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Response Essay: History, Ideology, and Erie v. Tompkins

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Response Essay
History, Ideology, and *Erie v. Tompkins*

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Professor McGinnis's lucid, balanced, and insightful essay is surely correct in suggesting that the long-term significance of the U.S. Supreme Court's decision in *Sosa v. Alvarez-Machain*[1] is uncertain. The far-reaching impact of globalization, the changing position of the United States in world affairs, and the evolution of domestic social and cultural values may reshape attitudes toward the substantive political issues that underlie current debates over customary international law. His suggested analogy to *Washington v. Glucksberg*[2] could prove apt. The Court's history, after all, is replete with doctrines, analytic frameworks, and interpretive methodologies that have been applied erratically, remolded drastically, discarded silently, or repudiated overtly.

I. Political Dynamics and Constitutional Arguments

As Professor McGinnis has explored *Sosa*'s doctrinal implications so thoughtfully, I consider the case from a different perspective – as a paradigmatic example of the political dynamic and rhetorical practice of American constitutionalism. The key to understanding our governmental system is to recognize the ways in which partisan groups struggle to secure relatively hospitable institutional havens for themselves among the levels and branches of government. Such groups support the levels and branches they perceive as most likely to favor their policy goals and seek to check those they perceive as obstacles or threats. Constitutional doctrines, theories, and principles serve as tools to magnify the institutional power of the former while minimizing that of the latter. Both this political dynamic and its generation of contending constitutional arguments are as old as the Constitution itself, beginning classically with Hamilton's defense of national authority (on the federalism axis) and executive and judicial power (on the separation of powers axis) and Jefferson's rival defense of state authority (on the federalism axis) and legislative power (on the separation of powers axis). Over the years the dynamic has spawned countless variations and recombinations as rival groups in succeeding generations forged

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[1] 542 U.S. 692 (2004).

[2] 521 U.S. 702 (1997); *see* John O. McGinnis, Sosa *and the Derivation of Customary International Law*, *supra* p. 492.

their own distinctive constitutional ideologies and rhetorics to serve their conflicting purposes in new historical contexts.

That dynamic largely explains the jurisprudential contours of contemporary debates over customary international law. Essentially, after World War II some political liberals became vigorous supporters of the international "human rights" movement and recognized that its principles and institutional achievements could be used to support their domestic policy goals, such as prohibiting various forms of discrimination and abolishing the death penalty. They sought to gain legal leverage by expanding the traditional constitutional dynamic to include a newly prominent and empowered "level" of authority: the treaties and customs of international law. Quite understandably, political conservatives rose in opposition, severely challenging or flatly rejecting that proclaimed level of authority. When conservatives succeeded in persuading Congress and the Executive to refuse to ratify most international human rights treaties or to ratify them with non-self-executing declarations and other reservations, liberals began to look toward the federal judiciary and maintain that it had the right to enforce customary international law on its own authority. Conservatives responded by denying that authority and insisting that customary international law could become law in the United States only with the approval of Congress and the Executive. When the Warren Court used federal judicial power to serve liberal policies and conservatives reacted by seeking to restrict that power and reverse those policies, their efforts confirmed the two sides in their contrasting views of the federal judicial power and extended their conflicting attitudes to issues that ranged across the spectrum of constitutional debate. Thus, by the time that the international human rights movement gained new momentum in the late 1970s and the 1980s, the positions of the two sides had long since hardened into rival ideological principles.

Against that background, the opinions in *Sosa* are readily understandable. Six Justices, three considered "liberals" and three considered "moderates," joined to outline a cautious approach to customary international law claims. On the one hand, they affirmed the power of the federal courts to enforce customary international law in the context of the Alien Tort Statute (ATS),[3] but on the other hand they prescribed a highly deferential role for those courts and limited their power to claims that met sharply restrictive conditions.[4] Concurring in the judgment denying plaintiff's claim, the Court's three "conservatives" agreed with the limiting elements of the majority's opinion but rejected its conclusion that the federal courts possessed narrow discretion to recognize new customary international law claims.[5] Their goal was to deny the federal judiciary any power to enforce such claims absent authorization by the legislative and executive branches. Thus, in *Sosa* the Justices divided along established ideological lines on a critical issue, while the Court as an institution inched along a political middle road, edging slightly to the right.

II. The Salience of *Erie v. Tompkins*

Just as the lineup of the Justices illustrated the political dynamic at work, the treatment they accorded *Erie Railroad Co. v. Tompkins*[6] exemplified the way the dynamic shapes constitutional arguments. *Erie* itself said nothing about customary international law, and

[3] *Sosa*, 542 U.S. at 729–30.
[4] *Id.* at 724–28.
[5] *Id.* at 744–47 (Scalia, J., concurring in part and concurring in the judgment).
[6] 304 U.S. 64 (1938).

for a half-century most commentators on the subject assumed that it was not relevant.[7] More recently, however, as human rights advocates pressed the federal courts for ever more energetic enforcement of customary international law, conservatives turned to *Erie* to bolster their grounds of legal opposition.[8] *Erie*, after all, had been the product of an earlier and quite different ideological era when Progressives sought to restrict the jurisdiction and lawmaking capacities of the federal judiciary,[9] and the Court's opinion surely contained language that contemporary conservatives could hope to use.

Thus, the contrary arguments of the Justices took shape. The concurrence contended that *Erie* was central to the customary international law issue and that it imposed strict limitations on federal judicial power. *Erie*, the concurring Justices argued, held that there was no such thing as "general" common law, that federal courts could only make law when authorized by a positive statutory or constitutional grant, and that mere jurisdictional statutes – such as the ATS – were not grants of lawmaking authority.[10] Because customary international law was part of the "general" common law that *Erie* abolished, and because customary international law claims were not authorized by the Constitution or congressional statutes,[11] the concurrence concluded, *Erie* meant that customary international law necessarily lay beyond the lawmaking power of the federal courts.[12] In response, the majority rejected that essentially prohibitory interpretation of *Erie* and construed the case as establishing for customary international law claims a less restrictive principle of "judicial caution."[13] While *Erie* induced a "significant rethinking of the role of the federal courts" in making common law and eliminated the "general" law, the majority Justices reasoned, it also inspired a new "special" federal common law based on the constitutional powers of the national government. Thus, for the majority, *Erie* meant only that the Court should "look for legislative guidance before exercising innovative authority over substantive law."[14]

Those contrasting interpretations are unsurprising. Indeed, they fit snugly within the pattern of *Erie*'s forensic history. New Deal liberals construed the case to uphold broad congressional power and protect ordinary individuals against harsh corporate litigation tactics. Warren Court liberals construed it to strengthen the federal courts and free them from state procedural rules. Burger and Rehnquist Court conservatives construed it to prevent the federal courts from creating statutory and constitutional causes of action for individuals injured by unlawful behavior, while conveniently ignoring it when they created federal common law to protect military contractors from tort suits.[15] Thus, the

[7] *E.g.*, Restatement (Third) of the Foreign Relations Law of the United States § 111, Reporters' Note 3 (1987).

[8] *E.g.*, 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).

[9] Edward A. Purcell, Jr., Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in Twentieth-Century America, 13–16, 19–26, 64–91 (2000).

[10] 542 U.S. at 744 (Scalia, J., concurring in part and concurring in the judgment).

[11] The Torture Victim Protection Act, 28 U.S.C. § 1350 note, is a narrow exception.

[12] The concurrence cited Bradley & Goldsmith, *supra* note 8, and followed their basic argument. *See* 542 U.S. at 739–40, 750 (Scalia, J., concurring in part and concurring in the judgment).

[13] 542 U.S. at 725.

[14] *Id.* at 726.

[15] Purcell, *supra* note 9, at 213–16, 287–95, 301–02. The concurrence's position would serve similar pro-corporate purposes. *See* William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 Va. J. Int'l L. 687, 688 (2002) (noting that the defendants in many recent ATS suits are U.S. corporations).

opinions in *Sosa* followed familiar ideological practice, demonstrating once again that *Erie* is a kind of jurisprudential Rorschach test, a device that reveals the political goals and values of those who seek to use it.

The use of *Erie* in *Sosa* is particularly problematic for the concurrence. The majority did not base its conclusions on *Erie* but merely construed the case as establishing an important limiting principle. The concurrence, in contrast, relied on *Erie* as the foundation of its position. Claiming that *Erie* provided such clear and controlling authority on customary international law issues seems both puzzling and unjustified.

The claim seems puzzling because two of the three Justices who concurred, Justices Scalia and Thomas, are outspoken originalists who used *Erie* to trump the understanding of the Founders. *Erie* effected – in the words of the concurrence itself – an "avulsive change"[16] that rejected the Founders' views of the nature of the common law. Similarly, *Erie* also quite likely misconstrued the intention of the First Congress – whose membership included many of the Founders – when it interpreted the meaning of the word "laws" in Section 34 of the original Judiciary Act of 1789.[17] Such considerations should have led originalists to argue that *Erie*, if shielded from overruling by compelling practical considerations, must be confined to areas where it already applied and not be extended to new areas, especially not to an area such as customary international law where it repudiates the original understanding of the Founders.[18] Equally striking, the concurrence defends its embrace of *Erie* and its "avulsive change" on the ground that since 1789 there have been many other changes in both the nature and content of customary international law and federal common law.[19] Thus, its argument assumes that legal concepts and principles must be altered and adapted to meet changed historical conditions, an argument that severely limits, if it does not fundamentally undermine, the claims of originalism.[20]

The concurrence's claim about *Erie* is unjustified because the substantial legal changes that it highlights point to a fundamental flaw in its argument. Like both common law and customary international law, "general" law was also an evolving concept, not an eternally fixed category containing timeless and unchanging elements. Between 1789 and 1938, in fact, its content underwent massive changes. It expanded broadly as both constitutional issues and more than two dozen common law fields were pulled within its realm, leading the Court in 1888 to confess embarrassment at its inability to clearly define and limit its scope.[21] During the same years, "general" law also contracted as state statutes created increasing numbers of "local" laws that narrowed its rule, and – most telling for present purposes – as the Court withdrew selected components from the

[16] 542 U.S. at 744–45, 749 (Scalia, J., concurring in part and concurring in the judgment).

[17] PURCELL, *supra* note 9, at 306 & works cited at 407 nn.98–99.

[18] Conservatives similarly stretched *Erie* when they sought to prevent the federal courts from implying private rights of action under federal statutes and constitutional provisions even though such actions were within areas that *Erie* expressly recognized as proper for federal judicial lawmaking. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[19] 542 U.S. at 744–46 & n.* (Scalia, J., concurring in part and concurring in the judgment).

[20] The concurrence attempts to reconcile its use of *Erie* with originalism by, in effect, abandoning originalism. It contends that changed historical conditions would have led the Founders to change their views. 542 U.S. at 749–50 (Scalia, J., concurring in part and concurring in the judgment).

[21] Bucher v. Cheshire R.R. Co., 125 U.S. 555, 583 (1888).

category and incorporated them into authentically "federal" law. Maritime law was part of "general" law in the eighteenth century, but by the early twentieth century the Court had transformed it into "federal" law through federal admiralty jurisdiction.[22] The law of interstate disputes was another area of "general" law based in part on customary international law that the Court incorporated into "federal" law on the basis of a jurisdictional statute.[23] Further, the Court narrowed the "general" law of personal jurisdiction and conflicts of laws by partially constitutionalizing both fields.[24] Finally, beginning in the 1890s the Court used the Fourteenth Amendment to constitutionalize the "general" law of limitations on government that had developed during the nineteenth century.[25] Thus, the content of "general" law changed substantially over time, and the Court assumed that it could constitutionalize or otherwise incorporate into "federal" law those parts of "general" law that covered issues falling within areas of federal constitutional authority. *Erie* abolished the *category* of "general" law, but it did not define the specific content of that category, and it neither repudiated those prior incorporations nor prohibited similar incorporations in the future.

What *Erie* did is complex, but for customary international law it is inconclusive. *Erie* determined that some elements then placed within the category of "general" law – explicitly the commercial law of *Swift v. Tyson*,[26] on its facts the tort law of *Baltimore & Ohio Railroad Co. v. Baugh*,[27] and by express statement all "general" law fields over which Congress lacked legislative power[28] – were beyond the non-constitutional lawmaking authority of the federal judiciary. *Erie* did not determine that all the various components of customary international law were necessarily and forever "general," nor did it determine that the Court was powerless to incorporate some of them into "federal" law if that became appropriate.[29] Indeed, it could not have done so because such a determination would have contradicted its fundamental constitutional premise that congressional power is the touchstone of the non-constitutional lawmaking power of the federal judiciary.[30] Thus, *Erie* left untouched the Court's long-exercised and still-recognized power to

[22] *E.g.*, S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

[23] *E.g.*, Kansas v. Colorado, 206 U.S. 46 (1907); Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

[24] Chapter 7, pp. 235–36.

[25] Michael G. Collins, *October Term, 1896 – Embracing Due Process*, 45 AM. J. LEGAL HIST. 71 (2001).

[26] 41 U.S. 1 (1842).

[27] 149 U.S. 368 (1893).

[28] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[29] Illustrating its continuing use of selective incorporation after *Erie*, the Court decided that conflict of laws rules should not be incorporated into federal common law, Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487 (1941), but that limits on personal jurisdiction should remain constitutionalized. International Shoe Co. v. Washington, 326 U.S. 310 (1945). Similarly, *Erie* determined that the old "law merchant," a part of customary international law and "general" law, had been applied beyond the limits of federal judicial power, but *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), held that one part of that "law merchant" lay within federal power and remained an area of "federal" common law. Again, the Court had treated the act of state doctrine as a matter of "general" law in *Underhill v. Hernandez*, 168 U.S. 250 (1897), but it incorporated that doctrine into federal common law in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

[30] *Erie*, 304 U.S. at 78. The Constitution grants Congress authority to legislate over customary international law. U.S. CONST. art I, § 8, cl. 10.

incorporate elements of customary international law whenever those elements involve issues that fall within areas of federal constitutional authority.[31]

III. Conclusion

Professor McGinnis is surely right that *Sosa*, like *Erie* and so many other constitutional decisions, leaves many questions unanswered. The Court inevitably deals with complex and far-reaching issues incapable of full and final resolution. Legal materials, moreover, are frequently inadequate to answer the novel and difficult questions that our world continually generates. We rely unavoidably on the hope of wisdom in the Court.

[31] The old "general" law areas of admiralty, interstate controversies, constitutional limitations on government, and judicial jurisdiction over persons and things all remain recognized areas of federal law, although their content has been changed and their foundations placed on diverse statutory and constitutional provisions. Further, the Court recognized an analogous type of federal law rooted implicitly in constitutional and statutory sources involving the national government's powers over foreign relations that remains in force today. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Belmont, 301 U.S. 324 (1937).