

CUSTOMARY INTERNATIONAL LAW AND THE QUESTION OF LEGITIMACY

*William S. Dodge**

Responding to Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007).

In 1997, Professors Curtis Bradley and Jack Goldsmith shook the international law academy by arguing that the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*¹ made it illegitimate for federal courts to continue to apply customary international law (which they called CIL) without further authorization from Congress.² The Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*³ seemed to reject this argument, holding that federal courts could apply customary international law under the Alien Tort Statute⁴ (ATS) without any authorization beyond the jurisdictional grant.⁵ Undaunted, Professors Bradley and Goldsmith (joined now by Professor David Moore) have returned to claim that *Sosa* in fact supports their argument and that "courts can domesticate CIL only in accordance with the requirements and limitations of post-*Erie* federal common law."⁶ In my view, their latest article not only misinterprets *Sosa* but also raises fundamental questions concerning both the legitimacy of customary international law itself and the legitimacy of requiring its express incorporation into the U.S. legal system, a requirement that is contrary to the understanding of the founding generation.

I. MISREADING *SOSA*

Professors Bradley, Goldsmith, and Moore start by contrasting two positions.⁷ The first, which they call the "modern position," holds that federal courts may apply customary international law "without any

* Professor of Law, University of California, Hastings College of the Law. My thanks to Ash Bhagwat, Martin Flaherty, and Reuel Schiller for comments on an earlier draft.

¹ 304 U.S. 64 (1938).

² Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

³ 542 U.S. 692 (2004).

⁴ 28 U.S.C. § 1350 (2000).

⁵ *Sosa*, 542 U.S. at 712.

⁶ Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 874 (2007).

⁷ *See id.* at 870-71.

need for it to be enacted or implemented by Congress.”⁸ The second, which is their own position, holds that federal courts may not apply customary international law unless expressly authorized by the Constitution or a statute. Specifically, they assert that a court must find “positive authority for the incorporation” of customary international law into the U.S. legal system.⁹ The authors claim that *Sosa* rejected the first position and endorsed the second, and that it found authority for the incorporation of customary international law in the ATS itself: “[T]he Court inferred, from a jurisdictional statute that enabled courts to apply CIL as general common law, the authorization for courts to create causes of action for CIL violations, in narrow circumstances, as a matter of post-*Erie* federal common law.”¹⁰

In fact, the *Sosa* Court expressly rejected this interpretation of the ATS. The respondent Alvarez argued “that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law.”¹¹ The Court dismissed this reading as “implausible,”¹² agreeing instead with the petitioner *Sosa* that the ATS was “only jurisdictional.”¹³ Nevertheless, the Court rejected *Sosa*’s claim that because the ATS was only jurisdictional further congressional action was needed to authorize suits. Instead, the Court adopted the view of the amici professors of federal jurisdiction and legal history that the common law provided a right to sue.¹⁴ As the Court summarized, “[t]he 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.”¹⁵ Rather than rejecting the view that federal courts may apply customary international law without express incorporation by Congress, the Supreme Court endorsed it — not as a “modern position” but as the original understanding.

Ironically, Professors Bradley, Goldsmith, and Moore’s reading of *Sosa* is inconsistent not only with its holding but also with the post-*Erie* rules of federal common law to which the authors purport to adhere. The Court has made it quite clear that “[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority

⁸ *Id.* at 871 (quoting Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984)).

⁹ *Id.* at 903.

¹⁰ *Id.* at 895.

¹¹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 713 (2004).

¹² *Id.* at 713.

¹³ *Id.* at 712.

¹⁴ *Id.* at 714. I should disclose that I wrote the amicus brief in question, which is reprinted at 28 HASTINGS INT’L & COMP. L. REV. 95 (2004).

¹⁵ *Sosa*, 542 U.S. at 724.

to formulate federal common law.”¹⁶ Acknowledging this, Professors Bradley, Goldsmith, and Moore observe that there is “tension, if not outright contradiction, in the Court’s construction of the ATS as both purely jurisdictional and an authorization for creating causes of action.”¹⁷ But this tension is of their own making and vanishes once one accepts, as the *Sosa* Court did, that congressional authorization is unnecessary because customary international law is already part of the U.S. legal system.

This is not to say that the *Sosa* Court ignored the changes in domestic and international law that have occurred over the past two centuries or that *Erie* is irrelevant to translating provisions like the Alien Tort Statute into modern terms. Indeed, the Court discussed *Erie* when explaining why it is best to be cautious in interpreting the ATS’s jurisdictional grant. But in the Court’s view, *Erie* and other changes in domestic and international law are prudential considerations — “reasons . . . for caution”¹⁸ — not requirements that may override the original understanding.

II. *ERIE RAILROAD CO. V. THE ORIGINAL UNDERSTANDING*

The original understanding was that federal courts could apply the law of nations to resolve questions that depended on it in any case over which those courts had jurisdiction. No act of Congress incorporating the law of nations into domestic law was necessary because the law of nations was already part of the common law. “[T]he law of nations,” Blackstone wrote, “is here adopted in [its] full extent by the common law, and is held to be a part of the law of the land.”¹⁹ The colonists brought this principle with them to America and used it in a variety of contexts.²⁰ As Professors Bradley, Goldsmith, and Moore concede, “during the period prior to *Erie*, federal courts often applied CIL . . . without requiring authorization from the federal political branches.”²¹

The boundaries of the law of nations in the late eighteenth century were different from those of customary international law today. The law of nations included not just rules that applied between states, but

¹⁶ *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640–41 (1981).

¹⁷ Bradley, Goldsmith & Moore, *supra* note 6, at 896.

¹⁸ *Sosa*, 542 U.S. at 725.

¹⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

²⁰ For more detailed discussion, see William S. Dodge, *The Story of The Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES (Laura Dickinson et al. eds., forthcoming 2007).

²¹ Bradley, Goldsmith & Moore, *supra* note 6, at 882.

also maritime law, the law merchant, and the conflict of laws.²² These boundaries shifted over the next two centuries. “Domestic law absorbed the private-law elements of the law of nations,”²³ while new rules of customary international law emerged in areas like human rights. Such changes would not have surprised the Framers, who understood that customary international law evolves and that the law of nations in their own time differed from that of Greece and Rome.²⁴ As Justice Story wrote, “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations.”²⁵

As the scope of customary international law changed, so did the jurisprudential foundations of both the law of nations and the common law. In the late eighteenth century, all law was thought to rest ultimately on natural law. “[N]o human laws are of any validity, if contrary to this,” Blackstone wrote, “and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.”²⁶ At least since Grotius, the law of nations had been understood to have a positive aspect as well, “having its origin in custom and tacit agreement.”²⁷ But Vattel, the writer upon whom early Americans relied most heavily for the law of nations, emphasized its natural law basis, titling his book *The Law of Nations, or the Principles of Natural Law, Applied to the Conduct and to the Affairs of Nations and of Sovereigns*.²⁸ Over the course of the nineteenth century, the foundations of both the law of nations and the common law changed from natural law to positivism, but they did so in distinct ways.

²² See generally 4 BLACKSTONE, *supra* note 19, at *66–73; E. DE VATTEL, *THE LAW OF NATIONS* (photo. reprint 1995) (Charles G. Fenwick trans. 1916) (1758).

²³ Bradley & Goldsmith, *supra* note 2, at 822.

²⁴ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (Wilson, J., concurring) (“When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 7 *THE WORKS OF THOMAS JEFFERSON* 312, 314 (Paul Leicester Ford ed., 1904) (referring to “the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation”); Proclamation of Neutrality (Apr. 22, 1793), in 32 *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799*, at 430 (John C. Fitzpatrick ed., 1939) (referring to “the modern usage of nations”).

²⁵ *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

²⁶ 1 BLACKSTONE, *supra* note 19, at *41.

²⁷ 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS* 9 (photo. reprint 1995) (Francis W. Kelsey trans., Oxford Univ. Press 1925) (1646).

²⁸ VATTEL, *supra* note 22.

For the common law, the loss of faith in natural law required another source of authority upon which to ground its rules.²⁹ “The common law is not a brooding omnipresence in the sky,” Justice Holmes famously wrote, “but the articulate voice of some sovereign or quasi sovereign that can be identified.”³⁰ If judges “made” rather than “found” the common law, it followed that they needed lawmaking authority. It was this change that led ultimately to *Erie*.

The transition from natural law to positivism in customary international law was different. When its natural law foundation crumbled, customary international law came to rest on the positive authority of custom. No longer was the law of nations “deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation.”³¹ Rather, courts looked to what the Court in *The Paquete Habana*³² called “the customs and usages of civilized nations,”³³ usages that manifested “the general assent of civilized nations.”³⁴ “[T]he law[] of nations,” declared the Supreme Court in *The Scotia*,³⁵ “rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct.”³⁶ Because positive customary international law was grounded in state practice and consent, it was not open to the same charge of judicial lawmaking as the common law more generally. Judges applying customary international law still “found” the law, but they found it now in state practice rather than in principles of natural law.³⁷

Erie ratified the positivist view of the common law. It declared that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”³⁸ For the common law, that authority could only be the authority of a state because the federal government had no authority to make substantive rules of common law. But by 1938, customary international law already rested on a positivist foundation of state practice and consent. Customary interna-

²⁹ See Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1391 (1997).

³⁰ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

³¹ *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

³² 175 U.S. 677 (1900).

³³ *Id.* at 700.

³⁴ *Id.* at 694.

³⁵ 81 U.S. 170 (1872).

³⁶ *Id.* at 187.

³⁷ See Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 876 (1987) (“[C]ourts do not create but rather find international law, generally by examining the practices and attitudes of foreign states.”).

³⁸ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

tional law did have “some definite authority behind it” — the consent of nations reflected in their practice.³⁹

Professors Bradley, Goldsmith, and Moore would read *Erie* to require not just a positivist foundation for customary international law but also “positive authority for the incorporation” of customary international law into the U.S. legal system.⁴⁰ Because this is contrary to the original understanding that federal courts could apply customary international law without such incorporation, one might ask upon what authority this additional requirement is based. Why should this reading of *Erie* trump the original understanding?

Under *Erie*'s own positivist view, which the authors adopt, authority for the additional requirement of incorporation would have to be found in a statute or the Constitution. If it were simply the product of judicial lawmaking, it would be illegitimate. *Erie* itself disclaimed any reliance on legislative changes and rested its decision expressly on constitutional grounds.⁴¹ “Congress has no power to declare substantive rules of common law applicable in a State,”⁴² the Court wrote, and in exercising such power the federal courts had “invaded rights which in our opinion are reserved by the Constitution to the several States.”⁴³ But no such constitutional infirmity exists with respect to customary international law. Congress has express authority under Article I of the Constitution to “define and punish . . . Offenses against the Law of Nations.”⁴⁴ Moreover, the Constitution vests the federal government with the vast majority of powers over foreign relations. As Dean Harold Koh has noted, “[f]ederal 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.”⁴⁵ In short, the authority that supports *Erie*'s application to state tort law does not support its application to customary international law. Lacking a statutory or constitutional basis for their incorporation requirement, Professors Bradley, Goldsmith, and Moore's argument fails *Erie*'s own test of legitimacy.

³⁹ *Erie* itself involved no question of customary international law. Nor did *Erie* affect the status of customary international law indirectly by overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). It is true that *Swift* applied the law merchant, which was then considered part of the law of nations, but by 1938 customary international law no longer covered such topics, and the *Erie* Court would not have viewed *Swift* as involving anything other than issues of domestic law. See *supra* note 23 and accompanying text.

⁴⁰ Bradley, Goldsmith & Moore, *supra* note 6, at 903.

⁴¹ *Erie*, 304 U.S. at 77–78.

⁴² *Id.* at 78.

⁴³ *Id.* at 80.

⁴⁴ U.S. CONST. art. I, § 8, cl. 10.

⁴⁵ Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1831–32 (1998).

Like the authors, Justice Scalia would reject the original understanding that federal courts may apply customary international law without legislative incorporation because “that understanding rested upon a notion of general common law that has been repudiated by *Erie*.”⁴⁶ Justice Scalia offered no authority for rejecting the original understanding, but assured us that “[d]espite the avulsive change of *Erie*, the Framers . . . would be entirely content with the post-*Erie* system I have described, and quite terrified by the ‘discretion’ endorsed by the Court.”⁴⁷ Customary international law today limits what a nation can do to its own citizens. “The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples’ democratic adoption of the death penalty . . . could be judicially nullified because of the disapproving views of foreigners.”⁴⁸ I see no evidence for these assertions but plenty of evidence that the Framers expected customary international law to evolve.⁴⁹ Perhaps surprisingly, it was not Justice Scalia but the *Sosa* majority that seemed most committed to the original understanding and to the need for some legitimate source of authority for departing from it. “We think it would be unreasonable,” the Court said, “to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”⁵⁰

III. THE LEGITIMACY OF CUSTOMARY INTERNATIONAL LAW

Despite the lack of authority for a positive incorporation requirement, one might argue that it is nevertheless necessary to remedy a lack of legitimacy in customary international law itself. In their 1997 article, Professors Bradley and Goldsmith criticized the position that federal courts could apply customary international law without legislative incorporation as being “in tension with basic notions of American representative democracy.”⁵¹ In *Sosa*, Justice Scalia made the same argument more colorfully:

⁴⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 744 (2004) (Scalia, J., concurring).

⁴⁷ *Id.* at 749.

⁴⁸ *Id.* at 750.

⁴⁹ See *supra* notes 24–25 and accompanying text. In other contexts, Justice Scalia has been willing to read statutory references to the common law as allowing for evolution. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (noting that the Sherman Act “invokes the common law itself, and not merely the static content that the common law had assigned to the term [‘restraint of trade’] in 1890”).

⁵⁰ *Sosa*, 542 U.S. at 730.

⁵¹ Bradley & Goldsmith, *supra* note 2, at 857; see also John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. (forthcoming 2007); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 718–23 (1986).

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law.⁵²

Essentially, this legitimacy critique consists of two interrelated points: that the power to apply customary international law gives too much discretion to federal judges — discretion to smuggle into American law whatever “*they regard as norms of international law*” — and that customary international law is not made through a democratically accountable political system.

The response to the first point is that federal judges may not read into customary international law anything they would like to see. Under the positivist theory that has prevailed since the nineteenth century, customary international law must be based upon “a general and consistent practice of states followed by them from a sense of legal obligation.”⁵³ As the Second Circuit noted in *Filartiga v. Pena-Irala*,⁵⁴ “[t]he requirement that a rule command the ‘general assent of civilized nations’ to become binding upon them all is a stringent one.”⁵⁵ Experience has shown that the federal courts have had no difficulty applying this test and distinguishing real rules of customary international law like the prohibition against torture⁵⁶ from spurious ones like the prohibition against domestic pollution.⁵⁷ In fact, modern customary international law gives judges far less discretion than the law of nations the Framers expected federal courts to apply. Under a natural law theory, as Justice Story wrote, “every doctrine, that may fairly be deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.”⁵⁸ The same is decidedly not true today.

The response to the second point is that although customary international law is not made through a democratically accountable political system, it may be limited or overridden democratically. Congress controls the jurisdiction of the federal courts and could restrict their jurisdiction over questions of customary international law. Alternatively, Congress could override substantive rules of customary interna-

⁵² *Sosa*, 542 U.S. at 750 (Scalia, J., concurring).

⁵³ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987).

⁵⁴ 630 F.2d 876 (1980).

⁵⁵ *Id.* at 881 (1980) (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

⁵⁶ *See, e.g., id.* at 880.

⁵⁷ *See, e.g., Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 255 (2d Cir. 2003).

⁵⁸ *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

tional law by enacting a statute to the contrary.⁵⁹ Indeed, *Sosa* acknowledged that Congress has the power “to shut the door to the law of nations entirely . . . at any time . . . , just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.”⁶⁰ Just as the possibility of legislative override provides democratic legitimacy to judge-made common law,⁶¹ so too it provides legitimacy to customary international law made by the general assent of nations.

IV. CONCLUSION

Sosa is centrally concerned with questions of legitimacy and how to remain faithful to the meaning of provisions written in a very different legal environment. These questions are relevant not just to the ATS but also to other statutes and to various constitutional provisions. Professors Bradley, Goldsmith, and Moore offer their views on some of these provisions in their article,⁶² while I have offered my own elsewhere.⁶³ What fundamentally separates my positions from theirs is that I would begin with the original understanding of each provision and ask whether there is a legitimate reason to depart from it, while they begin and end with the positivist framework of *Erie*.

It might appear at first glance that the democratic legitimacy of customary international law is questionable and that requiring Congress to incorporate it expressly would bolster its legitimacy. I have argued that the opposite is true. The requirements of customary international law already operate to constrain the discretion of federal judges, while the possibility of legislative override confers legitimacy. Professors Bradley, Goldsmith, and Moore’s incorporation requirement, by contrast, rests on nothing but “academic fiat.”⁶⁴

⁵⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 115(1)(a) (1987) (“An act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the act to supersede the earlier rule or provision is clear or if the act and the earlier rule or provision cannot be fairly reconciled.”).

⁶⁰ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004).

⁶¹ See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 92 (1982) (noting that “judge-made rules are all in a sense conditional, that is, they are subject to legislative or popular revision and hence are acceptable in a democracy”).

⁶² See Bradley, Goldsmith & Moore, *supra* note 6, at 911–35.

⁶³ See William S. Dodge, *After Sosa: The Future of Customary International Law in the United States*, in OUTSOURCING AMERICAN LAW (Jack Goldsmith & John Yoo eds., forthcoming 2007); William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87 (2004); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT’L L. 687 (2002).

⁶⁴ Bradley & Goldsmith, *supra* note 2, at 821.