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Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith

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PROFESSORS Bradley and Goldsmith have their finger on a sore spot in U.S. human rights law, the charge of judicial activism levied against judicial enforcement of customary international law. The spot is sore because it has been chafed before, by Judge Robert Bork and Professors Phillip Trimble and A.M. Weisburd, among others. Bradley and Goldsmith have more in mind than those criticisms, but much of what they add is seriously in error and is embedded in a bizarre conspiracy theory. This Response will regrettably have to engage with this aspect of their argument before it can address the eternal debate over judicial activism.

Bradley and Goldsmith’s argument is contained in two articles, the previously published Customary International Law: A Critique of the Modern Position (hereinafter B&GI) and their summary and supplementation of it for this symposium, The Current Illegitimacy of Human Rights Litigation (hereinafter B&GII). B&GI takes the form of an attack on what it calls “the modern position” on customary international law in the United States, the established doctrine that customary international law norms are incorporated into the U.S.
legal system as a form of federal law.\textsuperscript{6} \textit{B&GI} offers in place of this established doctrine the claim that, in the absence of federal statute or treaty, customary international law is at most \textit{State} common law.\textsuperscript{7} Although \textit{B&GI} attacks the modern position wholesale, its main quarrel is with human rights enforcement. Several of its arguments rely specifically on the features of human rights law, or what it calls "the new CIL" ("CIL" being their abbreviation for customary international law). As a result, the analysis neglects the effect of denying federal character to the "old" customary international law, which addresses the rights of states against each other and, to some degree, the treatment of foreign nationals. And because the major focus of the analysis is judicial constraint of State legislatures, the analysis overlooks the need to provide rules of decision for lower-level executive officials and judges.

This short Response is inevitably selective. Parts I and II will discuss \textit{B&GI} and two major errors in its argument. Part III will address whether, as \textit{B&GI} maintains, the freedom of State legislatures to violate international human rights norms is required by U.S. traditions of democracy. Finally, part IV will reconsider three issues clarified or modified by \textit{B&GII}.

I. The "Cautionary Lesson"

\textit{B&GI} presents a two-pronged assault on the incorporation of customary international law as federal law. First, the article seeks to delegitimate the "modern position" (a nonstandard shorthand that I will also employ for brevity) by attacking the process by which it gained consensus support, finally resulting in its inclusion by the American Law Institute in Section 111 of the Restatement (Third) of the Foreign Relations Law of the United States. Second, the article focuses on some of the real and supposed consequences of the modern

\begin{itemize}
  \item \textsuperscript{6} The Restatement (Third) describes customary international law, as incorporated in the U.S. legal system, as "federal law." Restatement (Third), supra note 5, § 111 cmt. d. This usage is consistent with both the thesis that customary international law is incorporated as federal common law and with alternative theses about the status of customary international law within federal law.
  
  Although there is no settled definition of the term "federal common law," it will be sufficient here to define it as federal law made by judges "that cannot fairly be described as simply the application of federal statutory or constitutional enactments." Richard H. Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 744 (4th ed. 1996).
  
  \item \textsuperscript{7} \textit{B&GI}, supra note 1, at 819-20, 870. Moreover, if I read \textit{B&GI} correctly, under its proposal, the incorporation of a customary international law rule as federal law within a given statutory context, e.g. the Alien Tort Statute, 28 U.S.C. § 1350 (1994), would not authorize its application as federal law in any other context.
  
  In this Response, I have tried to capitalize the word "State" when used to refer to one of the fifty States and to leave it uncapitalized when referring to a state in the sense of international law. I have not tampered with capitalization in quotations.
\end{itemize}
position, asserting their undesirability. In this part, I will address the first prong.

A. The Road to the Modern Position

To understand the critique, it is necessary to recall why the "modern position" is modern. As B&GI partly explains, the United States has passed through a series of stages in the conceptualization of international law and its relation to domestic law. In the intellectual world of the late eighteenth century, the law of nations was understood as a branch of natural law, deducible by reason and not merely from convention, and obligatory on all nations.8 Two of the English jurists most influential in the United States, Blackstone and Lord Mansfield, had affirmed the principle that the law of nations was incorporated into the common law of England.9 In the early Republic, the interaction of the newly-minted federalism with the common law heritage was controverted and the implications of various solutions had not been fully thought through.10 Nor had the relationship among natural law, statute law, and written constitutions been settled. In fact, B&GI does not propose an originalist argument that we should return to the intellectual approach of the Framers and adopt their understanding of international law and its relationship to domestic law.11

As the nineteenth century progressed, two important changes occurred. First, positivist jurisprudence superseded naturalist jurisprudence as the prevailing approach to international law.12 Second, a regime for dividing the common law powers between State and federal courts was established. This regime limited the federal courts' power to decree federal common law, but permitted them to participate in the elaboration of the "general common law" that they shared with the States in cases governed neither by statute nor by distinctively "local" law. Under this regime, associated today with the 1842

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10. For historical accuracy, it is important to distinguish—as Bradley and Goldsmith do not always do—between the first decades under the Constitution and the later nineteenth century. In the first decades, the common law jurisdiction of the federal courts was highly uncertain and a matter of partisan dispute. See Edwin DeWitt Dickinson, The Law of Nations as Part of the National Law of the United States, II, 101 U. Pa. L. Rev. 792, 792-95 (1953); Stewart Jay, Origins of Federal Common Law: Part One, 133 U. Pa. L. Rev. 1003, 1010-11 (1985). The narrower Jeffersonian view prevailed later, but it should not be anachronistically projected backward. Id. at 1017-18.
11. I mention this not as a criticism, but as a clarification.
12. See Dickinson, supra note 8, at 253, 259-60; Sprout, supra note 8, at 280-81. It would therefore be a mistake to associate the pre-Érie regime with a naturalist approach to international law.
decision in *Swift v. Tyson*, customary international law came to be treated as part of the “general common law,” assertable in both State and federal courts, but not specifically federal in character. The oft-quoted case of *The Paquete Habana* illustrates the federal application of international law in that period. *The Paquete Habana* invoked a rule of customary international law to declare unlawful two U.S. naval ships’ seizure of fishing vessels in Cuban waters during the Spanish-American War. “International law,” wrote Justice Gray, “is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination.”

B&GI focuses on the transition from the regime of *Swift v. Tyson* to the modern regime of judicial federalism declared by the 1938 decision *Erie Railroad Co. v. Tompkins*, implementing Justice Holmes’ realist critique of the “general common law.” After *Erie*, most of the “general common law” was dissolved into various bodies of State common law to be elaborated authoritatively by the courts of each State. At the same time, the Supreme Court recognized that some portions of the “general common law” had addressed matters of overriding national interest that could not be left to the varying wills of the several States and which should therefore be retained as genuinely “federal common law.” The question thus arose whether customary international law should be regarded as rules that each State was free to adopt, discard, or modify in the exercise of its local sovereignty (as B&GI now maintains) or whether customary international law should be kept uniform, and therefore federal.

Philip Jessup called attention to the problem and the desirability of the federal solution the year after *Erie* was decided. He wrote:

> [A]ny attempt to extend the doctrine of the Tompkins case to international law should be repudiated by the Supreme Court. Mr. Justice Brandeis was surely not thinking of international law when he wrote his dictum. Any question of applying international law in our courts involves the foreign relations of the United States and can thus be brought within a federal power. The application of international law by the federal courts does not need to be justified by the

15. 175 U.S. 677 (1900).
16. *Id.* at 700.
17. 304 U.S. 64 (1938).
20. See B&GI, supra note 1, at 870.
theory that we took over international law as part of the common law. . . . The duty to apply it is one imposed upon the United States as an international person. The several states of the Union are entities unknown to international law. It would be as unsound as it would be unwise to make our state courts our ultimate authority for pronouncing the rules of international law.\textsuperscript{21}

The question remained unresolved until 1964, when Justice Harlan's opinion for the Court in \textit{Banco Nacional de Cuba v. Sabbatino}\textsuperscript{22} invoked Jessup's article with approval.

Another development between 1842 and 1938 must be mentioned here: the strengthening of national sovereignty by the Civil War and the recognition of implied foreign affairs powers vested in Congress and the President. Rather than strictly construing particular grants of power to the federal political branches, the Supreme Court ascribed to them those powers it considered necessary for the exercise of the external sovereignty of the nation. This process reached its conceptual peak in \textit{United States v. Curtiss-Wright Export Corp.}\textsuperscript{23} where Justice Sutherland expounded his theory of direct transmission of foreign affairs powers from the Crown to the nation at the time of the Revolution.\textsuperscript{24} A year later, the Court also approved the President's creation of federal law supreme over the States through a sole executive agreement, noting that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."\textsuperscript{25}

Against this background, Justice Harlan's opinion in \textit{Sabbatino} reconceptualized the act of state doctrine as a product of judicial lawmaking ancillary to the federal political branches' conduct of international relations.\textsuperscript{26} He affirmed the doctrine's legitimacy as a rule of federal common law and emphasized its supremacy over contrary rules of State law, explicitly analogizing it to Jessup's account of customary international law as federal law. He noted that Jessup had "cautioned that rules of international law should not be left to divergent and perhaps parochial state interpretations. His basic rationale is

\textsuperscript{22} 376 U.S. 398, 425 (1964).
\textsuperscript{23} 299 U.S. 304 (1936).
\textsuperscript{24} Id. at 316. Sutherland's theory remains controversial. It illustrates, however, the modern trend toward a unified conception of the federal foreign affairs powers, as opposed to the clause-by-clause parsing exhibited in portions of \textit{B&GI}. See \textit{B&GI}, supra note 1, at 856-57.
\textsuperscript{25} United States v. Belmont, 301 U.S. 324, 331 (1937).
\textsuperscript{26} Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421-27 (1964). The act of state doctrine is a rule that, with some exceptions, "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own territory." Id. at 401; see W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp. Int'l, 493 U.S. 400 (1990) (emphasizing the limits of the act of state doctrine); Restatement (Third), \textit{supra} note 5, § 443.
equally applicable to the act of state doctrine.” This endorsement eventually led to the consensus in favor of the modern position, a similar reconceptualization of the incorporation of customary international law into U.S. law.

As B&GI recognizes, the modern position has its variants. Understanding that there is no canonical statement, I would offer a precis as follows: The existence and content of rules of customary international law that are binding on the United States is to be determined as a matter of federal law. Such rules are presumptively incorporated into the U.S. domestic legal system and given effect as rules of federal law. I say “presumptively,” because contrary norms found in the Constitution, federal statutes or treaties, or valid presidential acts may supersede the applicability of a particular rule, altogether or in specific circumstances.

In my own opinion, this doctrine is itself a rule of federal common law, ancillary to the political branches’ conduct of foreign relations. Although it has a pedigree stretching back to the beginning of the Republic, I do not believe that it is constitutionally mandated. The doctrine enables the federal courts to fill the gap left when Congress has not specified the domestic legal stance toward an international obligation of the United States or of a foreign state. In carrying out this function, the federal courts exercise a limited role; they can apply only those norms that external evidence demonstrates embody genuine international legal obligations binding on the United States. As legal realists, we know that judges have discretion at the margins in recognizing and applying these norms; but they do not exercise the innovating powers of State common law courts. Incorporation at the federal level respects the national character of foreign relations: the States are not entitled to adopt individual approaches to international

27. Sabbatino, 376 U.S. at 425 (emphasis added).
28. B&GI, supra note 1, at 816 n.2.
29. The limitation to rules that are binding on the United States gives recognition to the international law doctrine that states dissenting from a new custom during its formation are not bound by it, although it is binding among other states. See Restatement (Third), supra note 5, § 111 cmt. b. There is also a narrow category of peremptory, or jus cogens norms that bind even dissenters. Id. § 102 cmt. k, reporters’ note 6. In the unlikely event that such a norm unacceptable to the United States arose, the federal government would still have the power to exclude its domestic application.
30. In addition, an applicable rule does not always determine the outcome of a specific case, which may turn instead on other issues such as standing, immunity, or the political question doctrine.
31. Similarly, I would be content to label the incorporated rules as rules of federal common law. Readers familiar with the literature will have observed that my preferred version of the modern position differs from that proposed by Professor Louis Henkin. See Louis Henkin, International Law as Law in the United States, 82 Mich. L. Rev. 1555 (1984).
32. Congress’s frequent silence on such matters is further encouraged by the longstanding traditions of incorporating customary international law and of construing statutes to avoid conflict with international law.
law. The Supreme Court has repeatedly recognized disputes implicating foreign relations as one of the areas where the creation of federal common law is justified by an overriding federal interest.\textsuperscript{33}

\section*{B. B\&GI and the ALI}

The account given in \textit{B\&GI} of how the consensus in favor of the modern position solidified is badly misinformed. The article asserts that the Reporters misled the American Law Institute into adopting an approach supported only by academic commentary. It claims that the Third Restatement’s position had no legal support, but rather was a feat of “doctrinal bootstrapping” and “academic fiat.” The improbability of this account is magnified by an additional fact that \textit{B\&GI} notes obliquely: the Reagan administration actively participated in the discussion of the Restatement and strongly objected to some of the proposals, including certain aspects of the draft provisions on the effects of customary international law.\textsuperscript{34} Yet the characterization of customary international law as federal law excited no controversy. Surely one must wonder why the Reagan administration would sit idly by while this coup occurred.

To the contrary, the modern position has enjoyed affirmative executive support. As early as 1969, the Nixon administration filed an amicus brief in the New York Court of Appeals, arguing that under \textit{Sabbatino}, custom international law was federal law that must be enforced.\textsuperscript{35} That case, \textit{Republic of Argentina v. City of New York},\textsuperscript{36} involved the immunity of a consulate from taxation, an issue of foreign state immunity that is governed by customary international law in the absence of a treaty.\textsuperscript{37} Similarly, in \textit{Filartiga v. Pena-Irala},\textsuperscript{38} whose


\textsuperscript{36} 250 N.E.2d 698 (N.Y. 1969). Argentina, supported by the federal government, prevailed. The court’s reasoning may be susceptible to different interpretations. I read it as recognizing a federally-derived obligation for “all domestic courts” to apply customary international law. \textit{Republic of Argentina} does not explicitly confirm that the law it applies is federal. The opinion is unambiguous, however, in stating that it applies customary international law by obligation and not, as \textit{B\&GI} would have it, by choice.

\textsuperscript{37} \textit{Id.} at 699. After the decision in \textit{Republic of Argentina}, the United States became a party to the Vienna Convention on Consular Relations. But consular immunity is still governed by customary law as between the United States and states that are parties neither to the Consular Convention nor to a bilateral treaty with the United States. \textit{See} Restatement (Third), \textit{supra} note 5, ch. 6, at 457. Moreover, the Consular Convention itself affirms “that the rules of customary international law con-
role in B&GI will receive more attention later, the Second Circuit adopted its view of the customary international law ban on torture as federal law at the explicit urging of the Carter administration.

Judge Henry Friendly, normally regarded as a respectable authority on the federal common law, viewed Sabbatino as affirming the federal character of customary international law in a 1972 decision, Fiocconi v. Attorney General.\(^3\) Fiocconi involved customary international law limits on the prosecution of individuals who had been extradited on the basis of comity rather than under an extradition treaty. The Second Circuit explained that those limits bound the court, as a rule of "United States foreign relations law,"\(^4\) not to permit prosecution for additional crimes unrelated to those for which extradition had been granted, but found the new charges sufficiently related.

Thus—contrary to the bootstrapping theory of B&GI—the 1980 Tentative Draft of the Restatement reflected the widely held conclusion, shared by judges and the Executive Branch as well as commentators, that Sabbatino's endorsement of the modern position indicated that customary international law was federal law, not State law, after Erie.\(^4^1\) Once we discard the charge that the American Law Institute was subordinated to academic fiat, it should be easy to recognize why the Executive would favor the modern position. The State Department wants control over the nation's compliance with its international obligations. Without the uniformity of federal law, government attorneys would have to persuade fifty independent State legal systems to adopt customary norms voluntarily. The "general common law" had provided a coordinating concept that linked those systems in a joint interpretive enterprise; without a replacement, its dismantling would free the States to follow their separate wills, to the detriment of U.S.

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\(^{38}\) 630 F.2d 876 (2d Cir. 1980) (recognizing torture as a violation of customary international law and thus as providing a basis in federal common law for jurisdiction under the Alien Tort Statute, 28 U.S.C. § 1350 (1994)).

\(^{39}\) 462 F.2d 475, 479-80 & n.7 (2d Cir. 1972) (citing Sabbatino and quoting the usual sentence about international law as "part of our law" from The Paquete Habana).

\(^{40}\) 462 F.2d at 479 (citing Sabbatino). Judge Friendly had earlier used the phrase "federal law of foreign relations" to describe the category of federal common law approved by Sabbatino, in the published version of his well-known lecture on federal common law. See Henry J. Friendly, In Praise of Erie—and of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 408 n.119 (1964).

foreign relations. The characteristics of supremacy over State law and reviewability in the Supreme Court make federal common law an excellent instrument for protection of the federal interest.

After erroneously denying that anything relevant occurred between 1964 and 1980, B&GI continues its attack on the Restatement by attempting to explain away the body of case law decided between 1980 and 1986, when the Restatement was adopted by the ALI. Although the authors cannot deny that these decisions hold that customary international law enters the U.S. legal system as federal law, they insist on divorcing these cases from the Restatement by attributing differences in reasoning to them. Thus, we are told that the Second Circuit’s 1980 decision in Filartiga v. Pena-Irala “did not provide reliable support for the Restatement (Third)’s position because Filartiga rested squarely on nineteenth century precedents, whereas the Restatement (Third) correctly acknowledged that CIL was not federal law in the nineteenth century.” In other words, because the Filartiga opinion attempted to synthesize cases from all periods of U.S. history, including The Paquete Habana and Sabbatino, into a consistent whole, it cannot be cited in support of the modern position.

B&GI misses the fact that the novelty of Filartiga did not lie in its recognition of customary international law as federal law. The novelty of Filartiga lay in the Second Circuit’s belated recognition that customary international law had expanded to impose limits on a state’s treatment of its own nationals. The district court had dismissed the case on the ground that circuit precedent excluded such issues from the scope of “the law of nations.” The Second Circuit had requested the State Department to submit a memorandum setting forth its pos-
tion on the case.\textsuperscript{48} The resulting Memorandum devoted an argument heading and several pages to the proposition that “[i]nternational law now embraces the obligation of a state to respect the fundamental human rights of its citizens,”\textsuperscript{49} and only a footnote to the noncontroversial proposition that “[c]ustomary international law is federal law, to be enunciated authoritatively by the federal courts,” citing \textit{Sabbatino} and \textit{The Paquete Habana}.\textsuperscript{50}

No doubt \textit{Filartiga} and other opinions would have been more scholarly if they had accurately portrayed the stage-by-stage evolution of U.S. approaches to international law. But the \textit{Erie} decision did not require that federal courts stop citing cases decided before 1938 and reinvent federal common law from scratch. The Supreme Court has continued to rely on pre-1938 cases about federal officers’ immunity from suit and interstate boundary disputes.\textsuperscript{51} Former doctrines of “general common law” have been reconceptualized as doctrines of federal common law that continue to govern in areas of dominant federal concern. The continued circulation of old wine in new bottles is a standard process of doctrinal evolution, even after major realignments like \textit{Erie}.

Thus, the delegitimation tactic fails. It is not the modern position in the Restatement that lacks support, but rather \textit{B&GI}.

\section*{II. \textit{B&GI} and Federal Violations of International Law}

Although \textit{B&GI} artificially divides them, the traditional justification for the modern position lies in history, \textit{Sabbatino}, and the federal power over foreign affairs (\textit{B&GI} calls this third element the “structural authorization argument”).\textsuperscript{52} \textit{B&GI} objects to the modern position both from the federal perspective (which I will consider here) and from the perspective of the States (part of which I will consider in Part III). At the federal level, \textit{B&GI} rejects judicial enforcement of customary international law as unjustifiable interference with “the political branches.” This quick dismissal involves errors of commission and omission. First, \textit{B&GI}’s quarrel here is less with the Restatement than with speculative variants on the modern position offered by par-

\textsuperscript{48} See 19 I.L.M. 585 (1980) (reprinting the text of the Memorandum, which was submitted jointly by the Departments of Justice and State). Significant portions of the brief were also excerpted in the State Department’s 1980 Digest of United States Practice in International Law 11-13, 253-62 (1986).
\textsuperscript{49} 19 I.L.M. 585, 589-95 (1980).
\textsuperscript{50} Id. at 606 n.49. The footnote also cited a Yale student note written shortly after \textit{Sabbatino}, setting forth how \textit{Sabbatino} justified the recognition of customary international law as federal common law and how this recognition supported the Alien Tort Statute. See Note, \textit{Federal Common Law and Article III: A Jurisdictional Approach to Erie}, 74 Yale L.J. 325 (1964).
\textsuperscript{52} \textit{B&GI}, supra note 1, at 860.
ticular scholars. Second, \textit{B&GI} ignores the fact that customary international law has other functions at the federal level aside from restricting Congress and the President.\textsuperscript{53}

A glance at the issue of federal statutes illustrates the first point. Declaring that customary international law is genuinely federal common law, and not some other form of federal law akin to federal common law, would not give judges the power to override earlier statutes that are still in force. Federal common law is made within the framework of existing federal statutes, not in contradiction to it. The Reporters' initial suggestion that the later-in-time rule, by which treaties and customary law supersede each another on the international plane, should be replicated in domestic law was not adopted by the ALI, and the Restatement indicates that the issue has "not been authoritatively determined."\textsuperscript{54}

Far more important, however, is the \textit{Paquete Habana} problem, the application of customary international law to the acts of executive officers. \textit{B&GI} includes this question in its indictment of the modern position and observes that the problem would not arise at all if customary international law were never federal law.\textsuperscript{55} But its discussion collapses all relevant distinctions. In \textit{The Paquete Habana}, the Supreme Court enforced a rule of customary international law against naval officers, and its opinion indicated that judicial enforcement would yield to a "controlling executive or legislative act."\textsuperscript{56} Mainstream commentators and the Restatement agree that the President, in the exercise of his foreign affairs powers, has discretion to violate customary international law without judicial contradiction.\textsuperscript{57} Yet this view of the President's authority is wholly consistent with the application of federal common law to acts of federal officials whose violations lack specific higher authorization. The Eleventh Circuit's decision in

\textsuperscript{53} The failure to recognize a positive role at the federal level may also explain why \textit{B&GI} characterizes the application of federal common law against the States as an example of "dormant foreign affairs preemption." \textit{Id.} at 862.

\textsuperscript{54} Restatement (Third), \textit{supra} note 5, § 115 cmt. d. \textit{Compare id. and reporters' note 4 with tentative draft § 135(1) cmt. b and reporters' note 1. Although \textit{B&GI} does not recognize it as such, this dispute is in significant degree about the powers of the President vis-à-vis Congress or the Senate, not about the powers of the courts vis-à-vis the political branches. See Trimble, \textit{supra} note 2, at 682-84.

\textsuperscript{55} See \textit{B&GI}, \textit{supra} note 1, at 844-46, 861.

\textsuperscript{56} \textit{The Paquete Habana}, 175 U.S. 677, 700 (1900).

Garcia-Mir v. Meese,58 cited in B&GI, turned on the question of whether the Attorney General, as a cabinet officer, shared the President's authority to issue a "controlling executive act" (and found that he did).59 The district court decision in Fernandez v. Wilkinson,60 also cited in B&GI, similarly involved a challenge to the action of "the Attorney General and his delegates," not the President.61

By ignoring the orthodox version of the modern position, B&GI misses one of the central difficulties with its State law proposal. Reducing customary international law to State common law would free not only the President, but also federal officers at every level, to commit violations because State common law rules cannot authoritatively control the action of federal officers within the scope of their duties.62 Federal law can incorporate or authorize State regulation, but a federal decision to do so would still be required. Moreover, one might well ask which State's common law could be thought to govern the subject matter of The Paquete Habana, the capture of ships in Cuban waters. Prior to Erie, the "general common law" could be used to ensure compliance with international law by lower executive officials, but after Erie, only a federal policy of compliance can serve that purpose.

Similarly, the courts need federal law not only to evaluate the actions of executive officers, but also to guide their own actions. Consider, as a simplified example, the customary international law of consular immunity; assume no relevant statute or treaty, and assume that after Erie, federal courts have no authority to incorporate customary international norms into federal law. Then the federal courts would be required to follow State law in cases brought on State law claims, either affording or violating consular immunity according to the practice of the State. At the same time, the federal courts would be powerless to afford consular immunity in cases brought on federal claims. Such a regime would be absurd and wholly inconsistent with the national character of U.S. foreign relations. Contrary to B&GI, federal courts must have the power to adopt customary international

58. 788 F.2d 1446 (11th Cir. 1986).
59. Id. at 1454-55. Even the controversial Barr opinion on extraterritorial abductions, relying on Garcia-Mir, expresses doubt that a violation of customary international law could be authorized by an official below cabinet rank. See Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. Off. Legal Counsel 163, 180 (1989).
60. 505 F. Supp. 787 (D. Kan. 1980) (finding arbitrary detention to be a violation of customary international law and an abuse of discretion on the part of the Attorney General and his delegates), aff'd on other grounds, 654 F.2d 1382 (10th Cir. 1981).
61. Fernandez, 505 F. Supp. at 792, 798, 800.
norms to restrain their own conduct, in the absence of conflicting directions from the political branches.  

Thus, B&GI would replace the modern position with a system in which, without prior authorization by statute or treaty, federal courts would be powerless to prevent violations of customary international law by lower-level executive officials, or even by themselves. Even if we ignored the problem of cacophony resulting from independent and unreviewable enunciation of customary international law by the States, this gap would justify a post-Erie federal common law.

III. States’ Rights, Human Rights, and Democracy

B&GI is on firmer ground in stating that the modern position entails the conclusion that, in the face of congressional silence, customary international law will be supreme over the laws of the States. The authors attack this consequence by associating it with a broader, less well-defined notion they term “dormant foreign relations preemption,” and insist that it is undemocratic and involves “a dramatic transfer of constitutional authority from the states to the world community and to the federal judiciary.” I will not try to deal with the broader notion of dormant preemption here, but will address the question whether judicial enforcement of customary international law is inconsistent with American democratic tradition.

I do not deny that the modern position shifts some degree of power from the States, relative to what they would have under the B&GI proposal. But I see the main recipients of that power as Congress and the federal Executive Branch.

Viewing the argument in its full generality, one might think it was rather late to claim that judicial application of customary international law was in principle inconsistent with the American understanding of democracy. Although the precise content of customary international law has varied from generation to generation, it has always provided externally generated standards for the decision of cases within the domestic legal system. Indeed, if the external origin of the norm is objectionable, the same problem inheres in B&GI’s proposed solution—the enforcement of customary international law as State common law. Absent State legislative action, the citizens in States with nonelected judiciaries would be entitled to complain against their State judges that the judges were undemocratically imposing on them norms derived from a remote international community.

Admittedly, State common law decisions can be overturned by State legislatures. But federal common law decisions can be over-

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63. For more on this example, see infra Part IV.C.
64. B&GI, supra note 1, at 862-68.
65. Id. at 857-58.
66. Id. at 846.
turned by Congress. So the argument from democracy really boils down to the setting of a default rule and the choice of the level at which the default option can be rejected. In the absence of specific action by federal statute or treaty, should courts apply customary international law norms or disregard them? Our system follows a practice of presumptive enforceability of customary international law, subject to congressional override. While this is not direct democracy, it is a form of representative democracy appropriate to a system in which responsibility for foreign relations is vested at the national level.

B&GI claims that independent State authority to declare customary international law would not impair the ability of the United States to "speak[ ] with one voice" in the process of forming customary international law because the States would be likely to defer to the federal executive's view of what international law requires. But that is just saying that independent State authority would be harmless so long as it were not exercised. Why wage such an uphill battle to return this authority to the States if their independence is not truly desirable? The States have no reserved sovereignty to act on the international plane; the Constitution was designed to take that away from them.

Nor does our constitutional system require formal representation of the States in the formation of international obligations. New York, for example, might prefer a greater say in the withdrawal of prime real estate from New York City's tax base, but the Constitution gives it no veto power. Even indirect representation through the Senate and the House of Representatives is not always a prerequisite to federal action affecting a State's interests. Sometimes the President can displace State policies through the negotiation of a sole executive agreement; sometimes the President can displace them through participation in the creation of a customary norm.

B&GI argues, however, that whatever may have been true for the "old" customary law, the situation has been changed by the advent of a customary law of human rights. This would be an ironic occasion for abandoning the practice of incorporation. To be sure, the Nuremberg trials inaugurated an expansion of customary international law into the previously unaddressed realm of a state's most basic duties to its own citizens. But how was this transformation brought about? Bradley and Goldsmith write as if the United States had been a passive observer of the Nuremberg trials, the adoption of the Universal Dec-

67. Id. at 871.
69. See United States v. Belmont, 301 U.S. 324, 331 (1937); Restatement (Third), supra note 5, § 303 & cmt. j. Belmont was written by no less a friend of federalism than Justice Sutherland.
laration of Human Rights, and the later unfolding of human rights law. To the contrary, the United States itself, including both Congress and the President, have given impetus to the recognition of core human rights as international legal obligations even in the absence of human rights treaties.\footnote{See e.g., Oscar Schachter, \textit{International Law Implications of U.S. Human Rights Policies}, 24 N.Y.L. Sch. L. Rev. 63 (1978-79).} Moreover, as we have seen, the recognition of customary human rights norms as enforceable federal law in \textit{Filartiga} was also encouraged by the federal executive. Thus, the normativity of international human rights did not just happen to the United States; the political branches deliberately participated in its creation.

On the other hand, American democratic tradition includes many strands, some of which have opposed the domestic application of international human rights norms. The segregationist strand contributed significantly to resistance to human rights treaties in the name of States’ rights in the 1940s and 1950s.\footnote{\textit{See generally} Natalie Hevener Kaufman, \textit{Human Rights Treaties and the Senate: A History of Opposition} (1990) (describing early opposition to human rights treaties and consequences in later years); Duane Tananbaum, \textit{The Bricker Amendment Controversy: A Test of Eisenhower’s Political Leadership} (1988) (analyzing the politics of the Bricker Amendment in the 1950s).} Another contributing factor was the suspicion that international tribunals were biased against the United States, which has informed a broader reluctance to submit to international adjudication. Objections that had been raised against the New Deal—fear of bureaucracy, opposition to redistribution, and preference for State sovereignty—were reasserted. These elements of American tradition produced the movement for the Bricker Amendment, which would have restricted the federal treaty power. The movement failed, but some of its concerns survive, and they delayed for many years the ratification of human rights treaties.

Has the Bricker controversy reoriented the American conception of democracy so that international law has lost its traditional legitimacy, even in the fields of the “old” customary law? \textit{B&GI} suggests, in effect, that it should have,\footnote{\textit{See B&GI, supra} note 1, at 858-59, 869-70. Although \textit{B&GI} attempts to draw broad conclusions from the Senate’s reluctance to ratify human rights treaties or to accept them as self-executing, \textit{B&GI} does not expressly invoke the Bricker legacy, conceivably because the authors accept the legitimacy of formally ratified treaties. \textit{Id.} at 858-59.} but provides no evidence that it did. I see no sign, for example, that after 1950 the executive branch or the courts were embarrassed about complying with international custom in matters of diplomatic or consular immunity, or about adjusting to changes in customary practice. Nor have the courts displayed discomfort with the customary law of treaties. Despite the stalemate between the President and the Senate over the ratification of the Vienna Convention on the Law of Treaties, courts have followed the State Department’s advice that many of its provisions are declaratory of
customary law.\textsuperscript{73} Thus, the traditional legitimacy of the "old" customary law seems unimpaired.

Should the "new CIL" be regarded differently? In the process of insisting upon the universality of core human rights obligations, the United States has cooperated in the development of customary norms and, as B&GI notes, the United States cannot unilaterally control the content of those norms.\textsuperscript{74} In some respects, customary law may require less than the United States would have preferred.\textsuperscript{75} In other instances, the United States may have acquiesced in the creation of an international norm stricter than it would have preferred as one of the compromises that make international cooperation possible. There may also be instances in which the United States has persistently dissented from the development of a customary norm in such a way that the norm binds others, but not the United States.\textsuperscript{76}

Absent such dissent, customary human rights norms represent valid international obligations of the United States. Most if not all of them have enjoyed affirmative U.S. support and are redundant vis-à-vis the States because they mirror norms of domestic constitutional law. Their primary significance in U.S. law may currently lie in litigation against foreign government officials, who are not bound by the U.S. Constitution. But if the United States has acquired human rights obligations that impose further limitations on the States, then these obligations are presumptively enforceable. If Congress opposes the application of such norms in domestic law, it has the constitutional authority to deny them domestic enforcement. I do not see a large


Trimble would explain the courts' acceptance of the Convention's rules by asserting that executive advice performs the needed legitimating function and that the courts follow the executive's lead. See Trimble, supra note 2, at 684-87, 692. But that explanation would not satisfy B&GI's criteria for democratic legitimacy, and it would support Filartiga. See id. at 695.

\textsuperscript{74} B&GI, supra note 1, at 858.

\textsuperscript{75} See, e.g., Kaufman, supra note 71, at 78-81 (noting disappointment that post-war human rights law did not emphasize protection of property rights).

\textsuperscript{76} Two possible examples are a customary norm prohibiting execution for crimes committed before age eighteen and a customary norm requiring states to regulate hate speech. It is possible instead that these putative norms have not become customary international law, in part because of the United States' opposition. See, e.g., General Comment No. 24(52), U.N. GAOR, Hum. Rts. Comm., 1382nd meeting, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), reprinted in 34 I.L.M. 839, 842 (1995) (listing these as norms of customary international law); Observations of the United States of America on General Comment No. 24(52), reprinted in 16 Hum. Rts. L.J. 422-23 (1995) (denying that these are norms of customary international law); Theodor Meron, Human Rights and Humanitarian Norms as Customary Law 98-99 (1989) (discussing status of prohibition of juvenile death penalty as customary norm).
discontinuity here with the tradition of incorporating the "old" customary international law, once we accept—unlike Senator Bricker—the legitimacy of federal regulation in the field of human rights.

Buried in B&GI's attack on the modern position, however, is an argument of a different character. B&GI briefly contends that the President and the Senate have in fact taken steps to prevent the enforcement of human rights norms in the United States by declaring certain treaties non-self-executing, and that applying the modern position to customary human rights norms circumvents this directive. This argument deserves exploration with greater precision and documentation than B&GI gives it. One might concede the validity of the modern position and analyze whether the terms of ratification of a particular treaty—or perhaps a class of treaties—should be interpreted beyond their literal language as a "controlling act" dictating that customary norms that coincide with any provision of the treaty should no longer be incorporated into federal law. Such an analysis would require attention to a series of relevant factors that neither B&GI nor B&GII provides. I cannot say in advance how that analysis would turn out. But in either case the modern position would accommodate the result. This fact should reinforce the compatibility of the modern position with American democratic traditions.

At last we are in a position to consider the question of judicial activism. I could agree that judges would produce "undemocratic" results if they prematurely enforced so-called "emerging norms" of customary international law. The judges would also be misapplying the modern position. As the Restatement clearly expresses, the norm to be applied must be a genuine norm of customary international law and one validly binding on the United States. The position of the federal Executive Branch on what customary international law requires, if available, deserves considerable deference. At the same time, the normativity of law requires that once a right has been embodied in

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77. See B&G, supra note 1, at 869-70.

78. B&GI lumps together "various multilateral treaties" on human rights and attempts to draw conclusions about the "new CIL" in general. B&G, supra note 1, at 869. This method of reasoning is much too imprecise. Even the treatment of human rights treaties has not been uniform.

79. For example, the reservations, understandings, and declarations have generally addressed only the treaty itself and have not been directed at repealing other domestic law consistent with the treaty. Second, a reservation to a treaty provision that codifies a customary norm may be intended to deny the customary character of the norm, or it may be intended to exclude the enforcement of the norm from the particular procedures (typically international in character) involved in that treaty regime. Third, declarations of non-self-executing character have sometimes been attached to treaties for which implementing legislation has already been enacted and, therefore, do not always evidence an intention that the treaty provisions not receive judicial enforcement. Fourth, because human rights treaties generally include provisions declaratory of customary law and also other provisions, a declaration that the entire treaty is non-self-executing might be intended to serve a purpose relating to the noncustomary provisions.
federal common law, the executive cannot retain direct control over its elaboration and application to particular cases. But the executive has subtler methods for influencing its development, and Congress can replace common law norms by statutes or repeal them altogether.

Within these limits, judges have a salutary role to play in clarifying and impartially enforcing customary human rights norms. The impartiality of the courts is an asset to the federal government because it reinforces the credibility of the political branches in their own calls for compliance with customary human rights norms by other countries. The judicial function is not mechanical, and judges who interpret and apply human rights norms will inevitably infuse to some degree their individual versions of American values. One could label this judicial activism if one were so inclined. But overruling the well-established tradition of incorporation would be a more massive exercise in judicial activism.

IV. B&GII

In B&GII, Professors Bradley and Goldsmith amplify, and in some respects modify, the arguments of B&GI. I will not burden the reader with a reply to every allegation B&GII makes about this Response. Nor will I expand the scope of this Response to address the debates among the other participants. Instead, I will concentrate on what B&GII tells us about the ALI, democracy, and the “old” customary international law.

A. B&GII and the ALI

In a welcome development, Professors Bradley and Goldsmith distance themselves from the accusations that B&GI made about the drafting of the Third Restatement. Confronted with indisputable evidence that the modern position enjoyed more than academic support between 1965 and 1980, they concede the facts. They then try to downplay the significance of those facts, and they repeat the fallacious argument that Filartiga and its progeny did not properly support the Restatement because Filartiga got its history wrong.

Despite these efforts, the evidence refutes the authors’ attempt to discredit the Restatement. They may prefer a different interpretation

80. Illustrative is Bradley and Goldsmith’s claim that I mistakenly assume that under their proposal customary international law must be enforceable by courts and thus enforceable as State common law. B&GII, supra note 1, at 349 n.174. To the contrary, this Response says more than once, though it does not repeat obsessively, that under the B&GI proposal State courts would be free to adopt, reject, or impose their own views of customary international law. Other passages in B&GII force me to state explicitly that no silence on my part implies agreement that any proposition in B&GI or B&GII is correct.

81. B&GII accuses me of “distort[ing]” their account, B&GII, supra note 1, at 341, but readers can judge for themselves whether B&GI describes an ALI misled by its Reporters.
of Sabbatino, but Judge Friendly and others outside the academy understood Sabbatino as endorsing the modern position. That is why the core of the modern position was uncontroversial and why the debate in the ALI focused on the details.

B. B&GII and Democracy

B&GII sheds further light on B&GI’s argument based on democracy. B&GI contains strongly worded claims that the modern position conflicts with “fundamental constitutional principles”82 and “basic notions of American representative democracy.”83 Although B&GI never defined what it meant by democracy, I took these criticisms seriously and attempted to explore whether the practice of presumptive judicial incorporation of customary international law had lost its democratic legitimacy. I also pointed out that if it had, then the same objection would apply to B&GI’s proposal that, after Erie, it was the State judges who had the power to incorporate customary international law.

B&GII rejects this observation. It maintains that I am “incorrect” to assert that the argument from democracy raises “the same problem” at the State and federal levels, because federal constitutional separation of powers provisions do not govern state judicialities.84 It then declines to analyze or to take a definite stance on the question whether unelected State judges would be acting in a manner inconsistent with basic notions of American representative democracy if they applied customary international law rules as State common law without prior authorization from the State legislature. It denies that conducting this inquiry would yield any insight favorable to the modern position.

Refusing to pursue the question will not enable B&GII to avoid the dilemma inherent in its argument. If presumptive judicial incorporation of customary international law is inconsistent with basic notions of American democracy in the normative sense, then that criticism would seem to apply to unelected State judges as well as to federal judges. State judges must have been behaving undemocratically through all the years since 1776 when they were applying international law, whether as “general common law” or as anything else. Thus, Bradley and Goldsmith would be making a radical critique of American practice in the name of its own basic notions. If they had taken the trouble to explore this obvious consequence of their argument, it would have become clearer whether these “basic notions” involve de-

82. B&GI, supra note 1, at 817; id. at 873 (“some of our nation’s most fundamental constitutional principles”).
83. Id. at 857; id. at 821 (“well-accepted notions of American representative democracy”); id. at 816 (abstract) (“basic understandings about American representative democracy”).
84. B&GII, supra note 1, at 347 n.162.
fensible principles actually held in the United States or a simplistic and ahistorical conception of unqualified majoritarianism.

On the other hand, if State judicial incorporation of customary international law is democratically legitimate because of "institutional arrangements" that can properly vary between the State and federal levels, then we are really talking about the specific positive embodiment of separation of powers at the federal level—in particular, the scope of the enclave of federal common law that concerns foreign relations. But to challenge the modern position on *positive* constitutional grounds places a heavy burden on the challengers to overcome the positive data that support the modern position. Presumptive incorporation of customary international law is within the understanding of judicial power inherited from England and maintained since the beginning of the Republic. It occurs within a field of overriding federal concern, justifying its continuation as post-*Erie* federal common law. *B&G*I gives insufficient respect to federal supremacy in foreign affairs and the twentieth century case law that reinforced it. Even with regard to human rights law, *B&G*I does not sufficiently recognize the need for uniformity.86

C. *B&G*II and the "Old" Customary International Law

*B&G*II makes explicit how thoroughly the analysis in *B&G*I neglects the "old" customary international law in its crusade against the judicial enforcement of human rights law. *B&G*II defends this inattention:

[T]he enormous post-1980 literature on the domestic status of CIL rarely if ever speaks to traditional CIL. It may still be possible for an occasional issue of uncodified traditional CIL to arise in domestic litigation. But these situations will be rare, however, and they are not the focus of the modern position debate.87

Again:

Our position is that the judicial federalization of any CIL requires some authorization from the Constitution or a federal statute. It is important to keep in mind, however, that the authorization requirement has little if any practical significance in connection with traditional CIL. As explained above, the federal political branches

85. *Id.*
86. At the risk of repetition, I must point out the problem raised by their defense of independent State activism in human rights. If State judges have the constitutional authority to make independent and unreviewable determinations of what practices violate customary international law, then they can enter holdings inconsistent with national policy on that question. These will undermine federal efforts to maintain or modify customary law, because decisions of domestic courts are important data in the demonstration of customary norms. State decisions that, from a federal perspective, rest on incorrectly identified customary human rights norms should be reviewable, as well as State decisions that incorrectly deny the existence of customary norms.
87. *B&G*II, *supra* note 1, 326.
appear to have incorporated into federal law most if not all of traditional CIL that is likely to come up in domestic litigation. The debate about CIL’s domestic status in the last three decades has almost exclusively concerned new, rather than traditional, CIL. It is significant that Neuman can cite only hypothetical and academic examples of the need for a federal common law of the traditional CIL.\footnote{88}{Id. at 354.}

In part II above, I offered consular immunity as an uncomplicated example to illustrate the need for federal common law in domestic litigation. As Professors Bradley and Goldsmith concede, U.S. accession to the Vienna Convention on Consular Relations did not make that Convention applicable to consuls in the United States from states that are not parties to the Convention;\footnote{89}{Id. at 354.} it therefore did not make customary immunity irrelevant in the United States. Nonetheless, they dismiss the example as “hypothetical,” because I cite no cases involving suits against consuls from the nonparty states for actions within the scope of their immunity.\footnote{90}{See id. at 342.} But the rarity of cases is scarcely surprising, given the prevalence of the modern position. The important inquiry is not what suits are being brought now, when they are clearly futile, but what suits would be brought if the modern position were overthrown as B&GI urges, and what a court would then do if faced with such a case.

The fact that customary international law retains its relevance within the United States despite U.S. accession to a multilateral convention illustrates a point that readers of B&GI might well have missed. B&GI’s overriding focus on human rights law obscures the very different way that adoption of customary law by treaty works in other fields. In human rights treaties, states usually promise each other to respect certain rights of persons irrespective of nationality. It is therefore possible to speak of the treaty as incorporating a customary norm into federal law, without specifying the class of beneficiaries. In other treaties, states usually make reciprocal promises for the benefit of each other, without conferring any benefit on third-party states and their nationals. In that case, the treaty would not incorporate the customary norm as such, but only incorporate it vis-à-vis treaty partners. If B&GI had not neglected the “old” customary law, its analysis would have been required to grapple with this distinction and the gaps that it causes.

If consular immunity is a simple but limited example, a more controversial and complicated example has figured prominently in the literature. That is the problem of customary international law limits on the exercise of extraterritorial prescriptive jurisdiction. Professor Trimble devoted ten pages to it in his 1986 critique of the modern

\footnote{88}{Id. at 354.} \footnote{89}{See id. at 342.} \footnote{90}{See id. at 354-55.}
position, and Professor Brilmayer discussed it at some length as well in an article that B&GI cites frequently. B&GI mentions this issue in passing, but provides no analysis of the situation of a federal court asked to apply State law extraterritorially in a case where customary international law forbids such application. There is, of course, no U.S. treaty or statute governing the general subject of State extraterritorial regulation.

B&GII dismisses the extraterritoriality example as "hypothetical and academic." Once more, rather than trying to understand the implications of the example, they belittle it, and they quarrel with the substantive rule.

B&GI and B&GII evidence no effort to investigate what the consequences of their proposal would be for the "old" customary international law. Bradley and Goldsmith have simply made the unsupported assertion that "most if not all" of that law has been incorporated in treaties and statutes, and waited to snipe at counterexamples. That assertion is no substitute for informed analysis. The distinction between most and all is crucial in this context. In addition to their other major errors, they give no serious attention to this difference before urging the abandonment of the 200-year-old practice of judicially incorporating customary international law.

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91. Trimble, supra note 2, at 696-707.
93. B&GI, supra note 1, at 847.
94. B&GII, supra note 1, at 354.
95. See id. at 354-55.
96. Id. at 354.