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THE ALIEN TORT STATUTE: INTERNATIONAL HUMAN RIGHTS WATCHDOG OR SIMPLY “HISTORICAL TRIVIA”? 

The Alien Tort Statute (the “Statute”) is an ancient yet uncelebrated law. Enacted as part of the Judiciary Act of 1789, the Statute confers original jurisdiction on federal district courts when an injured alien plaintiff brings suit against a defendant for committing a tort in violation of the Law of Nations. Until recently, the Statute rested unnoticed amidst the more widely used jurisdictional sections of the United States Code. The Statute is especially relevant, however, within the context of modern international events. With the advent of an unrelieved string of international upheavals and acts of terrorism, the Statute could unfold as a cogent legal mechanism for enforcing universal human rights norms.

This Comment examines the Statute’s intrinsic correlation to separation of powers principles. Specifically, it asserts that the judicial branch’s proper constitutional role in foreign affairs mandates adjudication of suits properly brought under the Statute. Part I provides a historical overview that depicts the framers’ intentions and


2. Judiciary Act of 1789, ch. 20, § 9(b), 1 Stat. 73, 76-77. The Alien Tort Statute was included in section 9 of the Judiciary Act, which encompassed the jurisdiction of the federal district courts.

3. The Statute provided: “And be it further enacted, that the district courts (c) shall 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,” Id. For a discussion of the Law of Nations, see infra note 19 and accompanying text.

4. The Statute was obscure until the Filartiga decision in 1980. See infra notes 34-51 and accompanying text for a discussion of Filartiga and its potential impact on international human rights.
the contemporary philosophy prevalent at the time of the Statute's enactment, both of which advocate federal judicial involvement in foreign affairs. Part II presents a detailed analysis of the recent cases that have foreshadowed the Statute's potentially revolutionary impact upon the international human rights arena. The underlying logic and policy considerations of these decisions demonstrate that the Statute's viable function for redressing violations of human rights conforms with the framers' intentions and with constitutional precepts. Part III examines the judiciary's traditional role in international affairs and the underlying rationale of the act of state and political question abstinence doctrines. Part IV analyzes the Statute within the context of these separation of powers tenets and maintains that these prudential doctrines do not preclude judicial involvement in suits for human rights violations brought under the Statute.

I. A Historical Overview: The Framers' Perceptions of the Judiciary's Role in Foreign Affairs and the Alien Tort Statute's Early Development

The first United States Congress enacted the Statute on September 24, 1789, as part of the Federal Judiciary Act. Remaining virtually unchanged for almost two hundred years, the Statute provides that the federal "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Unfortunately, the legislative history surrounding the Statute's enactment is extremely sketchy. Legal scholars, however, have uncovered the values and philosophies that inspired the framers. This section explores this ideological climate and demonstrates that the Statute's


6. The Statute is codified at 28 U.S.C. § 1350 (1982). See supra note 3 for text of original statute. Note that although the language has been slightly amended, the substantive meaning remains the same.

7. See Warren, supra note 5, at 49. Unfortunately, the activities were unrecorded, and it is unlikely that a thorough account will ever surface. Warren underscores the secrecy of the proceedings, quoting a letter that George Washington wrote to David Stuart on July 26, 1789, which highlights the clandestine nature of the activities: "Why they [the Senate] keep their doors shut when acting in a legislative capacity, I am unable to inform you, unless it is because they think there is too much speaking to the gallery in the other House, and business is thereby retarded." Id. n.2 (quoting 10 WRITINGS OF WASHINGTON, Spark's ed.).

8. See id. at 52-54. Although later generations viewed the Judiciary Act as an accomplished work of art, contemporary criticism focused on a perceived broad base of judicial power. See generally Dickenson, The Law of Nations as Part of the National Law of the United States, 101 U. PA. L. REV. 26 (1952) (extensive scholarly discussion of the 18th-century political and philosophical climate).
modern role in redressing international human rights violations conforms with the framers' intentions.

During the eighteenth century, the Law of Nations, which forms the basis of the Statute, was viewed as a "universal law binding upon all mankind." Distinctions between public and private law did not exist. The responsibilities arising under the Law of Nations were ancient and time-honored axioms that bound all civilized people. As a result, the framers of our legal system perceived this age-old Law of Nations as part of the common law.

The framers who participated in the Constitutional Convention wanted the federal courts—not the state courts—to address international law issues. The framers recognized that the world community would hold the national government accountable for the actions of American citizens. Because external affairs issues could lead to

9. Dickenson, supra note 8, at 27.
10. Id. Professor Dickenson states that "[i]n countries of the common law, at least, arbitrary distinctions between private and public right or duty were still far in the future. The universal law was law for individuals no less than for states." Id.; see also Note, A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789, 14 U.S.F.L. Rev. 105, 112 (1979). During the 19th century, international law became divided between public and private law. Id. at 112. Public international law encompassed relationships between sovereigns. Id. Private international law dealt with individuals "in particular situations." Id. The scope of private international law, however, remains extremely vague. Id.

There is no room to question the reality and certainty of such a law of nations obligatory to its own nature, and to which nations, or the sovereigns that rule them, ought to submit. For if God, by means of right reason, imposes certain duties between individuals, it is evident he is likewise willing that nations, which are only human societies, should observe the same duties between themselves.

Id. (quoting 1 BURLAMAQUI, NATURAL & POLITICAL LAW 164 (1791)).

See also Dickenson, supra note 8, at 30. Dickenson quotes Blackstone as a means of explaining the Law of Nations: "[The Law of Nations was] not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." Id. (quoting BLACKSTONE, 4 BL. COMM. 67 (1769)).

12. Dickenson, supra note 8, at 34-35. Dickenson states that there was little question among men of learning in the 18th century that the Law of Nations was incorporated into the domestic common law. Additionally, he states that "[i]t was axiomatic among them that the Law of Nations, applicable to individuals and to states, was an integral part of the law which they administered or practiced." Id. at 35; see also The Nereide, 13 U.S. (9 Cranch) 388, 422 (1815). In The Nereide, Chief Justice Marshall stated that in the absence of a congressional enactment, domestic courts are "bound by the law of nations, which is a part of the law of the land." Id. See generally Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853, 868 (1987)("International law was domestic law.").

13. Dickenson, supra note 8, at 38.
14. See id. at 44. The United States Supreme Court has also reaffirmed this premise in recent years. See, e.g., Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398 (1964). In Sabbatino, while addressing the act of state doctrine, the Court stated:
war, they believed that "[s]o great a proportion of the controversies in which foreigners are parties, involve national questions, that it is by far most safe and most expedient to refer all those in which they are concerned to the national tribunals." Thus, the framers fully intended to grant the federal judiciary the power necessary to resolve disputes in areas of law involving aliens. The framers also considered it the judiciary's duty, as in any other legal matter, to resolve issues arising under international law because they viewed the Law of Nations as an integral component of the evolving common law and viewed the judiciary's role as an expanding one in the international arena.

The courts that have reviewed the Statute during the past two hundred years have analyzed it within the frameworks of their contemporary cultures, and have consistently struggled to define the body of law that comprises the Law of Nations. Generally, the

Whatever considerations are thought to predominate, it is plain that the problems involved are uniquely federal in nature. If federal authority, in this instance this Court, orders the field of judicial competence in this area for the federal courts, and the state courts are left free to formulate their own rules, the purposes behind the doctrine could be as effectively undermined as if there had been no federal pronouncement on the subject.

Id. at 424.

15. Dickenson, supra note 8, at 45 (quoting Hamilton, The Federalist 112 (2 Bourne ed. 1901)).

16. Id. at 34. Professor Dickenson states that "[w]ith the achievement of independence, there was little doubt among men of legal learning . . . that it was the responsibility of courts to apply [the Law of Nations] like any other law when the appropriate case was presented."

17. Id.

18. The early suits invoking The Alien Tort Statute dealt primarily with piracy and war prize cases. See Moxon v. Brigantine Fanny, 17 F. Cas. 942 (D. Pa. 1793) (denying jurisdiction over a war prize case in war between Britain and France; result probably due to United States' neutrality); Bolchos v. Darrell, 3 F. Cas. 810 (D.S.C. 1795) (exercising jurisdiction, ordering return of seized slave ship to ally France; result probably due to United States' friendly relationship with France).

After these cases, the Statute fell into disuse for over a century. It reappeared in 1907, in an attorney general's opinion regarding a treaty violation dispute between Mexico and an American company. 26 Op. Atty' Gen. 250, 252 (1907). This executive branch opinion advised that federal court involvement was proper. Id. at 251, 253. This encouragement was probably based upon the fact that the United States was experiencing foreign relations problems, and had no wish to offend neighboring Mexico. See Bailey, A Diplomatic History of the American People 486-97; 521-23 (7th ed. 1964).

The Statute surfaced again the next year. See O'Reilly De Camara v. Brooke, 209 U.S. 45 (1908) (exercising jurisdiction, but stating that ratification by the United States government converted a tort into a non-tort; obviously basing decision on executive power).

19. See, e.g., United States v. Smith, 18 U.S. (5 Wheat.) 153 (1820). The Smith Court attempted to define piracy within the Law of Nations. Chief Justice Story, writing for the Court, noted that the Law of Nations was based upon universal consensual expectations. Id. at 162. Justice Story noted, however, that an explicit definition of the Law of Nations was almost impossible because "[o]ffences, too, against the law of nations, cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations." Id. at 159.
courts have defined the Law of Nations as practices which, over a long period of time, have evolved into consensual and universal behavioral expectations among civilized societies. The courts have determined these practices by studying customary usage, the writings of legal scholars, and judicial opinions on an international level. Thus, the Law of Nations has gradually evolved into a universal body of law.

Because issues involving external affairs are potentially explosive and controversial in nature, courts have been sensitive to policy considerations important at the times of the decisions. For example, in The Paquete Habana, a war prize case decided by the United States Supreme Court in 1899, the dissent argued that the Court should not exercise jurisdiction because the issue evoked a policy concern that the judicial branch should not address. While

See also De Sanchez v. Banco Central De Nicaragua, 770 F.2d 1385, 1398 (5th Cir. 1985) ("[o]nly where a state has engaged in conduct against its citizens that outrages basic standards of human rights or that calls into question the territorial sovereignty of the United States is it appropriate for us to interfere"); Sanchez-Espinoza v. Reagan, 770 F.2d 202 (D.C. Cir. 1985) (jurisdiction under Statute denied because case presented a nonjusticiable political question); Benjamins v. British European Airways, 572 F.2d 913 (2d Cir. 1978) (Statute did not provide a basis for jurisdiction over wrongful death and baggage loss claims against an international air carrier), cert. denied, 439 U.S. 1114 (1979); Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir. 1978) (Statute did not confer jurisdiction over complaint of grandmother whose grandchildren had been airlifted from Vietnam); Dreyfus v. Von Finck, 534 F.2d 24 (2d Cir.) (plaintiff's complaint under Statute alleging that property wrongfully confiscated under Nazi regime dismissed), cert. denied, 429 U.S. 835 (1976); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1201 n.13 (9th Cir. 1975) (although airlifting children from Vietnam might be tort within Law of Nations, court could not decide without more briefing); ITT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975) (Statute a "legal Lohengrin"; "Thou shalt not steal" not a tort within definition of Law of Nations); Khedivial Line, S.A.E. v. Seafarers' Int'l Union, 278 F.2d 49 (2d Cir. 1960) (union picketing not a tort in violation of Law of Nations); Guinto v. Marcos, 654 F. Supp. 276, 280 (S.D. Cal. 1986) (violation of first amendment right to free speech not violation of Law of Nations); Von Dardel v. USSR, 623 F. Supp. 246 (D.D.C. 1985) (Soviet Union's seizure and detention of a Swedish diplomat in 1945 violated Law of Nations; political question doctrine did not defeat jurisdiction); Siderman v. Republic of Argentina, No. CV 82-1772-RMT(MCx), slip op. (C.D. Cal. Sept. 28, 1984) (available on LEXis, Genfed library, Dist. file) (Statute does not create an exception to sovereign immunity rule); Lopes v. Schroder, 225 F. Supp. 292 (E.D. Pa. 1963) ("unseaworthiness" not a tortious violation of Law of Nations).

20. See supra note 19 for a list of cases attempting to define the Law of Nations. See also The Paquete Habana, 175 U.S. 677, 686 (1900) ("[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law").

21. See, e.g., Paquete Habana, 175 U.S. at 700 (Law of Nations may be ascertained by consulting the customs and usages of civilized nations as well as works by learned jurists and commentators).

22. See supra note 18 for a discussion of how the outcome of the cases depended upon the contemporary political climate.

23. 175 U.S. 677 (1900). This case is cited in virtually all the cases brought under The Alien Tort Statute. See supra notes 20-21 and accompanying text for further discussion of this case.

24. The Paquete Habana, 175 U.S. at 716. Chief Justice Fuller, in dissent,
most previous cases had denied jurisdiction on the basis of statutory interpretation, maintaining that the causes of action were not violations of the Law of Nations. The Paquete Habana dissent was the first to foreshadow the rise of the political question doctrine within the context of the Statute.

Sixty-two years after The Paquete Habana, a Maryland district court, in Adra v. Clift, exercised jurisdiction in a suit brought under the Statute and reached the merits although the case involved domestic relations, which is traditionally the exclusive province of state courts. While the Adra court noted the political considerations that the case involved, it cautioned that courts should not “decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations.” In effect, Adra manifested the framers' intentions that the judiciary must exercise its constitutionally delegated duty by exercising jurisdiction in appropriate cases. As the Adra court wisely perceived, consistent fulfillment of this obligation would preserve harmony with foreign powers.

Although The Paquete Habana and Adra involved dissimilar legal controversies that arose in different eras, the underlying themes of foreign relations, political tensions, and the judiciary’s proper function in adjudicating such issues surfaced in both cases. Both cases accentuate the fact that the judiciary cannot view these controversies in a vacuum. The Adra court fulfilled its constitutional obligation by exercising jurisdiction and the decision conforms with the framers' intentions because the court confronted the underlying political concerns and resolved them in a spirit consistent with the Statute's purpose. Conversely, The Paquete Habana dissent fore-shadowed the political question doctrine's capacity for crippling the Statute's humanitarian potential.

stated that the issue was a “question rather of policy than of law . . . . [I]t is proper for the consideration of a department which can modify it at will; not for the consideration of a department which can pursue only the law as it is written. It is proper for . . . . the legislature not . . . . [the] . . . . judiciary.” Id. (Fuller, C.J., dissenting).

25. See supra note 19 for list of cases that attempted to define a tort under the Law of Nations.

26. 195 F. Supp. 857 (D. Md. 1961). In Adra, the Maryland district court granted jurisdiction over a suit brought by an alien over the custody of his daughter, who was living with the plaintiff's ex-wife in the United States. Id. at 865. Because the defendant was transporting the couple’s daughter via an illegal passport, which violated international law, the court exercised jurisdiction over the case and reached the merits even though the case involved domestic relations. Id.

27. Id.

28. Id.

29. Id.

30. Id. The Adra court noted that the plaintiff was a citizen of Iraq, a country with which the United States had good relations. Id. Additionally, the court stated: “An alien, understandably . . . . may prefer to bring an action for a tort in a federal court rather than in a local court, and Congress has authorized him to do so in this limited class of cases.” Id.
The framers clearly intended to keep controversies involving foreigners within the federal judicial system. Additionally, the framers believed that the judiciary had a fundamental obligation to adjudicate these controversies because the Law of Nations was subsumed within the common law. The Statute is a tangible and enduring reflection of that determination to keep potentially explosive issues within the federal judiciary's domain. The political question doctrine, however, is an abstention device that should not be allowed to nullify the Statute's modern day capacity for human rights reform.

II. The Alien Tort Statute in the 1980's: A Revitalization of the Statute as an Avenue for Remedying Universally Abhorred Human Rights Violations

The early twentieth-century cases involving the Statute generally served to narrow its applicable scope. In 1980, however, in Filartiga v. Pena-Irala, the Court of Appeals for the Second Circuit revitalized the Statute as an avenue for remedying human rights violations. The Filartiga court exercised jurisdiction in a case where the alien plaintiffs alleged that the defendant had tortured and murdered their relative.

The plaintiffs, the Filartiga family, were citizens of the Republic of Paraguay and had applied for permanent political asylum in the United States. They brought an action under the Statute against the defendant, Pena, a Paraguayan state official, who was present in the United States on a visitor's visa. Dr. Filartiga alleged that his seventeen-year-old son had been tortured by Pena and that this torture later resulted in the boy's death. The plaintiffs asserted that this tortious action was in retaliation for Dr. Filartiga's political activities. Further, the Filartigas contended that Pena's alleged ac-

31. See supra note 12 and accompanying text for a discussion of the framers' intentions.
32. See supra note 16 and accompanying text for a discussion of the framers' views of the relationship between international law and domestic law. See also The Paquete Habana, 175 U.S. 677, 700 (1900) ("[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction").
33. See supra note 18 for a list of cases brought under the Statute in the early 1900's.
34. 630 F.2d 876 (2d Cir. 1980).
35. Id. at 890.
36. Id. at 878.
37. Id. The Filartigas had also filed a criminal action in their native Paraguay. Id. After this suit was filed, their attorney was taken to police headquarters, shackled, and threatened with death. Id. The attorney was later disbarred for no legitimate reason. Id. This suit was still pending after four years. Id.
38. Id.
39. Id. Dr. Filartiga was a longstanding political opponent of President Stroess-
tion violated the Law of Nations.\textsuperscript{40} The district court dismissed the plaintiffs’ complaint for want of federal jurisdiction.\textsuperscript{41}

The Court of Appeals for the Second Circuit reversed, holding that state-sanctioned torture violates the Law of Nations.\textsuperscript{42} The \textit{Filartiga} court concluded that “whenever an alleged torturer is found and served with process by an alien within our borders, [the Statute] provides federal jurisdiction.”\textsuperscript{43} In reaching this holding, the court cited earlier cases\textsuperscript{44} brought under the Statute as a means of determining what acts violate the Law of Nations.\textsuperscript{45} The court stated that the Law of Nations is not stagnant.\textsuperscript{46} Rather, because it evolves over a period of time,\textsuperscript{47} courts should analyze international norms of acceptable behavior under contemporary standards, not under standards that existed in 1789.\textsuperscript{48} Noting that modern international agreements uniformly condemned state-supported torture “in principle if not in practice,” the \textit{Filartiga} court concluded that such

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torture violated universal human rights norms and thus violated the Law of Nations.\textsuperscript{49}

The \textit{Filartiga} court severely narrowed the scope of this conclusion, however, stating that "[t]he requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."\textsuperscript{50} Thus, the \textit{Filartiga} decision was essentially conservative, reflecting concern about overreaching, and possibly judgmental, judicial activity in externally related affairs.\textsuperscript{51} This approach provides the Statute with a modern basis of application, and is faithful to the framers' perceptions of the judiciary's role in foreign affairs.

The next significant case brought under the Statute was \textit{Tel-Oren v. Libyan Arab Republic}.\textsuperscript{52} In \textit{Tel-Oren}, the plaintiffs were survivors and representatives of persons murdered in an armed attack on a civilian bus in Israel. They brought suit against the Palestine Liberation Organization ("PLO"),\textsuperscript{53} maintaining that the PLO's tortious actions violated the Law of Nations.\textsuperscript{54} The Court of Appeals for the District of Columbia Circuit unanimously agreed that the Statute did not confer jurisdiction over the plaintiffs' cause of action.\textsuperscript{55} In a \textit{per curiam} decision, the three court of appeals judges, Judges Edwards,\textsuperscript{56} Bork,\textsuperscript{57} and Robb,\textsuperscript{58} wrote separate concurring opinions each articulating his disparate reasoning for denying jurisdiction under the Statute.

Judge Edwards basically adhered to the \textit{Filartiga} formulation. Noting \textit{Filartiga}'s extremely narrow scope, he observed that actions which would violate the Law of Nations and thus trigger jurisdiction

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\item \textsuperscript{49} \textit{Id.} at 878. The court stated: Construing this rarely-invoked provision, we hold that deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction. \textit{Id.}
\item \textsuperscript{50} \textit{Id.} at 881.
\item \textsuperscript{51} The \textit{Filartiga} court was extremely careful to limit its decision to universally accepted norms, stating that "[i]t is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation within the meaning of the statute." \textit{Id.} at 888.
\item \textsuperscript{52} 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).
\item \textsuperscript{53} \textit{Id.} at 775 (Edwards, J., concurring).
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.} at 775-98 (Edwards, J., concurring).
\item \textsuperscript{57} \textit{Id.} at 798-823 (Bork, J., concurring).
\item \textsuperscript{58} \textit{Id.} at 823-27 (Robb, J., concurring).
\end{itemize}
under the Statute were limited to "a handful of heinous actions—each of which violates definable, universal and obligatory norms." Judge Edwards took his two colleagues to task, criticizing their reasoning on the issue of judicial abstention, and arguing that the judiciary must exercise jurisdiction when a proper cause of action satisfies the Statute's threshold requirements.

Maintaining that the Statute was an express grant of congressional authority, Judge Edwards asserted that his colleagues' efforts to construe the Statute out of existence would have the dual effect of insulting Congress, while simultaneously placing judicial power above that of the legislative branch. Judge Edwards concluded that separation of powers concerns should not deter the judiciary from exercising jurisdiction under the Statute when a proper controversy arises.

Although Judge Bork also denied jurisdiction over the Tel-Oren plaintiffs' cause of action, his logic for arriving at this result differed dramatically from Judge Edward's rationale. Initially, Judge Bork stated that separation of powers principles guided his decision, contending that the act of state and political question doctrines barred the judiciary from becoming involved in foreign affairs. In essence, Judge Bork thought that the Statute was obsolete. If applied at all, Judge Bork believed that the Statute should be strictly construed within the limited causes of action justiciable in 1789. Disagreeing with the substance of the Filartiga de-

59. Id. at 781 (Edwards, J., concurring).
60. Id. at 789. Judge Edwards stated: "It simply is not the role of a judge to construe a statutory clause out of existence merely on the belief that Congress was ill-advised in passing the statute . . . . [O]nly Congress is authorized to decide that those actions 'exacerbate tensions' and should not be heard." Id.
61. Id.
62. Id. at 790.
63. Id. at 797. Judge Edwards, however, agreed with his colleagues that this was not the proper case in which to exercise jurisdiction because the PLO was not acting under the official color of state authority. Id. at 791.
64. Id. at 799 (Bork, J., concurring).
65. Id. Judge Bork stated: "I am guided chiefly by separation of powers principles, which caution courts to avoid potential interference with the political branches' conduct of foreign relations."
66. Id. at 802-05. Judge Bork used both the act of state and political question doctrines to support his abstention viewpoint. Id. at 803. He stated that the act of state doctrine precluded judicial involvement in the affairs of sovereign states. Id. His view encompassed even human rights abuses. Judge Bork was wary of employing the political question doctrine, however, because "the contours of the doctrine are murky and unsettled as shown by the lack of consensus about its meaning among members of the Supreme Court." Id. n.8.
67. Id. at 815 ("statute whose original meaning is hidden from us and yet which, if its words are read incautiously with modern assumptions in mind, is capable of plunging our nation into foreign conflicts, ought to be approached by the judiciary with great circumspection").
68. Judge Bork limited these causes of actions to three torts that he gleaned
cision, Judge Bork contended that it ignored the express constitutional allotments of power among the three branches. Finally, Judge Bork contended that exercising jurisdiction in Filartiga-type causes of action contravened the framers’ intentions because judicial involvement in this area would have created international tensions that “a young weak nation” was attempting to avoid.

In the third Tel-Oren opinion, Judge Robb based his concurrence on separation of powers principles as manifested in the political question doctrine. Judge Robb asserted that if the judiciary became involved in foreign affairs issues, it would seriously impair the national need for a single voice in international affairs and could prove embarrassing to the other branches. Essentially, Judge Robb’s approach was pragmatic, expressing concern about the judiciary’s fact-finding capabilities in these type of cases, problems with enforcement, and with bringing the defendants into court. Finally, Judge Robb echoed Judge Bork’s characterization of the Statute as a fossil with no contemporary application. Rejecting the Filartiga formulation, Judge Robb implied that the Statute should simply fade into oblivion.

Although the trailblazing Filartiga decision signaled a new frontier for judicial review of international human rights violations, Tel-Oren placed the Statute’s function as a watchdog of international human rights in jeopardy. While this judicial battle wages over the scope and function of the Statute, a deluge of universally renounced human rights violations further aggravates the world community.

from Blackstone’s writings: the violation of safe conducts; the infringement on the rights of ambassadors and; piracy. Id. at 813.

69. Id. at 822.
70. Id. at 821. Judge Bork stated that
[f]or a young, weak nation, one anxious to avoid foreign entanglements and embroilment in Europe’s disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breathtaking folly—so breathtaking as to render incredible any reading of the statute that produces such results.

71. Id. at 823 (Robb, J., concurring).
72. Id. at 824. Moreover, Judge Robb asserted that because terrorist acts were so reprehensible, courts should not “dignify” them by taking judicial notice. Id. at 823.
73. Id. at 826.
74. Id. at 823.
75. Id. at 827. Additionally, Judge Robb expressed concern, contending that exercising jurisdiction under the Statute would cause counter-revolutionaries from all over the world to bring suit, thus creating a floodgate of litigation. Id.
76. Id. Judge Robb stated: “We ought not cobble together for it a modern mission on the vague idea that international law develops over the years. Law may evolve, but statutes ought not to mutate.” Id.
77. Id.
78. See, e.g., N.Y. Times, August 2, 1986, § 1, at 14, col. 1 (editorial discussing
Because this international situation exists, it is imperative that the Statute's capacity for remedying human rights violations be explicitly defined.  

III.  THE JUDICIARY'S TRADITIONAL ROLE IN FOREIGN AFFAIRS: THE ACT OF STATE AND POLITICAL QUESTION DOCTRINES

The act of state and political question doctrines constrict judicial involvement in controversial issues. This section of the Comment provides an overview of these doctrines and establishes a framework for a later analysis of these doctrines within the context of The Alien Tort Statute.

Act of State Doctrine

The judicially created act of state doctrine arises from the premise that domestic courts should not review the acts of foreign states. This prudential doctrine stems from the judiciary's desire to avoid infringing upon functions that are constitutionally delegated to the executive branch. Thus, the act of state doctrine is rooted in

human rights abuses in Chile); Zimmermann, Making Moscow Pay the Price for Rights Abuses, N.Y. Times, August 1, 1986, § 1, at 23, col. 1 (“[t]he Soviet human rights record since Helsinki has been abysmal”); Lewis, Don't We Care? N.Y. Times, July 31, 1986, § 1, at 23, col. 1 (comparing Soviet tactics in Afghanistan with the United States' policy in Nicaragua and Angola); Lewis, Self-Evident Truths: South Africa's Blacks Don't Have a Legal Framework, N.Y. Times, July 28, 1986, § 1, at 15, col. 5 (“Blacks in South Africa have . . . no constitution, no political rights”); Cowell, Detainees in South Africa are now Estimated at 8,000, N.Y. Times, July 25, 1986, § 1, at 2, col. 1 (“the authorities do not identify detainees . . . [and] have not published statistics showing how many people have been seized”); Lewis, Judges and Freedom: Courts Can Make a Difference, N.Y. Times, July 21, 1986, § 1, at 17, col. 5 (“[South African] courts have found chinks in the totalitarian structure of the emergency regulations. That is the remarkable message from South Africa, one that should echo through the American debates about the role of judges.”); Kennedy, Will Mr. Reagan Denounce Pretoria?, N.Y. Times, July 21, 1986, § 1, at 17, col. 1 (Senator Kennedy discussing the apartheid system in South Africa, and the role the United States should play).

79. Although Judge Edwards made an express plea for Supreme Court review of this area of law, the Court denied certioria. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 775 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985). Because this calamitous international crisis exists, it is imperative that the Supreme Court explicitly define The Alien Tort Statute's capacity for remedying human rights violations.

80. See Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 409-11 (1964), for a discussion of the history and scope of the act of state doctrine. Although the Constitution does not expressly mandate the act of state doctrine, it is premised on separation of powers concerns. Id. at 423.

81. For a further discussion of the act of state doctrine, see generally J. CAREY, INTERNATIONAL PROTECTION OF HUMAN RIGHTS: BACKGROUND PAPER AND PROCEEDINGS OF THE TWELFTH HAMMARSJOLD FORUM (1968) (discussing, inter alia, individual human rights within the scope of international law); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 217-24 (1972) (discussing the act of state doctrine and separation of powers); C. SCHREUER, DECISIONS OF INTERNATIONAL INSTITUTIONS BEFORE DOMESTIC COURTS (1981) (scholarly comparative study of domestic courts in the interna-
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separation of powers principles.

The United States Supreme Court articulated the concept of
state doctrine in the 1964 decision of Banco Nacional de Cuba v.
Sabbatino. In Sabbatino, the Court held that United States courts
cannot scrutinize the validity of a taking of property by a recognized
sovereign within its own territory, even when the taking violates in-
ternational law. Although the Court noted that the act of state
decision is a judicially created rule “compelled by neither interna-

See also International Ass'n of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982). In OPEC, which was decided shortly after Filartiga, the court employed the act of state doctrine as a means of avoiding juris-
diction. Id. at 1358-61. The plaintiffs, members of a nonprofit labor organization,
which consumed gasoline and other petroleum-derived products, brought suit against
OPEC, an organization of petroleum-producing countries. Id. at 1355. The plaintiffs
contended that OPEC’s price-setting activities violated United States’ antitrust law.

The Court of Appeals for the Ninth Circuit affirmed the district court’s holding
that under the act of state doctrine, exercise of federal court jurisdiction was inappro-
priate. Id. The OPEC court stated that the act of state doctrine recognized the “insti-
tutional limitations” of the courts. Id. The court maintained that a prime distinction
between the political branches and the judiciary is that the political branches can
take an expansive view, while the judiciary is limited to “focus[ing] on single disputes
and mak[ing] decisions on the basis of legal principles.” Id. at 1358. Additionally, the
court noted that the judiciary’s timing is randomly controlled by the court calendar.
Id. In effect, the OPEC court asserted that the political branches view issues pa-
noramically while the judiciary’s frame of vision is tunneled. Thus, the court refused
to exercise jurisdiction on the basis that judicial involvement could detrimentally af-
fect the United States’ relations with the OPEC nations. Id. at 1361.

OPEC points out the inherent open-ended nature of the act of state doctrine and
the Sabbatino decision. Although the OPEC court stated that it was denying jurisdic-
tion based on the act of state doctrine, the opinion reads like the political question
decision. The Ninth Circuit recently reaffirmed its position in Republic of Philippines
v. Marcos, 818 F.2d 1473 (9th Cir. 1987). In Marcos, the court utilized the act of state
decision and did not adjudicate a suit brought by the Republic of the Philippines
against deposed Ferdinand Marcos. The plaintiff sought recovery, contending that
Marcos had stolen property and money from the Republic. Id. at 1475. The Marcos
court refused jurisdiction and cited OPEC as support for the proposition that a fed-
eral court should not adjudicate issues that evoke political concerns. Id. at 1488. In
reaching this holding, the court noted that the act of state doctrine and the political
question doctrine are intertwined, stating that “[q]uestions that appear to implicate
one doctrine are sometimes best resolved by reference to the other.” Id. See infra
notes 93-111 and accompanying text for a discussion of the political question
decision.

82. 376 U.S. 398 (1964).
83. Id. at 428.
tional law nor the Constitution,"84 it expressly stated that the doctrine arises from separation of powers concerns.85

The Sabbatino Court did not articulate a severely formalistic rule. Instead, the Court advocated a fluid approach. The Court stated that the factors a court should balance when deciding whether to invoke the act of state doctrine included the amount of international consensus on a particular issue, the domestic unity over the particular issue, and the probability that judicial involvement would detrimentally affect current foreign policy.86 In effect, the Sabbatino Court articulated a commonsense approach. Ultimately, Sabbatino stands for the proposition that United States courts should not judge the actions of foreign sovereigns.

Justice Harlan, the author of the Sabbatino opinion, based his rationale upon the writings of Professor Richard Falk.87 Professor Falk maintains that the act of state doctrine is a beneficial mechanism because it prevents judicial involvement in areas of "legitimate diversity" such as dissimilar forms of government or economic systems.88 Judicial activism in such matters would promote judgmental attitudes that would sabotage universal social order.89 In areas that involve "illegitimate diversity" such as human rights violations, however, the courts should not abstain.90

84. Id. at 427-28.
85. Id. The Sabbatino Court described the act of state doctrine as "a principle of decision binding on federal and state courts alike but compelled by neither international law nor the Constitution, its continuing vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing on foreign affairs." Id.
86. Id.
89. Id. at 72.
90. Id. Professor Falk has stated his philosophy: Briefly, the position is this: in general, municipal courts should avoid interference in the domestic affairs of other states when the subject matter of disputes illustrates a legitimate diversity of values on the part of two national societies. In contrast, if the diversity can be said to be illegitimate, as when it exhibits an abuse of universal human rights, then domestic courts fulfill their role by refusing to further the policy of the foreign legal system. In instances of illegitimate diversity, where a genuine universal sentiment exists, then the domestic courts properly act as agents of international order only if they give maximum effect to such universality.

Id.
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The *Sabbatino* and *Filartiga* decisions illustrate Professor Falk's thesis. The *Sabbatino* Court expressly noted that the act of state doctrine precluded judicial involvement because the issue of the limitations on a sovereign's power to expropriate the property of aliens evoked many diverse opinions, and was thus an area of legitimate diversity.\(^1\) In direct contrast, as the *Filartiga* court noted, the world community is generally unified in its stance against state-sanctioned torture.\(^2\) Because this universal abhorrence of torture exists, such torture constitutes illegitimate diversity. Thus, the act of state doctrine, as articulated in *Sabbatino*, does not bar the federal judiciary from adjudicating human rights violations arising under the Statute. Because human rights violations are universally condemned and do not involve legitimate governmental methods, a federal court can, and should, address these issues.

**The Political Question Doctrine**

The political question doctrine, like the act of state doctrine, is an abstention device that enables the judiciary to avoid adjudicating cases involving controversial issues.\(^3\) When faced with such issues, a

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92. *Filartiga* v. Pena-Irala, 630 F.2d 876, 883 (1980). The *Filartiga* court examined the *Sabbatino* opinion and noted that torture was not an area where legitimate diversity existed. *Id.* at 881. In support of this contention, the *Filartiga* court cited The United Nations Charter, various cases, and the writings of commentators. *Id.* at 881-83.
93. For a general background of the political question doctrine, see L. Tribe, *American Constitutional Law* 71-79 (1978). Professor Tribe notes that the "(p)olitical question doctrine is in a state of some confusion." *Id.* at 71. Further, he asserts that Baker v. Carr, 369 U.S. 196 (1962), reflects this confusion, although Justice Brennan, the author of the opinion had attempted to provide a "definitive" statement of the doctrine. *Tribe, supra,* at 71 n.1. Professor Tribe states:

Even this "definitive statement contains strands of at least three different theories of the role of the Court with regard to the other branches of the government. A classical view would take the Court's role as announced in *Marbury v. Madison*, quite rigidly, and would impose on the Court the requirement of deciding all cases and issues before it unless the Court finds, purely as a matter of constitutional interpretation, that the Constitution itself has committed the determination of the issue to the autonomous decision of another agency of government. A prudential view of the Court's role would treat the political question doctrine as a means to avoid passing on the merits of a question when reaching the merits would force the Court to compromise an important principle or would undermine the Court's authority. Unlike the classical or prudential view, a functional approach to the role of the Court would have it consider such factors as the difficulties in gaining judicial access to relevant information, the need for uniformity of decision, and the wider responsibilities of the other branches of government, when determining whether or not to decide a certain issue or case.

*Id.* (citations omitted).

See also W. Douglas, *The Court Years* 133-53 (1980). In his memoirs, United States Supreme Court Justice William O. Douglas discussed the origins of the political question doctrine and the divisive impact it had upon the Court. *Id.* Justice Douglas noted that Dean James Bradley Thayer of Harvard Law School greatly influenced
court can simply declare the controversy nonjusticiable. The doctrine is based on separation of powers principles and prudential concerns.\textsuperscript{94} Theoretically, the doctrine ensures that the judiciary will

jurists such as Holmes and Frankfurter on this subject. \textit{Id.} at 134. This school of thought believed that if courts remedied individual wrongs, citizens would fail to seek relief from the political branches. \textit{Id.} As a result, the democratic form of government would suffer because citizens would participate less in the political process. \textit{Id.} By conferring an exclusive remedial power to the political branches, it would force citizens to be more active. \textit{Id.} Thus, democracy would be preserved.

Justice Douglas asserted that this philosophy, which Justices Holmes and Frankfurter advocated, was the root of great societal injustices. \textit{Id.} Because the doctrine promoted judicial inaction, the doctrine avoided contemporary realities. Specifically, the Court's abstinence policy prevented two generations of black Americans from exercising their constitutional right to vote. This injustice occurred because the Holmes' philosophy mandated that a remedy for this evil was contained in political, not judicial, procedures. \textit{Id.} Justice Douglas contended that the Court's abstention in this area greatly aggravated atmospheric tensions that finally erupted into racial violence during the 1960's. \textit{Id.} Additionally, Justice Douglas believed that if the Court had acted sooner, rather than hiding behind a judicially created abstinence theory, progress might have been swifter and certainly less bloody. \textit{Id.} See \textit{infra} note 137 for a discussion of Justices Holmes' and Frankfurter's decisions in voting rights cases.

For a behind-the-scenes view of Justice Frankfurter's position on the desegregation issues arising in the 1950's, see Elman, \textit{The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation}, 100 Harv. L. Rev. 817 (1987). This article, which is actually an interview of Mr. Elman, who served as Justice Frankfurter's law clerk and maintained close ties with the Justice throughout his lifetime, depicts the concerns Frankfurter expressed. Mr. Elman states that Justices Frankfurter and Jackson wanted to postpone adjudicating the segregation issue because they wanted the Court to present an unanimous front. \textit{Id.} at 822-23. Elman explains Justice Frankfurter's delay: "He felt that whatever [the Court] did had to go out to the country with an appearance of unity, so that the Court as an institution would best be able to withstand the attacks that inevitably were going to be made on it." \textit{Id.} at 823.

The traditional political question doctrine also involves the notion that the judiciary should insulate itself from external influences. Justice Holmes, a great advocate of this philosophy, stated:

Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, yet when their task is to interpret and apply the words of a statute, their function is merely academic to begin with—to read English intelligently—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt.

Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1903) (Holmes, J., dissenting).

94. Justice Brennan explained the political question doctrine:

Properly understood, the political question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly]
not usurp functions that are constitutionally delegated to the political branches. Although the rationale underlying the doctrine is valid, its application is often arbitrary, merely providing a convenient mechanism for avoiding difficult issues.

Controversies involving foreign affairs are a fertile source for expansion of the political question doctrine. Because the Statute always involves foreign affairs issues, the political question doctrine has the capability of permanently nullifying the Statute. The correct application of the political question doctrine, however, should not

committed." But the doctrine does not pertain when a court is faced with the antecedent question whether a particular branch has been constitutionally designated as the repository of political decision making power. The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.


95. See supra note 93, at 151. Justice Douglas stated that "[c]ourts do not—and should not—undertake to run the country, but where individual or group rights are created by the Constitution or laws of the United States, a Court is niggardly which does not enforce them, unless their enforcement has been entrusted by the Constitution to one of the other branches of government." Id.


97. Because under the Statute an alien plaintiff always brings the cause of action, the legal issue always involves externally related matters.
preclude the federal judiciary from adjudicating human rights violations properly brought under the Statute.

Historically, the political question doctrine has been cloaked in confusion and courts have consistently misapplied the doctrine as a means of declaring hard cases nonjusticiable. When the Supreme Court attempted to clarify this area in the 1961 decision of Baker v. Carr, it explicitly denied that all foreign affairs issues are nonjusticiable political questions. Justice Brennan, writing for the Court, refused to articulate a formalistic rule. Rather, Justice Brennan's opinion in Baker is similar to Justice Harlan's opinion in Sabbatino because both advocate a case-by-case prudential approach in legal matters involving foreign affairs.

The open-ended decision in Baker offers the lower courts more latitude because it allows them to reach the merits of cases that in-

98. For a rather uniform scholarly attack on the political question doctrine, see generally Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 Yale L.J. 1287 (1982) (examining the role of judicial abstention doctrines within the context of the civil rights movement); Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597 (1976) (contending that there is no need for the doctrine because the Constitution's express delegation of power between the three branches is sufficient); Henkin, Vietnam in the Courts of the United States: "Political Question," 63 Am. J. Int'l L. 284 (1969) (political question doctrine does not blanketly apply to judicial adjudication of all foreign affairs issues); Jessup, Has the Supreme Court Abandoned One of its Function? 40 Am. J. Int'l L. 168 (1946) (domestic courts, as well as international courts, should resolve foreign affairs legal issues); McGowan, Congressmen in Court: The New Plaintiffs, 15 Ga. L. Rev. 241, 244 (1981) ("political question doctrine [is] notoriously difficult to understand and apply [and fails] to account for the underlying separation of powers concerns"); Scharpf, Judicial Review and the Political Question: A Functional Analysis, 75 Yale L.J. 517 (1966) (intensive study of the political question doctrine contending that no need for doctrine because constitutional allotment of power is sufficient).

99. See supra notes 96 and accompanying text for a discussion of cases that have involved the political question doctrine.

100. 369 U.S. 186 (1961).

101. Justice Brennan, writing for the Baker Court, stated: "There are sweeping statements to the effect that all questions touching foreign relations are political questions . . . . Yet it is error to suppose that every case or controversy which touches foreign affairs lies beyond judicial cognizance." Id. at 211.

102. The Baker Court enunciated an open-ended test for determining whether a case presents a nonjusticiable political question:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political question already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question. Id. at 217.

Justice Douglas hailed the Baker decision as "the bugaboo of the political question [being] put to rest." Douglas, supra note 93, at 151.

103. For a discussion of Sabbatino, see supra notes 82-87 and accompanying text.
volve foreign affairs. Conversely, Baker’s flexibility also enables the courts to designate such cases nonjusticiable because they present political questions. Thus, it is not surprising that the contours of the political question doctrine remain blurred. Although Baker attempted to solve the political question doctrine’s inherent problems, the doctrine’s applicability remains unsettled.

Past signals indicated that the doctrine was suffering a dwindling demise. The doctrine has been the consistent focus of “judicial indifference and scathing scholarly attack,” and the Supreme Court has rarely employed the doctrine in the twenty years following Baker v. Carr. The current political climate, however, is moving towards the conservative right, which espouses a rigid separation of powers philosophy. As a result, the political question doctrine’s

104. Because the Baker test is extremely subjective, the courts have expansive leeway in determining whether the presented issue is a political question. Probably all that was needed was the first prong of the test: whether the Constitution has textually committed the matter to a co-ordinate political branch.

105. Conversely, because the Baker test is lenient, the courts can also easily abstain from difficult cases by merely stating that a nonjusticiable political question is presented.

106. For a list of authorities explaining the political question doctrine, see supra note 98.

107. See Scharpf, supra note 98, at 539, for a discussion of the inconsistent judicial application of the doctrine.

108. McGowan, supra note 98, at 256.

109. Id.

110. Id.

111. Although it might seem ironic in view of the executive branch’s quest for increasing power, President Reagan asserts that he is a separation of powers advocate. See generally Morrow, Yankee Doodle Magic: What Makes Reagan So Remarkably Popular a President?, TIME, July 7, 1986, at 12 (discussing Reagan’s pre-Iranian success in achieving his political goals). At the end of his tenure, his administration will have appointed a substantial portion of the federal judiciary. Although the Reagan administration vehemently denies that these appointments are ideologically based, it is appointing conservative judges to life-term positions. It is highly probable that this new judiciary will defer to the political branches whenever possible. This controversy peaked in the summer of 1987 when President Reagan nominated Judge Robert Bork to the United States Supreme Court vacancy created by Justice Lewis Powell’s retirement. See supra notes 64-70 and accompanying text for a discussion of Judge Bork’s concurring opinion in Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985). Judge Bork’s nomination dominated the media for months, and brought his legal writings and judicial opinions into public scrutiny. See, e.g., Lewis, The Larger Message, N.Y. Times, October 8, 1987, at 27, col. 5 (“[Bork] was chosen as that instrument, by an Administration that has made reshaping the Federal Judiciary in the image of the right a top priority.”); Against Robert Bork, N.Y. Times, October 5, 1987, at 22, col. 1 (“Judge Bork carries the idea [of judicial restraint] to mechanistic extremes.”); Burns, As the Bork Vote Approaches His Judicial Restraint is Laudable, N.Y. Times, October 5, 1987, at 23, col. 1 (“I inveigh against deciding [Bork’s confirmation] on pure symbolism—Judge Bork as the false boogeyman of the left who will singlehandedly veto all sorts of social programs and nullify individual rights, or Judge Bork as the ersatz champion of the right who will singlehandedly adopt a conservative policy agenda.”); Rosenthal, Robert Bork, Radical, N.Y. Times, September 15, 1987, at 31, col. 3 (“Supreme Court Justice Robert Bork would wither American liberties—and not conserve
debate over the Court's role is thus not really about activism and restraint. It is about 

Robert Bork's Position on Reproductive Rights: You Don't Have Any, N.Y. Times, September 14, 1987, at 13 (full page advertisement presenting a parade of horribles should Bork be appointed to the Supreme Court); Wicker, Bork At the Bar, N.Y. Times, September 14, 1987, at 25, col. 1 (“One problem is that Judge Bork's record suggests that he often has been indifferent toward individual rights, when they conflict with government or powerful institutions.”); Taylor, Judge Bork: Restraint vs. Activism, N.Y. Times, September 13, 1987, at 15, col. 2 (“A repeated theme is ‘the majority's legitimate right to govern' and to impose its views of morality on dissenting individuals or minorities, subject only to the handful of specific individual rights explicitly listed in the Constitution and its amendments.”). For a further discussion on the Reagan administration's policies on appointing the federal judiciary, see Wicker, Another Such Victory, N.Y. Times, July 25, 1986, § 1, at 29, col. 1 (discussing Reagan's political manipulations in getting Daniel Manion approved as a judge for the Court of Appeals for the Seventh Circuit); Squeeze Play, Manion Slips By the Senate, TiME, August 4, 1986, at 25 (discussing the President's nomination of conservative Daniel Manion to a federal judgeship). See also Schwartz, What About Mr. Reagan's Own Judicial Activism!, N.Y. Times, July 28, 1986, § 1 at 15, col. 1 (“The debate over the Court's role is thus not really about activism and restraint. It is about competing conceptions of the proper balance of individual rights and Government authority, between the contrasting visions of the good society.”); Abrams, Mr. Meese Caricatures the Constitution, N.Y. Times, July 25, 1986, § 1, at 23, col. 1 (“history rewritten to insulate this Administration's social agenda from judicial review”).

Moreover, strict-constructionist William Rehnquist sits as Chief Justice on the United States Supreme Court. Justice Rehnquist's views are rarely, if ever, a surprise. See, e.g., Rehnquist, The Notion of a Living Constitution, 54 Texas L. Rev. 693 (1976) (Justice Rehnquist's own views on his constitutional philosophy); Powell, The Complete Jeffersonian: Justice Rehnquist and Federalism, 91 Yale L.J. 1317 (1982) (discussing Justice Rehnquist's constitutional outlook). Like the President who appointed him to his new capacity, Justice Rehnquist is a staunch separation of powers advocate. See id. In Goldwater v. Carter, 444 U.S. 996, 1003-04 (1979), Justice Rehnquist almost persuaded a majority of the Court to declare that a challenge to the Taiwan treaty termination was a nonjusticiable political question. Justice Rehnquist based this opinion primarily on the fact that the issue involved foreign affairs. Id. Justice Brennan, author of the Baker decision, severely criticized Justice Rehnquist's approach, stating that Justice Rehnquist "profoundly misapprehends the political question doctrine principle as it applies to matters of foreign affairs." Id. at 1005 (Brennan, J., dissenting). See also McGowan, supra note 98, at 248-49, for a discussion of Justice Rehnquist's opinion in Goldwater.

Moreover, as Justice Powell noted in his concurring opinion in Goldwater, Justice Rehnquist ignored the Baker test, and instead chose to employ a sweeping rationale, which deemed any issue involving foreign affairs a nonjusticiable political question. Id. at 1000 (Powell, J., concurring). Justice Powell noted the inherent illogic of this position. Id. Further, Justice Powell easily created a hypothetical that pointed out the flaw in Justice Rehnquist's logic:

A simple hypothetical demonstrates the confusion that I find inherent in Mr. Justice Rehnquist's opinion concurring in the judgment. Assume that the President signed a mutual defense treaty with a foreign country and announced that it would go into effect despite its rejection by the Senate. Under Justice Rehnquist's analysis that situation would present a political question even though Art. II, § 2, clearly would resolve the dispute. Although the answer to the hypothetical case seems self-evident because it demands textual rather than interstitial analysis, the nature of the legal issue presented is no different from the issue presented in the case before us. In both cases, the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law. Such an inquiry demands no special competence or information beyond the reach of the Judiciary.

Id. (Powell, J., concurring).
While the resurgence of the political question doctrine would greatly affect the domestic sphere, it would destroy all judicial involvement in foreign affairs. Because the Statute always involves externally related issues, the political question doctrine could condemn the Statute to the "historical trivia" status that Judge Edwards predicted. If the Statute meets that gloomy fate, an important avenue for remedying international human rights violations could permanently close.

IV. THE POLITICAL QUESTION DOCTRINE AND THE ALIEN TORT STATUTE: WILL JUDICIAL ABSTENTION DESTROY THE STATUTE'S FUNCTION OF REMEDYING HUMAN RIGHTS ABUSES?

The courts should not uniformly apply judicial abstention doctrines to causes of action arising under the Statute. There are crucial reasons why the federal judiciary should adjudicate human rights suits brought under the Statute. This section of the Comment

Additionally, Justice Scalia, appointed in the summer of 1986, appears to belong to the Rehnquist school of thought on the political question doctrine. See, e.g., Lewis, The Court: Scalia, N.Y. Times, June 26, 1986, § 1, at 23, col. 1 (discussing Justice Scalia's views). Justice Scalia is noted for his strong view on separation of powers issues as is evidenced by his decision in the Gramm-Rudman case. See id. An avid opponent of judicial activism, Justice Scalia appears to be ready to "enforce the constitutional separation of powers vigorously when he sees an infringement on Presidential power." Id. Justice Scalia has also made comments that echo the Holmes-Frankfurter philosophy, stating that "the [people have the] prerogative to have their elected representatives determine" the application of the law. Id. See also Scalia, The Disease As Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race," 1979 Wash. U.L.Q. 147 (1979) (discussing Scalia's own views of constitutional law). In effect, Justice Scalia, like Justices Holmes and Frankfurter, believes in separation of powers. Separation of powers, that is, with a very heavy thumb on the political side of the scales.

The judicial philosophy of Anthony Kennedy, the newest Supreme Court Justice, appears to be a bit of a mystery. See Senate, 97-0 Confirms Kennedy to High Court, N.Y. Times, February 4, 1988, at 9, col. 1 (stating that because Kennedy "has said little about divisive issues, senators have been free to project their own hopes and views onto a somewhat ambiguous record"). Thus, it appears that the political question doctrine—the judicial abstention mechanism that Justice Douglas abhorred because he believed that it obstructed societal progress—could experience a rebirth with the advent of the new conservative federal judiciary. The political question doctrine, which in recent years has been an unimportant judicial philosophy, could now become a pervasive force.


113. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 791 (1984)(Edwards, J., concurring)("It is also erroneous to assume that the troublesome cases will disappear altogether from state courts, as well as federal, if section 1350 becomes mere historical trivia."). cert. denied, 470 U.S. 1003 (1985). See supra note 102 and accompanying text for a discussion of the proper use of the political question doctrine.
demonstrates that the judiciary should not allow the political question doctrine to destroy the Statute's humanitarian capacity for remedying human rights abuses.

First, Congress expressly conferred power upon the federal judiciary to adjudicate suits properly brought under the Statute. The express grant of authority is the Statute itself. Absent a challenge to a Statute's constitutionality, the courts cannot take it upon themselves to evaluate the wisdom of a congressional act. The judicial branch created the political question doctrine, which, when employed properly, prevents the judiciary from usurping the political branches' authority. One of these political branches, however, has bestowed this decision-making power upon the judiciary. For the judiciary to simply construe the Statute out of existence via abstention doctrines, as Judge Bork and Judge Robb advocated in Tel-Oren, would instead usurp the legislative function that separation of powers enthusiasts claim they are trying to uphold. Judge Edwards succinctly noted this hypocrisy in Tel-Oren, stating that Judge Bork "[v]igorously wav[es] in one hand a separation of powers banner, ironically, with the other he rewrites Congress' words and renounces the task that Congress has placed before him."

Second, when the judiciary refuses to confer jurisdiction on suits properly brought under the Statute, it circumvents the framers' intentions. As discussed in Part I of this Comment, the drafters of the Statute and the Constitution believed that the eighteenth-century ideological climate transcended provincial national boundaries and envisioned that the judiciary would have an expansive role in redressing international wrongs. Because the framers understood the controversial nature of foreign affairs issues and be-

115. See, e.g., Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821). In Cohens, Chief Justice Marshall stated that the Court must take jurisdiction when it is constitutionally delegated: "The judiciary cannot . . . avoid a measure, because it approaches the confines of the Constitution . . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." Id.
116. See supra note 98 for a list of scholarly articles that depict the history of the political question doctrine.
117. See supra note 101 for Justice Brennan's explanation of the proper use of the political question doctrine.
118. Congress, the legislative branch, has conferred this decision-making power upon the judiciary. See 28 U.S.C. § 1350 (1982).
119. 726 F.2d 774, 798-827 (Bork, J., and Robb, J., concurring).
120. Id. at 790 (Edwards, J., concurring).
121. See supra text accompanying notes 5-17 for a discussion of the ideological climate at the time the Statute was drafted.
122. See supra text accompanying notes 5-17.
123. See supra text accompanying notes 5-17.
lieved that international law was an integral component of domestic law, they placed the power to adjudicate such cases in the federal judiciary's domain. 124

In Tel-Oren, Judge Bork contended that the Statute's modern scope should be limited to the private causes of action that were applicable in the 1700's. 125 This argument contradicts both eighteenth-century ideology and the role of the common law, of which the Law of Nations composes. The framers of our legal system were classically educated men and common law lawyers who believed in the tenets of natural law. 126 They saw beyond the confines of the written domestic law, and recognized that intangible law, which derived from nature, bound all civilized people. 127 Most certainly, they would disagree with Judge Bork's provincial and rigid view of "original intent." Rather, Judge Kaufman's analogy in Filartiga that "the torturer has become—like the pirate and slave trader before him—hostis human generis, an enemy of all mankind,"128 more closely conforms with "original intent." In all probability, the framers would applaud the humanitarian Filartiga decision and disagree with Judge Bork's inflexible interpretation.

Third, the Statute has the capacity for enabling the federal judiciary to create a universal model of human rights standards.129

124. See supra text accompanying notes 5-17.
125. 726 F.2d at 812-13 (Bork, J., concurring). See supra note 68 for the causes of action that Judge Bork believes are justiciable under the Statute.
126. See supra notes 5-17 and accompanying text for discussion of the 18th century political climate that greatly influenced the framers.
127. See supra notes 5-17 and accompanying text; see also O. W. Holmes, The Common Law 5 (43rd printing 1949) ("rule adapts itself to the new reasons . . . and enters on a new career . . . . The old form receives a new content, and in time even the form modifies itself to fit the meaning which it has received"); R. Pound, The Spirit of the Common Law 96 (1921). Professor Pound discussed the philosophy of the early American common law lawyer:

   Hence scholar and lawyer concurred in what became a thorough-going conviction of the nineteenth century, that at least the principal dogmas of the common law were of universal validity and were established by nature. When the lawyer spoke of law he thought of these doctrines. He conceived that constitutions and bills of rights simply declared them. He construed statutes in accord with them. He forced them upon modern social legislation.
   Id.
128. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980).
129. Cf. Falk, supra note 88, at 10. Professor Falk, upon whose writings the Sabbatino case was largely based, advocates a horizontal universal approach for domestic courts in international affairs. Falk strongly asserts that the judiciary should not sacrifice its constitutionally delegated independence by deferring to the political branches. Id. Instead, national policy should be completely separate from the federal courts' application of international law. Id. To allow the judiciary to become merely another political pawn would destroy the credibility of the courts' potential role. See id. at 10-11. If the United States could allow the judiciary to adjudicate international issues without consideration as to how the President feels that particular day, and instead applied law according to "functional principles of allocation," great progress towards achieving international order could be made. Id. See also C.W. Jenks, The
This judicial role also conforms with the framers' view of the mutable common law, of which they perceived international law to be an integral component.\(^{130}\) The judiciary is well suited for this role because, in theory, it is an independent body.\(^{131}\) It is insulated from the transient political policies that shift after every election. The framers created the judiciary as a non-political branch in an effort to ensure its continued independence.\(^{132}\) This does not mean, however, that the judiciary should view cases in a legal vacuum. Rather, the framers merely freed the judiciary from the dictates of the volatile popular mood.\(^{133}\) Precisely because the judicial branch is de-

\(^{130}\) Common Law of Mankind 105-07 (1958) (advocating “transformation of international law into a universal system”). Contra Tel-Oren, 726 F.2d at 821 (“[t]he United States would be perceived, and justly so, not as a nation magnanimously refereeing international disputes but as an officious interloper and an international busybody”) (Bork, J., concurring).

\(^{131}\) See R. Bridwell & Whitten, The Constitution and the Common Law 13 (1977) (“traditional common law system was closely associated with a concept of law as an unconscious process by which society adapted itself over centuries to the new situations it confronted”); G. Calabresi, A Common Law for the Age of Statutes 4 (1982)(discussing the “incremental nature of common law adjudication”).

\(^{132}\) See Falk, supra note 88, at 10; see also A. Bickel, The Least Dangerous Branch 23-28 (1962). Bickel examines the inherently different function the judiciary performs when compared with the legislative and executive branches:

[C]ourts have certain capabilities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. It calls for a habit of mind, and for undeviating institutional customs. Another advantage that courts have is that questions of principle never carry the same aspect for them as they did for the legislature or the executive. Statutes, after all, deal typically with abstract or dimly foreseen problems. The courts are concerned with the flesh and blood of an actual case . . . . Their insulation and the marvelous mystery of time give courts the capacity to appeal to men’s better natures, to call forth their aspirations, which may have been forgotten in the moment’s hue and cry.

\(^{133}\) Id. at 25-26 (emphasis added).

\(^{132}\) See Warren, supra note 5, at 52. “The Judiciary Act was ‘probably the most important and the most satisfactory Act ever passed by Congress,’ and that ‘the wisdom and forethought with which it was drawn have been the admiration of succeeding generations’.” Id. (quoting Mr. Justice Brown in his address before the American Bar Association, August 20, 1911; Miller J., in United States v. Holliday, 70 U.S. (Wall) 407 (1865)).

\(^{133}\) See Seng, Federalism, the Courts and Individual Liberties, 75 ILL. B.J. 310 (1987). Professor Seng notes the societal progress gained as a result of the federal judiciary’s insulation from the electoral processes:

We have recently witnessed the sorry spectacle where state judges in California had to defend their judicial opinions in a popular election and came out the losers. One can only wonder if the brave judges in the fourth and fifth federal judicial circuits who were called upon in the 1950’s and ‘60’s to implement the federal law outlawing racial discrimination could have behaved so nobly and effectively if they had faced popular election. The protection of basic liberties cannot rest upon the shifting sands of popular opinion.

\(^{133}\) Id. at 312-13.
The Alien Tort Statute could be our only hope for creating a model of universal human rights norms. The Statute could provide a mechanism for remediying injustices while simultaneously creating a comprehensive body of international law. As a result, a universal model of behavioral expectations could evolve.

There is a very strong caveat in this theory, however. The federal courts must be prepared to adjudicate wrongs that the United States government perpetrates against foreigners. If the courts engage in selective jurisdiction based upon political considerations, the concept of a neutral judicial body would suffer an irreparable loss of credibility. If that occurred, the goal of a universal social order and an international body of law enmeshed into our domestic law would remain unattainable. Although this challenging goal would require discipline and consistent application, the current state of world events mandates a permanent solution. The Statute could play a major role in achieving that goal.

Finally, the blanket use of the political question doctrine as a mechanism for judicial abstinence should also be studied from a historical perspective. As history demonstrates, two generations of black Americans were denied their constitutional right to vote because the Court viewed the issue as a nonjusticiable political question. The federal judiciary, however, was later able to spearhead

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134. See Falk, supra note 88, at 71. Falk states that “[courts] enjoy an independence of the executive and legislative branches of government especially in a democratic government . . . separation encourages a resolution of conflict in a relatively depoliticized setting.” Id.


136. The past few years have witnessed an upswing in turbulent international activities. Several tourists were gunned down at the Rome airport. A man confined to a wheelchair was shot in the head and thrown overboard a cruise ship. Unrest continues in the Gulf. Revolutions occurred in the Phillipines and in Haiti. The Reagan administration continually attempts to push through millions of dollars of aid to the contras in Central America. The South African government has reached new heights in human rights violations through apartheid. The list goes on and on.

137. See, e.g., Giles v. Harris, 189 U.S. 475 (1903). In Giles, the plaintiffs, southern blacks who were not being allowed to register to vote, sought judicial relief. Justice Holmes, writing for a six-Justice majority, stated that the judicial process could not redress the plaintiffs’ complaint. Id. at 488. Justice Holmes stated that “[a]part from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.” Id. In effect, the Giles Court told the plaintiffs to seek aid from the very same group that was depriving them of their constitutional right to vote.

See also Colegrove v. Green, 328 U.S. 495 (1946). In Colegrove, the Court affirmed the dismissal of the plaintiff’s complaint, which alleged that population changes in Illinois precluded “compactness of territory and approximate equality of population.” Id. In short, the plaintiffs contended that they were being deprived of
reforms that were light years ahead of the political processes. Had the legislative branches been left to their own devices, public schools might still be racially segregated. Instead, the Warren Court put aside abstinence doctrines and in *Brown v. Board of Education*, expressly rejected the "separate but equal" status quo. The last twenty-five years of racial reform are greatly attributable to this decision.

The international human rights arena is analogous to the civil rights movement. Although our system of enforced segregation was a tragic wrong, it pales in comparison to the worldwide injustices that people are suffering every day in the hands of repressive regimes. The political branches are unable, or perhaps merely unwilling, to redress these wrongs on a permanent basis. Because the political branches are subject to the everchanging whims of the national posture, they conform to the popular mood.

Conversely, the judiciary is an independent branch that can redress wrongs on a case-by-case basis. The judiciary served a crucial
function in ending our racial segregation. Similarly, the judiciary could make a significant contribution towards ending international human rights abuses. The cumulation of many such decisions would evolve into a comprehensive body of case law and would promote the possibility of achieving a universal human rights model.

Because of its vague and overinclusive nature, the political question doctrine could render virtually any controversial issue non-justiciable. Applied in the modern context, it is reminiscent of majoritarian philosophy that prevailed in the early part of this century. That judicial climate, as manifested in abstention doctrines, impeded societal progress. Only when the judiciary finally asserted its proper constitutional role was reform achieved. Thus, our own history clearly demonstrates that judicial abstinence doctrines can stifle justice. The political question doctrine is the true essence of action by inaction.

CONCLUSION

The Statute will celebrate its 200th anniversary very shortly. As this Comment has demonstrated, it has the potential for transforming the international human rights sphere. Although the Statute is very old, it should not be characterized as an obsolete relic because it fulfills an urgent need in the contemporary world. Because injustices that violate the Law of Nations occur daily, the Statute has never had a more fertile basis for application than in our present world community. Unfortunately, unless the judiciary exercises self-restraint in applying abstention doctrines, the interpretations of Judge Bork and Judge Robb will prevail and the Statute may become a mere piece of "historical trivia."

Debra A. Harvey

142. See, e.g., DOUGLAS, supra note 93, at 133-68 (castigating the majoritarian views of former Court Justices); Cover, supra note 98, at 1287-90 (describing the Holmes-Stone-Frankfurter philosophy).
143. See supra note 137 for a discussion of the Court’s abstention in Giles, which helped to deny two generations of blacks their constitutional right to vote.
144. See supra note 138 and accompanying text for a discussion of an area where the Court exercised its constitutionally delegated right to adjudicate and was able to make great steps toward social reform.
145. The Alien Tort Statute will be 200 years old on September 24, 1989.
146. See supra note 136 for a discussion of our current state of international crisis.