

## SOSA AND THE RETAIL INCORPORATION OF INTERNATIONAL LAW

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Replying 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).

Since its release in 2004, Justice Souter's majority opinion in *Sosa v. Alvarez-Machain*<sup>1</sup> has become something of a Rorschach blot, in which each of the contending sides in the debate over the domestic status of customary international law (CIL) sees what it was predisposed to see anyway. Neither the thoughtful article by Professors Curtis Bradley, Jack Goldsmith, and David Moore,<sup>2</sup> nor this comment upon that article, is any exception to that tendency: we, too, read *Sosa* as vindicating our previously expressed positions on this debate. That is an embarrassing situation for scholars all round, and it counsels caution in interpreting what the Court actually did and said in *Sosa*. But the willingness of all sides to claim victory doesn't mean that nobody, in fact, won. I think that CIL revisionists like Professors Bradley, Goldsmith, and Moore (with whom I consider myself at least a fellow traveler<sup>3</sup>) have the better claim on *Sosa*. In this brief comment, I hope to explain why.

### I. RETAIL OR WHOLESALE INCORPORATION

The "modern position" on CIL is that "customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."<sup>4</sup> This position amounts to a wholesale incorporation of all CIL into domestic law: CIL just *is* federal law, always and everywhere, and no positive act by a domestic institution is required to make it effective within the domestic legal sys-

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<sup>1</sup> 542 U.S. 692 (2004).

<sup>2</sup> 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).

<sup>3</sup> See Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002) [hereinafter Young, *Sorting*].

<sup>4</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 n.3 (1987).

tem.<sup>5</sup> The opposing position is one of retail incorporation — that is, CIL may *become* federal law, but only when federal governmental institutions take positive action to make it so.<sup>6</sup> Proponents of retail incorporation will often permit *state* governmental actors to incorporate CIL into state law, although such incorporation may be subject to doctrines limiting state involvement in foreign affairs.<sup>7</sup> Different scholars introduce different nuances, but I think this distinction between wholesale and retail incorporation captures the basic controversy.

If this is the question, then *Sosa* plainly gave a revisionist answer. If CIL just *is* federal law, then the Alien Tort Statute<sup>8</sup> (ATS) ought to cover all CIL claims, so long as they also qualify as torts. But *Sosa* rejected this view, holding instead that the ATS “furnish[es] jurisdiction for a relatively modest set of actions,” encompassing “only a very limited set of claims.”<sup>9</sup> These claims are actionable, moreover, not because CIL is always a basis for relief in U.S. courts, but rather because the drafters of the ATS presupposed “that the common law would provide a cause of action” for a “modest number of international law violations.”<sup>10</sup> This is retail incorporation of CIL: the Court gave domestic legal force to an extremely limited subset of CIL claims, and it did so based on its reading of the specific intent of Congress. To be sure, the *Sosa* cause of action is an implied one rather than an express statutory right; nonetheless, it is familiar law that implied rights must be grounded in the intent of the national political branches. Justice Souter’s opinion thus was at pains to derive the *Sosa* right from the early Congress’s concern for providing private remedies for CIL violations.<sup>11</sup>

The only plausible alternative account is unlikely to appeal to internationalist proponents of the modern position. For *Sosa* to be consistent with wholesale incorporation, the majority would have to have meant that international norms failing to meet *Sosa*’s high standard of definiteness were not simply unactionable under the ATS, but not part of CIL at all. In other words, *Sosa* would have been interpreting not simply the ATS but international law as well, resulting in a very narrow reading of what counts as binding CIL. This reading would fore-

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<sup>5</sup> See, e.g., Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (arguing that CIL can be “applied by courts in the United States without any need for it to be enacted or implemented by Congress”).

<sup>6</sup> See, e.g., Bradley, Goldsmith & Moore, *supra* note 2, at 871.

<sup>7</sup> See, e.g., William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. IN BRIEF 1, 8–12 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/fletcher.pdf>.

<sup>8</sup> 28 U.S.C. § 1350 (2000).

<sup>9</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692, 720 (2004).

<sup>10</sup> *Id.* at 724.

<sup>11</sup> *Id.* at 715–21. For a careful account of *Sosa* generally consistent with the distinctions offered here, see *The Supreme Court, 2003 Term—Leading Cases*, 118 HARV. L. REV. 248, 446–56 (2004).

close arguments that less definite norms count as CIL in other contexts, and it would also forbid state courts from incorporating a broader view of CIL into state law.<sup>12</sup>

In support of the retail view, I want to offer two additional arguments not canvassed by Professors Bradley, Goldsmith, and Moore. The first has to do with the Framers' general caution about importing outside legal norms into federal law. As Justice Souter emphasized in his dissent in *Seminole Tribe v. Florida*,<sup>13</sup> "the founding generation . . . join[ed] an appreciation of its immediate and powerful common-law heritage with caution in settling that inheritance on the political systems of the new Republic."<sup>14</sup> The Framers refused to incorporate the English common law wholesale into federal law, as many state legislatures had done;<sup>15</sup> it would therefore seem highly incongruous to read the cryptic words of the ATS as accomplishing an equally broad and open-ended incorporation of external norms into federal law. The generation that denied federal courts the power to try federal common law crimes<sup>16</sup> is unlikely to have approved a wholesale incorporation of CIL into federal law. And we know, in fact, that CIL ordinarily had "general" law status in the early republic notwithstanding the existence of the ATS.

The second point is that retail incorporation best comports with the gatekeeper role that the Supreme Court has assumed toward international law in other contexts. In *Banco Nacional de Cuba v. Sabbatino*,<sup>17</sup> the Court recognized the act of state doctrine as a limit on the direct applicability of international law in U.S. courts. More recently, in *Sanchez-Llamas v. Oregon*,<sup>18</sup> the Court both rejected arguments that international tribunal judgments have direct domestic effect and held that what remedies were available for a violation of international law was a question of domestic law. In both situations, the Court has insisted that federal law incorporates international norms only selectively and at retail — a position at odds with the categorical imperative of the modern position.

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<sup>12</sup> The modern position, after all, holds that federal court interpretations of CIL bind state courts. See *supra* note 4 and accompanying text.

<sup>13</sup> 517 U.S. 44 (1996).

<sup>14</sup> *Id.* at 132 (Souter, J., dissenting). The *Seminole* majority did not dispute Justice Souter's account of the common law's American reception.

<sup>15</sup> See *id.* at 137–42; see also Stewart Jay, *Origins of Federal Common Law* (pts. 1 & 2), 133 U. PA. L. REV. 1003, 1231 (1985).

<sup>16</sup> See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812).

<sup>17</sup> 376 U.S. 398 (1964).

<sup>18</sup> 126 S. Ct. 2669 (2006).

## II. THE FEDERAL QUESTION IN ATS CASES

In my view, *Sosa* is best read as recognizing a federal common law implied right of action for the violation of certain CIL rules of decision.<sup>19</sup> A cause of action and the rule of decision it enforces need not be the same sort of law: some statutes create a federal right of action but stipulate that state law will provide the rule of decision,<sup>20</sup> and, conversely, state tort law often provides a vehicle for enforcing federal legal standards.<sup>21</sup> If this reading is correct, then we may say that the right of action in a successful *Sosa* claim is federal, but that the underlying CIL rule of decision is not.

This reading, however, highlights a question that the *Sosa* Court largely avoided: what is the federal law that a *Sosa* claim “arises under” for purposes of Article III jurisdiction?<sup>22</sup> Most scholars — and each of the Justices who decided *Sosa* — seem to agree that CIL was “general” law, not federal law, in 1789.<sup>23</sup> Today, the existence of a federal common law cause of action to enforce such principles would be sufficient to create federal question jurisdiction under the “Holmes Rule,” which holds that “[a] suit arises under the law that creates the cause of action.”<sup>24</sup> But this jurisdictional hook would likely *not* have been available in 1789, when the enforceability of a non-statutory claim was derived from the common law forms of action.<sup>25</sup> Under the Process Act of 1789, a federal court applied “the forms of writs and executions” and “modes of process” used in the courts of the state in

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<sup>19</sup> See Ernest A. Young, *Federal Suits and General Laws: A Comment on Judge Fletcher's Reading of Sosa v. Alvarez-Machain*, 93 VA. L. REV. IN BRIEF 33, 35 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/young.pdf>.

<sup>20</sup> See Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, §§ 402(5), 405(a)(1), 115 Stat. 230, 237–38 (2001), as amended by Aviation and Transportation Security Act, Pub. L. No. 107-71, § 201(d), 115 Stat. 597, 646–47 (2001), reprinted in 49 U.S.C. § 40101 note (Air Transportation Safety and System Stabilization), secs. 402(7), 405(a)(1) (Supp. III 2003); Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2401(b), 2671–2680 (2000).

<sup>21</sup> See, e.g., *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804 (1986).

<sup>22</sup> See Anthony J. Bellia Jr., *Sosa, Federal Question Jurisdiction, and Historical Fidelity*, 93 VA. L. REV. IN BRIEF 15, 18–21 (2007), <http://www.virginialawreview.org/inbrief/2007/03/22/bellia.pdf>.

<sup>23</sup> See generally William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984) (discussing the phenomenon of “general” law in the 18th and 19th centuries).

<sup>24</sup> *Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). *American Well Works* was construing the statutory reach of 28 U.S.C. § 1331, but its conclusion applies a fortiori to Article III itself. A federal right of action is not a *necessary* condition for “arising under” jurisdiction, even under § 1331, but it is certainly a *sufficient* one. See RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 864 (5th ed. 2003).

<sup>25</sup> See Anthony J. Bellia Jr., *Article III and the Cause of Action*, 89 IOWA L. REV. 777, 786–87 (2004).

which it sat.<sup>26</sup> The “cause of action” for an ATS claim would thus have been considered either state law or part of the general law shared by the state and federal courts. If this account is right, then neither the cause of action nor the rule of decision would have constituted a federal element to bring the ATS within the scope of Article III’s “arising under” jurisdiction at the time of the statute’s enactment.

We might justify the ATS on a number of other jurisdictional grounds, however. Its drafters may have intended it to address primarily cases between aliens and citizens, in which cases party diversity would satisfy Article III without need of a federal question.<sup>27</sup> Other key cases may have involved ambassadors, who enjoyed their own constitutional provision for jurisdiction. And cases of piracy — a key category in *Sosa*’s account of the ATS — would have arisen after 1819 under a statute expressly incorporating the CIL of piracy into federal law.<sup>28</sup> Finally, the ATS’s drafters might have thought it could fit within Article III on some version of “protective jurisdiction,” which rests “arising under” jurisdiction upon strong federal interests rather than a federal rule of decision.<sup>29</sup> If any of these possibilities has merit, then we need not view the ATS as “stillborn” simply because a claim like that in *Sosa* or *Filartiga v. Pena-Irala*<sup>30</sup> would have raised no federal question in 1789.

I like my history as well as the next scholar, but it does seem that the more pressing question is whether, on *current* jurisdictional understandings, the sort of suits envisioned by the ATS’s drafters can fit within Article III without the need to classify CIL rules of decision as “federal.” And the answer to that question is easy because we no longer derive causes of action from the common law forms. Rather, a right of action must be either conferred expressly by statute or implied, as a matter of federal common law, as necessary to effectuate the intent of Congress.<sup>31</sup> Judicial recognition of implied rights of action is problematic, of course,<sup>32</sup> but the interface between domestic and international law has been an area of federal common law activity ever since *Sabbatino*’s recognition of the act of state doctrine. It is also true

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<sup>26</sup> Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93.

<sup>27</sup> See Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002).

<sup>28</sup> Act of Mar. 3, 1819, ch. 77, § 5, 3 Stat. 510, 513–14 (1819) (punishing “the crime of piracy, as defined by the law of nations”).

<sup>29</sup> See, e.g., Paul J. Mishkin, *The Federal “Question” in the District Courts*, 53 COLUM. L. REV. 157 (1953). I do not mean to concede the validity of such a theory. See Ernest A. Young, *Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption*, 95 CAL. L. REV. (forthcoming 2007) [hereinafter Young, *Yeti*] (arguing that protective jurisdiction is unconstitutional).

<sup>30</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>31</sup> See, e.g., *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).

<sup>32</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001).

that *Sosa* extends judicial power by recognizing a cause of action while the act of state doctrine restrains the exercise of judicial power, much like doctrines of prudential standing.<sup>33</sup> But there is a plausible case for federal common law in foreign affairs cases extending beyond *Sabbatino*'s rule of restraint.<sup>34</sup> In any event, the important point for present purposes is that once *Sosa* recognized a federal right of action, that recognition was sufficient to bring such claims within current understandings of Article III's "arising under" jurisdiction.

One might question whether this invocation of the Holmes Rule — that a case arises under the law that creates the cause of action<sup>35</sup> — ought to be sufficient to support federal question jurisdiction. Congress could, in theory, vastly expand federal jurisdiction by creating federal rights of action to enforce rules of decision that it did not have to legislate.<sup>36</sup> But even when the rule of decision to be enforced derives from some other body of law — state law under the FTCA, or "general" CIL on my reading of *Sosa* — the decision to provide a private federal remedy represents a significant federal policy choice. Observers of the legislative process note that whether to allow private enforcement is often one of the most contentious issues surrounding the enactment of substantive rules, and both courts and commentators have energetically debated the propriety of judicially implied private rights. It thus makes some functional sense to view a federal decision to provide a private right as a sufficient basis for invoking federal question jurisdiction.<sup>37</sup>

### III. IS THERE STILL GENERAL LAW?

My suggestion that the CIL rule of decision in *Sosa* suits should be viewed as "general" in nature highlights a disagreement with revisionist scholars like Professors Bradley, Goldsmith, and Moore about the continued validity of general law as a jurisprudential category after *Erie*.<sup>38</sup> In their earlier work on CIL, Professors Bradley and Gold-

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<sup>33</sup> See Young, *Sorting*, *supra* note 3, at 441.

<sup>34</sup> See Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 536–51 (2002).

<sup>35</sup> See *supra* note 24 and accompanying text.

<sup>36</sup> See Young, *Yeti*, *supra* note 29 (arguing that allowing Congress to create federal question jurisdiction without having to legislate some element of federal law would illegitimately ease the expansion of federal jurisdiction).

<sup>37</sup> Cf. *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding that where Congress has declined to provide a private right of action to enforce a federal rule of decision, that rule cannot support statutory arising under jurisdiction where it is enforced by a state law cause of action).

<sup>38</sup> See Bradley, Goldsmith & Moore, *supra* note 2, at 906 (arguing that *Sosa* "reiterated *Erie*'s assertion that federal courts could no longer apply general common law"). For my earlier proposal that CIL be treated as general law, see Young, *Sorting*, *supra* note 3, at 467–84.

smith argued that “*Erie* requires federal courts to identify the sovereign source for every rule of decision. Because the appropriate ‘sovereigns’ under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law.”<sup>39</sup> I want to suggest, however, that this disagreement is more apparent than real.

No one disagrees that CIL is “general” law in an important sense: As it exists on the international plane, CIL is derived from the mandate of no particular sovereign. Rather, it is a collective product arising out of the practice of many nations. Moreover, I doubt any revisionist scholar would disagree with the further proposition that, until CIL is incorporated into U.S. domestic law by some positive act, CIL retains only this “general” status and lacks any binding force in domestic courts. Professor Bradley, for example, has written that after *Erie*, “federal courts can no longer apply international law of its own force.”<sup>40</sup> Whether it is correct to say that U.S. courts *ever* applied international law “of its own force,”<sup>41</sup> it is certainly the case that they do not do so today.

The disagreement, if we have one at all, is over what sorts of positive acts are sufficient to give international law binding effect within the domestic legal system. Professors Bradley, Goldsmith, and Moore agree that the national political branches can adopt elements of CIL into federal law, as Congress did in the Torture Victim Protection Act of 1991.<sup>42</sup> They may also agree that state legislatures (and possibly courts) can incorporate CIL norms into state law in much the same way. The only disagreement, as I see it, goes to whether courts may sometimes interpret ordinary choice of law rules as providing the necessary authorization to give general CIL binding effect in the cases before them. In my view, there may be some cases in which no domestic jurisdiction has much interest in applying its own law to a dispute, and the application of ordinary choice of law rules might call for applying CIL — much as those rules might call for applying the law of a foreign nation in some cases. The question is whether *Erie* forecloses *that*.

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<sup>39</sup> Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 852 (1997).

<sup>40</sup> Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 523 (1997).

<sup>41</sup> A more accurate description, to my mind, would be that both state and federal jurisdictions prior to *Erie* decided — explicitly or implicitly — to adopt the general principles of international commercial law as binding, much as states today decide whether and to what extent to adopt the Uniform Commercial Code. If this description is right, then international law never applied “of its own force.”

<sup>42</sup> Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (Torture Victim Protection) (2000)).

It is hard to see why it would. My approach is certainly no affront to positivism, as the choice of law rule itself represents an act of the relevant state or federal sovereign that authorizes the court to apply the CIL norm in question.<sup>43</sup> Nor does it offend the exclusive *authority* of state and federal law within the domestic legal system because the application of CIL would turn, once again, on authorization from a federal or state choice of law rule. No one thinks, after all, that *Erie* forbids a federal court from applying French law in a case in which the events underlying a dispute all transpired in France, or in which the parties have agreed to a law-selection clause in a contract. French law does not apply “of its own force” in such cases; rather, application of foreign law is permitted to the extent that the relevant state or federal choice of law rules permit it. The “general law” proposal is no different, and it is hard to see why revisionists would reject it.

#### IV. SEAMS IN THE WEB

I want to end where I began, with the broader issue of retail versus wholesale incorporation of international law into the domestic legal system. The CIL debate is one of a range of debates about the domestic status and uses of international and foreign law within the domestic legal system. Others include longstanding disputes about self-executing treaties and the validity of treaty reservations, as well as the more recent fracas concerning the Supreme Court’s citation of foreign authority in constitutional interpretation. In each of these contexts, internationalists tend to see the domestic legal system as part of a more global system of legal norms — a seamless web of legal principles that act across national boundaries. A more nationalist perspective — to which the CIL revisionists plainly subscribe — sees global norms crossing national boundaries only by reason of a particularized political choice. This is not to say that such global norms may never cross into the domestic sphere, but rather only that the domestic legal system remains the primary source of legal principle just as it remains the most ready focus of democratic accountability. This principle of domestic primacy is what is at stake in debates about the way we incorporate international law.

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<sup>43</sup> See Young, *Sorting*, *supra* note 3, at 486–92.