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CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW: A CRITIQUE OF THE MODERN POSITION

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CUSTOMARY INTERNATIONAL LAW AS FEDERAL COMMON LAW: A CRITIQUE OF THE MODERN POSITION

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In the last twenty years, a consensus has developed among courts and scholars that customary international law has the status of federal common law. Professors Bradley and Goldsmith label this consensus the "modern position." Courts have endorsed the modern position primarily to support their conclusion that international human rights lawsuits between aliens "arise under" the laws of the United States for purposes of Article III of the Constitution. Scholars have pushed the consequences of the modern position further by arguing that customary international law preempts inconsistent state law under the Supremacy Clause, binds the President under the Take Care Clause, and even supersedes prior inconsistent federal legislation.

In this Article, Professors Bradley and Goldsmith challenge the modern position. They question the modern position's historical validity, and they show that its recent rise to orthodoxy has been accompanied by little critical scrutiny. They then question contemporary arguments for the modern position and show how these arguments depart from basic understandings about American representative democracy, federal common law, separation of powers, and federalism. Professors Bradley and Goldsmith conclude that, in the absence of authorization by the federal political branches, customary international law should not have the status of federal law. This conclusion requires less change in judicial practice than might commonly be thought. Nonetheless, the story of the modern position's rise and continued influence presents cautionary lessons for a democratic society increasingly governed by international law.

I. INTRODUCTION

The proposition that customary international law ("CIL") is part of this country's post-*Erie*[1] federal common law has become a well-entrenched component of U.S. foreign relations law. In this Article, we refer to this proposition as the "modern position."[2] During the last

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

[2] We use the term "modern" to signify that widespread endorsement of this view occurred only recently. We use the term "position" to signify that there is substantial agreement that CIL has the status of federal common law, not to signify that all those who adopt this position are in agreement regarding its rationales or implications.

twenty years, almost every federal court that has considered the modern position has endorsed it. Indeed, several courts have referred to it as "settled."[3] The modern position also has the overwhelming approval of the academy.[4]

Despite (or perhaps because of) this uniformity of opinion, there has been little scrutiny of the modern position. This lack of scrutiny is surprising, in light of the modern position's potentially dramatic implications. If CIL has the status of federal common law, it presumably preempts inconsistent state law pursuant to the Supremacy Clause[5] and provides a basis for Article III "arising under" jurisdiction.[6] It may also bind the President under Article II's Take Care Clause.[7] Some proponents of the modern position even argue that CIL can supersede prior inconsistent federal legislation.[8]

In this Article, we provide a critique of the modern position. This critique reveals that the modern position is founded on a variety of questionable assumptions and that it is in tension with fundamental constitutional principles. We conclude that, contrary to conventional wisdom, CIL should not have the status of federal common law.

By way of background, there are two principal sources of international law:[9] treaties and CIL. Treaties are express agreements among nations.[10] CIL, by contrast, is the law of the international community

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[3] *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995) (referring to the "settled proposition that federal common law incorporates international law"), *cert. denied*, 116 S. Ct. 2524 (1996); *In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992) ("It is . . . well settled that the law of nations is part of federal common law."); 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."). Also see the cases cited below in note 150.

[4] *See, e.g.*, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 111 cmt. d, 115 cmt. e (1987) [hereinafter RESTATEMENT (THIRD)]; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295, 302–04; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1560–62 (1984). Also see the books and articles cited below in note 151.

[5] *See* U.S. CONST. art. VI, cl. 2 ("Laws of the United States . . . shall be the supreme Law of the Land.").

[6] *See id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases . . . arising under . . . the Laws of the United States . . . .").

[7] *See id.* art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

[8] *See, e.g.*, Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 875–78 (1987).

[9] Unless otherwise specified, throughout this Article we use the term "international law" to mean what is often referred to as "*public* international law" — the "rules and principles of general application dealing with the conduct of states and international organizations and with their relations *inter se*, as well as with some of their relations with persons, whether natural or juridical." RESTATEMENT (THIRD), *supra* note 4, § 101.

[10] Under international law, a treaty is any "purposeful agreement among states." RESTATEMENT (THIRD), *supra* note 4, pt. I, ch. 1 introductory note at 18. The term "Treaties" in the U.S. Constitution, however, refers only to those international agreements concluded by the President with the "Advice and Consent" of two-thirds of the Senate. U.S. CONST. art. II, § 2, cl. 2. The

that "results from a general and consistent practice of states followed by them from a sense of legal obligation."[11] Despite its relatively amorphous nature, CIL has essentially the same binding force under international law as treaty law.[12]

Historically, CIL primarily governed relations among nations, such as the treatment of diplomats and the rules of war. Today, however, CIL also regulates the relationship between a nation and its own citizens, particularly in the area of human rights. The scope of these customary international human rights norms is unclear. There is widespread agreement in the international community that CIL prohibits acts such as torture, genocide, and slavery.[13] Many commentators argue that it also prohibits certain applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation.[14] Others even contend that CIL confers various economic and social rights, such as the right to form and join trade unions and the right to a free primary education.[15] The list of putative CIL norms keeps growing.

In recent years, U.S. courts have been increasingly called upon to ascertain and apply CIL. For example, the U.S. Court of Appeals for the Second Circuit recently considered claims by Croat and Muslim citizens of Bosnia-Herzegovina against Radovan Karadzic, leader of the Bosnian Serbs, for violations of CIL prohibitions against genocide, war crimes, and related acts.[16] Similarly, in the last few years, several state courts have considered the argument that CIL invalidates certain applications of state death penalty laws.[17] These and other cases raise important questions about the domestic legal status of CIL. Under

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Supreme Court has also recognized the legitimacy of so-called "executive agreements." *See* United States v. Belmont, 301 U.S. 324, 330–31 (1937). Executive agreements are, quite simply, international agreements concluded by the President without the concurrence of two-thirds of the Senate. *See* RESTATEMENT (THIRD), *supra* note 4, § 303. Most, but not all, executive agreements are either authorized in advance or approved after the fact by legislation. *See* LOCH K. JOHNSON, THE MAKING OF INTERNATIONAL AGREEMENTS: CONGRESS CONFRONTS THE EXECUTIVE 3–19 (1984). Executive agreements have the same legal status under domestic law as treaties. *See Belmont*, 301 U.S. at 331. For a recent debate about the constitutional legitimacy of executive agreements, compare Bruce Ackerman & David Golove, *Is NAFTA Constitutional?*, 108 HARV. L. REV. 799, 836–37 (1995), with Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on the Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1249–78 (1995).

[11] RESTATEMENT (THIRD), *supra* note 4, § 102(2). For general discussions of CIL, consult ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW *passim* (1971), and KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW *passim* (2d rev. ed. 1993).

[12] *See* RESTATEMENT (THIRD), *supra* note 4, § 102 cmt. j.

[13] *See infra* p. 841.

[14] *See infra* p. 841 & note 171.

[15] *See infra* p. 841.

[16] *See* Kadic v. Karadzic, 70 F.3d 232, 236–37 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996).

[17] *See, e.g.*, State v. Ross, 886 P.2d 1354, 1358 (Ariz. 1994); State v. Steffen, No. C-930351, 1994 Ohio App. LEXIS 1973, at *11 (Ohio Ct. App. May 11, 1994); State v. Williams, Nos.

what authority do U.S. courts apply CIL? What is the relationship between CIL and federal treaties and statutes? Do issues of CIL arise under the laws of the United States for purposes of Article III? Can states violate CIL? Are state courts bound by federal court interpretations of CIL?[18]

International law does not itself answer these questions.[19] Rather, the answers must be found in U.S. law. In the first instance, that law is the U.S. Constitution. The Constitution, however, provides little guidance regarding the domestic legal status of CIL. It states that *treaties* are part of the supreme law of the land[20] and are a basis for Article III federal court jurisdiction,[21] but it is generally silent regarding the domestic legal status of CIL. There is only one reference in the Constitution to such law: Article I states that Congress has the power to "define and punish . . . Offences against the Law of Nations,"[22] the progenitor of CIL. Exercising this and related powers,[23] Congress has incorporated select aspects of CIL into federal statutory law.[24] In addition, the Treaty Clause of the Constitution gives the

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CA91-04-060, CA92-06-110, 1992 Ohio App. LEXIS 5529, at *24–*25 (Ohio Ct. App. Nov. 2, 1992).

18 Commentators sometimes discuss issues such as these in terms of the debate between the "monist" and "dualist" conceptions of the relationship between international and domestic law. *See* LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 64–67 (1995). This Article does not use those terms because their meaning is unclear and their usefulness questionable. *See id.* at 65–66.

19 Although international law imposes obligations on nations, it does not purport to specify how the nations must treat international obligations as a matter of domestic law. *See* LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 153 (3d ed. 1993). Accordingly, nations "differ as to whether international law is incorporated into domestic law . . . and whether the executive or courts will give effect to norms of international law or to treaty provisions in the absence of their implementation by domestic legislation." *Id.*

20 *See* U.S. CONST. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.").

21 *See id.* art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority."). In contrast to the U.S. Constitution, the constitutions of some countries expressly address the domestic legal status of CIL. For example, article 25 of the German Constitution provides that rules of international law "are part of federal law" and that "[t]hey take precedence against domestic law and directly create rights and duties for persons in the country." MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 105 (2d ed. 1993) (internal quotation marks omitted).

22 U.S. CONST. art. I, § 8, cl. 10.

23 *See id.* art. I, § 8, cl. 3 (power "to regulate Commerce with foreign Nations"); *id.* art. I, § 8, cl. 4 (power "[t]o establish an uniform Rule of Naturalization"); *id.* art. I, § 8, cl. 11 (power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* art. I, § 8, cl. 14 (power "[t]o make Rules for the Government and Regulation of the land and naval Forces"); *id.* art. I, § 8, cl. 18 (power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers").

24 An early example of the exercise of this power is a 1790 federal statute that criminalized piracy as defined by the law of nations. *See* Act of Apr. 30, 1790, ch. 9, § 8, 1 Stat. 113, 113–14

President an indirect power to incorporate CIL into domestic law: when treaties codify CIL, the President can, with the advice and consent of the Senate, ratify these treaties and thereby convert the CIL codified within them into federal law.[25]

In the absence of such incorporation of CIL norms by the federal political branches, the prevailing view is that CIL nevertheless has the status of federal law, in the form of federal common law.[26] Under this view, no congressional authorization is necessary in order for courts to apply CIL as federal law;[27] indeed, courts are bound to do so even in the absence of such authorization.[28]

We begin our critique of the modern position by sketching its origins. Throughout most of this nation's history, CIL did not have the status of federal law. Prior to *Erie*, CIL was viewed as part of the general common law most famously identified with *Swift v. Tyson*.[29] During this period, CIL, like all general common law, lacked the

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(codified at 18 U.S.C. § 1651 (1994)); *see also* LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 508 n.16 (2d ed. 1996) (citing additional examples).

[25] The President's foreign policy decisions may also turn in part on his evaluation of CIL, and these decisions are sometimes treated as binding on federal courts and the states. One example is the President's decision to recognize an entity as a sovereign state. *See, e.g.*, United States v. Pink, 315 U.S. 203, 230 (1942); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918). Similarly, prior to the enactment of the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (1994), courts viewed executive branch declarations concerning a foreign sovereign's immunity from suit — an issue governed by CIL — as binding federal law. *See, e.g.*, Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945). *See generally* HENKIN, *supra* note 24, at 54–61 (analyzing and critiquing "presidential law-making" in foreign affairs).

[26] Professor Weisburd has challenged some aspects of the modern position. *See* Arthur Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1239–40 (1988) [hereinafter Weisburd, *Executive Branch*]; A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1, 38–44 (1995) [hereinafter Weisburd, *State Courts*]. Although we agree with some of Professor Weisburd's analysis, we believe that it is incomplete in several respects, and we disagree with his ultimate conclusion that federal courts can continue to apply CIL in the absence of political branch authorization as "neither state nor federal law." Weisburd, *State Courts*, *supra*, at 49. We discuss Professor Weisburd's views below at pp. 853–54. Professor Trimble has also been critical of certain aspects of the modern position, *see* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 669–70 (1986), but he has not directly challenged the claim that CIL is federal common law.

[27] *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 896, 887 n.20 (2d Cir. 1980) ("[I]nternational law has an existence in the federal courts independent of acts of Congress . . . ."); Henkin, *supra* note 4, at 1561 (stating that customary international law "is 'self-executing' and is applied by courts in the United States without any need for it to be enacted or implemented by Congress").

[28] *See* Ishtyaq v. Nelson, 627 F. Supp. 13, 27 (E.D.N.Y. 1983) ("[I]nternational law is a part of the laws of the United States that federal courts are bound to ascertain and apply in appropriate cases . . . ."); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980) ("International law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case."); RESTATEMENT (THIRD), *supra* note 4, § 111(3) ("Courts in the United States are bound to give effect to international law . . . ."); *id.* § 115 cmt. e ("[A]ny rule of customary international law . . . is federal law (§ 111) [and] supersedes inconsistent State law or policy whether adopted earlier or later."); Brilmayer, *supra* note 4, at 324 (asserting that "*whatever international law requires*, it preempts state law").

[29] 41 U.S. (14 Pet.) 1 (1842).

supremacy, jurisdictional, and other consequences of federal law. *Erie*, of course, abrogated general common law and led to the creation of a common law that does possess the characteristics of federal law.[30] But for several decades after *Erie*, it remained an open (and generally unaddressed) question whether CIL was part of this new federal common law. As we explain below, the recent ascendancy of CIL to the status of federal common law is the result of a combination of troubling developments, including mistaken interpretations of history, doctrinal bootstrapping by the *Restatement (Third) of Foreign Relations Law*, and academic fiat.

We then examine some of the potential implications of the proposition that CIL is federal common law. We explain how CIL has changed in recent years and how this "new CIL" purports to regulate many areas that were formerly of exclusive domestic concern. With this in mind, we analyze some of the potential consequences of the modern position's federalization of CIL. As we explain, these potential consequences are largely being advocated by the academic community. Although the lower federal courts have endorsed the modern position, they have done so mostly in jurisdictional contexts and have not generally considered its broader substantive implications.

We next consider the various, and often contradictory, arguments that have been asserted in support of the modern position. These arguments are based on claims about history, the implications of *Erie*, and the nature of the post-*Erie* federal common law. We conclude that some of these arguments are manifestly insupportable and that others are open to substantial question on the ground that they depart from well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism.

Finally, we discuss the implications of our critique. Because courts (as opposed to the academy) have not generally endorsed the broader consequences of the modern position, the acceptance of our conclusion that CIL does not have the status of federal common law does not require a significant change in current judicial practice. Nonetheless, the issue of CIL's domestic status remains important. The rapidly growing number of international cases in U.S. courts, the superficial plausibility of the modern position, the relative unfamiliarity of U.S. judges with international law, and courts' frequent reliance on academic opinion in international cases all make it likely that the modern position will exercise increasing influence on the courts. This possibility suggests cautionary lessons for a democratic society increasingly governed by international law.

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[30] *See* Henry J. Friendly, *In Praise of* Erie — *And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 405–07 (1964). As Judge Friendly explained, the new federal common law differs from the old because, among other things, it is binding on state courts pursuant to the Supremacy Clause. *See id.*

II. Rise of the Modern Position

As noted above, the proposition that CIL is federal common law is today a well-settled principle of U.S. foreign relations law. This was not always so. Indeed, the modern position has become orthodoxy only in the last two decades. This Part examines the origins of the modern position and demonstrates the remarkable lack of critical scrutiny that has accompanied its recent rise.

A. *Pre-*Erie *Understanding*

Modern CIL descended from the "law of nations." At the time of the adoption of the U.S. Constitution, the law of nations, conceived most broadly, "comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states."[31] For a number of reasons, the scope and structure of the law of nations changed in the nineteenth century.[32] Domestic law absorbed the private-law elements of the law of nations,[33] and the law of nations came to govern primarily relations among nation-states. Reflecting this new orientation, the law of nations became known as "international law"[34] and that portion of it based on customary practice "customary international law."[35]

Throughout the nineteenth and early twentieth centuries, federal courts applied CIL in a variety of contexts. They usually did so in the absence of statutory or constitutional authorization.[36] Several theories supported this practice.[37] Some courts applied CIL as an element of

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[31] Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989).

[32] *See* R.Y. JENNINGS, THE PROGRESS OF INTERNATIONAL LAW 8–30 (1960) (describing "development and change" in nineteenth-century international law); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 178–237 (1947) (describing numerous changes in international law in the nineteenth century).

[33] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2353–54, 2356 (1991); Joel R. Paul, *The Isolation of Private International Law*, 7 WIS. INT'L L.J. 149, 163 (1988).

[34] Jeremy Bentham first coined the term "international law" in 1789. *See* M.W. Janis, *Jeremy Bentham and the Fashioning of "International Law"*, 78 AM. J. INT'L L. 405, 408 (1984). The Supreme Court employed the term "inter-national law" as early as 1815. *See* The Nereide, 13 U.S. (9 Cranch) 388, 433 (1815). The first general American treatise on the subject, published in 1836, used the term "international law" rather than the "law of nations" and covered only the law that governed nation-states. *See* HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW *passim* (Philadelphia, Lea & Blanchard 1836).

[35] According to LEXIS and Westlaw searches, the earliest reference in U.S. case reports to the term "customary international law" is a statement by counsel in *United States v. Percheman*, 32 U.S. (7 Pet.) 51, 65 (1833). Search of LEXIS, Mega Library, FEDOLD and STATS File (Dec. 6, 1996); Search of Westlaw, ALLCASES-OLD database (Dec. 6, 1996).

[36] *See* Henkin, *supra* note 4, at 1557.

[37] *See* Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT'L L. 280, 280 (1931).

natural law.[38] Others applied CIL as part of the common law inherited from England.[39] Yet others applied CIL as part of "our law"[40] or the "law of the land"[41] without further explanation. Most decisions failed to identify any theory to support the application of CIL.

This inattention to sources of authority may seem odd to modern lawyers. But the practice of applying law without apparent authorization was perfectly appropriate in a legal world that had not, prior to *Erie*, assimilated legal positivism into its constitutional structure.[42] Before *Erie*, federal courts regularly applied, in the absence of specific authorization, a body of law known as "general common law."[43] Justice Holmes accurately, though derogatorily, described general common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute."[44] This general common law "existed by common practice and consent among a number of sovereigns. . . . The American courts resorted to [it] to provide the rules of decision in particular cases without insisting that the law be attached to any particular sovereign."[45] The important point for present purposes is that general common law was not part of the "Laws of the United States" within the meaning of Articles III and VI of the Constitution: federal court interpretations of general common law were not binding on the states, and a case arising under general common law did not by that fact alone establish federal question jurisdiction.[46]

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[38] *See, e.g.*, Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (ascertaining the unwritten law of nations by "resort to the great principles of reason and justice"); The Venus, 12 U.S. (8 Cranch) 253, 297 (1814) ("The law of nations is a law founded on the great and immutable principles of equity and natural justice."); *see also* Jesse S. Reeves, *The Influence of the Law of Nature upon International Law in the United States*, 3 AM. J. INT'L L. 547, 547–48 (1909) (exploring the influence of Continental natural rights theory on the law of nations); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727, 734–35 (1989) (exploring the discussions of natural law in piracy jurisprudence).

[39] *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820) ("[The] law of nations . . . is part of the common law . . . ."); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.) (referencing "the common law, of which the law of nations is a part"); Sprout, *supra* note 37, at 282–85.

[40] The Paquete Habana, 175 U.S. 677, 700 (1900).

[41] The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815).

[42] By "legal positivism" we refer to the view, which can be traced to the writings of Austin and Bentham, that all law is the product of an identifiable sovereign. *See* Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2064 (1995).

[43] *See* William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1798: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1515, 1517–21 (1984); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263–79 (1985).

[44] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

[45] Fletcher, *supra* note 43, at 1517.

[46] *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276–92 (1996); Fletcher, *supra* note 43, at 1521–27; Jay, *supra* note 43, at 1274–75.

During this period, the law of nations, which included what we today call CIL,[47] had the legal status of general common law.[48] Indeed, the Supreme Court's most famous application of general common law, *Swift v. Tyson*,[49] involved the law merchant, which was then a component of the law of nations.[50] Like all general common law, CIL was not considered part of the "supreme Law of the Land" under Article VI.[51] Thus, a "state constitution or legislative provision in violation of customary international law [was] valid unless in conflict with a Federal constitutional provision or an act of Congress."[52] In addition, CIL was not considered part of the "Laws of the United States" for purposes of constitutional or statutory federal question jurisdiction.[53] Accordingly, "State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts."[54]

At first glance, CIL's pre-*Erie* status as general common law appears inconsistent with the Framers' well-known desire that the fed-

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[47] *See* RESTATEMENT (THIRD), *supra* note 4, pt. I, ch. 2 introductory note at 41.

[48] *See, e.g.*, Oliver Am. Trading Co. v. Mexico, 264 U.S. 440, 442–43 (1924); Huntington v. Attrill, 146 U.S. 657, 683 (1892); New York Life Ins. Co. v. Hendren, 92 U.S. 286, 286–87 (1875). *See generally* Jay, *supra* note 31, at 832 (explaining that "[t]he law of nations was classified as 'general law' in the sense that *Swift v. Tyson* . . . employed the term" (footnote omitted)).

[49] 41 U.S. (16 Pet.) 1 (1842).

[50] As Justice Story stated: "The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in *Luke v. Lyde*, to be in a great measure, not the law of a single country only, but of the commercial world." *Id.* at 19 (citation omitted).

[51] *See* Fletcher, *supra* note 43, at 1521–25; Jay, *supra* note 31, at 832–33.

[52] QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 161 (1922); *see also* CHARLES PERGLER, JUDICIAL INTERPRETATION OF INTERNATIONAL LAW IN THE UNITED STATES 19 (1928) (noting that, if a state statute "violates an established principle of international law . . . clearly there would be only one course open to the courts, viz., to enforce the state statute, always assuming its constitutionality and that it does not contravene any valid federal enactment, or any treaty"); *cf.* Sprout, *supra* note 37, at 292 (concluding that, as of 1932, federal courts had "treated international law as a branch of the municipal common law, and hence as State law" (footnotes omitted)).

[53] With regard to federal question jurisdiction under Article III, consult *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828), which held that a case involving application of the "law, admiralty and maritime" — elements of the law of nations — "does not . . . arise under the Constitution or laws of the United States" within the meaning of Article III; Jay, cited above in note 43, at 1309–11; and Weisburd, *Executive Branch*, cited above in note 26, at 1214–18. With regard to statutory federal question jurisdiction, consult *Ker v. Illinois*, 119 U.S. 436 (1886), which held that the question whether forcible seizure in a foreign country is grounds to resist trial in state court is "a question of common law, or of the law of nations" that the Supreme Court has "no right to review," *id.* at 444; *New York Life Insurance Co. v. Hendren*, 92 U.S. 286 (1875), which held that the Supreme Court has no jurisdiction to review "general laws of war, as recognized by the law of nations applicable to this case," because they do not involve "the constitution, laws, treaties, or executive proclamations, of the United States," *id.* at 286–87; and Weisburd, *State Courts*, cited above in note 26, which discusses additional cases, *see id.* at 38–41.

[54] RESTATEMENT (THIRD), *supra* note 4, pt. I, ch. 2 introductory note at 41; *see also* Clark, *supra* note 46, at 1283 (stating that federal and state courts "considered themselves free to exercise independent judgment in cases arising under the law of nations" (footnote omitted)).

eral government have the power to ensure state compliance with international law.[55] After all, one consequence of CIL's status as general common law was that a state of the Union had the ability, in the absence of a constitutional provision or federal enactment to the contrary, to violate international law and thereby implicate the international responsibility of the United States. In the early years of the nation, for example, states allegedly violated immunities guaranteed by the law of nations by prosecuting certain foreign citizens. In a number of these cases, the federal government disclaimed the power to interfere with or review the state proceedings, even though it acknowledged its responsibility to other nations for these violations of international law.[56] Similarly, in the late nineteenth and early twentieth centuries, there were instances in which the states, in alleged violation of obligations under CIL, failed to prosecute the perpetrators of mob violence.[57] Again, the federal government maintained that it lacked the authority under existing law to compel state compliance with CIL but nevertheless paid indemnification to the injured nations.[58]

This state of affairs was in fact consistent with the Framers' desire to establish plenary federal control over international law because "the difficulty [lay] in the failure of Congress to act rather than in constitutional incompetence of the national Government to meet international responsibilities."[59] The Constitution ensured federal control over CIL

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[55] The Framers were particularly concerned that, under the Articles of Confederation, the national government had lacked the power to compel state enforcement of U.S. treaty obligations, especially the Treaty of Paris with England, and that the state courts had been denying justice to aliens in violation of the law of nations. *See* FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3–15, 142–43 (1973).

[56] The most notorious such example involved New York's prosecution in 1840 of Alexander McLeod, a British citizen who allegedly murdered an American citizen in connection with the sinking by British troops of the American-owned steamer *Caroline*. Great Britain demanded McLeod's release, arguing that he was immune from prosecution under the law of nations because the destruction of the *Caroline* was the act of a foreign public official obeying superior orders. Secretary of State Daniel Webster disclaimed the constitutional power to release McLeod but accepted responsibility for any violation of the law of nations. *See* David J. Bederman, *The Cautionary Tale of Alexander McLeod: Superior Orders and the American Writ of Habeas Corpus*, 41 EMORY L.J. 515, 515–20 (1992); R.Y. Jennings, *The* Caroline *and McLeod Cases*, 32 AM. J. INT'L L. 82, 82–99 (1938). For other examples of state prosecutions of aliens that may have violated the law of nations, but that the federal government believed itself powerless to prevent, consult Bederman, cited above, at 526–27.

[57] *See* 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 290 (1922); 6 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW §§ 1022–1031 (1906); Charles H. Watson, *Need of Federal Legislation in Respect to Mob Violence in Cases of Lynching of Aliens*, 25 YALE L.J. 561, 561–88 (1916).

[58] *See* 1 HYDE, *supra* note 57, § 291; 6 MOORE, *supra* note 57, §§ 1022–1031.

[59] Quincy Wright, *International Law in Its Relation to Constitutional Law*, 17 AM. J. INT'L L. 234, 239 (1923); *see also* 1 HYDE, *supra* note 57, § 290 (examining possible reasons for the federal government's failure to act); Nelson Gammans, *The Responsibility of the Federal Government for Violations of the Rights of Aliens*, 8 AM. J. INT'L L. 73, 76–80 (1914) (explaining that the United States could meet its international obligations by entering into treaties, drafting legislation, extending jurisdiction by statute, or amending the Constitution).

through two means. First, it authorized the federal political branches to incorporate CIL into federal statutory or treaty law.[60] Second, it permitted Congress to vest federal courts with exclusive subject matter jurisdiction in many of the cases and controversies that would involve application of CIL.[61] In a world in which courts applied CIL as general common law, this latter mechanism enabled Congress to ensure uniform federal interpretations of CIL without incorporating CIL into federal statutory law.

Both means have been employed throughout our history to ensure federal control over CIL.[62] Indeed, the events following the aforementioned examples of apparent federal inability to control state violations of CIL demonstrate the nature of political branch authority in this area. In response to the perception that state courts had disregarded the immunities of alien criminal defendants under the law of nations, Congress enacted legislation in 1842 that extended federal habeas corpus jurisdiction to citizens of foreign states held in custody for acts done under color of foreign law, "the validity and effect whereof depend upon the law of nations."[63] Likewise, there were several proposals for federal legislation to make mob violence against foreigners a federal crime.[64] Congress's failure to enact such legislation was a political decision that elevated concerns about federalism over the obligation to comply with international law.[65]

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[60] *See supra* notes 23–25 and accompanying text.

[61] *See* U.S. CONST. art. III, § 2 (extending the "judicial Power" to, among other things, "Cases . . . arising under . . . Treaties"; "Cases affecting Ambassadors, other public Ministers and Consuls"; "Cases of admiralty and maritime Jurisdiction"; and "Controversies . . . between a State, or the Citizens thereof, and foreign States"); *see also* The Moses Taylor, 71 U.S. (4 Wall.) 411, 429 (1866) ("[I]n all cases to which the judicial power of the United States extends, Congress may rightfully vest exclusive jurisdiction in the Federal courts"); Jay, *supra* note 43, at 1321 (stating that the Framers intended to achieve uniformity in the law of nations "by providing access to federal courts, sometimes exclusive of state courts," and through federalization of the law of nations).

[62] As for statutes, consult, for example, Act of Apr. 30, 1790, ch. 9, § 28, 1 Stat. 112, 118 (codified as amended at 18 U.S.C. § 112 (1994)), which deemed assault on a foreign ambassador within the United States a criminal offense under U.S. law, and Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76 (codified at 28 U.S.C. § 1351 (1994)), which conferred federal jurisdiction, exclusive of state courts, over all suits against consuls or vice consuls. As for treaties, consult, for example, Proclamation to the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 3227–28, which codified CIL rules governing diplomatic privileges and immunities, *see* RESTATEMENT (THIRD), *supra* note 4, pt. IV, ch. 6 introductory note at 456.

[63] Act of Aug. 29, 1842, ch. 257, 5 Stat. 539, 539 (codified as amended at 28 U.S.C. § 2241(c)(4) (1994)); *see also* Bederman, *supra* note 56, at 527–30 (discussing the constitutional controversy that surrounded the statute's enactment).

[64] *See* 1 HYDE, *supra* note 57, § 291; Watson, *supra* note 57, at 578–79 & n.22.

[65] *See* Watson, *supra* note 57, at 579–81.

B. Erie *Through* Sabbatino

Erie declared an end to federal court creation of general common law and held that, "[e]xcept 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."[66] As we have just seen, before *Erie*, CIL was considered to be part of the general common law.[67] *Erie* thus raised important questions about the status of CIL in the federal courts. Did *Erie*'s abolition of general common lawmaking by the federal courts apply to CIL? Did it require federal courts to defer to state court interpretations of CIL? Or did CIL become part of the new federal common law, binding on the states, to which *Erie* gave rise?[68]

Philip Jessup was the first to recognize the need for an examination of *Erie*'s applicability to international law.[69] One year after *Erie*, Jessup acknowledged in a brief essay that, if *Erie* were "applied broadly, it would follow that hereafter a state court's determination of a rule of international law would be a finding regarding the law of the state and would not be reviewed by the Supreme Court of the United States."[70] Jessup argued against this construction of *Erie*. He reasoned that *Erie*'s language did not embrace international law and that it "would be as unsound as it would be unwise" to bind federal courts to state court interpretations of CIL.[71]

Jessup's argument would eventually play a prominent role in the rise of the modern position.[72] But for twenty-five years after *Erie*, courts and scholars generally ignored Jessup's argument and, more broadly, the question of the domestic legal status of CIL. Several factors likely explain this silence. First, there was relatively little CIL for courts to apply during this period because much of the CIL that courts had applied in the nineteenth century either had been codified in treaties[73] or had become irrelevant.[74] Second, the issues still governed by CIL, such as foreign sovereign immunity, rarely arose in

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

[67] *See supra* p. 824.

[68] *See generally* Friendly, *supra* note 30, at 405–21 (explaining the rise of post-*Erie* federal common law). For further explanation of the relationship between *Erie* and the new federal common law, see pp. 855–58 below.

[69] *See* Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 741 (1939).

[70] *Id.* at 742.

[71] *Id.* at 743.

[72] *See infra* pp. 829–30.

[73] *See* RESTATEMENT (THIRD), *supra* note 4, pt. I, ch. 1 introductory note at 18; NUSSBAUM, *supra* note 32, at 196–97; J.G. STARKE, AN INTRODUCTION TO INTERNATIONAL LAW 37–38 (11th ed. 1994).

[74] For example, the CIL governing prize law, which was frequently applied by courts in the nineteenth century, had largely disappeared by 1948. *See* David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 36–41 (1995) (book review) (providing various reasons for this phenomenon).

state courts and rarely involved divergent interpretations by state and federal courts. Finally, during this period, CIL was not yet viewed as regulating the relations between a nation and its citizens; it thus generated few conflicts with traditional areas of domestic lawmaking. For these reasons, there was little need for courts and scholars to address the domestic legal status of CIL.[75]

The one reported decision in the quarter century following *Erie* that did address the domestic legal status of CIL reached a conclusion contrary to Jessup's. In *Bergman v. De Sieyes*,[76] a diversity case removed to New York federal court, the issue was whether an ambassador in transit to another country was entitled under CIL to immunity from service of process.[77] Writing for the Second Circuit, Judge Learned Hand explained that "[the New York state courts'] interpretation of international law is controlling upon us, and we are to follow them so far as they have declared themselves."[78] After analyzing three New York decisions and a variety of international sources, Hand concluded that "the courts of New York would today hold" that an ambassador in transit is immune under CIL from service of process in New York.[79]

Interest in the legal status of CIL increased significantly after the Supreme Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*.[80] The plaintiff in *Sabbatino*, a Cuban national bank, sought to recover proceeds from the sale of a shipment of sugar that had been expropriated by the Cuban government from a U.S.-owned company.[81] The defendant maintained that the bank was not entitled to recover the proceeds because the expropriation violated CIL rules governing state responsibility towards aliens.[82] Under normal circumstances, the Cuban expropriation would have been considered a foreign "act of state," the validity of which U.S. courts would not question.[83] In *Sabbatino*, the Supreme Court held that there was no

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75 A few decisions during this period applied CIL, but they failed to analyze the implications of *Erie* for CIL's domestic legal status. *See, e.g.*, Peters v. McKay, 238 P.2d 225, 230–32 (Or. 1951). Similarly, most of the articles and books during this period that discussed the implications of *Erie* failed to consider the domestic legal status of CIL. One exception is HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 261–67 (1953), which excerpted *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), and contained a note with questions about CIL's legal status.

76 170 F.2d 360 (2d Cir. 1948).

77 *See id.* at 361.

78 *Id.* Judge Hand added the following caveat: "Whether an avowed refusal to accept a well-established doctrine of international law, or a plain misapprehension of it, would present a federal question we need not consider, for neither is present here." *Id.*

79 *Id.* at 363.

80 376 U.S. 398 (1964).

81 *See id.* at 403, 406.

82 *See id.* at 433.

83 *See id.* at 416. The act of state doctrine, in its classic formulation, provides that "the courts of one country will not sit in judgment on the acts of the government of another done

exception to the act of state doctrine for acts of state that violated CIL.[84]

The Court noted that the CIL rules governing the expropriation of alien property were controversial.[85] It expressed concern that an adjudication of the validity of a foreign expropriation under this contested standard of CIL would impinge on the President's constitutional prerogative to conduct foreign relations.[86] To avoid the "possibility of conflict between the Judicial and Executive Branches,"[87] the Court concluded that, "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles," the act of state doctrine precluded the judiciary from inquiring into the validity of the Cuban expropriation under CIL.[88]

Before reaching this conclusion, the Court stated[89] that the act of state doctrine was a rule of federal common law binding on the states.[90] It explained that, although not required by either international law or the Constitution, the doctrine flows from the relationship between the federal branches of government "in ordering our relationships with other members of the international community."[91] Because of this, the Court concluded that the doctrine, whatever its content may be, "must be treated exclusively as an aspect of federal law."[92] The Court distinguished *Erie* as "not [having] rules like the act of state doctrine in mind."[93] Invoking Jessup's essay,[94] the Court stated:

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within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Before *Sabbatino*, the precise rationale for the application of the act of state doctrine by U.S. courts was unclear, although the courts sometimes justified it by reference to principles of international law and international comity. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY & MATERIALS 686–88 (3d ed. 1996). In *Sabbatino*, the Supreme Court explained that the doctrine is not in fact required by international law, but rather is based on domestic separation of powers considerations. *See Sabbatino*, 376 U.S. at 421–24.

84 *See Sabbatino*, 376 U.S. at 428. Before *Sabbatino*, many commentators had argued that the act of state doctrine did not apply when the foreign act of state violated CIL. *See* Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805, 808 & n.13 (1964) (citing examples).

85 *See Sabbatino*, 376 U.S. at 428.

86 *See id.* at 431–33. The Court indicated that this separation of powers problem presented itself regardless of how the Court ruled on the validity of the Cuban expropriation. *See id.* at 432.

87 *Id.* at 433.

88 *Id.* at 428.

89 We say "stated" rather than "held" because this passage was technically dictum. The Court acknowledged that New York law concerning the act of state doctrine was consistent with, and indeed had "foreshadowed," Supreme Court act of state decisions. *See id.* at 424. It also acknowledged that its "conclusions might well be the same whether [it] dealt with this problem as one of state law . . . or federal law." *Id.* at 425 (citations omitted).

90 *See id.* at 425–27.

91 *Id.* at 425.

92 *Id.*

93 *Id.*

94 *See supra* p. 827.

> Soon [after *Erie*], Professor Philip C. Jessup . . . recognized the potential dangers were *Erie* extended to legal problems affecting international relations. He cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is equally applicable to the act of state doctrine.[95]

Because *Sabbatino* declined to apply CIL to invalidate the Cuban expropriation, it was initially viewed as a setback for the application of CIL in U.S. courts.[96] However, *Sabbatino*'s reference to Jessup's article, as well as the Court's conclusion that the act of state doctrine had the status of federal common law, soon proved to be a catalyst for scholarly argument that CIL should be treated as federal common law.

In its *Restatement (Second) of the Foreign Relations Law of the United States*,[97] issued one year after *Sabbatino*, the American Law Institute (ALI) took a cautious approach. It did not address the issue of CIL's domestic legal status in its statements of blackletter law. A reporters' note, however, contrasting Jessup's article with *Bergman*, observed that the status of CIL as state or federal law was "not settled."[98] The note added without further explanation that "the holding of the Sabbatino case that Erie v. Tompkins does not apply to the act of state doctrine would appear to apply *a fortiori* to questions of international law."[99] This latter statement was probably meant to suggest that CIL, like the act of state doctrine, was federal common law. But the *Restatement (Second)* did not make the point explicit, nor did it consider the implications of this position.

Some commentators in the 1960s and 1970s were more confident than the *Restatement (Second)* about the effect of *Sabbatino* on the legal status of CIL.[100] These scholars argued that the modern position

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[95] *Sabbatino*, 376 U.S. at 425 (citation omitted).

[96] *See, e.g.*, John R. Stevenson, *The State Department and Sabbatino — "Ev'n Victors Are by Victories Undone"*, 58 AM. J. INT'L L. 707, 708 (1964). As Professor Koh has noted, *Sabbatino* initially "cast a profound chill upon the willingness of U.S. domestic courts to interpret or articulate norms of international law." Koh, *supra* note 33, at 2363; *see also* Michael J. Bazyler, *Abolishing the Act of State Doctrine*, 134 U. PA. L. REV. 325, 329 (1986) ("[T]he [act of state] doctrine is probably the single most important reason for the arrested development of international law in the United States.").

[97] RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1965) [hereinafter RESTATEMENT (SECOND)]. Although the 1965 Restatement is self-described as the "Second" Restatement, it was actually the first Foreign Relations Restatement published by the ALI.

[98] *Id.* § 3 reporters' note 2.

[99] *Id.*

[100] *See* LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 223 (1972); Richard A. Falk, *The Complexity of Sabbatino*, 58 AM. J. INT'L L. 935, 948–49 (1964); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1042–68 (1967); Note, *Federal Common Law and Article III: A Jurisdictional Approach to* Erie, 74 YALE L.J. 325, 335–37 (1964).

was implicit in *Sabbatino*.[101] They interpreted *Sabbatino* broadly to "establish[ ] foreign affairs as a domain in which federal courts can make law with supremacy"[102] — the so-called "federal common law of foreign relations."[103] They concluded that, because the "[d]etermination and application of international law are integral to the conduct of foreign relations and are the responsibility of the federal government,"[104] CIL, as interpreted by federal courts, had the status of federal law binding on the states.[105]

Despite *Sabbatino* and isolated academic support for the view that CIL should be treated as federal common law, CIL's legal status remained largely unexamined until 1980. In that year, two events provided the central pillars for the modern position: the Second Circuit's *Filartiga* decision and the publication of the Tentative Draft of the *Restatement (Third) of Foreign Relations Law*.

C. Filartiga *and Human Rights Law*

For much of the nineteenth century and until World War II, CIL primarily governed only interstate relations, and its content was determined by the consensual practice of nations. Under the then-prevailing conception of CIL, "it was thought to be antithetical for there to be international legal rights that individuals could assert against states, especially against their own governments."[106] The Nuremberg trials shattered this conception. International law came to be viewed as placing limits on the way a nation could treat its own citizens.[107] The Nuremberg trials were followed by the United Nations General As-

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[101] *See* HENKIN, *supra* note 100, at 223; Hill, *supra* note 100, at 1065–67; John Norton Moore, *Federalism and Foreign Relations*, 1965 DUKE L.J. 248, 268–75.

[102] HENKIN, *supra* note 100, at 219.

[103] Moore, *supra* note 101, at 273.

[104] HENKIN, *supra* note 100, at 223.

[105] *See id.*; *see also* Hill, *supra* note 100, at 1057–68 (considering the ramifications of the Court's reasoning in *Sabbatino* regarding CIL); Moore, *supra* note 101, at 268–75 (same).

[106] JANIS, *supra* note 21, at 245; *see also* John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, *in* THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS 75, 75 (Maarten Bos ed., 1973) (arguing that human rights are "essentially a relationship between the State and individuals," and that before the mid-twentieth century, they were "considered to fall within domestic jurisdiction and hence beyond the reach of international law"); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9 (1982) ("[A]part from a few anomalous cases . . . individuals were not subjects of rights and duties under international law."). During that period, as today, a state's mistreatment of an alien could implicate the international law of state responsibility. But the mistreatment constituted an injury to the state of the alien's nationality, and therefore the alien's state alone, and not the individual, could invoke the remedies of international law. *See* Panevezys-Saldutiskis Railway (Est. v. Lith.), 1939 P.C.I.J. (ser. A/B) No. 76, at 16 (Feb. 28); Mavrommatis Palestine Concessions (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 12 (Aug. 30); RESTATEMENT (THIRD), *supra* note 4, § 713 cmt. a.

[107] *See* JANIS, *supra* note 21, at 247–48; David Luban, *The Legacies of Nuremberg*, 54 SOC. RES. 779, 780–81 (1987); Sohn, *supra* note 106, at 9–10. For discussion of the pre-Nuremberg antecedents to international human rights law, consult HENKIN, *supra* note 18, at 169–73.

sembly's Universal Declaration of Human Rights[108] and a series of international human rights agreements.[109] These and other instruments are said to reflect general acceptance of the principle that "how a state treats individual human beings . . . is a matter of international concern and a proper subject for regulation by international law."[110] Most importantly for present purposes, these instruments have been viewed as spawning a large body of CIL of human rights.[111]

This growing body of CIL suffered from the lack of an enforcement mechanism. International tribunals like the International Court of Justice did not provide effective enforcement because individuals lacked standing to sue[112] and because jurisdiction turned on state consent.[113] And the domestic courts of the alleged human rights violator were, as a practical matter, generally unavailable for the enforcement of these norms.[114]

The Second Circuit's famous decision in *Filartiga v. Pena-Irala*,[115] described by Professor Koh as the "*Brown v. Board of Education*" of "transnational public law litiga[tion],"[116] established a novel mechanism for the enforcement of the CIL of human rights in the United States. In *Filartiga*, citizens of Paraguay sued a fellow Paraguayan for acts of torture committed in Paraguay under color of Paraguayan governmental authority.[117] The plaintiffs premised federal jurisdiction on

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[108] G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

[109] Among the most prominent agreements are, in chronological order, the Convention on the Prevention and Punishment of the Crime of Genocide, *adopted by the U.N. General Assembly* Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, S. EXEC. DOC. C, 95-2, at 1 (1978), 660 U.N.T.S. 195; the International Covenant on Economic, Social and Cultural Rights, *adopted by the U.N. General Assembly* Dec. 16, 1966, S. EXEC. DOC. D, 95-2, at 1 (1978), 993 U.N.T.S. 3; the International Covenant on Civil and Political Rights, *adopted by the U.N. General Assembly* Dec. 19, 1966, S. EXEC. DOC. E, 95-2, at 1 (1978), 999 U.N.T.S. 171; the Convention on the Elimination of All Forms of Discrimination Against Women, *adopted by the U.N. General Assembly* Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 23 I.L.M. 1027, *as modified*, 24 I.L.M. 535; and the Convention on the Rights of the Child, *adopted by the U.N. General Assembly* Nov. 20, 1989, 28 I.L.M. 1448.

[110] RESTATEMENT (THIRD), *supra* note 4, pt. VII introductory note at 144–45.

[111] *See infra* pp. 839–41.

[112] *See* Statute of the International Court of Justice, June 26, 1945, art. 34(1), 59 Stat. 1055, 1059, 3 Bevans 1153, 1186 ("Only States may be parties in cases before the Court.").

[113] *See id.* art. 36(1) and (2).

[114] Of course, other methods now exist for the enforcement of international human rights law, including committee monitoring pursuant to treaties, adjudication by regional human rights courts, and collective humanitarian intervention. *See* Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31, 41–43 (1995–96). Nonetheless, the fact remains that "[e]nforcement . . . is surely the weak link of international human rights law." *Id.* at 41.

[115] 630 F.2d 876 (2d Cir. 1980).

[116] Koh, *supra* note 33, at 2366.

[117] *See Filartiga*, 630 F.2d at 878.

the Alien Tort Statute (ATS), which grants federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[118] Drawing on the Universal Declaration of Human Rights and other international instruments, *Filartiga* held that official torture "violates established norms of the international law of human rights, and hence the law of nations."[119] The court thus upheld federal jurisdiction on the ground that the suit was "an action by an alien, for a tort . . . in violation of the law of nations."[120]

Filartiga is significant for present purposes because of its additional holding concerning the constitutionality of the ATS. To be constitutional, the ATS's grant of jurisdiction had to fall within one of the categories of federal judicial power set forth in Article III. However, the Article III basis for federal jurisdiction in *Filartiga* was questionable. The parties were not diverse,[121] and the case did not arise under either a treaty or a federal statute.[122] But there was another possibility, for federal question jurisdiction also extends to cases that arise under federal common law.[123] Asserting that "the law of nations . . . has always been part of the federal common law," the court in *Filartiga* concluded that the plaintiffs' CIL claim arose under federal law for purposes of Article III.[124]

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[118] 28 U.S.C. § 1350 (1994). The ATS, which is sometimes also called the Alien Tort Claims Act, was originally enacted as part of the Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (1789). Prior to *Filartiga*, however, the ATS was an "old but little used section." IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). Between 1789 and the 1980 *Filartiga* decision, the statute was invoked in only a handful of cases, and jurisdiction under the statute was approved in only two cases: *Bolchos v. Darrel*, 3 F. Cas. 810, 810 (D.S.C. 1795) (No. 1,607), and *Abdul-Rahman Omar Adra v. Clift*, 195 F. Supp. 857, 863–65 (D. Md. 1961). *See IIT*, 519 F.2d at 1015. The original purpose of the ATS is shrouded in controversy. For various perspectives, consult Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461, 475–80 (1989); William R. Casto, *The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 499–510 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists"*, 19 HASTINGS INT'L & COMP. L. REV. 221, 225–37 (1996); John M. Rogers, *The Alien Tort Statute and How Individuals "Violate" International Law*, 21 VAND. J. TRANSNAT'L L. 47, 48–60 (1988); Joseph Modeste Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L & COMP. L. REV. 445, 446–47 (1995); Weisburd, *Executive Branch*, cited above in note 26, at 1223–26.

[119] *Filartiga*, 630 F.2d at 880.

[120] *Id.* at 887.

[121] The Alienage Diversity Clause of Article III does not extend the federal judicial power to suits between aliens. *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 303–04 (1809).

[122] *See Filartiga*, 630 F.2d at 887. This point assumes, as the court in *Filartiga* assumed, that the ATS is merely a jurisdictional grant and does not itself create a federal cause of action for torts committed in violation of the law of nations. For further elaboration of this and related points, see pp. 872–73 below.

[123] *See* Illinois v. City of Milwaukee, 406 U.S. 91, 99 (1972).

[124] *Filartiga*, 630 F.2d at 885.

In reaching this conclusion, the court relied uncritically on pre-*Erie* precedents applying CIL.[125] The court appeared not to understand that these precedents applied CIL as general common law, not federal law. In addition, the court ignored *Bergman v. De Sieyes*,[126] a contrary Second Circuit precedent directly on point; it failed to contemplate the significance of *Erie* for the legal status of CIL; and it made no attempt to fit CIL within the rationale of *Sabbatino* or, more broadly, the post-*Erie* federal common law. Finally, the court failed to consider the numerous and potentially profound collateral consequences that follow from the view that CIL is federal common law.

D. Restatement (Third) of the Foreign Relations Law of the United States

The second pillar of the modern position is the *Restatement (Third)*. The ALI did not officially publish the *Restatement (Third)* until 1987, but the publication of the Tentative Draft in 1980 had an immediate impact on the courts.[127] The reporters for this project were four renowned international law scholars: Louis Henkin (the Chief Reporter), Andreas Lowenfeld, Louis Sohn, and Detlev Vagts. Part I of their Tentative Draft contained a lengthy discussion of the relationship between CIL and U.S. law that did not appear in the previous *Restatement*.[128] The new Part I acknowledged that CIL had not been

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[125] The court in *Filartiga* relied primarily on the statement in *The Paquete Habana* that "[i]nternational law is part of our law," The Paquete Habana, 175 U.S. 677, 700 (1900), and the statement in *The Nereide* that U.S. courts are "bound by the law of nations, which is a part of the law of the land," The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815). *See Filartiga*, 630 F.2d at 887. As we have outlined above, and as we explain more fully below at pp. 849–51, none of these citations stands for the proposition that CIL is federal law.

[126] 170 F.2d 360 (2d Cir. 1948).

[127] *See In re* Grand Jury Proceedings, 691 F.2d 1384, 1388 (11th Cir. 1982); Gilson v. Republic of Ireland, 682 F.2d 1022, 1025 (D.C. Cir. 1982); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 891 (2d Cir. 1981); Mitsui & Co. v. American Export Lines, Inc., 636 F.2d 807, 821 (2d Cir. 1981); Lareau v. Manson, 507 F. Supp. 1177, 1188 n.9, 1193 n.18 (D. Conn. 1980), *aff'd in part and modified and remanded in part on other grounds*, 651 F.2d 96 (2d Cir. 1981); *see also* Jonathan I. Charney, *International Agreements and the Development of Customary International Law*, 61 WASH. L. REV. 971, 972 n.8 (1986) (citing additional cases).

[128] It is unclear why the reporters even chose to "restate" the relationship between CIL and U.S. law, given that there had been no decisions on this point between the *Restatement (Second)* and the issuance of the Tentative Draft of the *Restatement (Third)* in 1980. At the 1979 ALI Meeting, Chief Reporter Louis Henkin stated without further explanation that the reporters planned to "*refine* . . . the relationship of international law to American law." *56th Annual Meeting*, 56 A.L.I. PROC. 64 (1979) (statement of Prof. Henkin) (emphasis added). The reporters' introduction to the Tentative Draft explained:

> Experience with the previous Restatement, and other developments in the "real world," have led us to *somewhat different answers* to some problems faced by our predecessors. We have thought it desirable now, for example, to give fuller expression . . . to the place of international law in the jurisprudence of United States law.

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES at xvi (Tentative Draft No. 1, 1980) (emphasis added) [hereinafter RESTATEMENT (THIRD) (Tentative Draft)].

considered federal law prior to *Erie*[129] and that the *Restatement (Second)* had considered the status of CIL to be an open question.[130]

Nonetheless, without citing any new decision on the issue since the 1965 *Restatement (Second)*, the Draft proclaimed that the previously unsettled issue of CIL's legal status "*had now been established.*"[131] The Tentative Draft also stated that, since *Bergman*'s holding that federal courts must defer to state court interpretations of CIL, "*a different view has prevailed.*"[132] It explained, without citing any authority, that "*courts have declared* that . . . interpretations of customary international law are . . . supreme over state law."[133] It also asserted that CIL "has come to be regarded as federal common law."[134]

The final version of the *Restatement (Third)* would refine and strengthen the Tentative Draft's assertion that CIL was federal law.[135] But it would provide remarkably little support for this proposition. The issue was not debated during ALI deliberations,[136] and the *Restatement (Third)* cited no decision that had adopted the view that CIL was federal law. The only arguments in favor of the *Restatement (Third)*'s position are found in two reporters' notes. One note asserts (without further explanation) that the reasoning in *United States v. Belmont*,[137] which held that an executive agreement between the United States and the Soviet Union preempted state law,[138] "would apply" to CIL as well.[139] After quoting the paragraph from *Sabbatino* that cites Jessup,[140] another note declares: "Based on the implications

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[129] *See* RESTATEMENT (THIRD) (Tentative Draft), *supra* note 128, pt. I, ch. 2 introductory note at 40; *id.* § 131 reporters' note 3.

[130] *See id.* § 131 reporters' note 8.

[131] *Id.* (emphasis added).

[132] *Id.* pt. I, ch. 2 introductory note at 41 (emphasis added).

[133] *Id.* introductory note at 7 (emphasis added).

[134] *Id.* pt. I, ch. 2 introductory note at 41. For other parts of the Tentative Draft reflecting this view, see *id.* § 131(1)–(2) & cmts. (d)–(e) & reporters' notes 2–4; *id.* § 132(2) & cmt. a; *id.* § 135(1)–(2) & cmt. b & reporters' note 1.

[135] *See* RESTATEMENT (THIRD), *supra* note 4, §§ 111, 115. But in an apparent concession to the Chief Reporter, Professor Henkin, the final draft maintained that CIL was "like" federal common law rather than actually federal common law. *See id.* § 111 cmt. d; *see also* Henkin, *supra* note 4, at 1561–62 (stating that CIL is "like federal common law"). For an explanation of the significance of this qualification, see pp. 842–44 below.

[136] At least we have found no evidence of any such debate in the official records of the ALI. There was a lively debate, however, about the Tentative Draft's position that CIL could invalidate a prior inconsistent federal statute. *See* Harold G. Maier, *The Authoritative Sources of Customary International Law in the United States*, 10 MICH. J. INT'L L. 450, 468–70 (1989); *see also The Authority of the United States Executive to Interpret, Articulate or Violate the Norms of International Law*, 80 AM. SOC'Y INT'L L. 297, 300–01 (1988) [hereinafter *Authority of the Executive*] (discussing this and other issues). In response to criticism, the final draft equivocated on this point. *See infra* note 179.

[137] 301 U.S. 324 (1937).

[138] *See id.* at 327.

[139] RESTATEMENT (THIRD), *supra* note 4, § 111 reporters' note 2.

[140] *See supra* p. 830.

of *Sabbatino*, the modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts."[141]

Neither *Sabbatino* nor *Belmont* addressed the domestic legal status of CIL. Nonetheless, the *Restatement (Third)* provided no further judicial support for the "modern view" it purported to identify. It did, however, cite a 1984 article by Professor Henkin, the *Restatement (Third)*'s Chief Reporter.[142] But the *Restatement (Third)*'s reliance on the Henkin article was pure bootstrapping, given that the Henkin article cited only the 1980 Tentative Draft (which itself drew on no judicial decisions) for the conclusion that "there is now general agreement" that CIL is federal law.[143]

The *Restatement (Third)* never admitted that its "restatement" of the legal status of CIL lacked case law support; indeed, as we have seen, it asserted the opposite. Of course, by the time the final draft of the *Restatement (Third)* was published in 1987, there *was* a decision that supported the claim that CIL is federal common law — namely, *Filartiga*. But *Filartiga* did not provide reliable support for the *Restatement (Third)*'s position because *Filartiga* rested squarely on nineteenth century precedents,[144] whereas the *Restatement (Third)* correctly acknowledged that CIL was not federal law in the nineteenth century.[145] It is thus no surprise that the *Restatement (Third)* never mentioned *Filartiga* in its discussion of CIL's domestic legal status.

In any event, the *Restatement (Third)* did not confine its pronouncements concerning CIL's domestic legal status to the jurisdictional context of *Filartiga*. Rather, it asserted more broadly that CIL has some of the substantive collateral consequences of federal law, such as supremacy over state law,[146] and it suggested that CIL might, under certain circumstances, trump prior inconsistent federal statutory law and bind the President.[147] Like the earlier scholarship on which it was implicitly based, the *Restatement (Third)* grounded CIL's federal law status in the "implications" of *Sabbatino*. It did so without considering the numerous arguments against the view that *Sabbatino* federalized CIL.[148] Moreover, the *Restatement (Third)* did not consider

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141 RESTATEMENT (THIRD), *supra* note 4, § 111 reporters' note 3.

142 *See id.* pt. I, ch. 2 introductory note at 42 (citing Henkin, *supra* note 4).

143 Henkin, *supra* note 4, at 1559; *see also* Henkin, *supra* note 8, at 878 & n.103 (citing the Tentative Draft for the proposition that CIL "has now been declared to be United States law within the meaning of both article III and the supremacy clause").

144 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 885–87 (2d Cir. 1980).

145 *See* RESTATEMENT (THIRD), *supra* note 4, pt. I, ch. 2 introductory note at 41 ("During the reign of Swift v. Tyson . . . State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts.") (citation omitted).

146 *See id.* § 111(1).

147 *See id.* § 115 & cmt. d & reporters' notes 3–4.

148 *See infra* pp. 859–60.

how the federalization of CIL, in combination with CIL's expanding regulation of traditional domestic concerns, would affect the allocation of lawmaking authority in the United States.[149]

* * *

By 1980, then, both the Second Circuit in *Filartiga* and the *Restatement (Third)* reporters had concluded, for very different reasons, that CIL was federal law. Since that time, the *Filartiga/Restatement* view has prevailed in the lower federal courts and among scholars. Numerous lower federal courts have adopted the modern position, albeit mostly in the limited context of the ATS.[150] Scholars, by contrast, have embraced the modern position more broadly and have been busy working out the implications of the wholesale federalization of CIL.[151] We now examine some of these implications.

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[149] *See infra* pp. 838–48.

[150] In addition to the decisions cited in note 3 above, consult *In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1473, 1475 (9th Cir. 1994); Filartiga v. Pena-Irala, 630 F.2d 876, 885 (2d Cir. 1980); Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); United States v. Schiffer, 836 F. Supp. 1164, 1170 (E.D. Pa. 1993), *aff'd*, 31 F.3d 1175 (3d Cir. 1994); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987), *reh'g granted on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981). Numerous additional lower court decisions recite, often with a citation to *The Paquete Habana*, 175 U.S. 677, 700 (1900), that CIL is part of the "common law," the "law of the United States," or "our domestic law" without expressly stating that CIL has the status of federal law. *See, e.g.*, Garcia-Mir v. Meese, 788 F.2d 1466, 1453 (11th Cir. 1986) ("common law"); Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) ("law of the United States"); United States v. Feld, 514 F. Supp. 283, 288 (E.D.N.Y. 1981) ("our domestic law"). Similarly, during this period the Supreme Court has stated, in dicta and without explanation, that international law is "part of our law." First Nat'l City Bank v. Banco para el Comercio Exterior de Cuba, 462 U.S. 611, 623 (1983) (quoting *The Paquete Habana*, 175 U.S. at 700).

[151] In addition to the sources cited in note 4 above, consult HENKIN, cited above in note 24, at 238–39; HENKIN, cited above in note 18, at 69; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 6–7 (1996); Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 3–27 (1992); Jeffrey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act After* Filartiga v. Peña-Irala, 22 HARV. INT'L L.J. 53, 57, 98–102 (1981); Jorge Cicero, *The Alien Tort Statute of 1789 as a Remedy for Injuries to Foreign Nationals Hosted by the United States*, 23 COLUM. HUM. RTS. L. REV. 315, 340–58 (1992); Clyde H. Crockett, *The Role of Federal Common Law in Alien Tort Statute Cases*, 14 B.C. INT'L & COMP. L. REV. 29, 40–41 (1991); Martin Flaherty, *Human Rights Violations Against Defense Lawyers: The Case of Northern Ireland*, 7 HARV. HUM. RTS. J. 87, 119 & n.142 (1994); Gregory H. Fox, *Reexamining the Act of State Doctrine: An Integrated Conflicts Analysis*, 33 HARV. INT'L L.J. 521, 567–69 (1992); Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 578–80 (1994); Michael J. Glennon, *Raising* The Paquete Habana*: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325, 343–53 (1985); Henkin, cited above in note 8, at 875–76; Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 932–34 (1986) [hereinafter Henkin, *The President and International Law*]; Koh, cited above in note 33, at 2385–86; David A. Koplow, *Constitutional Bait and Switch: Executive Reinterpretation of Arms Control Treaties*, 137 U. PA. L. REV. 1353, 1432–34 (1989); Tom Lininger, *Overcoming Immunity Defenses to Human Rights*

III. IMPLICATIONS OF THE MODERN POSITION

Part II demonstrated that the modern position orthodoxy is less than two decades old and has a questionable pedigree. In this Part, we consider the doctrinal implications of the modern position. The lower federal courts have adopted few of the implications that we examine here. Rather, these implications are being developed (and urged on courts) primarily by scholars. Before turning to these implications, we first explain the recent changes in the process of making and identifying CIL, and in its content. These changes have increasingly brought CIL into conflict with domestic law. In light of these developments, we explain why the modern position, if taken to its logical conclusion, is such a radical doctrine.

A. New CIL

The traditional conception of CIL was that it resulted from "a general and consistent practice of states followed by them from a sense of legal obligation."[152] Both the "state practice" and "sense of legal obligation" requirements reflected the notion that international law was grounded in state consent.[153] To ensure that states had consented to a CIL rule, the passage of a substantial period of time was generally

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Suits in U.S. Courts, 7 HARV. HUM. RTS. J. 177, 191–96 (1994); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1075, 1179–80 (1985); Viktor Mayer-Schönberger & Teree E. Foster, *More Speech, Less Noise: Amplifying Content-Based Speech Regulations Through Binding International Law*, 18 B.C. INT'L & COMP. L. REV. 59, 90–94 (1995); Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 388–93 (1988) [hereinafter Randall, *Federal Questions*]; Kenneth C. Randall, *Universal Jurisdiction under International Law*, 66 TEX. L. REV. 785, 785–91 (1988); Hernan de J. Ruiz-Bravo, *Monstrous Decision: Kidnapping is Legal*, 20 HASTINGS CONST. L.Q. 833, 867–70 (1993); Jacques Semmelman, *The Doctrine of Specialty in the Federal Courts: Making Sense of* United States v. Rauscher, 34 VA. J. INT'L L. 71, 141–42 (1993); Jacques Semmelman, *Due Process, International Law, and Jurisdiction over Criminal Defendants Abducted Extraterritorially: The* Ker-Frisbie *Doctrine Reexamined*, 30 COLUM. J. TRANSNAT'L L. 513, 551–57 (1992); Ralph G. Steinhardt, *Fulfilling the Promise of* Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 20 YALE J. INT'L L. 65, 77–79, 98–101 (1995); Janice D. Villiers, *Closed Borders, Closed Ports: The Plight of Haitians Seeking Political Asylum in the United States*, 60 BROOK. L. REV. 841, 871–75 (1994); Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269, 1270–71, 1287–88 (1991).

152 RESTATEMENT (THIRD), *supra* note 4, § 102(2); *see also* Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (including "international custom, as evidence of a general practice accepted as law" in the law that the International Court of Justice is to apply).

153 *See* HENKIN, *supra* note 18, at 30; JANIS, *supra* note 21, at 42–43. A classic statement of this proposition can be found in the famous *Lotus* decision by the Permanent Court of International Justice: "International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will . . . ." S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7). For early statements by the U.S. Supreme Court to this effect, see *The Scotia*, 81 U.S. (14 Wall.) 170, 187–88 (1871); *The Antelope*, 23 U.S. (10 Wheat.) 66, 120–22 (1825).

required before a practice could become legally binding.[154] Furthermore, CIL, like international law generally, primarily governed relations among nations, not the relations between a nation and its citizens.[155]

The post-World War II era has witnessed a dramatic transformation in the nature of CIL lawmaking.[156] Conceptually, one of the results of the Nuremberg trials was that the individual, and not just the state, came to be viewed as a significant subject of international law.[157] Structurally, the establishment of the United Nations and other international organizations made it easier for nations to meet and express their views about the content of international law. These organizations also facilitated the proliferation of multilateral treaties on a wide range of subjects, including human rights. Such changes, not surprisingly, have influenced the nature of CIL.

Perhaps the most significant change in the nature of CIL is that it is less tied to state practice. International and U.S. courts now rely on General Assembly resolutions, multilateral treaties, and other international pronouncements as evidence of CIL without rigorous examination of whether these pronouncements reflect the actual practice of states. In the *Nicaragua* case,[158] for example, the International Court of Justice relied heavily on General Assembly resolutions and multilateral treaties as evidence of CIL rules concerning limitations on the allowable use of force and the principle of non-intervention,[159] and "referred only generally to the relevant practice."[160] Similarly, in *Fi-*

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154 As late as 1963, Professor Brierly's famous book on international law observed that "[t]he growth of a new custom is always a slow process." J.L. BRIERLY, THE LAW OF NATIONS 62 (6th ed. 1963); *see also* The Paquete Habana, 175 U.S. 677, 686 (1899) (referring to "usage among civilized nations . . . gradually ripening into a rule of international law").

155 *See supra* p. 831.

156 *See* HENKIN, *supra* note 18, at 37–40; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9–10 (1982); Blum & Steinhardt, *supra* note 151, at 64–75. We take no position here regarding the legitimacy of this transformation, which is a subject of some controversy. *Compare* Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 12–21 (1995–96) (arguing in favor of recent changes in the process of CIL formation), *with* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 83 (1992) (arguing against these changes and proposing an alternative approach that preserves the "integrity" of CIL). Rather, our goal is merely to describe the prevailing views and trends regarding the new CIL, as evidenced by judicial decisions and academic commentary.

157 *See* HENKIN, *supra* note 18, at 173–74, 176.

158 Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

159 *See id.* at 98–107.

160 HENKIN, PUGH, SCHACHTER & SMIT, *supra* note 19, at 85. For discussions of the erosion of the state practice requirement in the *Nicaragua* case, consult THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 107 (1989); Anthony D'Amato, *Trashing Customary International Law*, 81 AM. J. INT'L L. 101, 102–03 (1987). For a similar comment about the recent *Tadić* decision by the Yugoslavian war crimes tribunal, consult Theodor Meron,

lartiga, the Second Circuit relied extensively on declarations and treaties as evidence of a CIL rule against torture, although it recognized that such a rule did not necessarily comport with state practice.[161]

The modern doctrine of *jus cogens* is another example of the drift away from the state practice requirement and, correspondingly, away from a consent-based conception of CIL. Those rules of CIL labeled as *jus cogens*, or "peremptory norms," are said by courts and commentators to be binding on states regardless of consent.[162] State practice inconsistent with these norms is not viewed as evidence against their CIL status, but rather is disregarded as mere lawbreaking.[163] Although the peremptory norms initially included only restrictions on widely-condemned practices such as slavery, genocide, and torture, the purported scope of these norms has expanded in recent years.[164]

Another difference between the traditional and the new CIL is that the latter can develop very rapidly. The International Court of Justice has stated that "the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law."[165] The accelerated process of CIL lawmaking is due in part to improvements in communication, which have "made the practice of states widely and quickly known."[166] It is also due to the fact that discrete events such as pronouncements of international organizations and the promulgation of multilateral treaties are treated as evidence of CIL. As Professors Blum and Steinhardt have noted, "[t]he essence of the new modes of lawmaking is that they accelerate the process of customary law formation by relying upon the unique form of state practice which occurs in multilateral organizations like the United Nations."[167]

Finally, the content of CIL has changed. In particular, CIL is now viewed as regulating many matters that were traditionally regulated by

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The Continuing Role of Custom in the Formation of International Humanitarian Law, 90 AM. J. INT'L L. 238, 239 (1996).

161 *See* Filartiga v. Pena-Irala, 630 F.2d 876, 882 (2d Cir. 1980).

162 *See* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, arts. 53, 64, 1155 U.N.T.S. 331, 334, 347, 8 I.L.M. 679, 698–99, 703; Siderman v. Argentina, 965 F.2d 699, 715 (9th Cir. 1992); RESTATEMENT (THIRD), *supra* note 4, § 102 cmt. k & reporters' note 6.

163 *See, e.g.*, *Siderman*, 965 F.2d at 717; *Filartiga*, 630 F.2d at 884 n.15.

164 *See, e.g.*, Xuncax v. Gramajo, 886 F. Supp. 162, 185–87 (D. Mass. 1995) (holding that peremptory norms prohibit, among other things, "arbitrary detention" and, to some extent, "cruel, inhuman or degrading treatment"). *See generally* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1, 2 (1990) (noting that a growing number of human rights are being labeled as peremptory norms).

165 North Sea Continental Shelf (F.R.G. v. Den., F.R.G. v. Neth.), 1969 I.C.J. 4, at 44 (Feb. 20); *see also* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 5 (4th ed. 1990) (noting that "[t]he International Court does not emphasize the time element as such in its practice"); WOLFKE, *supra* note 11, at 59 ("At present . . . an international custom can arise even in a very short time.").

166 RESTATEMENT (THIRD), *supra* note 4, § 102 reporters' note 2.

167 Blum & Steinhardt, *supra* note 151, at 72.

domestic law alone. By far the largest such body of new CIL concerns human rights. There is widespread agreement that CIL now protects the rights to be free from genocide, slavery, summary execution or murder, "disappearance," "cruel, inhuman, or degrading treatment," "prolonged arbitrary detention," and "systematic racial discrimination."[168] An intergovernmental human rights committee recently asserted that CIL also protects "freedom of thought, conscience and religion," a presumption of innocence, a right of pregnant women and children not to be executed, and a right to be free from expressions of "national, racial, or religious hatred."[169] A prominent human rights organization's list of "potential candidates for rights recognized under customary international law" includes "the right to free choice of employment; the right to form and join trade unions; and the right to free primary education, subject to a state's available resources."[170] The list continues to grow. As a leading authority on international human rights has observed, "[g]iven the rapid continued development of international human rights, the list as now constituted should be regarded as essentially open-ended. . . . Many other rights will be added in the course of time."[171]

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168 RESTATEMENT (THIRD), *supra* note 4, § 702.

169 UNITED NATIONS, HUMAN RIGHTS COMMITTEE, GENERAL COMMENT ADOPTED BY THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 40, PARAGRAPH 4, OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, General Comment No. 24(52) at 3, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994); *see also* Beth Gammie, *Human Rights Implications of the Export of Banned Pesticides*, 25 SETON HALL L. REV. 558, 583–93 (1994) (arguing that CIL protects the right to life, health, and to conceive and bear children); Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 699 (1983) (asserting that CIL prohibits the execution of juveniles); Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT'L L.J. 40, 91 (1995) (stating that the freedom of religion is a "non-derogable core right[ ]" under CIL).

170 International Law Ass'n, Committee on the Enforcement of Human Rights Law, *Final Report on the Status of the Universal Declaration of Human Rights in National and International Law*, *in* INTERNATIONAL LAW ASS'N, REPORT OF THE SIXTY-SIXTH CONFERENCE 525, 548 (1994) (footnotes omitted). For commentary regarding a possible right of free education under CIL, consult Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 616–22 (1992); Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 HARV. BLACKLETTER L.J. 37, 59–60 (1994); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367, 406–08 (1985); Comment, Plyler v. Doe *and the Right of Undocumented Alien Children to a Free Public Education*, 2 B.U. INT'L L.J. 513, 523–32 (1984); Note, *Proposition 187 and International Human Rights Law: Illegal Discrimination in the Right to Education*, 19 HASTINGS INT'L & COMP. L. REV. 183, 197–98 (1995). For commentary regarding a possible right under CIL to bargain collectively, consult Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 1, 26 (1994); Neil A. Friedman, Note, *A Human Rights Approach to the Labor Rights of Undocumented Workers*, 74 CAL. L. REV. 1715, 1736 (1986).

171 MERON, *supra* note 160, at 99. After listing seven categories of CIL human rights norms, the *Restatement (Third)* notes that its "list is not necessarily complete, and is not closed: human

In sum, the new CIL differs from traditional CIL in several fundamental ways. It is less tied to state practice, it can develop rapidly, and it increasingly purports to regulate a state's treatment of its own citizens. With these points in mind, we now consider some of the implications of the claim that CIL is federal common law.

B. CIL, Federal Statutes, and Treaties

The Supremacy Clause declares both treaties and "Laws of the United States" to be "the supreme Law of the Land."[172] In *Whitney v. Robertson*,[173] the Supreme Court interpreted this clause to mean that "no superior efficacy is given to either over the other."[174] One consequence of *Whitney*'s logic is that a conflict between treaties and statutes is resolved by a last-in-time rule. Courts will give effect to a later act of Congress inconsistent with an earlier treaty, and vice-versa.[175]

If CIL is federal common law, it is presumably part of the "Laws of the United States" within the meaning of the Supremacy Clause.[176] But what legal status does it have in relation to statutes and treaties? Does a last-in-time rule prevail? Courts and scholars generally agree that, for purposes of U.S. domestic law, a federal statute trumps a prior inconsistent norm of CIL — that is, Congress can violate CIL.[177]

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rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future." RESTATEMENT (THIRD), *supra* note 4, § 702 cmt. a. Indeed, as recounted by Professor Lillich, Chief Reporter Louis Henkin recently indicated that, "if he were drafting Section 702 today he would include as customary international law rights the right to property and freedom from gender discrimination, plus the right to personal autonomy and the right to live in a democratic society." Lillich, *supra* note 156, at 7 n.43 (citation omitted). Other commentators have asserted, for example, that CIL now confers rights relating to sexual orientation. *See, e.g.*, David A. Catania, *The Universal Declaration of Human Rights and Sodomy Laws: A Federal Common Law Right to Privacy for Homosexuals Based on Customary International Law*, 31 AM. CRIM. L. REV. 289, 315–18 (1994); James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 119 (1994).

172 U.S. CONST. art. VI.

173 124 U.S. 190 (1888).

174 *Id.* at 194.

175 *See* Chinese Exclusion Case, 130 U.S. 581, 600–02 (1889); *Whitney*, 124 U.S. at 194; Head Money Cases, 112 U.S. 580, 599 (1884).

176 The Supreme Court has held that post-*Erie* federal common law is binding on the states, *see, e.g.*, Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103 (1962), but it has never specifically tied this holding to the Supremacy Clause. Presumably, federal common law binds the states because it constitutes a "Law[] of the United States made in pursuance" of the Constitution. U.S. CONST. art. VI. This, in any event, is the conclusion of lower courts and scholars. *See* Klinghoffer v. S.N.C. Achille Lauro, 937 F.2d 44, 53 (2d Cir. 1991); American Petrofina Co. v. Nance, 859 F.2d 840, 841 (10th Cir. 1988); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 897 (1986); Hill, *supra* note 100, at 1073–74; *cf.* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (stating that federal common law is part of the laws of the United States for purposes of 28 U.S.C. § 1331).

177 *See* RESTATEMENT (THIRD), *supra* note 4, § 115(1)(a). The Supreme Court has never specifically held that Congress can enact a statute in violation of CIL. The Court has held, however, that Congress can enact a statute in violation of a treaty, *see, e.g.*, *Whitney*, 124 U.S. at 194, and it has asserted in dictum that Congress can enact a statute in violation of CIL, *see* Lauritzen v.

This conclusion is consistent with the modern position, for it is well settled that Congress can overrule non-constitutional federal common law.[178]

In contrast, it is unclear whether a newly-developed norm of CIL, like a new treaty, trumps a *prior* inconsistent federal statute. The answer may depend on the legal status of CIL. If CIL has the status of federal law under Article VI, the logic of *Whitney* might suggest that a newly-developed norm of CIL would trump a prior inconsistent federal statute. As the *Restatement (Third)* explains:

> Since international customary law and an international agreement have equal authority in international law, and both are law of the United States, arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement.[179]

To date, no court seems to have considered whether a newly-developed norm of CIL can supersede a prior inconsistent treaty or statute.[180] The view that it can does not sit well with the traditional conception of federal common law. As a general matter, courts cannot exercise their (non-constitutional) federal common law powers to invalidate a federal statute.[181] Unless CIL has the status of constitutional law — a proposition with few defenders[182] — it is hard to see how federal courts can apply a newly-developed norm of CIL as a matter of federal common law to invalidate a prior inconsistent federal statute.

In an attempt to address this doctrinal tension, Professor Henkin maintains that CIL merely "resembles" or "is like" federal common

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Larsen, 345 U.S. 571, 578 (1953); The Paquete Habana, 175 U.S. 677, 700, 708 (1900). The lower courts have unanimously held that Congress can violate CIL. *See, e.g.*, Galo-Garcia v. I.N.S., 86 F.3d 916, 918 (9th Cir. 1996); United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); Garcia-Mir v. Meese, 788 F.2d 1446, 1453–54 (11th Cir. 1986).

[178] *See* City of Milwaukee v. Illinois, 451 U.S. 304, 313–15 (1981); RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 756 (4th ed. 1996).

[179] RESTATEMENT (THIRD), *supra* note 4, § 115 reporters' note 4 (citations omitted). The Tentative Draft originally endorsed this position as a statement of blackletter law. *See* RESTATEMENT (THIRD) (Tentative Draft), *supra* note 128, § 135(1). But in the face of pressure from the State Department and others, *see* Maier, *supra* note 136, at 464, the final version of the *Restatement (Third)* treated the view that CIL can trump prior inconsistent federal statutes as a mere possibility and acknowledged that the issue "has . . . not been authoritatively determined," RESTATEMENT (THIRD), *supra* note 4, § 115 cmt. d.

[180] *See* RESTATEMENT (THIRD), *supra* note 4, § 115 reporters' note 4. For a plausible situation in which this could occur, see Trimble, cited above in note 26, at 682–84.

[181] *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 412–13 (5th ed. 1994). This is because "[f]ederal common law implements the federal Constitution and statutes, and is conditioned by them." D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 472 (1942).

[182] *But see* PAUST, *supra* note 151, at 5–6, 95, 338–45 (arguing that some CIL human rights norms have constitutional status based on, among other things, the Ninth Amendment).

law.[183] Henkin agrees with other proponents of the modern position that CIL is federal law that trumps inconsistent state law and establishes federal jurisdiction.[184] But he argues that, unlike federal common law, CIL is *not* inferior to federal statutes because "the reasons that the common law bows to [federal] legislation are inapplicable to international law."[185] He notes that the source of CIL is the practice of the international community of states, not U.S. policy ultimately derived from the Constitution or federal statute.[186] Accordingly, "when courts determine international law, they do not act as surrogates for the national legislature."[187] Henkin concludes that, as a law of the United States that does not derive from an act of Congress, CIL "is equal in status to legislation, and the more recent of the two governs."[188]

Not all supporters of the modern position agree with Professor Henkin's analysis,[189] but this debate is not of immediate concern here. The key point for present purposes is that, whether CIL is federal common law or, as Professor Henkin asserts, merely "like" federal common law, only its purported status as federal law within the meaning of Article VI enables it to be considered equal to a federal statute and thus a candidate for the last-in-time rule. If CIL is not federal law, it is clearly inferior (as a matter of U.S. law) to a federal statute.

C. CIL and the President

One of the most hotly debated issues in U.S. foreign relations law is whether the President has the domestic legal authority to violate CIL. A number of commentators maintain that he does not.[190] Much of their argument derives from Article II of the Constitution, which obligates the President to "take Care that the Laws be faithfully exe-

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[183] *See* Henkin, *supra* note 8, at 876; Henkin, *supra* note 4, at 1561; *cf.* RESTATEMENT (THIRD), *supra* note 4, § 111 (asserting that CIL "is like" federal common law without connecting the assertion to the conclusion that a newly-developed CIL norm might trump a prior inconsistent federal statute).

[184] *See* Henkin, *supra* note 4, at 1561.

[185] Henkin, *supra* note 8, at 876.

[186] *See* Henkin, *supra* note 4, at 1561–62; Henkin, *supra* note 8, at 876.

[187] Henkin, *supra* note 8, at 876.

[188] *Id.* at 878; *see also* Henkin, *supra* note 4, at 1565 (concluding that "[t]here seems to be no authority in jurisprudence, nor any reason in principle, for giving customary law less weight than a treaty in relation to an earlier act of Congress").

[189] *See, e.g.*, Jack M. Goldklang, *Back on Board the* Paquete Habana*: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143, 148 (1984).

[190] *See* Glennon, *supra* note 151, at 324–25; Michael J. Glennon, *State-Sponsored Abduction: A Comment on* United States v. Alvarez-Machain, 86 AM. J. INT'L L. 746, 748–49 (1992); Lobel, *supra* note 151, at 1116–20; Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 402–05 (1987); Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377, 378 (1987). For an interesting exchange on the issue, see *Authority of the Executive*, *supra* note 136, at 297–308.

cuted."[191] The term "Laws" in Article II presumably has the same meaning as the phrase "Laws of the United States" in Articles III and VI, which courts have interpreted to include federal common law.[192] Accordingly, if CIL is federal common law, Article II arguably requires the President to "take Care that [CIL] be faithfully executed," and the President may not violate it, at least absent congressional authorization.

This implication of the modern position is illustrated by the district court decision in *Fernandez v. Wilkinson*.[193] *Fernandez* held that the one-year detention in a federal penitentiary of a Cuban citizen awaiting deportation was consistent with "the United States Constitution [and] our statutory laws"[194] but nonetheless violated "fundamental human justice as embodied in established principles of international law."[195] Relying without further analysis on the pre-*Erie* decisions in *The Paquete Habana* and *The Nereide*, and on *Filartiga*, the district court stated that "[i]nternational law is a part of the laws of the United States which federal courts are bound to ascertain and administer in an appropriate case."[196] Because the CIL prohibition against indeterminate detention was "judicially remedial as a violation of international law,"[197] the district court ordered that the prison "lawfully terminate the arbitrary detention" within ninety days.[198]

The view that judicial interpretations of CIL bind the President is far from universally accepted.[199] Indeed, some proponents of the modern position shy away from this implication.[200] Nonetheless, if the

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191 U.S. CONST. art. II, § 3.

192 *See, e.g.*, Self-Insurance Inst. of Am., Inc. v. Korioth, 993 F.2d 479, 482–84 (5th Cir. 1993); *cf.* Illinois v. City of Milwaukee, 406 U.S. 91, 100 (1972) (construing "laws" in federal question jurisdiction statute to include federal common law). *But see* Weisburd, *Executive Branch*, *supra* note 26, at 1209–10 (arguing that the word "Laws" in Article II should be given a meaning different from the current meaning of "Laws of the United States" in Article III).

193 505 F. Supp. 787 (D. Kan. 1980), *aff'd on other grounds*, 654 F.2d 1382 (10th Cir. 1981).

194 *Id.* at 795.

195 *Id.* at 798.

196 *Id.*

197 *Id.*

198 *Id.* at 800.

199 The only court of appeals to address the issue held, without examining Article II's Take Care Clause, that the President is not obligated as a matter of U.S. law to comply with CIL. *See* Garcia-Mir v. Meese, 788 F.2d 1446, 1453–55 (11th Cir. 1986). *Garcia-Mir* drew support from *The Paquete Habana*, which contained dicta that appear to exclude the President from the judicially enforceable scope of CIL. *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that courts must apply CIL "where there is no treaty, and no controlling *executive* or legislative act or judicial decision" (emphasis added)).

200 *See, e.g.*, Henkin, *supra* note 8, at 878–84 (arguing that the Take Care Clause obligation applies to international law but also asserting that in some circumstances the President may violate CIL); RESTATEMENT (THIRD), *supra* note 4, § 115 reporters' note 3 ("There is authority for the view that the President has the power, when acting within his constitutional authority, to disregard a rule of international law or an agreement of the United States . . . ."); *cf.* Brilmayer, *supra* note 4, at 303 (remaining agnostic on the issue).

modern position that CIL is federal law is correct, the doctrinal conclusion that CIL binds the President may be hard to escape. But if CIL is not federal law, then there is no basis for the federal judiciary to enforce CIL against the President.

D. CIL and the States

As discussed above, the term "Laws of the United States" in the Supremacy Clause is generally viewed as including federal common law. If CIL is federal common law, then it presumably is "the supreme Law of the Land,"[201] and "trumps *all* state law."[202] In other words, although a practice of one of the several states is consistent with federal and state constitutions and statutes, the norms of the international community, as interpreted by federal courts, could render the practice illegal as a matter of U.S. law.

There is less disagreement about CIL prevailing over state law than there is about its effect on the President and Congress. As Professor Brilmayer explains:

> There has been much debate about the relative status of customary international law and other varieties of federal authority. May the President violate customary international law? What do we do when customary international law conflicts with a federal statute? But none of these issues need be addressed when state and international law are inconsistent, so long as the federal characterization sticks. . . . *All* federal law trumps *all* state law. If international law enjoys that elevated status, it also will prevail.[203]

Thus, many commentators who shy away from arguing that CIL binds the President assert without qualification that it binds the states.[204] If taken seriously, however, the doctrine that CIL is the supreme law of the land portends a dramatic transfer of constitutional authority from the states to the world community and to the federal judiciary. For example, many commentators argue that the CIL of human rights is, in many particulars, more protective of individual rights than state constitutions and statutes.[205] Professor Brilmayer il-

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201 U.S. CONST. art. VI.

202 Brilmayer, *supra* note 4, at 303. In Professor Brilmayer's disarmingly simple syllogism:

1. All federal laws preempt inconsistent state law under the Supremacy Clause;
2. International law is federal law;
3. Therefore, international law preempts contrary state law.

Id. at 295; *see also* RESTATEMENT (THIRD), *supra* note 4, § 111(1) ("International law and international agreements of the United States are law of the United States and supreme over the law of the several States."); *id.* § 115 cmt. e ("Since . . . any rule of customary international law, is federal law . . . it supersedes inconsistent State law or policy whether adopted earlier or later.").

203 Brilmayer, *supra* note 4, at 303.

204 *See* RESTATEMENT (THIRD), *supra* note 4, § 115 reporters' note 3; Henkin, *supra* note 4, at 1561.

205 *See, e.g.*, Kathryn Burke, Sandra Coliver, Connie de la Vega & Stephen Rosenbaum, *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291,

lustrates this point by suggesting that CIL could prohibit certain otherwise constitutional applications of state death penalty statutes.[206] In addition, CIL is arguably more restrictive than state law on matters ranging from personal jurisdiction over foreign defendants[207] to the extraterritorial application of state law,[208] including state tax law.[209]

The view that CIL preempts state law depends wholly on the validity of the modern position. If CIL is not federal common law, then there is no basis under the Supremacy Clause for concluding that it preempts state law.

E. CIL, Federal Jurisdiction, and the Alien Tort Statute

The final consequence of the modern position concerns federal jurisdiction. If CIL is part of the "Laws of the United States," then a claim that "arises under" CIL arguably establishes both constitutional and statutory federal question jurisdiction.[210] If it is not part of the "Laws of the United States," then some independent source of jurisdic-

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294 (1983); Paul L. Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 INT'L LAW. 61, 63 (1984).

206 *See* Brilmayer, *supra* note 4, at 322–26. For other commentary suggesting that state death penalty laws are invalid because they are in conflict with CIL, see Joan F. Hartman, *"Unusual" Punishment: The Domestic Effects of International Norms Restricting the Application of the Death Penalty*, 52 U. CIN. L. REV. 655, 691–95, 699 (1983); Lauren B. Kallins, *The Juvenile Death Penalty: Is the United States in Contravention of International Law?*, 17 MD. J. INT'L L. & TRADE 77, 77, 78, 91–92 (1993); Ved P. Nanda, *The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights*, 42 DEPAUL L. REV. 1311, 1336 (1993); David Weissbrodt, *Execution of Juvenile Offenders by the United States Violates International Human Rights Law*, 3 AM. U. J. INT'L L. & POL'Y 339, 367–69 (1988); Note, cited above in note 151, at 1273–75.

207 One possible difference between state law and international law in this context concerns "tag" jurisdiction, i.e. general jurisdiction based solely on the transitory territorial presence of an individual defendant. Some commentators believe that CIL prohibits tag jurisdiction over alien defendants. *See, e.g.*, RESTATEMENT (THIRD), *supra* note 4, § 421(2)(a) & cmt. e & reporters' note 5. Thus, although the Supreme Court has held that tag jurisdiction over domestic defendants pursuant to a state statute is consistent with the U.S. Constitution, *see* Burnham v. Superior Court, 495 U.S. 604, 627 (1990), courts might use the modern position and CIL to invalidate such an assertion of personal jurisdiction over foreign defendants.

208 *See* Brilmayer, *supra* note 4, at 315–22; *see also* RESTATEMENT (THIRD), *supra* note 4, § 402 cmt. k ("Since international and other foreign relations law are the law of the United States, under the Supremacy Clause of the Constitution an exercise of jurisdiction by a state that contravenes the limitations of [international law] is invalid.").

209 Many states tax international corporations by first determining their worldwide income and then attributing a portion of that income to the taxing state. According to the *Restatement (Third)*, it is an open question whether this "worldwide" taxation method is consistent with CIL limitations on extraterritorial jurisdiction. *See* RESTATEMENT (THIRD), *supra* note 4, § 412 cmt. e. Thus, although the Supreme Court has held that such methods of international taxation are consistent with federal constitutional and statutory law, *see* Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298, 303 (1994), CIL could, under the modern position, render these state practices illegal.

210 *See* RESTATEMENT (THIRD), *supra* note 4, § 111; Henkin, *supra* note 4, at 1561; Randall, *Federal Questions*, *supra* note 151, at 351.

tion must be found in order for a federal court to consider a CIL claim.

Despite their endorsement of the modern position, *Filartiga* and its progeny have not generally relied on statutory federal question jurisdiction.[211] Instead, statutory jurisdiction in these cases is typically founded on the ATS, which purports to grant the federal district courts jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[212] The constitutionality of these assertions of jurisdiction under the ATS, however, may depend on the validity of the modern position that CIL is part of "the Laws of the United States" for purposes of Article III. Every congressional grant of statutory jurisdiction must find its source in, and be consistent with, one of the nine heads of federal judicial power in Article III, Section 2.[213] *Filartiga*-type cases, however, involve suits between nondiverse aliens that implicate neither the treaty nor the admiralty heads of jurisdiction in Article III. As a result, it may be that federal jurisdiction in *Filartiga*-type cases under the ATS "can . . . be constitutionally justified only as an exercise of [Article III] federal question jurisdiction."[214]

Defenders of the ATS's constitutionality do not dispute this last proposition. They simply recite that CIL is federal common law and conclude that a *Filartiga*-type case therefore "arises under the . . . laws of the United States."[215] But if CIL is not federal common law, "a tort . . . committed in violation of the law of nations"[216] would not arise under "the Laws of the United States" within the meaning of Article III, rendering *Filartiga*-type suits constitutionally suspect.

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[211] The federal district courts are divided over whether a claim under CIL "arises under" the laws of the United States for purposes of statutory federal question jurisdiction. *Compare, e.g.*, Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987) ("[A] case presenting claims arising under customary international law is a federal question."), *with* Backlund v. Hessen, 904 F. Supp. 964, 971 n.2 (D. Minn. 1995) ("Courts have declined to recognize that federal question jurisdiction . . . gives federal courts jurisdiction over a claim for a violation of international law."). The federal courts of appeals have mentioned but have not resolved the issue. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 246 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 779–80 n.4 (D.C. Cir. 1984) (Edwards, J., concurring); Filartiga v. Pena-Irala, 630 F.2d 876, 887 n.22 (2d Cir. 1980).

[212] 28 U.S.C. § 1350 (1994).

[213] *See* WRIGHT, *supra* note 181, at 27, 31–32.

[214] Burley, *supra* note 118, at 468. For theories other than the modern position that might preserve the constitutionality of the ATS, see p. 872–73 below.

[215] *Filartiga*, 630 F.2d at 886 (internal quotation marks omitted) (omission in original); *see also* RESTATEMENT (THIRD), *supra* note 4, § 111(2) ("Cases arising under international law or international agreements . . . are within the Judicial Power of the United States and . . . are within the jurisdiction of the federal courts."); Henkin, *supra* note 4, at 1560–61 (stating that "there is now general agreement" that international law cases "are within the judicial power . . . under article III").

[216] 28 U.S.C. § 1350 (1994).

IV. CRITIQUE OF THE MODERN POSITION

This Part critiques the modern position. One obstacle to such a critique is that there is no canonical account of CIL's status as federal common law. Rather, proponents of this view have advanced a variety of arguments, some of which are contradictory. For example, as we explained above, the twin pillars of the modern position — *Filartiga* and the *Restatement (Third)* — rest on incompatible foundations. The *Filartiga* approach grounds CIL's federal law status in nineteenth-century judicial precedents, whereas the *Restatement (Third)* approach acknowledges that *Filartiga*'s historical claims are false and instead grounds CIL's federal law status in a variety of arguments concerning the structure of international law and the post-*Erie* federal common law.

Below, we consider the five principal arguments that have been made in support of the modern position: that CIL was federal law prior to *Erie*; that *Erie* did not affect the legal status of CIL; that general principles of post-*Erie* federal common law support the modern position; that *Sabbatino* adopted the modern position; and that the modern position is a component of the federal common law of foreign relations.

A. *Pre-*Erie *Status of CIL*

Several federal decisions[217] and some scholars[218] rest their support for the modern position on the claim that CIL has historically been considered to be federal law. We have already addressed this claim to some extent in section II.A. As we have pointed out, the claim fails to appreciate that pre-*Erie* declarations regarding the status of CIL were made under the rubric of general common law, not post-*Erie* federal common law.[219] Thus, to take the pre-*Erie* decision relied on most frequently in this regard, the statement in *The Paquete Habana* that CIL was "part of our law" did *not* mean that CIL had the status of federal law.[220] Indeed, the Court in *The Paquete Habana* itself strongly insinuated as much when it suggested that CIL as applied by federal courts did not bind either Congress or the President.[221]

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[217] *See In re* Estate of Ferdinand E. Marcos Human Rights Litig., 978 F.2d 493, 502 (9th Cir. 1992); *Filartiga*, 630 F.2d at 885; Xuncax v. Gramajo, 886 F. Supp. 162, 193 (D. Mass. 1995); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

[218] *See* PAUST, *supra* note 151, at 5–8; Blum & Steinhardt, *supra* note 151, at 57–58; Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 34–46 (1952); Glennon, *supra* note 151, at 343–47; Lobel, *supra* note 151, at 1090–95; Steven M. Schneebaum, *The Enforceability of Customary Norms of Public International Law*, 8 BROOK. J. INT'L L. 289, 289–91 (1982); Note, *supra* note 100, at 334–37.

[219] *See supra* pp. 822–26.

[220] *See supra* pp. 823–24.

[221] *See* The Paquete Habana, 175 U.S. 677, 700 (1900) (stating that customs and usages of civilized nations govern "where there is no treaty, and no controlling executive or legislative act");

A comprehensive response to the historical claim is unnecessary here, for others, including many proponents of the modern position, have effectively repudiated the claim.[222] We have only three points to add to what we and others have already said about CIL's non-federal status prior to *Erie*. First, eighteenth- and nineteenth-century statements that the law of nations was part of the "law of the land"[223] were not made in the context of interpreting Article VI, and there is no reason to believe that these statements were references to the "*supreme* Law of the Land" in that Article.[224] Article VI limits supreme federal law to those "Laws of the United States" that are "made in pursuance" of the Constitution.[225] Under the prevailing pre-*Erie* jurisprudence, the law of nations was not viewed as made by any particular sovereign source, especially not by a U.S. constitutional law-making source and especially not by federal courts.[226] The assertion that the law of nations was part of the law of the land was likely nothing more than a mimicking of earlier statements by Blackstone, who was not, of course, referring to supreme U.S. federal law.[227] In any event, the characterization of the law of nations as the law of the land was perfectly consistent with the law of nations' status as general common law. Nineteenth-century courts frequently employed the phrase "law of the land" to refer to a variety of non-federal laws, including general common law.[228]

Second, statements made in connection with neutrality prosecutions in the 1790s, that the law of nations is part of "the law of the United States,"[229] do not establish that CIL was federal law. The meaning of

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id. at 708 (stating that courts must "give effect to" CIL "in the absence of any treaty or other public act of [the] government in relation to the matter").

222 *See, e.g.*, 3–4 G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 923–26 (1988); Fletcher, *supra* note 43, at 1517–21; Jay, *supra* note 31, at 821; Weisburd, *Executive Branch*, *supra* note 26, at 1226–34; Weisburd, *State Courts*, *supra* note 26, at 28–35. Modern position proponents who acknowledge that CIL was not federal law prior to *Erie* include RESTATEMENT (THIRD), cited above in note 4, pt. I, ch. 2 introductory note at 41, and Henkin, cited above in note 4, at 1556–57. *Cf.* Brilmayer, *supra* note 4, at 302 (stating that, prior to *Erie*, "there was no real need to characterize international law as definitively state or federal").

223 *See, e.g.*, The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815); 11 Op. Att'y Gen. 297, 299–300 (1865); 1 Op. Att'y Gen. 567, 570 (1822); 1 Op. Att'y Gen. 26, 27 (1792); ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793 at 15 (Richard Loss ed., 1976).

224 U.S. CONST. art. VI (emphasis added).

225 *Id.*

226 *See* Jay, *supra* note 31, at 833; *supra* pp. 823–24.

227 *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 67 (1769) (stating that the "law of nations . . . is held to be a part of the law of the land").

228 *Cf.* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 320 (1827) (stating that the law of the land governs enforcement of contracts); Marine Ins. v. Tucker, 7 U.S. (3 Cranch) 357, 393 (1806) (declaring a well-settled marine insurance rule to be part of the "law merchant of the land").

229 *See* Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 474 (1793); United States v. Worrall, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798) (No. 16,760); United States v. Ravara, 2 U.S. (2 Dall.) 297, 299 (C.C.D. Pa. 1793); Henfield's Case, 11 F. Cas. 1099, 1100–01 (C.C.D. Pa. 1793) (No. 6360) (Grand

these statements is the subject of some debate.[230] Again, they did not purport to be interpretations of Article VI. In any event, the Supreme Court subsequently resolved the matter against CIL having federal law status. A series of early nineteenth-century decisions[231] established that the unwritten common law applied by federal courts was not federal law.[232] Later in the century, the Supreme Court expressly held that the law of nations was general common law, not federal law.[233] No court prior to *Filartiga* in 1980 ever held that CIL was part of the "Laws of the United States" within the meaning of Article III, and to date no court has held that CIL is part of the "Laws of the United States" within the meaning of the Supremacy Clause.

Finally, some commentators suggest that the ATS, which was part of the Judiciary Act of 1789, demonstrates that the First Congress (and therefore perhaps the Framers) believed the law of nations to be part of the "Laws of the United States," at least within the meaning of Article III.[234] The argument asserts that the First Congress intended the ATS to extend to cases between aliens and concludes that, because Article III does not provide for alien-alien jurisdiction, the drafters of the ATS must have thought that claims under the law of nations gave rise to federal question jurisdiction.[235] But even assuming that the First Congress did in fact intend the ATS to extend to alien-alien suits,[236] it does not follow that the First Congress thought that claims under the law of nations arose under federal law. The First Congress may well have believed that alien-alien suits under the ATS were con-

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Jury charge of Jay, C.J.); *id.* at 1117 (Grand Jury charge of Wilson, J.). *See generally* Jay, *supra* note 31, at 825–27 (discussing the meaning of these statements).

230 *Compare* PAUST, *supra* note 151, at 6 & n.44 (arguing that such statements meant that CIL was federal law), *with* Jay, *supra* note 31, at 825–33 (arguing that such statements meant that CIL was general common law), *and* Robert C. Palmer, *The Federal Common Law of Crime*, 4 LAW & HIST. REV. 267, 294–96 (1986) (arguing that such statements meant that CIL was state law). It is perhaps worth noting that, by the time of the Jefferson administration, it seemed clear to Jefferson's Attorney General, Levi Lincoln, that the law of nations was not federal law. In an official legal opinion in 1802, he wrote that "an aggravated violation against the law of nations" did not contravene any "provision in the Constitution [or] any law of the United States," and that the "law of nations is considered as a part of the municipal law of each State." 5 Op. Att'y Gen. 691, 692 (1802).

231 *See* Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657–58 (1834); American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 545–46 (1828); United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416–17 (1816); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

232 *See* DAVID R. DEENER, THE UNITED STATES ATTORNEYS GENERAL AND INTERNATIONAL LAW 158–60 (1957); Jay, *supra* note 43, at 1299–1300; Weisburd, *Executive Branch*, *supra* note 26, at 1212–20.

233 *See* sources cited *supra* note 48.

234 *See, e.g.*, HENKIN, *supra* note 24, at 508 n.16; Note, *supra* note 100, at 334–37.

235 *See* Note, *supra* note 100, at 334–37.

236 The First Congress may have intended the ATS to apply only to suits between aliens and U.S. citizens. *See* Weisburd, *Executive Branch*, *supra* note 26, at 1223–26; Scott A. Rosenberg, Note, *The Theory of Protective Jurisdiction*, 57 N.Y.U. L. REV. 933, 1015–17 (1982).

sistent with Article III's Alien Diversity Clause.[237] Although such suits appear inconsistent with the language of this clause,[238] this would not have been the only instance in which the First Congress thought otherwise. The Judiciary Act of 1789 also extended federal jurisdiction to *"all"* civil suits in which "an alien is a party."[239] This statutory language encompasses alien-alien suits, and many such suits were brought in the federal courts until the Supreme Court declared such federal jurisdiction unconstitutional in the early nineteenth century.[240] The enactment of the ATS, therefore, is not persuasive evidence that the First Congress or the Framers thought that CIL had the status of federal law. In any event, subsequent nineteenth-century developments, discussed above, made clear that the law of nations was not part of federal law.

B. Erie*'s Relevance to CIL*

Prior to *Erie*, federal courts applied a common law (which included CIL) that did not emanate from a particular sovereign authority, and they determined the content of this common law independently of state courts. The Court in *Erie* effectively "overruled [this] particular way of looking at law"[241] and replaced it with another. *Erie*'s new conception of law, and of the constitutional role of the federal courts in applying law, bears upon the claims of the modern position in several ways.

The first way in which *Erie* is relevant to the modern position is in its embrace of legal positivism. In rejecting the notion of a general common law in the federal courts, the Court explained that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[242] This strand of *Erie* requires federal courts to identify the sovereign source for every rule of decision. Because the appropriate "sovereigns" under the U.S. Constitution are the federal government and the states, *all* law applied by federal courts must be either federal law or state law.[243] After *Erie*, then, a

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[237] *See* Casto, *supra* note 118, at 515 & n.273; Weisburd, *Executive Branch*, *supra* note 26, at 1225.

[238] The Diversity Clause extends federal judicial power to controversies "between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects." U.S. CONST. art. III, § 2.

[239] Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (emphasis added).

[240] *See* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809); Mossman v. Higginson, 4 U.S. (4 Dall.) 12, 13 (1800).

[241] Guaranty Trust Co. v. York, 326 U.S. 99, 101–02 (1945).

[242] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted).

[243] *See id.* at 78 ("Except in matters governed by the Federal Constitution or by Act of Congress, the law to be applied in any case is the law of the State."); Jay, *supra* note 43, at 1312 ("A common-law rule, in other words, must be associated with the sovereign that has authority to promulgate it: either the state or the federal government."); Louise Weinberg, *Federal Common*

federal court can no longer apply CIL in the absence of some domestic authorization to do so, as it could under the regime of general common law.

This conclusion has several implications for the domestic law status of CIL. Most notably, it further confirms that advocates of the modern position err in relying on pre-*Erie* decisions applying CIL as general common law.[244] In addition, the suggestion that federal courts can apply CIL in the absence of any domestic authorization[245] cannot survive *Erie*, which rejected precisely this type of federal judicial power.

Professor Weisburd is therefore mistaken in arguing that, notwithstanding *Erie*, federal courts can apply CIL "as neither state nor federal law."[246] He reasons that, because CIL emanates from "the joint product of the lawmaking activity of many sovereigns," it satisfies *Erie*'s positivist conception of "law":

> [T]he human authority that creates customary international law is the collective international community. That community makes law as positivistic as those the states employ. Thus, applying rules developed under the authority of the international community . . . incorporates the insight from *Erie*, that human agency creates law, and looks to the appropriate agency to determine a particular law's content.[247]

Assuming that it makes sense to think of CIL in this way, and thus as "law" in a positivist sense, Professor Weisburd begs the questions of when and why a court "looks to the appropriate agency to determine a particular law's content." Even if CIL is "real law," *Erie* still requires a domestic source of authority (the federal government or a state government) before federal courts can apply such law.[248] After *Erie*, CIL

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.").

[244] *See supra* p. 849.

[245] Professors Weisburd and Henkin both make this argument, but for different reasons. *See* Henkin, *supra* note 8, at 875–78; Weisburd, *State Courts*, *supra* note 26, at 48–56.

[246] Weisburd, *State Courts*, *supra* note 26, at 49.

[247] *Id.* at 51.

[248] Justice Holmes explained this point in *The Western Maid*, 257 U.S. 419 (1922), a famous maritime decision anticipating *Erie*. In terms directly applicable to the domestic legal status of CIL, Justice Holmes reasoned:

> In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.

Id. at 432. Professor Weisburd himself has recognized this point. *See* Weisburd, *Executive Branch*, *supra* note 26, at 1237.

no more applies in federal courts in the absence of domestic authorization than does the law of France or Mars.[249]

The second way in which *Erie* pertains to the modern position concerns its embrace of a legal realist view of judicial decisionmaking. In the rhetoric, if not the reality, of the *Swift* regime, judicial decisionmaking was not a form of lawmaking.[250] *Erie* rejected this view when it interpreted the term "laws" in the Rules of Decision Act[251] to include state judicial decisions.[252] The recognition that courts "make" law when they engage in common law decisionmaking also formed a basis for the Court's conclusion that the development of an independent general common law by federal courts was "an unconstitutional assumption of powers."[253]

This legal realist conception of judicial decisionmaking undermines the assertion by Professor Henkin — central to his claim that CIL can trump a prior inconsistent federal statute[254] — that judges "find" rather than "make" CIL.[255] Henkin seems to suggest that, because

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249 Another part of Professor Weisburd's argument can be read to suggest that state choice-of-law rules constitute the domestic authorization for the application of CIL by federal courts. *See* Weisburd, *State Courts*, *supra* note 26, at 52–55. Professor Weisburd does not explain, however, how state choice-of-law authorization for federal court application of CIL is consistent with his broader contention that the CIL applied by federal courts is "neither state nor federal law." *Id.* at 49. We doubt that any such explanation can be provided in light of *Erie*'s mandate that, except for matters governed by federal law, "the law to be applied in any case is the law of the State." Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). For further discussion of the relevance of state choice-of-law rules to the domestic legal status of CIL, see note 345 below.

250 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) ("In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws. They are, at most, only evidence of what the laws are; and are not of themselves laws.").

251 The Rules of Decision Act provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1994).

252 *See Erie*, 304 U.S. at 71, 78.

253 *Id.* at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)) (internal quotation marks omitted). Specifically, such lawmaking by federal courts was unconstitutional because it was not a power delegated to federal diversity courts. *See id.* at 78. Even the broader (and now generally repudiated) constitutional holding of *Erie* — that the common law rule announced by the court below was beyond the legislative power of the entire federal government (including Congress), *see id.* at 78–80 — turns on the realist assumption that federal court development of common law rules is an exercise of legislative power. On the realist roots of *Erie*'s holding, consult William R. Casto, *The* Erie *Doctrine and the Structure of Constitutional Revolutions*, 62 TUL. L. REV. 907, 911–12 (1988); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 430–32 (1995); Akhil Reed Amar, *Law Story*, 102 HARV. L. REV. 688, 695 (1989) (book review).

254 *See supra* pp. 842–44.

255 *See* HENKIN, *supra* note 24, at 137 n.* ("[I]n applying international law, the courts are supposed to be finding rather than making the law . . . ."); Henkin, *supra* note 8, at 876 ("However one views the role of the courts in relation to the common law, courts do not *create* but rather find international law, generally by examining the practices and attitudes of foreign states."); Henkin, *supra* note 4, at 1561–62 ("[F]ederal courts *find* international law rather than

CIL's content is formally defined as the practice of states followed from a sense of legal obligation, courts identify and apply CIL without the exercise of any "creative" lawmaking powers. This argument assumes a sharp distinction between law-interpretation and lawmaking that cannot survive even the mildest of legal realist critiques. More importantly, it ignores the character of CIL lawmaking: CIL is often unwritten, the necessary scope and appropriate sources of "state practice" are unsettled, and the requirement that states follow customary norms from a "sense of legal obligation" is difficult to verify. Given what Professor Henkin himself refers to as CIL's "soft, indeterminate character,"[256] it makes no sense to say that judges "discover" an objectively identifiable CIL. In fact, the process of identifying and applying CIL is at least as subjective as the domestic common law process.[257] This is particularly true of the new CIL, which is less tied than traditional CIL to "objective" evidence of state practice.[258]

The final way in which *Erie* is relevant to the modern position concerns the "new" federal common law to which the decision gave rise.[259] *Erie* did not eliminate the lawmaking powers of federal courts — it changed them. Federal court development of general common law was illegitimate not because it was a form of lawmaking, but rather because it was *unauthorized* lawmaking. Thus, federal judicial lawmaking is consistent with *Erie* if it is legitimately authorized. Since *Erie*, federal courts have determined that such authorization exists in a variety of circumstances.[260] Is it within the federal judiciary's authority, after *Erie*, to apply CIL as federal common law? We now turn to this question.

C. *Post-*Erie *Federal Common Law*

There is "considerable uncertainty" concerning the proper scope of the post-*Erie* federal common law.[261] The Supreme Court's federal common law decisions do not lend themselves to ready synthesis. As a

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make it, as was not true when courts were applying the 'common law,' and as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation."). Professor Clark's recent defense of the federal law status of CIL also appears to rely on the assumption that judges "discover" the principles of CIL. *See* Clark, *supra* note 46, at 1300–01 & n.262.

256 HENKIN, *supra* note 18, at 29.

257 Many commentators have made this or a similar point. *See, e.g.*, JANIS, *supra* note 21, at 53; Michael J. Glennon, *Can the President Do No Wrong?*, 80 AM. J. INT'L L. 923, 925 (1986); Maier, *supra* note 136, at 459.

258 *See supra* pp. 839–40.

259 *See generally* Friendly, *supra* note 30, at 405–07 (distinguishing between new, post-*Erie* and old, pre-*Erie* types of federal common law).

260 *See generally* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 331–64 (2d ed. 1994) (detailing the development of federal common law in various areas).

261 Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1167 (1986).

result, both the Court and commentators sometimes "explain" federal common law by simply listing categories, or "enclaves," of federal common law decisions.[262]

The uncertainty regarding the proper scope of federal common law is grounded more in the application of first principles than in the principles themselves. Courts and scholars generally agree that federal common law must be authorized in some fashion by the Constitution or a federal statute.[263] This principle flows from *Erie*'s requirement that all law applied by federal courts must derive from a domestic sovereign source.[264] It is precisely the grounding of federal common lawmaking in a *federal* sovereign source that makes the new federal common law, unlike the pre-*Erie* general common law, binding on the states.[265]

Is there domestic federal authorization for federal courts to interpret and apply CIL as federal law in the wholesale fashion contemplated by the modern position? Nothing on the face of the Constitution or any federal statute authorizes such a practice.[266] Article III of the Constitution does not even list CIL as a basis for the exercise of federal judicial power, much less authorize federal courts to incorporate CIL wholesale into federal law.[267] Nor does Article VI list CIL as a source of supreme federal law. Article I does authorize Congress to define and punish offenses against the law of nations,[268] and Congress has exercised this and related powers to incorporate select

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262 *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); CHEMERINSKY, *supra* note 260, at 335–36.

263 Many scholars who otherwise disagree about the scope of federal common law agree that its defining characteristic is its ultimate authorization in enacted federal law. *See* Field, *supra* note 176, at 887; Friendly, *supra* note 30, at 407; Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263, 268–88 (1992); Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 17 (1985); George Rutherglen, *Reconstructing* Erie*: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENTARY 285, 294 (1993); Henry P. Monaghan, Book Review, 87 HARV. L. REV. 889, 892 (1974).

264 *See Erie*, 304 U.S. at 78.

265 *See* Friendly, *supra* note 30, at 407 ("By focusing judicial attention on the nature of the right being enforced, *Erie* caused the principle of a specialized federal common law, binding in all courts because of its source, to develop within a quarter century into a powerful unifying force." (footnote omitted)).

266 In some circumstances, authorization for federal common law can be derived from the structure rather than the text of the Constitution. In section IV.E, we consider whether the modern position can be justified on the basis of such a structural authorization. *See infra* pp. 860–70.

267 Article III's lack of reference to CIL stands in contrast to its explicit grants of jurisdiction over admiralty and interstate dispute cases, both of which have been interpreted as implying a grant of federal common lawmaking power. *See* FALLON, MELTZER & SHAPIRO, *supra* note 178, at 790.

268 *See supra* p. 819. This federal power is not exclusive; the states also can define and punish offenses against the law of nations. *See* United States v. Arjona, 120 U.S. 479, 487 (1887). For an account of the history of the Define and Punish Clause, consult Charles D. Siegal, *Deference and Its Dangers: Congress' Power to "Define . . . Offenses Against the Law of Nations"*, 21 VAND. J. TRANSNAT'L L. 865, 874–79 (1988).

CIL principles into federal statutes.[269] But Congress has never purported to incorporate all of CIL into federal law. And Congress's selective incorporation would be largely superfluous if CIL were already incorporated wholesale into federal common law, as advocates of the modern position suggest.

CIL's alleged federal law status also departs dramatically from generally accepted limitations on federal common law. The modern position claims that the common law powers of federal courts provide the federal authority for transforming CIL into domestic federal law. But the modern position also claims that CIL applies wholesale as federal common law and that federal courts must apply *whatever* CIL requires.[270] The problem with this latter claim is not merely that it violates the principle that federal common lawmaking be interstitial[271] — although that is a concern. Rather, the problem is that, under the modern position, the federal law status of CIL simply cannot be based upon the common law powers of federal courts. If, according to the modern position, federal courts must apply whatever CIL requires, then it is illogical also to assert that they exercise the political or legal authority that transforms CIL into federal law. In other words, the modern position at bottom assumes that U.S. courts apply CIL in the absence of any domestic authorization. Viewed in this way, the modern position has the structure of pre-*Erie* general common law, with the important difference that the CIL that applies in the absence of a domestic authorization has the status and collateral consequences of federal law. As explained above,[272] however, the notion that federal courts may apply any law, including CIL, without domestic authorization cannot survive *Erie*.

In addition, the modern position that CIL is federal common law is in tension with basic notions of American representative democracy.[273] When a federal court applies CIL as federal common law, it is not applying law generated by U.S. lawmaking processes. Rather, it is applying law derived from the views and practices of the international community. The foreign governments and other non-U.S. participants in this process "are neither representative of the American political community nor responsive to it."[274] Indeed, under modern conceptions of CIL, CIL rules may be created and bind the United States without any express support for the rules from the U.S. political branches.[275]

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269 *See supra* note 24.

270 *See supra* p. 820.

271 *See* Meltzer, *supra* note 261, at 1168–69.

272 *See supra* p. 853.

273 Professor Trimble has forcefully argued this point. *See* Trimble, *supra* note 26, at 718–23.

274 *Id.* at 721.

275 The prevailing view is that a CIL rule binds all nations except those that actively dissent from the rule during its formation. *See* RESTATEMENT (THIRD), *supra* note 4, § 102 cmt. d. Under this view, a CIL rule will bind even nations that have given no affirmative indication of

Nonetheless, as federal law, such CIL would preempt state law and, under certain formulations of the modern position, might bind the President and supersede prior inconsistent federal legislation.

One can see the incompatibility of the modern position with American political traditions by comparing the modern position's classification of CIL as federal common law with the accepted treatment of the other principal source of international law: treaties. Under U.S. practice, a treaty is a written document, negotiated and ratified by the President with the consent of the Senate, and it is expressly made federal law by Article VI. Despite these legitimating factors, courts often construe treaties to be "non-self-executing" and thus not to have the status of enforceable federal law.[276]

In contrast to treaties, CIL is often unwritten and its contours are often uncertain. Moreover, the U.S. political branches have only limited control over its content. There is also no mention of CIL in the menu of supreme federal law in Article VI. Although these features reveal that CIL is much *less* grounded in American lawmaking processes than treaties, proponents of the modern position contend that all of CIL, unlike treaties, is "self-executing" federal law.[277] This anomaly becomes even more troubling when one considers the changed nature of CIL. Consistent with the erosion of the state practice requirement,[278] U.S. courts rely on multilateral treaties as a source of CIL even in situations in which the United States has not ratified the treaty or has declared the relevant provisions of the treaty to be non-self-executing.[279] In accordance with the modern position, these courts apply the norms derived from the treaties as self-executing federal common law. In other words, even when the political branches of the U.S. government have expressly declined to make the terms of a

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support for the rule. *See id.* pt. I, ch. 1 introductory note at 18 (stating that nations "may be bound by a rule of customary law that they did not participate in making if they did not clearly dissociate themselves from it during the process of its development."). Indeed, a rule of CIL will bind even nations that were not in existence at the time of the rule's formation. *See id.* § 102 cmt. d; HENKIN, *supra* note 18, at 37–38.

276 *See generally* RESTATEMENT (THIRD), *supra* note 4, § 111 cmt. h (discussing self-executing and non-self-executing agreements); HENKIN, PUGH, SCHACHTER & SMIT, *supra* note 19, at 212–21 (collecting cases and discussing the difference between self-executing and non-self-executing agreements).

277 *See* RESTATEMENT (THIRD), *supra* note 4, § 111(3); Brilmayer, *supra* note 4, at 328–29; Henkin, *supra* note 4, at 1561 n.25.

278 *See supra* pp. 839–40.

279 *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 880–85 (2d Cir. 1980) (relying on non-self-executing provisions of the U.N. Charter, nonbinding U.N. declarations, and treaties not ratified by the United States to find a CIL prohibition against torture); Xuncax v. Gramajo, 886 F. Supp. 162, 184–85 (D. Mass. 1995) (relying on similar sources in finding CIL prohibitions against torture, summary execution, disappearance, and arbitrary detention). *See generally* RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE 172–73 (3d ed. 1995) (citing sources demonstrating the domestic legal effect given to international agreements that have not been ratified by the United States).

treaty part of U.S. law, the modern position permits, indeed requires, that courts do exactly that.

D. Sabbatino *and the Modern Position*

Proponents of the modern position rarely consider these incongruities between the modern position and the general framework of post-*Erie* federal common law. This may be due in part to the belief of some courts[280] and commentators[281] that the Supreme Court adopted the modern position in *Sabbatino*. As noted above,[282] *Sabbatino* stated that the act of state doctrine is a rule of federal common law binding on the states. In so doing, the Court analogized to Jessup's argument that "rules of international law should not be left to divergent and perhaps parochial state interpretations."[283]

Despite this dictum, *Sabbatino* did not in fact adopt the modern position. *Sabbatino* clearly indicated that the act of state doctrine was neither required by nor an element of CIL.[284] As a technical matter, then, the Court's statement that the act of state doctrine is a federal common law rule does not extend to questions of CIL. More importantly, the act of state doctrine is fundamentally different from CIL because it is grounded in "'constitutional' underpinnings" concerning the respective roles of the federal branches of the U.S. government in carrying out U.S. foreign policy.[285] As the Supreme Court explained: "[The act of state doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international rela-

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[280] *See, e.g.*, *Filartiga*, 630 F.2d at 886–87 (citing *Sabbatino* as a decision "applying rules of international law uncodified in any act of Congress" and thus refuting the defendant's "extravagant claim" that CIL "forms a part of the laws of the United States only to the extent that Congress has acted to define it"); Forti v. Suarez-Mason, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987) (reasoning that the Supreme Court held in *Sabbatino* "that the interpretation of international law is a federal question" and that, as a result, a case presenting CIL claims "arises under federal law for the purposes of federal question jurisdiction").

[281] *See, e.g.*, JANIS, *supra* note 21, at 102 ("The Supreme Court in Banco Nacional de Cuba v. Sabbatino held that customary international law, in this case the act of state doctrine, 'must be treated exclusively as an aspect of federal law.'" (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964))); Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1221 n.18 (1992) (citing *Sabbatino* for the proposition that "international law has the status of federal common law"); Stefan A. Riesenfeld, *The Powers of the Congress and the President in International Relations: Revisited*, 75 CAL. L. REV. 405, 413 n.48 (1987) (citing *Sabbatino* for the proposition that "customary international law is part of the federal common law").

[282] *See supra* pp. 829–30.

[283] *Sabbatino*, 376 U.S. at 425 (citing Jessup, *supra* note 69, at 742–43).

[284] *See id.* at 421.

[285] *Id.* at 423.

tions."[286] The federal law status of this separation of powers doctrine says nothing about the domestic legal status of CIL, which concerns the law of the international community.[287]

Finally, *Sabbatino* actually *denied* that all of CIL was enforceable federal law. The Court held that the act of state doctrine barred review of the legality, *under CIL*, of a foreign government's expropriation of alien property.[288] As the dissent in *Sabbatino* pointed out, the Court "declared the ascertainment and application of international law *beyond the competence of the courts of the United States* in a large and important category of cases."[289] The Court thus "did not consider international law to be part of the law of the United States in the sense that U.S. courts must find and apply it as they would have to do if international legal rules had the same status as other forms of U.S. law."[290] Indeed, for this reason, proponents of the view that federal courts can enforce CIL initially viewed *Sabbatino* as a setback.[291] In this light, it is odd, to say the least, to assert that *Sabbatino* established the proposition that all of CIL is federal common law.

E. Federal Common Law of Foreign Relations

Many proponents of the modern position concede that *Sabbatino* itself did not adopt the modern position. They argue, however, that the "federal common law of foreign relations" implicit in *Sabbatino* supports the modern position. Scholars and many courts have interpreted *Sabbatino* to establish a federal common lawmaking power when "necessary to protect unique federal interests"[292] in foreign affairs.[293] The claim that this power justifies the incorporation of CIL into federal law is the structural authorization argument for the modern position to which we referred above.[294]

We analyze this argument in two steps. First, we consider whether the federal common law of foreign relations supports the modern position's claim that federal courts can interpret CIL as federal law in a

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286 *Id.*; *see also* W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., 493 U.S. 400, 404 (1990) (reasoning that the act of state doctrine is "a consequence of domestic separation of powers").

287 *See* Maier, *supra* note 136, at 463.

288 *See Sabbatino*, 376 U.S. at 428 ("[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government . . . in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, *even if the complaint alleges that the taking violates customary international law*." (emphasis added)).

289 *Id.* at 439 (White, J., dissenting) (emphasis added).

290 Maier, *supra* note 136, at 463 n.48 (citing *Sabbatino*, 376 U.S. at 431–32).

291 *See supra* p. 830.

292 *Sabbatino*, 376 U.S. at 426.

293 *See, e.g.*, CHEMERINSKY, *supra* note 260, at 349–50; HENKIN, *supra* note 24, at 139; 19 CHARLES ALAN WRIGHT, ARTHUR MILLER, AND EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 4514, at 464 & n.31 (1982).

294 *See supra* note 266.

manner that binds the federal political branches. Then, we consider whether the federal common law of foreign relations supports the modern position's claim that federal courts can interpret CIL in a manner that binds the states. Throughout the discussion, it is important to recall that the modern position does not fit comfortably with more general principles of federal common law.[295]

1. Separation of Powers. — At the level of separation of powers, it is difficult to see how the federal common law of foreign relations could authorize federal courts to bind the federal political branches to judicial interpretations of CIL. *Sabbatino* recognizes that courts can make law in certain contexts involving foreign affairs. But the Court in *Sabbatino* made law in the face of political branch silence, and the law it made flowed from a recognition of both political branch hegemony and relative judicial incompetence in foreign affairs. *Sabbatino*'s federal common law analysis was designed to shield courts from involvement in foreign affairs.[296] It was not an endorsement of a free-wheeling coordinate lawmaking power for federal courts in the foreign affairs field.

The modern position that federal court interpretations of CIL bind the federal political branches overlooks this connection between the federal common law of foreign relations and political branch hegemony in foreign affairs. The federal common law of foreign relations is based on the principle that the federal political branches, and not the courts, are constitutionally authorized and institutionally competent to make foreign relations judgments. Once this principle is considered, the justification for binding the political branches to judicial interpretations of CIL vanishes. Like all other federal common law, CIL as a component of the federal common law of foreign relations must accommodate and conform to authoritative political branch acts.[297]

2. Federalism. — Turning to federalism, the federal common law of foreign relations argument in support of the modern position is

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[295] *See supra* pp. 856–59.

[296] *See Sabbatino*, 376 U.S. at 432 (stating that inquiries into the validity of foreign acts of state might affront the foreign sovereign and thus "seriously interfere with negotiations being carried on by the Executive Branch"); *id.* at 433 (stating that a case-by-case inquiry into the validity of foreign acts of state "would involve the possibility of conflict with the Executive view"); *id.* ("[T]he very expression of judicial uncertainty might provide embarrassment to the Executive Branch."). *See generally* Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948) (stating that foreign policy decisions have "long been held to belong to the domain of political power not subject to judicial intrusion or scrutiny"); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative . . . Departments . . . .").

[297] This does not mean that the federal courts must defer to the political branches on all matters touching on foreign relations. Political branch hegemony in foreign relations does not preclude judicial scrutiny of the constitutionality of political branch activity in foreign affairs. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585–89 (1952). Nor does it preclude examination of whether executive acts in foreign affairs are consistent with federal statutes. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 669–88 (1981).

premised on the doctrine of dormant foreign affairs preemption. The idea here is that the Constitution's grants of foreign relations powers to the federal government have, at least in some contexts, a dormant preemptive effect analogous to that of the dormant commerce clause.[298] Proponents of the modern position contend that all issues relating to compliance with, or interpretation of, CIL are "integral to the conduct of foreign relations and are the responsibility of the federal government."[299] They conclude that, even if the federal political branches have not incorporated CIL into domestic federal law, state authority to act contrary to CIL is preempted under a dormant foreign relations theory, and the federal judiciary interprets and applies CIL as a matter of federal common law.[300] As is true with dormant commerce clause jurisprudence, judicial interpretations of CIL under a dormant foreign relations theory are presumably subject to congressional revision.[301]

We address this argument on several levels. We first question the validity of dormant foreign relations preemption in general. Assuming this doctrine retains its validity, we then question whether it is sufficiently broad to support the modern position that all of CIL is federal law. Finally, we explain that the modern position ignores and is inconsistent with the Supreme Court's modern federalism jurisprudence. This jurisprudence is especially pertinent to the status of the new CIL, which purports to regulate many areas that are traditional state prerogatives, and provides independent reasons to think that CIL is not supreme federal law unless the federal political branches say so.[302]

As an initial matter, dormant foreign relations preemption is of questionable legitimacy from the perspectives of text and history. Although the Constitution gives the federal political branches full control over U.S. foreign relations, it does not follow that it preempts state law in the foreign relations field in the absence of affirmative

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298 The Commerce Clause is, on its face, only a grant of power to Congress. *See* U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress to "regulate Commerce with foreign nations, among the several States, and with the Indian Tribes"). The Supreme Court has interpreted the clause, however, also to have a "dormant" element that limits certain state regulations of interstate and foreign commerce even in the absence of pertinent federal legislation. *See* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 6-1 to 6-15, 401–40 (2d ed. 1988).

299 Henkin, *supra* note 4, at 223.

300 *See, e.g., id.* at 221–24; Clark, *supra* note 46, at 1294–99; Hill, *supra* note 100, at 1042–68.

301 This conclusion flows from the justification for federal judicial lawmaking in this area, namely protection of political branch prerogatives. As in the dormant commerce clause context, it would be odd to limit a power of the federal political branches in the name of protecting that power. *See* HENKIN, *supra* note 24, at 164–65; MARTIN REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 137 (2d ed. 1990).

302 Of course, there may be constitutional limitations on the power of the political branches to incorporate CIL into domestic law. *Cf.* Reid v. Covert, 354 U.S. 1, 16 (1957) (plurality opinion) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.").

political branch action. Indeed, constitutional text suggests the opposite. In contrast to the Commerce Clause, no clause in the Constitution provides the federal government with a general "foreign relations" power. Article I, Section 8 of the Constitution authorizes Congress to "define and punish . . . Offences against the Law of Nations,"[303] but it was settled long ago that this clause does not of its own force preempt state authority to do so as well.[304] In addition, Article I, Section 10 expressly prohibits state activity in certain specified foreign affairs contexts,[305] and Article I, Section 8 and Article II authorize the federal political branches to act with supremacy in certain specified foreign affairs contexts.[306] Consistent with the reading that has been given to the Define and Punish Clause, the natural inference is that Article I, Section 10's self-executing limitations on state power in foreign relations are exhaustive and that other foreign relations activities fall within the concurrent authority of the state and federal governments until the federal political branches exercise their foreign relations powers in a manner that preempts state law.[307] This natural reading of

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[303] U.S. CONST. art. I, § 8, cl. 10.

[304] *See* United States v. Arjona, 120 U.S. 479, 487 (1887). *See generally* HENKIN, *supra* note 24, at 150–51 (discussing how Congress has left authority to the states to implement some U.S. obligations under international law).

[305] *See* U.S. CONST. art. I, § 10 (prohibiting states from entering into treaties, granting letters of marque and reprisal, or engaging in war).

[306] *See id.* art. I, § 8, cl. 1 (granting Congress the power to "collect Taxes, Duties, Imposts and Excises, [and] to . . . provide for the common Defence"); *id.* cl. 3 (granting Congress the power to regulate "Commerce with foreign Nations"); *id.* cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization"); *id.* cl. 5 (granting Congress power to "regulate the Value . . . of foreign Coin"); *id.* cl. 10 (granting Congress the power to "define and punish . . . Offences against the Law of Nations"); *id.* cl. 11 (granting Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water"); *id.* cls. 12–13 (granting Congress the power to "raise and support Armies" and "provide and maintain a Navy"); *id.* cl. 14 (granting Congress the power to regulate "land and naval Forces"); *id.* cl. 16 (granting Congress the power to organize, arm, discipline, and train the militia); *id.* art. II, § 1, cl. 1 (vesting the executive power in the President); *id.* § 2, cl. 1 (providing that the President is the commander-in-chief of the armed forces); *id.* cl. 2 (granting the President the power, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"); *id.* (granting the President the power, "by and with the Advice and Consent of the Senate, [to] appoint Ambassadors, other public Ministers and Consuls"); *id.* § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

[307] Professor Clark agrees that this is the natural inference to draw from the constitutional text. *See* Clark, *supra* note 46, at 1296. He maintains, however, that such an inference "is unpersuasive in this context," *id.*, because the federal government's "powers of external sovereignty [do] not depend upon the affirmative grants of the Constitution," but instead are vested in the federal government "as necessary concomitants of nationality," *id.* at 1296–97 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318 (1936)) (internal quotation marks omitted) (alteration in original). This view of the basis for federal authority in foreign affairs, recited by the Supreme Court in *Curtiss-Wright*, has received "withering criticism" on the grounds of incompatibility with constitutional text, history, and structure. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 94 (1990). It is also belied by Supreme Court decisions that closely analyze the constitutional basis for federal action in foreign affairs. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587–88 (1952). More importantly, even assuming that the

constitutional text was, in fact, the law for the first 175 years of our history.[308]

Modern case support for dormant foreign relations preemption is similarly uncertain. The two Supreme Court decisions typically cited in support of a dormant preemptive foreign relations power are *Sabbatino* and *Zschernig v. Miller*.[309] The Court in *Sabbatino* stated that the purposes of the act of state doctrine require that it "be treated exclusively as an aspect of federal law."[310] But the Court did not view the act of state doctrine as required by the Constitution.[311] Rather, the Court viewed it as a federal judge-made policy designed to ensure that courts, including state courts, do not unduly impinge on the exclusive prerogatives of the federal political branches in foreign affairs.[312] Given this emphasis, it is unlikely that *Sabbatino* established a broad federal common law of foreign relations power. As Professor Burbank notes,

> *Sabbatino* is best regarded not as authority for an expansive federal common law of foreign affairs but rather for the power of the federal judiciary to make uniformly applicable rules (the act of state doctrine) designed to protect courts from entanglements in, and interbranch conflicts about, matters for which they are not institutionally suited.[313]

In *Zschernig*, an Oregon statute conditioned a nonresident alien's inheritance rights on the availability of certain inheritance rights in the alien's country.[314] After determining that the statute had a "direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems," the Court concluded that the statute was an "intrusion by the State into the field of

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federal government has foreign affairs powers that do not derive from the Constitution, Professor Clark's broad conclusion that state authority over "matters touching on 'external sovereignty'" is automatically preempted, Clark, *supra* note 46, at 1297–98, does not follow. The existence of a comprehensive federal foreign relations authority says nothing about the exclusivity of such authority in the absence of its exercise. Moreover, even by its own terms, *Curtiss-Wright*'s unusual theory about the source of the federal foreign relations power only applies to powers that the states did not possess prior to the Constitution. *See Curtiss-Wright*, 299 U.S. at 316. The law of nations, however, was clearly viewed as under the control of state law during the pre-Constitutional period. *See, e.g.*, Respublica v. DeLongchamps, 1 U.S. (1 Dall.) 111, 116 (O. & T. Pa. 1784) (stating that the law of nations, "in its full extent, is part of the law of this State").

308 *See* HENKIN, *supra* note 24, at 163; Hans A. Linde, *A New Foreign-Relations Restraint on American States: Zschernig v. Miller*, 28 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 594, 603 (1968).

309 389 U.S. 429 (1968). In addition, the Supreme Court has referred to a federal common law of foreign relations in dictum. *See* Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981).

310 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

311 *See id.* at 423.

312 *See id.* at 432.

313 Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 TEX. L. REV. 1551, 1577 (1992).

314 *See Zschernig*, 389 U.S. at 430 n.1.

foreign affairs which the Constitution entrusts to the President and the Congress."[315] Although the rationale for the Court's decision in *Zschernig* is notoriously uncertain,[316] the decision suggests a broader foreign relations preemption than *Sabbatino* because the preempted activity involved a traditional state function and because the Court never specified the manner in which the statute jeopardized political branch prerogatives.

Nonetheless, there are reasons to think that *Zschernig*'s dormant foreign relations preemption retains little, if any, validity. The decision, authored by Justice Douglas, created "new constitutional doctrine."[317] The Supreme Court read the doctrine narrowly in *Zschernig*'s immediate aftermath,[318] and lower courts have applied it only rarely and narrowly since then.[319] Perhaps most importantly, the Supreme Court backed away from a similar doctrine in the recent *Barclays Bank* decision.[320] At issue in *Barclays Bank* was the constitutionality of California's worldwide combined reporting method for taxing multinational corporations. The plaintiffs argued that the California method violated the foreign dormant commerce clause because it impermissibly "preven[ted] the Federal Government from 'speaking with one voice' in international trade."[321] In support of their "one voice" argument, the plaintiffs relied on the enormous diplomatic controversy provoked by the California method and on a series of executive branch actions, pronouncements, and amicus filings suggesting that the California method interrupted U.S. foreign relations and trade.[322] The Supreme Court rejected the challenge. The Court noted that the Constitution assigned to Congress, rather than to the executive branch or to the courts, the duty of resolving the competing

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315 *Id.* at 432. The Court reached this conclusion despite the Solicitor General's representation that the Oregon statute did not interfere with the federal government's conduct of foreign relations. *See id.* at 434.

316 As Professor Maier has noted, one can discern at least three rationales for *Zschernig*'s conclusion that the Oregon statute was preempted: "(1) the state's law had an adverse effect upon international relations; (2) the state's law interferes with the national government in carrying out an existing foreign policy; and (3) the purpose of the state law is one to be carried out only by the national government." Harold G. Maier, *The Bases and Range of Federal Common Law in Private International Matters*, 5 VAND. J. TRANSNAT'L L. 133, 140 (1971); *see also* HENKIN, *supra* note 24, at 163–64 (noting a similar uncertainty about *Zschernig*'s rationale and scope).

317 HENKIN, *supra* note 24, at 163; *see also id.* at 436 n.64 ("The Court did not build sturdy underpinnings for its constitutional doctrine . . . ."); Linde, *supra* note 308, at 601 (noting that the decision went "well beyond the constitutional text or precedents").

318 *See* Maier, *supra* note 316, at 141–43 & n.43 (1971) (citing Gorun v. Fall, 393 U.S. 398 (1968), and Ioannou v. New York, 391 U.S. 604 (1968) (per curiam)).

319 *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 278 (2d ed. 1995).

320 Barclays Bank PLC v. Franchise Tax Bd., 512 U.S. 298 (1994).

321 *Id.* at 320 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 453 (1979) (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976))).

322 *See id.* at 312–13, 327–28.

claims of U.S. trading partners and the several states.[323] Accordingly, the Court concluded: "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."[324] As Professor Spiro correctly notes, *Barclays Bank* "was a highly significant retreat in a line of foreign Commerce Clause rulings articulating a 'one-voice' approach parallel to other forms of foreign affairs preemption."[325]

Even assuming the continued validity of dormant foreign relations preemption, the modern position that all of CIL is federal law does not follow. The few instances in which courts have actually preempted state law under a dormant foreign relations theory have involved state acts that discriminate against particular foreign entities or otherwise have the purpose of influencing U.S. foreign relations.[326] In contrast, courts have generally declined to find state acts not targeted at particular countries to be preempted, even if the acts have collateral effects on foreign relations and even if these effects include diplomatic consequences.[327] Most instances in which state law and CIL potentially clash — frequently discussed examples are state long-arm and death penalty statutes — are easily distinguishable from the cases preempting state law under a dormant foreign relations rationale. These state laws clearly fall within the traditional legislative jurisdiction of states; they do not discriminate against particular foreign governments or entities; and they are usually not enacted with the purpose of affecting foreign relations.

Some scholars argue that dormant foreign relations preemption turns on some form of a foreign relations "effects" test. They maintain that all state activities that have a certain level of effect on foreign

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323 *See id.* at 329–30.

324 *Id.* at 331.

325 Peter J. Spiro, *The States and Immigration in an Era of Demi-Sovereignties*, 35 VA. J. INT'L L. 121, 164 (1994) (quoting *Japan Line*, 441 U.S. at 449 (quoting *Michelin Tire*, 423 U.S. at 285)).

326 Outside of decisions that are factually similar to *Zschernig*, *see, e.g.*, Bjarsch v. DiFalco, 314 F. Supp. 127, 132 (S.D.N.Y. 1970); Mora v. Battin, 303 F. Supp. 660, 663–64 (N.D. Ohio 1969), we have found only three reported decisions holding actions by states to be preempted under a foreign affairs preemption rationale. *See* Tayyari v. New Mexico State Univ., 495 F. Supp. 1365, 1380 (D.N.M. 1980) (reviewing a decision by the regents of New Mexico State University to deny admission to Iranian students); Springfield Rare Coin Galleries, Inc. v. Johnson, 503 N.E.2d 300, 305 (Ill. 1986) (concerning an Illinois statute that excluded South Africa from a list of countries exempt from a tax on legal tender and currency); Bethlehem Steel Corp. v. Board of Comm'rs, 80 Cal. Rptr. 800, 804–05 (Ct. App. 1969) (considering a California "Buy American" statute).

327 *See, e.g.*, *Barclays Bank*, 512 U.S. at 320–21; Clark v. Allen, 331 U.S. 503, 517 (1947) (holding state laws with "incidental or indirect effect" on foreign relations not preempted); Trojan Techs., Inc. v. Pennsylvania, 916 F.2d 903, 905–09 (3d Cir. 1990) (holding Pennsylvania's "Buy American" steel act not preempted).

relations are preempted.[328] If adopted, this view could dramatically alter the federal-state balance, because many activities that otherwise fall within the authority of states may have effects, even substantial effects, on U.S. foreign relations.[329] But even assuming this were the test for dormant foreign relations preemption, the modern position that *all* CIL issues are governed by federal law does not follow. As even Professor Brilmayer acknowledges, not all issues concerning the interpretation of and compliance with CIL have substantial effects on U.S. foreign relations.[330] The term "customary *international* law" might suggest otherwise, for it connotes a law that governs relations among nations. Today, however, this traditional connotation of the term is misleading. As we have seen, much of the new CIL, and most of the CIL that litigants and scholars wish to see applied under the rubric of the modern position, concerns not duties between nations, but rather duties that a nation owes to its citizens. The modern position ignores this and other important differences between the traditional and the new CIL. But these differences matter when one attempts to assess

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328 *See, e.g.*, HENKIN, *supra* note 24, at 139 (stating that any state "law that is substantially related to foreign affairs" is preempted); Clark, *supra* note 46, at 1294 (arguing for preemption whenever state activities "directly implicate" foreign relations); Moore, *supra* note 101, at 284 (arguing for preemption whenever state law has "a sufficiently substantial effect on foreign relations").

329 Areas currently governed by state law that might be preempted by a foreign relations effects test include state tax law and state criminal law. *See, e.g.*, *Barclays Bank*, 512 U.S. at 324 n.22; Ronan Doherty, Note, *Foreign Affairs v. Federalism: How State Control of Criminal Law Implicates Federal Responsibility Under International Law*, 82 VA. L. REV. 1281, 1309–13 (1996) (explaining that the imposition of the death penalty on foreign nationals who have committed crimes in the United States has roused frequent diplomatic protest). In addition, some commentators have argued that this type of foreign relations effects test justifies federalization of a variety of international litigation doctrines such as international choice of law, forum non conveniens, and enforcement of foreign judgments. *See* BORN, *supra* note 83, at 358–66, 681–84, 960–62; Curtis A. Bradley & Jack L. Goldsmith, Book Review, 34 VA. J. INT'L L. 233, 239 & n.44 (1993); *cf.* Weisburd, *State Courts*, *supra* note 26, at 20 ("To argue that federal common law must govern whenever a case implicates the international relations of the United States is to provide a basis for taking *all* cases with international elements out of the state courts.").

330 *See* Brilmayer, *supra* note 4, at 311 n.51, 332 n.109. For example, when courts assess the compliance of foreign governments with CIL (as in *Filartiga* and its progeny), it is unclear whether, and if so how, U.S. foreign relations are affected. In these cases, the CIL obligations of the United States are not at issue, and the United States is under no international obligation to apply CIL. As is true with many questions of foreign affairs, the foreign relations interests of the United States in this context depend on changing political factors. *Compare* Memorandum for the United States as Amicus Curiae at 6–9, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), *reprinted in* 19 I.L.M. 585, 586–89 (1980) (Carter administration) (arguing for a broad construction of the ATS), *with* Brief for the United States as Amicus Curiae at 4, Trajano v. Marcos, 878 F.2d 1439 (9th Cir. 1989) (No. 86-2448) (Reagan administration) (arguing for a narrow construction of the ATS). In *Sabbatino*, for example, the Court *declined* to apply CIL in order to further its conception of the requirements of U.S. foreign policy interests. At the very least, this suggests that, even if dormant foreign affairs preemption were properly determined by a substantial effects criterion, judges could not presume that every application of CIL would satisfy this criterion. *Cf.* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) ("[S]ome aspects of international law touch much more sharply on national nerves than do others . . . .").

the effect, if any, that compliance with or interpretation of CIL has on U.S. foreign relations.

The analysis presented thus far suggests, at minimum, that dormant foreign relations preemption provides inadequate support for the modern position that *all* CIL is federal law. The Supreme Court's modern federalism jurisprudence suggests the broader conclusion that CIL is *never* supreme federal law in the absence of some authorization from the federal political branches. In the mid-1980s, the Supreme Court largely abandoned federalism as a substantive limitation on federal legislative authority.[331] This abandonment was premised on the thesis that the Constitution, by providing for the representation of state interests in Congress, entrusts the maintenance of the federal balance to "the internal safeguards of the political process."[332] As the central concept of political participation makes clear, this thesis "applies only to congressional (and perhaps, though less forcefully, to presidential) initiatives undertaken at the expense of the states."[333] The modern position, however, posits that *unelected federal judges* apply customary law made by *the world community* at the expense of state prerogatives. In this context, of course, the interests of the states are neither formally nor effectively represented in the lawmaking process.[334]

Another feature of the Supreme Court's modern federalism jurisprudence is its "plain statement" requirement. This requirement further supports the view that CIL is not federal law in the absence of political branch authorization. Despite (and perhaps in response to) the Court's diminution of federalism as a substantive limitation on congressional authority over states, the Court has policed the federalism balance between Congress and the states in a variety of contexts through the interpretive mechanism of a strict plain statement rule.[335]

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331 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 531 (1985). In recent years, the Supreme Court appears to have retreated to some extent from *Garcia*. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624, 1634 (1995); New York v. United States, 505 U.S. 144, 160, 188 (1992).

332 *Garcia*, 469 U.S. at 556; *see also id.* at 550–52 & n.11 (discussing the role of the states in the "constitutional scheme"); South Carolina v. Baker, 485 U.S. 505, 513 (1988) (allowing Congress to regulate state activities as long as "the national political *process* did not operate in a defective manner").

333 Merrill, *supra* note 263, at 17.

334 Professor Friedman has made a similar point with regard to GATT and other multilateral *treaty* regimes. *See* Barry Friedman, *Federalism's Future in the Global Village*, 47 VAND. L. REV. 1441, 1473–78 (1994). The point has even greater applicability to CIL, of course, over which the federal political branches have, as a general matter, weaker influence. This is especially true given the nature of modern CIL lawmaking. *See supra* pp. 839–41.

335 *See, e.g.*, Blatchford v. Native Village of Noatak, 501 U.S. 775, 786–88 (1991); Gregory v. Ashcroft, 501 U.S. 452, 460–64 (1991); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238–40 (1985). For general discussions of this approach, see William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596–98 (1992), and Note, *Clear Statement Rules, Federalism, and Congressional Regulation of States*, 107 HARV. L. REV. 1959, 1961–73 (1994).

Under this rule, if Congress wishes to regulate areas of traditional state concern, it must make plain its intention to do so in the statute. It makes no sense, in our nation's constitutional scheme, to require Congress to jump over these procedural hurdles before legislating against the states, yet to permit federal courts to apply international community norms against the states in the absence of any congressional authorization. If a plain statement rule limits Congress's power to regulate the states in contexts that are narrower and less intrusive than a wholesale incorporation of CIL, then at the very least such a congressional authorization must exist for the courts to do so at the behest of the world community.

It may not always be easy to determine whether the political branches have authorized the development of a federal common law rule concerning CIL. Even accepting the inevitable uncertainty on this point, however, the requisite inquiry into political branch intent necessarily undermines the modern position. Although the political branches have incorporated into federal law through statutes and treaties much of the traditional CIL that remains relevant to domestic litigation,[336] the opposite is true with regard to the new CIL. Far from authorizing the application of the new CIL as domestic federal law, the political branches have made clear that they do not want the new CIL to have domestic law status.

Much of the new CIL is derived from various multilateral treaties that have been promulgated since World War II.[337] The United States has only recently begun to ratify these treaties.[338] Significantly, as a condition to ratification of these treaties, the political branches have typically attached a series of reservations, understandings, and declarations (RUDs).[339] One motivation for these RUDs is "a desire not to effectuate changes to domestic law."[340] To take the example of the International Covenant on Civil and Political Rights, the non-self-exe-

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336 For example, the law governing sovereign, diplomatic, and consular immunity is today governed largely by treaty or statute. *See* Trimble, *supra* note 26, at 688–92.

337 *See supra* pp. 832, 839–40.

338 The United States ratified the Convention Against Torture and the International Convention on the Elimination of All Forms of Racial Discrimination in 1994, the International Covenant on Civil and Political Rights in 1992, and the Genocide Convention in 1989. *See* Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 347–48 (1995).

339 *See generally id.*, *passim* (discussing the package of RUDs that the United States typically attaches to its ratification of human rights conventions).

340 David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1206 (1993). Mr. Stewart, an assistant to the Legal Advisor for Human Rights and Refugees to the State Department, further explains the purpose of RUDs (in connection with the Covenant on Civil and Political Rights) as follows:

> There is little question that under Article VI of the Constitution, the federal government could in fact have made necessary changes to federal law and required parallel changes in state and local law to give effect to the Covenant's provisions. For many reasons, *includ-*

cuting declaration "clarif[ies] that the Covenant will not create a private cause of action in U.S. courts";[341] the federalism understanding "serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States";[342] and specific reservations and other conditions that preserve differences between U.S. law and the requirements of the Covenant ensure that "changes in U.S. law in these areas will occur through the normal legislative process."[343] Whatever one thinks of the validity of these RUDs under international law,[344] they make clear that the political branches have not generally authorized the application of the norms embodied in the treaties as domestic federal law.

V. IMPLICATIONS OF THE CRITIQUE

A. Doctrinal Consequences

We have argued that, in the absence of federal political branch authorization, CIL is not a source of federal law. Certain doctrinal consequences follow from this argument. First, as a general matter, a case arising under CIL would not by that fact alone establish federal question jurisdiction. Second, federal court interpretations of CIL would not be binding on the federal political branches or the states. If a state chooses to incorporate CIL into state law, then the federal courts would be bound to apply the state interpretation of CIL on issues not otherwise governed by federal law. If a state did not, in fact, incorporate CIL into state law, the federal court would not be authorized to apply CIL as federal or state law.[345]

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ing those rooted in respect for our federal system of government, there was substantial resistance in both the Executive branch and the Senate to exercising that authority.

Id. (emphasis added).

341 COMMITTEE ON FOREIGN RELATIONS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, S. EXEC. REP. NO. 102-23, at 19 (1992).

342 *Id.* at 18.

343 *Id.* at 4.

344 For a critical view, see Henkin, cited above in note 338, at 345–48.

345 In a case in which no clear state law is on point, as will usually be the case in view of the paucity of state court interpretations of CIL, a federal court sitting in diversity would be required to predict how the highest state court would rule regarding CIL's status. *See* WRIGHT, *supra* note 181, at 394–96. It is true that most states have receiving statutes that incorporate as rules of decision at least part of the common law of England. At one time, CIL was viewed as part of the English common law. *See* Sprout, *supra* note 37, at 282–84. One thus might argue that states with appropriate receiving statutes have made CIL part of state law, to the extent not superseded by a state statute or judicial decision. The receiving statutes would therefore authorize federal diversity courts to apply CIL as state law. The argument for state incorporation would have its greatest force with regard to traditional CIL principles in existence at the time the statutes were enacted. The argument would have less force with regard to the new CIL, almost all of which has come into existence since the enactment of the receiving statutes and some of which conflicts with existing state law.

These consequences are not as dire as the rhetoric of the modern position would suggest. As an initial matter, even if it were not viewed as federal common law, CIL would continue to play an important role in the United States. Congress, and in limited circumstances the President, would still have the power to authorize the application of CIL as domestic federal law.[346] CIL would also continue to bind the United States on the international plane. But the federal political branches, rather than the federal courts, would have the primary role in deciding when and how the United States carried out its international obligations and when and how these norms created enforceable rights in U.S. courts.

In addition, rejection of the modern position would not, as some proponents of the modern position argue,[347] prevent the United States from speaking with one voice concerning issues of international law. Two mistaken assumptions underlie this concern. The first assumption is that the state and federal governments are in conflict over issues of international law. It is telling, however, that proponents of the modern position cite no recent examples of such disagreement. In fact, states rarely consider issues of CIL,[348] and when they do, they tend to adopt a very deferential attitude toward the federal government's views. The second assumption is that a lack of federal *judicial* control over CIL entails a lack of *federal* control over CIL. As noted above, both Congress and, to some extent, the President have the authority to incorporate CIL into domestic law.

The requirement of political branch authorization does mean that there would likely be less CIL as federal law than would be the case under the modern position. Proponents of broad enforcement of the new CIL may find this result disturbing because, in the short run at least, it may undercut efforts to enforce international human rights norms in U.S. courts. In the long run, however, the requirement of political branch authorization may actually enhance the enforceability of these norms. In general, CIL norms incorporated into federal statutes possess the virtues of being clearer, more concrete, and more democratic than uncodified CIL. These characteristics may alleviate concerns in this country about the legitimacy and content of these CIL norms.

A rejection of the modern position might, but need not, affect two aspects of current practice. The first concerns the longstanding canon of construction that federal courts should, when fairly possible, construe federal statutes so that the statutes do not violate international

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346 *See supra* pp. 819–20.

347 *See* HENKIN, *supra* note 24, at 238 ("Fifty states could have fifty different views on some issue of international law and the federal courts might have still another view.").

348 *See* Brilmayer, *supra* note 4, at 314.

law.[349] Depending on the canon's rationales, our critique of the modern position might undermine its validity. If the canon rests on an empirical judgment that Congress generally wishes to conform its legislation to the requirements of international law, then our critique renders the canon questionable, at least in the context of the new CIL. But if the canon is, like *Sabbatino*, designed to ensure that courts do not involve the political branches in unintended international controversy, then the continued application of the canon may be consistent with the democratic and separation of powers concerns underlying our critique of the modern position.[350]

The other change in current practice that might result from a rejection of the modern position concerns the Alien Tort Statute. As explained above, if CIL is not federal common law, then the Article III basis for federal jurisdiction over suits involving only aliens — the large majority of international human rights suits under the ATS — is suspect.[351] But rejection of the modern position would not necessarily spell the end for *Filartiga*-type litigation, for two reasons. First, there might be justifications other than the modern position for the constitutionality of the ATS. For example, one could perhaps interpret the ATS's jurisdictional grant as authorizing federal courts to create federal common law rules of tort liability in cases brought by aliens based on the courts' interpretation of CIL; ATS cases would therefore arise under this federal law for purposes of Article III.[352] Similarly, one could perhaps interpret the ATS to create a federal cause of action and conclude that claims brought pursuant to the ATS therefore "arise

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[349] *See* RESTATEMENT (THIRD), *supra* note 4, § 114.

[350] Even if the canon does rest on an assessment of likely congressional intent, we disagree with Professor Brilmayer's claim that the canon supports the conclusion that CIL automatically preempts inconsistent state law. Professor Brilmayer reasons that the canon rests on the assumption that Congress generally does not itself want to violate CIL, and she concludes that "a fortiori, Congress typically does not wish the states to do so." Brilmayer, *supra* note 4, at 334. We doubt that her point really follows "a fortiori." Congress's desires concerning its own political acts do not necessarily imply identical desires concerning the acts of the states. In any event, a mere "wish" by Congress that the states not violate CIL does not translate into congressional intent to preempt state law. As was true during the nineteenth century, Congress may recognize an obligation that the country follow CIL but decline to force the states to do so. *See supra* p. 825. Moreover, even if Congress did "wish" to preempt state law, the Constitution requires it to convert its wish into positive law, pursuant to the political process in which the states are represented.

[351] *See supra* p. 848.

[352] At least one federal court appears to have adopted this view. *See* Abebe-Jira v. Negewo, 72 F.3d 844, 848 (11th Cir.), *cert. denied*, 117 S. Ct. 96 (1996); *cf.* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456–57 (1957) (interpreting § 301(a) of the Labor Management Relations Act of 1947 as impliedly conferring federal common lawmaking power). As an original matter, however, the first Congress is unlikely to have intended the ATS to be a grant of federal common lawmaking power to the federal courts; such a view would have been inconsistent with prevailing views of the judicial role in 1789. *See supra* pp. 823–24.

under" federal statutory law.[353] Some theory of "protective jurisdiction" might also support the constitutionality of the statute.[354] Second, and more importantly, Congress retains the power to remedy any Article III problem by legislating human rights norms into federal law.[355] Indeed, Congress did precisely this with respect to torture cases when it enacted the Torture Victim Protection Act.[356]

B. Cautionary Lessons

In this Article, we have attempted to analyze and critique the foundations and logical consequences of the modern position that CIL is federal common law. As we have seen, the modern position carries with it implications that are in tension with some of our nation's most fundamental constitutional principles. These implications, however, have been developed more by the academy than the courts.

Although the federal courts, like the academy, have generally endorsed the proposition that CIL is federal common law, they have done so primarily in the context of determining the existence of federal jurisdiction in alien-alien cases. Even in this relatively narrow context, some courts have attempted to cabin the modern position.[357]

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[353] Although several courts have held that the ATS creates a cause of action, they have not specifically related that holding to the issue of the ATS's constitutionality under Article III. *See, e.g., In re* Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1474–75 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 934 (1995); Xuncax v. Gramajo, 886 F. Supp. 162, 179 (D. Mass. 1995); *cf.* Filartiga v. Pena-Irala, 630 F.2d 876, 887 (2d Cir. 1980) (construing the ATS, for purposes of the case, "not as granting new rights to aliens, but simply as opening the federal courts for adjudication of the rights already recognized by international law").

[354] There are a variety of theories about the existence and scope of protective jurisdiction. *See, e.g.*, Paul J. Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 192–93 (1953) (noting that Congress apparently has the power to provide jurisdiction "where there is an articulated and active federal policy regulating a field"); Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948) (arguing that, when Congress has the constitutional power to enact a federal substantive rule governing a claim, it should have the constitutional power to take the "lesser step" of providing a federal forum for the claim under state substantive law). *See generally* Rosenberg, *supra* note 236, at 1014–24 (discussing the ATS as an exercise of protective jurisdiction). We express no opinion on the validity of these theories, which the Supreme Court has never endorsed. However, even if protective jurisdiction were to provide constitutional support for the ATS, it probably would not support the application of CIL as federal law in ATS cases. Most theories of protective jurisdiction provide no justification for federal common lawmaking; rather, they simply allow the federal courts to apply state law in some cases not otherwise falling within the categories of federal jurisdiction. *See Lincoln Mills*, 353 U.S. at 473–74 (Frankfurter, J., dissenting).

[355] *See supra* notes 23–24.

[356] *See* 28 U.S.C. § 1350 note (1994). By creating a federal cause of action for torture, the Act arguably provides a basis for federal question jurisdiction for suits involving torture. *See* Weisburd, *State Courts*, *supra* note 26, at 3–4.

[357] *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 810–20 (D.C. Cir. 1984) (Bork, J., concurring) (accepting that international law is federal common law but arguing that CIL generally does not itself provide a private cause of action); *id.* at 823 (Robb, J., concurring) (refusing to consider claim because of the political question doctrine); Linder v. Portocarrero, 747 F. Supp. 1452, 1461 (S.D. Fla. 1990) (requiring plaintiff to show that CIL "unambiguously provides a cause

Moreover, the broader implications of the modern position — that CIL is part of supreme federal law binding the several states and perhaps the President and Congress — have had relatively little influence on courts and nonacademic lawyers. As Professor Brilmayer observes, "[l]awyers don't make [the argument that CIL is supreme federal law], judges don't consider it, and scholars haven't thus far intervened to ask for explanations."[358]

Our critique of the modern position helps to explain the apparent reluctance of many judges and nonacademic lawyers to embrace the broader consequences of the modern position. We are not suggesting that they have been guided by the arguments we have proffered, but our critique does provide analytical support for their intuitions. It is true that *Filartiga* and its ATS progeny have held that CIL is part of the "Laws of the United States" for purposes of Article III, but *Filartiga*'s conclusion rested on a mistaken historical analysis rather than an analysis of modern constitutional principles.[359] *Filartiga*'s conclusion generally has not spread beyond the Article III context, contrary to what the modern position would suggest.

Although the influence of the modern position to date has been greater in the academy than in the courts, it nonetheless presents a potential threat to traditional U.S. domestic lawmaking processes. The courts have already endorsed the modern position that CIL has the status of federal common law. Though they have not yet embraced some of the implications of this claim, they also have not yet generally rejected them. This lack of action may be partly due to the fact that courts have not yet faced many cases raising these issues, something that may soon change with the burgeoning number of international cases in U.S. courts. There are several reasons to believe that, when courts face cases that require broader consideration of the modern position, they may follow the lead of the academy and give greater effect to the purported federal law status of CIL.

Perhaps most significantly, the modern position is superficially plausible. Removed from their historical context, statements in nineteenth-century judicial decisions seem supportive of the modern position. And on its face, the term "customary *international* law" appears to raise uniquely federal concerns. Only when one looks closely at the justifications for the modern position and the structure and content of the new CIL does this proposition become less certain.

This surface plausibility has special force because of the judiciary's relative unfamiliarity with CIL. International law is a mystery to

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of action"), *aff'd in part and rev'd and remanded in part*, 963 F.2d 332 (11th Cir. 1992); Handel v. Artukovic, 601 F. Supp. 1421, 1426–27 (C.D. Cal. 1985) (same).

[358] Brilmayer, *supra* note 4, at 296.

[359] *See supra* p. 834.

most U.S. judges.[360] Since international law is not part of the core law school curriculum, many judges were not exposed to the subject as students. Also, international law issues have arisen much less frequently in U.S. courts during this century than have "domestic" issues such as interpretation of the U.S. Constitution and federal and state statutes. Finally, most judges are not familiar with the materials relevant to the resolution of international law questions, such as compilations of treaties, statements by government representatives, and pronouncements of international and foreign tribunals.

Because of their relative unfamiliarity with international law and because of the special difficulties associated with determining international law rules, judges tend to be heavily influenced by academic sources in this context.[361] As we have seen, the academic establishment has almost uniformly endorsed the modern position. Academic influence on the judiciary in this context has not been limited to "traditional" sources such as the *Restatement (Third)*[362] or academic articles and books. Judges in international cases also rely heavily on academic opinions in the form of amicus curiae briefs and even expert testimony. This reliance is particularly evident in human rights litigation. In such cases, law professors file briefs as a matter of course that exhort the modern position.[363] And legal scholars increasingly offer expert testimony, not only about the substance of CIL but also about

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[360] As Professor Maier recently observed, "most judges in the United States (and, one suspects, in many other legal systems as well) have, at the most, a superficial familiarity with the theory of law creation in the international legal system and only the vaguest notion of how the system functions." Harold G. Maier, *The Role of Experts in Proving International Human Rights Law in Domestic Courts: A Commentary*, 25 GA. J. INT'L & COMP. L. 205, 205 (1995–96).

[361] Courts have long given scholarly views a degree of respect in international law that is perhaps unparalleled in other areas of law. This respect is reflected in article 38(1)(d) of the Statute of the International Court of Justice, which provides that the Court shall apply "teachings of the most highly qualified publicists of the various nations, as [a] subsidiary means for the determination of rules of law." Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (explaining that, in order to ascertain CIL, courts must look to the "customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators").

[362] The *Restatement (Third) of the Foreign Relations Law of the United States* is not, of course, merely an academic product. Rather, it is a product of the American Law Institute, a private organization whose members include legal academics, judges, and lawyers in private and government practice. *See* RESTATEMENT (THIRD), *supra* note 4, at xi. However, the reporters for the *Restatement (Third)* were prominent academics, and the *Restatement (Third)* bears the unmistakable marks of current academic thinking in U.S. foreign relations law.

[363] *See* Lillich, *supra* note 156, at 23–24 (referring to the "ubiquitous . . . 'Affidavit of International Law Scholars' that has become the norm in recent human rights cases"). A noteworthy recent example is *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2524 (1996). The list of counsel that accompanied the reported decision shows the names of numerous law professors, as well as a variety of academic amicus curiae groups. *See id.* at 235–36. Numerous other examples exist. *See, e.g.*, Princz v. Federal Republic of Germany, 26 F.3d 1166, 1167 (D.C. Cir. 1994) (noting amicus curiae brief submitted by, and appearance made on behalf of, "Faculty Members of the American University, Washington College of Law"), *cert. denied*, 115 S. Ct. 923 (1995); Xuncax v. Gramajo, 886 F. Supp. 162, 185 (D. Mass. 1995) (quoting an affidavit

its domestic legal status.[364] In other words, they testify about a question of *constitutional* law.[365]

These factors — the increasing number of international cases in U.S. courts, the surface plausibility of the modern position, the unfamiliarity of judges with international law, and courts' heavy reliance on academic opinions — all suggest that the modern position's influence is likely to expand in the future. This Article has attempted to demonstrate that substantial reasons exist to question the validity of the modern position. At the least, we hope to have shown that by embracing the modern position, both the academy and the courts have taken for granted fundamental propositions about the domestic legal status of CIL. In this light, the modern position deserves much more scrutiny and reflection than it has yet received.

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of 27 international law scholars); Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (noting that the court had examined affidavits from "eight renowned international law scholars").

[364] *See, e.g.*, Fernandez-Roque v. Smith, 622 F. Supp. 887, 902 (N.D. Ga. 1985). *See generally* Maier, *supra* note 360, at 217–19 (discussing the role of experts in *Fernandez-Roque*).

[365] In addition to these influences, at least one organization, the Aspen Institute, offers seminars "to expose judges to international human rights law — a body of law which is largely unfamiliar to most U.S. judges." Letter from Alice Henkin, Director, Aspen Institute, to Jack Goldsmith, Associate Professor, University of Virginia School of Law (Aug. 13, 1996) (on file with the *Harvard Law Review*). As of August 13, 1996, 250 judges, including 189 federal judges, had participated in the seminar. *See id.* The Institute itself "take[s] no position on the domestic status of customary international law." *Id.* But its discussion leaders for "U.S. Case Law and Jurisprudence" have been three academic proponents of the modern position: Professors Henkin, Koh, and Steinhardt. *Id.* In addition, the materials for the seminar include excerpts from the *Restatement (Third)* and copies of *Filartiga* and other decisions embracing the modern position. *See* Materials for the Aspen Institute Seminar, International Human Rights Law: Its Application in National Jurisprudence (Sept. 15, 1995) (on file with the *Harvard Law Review*).