# CUSTOM IN OUR COURTS:
## Reconciling Theory with Reality

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*Abstract:* One of the most heated debates of the last two decades in US legal academia centers on customary international law's domestic status after *Erie Railroad v. Tompkins.* At one end, champions of the "modern position" support CIL's wholesale incorporation into post-*Erie* federal common law. At the other end, "revisionists" argue that federal courts cannot apply CIL as federal law absent federal political branch authorization. Scholars on both sides of the *Erie* debate also make claims about what sources judges cite to when discerning CIL, which they then use to support their arguments regarding CIL's domestic status. Interestingly, neither side of this great debate has done anything in the way of empirically looking at what US federal courts actually do. In this article, we take a first cut at doing that, and what we find suggests that the US federal courts have, for the most part, been doing something that neither revisionism nor the modern position has focused on – following themselves. After tracking the sources cited to as evidence of CIL in both pre-*Erie* and post-*Erie* case law, it turns out that, at all times before and after 1938, US federal judges have relied primarily on domestic case law when making CIL determinations. Not only does this finding yield thought-provoking implications for the *Erie* debate, but it also forces all of us to circle back to the bigger questions about CIL: namely, what is customary international law, is it even legitimate "law", and if so, just how "international" does it have to be?

# CUSTOM IN OUR COURTS:
## Reconciling Theory with Reality in the Debate about *Erie Railroad* and Customary International Law

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## INTRODUCTION

What is customary international law? More to the point, is it even "law" to begin with? Although both academia and the international community have recognized customary international law ("CIL") as one of the two main sources of international law—the other one being treaties—this inquiry still lurks in the minds of those who study it.[1] One way of answering these questions is by asking another: where does CIL get its authority from? In other words, what sources count as evidence of CIL such that judges may cite to them when discerning CIL norms?

At first glance, the US Supreme Court's decision in *Erie Railroad v. Tompkins*[2] seems to have little to do with CIL. Nevertheless, scholars have latched onto the famous narrative about the death of general common law, reaching sharp disagreements over its effect on CIL's domestic status in the United States. On one side, some support CIL's wholesale incorporation into the "federal common law" [3] that the Supreme Court recognized on the same day that it

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[1] H.L.A HART, THE CONCEPT OF LAW 209 (1961) (questioning international law as "law" despite lacking a single sovereign lawmaker); *see also* Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WM. & MARY L. REV. 885 (2013) (studying the concept of "custom" and arguing that "medieval jurists had the same disputes, and the same doubts, about custom that plague contemporary lawyers, and they never came to an adequate resolution").

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

[3] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (holding that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive.").

decided *Erie*.[4] On the other side, some argue that federal courts cannot apply CIL as federal law absent federal political branch authorization.[5] Ever since the debate gained momentum in 1997, others have reached alternate conclusions, but all in keeping with the same question: whether, in light of *Erie*, US courts should apply CIL as federal law. The question, then, that the *Erie* debate focuses on is one about CIL's *status* in the US, specifically—something distinct from the question of CIL's *sources*, generally.

Nevertheless, scholars within the *Erie* debate's main camps have advanced their arguments about the "status" question against a backdrop of assumptions relating to the "sources" question. As we show here, most of these assumptions are about what counts as evidence of either "state practice" or "international consensus."[6] Interestingly, even though these assumptions make recurring appearances throughout the *Erie* literature, none of the *Erie* debate's most notable participants substantiate them with empirical evidence. The few who do try to provide evidence restrict it to the anecdotal sort.[7]

In the face of this silence, we decided to fill in the empirical gap ourselves. Rather than choosing a side in the classic *Erie* debate, we hope to inform the debate by placing it against the context of federal judicial practice. Using a sample of US federal court cases that covers the period 1790 to 2015, we document how US federal courts make CIL determinations both before and after *Erie*. More specifically, our study tracks the types of sources that US federal judges have cited to as evidence of CIL and the frequency with which they cite to them. By observing

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[4] For examples of this "modern position," *see* Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).
[5] *See* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997) (articulating the "revisionist" position on *Erie*'s implications for CIL).
[6] *See* discussion *infra* Part IV.
[7] Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997).

these trends before and after *Erie*, we put to the test three different narratives we detected in the *Erie*/CIL literature about how courts discern CIL: the "state practice" story, the "international consensus" story, and the "revisionist" story.[8] After tracking the sources cited to as evidence of CIL over time, it turns out that, at all times before and after 1938, federal judges have relied primarily on domestic case law when making CIL determinations. It also turns out that this and other findings potentially undermine all three of the *Erie* narratives we tested here, albeit in different ways.

As we present the study's results, our principle aim is to hold the great *Erie* debaters accountable for reconciling their theories about the "status" issue with the reality of how the "sources" issue has played out in US courts. To be clear, we have no quarrel with scholars supporting their views about CIL's domestic status with claims about how courts discern CIL's content. Our argument is that grounding these claims in empirics can add substance to the arguments being made by those on both sides of the *Erie* debate, and it does so in a way that forces all of us to circle back to the bigger question about CIL's legitimacy as law.

## I. CUSTOMARY INTERNATIONAL LAW

In general, the two main sources of international law are treaties and customary international law. Apart from the basic idea that CIL consists of universal, unwritten norms—or "customs"—the precise nature of CIL is difficult to pin down.[9] The classic definition comes from the International Court of Justice ("ICJ"), through which a legal norm reaches CIL status upon meeting a two-part test: first, the norm must "result from a general and consistent practice

[8] See discussion *infra* Section IV.
[9] *See* Curtis A. Bradley, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 138 (Oxford Univ. Press 2013) (distinguishing CIL from treaties).

of states," and second, states' adherence to this widespread practice must stem "from a sense of legal obligation" known as *opinio juris.* [10]

Despite recurring citations to the ICJ's two-part test in textbooks and treatises, scholars have questioned its accuracy, focusing most of their critiques on the state practice requirement.[11] As J. Patrick Kelly notes, the empirical task of finding evidence of widespread state practice seems impossible, especially given the high number of nations that make up planet earth and the low number of nations (if any) that bother to record their state practice.[12] Even if such an undertaking were achievable, the likelihood of finding a consistent pattern of practice across a multitude of diverse nations seems slim.[13] Others who share Kelly's view add that courts rarely do cite to state practice when making CIL determinations.[14] In a recent examination of the data, one of us (along with Stephen Choi) found that even the ICJ has consistently ignored its own two-part test over the years, making only scant citations to evidence of state practice.[15]

Another problem with the state practice requirement is determining what even counts as "practice." Here, the puzzle is figuring out whether to restrict "state practice" to refer exclusively to state acts rather than broadening it to include "verbal" evidence, such as diplomatic

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[10] *See* Statute of the International Court of Justice, art. 38, ¶ 1 (b) (asserting that "international custom" is "evidence of a general practice accepted as law"); s*ee also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 (2) (1987) (explaining that CIL "results from a general and consistent practice of states followed by them from a sense of legal obligation."); Michael Akehurst, A MODERN INTRODUCTION TO INTERNATIONAL LAW 44–45 (Peter Malanczuk ed., 7th ed. 1997) (describing *opinio juris* as the conviction by states that a norm is required as an international legal obligation).

[11] For an example, *see* J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449 (2000).

[12] *See id.* at 472 (noting that only the "largest and most sophisticated nations" record and publish their state practice); *see also* Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 A.M. J. INT'L L. 757, 767 (2001) (noting that "most customs are found to exist on the basis of practice by fewer than a dozen states").

[13] *See* Kelly, *supra* note 11, *at* 453 (claiming that CIL analysis as it is conducted in reality involves "little consideration of alternatives and trade-offs in reconciling diverse values and interests.").

[14]*See* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 386 (2002) (citing to Kelly's work).

[15] *See generally* Stephen J. Choi & Mitu Gulati, *Customary International Law: How do Courts do it?*, *in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD (Curtis A. Bradley ed., forthcoming 2015) (finding that the ICJ, in CIL determinations, cites primarily to treaties and rarely to state practice).

correspondences, legal opinions, UN resolutions, or international committee reports.[16] Then, there is the extra puzzle of determining what counts as *opinio juris*. Some suggest that we can simply infer *opinio juris* from state practice or that you can infer both CIL requirements from the same "conduct."[17] Others insist that the two requirements "must be assessed separately."[18] Still others claim that the same international agreements and declarations that scholars often cite to for state practice are in fact more indicative of *opinio juris*.[19]

Ultimately, Kelly concludes that CIL does not stem from an inductive process, but rather, "CIL norms are the deductive conclusions of international law writers, judges, and advocates."[20] This statement echoes Louis Sohn's renowned piece, in which he argues that CIL "is made by the people that care; the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."[21] In under nine pages, Sohn documents how British, American, and international courts over time have "agreed that [international] law is made by the practice of states," while ultimately citing to the writers and publicists who "collected and crystallized" the myriad histories of state practice.[22] Add to that the fact that these writers and publicists are publishing their own unique views regarding CIL, and it seems that it is not just practice that they're crystallizing. Should this worry us? Perhaps not, but it worries Kelly, who takes his critique one step further by concluding that "CIL lacks authority as law, because such norms are not, in fact, based on the […] general acceptance of the international

[16] *See* Young, *supra* note 14, at 86 ("Disagreements exist as to what sort of things ought to count as practice: Should we only count actual state actions, on the theory that they speak louder than words?").
[17] *See* Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L. REV. RED CROSS 175, 178–183 (2005) ("When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of *opinio juris*.").
[18] John B. Bellinger III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study*, Customary International Humanitarian Law, 89 INT'L. REV. RED Cross 443, 447–448 (describing *opinio juris* as distinct from state practice).
[19] Young, *supra* note 14, 386–7.
[20] Kelly, *supra* note 11, at 475.
[21] Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT'L & COMP. L. 399, 399 (1996).
[22] *Id.* at 401.

community that a norm is obligatory."[23] Between Kelly and Sohn, it becomes clear that the broader questions regarding CIL's legitimacy as law flow directly from questions about the proper sources and processes for discerning CIL norms.

As we shall see**,** many of the arguments for and against CIL's status as federal common law in the US circle back to these questions about how courts should determine CIL, the extent to which the classic CIL definition plays a role in these determinations, what counts as "state practice" versus *opinio juris*, and whether courts' reliance on certain sources—such as treatises and academic writings— undermines what CIL discernment is supposed to look like. First, however, we must revisit the case around which the "status" debate revolves.

## II. *ERIE RAILROAD V. TOMPKINS*

Justice Frankfurter put it best when he noted that *Erie* "did not merely overrule a venerable case. It overruled a particular way of looking at law."[24] That venerable case was *Swift v. Tyson*, which contains the most famous application of the "general common law" that U.S. courts developed before 1938.[25] The general common law was neither state nor federal: it was just "the common law" that existed independently of any sovereign authority.[26] Under this natural law[27] conception of *Swiftian* common law as something stemming from "reason and morality,"[28] any judge in any court could determine the correct common law rule based on his own understanding of the law. More specifically, the independent, uniform nature of general

[23] Kelly, *supra* note 11, at 452.
[24] Guar. Trust Co. of N.Y. v. York, 326 U.S. 99, 101 (1945).
[25] Swift v. Tyson, 41 U.S. 1 (1938).
[26] Stephens, *supra* note 4, at 410 (describing pre-*Erie* common law).
[27] *See* George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285 (1993) (describing general common law as "a form of natural law").
[28] *See* Edward A. Purcell, Jr., *Varieties and Complexities of Doctrinal Change: Historical Commentary, 1901-1945, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 289–90 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011) (describing the "general law").

common law[29] meant that judges "found" rather than "made" law, which they did by culling together all of the available sources from the common law world to identify the "right" rule.[30] In his famous dissents, Justice Oliver Wendell Holmes derided the "transcendental body of law"[31] that the *Swift* regime upheld, arguing that the common law is "not a brooding omnipresence in the sky."[32] Nearly a century after *Swift*, the Supreme Court's decision in *Erie* vindicated Justice Holmes's critique when it declared that "there is no federal general common law."[33]

The Court in *Erie* declared the *Swift* doctrine unconstitutional, holding that federal courts "in applying the doctrine . . . have invaded rights which . . . are reserved by the Constitution to the several States."[34] In abolishing the general common law, Justice Brandeis relied heavily on Justice Holmes's arguments:

> "'[B]ut law in the sense in which courts speak of it today *does not exist without some definite authority behind it*. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. . . .'"[35]

In channeling Justice Holmes, *Erie* established that—because the common law is not a uniform, "august corpus"[36] in the sky—the common law is something judges "make" rather than "find."[37] From *Erie*'s legal realism flowed the legal positivist idea that judges needed "some

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[29] *See Swift,* 41 U.S. at 19 (asserting that the law cannot be one thing in Rome and something else in Athens).
[30] *See id.*at 18 ("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"). *See also* R. Jackson, *The Rise and Fall of Swift v. Tyson*, 24 A.B.A.J. 609, 612 (1938) (asserting that a court "does not *make* the law but merely *finds* or declares the law, and so its decisions simply constitute evidence of what the law is, which another court is free to reject in favor of better evidence to be found elsewhere.").
[31] Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928).
[32] Southern Pacific Company v. Jensen 244 U.S. 205, 222 (1917).
[33] Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
[34] *Id.* at 77.
[35] *Id.* at 79 (citing Black & White Taxicab Co. v. Brown & Yellow Taxicab Co., 276 U.S. 518, 532–36 (1928)).
[36] Black & White Taxicab, 276 U.S. at 533.
[37] William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 23 (2007) (noting that "if judges 'made' rather than 'found' the common law, it followed that they needed lawmaking authority. It was this change that led ultimately to *Erie*.").

definite" lawmaking authority from a sovereign source in order to "make" law.[38] After *Erie*, the only valid sovereign sources under which federal courts can legitimately make law would be either the Constitution or some form of political branch authorization (a statute). [39]

On the same day that it issued the *Erie* decision, the Supreme Court also decided *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, in which it clarified that federal judges have the power to make "federal common law" in cases pertaining to "uniquely federal concerns" where Congress has yet to enact a statute that governs.[40] In its post-*Erie* case law, the Supreme Court carved out "enclaves" of this new form of federal judge-made law, upholding it as "genuine federal law that binds the states under the Supremacy Clause and potentially establishes Article III and statutory 'arising under' jurisdiction."[41]

Legal realists consider the distinction between "finding" and "making" law a false one. Technically speaking, judges are always "making" common law, pulling sources together and determining the rule from their independent judgment (although, even under federal common law, judges will almost never admit that they are "making" law). The process never changed,

[38] *See id.* and accompanying text. *But see* Jack Goldsmith & Steven Walt, *Erie and the Irrelevance of Legal Positivism*, 84 VA. L. REV. 673, 674 (1998) (challenging the conventional view that *Erie's* "constitutional holding relies on a commitment to legal positivism.").
[39] *See* Dodge, *supra* note 37, at 24 ("Under *Erie*'s own positivist view . . . authority for the additional requirement of incorporation would have to be found in a statute or the Constitution. If it were simply the product of judicial lawmaking, it would be illegitimate.").
[40] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (stating that the issue of interstate water apportionment "is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive."). For an explanation of when federal judges apply federal common law, *see* Koh, *supra* note 4, at 1831–2.
[41] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426 (1964) ("[T]here are enclaves of federal judge-made law which bind the [s]tates"); Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 878 (2007) (discussing the Supreme Court's references to federal enclaves).

although the label for it may have after *Hinderlider*. The *Erie* decision itself reflects this legal realism, and most scholars in the *Erie*/CIL debate seem to have accepted it as well.[42]

On a superficial level, *Erie*'s story about the death of general common law and the birth of federal common law has little to do with CIL's legal status in the United States. Before *Erie*, US courts applied CIL without question and in a wide variety of contexts, including admiralty cases, state boundary disputes, and other interstate matters.[43] Even *Swift v. Tyson*'s analysis of "the law merchant" hints at the courts' commonplace application of "the law of nations."[44] In case anyone doubted CIL's place in US common law before 1938, Justice Gray famously clarified it in *The Paquete Habana* when he upheld the law of nations as "part of our law."[45] Upon further reflection, Justice Gray's assertion begs the question: in what sense was CIL "part of our law" before *Erie*? More importantly, did the answer to this question change after *Erie* eliminated the unconstitutional "august corpus" of general common law?[46]

The text of the US Constitution does not answer these questions on its face, although it does mention that Congress has to power to "define and punish offenses against the "law of

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[42] Jeremy Rabkin, *Off the Track or Just Down the Line? From Erie Railroad to Global Governance*, 10 J.L. ECON. & POL'Y 251, 290 (2013) ("The positivist premise of *Erie* can't be taken seriously, because the same justices who endorsed *Erie* were quite ready to embrace a great deal of judicial improvisation in other areas."). *See also id.* ("In later years, of course, courts would continue to invoke *Erie* as a caution against judge-made law—while confidently asserting ever more elaborate judge-made rules purporting to have some relation to vague phrases in the Constitution."); Stephens, *supra* note 4, at 437 (asserting the Supreme Court in *Erie* "was not rejecting the entire concept of federal court lawmaking, but rather the particular kind developed under the rubric of *Swift v. Tyson*.").

[43] *See e.g. Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793) ("The law of nations as well as the law of nature is of 'origin divine.'"); *Talbot v. Jansen*, 3 U.S. 133 (1795) (applying the law of nations to a prize case); *United States v. Smith*, 18 U.S. 153 (1820) (adopting the definition of "piracy" under the law of nations); *State of Iowa v. State of Ill.*, 147 U.S. 1 (1893) (applying the "thalweg" rule to a state boundary case).

[44] *See* Swift v. Tyson, 41 U.S. 1, 19 (1938) (The law respecting negotiable instruments may be truly declared . . . to be in a great measure, not the law of a single country only, but of the commercial world."). *See also* Michael D. Ramsey, *Customary International Law in the Supreme Court, 1901-1945*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 28, at 228 (explaining that the common law of bills of exchange stems from the "law merchant," which "was often described as a branch of the law of nations").

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

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

nations."[47] One of the first attempts at addressing *Erie*'s implications for CIL came in 1939 from Philip Jessup, a Columbia Law professor who eventually served as a judge for the ICJ.[48] In an article for the *American Journal of International Law*, Jessup concluded that "any attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court."[49] He noted that "applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power."[50] Thus, he reasoned, it "would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law."[51]

Since Jessup's writings, other international law scholars have taken on the *Erie* narrative, reaching diverse conclusions—and ferocious disagreements—about *Erie*'s effect on CIL application in the United States. Over time, this chorus of differing opinions has culminated into the great *Erie* debate that we turn to now.

## III. THE *ERIE* DEBATE: A STATUS QUESTION

Despite some diversity of opinion within camps, the debate concerning CIL's domestic status after *Erie* centers on two main stances: the "modern position" and "revisionism".

In its most extreme form, the modern position supports the automatic, wholesale incorporation of CIL into federal common law after *Erie*.[52] In other words, federal judges can "make" CIL using the common-lawmaking authority that they retained after *Hinderlider*, and

[47] U.S. CONST. art. I, §8, cl. 10.
[48] Rabkin, *supra* note 42, at 254 (describing Jessup's role in the *Erie* debate).
[49] Philip C. Jessup, *The Doctrine of* Erie Railroad v. Tompkins *Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).
[50] *Id.*
[51] *Id.*
[52] *See e.g.* Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 376 n.31 (1997) ("I would be content to label the incorporated [CIL] rules as rules of federal common law.").

CIL would have the force of federal law that both establishes Article III jurisdiction and preempts inconsistent state laws under the Supremacy Clause of the U.S. Constitution.[53]

Academics from the modern camp do not necessarily deny CIL's pre-*Erie* status as general common law.[54] Nevertheless, one of the underlying premises of the modern position is that CIL has always—both before and after *Erie*—had the status of federal law insofar that it governs foreign relations: an area of distinctly "federal interest" ever since the time of our Forefathers.[55] Others point to Article I, Section 8, Clause 10 of the Constitution, as well as to certain federal statutes[56], as additional "explicit grant[s] of authority" for federal courts "to define and fashion federal rules with regard to the law of nations."[57] If these are correct and CIL has always been part of US federal law, then federal judges who apply CIL after *Erie* are simply exercising a legitimate authority that they never lost.[58] In other words, CIL does not require an extra layer of domestic authorization before judges can incorporate it into post-*Erie* federal common law because CIL never constituted "unauthorized" general common law to begin

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[53] *See e.g. id.* at 383 (claiming that "the modern position entails the conclusion that, in the face of congressional silence, customary international law will be supreme over the laws of the States."); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–61 (1984) (asserting that customary international law has "the status of federal law for purposes of supremacy to state law" and that "there is now general agreement" that international law cases "are within the judicial power ... under [A]rticle III. . . ."); Stephens, *supra* note 4, at 397 (arguing that a CIL determination "is a federal question, which triggers federal court jurisdiction and on which federal court decisions are binding on the states.").

[54] *See* Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2354 (1991) [hereinafter *Transnational*] ("throughout the early nineteenth century, American courts regularly construed and applied the unwritten law of nations as part of the 'general common law,' . . . without regard to whether it should be characterized as federal or state."); Henkin, *supra* note 53, at 1557–58 (describing "the reign of *Swift v. Tyson*" and how "[e]arly in our history, the question whether international law was state law or federal law was not an issue: it was 'the common law.'").

[55] *See generally* Stephens, *supra* note 4 (arguing that the framers of the Constitution intended for the federal government to enforce the "law of nations" as it governed foreign affairs, and that pre-*Erie* international law cases applied a "precursor" of federal common law). *See also* Koh, *supra* note 4, at 1841 ("[T]he so-called 'modern position' extends at least as far back as Alexander Hamilton. Far from being novel, the 'modern position' is actually a long-accepted, traditional reading of the federal courts' function."); Neuman, *supra* note 52, at 392 (upholding the modern position as a "200-year-old practice of judicially incorporating customary international law.").

[56] *See* Koh, *supra* note 4 at 1835 n.60 (citing the Alien Tort Claims Act and the Foreign Sovereign Immunities Act as federal statutes that "expressly delegate to the federal courts authority to derive federal common law rules from established norms of customary international law.").

[57] *Id.* at 1835.

[58] *See id.* at 1841 ("Both before and after Erie, the federal courts issued rulings construing the law of nations. Erie never intended to alter or disrupt that practice, which has continued as the 'new' federal common law.").

with.[59] To the extent that *Erie's* positivist underpinnings do touch CIL, some of the modern position's supporters argue that CIL already has a "definite authority behind it" because it has always been grounded in the practice of sovereign states (and not some mystical body of law in the sky).[60]

The modern position became the mainstream academic view in the decades immediately following the Supreme Court's 1964 decision in *Banco Nacional de Cuba v. Sabbatino*. The world of legal academia threw a fit in 1997, however, when two *enfants terribles*, Curtis Bradley and Jack Goldsmith, took on the international law establishment in the US in their now-classic "emperor has no clothes" critique of the establishment view. Calling the establishment's view the "modern position", theirs was a manifesto for "revisionism."[61]

The revisionist view begins with the "uncontroversial" premise that pre-*Erie* CIL had the status of general common law.[62] After *Erie*, they reason, federal courts cannot apply CIL as federal law without domestic, positive incorporation from the federal branches, either through the Constitution or a federal statute.[63] In their vigorous attack on the modern position's historical and legal claims, Bradley and Goldsmith conclude that "CIL should not have the status of federal

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[59] *See* Dodge, *supra* note 37, at 23–24 (arguing that the "original understanding" of *Erie* permits federal courts to apply CIL without the revisionists' "additional requirement" of "positive authority for the incorporation" of CIL into US law, and this is so because of CIL's positivist foundation).

[60] *See id.* ("[B]y 1938, customary international law already rested on a positivist foundation of state practice and consent. Customary international law did have 'some definite authority behind it' — the consent of nations reflected in their practice").

[61] Bradley and Goldsmith were both in their first years in the academy, Bradley at the University of Colorado Law School and Goldsmith at the University of Chicago Law School. For the article that set off the firestorm, *see* Bradley & Goldsmith, *supra* note 5; *see also* Curtis A. Bradley & Jack L. Goldsmith, *Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) (explaining that "the legitimacy of human rights litigation is what is really at stake in debates over the modern position."). For earlier versions of the revisionist stance, *see* A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L L. 1 (1995) (criticizing the "federalization" of CIL in international cases brought before US courts); Phillip R. Trimble*, A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) (arguing that US courts had been applying CIL in a way that was irreconcilable with American political tradition).

[62] Bradley, Goldsmith & Moore, *supra* note 41, at 882.

[63] *See* Bradley & Goldsmith, *supra* note 5, at 870 (arguing that "in the absence of federal political branch authorization, CIL is not a source of federal law.").

common law," asserting that any arguments in favor of CIL's automatic incorporation into federal common law "depart from well-accepted notions of American representative democracy, . . . separation of powers, and federalism."[64] In return, proponents of the modern position launched equally vigorous attacks on Bradley and Goldsmith's piece shortly after its publication.[65] Things got so heated at one point that José Alvarez, giving the 2007 Presidential Address at the American Society of International Law meetings, referred to Bradley and Goldsmith as among the "four horsemen of the [constitutional] apocalypse."[66] Alvarez was by no means the only prominent legal academic to see Bradley and Goldsmith as having started a dangerous trend. Peter Spiro, in an article in *Foreign Affairs* in 2000, pointed to the Bradley and Goldsmith paper as having given birth to a "New Sovereigntist" movement, whose core belief was in an anti-international form of American exceptionalism.[67] The two sides to the great *Erie* debate have been at it ever since, with several others joining in the discussion and contributing their own alternative perspectives regarding CIL's post-*Erie* domestic status.[68]

No matter whom you ask, all players in the *Erie* debate ground their arguments on the same historical narrative. To begin with, most of the literature on CIL's domestic legal status mentions the federal courts' silence on the subject during the decades immediately following

[64] *Id.* at 821.
[65] *See e.g.* Goodman & Jinks, *supra* note 7; Koh, *supra* note 4; Stephens, *supra* note 4; Neuman, *supra* note 52.
[66] José E. Alvarez, *The Future of Our Society*, 102 ASIL 499 (2008). The other two horsemen, according to Alvarez, were John Yoo of UC Berkeley and Ernest Young of Duke University.
[67] Peter Spiro, *The New Sovereigntists: American Exceptionalism and its False Prophets*, FOREIGN AFFAIRS (Dec. 2000), https://www.foreignaffairs.com/articles/united-states/2000-11-01/new-sovereigntists-american-exceptionalism-and-its-false-prophets.
[68] *See generally* Young, *supra* note 14 (advancing an "an intermediate solution" of treating CIL as "general" law—a category of law that is neither state nor federal, that would not preempt contrary state policies, and that both state and federal courts may apply in accordance with traditional conflict of laws principles). *See also* Michael D. Ramsey, *International Law As Non-Preemptive Federal Law*, 42 VA. J. INT'L L. 555, 577 (2002) (arguing that courts should treat CIL as a form of non-preemptive federal law).

*Erie*.[69] Some attribute this silence to several factors: the decrease of CIL-related cases, the increased codification of CIL in treaties, and the rarity with which state and federal courts reached conflicting interpretations of CIL.[70]

As far as almost everyone is concerned, the Supreme Court did not expressly address CIL's post-*Erie* status until 1964, when it decided *Banco Nacional de Cuba v. Sabbatino*.[71] The Court in *Sabbatino* ruled that the "act of state doctrine" applied even in cases where state acts violated international law.[72] In the process, the Court also held that the act of state doctrine was a rule of federal common law, binding on the states and flowing from the federal governments' authority to determine issues of foreign relations.[73] In holding that the act of state doctrine was immune from *Erie*'s purview, the Court cited to Jessup, finding that he correctly "recognized the potential dangers were Erie extended to legal problems affecting international relations."[74]

Although supporters of the modern position initially considered *Sabbatino* a "setback" for CIL application in US courts,[75] they eventually latched onto the Court's reference to Jessup juxtaposed with its characterization of the act of state doctrine as federal common law, and used

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[69] *See* Stephens, *supra* note 4, at 440 (stating that the Supreme Court did not address CIL's post-*Erie* domestic status until "twenty-five years after [Philip] Jessup's [1938] article . . . ."); Koh, *supra* note 4, at 1833 ("More than a quarter century [after *Erie*] would pass before the Supreme Court clarified whether customary international law rules should be characterized as state or federal law."). *See also* Bradley & Goldsmith, *supra* note 5, at 821 ("[F]or several decades after *Erie,* it remained an open (and generally unaddressed) question whether CIL was part of this new federal common law.").

[70] Bradley & Goldsmith, *supra* note 5, at 827–28 (adding that in the decades between *Erie* and *Sabbatino*, "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."). *But see id.* at 828 (citing *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948)) (pointing to *Bergman* as the "one reported decision in the quarter century following *Erie* that did address the domestic legal status of CIL" and that "reached a conclusion contrary to Jessup's.").

[71] *But see id.* at 836 (asserting that *Sabbatino* did not address CIL's domestic legal status).

[72] *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (declining to answer the question of whether the Cuban government violated CIL when it expropriated a sugar shipment from a US-owned company).

[73] *Id.* at 425–27.

[74] *See id.* at 425 (citing to Jessup, *supra* note 49) ("[I]t seems fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie R. Co. v. Tompkins.").

[75] *See* Koh, *Transnational*, *supra* note 54, at 2363 (1991) (suggesting that *Sabbatino* initially "cast a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law. . . ."). *See also* John R. Stevenson, *The State Department and Sabbatino—"Ev'n Victors Are by Victories Undone"*, 58 AM. J. INT'L L. 707, 708 (1964) (criticizing how *Sabbatino* forecloses US courts from applying CIL).

it as a basis for arguing that the Supreme Court did incorporate CIL into federal common law.[76] In response, Bradley and Goldsmith point out that "*Sabbatino* clearly indicated that the act of state doctrine was neither required by nor an element of CIL," and therefore, "the Court's statement that the act of state doctrine is a federal common law rule does not extend to questions of CIL."[77]

The literature identifies the 1980's as the next phase of the *Erie* saga, which heralded the rise of international human rights litigation in the United States.[78] Many of these lawsuits came under 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."[79] In 1984, the Second Circuit issued the first decision to approve the use of the ATS in international human rights litigation: *Filartiga v. Pena-Irala*.[80] In finding that official torture "violates established norms of the international law of human rights, and hence the law of nations,"[81] the court in *Filartiga* upheld Article III jurisdiction over the plaintiffs' claim on the basis that it arose under the ATS.[82] In reaching this conclusion, the court asserted that CIL "has always been part of the federal common law."[83]

Despite what appears to be a blatant embrace of the modern position, Bradley and Goldsmith argue that *Filartiga* does not provide reliable support for CIL's status as federal

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[76] *See e.g.,* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 876 (1987) [hereinafter *United States Sovereignty*] ("The Supreme Court . . . eliminated th[e] historic confusion of international with common law when it recognized in 1964 that international law is not state but federal law"); Koh, *supra* note 4 at 1833–35 (arguing that rather than "shy[ing] away from interpreting questions of customary international law," the *Sabbatino* Court "construed customary international law to determine that international law neither compelled nor required application of the act of state doctrine.").
[77] Bradley & Goldsmith, *supra* note 5, at 859 n.284 (citing *Sabbatino*, 376 U.S. at 421).
[78] *See generally id.* at 831–34 (dedicating an entire subsection of their article to *Filartiga*'s effect on the post-*Erie* CIL question).
[79] 28 U.S.C. § 1350 (2015).
[80] *See* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (reviewing Paraguayan citizens' suit for acts of torture committed in Paraguay).
[81] *Id.* at 880.
[82] *Id.* at 887.
[83] *Id.* at 885.

common law because the Second Circuit "relied uncritically on pre-*Erie* precedents," all of which applied CIL as general common law, not federal law.[84] Furthermore, they emphasize that the *Filartiga* court was just a circuit court and that—like other lower courts—it focused only on using CIL's status as federal law to ensure jurisdiction, as opposed to addressing other issues such as preempting state law.[85] The revisionists do concede, however, that the federal courts became more accepting of the modern position after the *Filartiga* line of cases, from which a "new CIL" emerged.[86] This "new CIL" differs from "traditional CIL" in three main respects: it is "less related to state practice, can develop rapidly, and purports to regulate a state's treatment of its own citizens" as opposed to matters between states. [87]

Most of the more recent discussions about *Erie* and CIL focus on ATS litigation, especially the Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain*.[88] As one might expect, the modern position's supporters read *Sosa* as the Supreme Court's ringing endorsement of customary international law as federal common law in ATS cases,[89] while revisionists claim that *Sosa* is "best read as rejecting that position."[90] At this rate, it might take more than *Sosa* to resolve the *Erie* debate.

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[84] Bradley & Goldsmith, *supra* note 5, at 834.
[85] *Id.* at 831.
[86] *See generally id.* (referring to *Filartiga* as one of the "twin pillars" of the modern position, the other one being the Restatement (Third)). *Id.* at 838–842 (distinguishing the "new CIL" from "traditional" CIL).
[87] *Id.* at 842.
[88] *See* Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (reviewing one Mexican national's claim against another for violating CIL's prohibition on arbitrary arrest).
[89] *See* William S. Dodge, *Bridging* Erie*: Customary International Law in the U.S. Legal System After* Sosa v. Alvarez-Machain, 12 TULSA J. COMP. & INT'L. L. 87, 95–96 (2004) (arguing that the *Sosa* majority had rejected many of Bradley's, Goldsmith's, and Justice Scalia's revisionist premises); *see also* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 104 n.27 (2004) (stating that *Sosa* "settled part of [the *Erie*] debate, recognizing that some CIL is federal common law.").
[90] See Bradley, Goldsmith & Moore, *supra* note 41, at 870 (granting that there are still "a number of contexts in addition to the ATS in which it is appropriate for courts to develop federal common law by reference to CIL" after *Sosa*).

We decided not to undertake that task ourselves. Instead, what interested us were the empirical assumptions underlying a number of the arguments that the two sides were making, and the question of whether those arguments might be different had the authors had data instead of anecdote. We discovered that both camps defend their stances on CIL's domestic status by relying—to some extent—on claims about CIL's sources. Some of these claims stem from the *Erie* literature, while others originated from academic writings long preceding the debate. In the discussion that follows, we explore these different claims about how pre- and post-*Erie* courts discerned the content of CIL norms.

## IV. CIL AND FEDERAL JUDICIAL PRACTICE: A SOURCES QUESTION

When contrasting the modern position's answers to the "sources" question with the revisionists' answers, we found it helpful to think of CIL in terms of its pre-*Erie* and post-*Erie* forms. This, in turn, required a history lesson on how academics narrate the story of CIL in US courts from the seventeenth century up until the present. Along the way, we began developing predictions about what we could expect to see if we tracked the sources US federal courts cited to across the centuries as evidence of CIL. Our predictions revolve around three narratives that we discerned in the *Erie*/CIL literature, two from the modern camp and one from the revisionist camp. For ease of reference, we refer to them as the "state practice" story, the "international consensus" story, and the "revisionist" story.

### a. CIL in US Courts: 1700-1937

By now, basically everyone in academia agrees that pre-*Erie* courts treated CIL as general common law, which neither preempts inconsistent state law nor creates an independent basis for federal jurisdiction.[91] We also know that pre-1938 courts regarded general common law

[91] *See* sources cited *supra* note 54; *see also supra* note 62 and accompanying text.

as stemming from natural law principles[92] and from British common law.[93] Unsurprisingly, US courts by the late eighteenth century also regarded CIL as part of the natural law and of the common law inherited from England.[94] Throughout this era, writers such as Hugo Grotius, Emmerich de Vattel, and William Blackstone received credit for laying the foundation of international law upon natural law principles.[95]

That said, even Vattel developed a theory of "voluntary" or "positive" CIL, a form of CIL that was based on the actual practices of states.[96] In fact, the conventional academic narrative is that CIL developed a positivistic streak by the end of the nineteenth century.[97] This positivism appeared through the rhetoric of state practice, which courts often referred to as the "common consent" of states or the "usages of civilized nations."[98] The famous *The Paquete Habana, Antelope* and *Scotia* cases are often invoked as illustrative of the positivist CIL move in the pre-*Erie* days.[99]

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[92] See Dodge, *supra* note 37, at 22–23 (discussing the natural law basis for eighteenth century common law and explaining how the common law later shifted toward positivism because of *Erie*).
[93] See Swift v. Tyson, 41 U.S. 1, 15 (1938) (citing to English court decisions and concluding that "In the American Courts, so far as we have been able to trace the [decisions], the same doctrine seems generally but not universally to prevail.").
[94] Bradley & Goldsmith, *supra* note 5, at 822–23 (citing to The Venus, 12 U.S. (8 Cranch) 253, 297 (1814); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815); Talbot v. Janson, 3 U.S. (3 Dall.) 133, 161 (1795) (Iredell, J.); United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820)).
[95] *See* Sloss et al., *International Law in the Supreme Court to 1860*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 28, at 8 (specifying Vattel's *The Law of Nations* and Blackstone's *Commentaries on the Laws of England* as the "two works" that "in particular framed the early American view of the law of nations"); *see also* Sohn, *supra* note 21, at 399 (referring to Grotius and Vattel as two of the "'fathers of international law'").
[96] EMMERICH DE VATTEL, THE LAW OF NATIONS OR THE PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND THE AFFAIRS OF NATIONS AND SOVEREIGNS lxv–lxvi (Joseph Chitty trans., 7th ed. 1849).
[97] *See* David J. Bederman, *Customary International Law in the Supreme Court, 1861-1900*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 28, at 97–100 (explaining the "positivist outlooks" of Supreme Court's CIL determinations throughout the nineteenth century). *See also* Neuman, *supra* note 52, at 373, 373 n.12 (stating that "positivist jurisprudence superseded naturalist jurisprudence as the prevailing approach to international law" during the nineteenth century, and that "[i]t would therefore be a mistake to associate the pre-*Erie* regime with a naturalist approach to international law.");
[98] *See* Bederman, *supra* note 97, at 95, 109 (citing to *Hilton v. Guyot* and to the the prize cases for "common consent."). Bradley & Goldsmith, *supra* note 5, at 838–839 (asserting that the "traditional CIL" that prevailed before World War II was more closely tied to state practice).
[99] *See* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 36, 97, 99, 109 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

We should note here, however, that some scholars who discerned this positivist trend also say that the US Supreme Court merely paid lip service to CIL's basis in state practice while rarely ever citing to concrete, empirical evidence of such practice.[100] Among them is Michael Ramsey, who also asserts that the international law positivism of *The Paquete Habana* faded in the early twentieth century, as the fusion of CIL with general common law became even more pronounced.[101] After all, since general common law was "based on principles of reason and morality, the merger of customary international law into 'general law'" presumably "meant that American courts would look to those principles, not to state behavior, to determine customary international law's content."[102] Other scholars, such as David Bederman, note that judges were already segueing into a positivistic view of CIL as early as the *Antelope* case in 1820, but that they also continued using naturalistic language well into the late nineteenth century.[103]

Despite these mixed opinions about pre-*Erie* reliance on state practice, academics agree that the centuries preceding *Erie* comprised the golden era of the international treatises and digests.[104] To the extent that courts did cite to state practice, they often delegated the empirical task of gathering evidence of practice to the digest writers of England, France, and the United

[100] Bederman, *supra* note 97, at 104 ("Even by the time of *The Scotia* and *The Paquete Habana* . . . even as the rhetoric of the Court's decisions seemed to emphasize [CIL] as the empirical product of state practice, the evidence of such norms that the Court chose to cite was often not so inductive.").
[101] Ramsey, *supra* note 44, at 227 ("General common law, as the early-twentieth century [Supreme] Court applied it, was not heavily tied to customary practices; as it gradually subsumed international law, the positivism of *The Paquete Habana* (and its strict link to nation's practices) also declined.").
[102] Purcell, Jr., *supra* note 28, 289–90.
[103] Bederman, *supra* note 97, at 92.
[104] *See* Sloss et al., *supra* note 95, at 8 ("For the content of the law of nations, early Americans relied heavily on European treatise writers('publicists'), including Grotius, Pufendorf, Bynkershoek, Burlamaqui, Wolff, and Rutherforth. Of the publicists, they turned most often to Vattel."). For a thorough, early twentieth century perspective on how publicists shaped the law of nations in centuries past, *see generally* Jesse S. Reeves, *The Influence of the Law of Nature Upon International Law in the United States*, 3 AM. J. INT'L L. 547 (1909) (describing early academia's comingling of international law with the natural law tradition through the works of Locke, Hooker, Grotius, Vattel, Blackstone, Wilson, Pufendorf, Burlamaqui, Rutherforth, and Bynkershoek).

States.[105] Thinking ahead, we felt confident that if we tracked the sources judges cited to as authority for CIL, the pre-*Erie* data would yield high citation rates to academic sources regardless of whether courts relied on these sources for their naturalistic or positivistic content. As for state practice, we temporarily left Ramsey to the side and decided to test the traditional academic consensus that pre-*Erie* courts cited heavily to the actual practices of states.

Of course, if we assume that US courts actually follow the traditional definition of CIL, then we should expect high citation rates to actual practice in both pre- and post-*Erie* CIL determinations. In fact, some of the modern position's scholars from the *Erie* debate imply in their writings that this did in fact occur. Here, we uncovered the first narrative that we test in our study, which we decided to call the "state practice" story.

Under this narrative, international state practice serves as the basis of CIL's pre-*Erie* and post-*Erie* legitimacy as federal law. Remember: *Erie* injected legal positivism into common-lawmaking when it declared that "law in the sense in which courts speak of it today does not exist without some definite authority behind it."[106] Thus, some champions of the modern position challenge the revisionist calls for CIL's positive incorporation into federal law by arguing that CIL has always come from a positive authority: "the consent of nations reflected in their practice."[107]

For example, after citing to *The Paquete Habana* and *The Scotia*, William Dodge asserts that "[b]ecause positive customary international law [before *Erie*] was grounded in state practice and consent, it was not open to the same charge of judicial lawmaking as the common law more

[105] For thorough review of how the pre-*Erie* publicists shaped CIL determinations, *see e.g.* Edwin D. Dickenson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932); 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 (1931); Sohn, *supra* note 21, at 400.
[106] 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))
[107] Dodge, *supra* note 37, at 24.

generally."[108] In other words, the fact that federal courts have no authority to make substantive law after *Erie* does not matter because, by 1938, CIL did have "some definite authority behind it" in the form of state practice.[109] For Dodge, CIL's "positivist foundation" renders superfluous the revisionists' "additional requirement" of "positive authority for the incorporation" of CIL into the US legal system.[110]

In a famous variation on the modern position, Louis Henkin argued that CIL is "like" federal common law insofar as it counts as federal law that trumps inconsistent state law and establishes federal jurisdiction.[111] He distinguishes CIL from federal common law, however, as something judges "find" rather than "create," claiming that judges find CIL "by examining the practices and attitudes of foreign states."[112] If judicial practice does reflect Dodge and Henkin's views, then our data should yield high citation rates to variables indicative of state practice, both before and after *Erie*. This result would not only vindicate traditional conceptions of CIL, but it would also dispel revisionist fears of undemocratic judges making up CIL norms. Neither Dodge nor Henkin explicitly address which sources count as "practice," so we decided to test the more traditional, uncontroversial sources for this narrative, such as the concrete acts of states.

### b. CIL in US Courts 1938-1980

The decades immediately following *Erie* presented us with a special puzzle. As far as almost everyone is concerned, the question of *Erie's* effect on CIL's domestic status remained virtually unanswered for a few decades, or least until either the *Sabbatino* or *Filartiga* decisions surfaced.[113] What, then, was happening in those thirty or forty years after *Erie*?

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[108] *Id.* at 23.
[109] *Id.* at 23–24.
[110] *Id.* at 24.
[111] Henkin, *supra* note 53, at 1561–62 (1984) (distinguishing CIL from federal common law).
[112] Henkin, *United States Sovereignty*, *supra* note 76, at 876 (1987).
[113] *See* Discussion *supra* Section III.

Overall, fewer CIL-related cases reached the courts during this era for several reasons, such as the disappearance of nineteenth century subjects where CIL used to be relevant (such as piracy) and certain developments in constitutional law adjudication.[114] Most of the CIL-related cases that did emerge in this time period were not direct application cases; they drew upon CIL norms, but were ultimately governed by the statutes and treaties that codified those norms.[115] Thus, we posited that the numbers might increase for citations to treaties and statutes, but we did not expect any dramatic changes in the data between 1938 and 1980. If the literature is correct and if no one challenged CIL's domestic legitimacy until *Sabbatino* or *Filartiga*, then whatever judges did before *Erie* must have still seemed legitimate to judges deciding cases before 1964 (*Sabbatino*) or at least 1980 (*Filartiga*).

One particular case, however, lead us to consider another possibility. On the same day that the Supreme Court decided *Erie* and *Hinderlider*, it also decided *Guaranty Trust Co. of New York v. United States*, where the issue was whether the Russian Government could claim sovereign immunity against New York's statute of limitations for a case brought in a US federal court.[116] Writing for the majority, Justice Stone acknowledged the ancient principle of *quod nullum tempus ocurrit regi* ("no time runs against the king") as one that stemmed from British law.[117] He concluded, however, that if this principle still had any validity, it stemmed from "its uniform survival in the United States" and from public policy rather than from "any inherited notions of the general privilege of the king."[118] Curiously, when the Court declined to

[114] Ramsey, *supra* note 44, at 226, 235.
[115] *Id.* at 235.
[116] Guar. Trust Co. of New York v. United States, 304 U.S. 126 (1938).
[117] *Id*. at 132 (citing to two British cases for support).
[118] *See id*. ("[I]ndependently of the royal prerogative once thought sufficient to justify it, the rule is supportable now because its benefit and advantage extend to every citizen . . . and its uniform survival in the United States has been generally accounted for and justified on grounds of policy rather than upon any inherited notions of the personal privilege of the king.").

apply the rule, the majority cited exclusively to US cases when asserting that international law did not support its application.[119]

As Michael Ramsey points out, the only question under *Erie* "should have been whether *the New York Courts* would apply the limitations period—so Stone must have thought that *Erie* for some reason did not apply."[120] Perhaps Justice Stone saw this foreign relations matter as a distinctly federal interest where the federal common law could displace state law.[121] Then again, perhaps we were reading too much into the fact that the Supreme Court decided this case on the same day that it decided *Erie* and *Hinderlider*. Ultimately, we posited that if the *Guaranty Trust Co.* case does give us an indication of what to expect, we would see more citations to domestic case law for CIL during the period 1938-1980. Overall, however, we predicted that we would see only some change during this period, all the while believing that the more dramatic shifts in our data would not emerge until much later.

### c. CIL in US Courts: 1980-2015

As far as many *Erie* scholars are concerned, the period between 1980 and the present constitutes a key chapter in the "status" debate about CIL. Many of them credit the *Filartiga* line of cases and the publication of the Restatement (Third) of the Foreign Relations Law of the United States in the 1980's for the federal courts' alleged acceptance of the modern position.[122] While examining this episode in the *Erie* saga, we uncovered two more narratives about how judges discern CIL: the "international consensus" story and the "revisionist" story.

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[119] *See id.* ("Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country.").
[120] *See* Ramsey, *in supra* note 44, at 250 (emphasis in original).
[121] *See id.* ("Put together with *Hinderlider*, *Pink*, *Belmont*, and *Curtiss-Wright*, one might argue that the Court [in *Guaranty Trust Co. of New York*] had in mind a federal common law displacing states in foreign affairs cases (including customary international law cases).").
[122] *See* sources cited *supra* note 4.

As the label we gave it suggests, the "international consensus" story relies less exclusively on just state practice and focuses broadly on "consensus." Here, a sub-group of the modern camp bases its philosophy on a particular passage from *Sabbatino*:

> It should be apparent that the greater the degree of *codification or consensus* concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it, since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest or with international justice.[123]

After asserting a lack of international consensus with regard to foreign expropriations,[124] Justice Harlan adds in a footnote that the *Sabbatino* decision "in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law" because "[t]here are, of course, areas of international law in which *consensus* as to standards is greater and which do not represent a battleground for conflicting ideologies."[125]

In defense of the modern position, Koh interprets Justice Harlan's language to mean that "[o]nce customary norms have sufficiently crystallized, courts should presumptively incorporate them into federal common law, unless the norms have been ousted as law for the United States by contrary federal directives."[126] This interpretation forecloses federal judges from relying exclusively on independent judicial law-making when construing CIL, "as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of customary international law rules."[127] In other words, federal judges can only apply CIL norms

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[123] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964) (emphasis added).
[124] *See id.* ("There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens.").
[125] *Id.* at 430 n.34 (emphasis added).
[126] *See* Koh, supra note 4, at 1835 (explaining his view that "even after *Erie* and *Sabbatino*, federal courts retain legitimate authority to incorporate bona fide rules of customary international law into federal common law."). *See also id.* at 1842 ("Thus, when customary international norms are well-defined, the executive branch has regularly urged the federal courts to determine such rules as matters of federal law.").
[127] *Id.* at 1853 (arguing that "[w]hen construing customary international law, federal courts arguably exercise less judicial discretion than when making other kinds of federal common law. . . .").

as federal common law after verifying that "a clear international consensus" has sufficiently "crystallized" them.[128]

Admittedly, we struggled to determine whether "consensus" and "state practice" were interchangeable terms in the sense that Koh meant, especially since the sources he cited to for "consensus" are precisely the type of "verbal" evidence that some—including Koh—believe counts as state practice.[129] Historically, "consensus" refers to a theory that arose during the nineteenth and early twentieth centuries, which described CIL as a universal law based on the "common consent" of (most) nations. [130] Another *Erie* scholar, Ernest Young, claimed in his piece with Emily Kadens that the modern version of consensus differs significantly from traditional perceptions of custom, for the latter looks backward at past practices while the former looks to new emerging practices.[131] Young and Kadens add that this normative, forward-looking concept of international consensus is a key tool for enforcing CIL norms in human rights litigation.[132]

When Koh proceeds to tout the United States as a key participant in the "traditional state practice" that shapes CIL rules, he seems to suggest that state practice is, at minimum, one category of evidence from which judges may infer this international consensus.[133] Along this vein, Koh cites to multilateral treaty drafting processes, the United Nations, regional fora, standing and ad hoc intergovernmental organizations, and diplomatic conferences as "driving

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[128] Koh, *Transnational*, *supra* note 54, at 2385–86 (asserting that "over the centuries," federal courts "determine whether a clear international consensus has crystallized around a legal norm that protects or bestows rights upon a group of individuals that includes plaintiffs.").
[129] Young, *supra* note 14, at 386.
[130] Kelly, *supra* note 11, at 510–12.
[131] Kadens & Young, *supra* note 1, at 909.
[132] *Id*.
[133] *See* Koh, *supra* note 4, at 1853–54 (attacking the revisionist charge that the CIL lawmaking process does not adequately represent state interests because "insofar as customary international law rules arise from traditional [s]tate practice, the United States has been, for most of this century, the world's primary maker of and participant in this practice.").

forces" that shape CIL.[134] Koh gave us an idea of what to look for when determining whether federal courts really did base CIL determinations on a "clear international consensus."

In their response to Bradley and Goldsmith's 1997 piece, Ryan Goodman and Derek Jinks extract the same "codification and international consensus" requirement from *Sabbatino*, arguing that the *Sabbatino* majority upholds CIL as part of the federal common law while limiting justiciable CIL claims to those that fulfill this consensus requirement.[135] Goodman and Jinks rest their thesis on the same *Sabbatino* quotation that Koh clings to, expressing it through what they call *Sabbatino's* "sliding scale."[136] This sliding scale distinguishes between areas of international law that are rife with political divisions among nations, and "areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies."[137] According to Goodman and Jinks, *Sabbatino* establishes the latter category of international law as the justiciable one.[138]

Furthermore, Goodman and Jinks credit the *Filartiga* line of ATS cases for fully incorporating *Sabbatino's* "sliding scale" framework into federal judicial practice.[139] They also claim that a tripartite test for judicially cognizable CIL flows from this line of litigation—which

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[134] *Id.* at 1854 (noting that "in nearly all of these organizations and fora, the United States ranks among the leading participants.").
[135] Goodman & Jinks, *supra* note 7, at 512 ("Properly interpreted, *Sabbatino* stands both for the proposition that international law is federal common law and for the proposition that courts should refrain from adjudicating international law claims without the requisite degree of codification or international consensus.").
[136] *See id.* at 482 (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964); Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp 246, 258 (D.D.C. 1985) ("[T]he *Sabbatino* Court established a 'sliding scale.' That is, the greater degree of codification and consensus supporting a CIL norm, the more allowance courts have in finding attendant claims actionable.").
[137] *See id.* (quoting *Sabbatino*, 376 U.S. at 430 n.34) (explaining the "sliding scale").
[138] *Id.*
[139] *Id.* at 494–98, 512 ("Several insights can be drawn from the Filartiga case line. First, the incorporation of Sabbatino's sliding-scale"). *See also id.* at 496 (explaining that Filartiga's approach is "based primarily on the principle of consent" and "[T]hese standards coincide with the Sabbatino Court's concern for finding a consensus . . . .").

effectively narrows the range of actionable CIL claims to those based in *jus cogens* norms—but we do not seek to address that particular thesis in this paper. [140]

Rather, what interests us even more is their claim that post-*Filartiga* courts engage in a "prevailing judicial practice" of determining when a CIL norm carries enough international consensus to tip the "sliding scale" in the direction of justiciability.[141] According to Goodman and Jinks, the routine practice among federal judges is to consult the "ample documents and international legal instruments" available to them and, from there, determine whether a given CIL norm meets the consensus requirement inferred from *Sabbatino* and *Filartiga*.[142] What's more, they claim that this judicial practice yields "uniform results" that "belie the revisionist portrayal of CIL as 'often unwritten . . . unsettled . . . difficult to verify' and the 'contours [of which] are often uncertain."[143]

Goodman and Jinks go on to explain how *Filartiga* itself exemplifies this routine practice.[144] Here, the Second Circuit confirmed "the universal condemnation of torture . . . by virtually all of the nations of the world" by consulting "numerous international agreements."[145] More specifically, the court looked to UN materials, such as the United Nations Charter, the Universal Declaration of Human Rights, and the UN General Assembly's unanimous Declaration on the Protection of All Persons from Being Subjected to Torture.[146] Additionally, the court also

[140] *See generally id.* for Goodman and Jinks' theory on *jus* cogens norms and the tripartite test.
[141] *See generally id.* at 494–97; also *id*. at 512 ("[A] thorough account of the prevailing judicial practice of finding and applying CIL demonstrates the systematic nature of these inquiries.").
[142] *See generally id.* at 494–500 ("The availability of ample documents and international legal instruments enables effective adjudication of the status of CIL").
[143] *Id.* at 512 (citing to Bradley & Goldsmith, *supra* note 5, at 855).
[144] *Id.* at 499–500 ("Notably, the *Filartiga* court's method of analyzing the international law claims has also become the routine judicial method.").
[145] *Filartiga*, 630 F.2d at 880.
[146] See Goodman & Jinks, *supra* note 7, at 500.

relied on many domestic sources, such as the Department of State's human rights reports, congressional statutes, and the amicus brief filed on behalf of the US.[147]

According to Goodman and Jinks, *Filartiga*'s review of "both international and domestic legal instruments" is in fact the routine, established process through which federal judges identify actionable CIL.[148] Thus, they criticize how revisionists "mischaracterize" this approach by suggesting "that judges adopt the reverse presumption, finding actionable CIL violations when presented with even minimal documentation." In another stab against the revisionist stance, the authors also offer *Tel-Oren v. Libyan Arab Republic* as a counter-example to *Filartiga*, whereby the D.C. Circuit uses the same judicial method to find that the prohibition of nonofficial torture lacked sufficient consensus to constitute a justiciable CIL norm.[149] Taken together, this "consensus" view that we see from Koh, Goodman and Jinks—if true—ought to translate into increasing citations to UN materials, treaties and other international materials. As for domestic sources, we would likely see more "sources of U.S. political branch action"[150] rather than more case law.

Finally, we have the "revisionist" story about what federal courts cite to as sources of CIL and how those citations evolved after *Erie*. On the "status" question, revisionists argue that CIL needs positive incorporation through the US Constitution or a federal statute for it to become federal law.[151] Thus, if courts took their cues from revisionist thought, then perhaps we would see an increased citation to domestic statutes and to the Constitution after *Erie*.[152]

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[147] *Id.*
[148] *Id.* ("As the following cases demonstrate, Filartiga's investigation of such international and domestic legal instruments typifies the ways in which other CIL claims are deemed actionable in federal court.").
[149] *See id.* at 530 n.189.
[150] *Id.* at 500.
[151] *See generally* Bradley & Goldsmith, *supra* note 5.
[152] This last hypothesis would have required extra caution, however, since such an increase could also result from the longstanding tradition of using CIL as a tool for statutory interpretation under the *Charming Betsey* canon, whereby U.S. courts interpret federal statutes and treaties to avoid conflicts with the law of nations. For the origin of

Furthermore, in an ideal revisionist world, *Erie*'s positivist underpinnings ought to translate into more references to state practice in CIL cases.[153]

When describing what actually played out in the courts, however, revisionists claim that federal courts moved in the opposite direction after *Filartiga*, especially in the context of ATS litigation. According to Bradley and Goldsmith, the rise in human rights litigation after World War II brought a "new" CIL with it.[154] Unlike the "traditional CIL" of the past, which primarily governed interstate matters and was based in state practice, the "new" CIL mostly regulates states' treatment of their own citizens and is less tied to state practice.[155]

In a subsequent article, Bradley, Goldsmith, and David Moore describe how the Second Circuit applied "new" CIL in *Filartiga* by prioritizing verbal evidence of state assent over actual state practice. [156] Per the article, examples of "verbal assent" evidence in *Filartiga* include the United Nations Charter, the non-binding Universal Declaration of Human Rights, another non-binding United Nations resolution, multiple treaties that the US had not ratified, and various national constitutions.[157] If this list sounds familiar, it is because it is roughly the same one that Goodman and Jinks focus on when they describe the "prevailing judicial practice" of determining actionable CIL by digging for "international consensus."[158] In fact, Bradley, Goldsmith and Moore use the terms "verbal assent" and "consensus" interchangeably.[159]

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the canon, *see* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). For an empirical study on CIL as statutory interpretation tool in the US, *see* Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118 (2014).

[153] Bradley, Goldsmith & Moore, *supra* note 41, at 890–91 (implying that the Second Circuit espoused a "revisionist position with respect to the sources of CIL in ATS litigation" after *Filartiga*, when it began citing to more "concrete" evidence of state practice).

[154] Bradley & Goldsmith, *supra* note 5, at 831–32.

[155] *Id.*

[156] *See* Bradley, Goldsmith & Moore, *supra* note 41, at 889–91.

[157] *Id*. at 889.

[158] See discussion *infra* pp.26–28.

[159] Bradley, Goldsmith & Moore, *supra* note 41, at 890 (describing how the Second Circuit eventually "pulled back from the approach in *Filartiga*, which, as we noted earlier, had relied heavily on verbal statements and 'consensus' and had downplayed actual practice.").

Of course, the revisionists do not stop there. Bradley, Goldsmith, and Moore go on to argue that the Supreme Court's decision in *Sosa v. Alvarez-Machain* promoted a new approach to deriving CIL in ATS cases, shifting away from *Filartiga*'s reliance on verbal assent evidence and returning to the more "revisionist" method of citing to actual state practice.[160] Others agree with this positivist reading of *Sosa,* extending it beyond just ATS litigation and into any CIL-related cases decided in US federal courts.[161]

For this study, we decided to split the post-*Filartiga* data into sub-periods: 1980-2003 and 2004-2015 to determine whether *Sosa* really did mark a retreat from "consensus" or "verbal assent" or whether it was merely an outlier in its pro-practice approach to CIL. If our data revealed more citations to "verbal assent" variables than to variables representing "actual practice,"[162] then perhaps CIL lacks the "positivist foundation" that Dodge, Henkin, and others have relied on when challenging revisionist arguments. That said, such results might vindicate the "consensus" camp of the modern position, which, needless to say, would prove why Bradley and Goldsmith had something to worry about back in 1997.

## V. PREDICTIONS

To summarize, the *Erie* literature provides three different narratives in response to the "sources" question about CIL, all three of which scholars have used to bolster their arguments on the "status" question. To test the validity of each narrative, we created a study identifying

[160] *Id.* at 910 (claiming in "Table 2" of their piece that *Sosa* "resolved" the debate about the "scope and sources of CIL" to be applied by courts in ATS litigation and that *Sosa* calls for a "[l]imited set of CIL norms, with increased emphasis on the practice of nations"). To be fair, not all scholars who interpret *Sosa* as endorsing a return to traditional state practice would self-identify as revisionists. *See* John O. McGinnis, Sosa *and the Derivation of Customary International Law*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 28, 488–89 (interpreting *Sosa* as endorsing an "inductive methodology" for CIL that not only calls for "hard evidence of actual state practice . . ." but that also "reflects the movement to positivism contained in *Erie*.").
[161] *Id*. at 493 (observing that *Sosa*'s positivism "may have important implications for deriving customary international law even outside the context of the ATS.").
[162] *See* discussion *infra* Part VI.

various sources that courts cite to as evidence of CIL, and then we tracked how citation rates to these sources evolved over time.

We strategically divided the data into specific eras based on three game-changing cases: *Erie*, *Filartiga*, and *Sosa*. If the "state practice" story holds up, then these time divisions should make little difference: with or without *Erie*, state practice would always be there as CIL's positive foundation. If the data reflected this assertion, then we would be vindicating not only Dodge and Henkin, but also the traditional ICJ definition of CIL. If the "international consensus" story played out in practice, then the 1980's would be a crucial turning point in our data. Although Goodman, and Jinks credit *Sabbatino* for giving courts the "sliding scale" to work with, it also credits *Filartiga* and its progeny for solidifying the sliding scale as the accepted form of judicial practice. Thus, we would probably see an increase in citations to "verbal assent" variables after the 1980's. Finally, if our data vindicated the "revisionist story," then we would see higher citation rates to traditional state practice sources before *Erie*, higher citation rates to "verbal assent" sources after *Filartiga* (and after World War II, generally), and then an increase in traditional state practice sources in ATS litigation and other cases after *Sosa*.

Taking these three narratives together with general academic CIL accounts, we summarize our predictions as follows:

- First, in the 1790-1938 pre-*Erie* period, with federal courts applying the "general common law," we would expect to see a higher rate of citation to foreign (especially British) cases and academic treatise writers, as well as a fairly high rate of citation traditional evidence of state practice.
- Second, in the post-*Erie* period, we should expect to see a difference between the 1938-1980 period (before the emergence of the modern position via *Filartiga*) and the 1980-

2015 period (after its emergence). Furthermore, if the prevailing *Erie* scholars on both sides of the debate are correct, then this difference should show up most significantly in cases involving individual rights and especially in the ATS cases.

- Third, we should generally expect to see an increase in citations to international sources after *Filartiga*. If Dodge and Henkin are correct, then the vast majority of these sources will be the types that are traditionally associated with state practice; what's more, we would expect to see these state practice variables consistently throughout the ages. If Koh, Goodman and Jinks's "international consensus" view is correct, then we should see citations to UN materials, international committee materials, treaties, and other types of international legal instruments increase after 1980, since *Filartiga* would have supposedly propagated *Sabbatino*'s "sliding scale" approach by then. Finally, if the revisionists are right and *Sosa* really did signal a switch back to grounding CIL in state practice, then we can expect to see traditional state practice variables making a comeback in our data between 2004-2015.

Armed with these predictions, we examined the data.

## V. METHODOLOGY

We designed this study with a particular aim in mind: to set aside what judges say that they are doing and to uncover what they are actually doing in cases where U.S. federal courts apply CIL.[163] To do so, we first created a database of federal cases that were decided in the United States between the early 1790's up until 2015. Although much of the scholarship regarding *Erie* and CIL focuses on Supreme Court cases, we tried to ensure that our database included case law from the Supreme Court, the Circuit Courts, and from various U.S. federal

[163] The basic methodology is taken from Choi & Gulati, *supra* note 15.

district courts[164] so that we could capture a more comprehensive picture of how courts across the entire federal judicial system discern CIL. Next, we identified individual opinions within each case in the database —including majority opinions, concurring opinions, and dissents—that discussed CIL, and created a database of CIL determinations. We included cases that both found CIL and did not find CIL, and if a given opinion covered multiple issues that yielded separate CIL determinations, we entered each issue as a separate entry on the spreadsheet.

To construct our database in a fashion where we were both obtaining an adequate sample from each level of court and also sampling the cases that the key authors in the debate were looking to, we used two strategies. First, to obtain a sample of cases that the key players in the CIL debate themselves considered important enough, we fished through their articles for all the cases that they attached importance to. Our proxy for determining whether a case was important was whether it was discussed in the text of the article as relevant to the debate. The authors whose canonical articles we mined were those by Bradley and Goldsmith, Stephens, Koh, and Young.[165] We then also went through the chapters of the volume edited by Dodge, Sloss and Ramsey that is widely considered to be the best compilation of authoritative accounts of how CIL has evolved over history in the U.S.[166] Here, we did not code every case mentioned, but instead looked to get an equal representation of cases from every decade between 1790 and the date of publication of the volume, 2011. The foregoing method yielded primarily cases from the Supreme Court and to a lesser extent the Circuit courts. To supplement the latter, we added in a random set of cases we obtained from Westlaw using searches for cases that used the terms "customary international law", "custom" (in conjunction with international law), or the "law of

[164] The database also includes a tiny batch of cases from the original U.S. Circuit Courts that Congress established shortly after it enacted the Judiciary Act of 1789. *See e.g. Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793).
[165] *See* sources cited *supra* notes 4, 5, and 14.
[166] INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

nations". Overall, we tried to obtain roughly the same number of observations from each of the types of courts (Supreme Court, Circuit court, and district court) and also across the pre and post *Erie* periods. Our initial goal was to obtain between 250 and 300 observations; the total we ended up with was 267. Of these observations, 97 were from the Supreme Court, 71 from the Circuit courts and 98 from the district courts. In terms of *Erie*, 121 observations were from before *Erie* and 146 after.

After isolating each CIL determination, we selected "variables" based on what the relevant literature commonly cites to as sources of CIL. Then, for each CIL determination, we tallied the number of unique evidentiary items (pertaining to the variables) that the court cited to as definitive evidence of CIL. For example, if a legal opinion cited to Blackstone's *Commentaries on the Laws of England* and to Vattel's *The Law of Nations*, the evidentiary item count in the "Academic Sources" column of the spreadsheet for that case would be a "2."[167] Ultimately, we estimated counts of sources being cited to in each entry by giving a maximum score of "1" if a specific type of source was cited to (so, if a case cited to 6 domestic statutes, that case would receive a score of "6" for the "Domestic Statutes" category), which gave us the fraction of CIL determinations that used each source.

Ultimately, we selected eleven types of sources as our variables to code for:

**Academic Sources:** This category covers a broad range of materials from legal academia, including everything from treatises and international law digests to law review articles. Sometimes—especially in the pre-*Erie* cases—judges would refer to specific treatise writers without citing to or quoting from a specific work. In such instances, we would code these mentions of the authors as an academic source. On the other hand, whenever courts cited to

[167] Note: we only coded whether specific sources were cited to more than once. For example, if a court cited to Blackstone's *Commentaries* ten times within the same opinion, we would tally that source only once under the "Academic Sources" column, not ten times.

multiple works from the same author, we coded each individual work as a separate academic source. This category not only includes both U.S. and international sources, but it also represents a variation of perspectives: from the "natural law" philosophies of Grotius and Vattel, to the pro-modern position literature that Bradley and Goldsmith expected judges to increasingly rely on after 1997.[168]

**Domestic Cases:** Whenever judges cited to a case decided in any U.S. court, we coded that case under the "Domestic Cases" variable. For example, if a judge sitting on the Eleventh Circuit cited to three Eleventh Circuit cases, five Supreme Court cases, one federal district court case, and one state court case, we would code all ten of these cases as domestic cases. Ultimately, we coded such a small number of state court cases that we did not feel justified in splitting this variable into two separate ones for federal cases and state cases.

**Domestic Statutes:** Here, we coded any federal or state statutes that judges cited to as evidence of CIL. As with the materials we coded under the Domestic Cases variable, most of what we coded here were federal as opposed to state sources.

**Treaties:** This variable included any treaties and other international agreements between states. Along the way, we took note of the number of treaties that courts specifically referred to as codifications of state practice. In keeping with the revisionist label of "verbal assent" evidence, we note here that treaties fall under this category.

**UN Resolutions:** As with treaties, this type of evidence would also count as "verbal assent" for revisionists.

**UN/League Conference and Committee Reports:** As with treaties and UN resolutions, this type of evidence would also count as "verbal assent" for revisionists.

[168] Bradley & Goldsmith, *supra* note 5, at 875 ("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.").

**International Tribunal Sources:** This variable accounted for any cases, charters, or statutes coming out of international tribunals such as the ICJ, the ECJ, the ICTY or the Nuremberg Tribunal, to name a few.

**International Committee Reports:** This variable accounted for any non-UN reports from committees such as the International law Association or the Red Cross. We also marked this as a "verbal assent" variable.

**Actions by States:** This variable describes the traditional evidence for state practice. Basically, whenever we encountered a court finding CIL when "State 'X' did 'Y,'" we coded it under this variable.

**Statements from State Officials:** A typical source of *opinio juris,* we used this variable to track Attorney General letters, letters from secretaries of state, presidential proclamations, or even military handbooks, among other official statements.

**Parties Agreement:** This variable accounts for whenever parties to the litigation in a case agree that a rule or norm amounts to CIL. We found that the vast majority of the cases we coded barely cited to this type of evidence. Consequently, this paper will not devote too much analysis to this variable.

After selecting our variables, we had to make a judgment call about how to divide the time periods we coded. The two breaks in time that we chose to do our comparisons across were first, of course, before and after *Erie* in 1938. Secondarily, and within the post-*Erie* era, we looked at the pre and post-1980 periods, all in keeping with the idea that the Second Circuit's 1980 *Filartiga* decision and the Restatement (Third) Foreign Relations in 1987 constituted the two pillars of the move toward the modern position.[169] Finally, we further broke the post-1980

[169] Bradley & Goldsmith, *supra* note 5 at 831–34.

period into pre and post-2004 periods, so that we could test the revisionists' theories regarding *Sosa*.

## VI. RESULTS AND ANALYSIS

Our results tell a story of the kinds of materials U.S. federal courts have looked to over roughly a 200-year period as their authority in making CIL determinations. We begin by describing the overall numbers and then break the results down into component parts, first by types of court and then in terms of the types of cases. Table 1A reports the overall counts in terms of the numbers of pieces of evidence of each type cited; Figure 1A provides a graphical representation of the same.

### A. Overall Picture

[insert Table 1A and Figure 1A – from Appendix]

From the first column, of Table 1A, we see that the dominant form of evidence cited across the 200 plus years is the domestic case. Academic materials come next. These two sources of evidence, added together, are more important in aggregate number of citations than the other eleven sources of evidence put together. Direct evidence of the two types of materials that, theoretically, should be driving every determination of CIL–evidence of state practice and *opinio juris* (the two elements of the textbook formulation of when CIL forms)–seems relatively unimportant to U.S. federal courts investigating CIL matters. And that is so whether one views state practice narrowly as just what is counted by the Actions of States variable or also including Foreign Statutes, Foreign Cases, or any other variables that may fall under the "verbal assent" label.

Interestingly, Table 1A and Figure 1A show us that domestic cases dominate the field both before and after *Erie*, and we also see that academic sources remain in second place, both

before and after *Erie*. In terms of overall numbers of citations to the dominant form of evidence used by US courts in CIL determinations—their own pronouncements in prior cases—then, there seems to have been no radical change in the behavior of the federal courts in CIL determination before and after the 1938 Supreme Court case that scholars have spent decades arguing over.

A critic might dismiss any concerns over the results in Table 1A, pointing to the well-known tendencies of US federal judges to cite multiple prior federal court cases in their opinions, even on trivial matters where a single cite might suffice. Furthermore, there is also the problem of outliers where we might have a handful of courts that cite to lots of a particular type of a material. To correct for these two foregoing possibilities, we provide an alternate representation of the data in Table 1B, Table 1C and Figure 1B. Instead of reporting raw counts of the number of materials cited, we report the percentage of determinations where a type of material was cited at least once. We also look to see whether there are statistically significant differences across the time periods in terms of the fractions of materials that are cited to as authority. The method of looking at the data utilized here, in terms of fractional use, avoids the problem of having a handful of cases where there are a disproportionate number of cites to a particular type of evidence. For example, therefore, if a particular Supreme Court case such as *The Scotia* cites to 40 different pieces of evidence of state practice, we count it here as just 1 (whereas in the prior representation it would have been 40).

It is worth reiterating here that at least some of the authors in the *Erie* debate would probably not have predicted big changes at the time *Erie* was decided. Rather, they imply that *Erie's* relevance to CIL determinations came to prominence in the 1980s, when the Second Circuit decided *Filartiga v. Pena-Irala* and the Restatement (Third) was published. That debate then supposedly gets impacted by the Supreme Court's decision in *Sosa v. Alvarez-Machain* in

2004 (the direction of the impact of *Sosa* is contested). To test these effects, we break the data down into the pre- and post-1938 periods (*Erie*), and then the pre- and post-1980 periods (*Filartiga*/Restatement) and the pre and post 2003 (*Sosa*) periods.

Viewing the results in terms of the correction mentioned above, and in terms of significance tests across time periods, we see a more nuanced picture of the changes over time. As a threshold matter though, we see that despite the corrections described, domestic cases and academic materials still show up as the most utilized pieces of evidence by a significant margin (the former are cited to in 76% of all CIL determinations, the latter in 69%). By contrast, evidence of Actions by States—the core of what we would expect evidence of state practice to be—shows up at near the bottom (cited to in only 7% of determinations).

In terms of effects over time though, we see that academic materials drop significantly in importance during the post-*Erie* period. This drop, however, does not occur immediately after *Erie*. Indeed, there is actually an increase in the 1938-1980 period from citations to academic materials in 75% of all CIL determinations to 88%. Rather, the drop is in the post 1980 period; and it is big—from citations to academic materials in 88% of determinations to 57%.

[insert Table 1B, Table 1C, Figure 1B – from Appendix]

To the extent that the academic citations for the pre-*Erie* period were primarily to the natural law masters such as Grotius, Pufendorf, Vattel and so on, we may be seeing a clear move away from "finding CIL" in the works of natural law scholars and foreign (mostly British) common law cases perspective.[170] And indeed, we do find a simultaneous big drop in the post-

[170] Although we did not count specific numbers here, our impression from coding the cases is that as citations to international digests died out, the most-cited treatise we coded was the Restatement (Third). Since the Restatement arguably reflects the modern position, this could be (with further research) a potentially revealing tidbit.

1980 period from citations to foreign cases in 37% of determinations to citations in 7%.[171] However, that we do not know whether courts were citing to academic materials in the pre-1980 period because of the natural law perspectives on international law or because these materials provided useful aggregations of state practice and *opinio juris* at the time. Part of the reason for this ambiguity is that, frankly, most judges in the cases we coded cited to academic sources without explaining why. Clearly, they did not have us or our study in mind when they crafted their opinions. Whatever the reason, there is a dramatic drop in the post-1980 period in US federal courts looking to academic materials and to foreign cases (and foreign statutes for that matter) for assistance in their CIL determinations.

In terms of other significant results, it is interesting (and puzzling from a revisionist standpoint, we think) that the shift toward citing more domestic statutes does not occur simultaneously with the shift away from citations to academic material. Instead the shift toward domestic statutes occurs immediately after *Erie*, in the post-1938 period, forty years or so before the shift away from academic sources (and foreign cases/statutes). The real story of how federal judges have chosen their sources for CIL determinations played out in stages: stage one, the move toward citing domestic statutes more, shows up post-1938, and stage two, the shift away from citing academic materials (assuming they were of the natural law variety) and away from foreign cases/statutes, shows up forty years later, in the 1980s. The largest shift in the post-*Erie* period, however, is toward more citations to domestic cases (from citations in 59% of CIL determinations pre *Erie* to roughly 90% after). And that shift is not one that is predicted or even commented on by any of the players in the CIL debate described earlier in the first part of this article.

[171] Our impression from the coding was that the vast majority of these cases were British. This fact (and the drop in the citations to these materials) might counter the claim that judges have continued applying CIL as a type of general common law inherited from England. We did not count specific numbers here though.

Although the shift toward citing more domestic statutes as support for CIL determinations is consistent with the revisionist position, one can by no means conclude that the post-*Erie* shift was all in the revisionist direction.[172] That is because the other big significant shifts we see around the time of *Erie* are toward more citations to international materials indicative of verbal assent: UN resolutions, international committees, international tribunals, and international treaties. The most significant of these shifts is the increased citation to treaties, which is roughly the same size shift (10-15% to around 30-35%) as we saw with citations to domestic statutes.

To summarize, our data seems to lend at least some support for both the "revisionist" story and the "international consensus" story. On the one hand, U.S. federal courts seem to heed what revisionists consider the dictates of *Erie* by citing more to domestic statutes after 1938. And then there seems to be something of an *Erie* tailwind in the post-1980 period, with significant reductions in citations to academic materials and foreign domestic sources. On the other hand, not all of the movement on the citation front is inward-looking. On the "international consensus" front, we see significant increases in the post-1938 era citations to at least some of the types of sources that Goodman and Jinks associate with consensus, such as international tribunal decisions and materials coming out of the UN and international committees. Among the international consensus or "verbal assent" variables, the most significant trend we see is a move toward greater citations to treaties. In the 1980-2015 period, treaties are cited in 45% of all determinations (in the pre-1938 period, that fraction was 14%).

[172] The revisionist position, at least the Bradley and Goldsmith 1997 variety, isn't just that *Erie* mandated a move toward domestic sources of law, but rather that *Erie* requires that CIL be positively incorporated into domestic law through two specific domestic sources—the US Constitution and federal statutes—before courts can rightfully apply CIL as federal common law. So, from this perspective, the finding that domestic cases are the most-cited source may be troubling for the revisionists even before we get to the increase in citations to international sources. That is, the domestication that revisionists look for is not the same kind of domestication we found here.

One question we had was whether the increased citations to international materials vindicated the "state practice" story in any meaningful way. We tried to unpack the citations to treaties further to examine this question. Treaties, of course, come in all sorts of shapes and forms. Some of them reflect a codification of state practice and some of them reflect the opposite; that is, a treaty is necessary precisely because there is no prevailing practice among nations about how they are going to behave under certain circumstances. To examine what fraction of our citations to treaties were to practice-reflecting treaties, we coded for whether the court explicitly said that the treaty codified state practice or not (something that we had seen courts doing in a few cases in our initial coding). Overall, we found that it was only about 5% of treaty citations where the court said that the treaty reflected any sort of generalized state practice.[173] In other words, while the increase in citations to treaties strikes us as noteworthy for the "international consensus" story, it does not, at least at first cut, seem to be the product of courts looking for evidence of traditional state practice.

While we do find a number of significant effects of the breaks in time in the 1930s and 1980s, we do not see as many key shifts in court behavior around the time of the Supreme Court's decision in *Sosa* other than a continued increase in citations to domestic statutes. In fact, citations to domestic statutes surpass citations to treaties in the years between 2004 and 2015, which perhaps should provide some comfort to revisionists. Nevertheless, citations to verbal assent variables—especially international tribunal cases and international committee materials—continue to increase during this period (at minimum, their citation rates have stabilized). Citations to the acts of states, on the other hand, remain at the meager 5% level, which does not mesh with the "revisionist story" of a return to citing traditional state practice for CIL. More

[173] Choi and Gulati find essentially the same result in their examination of international tribunal determinations of CIL. *See* Choi & Gulati, *supra* note 15.

importantly, none of these variables surpass domestic cases or academic sources, which continue to occupy the number one and number two slots, respectively. In that sense, *Sosa* might not be as dramatic of a turning point as the "revisionist story" posits.

The next question is whether these seemingly contradictory effects are occurring primarily in different types of courts or cases.

**B. Type of Court**

The existing academic research into CIL determinations in US domestic courts has tended to focus primarily on the pronouncements of the US Supreme Court and to a lesser extent on determinations from a small number of Circuit court cases. The vast majority of determinations, however, are made at the district court level—and district court judging, researchers have found, tends to be far more constrained than that on the High Court.[174] So, the question was whether we would see different patterns in CIL determinations at the different court levels.

[insert Table 2A and Figure 4.3 – from Appendix]

For the sake of simplicity, we present only one table with the breakdowns across the different types of courts, Table 2A. This table reports on the percentages of types of materials being cited at least once in each CIL determination. We see in Table 2A that there are some statistically significant differences that stand out. Unsurprisingly, given what we saw earlier, we find that citations to domestic cases dominate across all three types of courts. Further, these increases are large and statistically significant in the post-*Erie* period for two of the three sets of courts (trial courts and the Supreme Court). To a lesser extent, we see also significant increases to citations to international materials. But overall the general trends seem to be in the same direction in all three types of courts (to the extent that there are differences, they are likely the

[174] *E.g.,* Lee Epstein, William M. Landes & Richard A. Posner, THE BEHAVIOR OF FEDERAL JUDGES (2013).

product of the differences in the numbers of cases). Parsing the data further, in terms of the additional time breaks we showed in the prior subsection (*Filartiga*, *Sosa*), does not add much and we do not report that additional material here.

**C. Type of Case**

To the extent there is some overlap between the "international consensus" story and the "revisionist story, it is in that both revisionists and modern position advocates suggest that the types of CIL determinations occurring in ATS and individual rights cases (which almost all would have shown up in the post-*Erie* period) were different. Given that there was little state practice to support the proposed CIL rules on many human rights matters (past state practice in many cases, if anything, went in the other direction), scholars have suggested that CIL determinations in this area might have looked more to looser types of evidence—UN materials, international committee reports and human rights treaties—than they would have in more traditional types of CIL determination.[175] As we mentioned earlier, revisionists refer to these looser types of evidence as "verbal assent."

[Insert Table 3 and Figures 3A, 3B, 4.1 and 4.2 – from Appendix]

To examine the foregoing question, we broke the data down in two ways. First, we coded each of our CIL determinations for whether the issue was one involving interstate relations (e.g., diplomatic immunity) or individual rights (e.g., torture of a domestic citizen). Second, we coded the determinations for whether the case had been brought under the ATS or not. Tables 3 and Figures 3A and 3B report the results we found. Basically, we found few indications that courts were doing anything significantly different in individual rights or ATS cases than they were in other types of cases. Perhaps some of these theorized differences might have manifested themselves had courts been actually searching for evidence of state practice in cases with topics

[175] *See* Roberts, *supra* note 12, at 757–60 (2001).

under "traditional" international law. But our data shows quite clearly that traditional sources of state practice are simply not that important to courts making CIL determinations. And, as a corollary, big differences between the types of cases don't show up as a function of individual rights/ATS.

## VII. IMPLICATIONS

After testing three *Erie*-based approaches to the CIL "sources" question, our study's main takeaway is that whenever U.S. federal courts decide issues based on CIL, the number one source that they consult has always been domestic case law, with academic sources trailing behind in second place.[176] In other words, the CIL that U.S. federal courts apply appears to be mostly a creation of their own making (or common law making, if you will), and the rest of it comes from "the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals."[177] Only after consulting these two sources do federal judges figure international materials into their CIL analyses. This trend started before *Erie*, and it has continued after *Erie*. Not even the supposedly game-changing advent of human rights litigation managed to dismantle domestic case law from its first place slot.[178]

However, we did correctly predict an increase in international sources after *Erie* generally, with most of this increase spiking after the 1980 *Filartiga* decision. To what extent, then, has our data vindicated the "state practice" story or the "international consensus" story? Up until this point, we have discussed "state practice" and "international consensus" as separate and distinct concepts, where the former includes both traditional state practice and the sorts of "verbal assent" sources that revisionists deride as mere "cheap talk." As we have pointed out

[176] *See supra* Table 1A and Figure 1A.
[177] Sohn, *supra* note 21, at 399.
[178] Ryan Scoville conducted a similar study to ours with roughly the same methodology, only his piece focuses exclusively on post-*Sosa* US case law. In that study, citations to domestic sources came out on top. *See* Ryan M. Scoville, *Finding Customary International Law,* IOWA L. REV. (forthcoming April 2016).

repeatedly, however, the international legal community continues to debate the meaning of "state practice." On the one hand, many regard actual state actions as the truest evidence of practice, the idea being that words are more indicative of *opinio juris.*[179] As far as others are concerned, the idea that so-called "verbal" evidence of CIL counts as "state practice" is pretty much settled, in which case "state practice" and "international consensus" would effectively become interchangeable terms.[180] This ongoing disagreement begs the question: should these conflicting definitions of state practice substantially affect how we analyze our own *Erie* data?

In a way, it certainly should (and does). If we shelve verbal assent to the side and adopt a traditional conception of state practice, then at least some of the modern position's arguments regarding CIL seem to crumble. Consider William Dodge's claim that CIL is immune from *Erie's* positivist mandate because it has always been grounded in state practice as its positive authority.[181] True, the citation rates to "actions by states" have never been 0%, but they have been only 10% or less in any given era.[182] If state practice consists only of the concrete acts that nations take, then CIL's positive foundation may be too meager to survive *Erie* in the way that

[179] *See* discussion *supra* pp. 4–5. *See also* Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication, in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD, *supra* note 15, at 53 (describing the "debate in the literature" about "whether verbal acts by states can be considered a form of state practice. Those who object to such classification worry that these acts will end up being 'double counted' as both practice and evidence of *opinio juris."*).

[180] *See* Omri Sender and Michael Wood, *Custom's Bright Future: The Continuing Importance of Customary International Law, in* CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD, *supra* note 15, at 368 ("[S]everal long-standing theoretical controversies related to customary international law have by now been put to rest. It is no longer contested, for example, that verbal acts, and not just physical conduct, may count as 'practice.'") s*ee also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102 cmt. b (1987) (explaining that "state action" can take the form of "diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy, whether they are unilateral or undertaken in cooperation with other states").

[181] *See* discussion *supra* pp. 20–21.

[182] *See* Table 1B, Table 1C, Figure 1B.

Dodge or Louis Henkin propose. The bad news extends to revisionists as well, quashing their hopes for a post-*Sosa* comeback of traditional state practice variables.[183]

If, however, we expand the meaning of practice to include evidence of verbal assent—such as statements by state officials, U.N. resolutions, committee reports from the International Law Commission, international tribunal decisions, or recitals in treaties and other international agreements—the result resembles the very concept that Goodman, Jinks, Koh and others have labeled as "international consensus." Assuming that the Dodges and Henkins of the world adopted this construction of state practice, then the modern position's two "camps" we described earlier in our predictions would merge into a single "consensus" camp.[184] If we revisit the data under these circumstances, do the theoretical foundations of this "consensus" camp fare any better than those of the traditional practice camp?

The answer to this last question is less straightforward. In theory, as Koh sees it, federal courts exercise less judicial discretion when making CIL than they do when making other kinds of federal common law, "as their task is not to create rules willy-nilly, but rather to discern rules of decision from an existing corpus of customary international law rules."[185] Put differently, CIL norms qualify as federal common law only after "a clear international consensus" has sufficiently "crystallized" them.[186] Derek and Jinks have already argued that we should see this theory play out in judicial practice in the form of the *Sabbatino* "sliding scale."[187]

After re-examining our own data, however, we find ourselves unsure whether to agree or disagree on this point. Although we do see increasingly higher citation rates to these

[183] See discussion *supra* pp. 29-30. *See also* Table 1B (Citations to "Actions of States" staid at 5% after 1980, indicating no change after *Sosa* in 2004).
[184] *See* discussion *supra* Section IV.c.
[185] Koh, supra note 4, at 1835.
[186] Koh, *Transnational*, *supra* note 54, at 2385-86 (asserting that "over the centuries," federal courts "determine whether a clear international consensus has crystallized around a legal norm that protects or bestows rights upon a group of individuals that includes plaintiffs.").
[187] Goodman & Jinks, *supra* note 7, at 482.

international consensus variables over time—with treaties making the most dramatic leaps—the citation rates to every single one of these variables still pales in comparison to the citation rate to domestic case law at all times.[188] For that matter, most of the verbal assent variables also have consistently lower citation rates than academic sources do, including after 1980 when citations to academic sources dropped. Even when treaties reached citation rates in the 30's and 50's percentiles, they were still trailing behind citation rates for domestic cases, which were consistently valued around 90%, give or take a few percentage points. Even if federal judges are consulting an "existing corpus" of CIL rules, they seem to be relying even more heavily on an existing corpus of U.S. judges' interpretations of those rules.

Therefore, we believe the operative sources-related question for the modern position is this: just how much international consensus is enough? In other words, what do the citation rates to international sources have to be in order to conclude that judges have sufficiently "crystallized" a CIL norm into justiciability in U.S. federal courts? Put yet another way, at what point is the gap between citations to domestic cases and citations to international sources so wide that we may justifiably accuse judges of "creating CIL rules willy-nilly" rather than discerning them from an "existing corpus of customary international law rules"? For now, we leave this question open for champions of the modern position to answer—perhaps with a more detailed analysis of the data.

Setting the "consensus" versus "state practice" issue to the side, we still had difficulty accounting for the high citations to treaties over time. As we mentioned earlier, our results cut against any argument that courts have been citing to treaties as codifications of state practice.[189] Another possibility, then, is that courts have been making a revisionist attempt to incorporate

[188] *See* Table 1B.
[189] *See* Results and Analysis *supra* p.42.

CIL into domestic federal law through treaties.[190] We dismissed this idea, however, because many of the treaties that we saw courts citing to are ones that the United States has not ratified and that, therefore, are not part of federal law.

Some have argued that treaties are a problematic source for CIL, for they are "good evidence of what states want the law to be, but they are not necessarily good evidence of what the law is."[191] If anything, the increased citation to treaties may reflect the modern emergence of *opinio juris* as a normative concept: one that focuses less on whether states actually consider themselves legally obligated to act and more on whether states believe that such a legal obligation ought to exist.[192] If that is the case, then the increased citation to treaties after *Erie* yields a new breed of "brooding omnipresence in the sky": replacing the natural law principles of pre-*Erie* times with an "august corpus" of new, "aspirational" norms from which federal judges can "make" CIL.[193]

On the other hand, the rise of this new omnipresence seems short-lived, as the citation rate for treaties drops from 55% to 38% in the years following the *Sosa* decision.[194] At the same time, citations to domestic statutes increased from 39% to 45%.[195] In a way, perhaps these simultaneous shifts signal a partial victory for revisionists, who not only advocate for positive

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[190] *See* Bradley & Goldsmith, *supra* note 5, at 819–20 ( ". . . 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."); *see also* Bradley, Goldsmith & Moore, *supra* note 41, at 87 ("[B]ecause 'the federal lawmaking power is vested in the legislative, not the judicial, branch of government,' federal common law must be grounded in extant federal law: the Constitution, a federal statute, or a treaty.").

[191] Choi & Gulati, *supra* note 15, at 129 ("[T]he need for a treaty will often arise because of the absence of law, not when it is widespread and well established.").

[192] *See* Roberts, *supra* note 12, 775–77; s*ee also* Kadens & Young, *supra* note 1, at 908 (("More often nowadays, *opinio* [*j*]*uris* is found in normative statements—U.N. General Assembly Resolutions, aspirational treaty language, and the like. Such statements, which are generally divorced from actual state practice, are more like statements about the moral obligation or reasonableness of a principle than they are an account of why states do what they do.").

[193] Also along this vein, *see* Szewczyk, *supra* note 152, at 123 (suggesting in his own empirical study what he calls "emerging custom" embodies this "brooding omnipresence" concept).

[194] *See* Table 1B.

[195] *See id.*

incorporation of CIL through domestic federal statutes after *Erie*, but also anticipated a decreased reliance on "verbal assent" sources (such as treaties) after *Sosa*. Again, this victory is merely partial, for the revival of traditional state practice citations did not emerge after *Sosa*. Furthermore, federal judges have not been domesticating CIL through statutes and the US Constitution so much as they have been domesticating it through an overwhelming reliance on US case law.

On that note, whenever we try to analyze the data within the framework of the *Erie* debate, we continuously come back to the one finding that nobody from the debate anticipated: the prevalence of domestic cases as the primary source for determining CIL. After wading through the august corpus of *Erie*/CIL literature, we could not find a single scholar positing a post-*Erie* increase in citations to domestic cases for CIL. More often than not, the existing commentary cuts in the opposite direction.[196] If our data has confirmed anything, it is that there is something less international and more self-referential about the customary "international" law that U.S. federal courts have been applying.

Should this reality bother us? On the one hand, perhaps it should not. After all, is it not customary in our courts for federal judges to cite primarily to federal precedent, which would be mandatory authority in their jurisdictions? Perhaps by following themselves, US federal judges are engaging in a more pragmatic form of common law decision-making – what a legal realist

[196] Koh, supra note 4, at 1835 (arguing that judges exercise less judicial discretion when adjudicating CIL). *See also* Neuman, *supra* note 52, at 376 (asserting that federal courts "exercise a limited role" when applying CIL because they can "apply only those norms that external evidence demonstrates embody genuine international legal obligations binding on the United States.). Like Koh, Neuman insists that federal judges do not just create CIL rules based solely on their independent judgment. *See id.* ("As legal realists, we know that judges have discretion at the margins in recognizing and applying these norms; but they do not exercise the innovating powers of State common law courts.").

would predict. Indeed, this is what Bradley in 2015 suggests courts both are doing and should be doing with CIL (in contrast to the Bradley of 1997).[197]

On the other hand, haven't both sides of the original *Erie* debate argued that CIL requires something extra before anyone can apply it as federal common law in US courts? Dare we suggest that this "something extra" should be state practice and *opinio juris*? Without citing to sufficient evidence of both, judges risk validating Patrick Kelly's critique of CIL as "lacking authority as law, because such norms are not, in fact, based on the […] general acceptance of the international community that a norm is obligatory." [198] Moreover, even if we all agreed that CIL enjoys the status of federal common law, we should still expect judges to apply CIL as traditionally defined; they would just be adding a U.S. federal law effect to it.

Perhaps the federal courts' heavy reliance on their previous case law does serve a useful purpose: namely, that of promoting efficiency and uniformity in US interpretations of CIL. We ourselves suggested earlier that gathering sufficient evidence of state practice is a nearly impossible task.[199] Rather than having US judges conduct that empirical inquiry each time they meet a CIL issue, it may make more sense for them to cite to the one or two judges who already did all the homework of collecting and compiling international materials to discern a "crystallized" CIL norm. From a practical standpoint, prior US decisions are easily accessible to US judges, possibly more so than the myriad international sources that judges (and their clerks) may not necessarily know to look for. Furthermore, if the first judge to face a given CIL issue did correctly discern the content of a CIL norm, then maybe the second judge should be able to cite to that first judge rather than replicate those efforts. The end result would be a consistent US stance on CIL rules that contributes to CIL formation globally.

[197] *See generally* Bradley, *supra* note 179.
[198] Kelly, *supra* note 11, at 452.
[199] *See* discussion *supra* Part I.

The federal courts' domestication of CIL may also increase their opportunities to directly apply CIL. A recent study by Pierre-Hughes Verdier and Mila Versteeg reveals that a growing number of nations regard domestic law as hierarchically superior to CIL, thus limiting their courts' ability to apply CIL directly.[200] In a way, the *Guaranty Trust Co.* case is an American, microcosmic example of Verdier and Versteeg's findings.[201] Perhaps by domesticating CIL in the way that they do, federal judges can elevate CIL closer to the top of this hierarchy, thus enabling courts to engage with international law more freely (although, obviously, our revisionist colleagues assert that we should be positively incorporating CIL into domestic law through other means).

Nevertheless, we ask again: at what point does CIL become too domesticated to constitute truly international law? To the possibility that judges cite to each other for efficiency purposes, we have two responses: first, whoever makes that claim bears the burden of producing actual evidence of this practice before we can assume that it is in fact happening; secondly, even if we find it acceptable to delegate the "crystallizing" to a small subset of judges in this way, our original question still stands: what percentages of international consensus variables should *they* be citing to? Ironically, we suspect that the highly domestic nature of our courts' CIL may resurrect the fears of some of Bradley and Goldsmith's critics, namely those who decried the American exceptionalism and anti-internationalism that made up the "New Sovereigntist" movement.[202] Still, if those fears do reappear, are they warranted?

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[200] Pierre-Hughes Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015) (surveying international law in domestic legal systems of 101 countries between 1815-2013).
[201] *See* discussion *supra* Part IV.b.
[202] *See* Spiro, *supra* note 67; *see generally* Scoville, *supra* note 178 (critiquing the under-inclusive [O]ccidentalism of CIL as applied in ATS cases).

All of the foregoing questions really boil down to one: what is customary international law, really? Although we cannot presume to adequately answer that last one, we hope that this study has breathed new life into this age-old inquiry.

## VIII. CONCLUSION

When we initially resolved to answer the CIL "sources" question, we identified three narratives from the *Erie* "status" debate that could possibly play out in practice. Instead, we found that whenever U.S. federal judges must determine CIL's content, they primarily consult what other U.S. federal judges have done and then, to a lesser extent, what academic treatments say. Only then do the views and actions of other nations and international organizations come into play. We have suggested a few ways in which these judicial practices affect the *Erie*/CIL debate, but for now, we will leave it up to the reader to decide whether these realities ought to bother us as a matter of principle. The main inquiry that we emphasize for now is whether highly domesticated, self-referential methods of CIL discernment detract from CIL's legitimacy as law.

If we were to conduct a similar study to the one we created here for other courts in the international legal stage, then perhaps we would find that the U.S. federal judiciary is merely dancing to the tune of more global trends in CIL application. As we noted earlier, even the dearth of citations to traditional state practice and the plethora of references to academic sources are not strictly American trends.[203] In fact, many of the trends we saw in our study resemble those followed by international courts, such as the ICJ, the ECJ or the ECHR.[204] Many of these courts cite to their own case law when determining CIL's content, and recent studies show that the ICJ increasingly derives "aspirational" CIL principles from treaties, a source that they cite to more

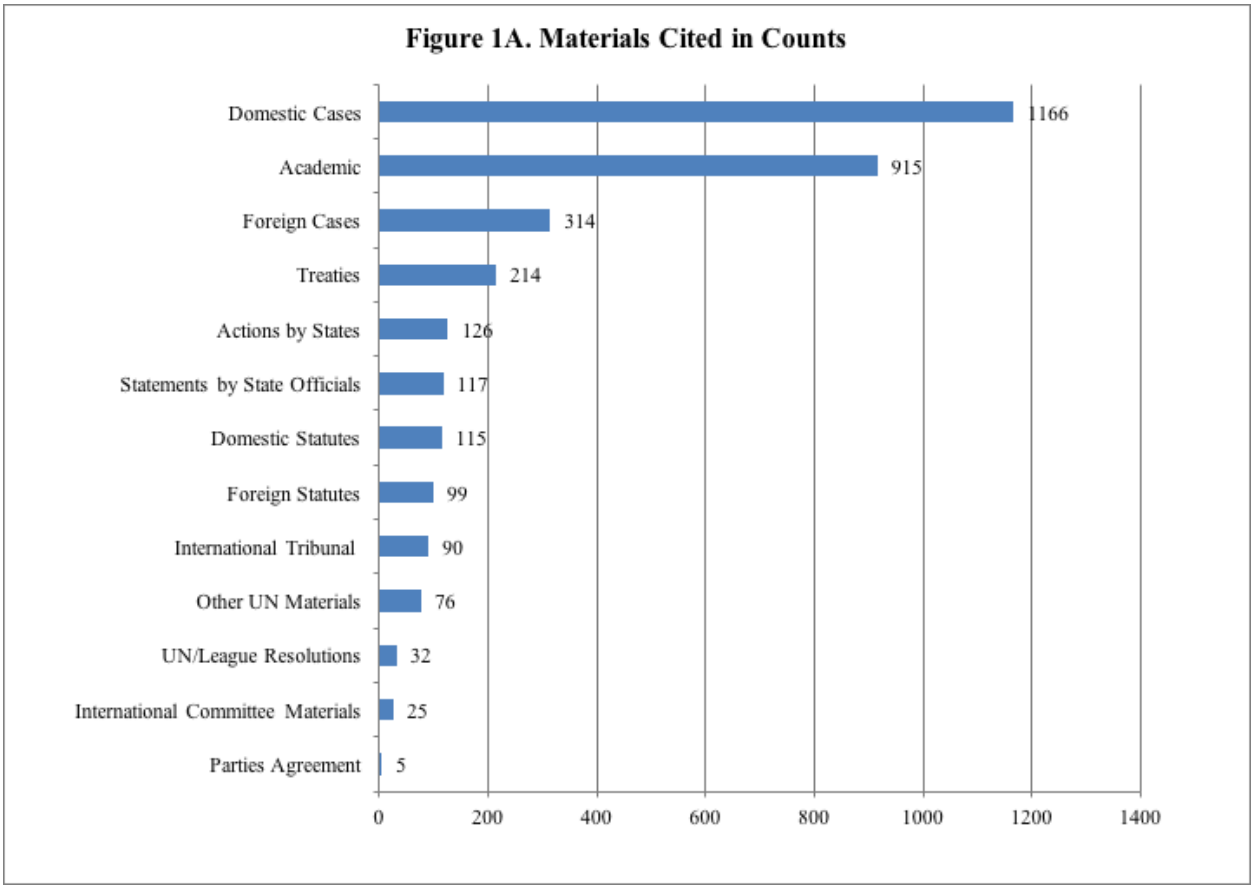
[203] *See* discussion *supra* Section I.
[204] *See* Choi & Gulati, *supra* note 15 (tracking CIL determinations in the ICJ). We also conducted a similar study to the one we present here, tracking sources cited to for CIL in ECJ and ECHR cases, but we have not published these just yet.

than any other.[205] Maybe those who credit World War II for changing how all nations determine CIL could conduct a study like ours on a greater scale to test if US federal courts' behavior differs significantly from what other jurisdictions do after the 1940s.

Until these next branches of research occur, we hope that the great *Erie* debaters will reconcile at least some of their theories with the realities of how federal judges actually discern CIL. In the process, we hope they will go beyond exploring CIL's place as "part of our law," revisiting with a more informed eye bigger questions about CIL as law, period.

[205] Choi & Gulati, *supra* note 15.

Appendix – Figures and Tables



| Table 1A. Materials Cited in Counts | | | | | | |
|---|---|---|---|---|---|---|
| | All 1700-2015 (N=267) | 1700-1937 (n=121) | 1938-1979 (n=49) | 1980-2015 (n=97) | 1980-2003 (n=42) | 2004-2015 (n=55) |
| Parties Agreement | 5 | 0 | 0 | 5 | 1 | 4 |
| International Committee Materials | 25 | 2 | 11 | 12 | 1 | 11 |
| UN/League Resolutions | 32 | 0 | 1 | 31 | 12 | 19 |
| Other UN Materials | 76 | 0 | 22 | 54 | 18 | 36 |
| International Tribunal | 90 | 5 | 25 | 60 | 13 | 47 |
| Foreign Statutes | 99 | 33 | 9 | 57 | 55 | 2 |
| Domestic Statutes | 115 | 22 | 27 | 66 | 17 | 49 |
| Statements by State Officials | 117 | 63 | 30 | 24 | 8 | 16 |
| Actions by States | 126 | 105 | 11 | 10 | 6 | 4 |
| Treaties | 214 | 35 | 28 | 151 | 68 | 83 |
| Foreign Cases | 314 | 210 | 96 | 8 | 4 | 4 |
| Academic | 915 | 471 | 269 | 175 | 87 | 88 |
| Domestic Cases | 1166 | 407 | 287 | 472 | 176 | 296 |

**Table 1B.Materials Cited in Percent**

| | All 1700-2015 (N=267) | 1700-1937 (n=121) | 1938-1979 (n=49) | | 1938-1979 (n=49) | 1980-2003 (n=42) | | 1980-2003 (n=42) | 2004-2015 (n=55) | |
|---|---|---|---|---|---|---|---|---|---|---|
| Parties Agreement | 2% | 0% | 0% | | 0% | 2% | | 2% | 7% | |
| UN/League Resolutions | 6% | 0% | 2% | | 2% | 14% | * | 14% | 15% | |
| International Committee Materials | 6% | 2% | 10% | * | 10% | 2% | | 2% | 15% | * |
| Actions by States | 7% | 10% | 6% | | 6% | 5% | | 5% | 5% | |
| Foreign Statutes | 9% | 12% | 16% | | 16% | 2% | * | 2% | 2% | |
| Other UN Materials | 12% | 0% | 18% | *** | 18% | 26% | | 26% | 20% | |
| International Tribunal | 12% | 2% | 10% | * | 10% | 19% | | 19% | 29% | |
| Statements by State Officials | 19% | 20% | 24% | | 24% | 14% | | 14% | 15% | |
| Foreign Cases | 23% | 31% | 37% | | 37% | 7% | *** | 7% | 5% | |
| Domestic Statutes | 25% | 13% | 31% | ** | 31% | 29% | | 29% | 45% | |
| Treaties | 29% | 14% | 35% | ** | 35% | 55% | | 55% | 38% | |
| Academic | 69% | 74% | 88% | * | 88% | 57% | *** | 57% | 51% | |
| Domestic Cases | 76% | 59% | 88% | *** | 88% | 95% | | 95% | 89% | |

*$p<.05$, ** $p<.01$, *** $p<.001$

**Table 1C.Materials Cited in Percent**

| | All 1700-2015 (N=267) | 1700-1937 (n=121) | 1938-1979 (n=49) | | 1938-1979 (n=49) | 1980-2015 (n=97) | |
|---|---|---|---|---|---|---|---|
| Parties Agreement | 2% | 0% | 0% | | 0% | 5% | |
| UN/League Resolutions | 6% | 0% | 2% | | 2% | 14% | * |
| International Committee Materials | 6% | 2% | 10% | * | 10% | 9% | |
| Actions by States | 7% | 10% | 6% | | 6% | 5% | |
| Foreign Statutes | 9% | 12% | 16% | | 16% | 2% | ** |
| Other UN Materials | 12% | 0% | 18% | *** | 18% | 23% | |
| International Tribunal | 12% | 2% | 10% | * | 10% | 25% | * |
| Statements by State Officials | 19% | 20% | 24% | | 24% | 14% | |
| Foreign Cases | 23% | 31% | 37% | | 37% | 6% | *** |
| Domestic Statutes | 25% | 13% | 31% | ** | 31% | 38% | |
| Treaties | 29% | 14% | 35% | ** | 35% | 45% | |
| Academic | 69% | 74% | 88% | * | 88% | 54% | *** |
| Domestic Cases | 76% | 59% | 88% | *** | 88% | 92% | |

*$p<.05$, ** $p<.01$, *** $p<.001$

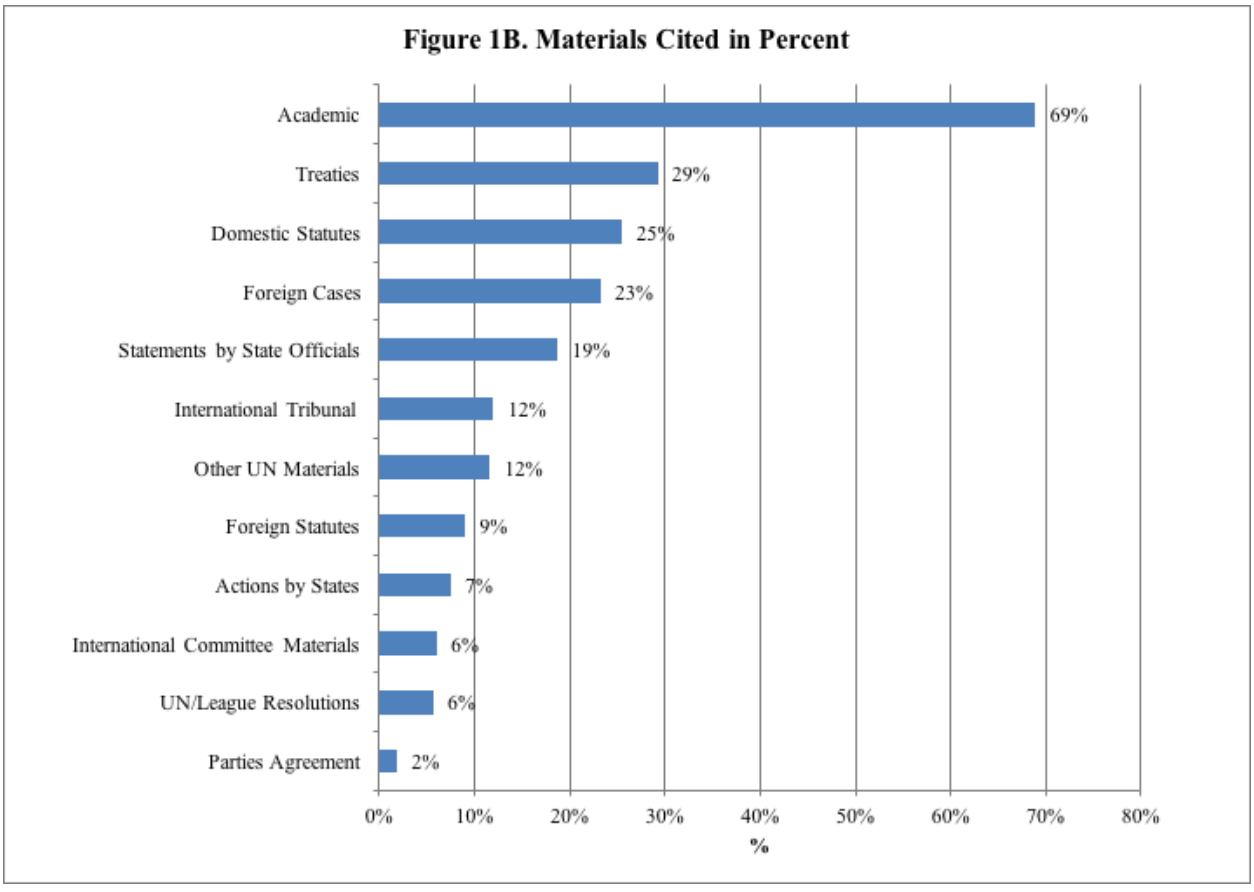


Figure 1B. Materials Cited in Percent
Academic
Treaties
Domestic Statutes
Foreign Cases
Statements by State Officials
International Tribunal
Other UN Materials
Foreign Statutes
Actions by States
International Committee Materials
UN/League Resolutions
Parties Agreement
69%
29%
25%
23%
19%
12%
12%
9%
7%
6%
6%
2%
0%
10%
20%
30%
40%
50%
60%
70%
80%
%

**Figure 2B. Materials Cited in Percent by Time Periods**

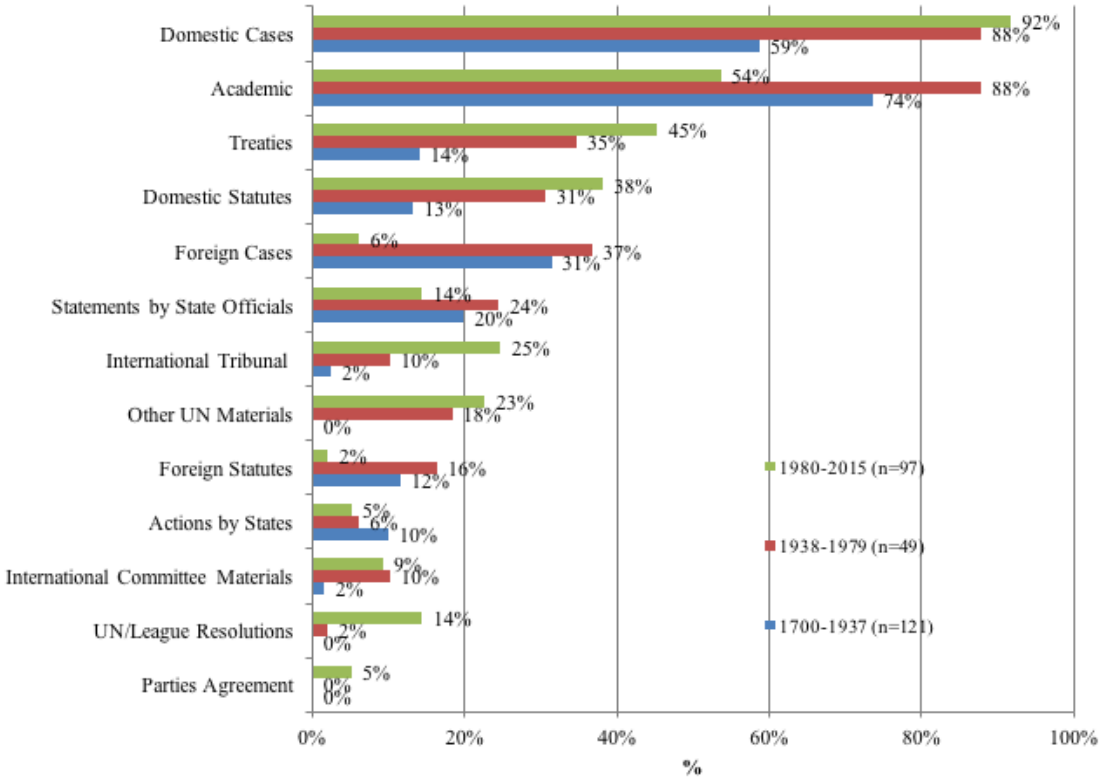



**Table 2B. Materials Cited by Type of Court**

| | Trial Court | | | Circuit Court | | | Supreme Court | | |
|---|---|---|---|---|---|---|---|---|---|
| | 1700-1837 (n=36) | 1838-2015 (n=62) | | 1700-1837 (n=10) | 1838-2015 (n=61) | | 1700-1837 (n=75) | 1838-2015 (n=22) | |
| Parties Agreement | 0% | 2% | | 0% | 7% | | 0% | 0% | |
| UN/League Resolutions | 0% | 5% | | 0% | 18% | | 0% | 5% | |
| International Committee Materials | 3% | 3% | | 0% | 15% | | 1% | 14% | * |
| Foreign Statutes | 17% | 35% | * | 0% | 10% | | 13% | 14% | |
| International Tribunal | 0% | 10% | | 10% | 28% | | 3% | 23% | ** |
| Other UN Materials | 0% | 11% | * | 0% | 28% | | 0% | 27% | *** |
| Actions by States | 14% | 5% | | 0% | 8% | | 9% | 0% | |
| Statements by State Officials | 33% | 8% | ** | 30% | 26% | | 12% | 18% | |
| Treaties | 11% | 26% | | 0% | 70% | *** | 17% | 23% | |
| Foreign Cases | 33% | 15% | * | 30% | 11% | | 31% | 36% | |
| Domestic Statutes | 17% | 35% | * | 10% | 39% | | 12% | 27% | |
| Academic | 78% | 52% | * | 60% | 70% | | 73% | 91% | |
| Domestic Cases | 69% | 94% | ** | 70% | 89% | | 52% | 86% | ** |

*$p<.05$, ** $p<.01$, *** $p<.001$

**Figure 3B. Materials Cited in Percent by Time Periods**

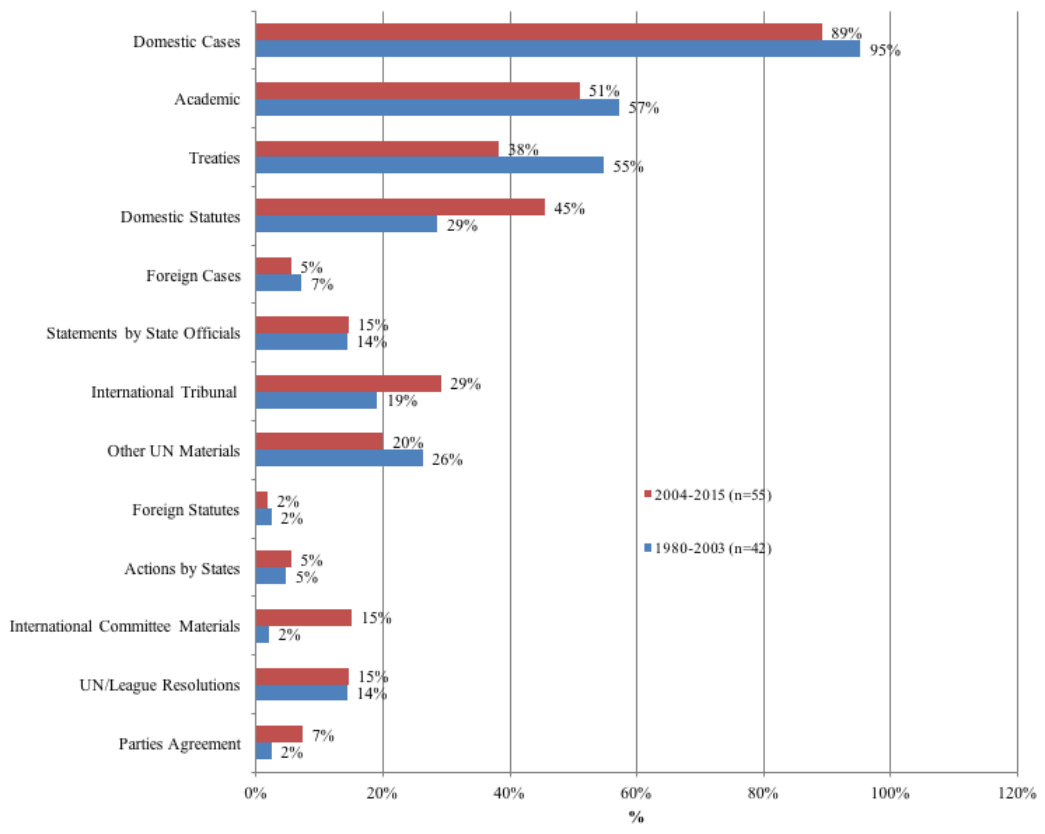


**Figure 4.1 Materials Cited by Interstate v. Individual**

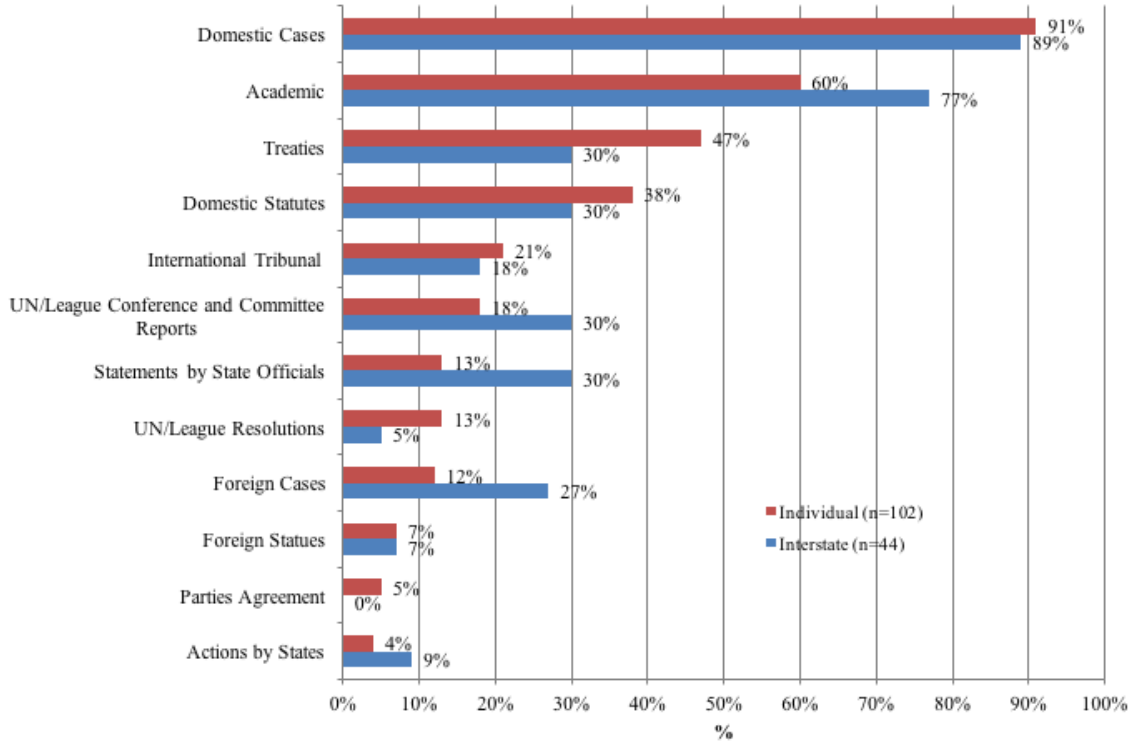



**Figure 4.2 Materials Cited by ATS**

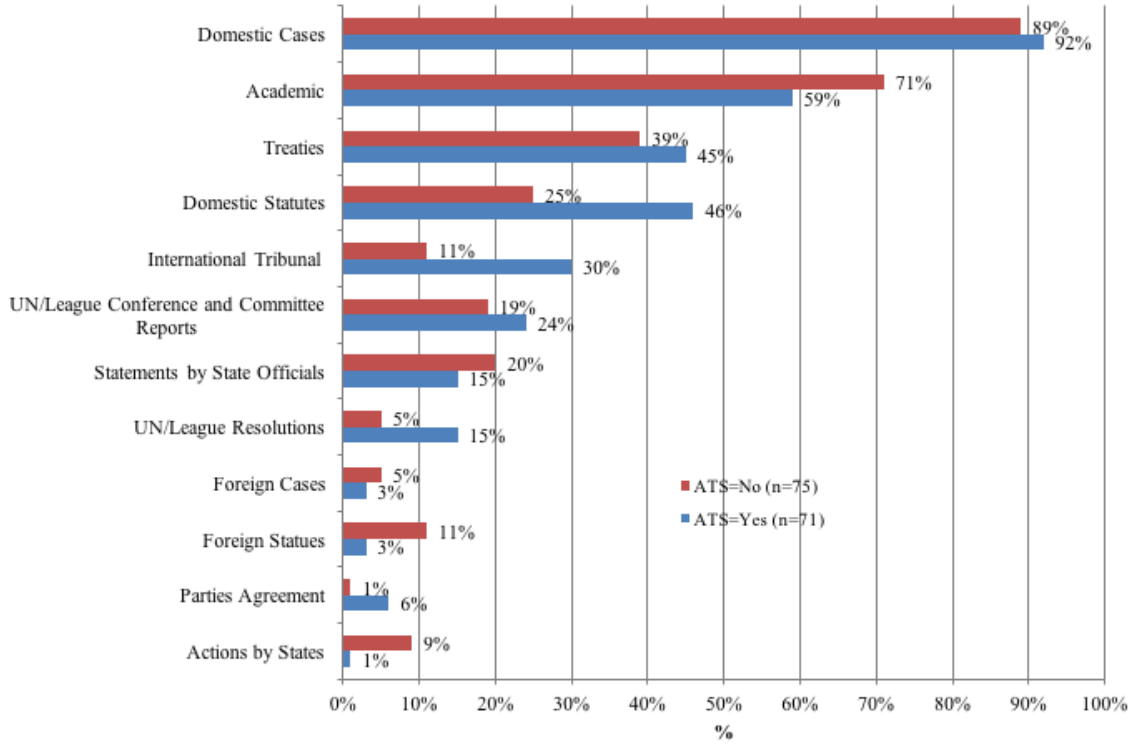


**Figure 4.3 Materials Cited by Type of Court**