THE LONG ARM OF THE LAW: CUSTOMARY INTERNATIONAL LAW IN DOMESTIC COURTS

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INTRODUCTION

Does Missouri have the power to execute a juvenile defendant?[1] Does it matter that "the United States [was] the only country in the world that continue[d] to give official sanction to the juvenile death penalty?"[2] These questions implicate the relevance and application of international law in domestic courts. International law includes formal agreements, such as treaties, and informal norms, known as customary international law (CIL), that a supermajority of countries follow.[3] Application of international law in domestic cases raises a multitude of legal issues, including: (1) identifying the source of authority that allows international law to be applied domestically,[4] (2) analyzing whether the application comports with the principles of federalism and separation of powers,[5] (3) assigning the status

* J.D. Candidate, 2023, Fordham University School of Law; B.A., 2019, Binghamton University. Thank you to Josselin Aldana and Miles Patton for their time and very helpful feedback, as well as Leigh Forsyth, Isaac Krier, and the other editors and staff of the *Fordham Law Review* for their tireless work. I would also like to thank my family for their constant encouragement, love, and support.

1. *See* Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that the Eighth Amendment disallows capital punishment for juvenile offenders).

2. *Id.* at 575.

3. *See International Law*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu wex/international_law [https://perma.cc/HYK8-GUNZ] (last visited May 1, 2023).

4. *See generally* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825 (2018); Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 BYU L. REV. 1 (reviewing an original understanding of the domestic role of courts, including applying international law to resolve disputes that involve foreign affairs).

5. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control Over International Law*, 131 HARV. L. REV. 1201 (2018) [hereinafter Bradley & Goldsmith, *Presidential Control*]; Ingrid Wuerth, *An Originalism for Foreign Affairs?*, 53 ST. LOUIS U. L.J. 5 (2008); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309 (2006); Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089 (1999); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique of the Modern Position*]; Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071 (1985); Albert A. Lindner, *Judgments Rendered Abroad—State Law or Federal Law*, 12 VILL. L. REV. 618 (1967); Louis Henkin, *The Foreign Affairs Power of the Federal Courts:* Sabbatino, 64 COLUM. L. REV. 805 (1964).

of international law among domestic sources of law,[6] (4) deciding whether international law provides for jurisdictional and procedural rules or if it also includes substantive law,[7] and (5) establishing the appropriate method of application in federal courts. This Essay focuses on the fifth issue and shows how U.S. Supreme Court decisions, the history of the drafting of the Constitution, and past practice collectively provide strong support for federal district courts considering CIL as precedent and applying CIL as a rule of decision.

This Essay proceeds in four parts. Part I reviews the core concepts of international law and briefly explores the academic discussion regarding its application domestically. Part II explains two of the essential Supreme Court cases addressing international law. Part III introduces primary source research concerning the original meaning and understanding of the domestic application of international law. Finally, Part IV argues that treating CIL as common law precedent is consistent with several methods of constitutional analysis.

I. THE LAY OF THE LAND

"International law is concerned primarily with the rights, duties, and interests of sovereign states."[8] International law is bifurcated into *public* and *private* categories.[9] Public international law covers country-to-country interactions and country-to-citizen interactions.[10] Private international law, also called conflict of laws, concerns disputes between private parties that implicate multiple nationalities.[11] Sources of international law include formal treaties and the consistent practices of a supermajority of nations, followed out of "a sense of legal obligation," called "customary international law."[12] Within CIL is a subcategory, jus cogens, or fundamental CIL, which

6. *See generally* U.S. CONST. art. VI, cl. 2.; Jack L. Goldsmith & Curtis A. Bradley, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393 (1997); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990); Richard B. Lillich, *Invoking International Human Rights Law in Domestic Courts*, 54 U. CIN. L. REV. 367 (1985).

7. *See* Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1621 (1997).

8. William R. Grove, Jr., Note, *International Law, Conflict Law and* Sabbatino, 19 U. MIAMI L. REV. 216, 224 (1964).

9. *See International Law*, *supra* note 3.

10. *Public International Law: Research Guide,* UCLA SCH. OF L. HUGH & HAZEL DARLING L. LIBR., https://libguides.law.ucla.edu/publicinternationallaw [https://perma.cc/7P8A-E2SB] (last visited May 1, 2023).

11. *Id.*

12. *Customary International Law*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/DU9Q-CC9N] (last visited May 1, 2023).

includes principles with "near-universal agreement" such as prohibitions against genocide.[13]

In the United States, formal international law derives binding authority from the Constitution, more specifically from the Treaty Clause.[14] Discussions of CIL tend to cite more indirect sources, such as historical understanding and precedent.[15] Regarding international law, scholars debate the extent of its authority in accordance with federalism[16] and separation-of-powers concerns.[17] The core federalism argument against the application of international law can be found in the influential article written by Professors Curtis A. Bradley and Jack L. Goldsmith.[18] In short, they argue for two premises. First, that the enforcement of CIL in domestic cases, especially CIL concerning human rights, infringes on the authority of the states.[19] Second, that incorporating CIL as federal common law contradicts constitutional text, history, and past practice.[20]

Conversely, proponents of incorporation, such as Professor Harold Hongju Koh, use similar interpretive methods to assert that foreign affairs are an exception from both the standard federalism analysis and the conceptually related separation-of-powers question.[21] One position maintains that due to past practice, text, and the practical realities of modern politics, the executive branch is the primary authority in foreign affairs.[22] This view generally assigns the U.S. Congress as secondary to the executive, and the judiciary as a distant third that should defer to the political branches on foreign affairs questions.[23] Others contend that active separation of powers and the concept of coequal branches extends to foreign affairs.[24] This approach suggests that the judicial branch should act as a check on foreign affairs topics insofar as it checks domestic affairs.[25] Following the concerns of authority, federalism,

13. *Jus Cogens*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/jus_cogens [https://perma.cc/V4DV-NACK] (last visited May 1, 2023).

14. U.S. CONST. art. II, § 2, cl. 2. For an example of the Supreme Court's application of the clause, see *Asakura v. City of Seattle*. 265 U.S. 332 (1924) (enforcing treaty obligations between the United States and Japan to overturn a Seattle law banning noncitizens from being pawnbrokers).

15. *See* Arlyck, *supra* note 4, at 28–30. *See generally* Wuerth, *supra* note 4.

16. *See* Lindner, *supra* note 5, at 622–23; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 853, 866; Koh, *supra* note 5, at 1839.

17. *See* Lobel, *supra* note 5, at 1166–71; Henkin, *supra* note 5, at 814, 822–23; Wuerth, *supra* note 5, at 6; Bradley & Goldsmith, *Presidential Control*, *supra* note 5, at 1204–06; Van Alstine, *supra* note 5, at 312, 317–20, 367.

18. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5.

19. *Id.* at 840–41.

20. *Id.* at 817, 819–21.

21. *See* Koh, *supra* note 5, at 1839.

22. Van Alstine, *supra* note 5, at 311–12, 317–20, 367.

23. Henkin, *supra* note 5, at 823; Wuerth, *supra* note 4, at 1826, 1838–42; Bradley & Goldsmith, *Presidential Control*, *supra* note 5, at 1204–06.

24. MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS 167 (2019).

25. *See* Lobel, *supra* note 5, at 1166–71; Van Alstine, *supra* note 5, at 317–20, 367. *See generally* FLAHERTY, *supra* note 24; Jordan J. Paust, *The President Is Bound by International Law*, 81 AM. J. INT'L L. 377 (1987).

and separation of powers is the question of how CIL fits within the hierarchy of the Constitution, federal statutes, and treaties.[26] Although the academic discussion in this area was vigorous following a series of Supreme Court decisions starting in the 1960s, discussion of the topic has recently cooled.[27] An explanation may be that the Court has not decisively weighed in on the issue, instead relying on alternative methods of deciding cases.[28] Given the unresolved questions, any study of the topic must cast a wide net for evidence—including cases over one hundred years old, such as *The Paquete Habana*.[29]

II. THE SUPREME COURT CROSSING BORDERS: *PAQUETE HABANA* AND *SABBATINO*

Paquete Habana and *Banco Nacional de Cuba v. Sabbatino*[30] are examples of the Supreme Court applying CIL to resolve domestic disputes. Each case will be discussed below.

A. The Paquete Habana

Just prior to the Spanish-American war, two fishing vessels—the *Paquete Habana* and the *Lola*—were sailing off the Cuban coast and captured by the American Navy as prizes of war.[31] The *Paquete Habana*'s owner challenged the capture, arguing that CIL automatically exempted vessels solely engaged in fishing from capture.[32] The United States responded that CIL gave belligerents the discretion to decide if fishing vessels were exempt from capture.[33]

First, the Supreme Court established that CIL principles may properly be used as rules of decision in federal court: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."[34] The Court noted that a "controlling

26. *See* Stephens, *supra* note 6, at 449–50; Goldsmith & Bradley, *supra* note 6, at 2262–63. *See generally* Steinhardt, *supra* note 6; Lillich, *supra* note 6; Jack M. Goldklang, *Back on Board the* Paquete Habana*: Resolving the Conflict Between Statutes and Customary International Law*, 25 VA. J. INT'L L. 143 (1984).

27. Wuerth, *supra* note 4, at 1826.

28. *See id.* For example, recently the Court "express[ed] no view" as to whether "common-law immunity" applied to a bank owned by the Republic of Turkey and remanded the case back to the Second Circuit. Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 951 (2023). In another opinion, the Court sidestepped the CIL issue by dismissing claims brought by victims of child slave labor on cocoa farms controlled by Nestlé and other corporations. Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1936–37 (2021) (dismissing on the grounds that the presumption against extraterritorial application of statutes was not overcome due to insufficient domestic misconduct by the corporations, but with no majority opinion as to whether the plaintiff's claims could be brought at all).

29. 175 U.S. 677 (1900).

30. 376 U.S. 398 (1964).

31. *Paquete Habana*, 175 U.S. at 678.

32. *See id.* at 686.

33. *Id.* at 712–13.

34. *Id.* at 700.

executive or legislative act or judicial decision" may exclude CIL.[35] This reasoning retained for the courts some power to control domestic decisions but left open CIL's status within a court's hierarchy of authority.

Next, the Court examined various treatises and historical cases to determine if the automatic exemption or discretionary approach was CIL.[36] After performing a painstaking analysis, the Court held that "independently of any express treaty or other public act," the automatic exemption was CIL, and courts "are bound to take judicial notice of, and to give effect to" that understanding.[37] On first reading, the status of CIL in the federal courts seems clear. However, the Court's decision relied on the traditional common law rulemaking power of federal courts. Thirty-eight years later, the *Erie Railroad Co. v. Tompkins*[38] decision seemingly eliminated that authority by holding that there was no federal common law, curtailing federal courts' authority to use the common law rulemaking process.[39] After *Erie*, an open question remained as to whether a federal court had the power to incorporate CIL in decisions until 1964, when the Court decided *Sabbatino*.[40]

B. Banco Nacional de Cuba v. Sabbatino

In 1960, the Cuban government nationalized a sugar company previously owned by Americans.[41] After the nationalization, an American broker contracted with the nationalized company to purchase sugar, but paid a representative of the prior (American) owners.[42] The gravamen of the suit was whether the nationalization was lawful, and therefore, whether the prior American owners had no claim to the proceeds.[43] Answering this question required the Supreme Court to address whether the "Act of State" doctrine applied in this case.[44] Act of State is a CIL doctrine counseling that the lawful act of one sovereign state cannot be overturned by the courts of another sovereign state.[45] Addressing the lingering *Erie* issue, the Court reasoned that in foreign affairs, the federal interest in uniformity outweighed state interests.[46] Therefore, federal courts retained the power to use the common law method of incorporating CIL as a rule of decision.[47] The Court exercised that power by applying the Act of State doctrine.[48] Interestingly, when the Supreme Court announced the *Sabbatino* decision, applying the Act

35. *Id.*
36. *Id.* at 685–708.
37. *Id.* at 708.
38. 304 U.S. 64 (1938).
39. *See* Henkin, *supra* note 5, at 809; Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 820–21; Wuerth, *supra* note 4, at 1827.
40. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).
41. *Id.* at 403–06.
42. *Id.*
43. *See id*.
44. *Id.* at 415.
45. *Id.* at 416.
46. *Id.* at 424–27.
47. *Id.* at 428.
48. *Id.*

of State doctrine to nationalizations was not CIL.[49] Indeed, one of the reasons the case was before the Court was the novelty of whether to apply this doctrine to nationalizations.[50]

In *Sabbatino*, the Court took an active role in foreign affairs by incorporating a debated principle of CIL. Still, the result was ultimately politically neutral—by invoking the Act of State doctrine, the Court avoided what would have been a sensitive case involving policy decisions.[51] This approach exemplifies a Court willing to participate in foreign affairs but mindful of the separation of powers between the judiciary and the political branches. The case stands for two principles: First, federal courts retain common law rulemaking powers concerning foreign affairs cases.[52] Second, CIL is relevant in federal courts and may even become a rule of decision even if a principle is not yet CIL.[53]

In response to the *Sabbatino* decision, Congress enacted the so-called second Hickenlooper Amendment[54] to the Foreign Assistance Act of 1964.[55] The amendment prevents federal courts from using the Act of State doctrine to avoid deciding if a nationalization violated CIL.[56] The *Sabbatino*-Hickenlooper interaction serves as an example of the "invitation to struggle"[57] characterizing separation of powers. The Court used common law rulemaking to decide a domestic case involving foreign affairs, and Congress responded by establishing a rule of decision for the judiciary. The checks and balances imposed by separation of powers functioned properly even though the topic was foreign affairs.[58] Indeed, this interaction exemplifies the constitutional system functioning as its Framers designed.

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49. *Id.* at 428–31.

50. *Id.* at 416–22.

51. Henkin, *supra* note 5, at 809.

52. *See generally Sabbatino*, 376 U.S. 398.

53. *See generally id*.

54. Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (codified as amended at 22 U.S.C. § 2370(e)(2)). The first Hickenlooper Amendment prevented the president from delivering foreign aid "to any country taking the property of, or repudiating or nullifying contracts with, any U.S. citizen" unless the citizen was compensated. R.B. Lillich, *Requiem for Hickenlooper*, 69 AM. J. INT'L L. 97, 97 (1975).

55. 22 U.S.C. § 2151; *see International Law: Hickenlooper Amendment Held Applicable to Property Confiscated by a Foreign Nation Only If Property Marketed in the United States*, 1970 DUKE L.J. 1248, 1250.

56. 22 U.S.C. § 2370(e)(2).

57. Jonathan Masters, *U.S. Foreign Policy Powers: Congress and the President*, COUNCIL FOREIGN RELS., https://www.cfr.org/backgrounder/us-foreign-policy-powers-congress-and-president [https://perma.cc/T29X-PFMZ] (March 2, 2017, 2:28 PM) (describing the effect of separation of powers in the Constitution as inviting the branches to struggle regarding foreign policy).

58. This weakens arguments that active separation of powers simply does not work when foreign affairs is involved. *See* Lobel, *supra* note 5, at 1166–71 (explaining the common arguments against judicial involvement).

III. HISTORICAL PERSPECTIVE

Under the Articles of Confederation, Americans had problems: (1) international creditors did not trust them, and (2) other countries thought the United States was weak.[59] Central to the discussions at the Constitutional Convention were economic and political foreign affairs concerns.[60] The colonial economy flourished with access to the British empire's trade system.[61] After the revolution, Britain cut off American trade with the West Indies and the profitable sugar trade.[62] The central U.S. government lacked bargaining power that could have been gained by closing or limiting British access to American markets.[63] This resulted from states' refusal to coordinate trade policy to influence British stakeholders.[64] An important term in the peace treaty with Britain was that Americans would be required to repay debts owed to British creditors.[65] In fact, default was widespread, states were unwilling to enforce actions for repayment, and the central government did not have the power to enforce judgments.[66] International creditors were thus hesitant to lend to Americans.[67] Additionally, Britain retaliated against the treaty violations by retaining control of forts in the Ohio River Valley, causing conflict with land speculators and settlements.[68] Due to distrust of American business and perceptions of the central U.S. government's weakness, Spain and France closed American access to the Mississippi, hamstringing western settlement.[69]

The Constitutional Convention delegates considered these factors while drafting the Constitution, aware of their vital importance for the proper functioning of the new government. For the United States to participate in

59. *See* FLAHERTY, *supra* note 24, at 50–51; Sonia Mittal, Jack N. Rakove & Barry R. Weingast, *The Constitutional Choices of 1787 and Their Consequences*, *in* FOUNDING CHOICES: AMERICAN ECONOMIC POLICY IN THE 1790S, at 25, 28 (Douglas A. Irwin & Richard Sylla eds., 2011); Robert W. Smith, *Foreign Affairs and the Ratification of the U.S. Constitution in Massachusetts*, 40 HIST. J. MASS. 148, 151–54 (2012).

60. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

61. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

62. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

63. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

64. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

65. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

66. The Virginia Convention Monday 23 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1469 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, Marybeth Carlson, Charles D. Hagermann & Margaret C. Leeds eds., 1993). As Madison stated: "There are also many public debtors who have escaped from justice, for want of such a method as is pointed out in [the Constitution]." *Id.* (statement of James Madison).

67. Smith, *supra* note 59, at 153–54.

68. FLAHERTY, *supra* note 24, at 50–51; Mittal et al., *supra* note 59, at 28; Smith, *supra* note 59, at 153–54.

69. FLAHERTY, *supra* note 24, at 50–54; Mittal et al., *supra* note 59, at 28.

international trade and capital, foreign partners needed confidence that the application and enforcement of international law would be uniform among the states.[70] Additionally, the Framers had to ensure that the central government was strong enough to maintain real bargaining power with other countries.[71]

There is strong historical evidence that the intent and understanding of the new Constitution was that the federal judiciary would apply international law. James Madison, one of the most influential drafters, led the Federalists during the ratification debates at the Virginia Convention.[72] On June 20, 1788, Madison argued:

> With respect to the laws of the Union, it is so necessary and expedient that the Judicial power should correspond with the Legislative, that it has not been objected to. With respect to treaties, there is a peculiar propriety in the Judiciary expounding them.—These may involve us in controversies with foreign nations. It is necessary therefore, that they should be determined in the Courts of the General Government. There are strong reasons why there should be a Supreme Court to decide such disputes. If in any case uniformity be necessary, it must be in the exposition of treaties.[73]

Here, Madison opined on two primary subjects of foreign affairs literature: federalism and separation of powers. He proposed that the federal government have exclusive power over foreign affairs due to the vital importance of uniformity.[74] Madison's view designates the judiciary as coequal to the political branches. Madison even suggested that judicial involvement is *more important* in foreign affairs.[75] By discussing treaties, an area where the legislature and executive have enumerated powers, Madison pictured a judiciary designed to actively check the political branches from overreach in all areas of governance. Indeed, one may read the mention of treaties as indicating a particular importance in checking executive power, given the argument that the executive is the primary branch involved in the negotiation and enforcement of treaty obligations.[76]

In modern terminology, Madison argued for foreign affairs exceptionalism in the federalism context, but not in the separation-of-powers context. Madison was also concerned about the new government's reputation among

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70. The Virginia Convention Monday 23 June 1788, *supra* note 66, at 1469 (statement of James Madison). As Madison stated: "We well know, Sir, that foreigners cannot get justice done them in these [state] Courts, and this has prevented many wealthy Gentlemen from trading or residing among us." *Id.*

71. FLAHERTY, *supra* note 24, at 50–51, 53–55.

72. *James Madison*, WHITE HOUSE, https://www.whitehouse.gov/about-the-white-house/presidents/james-madison/ [https://perma.cc/K6TF-985H] (last visited May 1, 2023).

73. The Virginia Convention Friday 20 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 66, at 1413 (statement of James Madison).

74. *Id.*

75. *Id.* "With respect to treaties, there is a peculiar propriety in the Judiciary expounding them." *Id.*

76. Van Alstine, *supra* note 5, at 312, 317–20.

other countries, which would be improved if the Constitution respected the law of nations. Discussing the Supreme Court's original jurisdiction, Madison stated: "disputes between a foreign State, and one of our States . . . . ought to be tried by the national tribunal. This is consonant to the law of nations."[77] The Madisonian view of foreign affairs power may be described as a strong federal government, with each branch having an active role, and structured in accordance with CIL.

Federalists supported the Madisonian position with the understanding that it would provide a stable foundation for commercial activity and general governance. For example, Alexander White, a prominent Virginia lawyer and later one of the inaugural representatives in the U.S. House of Representatives,[78] argued in a published letter:

> The provision that treaties shall be the supreme law of the land, is no more than declaring that the law of nations shall take place in America—for if you mean to support an intercourse with the other nations of the earth, you must appoint some men or body of men to conduct that intercourse, and if you do not provide the means to carry their treaties into effect, you subject yourselves to all the horrors of war, whenever any one State shall fail in compliance. To support this doctrine, I could produce many authorities, but it seems too evident to require proof.[79]

Here, White takes the incorporation of the law of nations into domestic affairs as granted. Still, his bias must be considered when analyzing the source. His writing is not a neutral treatise on the state of the law and is crafted to offer partisan arguments. However, he uses several rhetorical strategies that evince an understanding that the law of nations applied within the United States. Specifically, White implied that objections to the idea that the law of nations applied domestically were absurd, compared the Supremacy Clause to the law of nations, and concluded that objections to the Supremacy Clause were likewise absurd. According to White, the enforcement of international law was considered necessary for stable and peaceful governance and to support American interests with other countries.

Even moderates agreed with the Madisonian view. James Monroe opposed ratification of the Constitution absent a bill of rights,[80] but was in favor of an active judiciary in the context of separation of powers. He said:

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77. The Virginia Convention Friday 20 June 1788, *supra* note 73, at 1414–15 (statement of James Madison).

78. *WHITE, Alexander*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/W000352 [https://perma.cc/LP7R-HSJY] (last visited May 1, 2023).

79. Alexander White, *To the Citizens of Virginia* (Feb. 29, 1788), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 438, 442 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, Marybeth Carlson, Charles D. Hagermann & Margaret C. Leeds eds., 1988).

80. James Monroe, *Some Observations on the Constitution* (May 25, 1788), *in* 9 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 844–46 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, Marybeth Carlson, Charles D. Hagermann & Margaret C. Leeds eds., 1990).

> The judiciary in this, as in all free governments, should be distinct from, and independent of the other branches, and equally permanent in its establishment. Performing its appropriate functions, the extent of its authority should be commensurate with theirs. As it forms the branch of a national government, so it should contemplate national objects only.[81]

Monroe argues for a strong separation of powers but shows reticence on the federalism point by stating that the Court's power should be limited to national affairs. Still, the understanding of the Framers was that national affairs included foreign affairs.[82]

Antifederalists, fearful of the loss of their own state's political powers[83] and the potential for tyranny, were staunchly opposed to the federal judiciary. George Mason predicted that diversity jurisdiction would "annihilate [the] State Judiciary: It [would] prostrate [the] Legislature."[84] Additionally, there was a fear that all cases would be strategically removed to federal courts to add expense for defendants.[85] William Grayson, an antifederalist and later inaugural Virginian senator, decried the power of the Court: "[federal jurisdiction for] all cases depending on the law of nations—a most extensive jurisdiction! This Court has more power than any Court under Heaven."[86] Here, the antifederalists were concerned that federal courts would be less favorable for locals than state courts.[87] Also, in Boston, antifederalists feared the loss of power for the city if the federal government had control of foreign affairs.[88] Even based on this small selection of primary sources, it is clear that the Founders, although holding opposing views on the wisdom of the authority, understood that the federal judiciary had coequal power in the realm of foreign affairs, and would decide cases based on the principles of international law—formal treaties and CIL.

IV. CUSTOMARY INTERNATIONAL LAW SHOULD BE CONSIDERED PRECEDENT IN DISTRICT COURTS

Although there has been significant scholarship on whether courts should consider CIL,[89] and whether it is required,[90] discussion focused on the implications for district courts rendering a decision is currently

81. *Id.* at 866.
82. FLAHERTY, *supra* note 24, at 46; Mittal et al., *supra* note 59, at 27–28.
83. Smith, *supra* note 59, at 160.
84. The Virginia Convention Thursday 19 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 66, at 1407 (statement of George Mason).
85. *See* Letter from Richard Henry Lee to James Gordon, Jr. (Feb. 26, 1788), *in* 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 79, at 419.
86. The Virginia Convention Saturday 21 June 1788, *in* 10 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, *supra* note 66, at 1446 (statement of William Grayson).
87. *Id.* at 1447. Given that foreigners were routinely denied relief that they were entitled to by state courts, it is true that a federal court was likely to be more disinterested. *See supra* note 70 and accompanying text.
88. *See* Smith, *supra* note 59, at 160.
89. *See supra* Part I.
90. *See supra* Part I.

underdeveloped. This part offers a rudimentary framework for analysis of this question—proposing that federal district courts treat CIL as they would common law precedent. CIL as precedent offers a flexible approach between mechanical application and irrelevancy, balancing the policy considerations inherent to foreign affairs cases. This approach is consistent with the original understanding of the Constitution, stare decisis, and past practice. For the purposes of this Essay, the arguments are intended to be starting points for further research and to demonstrate how several interpretive approaches tend to favor an active application of CIL.

A. History

The Constitution was drafted in response to the conditions facing the Framers.[91] The Articles of Confederation demonstrated the necessity for the federal government to have primacy over foreign affairs.[92] For this reason, the Framers established that the federal government would supersede the states when it came to foreign issues.[93] The Framers were also mindful that delegation of power to government without commensurate accountability was an invitation to tyranny.[94] The new government was designed with coequal branches to limit overreach from other branches.[95] The Framers did not view the judiciary as a second-class branch, least of all when it came to foreign affairs.[96] Indeed, according to primary sources, both supporters and opponents of the Constitution agreed that the judiciary would play an active role in the foreign affairs power of the federal government.[97]

The Framers also understood that in order to have bargaining power with other countries, the United States would need to follow international law.[98] This was considered a necessity: for a nation built on trade, the free flow of capital and credit was key to further development.[99] In addition to economics, the security of the country depended on the strength of the government to enter into negotiations with the colonial powers—France, Spain, and Britain—that occupied much of the continent.[100] The Framers understood that for negotiations to be effective, international law—via treaties and CIL—must be enforced by federal courts.[101] Although this topic warrants further research and investigation, the likely understanding at the time was that the United States would be an international power requiring uniform enforcement of international law, including CIL.[102]

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91. *See supra* Part III.
92. *See supra* Part III.
93. U.S. CONST. art. VI, cl. 2.
94. FLAHERTY, *supra* note 24, at 42.
95. *See id.*
96. *See id.* at 42–43.
97. *See supra* Part III.
98. *See supra* Part III.
99. *See supra* Part III.
100. *See supra* Part III.
101. *See supra* Part III.
102. *See supra* Part III.

B. Paquete Habana*,* Sabbatino*, and Past Practice*

Stare decisis and institutional past practice lend support for treating CIL as common law precedent. First, in *Paquete Habana*, the Court strongly affirms that CIL "is part of our law."[103] The Court qualifies its support by stating that a **"**controlling executive or legislative act or judicial decision" can limit the application of CIL.[104] The two statements, although apparently in conflict, work in harmony to outline a framework for application. Requiring the act or decision to be "controlling" adds the prima facie requirement that the governmental action is constitutional and directly applicable to the facts.[105] Additionally, international law provides for the option to supersede CIL through the "Persistent Objector Rule."[106] A country may opt-out of a CIL principle if it timely and consistently objects to the principle's application.[107] Therefore, the statements in *Paquete Habana* may be interpreted as an acknowledgement of the mechanics of international law. By acknowledging the importance of CIL, the Court did not—as the opponents of the application of international law fear—tie the government's hands.[108] Essentially the Court acknowledged that CIL principles had a role in the federal judicial system, but left open the exact method of application for later development.

Next, the *Sabbatino* case picked up the thread and further solidified support for CIL as precedent. It confirmed that post-*Erie*, federal courts retain the power to use the common law method to fashion a rule of decision in foreign affairs cases.[109] By retaining the common law power, the Court endorsed an exception to the standard division of federal and state authority over foreign affairs.[110] Indeed, the complexity of foreign affairs has only increased, giving more reason for federal courts to hear such cases.

Third, the rule of decision endorsed by the Court in *Sabbatino* was not yet considered CIL, which suggests significant power for courts interpreting CIL.[111] Still, this expansive approach may be conditioned on the fact that the decision was made by the Supreme Court, which retains the highest authority to make close calls. Fourth, *Sabbatino* does not offer direct guidance for lower courts deciding CIL cases. Therefore, based on the holdings in *Sabbatino* and *Paquete Habana*, lower courts should approach a case involving CIL as they would a case involving common law: apply CIL with precedential power as appropriate. This approach is desirable because CIL may be incorporated with common law rulemaking, absent specific

103. The Paquete Habana, 175 U.S. 677, 700 (1900).
104. *Id.*
105. *Id.*
106. *See generally* Shelly Aviv Yeini, *The Persistent Objector Doctrine: Identifying Contradictions*, 22 CHI. J. INT'L L. 581 (2022).
107. *Id.* at 583. This doctrine may be viewed simply as a recognition that international law relies on the consent of the parties rather than a higher enforcement authority.
108. *See* Lobel, *supra* note 5, at 1166–71.
109. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
110. *See id.*
111. *See id.* at 428–29.

direction from Congress. It is also consistent with the canon of interpretation from *Murray v. Schooner Charming Betsy*[112]—that a statute and CIL should be read not to conflict unless no other interpretation is possible.[113] This canon "has for so long been applied by [the Supreme] Court that it is beyond debate."[114]

Through these precedents, the Court has consistently respected CIL's authority in domestic courts. Furthermore, when deciding an uncertain constitutional matter, it is appropriate to examine the Court's past practice.[115] Since the founding, there have been many instances when the Court actively participated in foreign affairs.[116] For example, the recent *Sabbatino* case and resulting second Hickenlooper Amendment demonstrate the preferable interaction between the judiciary and Congress.[117] The text of the amendment,[118] passed due to a congressional desire to prevent support for the Cuban nationalizations, demonstrates two points about separation of powers. First, Congress has the power to establish rules of decision for federal courts,[119] and second, Congress did not perceive the Court to have overstepped its authority when rendering the *Sabbatino* decision.[120] The amendment also demonstrates that Congress felt an obligation to respect international law.[121] Although more research is needed as to the Court's past practice, such as the authoritative approach used by Justice Frankfurter in *Youngstown Sheet & Tube Co. v. Sawyer*,[122] there is evidence[123] that the political branches have consistently respected an active role for the judiciary.

112. 6 U.S. 64 (1804).

113. *See id.* at 118; Justin Hughes, *The* Charming Betsy *Canon, American Legal Doctrine, and the Global Rule of Law*, 53 VAND. L. REV. 1147, 1149 (2021).

114. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr., 485 U.S. 568, 575 (1988); *see also* Hughes, *supra* note 113, at 1149.

115. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 611 (1952) (Frankfurter, J., concurring).

116. *See generally* FLAHERTY, *supra* note 24, at 67–90.

117. *See supra* notes 54–57 and accompanying text.

118. 22 U.S.C. § 2370(e)(2) ("Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other rights to property is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation.").

119. *See* Stephens, *supra* note 6, at 448–49.

120. *See id.*

121. 22 U.S.C. 2370(e)(2) ("*Provided*, [t]hat this subparagraph shall not be applicable (1) in any case in which an act of a foreign state is not contrary to international law . . . .").

122. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

123. *See generally* FLAHERTY, *supra* note 24, at 67–90.

C. Federalism and Separation of Powers

This section demonstrates how the precedential approach responds to federalism and separation-of-powers concerns. As discussed, the thrust of the pro-state argument is that CIL as federal common law is novel and derogates state sovereignty.[124] First, the novelty of "federal common law" can be explained as semantic—terminology changed to reflect the *Erie* decision.[125] Second, the precedential approach is fundamentally a continuation of how courts dealt with CIL prior to *Erie*.[126] *Erie* rejected the concept of courts "discovering" general common law, partially out of fear of judicial activism or of creating "rules willy-nilly."[127] CIL does not suffer the same infirmities regarding the potential for judicial activism.[128] To hold that a principle is CIL, a court primarily engages in a "counting of heads" of the official positions of countries.[129] Therefore, it is less likely that a judge will spontaneously "discover" an aspect of the law without the parties' prior awareness.[130] Third, critics argue that CIL has expanded since the founding, especially concerning individual rights, such as the juvenile death penalty.[131] However, mere development of the law does not justify an abandonment of prior practice. CIL always dealt with individuals. For example, CIL concerning trade and merchants necessarily involved courts deciding cases of property and contract.[132] Additionally, it should not cause concern for the political branches that under CIL, states are prevented from torture or similar conduct.[133]

Regarding separation of powers, the primary argument against incorporation of CIL is that judicial involvement in foreign affairs impedes the political branches, which need flexibility when dealing with foreign affairs.[134] In practice, this often means that courts should defer to the executive.[135] To start, inconvenience or friction between the branches does not justify reducing judicial power; the purpose of separation of powers is to cause this friction.[136] Therefore, the fact that the executive chafes at judicial review is reason for a more active judiciary.[137] Additionally, fears that

124. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 866.
125. *See supra* Part II.A.
126. Koh, *supra* note 5, at 1835.
127. *See id.* at 1839.
128. *See id.* at 1853; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 428 (1964).
129. Koh, *supra* note 5, at 1853.
130. *Id.*
131. Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 840–41, 841 n.169, 866.
132. *See* Stephens, *supra* note 6, at 410.
133. *See* Lobel, *supra* note 5, at 1168 ("Flexibility and diplomacy do not require the United States to use torture or genocide.").
134. *See id.* at 1166–71.
135. *See, e.g.*, Trump v. Hawaii, 138 S. Ct. 2392, 2416 (2018) (noting that the executive has significant authority concerning foreign affairs); Van Alstine, *supra* note 5, at 317–20, 331, 337, 340–46, 367.
136. *See* Lobel, *supra* note 5, at 1166–71.
137. *Id.* at 1166 ("Our system of separation of powers limits the powers of separate, coequal branches of government and helps to maintain the friction among the different branches

incorporation of CIL will open the floodgates and lead to neutralization of domestic law are overstated. Parties will still face the hurdles posed by the political question doctrine,[138] the Act of State doctrine,[139] the presumption against extraterritorial application of statutes,[140] and the inherent judicial power to narrowly craft relief.[141] Given these hurdles, federal courts are well equipped to carefully navigate this topic without obliterating domestic law. Finally, the United States should strive to be an example of safeguarding basic human rights and fostering international cooperation through international law—goals best served by an active judiciary.[142]

CONCLUSION

The analytical framework explored in this Essay is not merely a theoretical exercise—domestic application of customary international law was recently before the Supreme Court. In *Turkiye Halk Bankasi A.S. v. United States*,[143] the Court remanded to the U.S. Court of Appeals for the Second Circuit the issue of whether "common-law immunity" precluded the prosecution of a bank owned by the Republic of Turkey.[144] In dissent, Justice Gorsuch noted that without guidance from the Court, it would fall to the Second Circuit to resolve several of the constitutionally significant questions identified in this Essay.[145] He expressed particular concern for the separation-of-powers question (whether courts should defer to the executive or retain independent judicial authority by applying CIL), the source of constitutional authority to apply CIL domestically, and the remaining post-*Erie* question of federal courts' common law power.[146] Given these pressing questions, affording CIL precedential status would provide clarity for litigants and lower courts, accord with Supreme Court decisions, maintain flexibility for the political branches, and comport with contemporary foreign affairs scholarship on federalism and separation of powers. Ultimately, adopting precedential status for CIL in federal courts would chart a path for an active judiciary to fulfill its constitutional role in foreign affairs.

necessary to preserve our constitutional order. Removing that friction in the sphere of international affairs damages, rather than serves, the separation of powers ideal.").

138. *Id.* at 1159; FLAHERTY, *supra* note 24, at 173.

139. *See* FLAHERTY, *supra* note 24, at 173.

140. *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021); FLAHERTY, *supra* note 24, at 173.

141. *See* Lobel, *supra* note 5, at 1170.

142. *See* Hughes, *supra* note 113, at 1147.

143. 143 S. Ct. 940 (2023).

144. *Id.* at 951–52.

145. *Id.* at 954–55 (Gorsuch, J., concurring in part and dissenting in part).

146. *Id.*