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COMMENTARIES

FEDERAL COURTS AND THE INCORPORATION OF
INTERNATIONAL LAW

Curtis A. Bradley and Jack L. Goldsmith***

In an article last year,¹ we critiqued the view that customary international law ("CIL") has the status of self-executing federal common law, to be "applied by courts in the United States without any need for it to be enacted or implemented by Congress."² We argued that this view, which we termed the "modern position," lacks historical support and conflicts with political branch enactments and with broader constitutional principles of separation of powers, federalism, and representative democracy. We concluded that CIL should not be treated as federal law in the absence of authorization from the federal political branches.³

Professor Koh recently responded to our argument in an article entitled *Is International Law Really State Law?*⁴ The title of Koh's article is somewhat misleading, for we have not in fact argued that CIL is state law. Rather, as Koh at times acknowledges,⁵ our view is that CIL should not be a source of law for courts in the United States unless the appropriate sovereign — the federal political branches or the appropriate state entity — makes it so. If accepted, this argument would mean, as Koh states emphatically, that CIL in some instances "[would not be] United States law at all!"⁶ Koh views this conclusion

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¹ Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

² Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984).

³ See Bradley & Goldsmith, *supra* note 1, at 849–70. We developed the argument further in Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997) [hereinafter Bradley & Goldsmith, *Current Illegitimacy*].

⁴ Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

⁵ See *id.* at 1828 (quoting Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 349–50).

⁶ *Id.*

as "radical," "utterly mistaken," and "bizarre."⁷ Perhaps not surprisingly, we disagree.

Our argument might seem strange, if not radical, when judged against the backdrop of Koh's conception of constitutional and international law. This conception is essentially as follows. Foreign affairs is a category distinct from domestic affairs. Although the Constitution limits federal power in domestic affairs, federal power is plenary and exclusive with respect to foreign affairs. This exclusive federal foreign affairs power encompasses the interpretation and application of CIL. If the federal political branches have not embodied CIL in a federal treaty or statute, the judicial arm of the federal government should interpret and apply CIL as a matter of federal common law, subject only to subsequent federal political branch revision. Federal courts have thus applied CIL without political branch authorization throughout the nation's history. This regime makes sense because, as "[e]very schoolchild knows[,] . . . the Constitution . . . established national governmental institutions to articulate uniform positions on such uniquely federal matters as foreign affairs and international law."⁸ A political branch authorization requirement would skew this arrangement, according to Koh, because it would mean that in the absence of such authorization, CIL would not be enforced or would be left to the non-uniform enforcement of the fifty states.⁹

The common-sense appeal of this picture helps explain its widespread acceptance in the academy. Unfortunately, this picture brushes over a number of fundamental distinctions, and much of it is either outdated or incorrect. In this short response, we focus on what we believe to be the four central errors in Koh's analysis: its mistaken use of history; its conflation of traditional CIL that regulates international relations with the new CIL of human rights that regulates the way a nation treats its citizens; its unjustifiably broad conception of the common law powers of federal courts; and its unwarranted assumption that all of international law must be incorporated into domestic law.

Before turning to these points, it is important to clarify what is at stake. There have been few recent decisions and little academic commentary discussing the domestic status of the traditional CIL that governs truly international relations, such as the CIL governing diplomatic immunity. In large part, this is because the federal political branches have incorporated this traditional CIL into enacted federal law. Instead, the modern position debate concerns the enforceability in U.S. courts of the CIL of human rights that purports to confer on individuals a host of political, social, and economic rights against their governments. This CIL of human rights derives primarily from mul-

⁷ *Id.* at 1828, 1827, 1850.

⁸ *Id.* at 1825.

⁹ *See id.* at 1828-29, 1851-52.

tilateral treaties that the executive and legislative branches of the U.S. government either have refused to ratify or have ratified subject to conditions that render them unenforceable as domestic law. Nevertheless, as Koh's article drives home, the modern position calls for U.S. courts to apply the norms contained in these treaties, in the form of CIL, as federal law. Our disagreements with Koh primarily concern the legitimacy of this practice.

I. HISTORY

Koh's first major error is his attempt to assign to the modern position a rich and lengthy historical pedigree. Koh asserts that the view that CIL is self-executing federal common law has been accepted since "the beginning of the Republic"¹⁰ and reflects "a long-accepted, traditional reading of the federal courts' function."¹¹ He cites, among other things, nineteenth-century judicial decisions referring to international law as "part of our law."¹² Koh maintains that this pedigree places a heavy burden on any challenge to CIL's status as self-executing federal law because such a challenge would amount to a "dramatic reversal of settled doctrine."¹³

Koh's historical account neglects monumental conceptual and practical differences between the historical treatment of CIL by federal courts and the modern position. During the pre-*Erie*¹⁴ period, federal courts with proper jurisdiction applied several bodies of law, including CIL, as part of "general common law."¹⁵ They applied general common law as a default in the absence of state or federal legislation to the contrary.¹⁶ General common law did not have the status of federal law, and, therefore, CIL did not trump state law and did not provide a basis for federal question jurisdiction.¹⁷ As a result, in the absence of

¹⁰ *Id.* at 1846.

¹¹ *Id.* at 1841.

¹² *Id.* at 1831 (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)) (internal quotation marks omitted).

¹³ *Id.* at 1828.

¹⁴ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

¹⁵ Bradley & Goldsmith, *supra* note 1, at 820-21.

¹⁶ See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1276-87 (1996); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1263-79 (1985); Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1790-92 (1997).

¹⁷ See, e.g., *New York Life Ins. Co. v. Hendren*, 92 U.S. 286, 286-87 (1876) (holding that the Court lacked jurisdiction to review "general laws of war, as recognized by the law of nations applicable to the case" because these laws do not involve "the constitution, laws, treaties, or executive proclamations, of the United States"); QUINCY WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 161 (1922) (observing that a "state constitution or legislative provision in violation of customary international law is valid unless in conflict with a Federal constitutional provision or an act of Congress"); sources cited *supra* note 16; see also Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 331-36 (elaborating on CIL's pre-*Erie* nonfederal status); Brad-

political branch federalization of CIL, states could, and sometimes did, depart from federal court understandings of the content of CIL.¹⁸

This is how matters stood until 1938, when *Erie* eliminated the federal court practice of applying general common law and held that, "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State."¹⁹ For decades after *Erie*, however, the question of CIL's domestic legal status was rarely litigated and certainly not settled.²⁰ The federal courts' silence on the issue raises a puzzle for Koh's attempt to create a pedigree for the modern position. If a self-executing CIL was so crucial to the Republic, why did courts so rarely apply CIL during the decades after *Erie*? One answer is that much of the CIL that courts had applied in the nineteenth century, such as prize law, had become irrelevant to domestic litigation. More significantly, the federal political branches began comprehensively to codify CIL in the post-World War II period. As a result, courts had little opportunity to address whether there was domestic authorization to apply CIL as a rule of decision or defense.

ley & Goldsmith, *supra* note 1, at 822-26, 849-52 (describing CIL's pre-*Erie* nonfederal status in detail).

¹⁸ See Bradley & Goldsmith, *supra* note 1, at 825-26; see also, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, ch. 2, introductory note, at 41 (1987) ("State and federal courts respectively determined international law for themselves as they did common law, and questions of international law could be determined differently by the courts of various States and by the federal courts.").

¹⁹ *Erie*, 304 U.S. at 78.

²⁰ The only case to address the issue in the three decades following *Erie* was *Bergman v. De Sieyes*, 170 F.2d 360 (2d Cir. 1948), in which Judge Learned Hand looked to state court precedents as governing authority in a diversity case involving the application of a CIL rule of diplomatic immunity. Koh acknowledges that *Bergman* is inconsistent with the modern position, but he contends that the decision "now has little precedential weight" in light of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), which Koh contends approved the modern position. Koh, *supra* note 4, at 1833 n.46. We have explained in detail elsewhere, and will not repeat here, why the Court in *Sabbatino* did not, as Koh suggests, embrace the view that CIL is federal law. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 336-41; Bradley & Goldsmith, *supra* note 1, at 828-30, 859-60.

It is worth explaining, however, why Koh errs in claiming that the Court in *Sabbatino* must have federalized CIL because otherwise the plaintiff's claim (for conversion of bills of lading) "would have raised no substantial federal question worthy of Supreme Court review." Koh, *supra* note 4, at 1833. Original federal jurisdiction in *Sabbatino* was premised on diversity of citizenship, see *Sabbatino*, 376 U.S. at 421 n.20, and the federal issue reviewed by the Supreme Court was Cuba's act of state defense, which the Court took pains to make clear was *not* governed by CIL, see *id.* at 421-22, 427. Koh himself once recognized that the Court in *Sabbatino* did not apply CIL, much less treat it as self-executing federal law. See Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2362-63 (1991) (noting that the Court in *Sabbatino* "declined even to apply international law to review the validity of the act of a recognized foreign sovereign fully executed within its own territory" and that the decision "cast a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law — both customary and treaty-based — in both private and public cases").

Beginning with the Second Circuit's *Filartiga v. Pena-Irala* decision in 1980,²¹ however, lower federal courts once again began to apply CIL as a rule of decision in domestic litigation. But the CIL they applied differed in crucial respects from the CIL applied by courts in the nineteenth and early twentieth centuries. First, they applied CIL as *federal* law, not general common law. Second, in contrast to the traditional CIL that primarily governed relations between nations, the CIL applied in the post-*Filartiga* period almost exclusively regulates relations between a nation and its citizens on such matters as torture, capital punishment, inhuman and degrading treatment, prolonged arbitrary detention, and freedom of thought, conscience, and religion.²² Third, the source of this "new" CIL of human rights is substantially different from that of traditional CIL. Traditional CIL was customary law that purportedly reflected the actual practices of the community of nations.²³ The CIL of human rights does not arise in that fashion, however, because many nations continue to commit human rights violations.²⁴ Rather, much of the new CIL arises from international pronouncements such as resolutions of the United Nations General Assembly and multilateral treaty regimes.²⁵

Koh fails to take account of these fundamental differences between the *traditional* — and genuinely international — CIL applied by nineteenth- and early twentieth-century federal courts as *nonfederal law*, and the *modern CIL of human rights* applied by federal courts during the last twenty years as *federal law*. Koh's attempt to ground the modern position in history thus amounts to the following: the nineteenth-century judicial tradition of applying CIL as nonfederal law to govern the sovereign immunity owed to the King of Spain supports the application by federal courts in the 1990s of CIL that, as a matter of federal law, might regulate a state's death penalty and prison detention practices. As this example illustrates, other than the label "customary international law," the modern position is fundamentally different from courts' historic application of CIL.

²¹ 630 F.2d 876 (2d Cir. 1980).

²² See Bradley & Goldsmith, *supra* note 1, at 840–41.

²³ See LOUIS HENKIN, *INTERNATIONAL LAW: POLITICS AND VALUES* 37 (1995).

²⁴ See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT'L L. 82, 90 (1992).

²⁵ Professor Henkin has described this "purposive creation of custom" through treaties and General Assembly resolutions as a "radical innovation" that "reflects a radical conception." HENKIN, *supra* note 23, at 37. Koh does not discuss these "radical" changes, but he does suggest (without explanation) that the modern position's federalization of the new CIL be limited to "bona fide rules" of CIL, Koh, *supra* note 4, at 1835, "universal, definable, and obligatory" rules of CIL, *id.* at 1853 n.166, and "ripened" CIL, *see id.* at 1859. In light of the many conceptual uncertainties regarding the creation and identification of the new CIL, it is far from clear what Koh's suggested limitations mean or how or why courts should limit the incorporation of CIL along those lines. Cf. HENKIN, *supra* note 23, at 29 (referring to the "soft, indeterminate character of custom and the uncertainties of the process from which it results").

We should be clear about our claim thus far. We are not arguing that CIL's status as nonfederal law during much of the nation's history is, by itself, a reason to reject the modern position. Our only goal here is to show that the pre-*Erie* history does not, as Koh and others insist, support the view that CIL is self-executing federal law. Koh is right that *Erie* did not expressly prohibit federal courts from applying CIL as domestic law,²⁶ but this observation is beside the point. What is significant is *Erie*'s rejection of general common law (of which CIL was a part), and its related requirement that federal courts ground the application of *federal* common law in the Constitution or a federal enactment.²⁷ These elements of *Erie*, combined with the substantial changes in the nature of CIL, mean that the pre-*Erie* precedents by themselves provide no support for the modern position's application of CIL as federal common law. Thus, recourse to pre-*Erie* practice cannot legitimize the modern position's federalization of CIL.

Koh also claims that, since *Erie*, courts and political officials have widely embraced the modern position, such that there is a "unanimity of relevant opinion."²⁸ This historical claim is greatly exaggerated.²⁹ International law scholars have, to be sure, broadly endorsed the modern position. By contrast, courts have adopted the modern position only in narrow circumstances. The lower federal courts that have applied CIL as self-executing federal law have done so almost exclusively for the purpose of establishing subject matter jurisdiction in cases involving the behavior of foreign state actors on foreign soil.³⁰ Although Koh suggests that it is settled that CIL governs domestic state officials, he cites no decision (and we know of none) that has ever squarely held

²⁶ See Koh, *supra* note 4, at 1831-32.

²⁷ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (announcing that "[t]here is no federal general common law" and holding that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State"); see generally Bradley & Goldsmith, *supra* note 1, at 856 n.263 (listing sources noting that post-*Erie* federal common law must find authorization in the Constitution or a federal enactment).

²⁸ Koh, *supra* note 4, at 1825. Most of the judicial decisions Koh cites in support of this claim, see Koh, *supra* note 4, at 1836-37, nn.62-72, involve the use of CIL as an interpretive guide in statutory or treaty construction rather than, as the modern position contemplates, a self-executing federal rule of decision or defense. As we explain below, see *infra* pp. 2272-73, these decisions do not depend on the validity of the modern position.

²⁹ One need look no further than the quotations with which Koh opens his article to see that his claim about the "unanimity of relevant opinion" in support of the modern position is overstated. Koh, *supra* note 4, at 1825. Koh quotes from a decision that he previously acknowledged did not apply CIL, see *supra* note 20, a footnote from a Carter Administration brief that was later renounced by the Reagan Administration, see *infra* note 34, and a snippet of legislative history from a statute that on its face appears to belie the modern position, see *infra* p. 2271.

³⁰ See, e.g., *Filartiga v. Pena Irala*, 630 F.2d 876, 884-85 (2d Cir. 1980) (allowing Paraguayan citizens to sue a Paraguayan government official for acts committed in Paraguay); *Xuncax v. Gramajo*, 886 F. Supp. 162, 193 (D. Mass. 1995) (allowing Guatemalan citizens to sue a Guatemalan government official for acts committed in Guatemala). But see *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1176 (D.C. Cir. 1994) (holding that a claim against a foreign government official under CIL did not provide a basis for "arising under" federal question jurisdiction).

that CIL is federal law within the meaning of the Supremacy Clause.³¹ And contrary to Koh's suggestions, the Supreme Court most definitely has not held that CIL is federal common law.³² If anything, recent Supreme Court decisions, which Koh fails to address, have implied that CIL is *not* self-executing federal law.³³ Finally, although the political branches have largely incorporated traditional CIL into enacted federal law, they have incorporated the new CIL of human rights into federal law only in very limited circumstances, an approach that belies rather than supports the view that CIL is self-executing federal law.³⁴

³¹ Koh chides us for not citing any examples "in which the states have complained about a federal court ruling on international law 'invading' their sovereignty." Koh, *supra* note 4, at 1851. Because no federal court actually has applied CIL to invalidate a state law, it is not surprising that there are no such complaints. We suspect that there would be plenty of state complaints if courts were to begin using CIL to invalidate, for example, state capital punishment schemes otherwise consistent with the Constitution and enacted federal law. Indirect evidence for this claim is provided by Virginia's recent execution of Angel Breard, a Paraguayan national. Virginia convicted Breard of a capital crime after failing to inform him of his right under the Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, to contact the Paraguayan Consulate. See *Breard v. Greene*, Nos. 97-8214 (A-732), 97-1390 (A-738), 97-8660 (A-767), and No. 125, Orig. (A-771), 1998 U.S. LEXIS 2465, at *2-*3 (U.S. Apr. 14, 1998). Paraguay later brought an action against the United States in the International Court of Justice, which ordered the United States to "take all measures at its disposal to ensure that [Breard] is not executed pending the final decision in these [ICJ] proceedings." Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.), International Court of Justice (Apr. 9, 1998) <<http://www.icj-cij.org/ldocket/ipaus/ipausorder090498.htm>>. When the United States Supreme Court subsequently declined to stay Breard's execution, see *Breard*, 1998 U.S. LEXIS 2465, at *12, Secretary of State Albright officially asked Virginia Governor James Gilmore to exercise his discretion to stay the execution, but Gilmore let the execution proceed. See David Stout, *Clemency Denied, Paraguayan is Executed*, N.Y. TIMES, Apr. 15, 1998, at A18.

³² Koh claims that, "[b]y 1981, the Supreme Court had come unanimously to 'recogniz[e] the need and authority in some limited areas to formulate what has come to be known as 'federal common law'' in cases in which 'a federal rule of decision is 'necessary to protect uniquely federal interests,' including 'international disputes implicating . . . our relations with foreign nations.'" Koh, *supra* note 4, at 1826 (quoting *Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964))). The passage quoted here was dictum in a decision that held that there is no federal common law right of contribution from antitrust co-conspirators. See *Texas Industries*, 451 U.S. at 646. The decision had nothing to do with international law, and it thus provides little evidence of the Supreme Court's "unanimous[] . . . recogni[tion]" that CIL is self-executing federal law.

³³ For example, in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992), the Court rejected the argument that a criminal prosecution of a person abducted from Mexico by U.S. agents violated the U.S.-Mexico extradition treaty, and the Court refused to give independent significance to the CIL prohibition on international abductions. See *The Supreme Court, 1991 Term — Leading Cases*, 106 HARV. L. REV. 163, 322-23 (1992) ("[B]y chance or design, the Supreme Court disposed of Alvarez-Machain's potentially viable customary international law defense without analysis."). Similarly, in *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court refused to consult international practice in construing the Eighth Amendment because "it is American conceptions of decency that are dispositive," and the Court failed to give any independent significance to a possible CIL prohibition on execution of juvenile offenders. *Id.* at 369 n.1.

³⁴ See *infra* p. 2271. Koh once again exaggerates when he claims that "the executive branch has regularly urged the federal courts to determine [rules of customary international law] as matters of federal law." Koh, *supra* note 4, at 1842. Although some executives have urged courts to apply CIL as federal law to regulate the behavior of foreign governmental officials on foreign soil,

II. THE FALSE UNITY OF CIL

Koh also argues that structural constitutional considerations support the modern position. His best argument in this regard is that CIL is part of foreign relations law and the Constitution makes foreign relations law exclusively federal law. Under Koh's view, because "the Tenth Amendment has reserved little or no power to the states" in this context,³⁵ the federal judiciary's application of CIL as federal law interferes with no state interest, and thus is consistent with *Erie*.

There are two problems with this analysis. The first concerns Koh's claim that the Constitution establishes a judicially enforceable realm of exclusive federal power in foreign affairs. Koh cites no provision of the Constitution for this proposition, perhaps because the text fails to support it. Articles I and II of the U.S. Constitution give the federal political branches numerous executory foreign relations powers, and Article I, Section 10 excludes state authority in a defined set of foreign relations contexts.³⁶ The most natural inference from these provisions and the enumerated power structure of the Constitution is that all foreign relations powers not denied to the states by Article I, Section 10 fall within the concurrent authority of the state and federal governments until the political branches act to preempt state authority. Consistent with this inference, for the first 175 years of our nation's history, the Supreme Court did not recognize a judicially enforceable realm of exclusive federal power in foreign relations. The Court recognized such a realm for the first time in the 1960s.³⁷ The scope of this federal exclusivity in foreign affairs has been uncertain ever since,

executive views have not been uniform even in this narrow context. For example, in a brief filed in the Ninth Circuit in the Marcos litigation, the Reagan Administration largely repudiated the modern position. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 342 n.132. More broadly, the executive branch has never argued that it should be bound by a judicially federalized CIL, and, indeed, it has in a number of instances defended its right to violate CIL. See, e.g., *Alvarez-Machain*, 504 U.S. at 669-70; Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935-36 (D.C. Cir. 1988); *Garcia-Mir v. Meese*, 788 F.2d 1446, 1453-55 (11th Cir. 1986). In addition, to the best of our knowledge the executive branch has never argued that the new CIL of human rights trumps state law. This makes sense because the Executive has consistently insisted that the human rights treaties on which this CIL is based not be construed to preempt state law. See *supra* 2261-62; *infra* note 39 and accompanying text.

³⁵ Koh, *supra* note 4, at 1832.

³⁶ See U.S. CONST. art. I, § 10.

³⁷ See *Zschoernig v. Miller*, 389 U.S. 429, 432, 436 (1968); *Sabbatino*, 376 U.S. at 424-27. As Professor Henkin has correctly noted, the constitutionally-based foreign affairs exclusivity recognized in these decisions was new constitutional doctrine. See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 239 (1972) (describing *Zschoernig*); Louis Henkin, *The Foreign Affairs Power of the Federal Courts: Sabbatino*, 64 COLUM. L. REV. 805, 806 (1964) (describing *Sabbatino*); see generally Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1641-64 (1997) (explaining in detail why the modern notion of foreign affairs exclusivity lacks basis in historical practice).

and in recent years the Court has begun to back away from the idea altogether.³⁸

The second problem with Koh's structural analysis is more fundamental. To the extent that a constitutionally-based, exclusive federal power in foreign affairs retains validity, it is justified by the need for the United States to speak with one voice in its relations *with foreign nations*. On its face, the modern position appears to fall within this rationale because customary *international* law seems to govern relations among members of the international community. But of course the label "international" is misleading here. The judicial and academic treatment of CIL as federal common law during the past twenty years has almost exclusively been limited to the new CIL of human rights that purports to govern the relationship between a nation and its citizens. In this context, *Erie*'s relevance becomes clear. Assume that Koh is right that judicial incorporation of traditional CIL into U.S. federal law does not implicate federalism concerns because such incorporation is an exclusive federal prerogative. The same cannot be said of the judicial incorporation of the new CIL, which regulates issues like criminal punishment that are *not* exclusive federal prerogatives. These latter issues are at the heart of what the Constitution permits states to regulate unless and until the federal political branches, in which the states and their citizens have a voice, preempt state law through democratic processes.

Koh's treatment of CIL as a unitary phenomenon also causes him to overemphasize the vertical issue of federal exclusivity at the expense of the horizontal issue of what the federal political branches have actually said about CIL's federal law status. Although the political branches have comprehensively incorporated into federal law the traditional CIL that regulates *international* affairs, the opposite is true with respect to the new CIL of human rights. A principal source of the new CIL is the multilateral human rights treaties that have flourished in the post-World War II period. The United States has not ratified many of these treaties, and when it has, the President and the

³⁸ The leading case in this respect is *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298 (1994), in which the Supreme Court upheld California's controversial international taxation method against the charge that it "impair[ed] federal uniformity in an area where federal uniformity is essential" by "preven[t]ing the Federal Government from speaking with one voice in international trade." *Id.* at 320 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 320 (1976)) (internal quotation marks omitted). The Court made clear that it lacked the authority to preempt state activity on the basis of its adverse effects on foreign relations, *see id.* at 328, and it emphasized that it was the job of "Congress — whose voice, in this area, is the Nation's — to evaluate whether the national interest is best served by tax uniformity, or state autonomy," *id.* at 331. Koh's attempt to recast *Barclays Bank* as a case about deference to the Executive, *see Koh, supra* note 4, at 1848–49, is contradicted by the Court's insistence that "Executive Branch communications that express federal policy but lack the force of law" were irrelevant to the constitutionality of the California practice, *Barclays Bank*, 512 U.S. at 330.

Senate have consistently conditioned ratification on a now-standard series of reservations, understandings, and declarations (RUDs) that ensure that the treaty norms do not apply as supreme federal law and do not affect the validity of inconsistent state law.³⁹ These political branch acts to exclude international human rights law from domestic federal law are meaningless if, as Koh believes, the CIL based on these treaties applies with full force as domestic federal law, regardless whether the United States has ratified the relevant treaty, and regardless whether the Senate and President have conditioned ratification on the treaty's nonapplication as domestic federal law.⁴⁰

III. THE COMMON LAW POWERS OF FEDERAL COURTS

Our focus on federal political branch action raises a broader disagreement with Koh regarding the proper common law role of federal courts in the federalization of CIL. Koh ascribes to us a rigid conception of the federal courts' common law powers. He says that we require an "explicit and unambiguous directive from a federal statute or treaty" before courts can treat CIL as federal common law,⁴¹ and that our argument "would disrupt [the] dynamic framework" by which federal courts exercise federal common law powers in interpreting and applying federal enactments.⁴²

Contrary to Koh's representations, we have never suggested that federal common law is legitimate only if it is sanctioned by an "explicit and unambiguous" federal directive. There is no doubt that through interpretation of federal enactments, and by virtue of delegations of lawmaking power from Congress, federal courts can and must make federal common law. The problem, however, lies in determining where legitimate federal common lawmaking authorized by the political branches ends and illegitimate federal common lawmaking begins.⁴³

Consider, for example, the difficulties raised by Koh's example of whether the Queen of England should receive head-of-state immunity on a visit to the United States.⁴⁴ This example is much more complex than Koh suggests. By treaty and statute, the political branches have comprehensively federalized foreign diplomatic and sovereign immu-

³⁹ See Peter J. Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 574 (1997) (noting that "the Senate has consistently refused to effect any changes in state laws by way of the human rights treaties"); see also Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 *AM. J. INT'L L.* 341, 342-44 (1995) (describing and criticizing this trend).

⁴⁰ See Koh, *supra* note 4, at 1828 n.24, 1838-40.

⁴¹ *Id.* at 1828.

⁴² *Id.* at 1839.

⁴³ On this point there is much debate among courts and scholars. See, e.g., *Symposium on Federal Common Law*, 12 *PACE L. REV.* 227, 227-357 (1992).

⁴⁴ See Koh, *supra* note 4, at 1829.

nity.⁴⁵ On their face, these enactments do not purport to govern head-of-state immunity. This has given rise to disputes about the existence and scope of head-of-state immunity under CIL,⁴⁶ and the circumstances, if any, in which federal courts should apply it. Some courts construe the Foreign Sovereign Immunities Act (FSIA)⁴⁷ to govern head-of-state immunity,⁴⁸ but others view the FSIA as "inapplicable to a head-of-state" and instead look to executive branch authorization to apply the doctrine.⁴⁹ Among the courts that seek executive branch authorization, some recognize head-of-state immunity only in the face of an explicit suggestion of immunity by the Executive,⁵⁰ and others infer executive branch authorization of immunity from executive branch silence.⁵¹ Importantly, all of these decisions purport to ground head-of-state immunity in a federal political branch authorization. Contrary to the modern position, *none* of the decisions assumes that the CIL of head-of-state immunity applies as self-executing federal law.

The head-of-state immunity example illustrates that in some cases there will be plausible arguments for and against the requisite political branch authorization for a particular federal common law rule of CIL. But the existence of shades of gray does not detract from the fact that much is black and white. This is why it is important to resist treating CIL as a unitary phenomenon. The term "customary international law" subsumes a variety of different norms, only some of which the political branches want to federalize. When the political branches cannot plausibly be viewed as having authorized the incorporation of CIL, and especially when they have explicitly precluded incorporation, federal courts cannot legitimately federalize CIL.⁵²

⁴⁵ See Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602–1611 (1994); Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95.

⁴⁶ As one prominent commentator has noted, head-of-state immunity is "an at best amorphous legal doctrine whose very existence is not entirely settled in U.S. law and whose reach is almost completely uncertain." Joseph W. Dellapenna, Case Note, *Head-of-State Immunity — Foreign Sovereign Immunities Act — Suggestion By the Department of State: Lafontant v. Aristide*, 88 AM. J. INT'L L. 528, 531 (1994); see *In re Doe*, 860 F.2d 40, 44 (2d Cir. 1988); *In re Grand Jury Proceedings*, 817 F.2d 1108, 1110 (4th Cir. 1987).

⁴⁷ 28 U.S.C. §§ 1330, 1602–1611 (1994).

⁴⁸ See, e.g., *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990).

⁴⁹ *Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994).

⁵⁰ See, e.g., *In re Doe*, 860 F.2d at 45–46; *Jungquist v. Nahyan*, 940 F. Supp. 312, 321 (D.D.C. 1996).

⁵¹ See, e.g., *Spacil v. Crowe*, 489 F.2d 614, 618–19 (5th Cir. 1974) (dealing with head-of-state immunity before the passage of the FSIA); see also *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (mentioning but not endorsing this approach).

⁵² Cf. *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942) (Jackson, J., concurring) (observing that federal common law "implements the federal Constitution and statutes, and is conditioned by them" (emphasis added)).

Koh purports to be sensitive to the dynamic interaction between federal statutory and common law, but he groups together traditional and new CIL and ignores the varying evidence of political branch intent with regard to each. For example, in sharp contrast to their extensive federalization of traditional CIL, the political branches have only narrowly federalized the CIL of human rights. The recently enacted Torture Victim Protection Act (TVPA)⁵³ creates a federal cause of action against foreign governmental actors for the violation of CIL prohibitions on torture and extrajudicial killing. The statute's significant procedural limitations, its failure to address other CIL prohibitions, and additional evidence of congressional intent suggest that Congress has not authorized the federal courts to apply other aspects of the CIL of human rights to regulate foreign governmental behavior.⁵⁴ More importantly, the TVPA's express limitation to foreign governmental actors confirms what the Senate and the President have made clear in their conditional ratifications of multilateral human rights treaties: with minute exceptions, the federal political branches do not want international human rights law to preempt state law.⁵⁵

⁵³ Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350).

⁵⁴ See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 363-68. Koh misrepresents our views regarding the significance of the TVPA. He suggests that we said in our first article that the TVPA codified the modern position, and that we later "reverse[d] course" to argue that the TVPA rejected the modern position. Koh, *supra* note 4, at 1844; see also *id.* at 1859 (stating that Bradley and Goldsmith have "hardened their position"). We did neither. In our first article, we referred to the TVPA's federalization of CIL prohibitions on torture and extrajudicial killing as an exemplar of how CIL should be federalized. See Bradley & Goldsmith, *supra* note 1, at 873. We later argued that the TVPA's limited incorporation of two specific CIL norms, in combination with its procedural limitations on this incorporation and other evidence of congressional intent, suggested that the TVPA did not federalize all of CIL. See Bradley & Goldsmith, *Current Illegitimacy*, *supra* note 3, at 365-67. Koh complains that we contemplate a "minimal task" for the TVPA, Koh, *supra* note 4, at 1845, apparently because we would read the statute, which purports to federalize only prohibitions on "torture" and "extrajudicial killing," 28 U.S.C. § 1350 note (1994) (Torture Victim Protection § 2(a)(1)-(2)), as federalizing only prohibitions on torture and extrajudicial killing.

⁵⁵ The TVPA expressly limits its causes of action to acts committed by an individual acting under color of law "of any foreign nation," 28 U.S.C. § 1350 note (1994) (Torture Victim Protection § 2(a)) (emphasis added), and thus does not apply to federal or state government officials. Consider also the recently enacted exceptions to the Foreign Sovereign Immunities Act for suits against officials for torture, extrajudicial killing, and certain acts of terrorism. See 28 U.S.C.A. § 1605(a)(7) (West Supp. 1997). The federal cause of action enacted in conjunction with those amendments applies only against foreign, not U.S. federal or state, officials. See Civil Liability for Acts of State Sponsored Terrorism, Pub. L. No. 104-208, § 589, 1996 U.S.C.A.N. (110 Stat. 3009) 3009-576. The Genocide Convention Implementation Act of 1987, 18 U.S.C. § 1091 (1994), evinces a similar political branch solicitude for states' rights. The Act, which implements the Genocide Convention with respect to conduct within the United States or by a U.S. national, makes clear that it shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." *Id.* § 1092. This provision was designed to ensure that the Act "create[] no new federal cause of action in civil proceedings," and not "preempt the rights of state and local governments to enact similar legislation." Genocide Convention Implementation Act of 1988, H.R. REP. NO. 100-566, at 8 (1988).

Koh's claim that the CIL of human rights is federal common law that preempts state law is inconsistent with these enactments.

Koh's view of the proper role of the federal courts in incorporating international law is reminiscent of the broad views of federal common law that reached their zenith during the 1960s and 1970s. Koh comes very close to saying that courts should have as much authority to make law as Congress does.⁵⁶ He also suggests that federal statutes, including what appear to be purely jurisdictional provisions, should be interpreted broadly as delegating lawmaking power to the federal courts.⁵⁷ In the past decade, however, the Supreme Court has embraced a different view of the proper scope of federal common law and its relationship to federal statutes. The Court has criticized the "run-away tendencies of federal common law untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."⁵⁸ This concern is especially implicated by the federal common law called for by the modern position, which is based on sources largely external to the U.S. legal system and is in tension with numerous policy positions taken by the federal political branches. In other foreign relations contexts, the Court has construed its common law and interpretive powers narrowly in order to encourage the federal political branches to specify the content of federal foreign relations law.⁵⁹ Koh's proposed "transnational public law litigation" model, which is self-consciously based on the Chayesian public law litigation model,⁶⁰ is oblivious to these and other institutional concerns.

A more balanced conception of the dynamic interaction between courts and the political branches precludes the view that all of CIL is self-executing federal law. Contrary to Koh's suggestion, such a rejection of the modern position would not prevent federal courts from using CIL-related canons in interpreting federal statutes.⁶¹ The canons

⁵⁶ See, e.g., Koh, *supra* note 4, at 1831, 1835-36, 1853-55 (suggesting that a constitutional delegation of power to Congress, such as the power to define and punish offenses against the law of nations, should be construed as also authorizing a similar lawmaking power in the federal courts).

⁵⁷ See *id.* at 1835 n.60 (relying on *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

⁵⁸ O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994).

⁵⁹ See, e.g., *Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 331 (1994) (refusing to preempt state tax law, despite its adverse foreign relations implications and inconsistency with executive policy, because it is the job of "Congress — whose voice, in this area, is the Nation's — to evaluate whether the national interest is best served by tax uniformity, or state autonomy"); *United States v. Alvarez-Machain*, 504 U.S. 655, 669 n.16 (1992) (reading an extradition treaty narrowly as not prohibiting international abductions, in deference to "the diplomatic approach" through the Executive); *EEOC v. Arabian American Oil*, 499 U.S. 244, 248, 259 (1991) (applying the presumption against extraterritoriality in order to avoid "unintended clashes" with foreign law and "international discord," and inviting Congress to "calibrate [Title VII's] provisions in a way that [the Court] cannot").

⁶⁰ Koh, *supra* note 20, at 2347-48 (analogizing to the framework described in Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976)).

⁶¹ See Koh, *supra* note 4, at 1836-39.

he mentions — that ambiguous statutes be construed not to violate international law, the presumption against extraterritoriality, and international comity — flourished in the nineteenth century when CIL was not viewed as federal law.⁶² In addition, the purposes of the canons are quite different from those of the modern position. Traditionally, these canons have been used to reduce judicial intervention in foreign relations matters, attenuate the need for judicial foreign relations judgments, and promote political branch supremacy.⁶³ The modern position, by contrast, contemplates an expansive foreign relations role for courts and a related lack of deference to the political branch processes. Finally, these canons do not raise the same federalism concerns as the modern position because they presumably are not binding on state courts (or federal courts sitting in diversity) in their application of state law.⁶⁴

Koh contends that if the modern position were rejected, “we would expect to see proliferation of varying state rules of customary international law.”⁶⁵ This standard refrain from modern position proponents has initial intuitive appeal, but it ignores the historical evidence and reflects an unwarranted lack of confidence in the federal political branches. “[B]alkanization”⁶⁶ never occurred during the 175 years when CIL was not viewed as federal law and states were legally entitled, in the absence of a preemptive federal enactment, to interpret or violate CIL. Balkanization did not occur during this period primarily because the political branches federalized those aspects of CIL that required uniform national treatment. Rejection of the modern position is much less likely to lead to balkanization today because the political branches have federalized traditional CIL more comprehensively than ever. It is possible, of course, that states will disagree about the relevance of the CIL of human rights to their governing institutions. Nonuniformity on these issues, however, is presumptively acceptable under our constitutional structure and has been expressly permitted by federal legislation.

⁶² See *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895) (applying principles of international comity); *United States v. Palmer*, 16 U.S. 610, 632–33 (1818) (applying the presumption against extraterritoriality); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (applying the canon that ambiguous acts of Congress should be construed not to violate international law).

⁶³ See generally Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 495–504, 524–29 (1998) [hereinafter Bradley, *The Charming Betsy Canon*] (discussing justifications for the *Charming Betsy* canon); Curtis A. Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT'L L. 505, 510–19, 550–61 (1997) (discussing justifications for the presumption against extraterritoriality).

⁶⁴ See Bradley, *The Charming Betsy Canon*, *supra* note 63, at 533–36; Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 334 n.114.

⁶⁵ Koh, *supra* note 4, at 1840.

⁶⁶ See *id.*

IV. THE INTERNATIONALIST ASSUMPTION

The first three errors in Koh's analysis — his misreliance on history, the false unity he claims for CIL, and his overly expansive views regarding federal common law — can be viewed as the product of a fourth, overarching error, which we will term the *internationalist assumption*. The internationalist assumption is that all of international law *must* be incorporated into domestic law.

The internationalist assumption permeates Koh's analysis. It underlies his repeated claim that if CIL is not federal law, then it must be state law.⁶⁷ It explains his inaccurate charge that we "argue for the near complete *ouster* of customary international law rules from federal judicial interpretation."⁶⁸ It is reflected in his extraordinary claim that if human rights treaty norms are accepted by much of the world community, the norms become CIL that is self-executing, supreme federal common law both before the United States has ratified the treaty and after it has ratified the treaty on the condition that the treaty norms will not apply as domestic federal law.⁶⁹ Finally, the internationalist assumption leads Koh to sound at times as if our liberties depend on the world community and the federal courts. Thus, for example, he worries that rejection of the modern position would allow U.S. states to commit genocide.⁷⁰ Suffice it to say that we have more confidence than Koh in our domestic constitutional and democratic processes.

Koh never defends the legitimacy of his internationalist assumption, and the assumption is in tension with prevailing understandings of international law and the U.S. Constitution. It is well accepted that international law does not itself speak to whether or how it applies within particular domestic regimes, but rather leaves this issue to be determined by domestic law.⁷¹ In the U.S. domestic regime, *Erie* makes clear that federal courts cannot apply any norm as *federal* law in the absence of some authorization from the Constitution or the federal political branches. And both the Constitution and recent federal enactments appear to rule out rather than embrace the view that international law in its entirety must be domestic federal law. Articles I and II of the Constitution specify procedures for political branch incorporation of international law by treaty and statute that would be unnecessary if the internationalist assumption were correct. The Su-

⁶⁷ In addition to the title of his article, see, for example, Koh, cited above in note 4, at 1827-29, 1850, 1851-52.

⁶⁸ *Id.* at 1828 (emphasis added); see also *id.* at 1840 n.84 (asserting that we argue for a "presumptive ouster" of CIL).

⁶⁹ See *id.* at 1828-29 n.24, 1838-40.

⁷⁰ See *id.* at 1840, 1850.

⁷¹ See, e.g., LOUIS HENKIN, RICHARD CRAWFORD PUGH, OSCAR SCHACHTER & HANS SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 153 (3d ed. 1993); Edwin Borchard, *The Relation Between International Law and Municipal Law*, 27 VA. L. REV. 137, 143 (1940).

premacY Clause's limitation of supreme federal law to those laws "made in pursuance[] of" the Constitution and those treaties made "under the Authority of the United States"⁷² also suggests that international law does not automatically apply as domestic federal law.⁷³ Finally, as explained above,⁷⁴ the federal political branches have incorporated international law into domestic federal law in carefully delineated circumstances rather than in the wholesale fashion contemplated by the internationalist assumption.

V. CONCLUSION

Koh's essay is symptomatic of a creeping incoherence at the heart of foreign affairs law. Much of this law assumes a sharp distinction between domestic and foreign relations, and between the constitutional law that governs each. Under this view, domestic relations concern *internal* affairs and are governed by a relatively rigorous set of constitutional understandings about federalism, separation of powers, and representative democracy. Foreign relations, by contrast, concern *external* affairs and are governed by relatively relaxed constitutional understandings.

As the development of international human rights law demonstrates, foreign affairs are in fact no longer distinct from domestic affairs. They increasingly overlap with what has traditionally been viewed as domestic, or local, concerns. As the distinction between domestic and foreign affairs wanes, it becomes crucial to identify which set of constitutional understandings should prevail. Our claim that CIL is not self-executing federal law is at bottom an argument that the more rigorous constitutional understandings that normally attend domestic matters must prevail. Koh's contrary claim in support of the modern position can be seen as an attempt to expand the relaxed understandings of foreign affairs law into the domestic realm, a problematic step for the reasons we have discussed.

Koh begins his essay by asserting that "even casual reflection compels the conclusion that Bradley and Goldsmith are utterly mistaken."⁷⁵ With due respect, we believe that it is just such "casual reflection" that has led Koh and so many other international law scholars to overlook the fundamental inconsistencies between the modern position and this country's constitutional traditions.

⁷² U.S. CONST. art. VI.

⁷³ See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 508 n.16 (2d ed. 1996) (noting that the Supremacy Clause "does not easily include [customary] international law," because CIL is not a treaty and is not made pursuant to the Constitution, but rather is made by the world community "in a process to which the United States contributes only in an uncertain way and to an indeterminate degree").

⁷⁴ See *supra* pp. 2266, 2271.

⁷⁵ Koh, *supra* note 4, at 1827.