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CUSTOMARY INTERNATIONAL LAW AND HUMAN RIGHTS TREATIES ARE LAW OF THE UNITED STATES

Jordan J. Paust*

I. THE FOUNDERS AND PREDOMINANT TRENDS

The Founders clearly expected that the customary law of nations was binding, was supreme law, created (among others) private rights and duties, and would be applicable in United States federal courts.¹ For example, at the time of the formation of the Constitution John Jay had written: "Under the national government . . . the laws of nations, will always be expounded in one sense . . . [and there is] wisdom . . . in committing such questions to the jurisdiction and judgment of courts appointed by and responsible only to one national government. . . ."² In 1792, the supremacy of the customary law of nations within the United States was affirmed in *Ross v. Rittenhouse*,³ and Attorney General Randolph declared: "The law of nations, although not specially adopted . . . is essentially a part of the law of the land."⁴

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1. For early views, including those of Bee, Bradford (Att'y Gen.), Chase, Duponceau, Hamilton, Ingersoll, Iredell, Jay, Jefferson, Lee (Att'y Gen.), Madison, Marshall, Mason, Nicholas, Paterson, Randolph (Att'y Gen.), Story, B. Washington, Wilson, and Wirt (Att'y Gen.), see, for example, JORDAN J. PAUST, *INTERNATIONAL LAW AS LAW OF THE UNITED STATES* 6, 8, 15–17, 34–36, 40–44, 47–50, 121, 144, 154–55, 182–83, 201, 205, 264–70 & 228–30 (1996). See also LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 234, 510 n.20 (2 ed. 1996) ("Framers expected federal courts to enforce state observance of the law of nations."); Edwin D. Dickinson, *The Law of Nations as Part of the Law of the United States*, 101 U. PA. L. REV. 26, 35–38, 43–46, 48–49 & 55–56 (1952); Ryan Goodman & Derek P. Jinks, *Filartiga's Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 464–65 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1925, 1841, 1846 & 1852 (1998); G. Edward White, *The Marshall Court and International Law: The Piracy Cases*, 83 AM. J. INT'L L. 727, 727 (1989) ("The Framers' Constitution anticipated that international disputes would regularly come before the United States courts, and that the decisions in those cases could rest on principles of international law, without any necessary reference to the common law or to constitutional doctrines."); see *infra* notes 30–31, 34.

2. THE FEDERALIST NO. 3, at 62 (John Jay) (J.C. Hamilton ed. 1868).

3. *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (Pa. 1792) ("[T]he law of nations . . . is enforced by . . . the municipal law . . . which . . . may . . . facilitate or improve the execution of its decisions . . . , provided the great universal law remains unaltered."). See PAUST, *supra* note 1, at 42–43 n.47, 121.

4. 1 Op. Att'y Gen. 26, 27 (1792); see also 1 Op. Att'y Gen. 68, 69 (1797) (Lee, Att'y Gen.) ("[T]he law of nations in its fullest extent . . . [is] part of the law of the land."). Concerning other cases, opinions, and recognitions that customary international law is "law of the

In 1793, then Chief Justice Jay recognized that “the laws of the United States,” the same phrase found in Article III, section 2, clause 1 and in Article VI, clause 2 of the Constitution, includes the customary “law of nations” and that such law was directly incorporable for the purpose of criminal sanctions.⁵ Also in 1793, the Chief Justice stated that prior to the Constitution:

[T]he United States had . . . become amenable to the laws of nations; and it was their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible to foreign nations for the conduct of each state, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States, became apparent. . . . These were among the evils which it was proper for the nation . . . to provide by a national judiciary.⁶

That same year it was affirmed that the “law of nations is part of the law of the United States.”⁷ Justice Wilson also declared that the Supreme Court has original jurisdiction in certain cases addressing such law, but that Congress can nevertheless provide a concurrent jurisdiction in lower federal courts.⁸ Chief Justice Jay had also charged a grand jury in Virginia that year in markedly familiar words: “The Constitution, the statutes of Congress, the law of nations, and treaties constitutionally

land.” See, e.g., *The Nereide*, 13 U.S. (9 Cranch) 388, 422–23 (1815) (finding that the United States courts are “bound by the law of nations, which is a part of the law of the land”), cited in *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980); PAUST, *supra* note 1, at 34, 36, 40–42 & 47–48, *passim*; see *infra* note 10.

5. *Henfield’s Case*, 11 Cas. 1099, 1101 (C.C.D.Pa. 1793) (No. 6,360); see also *id.* at 1103–04, 1112 & 1115; PAUST, *supra* note 1, at 6–8, 34–48, *passim*. For other cases, opinions, and recognitions that customary international law is “law of the United States,” see, for example, PAUST, *supra* note 1, at 40; Dickinson, *supra* note 1, at 46, 48 & 56 (stating that “a constituent part of the national law of the United States” is that “the Constitution accepted the Law of Nations as national law. . . .”) and Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1566 (1984); see *infra* notes 7, 9, 21 & 24. Today, it is not widely assumed that customary international law is directly incorporable for purposes of criminal sanctions. See PAUST, *supra* note 1, at 7, 44–45.

6. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793) (Jay, C.J.). The Chief Justice added that federal judicial power extends to “all cases affecting Ambassadors, or other public Ministers and Consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority” and to all cases of admiralty “because, as the seas are the joint property of nations, whose rights and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction.” *Id.* at 475; see Koh, *supra* note 1, at 1825, 1828, 1841 & 1846.

7. *United States v. Ravara*, 2 U.S. (2 Dall.) 297, 299 n.* (C.C.D. Pa. 1793).

8. *Id.* at 298 (Wilson, J.).

made compose the laws of the United States.”⁹ In that year also, Secretary of State Thomas Jefferson reassured the French Minister Genet that the law of nations is an “integral part” of the law of the land,¹⁰ and in his home state of Virginia it was declared in *Page v. Pendleton*¹¹: “[T]he legislature . . . admitted, that the law and usages of nations require . . . that the legislature could not retract their consent to observe the precepts of the law, and conform to the usages, of nations. . . .”¹² In 1795, Justice Iredell addressed direct incorporation of customary international law and affirmed the fact of incorporation with or without a statutory base in a consistent and telling fashion: “This is so palpable a violation of our own law . . . of which the law of nations is a part, as it subsisted either before the act of Congress on the subject, or since. . . .”¹³ With respect to the broad range of matters subject to incorporation, he added: “[A]ll . . . trespasses committed against the general law of nations, are enquirable. . . .”¹⁴ An early case had also expressly related the duty to incorporate customary international law to the Constitution: “[C]ourts . . . [i]n this country . . . are bound, by the Constitution of the United States, to determine according to treaties and the law of nations, wherever they apply.”¹⁵

Similar recognitions had occurred previously and would occur throughout our history.¹⁶ For example, in 1895, *Hilton v. Guyot*¹⁷ reaffirmed early decisions and expectations when declaring:

International law in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.¹⁸

9. PAUST, *supra* note 1, at 40 n.44 (quoting from Charge to the Grand Jury for the District of Virginia, May 22, 1793).

10. *See id.* at 42 n.45 (citing Letter from Thomas Jefferson to French Minister Genet of June 5, 1793).

11. 1 Va. Rep. (Wythe) 221 (Ch. 1793).

12. *Id.*

13. *Talbot v. Janson*, 3 U.S. (3 Dall.) 133, 159–61 (1795) (Iredell, J.); *see also* 1 Op. Att’y Gen. 566, 570–71 (1822) (ruling that the law of nations is part of “the laws of the country” and “our laws”). For other cases using the phrase “our law,” *see*, for example, PAUST, *supra* note 1, at 7, and *infra* note 18 and accompanying text.

14. *Talbot v. Janson*, 3 U.S. at 159–60.

15. *Waite v. The Antelope*, 28 F. Cas. 1341 (D.C.D.S. Car. 1807); *see also supra* note 5; *infra* notes 22, 31 & 48 and accompanying text. Concerning judicial recognition of the duty to identify, clarify, and apply customary international law, *see*, for example, PAUST, *supra* note 1, at 7–8, 47–48.

16. *See, e.g.*, PAUST, *supra* note 1, at 6–7, 34–48.

17. *Hilton v. Guyot*, 159 U.S. 113 (1895).

18. *Id.* at 163.

Nearly fifty years later, the Supreme Court summarized its practice in ascertaining and applying what is a portion of customary international law, the law of war, with or without a statutory base,¹⁹ in the following words:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.²⁰

Quite appropriately, the most recent *Restatement of the Foreign Relations Law of the United States* recognizes: "Matters arising under customary international law also arise under 'the laws of the United States,' since international law is 'part of our law' . . . and is federal law."²¹ Thus, the *Restatement* rightly adds, cases "arising under customary international law" are "within the Judicial Power of the United States under Article III, section 2 of the Constitution,"²² and such law, "while not mentioned explicitly in the Supremacy clause," is supreme federal law within the meaning of Article VI, clause 2.²³ For these reasons, the phrase "laws . . . of the United States" contained in 28 U.S.C. § 1331 gives the district courts original jurisdiction over all civil cases arising under customary international law and provides a general statutory base for judicial incorporation of customary international law.²⁴ As documented in my treatise:

19. The direct statutory base for application of criminal sanctions for violations of the laws of war did not exist until the 1916 Articles of War, Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 650, 652-53, arts. 12 & 15, were addressed in the Court's opinion in *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942). Nonetheless, the laws of war had been applied throughout our history. See, e.g., Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 112-18, *passim* (1972), in JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 242-47 (1996).

20. *Ex parte Quirin*, 317 U.S. 1, 27-28 (1942).

21. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111, reporters' note 4 (1987) [hereinafter RESTATEMENT]; see also *id.* cmt. e; *id.* § 702 cmt. c; PAUST, *supra* note 1, at 40-41 n.44, 41-42 n.45, *passim*; see *supra* notes 1, 4-5, 7, 9-10, 13 & 18.

22. RESTATEMENT, *supra* note 21, § 111 cmt. e; see also *id.* reporters' note 4, § 702 cmt. c; PAUST, *supra* note 1, at 42 n.46, *passim*; see *supra* notes 2, 6, 8, 14-15, 18 & 20; see *infra* notes 31, 48.

23. RESTATEMENT, *supra* note 21, § 111 cmt. d; see also *id.* reporters' note 2, §§ 115 cmt. e & 702 cmt. c; HENKIN, *supra* note 1, at 157; PAUST, *supra* note 1, at 6-7, 42-43 n.47 & *passim*; Koh, *supra* note 1, at 1835 n.59; see *supra* notes 1, 11.

24. See RESTATEMENT, *supra* note 21, § 111 cmt. e & reporters' note 4; PAUST, *supra* note 1, at 6-7, 43 n.48; Henkin, *supra* note 5, at 1561; Kenneth C. Randall, *Federal Questions and the Human Rights Paradigm*, 73 MINN. L. REV. 349, 351 (1988); see also Filartiga v. Pena-Irala, 630 F.2d at 887 n.22 ("We recognize that our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331."); cf. *Kadic v. Karadzic*,

[C]ustomary international law that provides rights or remedies, as law of the United States, is federal substantive law and federal courts have subject matter jurisdiction with respect to such law. Further, customary international law is federal law and supreme law of the land whether or not other more technical jurisdictional competencies also pertain (such as diversity or admiralty jurisdiction).

For these reasons also, customary international law has been directly incorporable, at least for civil sanction and jurisdictional purposes, without the need for some other statutory base. . . . Since international law is law of the United States in several senses noted above, the judiciary also has the power to take judicial notice of and, thus, to identify and clarify customary international law. More importantly, such attributes of international law and judicial power compel recognition [as evidenced in numerous cases throughout our history] that the judiciary is bound to identify, clarify and apply customary international law in cases or controversies properly before the courts.²⁵

70 F.3d 232, 246 (2d Cir. 1995) (not deciding whether § 1331 “provides an independent basis for subject matter jurisdiction over all claims alleging violations of international law,” but noting that several courts have “upheld section 1331 jurisdiction for international law violations”), citing *Abebe-Jiri v. Negewo*, No. 90-2010 (N.D. Ga. Aug. 20, 1993), *aff’d on other grounds*, 72 F.3d 844 (11th Cir. 1996); *Martinez-Baca v. Suarez-Mason*, No. 87-2057, slip op. at 4–5 (N.D. Cal. Apr. 22, 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1544 (N.D. Cal. 1987).

From the time of the Founders, Congress has known and expected that the federal judiciary will identify, clarify, and apply customary international law in cases otherwise properly before the courts. Such long-term expectations and continued congressional acceptance of judicial power are highly relevant to interpretation of phrases like “laws of the United States” in congressional legislation concerning jurisdictional competence of lower federal courts. They also help to identify an implied will of Congress or continued congressional acceptance relevant to allocated powers concerning international law, especially when Congress has known that the federal judiciary applies customary international law, and Congress has never enacted legislation to restrict such judicial power. *See also* *Dames & Moore v. Regan*, 453 U.S. 654, 677–80 (1981) (stating that Congress similarly can impliedly delegate or accept allocation of power to the Executive: “Congress has implicitly approved the practice of claim settlement by executive agreement Over the years, Congress . . . [demonstrated] Congress’ continuing acceptance Just as important, Congress has not disapproved of the action taken here.”); Michael J. Glennon, 95 MICH. L. REV. 1542, 1552–53 (1997) (book review) (explaining that in *City of Milwaukee v. Illinois*, 451 U.S. 304, 313–14 (1981), Chief Justice Rehnquist offered a theory of an implied congressional delegation to the federal courts of an authority to make common law—a theory that is useful by analogy concerning competence to apply customary international law even though customary international law is not mere common law).

25. PAUST, *supra* note 1, at 7, 44 n.50 & 46–48 nn.53–57.

II. THE BRADLEY-GOLDSMITH ERRORS AND FALLACIES

It is astonishing, therefore, to read a co-authored claim that the overwhelming patterns of expectation that customary international law is law of the United States, part of our law, and federal law is merely a “modern position” developed in the last twenty years.²⁶ Equally bizarre and unreal is the notion that customary international law was not incorporated by the federal judiciary for federal decision-making or, as Professors Curtis Bradley and Jack Goldsmith claim, that “[t]hroughout most of this nation’s history, CIL [customary international law] did not have the status of federal law . . . [and] lacked the supremacy, jurisdictional, and other consequences of federal law.”²⁷

Contrary to their ahistorical assertions, actual patterns of use of customary international law throughout our history demonstrate that what they term the “modern position” was generally endorsed long ago and has been evidenced fairly consistently in the continuous use of customary international law both directly and indirectly by federal courts for more than 200 years.²⁸ More specifically with respect to their concern about

26. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 816, 816–17 (1997) [hereinafter Bradley & Goldsmith]; see also *id.* at 834, 837 & 868; but see *id.* at 822–23 (admitting: “[t]hroughout the nineteenth and early twentieth centuries, federal courts applied CIL in a variety of contexts . . . usually in the absence of statutory . . . authorization . . . [and also] as part of ‘our law’ or the ‘law of the land’ . . .”), 834 n.125, 850–51 & nn.223, 229–230. They basically reiterate general points in other articles. See Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith II]; Curtis A. Bradley & Jack L. Goldsmith, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2264, 2273 (1998) [hereinafter Bradley & Goldsmith III]. Many of the points in this section are expanded upon from Jordan J. Paust, *Customary International Law in the United States: Clean and Dirty Laundry*, 40 GERMAN Y.B. INT’L L. 78, 92–99 (1997).

27. See Bradley & Goldsmith, *supra* note 26, at 820–21, 823–25, 834 n.125 & 851; Bradley & Goldsmith II, *supra* note 26, at 335; Bradley & Goldsmith III, *supra* note 26, at 2262, 2264–65; Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 492 n.66 & 493 n.77 (1998) [hereinafter Bradley, *Charming Betsy*]; Curtis A. Bradley, *Breard, Our Dualist Constitution and the Internationalist Conception*, 51 STAN. L. REV. 529, 543, 545–546 & 554 (1999) [hereinafter Bradley, *Breard*]. But see *infra* notes 49–52, 54–60; Glennon, *supra* note 24; Goodman & Jinks, *supra* note 1, at 469 (“revisionist” . . . radically new”); Koh, *supra* note 1, at 1827, 1835 n.59, 1841, 1846 & 1851; Andreas F. Lowenfeld, *Nationalizing International Law: Essay in Honor of Louis Henkin*, 36 COLUM. J. TRANSNAT’L L. 121, 126 n. 23 (1997) (maintaining that Bradley and Goldsmith’s arguments are “wholly unpersuasive” and advocate “a position that makes no sense from an international perspective”); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371 (1997) (“much of what they add is seriously in error”); see *id.* at 388–89, 391.

28. See, e.g., PAUST, *supra* note 1, at 1, 5–50, 95, 174–75, 179, 186, 192–95, 201–02, 221–22 nn.92–93, 248, 264–70, 338–45 & 371; see also Glennon, *supra* note 24, at 1552 (“hardly modern”); Koh, *supra* note 1, at 1827, 1841, 1846 & 1852. Unavoidably, a “mistaken

human rights,²⁹ such rights were of fundamental importance to the Founders and there has been significant attention to a rich and wide array of human rights ever since the formation of the United States.³⁰ In fact, Chief Justice Marshall recognized in 1810 that our judicial tribunals “are established . . . to decide on human rights.”³¹ Federal courts had been using human right precepts prior to Chief Justice Marshall’s affirmation of judicial authority and responsibility, and have done so ever since.³² Further, what Professors Bradley and Goldsmith consider to be “new” law regulating “a state’s treatment of its own citizens,”³³ including

historical analysis” of which Professors Bradley and Goldsmith complain, *see* Bradley & Goldsmith, *supra* note 26, at 874, is not that of the Second Circuit in *Filartiga*, but their own. When faced with the argument that customary international law “forms part of the laws of the United States only to the extent that Congress has acted to define it,” the Second Circuit rightly responded, “[t]his extravagant claim is amply refuted by the numerous decisions applying rules of international law uncodified in any act of Congress.” *Filartiga*, 630 F.2d at 886; *see also id.* at 887 & n.20 (“international law has an existence in the federal courts independent of acts of Congress . . .”).

29. *See* Bradley & Goldsmith, *supra* note 26, at 831 & n.106, 832 & 841; Bradley & Goldsmith II, *supra* note 26, at 330, 335, 359 & 364; Bradley & Goldsmith III, *supra* note 26, at 2261; Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 451 (1998) (assuming incorrectly that human rights or rights of man would not have been a proper subject for early treaties); *id.* 452 & n.353 (assuming incorrectly that in early U.S. history international and domestic law were “distinct”). An ahistorical bias against human rights is evident in an essay of Professor Lawrence Lessig that addresses portions of the Bradley & Goldsmith argument. *See* Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1796–97 (1997). Professor Lessig assumes incorrectly (or was misled) that customary human rights law is “new” and is divorced from or based less on other forms of customary international law than on patterns of expectation and practice. *See id.* He also assumes incorrectly: (1) that “consent” (especially of “states”) was a primary “source” of customary international law, and (2) that “consent” is now “less” relevant, especially with respect to human rights. *See id.*; *see infra* note 67. Professor Lessig may also be unaware of the fact that the judiciary has used scholarly writings (among other indicia) to evidence the content of international law since the dawn of the United States and that such is not unique with respect to customary human rights. *Compare* Lessig, *supra* at 1797 (“more the articulation of academics”), *with* PAUST, *supra* note 1, at 3, 19–20; Koh, *supra* note 1, at 1858 & n.190.

30. *See, e.g.*, PAUST, *supra* note 1, at 8, 169–203, 214–72, 323–25 & 329 (quoting Thomas Paine, who wrote that the “end of all political association is the preservation of the . . . rights of man”), *passim*; *United States v. Haun*, 26 F. Cas. 227, 230–32 (C.C.S.D. Ala. 1860) (No. 15, 329) (stating that Jefferson was concerned about “violations of human rights” by the citizens of the United States and, thus, private duties regarding inhabitants of Africa).

31. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).

32. *See, e.g.*, PAUST, *supra* note 1, at 182–98, 228–56.

33. Bradley & Goldsmith III, *supra* note 26, at 2261, 2264; Bradley, *Charming Betsy*, *supra* note 27, at 511, 513; Curtis A. Bradley, *The Status of Customary International Law in U.S. Courts—Before and after Erie*, 26 DENV. J. INT’L L. & POL. (forthcoming 1999) (manuscript at 23, on file with author) [hereinafter Bradley, *Status of Customary International Law*]; *see also* Bradley & Goldsmith II, *supra* note 26, at 327, 335 & 359 & n.221; Bradley & Goldsmith, *supra* note 26, at 828 (“[C]IL was not yet viewed as regulating the relations between a nation and its citizens”); *cf. id.* at 831 & n.106 (“primarily governed only interstate relations . . . ‘it was thought to be antithetical. . . .’”), 839 (“primarily”); *see infra* note 70.

customary legal rights of individuals against states, especially human rights, is not new. Indeed, it is partly what our nation and much of the Bill of Rights, especially the Ninth Amendment, were founded upon.³⁴ Moreover, one should not confuse the supposed lack of direct remedies of individuals at the international level prior to World War II with a lack of individual rights under international law and various remedies in domestic legal processes.³⁵ Although rare, such remedies at the international level had been recognized.³⁶

Much of Professor Bradley and Goldsmith's reasoning rests on an erroneous premise that customary international law was and is merely "general common law."³⁷ Because customary international law is not mere "common law" but part of the "law of the land" and "laws of the United States" within constitutionally-based judicial authority and responsibility,³⁸ their nearly obsessive focus on *Erie R.R. Co. v. Thompkins*,³⁹ and *Swift v. Tyson*,⁴⁰ neither of which addresses international law or has had any demonstrated impact on actual patterns of federal court use of customary international law, is significantly flawed and misleading. Additionally, use of what are merely "common law," "law merchant," or "maritime" and "admiralty" cases and arguments of

34. See, e.g., PAUST, *supra* note 1, at *passim*. Early patterns of expectation concerning various types of human rights included especially civil and political rights against one's own government, state or federal. *Id.* Yet, there were many others. See, e.g., *id.*

35. This type of error also exists in their treatment of customary international law concerning the "denial of justice" to an alien. Compare Bradley & Goldsmith, *supra* note 26, at 831 n.106, with RESTATEMENT, *supra* note 21, § 711; PAUST, *supra* note 1, at 259–61, 290.

36. See, e.g., PAUST, *supra* note 1, at 290–91, 274–75.

37. See Bradley & Goldsmith, *supra* note 26, at 820, 823–24, 827, 844 & 849; Bradley & Goldsmith II, *supra* note 26, at 323 (falsely stating that 19th and 20th century cases applying CIL did so as "general common law"); *id.* at 324, 326, 331–32 & 334–35; Bradley & Goldsmith III, *supra* note 26, at 2262; Bradley, *Charming Betsy*, *supra* note 27, at 485, 493–94 & 523; Bradley, *Breard*, *supra* note 27, at 543 ("courts applied . . . only as a form of 'general common law. . ."). This sort of error continues to mislead others. See, e.g., Neuman, *supra* note 27, at 374, 381–82; Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law after Erie*, 66 *FORDHAM L. REV.* 393, 393, 408–10, 412–13, 425 & 433 (1997).

38. PAUST, *supra* note 1, at 5–8, 30–50 & 176; see *supra* notes 1–2, 4–10 & 13–15; see also Henkin, *supra* note 5, at 1561–62, 1564–65; Koh, *supra* note 1, at 1835 n.59; White, *supra* note 1; but see Koh, *supra* note 1, at 1835 n.61. With respect to *United States v. Smith* (18 U.S. (5 Wheat.) 153, 161 (1820)), in particular, compare PAUST, *supra* note 1, at 31 n.34, 140 n.96, with Bradley, *Charming Betsy*, *supra* note 27, at 488 n.46. Further, customary international law is of a higher status than mere common law and, in case of a clash, should trump mere common law. See, e.g., PAUST, *supra* note 1, at 5–8, 30 n.34, 36 n.39, 42–43 n.47, 92 & 120–22 n.55; cases cited *infra* note 52.

39. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64 (1938).

40. *Swift v. Tyson*, 41 U.S. (14 Pet.) 1 (1842). Professor Bradley misstates the case, which made no mention of international law, when he argues that *Swift* is an example of a court treating customary international law "as part of the 'general common law.'" Bradley, *Charming Betsy*, *supra* note 27, at 493 & n.75.

others who rely on such cases are seriously misplaced.⁴¹ For example, Bradley and Goldsmith reference *United States v. Hudson & Goodwin*,⁴² a case that addresses mere “common law” and makes no mention of the law of nations or international law.⁴³ Further, Bradley and Goldsmith’s references to cases and opinions using the phrases “laws of the United States,” “law of the land,” and “our law,” are incomplete and potentially misleading.⁴⁴

Their disfavored theory requires that “all law applied by federal courts . . . be either federal law or state law”⁴⁵ and recognition that “if CIL [customary international law] is not federal law, then there is no basis for the federal judiciary to enforce CIL. . . .”⁴⁶ If so, the inescapable fact of continued use of customary international law in the

41. Compare Bradley & Goldsmith, *supra* note 26, at 822, 824, 850 n.222, 851 & nn.230–31, 852–56 & 859, and Bradley & Goldsmith II, *supra* note 26, at 324 n.28, with PAUST, *supra* note 1, at 30–33. Concerning mere “maritime” law, which was not customary international law, see PAUST, *id.* at 33 n.34, and compare Koh, *supra* note 1, at 1830–32, 1835 & nn.59, 61.

42. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32–33 (1812).

43. Compare Bradley & Goldsmith, *supra* note 26, at 851 & n.231 (and other cases cited therein), with PAUST, *supra* note 1, at 32–33, 44–45 (noting that despite the Supreme Court’s prohibition of “common law” crimes as such, subsequent cases did not invalidate indictments based on direct incorporation of the law of nations for criminal sanction purposes); PAUST, BASSIOUNI, ET AL., *supra* note 19, at 210–12; U.S. DEP’T OF ARMY FIELD MANUAL FM 27–10, THE LAW OF LAND WARFARE ¶.505 (e) (1956) (“As the international law of war is part of the law of the land in the United States, enemy personnel charged with war crimes are tried directly under international law without recourse to the statutes of the United States.”); and *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942). After *Hudson & Goodwin*, in *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820), it was not thought that Congress must definitely implement customary international criminal law by legislation. The *Smith* Court stated: “But supposing Congress were bound in all cases . . . to define,” *id.* at 159, thus implying that Congress may not have to define such offenses. Bradley and Goldsmith mislead readers when stating that the rejection of “common law” crimes cases occurred “even in cases involving violations of the law of nations.” Bradley & Goldsmith II, *supra* note 26, at 333. There are no such cases after *Hudson & Goodwin*. As noted here, on the contrary, there are cases involving direct incorporation of customary international law for criminal sanction purposes.

44. For an examination of the use of these phrases, and why Bradley and Goldsmith’s references to these phrases are incomplete, compare Bradley & Goldsmith, *supra* note 26, at 823, 834 n.125 & 850–51, and Bradley & Goldsmith II, *supra* note 26, at 332 n.69 (providing incomplete quotes of Chief Justice Jay and Attorney General Randolph), with PAUST, *supra* note 1, at 6–7, 34–36, 40–43 & 47; *supra* notes 4–13 and accompanying text. More recently, one finds the erroneous claim that all “part of our law” cases “simply demonstrate that” customary international law “was treated as part of . . . general common law.” Bradley, *Breard*, *supra* note 27, at 545.

45. Bradley & Goldsmith, *supra* note 26, at 852.

46. *Id.* at 846; Bradley, *Charming Betsy*, *supra* note 27, at 523. See Bradley & Goldsmith, *supra* note 26, at 847; see also Bradley, *Charming Betsy*, *supra* note 27, at 526 (arguing that courts should abandon judicial power and responsibility under the Constitution and allow Congress and the President to violate international law). Nonetheless, they admit that often in our history “federal courts applied CIL in a variety of contexts . . . usually in the absence of statutory . . . authorization . . . [and also] as part of ‘our law’ or ‘the law of the land.’” Bradley & Goldsmith, *supra* note 26, at 822–23; see also *id.* at 834 n.125, 850–51 & nn.223, 229–230.

federal courts and overwhelming patterns of supportive expectation, regardless of customary international law's domesticated name or classification (which clearly has not been merely "state law"), speak loudly with respect to the general validity of their theory and its erroneous premise. Moreover, this use continued after *Erie* and its supposedly relevant reasoning. Additionally, if *Erie*, which is not on point, requires that mere "common law" have some sort of authorization,⁴⁷ such a need is met with respect to customary international law given its constitutional bases in Articles III and VI of the U.S. Constitution as well as in other constitutional provisions and various federal statutes (also providing subject matter jurisdiction).⁴⁸

A thorough inquiry into actual patterns of legal expectation documented in numerous federal court opinions demonstrates that customary international law has long been incorporated by the federal judiciary for federal decision-making and that the sweeping claim of Professors Bradley and Goldsmith that customary international law lacked supremacy consequences,⁴⁹ lacked jurisdictional conse-

47. Bradley & Goldsmith, *supra* note 26, at 852 & n.243 (appropriate if merely "governed by the Federal Constitution"); *id.* 855-56 & n.263.

48. See PAUST, *supra* note 1, at 5-8, 30-50, 95, 174-75, 186, 192-94, 222, 246-48, 338-40 & *passim*; Dickinson, *supra* note 1, at 48 ("the Constitution accepted the Law of Nations as national law. . ."); see *supra* notes 5-6, 15, 22 & 24; but see Bradley & Goldsmith II, *supra* note 26, at 345; Bradley, *Status of Customary International Law*, *supra* note 33, at 20-21 nn.80-87 and accompanying text. Specifically, customary international law has various bases in the Constitution as well as in Acts of Congress (either of which should satisfy the language found in *Erie*). The more general statutory base is 28 U.S.C. § 1331. See *supra* note 24. The fact that customary international law has several constitutional bases for incorporation does not mean, however, that all customary international law or even all customary rights (or even all customary human rights) are constitutional rights in the normal sense of the phrase. The Bill of Rights provide a constitutional basis for many customary human rights, and the Ninth Amendment was meant to protect customary human rights for "the people." But, given the interpretation of the phrase "the people" in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), it does not appear that the Ninth Amendment reaches all customary human rights for all persons. Nonetheless, the Fifth, Fourteenth, and various other amendments also provide protection with respect to some human rights for aliens. See, e.g., *United States v. Toscanino*, 500 F.2d 267, 276-80 (5th Cir. 1974); *United States v. Yunis*, 681 F. Supp. 896, 916-18 (D.D.C. 1988); *United States v. Tiede*, Crim. Case No. 78-001A (U.S. Ct. for Berlin Mar. 14, 1979), 85 F.R.D. 227 (1979), reprinted in 19 I.L.M. 179 (1980).

49. Compare Bradley & Goldsmith, *supra* note 26, at 821, 824-25 & 851, Bradley & Goldsmith II, *supra* note 26, at 323-24, 335, Bradley & Goldsmith III, *supra* note 26, at 2262, 2265-66, Bradley, *Charming Betsy*, *supra* note 27, at 493 n.77, Bradley, *Breard*, *supra* note 27, at 543 (erroneous statement: "did not preempt state law"), *id.* at 554 (making outrageous, ahistorical statement that supremacy of CIL "has essentially no support in American case law" and "the Supreme Court has not addressed the issue"—concerning merely Supreme Court cases, see, e.g., *infra* note 52, and PAUST, *supra* note 1, at 15, 42-43, n.47, 44 n.50, 131 n.79 & 186-187), with PAUST, *supra* note 1, at 6-7, 15-16, 36 & 42-44 (universally binding, all tribunals), *id.* at 92, 97 & 121-22 (noting that the view of the Continental Congress had been similar to Philip Jessup's policy argument mentioned in Bradley & Goldsmith, *supra* note 26, at 859), *id.* at 131, 134, 139-40, 179, 182-83, 187, 193, 229, 248 n.391, 333-34 & 352, RESTATE-

quences,⁵⁰ and lacked “other consequences of federal law”⁵¹ is erroneous. Further, if general common law lacked such consequences and did not bind the states, use of the law of nations by state courts at various times in our history, often with recognition that such law is binding, and related recognitions by the federal judiciary also stand in opposition to claims that customary international law was mere common law and was not considered binding.⁵² Similarly, if “general common law” was not considered part

MENT, *supra* note 21, §§ 111 cmt. d & 115 cmt. e, LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 69 (1995), Henkin, *supra* note 5, Koh, *supra* note 1, at 1835 n.59, 1846 & 1851, and *infra* note 52. The view that customary international law is not binding law in the United States is actually without support in the views of the Founders, the text and structure of the Constitution, or federal judicial opinions. From a policy perspective, it would thwart the fundamental purposes of the supremacy clause, and it would disturb foreign relations. See also *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424–25 (1964); MARK W. JANIS & JOHN E. NOYES, INTERNATIONAL LAW 211 (1997). Concerning the ambiguous language “in Pursuance thereof” in Article VI of the Constitution, compare Bradley, *Status of Customary International Law supra* note 33, at 21, and Bradley & Goldsmith II, *supra* note 26, at 321 n.12 (“pursuant to U.S. constitutional processes”), with PAUST, *supra* note 1, at 43, as is stated:

Article VI . . . might require (1) that customary international law be “made” (as it is in part) by U.S. participation in pursuance of constitutional authority or powers, or (2) that customary law, to be supreme federal law, must be in conformity with (*i.e.*, in pursuance of) the Constitution. Certainly such a phrase does not require “enactment.”

50. Compare Bradley & Goldsmith, *supra* note 26, at 821, Bradley & Goldsmith II, *supra* note 26, at 324, 335, and Bradley & Goldsmith III, *supra* note 26, at 2262, with PAUST, *supra* note 1, at 8, 34 & nn.37–38, 42 & nn. 46–47, 45–46, 201–02 & 264–70 & nn.497–512, *Hudson v. Guestier*, 8 U.S. (4 Cranch) 293, 294 (1808), *Church v. Hubbard*, 6 U.S. (2 Cranch) 187 (1804) (counsel), and *United States v. Peters*, 3 U.S. (3 Dall.) 121, 129–32 (1795).

51. Compare Bradley & Goldsmith, *supra* note 26, at 820–21, Bradley & Goldsmith II, *supra* note 26, at 324, 335, Bradley, *Charming Betsy*, *supra* note 27, at 493 n.77, Bradley, *Breard*, *supra* note 27, at 543 (“U.S. courts in the nineteenth century did not treat customary international law as federal law”), and *id.* at 546, with PAUST, *supra* note 1, at 5–8, 29–50, 143–46, 154–60, 201–02 & 264–70 & nn.497–512.

52. See *supra* notes 3 & 49. For additional recognition that states are bound by the law of nations, see, for example, *Skiriotes v. Florida*, 313 U.S. 69, 72–73 (1941) (“International law . . . is the law of all States of the Union.”); *Manchester v. Massachusetts*, 139 U.S. 240, 264 (1891) (states are bound by law of nations in defining their boundaries); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 560 (1857) (McLean, J., dissenting) (“our States . . . are independent, . . . subject only to international laws. . . .”); *Murray v. Chicago & N.W. Ry. Co.*, 62 F. 24, 42 (N.D. Iowa 1894) (“no more subject to abrogation or modification by state legislation than are the principles of the law of nations. . . .”); *United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686, 692 (D.C.E.D. Pa. 1855) (No. 16,726) (each state “is bound by . . . because of its universal obligation, . . . the ‘law of nations.’ What it could not do if freed from federative restrictions, it cannot do now; every restraint upon its policy . . . binds it still. . . .”); *Thompson v. Doaksum*, 68 Cal. 593, 596, 10 P. 199, 201 (1886) (the obligation to protect private rights under the law of nations “passed to the new government”); *Teschmacher v. Thompson*, 18 Cal. 11, 22–23 (1861) (inviolability of property rights exists under the law of nations); *Riddell v. Fuhrman*, 233 Mass. 69, 73, 123 N.E. 237, 239 (1919) (“‘International law is a part of our law’ and must be administered whenever involved in causes presented for determination.”); *Territory ex rel. Wade v. Ashenfelter*, 4 N.M. 93, 148, 12 P. 879 (1887) (New

Mexico judicial duty is "to maintain only those principles of law . . . proper for the protection of human rights. . . ."); *People v. Liebowitz*, 140 Misc.2d 820, 822, 531 N.Y.S.2d 719, 721 (1988) ("Even in the absence of a treaty, it is a court's obligation to enforce recognized principles of international law where questions of right depending on such principles are presented for the court's determination."); *Republic of Argentina v. City of New York*, 25 N.Y.2d 252, 259, 250 N.E.2d 698, 700 (Ct. of App. N.Y. 1969) (action "in this case is mandated by the rules of international law. It is settled that . . . all domestic courts must give effect to customary international law."); *De Simone v. Transportes Maritimos do Estado*, 200 A.D. 82, 89 (S.Ct. N.Y., App. Div., 1st Dep't. 1922) (" . . . the court has no jurisdiction and could not disregard the protest and overrule the objection by a claim . . . [under] the municipal law of this State . . . , for by the law of nations an adjudication. . . could not be made. . . ."); and *Stanley v. Ohio*, 24 Ohio St. 166, 174 (1873) (state has concern "to discharge such duties as are imposed upon it by the law of nations").

[T]he rule is firmly established and uniformly recognized that "International law is part of our law and as such is the law of all States of the Union The rule has been briefly stated as follows: . . . the law of nations is to be treated as part of the law of the land. The courts of all nations judicially notice this law, and it must be ascertained and administered by the courts of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. . . ." 30 Am. Jur., *International Law*, p. 178 § 7. . . . In essence, the rule appears to be that international law is part of the law of every state which is enforced by its courts without any constitutional or statutory act of incorporation by reference, and . . . relevant provisions of the law of nations are legally paramount whenever international rights and duties are involved before a court having jurisdiction to enforce them.

Peters v. McKay, 195 Or. 412, 424, 426, 238 P.2d 225, 230-31 (S.Ct. Ore. 1951). In addition, see, for example, *Banks v. Greenleaf*, 10 Va. 271, 277 (1799) ("Admiralty causes bind all the world; because decided, upon the laws of nations. . . ."); *State v. Pang*, 132 Wash.2d 852, 908, 940 P.2d 1293, 1322 (1997) ("International law is incorporated into our domestic law."); *Woodworth v. Fulton*, 1 Cal. 295, 306 (1850) ("the law of nations, . . . , as it is a part of the laws of all civilized countries, forms also a branch of American jurisprudence."); and *People ex rel. Attorney-General v. Naglee*, 1 Cal. 232, 234 (1850) (state has "power to do a given act, which, without a transgression of international law, falls within the scope of powers of any independent nation," unless transferred to federal government).

However inclined courts may be to follow the interpretation of such statutes by the courts of the State which has enacted the statute, their interpretation is not conclusive, and . . . the Supreme Court distinctly lays down the rule that the question of international law as to whether the action is to enforce a penalty or not "must be determined by the court, State or National, in which the suit is brought." The test is not by what name the statute is called by the Legislature or by the courts of the State in which it was passed. . . .

Maryland v. Turner, 75 Misc. 9, 11, 132 N.Y.S. 173, 174 (1911); see also *Lehman v. McBride*, 15 Ohio St. 573, 607 (1863) (in face of argument that state legislation violates international law and is therefore void, state legislation was construed so as not to be extraterritorial in violation of international law); *Ex parte Bushnell*, 9 Ohio St. 77, 189 (1859) ("The constitution of the United States was framed, and the union perfected, subordinate to, and without violating the fundamental laws of nations. . . ."); *McArthur v. Kelly*, 5 Ohio 139, 143 (1831) ("The law of nations require it."); *Siplyak v. Davis*, 276 Pa. 49, 57, 119 A. 745, 747 (1923) (" . . . where the general law of nations and those of foreign commerce say the contrary . . . I very much question the power or authority of any state or nation . . . to pass such a law" (quoting *Robinson v. Wall*, 2 Nott & McC. 498, 503-05); *Manhattan Life Ins. Co. v. Warwick*, 61 Va. (20 Gratt) 614, 651-52 (1871) ("can it be maintained that this statute . . . shall override the

of the "Laws of the United States,"⁵³ it is telling that customary international law certainly was.⁵⁴ One case that Professors Bradley and Goldsmith cite, *Ker v. Illinois*,⁵⁵ actually declares that a state court "is bound to take notice" of the law of nations, "as . . . is . . . the courts of the United States."⁵⁶ Another case cited, *Huntington v. Attrill*,⁵⁷ actually recognizes that questions of international law involve concurrent duties since they "must be determined in the first instance by the court, state or national, in which the suit is brought," and adds both that such questions can be brought in federal courts and that the federal court "must decide for itself, uncontrolled by local decisions."⁵⁸

public and universal law of nations . . . ? . . . The refutation of such a proposition is found in its simple statement. It would be a solecism in law and reason. . . ."); Neuman, *supra* note 27, at 377. See *infra* note 159 and accompanying text.

Professor Peter Spiro claims that "no federal court has ever nullified a state law as inconsistent with customary norms." Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 578 n.40 (1997). In view of predominant expectations since the time of the Founders, which have apparently shaped the behavior of state legislative bodies, and cases noted above, such a statement is misleading. When he adds "[n]or have the courts shown any inclination to trump state laws with customary norms," *id.* at 578, the error of such a remark is quite evident in view of general patterns of legal expectation noted in the cases above. Clearly also, one should not infer that states are not bound by international law. For example, it may be that no federal case actually holds that state law cannot authorize genocide or other crimes against humanity within a state's borders. To conclude that state legislators or judges are therefore free to authorize such international crimes or to disregard their prohibition under customary international law would be fallacious. It would be similarly erroneous to proffer that courts had shown no inclination to trump state laws permitting genocide or crimes against humanity. Indeed, there has been some attention to the legal relevance and/or primacy of prohibitions of genocide and other crimes against humanity in state courts. See, for example, *Smith v. Regents of the University of California*, 4 Cal.4th 843, 884, 844 P.2d 500, 528 (1993) (Arabian, J., dissenting) (citing *Healy v. James*, 408 U.S. 169, 189-92 (1972)), which recognized that a university may properly deny recognition and funding to activities presenting "an imminent threat to campus order through the promotion of racial genocide." See also *Wilkinson v. People*, 86 Col. 406, 411 (1929) (ruling that state statute did not preclude the wife of the accused from testifying against the accused who was charged with a "crime committed against the natural daughter of the wife, and therefore an outrage . . . as well as a crime against humanity"), quoted in *State v. Crow*, 104 Ariz. 579, 586, 457 P.2d 256, 263 (1969); *O'Loughlin v. People*, 90 Colo. 368, 378, 10 P.2d 543, 546 (1932).

53. See Bradley, *Status of Customary International Law*, *supra* note 33, at 8.

54. See PAUST, *supra* note 1, at 6 & 40.

55. *Ker v. Illinois*, 119 U.S. 436, 444 (1886), cited in Bradley & Goldsmith, *supra* note 26, at 824 n.53; Bradley & Goldsmith II, *supra* note 26, at 324 n.28; Bradley, *Breard*, *supra* note 27, at 543 n.72.

56. *Ker*, 119 U.S. at 444.

57. *Huntington v. Attrill*, 146 U.S. 657, 683 (1892), cited in Bradley & Goldsmith, *supra* note 26, at 824 n.48; Bradley & Goldsmith II, *supra* note 26, at 332 n.64.

58. *Huntington*, 146 U.S. at 683. The Court did *not* hold that customary international law was not "federal law." But see Bradley & Goldsmith II, *supra* note 26, at 334. Nor did the *Huntington* Court completely reject what Bradley and Goldsmith refer to as "the modern position" in *id.* at 335 n.85. See *Huntington*, 146 U.S. at 683.

There are simply no known federal cases ruling that states can violate customary international law, and although, as Professors Bradley and Goldsmith point out, there are rare cases (late in our history) denying merely Supreme Court jurisdiction to review state rulings (a denial that is no longer authoritative),⁵⁹ at least two such cases actually reaffirm that state courts are “bound to take notice” of and are bound “as fully” to apply customary international law.⁶⁰ Not one of the cases noted declares that international law is not part of the law to be applied in lower federal courts. Indeed, these cases recognize that federal courts have the same duties as states with respect to cases that originate in federal courts. That others make broad, historically indefensible statements concerning such rare and specific rulings and ignore other recognitions even in such cases, is regrettable but of no authoritative support for even more erroneous generalities.

With respect to state competence, by necessary implication the very fact that under the Supremacy Clause state courts are bound to apply international law enhances their power to do so. The *Restatement* notes:

Questions under international law or international agreements of the United States often arise in State courts. As law of the United States, international law is also the law of every State, is a basis

59. See Bradley & Goldsmith, *supra* note 26, at 824 n.53 (citing *Ker v. Illinois*, 119 U.S. 436, 444 (1886), and *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286–87 (1875)); Bradley & Goldsmith II, *supra* note 26, at 324 n.28, 332 & n.64, 334 n.84; Bradley & Goldsmith III, *supra* note 26, at 2262 n.17; Bradley, *Status of Customary International Law*, *supra* note 33, at 10–11 (adding *Oliver American Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924)); see also RESTATEMENT, *supra* note 21, § 111 reporters’ note 3. Concerning *Ker*, see *supra* note 55 and accompanying text. Concerning *New York Life*, see PAUST, *supra* note 1, at 33 & 40. In my opinion, Justice Bradley, who dissented in *New York Life*, was correct that customary international law is “law of the United States” for purposes of Supreme Court review of state decisions. See *New York Life Ins. Co.*, 92 U.S. at 287–88 (Bradley, J., dissenting); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) at 474; *Neuman*, *supra* note 27, at 374 n.14. Justice Bradley later wrote for the majority in cases referring to international law. See PAUST, *supra* note 1, at 33, citing *Amy v. City of Watertown*, 130 U.S. 320, 326 (1888); *Coffee v. Grover*, 123 U.S. 1, 9 (1887). Justice Bradley was ultimately thoroughly vindicated by the Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) (“must be treated exclusively as an aspect of federal law . . . rules of international law should not be left to divergent and perhaps parochial state interpretations.”). See RESTATEMENT, *supra* note 21, §§ 111 reporters’ notes 2–3 & 115, cmt. e.

60. *Oliver American Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924) (stating that the question is one of “general law applicable alike” and “as fully” to “suits in state courts as to those in the courts of the United States” and should be “transferred to the Circuit Court of Appeals for the Second Circuit”); *Ker v. Illinois*, 119 U.S. 436, 444 (1886) (finding that the state court “is bound to take notice” of the law of nations, “as . . . is (sic) . . . the courts of the United States”). *Huntington*, 146 U.S. at 683, which uses the word “must,” is quite consistent. See *supra* note 58 and accompanying text.

for the exercise of judicial authority by State courts, and is cognizable in cases in State courts. . . .⁶¹

The *Restatement* adds: "State courts take judicial notice of federal law and will therefore take judicial notice of international law as law of the United States."⁶² Earlier in our history, the Supreme Court of Kentucky devised a remedy for an act of war by Confederate soldiers in violation of the law of nations, as that Court noted: "There is nothing in the Federal Constitution which deprives a State court of power to decide a question of international law incidentally involved in a case over which it has jurisdiction. . . ."⁶³ Today, 28 U.S.C. § 1441 (b) allows removal of an action from a state to a federal court, but, per terms of the statute, only if jurisdiction is actually "founded on a claim or right arising under" international law. Thus, removal is not required if international law is only incidentally involved.⁶⁴

With respect to the nature of customary international law, Professors Bradley and Goldsmith state incorrectly that the dissenter view is the "prevailing view,"⁶⁵ that the only participants concerning its formation and meaning are states;⁶⁶ that state "consent" is the basis of customary law;⁶⁷ that it does not specify how obligations must be treated within

61. RESTATEMENT, *supra* note 21, § 111 cmt. d; *see also* HENKIN, *supra* note 1, at 422 n.3, 423, 428 & 509 n.17 ("States can continue to enforce international law unless barred by federal law. Compare *Fox v. Ohio*, 46 U.S. (5 How.) 410, 417 (1847)."); *id. at passim*; Bradley & Goldsmith II, *supra* note 26, at 350.

62. RESTATEMENT, *supra* note 21, § 113 cmt. b. On judicial notice of international law, *see* PAUST, *supra* note 1, at 7, 26, 46–48, 132, 157, 265 & 271.

63. *Christian County Court v. Rankin & Tharp*, 63 Ky. (2 Duvall) 502, 505–06 (1866), *quoted more fully in* PAUST, *supra* note 1, at 200–01; 263–64 (citing other state court cases of a related nature); *see also supra* note 52.

64. *See* *Marathon Oil Co. v. Ruhrgas*, 1997 U.S. App. LEXIS 13676 (June 10, 1997) (stating that under "the well-pleaded complaint rule," if the complaint alleges only state law causes of action, removal will not obtain unless there is "a cause of action necessarily requiring 'the resolution of a substantial question of federal law.'"); *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540 (5th Cir. 1997); *Baker v. Bell Helicopter/Textron, Inc.*, 907 F. Supp. 1007, 1011–12 (N.D. Tex. 1995); *see also* *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1348–49 (S.D. Tex. 1995).

65. *Compare* Bradley & Goldsmith, *supra* note 26, at 857 n.275, *with* PAUST, *supra* note 1, at 14–18, *and* HENKIN, *supra* note 1, at 233 (affirming that international law is binding on all).

66. *Compare* Bradley & Goldsmith, *supra* note 26, at 838, *and* Bradley & Goldsmith II, *supra* note 26, at 325, *with* PAUST, *supra* note 1, at 1–3, 10–14 & 151, *and* Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 GEO. J. INT'L & COMP. L. 147, 147, 150, 155–58, 161–62, 164 (1996). In Bradley & Goldsmith, *supra* note 26, at 838 n.153, Bradley and Goldsmith miscite *The Scotia*, 81 U.S. (14 Wall.) 170 (1871), which actually noted that customary international law is founded on the "common consent of mankind." Bradley & Goldsmith, *supra* note 26, at 187–88 (emphasis added).

67. *Compare* Bradley & Goldsmith, *supra* note 26, at 838, *and* Lessig, *supra* note 29, at 1796–97 *with* PAUST, *supra* note 1, at 10–17, 28, Paust, *supra* note 66, at 151–52. Bradley and

domestic legal processes;⁶⁸ that it does not extend to or address “domestic enforcement,” access to courts, or remedies (including punitive damages);⁶⁹ and that it was antithetical for customary legal rights of individuals to obtain against states, especially against one’s own state.⁷⁰

In another article, Professor Bradley states that there are no 19th Century cases actually invalidating a presidential or congressional act.⁷¹ This would not be surprising, since it seems that well into the 20th Century no one expected that the President or Congress could even authorize a violation of customary international law and nothing in the text or structure of the Constitution permits such a result. Actually, it is more

Goldsmith also miscite J. L. Brierly concerning state “consent.” See Bradley & Goldsmith, *supra* note 26, at 838–39 & n.154. Brierly actually recognized a significant difference between “consent” and expectation. J.L. BRIERLY, *THE LAW OF NATIONS* 51–52 (6th ed. 1963) (“a customary rule is observed, not because it has been consented to, but because it is believed to be binding . . . [and such] does not depend . . . on the approval of the individual or the state. . .”).

68. Compare Bradley & Goldsmith, *supra* note 26, at 819 n.19, Bradley & Goldsmith II, *supra* note 26, at 321, 332 (quoting Louis Henkin), *id.* at 346, and Bradley & Goldsmith III, *supra* note 26, at 2274, with PAUST, *supra* note 1, at 8, 198–203, 212, 256, 259–64 & *passim*.

69. Compare Bradley & Goldsmith II, *supra* note 26, at 346, and Bradley & Goldsmith III, *supra* note 26, at 2274, with PAUST, *supra* note 1, at 8, 34 n.38, 49 n.75, 198–203, 212, 256–72, 280 n.556 & 292, *supra* note 6 and accompanying text, and *infra* note 97. Bradley and Goldsmith erroneously add that in *Filartiga* the district court’s adoption of punitive damages “was not contemplated by . . . international law. . . .” Bradley & Goldsmith II, *supra* note 26, at 346; *but see* *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 865 (E.D.N.Y. 1984); PAUST, *supra* note 1, at 203, 271–72 n.526, 212 & 292 n.621.

70. Compare Bradley, *Charming Betsy*, *supra* note 27, at 511 (quoting MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 245 (2 ed. 1993)), *id.* at 513, Bradley & Goldsmith, *supra* note 26, at 822 (incorrect and incomplete list of alleged categories of customary international laws quoted), *id.* at 831 & n.106, 828 & 839–42, and Bradley & Goldsmith II, *supra* note 26, at 335 & 359, with PAUST, *supra* note 1, at 8, 44, 169–75, 198–203, 209–10, 256–70, 288–91, 323–25, 329, 333 & *passim*, Ferris v. Coover, 10 Cal. 589, 619 (1858) (private rights in property protected “[b]y the law of nations, independent of treaty stipulations”), *Vanderslice & Clarkson v. Hanks*, 3 Cal. 27, 37 (1852) (regarding “legal rights of private persons. By the law of nations they are equally protected without any treaty stipulations”), *Reynolds v. West*, 1 Cal. 322, 328 (1850) (same), *Woodworth v. Fulton*, 1 Cal. 295, 306 (1850) (“the law of nations, which, as it is a part of the laws of all civilized countries, forms also a branch of American jurisprudence. By international law private rights are unaffected by conquest.”), *Territory of New Mexico v. Delinquent Tax List*, 73 P. 621, 622 (N.M. 1903) (“The effect of this treaty, and indeed, of the law of nations independent of the treaty, was to leave titles . . . perfect and complete under the United States. They were ‘intrinsicly valid’ and needed ‘no sanction from the legislative or judicial departments. . . .’”), and *United States v. Lucero*, 1 N.M. 422, 429 (1869) (“the right of the people to have their title to their property recognized and confirmed” has been settled by the Supreme Court as “the law of nations”). Bradley and Goldsmith have a generally impoverished and nearly Borkian view of the reach of customary international law. See Bradley & Goldsmith II, *see supra* note 26, at 359–60. For a fuller range of early subjects is identified, see, for example, PAUST, *supra* note 1, at 8, 49–50, 169–76, 182–83 & 207–10 (addressing Borkian errors).

71. See Bradley, *Status of Customary International Law*, *supra* note 33, at 14; *but see* PAUST, *supra* note 1, at 138 n.96 (discussing an 1892 case).

telling that there were no cases holding that presidential or congressional acts prevail against customary international law until the mid-1980s when a complete and unprofessional misreading of *The Paquete Habana*⁷² occurred, all in lower federal court cases concerning the mistreatment of aliens.⁷³ Further, in the 20th Century, there are cases allowing customary international law to prevail against Executive acts,⁷⁴ including *The Paquete Habana*, and congressional legislation.⁷⁵ As my treatise documents with respect to presidential power, rulings concerning similar claims (e.g., concerning the primacy of customary international law over acts of lower officials and even alleged orders or approval by the President) are near rulings, and overwhelming patterns of legal expectation that the President and other federal officials are bound by international law have long supported these results.⁷⁶ Of course, Article II, section 3, of the Constitution requires the President faithfully to execute the "Laws," an unavoidable constitutional duty that also happens to enhance presidential power to enforce customary international law.⁷⁷

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

73. See PAUST, *supra* note 1, at 92–95, 146, 148–50 & 161–64; Bradley, *Breard*, *supra* note 27, at 552 & n. 129 (ignoring *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 261 (1984) (O'Connor, J., opinion)). Because newer cases rest on a complete and serious misreading of *The Paquete Habana* and are not supported by the text and structure of the Constitution and the views of the Founders, they should be overruled. With respect to Congress, the judiciary apparently never questioned that customary international law conditioned congressional power and that such law would prevail in case of an unavoidable clash until dictum appeared in unreasoned federal opinions in 1919 and 1925. See *id.* at 6, 38–39, 88–97, 120–23, 127–29 & 138–41.

74. See PAUST, *supra* note 1, at 146, 149 & 163–64. Professors Bradley and Goldsmith argue "if CIL is not federal law, then there is no basis for the federal judiciary to enforce CIL against the President." Bradley & Goldsmith, *supra* note 26, at 846; see also Koh, *supra* note 1, at 1835 n.61, 1839 (theoretic assumption that CIL is mere common law that the President can ignore and "supervise"); but see *id.* at 1842 (noting the actual ruling in *The Paquete Habana*). It is telling then that the federal judiciary has long expected that it can enforce customary international law against the Executive and did so in *The Paquete Habana*. It is apparently also important to Bradley and Smith's theory that "federal court interpretations of CIL would not be binding. . . ." *Id.* at 870. In *The Paquete Habana*, however, judicial interpretations were quite contrary to those of the President and were nonetheless binding. See PAUST, *supra* note 1, at 148–49, 158 & 163–64. As the *Restatement* declares: "a determination or interpretation of international law by the Supreme Court would also bind the Executive branch. . . ." RESTATEMENT, *supra* note 21, § 112 reporters' note 1. See also *infra* note 81.

75. See PAUST, *supra* note 1, at 138–39, 141.

76. See *id.* at 88, 124–25, 143–46 & 154–60. Bradley and Goldsmith admit that if customary international law "is not federal law, it is not by itself binding . . . on even low-level executive officials. . . ." Bradley & Goldsmith II, *supra* note 26, at 352. From their admission and the unswerving recognition until the mid-1980s that federal officials are bound by customary international law, it follows that customary international law is federal law. See also *supra* note 74.

77. See, e.g., PAUST, *supra* note 1, at 6, 34–37.

Additional errors include Professor Bradley and Goldsmith's statement that the only appropriate "sovereigns" are either the federal government or the states;⁷⁸ that only one court of appeal ever addressed whether the President is bound by customary international law;⁷⁹ that *Banco Nacional de Cuba v. Sabbatino*⁸⁰ "actually denied that all of CIL (customary international law) was enforceable federal law" and "did not hold that CIL was federal law;"⁸¹ and that "much of traditional CIL [customary international law] is only relevant to international diplomatic

78. Compare Bradley & Goldsmith, *supra* note 26, at 852, with PAUST, *supra* note 1, at 171-72, 194, 328-31, 347-49, 353 & 469-70.

79. Compare Bradley & Goldsmith, *supra* note 26, at 845 & n.199, with PAUST, *supra* note 1, at 155 ns.8-9, 13-14, 158-59 nn.28, 31, 36-37, 161 n.61 & 164 n.68.

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

81. Compare Bradley & Goldsmith, *supra* note 26, at 860, and Bradley & Goldsmith II, *supra* note 26, at 325, with *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. at 428, 430 n.34 ("There are, of course, areas of international law in which consensus as to standards is greater and which do not represent a battleground for conflicting ideologies. This decision in no way intimates that the courts of this country are broadly foreclosed from considering questions of international law."), *Filartiga v. Pena-Irala*, 630 F.2d at 881 (using the *Sabbatino* approach with respect to generally shared patterns of legal expectation that supply customary normative content), Goodman & Jinks, *supra* note 1, at 481-82, 484 & n.119, and Jordan J. Paust, 18 VA. J. INT'L L. 601 (1978) (letter) [hereinafter Paust, letter]. See also Glennon, *supra* note 24, at 1553 (citing that Bradley and Goldsmith's claim that federal court interpretations of customary international law should not bind the political branches is belied by "[n]umerous Supreme Court cases" and "*Sabbatino* and its progeny, far from supporting" a so-called principle connected with their argument, "flatly reject it. . .").

The quotes from *Sabbatino* offered by Bradley and Goldsmith are incomplete and seriously misleading. See Bradley & Goldsmith II, *supra* note 26, at 337 n.97 (misquoting 376 U.S. at 428, and manipulating the phrase "unambiguous agreement" to suit their argument by making the word "agreement" plural). What the Court referred to was an unambiguous agreement concerning the content of international law. The actual context in which the phrase appears makes this clear: "in the absence of a treaty or other unambiguous agreement regarding controlling legal principles. . . . There are few if any issues in international law today on which opinion seems to be so divided. . . . The disagreement as to relevant international standards. . . ." 376 U.S. at 430 n.34. See Goodman & Jinks, *supra* note 1, at 481-82, 484 & n.119; Paust, letter, *supra* at 601-03. The Court also looked to evidences of customary international law in connection with this inquiry, but found this evidence to be so "divided" and inconsistent that it fails to support a customs norm, despite an allocation in the complaint that a norm exists. 376 U.S. at 428-30. See Paust, letter, *supra*, at 601-04.

Contrary to Bradley and Goldsmith's new position, it makes sense to defer generally to the political branches concerning merely "foreign relations" or "policy" as such, but to identify and apply customary international law in cases or controversies before federal courts. *But see* Bradley & Goldsmith II, *supra* note 26, at 338; Bradley, *Charming Betsy*, *supra* note 27, at 525-26 (openly arguing from judicial deference regarding mere "relations" and "policy" as such that courts should also abdicate judicial power and responsibility under Article III, Sec. 2, cl. 1 and Article VI, cl. 2 of the Constitution to apply law); *cf. id.* at 531 (rightly noting the "traditional judicial role and competence" re: "evaluating the content of international law"). Concerning judicial power and responsibility to identify and apply customary international law, see, for example, PAUST, *supra* note 1, at 7-9, 26, 34-35, 38, 40-44, 46-48, 100, 121, 148-51, 159-64, 198-203 & *passim*, and see *supra* notes 1-2, 5-6, 8, 13-18, 20, 22, 24-25 & 31.

relations and never arises in domestic litigation . . . and is no longer relevant."⁸²

Professors Bradley and Goldsmith have also seriously misinterpreted *The Paquete Habana*, especially with respect to the actual position of the United States before the Supreme Court and the ruling that Executive actions were in violation of the law of nations, were thus invalidated, and were redressable in our courts,⁸³ a ruling upheld in an opinion by Justice Holmes some three years later.⁸⁴ Moreover, the split in authorities concerning the primacy of customary international law over a federal statute was not adequately addressed.⁸⁵ With respect to the split, there is sparse

82. Compare Bradley & Goldsmith II, *supra* note 26, at 326, 359–60, with PAUST, *supra* note 1, at 8, 48–50 (historic reach of the law of nations, including domestic jurisdiction and remedies) and *id.* at 198–203, 212, 256–72, 280 n.556 & 292, and *supra* notes 1–20. See also Bradley & Goldsmith II, *supra* note 26, at 325 (stating in error that “the focus of pre-World War II CIL” was “law regulating the relations among nations”); but see Bradley, *Charming Betsy*, *supra* note 27, at 510 (“[L]aw of nations regulated to some extent the behavior of individuals.”). They also misstate and ignore some of the early history of the Alien Tort Claims Act (“ATCA”). See Bradley & Goldsmith II, *supra* note 26, at 360–61, 363–64. Regarding early history and the ATCA, see, for example, *Bolchos v. Darrell*, 3 F. Cas. 810, 810–11 (D.S.C. 1795) (No. 1607); 1 Op. Att’y Gen. 57, 58 (1795); PAUST, *supra* note 1, at 207–08, 282–84 nn. 571–81; and Jordan J. Paust, *Litigating Human Rights: A Commentary on the Comments*, 4 Hous. J. INT’L L. 81, 84–5 (1981). For example, to state that at the time of the ATCA, extraterritorial use of the ATCA would have been unthinkable, see Bradley & Goldsmith II, *supra* note 26, at 361, is to ignore 1 Op. Att’y Gen. 57, 58 (1795), *Bolchos*, 3 F. Cas. at 810, and other historic expectations, including those concerning both transitory and universal jurisdiction relevant to several early subjects of customary international law. See also PAUST, *supra* note 1, at 8, 206, 280 nn.556–557, 393, 402–03 & 405. And Bradley and Goldsmith misstate the scope of § 2 (a) of the Torture Victim Protection Act. Compare Bradley & Goldsmith II, *supra* note 26, at 365, Bradley, *Charming Betsy*, *supra* note 27, at 523 n.253 (missing “apparent authority”), with § 2 (a) of the Act; Jordan J. Paust, *Suing Karadzic*, 10 LEIDEN J. INT’L L. 91, 94 (1997).

83. Compare Bradley & Goldsmith, *supra* note 26, at 842–43 & n.177, 845 n.199 & 849, Bradley & Goldsmith II, *supra* note 26, at 324 & n.27, 335 (“did not bind the Executive”), *id.* at 352 & n.185, 353 n.191, and Bradley, *Charming Betsy*, *supra* note 27, at 498 n.98 (but see *id.* at 504 n.126 (recognizing one of the recent cases applying customary international law directly to bind the Executive)), with PAUST, *supra* note 1, at 92–95, 146, 148–50, 161–64, and Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 VA. J. INT’L L. 981 (1994). Also, contrary to Bradley and Goldsmith, see Bradley & Goldsmith II, *supra* note 26, at 352 & n.185, the Court did not state that customary international law “is judicially enforceable” where there is no treaty, etc., but stated that courts must enforce customary international law where there is no treaty, etc., leaving unaddressed when courts may also enforce customary international law. See PAUST, *supra* note 1, at 136–38 nn.93–95, 148–50 & 162–63 n.63.

84. See *United States v. The Paquete Habana*, 189 U.S. 453 (1903); Paust, *supra* note 83, at 983 n.8, 988.

85. Compare Bradley & Goldsmith, *supra* note 26, at 843, with PAUST, *supra* note 1, at 38–39, 88–95, 120–23 & 138–41; see also Koh, *supra* note 1, at 1835 n.61 (making theoretic assumption that CIL is mere common law that can be trumped by a federal statute); *id.* at 1839; see *supra* note 73. Concerning *The Nereide*, 13 U.S. (9 Cranch) 388 (1815), compare Bradley & Goldsmith, *supra* note 26, at 843, with PAUST, *supra* note 1, at 128–29. Concerning Brown

precedent on either side. Nonetheless, no Supreme Court opinion has expressly approved the primacy of a federal statute, and a few Supreme Court opinions, plus what are still predominant trends in legal decision, actually support the primacy of customary international law.⁸⁶

Finally, Professors Bradley and Goldsmith complain that customary international law, highly valued by our Founders⁸⁷ and the most democratic form of international law,⁸⁸ is somehow anti-democratic.⁸⁹ With respect to democratic values, it is worth emphasizing that no single institutional arrangement necessarily represents authority or guarantees a democratic functioning or outcome.⁹⁰ At any given time, legislative bodies may merely represent special interests. The same pertains with respect to administrative bodies.⁹¹ Moreover, the Founders had worried about the dangers of oppression and denial of rights by a government that is a mere instrument of the majority. Judicial power is an integral

v. United States, 12 U.S. (8 Cranch) 110 (1814), compare Bradley & Goldsmith, *supra* note 26, at 843, with PAUST, *supra* note 1, at 123–24, 144–45 & 156.

Professor Bradley recently sought to cover up this significant split by arguing that “it is well settled” that “courts are to apply” a federal statute in case of a clear conflict with customary international law and that “lower courts unanimously have held” that this result should occur. Bradley, *Breard*, *supra* note 27, at 549 (erroneous and misleading statement: “lower courts uniformly have held”); Bradley, *Charming Betsy*, *supra* note 27, at 498–99 & n.98, 532; *see also id.* at 484 (arguing that *The Charming Betsy* did not require an override of statutes—but *see* Section IV of this essay). Bradley also misreads *The Paquete Habana*. *See* Bradley, *Charming Betsy*, *supra* note 27, at 498 n.98. *Lauritzen v. Larsen*, 345 U.S. 571, 577–79 (1953) seemed to state merely that a maritime doctrine of construction does not limit the power of Congress. Dictum in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 39–40 (1826) is more supportive of Professor Bradley’s preference. Concerning the RESTATEMENT’S ambiguous comment about “pre-existing” customary international law, compare Bradley, *Charming Betsy*, *supra* note 27, at 498, with PAUST, *supra* note 1, at 94, 141 nn.98–99.

86. *See generally* PAUST, *supra* note 1, at 6, 38–39, 88–90, 94–95, 99–101, 120–23, 138–41, 152 & 165–66; *see infra* notes 145–147, 155–156 & 160–172 and accompanying text.

87. *See, e.g.*, PAUST, *supra* note 1, at vii, 1, 5–6, 8, 10, 15–17, 34–37, 40–45, 47–50, 120–23, 139, 144–45, 154–55, 170–76, 182–83, 214–24 & *passim*; *see also* Neuman, *supra* note 27, at 383 (“rather late to claim that judicial application of customary international law was in principle inconsistent with the American understanding of democracy.”), *quoted in* Koh, *supra* note 1, at 1852.

88. *See* PAUST, *supra* note 1, at 2–3, 11, 13–14 and references cited; *see generally* Koh, *supra* note 1, at 1854, 1857–58 (stating that customary international law is democratic because there are various public and private actors involved). It is especially relevant that all individuals can participate directly or indirectly in the formation, change, and termination of customary international law. The Internet era should further democratize these forms of participation.

89. *See* Bradley & Goldsmith, *supra* note 1, at 821, 857–58, 868 & 871.

90. *See, e.g.*, PAUST, *supra* note 1, at 462–63; Koh, *supra* note 1, at 1854 & nn.172–173; James A.R. Nafziger, *Political Dispute Resolution by the World Court, with Reference to United States Courts*, 26 DENV. J. INT’L L. & POL’Y. (forthcoming 1999) (manuscript at 2–3, on file with author).

91. *See, e.g.*, Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 Nw. U. L. REV. 173 (1997); *see supra* note 90.

part of the constitutional design for the separation of powers⁹² and reflects, in part, “the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed.”⁹³ Additionally, our democratic process has provided constitutional and statutory bases for judicial incorporation of customary international law.⁹⁴

As noted, human rights, the preferred consequences of democracy, are especially relevant to such a constitutional design and were of significant concern to the Founders. It would be preposterous to claim that judicial enforcement of customary human rights “is inconsistent with fundamental constitutional values.”⁹⁵ More generally in human history, democracies have fostered, and dictatorships have feared, customary international law,⁹⁶ especially the guaranteeing of human rights for each human being. One can conceive of a democracy in complete isolation, although with an increasing global interdependence such a conception is ethereal. Nonetheless, to paraphrase the European Court of Human Rights, one can scarcely conceive of a democracy without fundamental human rights,⁹⁷ especially the right of access to courts.

92. See, e.g., PAUST, *supra* note 1, at 7–8, 34–48, 198–202, 264–70, 367, 374 & *passim*.

93. *I.N.S. v. Chada*, 462 U.S. 919, 947, 951 (1983); see also PAUST, *supra* note 1, at 349 n.44 (quoting from a Letter from James Madison to Thomas Jefferson (1788)); Eugene V. Rostow, *President, Prime Minister or Constitutional Monarch?*, 83 AM. J. INT’L L. 740, 743–44 (1989) (quoting Madison in *THE FEDERALIST* NOS. 47, 48).

94. See *supra* notes 5–6, 15, 22–24 & 48; Koh, *supra* note 1, at 1852–53.

95. Compare Bradley & Goldsmith II, *supra* note 1, at 369, with *supra* notes 1, 5–6, 15, 22–24, 31 & 48.

96. See also PAUST, *supra* note 1, at 194, 223 n.111 & 323.

97.

One can scarcely conceive of the rule of law without there being a possibility of having access to the courts. . . . The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally ‘recognized’ fundamental principles of law; the same is true of the principle of international law which forbids the denial of justice.

Golder v. United Kingdom, 18 Eur. Ct. H.R., ser. A, paras. 34–35 (1975); see also *Democracy and Legitimacy—Is There an Emerging Duty to Ensure a Democratic Government in General and Regional Customary International Law?* (panel discussion), in *CONTEMPORARY INTERNATIONAL LAW ISSUES: SHARING PAN-EUROPEAN AND AMERICAN PERSPECTIVES* 126–41 (1992); PAUST, *supra* note 1, at 170–76, 180, 194, 219–20, 364 & 379 n.14. The right to an effective remedy in domestic tribunals for human rights violations is a fundamental human right. See, e.g., PAUST, *supra* note 1, at 198–203, 256–72. Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”) upholds “a series of individual rights such as equality before courts and tribunals,” applies to procedures to determine their “rights and obligations in a suit at law,” and guarantees “equality before the courts, including equal access to courts.” *General Comment No. 13 (21), Report of the Human Rights Committee*, U.N. GAOR, 39th Sess., Supp. No 40, at 143, U.N. Doc. A/39/40, ¶¶ 1–3 (1984).

III. ERRORS CONCERNING THE RELEVANCE OF HUMAN RIGHTS TREATIES

Professors Bradley and Goldsmith shift from customary international law as such to argue that certain reservations, understandings, and declarations with respect to newer human rights treaties ratified by the United States demonstrate “that the treaties not apply as domestic law and thus not preempt inconsistent state law.”⁹⁸ they “ensure that these international human rights treaties do not apply as domestic federal law and do not preempt inconsistent state law;”⁹⁹ and add that “[t]his means that the federal political branches have declared . . . that a principal source of the CIL (customary international law) of human rights should not be considered a source of federal law;”¹⁰⁰ and that such treaties have “no effect on contrary domestic law absent subsequent federal legislation.”¹⁰¹ Professor Peter Spiro, focusing on the federal clauses in certain United States instruments of ratification, is more cautious. He argues that use of the “federalism” understandings “appears to deny operability where a treaty provision infringes on constitutionally protected state powers;”¹⁰² “appears to have achieved the same result” as defeated Bricker amendments;¹⁰³ and “[a]lthough they have no international effect, and can be plausibly read as ‘wholly circular’ and without independent meaning,¹⁰⁴ the context of their adoption evinces a consistent refusal to displace state law with international human rights obligations.”¹⁰⁵ There are several errors in these statements.

A. Self-Execution Declarations and Supremacy

Although the instruments of ratification for certain human rights treaties contain a declaration that much (but not all) of the articles are

98. Bradley & Goldsmith II, *supra* note 26, at 340; *see also* Bradley & Goldsmith III, *supra* note 26, 2269 (“ensure that the treaty norms do not apply as supreme federal law and do not affect the validity of inconsistent state law.”); *see infra* note 116.

99. Bradley & Goldsmith II, *supra* note 26, at 340; *see also* Bradley & Goldsmith III, *supra* note 26, at 2269.

100. Bradley & Goldsmith II, *supra* note 26, at 340.

101. *Id.* at 366 (emphasis in original); *see also* Bradley, *Charming Betsy*, *supra* note 27, at 497 (“not given effect . . . in the absence of implementing legislation,” thus also missing other uses of such law, including indirect incorporation as an interpretive aid). It should be noted that federal legislation is not the only method of executing a treaty. *See, e.g.*, PAUST, *supra* note 1, at 62–63, 97–98 (explaining that such treaties are also executable by another treaty, an executive agreement, or an executive order that has the force of law).

102. *See* Spiro, *supra* note 52, at 575.

103. *Id.* at 576.

104. *Id.* at 577, *citing* Neuman, *supra* note 52, at 52.

105. Spiro, *supra* note 52, at 577.

“non-self-executing,” such declarations function as reservations that are fundamentally inconsistent with the objects and purposes of the treaties and, under international law, are thus void *ab initio* and can have no legal effect.¹⁰⁶ Even if portions were “non-self-executing” in a general sense or in the special sense preferred by the Executive upon adoption (relating merely to the creation of a private cause of action directly under the treaties and thus not precluding use defensively, in a habeas petition, for supremacy purposes, or indirectly to interpret other law¹⁰⁷), the treaties should still trump inconsistent state law under the Supremacy Clause of the United States Constitution and the doctrine of federal preemption.¹⁰⁸

106. See, e.g., General Comment Adopted by the Human Rights Committee under Article 40, ¶ 4, of the International Covenant on Civil and Political Rights, Addendum, Hum. Rts. Comm., General Comment No. 24 (52), ¶¶. 7–9, 11–12, 20, at 3–5, 8, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994) [hereinafter General Comment No. 24], reprinted in PAUST, *supra* note 1, at 374–76; PAUST, *supra* note 1, at 361–68, 373–76; Bradley, *Charming Betsy*, *supra* note 27, at 521 n.245; Jordan J. Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. J. INT’L L. 659, 671 & nn.43–44 (1997) [hereinafter Paust, *Affirmative Action*]. General Comment No. 24 explains that although such a declaration is void, it is severable, and the ratifying state is bound by the treaty. General Comment No. 24, *supra* at para. 20; see also PAUST, *supra* note 1, at 376, 381 n.30; Advisory Opinion on Reservations to the Convention on Genocide, 1951 I.C.J. 1, 15; Loizidou v. Turkey, 310 Eur. Ct. H.R. (ser. A) (1995), reprinted in 90 AM. J. INT’L L. 98 (1996); Belios v. Switzerland, 132 Eur. Ct. H.R. (ser. A) (1998).

The interpretations of the Covenant by the Human Rights Committee created by the Covenant are authoritative. See Report of the Committee, 1994 Report, vol. 1, 49 U.N. GAOR, Supp. No. 40 U.N. Doc. A/49/40, para. 5 (“General comments . . . are intended . . . [among other purposes] to clarify the requirements of the Covenant. . . .”); RICHARD B. LILLICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS LAW* 224 (3 ed. 1995) (“the Human Rights Committee from time to time has issued general comments about the nature of the obligations states have assumed under particular articles of the Covenant. . . they are . . . the gloss . . . put on the Covenant’s substantive provisions. . . .”); United States v. Bakeas, 987 F. Supp. 44, 46 n.4 (D. Mass. 1997) (“[T]he Human Rights Committee has the ultimate authority to decide whether parties’ clarifications or reservations have any effect.”), citing Manfred Nowak, *The Activities of the U.N. Human Rights Committee: Developments from 1 August 1992 to 31 July 1995*, 16 Hum. Rts. L.J. 377, 380 (1995).

107. See, e.g., S. REP. NO. 102-23, 102d Cong., 2d Sess., Explanation of Proposed Reservations, Understandings and Declarations, at 19, reprinted in 31 I.L.M. 645, 657 (1992) [hereinafter Executive Explanation] (“The intent is to clarify that the Covenant will not create a private cause of action in U.S. courts.”); Bradley, *Charming Betsy*, *supra* note 27, at 521 n.244; Connie de la Vega, *Civil Rights during the 1990s: New Treaty Law Could Help Immensely*, 65 U. CINN. L. REV. 423, 467 & 470 (1997); Thomas M. McDonnell, *Defensively Invoking Treaties in American Courts—Jurisdictional Challenges under the U.N. Drug Trafficking Convention by Foreign Defendants Kidnapped Abroad by U.S. Agents*, 37 WM. & MARY L. REV. 1401 (1996); John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555 (1998); Paust, *Affirmative Action*, *supra* note 106, at 672 n.45.

108. See *Oyama v. California*, 332 U.S. 633, 649–50 (1948) (Black, J., concurring) (finding that human rights articles in U.N. Charter, which to date have not been found to be self-executing, provide additional reasons why a California “law stands as an obstacle to the free accomplishment of our policy in the international field” and cannot prevail); *id.* at 672–73 (Murphy, J., concurring) (“Its inconsistency with the Charter . . . is but one more reason why the statute must be condemned”); *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806) (seemingly non-self-executing treaty “is supreme” over state constitution); 6 Op. Att’y Gen.

The Supremacy Clause mandates that “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, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding,”¹⁰⁹ not that some treaties or only “self-executing” treaties have that effect.¹¹⁰ Certainly a mere declaration of a President, even with full consent of the Senate, cannot alter a constitutional command. Thus, a declaration of non-self-execution, even if not void under international law, is unconstitutional and void under the Supremacy Clause.¹¹¹ Moreover, as the Supreme Court emphasized with broad language in *United States v. Pink*,¹¹² “state law must yield when it is inconsistent with, or impairs the policy or provisions of, a treaty . . . [and] must give way before the superior Federal policy evidenced by a treaty. . . .”¹¹³ Such a preemptive role of non-self-executing treaties is

291, 293 (1854) (finding that all treaties are supreme law over that of the states—even treaties requiring “enactment of a statute to regulate the details”); PAUST, *supra* note 1, at 62–64, 68, 97, 134–35; LOUIS B. SOHN, THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 947 (1973); BURNS H. WESTON, ET AL., INTERNATIONAL LAW AND WORLD ORDER 192 (1980); de la Vega, *supra* note 107, at 457 n.206, 460, 467 & 470; Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 AM. SOC. INT’L L. PROC. 262, 264 (1996); Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny*, 100 HARV. L. REV. 853, 867 n.65 (1987); Paust, *Affirmative Action*, *supra* note 106, at 671–72 & n.45; Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1097–1104 (1992); Quincy Wright, *National Courts and Human Rights—The Fujii Case*, 45 AM. J. INT’L L. 62, 69 (1951); see also *Galveston, Harrisburg & San Antonio Ry. Co. v. State*, 89 Tex. 340, 34 S.W. 746 (1896) (“the adoption of a treaty with the stipulations of which the provisions of a State law are inconsistent, is equivalent to the repeal of the State law. Deen ex-demise Fisher v. Harndon, 1 Paine 55.”); Malvina Halberstam, *United States Ratification of the Convention on the Elimination of All Forms of Discrimination against Women*, 31 GEO. WASH. J. INT’L L. & ECON. 49, 64 & 67–69 (1997) (maintaining that declarations of non-self-execution are “inconsistent with the language, history, and purpose of Article VI of the U.S. Constitution” and are constitutionally suspect); but see *In re Alien Children Education Litigation*, 501 F. Supp. 544, 590 (S.D. Tex. 1980); *Sei Fujii v. State*, 38 Cal.2d 713, 242 P.2d 617 (1952). Subsequent legal developments have obviated the two prongs of the *Sei Fujii* rationale. See PAUST, *supra* note 1, at 74, 282. Concerning the ICCPR, see also Executive Explanation, *supra* note 107, at 18 (emphasis added)(“the Covenant will apply to state and local authorities”).

109. U.S. Const., Art. VI, cl. 2 (emphasis added).

110. See also RESTATEMENT, *supra* note 21 § 115 cmt. e (emphasis added) (“any treaty . . . supersedes inconsistent State law or policy. . . . Even a non-self-executing agreement . . . may sometimes be held to be federal policy superseding State law or policy . . . [and] may also . . . preempt.”).

111. See, e.g., PAUST, *supra* note 1, at 51, 55, 59, 63–64, 366–68, 370–71 & 374; Halberstam, *supra* note 108 (addressing remarks of Professors Frederick Abbott, Lori Fisler Damrosch, Louis Henkin, and Stefan Riesenfeld).

112. *United States v. Pink*, 315 U.S. 203 (1942).

113. *Id.* at 230–31. On supremacy more generally, see, for example, *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924); *Maiorano v. Baltimore & Ohio R.R.*, 213 U.S. 268, 272–73 (1909); *Chirac v. Chirac*, 15 U.S. (2 Wheat.) 259, 271 & 274–76 (1817); *Owings v. Norwood’s*

consistent with the express language of Article VI of the Constitution, and denial of such a role would not be consistent with the language of the Constitution or views of the Founders.¹¹⁴

Additionally, the declaration concerning the International Covenant on Civil and Political Rights¹¹⁵ is not a general declaration of non-self-execution, but one that is expressly limited. It merely addresses Articles 1-27, and expressly does not apply to Article 50. Article 50 reaches back to all “[t]he provisions” of the Covenant and mandates, consistently with the command of the U.S. Constitution: “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”¹¹⁶ Such “shall” language is mandatory and self-executory.¹¹⁷ Moreover, the declaration should be interpreted consistently with Article 50 of the Covenant to preserve rights, since treaties are to be construed in a broad manner to protect express and implied rights.¹¹⁸

Lessee, 9 U.S. (5 Cranch) 344, 348-49 (1809); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236-37 (“any treaty,” “every treaty”), 244-45 (Chase, J.), 249, 256 (Paterson, J.), 272, 276-77 & 279 (Iredell, J.), 281 (Wilson, J.), 282, 284 (Cushing, J.), (1796); *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160, 162 (1792); *Hamilton v. Eaton*, 11 F. Cas. 336, 337-38, 340 & 342 (C.C.D. N.C. 1792); *Gordon v. Kerr*, 10 F. Cas. 801, 802 (C.C.D. Pa. 1806); *Page v. Pendleton*, 1 Wythe Rep. 127, 129 & 132 (Va. May 3, 1793); 6 Op. Att’y Gen. 291, 293 (1854); 1 Op. Att’y Gen. 26, 27 (1792); *Peters v. McKay*, 238 P.2d 225, 230-31 (Or. 1951); PAUST, *supra* note 1, at 51-57, 62-64, 67-68, 92, 97, 133-35, 143, 202, 314, 384, 386 & 413; Fitzpatrick, *supra* note 108, at 262 & 264.

114. For relevant views of the Founders, see, for example, PAUST, *supra* note 1, at 51-55, 65-68. See also Halberstam, *supra* note 108.

115. *Open for signature*, December 19, 1966, 999 U.N.T.S. 171. This treaty came into force for the United States on September 8, 1992. See RICHARD B. LILICH & HURST HANNUM, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY, AND PRACTICE* 261 (3 ed. 1995).

116. International Covenant on Civil and Political Rights, *opened for signature*, December 19, 1966, 999 U.N.T.S. 171, art. 50. See also Executive Explanation, *supra* note 107, at 18 (emphasis added) (“the *Covenant will apply to state and local authorities* . . . [and it will be implemented] by appropriate . . . judicial means, federal or state. . .”). Professor Bradley ignores the effect of Article 50 and has even stated incorrectly that the declaration of non-self-execution applies to the entire treaty. See Bradley, *Breard*, *supra* note 27, at 540.

117. See PAUST, *supra* note 1, at 55-59, 62, 69-71, 74, 110 & 112.

118. See, e.g., *Factor v. Laubenheimer*, 290 U.S. 276, 293-94 (1933); *Nielsen v. Johnson*, 279 U.S. 47, 51 (1929); *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928); *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924) (“Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *United States v. Payne*, 264 U.S. 446, 448 (1924) (“Construing the treaty liberally in favor of the rights claimed under it, as we are bound to do. . .”); *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (“where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.”); *Hauenstein v. Lynham*, 100 U.S. 483, 487 (1879) (“Where a treaty admits of two constructions, one restrictive as to the rights, that may be claimed under it, and the other liberal, the latter is to be preferred.”), *citing Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 249 (1830) (“If the treaty admits of two interpretations, and one is limited, and the other liberal; one which will further, and the other exclude private rights; why should

Indeed, it was recognized in the formal Executive Explanation concerning the Covenant:

In light of Article 50 . . . , it is appropriate to clarify that . . . *the Covenant will apply to state and local authorities*. . . the intent is *not to modify or limit U.S. undertakings* under the Covenant. . . . [It is] intended to signal to our treaty partners that the U.S. *will implement* its obligations under the Covenant *by appropriate legislative, executive and judicial means, federal or state* as appropriate. . . .¹¹⁹

Thus, even if the declaration of non-self-execution were operative, the treaty is partly self-executing, has the force and effect of law, and is supreme federal law. Importantly also, the declaration concerning the Covenant is further limited by its special meaning. As noted above, the intent was merely to clarify that the Covenant not be used directly to “create a private cause of action.”¹²⁰ Thus, in view of the limited nature of the declaration (*e.g.*, that it does not inhibit the reach of Article 50) and its special meaning (*i.e.*, that it merely not be used directly to create a cause of action), the Covenant can be self-executing for every other purpose. At a minimum, the Executive Explanations, consistently with Article 50 of the Covenant and the Supremacy Clause of the Constitution, assure that the Covenant’s provisions have full effect when used to override any inconsistent state law.

Additionally, even generally non-self-executing treaties are still law of the United States and can be used indirectly as aids for interpretation of other laws, defensively in civil or criminal contexts, for supremacy or preemptive purposes, or to provide a compelling state interest.¹²¹ For ex-

not the most liberal exposition be adopted?”); *see also* *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 348–49 (1809) (Marshall, C.J.) (“*Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right, it is to be protected.*”) (emphasis added).

119. Executive Explanation, *supra* note 107, at 18 (emphasis added).

120. *Supra* note 107 and accompanying text. For the Executive Explanations concerning the declaration, *see supra* note 107, and Article 50, *see supra* note 116, provide a consistent approach: the declaration merely limits the use of the Covenant directly to create a cause of action and does not inhibit direct or indirect use of the Covenant as law of the United States in any other way. Such an approach is also generally consistent with the Supremacy Clause of the U.S. Constitution.

121. *See, e.g.*, PAUST, *supra* note 1, at 62–64, 68, 92, 97–98, 134–35, 370, 377–78 n.4 & 384; de la Vega, *supra* note 107, at 457 n.206, 460, 467 & 470; Fitzpatrick, *supra* note 108, at 264; Paust, *Affirmative Action*, *supra* note 106, at 672 n.45; *but see* Bradley, *Charming Betsy*, *supra* note 27, at 497 n.9; Bradley, *Breard*, *supra* note 27, at 539–40 (making outrageously erroneous statement that the Court has held that non-self executing treaties “can be enforced in domestic courts only after and to the extent that Congress has implemented the treaties by federal statute” and, thus, ignoring indirect incorporation of such treaties as well as execution

ample, human rights precepts have been used to inform the meaning of the Eighth Amendment to the U.S. Constitution.¹²² Human rights in the Covenant have also been used by federal courts to clarify or provide content of other federal law.¹²³ Thus, such treaties can be invoked by individuals seeking relief under treaty-enhanced interpretations of federal statutes such as civil rights legislation and habeas corpus (28 U.S.C. § 2254), especially since federal statutes must be interpreted consistently with treaties.¹²⁴ Additionally, such federal statutes can serve an “executing” function whether or not the Covenant is partly self-executing, especially since the primary purpose of non-self-execution is to assure that there is some statutory or other legal base for bringing a relevant claim. For example, even if the Covenant cannot be used directly to create a cause of action, other federal law may provide a cause of action and allow implementation or “execution” of treaty-based human rights. 42 U.S.C. § 1983 is such a statute.¹²⁵ 28 U.S.C. § 2254(a) has a similar effect since it provides what is equivalent to a “cause of action” when mandating that a relevant federal court “shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court . . . on the ground that he is in custody in violation of . . . treaties of the United States.”¹²⁶ For that purpose, the statute expressly incorporates by reference” treaties of the United States.¹²⁷ A federal statute need not even refer to international law in order to function as implementary legislation.¹²⁸ Statutes, which do so, all the more clearly perform such a function.

through other laws and Executive acts. Compare PAUST, *supra* note 1, at 62–63, 92, 97–98, 134–35).

122. See, e.g., PAUST, *supra* note 1, at 192–93, 196, 248 n.392, 253 n.449 & 371.

123. See, e.g., *id.* at 369–70 & 383–84 nn. 54–66 & 74.

124. See, e.g., *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); PAUST, *supra* note 1, at 107–108 n.9.

125. See PAUST, *supra* note 1, at 179, 192–93, 226 n.163, 246–47 nn.380–81 and 383–84, 371–72 & 385 n.88; RESTATEMENT, *supra* note 21 § 111, cmt. h (“There can, of course, be instances in which the United States Constitution, or previously enacted legislation, will be fully adequate to give effect to an apparently non-self-executing international agreement. . . .”). An Executive Order can also execute a non-self-executing treaty in certain instances. See, e.g., PAUST, *supra* at 62, 97.

126. 28 U.S.C. § 2254(a). See, e.g., PAUST, *supra* note 1, at 179, 192–93, 226 n.163, 246–47 n.382 & 371–72 (noting also that the Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, and Torture Victim Protection Act (TVPA), Pub. L. 102-256, 106 Stat. 73, 102nd Cong. (Mar. 12, 1992), have an executing function).

127. Concerning incorporation by reference, see, for example, *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 158–62 (1820); *Ex parte Quirin*, 317 U.S. 1, 27–30 (1942); and *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–82 (2d Cir. 1980).

128. See, e.g., *United States v. Arjona*, 120 U.S. 479, 488 (1887).

B. *The Meaning of the Federal Clauses*

The United States instruments of ratification for certain human rights treaties have an understanding that contains a federal clause.¹²⁹ These clauses do not make the human rights treaties inapplicable as federal law. On the contrary, federal clauses allow state participation through law affirming or effectuating choice while assuring concurrent duties to implement the treaties through federal and state processes; create an overall responsibility for treaty-implementation in the federal government; and assure that, at a minimum, states cannot deny human rights based in the treaties.¹³⁰

The International Covenant's federal clause is typical. It reads:

[T]his Convention shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that the state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for fulfillment of the Covenant.¹³¹

Such a clause does not change the fact that human rights are assured under the treaty, or that the Covenant's obligations are to be fulfilled. More generally, the fact that the federal government has jurisdictional

129. See, e.g., Understanding No. 5 Concerning the International Covenant on Civil and Political Rights [hereinafter Understanding No. 5], reprinted in 31 I.L.M. 659 (1992); Understanding Concerning the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature, March 7, 1966, 660 U.N.T.S. 195 [hereinafter CEAFRD], reprinted in Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 88 AM. J. INT'L L. 719, 728 (1994).

130. See, e.g., Fitzpatrick, *supra* note 108, at 263; Paust, *Affirmative Action*, *supra* note 106, at 673-74; Elizabeth Landry, Note, *States as International Law-Breakers: Discrimination against Immigrants and Welfare Reform*, 71 WASH. L. REV. 1095, 1116-17 (1996); see *infra* notes 136-141.

131. Understanding No. 5, *supra* note 130. The "understanding" concerning the CEAFRD, *supra* note 120, reads:

this Convention shall be implemented by the Federal Government to the extent that it exercises jurisdiction over the matters covered therein, and otherwise by the [S]tate and local governments. To the extent that [S]tate and local governments exercise jurisdiction . . . , the Federal Government shall, as necessary, take appropriate measures to ensure the fulfillment of this Convention.

Nash, *supra* note 130, at 728.

competence to implement treaty law is well understood.¹³² To what the federal clause may be relevant is whether or not various entities within the federal government or the states are to proceed further to implement human rights. For example, it may be left to the discretion of the United States to exercise its jurisdictional competence to implement the Covenant or to allow states to proceed to take affirmative steps to implement the treaty. If the states do not proceed, the United States remains bound by the treaty and is ultimately responsible for domestic implementation. Ultimate responsibility exists as a matter of general international law.¹³³ It is also evident in the federal clause in the phrases “shall be implemented” and “shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for fulfillment of the Covenant.”¹³⁴

Additionally, this responsibility is especially assured by Article 50 of the Covenant, which requires: “The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions.”¹³⁵ As David Stewart of the Office of the Legal Adviser of the U.S. Department of State recognized, “Article 50 . . . was included precisely to prevent federal states from limiting their obligations to areas within the federal government’s authority), a reservation exempting constituent units might readily be characterized as contrary to the object and purpose of the Article, if not the Covenant as a whole.”¹³⁶

132. See, e.g., *Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Hann*, 26 F. Cas. 227 (C.C. S.D. Ala. 1860); PAUST, *supra* note 1, at 97–98, 207, 256 n.468, 282 nn.563–70, 371–72 & 385 nn.85–88; Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT’L L. 341, 345–46 (1995) (editorial comments). The same applies with respect to customary international law. See, e.g., *United States v. Arjona*, 120 U.S. 479, 483–88 (1887); *Frend v. United States*, 100 F.2d 691, 692–93 (D.C. Cir. 1938), *cert. denied*, 306 U.S. 640 (1939); PAUST, *supra* note 1, at 6, 33, 39, 130 & 394.

133. See, e.g., RESTATEMENT, *supra* note 21, § 207 (a)–(c), reporters’ note 3; Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . .”); Henkin, *supra* note 133, at 346.

134. See *supra* note 131 and accompanying text.

135. ICCPR art. 50.

136. David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings, and Declarations*, 42 DEPAUL L. REV. 1183, 1201 (1993).

[T]he Covenant will apply to state and local authorities. . . . [and] with respect to Article 50 . . . the intent is not to modify or limit U.S. undertakings under the Covenant. . . . [It is] intended to signal . . . that the U.S. will implement its obligations under the Covenant by appropriate legislative, executive and judicial means, federal or state as appropriate. . . .

Executive Explanation, *supra* note 107, at 18, *reprinted in* 31 I.L.M. 645, 656–57 (emphasis added); see also PAUST, *supra* note 1, at 361, 363; Fitzpatrick, *supra* note 108, at 263, and Landry, *supra* note 131, at 1116, *quoting* the Human Rights Committee, Consideration of Re-

With respect to the International Convention on the Elimination of All Forms of Racial Discrimination (“CEAFRD”), the duty to take action is strong. For example, Article 2 (2) of the CEAFRD requires the United States, “when the circumstances so warrant,” to take “special and concrete measures” of affirmative action.¹³⁷ Under the federal clause, it may be left to the discretion of the United States to exercise its jurisdictional competence to mandate special measures or to allow states to proceed, but if the states do not proceed, the United States is bound by Article 2 of the treaty to take action (*i.e.*, there is no gap in the United States duty under Article 2 merely because neither the states nor federal governmental entities have yet proceeded to adopt special measures).¹³⁸

With respect to the states, at a minimum, they cannot deny human rights assured under the treaties. Indeed, the federal clauses require that the treaties “shall be implemented . . . otherwise by the state and local governments,” thereby making duties under the treaties concurrent.¹³⁹ Thus, with respect to the Covenant, the federal clause, coupled with Article 50 of the Covenant and the Supremacy Clause of the United States Constitution, compel states and sub-state entities to execute and effectuate the treaty by choosing among affirmative and permissible options while not denying rights under the Covenant. The federal clause of the Race Discrimination Convention, coupled with the Supremacy Clause of the Constitution, compel the same.

Equally important, nothing in the federal clauses prohibits state or sub-state entities from executing or further implementing the treaties. Indeed, they recognize and confer a concurrent power to do so, especially in the phrases: “[S]hall be implemented . . . otherwise by the state and local governments,” “to the extent that the state and local governments exercise jurisdiction,” and “to the end that competent authorities of the state or local governments may take appropriate measures for fulfillment of the Covenant.”¹⁴⁰ In this sense, the federal clauses delegate and

ports Submitted by States Parties under Article 40 of the Covenant, U.N. Doc. CCPR/C/79/Add. 50, at 2–3, ¶¶ 9, 11–12 (1995), which recognized the U.S. Government’s “readiness . . . to take such further measures as may be necessary to ensure that the States of the Union implement the rights guaranteed by the Covenant” and the “assurances of the Government that its declaration regarding the federal system is not a reservation and is not intended to affect the international obligations of the United States.”

137. CEAFRD art. 2.

138. See also Nash, *supra* note 130, at 728 (quoting the understanding concerning the CEAFRD) (“the Federal Government shall, as necessary, take appropriate measures to ensure . . . fulfillment. . . .”); Stewart, *supra* note 138, at 1201–02 (the U.S. remains bound under the Covenant, the U.S. will also “ensure that the state and local governments fulfill their obligations,” and the Understanding “concerns the steps to be taken domestically by the respective federal and state authorities”).

139. Nash, *supra* note 129, at 728.

140. *Id.*

guarantee a competence of state and local authorities to act affirmatively to implement human rights and to have those choices protected as long as they are otherwise in fulfillment of the treaties. Thus, the federal clauses provide state and local competencies to participate in treaty effectuation in ways that might otherwise have been suspect under more inhibiting notions of federal preemption.¹⁴¹ The new implementary freedom guaranteed under the treaty regimes encourages participation and provides an opportunity for states and sub-state entities to choose affirmative approaches to human rights implementation.

IV. MISINTERPRETATION OF THE INTERPRETIVE ROLE OF CUSTOMARY LAW

Professor Bradley aptly relates the issue concerning the interpretive role of customary international law to judicial power and responsibility. Nonetheless, it is precisely because the federal judiciary has both the power and responsibility to identify and apply customary international law in cases otherwise properly before the courts that there is no violation of the separation of powers when federal courts apply international law while interpreting federal statutes. Additionally, his quotation of Chief Justice Marshall in *The Charming Betsy*¹⁴² is curiously incomplete.¹⁴³ A fuller quote actually demonstrates that rights under customary

141. See also S. Exec. Rep. 103-29, at 24 (1994) (emphasis added) (regarding the CEAFRD: "there is no intent to preempt . . . state and local *initiatives* or to federalize the entire range of anti-discrimination actions") (emphasis added); Statement of Legal Adviser of the Dep't of State, Conrad K. Harper, before the Senate Committee on Foreign Relations, May 11, 1994, reprinted in Nash, *supra* note 130, at 726 (emphasis added) ("This is to make clear that ratification does not preempt State and local anti-discrimination *initiatives*. The understanding also makes clear that where States and localities have jurisdiction over such matters, the Federal government will ensure compliance."); Executive Explanation, *supra* note 107, at 19, reprinted in 31 I.L.M. at 657 ("intended . . . that the U.S. will implement . . . by appropriate legislative, executive and judicial means, federal or state as appropriate, and that the Federal Government will remove any federal inhibition to the States' abilities to meet their obligations.").

[A]n invitation to state authorities to play an active part in fulfilling the treaty's promises" and "to: (1) provide appropriate state remedies for treaty norms; (2) assess potential preemption . . . ; (3) absorb international human rights norms into the common law lawmaking enterprise; and (4) turn to international law benchmarks in interpreting both state constitutions and statutes.

Fitzpatrick, *supra* note 108, at 263-64; Landry, *supra* note 131, at 1116-17 ("expression of the affirmative obligation of the states to implement the provisions of the Covenant . . . an invitation to state authorities. . ."); Paust, *Affirmative Action*, *supra* note 106, at 674.

More generally, states can experiment within the contours of logical and policy-serving meanings of a treaty norm, as long as there is no denial of the core of settled meaning.

142. *Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

143. See Bradley, *Charming Betsy*, *supra* note 27, at 482.

international law are to prevail over unavoidably inconsistent federal statutes. What the Court actually declared was: “[A]n act of Congress ought never be construed to violate the law of nations if any other possible construction remains, and, consequently, *can never* be construed to violate . . . rights . . . further than is warranted by the law of nations as understood in this country.”¹⁴⁴

Chief Justice Marshall did not identify the consequences generally flowing from an unavoidable clash between customary international law and a federal statute, although he did affirm that an act of Congress “*can never* be construed to violate . . . rights” under the law of nations.¹⁴⁵ Indeed, he identified two “principles” (*i.e.*, one general and one special when rights under international law are at stake).¹⁴⁶ Thus, although his opinion is silent on the question whether priority generally should be given to the law of nations or an act of Congress in case of an unavoidable clash, he identified a circumstance when the law of nations must prevail—namely, when rights under international law are at stake. This is so because an act of Congress “*can never* be construed to *violate*” such rights unless “warranted by the law of nations,” which would mean that by the law of nations such rights would not be protected (*e.g.*, not protected in a particular circumstance).¹⁴⁷ Thus, contrary to Professor Bradley, *The Charming Betsy* does require that courts use international law to override domestic law when rights are at stake.¹⁴⁸

In view of Professor Bradley’s theory, it is quite significant that Chief Justice Marshall was among those early in our history who unanimously affirmed that the President and other officials are bound by international law.¹⁴⁹ Marshall also made statements supportive of the primacy of customary international law over acts of Congress,¹⁵⁰ and recognized the competence and duty of our courts to apply customary international law.¹⁵¹

Professor Bradley notes that the interpretive role of customary law recognized in *The Charming Betsy* had been recognized three years

144. *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (emphasis added).

145. *Id.* (emphasis added).

146. *Id.*

147. PAUST, *supra* note 1, at 116 n.37; *see id.* at 138–40 n.96, 141–42 n.109.

148. *But see* Bradley, *Charming Betsy*, *supra* note 27, at 484, 497.

149. *See, e.g.*, PAUST, *supra* note 1, at 144–45, 154 n.2 & 155 nn.11–12.

150. *See id.* at 116 n.37, 121 n.55 (Representative Marshall stating that U.S. Const. Art. I, § 8, cl. 10 “cannot be considered, . . . as affecting acts which are piracy under the law of nations” and “can never be construed to make to the Government a grant of power, which the people making it do not themselves possess.”).

151. *See, e.g., id.* at 34 n.38, 47 n.56 & 128 n.62 (addressing *The Nereide*, 13 U.S. (9 Cranch) 388, 422–23 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is part of the law of the land.”)); *see supra* note 31 and accompanying text.

earlier in *Talbot v. Seeman*.¹⁵² The *Talbot* court stated: “[T]he laws of the United States ought not, if it be avoidable, so to be construed as to infract the common principles and usages of nations.”¹⁵³ The Court continued: “By this construction the act of Congress *will never violate* those principles which we believe, and *which it is our duty to believe*, the legislature of the United States will always hold sacred.”¹⁵⁴ In *Talbot*, there was no notion expressed of a power of Congress to override international law. Indeed, as Professor Bradley cautiously admits, the phrase “it is our duty to believe” suggests that the Court recognized that Congress cannot override international law and that courts, at least, must not permit such a result.¹⁵⁵ That the opinion of the Court was written by Chief Justice Marshall is also informing. Later in a circuit court decision it was declared that a court “*cannot give to . . . orders a construction that will lead to . . . the executive abrogating*” a right vested by the modern law of war.¹⁵⁶ Professor Bradley also recognizes that even earlier in *Rutgers v. Waddington*,¹⁵⁷ while construing a state statute so as to avoid a conflict with the Treaty of Paris, the *Rutgers* court stated “[t]he repeal of the law of nations, or any interference with it, could not have been in contemplation . . . when the Legislature passed this statute; and we think ourselves bound to exempt that law from its operation. . . .”¹⁵⁸ Such language also supports the predominant view at the time that domestic legislation cannot obviate the domestic effect of customary international law, and that the courts have a responsibility to assure that customary law prevails.

This responsibility seems to have been affirmed in a 1792 opinion of the Attorney General, in which Attorney General Randolph declared:

The law of nations, although not specially adopted . . . is essentially a part of the law of the land. Its *obligation* commences and runs with the existence of a nation, *subject to modifications on some points of indifference*. . . . [W]ith regard to foreigners,

152. *Talbot v. Seeman*, U.S. (1 Cranch) 1 (1801); see Bradley, *Charming Betsy*, *supra* note 27, at 485.

153. *Talbot*, 1 Cranch at 43.

154. *Id.* at 44 (emphasis added).

155. Bradley, *Charming Betsy*, *supra* note 27, at 496 n.89. Bradley is inconsistent when stating on the next page that the “canon has been linked to the primacy . . . of domestic law . . . [and] does not mandate the application of international law.” *Id.* at 497.

156. *Johnson v. Twenty-One Bales*, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (emphasis added).

157. N.Y. Mayor’s Court 1784, reprinted in SELECT CASES OF THE MAYOR’S COURT OF NEW YORK CITY, 1674–1784, 302 (R. Morris ed., 1935).

158. *Id.* at 308, 325. See Bradley, *Charming Betsy*, *supra* note 27, at 487 & n.41. For other cases construing state legislation to avoid a clash with international law, see *supra* note 52.

every change is at the peril of the nation which makes it. Impliedly . . . the law of nations is considered by the act. . . .¹⁵⁹

It is also informing that around this time other opinions recognize the primacy of international law.¹⁶⁰ For example, in *Bas v. Tingy*,¹⁶¹ Justice Chase stated: “[i]f a general war is declared [by Congress], its *extent and operations are only restricted and regulated by the jus belli*, forming a part of the law of nations. . . .”¹⁶² Thus, the law of nations does restrict and regulate wars extent and operations. In *Ross v. Rittenhouse*,¹⁶³ it was affirmed: “municipal law . . . may . . . facilitate or improve . . . [the ‘law of nations’], provided the great universal law remains unaltered.”¹⁶⁴ In *United States v. Palmer*,¹⁶⁵ Justice Johnson stated: “Congress cannot make that piracy which is not piracy by the law of nations, in order to give jurisdiction to its own courts.”¹⁶⁶ Additionally, several statements of the Founders are consistent with these expectations about the primacy of customary international law.¹⁶⁷

Later, *United States v. Darnaud*,¹⁶⁸ declared: “[I]f the Congress. . . were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits . . . [set by the “law of nations”], it would be the duty of courts of justice to decline. . . .”¹⁶⁹ A few years later, the Attorney General, having recognized that “the law of nations . . . [is] a part of the law of the land” declared: “Congress may define those laws, but cannot abrogate them . . . laws of nations . . . are of binding force upon the departments and citizens of the Government. . . . Congress cannot abrogate them or authorize their infraction. The Constitution does not permit this Government” (*i.e.*, the Executive) to do so either.¹⁷⁰ Such recognitions had appeared also in an earlier opinion of the Attorney General.¹⁷¹

159. 1 Op. Att’y Gen. 26, 27 (1792) (emphasis added).

160. *See, e.g.*, PAUST, *supra* note 1, at 88–89, 94–95, 120–21 n.55 & 139 n.96.

161. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800).

162. *Id.* at 43 (emphasis added).

163. *Ross v. Rittenhouse*, 2 U.S. (2 Dall.) 160 (Pa. 1792).

164. *Id.* at 162 (emphasis omitted).

165. *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818).

166. *Id.* at 641–42 (Johnson, J., dissenting).

167. *See, e.g.*, PAUST, *supra* note 1, at 120–22 n.55, 139 n.96.

168. *United States v. Darnaud*, 25 F. Cas. 754 (C.C.E.D. Pa. 1855).

169. *Id.* at 759–60.

170. *See* 11 Op. Att’y Gen. 297, 299–300 (1865).

171. It was recognized similarly that the law of nations “must be paramount to local law in every question where local laws are in conflict” and that “[w]hat you [the President] will do must of course depend upon the law of our own country, as controlled and modified by the law of nations.” 9 Op. Att’y Gen. 356, 362–63 (1859).

Importantly, the independent power and responsibility of the federal judiciary to identify and apply customary international law was well-recognized by the Founders and in early opinions and decisions, several court opinions using the terms “bound” or “duty.”¹⁷² This trend in expectation is evident throughout our history and continues.¹⁷³ Thus, it is not a violation of the separation of powers for the courts to apply international law. On the contrary, it would be seriously thwarting of the balance and separation of powers not to do so in cases otherwise properly before the courts.¹⁷⁴ In this sense, application of customary international law in *The Paquete Habana* against favored and admitted Executive acts taken abroad against aliens in time of war, at the height of Executive power and discretion, was supportive of a proper balance and separation of powers, since the Court identified and applied law to a case otherwise properly before it.¹⁷⁵ It is also appropriate for the courts, and they have done so from time to time, to use customary international law as an aid for purposes of interpreting constitutional rights, duties, powers, and competencies.¹⁷⁶ From the above, the suggestion that courts should step aside in the name of separation of powers to tolerate violations of the law is unacceptable.¹⁷⁷

CONCLUSION

The Founders, the text and structure of the Constitution, and the overwhelming patterns of legal expectation since the dawn of the United States support trends in judicial decision using customary international law as law of the United States. Human rights, of fundamental importance to the Founders and the preferred consequences of democracy, are reflected in long-term and widespread patterns of judicial use that, in comparison to new and radical theories scantily dressed in supposed historic veils, are thunderous in their affirmation of the competence and responsibility of the judiciary to identify, clarify, and apply customary

172. See, e.g., PAUST, *supra* note 1, at 7–8, 34–36 ns.37–38, 38–39 n.41, 40–41 n.44 & 47 n.56; see *supra* notes 1–2, 6, 15 & 31.

173. *Id.* at 7–8, 34–35 nn.37–38 & 46–48 nn.53–55 & 57.

174. See also PAUST, *supra* note 1, at 8–9, 76 n.101, 144–53, 198–203, 367, 382 n.34 & 474 nn.11–12; see *supra* notes 92–93.

175. See *supra* note 83. Even Justice Sutherland recognized in *Curtiss-Wright* (the case famously loaded with far-reaching foreign affairs dicta) that there are two profoundly compelling limits to foreign relations powers: “operations of the nation . . . [“foreign”] territory *must* be governed by treaties . . . and the principles of international law.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (emphasis added).

176. See, e.g., PAUST, *supra* note 1, at 5–7, 34–40, 95, 174–75, 179, 186, 192–95, 221–22 nn.92–93, 248, 338–45 & 371; Bradley, *Charming Betsy*, *supra* note 27, at 503 & n.120.

177. *But see* Bradley, *Charming Betsy*, *supra* note 27, at 525–26, 530.

international law. As our first Chief Justice rightly affirmed, the customary law of nations is part of the law of the United States, even with respect to private duties.¹⁷⁸ Later, Chief Justice Marshall assured that our courts “are established . . . to decide on human rights.”¹⁷⁹

The new theoretic strategies are not merely antithetical to the expectations and strivings of the Founders, the policy-structure of our Constitution, and our rich history, but are also antithetical to our future in an increasingly interdependent world and the demands of countless souls for a measure of human dignity and effective human rights. God grant that our courts not abandon customary human rights.¹⁸⁰

178. See *supra* note 5 and accompanying text. Concerning private duties under customary international law, see, for example, PAUST, *supra* note 1, at 7–8, 34, 43–45, 50, 182, 201–05, 207–10, 228, 264–70, 274–76 & 289–91; Jordan J. Paust, *The Other Side of Right: Private Duties under Human Rights Law*, 5 HARV. H.R. J. 51 (1992).

179. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810).

180. See also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 119 (1864) (Davis, J.) (“By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers. . .”).