

# A REVISED REVISIONIST POSITION IN THE LAW OF NATIONS DEBATE

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## ABSTRACT

*One of the most contentious debates in the legal field has continued for decades over the question: is customary international law incorporated into U.S. domestic law? This question has sparked controversy that has resulted in multiple positions but no definite answer—the modern position with Dean Harold Koh and Professor Carlos Vasquez to the revisionist position with Professors Curtis Bradley and Jack Goldsmith. The U.S. Supreme Court has declined to answer this question while acknowledging the importance of its impact on U.S. law. The latest case before the Supreme Court—Jesner v. Arab Bank—touched upon this debate once again, and while its decision implicitly supports the revisionist position, the Court did not resolve this debate.*

*This Article posits that the revisionist position put forth by Professors Curtis Bradley and Jack Goldsmith was ultimately correct—with a slight revision. This Article concludes that: (1) the traditional law of nations is exclusively within federal law, while modern CIL can be adopted by the states; and (2) the law of nations only becomes federal law if either (a) the Constitution permits or requires the law of nations in interpretation of its provisions; or (b) the political branches adopt CIL or give the judiciary jurisdiction to decide questions regarding the law of nations.*

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## INTRODUCTION

One of the most contentious debates in the legal field today is whether customary international law (“CIL”) or the “law of nations”<sup>1</sup> is incorporated into the domestic law of the United States. This debate began before the turn of the century with revisionist scholars Professors Curtis Bradley and Jack Goldsmith’s challenge to the long-

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1. Customary international law as it is defined today was historically known as the “law of nations.” While there is some debate whether customary international law is the same as the law of nations or is different or only a part of the law of nations, for purposes of this Article, both terms will be used interchangeably. See Jordan Paust, *Customary International Law: Its Nature, Sources and Status in the United States*, 12 MICH. J. INT’L L. 59, 59 (1990). Cf. William J. Moon, *The Original Meaning of the Law of Nations*, 56 VA. J. INT’L L. 51, 54 (2016) (arguing that the “law of nations” at the time of the Founding and current CIL are not necessarily the same). Compare *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 399 (4th Cir. 2011) (concluding that “customary international law is not synonymous with the law of nations, but rather that ‘customary international law is one of the sources for the law of nations’”) with *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 738 (9th Cir. 2008) (“The law of nations is synonymous with ‘customary international law.’”).

held position that CIL is federal law—what they termed the “modern position.”<sup>2</sup> While theirs was not the first article to challenge the idea that CIL is federal law,<sup>3</sup> it was the spark to the current debate. Since that article, scholars have split primarily into three schools of thought: (1) the modern position, (2) the revisionist position, and (3) the intermediate position, although this latter position encompasses several distinct conclusions.<sup>4</sup>

In this debate, the modern position generally holds that CIL is incorporated into federal law. The revisionist position posits the opposite: CIL is not federal law unless incorporated by the federal political branches or the states. The intermediate position takes a middle ground: that CIL has a status between state and federal law—essentially non-preemptive federal or non-federal law. Recently, additional articles have emerged from scholars including Gary Born, Professor Anthony Bellia, and Professor Bradford Clark.<sup>5</sup> Though this debate has ensued for decades, the arguments continue today without a prevailing answer.

This debate has not been contained to the academic field. Since Bradley and Goldsmith’s original article, the Supreme Court has reviewed several decisions involving CIL’s relationship to domestic law, including *Sosa v. Alvarez-Machain*,<sup>6</sup> *Kiobel v. Royal Dutch Petroleum Co.*,<sup>7</sup> and most recently *Jesner v. Arab Bank*.<sup>8</sup> Instead of providing answers as to CIL’s status in the United States, the Supreme Court has only muddied the waters.<sup>9</sup>

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2. See generally 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) [hereinafter Bradley & Goldsmith, *Critique*] (setting forth the revisionist position).

3. See, e.g., Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 668 (1986); M. E. Kelly, *Customary International Law in United States Courts*, 32 VILL. L. REV. 1089, 1126 (1987).

4. See generally Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011) (discussing the intermediate positions).

5. See also Anthony J. Bellia, Jr. & Bradford R. Clark, *The Law of Nations as Constitutional Law*, 98 VA. L. REV. 729, 729 (2012) [hereinafter Bellia & Clark, *Constitutional Law*]; Gary Born, *Customary International Law in United States Courts*, 92 WASH. L. REV. 1641, 1671 (2017).

6. 542 U.S. 692, 699 (2004) (concluding that non-resident aliens may file a tort suit in federal court for violations of customary international law but ultimately rejected the claim).

7. 569 U.S. 108, 124–25 (2013) (looking to violations against the law of nations but rejecting the claim because of the presumption against extraterritoriality application of the statute).

8. 138 S. Ct. 1386, 1394 (2018) (concluding that the Alien Tort Statute does not permit lawsuits against foreign corporations).

9. See, e.g., Ernest A. Young, *Sosa and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28, 28 (2007) (discussing how all sides of the law of nations debate have

This debate can affect many areas of domestic and international law.<sup>10</sup> As discussed *infra*,<sup>11</sup> CIL is a binding norm of international law if it is “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>12</sup> Essentially, if a critical number of states conform to a certain practice and consider it legally binding, then that practice is binding on all states.<sup>13</sup> For example, there are few domestic and international laws currently regulating the international realm of cybersecurity law. U.S. law has not kept up with the pace of changing technology or the interconnectedness of the internet.<sup>14</sup> This is a particularly troubling problem, as demonstrated in the 2016 U.S. presidential election and recent cyberattacks on states and private companies.<sup>15</sup> There are some international rules that provide guidance, such as the TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE.<sup>16</sup> These rules are adopted by experts and generally reflect CIL, including the idea that existing *jus ad bellum* (“right to war”)<sup>17</sup> and *jus in bello* (“law in waging war”)<sup>18</sup> rules apply in cyberspace.<sup>19</sup>

The question remains: in the absence of a statute or executive action, are federal courts *required* to apply CIL norms in cyber-related cases, such as in cases of cyberespionage or cyberterrorism? If the modern position of this debate is correct, then the answer is generally: yes, courts must apply CIL as part of federal law. If the revisionist position controls, then no, federal courts cannot apply CIL without

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interpreted the Supreme Court’s decisions through *Sosa v. Alvarez-Machain* as supporting their own arguments). After the decisions in *Sosa* and *Koibel*, the number of books and articles discussing the effect of these cases on CIL incorporation into federal law has seemed to increase. See generally ANTHONY J. BELLIA, JR. & BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* (2017) [hereinafter BELLIA & CLARK]; CURTIS BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2013); JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2006); Bellia & Clark, *Constitutional Law*, *supra* note 5.

10. BELLIA & CLARK, *supra* note 9, at xi–xii.

11. See *infra* Part II.

12. Restatement (Third) of Foreign Relations Law § 102(2) (1987).

13. Whether this is an accurate definition of CIL is beyond the scope of this article.

14. David M. Howard, *Can Democracy Survive the Cyber Age?: 1984 in the 21st Century*, 69 HASTINGS L.J. 1355, 1364 (2018).

15. See, e.g., Jessica Bursztynsky, *Ex-CIA officer sees Iran doing ‘hit-and-run’ cyberattacks — ‘They don’t want us to retaliate’*, CNBC (Jan. 9, 2020), <https://www.cnbc.com/2020/01/09/ex-cia-official-carol-rolle-flynn-sees-iran-doing-small-cyberattacks.html>.

16. TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (2d ed. 2017).

17. JUS AD BELLUM, Black’s Law Dictionary (11th ed. 2019).

18. JUS IN BELLO, Black’s Law Dictionary (11th ed. 2019).

19. Kristen E. Eichensehr, *The Cyber-Law of Nations*, 103 GEO. L.J. 317, 376 (2015); see also Harold Koh, *International Law in Cyberspace*, 54 HARV. INT’L L.J. ONLINE 1, 7–8 (2012).

prior political branch authorization.<sup>20</sup> Without knowing which position in this debate is prevailing, courts may choose contradictory or incorrect applications of the law, if any, or ignore international laws or tribunal decisions altogether. This is but one example of the potential effect of CIL in the United States.

Another example relates to the application of the Paris Agreement. Almost every country in the world has signed the agreement on climate change<sup>21</sup> except the United States.<sup>22</sup> As almost every country in the world has agreed to the terms in the Paris Agreement, this is a strong indicium of international custom. As such, the Paris Agreement appears to satisfy the dominant definition of CIL—a general and consistent practice of states followed by them from a sense of legal obligation.<sup>23</sup> Even though the United States withdrew from the Paris Agreement, would the U.S. still be bound by the terms of the Agreement through CIL? In the modern position, the answer could be yes. But the revisionist answer likely would be: no, not unless Congress or the states incorporated the terms of the Paris Agreement into law.<sup>24</sup>

Another question that must be assessed is whether the body of decisions of international courts and international tribunals, which make up a significant part of the law of nations, become part of federal law in the United States. For example, the International Court of Justice determined the United States violated another nations' rights under the Vienna Convention on Consular Relations. In *Medellin v. Texas*,<sup>25</sup> the United States refused to implement the international court's decision, as the Supreme Court ruled it is not obligated to follow that

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20. Curtis A. Bradley et al., *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 922 (2007) (“In some circumstances, the executive branch can provide the authorization for courts to draw upon CIL in developing federal common law.”).

21. *Paris Agreement - Status of Ratification*, U.N., [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) (last visited Dec. 14, 2019).

22. Lisa Friedman, *Syria Joins Paris Climate Accord, Leaving Only U.S. Opposed*, N.Y. TIMES (Nov. 7, 2017), <https://www.nytimes.com/2017/11/07/climate/syria-joins-paris-agreement.html>.

23. See Srinivas Raman, *Customary International Law implications of Trump's withdrawal from Paris Agreement*, MODERN DIPLOMACY (Nov. 17, 2017), <https://modern diplomacy.eu/2017/11/17/customary-international-law-implications-of-trump-s-withdrawal-from-paris-agreement/> (concluding that the U.S. “will be obligated to conform to customary international law principles emerging as the global norm from the Paris Agreement”).

24. This specific question does not solely relate to whether CIL is federal law, but also whether Congress—or in this specific instance, the executive branch—can withdraw from or reject the law of nations, and if it was effective enough to preclude the application of CIL norms to domestic law.

25. 552 U.S. 491 (2008).

court's interpretation.<sup>26</sup> The Supreme Court based its decision on the fact that because the treaty provisions are not "self-executing," the international court's decision is not binding on U.S. courts.<sup>27</sup>

The question, then, is not whether the international tribunal's *decision* is binding, but whether the United States courts would in the future be bound by the *law of nations*, which is created by an amalgamation of laws, including that ICJ decision. This argument could find that the U.S. violated a nation's rights under CIL, amounting to the same result as being bound by the ICJ decision. Rather than the specific decision being enforced in the U.S., it would be the CIL custom, including that international tribunal's decision, that would be enforced under the modern position. If the customs contained in the Vienna Convention on Consular Relations becomes part of CIL, the modern position again would say: yes, those norms are domestic law, while the revisionist position would adamantly disagree.

While analyzing the three positions and their underlying arguments, this Article leans in favor of the revisionist position. This position in this Article could be termed a "revised revisionist" position because it slightly alters the position espoused by the predominant revisionist scholars. The questions specifically addressed here are: (1) is CIL federal law, state law, or neither; and (2) how is CIL incorporated into federal law—or is it at all? Based on these questions, the Article concludes that: (1) the traditional law of nations is exclusively within the domain of federal law, while modern CIL can be adopted by either the federal or state political branches; and (2) the law of nations only becomes domestic law if either (a) the Constitution permits or requires the law of nations in interpretation of its provisions; or (b) the political branches adopt a certain custom or give the judiciary jurisdiction to decide questions regarding the law of nations.<sup>28</sup>

I would like to preface this Article with the statement that this is *not* an article against human rights litigation or protections in the United States. This Article simply stands for the proposition that before courts can apply CIL, the political branches of the federal, or in some

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26. Jenny S. Martinez, *International Courts and the U.S. Constitution: Reexamining the History*, 159 U. PA. L. REV. 1069, 1078 (2011)

27. *Id.*

28. This conclusion is in line with Professor Bradley and Goldsmith's more recent article co-authored with David Moore. See Bradley et al., *supra* note 20, at 886 ("By contrast to the modern position, the revisionist view was that CIL does not automatically have the status of federal common law and that after *Erie*, federal courts needed some authorization from either the political branches or the Constitution in order to apply CIL.").

cases, a state, government must incorporate or authorize CIL as law or the Constitution can be interpreted to have already incorporated these norms. While this conclusion may impact human rights litigation in the United States, it will also make it clear that the political branches should incorporate these norms, as the Constitution has delegated that task to them.

This Article will review the revisionist, intermediate, and modern positions, explaining why the revisionist position is the best resolution of this debate. This Article will proceed in five parts: Part I will discuss CIL overall, including the difficulty in determining what CIL entails and its modern importance to U.S. law. Part II will then review the current debate surrounding whether CIL is federal law, starting with Bradley and Goldsmith's initial challenge in 1997 to the most recent debate involving numerous professors and international law scholars. Part III will present a challenge to the modern and intermediate positions and then lay out the argument for the conclusion described in the previous paragraphs. Finally, the last part will conclude the Article.

## I. DEFINING CIL AND ITS RELATION TO FUNDAMENTAL CHANGES IN INTERNATIONAL RELATIONS

The “law of nations,” or customary international law (“CIL”), is one of the two main sources of international law—the other source is treaties.<sup>29</sup> CIL is considered a binding norm of international law if it is “a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>30</sup> It includes only those standards, rules, or customs (1) affecting the relationship between states or between an individual and a foreign state, and (2) used by those states for their common good and dealings with other states.<sup>31</sup> CIL is distinguished from the other main source of international law—treaties—in that treaties are written, negotiated, and stable once signed, while CIL is

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29. Nikki C. Gutierrez & Mitu Gulati, *Custom in Our Courts: Reconciling Theory with Reality in the Debate About Erie Railroad and Customary International Law*, 27 DUKE J. COMP. & INT'L L. 243, 246 (2017).

30. Restatement (Third) of Foreign Relations Law § 102(2) (1987). Emmerich de Vattel defined the law of nations as “[c]ertain maxims and customs, consecrated by long use, and observed by nations in their mutual intercourse with each other.” EMMERICH DE VATTEL, *THE LAW OF NATIONS* § 25 (Joseph Chitty ed., Phila., T. & J.W. Johnson & Co. 1859) (1758); see also Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1116 (1999) (“CIL is typically defined as the collection of international behavioral regularities that nations over time come to view as binding as a matter of law.”).

31. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d Cir. 2010), *aff'd*, 569 U.S. 108, 114 (2013).

generally unwritten and fluid in content and interpretation.<sup>32</sup> Customary international law is therefore best described as “a kind of international common law.”<sup>33</sup>

CIL historically governed areas of international law such as banning genocide, murder, and slavery, but in the past seventy years CIL has grown to cover numerous other human rights issues as well.<sup>34</sup> The expanding importance of CIL can be seen in the increasing number of domestic federal cases analyzing and applying CIL, either in the absence of federal law or in construing federal statutes.<sup>35</sup> As our world becomes more international and interdependent, the breadth and importance of CIL grows.

But how does a court or state know when CIL is sufficiently created or accepted? There are two parts to the definition of CIL: (1) a general and consistent practice of states, and (2) that practice is followed by states from a sense of legal obligation.<sup>36</sup> CIL does not need to be uniformly or unanimously applied or agreed upon for it to be considered a general and consistent practice.<sup>37</sup> But it is difficult to determine what consistent state practice actually *is*; there is no single source, giving CIL a soft and “indeterminate character.”<sup>38</sup> CIL is

32. Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 76 (2007).

33. See Lee M. Caplan, *The Constitution and Jurisdiction over Foreign States: The 1996 Amendment to the Foreign Sovereign Immunities Act in Perspective*, 41 VA. J. INT'L L. 369, 382 (2001) (noting that “the law of nations constituted something like an international common law”).

34. Berta E. Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 356 (1991); Edward H. Sadtler, *A Right to Same-Sex Marriage Under International Law: Can It Be Vindicated in the United States?*, 40 VA. J. INT'L L. 405, 446 (1999).

35. See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 737 (2004) (concluding that non-resident aliens may file a tort suit in federal court for violations of customary international law); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (holding that the act of state doctrine precluded U.S. courts from inquiring into the validity of the public acts that a recognized foreign sovereign power committed within its own territory); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d Cir. 2000) (holding that a district court has jurisdiction over a torture claim brought by Nigerian émigrés against an American corporation for actions that occurred in Nigeria); *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980) (holding that official torture violates the law of nations and that federal courts thus have jurisdiction to hear an action in tort by torture victims under the ATS).

36. *McKesson Corp. v. Islamic Republic of Iran*, 672 F.3d 1066, 1075–76 (D.C. Cir. 2008). This second element is often termed “*opinio juris*.” Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001).

37. Jordan J. Paust, *Customary International Law: Its Nature, Sources and Status as Law of the United States*, 12 MICH. J. INT'L L. 59, 63 (1990).

38. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (citing Louis Henkin, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995)).

created from myriad decisions and made in hundreds of international and domestic sources of law. Trouble particularly stems from the second element—a sense of legal obligation—as states generally do not explain why they take or refrain from taking particular actions. Therefore, this *opinio juris* element has most often been inferred from state practice,<sup>39</sup> which in effect melds the two elements into one and the same: general state practice.

Then what counts as “state practice”? Is it simply domestic case law, or does state practice consider the opinions of that state’s government and other indicia of a state’s actions? How does state practice become “general and consistent,” and what is the minimum criteria? To the traditional view, state practice is a practice of sufficient density, and the degree of consistency required may depend on the subject matter of the rule in question: “Rigorous conformity is not demanded for the establishment of a rule of customary international law.”<sup>40</sup> This state practice comes from a combination of international court decisions, actions and declarations from states, and other sources; together, they create the law of nations.<sup>41</sup> The U.S. Supreme Court has recognized the law of nations as “a norm that is specific, universal, and obligatory.”<sup>42</sup> This requires that an international law norm have at least as much “definite content and acceptance among civilized nations [as] the historical paradigms familiar” at the time the Alien Tort Claim Act was enacted.<sup>43</sup> Similarly, the ICJ has said that “State practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked.”<sup>44</sup>

An issue at the heart of CIL is whether domestic courts or their governments drive the creation of and change in CIL. As the consistent or general practice of states changes, so does CIL, and CIL is “continually evolving.”<sup>45</sup> The sources that create and alter CIL tend to be domestic courts themselves rather than solely international tribunals, but international decisions and agencies still influence the

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39. Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 373 (2002).

40. David M. Ong, *Joint Development of Common Offshore Oil and Gas Deposits: “Mere” State Practice or Customary International Law?*, 93 AM. J. INT’L L. 771, 793 (1999).

41. See *Flores*, 414 F.3d at 247 (“Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas.”).

42. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

43. *Sosa*, 542 U.S. at 719.

44. *The North Sea Continental Shelf Case (Judgment)*, 1969 I.C.J. 12, 43.

45. *Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988).

evolution of CIL, as both indicate “general state practice.”<sup>46</sup> A state acting in direct violation of general CIL could instead be interpreted as a change in the rule or evidence the beginning of a differing or new rule, just as a court reading a CIL rule too broadly or narrowly may actually influence or alter that rule.<sup>47</sup> Because it is “state practice” that defines the law of nations, the states themselves have the power to define CIL. Historically, only a limited number of states truly created or affected the law of nations, namely large powers or those dominant in the area of the relevant law of nations—such as Russia and the United States in the international law of war.<sup>48</sup> However, as globalization has increased, it has become more difficult for a few powerful states to control or create CIL, requiring a more general consensus outside the traditional powers.<sup>49</sup>

The second part of the CIL definition is that states follow this from a “sense of legal obligation.”<sup>50</sup> But what makes states comply with international law? One persuasive theory is that, rather than a check on state actions, international law instead arises from states’ pursuits of their own self-interests.<sup>51</sup> This theory explains that the law of nations as CIL comes directly from state practice and changes as state practice does. For example, virtually all states condemn torture, yet many are still accused of continuing the practice despite that the act of torture is a violation of the law of nations.<sup>52</sup> If a state acts against customary

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46. See Christiana Ochoa, *Towards a Cosmopolitan Vision of International Law: Identifying and Defining CIL Post Sosa v. Alvarez-Machain*, 74 U. CIN. L. REV. 105, 123 (2005) (“National courts and the international courts and tribunals referred to by McDougal, Lasswell, and Chen, as well as mechanisms like the ATCA, provide avenues through which individuals might have direct participation in the CIL formation process.”).

47. Cohen, *supra* note 32, at 77.

48. See John J. Chung, *The Role of Naval Power in the Development of Customary International Law*, 34 QUINNIPIAC L. REV. 39, 43 (2015) (stating that military power exercised by only a few states shaped the customary law of war).

49. B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1, 28 (2018).

50. While in practice these two elements can often be conflated, courts still look to both elements in determining CIL norms. See, e.g., *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 248 (2d Cir. 2003) (“Furthermore, a principle is only incorporated into customary international law if States accede to it out of a sense of legal obligation.”).

51. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 13 (2016).

52. See also Heather L. Williams, *Does an Individual Government Official Qualify for Immunity Under the Foreign Sovereign Immunities Act?: A Human Rights-Based Approach to Resolving A Problematic Circuit Split*, 69 MD. L. REV. 587, 620 (2010) (noting that “despite international condemnation, many of the world’s governments continue to engage in, condone, or tolerate torture”); Rick Noack, *Most countries are against torture — but most have also been accused of it*, WASH. POST (Dec. 12, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/12/12/most-countries-are-against-torture-but-most-have-also-been-accused-of-it/>.

international law, does this mean the state rejected it or changed it? Or if they say they prohibit an act but continue to perform that same act, does the state practice or *opinio juris* control? A state's interpretation, incorporation, or rejection of CIL norms in domestic decisions can further solidify or alter that CIL norm. Violation of a norm that is not fully crystallized or that does not enjoy unanimous approval may just be the beginning of a new evolution or disintegration for that specific custom. CIL emerges from states based on their own projected interests rather than as a check on their power.<sup>53</sup>

Over the past two centuries, states have undergone several changes to their structures, from the industrial state-nation, to the nation-state, finally becoming today what has been termed a "market state."<sup>54</sup> Many actions previously taken only by nations are now increasingly controlled by non-state actors, and these non-state actors have the ability to influence nations and harm or kill military personnel and civilians, effectively violating the law of nations.<sup>55</sup> Because of the prevalence and unregulated nature of non-state actors in the international realm, the law of nations becomes paramount.

In addition to the changes in international actors, international *actions* have undergone fundamental changes. Taking a page or two from Justice Stephen Breyer, international (or state-state) relations have moved from purely interstate to include purely intrastate actions.<sup>56</sup> When the Constitution was being written, the law of nations solely pertained to interactions between nations.<sup>57</sup> Today, much of international law is intimately concerned with intrastate actions, including human rights protections and state violations of those rights.<sup>58</sup>

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53. For a complete discussion of this issue, *see generally* GOLDSMITH & POSNER, *supra* note 51 (discussing how CIL is based on states' interest rather than limits on their powers).

54. PHILIP BOBBITT, *THE GARMENTS OF COURT AND PALACE: MACHIAVELLI AND THE WORLD THAT HE MADE* 169–175 (2013).

55. Shana Reeves, *What Happens When States No Longer Govern?*, *LAWFARE* (Feb. 9, 2017), <https://www.lawfareblog.com/what-happens-when-states-no-longer-govern>; *see also* Eric Boylan, *Applying the Law of Proportionality to Cyber Conflict: Suggestions for Practitioners*, 50 *VAND. J. TRANSNAT'L L.* 217, 225 (2017) (stating a "real possibility that non-state actors may be common players in the realm of cyber warfare"); *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 584 (E.D. Va. 2009) ("Indeed, *Sosa* explicitly acknowledges the existence of a developing consensus that non-state actors may violate certain norms as defined by the law of nations.").

56. STEPHEN BREYER, *INTERNATIONAL LAW AND THE COURTS* 167–170 (2016).

57. *Id.*

58. Ashley S. Deeks, *Confronting and Adapting: Intelligence Agencies and International Law*, 102 *VA. L. REV.* 599, 629–30 (2016) ("Professor Theodor Meron has described the various ways in which international law has shifted its focus away from state-state relations and toward the protection of the individual in areas as diverse as investment, the environment, war-fighting, and intellectual property. Humanization reflects that international law plays an important role in

Actions such as genocide have long been prohibited by the law of nations, and this invariably includes any acts of genocide that a country inflicts on its own citizens, a completely intrastate action with international implications.<sup>59</sup> Because of the growing concern by nations in the modern era, some “offenses that may be purely intra-national in their execution, such as official torture, extrajudicial killings, and genocide, do violate customary international law because the ‘nations of the world’ have demonstrated that such wrongs are of ‘mutual . . . concern,’ and capable of impairing international peace and security.”<sup>60</sup>

At the Founding, the Framers viewed the law of nations as arising from positive or natural law,<sup>61</sup> yet this is no longer the case. The law of state-state relations was quite clearly the most important of the three original categories of the law of nations, as it governed the relations between sovereign nations.<sup>62</sup> This law of state-state relations created a system that nations followed to keep the peace and promote economic connections, and is referenced and incorporated in several constitutional provisions, such as the recognition power.<sup>63</sup> However, customary international law has changed drastically since the Founding.<sup>64</sup> Fundamental technological, social, and geopolitical change can accelerate the formation of CIL<sup>65</sup> in what Professor Michael Scharf

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ensuring that states respect the integrity of the individual and in protecting him from excessive governmental control.”).

59. F. Giba-Matthews, *O.F.M., Customary International Law Acts As Federal Common Law in U.S. Courts*, 20 *FORDHAM INT’L L.J.* 1839, 1841 (1997) (“Prior to the founding of the United Nations, customary international law prohibiting such acts as torture, genocide, and slavery, was a part of the law of nations.”).

60. *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003).

61. See Carlos M. Vázquez, *Customary International Law As U.S. Law: A Critique of the Revisionist and Intermediate Positions and A Defense of the Modern Position*, 86 *NOTRE DAME L. REV.* 1495, 1571 (2011) (stating that “in the Founders’ view, much of the law of nations was not ‘made’ at all, but instead had its basis in natural law or right reason”).

62. *BELLIA & CLARK*, *supra* note 9, at 139.

63. See *id.* at 32 n.143 (noting that the recognition power within the U.S. Constitution permits the federal government to recognize a foreign state or government).

64. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 *STAN. L. REV.* 1175, 1188 (2007); see also *BELLIA & CLARK*, *supra* note 9, at 5 n.4 (citing David L. Sloss, Michael D. Ramsey, & William S. Dodge, *Continuity and Change over Two Centuries*, *INTERNATIONAL LAW IN THE U.S. SUPREME COURT* 589 (David L. Sloss, Michael D. Ramsey, and William S. Dodge eds., 2011) (“Although different doctrinal changes occurred at different times, there are few aspects of the Supreme Court’s international law doctrine that remain the same in the twenty-first century as they were 200 years ago.”)).

65. See generally MICHAEL P. SCHARF, *CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS* (describing this change).

calls Grotian moments,<sup>66</sup> or international constitutional moments.<sup>67</sup> These are large turning points in the law of nations. The law of nations is not stagnant, and each state action – to varying degrees – affects that “general and consistent” state practice on which CIL is defined. Because CIL is an unwritten body of law and continues to change, there is tremendous difficulty in determining what it requires. There is even debate over what evidence should be used to define CIL.<sup>68</sup> This is why “determinations of the content of customary international law implicate not only legal considerations but also considerations of U.S. foreign policy.”<sup>69</sup>

One such change is this emergence of “modern” CIL, which contrasts with the law of nations during the eighteenth century because it treats many internal state affairs as matters of international concern,<sup>70</sup> such as seeking to regulate how a state treats its citizens within their own territory.<sup>71</sup> This contrasts with the original law of nations at the Founding: the (1) law merchant; (2) law of state-state relations; and (3) law maritime.<sup>72</sup> The modern law of nations has been central to the debate about whether the law of nations is U.S. law, because it specifically regulates internal functions of the state rather than interactions between states.

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66. “Grotian Moment” is a term used to describe a “paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.” See Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 440 (2010).

67. An international constitutional moment “occurs when a rising political movement succeeds in placing a new problematic at the center of [international] political life.” See William Burke-White & Anne-Marie Slaughter, *An International Constitutional Moment*, 43 HARV. INT’L L.J. 1, 2 n.4 (2002) (citing Bruce Ackerman, *A Generation of Betrayal*, 65 FORDHAM L. REV. 1519, 1519 (1997)).

68. Curtis Bradley, *The Supreme Court as a Filter Between International Law and American Constitutionalism*, 104 CAL. L. REV. 1567, 1568 (2016).

69. *Id.*

70. Note: *The Offences Clause After Sosa v. Alvarez-Machain*, 118 HARV. L. REV. 2378, 2381 (2005).

71. Bradley & Goldsmith, *Critique*, *supra* note 2, at 822; BELLIA & CLARK, *supra* note 9, at 139; Young, *supra* note 39, 369.

72. See John T. Parry, *International Law in State Courts: Sovereignty, Resistance, Contagion, and Inevitability*, 20 WILLAMETTE J. INT’L L. & DISP. RESOL. 57, 62 (2012) (“By the time of the American Revolution, English jurisprudence recognized three components of international law: the law of state-state relations, the law merchant, and maritime law.”).

## II. THE CURRENT DEBATE OVER THE STATUS OF CUSTOMARY INTERNATIONAL LAW IN THE UNITED STATES

Since the creation of the U.S. Constitution, both courts and scholars have agreed that the “law of nations is a part of the law of the United States.”<sup>73</sup> Even so, the debate over the status of the law of nations is contentious and ongoing.<sup>74</sup> Much of the debate surrounds the effect of the Supreme Court’s decision in *Erie Railroad Company v. Tompkins*,<sup>75</sup> which rejected the existence of federal general common law. The modern position, the revisionist position, and the intermediate position generally agree that prior to the decision in *Erie*, the law of nations was incorporated into U.S. law as general common law.<sup>76</sup> It is the status of the law of nations after *Erie* that divides these scholars.<sup>77</sup>

As Justice Breyer describes: “[t]he world has changed so fast that even the usefulness and persuasiveness of formerly absolute factual distinctions . . . can no longer be taken as a given.”<sup>78</sup> So too has CIL and federal law changed. Before diving into defending the position expressed in this Article, this Part will describe each position currently defining the debate.

### A. *The Modern Position*

At its core, the “modern position” concludes that CIL is incorporated as binding federal law.<sup>79</sup> The modern position, as broadly

73. *United States v. Ravara*, 2 U.S. 297, 299 (C.C.D. Pa. 1793); *see also* Jordan J. Paust, *Customary International Law and Human Rights Treaties Are Law of the United States*, 20 MICH. J. INT’L L. 301, 301–04 (1999) (arguing that CIL has been the law of the land since the Founding).

74. *See generally* Michael D. Ramsey, *The Constitution’s Text and Customary International Law*, 106 GEO. L.J. 1747 (2018) (discussing the modern and intermediate positions); William S. Dodge, *Customary International Law, Change, and the Constitution*, 102 GEO. L.J. 1 (2018) (discussing the positions in the law of nations debate); Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495 (2011) (arguing for the modern position); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587 (2002) (discussing the revisionist position); Harold Honju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing for the modern position); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 FORDHAM L. REV. 393 (1997) (discussing the modern position).

75. 304 U.S. 64, 78 (1938).

76. *See, e.g.,* Young, *supra* note 39, at 374 (concluding that prior to *Erie*, CIL was incorporated as federal general common law; Born, *supra* note 5, at 1670 (same)).

77. Bellia & Clark do not necessarily focus on *Erie* and instead focus on the interaction between constitutional allocation of powers and CIL.

78. STEPHEN BREYER, *THE COURT AND THE WORLD* 84–85 (2016).

79. Restatement (Third) of Foreign Relations Law § 111 cmt. d (1987) (“Customary international law is considered to be like common law in the United States, but it is federal law. A determination of international law by the Supreme Court is binding on the States and on State

defined by Bradley and Goldsmith, is the “proposition that customary international law (CIL) is part of this country’s post-*Erie* federal common law.”<sup>80</sup> The primary scholars in this school of thought include Dean Harold Koh, Gerald Neuman,<sup>81</sup> Louis Henkin,<sup>82</sup> Carlos Vasquez, Beth Stephens, William Dodge, and Jordan J. Paust.<sup>83</sup> While these scholars’ arguments are not identical, their assertions and conclusions are similar enough to embody the modern position.

Professor Beth Stephens has argued in favor of the modern position, concluding that CIL is federal law and “that the determination of the content of CIL and whether it applies in a given situation is a federal question, which triggers federal court jurisdiction and on which federal court decisions are binding on the states.”<sup>84</sup> Similarly, Dean Harold Koh has argued directly against the revisionist position of Bradley and Goldsmith, concluding that the “the hornbook rule [is that] international law, as applied in the United States, must be federal law.”<sup>85</sup>

The modern position argues that even though *Erie* denied the existence of federal general common law, the Constitution gives the federal government sole jurisdiction and power over international relations and law. Because subsequent Supreme Court decisions have affirmed the federal government’s power over international law, modern position scholars argue that, therefore, CIL must be federal law.<sup>86</sup> Furthermore, modernists specifically reject the revisionist position that CIL can be adopted as state law, as states are excluded from enacting or participating in making international law; this is exclusively the power of the federal government.<sup>87</sup>

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courts.”).

80. Bradley & Goldsmith, *Critique*, *supra* note 2, at 816.

81. See Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 *FORDHAM L. REV.* 371, 371–72 (1997) (discussing the modern position).

82. Louis Henkin, *International Law As Law in the United States*, 82 *MICH. L. REV.* 1555, 1569 (1984); see also Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 *HARV. L. REV.* 853, 869 (1987) (“Arguably, the fact that treaties are subject to constitutional limitations does not conclude the issue with respect to customary law. Customary law is general law binding on all nations, and no country should be able to derogate from it because of that country’s particular constitutional dispositions.”).

83. This list of scholars is non-exhaustive but include the scholars whose works this Article is largely based upon.

84. Stephens, *supra* note 74, at 397.

85. Koh, *supra* note 74, at 1825.

86. Stephens, *supra* note 74, at 444.

87. Koh, *supra* note 74, at 1838 (“With certain exceptions, placing all international law on a federal, subconstitutional plane gives customary international law a lexical comparability with

The modern position further argues that CIL is not only federal law but is also binding on federal and state courts. Because the law of nations is federal common law—rather than federal *general* common law as rejected in *Erie*—CIL is not only federal law but is self-executing without the need for congressional authorization.<sup>88</sup> In contrast, revisionist scholars have argued that *Erie* does affect the status of CIL. This is because, they argue, judges no longer “discover” law, and because CIL is not listed in or derived from either Article III or Article VI, judges do not have authorization unless Congress incorporates CIL under Article I.<sup>89</sup> Additionally, both revisionists and recent scholars have objected to the modern position’s wholesale incorporation of CIL, noting that it does not take into account Congress’ actions or the nuances of the constitutional provisions relating to CIL.<sup>90</sup>

This Article takes the view that the traditional law of nations is within federal law. However, this position does not require that *all* of CIL be incorporated into domestic law. This is partly because, as Professors Bellia and Clark have described, the idea that CIL is adopted wholesale into federal law disregards the nuances of how and where in the federal constitution CIL attains its federal law status.<sup>91</sup> As discussed more in Part IV, Congress was given the power under Article I to “define and punish . . . Offences against the Law of Nations.”<sup>92</sup> This power would be largely unnecessary if the law of nations was already completely incorporated into federal law.<sup>93</sup> While it could be argued that Congress made some action that incorporated all existing CIL, we

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treaties and statutes, which are superior to state law under the Supremacy Clause.”).

88. Born, *supra* note 5, at 1649–50.

89. See Bradley & Goldsmith, *Critique*, *supra* note 2, at 855–57 (arguing the modernist view, in postulating that CIL can be incorporated without Congressional approval, is inconsistent with *Erie* and basic principles of representative democracy).

90. *Id.* at 857; However, this is not the view of all modern position scholars. See Carlos M. Vázquez, *Customary International Law As U.S. Law: A Critique of the Revisionist and Intermediate Positions and A Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1515 (2011) (“The version of the modern position that I defend here is that customary international law preempts State law insofar as it imposes obligations on State officials and private parties.”).

91. Anthony Bellia Jr. & Bradford R. Clark, *The Law of Nations and the United States Constitution: Response Article: Why Federal Courts Apply the Law of Nations Even Though it is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1935 (2018) [hereinafter, Bellia & Clark, *Response*] (highlighting that Professors Golove and Hulsebosch’s view fails to identify the specific Constitutional provisions that incorporate CIL in its entirety).

92. U.S. CONST. art. I, § 8, cl. 10.

93. Bradley & Goldsmith, *Critique*, *supra* note 2, at 857 (“Congress’s selective incorporation [of CIL] would be largely superfluous if CIL were already incorporated wholesale into federal common law.”).

would have to look to each of Congress' actions and specific constitutional provisions. Similarly, if CIL was already incorporated wholesale into federal law, then any actions by the political branches, including reservations or rejections of treaties that express CIL, would generally be pointless.<sup>94</sup> Gary Born has similarly argued that the modern position—in concluding that the law of nations is incorporated wholesale into federal law—disregards “critical limitations on the scope of federal judicial authority” and ignores recent judicial precedent, creating an overbroad approach to CIL.<sup>95</sup>

Therefore, the modern position often ignores the limits and foundation of federal law under the Constitution and is too broad to accept. Courts must look to certain provisions in the Constitution and the actions of the political branches before deciding whether certain customs within the law of nations are incorporated into federal law.

### *B. The Revisionist Position*

Against the backdrop of the modern position, the revisionist position generally concludes that CIL is not federal law unless incorporated into U.S. law by the federal political branches or the states. These revisionist scholars include Professors Curtis Bradley, Jack Goldsmith, David Moore, Philip Trimble, A.M. Weisberd,<sup>96</sup> and Eric Posner.<sup>97</sup> Additionally, a significant portion of the *en banc* D.C. Circuit has concluded that “international norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts after *Erie*.”<sup>98</sup>

In their first article that sparked this ongoing debate, Bradley and Goldsmith argued that after *Erie*, federal courts did not have jurisdiction based on international law and cannot impose federal interpretations of international law on the states without direct authorization from the executive or legislative branches of government.<sup>99</sup> Instead, the courts could only adopt customary

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94. Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2269 (1998) [hereinafter, Bradley & Goldsmith, *Incorporation*].

95. Born, *supra* note 5, at 1655.

96. A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995).

97. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

98. *Al-Bihani v. Obama*, 619 F.3d 1, 6 (D.C. Cir. 2010) (*en banc*) (Griffith, J., concurring in denial of rehearing).

99. Bradley & Goldsmith, *Critique*, *supra* note 2, at 870.

international law if there was some authorization by the political branches.<sup>100</sup> Bradley and Goldsmith invoked three central ideas that favor this conclusion: separation of powers, federalism, and democratic deficit.

Revisionists argue that because the Offenses Clauses—where Congress has the power to define the offenses against the law of nations—is the only place in the Constitution where the law of nations is mentioned, it follows that unless Congress defines these offenses, CIL is not federal law.<sup>101</sup> There are only three sources of federal law named in the Constitution, and CIL is not one of them.<sup>102</sup>

Like the modern position, the revisionist position has been hotly debated by courts and scholars.<sup>103</sup> It relies on the closing off of federal general common law, a conclusion stemming from the decision in *Erie*.<sup>104</sup> As decisions following *Erie* noted, it did not affect the rules of international law as to whether CIL is state or federal law.<sup>105</sup> “The Court in *Erie* could not reject ‘federal common law’ because federal courts routinely apply such law in multiple contexts. . . . [and] there is a broad consensus that courts can create federal common law in at least some cases that need a federal solution, but for which the Constitution, legislative action, and executive action have not directly supplied an answer,” including foreign relations and international law.<sup>106</sup>

In fact, “[i]t is well established that the federal government holds the exclusive authority to administer foreign affairs.”<sup>107</sup> States have no

100. *Id.* (noting that changes to domestic law must be authorized by the political branches).

101. *Id.* at 856 (noting that Congress’s selective incorporation of CIL pursuant to the Offenses Clause would be superfluous if CIL were federal law).

102. The Supremacy Clause expressly discusses that issue, providing that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land.” U.S. CONST. art. VI, cl. 2. *See also* J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 936 (2007) (omitting CIL from the Supremacy Clause indicates that CIL was not meant to bind the political branches).

103. *See, e.g.*, *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (noting that both the modern and revisionist position “have come under fire”); *see also* Koh, *supra* note 74, at 1825 (discussing Professors Bradley and Goldsmith’s “assault” on the varying views).

104. Bradley & Goldsmith, *Critique*, *supra* note 2, at 857 (arguing that the revisionist view “cannot survive *Erie*” because *Erie* bars judicial lawmaking).

105. *See, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425–26 (1964) (clarifying that even after *Erie* “rules of international law should not be left to divergent and perhaps parochial state interpretations”).

106. Allan Erbsen, *Erie’s Four Functions: Reframing Choice of Law in Federal Courts*, 89 NOTRE DAME L. REV. 579, 618 (2013).

107. *Gingery v. City of Glendale*, 831 F.3d 1222, 1228 (9th Cir. 2016) (citing *United States v. Pink*, 315 U.S. 203, 233 (1942)) (“Power over external affairs is not shared by the States; it is

control over foreign relations, which continues to be exclusively within federal control, and *Erie* did not change this fact.<sup>108</sup> Some courts have held that determinations of international law, including human rights law, are federal law.<sup>109</sup> Subsequent authors argue that the revisionist position ignores federal authority and control over U.S. foreign relations, and like the modern position, creates an overbroad rule.<sup>110</sup> If the states were permitted to incorporate CIL as they saw fit, it could create different sets of rules for each state which, through *Erie*, would be binding on federal courts absent congressional action. However, even though several later authors argue that the revisionist position is that CIL is state law,<sup>111</sup> Professors Bradley and Goldsmith did not argue so; instead they argued that CIL is not a source of federal law unless incorporated or authorized by the appropriate domestic sovereign.<sup>112</sup> They argued that states *could* adopt norms from CIL in the absence of federal pronouncements on that issue, because “in the absence of federal political branch authorization, CIL is not a source of federal law.”<sup>113</sup>

Additionally, *Erie* did not eviscerate federal common law in the realm of international relations.<sup>114</sup> Courts today still recognize that “international disputes implicating . . . our relations with foreign nations” are one of the “narrow areas” in which “federal common law” continues to exist.<sup>115</sup> The majority in *Erie* did not change whether federal courts could use the common law to apply or interpret the law of nations.<sup>116</sup> Some argue that the revisionist position “would make it

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vested in the national government exclusively.”).

108. See Koh, *supra* note 74, at 1838–42.

109. *In re S. African Apartheid Litig.*, 643 F. Supp. 2d 423, 434 (S.D.N.Y. 2009).

110. Born, *supra* note 5, at 1656–57.

111. See, e.g., Koh, *supra* note 74, at 1828 (explaining that Professors Bradley and Goldsmith’s view does not require that CIL be a matter of state law, given that state legislatures are unlikely to adopt CIL as state law); Bellia & Clark, *Constitutional Law*, *supra* note 5, at 744 (delineating that the revisionist position would actually subordinate CIL to conflicting state laws).

112. Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 852–53 (arguing that post-*Erie* federal courts cannot apply CIL without domestic authorization).

113. Ryan Goodman & Derek P. Jinks, Filartiga’s *Firm Footing: International Human Rights and Federal Common Law*, 66 *FORDHAM L. REV.* 463, 472 (1997).

114. *Id.* at 490, 490 n.141.

115. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004); see also *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). *But see Sosa*, 542 U.S. at 741–42 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the new federal common law after *Erie* was not federal law but rather “a federal rule of decision [that] is necessary to protect uniquely federal interests”).

116. Pierre N. Leval, *Distant Genocides*, 38 *YALE J. INT’L L.* 231, 243 (2013) (“*Erie* did not in any way involve the question of whether the federal courts possess common law powers to use in other areas of law whose interpretation was entrusted primarily to them. (Much less did it involve whether federal courts may apply the law of another nation or the law of nations in cases to which

impossible for federal courts to formulate federal choice-of-law rules for federal question cases and much other federal common law. The federal courts can properly adopt international law as part of the pattern of U.S. courts looking to general law to make common law.”<sup>117</sup>

However, just because CIL *can* be federal law through the federal common law, this does not mean CIL *must* be binding on courts in the U.S. This just means that it can *potentially* be domestic law. As addressed later in this Article, the revisionists are correct: CIL is not domestic law unless incorporated or authorized by the domestic political branches. *Erie* represented the acceptance of legal positivism—the requirement that there be a domestic source of authority for law in this nation. It is this portion of *Erie* that represents the difficulty in accepting the modern position’s conclusion of a wholesale incorporation of the law of nations.

### C. *The Intermediate Position*

The intermediate position seeks a middle ground between the revisionist and modern positions. Generally, under this position, CIL has a status between state and federal law—essentially non-preemptive federal or non-federal law. The scholars who argue for the intermediate position are Professor Ernest Young and Professor Michael Ramsey.

Ernest Young was the first to identify this intermediate position.<sup>118</sup> Professor Young “advance[d] an intermediate solution based on treating customary international law as ‘general’ law—a third category of law, neither state nor federal in nature. This ‘general’ law would not preempt contrary state policies . . . . But it would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws.”<sup>119</sup> He criticizes both the modern and revisionist positions as insufficient to resolve the debate. Instead, his proposal sought a middle ground, leaving CIL as general law—the way it was prior to *Erie*. However, Professor Young has seemingly abandoned this position and moved closer to accepting the revisionist position after the Supreme Court’s decision in *Sosa*.<sup>120</sup>

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they apply.)”).

117. Kevin M. Clermont, *Degrees of Deference: Applying vs. Adopting Another Sovereign’s Law*, 103 CORNELL L. REV. 243, 301 n.307 (2018).

118. See generally Young, *supra* note 39 (discussing the intermediate position in the law of nations debate).

119. *Id.* at 370.

120. See Young, *supra* note 9, at 28 (2007) (“I think that CIL revisionists like Professors

Michael Ramsey, while endorsing Professor Young's approach, critiques his general law theory and suggests a different middle position.<sup>121</sup> He claims that CIL applies in federal cases but that federal norms are not applicable to the states under the Supremacy Clause.<sup>122</sup> This would effectively make CIL “non-preemptive federal law”—a middle ground between the modern and revisionists but still a part of federal law.<sup>123</sup>

This intermediate position fails to account for the exclusivity of international law, including CIL, as federal law. As the revisionist position notes, the hierarchy of law under the U.S. Constitution is: Constitution, federal law (including treaties), and state law. There is no other type of law in the United States.<sup>124</sup> Additionally, both of Professor Ramsey's arguments are contrary to the express provisions of the Constitution: there is no source for non-preemptive federal law, and under the Supremacy Clause, federal law preempts state law.<sup>125</sup> As noted by Gary Born, these creations of unprecedented types of law are inconsistent with the U.S. Constitution and judicial authority.<sup>126</sup> Because this position has been challenged by many scholars and the first scholar to espouse the position has since come to agree with the revisionists, the intermediate position is of less relevance here.

#### *D. Recent Positions*

The modern and intermediate positions take a wholesale approach to the law of nations. Determining customs in the law of nations is nuanced, and the question of incorporation into federal law requires a nuanced approach. Recently, there have been two additional positions that, while similar to the modern position, are distinct for several reasons. Both positions accept parts of the modern and the revisionist positions rather than find a middle ground.<sup>127</sup> Both would find CIL to

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Bradley, Goldsmith, and Moore (with whom I consider myself at least a fellow traveler) have the better claim on *Sosa*.”).

121. Michael D. Ramsey, *International Law As Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555, 585 (2002).

122. *Id.* at 557–58.

123. *Id.* at 556 (framing CIL as general common law, analogous to pre-*Erie* general common law).

124. See Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 820 (1989) (“At the heart of [*Erie*] was the positivistic insight that American law must be either federal law or state law. There could be no overarching or hybrid third option.”).

125. Born, *supra* note 5, at 1656.

126. *Id.*

127. See *id.* (“[T]he better approach adopts elements of both the modernist and revisionist positions, while rejecting other aspects of those positions.”).

be federal law, but the law of nations would only be incorporated into federal law under certain circumstances.

For Professors Anthony Bellia, Jr. and Bradford Clark, CIL would be federal law only when it is based on specific powers in the Constitution in Article I and II.<sup>128</sup> For Gary Born, CIL would be federal law but is not binding on the courts unless expressly or implicitly authorized by the federal political branches. While Bellia and Clark argue some CIL is already federal law because it is required to interpret certain constitutional provisions, Born views CIL as non-self-executing federal common law.<sup>129</sup>

### 1. Professors Bellia and Clark’s Position

Bellia and Clark argue that both the modern and the revisionist positions fall short of accurately describing CIL’s role in federal law. They instead conclude that “[a] better reading of the Court’s decisions—consistent with the original public meaning of the Constitution—is that the judiciary must apply certain traditional principles of the law of nations when necessary to uphold the political branches’ recognition, war, capture, and reprisal powers.”<sup>130</sup> Rather than look to Article III, the authors look to the text of Article I and II, which they argue can only be understood by looking to the law of nations. Through the exercise of these powers by either Congress or the Senate, some CIL is incorporated into federal law or specifically rejected due to Congress’s actions, yet the law of nations is not the “supreme law of the land.”<sup>131</sup> The law of nations is used as a rule of decision in relation to a specific power in the Constitution. Rather than

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128. See generally BELLIA & CLARK, *supra* note 9 (concluding that federal law only when it is based on specific powers in the Constitution in Article I and II).

129. Born, *supra* note 5, at 1707 (“U.S. courts (both federal and state) may not apply a rule of customary international law unless the federal political branches have provided for judicial application of the rule. This approach treats all international legal obligations of the United States—treaties, other international agreements, and customary international law—in the same basic manner, and ensures observance of *Erie*’s limits on the federal courts’ law-making authority.”).

130. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 838; see also Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 9 (2009) (“Taken in historical context, the best reading of Supreme Court precedent . . . is that the law of nations does not apply as preemptive federal law by virtue of any general Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers . . .”).

131. Anthony J. Bellia Jr. & Bradford R. Clark, *Why Federal Courts Apply the Law of Nations Even Though It Is Not the Supreme Law of the Land*, 106 GEO. L.J. 1915, 1917–18 (2018) (rejecting the claim that CIL is federal law given there is no textual support to conclude that Supremacy Clause sub silentio accorded the law of nations federal law status).

treating CIL as a monolithic whole, Bellia and Clark assert that “the Constitution was designed to interact differently with distinct branches of the law of nations, and that the Constitution requires courts to apply different branches of the law of nations in distinct ways.”<sup>132</sup>

## 2. Gary Born’s Position

Preeminent international arbitration scholar Gary Born recently weighed into this debate. He concluded that the Constitution and precedent “require treating all rules of customary international law as rules of federal law, but that such rules will be directly applicable in U.S. courts only when the federal political branches have expressly or impliedly provided for judicial application of a particular rule.”<sup>133</sup> In his view, this would parallel the treatment of other international agreements, such as treaties, because international law would be federal law—unlike the revisionists’ positions—but would only be applied in U.S. courts if and when authorized by Congress.<sup>134</sup>

### *E. Summary of Positions in this Law of Nations Debate*

There are several positions one could take in this debate: (1) the modern position—CIL is federal law and is binding on the federal government and states;<sup>135</sup> (2) the revisionist position—CIL is not federal law unless it is incorporated by Congress or the states;<sup>136</sup> (3) the intermediate position—CIL is non-preemptive federal law;<sup>137</sup> (4) Bellia and Clark’s position—only some customs rising to CIL are incorporated into federal law based on the actions of the federal government under Article I and II of the Constitution;<sup>138</sup> or (5) Born’s position—CIL is federal law but is not binding on the courts until incorporated by the legislative branch.<sup>139</sup>

This Article (1) holds that the traditional law of nations is exclusively federal law—while the modern law of nations can be

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132. ANTHONY J. BELLIA JR. AND BRADFORD R. CLARK, *THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION* 168 (2017).

133. Born, *supra* note 5, at 1642.

134. *Id.*

135. Koh, *supra* note 74, at 1825 (citing the Offenses Clause as lending international law the force of federal law).

136. Bradley & Goldsmith, *Critique*, *supra* note 2, at 2260.

137. Young, *supra* note 39, at 371 (proposing that CIL act as neither federal nor state law but a category of law federal and state courts may apply).

138. BELLIA & CLARK, *supra* note 9, at 37 (arguing that CIL is incorporated by treaty or statute pursuant to the powers enumerated in Articles I and II).

139. Born, *supra* note 5, at 1641.

incorporated by the states but could still be federal law if incorporated by the federal branches—and (2) the law of nations is not incorporated into domestic law absent constitutional authorization, or political branch action or acquiescence to a norm within the law of nations. This is a “revised revisionist” position because, while it agrees with the foundation of the revisionist argument, it expands the types of authorization necessary for CIL to be incorporated into domestic law (such as implied authorization by the Executive Branch through executive orders or agreements or acquiescence by the Legislative Branch), and it holds that traditional CIL is exclusively federal through federal law rather than state law.

### III. ANALYSIS OF THE LAW OF NATIONS AS FEDERAL LAW

The above positions base much of their argument on Supreme Court decisions, such as *Kiobel* and *Sosa*, which is beneficial to the ongoing debate. However, this Article focuses more on the *foundation* of the law rather than what the Court says about it to understand the basis of CIL’s incorporation or rejection as domestic law. The law of nations is not domestic law unless there is authorization from a domestic source—the Constitution or the political branches.

The Constitution was written at a time where the law of nations was well-known, and the Founders knew well of the implications.<sup>140</sup> The Constitution was designed to simply be the “broad outline” and was not created to account for all possible circumstances.<sup>141</sup> It was meant to be interpreted in light of CIL,<sup>142</sup> and some of the provisions cannot be interpreted without looking to the law of nations for support or understanding.<sup>143</sup> Take for example, the Eighth Amendment: “nor cruel and unusual punishments inflicted.”<sup>144</sup> It would be very difficult for a court to determine what “unusual” punishment is without looking

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140. See Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 455 (2011) (noting interpretations of Alien Tort Statute have relied on theories of framer intent because Constitutional framers were intimately familiar with the law of nations).

141. Steven A. Engel, *The McCulloch Theory of the Fourteenth Amendment: City of Boerne v. Flores and the Original Understanding of Section 5*, 109 YALE L.J. 115, 118 (1999); *McCulloch v. State*, 17 U.S. 316, 407 (1819).

142. Ezequiel Lugo, *The Unfinished Business of American Democracy*, 24 WIS. INT’L L.J. 871, 882 (2007).

143. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 733 (“Although the Constitution mentions the ‘law of nations’ only in the Offences Clause, a number of other discrete constitutional provisions can only be understood by reference to that body of law.”).

144. U.S. CONST. amend. VIII.

around to other countries to see what is “usual.”<sup>145</sup> This is exactly what happened in *Roper v. Simmons*, when the Supreme Court looked to the status of capital punishment for juveniles in other countries and the international community.<sup>146</sup> Similarly, the “Guarantee” Clause of the U.S. Constitution<sup>147</sup> cannot properly be understood or defined without looking to international treaties and the law of nations.<sup>148</sup> For example, what does the term “guarantee” actually mean, and does a guaranteed party forfeit its sovereign rights?<sup>149</sup>

There are three traditional different types of CIL: (1) law merchant; (2) law of state-state relations; and (3) law maritime.<sup>150</sup> These three types regulate interactions between states rather than their internal actions within the state. Professors Bellia and Clark focus a significant portion of their argument distinguishing between these different types of CIL and discussing how the Constitution treats each of these types.<sup>151</sup> Modern CIL creates a different category within the law of nations that arose around the time of World War II, consisting of a different type of law and founded on a diverse basis of state practice.<sup>152</sup> Because it has a different foundation of state practice, the incorporation of the modern law of nations requires a different analysis on this question, as discussed below.

145. *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (“Yet at least from the time of the Court’s decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of ‘cruel and unusual punishments.’”); *Graham v. Florida*, 560 U.S. 48, 80 (2010), *modified* (July 6, 2010) (“The Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.”); Penn Law, *Debating Use of International Law in US Jurisprudence*: Deborah Pearlstein & Ilya Shapiro (10/5/2009) at 28:20–30:00, <https://www.youtube.com/watch?v=14KoV67GFRI>.

146. *Roper*, 543 U.S. at 577 (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”).

147. U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

148. Ryan C. Williams, *The “Guarantee Clause,”* 132 HARV. L. REV. 7, 13, 70 (2018).

149. *Id.* at 57, 67, 70.

150. *Id.*; John T. Parry, *International Law in State Courts: Sovereignty, Resistance, Contagion, and Inevitability*, 20 WILLAMETTE J. INT’L L. & DISP. RESOL. 57, 62 (2012) (“By the time of the American Revolution, English jurisprudence recognized three components of international law: the law of state-state relations, the law merchant, and maritime law.”); 4 WILLIAM BLACKSTONE, COMMENTARIES \*66.

151. See generally BELLIA & CLARK, *supra* note 9 (arguing that the Constitution treats different types of CIL differently).

152. See Chris Downes, *Must the Losers of Free Trade Go Hungry? Reconciling WTO Obligations and the Right to Food*, 47 VA. J. INT’L L. 619, 668 (2007) (describing modern CIL’s identity crisis and departure from custom).

*A. The Traditional Law of Nations is Exclusively Federal Law While the Modern Law of Nations May be Adopted by the States*

As noted by many of the scholars in this debate, there are differences between the traditional and the modern law of nations.<sup>153</sup> While traditional CIL regulates interactions between states, the modern law of nations specifically regulates internal decisions, such as environmental regulation or the protection of individual rights.<sup>154</sup> It does not require any determination of the actions *between* nations but rather *by* nations *within* their own borders. Unlike the law of state-state relations or the law maritime, modern CIL does not require the entire nation to speak as one voice and does not necessarily involve interactions with foreign countries.<sup>155</sup>

The first question is whether CIL is federal or state law. This focuses solely on *who* can incorporate or control CIL norms within the U.S.; the next section will discuss whether those norms are in fact part of domestic law. As revisionist, modernist, and intermediate authors have acknowledged, the courts have long said that traditional CIL is a part of federal law. Much of the law relating to foreign relations or international affairs has been exclusively given to the federal government due to the Constitution's allocation of the commerce recognition powers.<sup>156</sup> Relationships with other nations and those powers associated with international relations are exclusively within

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153. Rebecca Crotoof, *International Cybertorts: Expanding State Accountability in Cyberspace*, 103 CORNELL L. REV. 565, 644 n.340 (2018) ("Some have argued, however, that 'modern' customary international law can be established based on evidence of opinio juris alone.").

154. See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 759 (2001) (noting the diversity of issues international law now addresses in light of the increase in the diversity and number of states).

155. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) (concluding that the Framers understood that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power").

156. *United States v. Arjona*, 120 U.S. 479, 483 (1887) ("In our federal system, 'the Government of the United States has been vested exclusively with the power of representing the nation in all its intercourse with foreign countries.' It alone can 'regulate commerce with foreign nations,' [and] make treaties and appoint ambassadors and other public ministers and consuls.'" By contrast, "[a] state is expressly prohibited from entering into any 'treaty, alliance, or confederation.' 'Thus all official intercourse between a state and foreign nations is prevented, and exclusive authority for that purpose [is] given to the United States. The national government is in this way made responsible to foreign nations for all violations by the United States of their international obligations, and because of this, Congress is expressly authorized 'to define and punish . . . offences against the law of nations.'" (internal citations omitted).

the federal government's authority.<sup>157</sup> State courts have accepted this exclusive federal authority over international relations and have declined to extend state rules into this realm.<sup>158</sup> This is because interactions with other countries have been vested by the Constitution to the federal government, including foreign commerce, appointing ambassadors, and establishing treaties.<sup>159</sup>

As reaffirmed in *Jesner*, when the United States interacts with a foreign country, the federal government has exclusive power.<sup>160</sup> Even so, as discussed in the next section, those CIL norms must still be incorporated by the political branches to become law; the conclusion here just means the norms of the traditional law of nations relating to interactions with foreign countries cannot be adopted or rejected by the individual states within the U.S.

It might be viewed as strange that a revisionist argument would accept federal exclusivity over the traditional norms of CIL. However, it often makes the most practical sense that federal law would have exclusive control over the traditional norms because, in those instances, foreign affairs requires the nation to “speak with one voice” and not leave the interactions to fifty different states. With this concession in mind, the discussion regarding whether states may adopt traditional CIL becomes essentially moot as “the federal political branches have

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157. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936) (holding that “the United States is vested with all the powers of government necessary to maintain an effective control of international relations”); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (stating that “our relationships with other members of the international community must be treated exclusively as an aspect of federal law”).

158. *Alvez v. Am. Exp. Lines, Inc.*, 389 N.E.2d 461, 462–63 (N.Y. 1979), *aff'd*, 446 U.S. 274 (1980) (“To be distinguished, however, are those unique areas, such as admiralty and maritime matters, which either by Constitution or Congressional legislation have been deemed to require a uniform body of national law. In such areas not only does there exist a Federal question, but more importantly, an answer obtainable solely by recourse to Federal law.”) (internal citations omitted); *Amarel v. Connell*, 202 Cal. App. 3d 137, 145 (Cal. App. 1988) (“The conduct of foreign affairs and international relations is an exclusively federal concern. ‘Our system of government is such that the interest of the cities, counties and states, no less than the interest of the people of the whole nation, imperatively requires that federal power in the field affecting foreign relations be left entirely free from local interference.’”) (internal citations omitted).

159. See notes 142–144. *Bellia & Clark, Constitutional Law*, *supra* note 5, at 733 (“Although the Constitution mentions the ‘law of nations’ only in the Offences Clause, a number of other discrete constitutional provisions can only be understood by reference to that body of law.”); U.S. CONST. amend. VIII; *Graham v. Florida*, 560 U.S. 48, 80 (2010), modified (July 6, 2010) (“The Court has looked beyond our Nation’s borders for support for its independent conclusion that a particular punishment is cruel and unusual.”); *Penn Law*, *supra* note 145, at 28:20-30:00.

160. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”).

incorporated this traditional CIL into enacted federal law.”<sup>161</sup> Many traditional CIL norms are generally codified in federal legislation, so states could not adopt other norms without contradicting federal law.

Unlike traditional CIL norms, modern CIL norms are not exclusively within federal power—they instead can be adopted by states in the absence of federal legislation. Prior to the signing of the Constitution in 1787, the law of nations was part of individual state law,<sup>162</sup> as each state was its own sovereign. After the Constitution was ratified but before *Erie*, state courts repeatedly determined that the law of nations was the law of the state.<sup>163</sup> Even today, states have played an essential role in shaping and changing the law of nations, and not all of the law of nations has been held to be exclusively federal law.<sup>164</sup> “States are separate and independent sovereigns,” both before and after the signing of the Constitution,<sup>165</sup> bound by the federal Constitution and federal law.<sup>166</sup> In essence, prior to 1787, states themselves were the sovereigns and retained most of that sovereignty after the Founding.<sup>167</sup>

The exclusive federal power over foreign affairs is clear for traditional CIL—in place at the time of the Founding—yet it is not certain this same exclusivity applies to modern CIL, which was not yet created at the prior to the 20<sup>th</sup> century. This federal foreign affairs preemption has greatly expanded since the beginning of the modern

161. See Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2261.

162. *Respublica v. De Longchamps*, 1 U.S. 111, 116 (Pa. O. & T. 1784) (“The first crime in the indictment is an infraction of the law of Nations. This law, in its full extent, is part of the law of this State, and is to be collected from the practice of different Nations, and the authority of writers.”).

163. See, e.g., *Collie v. United States*, 9 Ct. Cl. 431, 443 (1873) (quoting *Richardson v. Me. Fire & Marine Ins. Co.*, 6 Mass. 102, 112 (1818) (“And here it is said that these voyages are prohibited by the law of nations[] which forms a part of the municipal law of every state . . . .”) (omission in original); *Wilcocks v. Union Ins. Co.*, 2 Binn. 574, 581 (Pa. 1809) (“In this respect I do not see any material difference between a law of our own state, and a law of nations. We consider the law of nations as part of our law.”); see Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 254 (2008) (citing state cases).

164. Julian G. Ku, *Customary International Law in State Courts*, 42 VA. J. INT’L L. 265, 269 (2001) [hereinafter Ku, *State Courts*] (“My analysis of these doctrines reveals that, in many cases, state courts acted as the primary judicial fora for originating, developing, and applying rules of CIL. Indeed, in several cases, federal courts explicitly disclaimed any authority to review state court interpretations of these CIL doctrines.”).

165. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 579 (2012).

166. *Webb v. Webb*, 451 U.S. 493, 499 (1981) (“[A]lthough the States are sovereign entities, they are bound along with their officials, including their judges, by the Constitution and the federal statutory law.”).

167. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

law of nations to include many domestic concerns that can now touch on international law.<sup>168</sup> Yet the federal government’s powers are expressly limited; the text of the Constitution does not imply that federal foreign affairs preemption extends into areas that were clearly within the states’ prerogatives at the time of the Founding.<sup>169</sup> Modern CIL does not involve the same type of regulation, because it does not arise from the same type of state practice, and it does not require that the nation “speak with one voice.”<sup>170</sup> It is unlikely that federal preemption applies to modern CIL, which touches on many internal workings of states.

Because modern CIL—which just became prevalent this past century—is sufficiently different from traditional CIL—which arose before the Constitution was written—the determination that all traditional CIL is exclusively within federal law cannot be conclusive as to modern CIL. The states have always been a source of redress for individual wrongs, and in the case of modern human rights CIL, “what presumptively seemed a ‘foreign relations’ matter for the federal government alone now appears a remedial matter presumptively for state courts to decide.”<sup>171</sup> Therefore, modern CIL implicates few of the same concerns that traditional CIL creates, and the Constitution has not expressly granted the federal government power over all these norms within the modern law of nations.

The same is not true for modern CIL. If a state were to adopt a modern CIL norm for the internal protection of its own citizens—for example, the prohibition of torture within its borders<sup>172</sup>—this would

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168. See Jack Goldsmith, *Statutory Foreign Affairs Preemption*, 2000 SUP. CT. REV. 175, 176 (2000) (“[A]s foreign affairs and international law expand to include issues at the core of the states’ reserved power . . . there may well be states-rights-based limitations on the federal government’s power to regulate traditional state prerogatives that implicate U.S. foreign relations.”).

169. See *id.* at 188–89 (emphasizing that the Constitution preferences federal regulation for areas such as war, peace, and diplomacy, “it does not suggest that the Constitution biases federal over state power in the many other regulatory contexts traditionally regulated by states . . .”).

170. See Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2264 (1998) (“The CIL of human rights does not arise in that fashion, however, because many nations continue to commit human rights violations. Rather, much of the new CIL arises from international pronouncements such as resolutions of the United Nations General Assembly and multilateral treaty regimes.”).

171. Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U.L. REV. 397, 405 (2018).

172. See Eric Posner & Jack L. Goldsmith, *Understanding the Resemblance between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639, 666–67 (2000) (describing the decision in *Filartiga v. Pena-Irala*, 630 F.2d 876, 881–84 (2d Cir. 1980), where the court’s restriction on torture was based on U.N. declarations and treaties, and on writings of jurists, not on state practice).

seem unlikely to undermine any uniquely federal purpose and purely domestic actions would be unlikely to affect international relations.<sup>173</sup> How can the federal government argue that a state's increased protection of its own citizens would undermine foreign relations?<sup>174</sup> Yes, the federal government may insist on reservations to a specific human rights treaty, for example, and a state's adoption of this treaty in spite of the reservations could potentially undermine that federal pronouncement.<sup>175</sup> But the state has an interest in protecting its citizens which is not a uniquely federal interest.

The *Erie* doctrine requires that federal courts in diversity apply the law of the state in which they sit. If that state has adopted a custom from the modern law of nations, this would require the federal court to apply this custom.<sup>176</sup> In this case, state law would bind a federal court sitting in diversity jurisdiction and could assert control over other foreign states.<sup>177</sup> And some may dismiss that as untenable. But states have long been involved with the evolution of the law of nations.<sup>178</sup> States often act in ways that affect foreign relations within their allocated powers, such as taxation on multinational corporations<sup>179</sup> and

173. See *Serra v. Lappin*, 600 F.3d 1191, 1199 (9th Cir. 2010) (“That the courts should ever invoke the *Charming Betsy* canon in favor of United States citizens is doubtful, because a violation of the law of nations as against a United States citizen is unlikely to bring about the international discord that the canon guards against.”).

174. William A. Fletcher, *International Human Rights in American Courts*, 93 VA. L. REV. 653, 670 (2007) (“If a state court decides that the death penalty should be forbidden in prosecutions brought under state law, such a decision is entirely that [S]tate’s business. Whether the state court so decides as a matter of customary international law . . . should make no difference.”).

175. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (“A state law, however, with no more than an ‘incidental or indirect effect in foreign countries’ will be valid.”). See generally *Gerling Glob. Reinsurance Corp. of Am. v. Low*, 240 F.3d 739, 752 (9th Cir. 2001) (describing cases where the Supreme Court and other circuit courts addressed foreign affairs challenges related to state laws).

176. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”); *Pilkington Bros. P.L.C. v. AFG Indus. Inc.*, 581 F. Supp. 1039, 1043–44 (D. Del. 1984) (“As a federal court operating under diversity jurisdiction, this Court must apply Delaware state law of international comity under the principles of [*Erie*].”); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89, 98 n.48 (1999) (“Indeed, in a diversity action, according to the post-*Erie* case law, the federal court looks to state law on recognition of a foreign judgment.”).

177. See *Ku*, *State Courts*, *supra* note 164, at 267–68 (2001) (“[T]he idea that CIL could become part of state common law, and that state court interpretations of CIL would bind federal courts sitting in diversity jurisdiction, has been dismissed by highly respected scholars as ‘bizarre,’ ‘radical,’ and ‘absurd.’”).

178. See *id.* at 269 (“My analysis of these doctrines reveals that, in many cases, state courts acted as the primary judicial fora for originating, developing, and applying rules of CIL.”).

179. Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617,

the recognition of foreign money judgments.<sup>180</sup> “[G]lobalization has caused virtually everything, including economic matters, to at least marginally implicate foreign affairs.”<sup>181</sup> States have continued to participate in activities that touch briefly or directly on international law or foreign affairs, including immigration issues and environmental regulations.<sup>182</sup> Only a few years after *Erie*, the Second Circuit looked to New York state law in diversity jurisdiction, concluding that “although the courts of that state look to international law as a source of New York law, their interpretation of international law is controlling upon us.”<sup>183</sup> There is little reason that states cannot adopt modern CIL norms, such as those included in human rights treaties, to regulate those within their own borders.<sup>184</sup>

Professors Bellia and Clark focus much of their argument on the fact that if courts were required to apply human rights CIL, this would harm other nations’ sovereignty and likely impact U.S. relations with that state. Their arguments rely on this in distinguishing how modern human rights CIL is different from “old” state-to-state CIL because it regulates how other states oversee their citizens.<sup>185</sup> As Bellia and Clark have stated: “Modern customary international law restricts how

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1620 (1997) (“Sometimes, states act in ways that adversely affect U.S. foreign relations but that do not violate any provision of the Constitution and that are not preempted by federal statute or treaty.”).

180. See Grace A. Jubinsky, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 567–68 (1985) (describing examples of “activities regularly undertaken by states that have obvious foreign relations ramifications [that] may be evidence of the leeway afforded to states.”).

181. Edward T. Hayes, *Changing Notions of Sovereignty and Federalism in the International Economic System: A Reassessment of WTO Regulation of Federal States and the Regional and Local Governments Within Their Territories*, 25 NW. J. INT’L L. & BUS. 1, 16–17 (2004).

182. Jean Galbraith, *Cooperative and Uncooperative Foreign Affairs Federalism Foreign Affairs Federalism*, 130 HARV. L. REV. 2131, 2132 (2017) (reviewing MICHAEL J. GLENNON AND ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* (2016)) (“Just as issues once viewed as local matters increasingly came to be seen as national, so now they are increasingly taken to have transnational significance.”).

183. See *Bergman v. De Sieyes.*, 170 F.2d 360, 361 (2d Cir. 1948) (concluding that New York state courts would apply international law and decide that a diplomat in transit would be provided diplomatic immunity).

184. See Julian G. Ku, *The State of New York Does Exist: How the States Control Compliance with International Law*, 82 N.C. L. REV. 457, 463 (2004) (“States have consistently fulfilled other kinds of international obligations that have intersected with areas of traditional state legislative authority. For example, states have played a central role in compliance with treaty and customary international law obligations affecting probate proceedings, local property and gasoline tax immunities, injuries to alien residents, notaries, family law, commercial law, and other areas. In sum, states play a much more significant and substantial role in the implementation of international law obligations than most commentators have recognized or endorsed.”).

185. See Bellia & Clark, *Constitutional Law*, *supra* note 5, at 835-37.

nations treat their own citizens within their own territory, and did not exist at the Founding. Accordingly, the Constitution contains no provisions designed to facilitate the application of such law in the U.S. legal system.”<sup>186</sup>

Additionally, courts have determined that Congress can enact laws that essentially violate the law of nations.<sup>187</sup> But when Congress enacts a statute relating to the law of nations, but not necessarily in violation of it, there is a rule for the courts to follow—the *Charming Betsy* canon.<sup>188</sup> While this will not overrule or reverse a statute, courts will follow this principle of interpretation to construe a statute in compliance with international law where possible.<sup>189</sup> The purpose of this canon is to prevent international law violations by the United States and to limit the scope of the courts’ statutory interpretation.<sup>190</sup>

Furthermore, there is a presumption against extraterritoriality of statutory application, which also limits the courts’ reach into foreign corporations and individuals.<sup>191</sup> This presumption “helps ensure that the Judiciary does not erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the political branches.”<sup>192</sup> Moreover, as “[a] long-standing common law principle, the act of state doctrine precludes courts from evaluating the validity of actions that a foreign government has taken within its own borders,” reflecting the concern of the courts that questioning the

186. BELLIA & CLARK, *supra* note 9, at 270.

187. See *Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (“Mindful that ‘Congress has the power to legislate beyond the limits posed by international law,’ we do not review federal law for adherence to the law of nations with the same rigor that we apply when we must review statutes for adherence to the Constitution.”).

188. See *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (announcing what is known as the *Charming Betsy* canon under which “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country”).

189. See, e.g., *Garcia v. Sessions*, 856 F.3d 27, 53 (1st Cir. 2017) (describing cases that demonstrate that the principle from *Charming Betsy* is “firmly established”). But see *Serra*, 600 F.3d at 1198 (applying the minority rule that courts “invoke the *Charming Betsy* canon only where conformity with the law of nations is relevant to considerations of international comity, and only ‘where it is possible to do so without distorting the statute.’”).

190. Kevin L. Cope, *Congress’s International Legal Discourse*, 113 MICH. L. REV. 1115, 1128 (2015) (“[T]he canon can also be conceived as a form of ‘soft’ judicial review, in that courts can use it to nullify a statute at odds with international law.”).

191. *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 248 (2010) (“When a statute gives no clear indication of an extraterritorial application, it has none.”).

192. *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

validity of foreign sovereign's actions within its own borders would "interfere with the executive branch's conduct of foreign policy."<sup>193</sup>

A recent example involves the Paris Climate Agreement. After the Trump administration withdrew, several states and cities, including California and Washington, joined several other nations to implement protections against rapid climate change and maintain the Paris Agreement.<sup>194</sup> This resulted in solely internal state regulations by those states and cities. States can adopt stricter or higher standards than federal protections,<sup>195</sup> and it should be no different in the context of the intrastate adoption of CIL. While this may have a tangential effect on foreign businesses or peoples, this type of internal working does not directly relate to the international relations of the country, and like *Barclays*,<sup>196</sup> Congress and the states should decide the issue.

These doctrines and their underlying purposes are to prevent judicial interference in foreign relations. The adoption of modern CIL by states into their own domestic law implicates none of these concerns, as it merely<sup>197</sup> certain human rights within those states.<sup>198</sup> But this does not imply that a foreign state would be subject to these state-

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193. *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 582 F.3d 1083, 1088 (9th Cir. 2009).

194. See Reuters, *California and Washington state join carbon pledge in defiance of Trump*, REUTERS (Dec. 12, 2017, 11:08 AM), <https://www.reuters.com/article/us-climatechange-summit-americas/california-and-washington-state-join-carbon-pledge-in-defiance-of-trump-idUSKBN1E625E>; Dakin Andone & Nicole Chavez, *US mayors, governors vow to stick with Paris accord*, CNN (June 2, 2017, 12:23 AM), <https://www.cnn.com/2017/06/01/us/trump-climate-deal-cities-states-defying/index.html>.

195. See, e.g., *Virginia v. Moore*, 553 U.S. 164, 171 (2008) ("States . . . [are] free to impose higher standards on searches and seizures than required by the Federal Constitution.") (citation and quotation omitted); *Op. of the Justices*, 122 N.H. 199, 204 (1982) (describing in the context of burdens of proof for civil commitment, that "[u]nder our federal system, however, the States are free to interpret their own constitutions and adopt stricter due process standards as long as they meet the federally prescribed minimum").

196. See *Barclays Bank PLC v. Franchise Tax Bd. of California*, 512 U.S. 298, 330–31 (1994) ("The Constitution does 'not make the judiciary the overseer of our government.' Having determined that the taxpayers before us had an adequate nexus with the State, that worldwide combined reporting led to taxation which was fairly apportioned, nondiscriminatory, fairly related to the services provided by the State, and that its imposition did not result inevitably in multiple taxation, we leave it to Congress-whose voice, in this area, is the Nation's-to evaluate whether the national interest is best served by tax uniformity, or state autonomy.").

197. See *Serra v. Lappin*, 600 F.3d 1191, 1199 (9th Cir. 2010) ("That the courts should ever invoke the *Charming Betsy* canon in favor of United States citizens is doubtful, because a violation of the law of nations as against a United States citizen is unlikely to bring about the international discord that the canon guards against.").

198. Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639, 672 (2000) ("The essential difference is content: old CIL focused on commercial and military relationships between states; modern CIL focuses on human rights. But similarities overwhelm this difference.").

incorporated norms outside the jurisdiction Congress has already created. The question of whether a foreign sovereign is subject to jurisdiction in a state or federal court is separate from whether CIL can be adopted by a state rather than the federal government. Therefore, modernist scholars' and Bellia and Clark's fears that state-adopted CIL norms would destroy national sovereignty by forcing U.S. courts to impose human rights on other countries is not necessarily a concern.<sup>199</sup>

*B. The Law of Nations is not Incorporated into Federal Law unless Authorized by the Federal Political Branches*

To understand the nature of the law of nations within U.S. law, we must understand the basis of U.S. law itself. The basic question is: what is law in the U.S.? *Erie* is not necessarily relevant in this Part for determining whether CIL is state or federal law.<sup>200</sup> Rather, *Erie* represented the evolution of U.S. law into an “embrace of legal positivism.”<sup>201</sup> Legal positivism rejects general law—which *Erie* explicitly did—and requires the law to be a command of an identifiable domestic sovereign.<sup>202</sup> Legal positivism is a position about *what* constitutes law.<sup>203</sup> Since at least the time of *Erie*, it has been a driving legal theory in American jurisprudence,<sup>204</sup> which Ronald Dworkin has termed the “ruling theory of law” in America.<sup>205</sup> U.S. courts have

199. See *Yaodi Hu v. Communist Party of China*, No. 1:12-CV-1213, 2012 WL 7160373, at \*2 (W.D. Mich. Nov. 20, 2012), report and recommendation approved, No. 1:12-CV-1213, 2013 WL 634719 (W.D. Mich. Feb. 20, 2013) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434–35 n.1 (1989)) (“From the nation’s founding, foreign states were generally granted complete immunity from suit in United States courts. Congress codified this principle in the Foreign Sovereign Immunities Act (FSIA), which applies to all claims against sovereign states, including claims under the ATS.”) (internal citations omitted).

200. See Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2265 (“What is significant is *Erie*’s rejection of general common law (of which CIL was a part), and its related requirement that federal courts ground the application of federal common law in the Constitution or a federal enactment.”).

201. Bradley & Goldsmith, *Critique*, *supra* note 2, at 852 (“This strand of *Erie* requires federal courts to identify the sovereign source for every rule of decision.”).

202. See Patrick J. Borchers, *The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and A Brave New World for Erie and Klaxon*, 72 TEX. L. REV. 79, 116 (1993) (“In this system, there is no room for a corpus of law without an identifiable sovereign.”).

203. Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 701 (1998) (“Because legal positivism is a position about what constitutes law while *Erie* concerns the proper role of federal courts in lawmaking, legal positivism has nothing to say about the latter.”).

204. See Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2056 (1995) (noting that “scholars today treat legal positivism as a major—if not the major—jurisprudence in America”).

205. RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* vii (1977) (assigning the name because the theory has been so popular and influential).

embraced legal positivism as the basis for law in the U.S.<sup>206</sup> While some scholars such as Dworkin have taken issue with legal positivism,<sup>207</sup> his alternative basis for law as expounded in his work *LAW'S EMPIRE* is quite similar to that of legal positivism.<sup>208</sup>

Whether legal positivism or a theory like Dworkin's is the correct theory for the basis of law in the United States, they have the same underlying requirement: that the law come from an identifiable authoritative sovereign<sup>209</sup> as "the judiciary requires an identifiable source of authority for any valid exercise of lawmaking powers."<sup>210</sup> This source can be the Constitution, federal statutes, treaties, or certain acts of the executive or congressional branches.<sup>211</sup> In essence, rights must emanate from an adjudicative body.<sup>212</sup>

Alone, CIL does not "emanate" from an appropriate domestic sovereign in the United States, and therefore does not satisfy the positivist requirement to be automatically incorporated into federal law without some additional authorization from a domestic source.<sup>213</sup> CIL itself has a positivist foundation, as the law of nations requires consent of the nations to be bound through a sense of legal

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206. See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 511 (1998) ("As the nineteenth century progressed, courts and commentators began to embrace positivism. As a result, the natural law conception of international law faded and was replaced by an emphasis on state practice and consent."); Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L. REV. 1051, 1119 (2010) (noting "Erie's embrace of positivism").

207. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (describing issues with legal positivism).

208. See Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909, 1912 (2004) ("Dworkin has often insisted that law is simply what lawyers and judges do."). Dworkin's theory of the law is that "[g]eneral theories of law, for us, are general interpretations of our own judicial practice." RONALD DWORKIN, *LAW'S EMPIRE* 410 (1986).

209. See Anthony J. Bellia Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825, 891 (2005) ("[T]he rise of positivistic legal thought led courts to conclude that all law . . . must be attributable to a sovereign source"); Louise Weinberg, *The Curious Notion that the Rules of Decision Act Blocks Supreme Federal Common Law*, 83 NW. U. L. REV. 860, 867 (1989) (stating that "post-Erie positivism has cleansed American courts of law lacking an identifiable sovereign source").

210. Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 CORNELL L. REV. 892, 955 (2004).

211. See George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 288 (1993) ("Any major extension of federal power must find its source in the Constitution or in a federal statute, not in the common law decisions of federal judges alone.").

212. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 406 (2011).

213. See Young, *supra* note 9, at 34 ("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.").

obligation.<sup>214</sup> The law of nations is built by state practice but is only binding on the states if states follow from a sense of legal obligation—the state’s consent.<sup>215</sup> But this is not so in the domestic sense, as domestic sources have not fully adopted CIL into our own domestic law.

The law of nations has not been incorporated wholesale into domestic law.<sup>216</sup> Congress was given the power under Article I to “define and punish . . . Offences against the Law of Nations.”<sup>217</sup> No phrase or clause in the Constitution is superfluous or irrelevant,<sup>218</sup> yet the modern scholars’ argument would make this power immaterial. This express constitutional authority, and any actions by Congress under this power, would be largely irrelevant if the law of nations was already incorporated wholesale into domestic law.<sup>219</sup> While one could argue that Congress through some action incorporated all or a portion of existing CIL at some point in time, we have to look to Congress’ actions and specific constitutional provisions. Similarly, if CIL was already incorporated wholesale into federal law, then any actions by the political branches, including reservations or rejections of treaties that express CIL, would generally be pointless.<sup>220</sup> For example, only three years after the signing of the Constitution, Congress incorporated the law of nation’s definition of piracy into domestic law.<sup>221</sup> If the first Congress had thought CIL was already incorporated as binding law,

214. See John C. Dehn, *Customary International Law, the Separation of Powers, and the Choice of Law in Armed Conflicts and Wars*, 37 CARDOZO L. REV. 2089, 2105 (2016) (“Grotius [and others] viewed the law of nations in positivist terms. He explained that the rules of the law of nations arise from the consent of nations, not from the law of nature, and therefore may differ in different parts of the world. This clearly articulates a positivist view of international law.”).

215. See Ines Gillich, *The Normativity of Principles Within the Positivist Theory of International Law*, 41 N.C. J. INT’L L. 1, 3 (2015)

216. See *Al-Bihani v. Obama*, 619 F.3d 1, 4 (D.C. Cir. 2010) (Sentelle, Chief Judge, with Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, J., concurring in the denial of rehearing en banc) (concluding that “nothing in the Constitution compels the domestic incorporation of international law”).

217. U.S. CONST. art. I, § 8, cl. 10.

218. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (“It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.”); *Knowlton v. Moore*, 178 U.S. 41, 87 (1900) (“[T]he elementary canon of construction which requires that effect be given to each word of the Constitution.”).

219. See Bradley & Goldsmith, *Critique*, *supra* note 2, at 857 (“Congress’s selective incorporation [of CIL] would be largely superfluous if CIL were already incorporated wholesale into federal common law.”).

220. Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2269.

221. 18 U.S.C. § 1651 (2012) (“Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.”).

then this act in 1790 would have been superfluous. Certainly, Congress has not incorporated much, if any, of the modern CIL into federal law. As Professors Bellia and Clark note: “None of these cases, however, applied customary international law as ‘federal common law’—a modern construct unknown at the Founding.”<sup>222</sup>

Turning to case law, Supreme Court precedent does not support the modern position. For example, modern scholars such as Professor Harold Koh rely heavily on the statement in *Paquete Habana* that “[i]nternational law is part of our law.”<sup>223</sup> Besides the fact that this decision was prior to *Erie*—making this and other pre-*Erie* precedent generally unresponsive of the modern position due to *Erie*’s rejection of the federal general common law—it does not account for the more recent decisions in which the modern position was effectively denied.<sup>224</sup> And, at the time of *Paquete Habana*, modern CIL had not yet emerged, giving little foundation to the modern scholars’ arguments relating to the new law of nations.

In the case often most relied on by modern scholars, *Sabbatino*, the Supreme Court determined that “United States courts apply international law as a part of our own in *appropriate* circumstances.”<sup>225</sup> The Supreme Court specifically limited this application to “appropriate circumstances,” yet there is no definition of what an “appropriate circumstance” is, nor would it make sense that CIL was fully incorporated in federal law if courts would only apply it in those situations, whatever those may be.<sup>226</sup>

Furthermore, the Supreme Court has essentially rejected the underlying theory of the modern position. In *Sosa v. Alvarez-Machain*, the Supreme Court stated that the Court knew “of no reason” that their jurisdiction was extended to include all common law claims arising from the law of nations.<sup>227</sup> In fact, the *Sosa* Court expressly cautioned

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222. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 829–30.

223. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

224. See Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2265 (“These elements of *Erie*, combined with the substantial changes in the nature of CIL, mean that the pre-*Erie* precedents by themselves provide no support for the modern position’s application of CIL as federal common law. Thus, recourse to pre-*Erie* practice cannot legitimize the modern position’s federalization of CIL.”).

225. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (emphasis added).

226. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 814.

227. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (“Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption.”).

lower courts to be restrained in adopting common law causes of actions from the law of nations, specifically the traditional CIL:

Accordingly, we think courts should require any claim based on the present day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized. This requirement is fatal to Alvarez’s claim.<sup>228</sup>

Case law in the United States appears to favor the revisionist position, as demonstrated by the reasoning in multiple recent Supreme Court cases. For example, in *Medellín v. Texas* the Supreme Court addressed whether judgments of the International Court of Justice are enforceable by the courts under federal law.<sup>229</sup> The Court determined that “while treaties ‘may comprise international commitments . . . they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be ‘self-executing’ and is ratified on these terms.’”<sup>230</sup> It would be implausible to believe that treaties, which are defined and expressly consented to by nations, must have congressional approval to be executed, while CIL—which is undefined and not expressly accepted by nations—does not need this authorization. This supports the revisionist position’s reasoning that international law, including treaties, are not domestic law until incorporated by the political branches.

Finally, the most recent case to touch on this subject, *Jesner v. Arab Bank*, again implicitly rejected the modern position’s claims, lending credence to the argument that the revisionist position is more correct under the law. In *Jesner*, the Supreme Court concluded that “any imposition of corporate liability on foreign corporations for violations of international law must be determined in the first instance by the political branches of the Government.”<sup>231</sup> The Court instead held the political branches must determine this question—essentially upholding the revisionist’s conclusion that there must be political branch authorization before domestic courts can apply the law of nations. As demonstrated here, the Court has implicitly adopted the revisionists’

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Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, as a more expansive common law power related to 28 U.S.C. § 1331 might not be.”).

228. *Id.* at 725.

229. *See* *Medellín v. Texas*, 552 U.S. 491, 498 (2008).

230. *Id.* at 505 (quoting *Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (en banc)).

231. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1408 (2018).

conclusion that the law of nations must be authorized by the domestic political branches prior to judicial application.

While the Supreme Court has only implicitly affirmed the revisionist position, several circuit courts have expressly adopted the revisionist holdings.<sup>232</sup> For example, the Ninth Circuit concluded that “customary international law is not a source of judicially enforceable private rights in the absence of a statute conferring jurisdiction over such claims.”<sup>233</sup> Similarly, almost the entire D.C. Circuit, in affirming the revisionist position, wrote: “international norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts after *Erie*.”<sup>234</sup> The Sixth Circuit proclaimed in *Buell v. Mitchell*:

We hold that the determination of whether customary international law prevents a State from carrying out the death penalty, when the State otherwise is acting in full compliance with the Constitution, is a question that is reserved to the executive and legislative branches of the United States government, as it their constitutional role to determine the extent of this country’s international obligations and how best to carry them out.<sup>235</sup>

While the Sixth Circuit limited their holding in this statement specifically to the death penalty and declined to take a position in the debate between the revisionists and the modern scholars at that time,<sup>236</sup> their reasoning aligns directly with the revisionist position.<sup>237</sup> Notably, the Second Circuit does not appear to take this position, instead choosing to side with pre-*Erie* precedent even after *Sosa*.<sup>238</sup>

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232. The Seventh Circuit has expressed uncertainty as to whether the pre-*Erie* case law supports the domestic incorporation of CIL. *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1153 (7th Cir. 2001).

233. *Serra v. Lappin*, 600 F.3d 1191, 1197 (9th Cir. 2010).

234. *Al-Bihani v. Obama*, 619 F.3d 1, 6 (D.C. Cir. 2010) (Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, J., concurring in the denial of rehearing en banc).

235. *Buell v. Mitchell*, 274 F.3d 337, 375–76 (6th Cir. 2001).

236. *Id.* at 376 n.10.

237. District courts are much less uniform in their decisions, likely due to the Supreme Court’s reluctance to provide guidance on this question. *Compare, e.g., Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (“[I]t is well settled that the body of principles that comprise customary international law is subsumed and incorporated by federal common law.”), with *In re XE Servs. Alien Tort Litig.*, 665 F. Supp. 2d 569, 579 (E.D. Va. 2009) (“It is clear, then, that *Sosa* does not incorporate customary international law (“CIL”) into the body of federal common law in a wholesale manner.”).

238. *See Oliva v. U.S. Dep’t of Justice*, 433 F.3d 229, 233–34 (2d Cir. 2005) (citing pre-*Erie* precedent).

In the Supremacy Clause of the U.S. Constitution, federal courts are bound by three sets of laws: (1) the Constitution; (2) federal law; and (3) treaties.<sup>239</sup> CIL does not fall into any of these categories. Instead, the law of nations is created by the amalgamation of decisions, statements, and interpretations of state action.<sup>240</sup> Because federal common law and the law of nations are not listed among these, it is unlikely the Founders meant to require application of the law of nations wholesale, much less have them preempt state law in all cases.<sup>241</sup> Additionally, federal common law is limited to very few areas that are heavily restricted—(1) those in which a federal rule of decision is “necessary to protect uniquely federal interests,” and (2) those in which Congress has given the courts the power to develop substantive law.<sup>242</sup>

Federal law has not fully incorporated CIL norms, and without some type of authorization by domestic powers, the judiciary cannot enforce the law of nations within the U.S.<sup>243</sup> We can understand the “revised revisionist” conclusion described in this Article by alluding to the hierarchy of presidential power derived from the famous Justice Jackson concurrence in the *Youngstown Steel*.<sup>244</sup> Like the Executive

239. U.S. CONST. art. VI.

240. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 508 n.16 (2d ed. 1996) (noting that the Supremacy Clause “does not easily include [customary] international law,” because CIL is not a treaty and is not made pursuant to the Constitution, but rather is made by the world community “in a process to which the United States contributes only in an uncertain way and to an indeterminate degree”);

241. See Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 *TEX. L. REV.* 1321, 1323–24 (2001) (“Although the Supremacy Clause performs the familiar function of securing the primacy of federal law over contrary state law, it also necessarily constrains the exercise of federal power by recognizing only three sources of law as ‘the supreme Law of the Land.’ . . . Accordingly, ‘federal law’ adopted outside these procedures does not clearly fall within the terms of the Supremacy Clause, and thus provides a questionable basis for displacing state law.”).

242. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

243. See *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (“Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law.”).

244. Justice Jackson explained the power of the Executive in relation to congressional powers, breaking the discussion into three categories:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth), to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
2. When the President acts in absence of either a congressional grant or denial of

Branch, the judiciary has limited powers in relation to Congress when applying, incorporating, or interpreting the law of nations as U.S. federal law:<sup>245</sup>

1. When the law of nations is pursuant to an express or implied authorization of Congress or the Constitution,<sup>246</sup> the judiciary's authority "is at its maximum" to apply and interpret the law of nations as federal law.
2. When the law of nations arises in absence of either a congressional grant or denial of authority, the judiciary can only rely on the judiciary's own independent powers to interpret domestic constitutional and statutory law in appropriate circumstances.<sup>247</sup>
3. When the law of nations is incompatible with the express or implied will of the political branches, the judiciary is at "its lowest ebb" of power as the judicial branch can only rely on its own powers to apply and interpret the congressional will or the federal Constitution.

While this is not an exacting analogy, the list above provides a good understanding for the general situations of where and how the law of nations is incorporated (or not) into federal law under the revised

authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

245. See Kristen E. Eichensehr, *Courts, Congress, and the Conduct of Foreign Relations*, 85 U. CHI. L. REV. 609, 645 (2018) (applying the *Youngstown* framework to assess the authority of non-executive actions).

246. See Bradley et al., *supra* note 20, at 935 ("The application of foreign law in both contexts might be viewed as consistent with *Erie*'s positivism because in both contexts the Court relies on a domestic sovereign source that purportedly makes relevant the foreign and international materials, and because the resulting legal conclusions reflect domestic U.S. law.").

247. See Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 913–14 (1996) ("The federal common law making power recognized by the Court encompassed the authority to formulate federal common law rules whenever either the Constitution or Congress has 'federalized' an area of the law but has failed to provide rules of decision for all issues that may arise.").

revisionist position. Before the judiciary can apply or reject the law of nations, courts must first look to whether Congress or the Constitution has expressly or impliedly authorized or rejected this particular custom within the law of nations.

The first situation—where Congress has expressly or impliedly authorized the law of nations to be federal law—is the most straightforward, as courts simply apply the codified law of nations to the case at hand. Situations falling under this category include the codification of CIL such as sovereign immunity, which, prior to the Foreign Sovereign Immunities Act,<sup>248</sup> was part of the law of nations.<sup>249</sup> This category of power also includes implied authorization of Congress or the Constitution to the law of nations.<sup>250</sup>

An example of implicit authorization is in the prohibition of capital punishment of minors. Under the Eighth Amendment, the U.S. cannot inflict “cruel and unusual punishments.”<sup>251</sup> It would be very difficult for a court to determine what “unusual” punishment is without looking around to other countries to see what is “usual.”<sup>252</sup> This is what happened in *Roper v. Simmons* when the Supreme Court looked to the status of capital punishment for juveniles in other countries and the international community.<sup>253</sup> In the Court’s analysis of the current international status of capital punishment for minors, the Court saw that the U.S. was alone among the world in permitting this, even though the U.S. had previously attached reservations to a treaty, stating that the U.S.:

248. 28 U.S.C. § 1604 (2012) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.”).

249. See Curtis A. Bradley & Jack L. Goldsmith, *Pinochet and International Human Rights Litigation*, 97 MICH. L. REV. 2129, 2161 (1999) (“Prior to *Erie*, federal and state courts alike applied the CIL of foreign sovereign immunity on the domestic plane without authorization from Congress or the Executive.”). See also *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 123 (1812) (upholding the sovereign immunity of France under the law of nations).

250. See, e.g., *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981) (“There is no sign that Congress intended to reject the application of international law when it enacted s 955a(a). Rather, the converse is true; the intent to abide by international law pervades the legislative history of the Marijuana on the High Seas Act. Since Congress did not reject application of the law of nations, the Court must determine whether the Indictment before it is proper under the international law of jurisdiction.”).

251. U.S. CONST. Amend. VIII.

252. See Penn Law, *supra* note 145, at 28:20–30:00 (noting that it is difficult to determine what would be unusual punishment without looking to other countries).

253. See *Roper v. Simmons*, 543 U.S. 551, 577 (2005) (“In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.”).

[T]he United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age.<sup>254</sup>

Despite this reservation, two years later Congress explicitly changed its stance when enacting the Federal Death Penalty Act, stating “that no person may be sentenced to death who was less than 18 years of age at the time of the offense.”<sup>255</sup> By changing this stance in 1994, Congress impliedly accepted the custom within the law of nations that minors cannot be subject to capital punishment, even though a number of states still permitted this practice. A little more than a decade later, the Court in *Roper v. Simmons* explicitly decided the Eighth Amendment requires this conclusion, prohibiting states from imposing the death penalty on minors, and in doing so, the Court noted the congressional change and looked to foreign jurisdictions in determining that this practice constituted cruel and unusual punishment.<sup>256</sup>

The second situation—where Congress has not acted one way or the other—is the most disputed area of this debate. In the absence of congressional authority or disapproval, the judiciary must look to other identifiable authoritative sources of law—namely, the Constitution or, in the case of modern CIL, the states. If the Constitution permits or requires application of the law of nations, then the courts, depending on the constitutional authorization, should or may incorporate the law of nations. For example, while the U.S. has signed the Vienna Convention on the Law of Treaties, the Senate never gave its advice or consent,<sup>257</sup> and “the United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”<sup>258</sup> Even though the U.S. has

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254. U.S. Senate Resolution of Advice and Consent to Ratification of the International Covenant on Civil and Political Rights, 138 Cong. Rec. 8070 (Apr. 2, 1992).

255. 18 U.S.C. § 3591 (2012).

256. *Roper*, 543 U.S. at 567-68, 575-77.

257. See Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (entered into force Jan. 27, 1980).

258. Katherine M. Davis, *I, Too, Sing America: Customary International Law for American State and Federal Courts' Post-Kiobel Jurisprudence, Guided by Australian and Indian Experiences*, 29 EMORY INT'L L. REV. 119, 142 (2014) (citing U.S. Dep't of State, Vienna Convention on the Law of Treaties, at <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Sept. 24, 2013, 9:57 PM)).

not adopted this treaty, courts rely upon it “as an authoritative guide to the customary international law of treaties,” insofar as it reflects actual state practices.<sup>259</sup> The U.S. has accepted and rejected some of the provisions within the treaty.<sup>260</sup> Therefore, in accordance with Article III, the courts would have to look to the Constitution in deciding whether to apply the law of nations from the Vienna Convention.

Another much more recent example of this second situation is the Paris Agreement. Congress has repeatedly adopted legislation and decrees stating that climate change is a national security issue and adopted the United Nations Framework Convention on Climate Change, an agreement that was ratified by the Senate and remains U.S. law today.<sup>261</sup> Before this, the U.S. has signed and ratified other treaties relating to addressing climate change on an international level.<sup>262</sup> Even though the current administration has purportedly left the agreement, the Paris Agreement has likely risen or will soon rise to the level of CIL, as 178 of the 195 signatories have ratified the agreement.<sup>263</sup> If the U.S. is then sued in federal court for a violation of the Paris Agreement, the courts will have to analyze this question under the framework: (1) has Congress implicitly authorized this environmental regulatory custom through its previous ratification of treaties and enactment of federal statutes; and (2) if the courts find Congress has not acted one way or the other on the Paris Agreements specifically (since the Agreement has not yet been submitted to the legislature), has the Constitution authorized incorporation of this CIL?

The third category—where the political branches have explicitly or impliedly rejected the law of nations—is another generally straightforward category. If Congress has expressly or impliedly rejected the law of nations or enacted contrary laws or treaties within that field, courts have held CIL has no place in federal law.<sup>264</sup> In *Paquete*

259. *Mora v. New York*, 524 F.3d 183, 196 n. 19 (2d Cir. 2008).

260. Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Court*, 28 VA. J. INT'L L. 281, 301 (1988).

261. Michael Dobson, *The Senate Story that Everyone is Missing*, HUFF. POST (April 7, 2017), [https://www.huffingtonpost.com/entry/the-senate-story-that-everyone-is-missing\\_us\\_58e810a4e4b06f8c18beebd5](https://www.huffingtonpost.com/entry/the-senate-story-that-everyone-is-missing_us_58e810a4e4b06f8c18beebd5).

262. *Id.*

263. *Environment, 7.d Paris Agreement*, UNITED NATIONS, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&lang=\\_en&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=_en&clang=_en) (last accessed June 26, 2018).

264. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (holding that Congress may “shut the door to the law of nations” either “explicitly, or implicitly by treaties or statutes that occupy the field”); *Brad v. INS*, 128 F.3d 1009, 1014 n. 5 (7th Cir. 1997) (“[C]ustomary international law is not applicable in domestic courts where there is a controlling legislative act, such as the

*Habana*,<sup>265</sup> the Court stated, “[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .” And both modern and revisionist scholars have agreed that Congress can enact laws in contradiction to the law of nations. Based on this, courts have determined that if there is congressional legislation or an executed treaty, this overrides inconsistent CIL.<sup>266</sup>

If CIL can become federal law, would the law of nations as incorporated preempt prior or subsequent federally-enacted law? If there is a conflict between the law of nations and a congressionally-enacted statute, which reigns supreme? Most scholars and courts agree that “a federal statute trumps a prior inconsistent norm of CIL—that is, Congress can violate CIL.”<sup>267</sup> Similarly, even the “modernist position recognizes, of course, that customary international law may be overridden by subsequent federal legislation.”<sup>268</sup> And this conclusion makes logical sense, as the domestic sovereigns have spoken on what law applies within the nation—a positivist conclusion.

Positivism—the basis of U.S. law as described above—requires that the law comes from an identifiable domestic sovereign. CIL does not satisfy this requirement unless and until the domestic political branches or the Constitution adopt or incorporate those norms into U.S. law. This authorization can come from either explicit incorporation, such as codification of those norms, or implicit, such as assenting to an

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statute here.”).

265. *The Paquete Habana*, 175 U.S. 677, 700 (1899).

266. *See, e.g., Galo-Garcia v. INS*, 86 F.3d 916, 918 (9th Cir. 1996) (rejecting refugee’s customary international law claim because Congress’ “extensive legislative scheme for the admission of refugees” governed it).

267. *See, e.g., Bradley & Goldsmith, Critique, supra* note 2, at 842; *Norris v. Doniphan*, 61 Ky. 385, 391 (1863) (“It must be conceded, however, that the courts of a sovereign engaged in war cannot compel him to observe the usage of nations, nor treat as void any act of his because it violates that usage. The law of nations has no obligatory force upon him in dealing with his subjects. He may disregard it, and establish a different rule; and if he does so, those within his jurisdiction must observe the rule so established, however it may conflict with the usage of nations. In the absence of any positive law to the contrary, the usage of nations may furnish a rule for the guidance of courts of justice; but they cannot be governed by it in the presence of a positive conflicting law made by a sovereign who may choose to disregard it.”). *See also Oliva v. United States Dep’t of Justice*, 433 F.3d 229, 236 (2d Cir. 2005) (concluding that “clear congressional action trumps customary international law”).

268. *Born, supra* note 5, at 1649. *See, e.g., Neuman, supra* note 81, at 384 (“Our system follows a practice of presumptive enforceability of customary international law, subject to congressional override.”); *Koh, supra* note 74, at 1835 (“Once customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives.”).

international treaty or passing a resolution in favor or against a norm.<sup>269</sup> Therefore, without authorization by our domestic sovereigns, courts cannot apply either traditional or modern CIL within the U.S.

### C. Should the *Law of Nations* be Domestic Law?

Now that we have discussed whether the law of nations (or part of it) is federal law, the policy question arises whether this is a beneficial conclusion. The theory in this Article means that much of CIL is not domestic law. This would be so unless and until the political branches incorporated CIL into federal law. But why should this be an undesirable result? And is this conclusion really “radical,”<sup>270</sup> to require domestic law to be created by the domestic lawmakers? As described in Section II, CIL is unwritten, variable, and changing. Additionally, specific CIL norms are difficult to determine and sources are often selectively chosen and cherry-picked among thousands of sources. To have the law of nations automatically incorporated into federal law—as the modernists would want—would be to introduce a constantly changing variable into domestic law over which the nation and its citizens have little to no control. “The fact that international jurists cannot agree on what it takes to produce a rule of customary international law is hardly comforting.”<sup>271</sup> And unlike the modernists claim that their position was the “hornbook” rule,<sup>272</sup> the modern scholars still cannot point to a single case that has adopted or applied their conclusion.<sup>273</sup>

One specific example espoused by revisionists is the democratic deficit that CIL incorporation brings, as the citizens of the United States have no direct say in the representatives or laws of CIL.<sup>274</sup> Essentially, the argument is that “if customary international law can be made by practice wholly outside the United States it has no basis in popular sovereignty at all. Some foreign governments are not

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269. The allocation of power between Congress and the president to do so are beyond the scope of this Article.

270. See, e.g., Koh, *supra* note 74, at 1828 (“For if customary international law is neither federal nor state law (unless specifically incorporated by the state or federal political branches), then in most cases, customary international law is not United States law at all!”).

271. Vázquez, *supra* note 61, at 1618.

272. Koh, *supra* note 74, at 1825.

273. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 829–30.

274. See Bradley & Goldsmith, *Critique*, *supra* note 2, at 857 (“In addition, the modern position that CIL is federal common law is in tension with basic notions of American representative democracy.”).

responsive to their own people, let alone to the American people.”<sup>275</sup> This is even more a concern in the context of modern CIL, as this derives not from the practice of states but from the pronouncements of the UN or international bodies, statements by states, and the writings of scholars. These pronouncements of judges and scholars used to make modern CIL are then based on democratically deficient foundations, such as agreements between or including non-democratic nations.<sup>276</sup> Even traditional CIL has its own democratic deficiencies, especially in the interpretation of what constitutes a general practice of states.<sup>277</sup>

This is a valid concern of the revisionist scholars. How can a foreign government—which has no required duty to American citizens and which often has significantly different problems within their own country—be directly responsive to or held responsible by citizens within this country? Professor Gerald Neuman attempted to respond to these critiques of democratic legitimacy by arguing that although the process associated with the formation of customary international law “is not direct democracy, it is a form of representative democracy” because the political branches participate in this process.<sup>278</sup>

It is true that not all law within the United States is created by elected representatives, and therefore, is like international law in that aspect.<sup>279</sup> But international law takes this another step further, particularly that of modern CIL. The United States does not always have a say in the evolution of international law, and with the increasing use of modern CIL—which emanates not from the general practice of states but also from other individual sources such as U.N. declarations—it is becoming even farther from the U.S. people’s hands. At the very least, democratic legitimacy requires full participation and should require assent to a specific norm.<sup>280</sup> Yet the law of nations

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275. Trimble, *supra* note 3, at 721.

276. See McGinnis & Somin, *supra* note 64, at 1204 (“The democracy deficit of modern customary international law is not limited to the unrepresentative nature of those charged with making crucial discretionary judgments. The sources that publicists and others rely upon to “make” international law are themselves forged undemocratically.”).

277. See *id.* at 1207–08, 1247 (“The political branches should be able to incorporate international law into domestic law through the ordinary legislative processes that ensure democratic control over lawmaking. But raw international law should not be allowed to become part of our law.”).

278. Neuman, *supra* note 81, at 383–84. See also Bellia & Clark, *Constitutional Law*, *supra* note 5, at 742.

279. See Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1, 103 (2006).

280. See J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 523 (2000) (The methodologies actually used to determine CIL cannot support the democratic legitimacy of its norms.”).

requires neither, particularly modern CIL, creating this democratic deficit in the application of CIL to federal law. Requiring the automatic incorporation of an “international common law” into domestic law by way of a restricted federal common law undermines the very foundation of the U.S. legal system. Policy further dictates that CIL should not be automatically incorporated as this would weaken the domestic legal system and introduce incredible uncertainty into our law.

*D. Professors Bellia and Clark Are Fundamentally Revisionists*

In one of the more recent positions, Professors Bellia and Clark’s articles—and now a rather convincing book—craft an extensive look into the interpretation of the Constitution in relation to the law of nations.<sup>281</sup> Rather than rejecting the revisionist position, this Author believes their ideas contribute more to an evolution of the revisionists’ fundamental conclusion to the second question posed at the beginning of this Article—how is CIL incorporated into federal law, or is it at all?<sup>282</sup> Unlike many assertions, the revisionist position never held that the law of nations was exclusively state law; that was the (incorrect) interpretation by modern scholars after Bradley and Goldsmith’s initial article.<sup>283</sup> Rather, the revisionists simply conclude that CIL is not federal law unless authorized for judicial application by the political branches—our domestic authority. Just because the law of nations is not initially federal law does not automatically make it state law.

On the second issue described in this Article—that CIL is only domestic law if adopted by the political branches—Bellia and Clark’s conclusions stem from the same foundation as the revisionists’ positions. Both schools of thought view domestic law as requiring some domestic source of authority to authorize application of CIL, whether it be the Constitution or federal statute. Bellia and Clark are correct in their statement that “the Constitution is a fundamental source of domestic law in the United States, and therefore U.S. courts not only may, but must, apply principles of the law of nations when the

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281. See generally Bellia & Clark, *Constitutional Law*, *supra* note 5 (discussing their view of the law of nations debate); BELLIA & CLARK, *supra* note 9 (same).

282. See Vázquez, *supra* note 61, at 1597–98 (2011) (showing some of the similarities and differences between the Bellia & Clark position with the revisionist position).

283. See Bradley & Goldsmith, *Incorporation*, *supra* note 94, at 2261 (“[W]e have not in fact argued that CIL is state law. Rather, as Koh at times acknowledges, our view is that CIL should not be a source of law for courts in the United States unless the appropriate sovereign—the federal political branches or the appropriate state entity—makes it so.”).

Constitution requires them to do so.”<sup>284</sup> The Constitution is the fundamental positivist source of law in the United States,<sup>285</sup> and if the law of nations is required to interpret a provision, then it must be applied. This is in line with the revisionists’ basic tenet that there must be a domestic source for the authorization of the law of nations. The Constitution can be that source of domestic authority. Therefore, even though Bellia and Clark attempt to distinguish themselves from revisionists, their fundamental theory appears to be quite similar to the revisionists’ elementary conclusion.

### CONCLUSION

The law of nations is not domestic law unless there is domestic authorization. This can be done either implicitly or explicitly, but it must be done before the courts can apply CIL as U.S. law. However, the question posed at the very beginning of this Article may not be decisively resolved by the Supreme Court anytime soon, and this debate may continue for years to come. The last three Supreme Court decisions in the past 15 years that touched on this topic only sparked more controversy, and *Jesner* did little to resolve the debate. Yet some of the Justices have begun to acknowledge the ensuing debate,<sup>286</sup> along with many lower courts.<sup>287</sup> A few of the lower courts have been taking sides, with much of the *en banc* D.C. Circuit adopting the revisionist positions.<sup>288</sup> As international law and the modern law of nations become more prominent and frequent in federal courts, this issue will arise more frequently.

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284. Bellia & Clark, *Constitutional Law*, *supra* note 5, at 832.

285. U.S. CONST. art. VI.

286. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 739 (2004) (Scalia, J., concurring in part) (referencing multiple law review articles on this law of nations debate); see also *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1416 (2018) (Gorsuch, J., concurring in part) (same).

287. See, e.g., *Buell v. Mitchell*, 274 F.3d 337, 376 (6th Cir. 2001) (“We take no position on the question of the role of federal courts to apply customary international law as federal law in other contexts, a subject of recent lively academic debate.”); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 245 n.19 (2d Cir. 2003) (citing several law review articles in this law of nations debate, stating “[a]mong legal commentators, *Filartiga’s* interpretation of the ATCA has attracted both celebrants and critics”); *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1153 n.4 (7th Cir. 2001) (“In light of the present uncertainty about the precise domestic role of customary international law, the statement that international law is part of our law provides limited support for the proposed application of *Charming Betsy*.”).

288. See, e.g., *Al-Bihani v. Obama*, 619 F.3d 1, 6 (D.C. Cir. 2010) (Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) (“[I]nternational norms outside of those explicitly incorporated into our domestic law by the political branches are not part of the fabric of the law enforceable by federal courts after *Erie*.”).

As stated in the introduction, this Article concludes that: (1) the traditional law of nations is exclusively within federal law, while the modern CIL can be adopted by either the federal or state domestic authorities; and (2) the law of nations only becomes federal law if either (a) the Constitution permits or requires the law of nations in interpretation of its provisions, or (b) the political branches adopt a certain custom or authorize the judiciary to decide questions regarding the law of nations. While a “revised” position to the revisionist foundation is presented in this Article, it too presents an evolution of those fundamental revisionist conclusions: that the law of nations is not domestic law unless authorized by domestic sources.