *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (CA9 1994), for the proposition that actionable norms must be “specific, universal, and obligatory”), with 331 F. 3d 604, 621 (CA9 2003) (en banc) (finding the norm against arbitrary arrest and detention in this case to be “universal, obligatory, and specific”); *id.*, at 619 (“[A]n actionable claim under the [ATS] requires the showing of a violation of the law of nations that is specific, universal, and obligatory” (internal quotation marks omitted)). Endorsing the very formula that led the Ninth Circuit to its result in this case hardly seems to be a recipe for restraint in the future.

The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches. *Kadic v. Karadzic*, 70 F. 3d 232 (CA2 1995), provides a case in point. One of the norms at issue in that case was a norm against genocide set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U. N. T. S. 278. The Second Circuit held that the norm was actionable under the ATS after applying Circuit case law that the Court today endorses. 70 F. 3d, at 238–239, 241–242. The Court of Appeals then did something that is perfectly logical and yet truly remarkable: It dismissed the determination by Congress and the Executive that this norm should *not* give rise to a private cause of action. We *know* that Congress and the Executive made this determination, because Congress inscribed it into the Genocide Convention Implementation Act of 1987, 18 U. S. C. §1091 *et seq.*, a law signed by the President attaching criminal penalties to the norm against genocide. The Act, Congress said, shall not “be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding.” §1092. Undeterred, the Second Circuit reasoned that this “decision not to create a *new* private

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remedy” could hardly be construed as *repealing* by implication the cause of action supplied by the ATS. 70 F. 3d, at 242 (emphasis added). Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is “no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section,” *ante*, at 23, to override a clear indication from the political branches that a “specific, universal, and obligatory” norm against genocide is *not* to be enforced through a private damages action? Today’s opinion leads the lower courts right down that perilous path.

Though it is not necessary to resolution of the present case, one further consideration deserves mention: Despite the avulsive change of *Erie*, the Framers who included reference to “the Law of Nations” in Article I, §8, cl. 10, of the Constitution would be entirely content with the post-*Erie* system I have described, and quite terrified by the “discretion” endorsed by the Court. That portion of the general common law known as the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates). Those accepted practices have for the most part, if not in their entirety, been enacted into United States statutory law, so that insofar as they are concerned the demise of the general common law is inconsequential. The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign’s treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human-rights advocates. See generally

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Bradley & Goldsmith, Critique of the Modern Position, 110 Harv. L. Rev., at 831–837. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty, see, *e.g.*, Tex. Penal Code Ann. §12.31 (2003), could be judicially nullified because of the disapproving views of foreigners.

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We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today’s opinion approves that process in principle, though urging the lower courts to be more restrained.

This Court seems incapable of admitting that some matters—*any* matters—are none of its business. See, *e.g.*, *Rasul v. Bush*, *ante*, p. \_\_\_\_; *INS v. St. Cyr*, 533 U. S. 289 (2001). In today’s latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their

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decisions. And no one thinks that all of them are eminently reasonable.

American law—the law made by the people’s democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today’s decision should have announced.