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After Sosa v. Alvarez-Machain, lawsuits against corporations under the Alien Tort Statute have become the focus of human rights litigation. One of the most important legal issues in this area is how corporate aiding and abetting liability operates in lawsuits alleging violations of customary international law. Federal courts and legal commentators are split over whether federal common law can and should define the relevant standard for aiding and abetting liability. When recently confronted with the issue, the Supreme Court failed to muster a quorum. In the academic debate, Professor Steinhardt argues for the Modern position that federal common law is the appropriate source for secondary liability standards under the ATS. On the other side, Professors Bradley, Goldsmith, and Moore argue for the Revisionist position that established federal common law principles bar the creation of a corporate aiding and abetting liability. This Article evaluates the Revisionists’ principles of federal common law. The Article argues that instead of barring the creation of corporate aiding and abetting liability, the Revisionists’ limitations actually enable and encourage the creation and application of federal common law for ancillary issues, such as secondary liability, under the ATS.

I. Introduction

After Sosa v. Alvarez-Machain, lawsuits against corporations under the Alien Tort Statute (ATS) have become the focus of human rights litigation. Secondary liability theories, such as aiding and abetting, for violations of the law of nations are crucial to this type of ATS litigation because most claims against corporations proceed on those theories of liability. While many courts hearing those kinds of ATS cases have held that aiding and abetting liability is appropriate in ATS litigation, judges and scholars have disagreed over whether international law or federal common law defines and provides the appropriate standard. Even if one decides, as some judges and writers

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3. See Comment, 121 Harv. L. Rev. 1953 (2008) (discussing this split in concurring opinions in Khulumani v. Barclays National Bank, Ltd., 504 F.3d 254 (2d Cir. 2007)); id. at 1957–60 (arguing that federal common law is the appropriate source for aiding and abetting liability); Curtis A. Bradley, Jack L.
have, that federal common law is the appropriate source of law for determining whether or not aiding and abetting liability is available under the ATS, an issue remains as to whether federal common law can and should supply the theory of liability.

Sosa itself does not address the issue. Sosa determined that federal common law could provide a cause of action in ATS litigation, but aiding and abetting is not an independent cause of action but rather a theory of liability. Nevertheless, in footnote twenty-one, the Sosa Court expressed an interest in and concern with a specific federal district court case in which plaintiffs alleged that corporations aided and abetted South African Apartheid. When the Second Circuit addressed that Apartheid litigation in Khulumani v. Barclays National Bank, it held that defendants could be liable under an aiding and abetting theory; however, the judges were divided about whether international law or federal common law was the appropriate source to provide such liability. The corporate defendants appealed their case to the Supreme Court, but, despite the Court’s previous expression of interest in footnote twenty-one in Sosa, the Court was forced to deny certiorari because it lacked quorum. In so doing, the Court declined an opportunity to provide gui-

Goldsmith & David H. Moore, Sosa, Customary International Law, and the Continuing Relevance of Erie, 120 Harv. L. Rev. 869, 924–29 (2007) (arguing that federal common law is the appropriate source but that federal common law cannot provide such liability); William R. Casto, The New Federal Common Law of Tort Remedies for Violations of International Law, 57 Rutgers L.J. 635, 650 (2006) (arguing that international law is the appropriate source for indirect liability); see also Paul L. Hoffman & Daniel A. Zaheer, The Rules of the Road: Federal Common Law and Aiding and Abetting Under the Alien Tort Claims Act, 26 Loy. L.A. Int’l & Comp. L. Rev. 47 (2003) (arguing that either federal common law or international law may be the appropriate source, but that both sources define identical standards for aiding and abetting liability).

4. See, e.g., Doe I v. Unocal Corp., 395 F.3d 932, 967 (9th Cir. 2002) (Reinhardt, J., concurring), vacated & reh’g granted, 395 F.3d 978 (9th Cir. 2003), and dismissed, 403 F.3d 708 (9th Cir. 2005) (en banc); Comment, supra note 3, at 1960.

5. See infra Part II.A.


7. Khulumani, 504 F.3d at 260. The court was not able to use a single rationale to reach this result, however, because the majority disagreed about whether federal common law or international law provided the relevant theory of aiding and abetting liability. Compare id. at 268–70 (Katzmann, J., concurring) (arguing that Sosa indicates that aiding and abetting liability would have to be recognized by international law for the ATS to provide jurisdiction and for the federal common law to provide a cause of action) with id. at 284 (Hall, J., concurring) (“As Sosa makes clear, a federal court must turn to international law to divine standards of primary liability under the ATCA. To derive a standard of accessorial liability, however, a federal court should consult the federal common law.”). The issue was therefore “left to a future panel of this Court [the Second Circuit] to determine whether international or domestic federal common law is the exclusive source from which to derive the applicable standard.” Id. at 286 n.4 (Hall, J., concurring).

8. Am. Isuzu Motors, Inc. v. Ntsebeza, 2008 U.S. LEXIS 5868 (2008) (affirming the holding of Khulumani, 504 F.3d at 260). As will be discussed later in this Article, the Supreme Court appears to have already dealt with this issue in some of the Court’s earliest cases. See infra note 101 and accompanying text.
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dance on the important issue of whether federal common law or international law could (or should) supply the rules of decision for aiding and abetting and other such ancillary issues in ATS litigation.9

Given this set of events, federal courts facing similar cases must decide the role of federal common law in ATS litigation with only Sosa to guide them. But in the words of Judge Hall of the Second Circuit, “Sosa at best lends Delphian guidance on the question of whether federal common law or customary international law represents the proper source from which to derive a standard of aiding and abetting liability under the ATCA.”10

Moreover, the academic literature similarly provides little guidance in determining what Sosa implies about the role federal common law is to play in ATS litigation. Sosa did clarify whether the ATS continues to operate on the original understanding of the Framers and the First Congress that federal common law can provide a cause of action for violations of a limited set of customary international law norms. Thus, Sosa establishes a legal division of labor: interpreting the ATS as providing a bare jurisdictional grant, but deciding that federal common law could provide the cause of action for some violations of the law of nations. But Sosa did nothing to explicitly clarify whether federal common law could also address other ancillary issues in ATS litigation.

In the legal academy, there are two distinct views—generally referred to as the Modern view and the Revisionist view—of how this division of customary international law and federal common law interacts to enable or limit the pursuit of claims for violations of the law of nations. The Modern view is best presented by Professor Steinhardt, who argues that Erie R.R. Co. v. Tompkins provided enclaves in which federal common law was to operate, that one such enclave is international law, and that the Sosa Court indicated that Erie was not offended by the creation of causes of action for a limited set of international law violations.11 According to Professor Steinhardt, Sosa stands for “the proposition that the law of nations, as an enclave of federal common law, survived Erie and [the ATS] authorizes the federal courts to hear cases and frame remedies under the [ATS] as they would any other common law cause of action, subject to a heightened burden of proof.”12 The Modern position, therefore, would argue that the ATS authorizes the creation of federal common law to provide the rules for all ancillary issues arising under ATS litigation, such as aiding and abetting liability.13

The Revisionist view is best presented by Professors Bradley, Goldsmith, and Moore, who argue that Sosa requires continued adherence by lower fed-

10. Khulumani, 504 F.3d at 286 (Hall, J., concurring).
12. Id. at 2259.
13. Id.
eral courts to the *Erie* principles when providing a cause of action for customary international law norms. Specifically, Bradley, Goldsmith, and Moore argue that *Erie* and its progeny require federal common law to meet three conditions: 1) be grounded in a federal law source, 2) be interstitial in nature, and 3) be consistent with policy choices reflected in extant federal law. Bradley, Goldsmith, and Moore argue that any federal common law cause of action under a customary international law norm must meet these three requirements. Presumably, proponents of the Revisionist position would also argue that any federal common law rule regarding ancillary issues in ATS litigation must similarly meet the aforementioned three requirements.

Assuming that federal common law provides the ancillary rules in ATS litigation, the distinction between the Modern and Revisionist positions will be central to current ATS litigation seeking to establish corporate aiding and abetting liability for violations of the law of nations. As applied to this question, proponents of the Modern position and the Revisionist position appear to be fully at odds. Professors Bradley, Goldsmith, and Moore use the specific example of aiding and abetting liability to show how *Erie* continues to limit the scope of litigation permissible under the ATS. They conclude that *Erie* and its related federal common law limitations preclude any cause of action for aiding and abetting liability for corporations. In contrast, Professor Steinhardt argues that aiding and abetting liability for corporations remains viable after *Sosa* precisely because federal common law powers can appropriately provide a remedy for violations of the law of nations.

This Article has two goals. First, this Article argues that the Modern and Revisionist positions have more in common in their principles of federal common law than is at first apparent, despite their differing conclusions about the viability of aiding and abetting liability after *Sosa*. Second, this Article argues that aiding and abetting liability is viable even under the Revisionists’ federal common law principles. In sum, this Article will use the example of aiding and abetting liability to show why federal common law can and should be used to create rules for ancillary issues in ATS litigation.

The three principles of federal common law espoused by the Revisionists actually support the Modern position that federal common law can fill in the gaps in the ATS by providing rules for ancillary issues, such as aiding and

15. Id. at 878–81.
16. Id. at 924–29.
17. *See infra* note 60 and accompanying text.
20. Steinhardt, supra note 11, at 2287–90.
abetting liability. In other words, federal common law can and should provide the complementary rules, such as the rules regarding liability theories, to the international law norms so that litigation can proceed under the ATS as the First Congress intended. This Article will critique Bradley, Goldsmith, and Moore’s analysis of aiding and abetting liability under the ATS and demonstrate how they fail to properly apply the very federal common law principles that they so rigorously espouse as restrictions on ATS litigation. If Bradley, Goldsmith, and Moore did fail to properly apply those principles, then Sosa and Erie together would imply that federal courts have the power to create federal common law rules to carry out congressional intent in providing a remedy for violations of customary international law. Moreover, there might be salient reasons that federal common law, and not international law, should provide these rules of decision.

This Article proceeds in three parts. Part II of this Article will begin by discussing the Sosa decision and its relationship to the ATS, as the decision was interpreted by the Modern and the Revisionist positions. Part III will critique the rationale for applying the three federal common law principles, as outlined by Bradley, Goldsmith, and Moore, to the common law powers of federal courts under the ATS. Part IV will specifically examine Bradley, Goldsmith, and Moore’s arguments regarding the potential liability of corporations under aiding and abetting standards and will argue that their federal common law analysis is not only incomplete, but also incorrect. This part will show why the very Erie principles that Bradley, Goldsmith, and Moore espouse actually lead to the conclusion that aiding and abetting by corporations should be afforded a common law cause of action in the context of ATS litigation. Part V concludes the Article by suggesting that this federal common law power is not only consistent with the intent of the First Congress, but integral to striking the correct balance between the judiciary and the political branches in modern foreign affairs.

II. Federal Common Law and the ATS: Sosa, the Modern Position, and the Revisionist Position

The Sosa decision has been claimed by both the Modern and Revisionist positions to support their beliefs about the nature of the ATS and the actionability of claims for violations of the law of nations. After describing the relevant parts of the Sosa decision, this section will evaluate the legitimacy of these claims so that the two positions can be fully understood as they apply to the Sosa decision and the future of ATS litigation.

A. Sosa: The Door Remains Ajar

Sosa involved an ATS claim by Dr. Humberto Alvarez-Machain, a medical doctor in Mexico who was kidnapped from his office in Guadalajara, held
overnight at a motel, and then transported to Texas where federal officers
arrested him. Alvarez had previously been indicted by a federal grand jury
for his alleged involvement in the torture and murder of a Drug Enforce-
ment Administration agent, but the U.S. Drug Enforcement Administra-
tion had been unable to persuade the Mexican government to transfer Alvarez to
the United States. Alvarez’s trial resulted in a judgment of acquittal, and, after
his return to Mexico, Alvarez proceeded to sue, among others, Jose
Francisco Sosa for his participation in Alvarez’s abduction. Alvarez sued
Sosa under the ATS, claiming that Sosa had violated the law of nations by
placing him under arbitrary arrest. Sosa, supported by the U.S. government,
claimed that even if he had violated the law of nations, the ATS was a purely
jurisdictional statute that provided no cause of action for violations of the
law of nations. Further congressional action, Sosa argued, would be re-
quired before claims could be heard under the jurisdictional grant. Alvarez
contended that the ATS was not simply a jurisdictional grant, but authority
for the creation of new causes of action for torts in violation of the law of
nations.

The Supreme Court “agree[d] that the statute is in terms only jurisdic-
tional.” However, the Court also stated “that at the time of enactment[,] the jurisdiction enabled federal courts to hear claims in a very limited cate-
gory defined by the law of nations and recognized at common law.” In
other words, the Supreme Court believed that the First Congress had in-
tended the federal courts to provide a common law cause of action for a
limited set of violations of the law of nations:

[F]ederal courts could entertain claims once the jurisdictional
grant was on the books, because torts in violation of the law of
nations would have been recognized within the common law at
the time . . . .

22. Id. at 697–98.
23. Id. at 698. Alvarez also attempted to sue others who directly participated in the abduction, as well
as the United States and DEA officials under the Federal Tort Claims Act. None of these claims are
relevant to this Article, so they will not be discussed.
24. Id. at 712.
25. Id.
26. Id. at 713. But see Steinhardt, supra note 11, at 2250 n.29 (“Contrary to the Supreme Court’s
assertion, Alvarez-Machain did not argue that the ATS qualified ‘as authority for the creation of a new
cause of action for torts in violation of the law of nations,’ a position the Court then dismiss [sic] as
implausible. Instead, Alvarez-Machain took the position that the ATS ‘authorizes the federal courts to
hear and resolve claims of tortious violations of the law of nations without further Congressional action.’
‘Nor is it unusual, unprecedented, imprudent, or unconstitutional for federal courts to fashion common
law principles to govern those aspects of [ATS] litigation not governed by the express Congressional
incorporation of tort law and the ‘law of nations.’”’ (internal citations omitted)).
27. Sosa, 542 U.S. at 712.
28. Id.
In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.29

The Supreme Court went even further to decide that federal courts could provide a cause of action under the ATS for some of the more modern violations of the law of nations. As to which violations of the law of nations could be considered actionable, the Court provided only the following guidance:

Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.30

The Court then approvingly cited examples from three courts of appeals as consistent with this requirement31—two of which included language stating that actionable violations of the law of nations were required to be violations of a norm that is definable or specific, universal, and obligatory.32 Furthermore, the Court stated that in addition to definiteness, courts should consider the practical consequences of making a cause of action available to litigants in federal courts as well as to whether a particular norm extends liability to the defendant facing suit.33

Having determined that federal common law provided the cause of action, the Court justified its decision to leave the fashioning of causes of action to the discretion of the federal courts. The Court explicitly stated that the decision of *Erie* had left certain enclaves of federal common law intact,

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29. *Id.* at 714–24.
30. *Id.* at 732; see also *id.* at 725 ("[C]ourts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.").
31. *Id.* at 732 (citing *Filartiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984); *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)).
32. See *Sosa*, 542 U.S. at 732 (citing *Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) ("suggesting that the ‘limits of section 1350’s reach’ be defined by ‘a handful of heinous actions—each of which violates definable, universal and obligatory norms.’"); see also *In re Estate of Marcos Human Rights Litig.*, 25 F.3d at 1475 ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory.").
33. See *Sosa*, 542 U.S. at 732–33.
one of which was international law.\footnote{Id. at 730 (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (“recognizing that ‘international disputes implicating . . . our relations with foreign nations’ are one of the ‘narrow areas’ in which ‘federal common law’ continues to exist.”)).} The Court further justified its decision to allow courts to fashion federal common law causes of action by noting that Congress in modern times had not only demonstrated no interest in limiting future actions, but had also explicitly shared the understandings of the First Congress and supplemented the ATS with the Torture Victim Protection Act.\footnote{See id. at 731.} The Court held that federal courts, while exercising great caution, should provide a common law cause of action for a limited set of violations of the law of nations. Ultimately, however, the Court rejected Alvarez’s claims of arbitrary detention because they did not meet the requirements that the Court had previously outlined.\footnote{Id. at 738. The Court’s reasoning is not relevant to the purposes of this Article and will therefore not be examined.}

The Court’s willingness to allow federal courts to entertain limits on the customary international law norms provided by \textit{Erie} and to allow for federal common law causes of action for more modern violations of the law of nations has prompted further debate about how litigation under the ATS should proceed. The following sections will take turns examining the two major sides of this debate—the Modern and Revisionist positions—as they relate to ATS litigation.

\textbf{B. The Modern Interpretation of Sosa}

The Modern position interprets \textit{Sosa} as a cautious endorsement of current litigation under the ATS. ATS litigation can continue, with federal common law providing the cause of action, but only for a limited set of customary international law norms. In this regard, the Modern position seems largely to comport with the interpretation of \textit{Sosa} by the Revisionist position.\footnote{Compare Steinhardt, supra note 11, at 2249–51 (discussing how the \textit{Sosa} Court “grounded the inherently discretionary judgment about the actionable norms of international law in the common law making powers and traditions of the federal judiciary”), with Bradley, Goldsmith & Moore, supra note 3, at 894 (discussing how \textit{Sosa} authorized “federal courts to recognize post-\textit{Erie} federal common law causes of action for a limited number of CIL violations”).}

The Modern position, however, interprets \textit{Sosa} at the very least to allow for federal courts to develop federal common law rules that would assist in effectuating the First Congress’s intent to provide a civil remedy for violations of the law of nations. There are two independently sufficient reasons that federal courts could have such a federal common law power in the context of ATS litigation: first, such a federal common law power would be necessary to meet uniquely federal interests in resolving disputes focusing on violations of international law; and second, federal common law is necessary
to effectuate congressional intent in providing a remedy for violations of the law of nations. 38

As to the first reason, federal courts have the power to develop federal law in areas unique to federal interests where Congress has provided such jurisdiction and the creation of common law is necessary to carry out congressional intent, as was established in Textile Workers Union of America v. Lincoln Mills of Alabama. 39 Sosa reaffirms the Court’s position in Banco Nacional de Cuba v. Sabbatino by holding that the resolution of international disputes is an area of uniquely federal concern. 40 But, as discussed above, Sosa found that the ATS provided jurisdiction while federal common law provided the cause of action. The result, as the Modern position would describe it, is that “the law of nations is an enclave where federal rules are required not only to protect uniquely federal interests but also to carry out Congressional intent.”41 The requisite congressional intent can be found in the First Congress’s desire that a civil remedy be provided for violations of the law of nations, as Sosa recognized.42 In other words, not only did the First Congress desire that federal common law provide the cause of action,43 but the First Congress also intended and expected federal courts to create federal common law in this area in order to fashion effective remedies. Proponents of the Modern position highlight the fact that federal courts facing these issues have taken precisely this position (albeit prior to the Sosa decision).44

38. See Hoffman & Zaher, supra note 3, at 54–63. Professor Erwin Chemerinsky has also posited that these are the two major justifications for creating federal common law. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION §§ 6.2–6.3 (2007).


40. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) (reasoning that “rules of interna-
tional law should not be left to divergent and perhaps parochial state interpretations”); see also Alfred Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 COLUM. L. REV. 1024, 1025 (1967) (arguing that the Constitution authorizes the judiciary to make federal common law in the area of international relations).

41. Steinhardt, supra note 11, at 2272; see also Hoffman & Zaher, supra note 3, at 54–55. At least one federal court deciding the issue prior to Sosa agreed with the Modern interpretation. See Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir. 1996) (“[The Alien Tort Statute] establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law.”); see also Doe I v. Unocal Corp., 395 F.3d 932, 966 (9th Cir. 2002) (Reinhardt, J., concur-
ing) (“It is precisely in order to implement the policies underlying Congress’s decision to make the violation of international law a federal tort, that it is necessary to flesh out the statute and apply federal common law; here, we must do so in order to fashion a remedy with respect to the direct or indirect involvement of third parties in the commission of the underlying tort.”). Cf. Illinois v. City of Milwaukee, 406 U.S. 91, 100–04 (1972) (holding that federal courts can fashion federal common law remedies to implement policies of federal water pollution statute where statute did not address the specific issue presented in case).


43. Id. at 724 (“The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.”).

44. See, e.g., Abebe-Jira, 72 F.3d at 848 (citing Lincoln Mills, 353 U.S. at 448) (“[W]e conclude that the Alien Tort Claims Act establishes a federal forum where courts may fashion domestic common law remedies to give effect to violations of customary international law. Congress, of course, may enact a statute that confers on the federal courts jurisdiction over a particular class of cases while delegating to
The second independent and sufficient reason for applying federal common law is that the two-part test adopted by the Supreme Court for whether federal common law should be created is satisfied in the context of ATS litigation. The Supreme Court’s test requires 1) a sufficiently strong federal interest in displacing state law and 2) the necessity of creation of federal common law to avoid significant conflict between federal concerns and the operation of state law.45 “In the context of [ATS] litigation, both of these prongs are easily satisfied by the federal interests in providing for a uniform application of international law and maintaining federal control over foreign relations.”46 Indeed, that justification appears to be, at the minimum, one of the reasons that the Framers wanted federal jurisdiction over issues involving the law of nations.47

Under the Modern position, once the determination has been made that federal common law is appropriate, “federal courts in ATS cases must derive federal common law rules to govern such [ancillary] issues as . . . third party complicity.”48 Indeed, proponents of the Modern position argue that “[Sosa’s] discussion of federal common law suggests that the federal courts have broader federal common law decision-making regarding such subsidiary rules once a plaintiff brings a ‘law of nations’ claim satisfying the [Sosa] test.”49 Under Sosa, federal courts can use federal common law to “fashion rules to fill gaps, borrowing from the most analogous body of law.”50 As will be discussed in greater detail in Part IV, in the context of aiding and abetting liability, federal common law can derive the rule of decision by...
looking to the extant federal aiding and abetting liability standards in the context of federal statutes and international law.\footnote{Hoffman & Zaheer, supra note 3, at 75–80.}

In conclusion, the Modern position would find that federal common law plays an important role in ATS litigation because federal common law can interstitially fill in the gaps for ancillary issues that remain in providing a tort remedy for violations of customary international law. Where federal courts use this standard, they are exercising their recognized federal common law powers to effectuate congressional intent and provide a uniform rule of decision for a dispute concerning the unique federal interest of international law.

C. The Revisionist Interpretation of Sosa

The Revisionist position differs from the Modern position in that it argues that \textit{Erie} and its progeny continue to place significant limits on the recognition of federal common law causes of action under the ATS.\footnote{See Bradley, Goldsmith & Moore, supra note 3, at 878–80.} The Revisionist position interprets \textit{Sosa} as continuing to incorporate similarly significant limits on the new federal common law power to recognize a cause of action for violations of customary international law. The Revisionists acknowledge that the Supreme Court has never fully outlined the post-\textit{Erie} federal common law approach.

Instead, the Revisionists argue that there are three basic parameters of post-\textit{Erie} federal common law: “1) it derives its authority from extant federal law, 2) it is interstitial, and 3) it must be tailored to the policy choices reflected in its federal law sources.”\footnote{Id. at 878.} In explaining the first principle, the Revisionists describe extant federal law as encompassing the Constitution, a federal statute, or a treaty.\footnote{Id.} The Revisionists argue that this requirement is a general point of agreement however one views federal common law in federal courts:

For example, Professor Merrill advocates a restrictive approach to federal common law, whereby there would have to be a showing that the federal common law rule “can be derived from the specific intentions of the draftsmen of an authoritative federal text.” By contrast, Professor Martha Field argues for a broader approach, maintaining that the development of federal common law is appropriate so long as the court can “point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.” The key point for present purposes is

\footnote{51. Hoffman & Zaheer, supra note 3, at 75–80.} \footnote{52. See Bradley, Goldsmith & Moore, supra note 3, at 878–80.} \footnote{53. Id. at 878.} \footnote{54. Id.}
that despite disagreement over how it is to be applied, there is
general agreement on the requirement of a federal law source.\textsuperscript{55}

The Revisionists claim that the second limitation—that federal common
law be used only to fill in the gaps of federal statutory regimes—"follows
from the Court’s reasoning in \textit{Erie} that ‘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.’"\textsuperscript{56} The third limitation—that
federal courts must create federal common law consistently with extant
federal policy choices—"follows from the fact that federal common law is a
derivative form of lawmaking rather than an independent judicial power to
make policy decisions."\textsuperscript{57} The Revisionists cite \textit{Lincoln Mills} for the propo-
sition that some federal common law rules would "lie in the penumbra of
express statutory mandates," whereas others "[would] lack express statutory
sanction but [would] be solved by looking at the policy of the legislation
and fashioning a remedy that [would] effectuate that policy."\textsuperscript{58}

While the Revisionists do not specifically discuss these limits in the gen-
eral context of the \textit{ATS},\textsuperscript{59} presumably they believe that these limits would
apply to any use of federal common law in \textit{ATS} cases. For example, they
seem to apply these limits in their analysis of aiding and abetting liability
under the \textit{ATS}, as will be discussed in greater detail later in this Article.\textsuperscript{60}

\textsuperscript{55} See id. at 879–80 (quoting Thomas W. Merrill, \textit{The Common Law Powers of Federal Courts}, 52 U.
Rev. 881, 887 (1986)).

\textsuperscript{56} Bradley, Goldsmith & Moore, \textit{supra} note 3, at 880 (quoting City of Milwaukee v. Illinois, 451

\textsuperscript{57} Id. at 880.

\textsuperscript{58} \textit{Textile Workers Union of Am. v. Lincoln Mills of Ala.}, 353 U.S. 448, 456–57 (1957). The
Revisionists also cite other Supreme Court cases to similar effect. See United States v. \textit{Kimbell Foods,
Inc.}, 440 U.S. 715, 738 (1979) ("[I]n fashioning federal principles to govern areas left open by Congress,
our function is to effectuate congressional policy."); Wallis v. \textit{Pan Am. Petroleum Corp.}, 384 U.S. 63, 69
(1966) ("If there is a federal statute dealing with the general subject, it is a prime repository of federal
policy and a starting point for federal common law.").

\textsuperscript{59} Professors Bradley, Goldsmith, and Moore wrote their piece primarily to examine the broader
question of whether or not customary international law is or could properly be considered incorpor-
ated into federal common law. See \textit{supra} note 3, at 873. This broader question is beyond the scope of this
Article because the wholesale incorporation of customary international law is largely irrelevant to the
issues surrounding \textit{ATS} litigation after \textit{Sosa}. See \textit{supra} note 3, at 926–28 (arguing that provision of aiding
and abetting liability without statutory authorization is inconsistent with Supreme Court precedent and fed-
eral statutes, and that provision of such liability would "require courts to exercise significant policy
judgment normally reserved to the legislature, such as fashioning the precise standards for what consti-
tutes aiding and abetting"); see also id. at 928 ("Consistent with \textit{Sosa} (and \textit{Erie}), assessment of such policy
issues is best left to the political branches."). As discussed previously, \textit{Sosa} establishes that federal com-
mon law provides the cause of action for violations of the law of nations that are specific, universal, and
obligatory. Thus, the Revisionists make these arguments because they seem to think that aiding and
abetting requires a separate federal common law cause of action, independent of the underlying violation
that is aided and abetted. See id. at 927 ("Nor does a claim of corporate aiding and abetting appear to
meet the requirement in \textit{Sosa} that norms, to be actionable under the \textit{ATS}, must have at least the same
definite content and acceptance among civilized nations as . . . the historical paradigms familiar when
the \textit{ATS} was enacted." (quoting \textit{Sosa} v. \textit{Alvarez-Machain}, 542 U.S. 692, 730 (2004))). This argument
III. An Evaluation of the Revisionists’ Federal Common Law Parameters

Before proceeding, it is important to evaluate the validity of the Revisionists’ purportedly well-accepted principles outlining the federal common law power of federal courts, particularly as they apply to the ATS. Indeed, applying these principles in the ATS context would significantly curtail the ability of federal courts to use federal common law powers in ATS cases. On the other hand, not applying the principles to the creation and application of federal common law in the ATS context would bolster the Modern position regarding federal common law’s interaction with the ATS. Each of the three principles will be examined in turn.

A. An Extant Federal Law Source

The Revisionists’ description of the first principle is, to say the least, rather puzzling when examined in the context of the ATS. If a federal statute and constitutional authority are sufficient to provide a source of extant federal law, then the Sosa decision seems to explicitly find the ATS to be a federal statute that is unquestionably valid under the Constitution. Although Sosa explicitly stated that the ATS was a purely jurisdictional statute, the Court recognized that the ATS was authorized by the political branches with the understanding that federal common law would provide a cause of action for violations of some customary international law norms. Accordingly, a federal law source, the ATS, provided federal courts the very congressional authorization needed to create federal common law.

But the Revisionists’ first principle is actually somewhat more complex than they describe it. There are two different interpretations about when federal courts can properly exercise federal common law making power. As explained below, whether one adopts the more restrictive view of Professor Merrill or the more expansive view of Professor Field could determine whether or not one finds authority for the federal courts to play a role in creating federal common law. As these principles apply to federal common law created under the ATS, however, it seems apparent that either view would support the proposition that federal courts have the necessary authority provided by Congress to create federal common law.

Under Professor Merrill’s four-step inquiry to determine the legitimacy of federal common law, the creation of federal common law under the ATS would be legitimate. First, the creation of federal common law under the

is inapposite because aiding and abetting is a liability theory, not an independent norm requiring an independent cause of action. See Comment, supra note 3, at 1959 n.52.

61. “In principle, any question involving the legitimacy of federal common law potentially entails four inquiries:

(1) Does the issue involve a ‘rule of decision’? . . . [D]oes it involve a question concerning . . . remedies available to parties? If the rule is a rule of decision in this sense, an issue of legiti-
ATS would certainly involve a question concerning remedies available to parties or the liability of defendants for violations of the law of nations. Once it has been determined that the first inquiry is satisfied, Professor Merrill’s test requires that at least one of the second, third, or fourth inquiries also be answered affirmatively. Here, both the third and fourth inquiries are satisfied. Under the third inquiry, the rule would be legitimate because a federal rule is necessary in order to effectuate the First Congress’s federal policy of ensuring that the ATS would provide a remedy for violations of the law of nations. Under the fourth inquiry, the draftsmen of the ATS provided federal courts with the lawmaking power to determine how the law of nations had been violated and how to fashion a remedy for such violations. Thus, under Professor Merrill’s four-part test, the creation and application of federal common law in ATS litigation is legitimate.

Under Professor Field’s view, the ATS itself would provide the requisite “federal enactment, constitutional or statutory, that [a federal court] interprets as authorizing the federal common law rule.” Indeed, some proponents of the Modern position seem to argue that Sosa adopted this view, arguing that “the Court’s discussion of federal common law suggests that the federal courts have broader federal common law decision-making regarding such subsidiary rules once a plaintiff brings a ‘law of nations’ claim satisfying the [Sosa] test.” In conclusion, whatever one’s view of the federal-common-law-making powers of federal courts, the Sosa decision recognizes the ATS as an extant federal law source that provides authorization for the creation of federal common law.

An affirmative answer to any one of questions (2) through (4) means that federal common law may legitimately supply the rule.

(2) [Omitted.]

(3) If the issue involves a rule of decision . . . is a federal rule necessary in order to preserve or effectuate some other federal policy that can be derived from the specific intentions of the draftsmen of an authoritative federal text [such as a federal statute]?

(4) Finally, if the issue involves a rule of decision, if conventional interpretation does not directly supply a rule, and if a federal rule is not necessary in order to preserve some other federal policy established by an authoritative text, is there evidence, based again on the specific intentions of the draftsmen of an authoritative federal text, that lawmaking power with respect to this issue has been delegated to federal courts in a reasonably circumscribed manner?

An affirmative answer to any one of questions (2) through (4) means that federal common law may legitimately supply the rule of decision.” Merrill, supra note 55, at 46–47.

62. See supra notes 27–29 and accompanying text.

63. See Merrill, supra note 55, at 46. This would be an example of what Professor Merrill calls delegated lawmaking. “Delegated lawmaking rests on the notion that federal courts can establish rule X, even where there is no specific intent that they do so, provided it can be shown that the issue falls within a reasonably circumscribed class of issues as to which Congress or the framers specifically intended to delegate lawmaking power to the federal courts.” Id.

64. Field, supra note 55, at 887.

65. Hoffman & Zaheer, supra note 3, at 88; see also Larry Kramer, The Lawmaking Power of the Federal Courts, 12 Pace L. Rev. 263, 288 (1992) ("[F]ederal judges must wait for Congress to take the first step. Once Congress has acted, however, federal courts can make any common law ‘necessary and proper’ to implement the statute.").
B. Interstitial in Nature

The Revisionists’ second limitation—that *Erie* requires federal common law to be interstitial—is entirely inapplicable to federal common law made under the ATS because this federal common law implicates no federalism concerns. By interstitial, the Revisionists mean that “courts are to develop [federal common law] only in retail fashion to fill in the gaps, or interstices of federal [statutes] . . . .”66 As Professor Field points out, the requirement that federal common law be interstitial is more imperative where federal common law might displace legitimate state law functions.67 Federalism is not implicated where the issues to which the federal common law rule applies are only federal in nature. In such situations, *Erie* does not limit federal common law making powers of federal courts. The Supreme Court made this clear in *United States v. Standard Oil Co.*:

[T]here was no purpose or effect for broadening state power over matters essentially of federal character or for determining whether issues are of that nature . . . . Accordingly the Erie decision, which related only to the law to be applied in exercise of [diversity] jurisdiction, had no effect, and was intended to have none, to bring within the governance of state law matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings.68

Because the ATS deals with disputes implicating international law and foreign relations, areas in which the states have no business operating and where uniformity is necessary,69 *Erie* cannot limit federal common law making powers in this area. Indeed, the *Sosa* Court recognized as much: "*Erie* did

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66. Bradley, Goldsmith & Moore, supra note 3, at 880.
67. See Field, supra note 55, at 924–26, 931–34.
68. United States v. Standard Oil Co., 332 U.S. 301, 307 (1947). For this reason, suggestions that state law provide the rules of decision are fundamentally flawed. See Philip A. Scarborough, Note, Rules of Decision For Issues Arising Under the Alien Tort Statute, 107 COLUM. L. REV. 457 (arguing that federal courts hearing ATS cases should use state law to determine ancillary issues such as aiding and abetting liability).
69. See Hoffman & Zaheer, supra note 3, at 56. Cf. Harold Hongju Koh, Is International Law Really State Law?, 111 HARV. L. REV. 1824, 1831–32 (1998) ("Federal judicial determination of most questions of customary international law transpires not in a zone of core state concerns, such as state tort law, but in a foreign affairs area in which the Tenth Amendment has reserved little or no power to the states."); Gerald Neuman, Sense and Nonsense about Customary International Law: A Response to Professors Bradley and Goldsmith, 66 FORDHAM L. REV. 371, 378–79 ("Without the uniformity of federal law, government attorneys would have to persuade fifty independent State legal systems to adopt customary [international law] norms voluntarily. The ‘general common law’ had provided a coordinating concept that linked those systems in a joint interpretative enterprise; without a replacement, its dismantling would free the States to follow their separate wills, to the detriment of U.S. foreign relations. The characteristics of supremacy over State law and reviewability in the Supreme Court make federal common law an excellent instrument for protection of the federal interest.").
not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-\textit{Erie} understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way.\textsuperscript{70} As discussed above, the \textit{Sosa} Court reaffirmed that one of these enclaves is disputes implicating foreign affairs and international law.\textsuperscript{71}

\textbf{C. Consistent with Extant Federal Policy}

Finally, the third limitation—that federal common law be consistent with extant federal policy—appears to be applicable to federal common law under the ATS only if one accepts the proposition that the ATS is not a statute that itself authorizes federal common law. In fact, the previous two sections show that there is strong evidence—even under the Revisionists’ analysis—that the ATS authorizes federal common law. Whether it does or not, congressional policy in other areas militates in favor of such an approach. Indeed, some proponents of the Modern position support the proposition that \textit{Sosa} held that the ATS authorizes the application and creation of federal common law.\textsuperscript{72} This authorization would then be consistent with the Supreme Court’s decision in \textit{Lincoln Mills}, which Bradley, Goldsmith, and Moore themselves cite,\textsuperscript{73} that some federal common law would “lie in the penumbra of express statutory mandates.”\textsuperscript{74} Indeed, the \textit{Lincoln Mills} decision is analogous to the \textit{Sosa} decision; in each case the Supreme Court faced a jurisdictional grant without a substantive rule, and in each case the Court held that federal common law would effectuate the intent of Congress. Thus, \textit{Sosa} and \textit{Lincoln Mills} can both be viewed as instances where Congress has provided authorization for federal courts to create federal common law rules by providing jurisdiction.\textsuperscript{75}

Bradley, Goldsmith, and Moore at least seem to acknowledge that the ATS provides such authorization. They acknowledge that the “historical section of the [\textit{Sosa}] opinion was consumed by a search for the original understanding of what Congress authorized, and the Court built on this historical understanding to ascertain what the ATS authorized in modern times.”\textsuperscript{76}

\textbf{\textit{Lincoln Mills} v. Linen Mills, 353 U.S. 448, 457 (1957).}
\textbf{\textit{ERISA} and the Antitrust statutes. See \textit{Chemerinsky}, infra note 38, § 6.3.}

\textbf{\textit{Sosa} v. Alvarez-Machain.\textsuperscript{74}}

\textbf{\textit{Chemelinsk, supra note 38, § 6.3.}}

\textbf{\textit{Sosa} v. Alvarez-Machain.\textsuperscript{76}}

\textbf{\textit{Bradley, Goldsmith & Moore, supra note 3, at 903.}}
creation of a domestic remedy, in the form of a cause of action, for a narrow set of CIL violations. . . . [The Sosa Court’s] description of the legitimate bases of post-Erie federal common law included a citation to Textile Workers Union v. Lincoln Mills, a decision in which . . . the Court implied federal common law-making powers from the Labor Management Relations Act’s grant of federal jurisdiction to decide disputes under certain labor-management contracts. Presumably, the common law powers recognized in Sosa were similar.77

But if this is the case, Lincoln Mills does not indicate that the relevant rules must be consistent with federal policy choices unless there is a lack of statutory authorization for the creation of federal common law.78 Because the Sosa Court found authorization for the creation of federal common law in the jurisdictional grant of the ATS, the Court “presumably” would assume related federal common law powers to provide a remedy for violations of the law of nations.79

Even assuming, for the moment, that the ATS does not authorize the application and creation of federal common law through an express statutory mandate, federal courts must fashion common law consistent with federal policy choices. But what expressions of federal policy choices are relevant to the determination of whether a federal common law rule is consistent with extant federal policy? The practice of the Supreme Court in Lincoln Mills suggests that federal common law should be consistent with policy choices concerning the particular area of the law in which federal common law is to operate.80 In respecting the limits of their federal common law powers under the ATS, federal courts should fashion federal common law to be consistent with congressional policy indicated in other areas governing the provision of remedies for violations of international law. Statutes expressing such policy preferences would certainly include the Torture Victim Protection Act,81 the

77. Id. at 895–96.
78. Cf. United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979) (“It is precisely when Congress has not spoken in an area comprising issues substantially related to an established program of government operation that Clearfield directs federal courts to fill the interstices of federal legislation according to their own standards.” (quotation marks and citations omitted)); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (“In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.” (emphasis added)).
79. Bradley, Goldsmith & Moore, supra note 3, at 896.
80. Textile Workers Union of Am. v. Lincoln Mills of Ala., 353 U.S. 448, 458–59 (1957) (discussing how a federal common law rule to not impose additional requirements on arbitration enforcement was consistent with congressional policy in favor of enforcement of agreements to arbitrate). Cf. Merrill, supra note 53, at 47 (arguing that federal common law rules are legitimate if the “federal rule [is] necessary in order to preserve or effectuate some . . . federal policy that can be derived from the specific intentions of the draftsmen of an authoritative federal text”).
Antiterrorism Act,\textsuperscript{82} and the Foreign Sovereign Immunities Act,\textsuperscript{83} among others.\textsuperscript{84}

IV. Creating and Applying Federal Common Law Under the ATS: The Example of Corporate Aiding and Abetting

In order to put the issue of the creation and application of federal common law under the ATS in context, it is useful to consider an example that has been discussed by both the Modern and Revisionist positions: corporate aiding and abetting liability. After \textit{Sosa}, there have been a number of cases in which federal courts have faced the issue of corporate liability under the ATS for aiding and abetting violations of customary international law. For all practical purposes, the issue of corporate aiding and abetting liability involves two separate questions. First, can the ATS provide a remedy for aiding and abetting a violation of the law of nations? Second, can the ATS provide a remedy for corporations which have allegedly aided and abetted a violation of the law of nations? In answering these questions, the role of the federal common law in ATS litigation is perhaps outcome determinative. After all, \textit{Sosa} requires that federal common law provide the cause of action, and at the very least, \textit{Sosa} suggests federal common law can be used to determine ancillary issues under the ATS such as third party complicity.

This section will argue that the Revisionists' own principles actually show that the federal common law can and should play an important role in determining whether the issues of aiding and abetting liability and corporate liability under the ATS are enforceable through tort remedies. Part A will proceed by discussing the debate about whether federal common law can provide a cause of action against corporations under the ATS. Part B will discuss the debate over whether aiding and abetting liability under the ATS can be deemed consistent with \textit{Sosa}'s interpretation of the ATS and federal common law. Each of these sections will apply the very principles that the Revisionists espouse in order to demonstrate that federal common law can and should address these issues in a manner consistent with the Revisionist position.

A. Aiding and Abetting: A Federal Common Law Theory of Liability

Aiding and abetting is an example of third party complicity for a tort violation. That is, aiding and abetting provides a theory of liability whereby the third party aider and abettor is liable for the actions of the actual tortfeasor. The ATS does not define third party liability or, for that matter, any other ancillary issue; the statute only declares that a remedy be provided

\textsuperscript{84} See discussion infra Part IV.A.2.
for a tort in violation of the law of nations. *Sosa* stated that the federal common law was to provide the cause of action. As discussed above, federal courts must also, presumably, have the power to effectuate the intent of the First Congress that a remedy be provided for violations of the law of nations. At the very least, it seems that even the Revisionists would be forced to admit that “federal courts [can] fill the interstices of federal legislation ‘according to their own standards’” where Congress has not provided the standard for the ancillary issue.85 Before and after *Sosa*, some courts have found that federal common law can implement the purposes of the ATS by providing for aiding and abetting liability for violations of customary international law.86 The Revisionists, nevertheless, seem to suggest that federal courts cannot create such federal common law and remain consistent with the three principles that they have outlined. This section will show that federal common law in this area would be consistent with those principles.

1. **Filling in the Gaps of a Federal Statute to Implement Congressional Intent**

The Revisionists do not explicitly argue that federal common law cannot be used to fill in the gaps of the ATS in order to implement the First Congress’s intent. Instead, they argue that the First Congress knew how to provide secondary liability for violations of international law and that the language of the ATS contains no such provision:

[I]t is important to recall that the text of the ATS refers to torts “committed” in violation of international law. There is no suggestion in this language of third-party liability for those who facilitate the commission of such torts. By contrast, just a year after the enactment of the ATS, Congress enacted a criminal statute


86. See, e.g., Khulumani v. Barclay Nat. Bank, Ltd., 504 F.3d 254, 287 (2d Cir. 2007) (Hall, J., concurring) (“[C]ustomary international law and the federal common law both include standards of aiding and abetting. In a situation such as this, I opt for the standard articulated by the federal common law. Supreme Court precedent commands the same result.”); Sarei v. Rio Tinto, PLC, 487 F.3d 1193, 1202 (9th Cir. 2007), vacated and reh’g en banc granted by Sarei v. Rio Tinto, PLC, 2007 U.S. App. LEXIS 19751 (9th Cir. Aug. 20, 2007) (“Courts applying the ATCA draw on federal common law, and there are well-settled theories of vicarious liability under federal common law.”); Cabello v. Fernández-Larios, 402 F.3d 1148, 1157 (11th Cir. 2005) (ATS permits plaintiffs to recover not only from those who perpetrated the violations of the law of nations but also from those who conspired with or assisted those directly liable on accomplice liability theories); Doe I v. Unocal Corp., 395 F.3d 932, 963 (9th Cir. 2002) (Reinhardt, J., concurring) (“I do not agree that the question of Unocal’s tort liability (under the ATS) should be decided by applying any international law test at all. Rather, in my view, the ancillary legal question of Unocal’s third-party tort liability should be resolved by applying general federal common law tort principles, such as agency, joint venture, or reckless disregard. . . . Assuming the allegations to be true, the fact that the underlying conduct violated customary international law is sufficient to support liability not only on the part of the governmental actor, but also on the part of a third party whose liability is derivative thereof.”).
containing specific provisions for indirect liability—for example, for aiding or assisting piracy.87

This, in their view, implies that the drafters of the ATS did not contemplate third party complicity.

This argument is not only legally incorrect but also historically inaccurate. The failure to provide explicitly for indirect liability in a statute does not bar its later creation through common law.88 The Revisionists’ reliance on the word “committed” in their historical argument is flawed—and indeed surprising—given that the language of the ATS as originally enacted did not include the word “committed” at all. Instead, the Act’s original language provided that all district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”89 In fact, the Supreme Court adopted the historical interpretation provided in the Amicus Curiae Brief of Professors of Federal Jurisdiction and Legal History, who pointed out that “[i]t has never been suggested that any change in wording upon codification was intended to alter the scope of this provision.”90 Historical accuracy regarding the intent of the draftsmen of the ATS is significant because federal common law is to act in an interstitial manner to effectuate the intent of the draftsmen and contemporaries of the ATS. In Sosa, the Supreme Court itself gave great deference to the views of the draftsmen and contemporary applications of the ATS in analyzing the intent of the statute.91

The contemporaries of the drafters of the ATS believed that the statute would provide third party liability, without further congressional action, for those who aided and abetted violations of the law of nations. Sosa itself had quoted a 1795 opinion of then-U.S. Attorney General William Bradford to

87. Bradley, Goldsmith & Moore, supra note 3, at 926.
88. See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney, 530 U.S. 238, 246–48 (2000) (providing secondary liability under ERISA even though the statute does not explicitly provide for such liability); see also Elec. Lab Supply Co. v. Cullen, 977 F.2d 798, 805 (3d Cir. 1992) (“The application of common law aiding and abetting liability to litigation under a federal statute is appropriate when it advances the goals of the particular statute and when the structure and text of the statute indicate a congressional intent to incorporate such liability.” (internal citation omitted)).
89. An Act to Establish the Judicial Courts of the United States (Judiciary Act), ch. 20, § 9, 1 Stat. 73, 77 (1789).
91. Sosa, 542 U.S. at 720 ("The sparse contemporaneous cases and legal materials referring to the ATS tend to confirm both inferences, that some, but few, torts in violation of the law of nations were understood to be within the common law.").
show that the ATS drafters had intended that federal common law provide a cause of action for violations of the law of nations.92

"But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a civil suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations . . . ."93

Attorney General Bradford’s opinion was provided to discuss the very possibility of liability under the ATS for American citizens who had “voluntarily joined, conducted, aided and abetted a French fleet in attacking the settlement, and plundering or destroying the property of British subjects on that coast.”94 Bradford explicitly stated his belief that the common law could provide for such theories of liability under the ATS for violations of the law of nations. Moreover, Attorney General Bradford’s opinion is particularly important, as Sosa noted,95 because he had been the chief prosecutor in the Marbois Affair,96 an incident that inspired the First Congress to pass the ATS.97 Bradford’s opinion also discussed the opinion of another contemporary of the ATS, President George Washington, who had declared in a proclamation in April 1793 that U.S. citizens who “‘render themselves liable to punishment under the laws of nations, by committing, aiding or abetting hostilities’ against the merchants of foreign nations at peace with the United States would not receive the protection of the United States.”98 Contemporaries of the ATS believed that federal common law could and would provide liability for aiding and abetting violations of the law of nations.

In addition to legal materials of contemporaries of the ATS, cases where the ATS was a basis for jurisdiction also indicate that federal courts could provide for aiding and abetting liability under federal common law. Sosa itself examined cases where the ATS had provided jurisdiction in determining that contemporary federal courts understood that federal common law

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92. Id. at 721 (“[I]t appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action.” (quoting Breach of Neutrality, 1 Op. Att’y Gen. 57, 59 (1795))).
93. Id. (quoting Breach of Neutrality, 1 Op. Att’y Gen. 57, 59 (1795)) (emphasis omitted).
95. Sosa, 542 U.S. at 721.
would provide a cause of action. A similar analysis indicates that federal courts were also thought to be able to provide for federal common law aiding and abetting liability under the ATS. For example, in the 1795 case of *Talbot v. Jansen*, the Supreme Court found jurisdiction under the ATS and provided liability under the federal common law when individuals had aided and abetted the unlawful capture of a neutral ship in wartime. The Court ordered the provision of restitution, thereby demonstrating that civil liability was proper where individuals had aided and abetted a violation of the law of nations. Other cases that predate the ATS also indicate that those who aided and abetted violations of the law of nations could be punished. Thus, it is at least plausible, if not beyond dispute, that the Supreme Court and the federal courts during the founding generation heard cases under the ATS and believed that the federal common law could and should provide for aiding and abetting liability for a tort in violation of the law of nations.

Even if it was not clear that the First Congress and contemporary federal courts believed that the ATS itself authorized federal common law to provide for third party liability, federal courts could still create federal common law in an interstitial manner to fill in the gaps regarding this ancillary issue of third party liability. Nothing in the ATS forecloses third party liability, and no act of Congress that has been passed since the ATS occupies the field. In this situation, federal common law is appropriate to fill in the interstitial gaps so as to effectuate the First Congress’s goals of providing a tort remedy for violations of international law. In other words, creating aiding and abetting liability under federal common law would meet the first two principles outlined by the Revisionists, namely being grounded in a federal law source and being interstitial in nature.

99. *See Sosa*, 542 U.S. at 720 (discussing Bolchos v. Darrel, 3 F. Cas. 810 (D.S.C. 1795) (No. 1,607) and *Monroe v. The Fanny*, 17 F. Cas. 942 (D. Pa. 1795) (No. 9,895)).


101. *See*, e.g., *Henfield’s Case*, 11 F. Cas. 1099, 1103 (C.C.D. Pa. 1793) (No. 6,360) (discussing liability under the laws of the United States for “committing, aiding or abetting hostilities” in violation of the law of nations).

102. *Khulumani*, 504 F.3d at 288 n.5 (Hall, J., concurring) (“Cases from that [founding] era, moreover, indicate that secondary liability was recognized as an established part of the federal common law.”).

103. To be sure, at least one court has found that the TVPA occupies the field and therefore precludes the pleading of claims of torture and extrajudicial killing under federal common law and the ATS. *See Enahoro v. Abubakar*, 408 F.3d at 888 (Cudahy, J., dissenting) (“The two acts thus are not competing provisions but are meant to be complementary and mutually reinforcing (if somewhat coextensive). Federal courts addressing this specific issue have ruled accordingly, holding that the TVPA does not restrict the scope and coverage of the ATCA.”). *See also Kadid v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1999) (“The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act.”). Even if the TVPA does occupy the field with regard to extrajudicial killings and torture, the TVPA itself is an example of the political branches contemplating aiding and abetting liability for violations of international law. *See S. Rep. No. 102-249, at 8 (1991)*.

104. *See Anne-Marie Burley, supra note 90, at 475* (“The Alien Tort Statute was a direct response to what the Founders understood to be the nation’s duty to propagate and enforce those international law rules that directly regulated individual conduct.” (emphasis omitted)).
Instead of discussing how federal common law aiding and abetting liability could effectuate the First Congress’s intent, the Revisionists mistakenly argue that the Supreme Court has explicitly stated in *Central Bank of Denver v. First Interstate Bank of Denver* that aiding and abetting liability should not be implied under federal statutes. The Revisionists extend *Central Bank* to support their argument that aiding and abetting liability should certainly not be implied under the ATS because it would raise policy concerns best addressed by the political branches. But some federal courts have actually stated that *Central Bank’s* application to the ATS affirms the provision of aiding and abetting liability, albeit under international law. Moreover, other commentators have convincingly disputed the applicability of *Central Bank* to the ATS context. For the purposes of this Article, however, it is more noteworthy—and perhaps ironic—that the Revisionists’ *Central Bank* argument has been rejected by federal courts that have instead chosen to apply the very common law principles the Revisionists themselves espouse.

Federal courts have refused to apply *Central Bank* to situations where a failure to interstitially provide aiding and abetting liability under federal common law would frustrate congressional intent. Moreover, the reasoning of these decisions rejecting *Central Bank* limitations on aiding and abetting liability is entirely applicable to ATS cases. In *Boim v. Quranic Literacy Institute*, the defendant argued that *Central Bank* precluded creation of federal common law aiding and abetting liability under the Antiterrorism Act (ATA) because the ATA did not explicitly provide for such liability. The Seventh Circuit rejected this argument and found *Central Bank* distinguishable for two major reasons. First, the *Boim* court believed that the creation of aiding and abetting liability under the ATA would actually effectuate the intent of Congress “to import general tort law principles, . . .

106. Bradley, Goldsmith & Moore, supra note 3, at 926–27. Moreover, these precise arguments were recently rejected by Judge Hall in his concurring opinion in *Khulumani*. 504 F.3d at 288 n.5 (Hall, J., concurring).
107. See, e.g., *Khulumani*, 504 F.3d at 282 (Katzmann, J., concurring) (citing *Casto, supra note 3, at 650*); id. at 527 (Korman, J., concurring in part and dissenting in part) (asserting that *Central Bank* requires the conclusion that the ATS “can support the recognition of a cause of action for aiding-and-abetting . . . only if . . . an international law norm . . . provides for such liability.”). But see Comment, supra note 3, at 1960 ("[E]ven if *Central Bank* is best read as counseling courts to look to international law for aiding and abetting liability, international law in turn says that such liability rules can be supplied by domestic law."). It should also be noted that the Revisionists argue, similar to Judge Korman’s dissent, that there is insufficient consensus around an international norm of aiding and abetting to meet the *Sosa* standard for providing a cause of action. See Bradley, Goldsmith & Moore, supra note 3, at 924–27. As previously discussed, this argument misses the mark because aiding and abetting is a liability theory, not a cause of action.
109. See, e.g., *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1016–21 (7th Cir. 2002); see also *Cent. Bank*, 511 U.S. at 176–77 (discussing legislative intent as a key factor in determining not to extend aiding and abetting liability).
110. 291 F.3d at 1016.
including aiding and abetting liability." 

Boim distinguished the ATA from the implied cause of action under securities regulations at issue in Central Bank:

Nothing in section 10(b) [of the 1934 Securities Exchange Act] reflects an intent to incorporate general tort law principles, and a careful review of that statute demonstrates to the contrary that Congress intended to limit liability in certain instances. As the Supreme Court noted [in Central Bank], Congress imposed some forms of secondary liability in section 10(b) (such as controlling person liability), but not others, manifesting a deliberate choice to exclude aiding and abetting liability. In contrast, the language of section 2333 tracks the traditional elements of tort law as expressed in the Restatement, and the legislative history expressly references tort principles in setting out the perimeters of Congress’ intent. 

This reasoning is equally applicable to the ATS. As discussed above, the draftsmen of the ATS did not include one form of secondary liability to the exclusion of another because they believed—and the very first ATS cases confirmed—that federal common law would cover these ancillary issues. In other words, the draftsmen of the ATS believed, and contemporary cases confirm, that the common law would provide the cause of action as well as secondary liability theories, such as aiding and abetting, that would be applicable in the context of tort claims alleging violations of the law of nations. 

The second reason the Boim court found Central Bank distinguishable was that, unlike the 1934 Securities Exchange Act, the Antiterrorism Act’s very purpose required the creation of aiding and abetting liability.

[If] we failed to impose liability on aiders and abettors who knowingly and intentionally funded acts of terrorism, we would be thwarting Congress’ clearly expressed intent to cut off the flow of money to terrorists at every point along the causal chain of violence. . . . The organizations, businesses and nations that support and encourage terrorist acts are likely to have reachable assets that they wish to protect. The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts. 

112. 291 F.3d at 1019.

113. Id. at 1020.

114. See supra notes 91–98 and accompanying text.

115. Boim, 291 F.3d at 1021 (citation omitted); see Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 188 (1994) (stating that policy considerations may be used to
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Again, this reasoning is instructive for the extension of common law aiding and abetting liability to the ATS context. While the purposes for the passage of the ATS are disputed, Sosa recognized that the ATS, at the time of its passage, was intended to cover acts of unlawful prize captures and piracy as violations of the law of nations.116 The previously discussed 1795 case of Talbot v. Jansen and the opinion of Attorney General Bradford demonstrate that those who aided and abetted these very violations were thought to be liable for their actions under the federal common law.117 Indeed, providing for aiding and abetting liability in those cases would ensure that American citizens were not able to benefit from their actions in violation of the law of nations, even if those theories of liability would not otherwise deter citizens from violating the law of nations. The Supreme Court has endorsed such reasoning by stating that aiding and abetting liability is available, even if a statute does not explicitly provide it, where a statute intends to create liability for particular acts as opposed to particular classes of defendants.118 This logic is applicable to common law operating in the ATS context: even if the draftsmen of the ATS only contemplated that a limited set of customary international law norms would give rise to a cause of action, their focus was the violations of customary international law norms, not the actors who would be violating those norms.

In conclusion, the principles of federal common law—that it be provided and extended interstitially to effectuate congressional intent—require a rejection of the Revisionists’ attempt to extend the reasoning of Central Bank to the ATS context. There is strong evidence that demonstrates the intent of the First Congress and the understanding of the contemporary federal courts that federal common law could and would recognize aiding and abetting liability in the context of suits heard under the ATS. No legal development—judicial decision or action by the political branches—has foreclosed the possibility of creating federal common law to effectuate the intent of the founding generation and the draftsmen of the ATS. Thus, it remains only to be demonstrated that aiding and abetting liability would be consistent with current federal policy choices.

2. Consistent with Federal Policy in the Area

The Revisionists’ arguments against aiding and abetting liability in the ATS context, somewhat surprisingly, do not discuss federal policy evidenced interpret the text and structure of a statute when a literal reading would lead to a result “so bizarre’ that Congress could not have intended it”.

117. See supra notes 91–98, 100 and accompanying text.
118. Cf. Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 246–48 (2000) (providing for aiding and abetting liability and holding that ERISA reaches beyond the immediate tortfeasor to include those who knowingly participate in the tortious action because the statute focuses not on the “universe of possible defendants” but rather on redressing an “act or practice which violates any provision” of the statute) (citation omitted).
by choices of the political branches in the area of international law. Instead, they make a variety of exaggerated arguments about how aiding and abetting liability “would significantly expand ATS litigation” and “would also require courts to exercise significant policy judgment normally reserved to the legislature, such as fashioning the precise standards for what constitutes aiding and abetting.” 119 The Revisionists further argue that this is precisely the type of claim that the Sosa Court warned against recognizing because it would be “innovative” and would recognize a new claim. 120 None of these arguments are valid, and they do not preclude aiding and abetting liability under federal common law and the ATS.

Contrary to the exaggerated assertions of the Revisionists, aiding and abetting liability is well defined in federal common law and has been provided under numerous federal statutes, even those that have not explicitly created indirect liability. 121 Indeed, the Seventh Circuit has gone so far as to say that “[a]iding and abetting . . . is a well known and well defined doctrine.” 122 Federal tort law adopts the principles of the Restatement (Second) of Torts and provides for aiding and abetting liability where a person has (1) knowingly (2) provided substantial assistance or encouragement to another person’s tortious action. 123 As to the knowledge requirement, courts are generally in agreement that awareness of the activity is sufficient. 124 As for the second element, the key inquiry is how much assistance or encouragement is substantial.

In practice, liability for aiding-abetting often turns on how much encouragement or assistance is substantial enough. The Restatement suggests five factors in making this determination: “the nature of

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119. Bradley, Goldsmith & Moore, supra note 3, at 926.
120. Id. (quoting Sosa, 542 U.S. at 726).
121. See, e.g., Harris Trust, 530 U.S. at 246–48.
123. Halberstam, 705 F.2d at 477–78 (“Aiding-abetting includes the following elements: (1) the party whom the defendant aids must perform a wrongful act that causes an injury; (2) the defendant must be generally aware of his role as part of an overall illegal or tortious activity at the time that he provides the assistance; (3) the defendant must knowingly and substantially assist the principal violation.”); RESTATEMENT (SECOND) OF TORTS § 876(b) (1977); see also Morganroth & Morganroth, 351 F.3d at 415 (referring to the elements of aiding and abetting).
the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other [tortfeasor] and his state of mind.”

There is no reason that aiding and abetting liability standards should be different under the ATS because this liability standard has been applied in a wide variety of contexts under other federal statutes, from international terrorism to RICO to ERISA.

Extension of this federal common law liability standard to ATS litigation would therefore not be new or innovative, but rather a logical extension of federal common law aiding and abetting liability to effectuate an important congressional statute. Even if federal courts were required to exercise some policy judgment in the application of aiding and abetting liability to the ATS context, this would be no more significant of a policy judgment than that which federal courts are already empowered to make when they create federal common law to provide remedies under other federal statutes. Indeed, federal common law has previously been deemed appropriate to deal with these types of ancillary issues.

More importantly, an extension of common law aiding and abetting to ATS litigation would be consistent with the choices of the political branches, which have shown a policy preference for indirect liability for international law violations. The political branches have repeatedly endorsed the idea of indirect liability in the context of some international law violations. For example, the congressional drafting history of the Torture Victim Protection Act, which itself declared support for ATS litigation generally, “anticipated that liability under the TVPA would extend to aiding and abetting, even though the TVPA—like the ATS—says nothing about secondary liability theories . . . .” In the Military Commissions Act of 2006, Congress explicitly defined unlawful enemy combatants to include anyone who is not a lawful combatant that has “purposefully and materially supported hostilities against the United States.” In fact, the only time that a member of Congress has shown concern about corporate aiding and abetting liability under the ATS was a recent instance in which Congress failed to discuss seriously, let alone amend, the ATS.

The Executive Branch has also repeatedly demonstrated support for indirect liability in the context of international law. The Administrations of Presidents Carter, Clinton, and George H.W. Bush have all supported liti-

125. Halberstam, 705 F.2d at 478 (quoting RESTATEMENT (SECOND) OF TORTS § 876 cmt. d (1977)).
126. See Boim, 291 F.3d at 1020 (providing aiding and abetting liability for terrorism); Hoffman & Zaheer, supra note 3, at 79–80 (discussing how aiding and abetting liability standard is the same under RICO and how Congress codified this standard in ERISA).
127. Stephens, supra note 50, at 558.
128. See Comment, supra note 3, at 1959 (citing S. REP. NO. 102-249, at 8).
gation under the ATS, even in cases involving corporate aiding and abetting liability, though President George W. Bush has opposed such litigation.\(^\text{131}\) For example, Clinton Administration officials played a large role in developing a global settlement in the ATS Holocaust litigation, which specifically alleged that corporations had aided and abetted genocide.\(^\text{132}\) While the Bush Administration has opposed aiding and abetting in ATS litigation, none of its binding executive actions preclude aiding and abetting liability. Indeed, there are plausible arguments that corporate aiding and abetting liability under the ATS would promote the Bush Administration’s stated policy interest of constructive engagement with nations that have horrific human rights records.\(^\text{133}\) Moreover, the Bush Administration has supported not only criminal aiding and abetting liability through the Department of Defense,\(^\text{134}\) but it has also supported the application of common law aiding and abetting civil liability to terrorism litigation.\(^\text{135}\)

Both of the political branches have demonstrated an interest in allowing the judiciary to hear cases involving aiding and abetting and to craft the appropriate standards under federal common law. Congress demonstrated this desire by providing for civil liability for terrorism in two separate statutes. First, Congress indicated that it wished to incorporate federal common law tort law principles into the civil liability created under the Antiterrorism Act.\(^\text{136}\) Federal courts have accepted the arguments of the Executive Branch that Congress contemplated the federal courts incorporating common law aiding and abetting liability when Congress created civil liability under the Antiterrorism Act.\(^\text{137}\) Second, Congress amended the Foreign Sovereign Immunities Act (FSIA) through the Antiterrorism and Effective Death Penalty Act. The amendment explicitly provides for an exception to foreign sovereign immunity where “damages are sought against a foreign state for personal injury or death that was caused by [a terrorist act] or the provision of material support or resources for such an act . . . .”\(^\text{138}\) The FSIA
explicitly provided subject matter jurisdiction for these acts, thereby demonstrating the political branches' policy preference to make such "provision of material support and resources" judicially cognizable torts. While the FSIA makes such torts judicially cognizable, the FSIA itself does not provide for a cause of action for such actions but rather makes foreign states liable in the same manner as private individuals for such actions. Again, federal courts have stated that the Antiterrorism Act provides the requisite cause of action for such provision of material support.

The Antiterrorism Act and the FSIA alone demonstrate that the political branches have chosen to support a policy of third party liability for the particular international law violation of terrorism. Taken together with the examples previously discussed, these statutes represent part of a sustained pattern of support by the political branches for a federal policy that favors both civil and criminal liability for third party violations of international law.

The extension of federal common law aiding and abetting liability to ATS cases would not require courts to "fashion the precise standards for aiding and abetting liability" because those standards are already well established. Moreover, the aiding and abetting liability standards that federal courts would apply would not require any exercise of "significant policy judgment" because federal courts would be extending the very tort law principles of aiding and abetting liability that the political branches support as a matter of policy. The extension of aiding and abetting liability to the ATS context is therefore proper under the principles governing federal common law.

B. ATS Liability of Corporations: A Federal Common Law Cause of Action

Given that aiding and abetting liability under the ATS can be applied through federal common law, the next question is whether such liability can be extended to corporations. Financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . , and transportation, except medicine or religious materials.[1] 18 U.S.C. § 2339A(b)(1) (2006). This definition of material support shows that it is analogous to aiding and abetting and therein demonstrates that the political branches have supported third party civil liability in the context of terrorism as a matter of policy.

141. See, e.g., Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1016–17 (7th Cir. 2002) (“We take the district court to mean that [FSIA] section [1605A(a)(1)] implies a foreign state may be sued in the United States for acts that would give rise to criminal liability under section 2339A . . . . The mechanism for suing a foreign state for these acts that would give rise to criminal liability under section 2339A is section 2333 [of the Antiterrorism Act]. The defendants complain that Congress did not specifically mention section 2333 as the device by which plaintiffs might sue foreign governments for violations of section 2339A, but they fail to point to any other source of civil liability. We agree that Congress made clear in section [1605A(a)(1)] of the FSIA its intent to characterize violations of section 2339A as acts of international terrorism under section 2333.” (internal citations omitted)).
142. See id. at 1016.
be applied to corporations. At the outset, it is important to note that there is some debate about whether international law can be applied to corporations. However, the Modern and Revisionist camps appear to agree that domestic law prescribes the methods for enforcement of international law. But if international law does not control the domestic enforcement of international law, and if *Sosa* requires that federal common law provide the cause of action under the ATS, then whether a corporation could be sued for aiding and abetting liability is a matter of federal common law. That is, federal common law determines whether, under the ATS, a cause of action exists against corporations for aiding and abetting violations of the law of nations. While *Sosa* does require the underlying norm itself to be violated by an appropriate private or public actor, nothing in *Sosa* indicates that accomplice liability requires that the accomplice be capable of violating directly the underlying international law norm. In fact, the *Sosa* Court’s statement seemed to treat private actors as a single category for purposes of the ATS, thereby failing to distinguish between private actors that were individuals or those that were corporations.

The determination that federal common law provides the cause of action does not determine, however, whether federal common law should provide a cause of action against corporations that aid and abet violations of the law of nations. This section will examine whether explicitly providing such a cause of action against corporations would be consistent with the three Revisionist common law principles.

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144. See Curtis Bradley & Jack Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 HARV. L. REV. 815, 819 n.19 (“Although international law imposes obligations on nations, it does not purport to specify how the nations must treat international obligations as a matter of domestic law.”); see also Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 778 (D.C. Cir. 1984) (Edwards, J., concurring) (finding that individual countries determine under domestic law how to create or define civil actions to be made available for violations of international law and that contrary readings would be contrary to the wording of the ATS), André Nollkaemper, Internationally Wrongful Acts in Domestic Courts, 101 AM. J. INT’L L. 760, 795 (2007) (“Since international law determines only general principles, leaves much of the detail of the fashioning of relief to the domestic level, and relies on domestic law to supplement it with necessary detail and to adjust it to the domestic context, different states will inevitably come up with different responses.”).

145. “A related consideration [in determining whether to provide a cause of action] is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual.” *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004).

146. See *id.*
1. **Filling in the Gaps of a Federal Statute to Implement Congressional Intent**

Providing a cause of action against corporations is precisely the type of interstitial federal common law, grounded in a federal source (the ATS), that is required to implement the First Congress’s intent that a civil remedy be provided for violations of the law of nations. The First Congress surely could not have predicted the rise of the legal form of corporations and their overall economic significance. It is clear, however, that the First Congress did intend to provide a remedy for such violations as one method of punishing, and remedying, violations of the law of nations. Indeed, federal courts have long held that corporations are subject to liability for the actions of their officers. In *New York Central & Hudson River Railroad Co. v. United States*, the Supreme Court explicitly endorsed this proposition, stating that there was "no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents. . . . If it were not so, many offenses might go unpunished."148

Provision of civil liability against corporations for aiding and abetting violations of the law of nations would ensure that federal law provides an incentive to “those who own the entity to see to it that their agents abide by the law” because common law aiding and abetting liability requires knowledge or awareness of the tortious activity and the provision of substantial assistance to or encouragement of such activity.149 Providing a cause of action against corporations that aid and abet violations of the law of nations would therefore interstitially fill in a gap in order to effectuate the purpose of the ATS: to compensate, punish, and deter violations of customary international law.150

In fact, the creation under the ATS of a federal common law cause of action against corporations would be appropriate even if such a cause of action was not explicitly contemplated by the First Congress. This is because the Congress has always understood that common law evolves in the same

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147. 212 U.S. 481 (1909).
148. Id. at 494–95.
150. Harold Hongju Koh, *Separating Myth from Reality About Corporate Responsibility Litigation*, 7 J. INT’L ECON. L. 263, 265–67 (2004) ("The commonsense fact remains that if states and individuals can be held liable under international law, then so should corporations, for the simple reason that both states and individuals act through corporations. Given that reality, what legal sense would it make to let states and individuals immunize themselves from liability for gross violations through the mere artifice of corporate formation? . . . Thus, like any aider and abetter, corporations can be held liable for the small class of cases that arise out of a claim of violation of obligatory, definable, and universal norms of international law (direct offenses) as well as for their complicity in a public actor’s violation of international law.”). *Cf.* Boim v. Quranic Literacy Inst., 291 F.3d 1000, 1021 (7th Cir. 2002) ("[T]he organizations, businesses and nations that support and encourage terrorist acts are likely to have reachable assets that they wish to protect. The only way to imperil the flow of money and discourage the financing of terrorist acts is to impose liability on those who knowingly and intentionally supply the funds to the persons who commit the violent acts."
way that it understood that customary international law would evolve.\footnote{151} Federal courts have always recognized that federal common law, by its nature, depends upon “conditions as they now exist.”\footnote{152}

The Supreme Court has always understood this principle as it applies to federal common law to provide ancillary rules to tort liability, even when the tort is defined by the law of nations. For example, in federal admiralty law, which is based upon the law of nations,\footnote{153} the Supreme Court has changed the common law rules for damages to meet modern circumstances.\footnote{154} The Revisionists believe that federal courts have greater common law powers in the area of admiralty law because the jurisdictional basis for admiralty is explicitly provided in the Constitution.\footnote{155} This assertion is inapposite to the purposes of this paper because \textit{Sosa} has interpreted the ATS, which the Framers adopted in conjunction with the Define and Punish Clause of the Constitution,\footnote{156} not only as providing jurisdiction for these claims but also as authorizing federal courts to provide a common law cause of action for these claims. There is no reason why federal common law should operate differently in providing ancillary rules in the context of admiralty law, a branch of the law of nations, as opposed to other violations of the law of nations, such as human rights law. Nor should federal common law operate differently simply because the First Congress provided statutory authorization for the exercise of jurisdiction over common law claims involving violations of the law of nations. In fact, providing a cause of action against corporations would effectuate the purpose of the ATS: to ensure that remedies are provided for violations of the law of nations as the law and circumstances where it is violated continue to evolve.

2. \textit{Consistent with Federal Policy in the Area}

The Revisionists argue that foreign affairs and policy considerations—that federal courts might interfere with the political branches—advise against the provision of a cause of actions against corporations,\footnote{157} but these foreign affairs considerations are sufficiently addressed by current doctrines such as the act of state and political question doctrines. Even if the Revisionists’ foreign affairs concerns are applicable as general constitutional limita-
tions on the cases that federal courts can hear, the Sosa Court suggested a case-by-case approach to develop a policy of “case-specific deference.” Sosa never so much as implied the wholesale denial of a cause of action. The Court seemed to imply that the political branches, and specifically the Executive Branch through the State Department, already have a sufficient opportunity to express their views of the need for deference in specific instances of litigation under the ATS.

There is nothing in extant policy that indicates that corporations should not be held liable for violations of the law of nations. In fact, the FSIA explicitly rejects this possibility by ensuring that even corporations that are partially or entirely owned by a foreign state are not immune from liability in some situations involving violations of international law. Aside from the vague foreign affairs policy implications that are cited by the Revisionists, there is no serious argument that current policy, as expressed by the political branches, disfavors providing a cause of action against corporations. Because an interstitial creation of a cause of action against corporations for violations of the law of nations would effectuate congressional intent and be consistent with current federal policy, federal common law can and should recognize a cause of action against corporations in ATS litigation.

V. CONCLUSION

Courts have yet to determine whether international law or federal common law should provide the appropriate theory of aiding and abetting liability. Given the Supreme Court’s lack of a quorum in Khulumani, it appears that federal courts will not receive any guidance from the Supreme Court on this issue any time soon. Nonetheless, aiding and abetting liability under federal common law can properly be extended to litigation under the ATS. The extension of aiding and abetting liability would use federal common law to provide ancillary rules that effectuate the intent of the draftsmen of the ATS. Additionally, such an extension would be consistent with demonstrated choices of the political branches and federal policy in the area of international law. As a threshold matter, there is no barrier to the use of federal common law to supply a theory of aiding and abetting liability in ATS litigation.

Although federal common law aiding and abetting liability should be available in ATS litigation, plaintiffs will continue to face an uphill battle in

159. The Sosa Court cited Republic of Austria v. Altmann, 541 U.S. 677 (2004), in a manner that seemed to suggest that the State Department should express its interest in ATS cases to represent the views of the political branches in a manner similar to that provided in the FSIA. See Sosa, 542 U.S. at 733 n.21; see also Margarita S. Clarens, Note, Deference, Human Rights, and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation, 17 DUKE J. COMP. & INT’L L. 415, 424 (2007).
proving the elements of such a theory of liability. Surviving a summary judgment motion would require not only that plaintiffs demonstrate not only that corporations had knowledge or awareness of the violation, but also that they “substantially assisted or encouraged” the violation of the law of nations. In fact, given the Supreme Court’s recent decision in Bell Atlantic v. Twombly, it might even be difficult for plaintiffs to survive the pleading stage in ATS cases.

Nevertheless, there are at least some situations where plaintiffs can succeed in their litigation. For example, Doe I v. Unocal was settled after several years of litigation and discovery revealed that top Unocal managers were directing the Myanmar military in connection with a pipeline project despite knowing that forced labor occurred. The First Congress probably did not anticipate litigation over these exact types of violations occurring hundreds of years after the passage of the ATS. But they did anticipate the evolution of international law, and their decision to leave ancillary issues to the federal common law surely was a result of their desire to ensure that violations of the law of nations are compensated, punished, and deterred. Federal common law aiding and abetting liability would give meaningful effect to this intent, while ensuring that federal courts retain the power to further develop the common law as need be. Moreover, where the political branches disagree with the way that federal common law has provided the ancillary rules in ATS litigation, the political branches always remain free to legislate and occupy the field, replacing the offending common law rule.

For this reason, some judges have argued that federal courts hearing ATS cases should always use federal common law, not only to provide the ancillary rules for aiding and abetting liability, but also to provide the rules for all other ancillary issues that arise from ATS litigation. While there are certainly limits on the creation and operation of federal common law, the Revisionists improperly apply federal common law principles to arrive at the erroneous conclusion that federal common law cannot operate to provide

161. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) (creating a plausibility standard for pleading in some antitrust cases); id. at 1988 (Stevens, J., dissenting) (“Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer.”).
163. See Doe I v. Unocal Corp., 395 F.3d 952 (9th Cir. 2002), vacated and reh'g granted, 395 F.3d 978 (9th Cir. 2003), and dismissed, 405 F.3d 708 (9th Cir. 2005) (en banc); Lisa Girion, Unocal to Settle Rights Claims, L.A. TIMES, Dec. 14, 2004, at A1.
corporate aiding and abetting liability in ATS litigation. The principles of federal common law support the creation and operation of corporate aiding and abetting liability. Given that the Modern and Revisionist camps agree that domestic law provides the method of enforcing international law, federal common law can and should provide the rules for ancillary issues involved in the enforcement of international law through the ATS.

The well-established limits on federal common law will provide democratic accountability and a functional balance between the political branches and the judiciary. In the context of the ATS, these limits not only provide a balance between the coordinate branches of the government in foreign affairs, but they do so while ensuring that the common law remains an important method of effectuating the intent of the First Congress. Unless and until the Supreme Court instructs otherwise, federal courts would do well to ensure that federal common law retains this important role in ATS litigation.