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**I, Too, Sing America: Customary International Law for American State and Federal Courts' Post-Kiobel Jurisprudence, Guided by Australian and Indian Experiences**

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# I, TOO, SING AMERICA: CUSTOMARY INTERNATIONAL LAW FOR AMERICAN STATE AND FEDERAL COURTS' POST-KIOBEL JURISPRUDENCE, GUIDED BY AUSTRALIAN AND INDIAN EXPERIENCES

## ABSTRACT

*In the excitement of the wake of the United States Supreme Court's 2013 *Kiobel v. Royal Dutch Petroleum Co.* decision, one less-addressed matter is the unresolved status of customary international law in American courts. This Comment highlights a lack of literature engaging comparative study of federally structured nations' experiences implementing customary international law within their state and federal courts, and proposes that such a study may aid in resolving the American dilemma. This Comment studies Australian and Indian experiences, then uses the findings to look back toward the American experience for possible solutions for the status of customary international law. While not endeavoring to resolve the entire issue of customary international law status, this Comment finds three helpful implications in the comparative study. Two are meta principles, and one is a concrete canon suggestion that would diffuse a subset of problem areas for customary international law implementation in American courts.*

*First, the American solution need not be as extreme as American theorists argue, given that multiple other federal nations successfully engage and implement customary international law within state and federal courts alike without resorting to such absolute strategies. Second, demonstrating that multiple other federal nations have similar reservations toward any sweeping implementation of customary international law, popular condemnations of America's isolationism and exceptionalism from customary international law should be more tightly correlated to a benign and unavoidable function of federalism than to a malicious and uniquely American elitism. Finally, borrowing from an Indian state court decision, this Comment proposes a customary international law equivalent of a *Charming Betsy* canon for interpreting municipal, state and federal laws. Under such a canon, when there exist multiple possible constructions of a municipal, state, or federal law, the construction conforming to customary international law would be used.*

*Ultimately, this Comment finds that a look outside American borders for resolution of domestic customary international law status provides a fresh perspective to re-focus the standing polarized discourse.*

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## INTRODUCTION

The status of customary international law (CIL) in American courts is unresolved. For years, academics had the luxury of addressing the issue through abstract legal theory because its resolution was unnecessary.<sup>1</sup> If the resolution of CIL status seemed less than pressing in the past,<sup>2</sup> *Kiobel v. Royal Dutch Petroleum Co.* revamped a need for resolution by re-engaging judicial dialogue on the Alien Tort Statute (ATS), which permits litigation for CIL violations.<sup>3</sup> As the American legal community returns its gaze to CIL in the wake of *Kiobel*, some mode of CIL engagement and implementation is necessary.<sup>4</sup> Toward that aim, this Comment seeks to answer two questions. First, considering the lack of resolution on CIL status in domestic courts, are there paths toward resolution that have not been considered? Much of the debate thus far appears to be a rehashing—and sometimes contortion—of United States Supreme Court precedent.<sup>5</sup> For all the acrobatics, none seems to

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<sup>1</sup> Unnecessary, perhaps, because of an American sense of dismissal to international custom adherence, and because the express call for courts to apply CIL came only “where there is no treaty, and no controlling executive or legislative or judicial decision.” *The Paquete Habana*, 175 U.S. 677, 700 (1900). See JOHAN VAN DER VYVER, IMPLEMENTATION OF INTERNATIONAL LAW IN THE UNITED STATES 11 (2010) (“I am well aware of the fact that, as far as perceptions entertained by the outside world community are concerned, most Americans don’t care too hoots.”); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 687 (2000) (“[W]hile Congress may not violate the Constitution, it is well established that Congress can violate international law. The Supreme Court has directly held this with respect to treaties, and both Supreme Court dicta and unanimous lower court authority support this with respect to customary international law.”) (emphasis added; internal citations omitted).

<sup>2</sup> See Bradley, *supra* note 1, at 689 (“It is not clear, however, why *Charming Betsy* should trump *Chevron* deference with respect to violations of other forms of international law (non-self-executing treaties and customary international law). Violations of those forms of law, after all, do not substantially implicate domestic legal continuity; instead, they implicate foreign relations issues that would seem to fall within the expertise of the executive branch.”).

<sup>3</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_\_\_ (2013) (finding that an Alien Tort Statute claim for violations of CIL lacked standing in federal court due to extraterritoriality, though generally reinvigorating CIL discussions and specifically reinvigorating talks of Alien Tort Statute utilization; both of which will ultimately require some mode for implementing CIL in domestic courts). The Alien Tort Statute is codified in 28 U.S.C. § 1350 (2012).

<sup>4</sup> *Kiobel*, 569 U.S. at 1. For purposes of this Comment, the term ‘implement’ will be used to mean make binding domestic law, and the term ‘engage’ to mean discuss, whether stating that something is or is not CIL, looking to CIL for mere anecdotal or persuasive value.

<sup>5</sup> See generally Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) [hereinafter Bradley & Goldsmith, *Critique of the Modern Position*]; contra Harold Hongju Koh, *Is International Law Really State Law?* 111 HARV. L. REV. 1824 (1998) (on the modern and revisionist theories of implementing customary international law within United States courts); but see Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998) [hereinafter Bradley & Goldsmith, *Federal Courts*]. These articles largely surround debate of *Erie Railroad Co. v. Tompkins*, a 1938 decision. 304 U.S. 64 (1938). Robert Schapiro and Ernest Young focus somewhat on precedent reinterpretation

produce a successful solution or even reduce the tremendously polarized nature of standing debates. Those debates are generally dominated by modernists, who believe CIL carries de facto federal law status; and revisionists, who assert that CIL has no binding status unless legislated.<sup>6</sup> Finding that comparative study of other nations' implementation and engagement of CIL in state and federal courts is an unexplored path,<sup>7</sup> this Comment conducts such a study of Australian and Indian precedent.

That study leads to the second focal question: can new paths shed light on the original question of CIL status in American courts? Without endeavoring to resolve the American CIL dilemma entirely, this Comment offers three findings from the Australian and Indian experiences that may contribute toward a coming solution for American jurisprudence. First, finding that multiple other federal nations successfully engage and implement CIL within state and federal courts alike without resorting to such absolute strategies as those proposed by American theorists, the American solution(s) need not be so extreme. Second, the Australian and Indian CIL experiences provide a commentary on negative associations of seeming American indifference toward CIL with American judicial exceptionalism; both that the United States is not alone in such tendencies, and that there are multiple grounds for asserting that the isolationism or exceptionalism should not be so tightly correlated to elitism. Third, one Indian state court proposed a canon of interpretation for municipal law relative to CIL that may resolve at least one of America's jurisdictional qualms.<sup>8</sup> Considering the role of state courts in CIL engagement, taking from both Indian and Australian precedent, this Comment proposes a CIL-equivalent of a Charming Betsy canon<sup>9</sup> for interpreting

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as well, though at least with an eye toward reducing the polarized nature of the debates. *See generally* ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM* (2009); Ernest A. Young, *Sosa and the Incorporation of International Law*, 120 *HARV. L. REV. F.* 28 (2007).

<sup>6</sup> *See infra* Part I.C.

<sup>7</sup> While there appears no literature even noting the lack of comparative analysis in studies concerning CIL status in American courts, the lack of comparative analysis is noted in legal academia broadly, and procedure specifically. *See* John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 *AM. J. COMP. L.* 545, 546 (1995) (“Within the intellectual life of the American legal academy, comparative law is a peripheral field.”); Richard L. Marcus, *Putting American Procedural Exceptionalism into A Globalized Context*, 53 *AM. J. COMP. L.* 709, 709, 740 (2005) (“American proceduralists have not been comparativists. . . . The problem in the U.S. is that comparative procedure is barely on the map.”).

<sup>8</sup> Though not expressly stating so, that court likely used the term “municipal” to reference all domestic law. *See infra* Part II.

<sup>9</sup> That is, interpreting congressional statutes as consistent with international law; proposed by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). This proposal rests upon the premise that the Charming Betsy canon itself is ill-fitted for CIL, if not entirely inapplicable. *See generally* *The*

municipal, state and federal laws relative to CIL. In sum, this Comment finds that looking outside American borders for resolution of domestic CIL status provides a much-needed fresh perspective to re-focus the standing polarized discourse.

This Comment will consider the proposed theories' application to both the immediate *Kiobel* context—the “law of nations” in federal courts as prescribed by the ATS—and the broader, longer-standing debate over the role of CIL in state courts. Realizing a need for broader context and perspective, this Comment will look to the two best-developed CIL jurisprudences from non-European, federal states; those of India and Australia. The analysis of Indian and Australian experiences will demonstrate that CIL can be engaged throughout the courts of a federal nation, can be engaged without the extreme models broadly proposed in American legal academia, can enrich legal discussions, and needs to be tailored to each federal government.<sup>10</sup> This final point of necessary tailoring may contradict assertions that American exceptionalism is unilateral, or grounded in elitist navel-gazing.<sup>11</sup>

Without question, the nuance of the three nations' structures must be kept in mind throughout this study. While Australia and India have more unitary judicial systems—Australia's federal circuit courts (the functional equivalent of American federal district courts) are few, and only came into existence in 1999,<sup>12</sup> and India has none<sup>13</sup>—the United States has 94 federal judicial

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*Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 Harv. L. Rev. 1215 (2008).

<sup>10</sup> Cf. Adam M. Smith, *Making Itself a Home - Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT'L L. 218, 222 (2006) (per foreign law implementation, American isolationist jurisprudence “is arguably a reasonable reaction to the forces impacting the American judicial system.”).

<sup>11</sup> See Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1481 (2003) (“When it comes to American exceptionalism . . . Americans generally tend to strike the world as pushy, preachy, insensitive, self-righteous, and usually, anti-French.”) (citing MARGARET MACMILLAN, *PEACEMAKERS: THE PARIS CONFERENCE OF 1919 AND ITS ATTEMPT TO END WAR* 22 (2001) (“American exceptionalism has always had two sides: the one eager to set the world to rights, the other ready to turn its back with contempt if its message should be ignored. . . . Faith in their own exceptionalism has sometimes led to a certain obtuseness on the part of Americans, a tendency to preach at other nations rather than listen to them, a tendency as well to assume that American motives are pure where those of others are not.”)). See also Marcus, *supra* note 7, at 710 (“[American procedural] exceptionalism also reinforces the tendency to view such navel-gazing as appropriate because procedure is peculiarly parochial.”).

<sup>12</sup> Federal Circuit Court of Australia Act 1999 (Cth) reg 20(3); *Introduction to the Federal Court of Australia*, FED. CIR. CT. OF AUSTL., <http://www.federalcircuitcourt.gov.au/html/introduction.html> (last visited Feb. 12, 2014) (“The Federal Circuit Court of Australia was established by the Federal Circuit Court of Australia Act 1999 (formerly the Federal Magistrates Act) and its jurisdiction at inception was conferred by the Federal Magistrates (Consequential Amendments) Act 1999. These Acts received royal assent on 23

districts.<sup>14</sup> While Australia and India take relatively uniform CIL interpretations despite their varying legal structures, America does law differently. The character of the American dilemma is somewhat idiosyncratic; permuted not only by federalism, but by how Americans conceive of their federal system. In the late eighteenth century, the founders' aspiration was for broad states' rights in times of peace.<sup>15</sup> American states' rights were historically conceived not only functionally, but philosophically;<sup>16</sup> envisioning little comity for comity's sake between state courts or federal district courts. That idea is still alive today, and is more than nationalist exceptionalism for exceptionalism's sake. In fact, as this Comment's conclusion will suggest, the persistently implied conflation of elitism and judicial isolationism is neither accurate nor fair.<sup>17</sup> The United States functions through a distinct brand of federalism that is unusually dualist; that is, bound by realms of original jurisdiction for state and federal courts alike.<sup>18</sup> Simply ignoring CIL is not an option, and will only nurse the nation's isolationist, elitist and exceptionalist image problems.<sup>19</sup>

The United States is in need of a unique solution that reflects its unique construction of federalism. To that end, this Comment observes that American

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December 1999. The Court is an independent federal court under the Australian Constitution. It is a federal court of record and a court of law and equity. Under section 8 of the FCC Act the Court is constituted by the Chief Judge and judges as appointed. Judges are appointed under the Act as justices in accordance with Chapter III of the Australian Constitution. . . . The establishment of the Federal Circuit Court marked a change in direction in the administration of justice at the federal level in Australia. Australia had not previously had a lower level federal court, although a considerable amount of federal law work had been done in state and territory courts of summary jurisdiction under the provisions of the Judiciary Act.”).

<sup>13</sup> See *Legal Research Guide: India*, LIBRARY OF CONGRESS, available at <http://www.loc.gov/law/help/india.php> (last updated Jan. 21, 2014) (chart illustrating Indian court structure).

<sup>14</sup> *District Courts*, UNITED STATES COURTS, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/DistrictCourts.aspx> (last visited Feb. 21, 2014).

<sup>15</sup> See generally THE FEDERALIST NO. 45 (James Madison) (Terrence Ball ed., 2003).

<sup>16</sup> See *id.*

<sup>17</sup> See *infra* Part III.B.

<sup>18</sup> See *infra* Part I.C.2.

<sup>19</sup> Smith, *supra* note 10, at 220 n.13, citing Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597 (2000) (noting the “general, broadly expressed fear regarding the American hegemony of global legal structures.”). Cf. VAN DER VYVER, *supra* note 1, at 11–12 (2010) (“Isolation relations of the United States have over the years been tainted by a certain mind-set. First and foremost in this regard is the notion that the United States is something special and should be treated differently within the international arena. In conformity with this conviction, the United States has in the past maintained a degree of isolationism from institutions, norms and obligations that have come to be perceived as conducive to the promotion of international comity.”); Marcus, *supra* note 7, at 710 (“Few polities are as self-consciously exceptional as the Americans . . .”). See also DAVID J. BEDERMAN, *GLOBALIZATION AND INTERNATIONAL LAW* 181, 185–88 (2008).

solutions regarding the implementation and engagement of CIL may benefit from comparison to studies addressing American importation of foreign law.<sup>20</sup> Professor Judith Resnik “take[s] issue with the assumptions that the critical field of play [for importing foreign law] is federal law and that the transformative players are on the Supreme Court of the United States.”<sup>21</sup> This Comment makes a similar assertion for the domestic importation of CIL: from other federal nations’ experiences, we learn that a variety of state court interpretations of CIL and its role within their jurisdictions are both possible and healthy.<sup>22</sup> For purposes of this discussion, the most notable difference in foreign law and CIL debates is that while foreign law importation is mostly, if not entirely optional, and arguably unnecessary outside the narrow scope of choice of law cases,<sup>23</sup> CIL is less of an optional matter because most of the world considers the entire world bound by it. This Comment does not endeavor to resolve the debate of modernists and revisionists, or to propose total resolution of America’s CIL quagmire in one fell swoop. This Comment further will not address related concerns of foreign law importation, save drawing parallels to CIL importation.<sup>24</sup> The goal of this Comment is not to promulgate further abstract legal theory, but to propose a few small steps toward a new way forward both for federal courts reacting to *Kiobel* and for state courts that stand to be enriched by the sweeping history and experience that CIL offers.

Part One will explore recent history of the CIL debate in America, which will demonstrate the lack of resolution on the matter and the pressing need for such resolution. Part Two will assess CIL engagement in Australian and Indian courts, demonstrating in both contexts that CIL deeply enriches discussions

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<sup>20</sup> That is, the domestic law of other nations, distinct from international law. See DAVID J. BEDERMAN ET AL., *INTERNATIONAL LAW: A HANDBOOK FOR JUDGES* 3 (2003).

<sup>21</sup> Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 *YALE L.J.* 1564, 1580 (2006).

<sup>22</sup> Mirroring the sentiment of Dean Robert Schapiro’s “polyphonic federalism” theory that diverse state and federal court perspectives of CIL fosters “a collaborative process of illumination,” though the Australian and Indian experiences are not necessarily bound within his promulgated “understanding of customary international law as nonpreemptive federal law.” SCHAPIRO, *supra* note 5, at 170.

<sup>23</sup> See Smith, *supra* note 10, at 242 (“Explaining his heavy reliance on foreign precedent, Justice Joseph Story (who served on the bench from 1811 to 1845) argued that ‘[foreign law] offered a reservoir of solutions to problems that American law had not yet faced.’ As America advanced, and its own ‘reservoir’ of solutions grew, the need for foreign law declined.”).

<sup>24</sup> For analysis of foreign law importation, see Resnik, *supra* note 21, at 1572 (“The effort to delegitimize the use of foreign law is, in short, part of larger battles about the role of judges in the American polity and the role of this nation in the world. The congressional proposals aimed at banning foreign law provide a window not only into nationalist but also into anti-judicial sentiments in America.”); Smith, *supra* note 10.

even on purely national issues. As Justice Breyer is prone to preach, there is much to be gained by considering how other nations' courts consider similar matters at similar times.<sup>25</sup> Part Three will consider the application of Australian and Indian findings to the American experiment. The value of a new midway forward in the implementation of CIL for American state courts is a seat at the table in the implementation and engagement of CIL, and a deeply enriched jurisprudence. Further, given the tremendously polarized nature of monist and dualist debates,<sup>26</sup> there is room for argument that the reason American state courts so rarely engage CIL in their legal analysis is not because CIL is of no use to them, but because they presume they would be boxed into federal court interpretations. A workable theory must precede the opening of a floodgate of cases.

The conclusion will summarize modest suggestions for a new way forward in American interpretation and engagement of CIL. American importations from the Australian and Indian experiences could impact the nation's separation of powers, the nation's understanding of promissory estoppel, and even the legalities of killing of foreign nationals denied their consular rights in violation of treaty law and customary international law alike. These possibilities are worth the journey.

## I. HISTORY OF CIL DEBATES IN THE UNITED STATES

Though arguably infrequently cited in American precedent, American debates over CIL status are long and fraught with impasses. This section will recount the heated history of what precedent does engage CIL, ultimately suggesting that a bit of outside perspective could hardly hurt and could potentially greatly behoove the resolution of the American quandary.

### *A. Confusion and Dissent Begin with the Mere Definition of CIL*

The law of nations, referenced here as CIL, arises out of custom and is amorphous by nature.<sup>27</sup> CIL is that part of international law not codified by

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<sup>25</sup> See generally Justice Steven Breyer, Discussion Between U.S. Supreme Court Justices Antonin Scalia and Stephen Breyer: Constitutional Relevance of Foreign Court Decisions, U.S. Association of Constitutional Law Discussion (Jan. 13, 2005) (American University Washington College of Law) (transcript available at <http://domino.american.edu/AU/media/mediarel.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>) [hereinafter Discussion Between U.S. Supreme Court Justices].

<sup>26</sup> See *infra* Part I.C.

<sup>27</sup> SCHAPIRO, *supra* note 5, at 165; DAVID J. BEDERMAN, THE SPIRIT OF INTERNATIONAL LAW 33 (2002) ("Custom is rooted not in the high positivism that only formal legal organs (courts and legislatures) can make

formal legal instruments or embodied in formal agreements (treaties, conventions and covenants).<sup>28</sup> CIL is established by two codependent components: uniform state practice and *opinio juris*, a sense of legal obligation motivating that state practice.<sup>29</sup> The International Court of Justice Statute defines CIL as “evidence of a general practice accepted as law.”<sup>30</sup> Generally, legal custom is believed to rise to CIL when states comply out of a sense of legal obligation rather than mere self-interest.<sup>31</sup>

However time-honored and beneficial to humanity, such an open-ended jurisprudence prone to continued expansion is grossly problematic. Throughout the world, CIL faces substantial challenges in its understanding, and thus its application, particularly in domestic courts.<sup>32</sup> Academics and practitioners alike disagree on what sort of state action constitutes qualifying “state practice.”<sup>33</sup> Some consider documents such as United Nations General Assembly resolutions, which are inherently non-binding, as evidence of CIL.<sup>34</sup> Other common disagreements include the breadth of consensus among states required for the tipping point of “state practice,” the threshold at which voluntary action becomes legal obligation, and debate on a clear delineation between state practice and *opinio juris*.<sup>35</sup> Perhaps ironically in light of American courts’ hesitance to engage, let alone implement CIL, the Obama administration’s Department of State maintains, “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”<sup>36</sup> Such CIL

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law but rather in a historicist insight that law resides in the spirit of a people and community, and custom is the expression of that will”). See also JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 26 (2005) (“CIL is best modeled as behavioral regularities that emerge when states pursue their interests on the international stage”); Niles Petersen, *Customary Law Without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation* 23 AM. U. INT’L L. REV. 275–310 (2007).

<sup>28</sup> SCHAPIRO, *supra* note 5, at 164.

<sup>29</sup> GOLDSMITH & POSNER, *supra* note 27, at 24.

<sup>30</sup> International Court of Justice Statute Art. 38. See also BEDERMAN ET AL., *supra* note 20, at 27 (“To show a rule of customary international law, one must prove to the satisfaction of the relevant decision-maker (whether it be an international tribunal, domestic court, or government or inter-governmental actor) that the rule (1) has been followed as “general practice,” and (2) has been ‘accepted as law.’”).

<sup>31</sup> GOLDSMITH & POSNER, *supra* note 27, at 23.

<sup>32</sup> BEDERMAN ET AL., *supra* note 20, at 27 (“Nonetheless, substantial difficulties face domestic courts when they are required to determine whether a particular norm qualifies as customary international law.”). See also GOLDSMITH & POSNER, *supra* note 27, at 23.

<sup>33</sup> GOLDSMITH & POSNER, *supra* note 27, at 23.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 24.

<sup>36</sup> *Vienna Convention on the Law of Treaties*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Sept. 24, 2013, 9:57 PM).

consideration is particularly notable because the U.S. Senate never ratified the treaty, though the United States became a signatory in 1970.<sup>37</sup>

While debates over the employment of laws beyond our own may be perceived as unique to our time or to America, neither is the case.<sup>38</sup> Debates over the implementation of *foreign* law in domestic legal structures are neither narrow nor new, though still somewhat unsettled.<sup>39</sup> Debates over the formulation of CIL, equally unsettled, are not unique to our time. In fact, they were arguably better understood in medieval times.<sup>40</sup> According to Ernest Young and Emily Kadens, “while the details may have changed, the thrust of these critiques of customary-law formation have been around for more than half a millennium. There is, if you will, no settled customary practice governing how to define customary rules of law.”<sup>41</sup> Because no practice for defining CIL is entirely settled, there should be no surprise that there is no settled practice for implementing CIL in domestic courts. As the girth of what is at least popularly considered CIL continues to grow, a method for implementation would prove all the more helpful. The formulation of CIL, the implementation of foreign law, and the domestic implementation of treaties receive judicious academic attention.<sup>42</sup> The domestic implementation of CIL, a separate matter entirely and the sole focus of this Comment, is unsettled despite academic attention that some deem disproportionate.<sup>43</sup>

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<sup>37</sup> *Id.*

<sup>38</sup> See generally VAN DER VYVER, *supra* note 1.

<sup>39</sup> That is, the application of one nation’s laws or precedents in another nation’s courts. See Smith, *supra* note 10, at 219–20 (“However, while the intensity of the debate [over applying foreign law in domestic courts] has been unequalled elsewhere, it is a mistake to brand this discussion an idiosyncrasy of the modern American system.”). See generally Resnik, *supra* note 21.

<sup>40</sup> Ernest Young & Emily Kadens, *How Customary Is Customary International Law?* 54 WM. & MARY L. REV. 885, 911 (2013).

<sup>41</sup> *Id.* at 911. See also BEDERMAN ET AL., *supra* note 20, at 27–28 (noting the tension between the elements of CIL); Smith, *supra* note 10, at 220.

<sup>42</sup> See Young & Kadens, *supra* note 39, at 911 (on the formulation of customary international law); Smith, *supra* note 10, at 220 (on the implementation of foreign law in domestic courts).

<sup>43</sup> BEDERMAN ET AL., *supra* note 20, at 42–45 (noting that the debate is unsettled); Daniel J. Meltzer, *Customary International Law, Foreign Affairs and Federal Common Law*, 42 VA. J. INT’L L. 513, 517 (2002) (“[T]o an outsider, the heat seems disproportionate to the practical importance of the issues.”). *But cf.* SCHAPIRO, *supra* note 5, at 165 (“The passion underlying this debate [between modernists and revisionists] stems in large measure from its application to human rights litigation.”).

*B. Problems from the Start: A Body of Law as Amorphous as CIL is Anathema to a Nation of Laws, Not of People*

Recognizing CIL, let alone adjudicating its implementation, has long proven problematic in American courts.<sup>44</sup> In a nation built expressly upon express laws,<sup>45</sup> the notion of implementing a body of law not codified anywhere, let alone by the nation itself, is incongruous. Some argue that part of the modern problem is rooted in a change in the world's conception of CIL over time. While CIL "was traditionally limited to customary practices that nations followed from a sense of legal obligation," indeed, as a traditional CIL definition requires,<sup>46</sup> human rights norms are now generally conceived as CIL, despite less than uniform state practice—let alone intent to be legally bound.<sup>47</sup>

For all the academic fervor, the comparative application of CIL within federal structures, let alone with attention to how and why federal states face specific issues, appears insufficiently addressed.<sup>48</sup> To that end, a federal quagmire of domestic CIL application is not unique to the United States. Other nations, too, are straining to discern how to apply CIL within federal frameworks. Though heated academic debates over the domestic

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<sup>44</sup> BEDERMAN ET AL., *supra* note 20, at 28–30 (recounting the U.S. Supreme Court's opinion in *The Paquette Habana*, 1900).

<sup>45</sup> WILLIAM SAFIRE, *Government of Laws, Not of Men*, in SAFIRE'S POLITICAL DICTIONARY 293 (1993) (noting use of the phrase "a government of laws, not of men" in John Adams' 1778 draft of the Massachusetts Constitution and by Chief Justice John Marshall in *Marbury v. Madison*).

<sup>46</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) (defining CIL as "general and consistent practice of states followed by them from a sense of legal obligation.").

<sup>47</sup> Jack Goldsmith, *International Human Rights Law and the United States Double Standard*, 1 GREEN BAG 356, 366 (1998).

<sup>48</sup> While some comparative analysis on the importation of foreign law is in print, there appears to exist virtually no literature so much as noting the lack of comparative analysis of CIL importation. One 2006 law review comment compares the narrow plights of Native Americans and Australian Aboriginals in enforcing emerging CIL rights in their respective nations' domestic courts, though without broader considerations for fully-crystallized CIL, and without much consideration of confounding variables inherent in the nations' structures. See generally John D. Smelcer, *Using International Law More Effectively to Secure and Advance Indigenous Peoples' Rights: Towards Enforcement in U.S. and Australian Courts*, 15 PAC. RIM L. & POL'Y J. 301 (2006). For discussion of the lack of comparative foreign law analysis, see Smith, *supra* note 10, at 221 ("What remains lacking is any truly 'comparative' understanding of how different countries approach [foreign law in domestic courts]. That is, while the use or absence of foreign law in specific states is clear, there is little literature that attempts to use the experiences of given states in their use of comparative law as a tool to understand other states' decisions to do so.").

implementation of CIL in the United States exist, there appears to be no comparative analysis of the same issue facing other federal nations.<sup>49</sup>

*1. On Its Face, Modern CIL Does Not Seem to Fit the American Federal Judiciary Model*

While there exists no perfect formula for the domestic implementation of CIL, one could easily posit that top-heavy centralized governments have an easier time authoritatively applying the law domestically, pronouncing as the law of the land what was never implemented through legislation or even necessarily agreed to by an executive. Federal nations face a steeper climb in implementing CIL. Through the exploration of Australian and Indian jurisprudence, this Comment will ask whether federal nations present isolationist tendencies relative to CIL, and whether the common thread is federalism. One scholar, noting the lack of comparative legal analysis of foreign law importation (perhaps paying insufficient homage to the works of Judith Resnik and others), studied Indian jurisprudence on foreign law for American implications.<sup>50</sup> His conclusions were twofold: the debate over foreign law propriety is oversimplified in and out of America and “American isolationist jurisprudence” “is arguably a reasonable reaction to the forces impacting the American judicial system.”<sup>51</sup> Further, “there is arguably enough history and esteem for today’s U.S. courts to rely solely on their own precedents,” rather than look to foreign law. While CIL is less optional in some instances, such as ATS litigation, this explanation may speak to why other nations look to CIL so frequently—as a supplement to either small or ill-esteemed domestic precedents; issues simply not facing American courts.<sup>52</sup>

Similarly, the easier application of CIL within non-federal frameworks may be due to the Eurocentric nature of international law.<sup>53</sup> That said, federalism is

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<sup>49</sup> See generally Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5; *contra* Koh, *supra* note 5; but see Bradley & Goldsmith, *Federal Courts*, *supra* note 5. While this author could not find so much as mention of the lack of comparative analysis on domestic CIL implementation, Adam Smith lamented the parallel lack of comparative analysis on the implementation of foreign law. Smith, *supra* note 10, at 221 (“[W]hile the use or absence of foreign law in specific states is clear, there is little literature that attempts to use the experiences of given states in their use of comparative law as a tool to understand other states’ decisions to do so.”).

<sup>50</sup> Smith, *supra* note 10, at 221.

<sup>51</sup> *Id.* at 221–22.

<sup>52</sup> *Id.* at 230.

<sup>53</sup> See generally ELIZABETH BEYERLY, *EUROCENTRIC INTERNATIONAL LAW? CONTEMPORARY DOCTRINAL PERSPECTIVES* (1998).

not the problem to be rooted out. Despite its differences from Eurocentric frameworks, federalism is worth keeping.<sup>54</sup> Federalism is particularly valuable to diverse nations striving to accommodate minorities.<sup>55</sup> Its celebration did not end with the Federalist Papers. In the early twentieth century, India's modern founders believed that federalism was vital to the protection of the diversity that made their coming nation great: "[t]he ultimate Constitution of India must be federal, for it is only in a federal constitution that units differing so widely in constitution as the provinces and the States can be brought together while retaining internal autonomy."<sup>56</sup> Because federalism is worth keeping, a better theoretical path must be fleshed out for federal nations to implement CIL.

Any state's approach "to the relationship between international law and domestic law raises significant issues of political theory."<sup>57</sup> The importation of non-domestic law—foreign, international, or CIL—into most any nation's courts requires both great finesse and general consensus on implementation. Where some scholars are quick to note that the United States is far from the only nation to ever wrestle with the importation of non-domestic law, (one citing seven centuries' history of nations who worked through foreign law qualms),<sup>58</sup> other scholars contend that the American position did not simply resolve over time as analysts may expect. Where "[o]ne might have assumed that the need to press a unique national identity would correlate with the newness of a country, seeking to establish its own authority, . . . the aging of this country has not produced a relaxed approach to law from abroad."<sup>59</sup> Further, domestic legal isolation cannot always be assumed to follow new

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<sup>54</sup> See generally SCHAPIRO, *supra* note 5; Ernest Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427 (2013).

<sup>55</sup> In fact, according to Ernest Young, "anyone seriously concerned with the well-being of minorities in a democratic society ought to be a proponent of federalism." Young, *supra* note 54, at 428. *Contra* Winston P. Nagan & Benjamin Goodman, *Inflated Federalism and Deflated International Law: Roberts CJ v. The ICJ*, 12 GLOBAL JURIST, Iss. 1, Article 1 (2012).

<sup>56</sup> M. GOVINDA RAO & NIRVIKAR SINGH, *A Historical Review of Indian Federalism*, in THE POLITICAL ECONOMY OF FEDERALISM IN INDIA (2006) available at Oxford Scholarship Online, <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780195686937.001.0001/acprof-9780195686937-chapter-3> (last visited Oct. 27, 2013).

<sup>57</sup> Henry Burmester & Susan Reye, *The Place of Customary International Law in Australian Law: Unfinished Business*, 21 AUST. Y.B. INT'L L. 39, 49 (2000).

<sup>58</sup> See Smith, *supra* note 10, at 220 ("[W]hile the intensity of the debate has been unequalled elsewhere, it is a mistake to brand this discussion an idiosyncrasy of the modern American system.") (Smith noted pervasive Irish concerns of English law importation since the fourteenth century and many nations' concern about American law's "imperialistic justice," among other issues).

<sup>59</sup> Resnik, *supra* note 21, at 1573–74.

polities in the face of the likes of South Africa's new constitution,<sup>60</sup> which requires that any court, tribunal, or forum interpreting the nation's Bill of Rights "must consider international law and may consider foreign law."<sup>61</sup> Perhaps not surprisingly, a comparative analysis of Indian and American foreign law importation concluded that American isolationist jurisprudence was more justified than given credit.<sup>62</sup> Again, all this analysis inquires as to the standing of foreign law in American courts, rather than CIL. The general principles of limbo are equally applicable to CIL, and the lack of attention to CIL bolsters the need for further attention to this Comment's aims.

## 2. *Both the U.S. Constitution and the Alien Tort Statute Acknowledge CIL and Call for Its Domestic Incorporation*

The American founders' intent was not for American jurists to ignore CIL. The United States Constitution gives a passing glance to CIL in Article 1, Section 8: "The Congress shall have power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations[.]"<sup>63</sup> Likewise, the Alien Tort Statute reads, "[t]he district courts shall have original jurisdiction of 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>64</sup>

That the modern federalism invention would face new challenges applying custom should not be a shock. Where traditional English constitutional law "was an unwritten mixture of laws, customs, principles, and institutions," America's founding fathers conceived of a constitution as a written "fundamental law circumscribing the government."<sup>65</sup> Once America's laws of governance were defined to a text—and a short one, at that—reliance on extra textual authority would require its own protocol. That protocol remains incomplete.<sup>66</sup>

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<sup>60</sup> *Id.* at 1574 ("[O]ne can find new polities (such as South Africa) open to international norms.").

<sup>61</sup> S. AFR. CONST., 1996, ch. 2, § 39(1) (punctuation excluded) ("When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.").

<sup>62</sup> Smith, *supra* note 10, at 222.

<sup>63</sup> U.S. CONST. art. I, § 8, cl. 1, 10.

<sup>64</sup> 28 U.S.C. § 1350 (2012) (emphasis added).

<sup>65</sup> GORDON S. WOOD, *THE IDEA OF AMERICA* 173 (2011).

<sup>66</sup> See BEDERMAN ET AL., *supra* note 20, at 27–29 (§ II.B.2: "Discerning Whether Customary International Law Exists in a Particular Case").

C. *American Precedent Narrowed CIL Implementation Discussions Over Time*

Within the United States, debates over CIL application are largely held between monists and dualists, also known as modernists and revisionists. These positions were best distilled by David Bederman:

The *monist* approach, in essence, is based on the idea that international law and domestic law are parts of the same legal system, but that international law is higher in prescriptive value than national law. A *dualist* approach, by contrast, assumes that international law and domestic law are separate and distinct legal systems that operate on different levels, and that international law can only be enforced in national law if it is incorporated or transformed.<sup>67</sup>

Modernists contend that CIL not only *should* be implemented domestically, but is de facto binding federal law, overriding whatever inconsistencies may arise with state law.<sup>68</sup> Revisionists view CIL as state law at best, subject to each state's acceptance.<sup>69</sup>

The United States is a dualist nation.<sup>70</sup> Bederman reached this conclusion by answering four inquiries: "whether international law can prevail over the Constitution," finding it could not;<sup>71</sup> "whether customary international law is part of federal common law or state common law," finding that "most courts and commentators" viewed CIL as federal law;<sup>72</sup> "whether states of the Union are obliged to observe customary international law," finding that while the topic was subject to heated debate because the Supremacy Clause does not

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<sup>67</sup> BEDERMAN ET AL., *supra* note 20, at 40.

<sup>68</sup> SCHAPIRO, *supra* note 5, at 167.

<sup>69</sup> *Id.* at 167. Robert Schapiro says the dualist school is dead despite still being utilized by the U.S. Supreme Court and throughout academia.

<sup>70</sup> BEDERMAN ET AL., *supra* note 20, at 40 ("The United States can rightly be regarded as a dualist nation"). *Cf.* SCHAPIRO, *supra* note 5, at 167 ("Both the modern view and the revisionist approach understand customary international law in dualist terms.").

<sup>71</sup> BEDERMAN ET AL., *supra* note 20, at 40.

<sup>72</sup> *Id.* at 42–43 ("The view of most courts and commentators is that customary international law is federal law. This means, at a minimum, that cases involving claims to exclusively customary international law rights and duties (some kinds of diplomatic immunities or law of the sea privileges, for example) may be decided by the federal courts.") citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 111 (1), (2) (1987); for contrast, citing *Bergman v. De Sieyes*, 170 F.2d 360, 362 (2d Cir. 1948) ("[T]he law of New York stands, and it must be owned that the result is not clear. The most recent authority on the matter in international law is 'The Research in International Law' of the Harvard Law School, published in 1932—a 'Restatement,' so to speak, of international law. Article 15 of this recognizes the *ius transitus innocui*, but goes no further; and the 'Comment,' which discusses the authorities at length, at best leaves open the question as to civil process, with perhaps some intimation that as to it there is no immunity.').

expressly uplift CIL to preempt state law, the U.S. Supreme Court at least hinted that the federal government possesses a “dormant foreign relations power” barring state legislation that undermines American foreign relations interests (notably, citing *American Ins. Assn. v. Garamendi*,<sup>73</sup> which the Supreme Court declined to follow five years after Bederman’s book was published in *Medellin v. Texas*<sup>74</sup> in 2008);<sup>75</sup> and “whether customary international law can be ‘trumped’ by federal statutes and executive determinations,” finding that pre-existing treaties or domestic statutes were widely believed to take precedent over CIL.<sup>76</sup>

The monist approach is expressly codified, for instance, in South Africa’s relatively new constitution: “[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.”<sup>77</sup> Critics say this approach “restricts the sovereignty of the State and may accordingly limit the capacity of the internal political process to oversee the extent of the state’s international obligations and domestic powers.”<sup>78</sup>

Where revisionists posit through a dualist framework that absolutely no international law is binding American law unless expressly codified by domestic legislatures,<sup>79</sup> modernists posit that international law is part and parcel of American law.<sup>80</sup> The modernist approach is unfaithful to the dualist tenets of the American judicial structure through its unilateral proclamations.<sup>81</sup>

<sup>73</sup> *American Ins. Assn. v. Garamendi*, 539 U.S. 396, 414 (2003).

<sup>74</sup> *Medellin v. Texas*, 552 U.S. 491, 523–24 (2008) (“The United States maintains that the President’s constitutional role ‘uniquely qualifies’ him to resolve the sensitive foreign policy decisions that bear on compliance with an ICJ decision and ‘to do so expeditiously.’ We do not question these propositions. . . . *American Ins. Assn. v. Garamendi*, (Article II of the Constitution places with the President the ‘vast share of responsibility for the conduct of our foreign relations’) . . . Such considerations, however, do not allow us to set aside first principles. The President’s authority to act, as with the exercise of any governmental power, ‘must stem either from an act of Congress or from the Constitution itself.’”) (internal citations omitted).

<sup>75</sup> BEDERMAN ET AL., *supra* note 20, at 43–44; *id.* at 43, n. 47 (citing *Zschernig v. Miller*, 389 U.S. 429 (1968) and noting that *Amer. Ins. Assn. v. Garamendi*, 539 U.S. 1100, 1100 (2003) “appl[ie]d *Zschernig* and discuss[ed] the ‘contrasting theories of field and conflict pre-emption evident in the *Zschernig* opinions”).

<sup>76</sup> *Id.* at 40–45.

<sup>77</sup> John Dugard, *International Law and the South African Constitution* 1 *EURO. J. INT’L L.* 77, 79 (1997) citing S. AFR. CONST., 1996 § 232. *See also* Burmester & Reye, *supra* note 57, at 49.

<sup>78</sup> Burmester & Reye, *supra* note 57, at 49, citing D. Feldman, *Monism, Dualism and Constitutional Legitimacy*, 20 *AUST. Y.B. INT’L L.* 105 (1999).

<sup>79</sup> Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5, at 816.

<sup>80</sup> *See generally* Koh, *supra* note 5.

<sup>81</sup> *See* BEDERMAN ET AL., *supra* note 20, at 40 (“The United States can rightly be regarded as a dualist nation”). *Cf.* SCHAPIRO, *supra* note 5, at 168 (“Both the modern view and the revisionist approach understand

The “revisionist” approach is difficult to flesh out in practice.<sup>82</sup> As the comparative analysis section of this Comment will demonstrate, neither extreme is necessary for either of America’s fellow federal, non-European former British colonies to engage and implement CIL within their state and federal courts.

Prior to *Kiobel*, two United States Supreme Court decisions spawned strong debate amongst American international legal academia. Both narrowed the issue of domestic CIL implementation and sparked avid debate, albeit the former coming nearly six decades after the decision.<sup>83</sup> Still, the debates allowed relatively no way forward, functionally proving nothing more than abstract legal theory.

### *1. Erie Sparked Debate Between Modernists and Revisionists*

*Erie Railroad Co. v. Tompkins*,<sup>84</sup> though decided in 1938, became the center of debate in 1997 when two soon-to-be-branded revisionists sparked an ardent though easily overlooked dispute among American legal scholars.<sup>85</sup> The academics debated the implementation of CIL within the nation’s domestic courts, state and federal. Professors Curtis Bradley and Jack Goldsmith asserted that while American jurists and academics alike came to view CIL as federal law over time, *Erie* stood for the proposition that such a rule was contrary to American constitutional history and violated the most essential aspects of federalism, separation of powers and democracy.<sup>86</sup> Bradley and

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customary international law in dualist terms.”); SCHAPIRO, *supra* note 5, at 168 (“The modern approach fails to appreciate the potential benefits of plurality and dialogue.”).

<sup>82</sup> The very use of the term “revisionist” is ironic. If the modernist approach is, from its very name, not the original theory at play, and “revisionists” point to something existing prior to the modernist theory, could the “revisionist” term be a misnomer for something perhaps more “originalist?” Revising something inherently modern should not necessarily imply creating something new.

<sup>83</sup> For debates over *Erie*, see generally Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5; *contra* Koh, *supra* note 5; but see Bradley & Goldsmith, *Federal Courts*, *supra* note 5. For debates over *Sosa*, see generally Curtis A. Bradley, Jack L. Goldsmith, & Davis H. Moore, *Sosa*, *Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869 (2007); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007); Young, *supra* note 5.

<sup>84</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>85</sup> Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 367, n.6 (2002) (“The current fracas [between monists and dualists] seems largely to have been prompted by the Bradley and Goldsmith article in 1997”). Easily overlooked, that is, because the theories seemed to have little real-world application; no matter how fascinating they were.

<sup>86</sup> See generally Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5; *contra* Koh, *supra* note 5; but see Bradley & Goldsmith, *Federal Courts*, *supra* note 5.

Goldsmith's opponents, including professor Harold Koh, perceived their analysis as a revision of American legal history, thus branding them "revisionists."<sup>87</sup> Koh retorted, "that United States federal courts shall determine questions of customary international law as federal law" was a "hornbook rule."<sup>88</sup> Bradley and Goldsmith responded to Koh, holding their ground.<sup>89</sup> The lines were drawn, and the theories were polarized. So polarized, in fact, that neither proved particularly workable.<sup>90</sup> The stalemate could easily be perceived as inconsequential: cases concerning the domestic implementation of CIL were not exactly pouring into American courts.<sup>91</sup>

## 2. *Sosa Slightly Narrowed the Debate but Demonstrated a Stalemate*

In 2004, the United States Supreme Court decided *Sosa v. Alvarez-Machain*, which again engaged CIL discussion.<sup>92</sup> At the end of an extensive litigation trail, the Supreme Court held that CIL violations were, indeed, permissible claims under the ATS; however, that Appellee Alvarez-Machain's short detention was an insufficient claim.<sup>93</sup> Legal commentaries in the aftermath of *Sosa* only demonstrated the unworkable stalemate of modernists and revisionists.<sup>94</sup> Where modernists "stressed the Supreme Court's affirmation that customary international law could function as binding law without being specifically so designated by Congress," revisionists "emphasized that the Court accepted only a narrow category of customary international law claims, and even then, only in the unusual and limited statutory context of the Alien Tort Statute."<sup>95</sup> Neither court nor commentary provided a workable solution. In courtrooms, if not in academia, the matter of CIL and ATS quieted somewhat until *Kiobel* in 2013.<sup>96</sup>

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<sup>87</sup> Koh, *supra* note 5, at 1824 (on the modern and revisionist theories of implementing customary international law within United States courts).

<sup>88</sup> *Id.* at 1824.

<sup>89</sup> See generally Bradley & Goldsmith, *Federal Courts*, *supra* note 5.

<sup>90</sup> See generally SCHAPIRO, *supra* note 5; Young, *supra* note 85.

<sup>91</sup> See Meltzer, *supra* note 43, at 517 ("As to the question whether CIL should be viewed as federal common law, the number of cases whose outcome would clearly be affected by one or another answer seems, at least at present, to be rather small.")

<sup>92</sup> *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

<sup>93</sup> *Id.* See also SCHAPIRO, *supra* note 5, at 167.

<sup>94</sup> See generally Bradley, Goldsmith, & Moore, *supra* note 83; Dodge, *supra* note 83; Young, *supra* note 5.

<sup>95</sup> SCHAPIRO, *supra* note 5, at 167.

<sup>96</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_\_\_ (2013) at 1.

### 3. *Kiobel* Re-Sparked Debate and Further Narrowed ATS Parameters

On April 17, 2013, the United States Supreme Court published its decision in *Kiobel v. Royal Dutch Petroleum Co.*<sup>97</sup> A Nigerian widow residing in the United States sued Dutch, British and Nigerian corporations for several claims under the ATS<sup>98</sup> of alleged aiding and abetting violations of the law of nations committed by the Nigerian government in Nigeria.<sup>99</sup> The ATS, an infrequently utilized section of the United States Code, grants district courts “original jurisdiction of 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>100</sup> After a District Court dismissed some of the claims, the Second Circuit fully dismissed the case on grounds that corporate liability is not recognized by the law of nations.<sup>101</sup> The United States Supreme Court granted certiorari to answer whether the law of nations recognizes corporate liability.<sup>102</sup> The Supreme Court heard oral arguments, then requested supplemental briefs on “whether and under what circumstances courts may recognize a cause of action under the ATS, for violations of the law of nations occurring within the territory of a sovereign other than the United States.”<sup>103</sup> After hearing a second round of oral arguments on the supplements, the Supreme Court affirmed the Second Circuit’s dismissal of the entire complaint on grounds of an unsurmounted presumption against extraterritoriality.<sup>104</sup>

Though *Kiobel* closed a certain door to extraterritoriality under the ATS, every decision noted that more issues were left undecided.<sup>105, 106</sup> While

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<sup>97</sup> *Id.* at 1.

<sup>98</sup> According to the ATS, “[t]he district courts shall have original jurisdiction of 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.” *Id.* at 1, citing 28 U.S.C. § 1350 (2012).

<sup>99</sup> *Id.* at 1.

<sup>100</sup> 28 U.S.C. § 1350 (2012).

<sup>101</sup> *Kiobel*, 569 U.S. at 1.

<sup>102</sup> *Id.* at 3.

<sup>103</sup> *Id.* at 1.

<sup>104</sup> *Id.* at 3.

<sup>105</sup> *Id.*, Roberts, C.J. at 11–12; Kennedy, J. at 1; Alito, J. at 1 (joined by Thomas, J.); Breyer, J. at 14 (joined by Ginsburg, Sotomayor, and Kagan, JJ.).

<sup>106</sup> In the early interim since the Supreme Court announced *Kiobel*, much of the pertinent commentary appears to surround ATS jurisdiction. See Jeffrey A. Meyer, *Extraterritorial Common Law: Does the Common Law Apply Abroad?*, 102 GEO. L.J. 301 (2014) (“This Article argues against new or presumptive limits on the extraterritorial application of the common law.”); Joel Slawotsky, *ATS Liability for Rogue Banking in A Post-Kiobel World*, 37 HASTINGS INT’L & COMP. L. REV. 121, 125 (2014) (“This article opines that providing sophisticated financial services such as performing financial transactions and services for rogue regimes,

declining to clarify, Chief Justice Roberts acknowledged that former Attorney General William Bradford's 1795 opinion "Breach of Neutrality," concerning the attack of a British colony in Sierra Leone involving American citizens and making one of the earliest known references to the ATS, "defies a definitive reading."<sup>107</sup> Justice Kennedy's concurrence approvingly characterized Chief Justice Roberts' majority opinion as "careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute."<sup>108</sup> Justice Alito noted that "[t]his formulation obviously leaves much unanswered, and perhaps there is wisdom in the Court's preference for this narrow approach."<sup>109</sup> Justice Breyer's concurrence in judgment opined that his proposed approach would preserve the promise that other cases might be able to be brought under the ATS.<sup>110</sup>

As Justice Kennedy's concurrence predicted, "other cases may arise with allegations of serious violations of international law principles protecting persons . . . and in those disputes the proper implementation of the presumption against extraterritorial application may require some further elaboration and explanation."<sup>111</sup> *Kiobel* left unanswered questions on CIL, and perhaps opened a door for the American legal community to return its attention to the merits of CIL, after polarizing debates between monists and dualists were left unresolved in classrooms, courtrooms, and the pages of American law reviews in the 1990s and 2000s.<sup>112</sup> CIL, the rest of the world's attention to it, and acute awareness of the United States' lack thereof, did not simply go away because America did not resolve a stance toward it. The application of CIL within federal structures will continue to be an issue for the United States and other federal nations. In the aftermath of *Kiobel*, the United States may be far off from seeing CIL implemented domestically under the ATS. Before reaching a question of what tenets of CIL will be enforced, America will likely see test cases refining the *Kiobel* ambiguities of "touch and concern" and corporate liability. (That is, whether tortious activity occurring abroad sufficiently implicates American interests to justify litigation in U.S. courts,

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despots, terrorists and drug cartels may constitute conduct qualifying for ATS jurisdiction in a post-*Kiobel* world for several reasons.").

<sup>107</sup> *Kiobel*, 569 U.S. Roberts, C.J. at 11–12; Curtis Bradley, *Agora: Kiobel*, 106 AM. J. INT'L L. 509 (2012).

<sup>108</sup> *Kiobel*, 569 U.S. Kennedy, J. at 1.

<sup>109</sup> *Id.*, Alito, J. at 1.

<sup>110</sup> *Id.*, Breyer, J. at 14.

<sup>111</sup> *Id.*, Kennedy, J. at 1.

<sup>112</sup> See generally Bradley & Goldsmith, *Critique of the Modern Position*, *supra* note 5; *contra* Koh, *supra* note 5; but see Bradley & Goldsmith, *Federal Courts*, *supra* note 5.

and whether ATS claims may be brought against corporations, respectively.) Those test cases, however, are coming quickly. A potential circuit split on corporate liability took only eight months.<sup>113</sup> Should forthcoming circuit court decisions be granted cert to the Supreme Court, federal courts may soon find themselves interpreting CIL for its application under the ATS.<sup>114</sup>

#### 4. *Unresolved Still Today: Potential Circuit Splits Developing over Kiobel*

The D.C. Circuit cases immediately responded to *Kiobel* and focused on the “touch and concern” issue. A mere month after the Supreme Court decided *Kiobel*, the D.C. Circuit held that a case concerning events that occurred in and around the American embassy in Nairobi (and were planned in the United States) sufficiently touched and concerned the U.S. to overcome the ATS presumption against extraterritoriality and establish proper jurisdiction for the claim.<sup>115</sup> In a separate matter two days later, the D.C. Circuit emphasized *Kiobel*’s limited touch and concern parameters, holding against extraterritoriality for concerning conduct in Iran committed by that nation’s Supreme Leader and its president.

Courts within the Second and Ninth Circuits are now reconsidering the merits of corporate liability under the ATS after *Kiobel*. After *Kiobel*, a Second Circuit case itself, was decided on extraterritoriality grounds—rather than corporate liability, as the Second Circuit expressly expected—a circuit court panel remanded *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL* for a district court to address the first instance of corporate liability questions.<sup>116</sup> Two months later, a district court within the Second Circuit permitted parties

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<sup>113</sup> Compare *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 174 (2d Cir. 2013) *reh’g denied*, 10-1306-CV, 2013 WL 5700963 (2d Cir. Oct. 18, 2013) (remanded corporate liability issue for further briefing), and *Doe I v. Nestle USA, Inc.*, 10-56739, 2013 WL 6670945 (9th Cir. 2013) (“[W]e conclude that corporations can face liability for claims brought under the Alien Tort Statute, 28 U.S.C. § 1350.”).

<sup>114</sup> Federal courts, and not state, because the ATS expressly vests its jurisdiction in federal district courts. § 28 U.S.C. 1350 (2012) (“The district courts shall have original jurisdiction of 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>115</sup> *Mwani v. Laden*, CIV.A. 99-125 JMF, 2013 WL 2325166 (D.D.C. 2013) (though immediately certifying the issue for appeal to the D.C. Circuit due to its potential controversy and the novelty of *Kiobel*.) *Distinguished by Kaplan v. Cent. Bank of Islamic Republic of Iran*, CIV. 10-483 RCL, 2013 WL 4427943 (D.D.C. 2013) (dismissing ATS claims for lack of touch and concern because attacks “allegedly funded by Iran, launched from Lebanon, and targeted Israel” were not specifically targeted at Americans, though Americans were undisputedly affected).

<sup>116</sup> *Licci*, 732 F.3d at 174 (“[W]e predicted that should the Supreme Court affirm this Court’s opinion in *Kiobel* . . . based on our conclusion in *Kiobel* that the ATS does not provide subject matter jurisdiction over corporate defendants for violations of customary international law”).

of *In re S. African Apartheid Litigation* to brief the matter of corporate liability.<sup>117</sup> Just a week before corporate liability briefs were solicited for *In re S. African Apartheid Litigation*, the Ninth Circuit interpreted *Kiobel* to clearly permit corporate liability. In the dicta of a December 2013 decision, the Ninth Circuit suggested that corporations may be liable under the ATS so long as presumption against extraterritorial application is overcome.<sup>118</sup> Notably, that same dicta cited decisions from two United Nations *ad hoc* tribunals for authority on *actus reus* standards on aiding and abetting.<sup>119</sup>

As these three circuits display, neither corporate liability nor “touch and concern” is likely to stay untouched for long. Courts are quickly wading into the waters of *Kiobel* interpretation. The matter of interpreting CIL for the purpose of the ATS, and likely other issues in turn, may soon be upon us. When those or other ATS cases reach the U.S. Supreme Court, what CIL framework will inform the court’s interpretation? As the legal community watches to see if the Second, Ninth, and DC circuits’ pending ATS cases will progress to the U.S. Supreme Court to clarify the “touch and concern” and corporate liability matters, a functional theory for CIL implementation will prove equally necessary.<sup>120</sup>

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<sup>117</sup> *In re S. African Apartheid Litig.*, 02 MDL 1499 SAS, 2013 WL 6813877 (S.D.N.Y. 2013). According to John Bellinger, *In re S. African Apartheid Litig.* is “the longest running of all major ATS cases.” John Bellinger, *More Kiobel Fall Out*, LAWFARE, (Dec. 26, 2013, 5:37 PM), <http://www.lawfareblog.com/2013/12/more-kiobel-fall-out-foreign-defendants-dismissed-from-ats-apartheid-case-but-ford-and-ibm-remain-for-now/#.UsXZ7PaRuDU>.

<sup>118</sup> *Doe I v. Nestle USA, Inc.*, 10-56739, 2013 WL 6670945 (9th Cir. 2013) (“In light of intervening developments in the law, we conclude that corporations can face liability for claims brought under the Alien Tort Statute, 28 U.S.C. § 1350.”).

<sup>119</sup> *Id.* at 5 (“[W]e grant plaintiff-appellants leave to amend their complaint in light of recent authority regarding the extraterritorial reach of the Alien Tort Statute and the *actus reus* standard for aiding and abetting.”) citing *Prosecutor v. Charles Ghankay Taylor*, Case No. SCSL-03-01-A Judgment, ¶ 475 (Special Court for Sierra Leone Sept. 26, 2013) (“[T]he *actus reus* of aiding and abetting liability is established by assistance that has a substantial effect on the crimes, not the particular manner in which such assistance is provided.”); *Prosecutor v. Perisic*, Case No. IT-04-81-A Judgment, ¶ 36 & n. 97 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013) (holding that “specific direction remains an element of the *actus reus* of aiding and abetting,” while noting that “specific direction may be addressed implicitly in the context of analysing substantial contribution”).

<sup>120</sup> John Bellinger, *Reflections on Kiobel*, LAWFARE (Apr. 22, 2013, 8:52 PM), <http://www.lawfareblog.com/2013/04/reflections-on-kiobel/>. Bellinger, a former U.S. Legal Advisor, blogged his surprise that the Supreme Court did not clearly define “touch and concern” in *Kiobel*. (“In their concurring opinion, Justices Alito and Thomas go farther, stating that a claim under the ATS would be barred unless the domestic conduct itself constitutes a violation of customary international law satisfying the requirements of *Sosa*. Personally, I am surprised that, after two rounds of briefing and argument and with the knowledge that several ATS cases remain on hold in Second, Ninth, and DC Circuits, the Court did not give clearer guidance to the lower courts

*D. The Way Forward Is Uncharted in the United States, But Not Elsewhere*

The way forward is uncharted domestically not only because the Supreme Court has thus far declined to chart a course and because CIL is subject to change over time, but because at present, the best-known approaches are of a polarized, insufficient variety.<sup>121</sup> Potential solutions may be best assessed in light of other federal nations' broader experiences implementing CIL in state and federal courts alike. Other nations, albeit through slightly different judicial structures, far surpass the United States in CIL implementation and engagement in state courts. At a time when American jurisprudence concerning international law is in greater need for direction than the nation may wish to admit, the matter of CIL implementation and engagement within a federal structure is worth undertaking a comparative study. *Kiobel* means that the U.S. needs an answer for the authority of CIL in its federal courts. Beyond the *Kiobel* context for federal courts, Australian and Indian state court cases indicate that the body of CIL stands to enrich a state court's jurisdiction, even if only for persuasive authority.

There is certainly a continuing role of CIL in determining the relationship between nation states. If the United States does not find a way to work through the application for CIL between American states, the nation will likely digress to a *Medellin* debacle in time.<sup>122</sup> Though *Medellin* dealt with treaty law rather than CIL, the implications for damaging, unresolved conflicts between American federalism and international law stand. The two bodies of law are not as discreet as some may like. For example, the United States Department of State publicly notes, "the United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."<sup>123</sup> One may wonder which of the provisions the United States does not consider constituting CIL, now codified in a treaty, or how the United States picked and chose among them. The State Department's website does not seem to address that distinction.<sup>124</sup>

For those dismayed at the thought of varying interpretations of CIL within the United States, consider the varying interpretations of CIL worldwide.

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and may have left the door to future ATS litigation easily opened. It remains to be seen how the lower courts interpret the phrase 'touch and concern.'").

<sup>121</sup> See SCHAPIRO, *supra* note 5, at 167; see *supra* Part I.C.

<sup>122</sup> See *infra* Part III.

<sup>123</sup> *Vienna Convention on the Law of Treaties*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Sept. 24, 2013, 9:57 PM).

<sup>124</sup> See *id.*

There is a potential wonder in informing each other and bettering each other's understandings while accounting for a world made of varying backgrounds and views that perhaps should not be made to forfeit any sense of identity for the sake of a perhaps unnecessary precise world uniformity.<sup>125</sup> As available theories brought no resolution, let us look to fellow federal nations who are moving forward in CIL engagement and implementation.

## II. COMPARING THE INDIAN AND AUSTRALIAN EXPERIENCES

This section will explain the selection of Australia and India for comparative study, compare their federal disbursements of power with that of the U.S., and then separately consider their federal and state precedents implementing and engaging CIL. Ultimately, this section reveals that Australian and Indian state and federal courts alike display a wide array of seemingly nonpreemptive perspectives on CIL. Some courts deny any domestic role for CIL, while others embrace it entirely; or acknowledge the establishment of CIL on a certain matter, then assert that they lack authority to enforce CIL either because that role should be left to another court, or even to another branch of government. The comparative analysis reaches four conclusions. In the combined Indian and Australian experiences engaging and implementing CIL in state and federal courts, (1) harmoniously engaging and/or implementing CIL in a federal nation's state *and* federal courts is possible; (2) the engagement and/or implementation of CIL in a federal context does not require the extreme reach of the modernist or revisionist position; (3) CIL enriches judicial decisions even when only engaged and not implemented; and (4) CIL engagement requires a tailor-made approach for a given nation.

### *A. Why India and Australia? A Mutually Beneficial Give-and-Take for Federal Nations Resolving the Status of CIL in Domestic Courts*

Australia and India are presented alongside the United States for their kindred experiences exploring the engagement of public international law within federal frameworks. The three nations share a common bond of former British colonization and exist as ongoing experiments in federal democracy. The implementation of CIL can prove particularly challenging in federal nations because their power is not conveniently centralized in a national

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<sup>125</sup> SCHAPIRO, *supra* note 5, at 170 (interpreting CIL as nonpreemptive federal law “would allow customary international law to develop in nonuniform ways in state and federal courts. The state and federal courts could engage in a collaborative process of illumination.”).

government that possesses authority to both outwardly make international declarations of legal intent and to inwardly see to the implementation of such declaration at state and local levels. India presents a unique federal perspective in contrast to Australia and the United States because its constitution prescribes a far more unitary government. Still, the nation is not immune to its federal peers' hurdles in implementing CIL.

While there exists no perfect comparison to the American experiment, federal, non-European, former British colonies provide a respectable fit. In this complementary regard, India, Australia and the United States share a bond worthy of exploration.

In a similar fashion to their progressive enumeration of individual rights,<sup>126</sup> the United States, Australia and India fall along a progressive scale of attention to CIL in state and federal courts. Where the United States says little of CIL in federal courts and next to nothing of CIL in state courts, save denying CIL concerning post-conviction conditions for prisoners,<sup>127</sup> Australia makes sweeping statements about CIL in its highest federal court, and gives moderate (though broad in scope) attention to CIL in state courts. India's attention to CIL exceeds the others, frequently and broadly addressing CIL in both its highest national court and in its state courts.

While Australian and Indian federal and state courts seem to have much to say about CIL, American state courts merely say that capital punishment, solitary confinement and life without parole are not firmly established tenets of CIL, and would not be binding domestic law even if they were CIL (Australian state courts have an analogous persistent issue in genocide).<sup>128</sup> Perhaps U.S. state courts do not look to CIL because the monist versus dualist debate it so polarized. Like it or not, America's federal courts will likely be forced to engage CIL at least in the context of future ATS litigation. But what of state courts? As Australian and Indian courts demonstrate, CIL stands to enrich American state court decisions.

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<sup>126</sup> See *infra* Part II.A.1.

<sup>127</sup> Interestingly, the Supreme Court of the Australian Capital Territory noted the United States' departure from European sentiments on this matter in *Eastman v Chief Exec. of the Dep't of Justice and Cmty. Safety* [2010] ACTSC 4 (12 January 2010) ("Although the concept of rehabilitation has profoundly shaped American sentencing and correctional policies, a constitutional right to rehabilitation remains unrecognized by the United States federal courts. In sharp contrast, a number of European nations include rehabilitation as a constitutional mandate.").

<sup>128</sup> See *infra* Part II.B.2.

### 1. *Differences in Separations of Power*

Before analyzing their legal precedent, the nations' constitutional positions on federalism and CIL must be explored. The nations' varying separations of powers are addressed here, and constitutional matters specific to CIL are addressed in the Australian and Indian subsections. While all federal in structure, the three former British colonies each boast unique government identities. Where the United States is a representative democracy, Australia is a constitutional monarchy and India is a constitutional republic.<sup>129</sup> One academic hypothesized that "the external environment in which courts operate is a critical component in analyzing their resort to foreign law."<sup>130</sup> The same is arguably true for courts' relationship with CIL.

The United States Constitution is known for its limited central powers and wide deference to states' rights.<sup>131</sup> Per international law implementation, the Constitution is clear that treaties will reign supreme:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; *and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land;* and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.<sup>132</sup>

While states are bound to self-executing treaties entered into by the executive,<sup>133</sup> the Constitution does not bind states' obligations concerning interpretation of CIL.<sup>134</sup>

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<sup>129</sup> SARAH JOSEPH & MELISSA CASTAN, *FEDERAL CONSTITUTIONAL LAW: A CONTEMPORARY VIEW* 27 (2001); GARY J. JACOBSON, *CONSTITUTIONAL IDENTITY* 149 (2010).

<sup>130</sup> Smith, *supra* note 10, at 232.

<sup>131</sup> Ronald L. Watts, *The American Constitution in Comparative Perspective: A Comparison of Federalism in the United States and Canada*, 74 J. AM. HIST. 769, 769 (1987).

<sup>132</sup> U.S. CONST. art. VI (emphasis added).

<sup>133</sup> See *Medellin v. Texas*, 552 U.S. 491, 504–05 (2008) ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law. The distinction was well explained by Chief Justice Marshall's opinion in *Foster v. Neilson*, which held that a treaty is 'equivalent to an act of the legislature,' and hence self-executing, when it 'operates of itself without the aid of any legislative provision.')

<sup>134</sup> See SCHAPIRO, *supra* note 5, at 165 ("Without further action by authorized bodies in the United States, such as state or federal legislatures, customary international law is not law that is binding in courts in the United States. For the revisionists, customary international law simply does not constitute law in the United States without some further authorizing act.").

Like the United States and India, Australia's legal structure is in many regards a product of its departure from British colonization. While the Commonwealth became a federal system in 1900,<sup>135</sup> and was legally independent of the British in 1942, the states themselves only gained legal independence in 1986.<sup>136</sup> The government is now a constitutional monarchy led by the Queen of England, known in this context as the Queen of Australia, though her duties are largely performed by an appointed Australian leader known as Governor-General.<sup>137</sup> A referendum to cut that final tie from the British failed almost unanimously in 1999.<sup>138</sup> Most important for the topic at hand, the Australian judiciary is legally independent of the British.<sup>139</sup> The Australian federal government is comprised of six states and two territories. According to the Australian Constitution, the Commonwealth Parliament and the states share certain concurrent powers; the High Court of Australia has ultimate authority concerning federal law, and Commonwealth law prevails in the instance of inconsistent state legislation.<sup>140</sup> A series of twentieth century cases in the High Court trended toward greater centralization of Commonwealth power over the states, though twenty-first century trends appear bound toward a greater reestablishment of states' rights.

Unlike the United States and Australia, India's federalism features a greater central bias.<sup>141</sup> Less can be said that one form of federalism is superior than that the nations simply achieved independence in markedly different eras of world history and particularly of international relations.<sup>142</sup> The Indian

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<sup>135</sup> DAVID CLARK, PRINCIPLES OF AUSTRALIAN PUBLIC LAW 13 (2003).

<sup>136</sup> JOSEPH & CASTAN, *supra* note 129, at 25–26 (Australia's federal legal independence was finalized in the *Statute of Westminster Adoption Act* of 1942, though adoption was backdated to 1939, synchronized with the beginning of World War II).

<sup>137</sup> *Id.* at 27.

<sup>138</sup> Kathleen E. Foley, *Australian Judicial Review*, 6 WASH. U. GLOBAL STUD. L. REV. 282, 284 n.30 (2007).

<sup>139</sup> JOSEPH & CASTAN, *supra* note 129, at 27.

<sup>140</sup> AUSTRALIAN CONSTITUTION s 51; s 71; s 109.

<sup>141</sup> INDIA CONST., Chapter XI, § 256, 257:

The executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose. [§257 (1)] The executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union, and the executive power of the Union shall extend to the giving of such directions to a State as may appear to the Government of India to be necessary for that purpose.

*Id.*; see generally Rao & Singh, *supra* note 56.

<sup>142</sup> See generally Rao & Singh, *supra* note 56.

Constitution, for instance, is a product of its post-World War II heritage; “infused with human rights protections more explicitly expansive than in any prior compact.”<sup>143</sup> Due at least in part to that intentional infusion, India boasts the longest constitution on record.<sup>144</sup>

Two matters explain the Indian founders’ commitment to a more unitary government. First, Indian leaders knew they needed to project a strong, uniform voice into the international community as the nation came into its own.<sup>145</sup> Having uniquely held membership in the League of Nations long before becoming an autonomous state,<sup>146</sup> India’s leaders knew the crucial value of public image as the country emerged independent. Second, where James Madison advocated through the Federalist Papers for checks and balances among government powers, undergirded by a belief in the depravity of man, Indian leaders took a more positive view of society and conceptualized government in a role of “benevolent guardian,” which naturally bent toward centralization.<sup>147</sup>

Among Australia and the United States, India’s federalism is newest and is a remarkable work in progress to this day.<sup>148</sup> While the Indian constitution appears to set up a tremendously unitary political system,<sup>149</sup> constitutional analysis alone leaves an insufficient and even misleading image of the reality of India’s separation of powers. After the 1964 death of its first independent democratic leader, Jawaharlal Nehru,<sup>150</sup> India embarked upon a “federalizing process” that incrementally continues to pass authority onto the states to this day, though not yet so much so that the balance of power tips away from

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<sup>143</sup> Smith, *supra* note 10, at 238 (“Moreover, the Constitution was a true post-World War II document, infused with human rights protections more explicitly expansive than in any prior compact. Part III of the document reflects these aspirations, mimicking the Universal Declaration of Human Rights (UDHR), which was adopted by the United Nations General Assembly in 1948.”).

<sup>144</sup> *Id.*

<sup>145</sup> Rao & Singh, *supra* note 56, at 7 (“[W]e are unanimously of the view that it would be injurious to the interests of the country to provide for a weak central authority which could be incapable of ensuring peace, of co-ordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere.”).

<sup>146</sup> Stephen Legg, *An International Anomaly? Sovereignty, the League of Nations, and India’s Princely Geographies*, 43 J. HIST. GEOGRAPHY 96, 96 (2014) (“Thanks, in part, to its contribution of men and materiel to the First World War, India secured a place at the 1919 Versailles Peace Conference, which (unexpectedly) made it a founding member of the League of Nations.”); STEPHEN P. COHEN, *INDIA: EMERGING POWER 2* (2001) (“India achieved its independence in 1947.”).

<sup>147</sup> Rao & Singh, *supra* note 56, at 8.

<sup>148</sup> COHEN, *supra* note 146, at 113.

<sup>149</sup> *Id.* at 106.

<sup>150</sup> *Id.* at 107.

center.<sup>151</sup> One academic characterizes India's federal system as a "metastable structure" in which "a federal revolution is real, but is grinning away slowly."<sup>152</sup>

### *B. The Australian Experience with CIL*

However relatively small the precedent set may be, Australia's experience implementing and engaging CIL provides a rich array of perspectives from which to draw. The High Court's precedents include a promulgation of three modes for CIL engagement, and a show-stopping question of whether courts are even the appropriate governmental branch to consider the domestic role of CIL. The breadth of CIL engagement in Australian state courts is remarkable, ranging from one court denying its authority, as a state court, to implement even the most absolutely binding form of CIL, *jus cogens*; to another declining to include well-established CIL in grounds that the law simply was not domestically binding; to another court recently noting that Australia was bound to CIL as embodied in the Vienna Convention on the Law of Treaties, similar to the passing nod given on the U.S. State Department's website.<sup>153</sup>

#### *1. Introduction to Australia*

Despite being penned more than a century later than the United States Constitution, when the body of CIL was more robust, the Australian Constitution makes little mention of CIL.<sup>154</sup> In fact, the Australian Constitution is entirely silent on "the method of Australia's entry into binding legal relationships on the international stage, the legal effect of international law within the domestic legal system, and the responsibility for enforcement of such obligations at the domestic level."<sup>155</sup> The constitution does grant power to address "external affairs" by enacting legislation to the federal parliament, and grants original jurisdiction for treaty matters to the High Court.<sup>156</sup> Procedures for the interpretation and implementation of CIL are left unresolved.

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<sup>151</sup> *Id.* at 106.

<sup>152</sup> *Id.* at 113.

<sup>153</sup> *See supra* Part I.D.

<sup>154</sup> Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423, 428 (2003).

<sup>155</sup> *Id.*

<sup>156</sup> AUSTRALIAN CONSTITUTION S 51(xxix); AUSTRALIAN CONSTITUTION S 75(i); Charlesworth et al., *supra* note 155, at 428.

Early drafts of the Australian Constitution did pay greater attention to international law, even containing a provision including treaties as a legal source modeled after the United States' Supremacy Clause.<sup>157</sup> Ultimately, the clause was removed because leaders felt that the measure "would be more in place in the United States Constitution, where treaties are dealt with by the President and the [S]enate, than in the constitution of a colony within an empire."<sup>158</sup> No provision of the Australian Constitution directly addresses the implementation of CIL.<sup>159</sup> Not surprisingly, then, the debate between monists and dualists is equally alive in Australia.<sup>160</sup> However, where American CIL precedent may be sparse, Australia has even less.<sup>161</sup>

## 2. *Australian High Court Cases*

When it comes to charting a course for the domestic application of CIL, the Australian High Court is historically nearly as noncommittal as the United States Supreme Court.<sup>162</sup> Consider former Chief Justice Latham's 1948 opinion in *Chow Hung Ching v The King*: "[international] law is not as such part of the law of Australia . . . but a universally recognized principle of international law would be applied by our courts."<sup>163</sup> In the same case, Justice Starke's opinion reiterated an earlier decision:

The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.<sup>164</sup>

The Australian legal principles established in *Chow Hung Ching* appear thoroughly explored in only two subsequent federal cases, *Dietrich v The*

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<sup>157</sup> Charlesworth et al., *supra* note 154, at 429.

<sup>158</sup> *Id.* at 429, citing Official Record of the Debates of the Australasian Federal Convention (Sydney, 1897) at 240.

<sup>159</sup> Henry Burmester, *The Determination of Customary International Law in Australian Courts*, 4 NON-ST. ACTORS & INT'L L. 39, 39 (2004).

<sup>160</sup> Burmester & Reye, *supra* note 57, at 49.

<sup>161</sup> See Meltzer, *supra* note 43, at 517 (asserting that CIL is not a major point of contention on the whole of American jurisprudence); Smelcer, *supra* note 48, at 318 (asserting less case law on CIL in Australia than in the United States).

<sup>162</sup> See *supra* Part I.

<sup>163</sup> Charlesworth et al., *supra* note 154, at 452 (citing *Chung Chi Cheung v The King* (1939) AC 160, 449).

<sup>164</sup> *Id.* at 452 (citing *Chung Chi Cheung v The King* (1939) AC 160, 167–68).

*Queen* before the Australian High Court and *Nulyarimma v Thompson* before the Full Federal Court.<sup>165</sup>

In *Dietrich v The Queen*, in 1992, the Australian High Court considered whether the right to government-sponsored counsel as articulated in the International Covenant for Civil and Political Rights, considered on its merits as CIL because it was not implemented into Australian domestic law, could or should be implemented as Australian common law.<sup>166</sup> The Court unanimously declined to incorporate CIL to establish an absolute right to counsel.<sup>167</sup> Interpreting that the standing Australian common law right to fair trial may include a right to fair counsel, however, the justices presented three distinct declinations to incorporate the right.<sup>168</sup> While three justices narrowly interpreted that CIL was appropriate only for speaking into Australian common law ambiguities,<sup>169</sup> one justice wrote that CIL could inform both ambiguities and clear gaps in the common law,<sup>170</sup> and another wrote that CIL could inform modifications or expansions to Australian common law subject to limits from policy and a constitutional separation of powers.<sup>171</sup> These three approaches will recur in this Comment both in themes of Indian precedent and in the way forward proposed by the conclusion.

Seven years later the Full Federal Court decided *Nulyarimma v Thompson*, addressing whether there existed a preemptory norm of CIL prohibiting genocide, and whether that norm was embraced by Australian law.<sup>172</sup> The matter of genocide prohibitions in CIL would go on to be raised in countless federal courts and at least one state court throughout Australia.<sup>173</sup> The majority opinion pronounced a decided “no,” while one justice provided a nuanced dissent.<sup>174</sup> The majority opinion characterized domestic courts’ decisions whether to implement CIL principles as policy issues, and that absent enacting

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<sup>165</sup> *Dietrich v R* (1992) 177 CLR 292. See generally *Nulyarimma v Thompson* (1999) 96 FCR 153; Charlesworth et al., *supra* note 154, at 453.

<sup>166</sup> Charlesworth et al., *supra* note 154, at 454.

<sup>167</sup> See generally *Dietrich v R* (1992) 177 CLR 292.

<sup>168</sup> Charlesworth et al., *supra* note 154, at 455.

<sup>169</sup> *Dietrich v R* (1992) 177 CLR 292 Mason CJ, McHugh J and Dawson J 306.

<sup>170</sup> *Id.*, Toohey J 360–61.

<sup>171</sup> *Id.*, Brennan J 318–21.

<sup>172</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153 para 18.

<sup>173</sup> In the Federal Court of Australia, see generally *SRYYY v Minister for Immigration and Multicultural and Indigenous Affairs*, 147 FCR 1 (2005); *SZITR v Minister for Immigration and Multicultural Affairs*, [2006] FCA 1759. In the Supreme Court of South Australia, see *Thorpe v Kennett* [1999] VSC 422 (15 November 1999) para 30.

<sup>174</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153; Charlesworth et al., *supra* note 154, at 455.

legislation, implementation should always be avoided in criminal matters.<sup>175</sup> The majority openly noted that such a perspective lacked significant precedent.<sup>176</sup> A concurrence in judgment noted that criminal offenses of CIL could not be incorporated into Australian law because the nation's Criminal Code abolished all common law crimes from Commonwealth law.<sup>177</sup> An artful dissent provided fodder for thought, theorizing that CIL principles should be domestically implemented unless found in conflict with domestic law, in which case the custom could only enter domestic law through implementing legislation.<sup>178</sup> These drastically disparate theories of CIL implementation would not be resolved any time soon.

In 2002, the High Court addressed the domestic implementation of CIL in two cases in nearly opposite fashion.<sup>179</sup> The High Court held in *Western Australia v Ward* that “[t]here is no requirement for the common law to develop in accordance with international law,” denouncing the prospect as “unacceptable.”<sup>180</sup> With a fascinating rhetoric seeming to draw upon a promissory estoppel theory, the Court articulated what is perhaps the strongest argument against courts as the proper forum for bringing CIL into domestic law.

The proposition that international law—itsself often vague and conflicting—demands that the common law of Australia be moulded in a particular way, apparently without regard for precedent, the conditions in this country, or the fact that governments and individuals may have reasonably relied on the law as it stands is unacceptable.<sup>181</sup>

*Western Australia v Ward* left open for discussion a fair issue for discussion in any federal nation—whether the appropriate place to consider ushering CIL into domestic law is federal legislatures. Months later, the High Court's *Dow Jones v Gutnick* decision provided a striking whiplash in a matter of months, holding that all developments of Australian common law concerning the

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<sup>175</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, para 164; Charlesworth et al., *supra* note 155, at 455.

<sup>176</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, para 164; Charlesworth et al., *supra* note 155, at 455.

<sup>177</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, para 172; Charlesworth et al., *supra* note 155, at 456.

<sup>178</sup> *Nulyarimma v Thompson* (1999) 96 FCR 153, para 190; Charlesworth et al., *supra* note 155, at 456 (“The approach of Merkel J to the integration of customary international law differed from that of his judicial colleagues in that his Honour’s approach relied neither on broad judicial consideration of policy . . . nor on the narrow requirement for express parliamentary approval of the relevant principle.”).

<sup>179</sup> Charlesworth et al., *supra* note 155, at 457.

<sup>180</sup> *Western Australia v Ward* (2002) 191 ALR 1, para 958.

<sup>181</sup> *Id.* at para 958.

“digital millennium” fall in line with CIL as embodied in the International Covenant for Civil and Political Rights.<sup>182</sup>

In sum, Australia’s highest federal courts are wary to incorporate CIL into their domestic common law. While considering the following Australian state cases, and Indian cases as well, readers should return to the three CIL incorporation possibilities proposed within *Dietrich*: employing CIL to speak into ambiguities in common law,<sup>183</sup> to inform both ambiguities and clear gaps in common law,<sup>184</sup> or to inform expansions and modifications upon common law.<sup>185</sup> The *Western Australia* question remains a valid one: are courts the best forums in which to bring international law of any kind into the fold of domestic law? Australian state courts provide excellent estuaries for such considerations.

### 3. *Australian State Court Cases*

More so than Australia’s High Court or Full Federal Court, Australian state courts have everything in the world to say about CIL—what qualifies, what does not, what may be in the process of becoming CIL (known as the “crystallizing” period), and what authority it holds domestically. Section 73 of Australia’s constitution grants the High Court of Australia nonexclusive appellate review over the state superior courts.<sup>186</sup> Section 109 establishes supremacy of Commonwealth law over state law.<sup>187</sup> The state courts enjoy substantial opportunities to establish common law, despite the High Court’s appellate jurisdiction, because appeal is not automatic. Those wishing to appeal decisions from a state supreme court (whether the Full Court; the Court of Appeal, a portion of state supreme court justices sitting in review of a civil matter; or the Court of Criminal Appeal, a portion of state supreme court justices sitting in review of a criminal matter), must apply for special leave to

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<sup>182</sup> *Dow Jones v Gutnick* (2002) 194 ALR 433, 116; Charlesworth et al., *supra* note 155, at 457.

<sup>183</sup> *Dietrich v R* (1992) 177 CLR 292 Mason CJ, McHugh J and Dawson J 306.

<sup>184</sup> *Id.*, Toohey J 360–61.

<sup>185</sup> *Id.*, Brennan J 318–21.

<sup>186</sup> *Commonwealth of Australia Constitution Act* (Cth) s 73; Foley, *supra* note 138, at 290 (“As a preliminary issue, in Australia, the power of judicial review does not reside exclusively with the High Court. Instead, lower courts also possess and exercise the power to decide constitutional questions. However, the High Court is the focus of attention regarding judicial review because it stands at the apex of Australia’s judicial system, deciding the most important constitutional cases.”).

<sup>187</sup> *Commonwealth of Australia Constitution Act* (Cth) s 109 (“When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.”).

do so. Special leave petitions are granted in only about 20 percent of instances.<sup>188</sup>

Australia is comprised of six states and ten territories, three of which maintain supreme courts equal in authority to those of the states due to sizable populations.<sup>189</sup> In the past twenty to thirty years' decisions from Australia's nine state and territory supreme courts,<sup>190</sup> five courts decided multiple cases concerning CIL.<sup>191</sup> A search of the other four courts' records produced no cases on point. Of the pertinent five courts, each decided two CIL-related cases.<sup>192</sup>

In 2001, the Supreme Court of the Northern Territory interpreted the right of asylum as one of state and not of individuals under CIL in *The Queen v Husen Baco & Others*, citing an Australian High Court precedent interpreting the same.<sup>193</sup> The same court earlier decided *Fa v Morris*, an international fishing case concerning fishery conservation zones.<sup>194</sup> The court agreed with the respondent's assertion that a 200 nautical mile fishing zone was "well established in customary international law," and explored multiple legal commentaries' theories that a 200-mile fishery conservation zone was "in the

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<sup>188</sup> David Malcolm, *State Supreme Courts*, in THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA (Michael Coper, Tony Blackshield & George Williams eds., 2007 online edition), available at Oxford Reference.

<sup>189</sup> *State and Territory Government*, AUSTRALIAN GOVERNMENT, <http://australia.gov.au/about-australia/our-government/state-and-territory-government> (last visited Feb. 22, 2014).

<sup>190</sup> Varying by records available from the Australasian Legal Information Institute, available at <http://www.austlii.edu.au>. The Institute's records extend as follows: the Australian Capital Territory, 1986 forward; New South Wales: 1993 forward; Norfolk Island, 1984 forward; the Northern Territory, 1986 forward; Queensland, 1994 forward; South Australia, 1989 forward; Tasmania, 1985 forward; Victoria, 1994 forward; Western Australia, 1996 forward.

<sup>191</sup> Through searches of the Australasian Legal Information Institute website, no pertinent cases were found in the supreme court records of Western Australia, Norfolk Island, Tasmania, or Queensland.

<sup>192</sup> Those courts are the Supreme Court of the Australian Capital Territory, the Supreme Court of New South Wales, the Supreme Court of the Northern Territory, the Supreme Court of South Australia, and the Supreme Court of Victoria. No cases concerning CIL were found in the recent records of the supreme courts of Queensland, Tasmania, Western Australia, or Norfolk Island.

<sup>193</sup> *The Queen v Husen Baco & Ors* [2011] NTSC 75 (28 September 2011) para 17 ("[C]ustomary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a State of which that individual is not a national"), citing *Minister for Immigration v Ibrahim*, [2000] HCA 55; (2000) 204 CLR 1 para 137 available at <http://www.austlii.edu.au/au/cases/cth/HCA/2000/55.html> ("[I]t has long been recognised that, according to customary international law, the right of asylum is a right of States not of the individual").

<sup>194</sup> *Fa v Morris* [1987] NTSC 20; 46 NTR 1; 87 FLR 36; 27 A Crim R 342 (8 May 1987).

process of crystallizing as a principle of customary international law.”<sup>195</sup> The court also looked to commentary asserting the establishment of CIL in light of other nations’ practices.<sup>196</sup>

In 1999, the Supreme Court of South Australia denied Australian state courts’ authority to implement CIL domestically, at least in the form of creating new crimes. In *Sumner v United Kingdom of Great Britain and Others*, the court explained, “The courts of the States and the Territories can have no authority for themselves to proscribe conduct as criminal under the common law simply because it has now become recognised as an international crime with the status of jus cogens under customary international law.”<sup>197</sup> *Jus cogens* norms are peremptory, nonderogable principles of “supercustom” out of which no state can contract, even by treaty.<sup>198</sup>

That same year, Supreme Court of Victoria handled the Australian state courts’ repeated CIL matter, genocide. The Court acknowledged not only that genocide was a crime of CIL, but that it had been since 1948 at the latest, when the crime was defined by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>199</sup> Still, the Court held firm: “that ratification did not have the effect of incorporating the Act as part of Australian law or for that matter as part of Victorian Law.”<sup>200</sup> Likewise, in 2000, the Supreme Court of South Australia declined to incorporate the criminalization of genocide into domestic common law in *Thorpe v Kennett*, even as the court accepted that the prohibition of genocide is both a “peremptory norm of customary international law” and “part . . . of Australia’s treaty obligations to other nation States.”<sup>201</sup> Again, the court pointed to decisions from Australia’s highest court that expressly held that “the offence of genocide is not recognized by Australian domestic law,” no matter its

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<sup>195</sup> *Id.* at para 142 (“Clearly the fishery conservation zone, not greater than 200 miles from the usual baselines, is in the process of crystallizing as a principle of customary international law”); also citing IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 219 (1979, 3d ed.).

<sup>196</sup> *Fa v Morris* [1987] NTSC 20; 46 NTR 1; 87 FLR 36; 27 A Crim R 342 (8 May 1987) citing K.W. RYAN, INTERNATIONAL LAW IN AUSTRALIA 377 (1984) (“While no provision has been made in international treaty for a 200 mile fisheries zone this zone may be regarded as having been established under customary international law in the light of claims of a vast number of maritime nations including the United States, Russia, Japan, the United Kingdom, European Economic Community and the countries of the third world.”).

<sup>197</sup> *Sumner v United Kingdom of Great Britain & Ors*, No. SCGRG-99-1257 Judgment No. S456 [1999] SASC 456 (27 October 1999) paras 31–32.

<sup>198</sup> BEDERMAN, *supra* note 27, at 39.

<sup>199</sup> *Thorpe v Kennett* [1999] VSC 422 (15 November 1999) para 30.

<sup>200</sup> *Id.* at para 30.

<sup>201</sup> *Sumner*, SASC 91 at para 17.

establishment as CIL.<sup>202</sup> The court interpreted outside sources and a series of higher court decisions as giving one uniform message: “customary international law [is] a potential *source* of Australian common law but not an automatic part of it.”<sup>203</sup>

In both its CIL cases, the Supreme Court of New South Wales safely engaged federal court interpretations of CIL rather than resting on its own interpretation. In 1997, in *Kotsambasis v Singapore Airlines*, the court looked to CIL for interpreting international conventions.<sup>204</sup> Later, in 2008, the Court looked to a federal court precedent, which assessed CIL by state practice, also considering *jus cogens* to conclude that Australia’s Foreign States Immunities Act provides immunities to foreign government officers.<sup>205</sup>

In 2013, the Supreme Court of Victoria made a seeming about-face from a long line of state court precedents herein noted which denied Australia to be bound by CIL. In *ZZ v Secretary, Department of Justice & Anor*, the Court nearly whispered in a footnote: “the *Vienna Convention on the Law of Treaties* is understood to represent a codification of existing customary international law, which also binds Australia.”<sup>206, 207</sup> On its face, this ruling cannot be harmonized with the Supreme Court of South Australia’s *Thorpe* decision that even “peremptory norm[s]” of CIL are not automatic domestic common law.<sup>208</sup> Need the two harmonize? Perhaps federalism says “no.”

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<sup>202</sup> *Id.* at para 32, citing *Nulyarimma v Thompson* [1999] FCA 1192 para 32; *Sumner v United Kingdom of Great Britain* [1999] SASC 462, para 17. (“Each of the judges in *Nulyarimma* engage in a detailed exploration of the international law pertaining to the crime of genocide and its relationship with Australian law, and made it clear that, in the absence of legislation, a prohibition against genocide is not cognisable under Australian law.”).

<sup>203</sup> *Sumner*, SASC 91 at para 30.

<sup>204</sup> See generally *Kotsambasis v Singapore Airlines Ltd Matter* [1997] NSWSC 303.

<sup>205</sup> *Zhang v Zemin & Ors.* [2008] NSWSC 1296 (14 November 2008) at para 39 (“there is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to *jus cogens*”).

<sup>206</sup> *Contra Vienna Convention on the Law of Treaties*, U.S. DEPARTMENT OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (the U.S. Department of State contends that only some of the provisions of the Vienna Convention on the Law of Treaties are binding upon the nation as CIL); see *supra* Part I.D.

<sup>207</sup> *ZZ v Secretary, Department of Justice & Anor* [2013] VSC 267 (22 May 2013), n.35 (the fuller quote: “Article 4 of the *Vienna Convention on the Law of Treaties* limits its temporal application to treaties enacted after 1980 (when it entered into force). The *International Covenant on Civil and Political Rights* entered into force in 1976. However, the *Vienna Convention on the Law of Treaties* is understood to represent a codification of existing customary international law, which also binds Australia: *Fisheries Jurisdiction (United Kingdom v Iceland) (Jurisdiction)* [1973] ICJ Rep 3, 19; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 38, 62.”).

<sup>208</sup> *Sumner v United Kingdom of Great Britain & Ors.* [2000] SASC 91 (13 April 2000) para 17.

Australian state courts display circumspect reflections upon the domestic engagement and implementation of CIL. Where the Supreme Court of South Australia was relatively dismissive, finding no authority to implement CIL to establish a crime not previously recognized in the domestic jurisdiction, even if perceived internationally as holding the binding authority of *jus cogens*,<sup>209</sup> the Supreme Court of the Northern Territory actively sought out principles of CIL to consider domestic issues. The Supreme Court of the Northern Territory engaged three points of CIL in three unique manners; interpreting asylum as not an individual right under CIL,<sup>210</sup> fishing zones as well-established CIL, and fishing conservation zones as in the continuing process of becoming CIL.<sup>211</sup>

#### 4. *Conclusions on the Australian Experience*

The whole of Australia's CIL jurisprudence demonstrates rich discussions that are arguably all the richer for not being bound to each other. On the broader theme of CIL engagement in federal nations, the Australian experience demonstrates four truths.

First, harmoniously engaging and/or implementing CIL in a federal nation's state *and* federal courts is possible. The Australian experience celebrates what dynamic perspective federalism can bring to the interpretation of something as broad and relatively unbounded as CIL. Where half the Australian state court decisions aimed to defer to federal interpretations of CIL, others looked to international commentaries,<sup>212</sup> or made relatively independent interpretations in light of what they observed in other nations' courts.<sup>213</sup>

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<sup>209</sup> *Sumner v United Kingdom of Great Britain & Ors* [1999] SASC 456, para 31–32.

<sup>210</sup> *The Queen v Husen Baco & Ors* [2011] NTSC 75, para 14 (“customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a State of which that individual is not a national”), citing *Minister for Immigration v Ibrahim*, [2000] HCA 55; (2000) 204 CLR 1, para 137 (“it has long been recognised that, according to customary international law, the right of asylum is a right of States not of the individual”).

<sup>211</sup> *Fa v Morris* [1987] NTSC 20; 46 NTR 1; 87 FLR 36; 27 A Crim R 342 (“Clearly the fishery conservation zone, not greater than 200 miles from the usual baselines, is in the process of crystallizing as a principle of customary international law”); citing BROWNLIE, *supra* note 196, at 219.

<sup>212</sup> *Fa v Morris* [1987] NTSC 20.

<sup>213</sup> *Id.* citing RYAN, INTERNATIONAL LAW IN AUSTRALIA 377 (1984) (“While no provision has been made in international treaty for a 200 mile fisheries zone this zone may be regarded as having been established under customary international law in the light of claims of a vast number of maritime nations including the United States, Russia, Japan, the United Kingdom, European Economic Community and the countries of the third world.”).

Second, the engagement and/or implementation of CIL in a federal context does not require the extreme reach of the modernist or revisionist position. Given the choice, half the Australian state court decisions mentioned here deferred to higher federal court rulings on CIL.<sup>214</sup> The state courts hardly thumbed their noses at the federal judiciary, as some monists believe state courts may if given the choice.<sup>215</sup> But again, need state courts harmonize? Federalism does not require it. For any large, diverse nation, a variety of interpretations seems inevitable and appropriate. As American revisionists argue that no CIL is binding unless legislated, and American modernists assert that international law is already U.S. law, Australian precedent presents a less polarized possibility for implementing and engaging CIL. While Dean Robert Schapiro's more moderate polyphonic federalist theory advocates conceiving of CIL as nonpreemptive federal law,<sup>216</sup> some Australian courts do not perceive CIL as federal law at all. To that end, why would each state not be permitted to interpret the matter as they wish? The Australian High Court could always grant appeal, if sought, to sort out any state court interpretation of CIL with which the High Court took issue.

Third, CIL enriches judicial decisions even when only engaged and not implemented. Consider the Supreme Court of the Northern Territory's three uses in two cases alone, and the three methods of CIL engagement proposed in the Australian High Court's *Dietrich* decision. Indeed, given all that can be taken from the Australian CIL precedents, perhaps federalism as an institution stands to offer more to CIL than it could begin to receive.

Finally, CIL engagement requires a tailor-made approach for a given nation. Australian courts made no bones of approaching CIL in a uniquely Australian manner, no matter the outside world's perceptions of CIL's preeminence. The Supreme Court of South Australia denied state courts'

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<sup>214</sup> See *Sumner v United Kingdom of Great Britain & Ors* [2000] SASC 91, para 17; *Zhang v Zemin & Ors*. [2008] NSWSC 1296, para 39 (“[T]here is no principle of customary international law which provides an exception from state immunity where an act of torture has been committed outside the forum, even for acts contrary to jus cogens.”) (citing *Bouzari v Islamic Republic of Iran* [2002] 124 ILR 428, para 63); see generally *Kotsambasis v Singapore Airlines Ltd* [1997] NSWSC 303; *The Queen v Husen Baco & Ors* [2011] NTSC 75, para 17 (“customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a State of which that individual is not a national”) (citing *Minister for Immigration & Multicultural Affairs v Haji Ibrahim*, [2000] HCA 55, para 137 (“it has long been recognised that, according to customary international law, the right of asylum is a right of States not of the individual”)).

<sup>215</sup> Young, *supra* note 85, at 479.

<sup>216</sup> SCHAPIRO, *supra* note 5, at 170.

authority to establish new crimes.<sup>217</sup> Even among the three relationships between CIL and Australian law offered in *Dietrich*, none called for CIL to override domestic law at any point. The closest ever suggested was for CIL to inform expansions and modifications upon common law.<sup>218</sup> Still, Australian common law was always the watermark.<sup>219</sup>

### C. *The Indian Experience with CIL*

India is the third of three nations studied in this Comment to resist blanket domestic enforcement of CIL in state and federal courts alike. Perhaps this trend confirms that at least some American tendencies to resist CIL are not as unique to the United States as some would contend. That premise established, the idiosyncrasy may be easier perceived as one of function rather than elitism.

#### 1. *Introduction to India*

Within a more centralized federal framework, the implementation of CIL does not appear problematic. Like America and Australia, India follows a dualist approach to the implementation of CIL.<sup>220</sup> In 1997, in concert with the yet-written Australian dissent in *Nulyarimma v Thompson*,<sup>221</sup> the Indian Supreme Court seemed to embrace the domestic incorporation of customary international law principles not in conflict with municipal law. The majority opinion in *Vellore Citizens' Welfare Forum v. Union of India* stated, “[i]t is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.”<sup>222</sup> “Almost” leaves much unsaid, though India’s state courts would negate the uncertainty in time.

Indian state court precedent will demonstrate a wide array of approaches to CIL. Some states meld reliance upon CIL and foreign law, while others interpret where CIL does and does not exist, let alone when it applies in state

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<sup>217</sup> See generally *Sumner v United Kingdom of Great Britain & Ors* [1999] SASC 456.

<sup>218</sup> *Dietrich v R* (1992) 177 CLR 292 Brennan J 318–21.

<sup>219</sup> See *id.*, Brennan J 318–21, Toohey J 360–61, Mason CJ, McHugh J & Dawson J.

<sup>220</sup> Smith, *supra* note 10, at 243 n.126 (“Regarding international conventional or treaty law, India subscribes to the dualist position; such agreements have no binding effect unless implemented by legislation. The [Indian] Supreme Court reiterated this position in *Jolly George Varghese v. Bank of Cochin* (1980) 2 S.C.C. 360.”).

<sup>221</sup> See *supra* Part II.B.ii.

<sup>222</sup> *People’s Union of Civil Liberties (PUCL) v. Union of India and Another*, A.I.R. 1997 S.C. 568, para. 23.

court. Some rely upon India Supreme Court precedent to interpret CIL, while others look to the precedent of fellow state courts. One thought-provoking canon proposal leaves fascinating questions for application in an American context.

## 2. *India Supreme Court Cases*

In 1984, the India Supreme Court decided *Gramophone Co. v. Birendra Bahadur Pandey*, in which the justices considered “whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute [and] whether, so drawn, it overrides municipal law in case of conflict.”<sup>223</sup> The Court resolved that municipal, national, and international law should abide in harmony as much as possible; though when conflict arises between the former two and the latter, “[n]ational courts being organs of the national state and not organs of international law must perforce apply national law if international law conflicts with it.”<sup>224</sup> When municipal law allowed room for interpretation, the Supreme Court called for interpretation in comity with international law; it then re-emphasized that international law “must yield . . . if conflict is inevitable.”<sup>225</sup>

In 1996, the India Supreme Court decided another case that would go on to be cited by state courts throughout the nation. *Vellore Citizens’ Welfare Forum v. Union of India*, an environmental law decision, established that the principle of “sustainable development” was “accepted as a part of the [c]ustomary [i]nternational [l]aw.”<sup>226</sup> More importantly, the court went on to note, “[i]t is almost [an] accepted proposition of law that the rule [sic] of [c]ustomary [i]nternational [l]aw which are not contrary to the municipal law shall be deemed to have been incorporated in the domestic law and shall be followed by the Courts of Law.”<sup>227</sup> Like its Australian counterpart, the India Supreme Court expressed deference to CIL only to the degree that Indian law remained untouched.

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<sup>223</sup> *Gramophone Co. v. Birendra Bahadur Pandey*, A.I.R. 1984 S.C. 667, 665 (The case also considered “whether there is any well established rule of international law on the question of the right of land-locked states to innocent passage of the goods across the soil of another state; and [] what is the meaning of the word ‘import’ used in s.53 of the Copyright Act.”).

<sup>224</sup> *Id.* at 666.

<sup>225</sup> *Id.* at 666.

<sup>226</sup> *Vellore Citizens’ Welfare Forum v. Union of India*, A.I.R. 1996 S.C. 2715. At that time, “sustainable development” was loosely defined “as a balancing concept between ecology [sic] and development.” *Id.*

<sup>227</sup> *Id.*

That same year, the India Supreme Court decided *People's Union of Civil Liberties v. Union of India* ("PUCL"). The Court addressed citizens' rights to privacy from telephone tapping. Ultimately finding that Indian citizens generally possessed an unenumerated liberty from phone tapping derived from the constitutional right to privacy asserted in the spirit of a number of legal instruments, the Court drew support from the Universal Declaration of Human Rights and the International Covenant for Civil and Political Rights, without exceeding the parameters of standing domestic law.<sup>228</sup> Closely paraphrasing *Vellore*, decided just a few months prior, the Court reiterated that the de facto incorporation of CIL not in conflict with municipal law was "almost an accepted proposition."<sup>229</sup> India's high courts would test the bounds of "almost."

### 3. *India High Court Cases*

The decisions of Indian state courts, known as "high courts," provide a rich engagement of CIL that is worthy of attention. First, though, must come a concession that Indian state courts possess less discretion for avoiding the matter than Australian or American courts. The Indian system on the whole, developed from a body already in motion during British occupation, is far more unitary than either Australia or America.<sup>230</sup> India has no federal district or appellate courts.<sup>231</sup> All matters originate in magistrate or state district courts.<sup>232</sup> Per the Indian constitution, ironically, district court judges are appointed by the state high courts and not by any federal authority.<sup>233</sup>

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<sup>228</sup> *People's Union of Civil Liberties (PUCL) v. Union of India and Another*, A.I.R. 1997 S.C. 568, paras. 21–24; BASANT LAL WADEHRA, *PUBLIC INTEREST LITIGATION: A HANDBOOK, WITH MODEL PIL FORMATS* 362 (2009).

<sup>229</sup> *People's Union of Civil Liberties (PUCL) v. Union of India and Another*, A.I.R. 1997 S.C. 568, para. 23. The court further expounded, "International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals." *Id.* at para. 22.

<sup>230</sup> The relatively unitary government structure crafted by India's founding fathers can largely be traced to the likes of Jawaharlal Nehru and Bhimrao Ambedkar perceiving government as a "benevolent guardian," where American founding fathers such as James Madison saw inevitable government leaders, mere men, as fallen creatures in need of constraint. Gandhi, incidentally, advocated a far less centralized nation. *See generally* Rao & Singh, *supra* note 56.

<sup>231</sup> *Indian Court Structure*, S.S. RANNA & CO., available at <http://www.ssrana.in/intellectual%20property/IP-Enforcement-And-Litigation/IP-IndianCourtsStructure.aspx> (chart illustrating Indian court structure).

<sup>232</sup> *Id.*

<sup>233</sup> INDIA CONST. art. 233.

A sampling of Indian state court decisions discussing CIL presents state courts interpreting and implementing CIL based on their own study, the persuasion of other state courts, the India Supreme Court, and even a variety of other nations' practices.<sup>234</sup>

The Delhi High Court may provide the strongest showing, as it has addressed everything from diplomatic immunity to international drug trafficking charges. In 1970 the Court held that a diplomat's wife had diplomatic immunity from legal proceedings concerning a car accident that she caused, finding that spouses possess diplomatic immunity under CIL.<sup>235</sup> Unlike other high courts' decisions, the Delhi High Court reached this finding without looking to, or at least expressly citing to, any India Supreme Court cases on the matter. Instead, the court looked to British and American conceptions of domestic implementation of CIL,<sup>236</sup> and asserted that even the state court was obliged to adhere to the federal government's commitment to the international community through signing on to the Vienna Convention on Diplomatic Relations.<sup>237</sup> Another case set aside an international drug trafficking conviction because, among other reasons, while India was a signatory to the United Nations Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, that international obligation had no municipal force of law because there were no codified provisions specific to the crime at hand.<sup>238</sup> In another sovereign immunity matter, the Delhi High Court considered "whether the principles of [i]nternational [l]aw as transformed from time to time about sovereign immunity apply in India in face of the provisions contained in Section 86 of the Code of Civil Procedure, 1908."<sup>239</sup> In an open willingness to consider how other jurisdictions addressed the matter, the Court considered how the issue was addressed in courts in the United States, Britain, Italy,

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<sup>234</sup> Notably, each high court is named for the city in which it sits rather than the state over which it governs. Indian high court decisions are not readily available through published reporters or the courts' own websites. An independent site, Kanoon, provides decisions for seven high courts. Searches on Kanoon for cases mentioning "customary international law" in January 2014 produced 27 results: Andhra Pradesh (3), Bombay (3), Calcutta (2), Delhi (5), Kerala (3), Madras (10), and Rajasthan (1).

<sup>235</sup> *Eagle Star Insurance Co. Ltd. v. L.V. Kumar*, 8 (1972) D.L.T. 32, available at <http://indiankanoon.org/doc/984520/>.

<sup>236</sup> *Id.* at paras. 9, 10.

<sup>237</sup> *Id.* at para. 12.

<sup>238</sup> *Emma Charlotte Eve v. Narcotic Control Bureau*, 2000 VAD Delhi 65 at paras. 11, 14 available at <http://indiankanoon.org/doc/86772/>. ("In the absence of there being any specific provisions in the [General Provisions] Act for dealing with an operation relating to controlled delivery, the provisions of 1998 U.N. Conventions relating to the concept of controlled delivery cannot have the force of law.")

<sup>239</sup> *Deepak Wadhwa v. Aeroflot*, 24 (1983) D.L.T. 1, para. 1, available at <http://indiankanoon.org/doc/1693084/>.

Belgium and France in one paragraph alone.<sup>240</sup> The Court, however, held that India would resolve the matter by statute, and that “transformed principles of international law” do not inform the matter.

Three cases from the Kerala High Court also display a diverse set of approaches to CIL. In 1960, the Court defined CIL by what it did not reach, holding that the CIL right of innocent passage exists only along coasts, and does not extend to states’ territorial jurisdiction over ships anchored at their ports.<sup>241</sup> Despite not yet being fully defined, the Kerala High Court had “no hesitation in holding that ‘Sustainable Development’ as a balancing concept between ecology and development has been accepted as a part of the customary international law” (and, as such, part of municipal law) in 2004, citing the India Supreme Court’s *Vellore* decision.<sup>242</sup> And in 2007, the Court explained that a Petitioner’s “right to remove ordinary earth”<sup>243</sup> was fettered by the general Indian peoples’ constitutional right to a pollution-free environment, explaining that *Vellore* mandated that the “Sustainable Development” principle of CIL under municipal law.<sup>244</sup>

In 2000, the Madras High Court pronounced a canon of municipal law interpretation in *Tamil Nadu*: “[i]f . . . two constructions of the municipal law are permissible, the Courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations.”<sup>245</sup> This philosophy, in particular, would be radically transformative in the American context. Any proponent of an ounce of states’ rights would give pause here: the state government now bound to interpret its municipal laws in light of the federal government’s international obligations likely had no say whatsoever in deciding to obligate itself to whatever treaty may be at play.<sup>246</sup> Still, a mere canon allows courts the

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<sup>240</sup> *Id.* at para. 7.

<sup>241</sup> Bernardo Steenholf Ultrich v. Assistant Collector Of Customs, A.I.R. 1960 (Ker.) 335, available at <http://indiankanoon.org/doc/729409/>.

<sup>242</sup> Soman v. Geologist, 2004 (3) K.L.T. 577, available at <http://indiankanoon.org/doc/14406/>.

<sup>243</sup> That is, to remove dirt from land that he owned in order to sell it to others. Thilakan v. Circle Inspector of Police, Cherpu Police Station and Others, A.I.R. 2008 Ker. 48, 2007 (3) K.L.J. 509 at paras. 1, 2, available at <http://indiankanoon.org/doc/1000673/>.

<sup>244</sup> *Id.* at para. 17.

<sup>245</sup> Tamil Nadu Tamil & English Schools v. Tamil Nadu, 2000 (2) C.T.C. 344, available at <http://indiankanoon.org/doc/261579/>.

<sup>246</sup> The thought of such a precedent undoubtedly leaves *Medellin v. Texas* coming to international legal scholar’s minds, and with good reason.

room to interpret any municipal law as clear on its face and without need of interpretation.

Ten years later, the Madras High Court cited *Tamil Nadu's* landmark canon and also considered two U.S. Supreme Court precedents in deciding whether the Uniform System of School Education Act interfered with children and parents' rights to determine the best education available to them, and with teachers' freedom for inventiveness.<sup>247</sup> In the one case in which the Rajasthan High Court appeared to engage CIL, decided in 2013, the state court cited another state court's implementation of the United Nations Declaration of Human Rights, also looking to the India Supreme Court's implementation of CIL in *PUCL*.<sup>248</sup> A bounty of other cases incorporated India Supreme Court precedents already discussed in this comment, including *Vellore*<sup>249</sup> and *PUCL*.<sup>250</sup>

#### 4. *Conclusions on the Indian Experience*

The Indian experience is undeniably unique, both in its relatively unitary judicial structure and in its courts' independent take on matters of CIL. Still, the same four truths of CIL engagement and implementation are visible in the Indian experience as in the Australian experience.

First, harmoniously engaging and/or implementing CIL in a federal nation's state *and* federal courts is possible. Yet again, a federal nation's interaction with CIL does not appear to be an all-or-nothing stake. State courts looked both to the Indian Supreme Court's interpretation of CIL as well as to each other's interpretations.<sup>251</sup>

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<sup>247</sup> *Krishnagiri District Private Schools' Association v. Tamil Nadu*, at para. 36, available at <http://www.indiankanoon.org/doc/1287559/> (citing *Epperson v. State of Ark.*, 21 L. Ed. 2d 228 (1968), and *Scopes v. State*, 154 Tenn. 105 (1927)).

<sup>248</sup> *Mr. Mahesh Bora, Senior Advocate v. Unknown*, S.B. C.R. Misc. Bail Application No. 8609, available at <http://indiankanoon.org/doc/167591344/>.

<sup>249</sup> *Bombay Environmental Action v. Maharashtra*, 2005 (6) (Bom.) C.R. 574, available at <http://indiankanoon.org/doc/1724514/>.

<sup>250</sup> *See Ukraine v. Md. Shafique Khan*, 2005 (3) (Chn.) 203, available at <http://indiankanoon.org/doc/753970/>.

<sup>251</sup> *Mr. Mahesh Bora, Senior Advocate v. Unknown*, S.B. C.R. Misc. Bail Application No. 8609, available at <http://indiankanoon.org/doc/167591344/>, citing both the Indian Supreme Court's CIL interpretation as well as that of a fellow state high court; see also *Thilakan* at para. 17 (citing the Indian Supreme Court).

Second, the engagement and/or implementation of CIL in a federal context does not require the extreme reach of the modernist or revisionist position. A bounty of Indian high courts looked to the guidance of the India Supreme Court's CIL interpretations. Not every state court did in every case. Again, high courts sometimes looked to each other.<sup>252</sup> But without a "one law" employment, as monists would require, or domestic legislation, as revisionists would aspire to see, CIL was actively considered for its merits throughout a federal nation's state and federal courts alike.

Third, CIL enriches judicial decisions even when only engaged and not implemented. Similar to the Australian experience, Indian courts consider CIL from a variety of perspectives, even when only anecdotally and not for the purpose of binding a given jurisdiction to CIL principles.

Finally, CIL engagement requires a tailor-made approach for any federal nation. Indian courts routinely returned to what could build upon or enrich domestic law. The compromise of domestic common law was never considered. The Madras High Court's canon of interpretation proposal in *Tamil Nadu* well illustrates this point.<sup>253</sup> CIL may be considered as well-worth Indian consideration, but never to the detriment of domestic common law. India's engagement of CIL requires a keen deference to the nation's laws. The Madras canon will be further explored in Part III.

#### *D. Comparative Analysis Conclusions*

Indian and Australian experiences demonstrate the same four truths concerning federal nations engaging CIL. In reflecting upon what is common to India and Australia, perhaps some of their commonalities can be surmised as generally true for federal nations.

##### *1. Harmoniously Engaging and/or Implementing CIL in a Federal Nation's State and Federal Courts is Possible*

Australia and India demonstrate that harmony is possible not only within a federal nation's state and federal courts, but among nations. One Indian high

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<sup>252</sup> Mr. Mahesh Bora, Senior Advocate v. Unknown, S.B. C.R. Misc. Bail Application No. 8609, available at <http://indiankanoon.org/doc/167591344/>. Citing both the Indian Supreme Court's CIL interpretation as well as that of a fellow state high court.

<sup>253</sup> Tamil Nadu Tamil & English Schools v. Tamil Nadu, (2000) (2) C.T.C. 344, available at <http://indiankanoon.org/doc/261579/>.

court cited multiple U.S. Supreme Court precedents in engaging CIL,<sup>254</sup> and one Australian court cited a variety of other nations' interpretations of CIL.<sup>255</sup> These findings fall in line with Judith Resnik's assertions on foreign law importation:

States and localities—through city councils, state legislatures, national organizations of local officials, and courts—serve as both importers and exporters of law. The conceit that United States law is basically bounded is inaccurate. Rather, laws (like people) migrate, and seepage is everywhere. The courts are only one stop along the way.<sup>256</sup>

Interpretations of CIL find their way between even seemingly disparate jurisdictions, and seem to play a positive role of sharpening each other's views, much as Robert Schapiro suggests their potential to do so.<sup>257</sup> As Resnik further notes, "once these multiple ports of entry come into view, so do questions about the legality and desirability of various modes of action by a range of actors (judges, legislatures, and the executive, both national and local)."<sup>258</sup> A more elaborate analysis of this point, relative to CIL, may need to account for potential actors outside court systems.

## 2. *The Engagement and/or Implementation of CIL in a Federal Context Does Not Require the Extreme Reach of the Modernist or Revisionist Position*

Both nations' courts navigated the engagement and interpretation of CIL without resorting to mandating that the entire nation interpret CIL in a uniform manner, or mandating that any bit of potential CIL be fleshed out in legislation before being considered by a state court.

<sup>254</sup> Krishnagiri Dist. Private Schools' Ass'n v. Tamil Nadu, at para. 36 (India), available at <http://www.indiankanoon.org/doc/1287559/>; citing Epperson v. State of Ark., 21 L. Ed. 2d 228 (1968), and Scopes v. State, 154 Tenn. 105 (1927).

<sup>255</sup> *Fa v Morris* [1987] NTSC 20; 46 NTR 1; 87 FLR 36; 27 A Crim R 342 (8 May 1987) (Austl.) citing K.W. RYAN, INTERNATIONAL LAW IN AUSTRALIA 377 (1984) ("While no provision has been made in international treaty for a 200 mile fisheries zone this zone may be regarded as having been established under customary international law in the light of claims of a vast number of maritime nations including the United States, Russia, Japan, the United Kingdom, European Economic Community and the countries of the third world.").

<sup>256</sup> Resnik, *supra* note 21, at 1576.

<sup>257</sup> See SCHAPIRO, *supra* note 5, at 168 ("As with other kinds of laws, the participation of multiple interpreters could illuminate the range of possible meanings. The various courts could benefit from reviewing the understandings of other tribunals.").

<sup>258</sup> Resnik, *supra* note 21, at 1579.

### 3. *CIL Enriches Judicial Decisions even when only Engaged and Not Implemented*

The Kerala High Court and the Supreme Court of the Northern Territory each considered CIL in three manners within their respective precedents.<sup>259</sup> The Australia High Court, too, offered three perspectives on how CIL could be engaged within the nation's jurisprudence in *Dietrich*. Even such ruminating on matters of CIL undoubtedly enriches the breadth and depth of judicial consideration. Again, the potential of polyphonic federalism that Schapiro projects for the United States seems already apparent in India and Australia.<sup>260</sup>

### 4. *CIL Engagement Requires a Tailor-Made Approach for any Federal Nation*

Australian and Indian engagement of CIL requires a keen deference to the nations' domestic common laws. The policy behind such deference for federal nations may be best illustrated in the promissory estoppel theory espoused by the Australian High Court in *Western Australia v Ward*.<sup>261</sup> When deciding within a given jurisdiction, officers of a court are engaging parties, governments and individuals alike, who likely "reasonably relied on the law as it stands."<sup>262</sup> Further, to change the law otherwise would both disregard judicial precedent and compromise constitutionally designated legislative power.<sup>263</sup>

That same decision made an obvious (though seemingly rarely articulated) observation of international law on the whole that is particularly true of CIL and may also well explain the need for general deference to domestic common law: "international law [is] itself often vague and conflicting."<sup>264</sup> The one method never seen in a single Australian or Indian case on point is domestic law of any kind displayed by CIL. Such a prospect is simply outside the realm of possibility for federal nations now or in the near future.

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<sup>259</sup> *Dietrich v R* [1992] 177 CLR 292 Mason CJ, McHugh J and Dawson J 306 (three justices narrowly interpreted that CIL was appropriate only for speaking into Australian common law ambiguities); Toohey J 360–61 (writing that CIL could inform both ambiguities and clear gaps in the common law); Brennan J 318–21 (writing that CIL could inform modifications or expansions to Australian common law subject to limits from policy and a constitutional separation of powers) (Austl.).

<sup>260</sup> SCHAPIRO, *supra* note 5, at 168.

<sup>261</sup> *Western Australia v Ward* [2002] 191 ALR 1 (Austl.).

<sup>262</sup> *Id.* at para 958 (Austl.).

<sup>263</sup> *See id.* at para 958 (Austl.).

<sup>264</sup> *Id.* at para 958 (Austl.).

For federal nations such as Australia and India to give such deep thought to CIL, to consider the body of law from so many perspectives—many informing and sharpening each other—may show far greater reverence for the body of international law than an entire nation uniformly interpreting CIL in a single manner in every court. As illustrated by the Indian and Australian experiences, CIL can be successfully and dynamically engaged throughout the courts of a federal nation. Now, the American implications must be considered.

### III. IMPORTING LESSONS LEARNED

Overall, the comparative section found that harmoniously engaging and implementing CIL in a federal nation's state *and* federal courts is possible, and does not require the extreme reach of the modernist or revisionist positions. In turn, this section answers the Comment's second question: what can be gleaned for American edification from the Australian and Indian experiences with CIL? This section finds that two particular modes of CIL implementation utilized in Australia and India, with a bit of tweaking, may have potential in American courts. Finally, this section considers the implications for CIL patterns in Australian and Indian courts upon cries of American isolationism relative to CIL, and finds both that any isolationism seems reasonably characteristic of federal nations generally, not just the United States; and that such isolationism should be less strongly associated with elitism or exceptionalism and more with functional federal structure and psyche.

#### *A. Two Modes of CIL Implementation Utilized in Australia and India May Have Potential in American Courts*

There exists no apparent evidence of major conflict amidst various federal and state court interpretations of CIL in Australia and India. None of the observed state court decisions appear to be overturned by higher courts. In light of these findings, and contrary to the polarized extremes of leading American theories, perhaps American state and federal courts promulgating a variety of CIL interpretations and engagements would do no harm. Indeed, Dean Robert Schapiro theorizes that such a variety of interpretations, a “polyphonic federalism,” would behoove all parties involved.<sup>265</sup> Two modes of

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<sup>265</sup> SCHAPIRO, *supra* note 5, at 170 (“This understanding of customary international law as nonpreemptive federal law fits well within a polyphonic framework. State courts and federal courts could develop diverse perspectives and contribute to an ongoing debate about the content and application of customary international law. This approach would allow customary international law to develop in nonuniform ways in state and federal courts. The state and federal courts could engage in a collaborative process of illumination.”).

receiving CIL would give American state and federal courts greater latitude to embrace and interpret CIL. First, American courts could consider implementing the Madras High Court's proposed canon of interpreting ambiguous municipal law in compliance with CIL. Second, American courts could consider following Australian and Indian courts' lead in interpreting treaty commitments as CIL.

Again, where some argue that the matter simply is not pressing in American jurisprudence, this Comment calls for a reassessment of cause and effect. Are American state and federal courts not embracing CIL more because the matter is patently irrelevant, or because the surrounding academic discourse is seemingly impossible to rectify or implement? This Comment asserts that the latter may be at least partly culpable for the lack of CIL engagement, coupled with a limited scope of necessary judicial exceptionalism.<sup>266</sup>

*1. American Courts Could Consider Implementing the Madras High Court's Proposed Canon of Interpreting Ambiguous Municipal Law in Compliance with CIL*

Among the most timely candidates for consideration in the American context is the Madras High Court's proposed canon of interpretation, that courts construe municipal law "in harmony with international law or treaty obligations"<sup>267</sup> when multiple constructions are possible.<sup>268</sup> This prospect also resembles two of the Australian High Court's propositions in *Dietrich*: three justices interpreted that CIL could appropriately speak into common law ambiguities,<sup>269</sup> and a fourth asserted that CIL should be permitted to speak into common law ambiguities and clear gaps alike.<sup>270</sup> When municipal law rather than common law is unclear, the need for resolution is equally strong.

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<sup>266</sup> See *infra* Part III.B.

<sup>267</sup> *Tamil Nadu Tamil & English Schools v. Tamil Nadu*, 2000 (2) C.T.C. 344, available at <http://indiankanoon.org/doc/261579/>.

<sup>268</sup> While American use of the term "municipal law" means local law, and can be used to generally reference domestic law in Europe, Indian use of the term is not as uniform. BEDERMAN, *supra* note 27, at 140 (on American and European uses). The Madras High Court's intended meaning of the term in *Tamil Nadu* is not explicit, though most likely references domestic law generally. See *Tamil Nadu Tamil & English Schools v. Tamil Nadu*, 2000 (2) C.T.C. 344. For purposes of American importation, the canon proposal here will employ the traditional American definition of "municipal law."

<sup>269</sup> *Dietrich v R* [1992] 177 CLR 292, 306 Mason CJ, McHugh J and Dawson J.

<sup>270</sup> *Id.*, Brennan J 318–21.

Here, narrowing the discussion to CIL has particular potential in expanding the role of CIL from only applying when expressly intended to any situation in which it may be applicable and where the law at hand is open to interpretation. Again, a mere canon of interpretation would not be as extreme as the monist and modernist position of binding the entire nation to a single interpretation. That said, a canon would not begin to resolve implementation of all CIL. Rather, a canon would allow courts to lean toward CIL compliance when municipal law interpretation was debatable.

In the American context, the equivalent would be a canon of interpretation for ambiguous municipal, state and federal to be interpreted in concert with CIL to which the nation has not consistently and vocally protested.<sup>271</sup> This canon would be a sort of cousin to the Charming Betsy canon, but specific to the context of CIL. By definition, adherence to *jus cogens* must be included. The Charming Betsy canon, promulgated by Chief Justice Marshall in *Murray v. Schooner Charming Betsy*, proposed to interpret congressional statutes as consistent with international law.<sup>272</sup> While the Charming Betsy canon itself is no stranger to calls for inapplicability to CIL, largely on grounds of circumventing Congress' legislative role,<sup>273</sup> the caveat repeatedly articulated in Indian and Australian precedent may resolve the separation of powers matter: no CIL in direct conflict with standing domestic law should be domestically incorporated.<sup>274</sup>

While some may be concerned that this canon would lead to a parade of horrors for ATS litigation, this canon would not permit that prospect. The violation of any ambiguous law, if construed to mesh with CIL, would still be a violation of that law itself and not directly of CIL. That is, unless the law was expressly codifying CIL—which hardly seems plausible for the American context.

Consider how such a canon, if part of common law throughout the United States, might revolutionize a case like *Medellin v. Texas*.<sup>275</sup> Therein, nearly a decade of litigation in state, federal and world courts alike—including two

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<sup>271</sup> A more elaborate analysis would further consider the separation of powers matters therein. For now, this Comment will leave the matter at asserting that any court would always have the option of simply interpreting a given law as non-ambiguous, avoiding the canon altogether.

<sup>272</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804); see Bradley, *supra* note 1, at 685.

<sup>273</sup> *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, *supra* note 9, at 1227.

<sup>274</sup> See *supra* Parts II.B.–II.C.

<sup>275</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

trips the United States Supreme Court, displaying an unprecedented time-and-a-half for oral argument before the justices at the behest of Chief Justice Roberts;<sup>276</sup> and two trips to the International Court of Justice<sup>277</sup>—never resolved a matter of municipal officers' responsibility to inform detained foreign nationals of their consular rights. In signing the Vienna Convention on Consular Relations, the American federal government committed to the international community that foreign nationals' consular rights would be upheld during detention. Congress never passed executing legislation, and American courts had no canon of interpretation such as the Madras High Court proposed. While federalism allowed that states and municipalities were under little legal obligation to the federal government to respect consular rights, and no obligation whatsoever directly to the world beyond the federal government, the federal government was unable to keep its word to the international community. Would the Roberts Court dispense with the matter by asserting that the Vienna Convention on Consular Relations was relatively inconsequential to Texas authorities as non-binding domestic legislation if such a canon was in practice? Perhaps not.

## 2. *American Courts Could Consider Following Australian and Indian Courts' Lead in Interpreting Treaty Commitments as CIL*

The second potential import is a broad construction of treaty commitments as CIL. While seemingly rash and sweeping, this strategy would only mildly expand the Obama administration's own statement on the State Department website that parts of the Vienna Convention on the Law of Treaties are CIL.<sup>278</sup> If some parts of the Vienna Convention on the Law of Treaties are CIL, why not other treaties to which the U.S. and a majority of states of the world or a given region are party?

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<sup>276</sup> LAWRENCE WRIGHTSMAN, ORAL ARGUMENTS BEFORE THE SUPREME COURT: AN EMPIRICAL APPROACH ix-x (2008) ("The comments and questions from the justices were so frequent and heated that Justice John Paul Stevens, ever gracious on the bench, told the Solicitor General of Texas that he would like to hear the six points in the advocate's argument 'without interruption by my colleagues.' Chief Justice Roberts did something that was unprecedented: he gave each side fifteen minutes extra time to argue their case; scheduled for an hour, the oral argument lasted an hour and a half. By the end, the justices had directed 122 questions or comments to the petitioner's attorney and 93 to the respondent's.").

<sup>277</sup> See generally Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2008 I.C.J. (Jul. 16).

<sup>278</sup> Notably, mirroring the earlier mentioned shift from CIL as purely concerning state relations to concerning individuals' rights. See *supra* Part I.D.

Both *Dow Jones* and *PUCL* drew upon Indian and Australian commitment as signatories to the International Convention on Civil and Political Rights,<sup>279</sup> considering treaty law as potential CIL.<sup>280</sup> Particularly for federal governments, where matters like signing treaties and interpreting laws are not performed by a single unitary system, such fuller discussions of CIL and treaty law in tandem are always wise. U.S. courts would do well take the Indian and Australian discourse a step further, embracing discussions of international treaty obligations as CIL when the treaties in question are non-self-executing and when no implementing legislation exists.

The subjection of another Mexican national to capital punishment in Texas in January 2014, after being denied his consular rights, solemnly demonstrated that the *Medellin* issue remains in grave need of resolution.<sup>281</sup> One day prior to Edgar Tamayo's execution, the Fifth Circuit and the United States Supreme Court denied Tamayo's appeal for cert.<sup>282</sup> The Fifth Circuit noted,

We respect the concerns expressed by the executive branch, such as Secretary of State Kerry who wrote a letter on Tamayo's behalf, but "we have no authority to stay an execution in light of an 'appeal of the President'" presenting free-ranging assertions of foreign policy consequences, when those assertions come unaccompanied by a persuasive legal claim.<sup>283</sup>

Something as simple as construing treaty commitments as CIL could one day be a "persuasive legal claim." The Fifth Circuit pointed to a 2011 United States Supreme Court decision, *Leal Garcia v. Texas*, "noting the failure of Congress to enact implementing legislation and stating that '[i]f a statute implementing *Avena* had genuinely been a priority for the political branches, it would have been enacted by now.'"<sup>284</sup> Where the lack of legislative implementation may (or may not) be more an issue of political stalemate than apathy, this canon of treaty interpretation offers another way out. So long as non-self-executing

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<sup>279</sup> *People's Union of Civil Liberties (PUCL) v. Union of India and Another*, A.I.R. 1997 S.C. 568, paras. 21–24; WADEHRA, *supra* note 229, at 362.

<sup>280</sup> *Dow Jones v Gutnick* [2002] 194 ALR 433, 116 (Austl.); Charlesworth et al., *supra* note 155, at 457.

<sup>281</sup> Manny Fernandez, *Texas Executes Mexican for Murder*, N.Y. TIMES, Jan. 23, 2014, at A17, <http://www.nytimes.com/2014/01/23/us/texas-executes-mexican-for-murder.html>.

<sup>282</sup> *Tamayo v. Stephens*, 134 S.Ct. 1021 (2014) ("The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is denied. The petition for a writ of certiorari is denied. Justice Ginsburg, Justice Breyer, and Justice Sotomayor would grant the application for stay of execution."); *Tamayo v. Perry*, 740 F.3d 991 (5th Cir. 2014).

<sup>283</sup> *Tamayo* 740 F.3d at 997 (quoting *Leal Garcia v. Texas*, 131 S. Ct. 2866, 2868 (2011) (per curiam) (internal citations omitted)).

<sup>284</sup> *Id.* at 997.

treaty obligations could be read as CIL, this canon could circumvent the matter of non-binding domestic legislation and bind municipalities to upholding foreign nationals' consular rights whenever the municipal law on point permitted multiple constructions.

To be sure, such a canon would be far from a glorious fix-all. Particularly, this canon would only characterize as CIL those treaties that a majority of states signed, by the basic definition of CIL. If such a canon could bring the United States a single step closer to resolving its lamentable consular rights (and broader international relations) debacle, the nation's international relations and international diplomatic capital would increase.<sup>285</sup> The United States could comply with one more facet of CIL, levying stronger arguments of legitimate exceptionalism on functional and procedural grounds, rather than exceptionalism for its own sake, regarding the points of CIL that the nation intentionally left unimplemented.

Considering the sweeping nature of this proposition, seemingly circumventing the legislature from a role relative to treaties, a thought from Australian precedent reemerges. *West Australia v Ward* discussions on potential legislation, while not directly asserting resolution, propose an even richer body of consideration and engagement of the other federal branches, potentially avoiding the *Medellin* issue recounted above.<sup>286</sup> Richness aside, the necessary involvement of the legislative branch in the promulgation of new laws is a basic reality of any federal structure. A central policy consideration raised by the Australia High Court in *Western Australia* that rings equally true in the American context is the prospective rise of promissory estoppel theory concerning implementing customary international law into domestic common-law without any pertinent legislation. Again, the basic definitional understanding of CIL provides a stopgap from a parade of horrors. *Jus cogens* aside, nations are not bound to CIL if they vocally and persistently did not intend to be legally bound. Any legislation expressing intent not to be bound by a certain treaty would preempt the application of either canon proposed here.

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<sup>285</sup> See Fernandez, *supra* note 281 ("The case became an international issue that Mexican officials and Secretary of State John Kerry said threatened to strain relations between the two countries. Mr. Tamayo's arrest in Houston in 1994 on charges of murdering a police officer violated the international treaty known as the Vienna Convention on Consular Relations. The authorities neglected to tell him of his right under the Vienna Convention to notify Mexican diplomats.").

<sup>286</sup> *Western Australia v Ward* [2002] 191 ALR 1, para 958 (Austl.). That is, both other branches would be involved through legislative promulgation of laws and the executive branch's approval.

*B. Seeming Exceptionalism in Resistance to CIL is At Least Partially Valid for Most Federal Nations, and Need Not Be So Closely Associated with “Navel-Gazing”*<sup>287</sup>

While the two proposed canons would expand the role of CIL in American courts, and are offered in good faith that such expansion is in the United States’ best interests, proponents of domestic CIL expansion must understand that some limits of and pushback from CIL are inevitable.<sup>288</sup> This resistance is inevitable not because of elitism, as is frequently implied,<sup>289</sup> but because of federalism itself. And not only because of federalism’s separation of powers, as Bradley and Goldsmith assert, but because of federalism’s psyche.

CIL engagement requires a tailor-made approach for any federal nation. Former colonies, in particular, are each in different developmental phases establishing identity and independence; those developmental phases often include seasons of stringent reliance upon domestic precedent, followed by a reemergence of willingness to look outside.<sup>290</sup> While India appears to have quickly reached that willingness to look outside, despite a broad domestic precedent,<sup>291</sup> and Australia is at least somewhat open to considering international law,<sup>292</sup> the United States is arguably not yet there. Justice Scalia, for instance, argues that America’s founding fathers wanted nothing to do with international law and that he is of like mind.<sup>293</sup> On the other hand, when provoked over the merits of considering foreign law as persuasive authority for

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<sup>287</sup> Marcus, *supra* note 7, at 710 (“[American procedural] exceptionalism also reinforces the tendency to view such navel-gazing as appropriate because procedure is peculiarly parochial.”).

<sup>288</sup> The same is said of American civil procedure. See Oscar G. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 278 (2002) (“[T]he well-documented idiosyncrasies of American culture are reflected in the procedural rules that govern civil litigation.”).

<sup>289</sup> Cf. Langbein, *supra* note 7, at 554 (“American jurists are disinclined to interest themselves in foreign example for the same reason that scientists at American medical schools are disinclined to investigate the merits of medicine as it is practiced among the witch doctors of the Amazonian rain forest. They operate on the assumption that the foreigners have nothing to teach. . . . [T]he disdain for Continental law rests upon a witch’s brew of ignorance, prejudice, and venality.”).

<sup>290</sup> See Smith, *supra* note 10, at 230 (“[I]n a post-colonial state, a period during which the courts manifest a desire to reduce reliance on the colonial power’s laws will sometimes be followed by a recognition of the value of the colonial system’s precedents. This process—which occurred in India—may indicate the end of the post-colonial, independence phase of nation building, and the beginnings of a more nuanced relationship between former colonialists and colonizers.”).

<sup>291</sup> *Id.* at 239.

<sup>292</sup> See *supra* Part II.B.

<sup>293</sup> See Justice Antonin Scalia, Discussion Between U.S. Supreme Court Justices, *supra* note 25.

American decisions, Justice Breyer explains, “I can read what I want.”<sup>294</sup> If the arch Adam Smith asserts regarding former colonies’ eventual openness to outside precedent will prove true for the United States, perhaps the turn is simply a few generations off. At any rate, the turn cannot be forced. The mindset at play appears to have little to do with externally defined identity, relative to the outside world, (as implied by cries of elitism and exceptionalism); but far more to do with an internally-defined identity simply does not consider the outside world.<sup>295</sup>

While writing specifically on America’s lacking embrace of foreign law, Smith noted that the isolation of general American exceptionalist jurisprudence “is arguably a reasonable reaction to the forces impacting the American judicial system,” “given the unique structure and placement of the American Supreme Court—and indeed the entirety of the U.S. judicial system.”<sup>296</sup> While some nations whose judicial powers are not so broadly disbursed may need to rely on CIL simply to supplement holes in their own precedent, “the United States is large and heterogeneous enough to keep producing novel, complex legal problems on which domestic courts will be able to draw.”<sup>297</sup> The breadth of American, Australian, and Indian precedent—arguably the result of broad court structures facilitated by federal systems—leaves the nations’ courts less likely to look to CIL as a gap-filler,<sup>298</sup> which could naturally skew perceptions of their reticence to look to CIL when that brand of law is more directly at issue.<sup>299</sup>

Deference to domestic laws in the United States is a prequalification for any new engagement of CIL, as demonstrated in Australia and India alike. Australia and India considered this reality in a variety of scenarios, but perhaps most notably in their parallel claw back provisions when asserting theories of CIL engagement. In *Chow Hung v Ching*, the Australia High Court willingly

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<sup>294</sup> Ashby Jones, ‘I Can Read What I Want,’ Says Breyer on International-Law [sic] Debate, WALL ST. J. ONLINE (Apr. 2, 2010, 12:33 PM), <http://blogs.wsj.com/law/2010/04/02/i-can-read-what-i-want-says-breyer-on-international-law-debate/>.

<sup>295</sup> See VAN DER VYVER, *supra* note 1, at 11 (“I am well aware of the fact that, as far as perceptions entertained by the outside world community are concerned, most Americans don’t care two hoots.”).

<sup>296</sup> See *supra* Introduction; Smith, *supra* note 10, at 222.

<sup>297</sup> Smith, *supra* note 10, at 230.

<sup>298</sup> This CIL analysis runs parallel to Smith’s assertion that nations with new or weak judiciaries are more likely to lean on foreign law more frequently. Smith, *supra* note 10, at 264.

<sup>299</sup> For what it is worth, Smith asserted that relative to foreign law, India’s isolationism would be “difficult to maintain,” and that even the United States’ will come in time to consider foreign law just as American states now supplement their own common law with each others’. Smith, *supra* note 10, at 267, 269.

acknowledged the existence of CIL as “a body of rules which nations accept among themselves,” and expressed an openness to incorporating CIL into domestic law to whatever degree it was consistent with the standing laws of the land.<sup>300</sup> Likewise, in *Vellore*, the India Supreme Court surmised that domestic law was “almost accepted” as automatically incorporated into domestic law to whatever degree it harmonized with standing municipal law.<sup>301</sup> To this end, federal nations are likely to hold in solidarity no matter the chagrin of European sentiment.<sup>302</sup>

The United States’ particular brand of federalism has a history of creating roadblocks to American participation in international law and international legal circles. The unique position of federal nations in relation to international law, and the pressing need for resolution on such matters, is illustrated in former International Court of Justice Judge Thomas Buergenthal’s dissent to the 2008 reinterpretation of *Mexico v. The United States*.<sup>303</sup> Buergenthal contended that the World Court mistakenly took the actions of one state, Texas, to speak authoritatively for the nation as a whole: “a state of the United States . . . does not and cannot speak for the United States on the international plane.”<sup>304</sup> The misunderstanding between the United States and the international legal community on the American federal identity carried grievous consequences. Buergenthal explained further,

[t]he finding by the [U.S.] Supreme Court that the *Avena* Judgment is not directly applicable law without implementing legislation and that the [U.S.] President lacks the authority without Congressional action to order the States to comply with the *Avena* judgment concerns principles of United States constitutional law relating to the allocation of power between the three branches of the United States. They have no bearing as such on the compliance or non-compliance by the United States with its international obligations.<sup>305</sup>

While *Medellin* and *Avena* revolved around a treaty and were not particularly concerned with matters of CIL, the conflict facing a federal state engaging outside law remains the same. Federalism boasts a myriad of internal benefits

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<sup>300</sup> Charlesworth et al., *supra* note 155, at 452, citing *Chow Hung Ching v The King* [1948] 77 CLR 449 at 470–71.

<sup>301</sup> *Vellore Citizens’ Welfare Forum v. Union of India*, 5 SCC 647 (1996), A.I.R. 1996 SC 2715.

<sup>302</sup> Smith, *supra* note 10, at 266 (noting “[g]rowing European legal amalgamation”).

<sup>303</sup> Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning *Avena* and Other Mexican Nationals (*Mex. v. U.S.*), 2008 I.C.J. (Jul. 16) (diss. op. Buergenthal, J).

<sup>304</sup> *Id.* at 340.

<sup>305</sup> *Id.* at 339 (emphasis added).

in decentralized lawmaking. But when it comes to engaging the world external to the federal nation, conflicts of law abound. Some resolution must be attempted in the days ahead.

*C. Conclusion: The Lessons Learned from India and Australia Are Primely Applicable to the American Experience*

Undoubtedly, not every case in state or federal court could or should be informed by CIL. Australian and Indian courts certainly do not look to CIL for persuasion in every case before their courts. But CIL is clearly a fruitful aid in working through the legal matters of more than a single issue—and a scope extending beyond the mere post-sentence criminal matters to which the vast majority of American state courts currently confine their glances toward CIL. Where Australia's endeavors to lean on CIL are moderate, India goes further; particularly in its high courts. Indian state courts do not seem to have trouble incorporating CIL as domestic law. Again, their relatively unitary judiciary makes for a more seamless process in this endeavor.

IV. IMPLICATIONS FOR AMERICAN STATE AND FEDERAL JURISPRUDENCE, AND FOR FURTHER RESEARCH

This Comment's findings do not purport to provide complete resolution to the status of CIL in American courts. Based on the rich reflections afforded from the limited foreign cases assessed here, however, there is likely much to be gained from further comparative study. In first asking whether there existed a yet-attempted approach to address the unresolved state of CIL in American courts, this Comment identified an absence of comparative analysis and engaged in comparative study. The comparative analysis of Indian and Australian state and federal court CIL precedent revealed that CIL could, indeed, be harmoniously engaged and/or implemented in a federal nation's state *and* federal courts; that CIL engagement and/or implementation did not require the extreme reach of American modernist or revisionist theories; CIL enriched judicial decisions even when only engaged and not implemented; and that CIL engagement always requires an approach tailored to a given nation. Particularly, this Comment found that just as some academics assert that state courts are fruitful forums for engaging foreign law, state courts are equally fruitful forums for engaging CIL. In subsequently asking how those findings may inform the American experience with CIL, this Comment surmised that two of India and Australia's practices—interpreting ambiguous municipal law in comity with CIL, and considering treaties to which the U.S. and a majority

of world or region states are members to have CIL status—may be worth implementing in state and American courts. Finally, through considering the post-colonial federalism experiences of Australia, India, and the United States alike, their isolationist jurisprudences could be seen as functions of federal structure and federal psyche rather than indulgent exceptionalism.

As *Kiobel*'s progeny trickle through American courts, likely renewing interest in CIL more generally, American courts may be well served by greater comparative study of how similarly structured nations are approaching the engagement and implementation of CIL. Unlike engaging foreign law, in which American courts will nearly always have a choice, the matter of CIL is unavoidable.<sup>306</sup>

American state courts require a distinctly federalist answer for a distinctively federalist problem in the United States. Perhaps one reason for resistance to CIL in the United States is because of federalism, concerning separation of powers; perhaps that concern does not exist in comparison countries, which view international law as a distinctively national, not local, issue. Australia and India do not face the same concerns through their relatively centralized judicial structures.<sup>307</sup> Still, the nations provide hope for an American way forward. The lessons of Australia and India can and should be tailored toward an American theory for engaging and implementing CIL. Such a theory is possible and meritorious; it does not have to be as polarized as the modernist or revisionist stance; and it has to be uniquely tailored to the nation's structure and tradition. Canons interpreting ambiguous laws in comity with CIL and treaty commitments as evidence of CIL may pave the way for broader American precedent, positioning American courts to more comfortably cite each other rather than looking to foreign precedent, which still seems generally avoided in the United States. A more nuanced, less villainized sense of American exceptionalist jurisprudence may help the nation's courts unapologetically and accessibly handle one facet of CIL at a time. The view outside American borders provides a much-needed fresh perspective on the

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<sup>306</sup> See *supra* Introduction.

<sup>307</sup> Bruce Ackerman characterized India as a “perfectly healthy federalism[] operating without a powerful federalist chamber at the center,” and Australia as “a fascinating hybrid of British and American elements.” Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 670, 672 (2000).

domestic status of CIL to focus discourse and encourage a solution for the United States.

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