

# CUSTOM IN OUR COURTS: RECONCILING THEORY WITH REALITY IN THE DEBATE ABOUT *ERIE RAILROAD* AND CUSTOMARY INTERNATIONAL LAW

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## ABSTRACT

*One of the most heated debates of the last two decades in U.S. legal academia focuses on customary international law's domestic status after *Erie Railroad v. Tompkins*. At one end, champions of the "modern position" support customary international law's ("CIL") 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 legislative authorization. Scholars on both sides of the *Erie* debate also make claims about the sources judges reference when discerning CIL. They then use these claims to support their arguments regarding CIL's domestic status. Interestingly, neither side of the debate has conducted an empirical analysis of what U.S. federal courts have actually done. This Article undertakes such an analysis and suggests that U.S. federal courts have, for the most part, behaved in a manner unanticipated by revisionists and modernists alike—the courts have followed themselves. After tracking the sources considered as evidence of CIL and cited in both pre-*Erie* and post-*Erie* case law, it turns out that, at all times before and after *Erie* in 1938, U.S. federal judges have relied primarily on domestic case law when making CIL determinations. Put starkly, the great *Erie* debate about CIL determinations in U.S. federal courts—and the authority the judiciary ought to attach to certain international sources—may have been occurring somewhat orthogonally to the fact that U.S. courts do not seem to pay much attention to these sources in practice.*

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## TABLE OF CONTENTS

INTRODUCTION .....	244
I. CUSTOMARY INTERNATIONAL LAW .....	246
II. ERIE RAILROAD V. TOMPKINS .....	248
III. THE <i>ERIE</i> DEBATE: A STATUS QUESTION.....	250
IV. CIL AND FEDERAL JUDICIAL PRACTICE: A SOURCES QUESTION. 255	
A. Customary International Law in U.S. Courts: 1700–1937 .....	255
B. Customary International Law in U.S. Courts: 1938–1980 .....	259
C. Customary International Law in U.S. Courts: 1980–2015 .....	260
V. PREDICTIONS.....	266
VI. METHODOLOGY .....	268
VII. RESULTS AND ANALYSIS .....	271
A. Overall Picture .....	272
B. Type of Court .....	279
C. Type of Case.....	280
VIII. IMPLICATIONS.....	284

## INTRODUCTION

What is customary international law? Is it even “law” to begin with? Although both the academic and the international communities have recognized customary international law (“CIL”) as one of two main sources of international law—the other being treaties—these inquiries persist in the minds of those studying CIL.<sup>1</sup> One method of answering these questions is to ask another—from where does CIL derive its authority? In other words, what sources qualify as evidence of CIL such that judges may cite to them when discerning CIL norms?

At first glance, the U.S. Supreme Court’s decision in *Erie Railroad v. Tompkins*<sup>2</sup> seems unrelated to CIL. Nevertheless, scholars have latched onto *Erie*’s famous narrative about the death of general common law, and have reached sharp disagreement over its effect on CIL’s domestic status in the United States. On one side, some scholars support CIL’s wholesale incorporation into the “federal common law”<sup>3</sup> that the Supreme Court

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1. See H.L.A. HART, THE CONCEPT OF LAW 214 (3d ed. 1961) (questioning international law as “law” for lacking a sovereign lawmaker); see also Emily Kadens & Ernest A. Young, *How Customary is Customary International Law?*, 54 WM. & MARY L. REV. 885, 920 (2013) (studying “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.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”).

recognized on the same day that it decided *Erie*.<sup>4</sup> On the other side, some argue that federal courts cannot apply CIL as federal law absent federal political branch authorization.<sup>5</sup> Alternate positions have been advanced since the debate intensified in 1997, but all sides recognize the same fundamental question—in light of *Erie*, should U.S. federal courts apply CIL as federal law? The question, then, that the *Erie* debate revolves around involves CIL’s *status* in the United States—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 demonstrated below, most of these assumptions discuss what counts as evidence of either “state practice” or “international consensus.”<sup>6</sup> Interestingly, even though these assumptions reappear throughout the *Erie* literature, the *Erie* debate’s most notable participants fail to substantiate these assumptions with empirical evidence. The evidence currently available is anecdotal in nature and not quantified.<sup>7</sup>

To counter this deficit, this Article undertakes such an empirical analysis. Rather than taking a position 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 U.S. federal court cases from 1790 to 2015, we document the U.S. federal judiciary’s methods for arriving at CIL determinations both before and after *Erie*. More specifically, our study tracks the types of sources that U.S. federal judges have cited as evidence of CIL and the frequency with which they reference them. By observing these trends before and after *Erie*, we test three different narratives detected in the *Erie*/CIL literature about how courts discern CIL: the “state practice” story, the “international

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4. For examples of this “modern position,” see Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1841 (1998) (“Far from being novel, the ‘modern position’ is actually a long-accepted, traditional reading of the federal courts’ function.”); see also Beth Stephens, *The Law of our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 397 (1997) (“This article offers a defense of the historical antecedents and current validity of the core of the ‘modern position.’”).

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) (arguing that “in the absence of federal political branch authorization, CIL is not a source of federal law”).

6. See discussion *infra* Part IV.

7. For a sophisticated example of this type of anecdotal analysis, see, e.g., Ryan Goodman & Derek P. Jinks, Filartiga’s *Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 469 (1997) (supporting the modern position’s inclusion of CIL in federal common law, and explaining that “[l]ocating the discussion in actual practice provides salutary conditions for evaluating the critique of the modern position. Discussions of federal common law, in particular, are better informed by an appreciation of prevailing judicial practices and restraints”).

consensus” story, and the “revisionist” story.<sup>8</sup> As we explain, our data suggest a different story than any of the foregoing three narratives. After tracking the sources cited as evidence of CIL over time, it turns out that the federal judiciary has relied primarily on domestic case law when making CIL determinations both before and after 1938.

In Part I, we begin by addressing several big picture questions underlying our study: namely, how should courts determine CIL? To what extent does CIL’s traditional definition influence these determinations? What counts as “state practice” versus *opinio juris*, and does the federal judiciary’s reliance on certain sources undermine the process of determining CIL? Parts II and III address the narrower context of the *Erie* debate by summarizing *Erie*’s history and the famous academic saga surrounding the CIL “status” question. In Part IV, we introduce the specific focus of our empirical work: the varying claims about how courts determined CIL norms both before and after *Erie*. Parts V and VI then explain how we used the aforementioned claims to make predictions and the methodology we used to test them. Part VII reveals our study’s results, while Part VIII draws out implications and concludes.

The principle aim of this study is to hold those debating *Erie* accountable and invite them to reconcile their theories about the “status” issue with the reality of how the “sources” issue has played out in U.S. courts. To be clear, we have no quarrel with scholars who support their views on CIL’s domestic status with claims about how courts discern CIL’s content. This Article simply argues that grounding claims in empirical evidence can add substance to the arguments advanced on both sides of the *Erie* debate. Empirical scrutiny also forces an important discussion of broader questions regarding CIL’s legitimacy as law.

## I. CUSTOMARY INTERNATIONAL LAW

In general, the two main sources of international law are treaties and customary international law. The classic definition of CIL comes from the International Court of Justice (“ICJ”), which held that legal norms become CIL upon meeting a two-part test: first, the norm must “result from a general and consistent practice of states,” and second, states’ adherence to this widespread practice must stem “from a sense of legal obligation” known as *opinio juris*.<sup>9</sup>

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8. See discussion *infra* Part IV.

9. See Statute of the International Court of Justice, art. 38, ¶ 1 (b), June 26, 1945, 33 U.N.T.S. 993 (asserting that the International Court of Justice “shall apply . . . international custom, as evidence of a general practice accepted as law”); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §102(2) (AM. LAW INST. 1987) (explaining that CIL “results from a general and

Despite recurring citations to this two-part test in textbooks and treatises, some scholars question its accuracy and focus, most of their critiques on the state practice requirement.<sup>10</sup> As J. Patrick Kelly notes, the empirical task of finding evidence of widespread state practice seems impossible given how many nations exist and how few of them record their state practices.<sup>11</sup> Moreover, the likelihood of uncovering a consistent pattern of practice across a multitude of diverse nations seems slim.<sup>12</sup> Others who share Kelly's view add that courts rarely cite to state practice when making CIL determinations.<sup>13</sup> In fact, recent empirical study reveals that the ICJ has consistently ignored its own two-part test over the years and only rarely cites to evidence of state practice.<sup>14</sup>

Another problem involves the difficulty of determining what qualifies as “practice.” Does the term refer exclusively to concrete state acts; or does it also encompass “verbal” evidence, including diplomatic correspondence, legal opinions, United Nations resolutions, or international committee reports?<sup>15</sup> A similar challenge involves determining what qualifies as *opinio juris*. Some suggest *opinio juris* may simply be inferred from state practice, or that both CIL requirements—state practice and *opinio juris*—can be inferred from the same “conduct.”<sup>16</sup> Others insist the requirements “must be assessed separately.”<sup>17</sup> Still others claim the international agreements and

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consistent practice of states followed by them from a sense of legal obligation”); Michael Akehurst, *AKEHURST'S 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).

10. See, e.g., J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT'L L. 449, 472 (2000).

11. See *id.* (noting that only the “largest and most sophisticated nations collect and publish their state practice”); see also Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. 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”).

12. See Kelly, *supra* note 10, 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”).

13. 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).

14. Stephen J. Choi & Mitu Gulati, *Customary International Law: How Do Courts Do It?*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 117, 137 tbl. 5.1 (Curtis A. Bradley ed., 2016) [hereinafter *CUSTOM'S FUTURE*] (finding that the ICJ, in CIL determinations, cites primarily to treaties and rarely to state practice).

15. See Young, *supra* note 13, at 386 (“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?”).

16. 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, 182 (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 an *opinio juris*.”).

17. John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International*

declarations that scholars often cite to as evidence of state practice are in fact more indicative of *opinio juris*.<sup>18</sup>

Kelly concludes that “CIL norms are the deductive conclusions of international law writers, judges, and advocates.”<sup>19</sup> This statement echoes Louis Sohn’s renowned piece, which contends 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.”<sup>20</sup> Sohn further describes how various courts have traditionally “agreed that [international] law is made by the practice of states,” while ultimately citing to writers and publicists who “collected and crystallized” myriad histories of state practice.<sup>21</sup> Given that these writers often publish their own unique views regarding CIL, it seems that it is not just state practice that they are crystallizing. Should this possibility worry CIL scholars? Perhaps not, but Kelly remains skeptical of CIL norms and argues that “CIL lacks authority as law, because such norms are not, in fact, based on the implied consent or general acceptance of the international community that a norm is obligatory.”<sup>22</sup> Between Kelly and Sohn, broader questions regarding CIL’s legitimacy as law appear to flow directly from questions surrounding the proper sources and processes for discerning CIL norms—questions that play a key role in the *Erie* debate over CIL.

## II. ERIE RAILROAD V. TOMPKINS

As Justice Felix Frankfurter aptly stated, *Erie* “did not merely overrule a venerable case. It overruled a particular way of looking at law . . . .”<sup>23</sup> The venerable case that Justice Frankfurter referenced was *Swift v. Tyson*, which contained the most famous application of the “general common law” that U.S. courts developed prior to 1938.<sup>24</sup> The general common law was neither state nor federal—it was simply “the common law.”<sup>25</sup> The independent, uniform nature of general common law<sup>26</sup> meant that judges “found” rather

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*Committee of the Red Cross Study on Customary International Humanitarian Law*, 89 INT’L REV. RED CROSS 443, 446 (describing *opinio juris* as distinct from state practice).

18. Young, *supra* note 13, at 386–87.

19. Kelly, *supra* note 10, at 475.

20. Louis B. Sohn, *Sources of International Law*, 25 GA. J. INT’L & COMP. L. 399, 399 (1996).

21. *Id.* at 401.

22. Kelly, *supra* note 10, at 452.

23. *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945).

24. *Swift v. Tyson*, 41 U.S. 1 (1938).

25. Stephens, *supra* note 4, at 410 (internal citation omitted) (describing pre-*Erie* common law).

26. See *Swift*, 41 U.S. at 19 (asserting, in Latin, that the law cannot be one thing in Rome and something else in Athens).

than “made” law.<sup>27</sup> Nearly a century after *Swift*, the Supreme Court’s decision in *Erie* declared “[t]here is no federal general common law.”<sup>28</sup> In the process, Justice Louis Brandeis—channeling Justice Oliver Wendell Holmes—held that the common law is not some “august corpus”<sup>29</sup> in the sky; it is law that judges “make” rather than “find.”<sup>30</sup> From *Erie*’s legal realism flowed the positivist idea that judges needed “some definite” lawmaking authority from a sovereign source in order to “make” law.<sup>31</sup> After *Erie*, the only valid sovereign sources under which federal courts can legitimately make law are the Constitution or federal legislation.<sup>32</sup>

On the same day it decided *Erie*, the Supreme Court also decided *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, holding that, while the general common law no longer exists, federal judges may still make “federal common law.”<sup>33</sup> After *Erie*, it became clear that this “federal common law” governed cases pertaining to uniquely federal interests.<sup>34</sup> Over time, the Supreme Court carved out “enclaves” of this 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.”<sup>35</sup>

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27. 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 Robert H. 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”).

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

29. *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928).

30. William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19, 23 (2007) (noting that “[i]f judges ‘made’ rather than ‘found’ the common law, it followed that they needed lawmaking authority. It was this change that led ultimately to *Erie*”).

31. 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”).

32. See Dodge, *supra* note 30, 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.”).

33. 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 1830–41.

34. See *Tex. Indus. Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981).

35. Curtis A. Bradley et al., 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); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (“[T]here are enclaves of federal judge-made law which bind the States.”).

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

On its face, *Erie*'s story about the death of general common law has little to do with CIL's legal status in the United States. Before *Erie*, U.S. courts regularly applied CIL in a wide variety of contexts.<sup>36</sup> Justice Gray provided the most famous pre-*Erie* praise of CIL when he upheld the law of nations as "part of our law" in *The Paquete Habana*.<sup>37</sup> However, Justice Gray's assertion begs an important question—in what sense was CIL "part of our law" before *Erie*? Did the answer to this question change after *Erie*? On the surface, the text of the U.S. Constitution leaves these questions unanswered, although it mentions that Congress has the power to "define and punish . . . offenses against the law of nations."<sup>38</sup>

Philip Jessup, a Columbia Law professor who later became a judge for the ICJ, became one of the first to tackle these questions in 1939.<sup>39</sup> In his famous piece, Jessup concluded that "any attempt to extend the [*Erie* doctrine] to international law should be repudiated by the Supreme Court."<sup>40</sup> 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."<sup>41</sup> Therefore, 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."<sup>42</sup> Since Jessup's writings, other scholars have taken on the *Erie* narrative and engaged in ferocious disagreements about its effect on the application of CIL in U.S. Courts. Despite myriad opinions, the debate concerning CIL's domestic status and *Erie* revolves around two main camps—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*.<sup>43</sup> In other words, federal judges can "make" CIL using the authority to create

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36. See, e.g., *Henfield's Case*, 11 F. Cas. 1099 (No. 6360) (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, 144 (1795) (applying the law of nations to a prize case); *United States v. Smith*, 18 U.S. 153, 153 (1820) (adopting the definition of "piracy" under the law of nations); *Iowa v. Illinois*, 147 U.S. 1, 8–9 (1893) (applying the thalweg rule to a state boundary case).

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

38. U.S. CONST. art. I, § 8, cl. 10.

39. Jeremy Rabkin, *Off the Track or Just Down the Line? From Erie Railroad to Global Governance*, 10 J.L. ECON. & POL'Y 251, 254 (2013) (describing Jessup's role in the *Erie* debate).

40. Philip C. Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT'L L. 740, 743 (1939).

41. *Id.*

42. *Id.*

43. 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.").



common law that they retained after *Hinderlider*.<sup>44</sup> This CIL will have the force of federal law that both establishes Article III jurisdiction and preempts inconsistent state law under the Supremacy Clause of the U.S. Constitution.<sup>45</sup> The modern camp does not deny CIL's pre-*Erie* status as general common law.<sup>46</sup> However, a key premise of the modern position is that CIL has always had the status of federal law insofar that it governs foreign relations—an area of distinctly “federal interest”—since the time of our forefathers.<sup>47</sup> Some adherents to the modern position point to Article I, Section 8, Clause 10 of the Constitution, and to certain federal statutes,<sup>48</sup> as “explicit grant[s] of authority” for federal courts “to define and fashion federal rules with regard to the law of nations . . . .”<sup>49</sup> If CIL has always been part of U.S. federal law, then—as Justice Harlan suggested in *Paquete Habana*—federal judges applying CIL post-*Erie* are simply exercising legitimate authority that they never lost.<sup>50</sup> In other words, CIL does not require extra domestic authorization before judges can incorporate it into post-*Erie* federal common law because CIL never constituted “unauthorized” general common law to

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44. See Koh, *supra* note 4, at 1832 (“It was precisely to preserve the federal common lawmaking power of the federal courts in such areas that Justice Brandeis acknowledged [in *Hinderlider*] that federal judges may continue to make specialized federal common law regarding issues of uniquely federal concern.”).

45. See, e.g., Neuman, *supra* note 43, at 383 (claiming that “the modern position entails the conclusion that, in the face of congressional silence, [CIL] will be supreme over the laws of the States”); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561, 1559–60 (1984) (asserting that CIL 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 issue “is a federal question, which triggers federal court jurisdiction and on which federal court decisions are binding on the states”).

46. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2354 (1991) [hereinafter *Transnational*] (“[T]hroughout 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 45, at 1557–58 (describing the *Swift* era and how “the question whether international law was state law or federal law was not an issue: it was ‘the common law’”).

47. See Stephens, *supra* note 4, at 443 (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 43, at 392 (upholding the modern position as a “200-year-old practice of judicially incorporating [CIL]”).

48. See Koh, *supra* note 4, at 1835 n.60 (citing the ATS and the Foreign Sovereign Immunities Act as “expressly delegat[ing] to the federal courts authority to derive federal common law rules from established norms of [CIL]”).

49. *Id.* at 1835.

50. 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.”).

begin with.<sup>51</sup> In fact, some modernists argue that CIL already has “definite authority behind it” because it has historically been grounded in state practice.<sup>52</sup>

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*.<sup>53</sup> However, the academic establishment was thrown into disarray in 1997 when two *enfants terribles*, Curtis Bradley and Jack Goldsmith, introduced the definitive manifesto for “revisionism.”<sup>54</sup> Revisionists begin with the “uncontroversial” premise that pre-*Erie* CIL had the status of general common law.<sup>55</sup> After *Erie*, they contend, federal courts cannot apply CIL as federal law without domestic, positive incorporation from the federal branches—either through the Constitution or a federal statute.<sup>56</sup> In their vigorous attack on the modern position, Bradley and Goldsmith conclude that “CIL should not have the status of federal common law” and assert that any arguments favoring CIL’s automatic incorporation into federal common law “depart from well-accepted notions of American representative democracy, federal common law, separation of powers, and federalism.”<sup>57</sup>

Proponents of the modern position responded by launching equally pointed attacks on the 1997 article shortly after its publication.<sup>58</sup> The ensuing debate intensified to the point that José Alvarez, in a 2007 Presidential Address before the American Society of International Law, referred to Bradley and Goldsmith as among the “Four Horsemen of the Constitutional

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51. See Dodge, *supra* note 30, at 21–25 (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 U.S. law, and this is so because of CIL’s positivist foundation).

52. See *id.* at 23–24 (“[B]y 1938, [CIL] already rested on a positivist foundation of state practice and consent. [CIL] did have ‘some definite authority behind it’—the consent of nations reflected in their practice.”).

53. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

54. For the article that set off the firestorm, see generally 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, 320 (1997) (“[T]he 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 generally A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 *YALE J. INT’L L.* 1 (1995) (criticizing the “federalizing” 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).

55. Bradley et al., *supra* note 35, at 882.

56. 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”).

57. *Id.* at 821.

58. See generally, e.g., Goodman & Jinks, *supra* note 7; Koh, *supra* note 4; Stephens, *supra* note 4; Neuman, *supra* note 43.

apocalypse.”<sup>59</sup> Peter Spiro—another prominent legal academic—considered Bradley and Goldsmith’s piece the source of a “New Sovereignist” movement that promoted an anti-international form of American exceptionalism.<sup>60</sup> Tension between the competing sides in the *Erie* debate has continued unabated, with several others joining in the discussion and contributing alternative perspectives regarding CIL’s post-*Erie* domestic status.<sup>61</sup>

Nearly all parties to the *Erie* debate ground their arguments in the same historical narrative—that the Supreme Court did not directly address CIL’s post-*Erie* status until 1964 when it decided *Banco Nacional de Cuba v. Sabbatino*.<sup>62</sup> *Sabbatino* held that the act of state doctrine<sup>63</sup> was a rule of federal common law, binding on the states and flowing from the federal government’s authority over foreign relations issues.<sup>64</sup> In holding that the doctrine was immune from *Erie*, the Court cited Jessup and found that he correctly “recognized the potential dangers were *Erie* extended to legal problems affecting international relations.”<sup>65</sup>

Although supporters of the modern position initially considered *Sabbatino* a “setback” for the application of CIL in U.S. courts,<sup>66</sup> they eventually adopted the Court’s analysis as a basis for arguing that the Supreme Court had incorporated CIL into federal common law.<sup>67</sup> In

59. José E. Alvarez, *The Future of Our Society*, 102 ASIL 499, 503 (2008). The other two horsemen, according to Alvarez, were John Yoo of UC Berkeley and Ernest Young of Duke University.

60. Peter J. Spiro, *The New Sovereignists: American Exceptionalism and its False Prophets*, FOREIGN AFFAIRS (Nov./Dec. 2000), <https://www.foreignaffairs.com/articles/united-states/2000-11-01/new-sovereignists-american-exceptionalism-and-its-false-prophets> [<https://perma.cc/N4VG-66Z6>].

61. See 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); see generally Young, *supra* note 13 (advancing “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).

62. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). But see Bradley & Goldsmith, *supra* note 5, at 836 (asserting, contrary to the majority of parties to the *Erie* debate, that *Sabbatino* did not address CIL’s domestic legal status).

63. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (The act of state doctrine refers to the rule that every sovereign state “is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory”).

64. *Sabbatino*, 376 U.S. at 425–27.

65. *Id.* at 425 (citing to Jessup, *supra* note 40) (“It 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*.”).

66. See *Transnational*, *supra* note 46, at 2363 (suggesting that *Sabbatino* “cast a profound chill upon the willingness of [U.S.] courts to interpret or articulate norms of international law . . .”); John R. Stevenson, *The State Department and Sabbatino—“Ev’n Victors are by Victories Undone,”* 58 AM. J. INT’L L. 707, 708 (1964) (expressing “dismay” with the *Sabbatino* opinion).

67. See, e.g., Louis Henkin, *The Constitution and United States Sovereignty: A Century of “Chinese*

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.”<sup>68</sup>

The literature identifies the 1980’s—a critical period for the rise of international human rights litigation in the U.S.—as the next phase of the *Erie* saga.<sup>69</sup> Many human rights lawsuits arose 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.”<sup>70</sup> In 1984, the Second Circuit in *Filartiga v. Pena-Irala* issued the first decision approving application of the ATS in international human rights litigation.<sup>71</sup> Finding that torture by public officials “violates . . . the law of nations,”<sup>72</sup> the court in *Filartiga* upheld Article III jurisdiction over the plaintiffs’ claim on the basis that it arose under the ATS.<sup>73</sup> In reaching its conclusion, the court asserted that CIL “has always been part of the federal common law.”<sup>74</sup>

Despite *Filartiga*’s apparent embrace of the modern position, revisionists claim the decision does not provide reliable support for CIL’s status as federal common law because the Second Circuit “relied uncritically on pre-*Erie* precedents” that “applied CIL as general common law, not federal common law.”<sup>75</sup> Revisionists also emphasize that the *Filartiga* court was merely a circuit court that, like other lower courts, focused only on using CIL’s status as federal law to ensure jurisdiction.<sup>76</sup> Recent discussions about *Erie* and CIL continue to focus on ATS litigation with particular attention to the Supreme Court’s 2004 decision in *Sosa v. Alvarez-Machain*.<sup>77</sup> In *Sosa*,

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*Exclusion” and Its Progeny*, 100 HARV. L. REV. 853, 876 (1987) (“The Supreme Court, however, 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 (arguing that rather than “shy[ing] away from interpreting questions of [CIL],” the *Sabbatino* Court “construed [CIL] to determine that international law neither compelled nor required application of the act of state doctrine”).

68. Bradley & Goldsmith, *supra* note 5, at 859 n.284 (citing *Sabbatino*, 376 U.S. at 421).

69. See, e.g., *id.* at 831–34 (dedicating an entire section of the piece to *Filartiga*’s effect on post-*Erie* CIL).

70. 28 U.S.C. § 1350 (2012).

71. See generally *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (reviewing Paraguayan citizens’ suit for acts of torture committed in Paraguay).

72. *Id.* at 880.

73. *Id.* at 887.

74. *Id.* at 885.

75. Bradley & Goldsmith, *supra* note 5, at 834.

76. See *id.* at 831 (noting the “jurisdictional context of *Filartiga*”).

77. See generally *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).

the Court looked to the ATS's legislative history and characterized it as a strictly jurisdictional statute.<sup>78</sup> Simultaneously, the Court held that after *Erie*, the ATS authorizes judges to create new causes of action for a narrow set of CIL violations as a matter of federal common law.<sup>79</sup> Unsurprisingly, the modern position's supporters considered *Sosa* a ringing endorsement by the Supreme Court of CIL as federal common law in ATS cases.<sup>80</sup> In contrast, revisionists claim that *Sosa* is "best read as rejecting that position."<sup>81</sup> At this rate, it will likely take more than the Supreme Court's decision in *Sosa* to resolve the *Erie* debate.

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

When contrasting the responses of both the modern position and the revisionists to the "sources" question, we found it helpful to consider CIL in terms of its pre- and post-*Erie* forms. Along the way, we developed predictions about what we would uncover if we tracked the sources to which U.S. federal courts have cited as evidence of CIL across several centuries. Our predictions revolve around three narratives discerned in the *Erie*/CIL literature—two from the modern camp and one from the revisionist camp. For ease of reference, we refer to these narratives as the "state practice" story, the "international consensus" story, and the "revisionist" story.

##### A. Customary International Law in U.S. Courts: 1700–1937

The academic community agrees that pre-*Erie* courts treated CIL as general common law.<sup>82</sup> Academicians also agree that pre-1938 courts recognized the general common law as originating from natural law

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78. *Id.* at 724.

79. *Id.* at 729–33.

80. 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").

81. See Bradley et al., *supra* note 35, at 870 (granting that there are "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*).

82. See sources cited *supra* note 46; see also Bradley et al., *supra* note 55 and accompanying text.

principles<sup>83</sup> and from British common law.<sup>84</sup> Unsurprisingly, U.S. courts by the late-eighteenth century also regarded CIL as a byproduct of natural law and of English common law.<sup>85</sup> Throughout this era, writers such as Hugo Grotius, Emmerich de Vattel, and William Blackstone laid the foundation of international law upon natural law principles.<sup>86</sup>

That said, even de Vattel developed a theory of “voluntary” or “positive” CIL—CIL based on the actual practices of states.<sup>87</sup> In fact, the conventional academic narrative is that CIL developed a positivist streak by the end of the nineteenth century.<sup>88</sup> This positivism appeared through the language of state practice, which courts often labeled the “common consent of states” or the “usages of civilized nations.”<sup>89</sup> Today, academics invoke famous cases such as *The Paquete Habana*, *The Antelope*, and *The Scotia* as illustrations of the positivist CIL trend in the pre-*Erie* days.<sup>90</sup>

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83. See Dodge, *supra* note 30, 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*); George Rutherglen, *Reconstructing Erie: A Comment on the Perils of Legal Positivism*, 10 CONST. COMMENT. 285, 285 (1993) (describing general common law as “a form of natural law”); 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 285, 289–90 (David L. Sloss, Michael D. Ramsey, and William S. Dodge eds., 2011) (describing the “general” law as law based on principles of “reason and morality”).

84. See *Swift v. Tyson*, 41 U.S. 1, 22 (1842) (citing to English court decisions and concluding that “[i]n the American Courts, so far as we have been able to trace the [decisions], the same doctrine seems generally, but not universally, to prevail”).

85. See 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)).

86. See David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 83, at 7, 8 (specifying de Vattel’s *The Law of Nations* and Blackstone’s *Commentaries on the Laws of England* as “[t]wo works in particular [that] framed the early American view of the law of nations”); see also Sohn, *supra* note 20, at 399 (referring to Grotius and de Vattel as two of the “fathers of international law”).

87. 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* lxxv–lxxvi (Joseph Chitty trans., 7th ed. 1849).

88. 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 83, at 89, 99 (describing the Court’s “decisive shift to a positivist footing for customary international law norms”); see also Neuman, *supra* note 43, 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”).

89. See Bederman, *supra* note 88, at 95 (citing to *Hilton v. Guyot* and to the *Prize Cases* for common consent); Bradley & Goldsmith, *supra* note 5, at 838–39 (asserting that the “traditional” CIL that prevailed before World War II was more closely tied to state practice).

90. See, e.g., Sloss et al., *supra* note 86, at 36; Bederman, *supra* note 88, at 97, 99, 109.

We should note, however, that some scholars who discerned this positivist trend also assert that the U.S. Supreme Court merely paid lip service to CIL's basis in state practice and rarely cited to concrete, empirical evidence of such practice.<sup>91</sup> Others assert that the positivism of *The Paquete Habana* faded in the early-twentieth century, as CIL became fused with general common law.<sup>92</sup> After all, since general common law was "based not on state consent and practice but on principles of reason and morality, the merger of customary international law into 'general' law meant that American courts would look to those principles, not to state behavior, to determine customary international law's content."<sup>93</sup> Other scholars note that judges were already segueing into a positivistic view of CIL as early as 1820 with the *Antelope* case, but that they continued using naturalistic language well into the late-nineteenth century.<sup>94</sup>

Despite these mixed opinions about courts' reliance on state practice before *Erie*, academics agree that the centuries preceding *Erie* comprised the golden era of the international treatises and digests.<sup>95</sup> To the extent that courts cited to state practice, they often delegated the empirical task of gathering evidence of such practice to the digest writers of England, France, and the United States.<sup>96</sup> From the foregoing, we expected 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

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91. Bederman, *supra* note 88, at 104 ("Even by the time of such cases as *The Scotia* and *The Paquete Habana* . . . [and] 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.").

92. 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 83, at 225, 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 nations' practices) also declined.").

93. Purcell, Jr., *supra* note 83, at 289-90.

94. Bederman, *supra* note 88, at 92.

95. See Sloss, Ramsey & Dodge *supra* note 86, 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 Rutherford. Of the publicists, they turned most often to [de] 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, de Vattel, Blackstone, Wilson, Pufendorf, Burlamaqui, Rutherford, and Bynkershoek).

96. For a thorough review of how the pre-*Erie* publicists shaped CIL determinations, see generally, e.g., Edwin D. Dickinson, *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 (1932); Sohn, *supra* note 20, at 400.

practice, we decided to test the traditional academic consensus that pre-*Erie* courts cited heavily to actual state practice.

Of course, if we assume that U.S. 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, as described below, some of the modern position's scholars from the *Erie* debate imply that this did in fact occur. Here, we uncovered the first narrative tested in our study—the “state practice” story.

Under this narrative, international state practice serves as the basis for CIL's pre-*Erie* and post-*Erie* legitimacy as federal law. As noted previously, *Erie* injected legal positivism into the making of common law by declaring that “law in the sense in which courts speak of it today does not exist without some definite authority behind it.”<sup>97</sup> Thus, some adherents to the modern position challenge revisionists' calls for CIL's positive incorporation into federal law by arguing that CIL has always originated from a positive authority—“the consent of nations reflected in their practice.”<sup>98</sup>

For example, after citing to *The Paquete Habana* and *The Scotia*, William S. 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 generally.”<sup>99</sup> In other words, the fact that federal courts lacked authority to make substantive law after *Erie* does not matter because, by 1938, CIL had “some definite authority behind it” in the form of state practice.<sup>100</sup> For Dodge, CIL's “positivist foundation” renders superfluous the revisionists' “additional requirement” of “positive authority for the incorporation” of CIL into the U.S. legal system.<sup>101</sup>

In a famous variation on the modern position, Louis Henkin argued that CIL is “like” federal common law insofar as it qualifies as federal law that preempts inconsistent state law and establishes federal jurisdiction.<sup>102</sup> Henkin distinguishes CIL from federal common law, however, as something judges “find” rather than “create,” and he claims that judges find CIL “by examining the practices and attitudes of foreign states.”<sup>103</sup> If judicial practice indeed reflects Dodge and Henkin's views, our data should yield high

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97. *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)).

98. Dodge, *supra* note 30, at 24.

99. *Id.* at 23.

100. *Id.* at 23–24.

101. *Id.* at 24.

102. Henkin, *supra* note 45, at 1561–62.

103. Henkin, *supra* note 67, at 876.



citation rates to variables indicative of state practice, both before and after *Erie*. Such a result would not only vindicate traditional conceptions of CIL, but it would also dispel revisionist fears of undemocratic judges concocting CIL norms. Neither Dodge nor Henkin explicitly addresses which sources count as “practice,” so we limited our test to traditional, uncontroversial sources for this narrative, such as concrete acts of states.

#### B. Customary International Law in U.S. Courts: 1938–1980

The decades immediately following *Erie* presented a special puzzle. As far as almost everyone is concerned, the question of *Erie*'s effect on CIL's domestic status remained unanswered at least until the *Sabbatino* or *Filartiga* decisions surfaced.<sup>104</sup> What, then, occurred during the thirty or forty years after *Erie*?

Generally, fewer CIL-related cases reached the courts during this era for several reasons, including the disappearance of nineteenth century subjects of significance to CIL (*e.g.*, piracy) and certain developments in constitutional law adjudication.<sup>105</sup> Most of the CIL-related cases that emerged during this time period were not direct application cases; rather, they drew upon CIL norms, but were ultimately governed by the statutes and treaties codifying those norms.<sup>106</sup> Thus, we predicted that the number of citations to treaties and statutes would likely increase, but we did not expect dramatic changes in the data between 1938 and 1980. If the literature is correct, and if CIL's domestic legitimacy remained unchallenged until *Sabbatino* or *Filartiga*, then judicial practices before *Erie* must have been considered legitimate by judges deciding cases before 1964 (*Sabbatino*), or at least before 1980 (*Filartiga*).

One particular case, however, presented another possibility. On the same day that the Supreme Court decided *Erie* and *Hinderlider*, it also decided *Guaranty Trust Company of New York v. United States*.<sup>107</sup> In *Guaranty Trust Company*, the primary issue was whether the Russian Government could claim sovereign immunity against New York's statute of limitations for a case brought in U.S. federal court.<sup>108</sup> Writing for the majority, Justice Stone recognized that the ancient principle of *quod nullum tempus occurrit regi* (“no time runs against the king”) originated under British law.<sup>109</sup> He concluded, however, that if the principle retained any validity, it

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104. See *supra* Part III (“The *Erie* Debate: A Status Question”).

105. Ramsey, *supra* note 92, at 226, 235.

106. *Id.* at 235.

107. *Guar. Tr. Co. v. United States*, 304 U.S. 126 (1938).

108. *Id.* at 129.

109. *Id.* at 132 (citing to two British cases for support).

stemmed from “its uniform survival in the United States” and from public policy rather than from “any inherited notions of the personal privilege of the king.”<sup>110</sup> Curiously, in declining to apply the rule, the Court’s majority cited exclusively to U.S. case law to argue that international law did not support the rule’s application.<sup>111</sup>

As Michael Ramsey points out, the sole 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.”<sup>112</sup> Perhaps Justice Stone saw this foreign relations matter as a distinctly federal interest where federal common law could displace state law.<sup>113</sup> Then again, perhaps we are reading too much into the fact that the Supreme Court decided *Guaranty Trust* on the same day that it decided *Erie* and *Hinderlider*. Ultimately, we predicted that if *Guaranty Trust* offers an accurate indicator of judicial practice, we would uncover more citations to domestic case law for CIL during the period from 1938 to 1980. Ultimately, however, we anticipated discovering only limited change during this period, and we predicted that dramatic shifts in our data would not emerge until much later.

### C. Customary International Law in U.S. Courts: 1980–2015

For many *Erie* scholars, the period from 1980 to the present represents a key chapter in the debate on the “status” of CIL. Many scholars credit the *Filartiga* line of cases and the publication in the 1980s of the *Restatement (Third) of the Foreign Relations Law of the United States* for the federal courts’ alleged acceptance of the modern position.<sup>114</sup> While examining this episode in the *Erie* saga, we uncovered two more narratives seeking to explain how judges discern CIL—the “international consensus” story and the “revisionist” story.

As its label suggests, the “international consensus” story places less emphasis on state practice and focuses more generally on “consensus.” Here,

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110. *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.”).

111. *See id.* at 133 (“Diligent search of counsel has revealed no judicial decision supporting such an application of the rule in this or any other country.”).

112. Ramsey, *supra* note 92, at 250 (emphasis in original).

113. *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).”).

114. *See Koh*, *supra* note 4.

a subgroup of the modern camp rests 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 [judges] 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.<sup>115</sup>

After asserting a lack of international consensus with regard to foreign expropriations,<sup>116</sup> Justice Harlan's *Sabbatino* opinion includes a footnote explaining that the 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."<sup>117</sup>

In defense of the modern position, Harold Hongju 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."<sup>118</sup> This interpretation forecloses federal judges from relying exclusively on independent judicial lawmaking when construing CIL, for "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."<sup>119</sup> In other words, federal judges can apply CIL norms as federal common law only after verifying that "a clear international consensus" has sufficiently "crystallized" them.<sup>120</sup>

Admittedly, we struggled to determine whether "consensus" and "state practice" were interchangeable terms according to Koh's perspective; particularly since the sources he cited to illustrate "consensus" are precisely

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115. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (emphasis added).

116. *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.")

117. *Id.* at 430 n.34 (emphasis added).

118. *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.")

119. *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").

120. *Transnational, supra* note 46, at 2385–86 (asserting that "over the centuries," federal courts have "determine[d] whether a clear international consensus has crystallized around a legal norm that protects or bestows rights upon a group of individuals that includes plaintiffs").

the type of “verbal” evidence that some—including Koh—believe qualify as state practice.<sup>121</sup> Historically, “consensus” refers to a theory that arose during the nineteenth and early-twentieth centuries and that described CIL as universal law based on the “common consent” of nations.<sup>122</sup> Another *Erie* scholar, Ernest Young, claims that modern conceptions of consensus differ significantly from traditional notions of custom, for the latter looks retroactively at past practices while the former looks to new emerging practices.<sup>123</sup> He and his co-author, Emily Kadens, add further that this normative, forward-looking concept of international consensus has been a key enforcement mechanism for CIL norms in human rights litigation.<sup>124</sup>

When Koh touts the United States as a key participant in the “traditional state practice” that shapes CIL rules, he appears to suggest that state practice is, at minimum, one category of evidence from which judges may infer international consensus.<sup>125</sup> 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 forces” that shape CIL.<sup>126</sup> Koh’s perspective guided our observations when determining whether federal courts truly based their 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 satisfy the consensus requirement.<sup>127</sup> Goodman and Jinks rest their thesis on the same *Sabbatino* quotation that Koh emphasizes, and they express their thesis using what they call *Sabbatino*’s “sliding

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121. See Young, *supra* note 13, at 386 (“But practice has problems of its own. Disagreements exist as to what sort of things ought to count as practice: Should we only count actual state actions, on the theory they speak louder than words?”).

122. Kelly, *supra* note 10, at 510–12.

123. Kadens & Young, *supra* note 1, at 909.

124. *Id.*

125. 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 [CIL] 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”).

126. *Id.* at 1854 (“In nearly all of these organizations and fora, the United States ranks among the leading participants.”).

127. 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.”) (emphasis in original).

scale.”<sup>128</sup> This sliding scale distinguishes between areas of international law that are rife with political divisions among nations and “areas . . . in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies.”<sup>129</sup> According to Goodman and Jinks, *Sabbatino* establishes the latter category of international law as justiciable.<sup>130</sup> Furthermore, Goodman and Jinks credit the *Filartiga* line of ATS cases for fully incorporating *Sabbatino*’s sliding scale framework into federal judicial practice.<sup>131</sup> They also claim that a tripartite test for judicially-cognizable CIL flows from the *Filartiga* case line and effectively narrows the range of actionable CIL claims to those based in *jus cogens* norms.<sup>132</sup> However, this Article stops short of addressing the Goodman and Jinks tripartite test.

Rather, this Article focuses instead on Goodman and Jinks’ claim that post-*Filartiga* courts have engaged 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.<sup>133</sup> According to Goodman and Jinks, federal judges routinely consult “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*.<sup>134</sup> More importantly, they claim that this 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.’”<sup>135</sup>

128. See *id.* at 482 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). For a later court’s presentation of *Sabbatino*’s sliding scale doctrine, see also, e.g., *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246, 258 (D.D.C. 1985) (“[T]he [*Sabbatino*] Court established a sort of sliding scale with respect to judicial application of international law: ‘[T]he 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 . . . .’”) (quoting *Sabbatino*, 376 U.S. at 254).

129. See Goodman & Jinks, *supra* note 7, at 482 (quoting *Sabbatino*, 376 U.S. at 430 n.34) (explaining the sliding scale framework).

130. *Id.*

131. *Id.* at 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 that “these standards coincide with the *Sabbatino* Court’s concern for finding a consensus”).

132. See *id.* at 512 (describing the “tripartite limiting principle”). For Goodman & Jinks’ theory on *jus cogens* norms and the tripartite test, see *id.* at 497, 512–13.

133. See *id.* at 469 (“Discussions of federal common law, in particular, are better informed by an appreciation of prevailing judicial practices and restraints.”); see also *id.* at 512 (“[A] thorough account of the prevailing judicial practice of finding and applying CIL demonstrates the systematic nature of these inquiries.”).

134. See *id.* at 512 (“The availability of ample documents and international legal instruments enables effective adjudication of the status of CIL.”).

135. *Id.* (citing to Bradley & Goldsmith, *supra* note 5, at 855).

Goodman and Jinks further contend that *Filartiga* itself exemplifies this routine practice.<sup>136</sup> In *Filartiga*, the Second Circuit acknowledged “the universal condemnation of torture . . . by virtually all of the nations of the world” by consulting “numerous international agreements.”<sup>137</sup> More specifically, the court referred to a variety of UN materials, including 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.<sup>138</sup> Additionally, the court also relied on domestic sources, including the “Department of State’s human rights reports, congressional statutes, and . . . the amicus brief filed on behalf of the United States.”<sup>139</sup>

According to Goodman and Jinks, *Filartiga*’s review of both “international and domestic legal instruments” is in fact the routine process through which federal judges identify actionable CIL.<sup>140</sup> Thus, they criticize revisionists’ “mischaracteriz[ation]” of this approach which “suggest[s] that judges adopt the reverse presumption, finding actionable CIL violations when presented with even minimal international documentation.”<sup>141</sup> In further opposition to the revisionist stance, Goodman and Jinks offer *Tel-Oren v. Libyan Arab Republic* as an additional example of the sliding scale approach.<sup>142</sup> In *Tel-Oren*, the D.C. Circuit Court of Appeals followed a method similar to that of the Second Circuit in *Filartiga* and found that the prohibition of nonofficial torture lacked sufficient consensus to qualify as a justiciable CIL norm.<sup>143</sup> Taken together, the “consensus” view of Koh, Goodman and Jinks—if true—ought to translate into increasing citations within our data to UN materials, treaties and other international materials. As for domestic sources, we would anticipate seeing more “sources of U.S. political branch action”<sup>144</sup> rather than case law.

Finally, the “revisionist” story also purports to explain what federal courts cite as sources of CIL and how those citations evolved after *Erie*. As

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136. *Id.* at 499 (“Notably, the *Filartiga* court’s method of analyzing the international law claims has also become the routine judicial method.”).

137. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (1980).

138. See Goodman & Jinks, *supra* note 7, at 500.

139. *Id.*

140. *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.”).

141. *Id.* at 500–01 n.189.

142. *Id.* (arguing that Judge Edwards’ concurrence in *Tel-Oren* “demonstrates both the importance of the tripartite test as well as the influence of *Sabbatino* in such evaluations”).

143. See generally *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

144. See, e.g., Goodman & Jinks, *supra* note 7, at 500 n.186–88 (citing to *Sabbatino*, 376 U.S. at 884, 884–85 n.17).

to the “status” question, revisionists argue that CIL requires positive incorporation—either through the U.S. Constitution or a federal statute—prior to becoming federal law.<sup>145</sup> Thus, if courts act in accordance with revisionist thought, we would anticipate finding an increased number of citations to domestic statutes and to the Constitution after *Erie*.<sup>146</sup> Furthermore, in an ideal revisionist world, *Erie*’s positivist underpinnings ought to translate into more references to state practice in CIL cases.<sup>147</sup>

When describing what actually played out in the U.S. federal courts, however, revisionists claim that the courts moved in the opposite direction after *Filartiga*, particularly in the context of ATS litigation. According to Curtis Bradley and Jack Goldsmith, the rise in human rights litigation after World War II brought a “new” CIL with it.<sup>148</sup> Unlike the “traditional CIL” of the past, which primarily governed interstate matters and was based in state practice, the “new” CIL primarily regulated states’ treatment of their own citizens and held less relation to state practice.<sup>149</sup>

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.<sup>150</sup> Their article includes examples of “verbal assent” evidence in *Filartiga*, such as the United Nations Charter, the non-binding Universal Declaration of Human Rights, the non-binding Declaration on the Protection of All Persons from Being Subjected to Torture, multiple treaties that the U.S. had not ratified, and

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145. See Bradley & Goldsmith, *supra* note 5, at 817 (critiquing the modern position and “conclud[ing] that, contrary to conventional wisdom, CIL should not have the status of federal common law”).

146. Bradley et al., *supra* note 35, at 886 (“[T]he revisionist view was that CIL does not automatically have the status of federal common law and that after *Erie*, federal courts needed some authorization from either the political branches or the Constitution in order to apply CIL.”). This last hypothesis requires 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 Betsy* canon, whereby U.S. courts interpret federal statutes and treaties to avoid conflicts with the law of nations. For the origin of the canon, see *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”). For an empirical study on CIL as a statutory interpretation tool in the U.S., see generally Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118 (2014).

147. See Bradley et al., *supra* note 35, at 890 (asserting that “some courts [including the Second Circuit] began to develop a revisionist position with respect to the sources of CIL in ATS litigation,” and that the Second Circuit, “pull[ing] back from the approach in *Filartiga*,” later held that “courts must look to concrete evidence of the customs and practices of States”) (quoting *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 250 (2d Cir. 2003)).

148. Bradley & Goldsmith, *supra* note 5, at 831–32, 838–43.

149. *Id.* at 842.

150. See Bradley et al., *supra* note 35, at 889–91.

various prohibitions on torture featured in national constitutions.<sup>151</sup> These types of sources are roughly the same as those that Goodman and Jinks reference as examples of “international consensus” evidence.<sup>152</sup> In fact, Bradley, Goldsmith and Moore use the terms “verbal assent” and “consensus” interchangeably.<sup>153</sup>

The revisionists do not stop there. Bradley, Goldsmith, and Moore further argue that the Supreme Court’s decision in *Sosa v. Alvarez-Machain* encouraged a new approach to determining CIL in ATS cases by eschewing *Filartiga*’s reliance on evidence of verbal assent and returning to the “revisionist” method of citing actual state practice.<sup>154</sup> Other scholars agree with this positivist reading of *Sosa*, and have extended it beyond ATS litigation into all CIL-related cases decided in U.S. federal courts.<sup>155</sup>

For our study, we split the post-*Filartiga* data into subperiods—1980 to 2003 and 2004 to 2015—in order to determine whether *Sosa* truly marked 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 variables representing “verbal assent” than to “actual practice” variables,<sup>156</sup> then perhaps CIL lacks the “positivist foundation” that Dodge, Henkin, and others have relied upon in their opposition to revisionist arguments. That said, such results might vindicate the “consensus” camp of the modern position and ultimately lend credence to the concerns that Bradley and Goldsmith expressed back in 1997.

## V. PREDICTIONS

To summarize, the *Erie* literature provides three different narratives in response to the “sources” question about CIL—the “state practice” story, the

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151. *Id.* at 889.

152. *See supra* pp. 262–63.

153. Bradley et al., *supra* note 35, 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”).

154. *Id.* at 910, 910 tbl.2 (claiming that *Sosa* “resolved” the debate about the “Scope and Sources of CIL to be applied by Courts in ATS litigation” and, in “Table 2,” 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 83, at 481, 488–89 (interpreting *Sosa* as endorsing a “positivist, inductive paradigm” for CIL that not only calls for “hard evidence of actual state practice,” but that also “reflects the movement to positivism contained in *Erie*”).

155. McGinnis, *supra* note 154, at 493 (concluding that *Sosa*’s positivism “may have important implications for deriving customary international law even outside the context of the ATS”).

156. *See supra* notes 151–152 and accompanying text for examples of variables representing “verbal assent.”



“international consensus” story, and the “revisionist” story. Scholars have summoned all three narratives to bolster their arguments regarding the “status” of CIL in U.S. law. To test each narrative’s validity, we identified various sources cited by the U.S. federal judiciary as evidence of CIL and we tracked how citation rates to these sources evolved over time.

We strategically divided our data into specific eras based on three landmark cases: *Erie*, *Filartiga*, and *Sosa*. If the “state practice” story is most reflective of reality, our time divisions should make little difference; with or without *Erie*, state practice would always exist as CIL’s positive foundation. If the data reflect this assertion, our results would not only vindicate Dodge and Henkin’s theories, but also the ICJ’s traditional definition of CIL. If the “international consensus” story is most accurate, we would anticipate the 1980s representing a crucial turning point in our data. Although Goodman and Jinks credit *Sabbatino* for providing courts the sliding scale concept to work with, they also credit *Filartiga* and its progeny for solidifying the sliding scale as an accepted form of judicial practice.<sup>157</sup> Therefore, we would expect to observe an increase in citations to “verbal assent” variables after the 1980’s. Finally, if our data vindicate the “revisionist” story, we would expect higher citation rates to sources representing traditional state practice before *Erie*, higher citation rates to sources illustrating “verbal assent” after *Filartiga* (and after World War II, generally), and an increase in citations to sources representing traditional state practice in ATS litigation and other cases after *Sosa*.

Taking these three narratives together with general academic CIL accounts, our predictions may be summarized as follows:

First, in the pre-*Erie* period from 1790 to 1938, during which federal courts applied “general common law,” we would anticipate observing a higher rate of citations to foreign cases and academic treatises, and a relatively high citation rate to sources offering traditional evidence of state practice.

Second, in the post-*Erie* period, we would anticipate uncovering a difference in the types of sources cited during the periods from 1938 to 1980 (before the emergence of the modern position via *Filartiga*) and from 1980 to 2015 (after the modern position emerged). Furthermore, if the prevailing *Erie* scholars on both sides of the debate are correct, then this difference should manifest itself most significantly in cases involving individual rights, and particularly in ATS cases.

Third, we would generally expect to observe an increase in citations to international sources after *Filartiga*. If Dodge and Henkin’s “state practice”

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157. Goodman & Jinks, *supra* note 7, at 480, 469–70.

theories are accurate, the vast majority of these sources will be those traditionally associated with state practice. Additionally, we would expect to see variables representing state practice consistently throughout our three time periods. If Koh, Goodman and Jinks's "international consensus" view is accurate, we would expect an increase after 1980 in citations to UN materials, international committee materials, treaties, and other types of international legal instruments, since *Filartiga* would have propagated *Sabbatino*'s sliding scale approach by that date. Finally, if the "revisionist" view is accurate, and *Sosa* indeed signaled a return to grounding CIL in state practice, we would expect an increase in variables representing traditional state practice in our data between 2004 and 2015.

Armed with these predictions, we examined the data.

## VI. METHODOLOGY

We designed our study with a particular goal in mind—to set aside what judges say that they are doing and to uncover the actual practices of the U.S. federal judiciary in cases applying CIL.<sup>158</sup> To do so, we created a database of federal cases decided in the United States between the early-1790s and 2015. Although most scholarship regarding *Erie* and CIL focuses on Supreme Court cases, we included within our database case law not only from the Supreme Court, but also circuit courts and a variety of federal district courts<sup>159</sup> to develop a comprehensive picture of judicial treatment of CIL across the entire federal system. We then identified individual opinions within each case in our database—including majority, concurring, and dissenting opinions—that discussed CIL and we created a database of CIL determinations. We included cases that both recognized and did not recognize CIL, and if a given opinion covered multiple issues yielding separate CIL determinations, we entered each issue as a separate entry.

In building our database, we followed two strategies to obtain adequate samples from each level of the federal judiciary while also making sure to include cases that key authors in the *Erie* debate have emphasized. First, we perused seminal articles on *Erie* and CIL and extracted the cases to which the authors attached importance. 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. Among the authors whose canonical articles we examined were Curtis Bradley and Jack Goldsmith, Beth Stephens, Harold

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158. For the inspiration behind our basic methodology, see generally Choi & Gulati, *supra* note 14.

159. 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).

Hongju Koh, and Ernest Young.<sup>160</sup> We also examined each chapter of the volume edited by David L. Sloss, Michael D. Ramsey, and William S. Dodge—a work widely considered the best compilation of authoritative accounts of CIL’s evolution throughout U.S. history.<sup>161</sup> Here, we did not code every case mentioned, but instead focused on extracting an equal selection of cases from each decade between 1790 and 2011—the volume’s date of publication. The foregoing process primarily yielded cases from the Supreme Court and, to a lesser extent, the circuit courts.

Second, to bolster our sample of CIL cases from U.S. circuit courts, we selected at random a subset of cases using Westlaw database searches with the terms “customary international law,” “custom” (in conjunction with “international law”), and the “law of nations.” Overall, we aimed to extract a roughly equal number of CIL determinations from each level of the federal judiciary (the Supreme Court, circuit courts, and district courts) and also across the pre- and post-*Erie* periods. Our initial goal was to acquire between 250 and 300 observations, and our final sample consisted of 267. Of these observations, 97 were from the Supreme Court, 71 from circuit courts, and 98 from district courts. Furthermore, 121 observations came from pre-*Erie* cases and 146 came from post-*Erie* cases.

After isolating each judicial determination with regards to CIL, we selected “variables” based on what the relevant literature commonly cites 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 as definitive evidence of CIL. For example, if a judicial opinion cited Blackstone’s *Commentaries on the Laws of England* and de Vattel’s *The Law of Nations*, the evidentiary item count in the “Academic Sources” column of our spreadsheet for that opinion would be a “2.”<sup>162</sup> Ultimately, we estimated counts of sources being cited in each entry by giving a maximum score of “1” if a specific type of source was cited. So, if a case cited a particular domestic statute six times, we counted it as citing one domestic statute (a “1”). However, if it cited six different domestic statutes, we counted that as a “6.”

In the end, we selected eleven varieties of sources as our variables to code for:

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160. See sources cited *supra* notes 4, 5, and 13.

161. See generally INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE, *supra* note 83.

162. 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.

**Academic Sources:** This category covers a broad range of material from legal academia, including treatises, international law digests, and law review articles. On numerous occasions—especially in pre-*Erie* cases—opinions referred to specific treatise authors without citing or quoting from a specific work. In these situations, we coded author references as academic sources. Relatedly, if an opinion cited to multiple works from a single author, we coded each individual work as a separate academic source. This category includes both U.S. and international sources, and it represents a variety of perspectives—from the “natural law” philosophies of Grotius and de Vattel to literature advocating the pro-modern position that Bradley and Goldsmith predicted judges would reference after 1997.<sup>163</sup>

**Domestic Cases:** Whenever judicial opinions cited case law from a U.S. court, we coded the citation under the “Domestic Cases” variable. For example, if a judge sitting on the Eleventh Circuit cited three Eleventh Circuit cases, five Supreme Court cases, one federal district court case, and one state court case, we coded each of these ten cases as “Domestic Cases.” We coded only a small number of state court cases, and did not feel justified in separating this variable into categories for federal and state cases.

**Domestic Statutes:** Here, we coded any federal or state statutes cited as evidence of CIL. As with the materials coded under the Domestic Cases variable, most of the statutes coded here were federal rather than state statutes.

**Treaties:** This variable includes any treaty or international agreement between states. Throughout our data collection, we noted the number of treaties that courts specifically referenced 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 qualifies as evidence of “verbal assent” for revisionists.

**UN/League Conference and Committee Reports:** As with treaties and United Nations resolutions, this type of evidence qualifies as evidence of “verbal assent” for revisionists.

**International Tribunal Sources:** This variable encompasses any cases, charters, or statutes derived from international tribunals such as the ICJ, the European Court of Justice (“ECJ”), the International Criminal Tribunal for the former Yugoslavia (“ICTY”), or the Nuremberg Tribunal, to name a few.

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163. 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 Committee Reports:** This variable includes any non-UN reports from committees such as the International Law Association or the Red Cross. Like treaties, United Nations resolutions, and UN or League Conference and Committee reports, this variable qualifies as evidence of “verbal assent.”

**Actions by States:** This variable describes the traditional evidence for state practice. Basically, whenever we encountered an opinion 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 letters from Attorneys General and secretaries of state, presidential proclamations, and military handbooks, among other official statements.

**Parties’ Agreements:** This variable encompasses agreements between litigating parties that ultimately determine a rule or norm amounts to CIL. The vast majority of the opinions we coded rarely cited this variety of evidence. Consequently, this paper does not devote significant analysis to this variable.

After selecting the variables above, we decided how to divide the time periods we coded. The two breaks in time that we chose were first, of course, before and after *Erie* in 1938. Secondarily, and within the post-*Erie* era, we assessed 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.<sup>164</sup> Finally, we further divided the post-1980 period into pre- and post-2004 periods, so that we could test the revisionists’ theories regarding *Sosa*. In sum, the breaks in the data we examine are at 1938, 1980 and 2004.

## VII. RESULTS AND ANALYSIS

Our results tell a story of the sources of authority that U.S. federal courts have relied upon in making CIL determinations over roughly 200 years. We begin by describing our statistical results. We then break these results into component parts—first by level of court and then according to the type of case. Table 1A and Figure 1A report our results in terms of the total number of each variety of evidence cited.

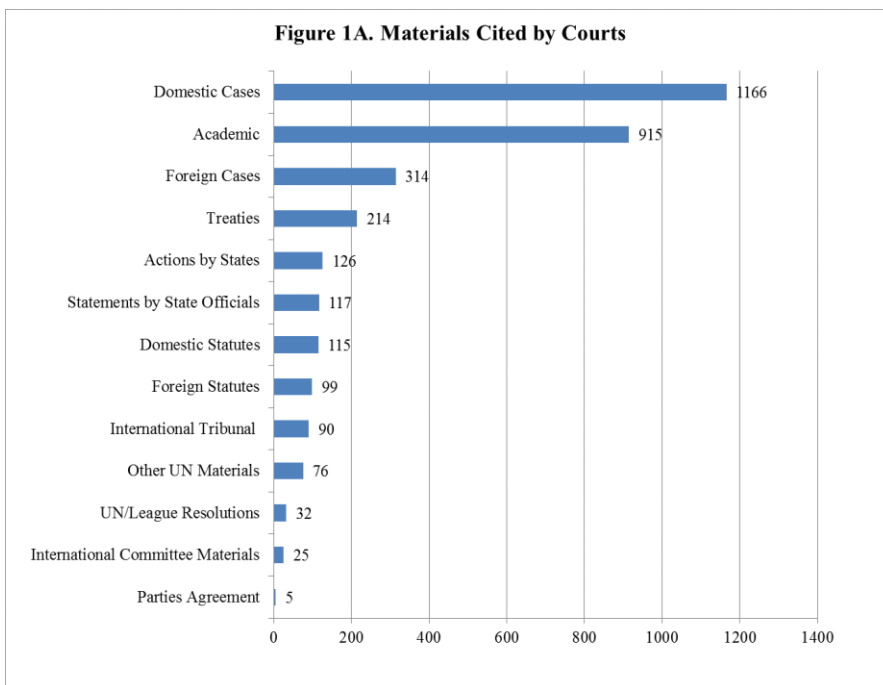
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164. *Id.* at 831 (“[T]wo events provided the central pillars for the modern position: the Second Circuit’s *Filartiga* decision and the publication of the Tentative Draft of the *Restatement (Third) of Foreign Relations Law*.”).

## A. Overall Picture

**Table 1A. Materials Cited by Courts (Numbers of Citations)**

	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

**Figure 1A. Materials Cited by Courts**

The first column of Table 1A shows that the dominant variety of evidence cited across our 200-plus year time frame is the domestic case. Academic sources are the second most widely-cited variety of evidence.

Together, domestic cases and academic sources are cited as evidence of CIL with greater regularity than the other eleven varieties of sources combined. Whether one views state practice narrowly—as only those sources qualifying under the “actions of states” variable—or broadly—including the “verbal assent” variable—direct evidence of the state practice and *opinio juris* materials that, theoretically, should be driving every CIL determination appears relatively insignificant to U.S. federal courts investigating CIL matters.

Table 1A and Figure 1A demonstrate that domestic cases remained the most widely-cited source both before and after *Erie*. Additionally, academic sources remained the second most cited source both before and after *Erie*. Therefore, in terms of what U.S. federal judges have relied on most when discerning CIL norms—namely, their own pronouncements—there seems to have been little change before and after the 1938 Supreme Court case that scholars have spent decades arguing over.

Critics may dismiss our results in Table 1A on grounds that U.S. federal judges have a well-known tendency to cite multiple prior federal court cases in their opinions, even in situations where a single citation may suffice. Furthermore, there is potential for outlier problems where courts cite many times to a particular type of source. To correct for these potential shortcomings, we provide an alternate representation of our data in Table 1B, and Figure 1B. Instead of reporting raw counts of the number of materials cited, we report the percentage of determinations in which a type of material was cited at least once. We also examine whether there are statistically significant differences across the time periods in terms of the fraction of materials that are cited. Here, our method of interpreting the data—in terms of fractional use—avoids the potential influence of outlier opinions where a disproportionate number of citations are made to a particular type of evidence. Thus, for example, if a particular Supreme Court case, such as *The Scotia*, cites forty different pieces of evidence of state practice, we count only one citation (whereas our prior representation would have counted forty).

It is worth reiterating that at least some of the authors in the *Erie* debate would probably not have predicted significant changes in our data at the time *Erie* was decided. Rather, they imply that *Erie*'s relevance to CIL determinations peaked in the 1980s, when the Second Circuit decided *Filartiga v. Pena-Irala* and the *Restatement (Third)* was published. The issue of *Erie*'s relevance to CIL then supposedly reemerged in 2004 with *Sosa v. Alvarez-Machain*. To test these effects, we have separated our data into pre- and post-1938 periods (*Erie*); pre- and post-1980 periods (*Filartiga/Restatement*); and finally pre- and post-2003 (*Sosa*) periods.

By analyzing our results—as corrected above—using significance tests across time periods, we are able to observe a nuanced picture of the changes in what types of materials are cited by the courts as sources of CIL over time. As a threshold matter, despite our corrections to account for the potential shortcomings described above, domestic cases and academic materials remain the most widely-cited sources of evidence by a significant margin—domestic cases are cited in seventy-six percent of all CIL determinations and academic materials are cited in sixty-nine percent. By contrast, citations to the actions of states—the core evidence of state practice—appears among the least-cited varieties of sources and is cited in only seven percent of determinations.

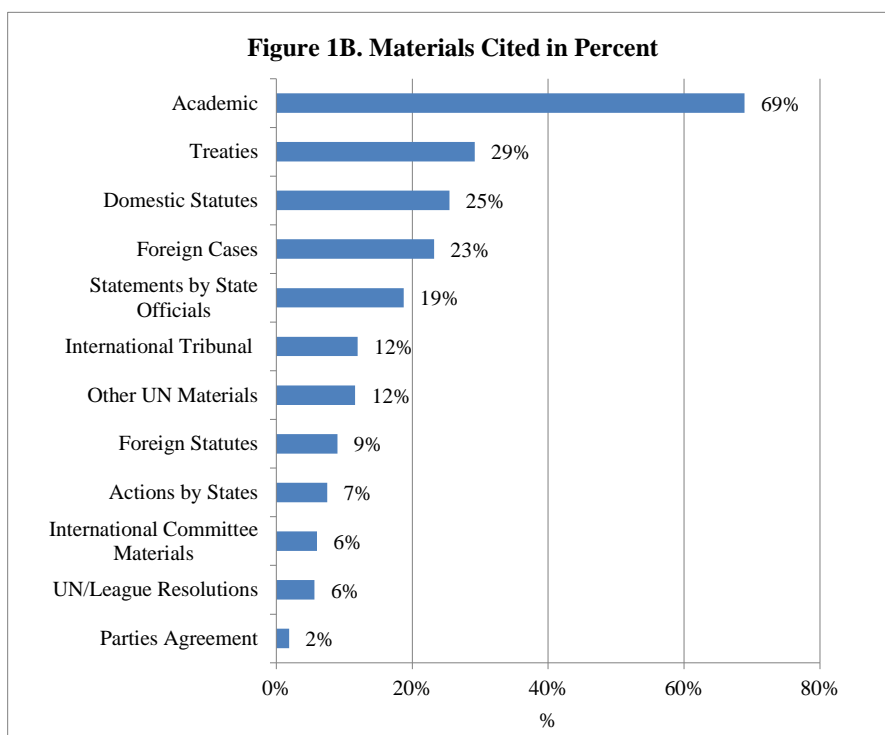
Academic materials appear to have declined significantly in importance during the post-*Erie* period. This decline, however, did not occur immediately after *Erie*, for our data shows an increase in citations to academic materials—from seventy-four percent of CIL determinations to eighty-eight percent—during the period from 1938 to 1980. Rather, the declining importance of academic materials occurred after 1980 when its citation rate plummeted from eighty-eight percent to fifty-seven percent.



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)	1938- 1979 (n=49)	1980- 2003 (n=42)	1980- 2015 (n=97)	1980- 2003 (n=42)	2004- 2015 (n=55)
Parties Agreement	2%	0%	0%	0%	2%	0%	2%	5%	2%	7%
UN/League Resolutions	6%	0%	2%	2%	14%	2%	14%	14%	14%	15%
International Committee Materials	6%	2%	10%	10%	2%	10%	2%	9%	2%	15% *
Actions by States	7%	10%	6%	6%	5%	6%	5%	5%	5%	5%
Foreign Statutes	9%	12%	16%	16%	2%	16%	2%	2%	2%	2%
Other UN Materials	12%	0%	18%	18%	26%	18%	23%	23%	26%	20%
International Tribunal	12%	2%	10%	10%	19%	10%	25%	25%	19%	29%
Statements by State Officials	19%	20%	24%	24%	14%	24%	14%	14%	14%	15%
Foreign Cases	23%	31%	37%	37%	7%	37%	6%	6%	7%	5%
Domestic Statutes	25%	13%	31%	31%	29%	31%	38%	38%	29%	45%
Treaties	29%	14%	35%	35%	55%	35%	45%	45%	55%	38%
Academic	69%	74%	88%	88%	57%	88%	54%	54%	57%	51%
Domestic Cases	76%	59%	88%	88%	95%	88%	92%	92%	95%	89%

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



To the extent that academic citations during the pre-*Erie* period were primarily to natural law masters such as Grotius, Pufendorf, and de Vattel, the declining citation rate to academic sources may indicate a clear move away from “finding CIL” in the works of natural law scholars and the perspectives of foreign common law cases.<sup>165</sup> In fact, after 1980, the percentage of cases in which this type of material was cited to foreign cases dropped from thirty-seven percent to seven percent.<sup>166</sup> However, we are uncertain 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 documented state practice and *opinio juris* at the time. This ambiguity is difficult to resolve, because most judges in the cases we coded cite to academic sources without explaining their reasoning.

165. 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.

166. 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.

Whatever the rationale underlying the judges' decisions, we observed a dramatic drop in U.S. federal courts' citations to academic material and foreign cases for CIL determinations after 1980.

Our data uncovered other significant results. It is interesting—and perhaps puzzling from a revisionist standpoint—that the increase in citations to domestic statutes did not occur concurrently with the shift away from citations to academic material. Instead the former occurred immediately after *Erie*, during the post-1938 period, roughly forty years before the shift away from academic sources. Thus, the true pattern followed by the U.S. federal judiciary in selecting their sources for CIL determinations played out in stages. Stage one encompasses the shift toward greater citations to domestic statutes and began in the post-1938 period. Stage two encompasses a shift away from citing academic materials, foreign cases and statutes, and begins in the 1980s—roughly forty years after *Erie*. The largest shift in the post-*Erie* period, however, involves an increased reliance on citations to domestic cases (from citations in fifty-nine percent of CIL determinations before *Erie* to roughly ninety percent after *Erie*). Scholars at the center of the traditional CIL debate have seemingly overlooked this shift, as they rarely discuss it.

Although an increased citation rate for domestic statutes in CIL determinations is consistent with the revisionist position, it is likely short-sighted to conclude that this post-*Erie* shift was perfectly in accord with revisionism.<sup>167</sup> Rather, something else may have been afoot, because our data also demonstrate a prominent increase in citations to international materials indicative of “verbal assent,” including UN resolutions, reports from international committees constituted by organizations such as the UN or the International Red Cross,<sup>168</sup> international tribunals, and international treaties. The most significant of these shifts occurred with international treaties, which underwent an increase of similar magnitude (ten to fifteen percent to around thirty to thirty-five percent) to the increase in citations to domestic statutes.

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167. The revisionist position, at least the version proffered by Bradley and Goldsmith in 1997, see generally Bradley & Goldsmith, *supra* note 5, is not 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 U.S. Constitution and federal statutes—before courts can rightfully apply CIL as federal common law. *See id.* at 871 (arguing that “in the absence of federal political branch authorization, CIL is not a source of federal 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. In other words, the domestication that revisionists look for is not the same kind of domestication we found here.

168. When referring to committee reports, we refer namely to sources such as International Red Cross expert committee materials that study the evolution of customary practices. Sometimes, courts cite to an actual report, but not always.

To summarize, our data support both the “revisionist” story and the “international consensus” story. On one hand, U.S. federal courts appear to have complied with what revisionists consider the dictates of *Erie* by citing greater numbers of domestic statutes after 1938. Additionally, our data illustrates something of an *Erie* tailwind during the post-1980 period—citations to academic material and foreign domestic sources dropped significantly. On the other hand, not all of the changes we observed related to domestic sources; we also observed significant increases in post-1938 citations to the varieties of sources that Goodman and Jinks associate with consensus, including international tribunal decisions and materials from the UN and international committees. Among the international consensus or “verbal assent” variables, the most significant trend we observed was an increasing number of citations to treaties. In the period from 1980 to 2015, treaties were cited in forty-five percent of all determinations—a significant increase from fourteen percent during the pre-1938 period.

One question we encountered was whether the increase in citations to international materials vindicated the “state practice” story in any meaningful way. To explore this question, we separated all citations to treaties included within our data depending on whether the treaty codified a state practice. Treaties, of course, can take many different forms. Some reflect a codification of state practice, while others reflect the opposite; that is, a treaty is necessary precisely because there is no prevailing practice among nations to define how they will behave under certain circumstances. To examine the percentage of our citations that referenced treaties codifying a state practice, we entered a specific code if the citing court explicitly stated that the treaty codified state practice. Overall, roughly five percent of the treaty citations we coded contained explicit statements that the treaty at issue reflected some form of generalized state practice.<sup>169</sup> In other words, although the increase in citations to treaties is noteworthy for the “international consensus” story, the trend does not appear to reflect an increase in judicial references to traditional evidence of state practice.

Despite significant trends both before and after the decisions in the 1930s and the 1980s, judicial behavior remained largely static around the time of the Supreme Court’s decision in *Sosa*, the lone exception being a continued increase in citations to domestic statutes. In fact, citations to domestic statutes surpassed citations to treaties during the period between

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169. Choi and Gulati find essentially the same result in their examination of international tribunal determinations of CIL. See Choi & Gulati, *supra* note 14, at 132–33 (reporting that courts will sometimes “specify that [they were] citing a treaty because that treaty represented a codification of past state practice and *opinion juris*,” but that “it happens rarely,” and concluding that “the dominant form of evidence being cited is forward-looking or aspirational”).

2004 and 2015. This trend should comfort revisionists. Nevertheless, citations to verbal assent variables—particularly international tribunal cases and international committee materials—continued to increase during this period. On the other hand, citations to acts of states remained at a miniscule five percent—a level that fails to mesh with revisionists’ story of a return to reliance on traditional state practice when determining CIL. Most importantly, neither of these variables surpasses domestic cases or academic sources, which remain the two most cited sources. Based on these observations, *Sosa* may have been less dramatic a turning point than revisionists believe.

The next question we faced was whether our seemingly contradictory findings stemmed primarily from different types of courts or cases.

### B. Type of Court

The existing academic research regarding CIL determinations in U.S. federal courts has focused primarily on the U.S. Supreme Court and, to a lesser extent, a small number of circuit court decisions. The vast majority of determinations, however, are made at the district court level—and district court opinions, researchers have found, tend to be far more constrained than those of higher courts.<sup>170</sup> Thus, we questioned whether we would observe different patterns of judicial practices in CIL determinations at different levels of the federal judiciary.

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170. *E.g.*, LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 79 (2013) (presenting empirical evidence that district court judges are far less likely than judges in higher courts to go off on tangents based on their personal policy preferences).

**Table 2A. Materials Cited by Type of Court (in Percent)**

	Trial Court	Circuit Court	Supreme Court	
Parties Agreement	1%	6%	0%	*
UN/League Resolutions	3%	15%	1%	***
International Committee Materials	3%	13%	4%	*
Foreign Statutes	5%	8%	13%	
International Tribunal	6%	25%	7%	***
Other UN Materials	7%	24%	6%	***
Actions by States	8%	7%	7%	
Statements by State Officials	17%	27%	13%	
Treaties	20%	55%	19%	***
Foreign Cases	21%	14%	32%	*
Domestic Statutes	29%	35%	15%	*
Academic	61%	69%	77%	
Domestic Cases	85%	86%	60%	***

For the sake of simplicity, we present a single table—Table 2A—with breakdowns of our observations across different levels of the judiciary. Table 2A displays the percentages of each type of material cited at least once in each CIL determination. As the Table illustrates, we observed several statistically significant differences. Unsurprisingly, our data indicate that citations to domestic cases dominated across all three levels of the judiciary. Furthermore, increases in citations to domestic cases were substantial and statistically significant in the post-*Erie* period for two of the three levels—trial courts and the Supreme Court. To a lesser extent, we also observed statistically significant increases in citations to international materials. However, the number of citations in all three levels of the judiciary appeared to trend in the same direction for all sources considered. To the extent that there are differences in the strength of these trends, they are likely the product of differences in the number of cases at each judicial level. We also examined the data for each court type during each of the time periods described above (designated by *Erie*, *Filartiga* and *Sosa*), but did not detect sufficiently significant differences among the trends we observed across the three time periods. We do not report that additional material here.

### C. Type of Case

To the extent that the “international consensus” and the “revisionist” stories overlap, advocates of both the revisionist and modern positions suggest that the types of CIL determinations occurring in ATS and individual rights cases (all of which would likely have appeared in the post-*Erie* period) were unique. There was little evidence of state practice to support the judiciary’s proposed CIL rules on many human rights matters. In many cases, past state practice, if anything, merely illustrated specific behavior that

judges wanted to eliminate in furtherance of human rights. As a result, revisionists assert that judges presiding over human rights cases were more likely to cite to “verbal assent” sources as evidence for CIL than judges presiding over cases requiring more traditional CIL determinations.<sup>171</sup> Meanwhile, Goodman and Jinks credit *Filartiga* and subsequent human rights litigation for setting *Sabbatino’s* sliding scale into motion, thereby establishing an “international consensus” approach to CIL determinations.<sup>172</sup> Given the strong association between “verbal assent” and the concept of “international consensus,” a higher citation rate to verbal assent sources in human rights cases would be just as consistent with this modern position view as it would be with the revisionists’ claims.

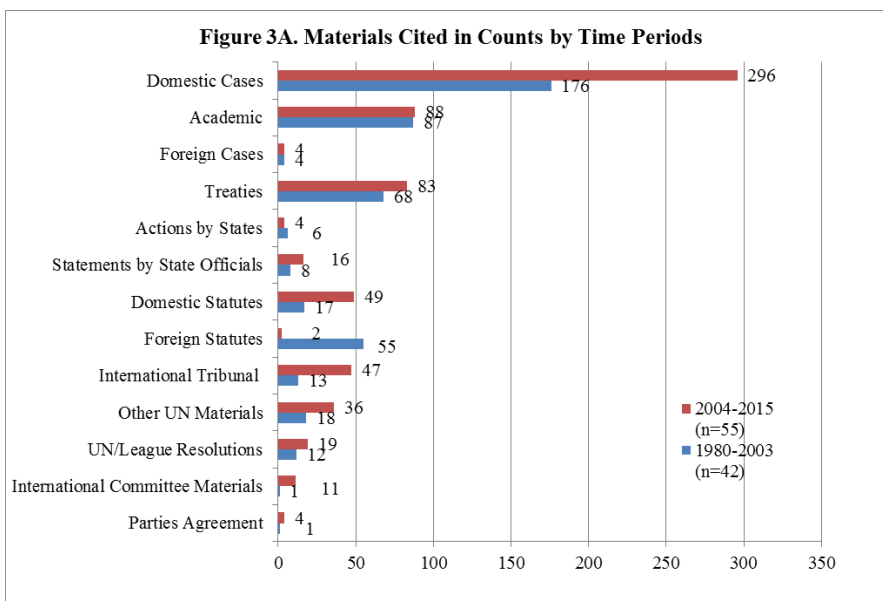
**Table 3. Citations to Materials by Interstate v. Individual and by ATS (in Percent)**

	Interstate (n=44)	Individual (n=102)		ATS=Yes (n=71)	ATS=No (n=75)	
Actions by States	9%	4%		1%	9%	*
Parties Agreement	0%	5%		6%	1%	
Foreign Statutes	7%	7%		3%	11%	
Foreign Cases	27%	12%	*	3%	5%	
UN/League Resolutions	5%	13%		15%	5%	*
Statements by State Officials	30%	13%	*	15%	20%	
UN/League Conference and Committee Reports	30%	18%		24%	19%	
International Tribunal	18%	21%		30%	11%	**
Domestic Statutes	30%	38%		46%	25%	
Treaties	30%	47%	*	45%	39%	
Academic	77%	60%	*	59%	71%	
Domestic Cases	89%	91%		92%	89%	

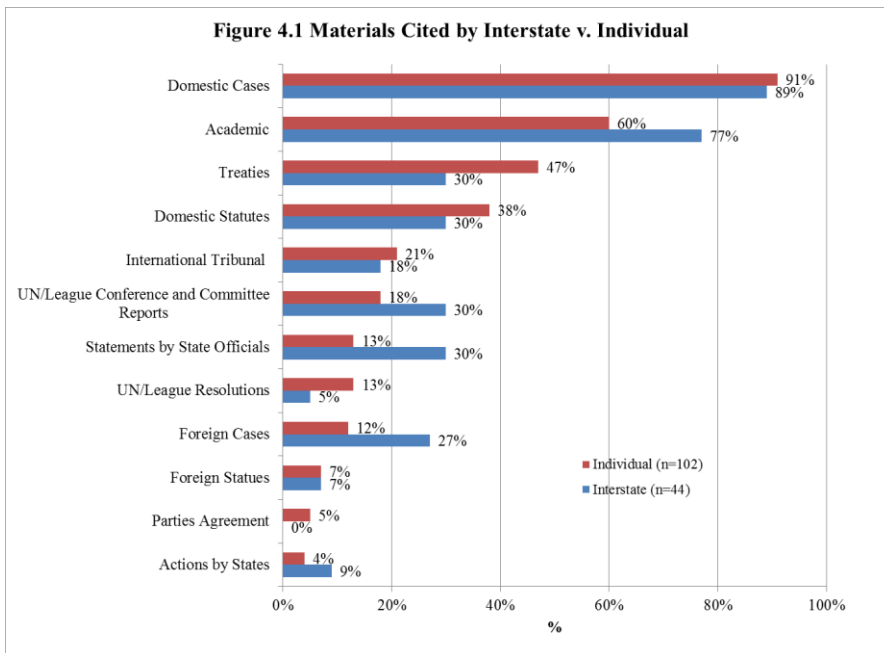
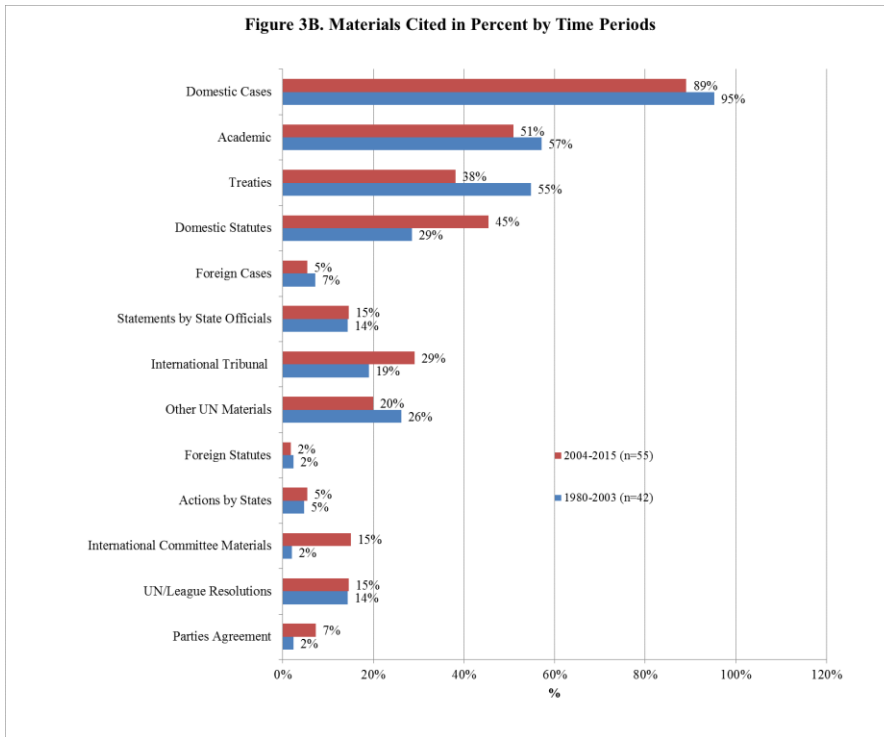
\* $p < .05$ , \*\*  $p < .01$ , \*\*\*  $p < .001$

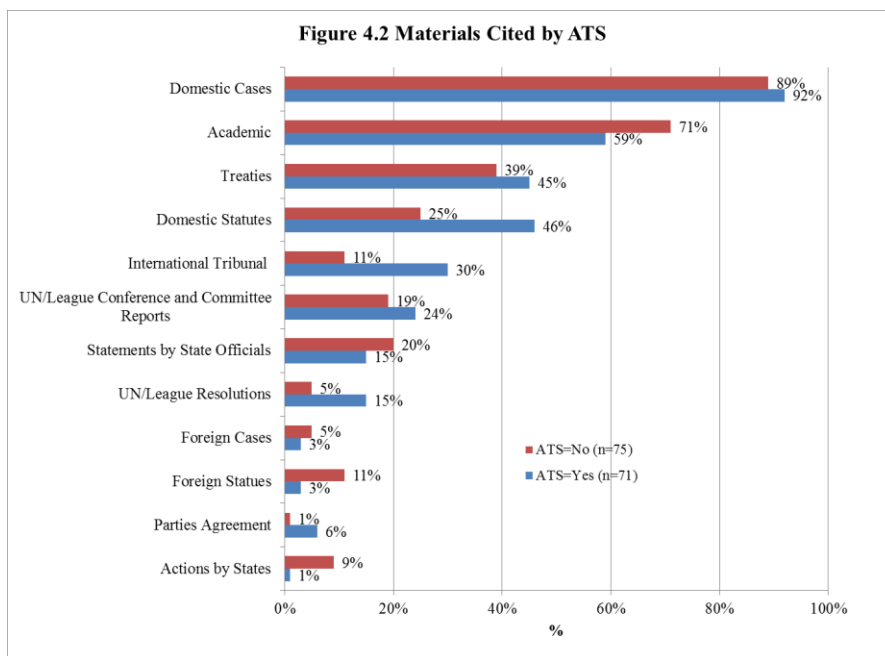
171. See Bradley et al., *supra* note 35, at 889–91.

172. See Goodman & Jinks, *supra* note 7, at 512.









To examine this hypothesis, we separated our data in two ways. First, we coded each of our CIL determinations according to the subject matter of the underlying case—in particular, whether the case involved interstate relations (*e.g.*, diplomatic immunity) or individual rights (*e.g.*, torture of a domestic citizen). Second, we coded each of the CIL determinations in one of two ways depending on whether the case had been brought under the ATS. Table 3, and Figures 3A and 3B illustrate our results. Ultimately, we observed few indicia that courts were behaving differently in individual rights or ATS cases than in other type of cases. Perhaps the differences that the *Erie* debaters theorized may have manifested themselves had courts actually sought evidence of state practice in cases with subject matters characterized as “traditional” international law. However, our data demonstrate quite clearly that traditional sources of state practice were simply not a significant resource for courts making CIL determinations.

### VIII. IMPLICATIONS

Our study reveals that U.S. federal courts have relied primarily on domestic case law in deciding issues based on CIL, and secondarily on academic sources.<sup>173</sup> In other words, the CIL that U.S. federal courts have

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173. See *supra* Table 1A and Figure 1A.

applied has largely been a product of their own making, and the remaining body of influential CIL has derived from “the professors, the writers of textbooks and casebooks, and the authors of articles in leading international law journals.”<sup>174</sup> Only after consulting these two sources have federal judges incorporated international materials into their CIL analyses. This trend began before *Erie* and has since continued. Not even the supposedly game-changing advent of human rights litigation has managed to displace domestic case law as the primary resource that U.S. courts cite to in CIL determinations.<sup>175</sup>

Turning to the matter of what other sources are cited, and how these citations have evolved, we find that citations to international sources did increase after *Erie*. The major portion of this increase occurred after *Filartiga* was decided in 1980. To what extent, then, has our data vindicated the “state practice” story or the “international consensus” story? Thus far, we have discussed “state practice” and “international consensus” as separate and distinct concepts, where the former includes both sources representing traditional state practice and sources illustrating “verbal assent” that revisionists deride as mere “cheap talk.”<sup>176</sup> As we have reiterated, however, the international legal community continues to debate the meaning of “state practice.” On one hand, many regard actual state action as the best evidence of state practice on the assumption that words are more indicative of *opinio juris*.<sup>177</sup> On the other hand, some scholars argue that so-called “verbal” evidence of CIL qualifies as evidence of “state practice,” in which case the terms “state practice” and “international consensus” effectively become interchangeable.<sup>178</sup> This ongoing disagreement begs an important question:

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174. Sohn, *supra* note 20, at 399.

175. 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*, 101 IOWA L. REV. 1893, 1911 fig.8 (2016) (finding that domestic citations accounted for roughly forty-eight percent of post-*Sosa* citations).

176. See, e.g., Curtis A. Bradley, *Customary International Law Adjudication as Common Law Adjudication*, in CUSTOM'S FUTURE, *supra* note 14, at 34, 53 (stating that “verbal actions should be considered with caution, since they might simply be ‘cheap talk’ as opposed to the expression of a genuine preference”).

177. See *supra* pp. 247–48; see also Bradley, *supra* note 176, at 53 (“There has also been much 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*.”).

178. See Omri Sender & Michael Wood, *Custom's Bright Future: The Continuing Importance of Customary International Law*, in CUSTOM'S FUTURE, *supra* note 14, at 360, 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.’”); see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. b (AM. LAW INST. 1987) (explaining that state practice can take the form of “diplomatic acts and

should conflicting definitions of state practice substantially affect how we analyze our data?

In a way, it should (and does). If we set aside sources representing verbal assent and adopt a traditional conception of state practice, then at least some of the modern position's arguments regarding CIL appear 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 source of positive authority.<sup>179</sup> True, citation rates to "actions by states" have never been 'zero percent,' but they have never risen above ten percent in any given era.<sup>180</sup> If state practice consists only of nations' concrete actions, then CIL's positivist foundation may be too meager to survive *Erie* in the manner that Dodge or Louis Henkin propose. This finding would not only be bad news for Dodge and Henkin, but also for revisionists, as it quashes their hopes for a post-*Sosa* comeback of traditional state practice variables.<sup>181</sup>

If, however, we expand the meaning of practice to include evidence of verbal assent—including 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—our results support the very concept that Goodman, Jinks and Koh have labeled as "international consensus." Assuming that scholars like Dodge and Henkin adopt this construction of state practice, the modern position's two "camps" referenced above would likely merge into a single "consensus" camp.<sup>182</sup> If we revisit our data under these circumstances, do the theoretical foundations of this "consensus" camp fare any better than those of the traditional state practice camp?

The answer to this question is not straightforward. In theory, as Koh sees it, federal courts exercise less judicial discretion when making CIL determinations than when making other kinds of determinations under federal 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."<sup>183</sup> Put differently, CIL norms qualify as federal common law only after "a clear international consensus" has sufficiently "crystallized" them.<sup>184</sup>

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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").

179. See *supra* pp. 258.

180. See Table 1B, Figure 1B.

181. See *supra* pp. 264–65; see also Table 1B (citations to "Actions of States" stayed at five percent after 1980, indicating no change after *Sosa* in 2004).

182. See *supra* Part IV.c.

183. Koh, *supra* note 4, at 1853.

184. *Transnational*, *supra* note 46, at 2385–86 (asserting that "over the centuries," federal courts have "determine[d] whether a clear international consensus has crystallized around a legal norm that

As Goodman and Jinks argue, this phenomenon should be manifested through judicial practice in the form of *Sabbatino*'s sliding scale.<sup>185</sup>

After re-examining our own data, however, we are uncertain whether to agree with this point. Although we observed increasingly higher citation rates over time to variables representing international consensus—with treaties showing the most dramatic increase—each of these rates paled in comparison to the citation rates to domestic case law at all times.<sup>186</sup> For that matter, most variables representing verbal assent also showed consistently lower citation rates than academic sources; including after 1980 when citations to academic sources decreased. Even when treaties reached citation rates between thirty percent and fifty percent, they were still dwarfed by the citation rates for domestic cases, which remained at roughly 90%. Even if federal judges have consulted an “existing corpus” of CIL rules, they appear to have relied primarily on an existing corpus of the federal judiciary’s interpretation of those rules.

Therefore, we believe adherents to the modern position should ask a more appropriate sources-related question—just how much international consensus is enough? In other words, how high must citation rates to international sources be to conclude that judges have sufficiently “crystallized” CIL norms into justiciable issues in U.S. federal courts? Put 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”?

Setting aside the “consensus” versus “state practice” issue, we encountered difficulty accounting for the high citation rates to treaties over time. As mentioned earlier, our results cut against any argument that courts have cited to treaties as codifications of state practice.<sup>187</sup> Another possibility, however, is that courts have made a revisionist attempt to incorporate CIL into domestic federal law through treaties.<sup>188</sup> We ultimately dismissed this idea, because many of the treaties cited by courts were treaties that the United States had not ratified and therefore were not part of federal law.

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protects or bestows rights upon a group of individuals that includes plaintiffs”).

185. Goodman & Jinks, *supra* note 7, at 482.

186. See Table 1B.

187. See *supra* note 169 and accompanying text.

188. See Bradley & Goldsmith, *supra* note 5, at 820 (“[W]hen 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 et al., *supra* note 35, at 878 (“[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.”).

Some have argued that treaties are a problematic source for CIL because they are “good evidence of what states want the law to be, but they are not necessarily good evidence of what the law is.”<sup>189</sup> If anything, the increase in citations 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 such a legal obligation ought to exist.<sup>190</sup> If this is the case, the increase in citations to treaties after *Erie* yields a new breed of “brooding omnipresence in the sky” that replaces the natural law principles of pre-*Erie* times with an “august corpus” of new, “aspirational” norms from which federal judges can “make” CIL.<sup>191</sup>

According to our data, the rise of this new omnipresence appears short-lived, as the citation rate for treaties dropped from fifty-five percent to thirty-eight percent in the years following the *Sosa* decision.<sup>192</sup> At the same time, citations to domestic statutes increased from thirty-nine percent to forty-five percent.<sup>193</sup> Perhaps these simultaneous shifts signal a partial victory for revisionists, who not only advocate for positive incorporation of CIL through domestic federal statutes after *Erie*, but also anticipate less reliance on “verbal assent” sources (including treaties) after *Sosa*. Again, this victory is merely partial, for a revival of citations to traditional state practice did not emerge after *Sosa*. Furthermore, federal judges have not domesticated CIL through statutes or the U.S. Constitution so much as they have through an overwhelming reliance on U.S. case law.

On that note, whenever we analyzed our data within the framework of the *Erie* debate, we continuously returned to the one finding that scholars involved in the debate did not anticipate—the prevalence of domestic cases as the primary source relied upon by the U.S. federal judiciary in determining CIL. After wading through the *august corpus* of *Erie*/CIL literature, we could not find a single scholar predicting a post-*Erie* increase in citations to

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189. Choi & Gulati, *supra* note 14, 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.”).

190. See Roberts, *supra* note 11, at 757 (“State practice refers to general and consistent practice by states, while *opinio juris* means that the practice is followed out of a belief of legal obligation.”); see 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.”).

191. Along the same vein, see Szewczyk, *supra* note 146, at 1123 (explaining how the “lack of determinacy of the subset of international custom that is vague or disputed (‘emerging custom’)” embodies this “brooding omnipresence” concept).

192. See Table 1B.

193. See *id.*

domestic cases for CIL. In fact, the existing literature often cuts in the opposite direction.<sup>194</sup> Our data appear to have uncovered something *less international* and *more self-referential* about the customary international law U.S. federal courts have applied.

Do our findings expose a troubling reality for scholars of CIL? On one hand, perhaps not. After all, it is customary for the federal judiciary to cite primarily to federal precedent since it is mandatory authority in their jurisdictions. Perhaps by following themselves, U.S. federal judges are engaging in a pragmatic form of common law decision making—precisely what legal realists would predict. Indeed, this is what Curtis Bradley suggested in 2015 that courts are doing and should be doing with CIL.<sup>195</sup>

On the other hand, haven't both sides of the original *Erie* debate argued that CIL requires something extra before it can be applied as federal common law in U.S. 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 “lack[ing] authority as law, because such norms are not, in fact, based on the . . . general acceptance of the international community that a norm is obligatory.”<sup>196</sup> Moreover, even if it was widely agreed that CIL enjoys the status of federal common law, we should still expect judges to apply CIL as traditionally defined by the ICJ.<sup>197</sup>

Perhaps the federal judiciary's reliance on domestic precedent serves a useful purpose—namely, that of promoting efficiency and uniformity in U.S. interpretations of CIL. We suggested earlier that gathering sufficient evidence of state practice is a nearly impossible task.<sup>198</sup> Rather than conducting such an empirical inquiry each time a question arises and poses an issue implicating CIL, it may be more practical for federal judges to cite

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194. See Koh, *supra* note 4, at 1853 (arguing that judges exercise less judicial discretion when adjudicating CIL); Neuman, *supra* note 43, 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.”).

195. See Bradley, *supra* note 176, at 34 (defending a “common law account [which] recognizes a significant element of judgment and creativity in determining the content of CIL”). But see Bradley & Goldsmith, *supra* note 5, at 816 (reflecting Bradley's different view in 1997, which “question[ed] the modern position's historical validity,” and argued that “its recent rise to orthodoxy has been accompanied by little critical scrutiny”).

196. Kelly, *supra* note 10, at 452.

197. See Statute of the International Court of Justice, art. 38, ¶ 1 (b), June 26, 1945, 33 U.N.T.S. 993 (noting that courts “shall apply . . . international custom, as evidence of a general practice accepted as law”).

198. See *supra* Part I.

precedent where international materials have been collected and analyzed to discern a “crystallized” CIL norm. From a practical standpoint, prior decisions are easily accessible to U.S. judges, much more so than the myriad international sources that judges (and their clerks) may not necessarily know exist. By citing domestic precedent, the federal judiciary is able to craft a consistent U.S. stance on CIL rules that contributes to a consistent body of CIL globally.

Nevertheless, we ask once more— at what point does CIL become too domesticated to qualify as international law? To the possibility that judges cite one another 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.<sup>199</sup> Still, if those fears do reappear, are they warranted?

All of the foregoing questions really boil down to one: what is customary international law, really? Although we cannot presume to adequately answer this final question, we hope that this study breathes new life into this age-old inquiry. For now, we have suggested several ways in which these judicial practices affect the *Erie*/CIL debate specifically, but we will allow readers to decide whether these realities ought to concern scholars of CIL as a matter of principle. In making this decision, it may prove helpful to consider whether highly domesticated, self-referential methods of determining CIL detract from its legitimacy as law.

Ultimately, it is our hope that the great *Erie* debaters will reconcile their theories with the realities of CIL determinations by the U.S. federal judiciary. In the process, we also hope they will venture beyond exploring CIL’s place as “part of our law” and revisit—in a more informed manner—fundamental questions relating to CIL’s status as law.

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199. See, e.g., Spiro, *supra* note 60 (“Sure to lose in the long run, New Sovereigntism also hurts America in the here and now.”); see Scoville, *supra* note 175, at 1899 (criticizing CIL as applied in ATS cases, and claiming that “contemporary CIL retains the under-inclusive and overwhelmingly occidental genealogy of the historical law of nations”).