Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions

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Abstract

This Article provides the first comprehensive empirical analysis of the use of customary international law by federal courts in statutory interpretation—a particularly important issue given the growth of subject-matter areas covered by international custom and the increased likelihood of its potential overlap with domestic legislation. The analysis shows that courts utilize international custom across a diverse range of fields, not only to construe ambiguous statutes but also to review unambiguous legislation. Some judges and commentators, however, have recently challenged the practical determinacy and democratic legitimacy of this interpretive modality and have sought to abrogate it altogether. Acknowledging the partial validity of these concerns, this Article argues that courts should interpret statutes in a manner that is consistent with custom that is clear and accepted ("established custom") based on what could be called the Sosa-Charming Betsy *doctrine. Conversely, courts should construe statutes independently of vague or disputed custom ("emerging custom") and articulate statutory interpretation as persuasive evidence of the formation of a new customary norm.*

Recognizing the constraint established custom has on statutory interpretation in turn increases the United States's influence over emerging custom. By engaging in this interpretive exercise within the international community and taking established custom seriously, United States judicial opinions regarding emerging custom also will be taken more seriously. These dual interactions provide a previously unexplored power-maximizing justification for this canon of construction. To be sure, important questions remain regarding the sources of evidence and the uniformity of state practice and extent of opinio juris necessary to identify established custom. But the scholarly and judicial debate should shift to these issues, which might be resolvable only in context and through a case-by-case assessment of particular norms, rather than by seeking overall nullification of this interpretive modality.

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"There is in the scholarly community an intuition that domestic statutes do not stand on their own authority, but rather rest against the backdrop of international norms. . . . [P]erhaps the majority of judges on this court are apprehensive about unambiguously rejecting it."

– Judge Janice Rogers Brown[1]

*"[N]either judicial respect for international law nor available evidence regarding actual congressional intent nor post-*Erie *Supreme Court precedent justifies use of the* Charming Betsy *canon to conform federal statutes to . . . customary international law."*

– Judge Brett Kavanaugh[2]

"[C]ourts should [not] take uncertain or disputed propositions of international law and build them into iron constraints on the meaning of [statutes, unless there is] clear reason to believe that [customary international rules are] consistently and evenhandedly applied, are the product of serious reasoning and are susceptible of practical application."

– Judge Stephen Williams[3]

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1 Al-Bihani v. Obama, 619 F.3d 1, 3–4 (D.C. Cir. 2010) (Brown, J., concurring in the denial of rehearing en banc).

2 *Id.* at 35–36 (Kavanaugh, J., concurring in the denial of rehearing en banc).

3 *Id.* at 56 (opinion of Williams, J.).

INTRODUCTION

What is the interaction between customary international law and statutory interpretation?[4] How have federal courts used international custom to construe statutes?[5] And what is the role of statutory interpretation in shaping international custom?

Customary international law—general practice accepted as law—is one of the three sources of international law, in addition to international agreements and general principles of law.[6] In contrast to treaties, which bind only parties to them, international custom is obligatory on all states.[7] Contemporary customary international law includes a vast range of rules on sovereign immunity, use of force, detention, immigration, and maritime law, among other fields. It increasingly overlaps (and potentially conflicts) with U.S. statutes, such as the Foreign Sovereign Immunities Act,[8] Authorization for Use of Military Force,[9] Military Commissions Act,[10] Immigration and Nationality Act,[11] Maritime Drug Law Enforcement Act,[12] and others. And the extraterritorial application of any domestic statute, criminal or civil, may depend on the international custom on jurisdiction.[13]

Consider the following examples. In the aftermath of the September 11, 2001 attacks against the United States by Al-Qaeda, Con-

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4 For a general discussion of the process of interaction between international law and domestic law, see Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2603 (1997) (describing the "process of interaction, interpretation, and internalization of international norms into domestic legal systems [as] pivotal to understanding why nations 'obey' international law, rather than merely conform their behavior to it when convenient").

5 This Article uses "customary international law" and "international custom" interchangeably. Although the former (as well as its acronym, CIL) is more prevalent in scholarship, the latter has three key advantages: greater concision; origins in the International Court of Justice and Permanent Court of International Justice statutes; and linguistic symmetry to constitutional custom and domestic custom. *See* Statute of the International Court of Justice art. 38, ¶ 1, June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; Statute of the Permanent Court of International Justice art. 38, para. 2, July 31, 1926.

6 ICJ Statute, *supra* note 5, at art. 38, ¶ 1.

7 *See infra* note 328.

8 Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1602–1611 (2012).

9 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

10 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–950t and other scattered sections of the U.S.C.).

11 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of the U.S.C.).

12 Maritime Drug Law Enforcement Act, 46 U.S.C. §§ 70501–70507 (2006).

13 *See generally* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 604–05 (5th ed. 2011).

gress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks[,] . . . or harbored such organizations or persons."[14] Does this provision authorize detention, and if so, can the detention be indefinite or must it be time-limited? Does the joint resolution authorize criminal prosecution by military commissions, and if so, are there any minimum procedural requirements?

The Foreign Sovereign Immunities Act grants immunity to foreign states except under certain circumstances, such as cases of takings "in violation of international law."[15] Does this provision lift immunity only for a state's taking of foreign property, or does it extend to a state's taking of domestic property if combined with another violation of international law?

To resolve these questions, courts have relied in part on international custom in construing the legislative texts.[16] Such judicial interpretations, in turn, can shape the development of customary international law on those particular issues.[17]

Scholars have analyzed extensively the independent status of customary international law as domestic law in the United States—operating apart from any constitutional or statutory provision—in light of Supreme Court doctrine and constitutional principles such as federalism and separation of powers.[18] International custom has been explored as a source of constitutional interpretation.[19] And there has been vast scholarship—and considerable litigation—on the topic of the Alien Tort Statute ("ATS"),[20] which gives U.S. courts jurisdiction over tort claims by non-U.S. citizens for violations of international custom or U.S. treaties.[21] This statute was the subject of the Supreme Court's most recent general statement on customary international law

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14 50 U.S.C. § 1541 note (2006).

15 28 U.S.C. § 1605(a)(3) (2012).

16 *See infra* Part I.C.

17 *See* 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xl (2005). The International Committee of the Red Cross periodically updates its online database of relevant State practice. *See Customary IHL*, INT'L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v2 (last visited Aug. 9, 2014).

18 *See infra* note 73.

19 *See, e.g.*, Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1, 11 (2006).

20 Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2012).

21 *See id.*

in *Sosa v. Alvarez-Machain*[22] and subsequent litigation before the Court in *Kiobel v. Royal Dutch Petroleum Co.*,[23] which significantly narrowed the future scope of the ATS by precluding from its reach extraterritorial claims against foreign defendants.[24]

But scholars have paid less attention to the use of international custom as a source of statutory interpretation beyond the ATS, which will continue regardless of the Court's construction of that particular statute.[25] And very little has been written on the converse effect of statutory interpretation on customary law formation. These dual interactions are the subject of this Article.

This Article provides a comprehensive empirical analysis of the use of customary international law by federal courts in statutory interpretation.[26] Following the methodology of other empirical studies of statutory interpretation,[27] it codes the dataset of cases for six variables—clarity of the statute, quality of the custom (based on its clarity and acceptance), existence of conflict, source prevalence in the case of conflict, cited sources of custom, and subject matter of the law—and identifies trends in the case law.[28] The analysis shows that courts utilize international custom in statutory interpretation across a diverse range of subject-matter areas—not only to construe ambiguous statutes, but also to review unambiguous legislation for consistency with

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22 Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

23 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

24 *See id.* at 1668–69; *Sosa*, 542 U.S. at 714–18; *see also infra* notes 403–24.

25 For notable exceptions, see INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011); Curtis A. Bradley, *The* Charming Betsy *Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998); Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990); Jonathan Turley, *Dualistic Values in the Age of International Legisprudence*, 44 HASTINGS L.J. 185 (1993). Historically, most treatises on statutory interpretation did not discuss the role of international custom. *See* Steinhardt, *supra*, at 1111 n.34 (collecting sources since the nineteenth century containing only a brief discussion of the *Charming Betsy* canon). Contemporary treatises, however, have drawn greater attention to international custom's interpretive role. *See, e.g.*, CALEB NELSON, STATUTORY INTERPRETATION 173–74 (2011).

26 For an important discussion of empiricism in international law, see Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

27 *See, e.g.*, William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from* Chevron *to* Hamdan, 96 GEO. L.J. 1083, 1093–97 (2008); Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1771–75 (2010); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 302–12 (2006).

28 *See infra* Part I.

customary international law.[29] In one recent case, international custom was even relied upon to invalidate clear statutory text, where a court of appeals held that federal criminalization of drug trafficking abroad exceeded Congress's power to define and punish offenses against the law of nations.[30] The modern use of customary international law turns out to be broader than the classical *Charming Betsy* canon articulated by Chief Justice Marshall, whereby "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[31] Thus, descriptively, the Article serves to update scholarly understanding of international custom's interpretive role to reflect the reality of contemporary U.S. jurisprudence.

Prescriptively, however, modern use of international custom should also be narrower than implied by the *Charming Betsy* canon. Some judges and commentators—as reflected in the D.C. Circuit's en banc opinion in *Al-Bihani v. Obama*,[32] excerpted above[33]—have recently challenged the practical determinacy and democratic legitimacy of this interpretive modality and have sought to abrogate it altogether.[34] Acknowledging the partial validity of these concerns, this Article seeks to update *Charming Betsy* to reflect the reality of contemporary customary international law. Whereas international custom in the early nineteenth century was mostly a limited set of clear and accepted norms ("established custom"),[35] it currently spans a wide spectrum of areas with varying degrees of clarity and acceptance.[36] Some critics might assume that modern international custom is like the "brooding omnipresence in the sky" that Justice Holmes argued did not exist.[37] Indeed, the lack of determinacy of the subset of international custom that is vague or disputed ("emerging custom") undermines its procedural legitimacy[38] and generates a "low quality" of the

29 The appropriate scope of such review is discussed in Part III.A.

30 *See infra* note 184 and accompanying text.

31 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

32 Al-Bihani v. Obama, 619 F.3d 1 (D.C. Cir. 2010).

33 *See supra* notes 1–3.

34 *See infra* Part II.A.

35 Notably, Blackstone identified only three norms as principal criminal offenses against the law of nations in the late eighteenth century: violation of safe conducts, infringement of the rights of ambassadors, and piracy. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *68.

36 *See infra* Part I.

37 *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

38 THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 195–98 (1990) (discussing legitimacy of international law rules).

underlying claims for purposes of judicial enforcement as U.S. law.[39] Courts should not apply vague or disputed custom in statutory interpretation because, in short, there is no rule of international law to apply. Because courts would need to choose between two (or more) competing rules of international custom that are emerging, "judges would produce 'undemocratic' results if they prematurely enforced" such norms.[40]

However, what characterizes some customary norms does not apply to all of international custom, a substantial portion of which is susceptible to judicial application without the risk of undemocratic judicial law making. As the Supreme Court held in *Sosa*, in assessing tort claims actionable under the ATS, federal courts can apply international custom that is clear and accepted. The *Sosa* Court stated that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms."[41] This heightened standard can apply as equally to claims of construction as it has, since *Sosa*, to causes of action under the ATS; for both interpretation and incorporation, the wheat can—and should—be separated from the chaff. As Harold Koh put it, once a normative claim has "crystallized" into established custom, that custom is not a mere proposal but an actual rule that judges can "find," as they have "over the centuries."[42] Moreover, this approach also ensures that established custom reflects considered state practice of the U.S. political branches, as norms that reach the required level of acceptance most likely reflect U.S. participation in their formation—thus alleviating concerns about democratic legitimacy.[43] Based on what could be described as the *Sosa-Charming Betsy* doctrine, courts have authority to construe statutes in light of such custom.[44] Rather than acting as legislators and "mak[ing] up

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39 John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1224–25 (2007).

40 Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 387 (1997); *see also infra* note 356.

41 Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

42 Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2385–86 (1991).

43 *See infra* note 356 and accompanying text.

44 Under rare circumstances of conflict between an earlier clear statute and a later established custom, courts might have authority to apply the latter, although there is no direct precedent on this issue. *See infra* notes 369–90 and accompanying text.

[rules] as they go along,"[45] courts can apply established custom as they find it in a process of discovery rather than creation.[46]

The interaction between international custom and U.S. statutes has become particularly important given the growth of subject-matter areas covered by customary international law and the increased likelihood of its overlap with statutes.[47] Oona Hathaway has observed that the line between domestic and international law is increasingly blurred.[48] As Jack Goldsmith and Curtis Bradley point out, this interpretive role is "where customary international law may have its most significant effect in the U.S. legal system."[49] While courts have some historical experience dealing with this question, they will face it more frequently (given recent trends) and with greater complexity. This Article aims to provide a useful analytical framework for judicial decisionmaking in such cases.

Moreover, litigants seeking to utilize international law arguments might be able to rely on them, for the most part, only in statutory interpretation, rather than direct enforcement.[50] The direct role of treaties in U.S. law has been gradually eviscerated through an expansion of the judicial doctrines of non-self-execution and private rights of action requirements,[51] as well as the rise of congressional-executive

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45 RICHARD A. POSNER, HOW JUDGES THINK 234 (2008).

46 *See* JEREMY WALDRON, "PARTLY LAWS COMMON TO ALL MANKIND": FOREIGN LAW IN AMERICAN COURTS 3–6 (2012) (advocating this approach for the use of foreign law in U.S. courts); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 832–33 (1989) (describing the nineteenth century approach to the law of nations in this manner).

47 *See* CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM xi (2013) ("The scope of international law's coverage has also expanded significantly, such that it now frequently overlaps with domestic law.").

48 Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 218 (2009).

49 CURTIS A. BRADLEY & JACK L. GOLDSMITH, FOREIGN RELATIONS LAW: CASES AND MATERIALS 644 (3d ed. 2009). *But see* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 166 (2010) (arguing that "[c]ustomary international law has played an even smaller role in domestic adjudication" than treaties, and that "[l]ike treaties, customary international law can influence the interpretation of ambiguous statutes that affect foreign relations, but again this is rare").

50 They might also be able to rely on them in constitutional interpretation, where many constitutional provisions are reasonably susceptible to competing constructions. *See generally* Cleveland, *supra* note 19.

51 *See, e.g.*, Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 71 (2012); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 628 (2008); Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 578 (2007).

agreements as a replacement for treaties.[52] The same concerns underlying the non-self-execution doctrine for treaties presumably would apply to international custom. And indeed, customary international law is also rarely enforced directly.[53]

The payoff from this relationship between custom and statutes, however, can run both ways. In addition to litigants utilizing established custom in statutory interpretation, emerging custom can be shaped through statutory interpretation.[54] Given the likelihood that international custom will be vague more frequently than statutes, statutory interpretation can have a greater effect on customary law formation than the reverse.[55] This potential influence of U.S. law on international law[56] has thus far been underappreciated as a power-maximizing justification for the use of international custom in statutory interpretation.[57]

Scholarly study of the use of international custom is particularly relevant now, and will continue to be in the near future. There are increasingly fewer treaties ratified by the United States, with a historically record low number of five between 2009 and 2012,[58] and fewer multilateral treaties adopted worldwide.[59] Thus, for many international questions, customary international law may be the main source of relevant rules as an instrument of national policy that is interchangeable with treaties and congressional-executive agreements.[60]

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52 *See* Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1306 (2008).

53 *See infra* text accompanying note 74.

54 *See infra* Part III.B.

55 *See infra* Part III.

56 *Cf.* David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. Rev. 762, 764 (2012).

57 *See infra* Part III.C.

58 *See Search Treaties*, THOMAS (LIBRARY OF CONGRESS), http://thomas.loc.gov/home/treaties/treaties.html (select "111th (2009–2010)" & "112th (2011–2012)" congresses) (last visited Aug. 10, 2014).

59 *See* G. John Ikenberry, *Is American Multilateralism in Decline?*, 1 PERSP. ON POL. 533, 533, 537 (2003); *see also* U.S. DEPARTMENT OF STATE, TREATIES IN FORCE, 316–489 (2012) (demonstrating the decline in recent ratified multilateral treaties compared to the second half of the twentieth century). Treaties can still serve an indirect role in statutory interpretation through the mechanism of customary international law. *See* Vienna Convention on the Law of Treaties art. 38, May 23, 1969, 1155 U.N.T.S. 331 (recognizing that "a rule set forth in a treaty" may "becom[e] binding upon a third State as a customary rule of international law, recognized as such").

60 *See infra* Part III; *see also* Bart M. J. Szewczyk, *Custom and Treaties as Interchangeable Instruments of National Policy*, AJIL UNBOUND (Apr. 30, 2014, 2:54 PM), http://www.asil.org/blogs/custom-and-treaties-interchangeable-instruments-national-policy; *cf.* Myres S. McDougal

The timing for this analysis is particularly appropriate given recently commenced projects by international and U.S. institutions on customary international law. In 2012, the United Nations International Law Commission started work on the international community's first authoritative report on the formation and evidence of international custom.[61] Aiming to reflect the global perspective, the Commission's analysis will involve a multi-year process, due to the extent of consultation and consensus building involved.[62] Although the Commission is likely to focus on the jurisprudence of international courts, the experience of domestic courts should also inform its work and ultimate consensus.[63] Likewise, the American Law Institute has begun work on the *Restatement (Fourth) of the Foreign Relations Law of the United States*, and may consider updating sections on international custom.[64] Thus, appraising the practice of U.S. courts with regard to international custom can help shape its future status under both international law and U.S. law.

This Article does not address the role of the other two sources of international law—treaties and general principles of law—in statutory interpretation. Although there is a related "canon of construction against finding implicit repeal of a treaty in ambiguous congressional action,"[65] it is complicated by the self-execution doctrine and other issues specific to treaties.[66] General principles of law have rarely been used by U.S. courts outside of ATS litigation, and sparingly so even in this area.[67] Moreover, there does not appear to be an interpretive ca-

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& Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181, 206 (1945).

61 *See* Rep. of the Int'l Law Comm'n, 64th Sess., May 7–June 1, July 2–Aug. 3, 2012, U.N. Doc. A/67/10; GAOR, 67th Sess., Supp. No. 10, ¶ 157 (2012).

62 *See id.* ¶¶ 156, 162.

63 *See infra* notes 321–26 and accompanying text.

64 The current topics under revision are jurisdiction/enforcement, treaties, and sovereign immunity. *See Current Projects*, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=projects.members&projectid=28 (last visited Aug. 10, 2014).

65 Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 252 (1984); *see also* Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 207 (1993) (Blackmun, J., dissenting); Weinberger v. Rossi, 456 U.S. 25, 32 (1982).

66 *See, e.g.*, Fund for Animals, Inc. v. Kempthorne, 472 F.3d 872, 880 (D.C. Cir. 2006) (Kavanaugh, J., concurring) ("There is little authority squarely analyzing whether those interpretive principles should extend to *non-self-executing* treaties, which have no force as a matter of domestic law."); *see also* John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010). *But see* Rebecca Crootof, Note, *Judicious Influence: Non-Self-Executing Treaties and the* Charming Betsy *Canon*, 120 YALE L.J. 1784, 1789 (2011) ("[M]ost judges employing the *Charming Betsy* canon use it—and should continue to use it—without regard to whether the relevant treaty is self-executing . . . .").

67 For an analysis of the use of general principles of law by the International Court of

non similar to *Charming Betsy* for general principles of law as a source of international law. The analysis in this Article also excludes foreign law, which is sometimes lumped together with international law[68] but is in fact analytically separate.[69] Finally, it sets aside the question of international custom's direct role in U.S. law on a stand-alone basis, which has been extensively explored elsewhere.[70]

The Article is structured as follows. Part I provides an empirical analysis of the use of customary international law by federal courts in statutory interpretation and discusses in greater detail the case law within specific categories of issues, such as extraterritoriality, sovereign immunity, the law of armed conflict, maritime law, and immigration.

Part II examines and responds to the fundamental (though still limited) resistance to international custom, links the contemporary concerns with their historical origins, and surveys the main theoretical approaches to address these critiques. It shows that there is need for judicial caution in using international custom given its uncertainty.

Part III offers a new framework for resolving interactions between custom and statutes based on the clarity of the statute, quality of the custom, and relative timing of each source of law. In light of this approach, it outlines the judicial competence to identify and influence custom and suggests a power-maximizing justification for the use of international custom in statutory interpretation.

The dual interaction between international custom and domestic statutes opens new avenues for the potential role of international law in U.S. law and the development of international custom through judicial interpretation.

Justice, see HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 167–69 (Grotius Publ'ns Ltd. 1982) (1958). But some have argued that the ICJ statute's provision on the use of general principles of law now has become a "dead letter." KAROL WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 108 (2d rev. ed. 1993).

68 For an example, see *infra* note 221 and accompanying text.

69 *See generally* WALDRON, *supra* note 46, at 6–11 (explaining that critics of *Roper v. Simmons*, 543 U.S. 551 (2005), "frequently ran together the issue of the citation of foreign law and the citation of international law").

70 *See infra* note 73. For some general remarks on this subject, in light of this Article's analysis, see *infra* notes 232–35 and accompanying text.

I. EMPIRICAL ANALYSIS OF STATUTORY INTERPRETATION THROUGH INTERNATIONAL CUSTOM

The U.S. Constitution makes treaties the supreme law of the land,[71] but it does not explicitly address the status of international custom apart from giving Congress the power "[t]o define and punish . . . [o]ffenses against the Law of Nations."[72] Much of the scholarly debate surrounding international custom has focused on whether it is incorporated into U.S. law on a stand-alone basis as judicially enforceable federal common law.[73] U.S. courts, however, have generally utilized customary international law in the context of statutory or constitutional interpretation, rather than through direct enforcement.[74] It is the jurisprudence of statutory interpretation that Part I addresses.

A. Methodology

Perhaps unsurprisingly, the role of international custom in statutory interpretation is not addressed in most federal cases. Fortunately for the scholar, this helps limit the empirical universe to a manageable size. On the other hand, the relationship between custom and statutes features frequently enough in U.S. jurisprudence—and at an increas-

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71 U.S. CONST. art. VI.

72 U.S. CONST. art. I, § 8, cl. 10. Historically, international custom was referred to as the law of nations. *See* BLACKSTONE, *supra* note 35, at 66–68; *see also* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1251 (11th Cir. 2012) ("We and our sister circuits agree that the eighteenth-century phrase, the 'law of nations,' in contemporary terms, means customary international law."). For a discussion of theories and elements of international custom, see *infra* Part II.C.

73 *Compare* Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825–26 (1998), Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After* Erie, 66 FORDHAM L. REV. 393, 397 (1997) (arguing generally for a broad incorporation of customary international law into U.S. law), *and* Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1501 (2011), *with* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997) (arguing generally for a narrow, if any, incorporation of international custom into U.S. law), Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 873–74 (2007), *and* Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT'L L. 365, 369 (2002).

74 For a few select examples to the contrary, typically involving prize, salvage, or foreign official immunity claims, see The Paquete Habana, 175 U.S. 677, 714 (1900) (awarding the proceeds of an illegally captured prize when "sitting as the highest prize court of the United States, and administering the law of nations"); Yousuf v. Samantar, 699 F.3d 763, 773 (4th Cir. 2012); R.M.S. Titanic, Inc. v. The Wrecked & Abandoned Vessel, 435 F.3d 521, 536 (4th Cir. 2006); United States v. Steinmetz, 973 F.2d 212, 218–19 (3d Cir. 1992).

ing rate—to warrant study and analysis. It is a narrow (but not esoteric) question with broad implications, as the reach of international custom continues to spread into new areas.

The initial set of cases included 745 reported federal appellate cases between 1945 and 2012, inclusive, based on a comprehensive word search.[75] The rationale for the beginning cut-off year was twofold: contemporary international custom was fundamentally transformed by World War II[76] and U.S. judicial perspectives on customary law were more generally transformed by *Erie Railroad Co. v. Tompkins*.[77] Cases addressing questions primarily under the Alien Tort Statute or Torture Victim Protection Act ("TVPA"),[78] which is often pleaded alongside ATS claims, were then excluded from this set, because they do not provide much variation in the relationship between international custom and statutory interpretation[79] and have received ample scholarly attention elsewhere.[80] On the other hand, ATS and TVPA cases that primarily focused on a separate question of international custom and statutory interpretation (e.g., sovereign immu-

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75 The word search in WestlawNext, limited to reported federal appellate cases, was ("international custom" OR "customary international law" OR "law! of nations" OR "law! of war" OR "international norm!" OR "international principle!").

76 *See* LORI FISLER DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 29–30 (5th ed. 2009).

77 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) ("There is no federal general common law."); *see* Sosa v. Alvarez-Machain, 542 U.S. 692, 726 (2004) (describing *Erie* as "the watershed in which [the Court] denied the existence of any federal 'general' common law" wrought by "conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it").

78 Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note (2012).

79 Indeed, notwithstanding the scholarly focus on ATS litigation, such cases are only a plurality of the overall set. Moreover, modern cases under the ATS began with the Second Circuit's decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), whereas the general use of international custom in statutory interpretation has a longer tradition. *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804).

80 For a selection of the scholarship, see Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011); Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT'L L. 587 (2002); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT'L L. 461 (1989); Anthony D'Amato, Editorial Comment, *The Alien Tort Statute and the Founding of the Constitution*, 82 AM. J. INT'L L. 62 (1988); William S. Dodge, *The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context*, 42 VA. J. INT'L L. 687 (2002); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the "Originalists,"* 19 HASTINGS INT'L & COMP. L. REV. 221 (1996); Ryan Goodman & Derek P. Jinks, Filartiga*'s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463 (1997); Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61 (2008); Eugene Kontorovich, *Implementing* Sosa v. Alvarez-Machain*: What Piracy Reveals About the Limits of the Alien Tort Statute*, 80 NOTRE DAME L. REV. 111 (2004); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830 (2006).

nity) were included. This subset was then filtered for irrelevant, reversed, or vacated cases, which yielded a dataset of 123 cases.[81] The dataset was coded for the following six variables:

(1) clarity of the statute;

(2) quality of the custom (based on its clarity and acceptance);

(3) existence of a conflict between a statute and international custom;

(4) source prevalence in the case of conflict;

(5) cited sources of custom; and

(6) subject matter.[82]

There are three methodological limitations to this approach. First, it excludes from the dataset cases in which international custom could have been used to construe statutes but was not discussed at all. Second, determining the clarity of a statute and quality of a custom is sometimes difficult and not easily susceptible to a binary classification, because there are degrees of clarity with any legal source and ranges of acceptance of a custom. Finally, the analysis relies on a given court's representation of the statute and custom as clear or not, rather than making an independent judgment, which would be difficult if not impossible for a single scholar to assess across subject areas and over time.

B. Overall Findings

Notwithstanding the above methodological constraints, this analysis reveals important insights into the relationship between international custom and statutory interpretation in U.S. jurisprudence. It also highlights previously underappreciated features.

General Harmony Between Custom and Statutes. In approximately ninety percent of the cases, there was no conflict between U.S. statutes and international custom: either both sources pointed in the same direction or one was sufficiently unclear so as to be construed consistently with the other. This vast preponderance of harmony between the two sources provides strong empirical support for the assumption underlying the *Charming Betsy* doctrine that Congress does not intend to violate customary international law through legislative

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81 Also excluded were cases that involved interpretation of state statutes in light of international custom. *See, e.g.*, Buell v. Mitchell, 274 F.3d 337, 370–76 (6th Cir. 2001) (finding the Ohio death penalty statute not to be inconsistent with customary international law).

82 The coded dataset is available at http://www.gwlr.org/2014/08/25/szewczyk_dataset/.

enactments, unless it clearly states so.[83] Historical practice suggests that this interpretive default rule is better than the alternatives.[84]

Use of Custom to Broaden Statutory Interpretation. International custom is often perceived as a potential constraint on domestic law, but frequently courts rely on international custom to expand the scope of statutes. Notably, notwithstanding the oft-repeated presumption against extraterritoriality, courts have applied statutes to situations abroad more often than not, in part by relying on broad bases under international custom for asserting jurisdiction.[85] This power of customary international law to facilitate projection of U.S. statutory law has been overlooked by those who view international law primarily as an obstacle.[86]

Increased Rate and Breadth of the Use of Custom. The use of international custom in statutory interpretation has increased significantly over time. More than sixty percent of the cases (77 of 123) occurred over the past twenty years, with the most recent decade more than doubling the prior decade's caseload (53 versus 24). In addition, the interpretive role of international custom has arisen in a wider variety of cases and in cases with higher stakes.

General but Not Universal Deference to the Executive Branch. In most cases, courts deferred to the executive branch's statutory construction in light of international custom. This tendency is related to the "super-strong" deference in foreign affairs.[87] However, this deference was not universal, and the exceptions are not trivial. Courts have declined executive interpretations of criminal statutes. Additionally, courts have even struck down legislative attempts to criminalize drug trafficking abroad as inconsistent with established custom and beyond

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83 *Charming Betsy*, 6 U.S. (2 Cranch) at 118 (holding that "Congress cannot be intended to have prohibited [activity protected under international custom], unless that intent be manifested by express words or a very plain and necessary implication").

84 *See infra* notes 428–31 and accompanying text.

85 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 401–404, 421–423, 431–433 (1987) (discussing the customary international law on the jurisdiction to prescribe, adjudicate, and enforce).

86 For some notable exceptions, see JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY 145–47 (2012); Cleveland, *supra* note 19, at 97 ("[I]nternational law has been applied both to enhance governmental authority and to limit the scope of individual constitutional protections.").

87 *See* WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 325 (1994) (describing the "[s]uper-strong rule against congressional interference with the president's authority over foreign affairs and national security"); Eric A. Posner & Cass R. Sunstein, Chevron*izing Foreign Relations Law*, 116 YALE L.J. 1170, 1176 (2007) (arguing that foreign affairs statutes often "require[ ] judgments of policy and principle, and the foreign policy expertise of the executive places it in the best position to make those judgments").

Congress's power to define and punish offenses against customary international law.[88] And even on matters of intense national security interest, such as the conduct of war and military detention, courts have applied international custom in statutory interpretation.[89]

Limited Sources of Evidence of Custom. Even though the reach of international custom is thick, its sources of evidence tend to be thin. The predominant source was federal case law, which was referenced in all instances but one and was the sole source in nearly forty percent of the cases. The next most common sources were scholarly writings, the *Restatement of Foreign Relations Law*, and treaties, which were used less than half the time and often in combination with each other.[90] Direct evidence of state practice was discussed in one out of five cases. International cases were referenced sparingly, and foreign cases even less so.[91] The limited sources of evidence of custom used by U.S. courts are not inconsistent with the general practice of international courts, which typically rely on their own case law in the first instance, followed by treaties, judicial decisions from other courts, and scholarly writings.[92] Notably, "raw state practice" is rarely analyzed, as such inquiry is often "impracticable."[93]

Rare Use of Custom on Human or Civil Rights. International human rights law has been one of the main developments of contemporary international custom,[94] but it has rarely been used in statutory interpretation. In particular, courts have been reluctant to entertain claims under international custom in the area of immigration law, where many courts have held that the detailed statutory framework provided by the Immigration and Nationality Act preempts rules of customary international law.[95]

Normative Justification Based on Legislative Intent. To the extent courts justified the use of international custom in statutory interpretation, they relied on a theory of legislative intent. Often quoting from *Charming Betsy*—that "Congress cannot be intended to have [violated international custom], unless that intent be manifested by express

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88 *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1258 (11th Cir. 2012).

89 *See infra* notes 153–79 and accompanying text.

90 For a critique of relying on indirect sources of state practice, see A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475 (2003).

91 More detailed statistics are provided in Table 1 of the Appendix.

92 *See* WOLFKE, *supra* note 67, at 139–54.

93 *See id.* at xiv–xv.

94 *See, e.g.*, DAMROSCH ET AL., *supra* note 76, at 956–61.

95 *See infra* notes 189–200 and accompanying text.

words or a very plain and necessary implication"[96]—courts typically view their role as faithful agents of the political branches and avoid unintended conflict with customary international law.

C. *Categories of Cases*

Cases utilizing international custom in statutory interpretation can be grouped into six categories: extraterritoriality, sovereign immunity, law of armed conflict, maritime cases, immigration, and other.[97] In each category, courts have relied on customary international law to both expand and constrain statutory authority.

Extraterritoriality. The most frequent use of international custom was to determine whether a statute applied to conduct abroad, which occurred in over one-third of the cases. Even though courts frequently cite the doctrine of a presumption against extraterritoriality[98]—including the Supreme Court in *Kiobel*[99]—the actual judicial practice is against recognizing extraterritoriality when urged by private parties but in favor of recognizing extraterritoriality when sought by the government: generally, private parties are denied and governmental parties are granted requests for statutory extraterritoriality.[100]

In nearly all cases in which the government sought to have statutes applied abroad, courts did so.[101] For instance, courts have applied criminal statutes abroad to combat fraud against the U.S. government,[102] drug trafficking,[103] sex with minors,[104] importation of illegal aliens,[105] violence in aid of racketeering,[106] and antitrust violations.[107]

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96 Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

97 The statistics for each category are included in Table 2 of the Appendix.

98 *See* Smith v. United States, 507 U.S. 197, 204 n.5 (1993) ("Congress generally legislates with domestic concerns in mind.").

99 *See* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665 (2013).

100 For a reform proposal to eliminate the presumption against extraterritoriality, see generally Zachary D. Clopton, *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. Rev. 1 (2014) (arguing for the *Charming Betsy* canon for civil statutes, the rule of lenity for criminal statutes, and *Chevron* deference for administrative cases).

101 For a discussion of the constitutional issues regarding the extraterritoriality of criminal statutes, see generally Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 Law & Pol'y Int'l Bus. 1 (1992); José A. Cabranes, *Our Imperial Criminal Procedure: Problems in the Extraterritorial Application of U.S. Constitutional Law*, 118 Yale L.J. 1660 (2009).

102 United States v. Ayesh, 702 F.3d 162, 164–67 (4th Cir. 2012).

103 United States v. Ibarguen-Mosquera, 634 F.3d 1370, 1378–79 (11th Cir. 2011); United States v. Cardales-Luna, 632 F.3d 731, 737–38 (1st Cir. 2011).

104 United States v. Weingarten, 632 F.3d 60, 63–67 (2d Cir. 2011).

105 United States v. Delgado-Garcia, 374 F.3d 1337, 1343–49 (D.C. Cir. 2004).

106 United States v. Vasquez-Velasco, 15 F.3d 833, 838–41 (9th Cir. 1994).

107 United States v. Nippon Paper Indus. Co., 109 F.3d 1, 4–9 (1st Cir. 1997).

This judicial deference extended to state governments.[108] Most cases involved ambiguous or no evidence of extraterritorial scope and generally relied on guidance from the executive branch.[109] The limited instances in which courts rejected governmental requests for extraterritoriality involved regulatory agency actions to enforce subpoenas abroad in the absence of clear statutory support.[110]

In contrast, courts have nearly always denied private parties the extraterritorial invocation of statutes, including Title VII of the Civil Rights Act of 1964,[111] the National Labor Relations Act,[112] the Railway Labor Act,[113] the Securities Exchange Act,[114] the Jones Act,[115] the Sherman Act,[116] and the Foreign Trade Antitrust Improvements Act.[117] Little distinguished most of these cases from the ones above in terms of statutory text, history, or purpose relevant to the question of extraterritoriality. The main explanatory factor was the lack of governmental request for extraterritorial application in these civil cases.

In one exception to this clear governmental/private divide on extraterritoriality, a district court issued a preliminary injunction against

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108 *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 795–99 (1993).

109 Some of these cases rested on the well-established doctrine that the presumption against extraterritoriality "should not be applied to criminal statutes which are, as a class, not logically dependent on their locality for the Government's jurisdiction, but are enacted because of the right of the Government to defend itself against obstruction, or fraud wherever perpetrated, especially if committed by its own citizens, officers or agents." United States v. Bowman, 260 U.S. 94, 98 (1922). This rationale, however, does not extend to "[c]rimes against private individuals or their property," *id.*, and thus does not explain the extraterritorial application of all criminal statutes.

110 *See* CFTC v. Nahas, 738 F.2d 487, 491–95 (D.C. Cir. 1984); FTC v. Compagnie De Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1310–15 (D.C. Cir. 1980).

111 *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2012); EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246–47 (1991), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071, 1077.

112 *See* National Labor Relations Act, 29 U.S.C. §§ 151–169 (2012); McCulloch v. Sociedad Nacional de Marineros de Hond., 372 U.S. 10, 12–13 (1963).

113 *See* Railway Labor Act, 45 U.S.C. §§ 151–188 (2006); Air Line Stewards & Stewardesses Ass'n, Int'l v. Nw. Airlines, Inc., 267 F.2d 170, 178 (8th Cir. 1959).

114 *See* Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012); Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 265 (2010).

115 46 U.S.C. § 30104 (2006) (formerly cited as 46 U.S.C. § 688); *see* Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 383–84 (1959) (holding that the Jones Act does not cover claims by a Spanish citizen against a Spanish vessel while in U.S. territorial waters); Lauritzen v. Larsen, 345 U.S. 571, 577 (1953) ("By usage as old as the Nation, [maritime shipping] statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law.").

116 *See* Sherman Act, 15 U.S.C. §§ 1–7 (2012); Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 357–58 (1909).

117 Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (2012); F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 173 (2004).

foreign court proceedings in order to preserve its own jurisdiction over a civil case brought by a private party.[118] In affirming the district court's injunction and permitting the U.S. proceedings to continue without interference from foreign litigation, the D.C. Circuit hastened to add that its holding was "in the absence of some emanation from the Executive Branch."[119] Thus, the exception confirmed the rule that courts generally grant governmental requests with respect to extraterritorial application of statutes.[120]

The presumption against private extraterritoriality and in favor of governmental extraterritoriality is consistent with customary international law, which provides five bases for jurisdiction but allocates the discretion to exercise extraterritorial jurisdiction to the state, rather than to nonstate actors.[121] International custom is generally permissive in accommodating assertions of extraterritorial jurisdiction, to enable states to protect their perceived national interests.[122] The main constraint is reasonableness of the asserted interests—a broad standard determined based on "all relevant factors," such as the link of the regulated activity or person to the territory of the regulating state or the importance of the regulation to the international system.[123]

This distinction between public and private projection of statutory authority explains the unanimous judgment in *Kiobel*, where the executive branch submitted an amicus brief against construing the ATS to apply extraterritorially to foreign defendants for aiding and abetting liability.[124] It also suggests that under different circum-

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118 *See* Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 915 (D.C. Cir. 1984) ("If the[ ] defendants had been permitted to file foreign injunctive actions, the United States District Court would have been effectively stripped of control over the claims—based on United States law—which it was in the process of adjudicating.").

119 *See id.* at 955.

120 The exception also shows that a civil/criminal divide on extraterritoriality, which can be potentially extrapolated from *Bowman*, does not explain the case law as well as the governmental/private distinction does. *See supra* note 109.

121 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402–404 (1987) (listing territory, nationality, protective personality, universality, and passive personality as grounds for jurisdiction under customary international law).

122 *See id.* § 402 ("Subject to § 403, a state has jurisdiction to prescribe law with respect to . . . certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.").

123 *See id.* § 403(2) (listing eight categories of relevant factors). In the event of conflict between two reasonable interests, the state with the stronger interest prevails. *See id.* § 403(3).

124 *See generally* Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) [hereinafter Gov't Supplemental Kiobel Brief]. *See also* Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013).

stances—where the government supports extraterritoriality against U.S. persons for conduct occurring abroad or against any person for direct liability—the Court's holding may be different.[125]

Notably, courts have not only utilized international custom to construe ambiguous statutes, as the *Charming Betsy* doctrine suggests, but they have also relied on it to review clear statutory text. For instance, in *United States v. Corey*,[126] Judge Kozinski permitted the application of special maritime and territorial jurisdiction over a private apartment in the Philippines leased by the U.S. embassy, because concurrent jurisdiction was "well-recognized in international law," and thus there was no conflict with U.S. law.[127] Similarly, clear statutory assertion of criminal jurisdiction over drug trafficking on stateless vessels on the high seas was upheld under the protective principle, which allows nations to assert jurisdiction over foreign vessels on the high seas that threaten security or governmental functions.[128] Rather than dismissing customary arguments altogether when statutes are clear, courts have reviewed the legislative text for compliance with international custom.[129] And as with the development of judicial review for constitutionality of statutes,[130] positive review affirming consistency[131] may foreshadow negative review resolving conflict.[132]

Sovereign Immunity. Courts have also addressed international custom in the context of construing the Foreign Sovereign Immunities Act ("FSIA"). The FSIA provides that foreign states are immune from the jurisdiction of federal and state courts, subject to several exceptions. One question raised in the cases was whether there are extratextual exceptions to sovereign immunity based on the international custom of jus cogens—"compelled" or "necessary" higher norms, such as the prohibition on genocide and torture, from which no derogation is permitted under international or domestic law.[133] In *Siderman de Blake v. Republic of Argentina*,[134] plaintiffs ar-

125 *See infra* notes 402–24 and accompanying text.

126 United States v. Corey, 232 F.3d 1166 (9th Cir. 2000).

127 *Id.* at 1179.

128 United States v. Marino-Garcia, 679 F.2d 1373, 1380–81 (11th Cir. 1982).

129 *See infra* notes 184–88 and accompanying text.

130 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 184 (2005) (explaining that "judicial invalidations were highly unlikely in early America").

131 Hylton v. United States, 3 U.S. (3 Dall.) 171, 175 (1796).

132 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). The appropriate scope of such review is discussed in Part III.A.

133 *See* Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (defining a jus cogens norm, also known as a "peremptory norm" of international law, as "a norm accepted and recognized by the international community of States as a whole as a norm

gued that the FSIA could not provide sovereign immunity for jus cogens violations, even if its text was silent on the issue, because under international custom jus cogens "trumped" the principle of immunity.[135] The Ninth Circuit concluded that the only exceptions to sovereign immunity were those specifically provided by the statute.[136] The D.C. Circuit rejected a related argument that jus cogens violations constitute implied waiver by the state,[137] which is one of the exceptions under the FSIA.[138] The Second and Seventh Circuits agreed.[139] But the holdings rested not on statutory override of international custom, nor on the latter's irrelevance, but rather on international law's silence on the issue. One court reasoned that "although *jus cogens* norms may address sovereign immunity in contexts where the question is whether international law itself provides immunity, *e.g.*, the Nuremberg proceedings, *jus cogens* norms do not require Congress (or any government) to create jurisdiction."[140] International custom permits lifting sovereign immunity for jus cogens violations, but it does not require it and leaves it to the discretion of domestic legal systems.

One explicit statutory exception to sovereign immunity under the FSIA is for expropriation.[141] Defined in part as a taking "in violation

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from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"). For a discussion of peremptory norms in the context of common law foreign official immunity, see Yousuf v. Samantar, 699 F.3d 763, 777 (4th Cir. 2012) (finding, in case where the government suggested nonimmunity, that "under international and domestic law, officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity").

134 Siderman de Blake v. Republic of Arg., 965 F.2d 699 (9th Cir. 1992).

135 *Id.* at 717–19.

136 *Id.* at 718–19.

137 Princz v. Fed. Republic of Ger., 26 F.3d 1166 (D.C. Cir. 1994).

138 28 U.S.C. § 1605(a)(1) (2012) ("A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver . . . .").

139 Sampson v. Fed. Republic of Ger., 250 F.3d 1145, 1152–57 (7th Cir. 2001); Smith v. Socialist People's Libyan Arab Jamahiriya, 101 F.3d 239, 242, 245 (2d Cir. 1996) ("The contention that a foreign state *should* be deemed to have forfeited its sovereign immunity whenever it engages in conduct that violates fundamental humanitarian standards is an appealing one[,]" but "Congress did not intend the implied waiver exception . . . to extend so far.").

140 *Sampson*, 250 F.3d at 1152.

141 28 U.S.C. § 1605(a)(3) ("A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the States in any case . . . in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on

of international law," the expropriation exception has typically been deemed by courts not to apply to domestic takings.[142] Thus, if France nationalizes French corporations, there is no action under the FSIA. But what if the domestic expropriation is part of a country's genocidal campaign against its own citizens? In *Abelesz v. Magyar Nemzeti Bank*,[143] the Seventh Circuit held that sovereign immunity does not apply under such circumstances, given the jus cogens prohibition on genocide.[144] "Where international law universally condemns the ends," the court held that it did "not believe the domestic takings rule can be used to require courts to turn a blind eye to the means used to carry out those ends—in this case, widespread expropriation of victims' property to fund and accomplish the genocide itself."[145] Although the defendants criticized the plaintiffs' argument as converting "non-actionable domestic takings" claims into genocide-based claims, the court viewed the FSIA as sufficiently ambiguous to permit this interpretation given the clarity and intensity of the international custom on genocide.[146]

Violations of jus cogens have also lifted the sovereign immunity of individual officials. In *Yousuf v. Samantar*,[147] the Fourth Circuit considered the scope of common law immunity after the Supreme Court decided that the FSIA did not apply to individuals.[148] The court looked to the "increasing trend in international law to abrogate foreign official immunity for individuals who commit acts, otherwise attributable to the State, that violate *jus cogens* norms."[149] Thus, the court allowed the plaintiffs' actions under the TVPA and ATS to pro-

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in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States . . . .").

142 *See, e.g.*, United States v. Belmont, 301 U.S. 324, 332 (1937) ("What another country has done in the way of taking over property of its nationals, and especially of its corporations, is not a matter for judicial consideration here. Such nationals must look to their own government for any redress to which they may be entitled."); FOGADE v. ENB Revocable Trust, 263 F.3d 1274, 1294 (11th Cir. 2001) ("As a rule, when a foreign nation confiscates the property of its own nationals, it does not implicate principles of international law.").

143 Abelesz v. Magyar Nemzeti Bank, 692 F.3d 661 (7th Cir. 2012).

144 *Id.* at 676.

145 *Id.*

146 *See id.* at 677.

147 Yousuf v. Samantar, 699 F.3d 763 (4th Cir. 2012).

148 Samantar v. Yousuf, 560 U.S. 305, 325 (2010).

149 *Yousuf v. Samantar*, 699 F.3d at 776 (citing Curtis A. Bradley & Laurence R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 SUP. CT. REV. 213, 236–37).

ceed against a former high-ranking government official for alleged acts of torture and human rights violations.[150]

Law of Armed Conflict. Courts have also interpreted war-related congressional enactments through the prism of customary international law, particularly in the context of the United States's armed conflict against Al-Qaeda. In *Hamdi v. Rumsfeld*,[151] the Supreme Court addressed the question of whether the Authorization for Use of Military Force ("AUMF")[152] provided for indefinite or perpetual detention by authorizing the President to "use all necessary and appropriate force" against Al-Qaeda and related organizations.[153] It agreed with the detainee's claim "that indefinite detention for the purpose of interrogation is not authorized."[154] But it held that the AUMF implicitly included "the authority to detain for the duration of the relevant conflict."[155] Notably, the Court based its "understanding . . . on longstanding law-of-war principles" and emphasized that "[i]f the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."[156] Similarly, in *Al-Bihani v. Obama*,[157] the D.C. Circuit reviewed a habeas petition from a detainee seeking release on the grounds that the AUMF authorized detention only for the duration of the war between the United States and Taliban-controlled Afghanistan, which had ended once the Taliban government fell.[158] The court found that international custom "require[d] release and repatriation only at the cessation of active hostilities" rather than at the end of "war" or "conflict."[159] The court also rejected the petitioner's argument that as a member of a paramilitary group allied with the Taliban, but not part of the Taliban regime, he should have been afforded the opportunity to remain neutral.[160] It observed that "the laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states" rather than irregular

150 *Id.* at 778.

151 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

152 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

153 *Hamdi*, 542 U.S. at 510–11.

154 *Id.* at 521.

155 *Id.*

156 *Id.*

157 Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010).

158 *Id.* at 871.

159 *Id.* at 874 (internal quotation marks omitted).

160 *Id.* at 871.

fighting forces.[161] In both cases, customary international law was used to expand the statutory text.

Notably, the propriety of interpreting the AUMF in light of international custom was confirmed by the political branches in the National Defense Authorization Act for Fiscal Year 2012 ("NDAA").[162] The NDAA "affirm[ed] that the authority of the President to use all necessary and appropriate force pursuant to the [AUMF] includes the authority for the Armed Forces of the United States to detain covered persons . . . pending disposition under the law of war."[163] It also confirmed that the "disposition of a person under the law of war" includes "[d]etention under the law of war without trial until the end of the hostilities authorized" by the AUMF.[164] Likewise, President Obama issued an executive order stating that "detention authorized by the Congress under the AUMF[ ] [i]s informed by the laws of war."[165]

International custom has also constrained statutory authority in the context of armed conflict. In *Hamdan v. Rumsfeld*,[166] the Court determined whether military commissions established by executive order[167] to try suspected members of Al-Qaeda, pursuant to the Uniform Code of Military Justice ("UCMJ")[168] and the AUMF, were consistent with the law of armed conflict.[169] In particular, the petitioner challenged the power of the military commission's presiding officer to deny him access to evidence by classifying it as "protected information"—a procedure requiring the officer's decision that the evidence was probative and that its admission without the defendant's knowledge would not "result in the denial of a full and fair trial."[170] The Court observed that "compliance with the law of war is the condition upon which the authority" for military commissions under the UCMJ is granted.[171] Based on treaties and scholarly writings, the Court concluded that international custom prohibited "the passing of

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161 *Id.* at 873.

162 *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1298 (2011).

163 *Id.* § 1021(a).

164 *Id.* § 1021(c)(1).

165 Exec. Order No. 13,567, 76 Fed. Reg. 13,277, 13,280 (Mar. 7, 2011).

166 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

167 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

168 Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2012).

169 *See Hamdan v. Rumsfeld*, 548 U.S. at 566–67.

170 *Id.* at 614 (internal quotation marks omitted).

171 *Id.* at 628.

sentences . . . without . . . all the judicial guarantees which are recognized as indispensable by civilized peoples."[172] Among these minimum standards was the requirement "that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him," which the military commission procedures failed to meet.[173] In response to the Court's ruling, Congress enacted the Military Commissions Act of 2006 ("MCA") to conform the procedures to international custom.[174]

In subsequent proceedings, Hamdan challenged his conviction for "material support for terrorism," a war crime specified by the MCA,[175] for actions he took from 1996 to 2001.[176] He argued that, at the time of his conduct, the UCMJ authorized military commissions to try only violations of the "law of war,"[177] which did not include material support for terrorism as an international crime.[178] The D.C. Circuit agreed and held that it was "quite evident" that material support for terrorism was not a recognized violation of customary international law as of 2001.[179]

Maritime Cases. Courts have also used international custom to interpret statutory text in maritime cases. For instance, in *United States v. Hensel*,[180] the First Circuit construed the Coast Guard's authority to "make . . . searches, seizures and arrests upon the high seas"[181] to not permit violations of international law, such as the search of a foreign vessel without the flag-state's permission.[182] In *United States v. Bellaizac-Hurtado*,[183] the Eleventh Circuit struck down the Maritime Drug Law Enforcement Act ("MDLEA")—authorizing the criminal prosecution of drug trafficking in foreign territorial waters—as inconsistent with customary international law, which does not recognize drug trafficking as a crime.[184] Consequently, the court found that the MDLEA exceeded Congress's authority under the Constitution to "define and punish . . . Offenses against the Law of

172 *Id.* at 630 (internal quotation marks omitted).
173 *Id.* at 634.
174 *See* 10 U.S.C. § 950 (2012).
175 10 U.S.C. § 950t(25).
176 Hamdan v. United States, 696 F.3d 1238, 1240 (D.C. Cir. 2012).
177 10 U.S.C. § 821 (2012).
178 *See Hamdan v. United States*, 696 F.3d at 1241.
179 *Id.* at 1251.
180 United States v. Hensel, 699 F.2d 18 (1st Cir. 1983).
181 14 U.S.C. § 89(a) (2012).
182 *Hensel*, 699 F.2d at 27.
183 United States v. Bellaizac-Hurtado, 700 F.3d 1245 (11th Cir. 2012).
184 *Id.* at 1249.

Nations."[185] In particular, the court explained that drug trafficking is not an international crime, even though it is criminalized by many nations, because it is "not a matter of mutual concern."[186] In other cases, both domestic statutes and international custom pointed in the same direction.[187] Interestingly, courts have construed the MDLEA in light of international custom notwithstanding the statute's provision that there is no "standing to raise a claim of failure to comply with international law as a basis for a defense," and that a "failure to comply with international law does not divest a court of jurisdiction and is not a defense to a proceeding under" the statute.[188]

Immigration. In contrast to the types of cases discussed above, courts have been generally reluctant to interpret immigration statutes in light of customary international law. Courts have often summarily dismissed arguments regarding international custom in such cases on grounds that custom "cannot override congressional intent as expressed by statute."[189] Reasoning that Congress has enacted "an extensive legislative scheme" in immigration matters, some courts have viewed customary international law as simply "inapplicable" in this area of law.[190] Notably, in *Guaylupo-Moya v. Gonzales*,[191] the Second Circuit expressly rejected the conclusion of a lower court, which construed a statute not to apply retroactively so as to prevent conflict with international custom.[192] The district court had concluded that "in order to overrule customary international law, Congress must enact domestic legislation which both postdates the development of a cus-

185 *See* U.S. CONST. art. I, § 8, cl. 10; *Bellaizac-Hurtado*, 700 F.3d at 1262.

186 *Bellaizac-Hurtado*, 700 F.3d at 1256.

187 *See, e.g.*, United States v. Dire, 680 F.3d 446, 468–69 (4th Cir. 2012) (holding that piracy did not require robbery and encompassed violent conduct on the high seas); Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634, 643 (4th Cir. 2000) (holding that U.S. domestic law is consistent with the customary international law rule that title to sunken warships may be abandoned only by an express act of abandonment).

188 46 U.S.C. § 70505 (2006) (formerly cited as 46 U.S.C. § 1903).

189 Martinez-Lopez v. Gonzales, 454 F.3d 500, 502 (5th Cir. 2006); *see also* Flores-Nova v. Att'y Gen. of the U.S., 652 F.3d 488, 495 (3d Cir. 2011) (holding that international custom is "not binding on the United States or this Court to the extent that it conflicts with" the statutory text on eligibility for cancellation of removal); Bradvica v. INS, 128 F.3d 1009, 1014 n.5 (7th Cir. 1997) ("[C]ustomary international law is not applicable in domestic courts where there is a controlling legislative act, such as the statute here.").

190 Galo-Garcia v. INS, 86 F.3d 916, 918 (9th Cir. 1996).

191 Guaylupo-Moya v. Gonzales, 423 F.3d 121 (2d Cir. 2005).

192 *See id.* at 124; Beharry v. Reno, 183 F. Supp. 2d 584, 604–05 (E.D.N.Y. 2002) (construing provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996—which precluded family hardship waivers for lawful permanent residents convicted of an aggravated felony, and expanded the definition of aggravated felony—in light of international custom), *rev'd on jurisdictional grounds*, Beharry v. Ashcroft, 329 F.3d 51 (2d Cir. 2003).

tomary international law norm, and which clearly has the intent of repealing that norm."[193] In rejecting that interpretation, the court of appeals noted that it was "not clear" that the sources cited by the district court rose to the level of international custom or that retroactive application of the statute would actually conflict with customary international law.[194] In any event, the Second Circuit viewed "the clarity of Congress's intent" as the "ultimately dispositive" factor in the case in overcoming arguments based on international custom.[195]

In other immigration cases, however, where the relative balance of clarity between statutory text and customary rules tilted towards the latter, courts have been more willing to consider international custom. In *Rodriguez-Fernandez v. Wilkinson*,[196] the Tenth Circuit construed the Immigration and Nationality Act ("INA") not to authorize indefinite detention as an alternative to exclusions, because to hold otherwise would violate the fundamental principle of international custom that "human beings should be free from arbitrary imprisonment."[197] Similarly, the Ninth Circuit has held that "construing the [INA] to authorize the indefinite detention of removable aliens might violate international law"[198]—in particular, the "clear international prohibition" against prolonged and arbitrary detention.[199] On the other hand, the Eleventh Circuit has noted that "arbitrary" is "hardly a self-defining term" and that it found "no evidence" that "it is current international practice to regard the detention of uninvited aliens seeking admission as a violation of customary international law."[200]

Other. Courts have also considered international custom in interpreting statutes of limitations for money judgments,[201] the Federal Tort Claims Act,[202] trade statutes,[203] jurisdictional matters,[204] the Fed-

193 *Beharry v. Reno*, 183 F. Supp. 2d at 599; *see also id.* at 600 ("Customary international law is legally enforceable unless superceded by a clear statement from Congress. Such a statement must be unequivocal. Mere silence is insufficient to meet this standard.").

194 *Guaylupo-Moya*, 423 F.3d at 135.

195 *Id.*

196 Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

197 *Id.* at 1388.

198 Kim Ho Ma v. Ashcroft, 257 F.3d 1095, 1114 (9th Cir. 2001).

199 *Id.* at 1114 (internal quotation marks omitted).

200 Jean v. Nelson, 727 F.2d 957, 964 n.4 (11th Cir. 1984).

201 Salvoni v. Pilson, 181 F.2d 615, 617 (D.C. Cir. 1950) (holding that statute of limitations tolled during World War II based on international custom).

202 Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680 (2012); *see* Cobb v. United States, 191 F.2d 604, 609–11 (9th Cir. 1951) (holding that Okinawa was a foreign country under the FTCA, because the United States could not alter tort law in Okinawa under international custom).

203 Allegheny Ludlum Corp. v. United States, 367 F.3d 1339, 1348 (Fed. Cir. 2004)

eral Arbitration Act,[205] and other matters.[206] Thus, the interpretive reach of international custom is not limited to the five categories discussed above. Notwithstanding dicta in one case that "no enactment of Congress can be challenged on the ground that it violates customary international law,"[207] the relevant interpretative inquiry has been more nuanced: it has been a function of the relative clarity of the statutory text and international custom, rather than wholesale rejection of the latter's role in statutory interpretation. Moreover, in not only construing ambiguous statutes but also reviewing clear legislation—and, in one recent case, invalidating clear statutory text as exceeding Congress's power to define offenses against international custom[208]—the contemporary use of customary international law has been broader than implied by the classical *Charming Betsy* doctrine.

The use of international custom in statutory interpretation appears to be well established across a wide range of subject-matter ar-

("[W]here neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, this court finds additional support for construing 19 U.S.C. § 1677(5)(F) as consistent with the determination of the WTO appellate panel."); Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1297 (Fed. Cir. 2002) (holding that regulations comporting with World Trade Organization rulings were consistent with U.S. statute).

204 TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 303 (D.C. Cir. 2005) (rejecting the "attempt to condition the jurisdiction of the courts of the United States upon the 'minimum contacts' purportedly required under customary international law"); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 339 (1st Cir. 2000) (holding that *parens patriae* is not grounds for standing under international custom); Murarka v. Bachrack Bros., 215 F.2d 547, 553 (2d Cir. 1954) ("It is the undoubted right of each country to determine who are its nationals, and it seems to be general international usage that such a determination will usually be accepted by other nations.").

205 Federal Arbitration Act, 9 U.S.C. §§ 1–16 (2012); *see* Compagnie Noga D'Importation et D'Exportation S.A. v. Russian Fed'n, 361 F.3d 676, 689–90 (2d Cir. 2004) (applying customary international law on state responsibility to enforce arbitral award under the FAA); China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp., 334 F.3d 274, 288 (3d Cir. 2003) ("[I]t appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed.").

206 *In re* Korean Air Lines Co., 642 F.3d 685, 696 (9th Cir. 2011) (Airline Deregulation Act); *In re* Maxwell Commc'n Corp., 93 F.3d 1036, 1046–50 (2d Cir. 1996) (Bankruptcy Code); Hassan v. Wright, 45 F.3d 1063, 1065 (7th Cir. 1995) (Social Security Act); Comm. of U.S. Citizens Living in Nicar. v. Reagan, 859 F.2d 929, 935–42 (D.C. Cir. 1988) (congressional funding of Nicaraguan Contras); Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 882 n.10 (2d Cir. 1981) (Hickenlooper Amendment to the Foreign Assistance Act of 1964); Melong v. Micronesian Claims Comm'n, 569 F.2d 630, 633–36 (D.C. Cir. 1977) (Micronesian Claims Act).

207 *Comm. of U.S. Citizens Living in Nicar.*, 859 F.2d at 939. Even in this case, however, the court reserved judgment as to domestic legal consequences if the "Congress and the President violate a peremptory norm (or *jus cogens*)." *Id.* at 935.

208 *See* United States v. Bellaizac-Hurtado, 700 F.3d 1245, 1249–58 (11th Cir. 2012); *supra* note 184 and accompanying text.

eas. But perhaps due to its ever-broader potential reach, fundamental (though still limited) opposition has emerged in the U.S. judiciary to this method of statutory interpretation, as explored next.

II. Challenges to International Custom

Part II turns to whether international custom should be used at all in statutory interpretation—a question mostly unanalyzed in the case law but posed as a wholesale objection by judges and scholars in several recent instances. It assesses the main critiques of international custom, shows that the contemporary concerns resonate with their historical origins, and discusses the prevailing uncertainty associated with customary international law.

A. Critiques of Custom

Only two decades ago, the Supreme Court implied that the *Charming Betsy* doctrine was "beyond debate."[209] Within the past few years, however, preliminary intellectual efforts to abrogate the use of international custom in statutory interpretation have begun gathering force.[210]

The most comprehensive discussion on this issue within modern U.S. jurisprudence occurred in *Al-Bihani*, which raised the question whether detention authority granted by the AUMF and MCA should be interpreted in light of the laws of war.[211] In affirming the denial of a detainee's habeas petition, the D.C. Circuit panel found that the detention was consistent with international custom.[212] But even if the statutes conflicted with customary international law, the court stated that the proposed interpretive approach was "mistaken" because there was "no indication" that "Congress intended the international laws of war to act as extra-textual limiting principles for the Presi-

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209 Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. This cardinal principle has its roots in Chief Justice Marshall's opinion for the Court in *Murray v. The Charming Betsy*, and has for so long been applied by this Court that it is beyond debate." (citations omitted)).

210 Posner & Vermeule, *supra* note 49, at 170 (noting, primarily in the context of constitutional interpretation, "the political controversy engendered by the occasional judicial practice of relying on foreign and international law," and that "members of Congress proposed banning this interpretive method").

211 *See supra* notes 157–61 and accompanying text.

212 Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010).

dent's war powers under the AUMF."[213] Writing for the panel majority, Judge Janice Rogers Brown argued:

> Further weakening their relevance to this case, the international laws of war are not a fixed code. Their dictates and application to actual events are by nature contestable and fluid. . . . Therefore, . . . we have no occasion here to quibble over the intricate application of vague treaty provisions and amorphous customary principles. The sources we look to for resolution of [this] case are the sources courts always look to: the text of relevant statutes and controlling domestic caselaw.[214]

Judge Stephen Williams, in concurring with the panel's judgment, pointed out that these statements were dicta, because they were not necessary to decide the case.[215] In his view, the law of war did not require the release of the petitioner when armed conflict continued to exist between the United States and Al-Qaeda.[216] The full court agreed 7–2 with this position in its denial of a petition for rehearing en banc.[217] But the original panel members took the opportunity of the en banc denial to further develop their debate on the interpretive role of international custom.

Judge Brown expressed concern that "below the surface" of the en banc court's opinion reserving judgment on this issue, there was an underlying "intuition about the domestic role of international law," shared with the scholarly community, that "domestic statutes do not stand on their own authority, but rather rest against the backdrop of international norms."[218] She argued that an interpretive role of international custom—"a hazy but ominous hermeneutics"—serves no constitutional values and, if anything, is "an aggrandizement of the judicial role beyond the Constitution's conception of the separation of powers."[219]

Judge Brett Kavanaugh questioned even more fundamentally the use of international custom in statutory interpretation. His argument

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213 *Id.* at 871.

214 *Id.* at 871–72 (citations omitted).

215 *Id.* at 885 (Williams, J., concurring).

216 *Id.* at 884–85.

217 Al-Bihani v. Obama, 619 F.3d 1, 1 (D.C. Cir. 2010) (en banc) (Sentelle, Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith, JJ., concurring in the denial of rehearing en banc) ("We decline to en banc this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

218 *Id.* at 2–3 (Brown, J., concurring).

219 *Id.* at 4.

was based on more than custom's potential lack of clarity. First, he argued that "there is no legitimate basis" for this interpretive role, because international custom, as well as non-self-executing treaties, "lack[s] any status as domestic U.S. law" after *Erie*.[220] He acknowledged that the *Charming Betsy* doctrine has been used by the Supreme Court since *Erie* in support of the presumption against extraterritoriality, as discussed above in Part I.C, but he concluded (without justification) that this more limited role was to avoid conflict with foreign law.[221] In the alternative, Judge Kavanaugh argued that the interpretive role of international custom cannot be invoked against the Executive, because the Executive has the power to interpret ambiguous statutes in light of international custom at its discretion and without "second-guessing" from the judiciary.[222] Finally, he claimed that international custom cannot be used to interpret congressional authorization of war, so as not to intrude into national security and foreign affairs matters.[223]

Judge Williams recognized the concern about using "gauzy notions of international law" and transforming "uncertain or disputed propositions of international law" into "iron constraints" on statutory interpretation.[224] He pointed out, however, that the panel majority's position regarding *Erie*'s effect on the interpretive role of international custom meant that "federal courts have been disobeying its command for more than seven decades."[225] Indeed, to the extent that courts have relied on international custom to expand the meaning of a statute, Judge Williams argued, they must by logical necessity also use international custom as a constraint.[226] While he encouraged judicial caution towards the interpretive role of customary international law, he suggested that custom can be utilized if it is "consistently and even-handedly applied," is the "product of serious reasoning," and is "sus-

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220 *Id.* at 32 (Kavanaugh, J., concurring); *see also* Note, *The* Charming Betsy *Canon, Separation of Powers, and Customary International Law*, 121 HARV. L. REV. 1215, 1235 (2008) (recommending "that courts wholly abandon the *Charming Betsy* canon where [customary international law] is concerned").

221 *Al-Bihani*, 619 F.3d at 32–35.

222 *Id.* at 36–38.

223 *Id.* at 38–41.

224 *Id.* at 56 (opinion of Williams, J.).

225 *Id.* at 54.

226 *Id.* at 54–55 ("[I]f the international laws of war 'can inform the powers that Congress has implicitly granted to the President in the AUMF, they logically can inform the boundaries of such powers.'" (quoting Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2094 (2005))).

ceptible of practical application."[227] Without citing *Sosa*, Judge Williams essentially translated its standard of specificity and universality (or clarity and acceptance) to statutory interpretation.[228]

Judge Brown suspected that even a heightened standard of clarity and acceptance for international custom in statutory interpretation was "only a mask for what is, at its core, a radical and sweeping claim, one at odds with our Constitution and caselaw."[229] However, this conclusion was made without the benefit of a comprehensive empirical analysis of contemporary federal case law, which, as Part I.C has demonstrated, shows an enduring interpretive function for international custom in modern U.S. jurisprudence.[230] Thus, overall distrust of the federal courts' competence to interpret customary international law, as a matter of practical ability and historical tradition, is misplaced.

Judge Kavanaugh's claim that customary international law lacks any status as U.S. domestic law has been comprehensively debated elsewhere[231] and is beyond the scope of this Article. However, the Supreme Court squarely held in *Sosa* that "[f]or two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[232] The Founders envisioned federal court jurisdiction over claims under customary international law.[233] Contemporary practice of U.S. courts shows increasing reliance on international custom in statutory interpretation. In some instances, such as questions of extraterritoriality or statutory incorporation of international cus-

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227 *Id.* at 56.

228 For an embrace and further elaboration of this method of interpretation, see *infra* Part III.A.

229 *Al-Bihani*, 619 F.3d at 5 (Brown, J., concurring).

230 *See supra* Part I.C.

231 *See supra* note 73.

232 Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004); *see also* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423, 430 n.34 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances . . . . There are, of course, areas of [customary] 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."); The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination."); The Nereide, 13 U.S. (9 Cranch) 388, 423 (1815) (opinion of Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

233 THE FEDERALIST NO. 80, at 430–31 (Alexander Hamilton) (Benjamin Warner ed., 1818); THE FEDERALIST NO. 83 (Alexander Hamilton) (discussing federal court jurisdiction over cases arising under treaties and the law of nations).

tom, the interpretive function is inevitable. In other cases, customary international law has proven useful in informing the meaning of statutory text.[234] And as the *Sosa* Court recognized, "[i]t would take some explaining to say now that federal courts must avert their gaze entirely from any international norm."[235]

Concerns regarding the uncertainty and lack of democratic legitimacy of international custom have also been voiced elsewhere within the judiciary and the scholarly community. For instance, as contrasted with the relative specificity of statutes, international custom is suspected to be "mushy and soft" or "inherently uncertain."[236] Judge José Cabranes expressed this perspective in the context of ATS litigation, noting:

> Customary international law is discerned from myriad decisions made in numerous and varied international and domestic arenas. Furthermore, the relevant evidence of customary international law is widely dispersed and generally unfamiliar to lawyers and judges. These difficulties are compounded by the fact that customary international law—as the term itself implies—is created by the general customs and practices of nations and therefore does not stem from any single, definitive, readily-identifiable source. All of these characteristics give the body of customary international law a soft, indeterminate character that is subject to creative interpretation.[237]

In a more limited manner, Judge Richard Posner argued that "a custom cannot be identified with the same confidence as a provision in a legally authoritative text, such as a statute or a treaty."[238]

Customary international law is also criticized as undemocratic and thus illegitimate, as it does not arise out of the bicameral legislative process of the two elected branches.[239] In holding that the Alien

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234 *Cf.* Justice Stephen Breyer, Speech at the Brookings Institution: The Internationalization of Law (Dec. 18, 2012), *available at* http://www.brookings.edu/events/2012/12/18-aron-internationalization#.

235 *Sosa*, 542 U.S. at 730.

236 Jonathan A. Bush, *The Binding of Gulliver: Congress and Courts in an Era of Presidential Warmaking*, 80 VA. L. REV. 1723, 1761 (1994) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)) (internal quotation marks omitted).

237 Flores v. S. Peru Copper Corp., 414 F.3d 233, 247–48 (2d Cir. 2003) (internal quotation marks, footnote, and citation omitted).

238 Flomo v. Firestone Natural Rubber Co., 643 F.3d 1013, 1016 (7th Cir. 2011) (denying ATS claim alleging child labor in violation of international custom).

239 *See, e.g.*, JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 116 (2012) (arguing in favor of presi-

Tort Statute is not "a blanket delegation of lawmaking to the democratically unaccountable international community of custom creators," Judge Posner reasoned:

> [T]here is a problem of legitimacy—and for democratic countries it is a problem of democratic legitimacy. Customary international legal duties are imposed by the international community (ideally, though rarely—given the diversity of the world's 194 nations—by consensus), rather than by laws promulgated by the obligee's local community.[240]

The international law doctrine of jus cogens, under which a state cannot derogate from certain customary international law obligations, such as the prohibitions on genocide, extermination, and piracy, is particularly problematic under this view.[241]

Bracketing the question regarding the status of international custom as U.S. law, objections based on the indeterminacy and democratic illegitimacy of international custom are potentially valid, given the theoretical and methodological difficulties associated with it. Indeed, some of the contemporary critiques of custom date back to its modern origins, as discussed in the next section.

B. Origins of Custom

International custom is "the oldest and the original source of international law."[242] It is also an indispensable source for the international system, notwithstanding periodic reports of its demise.[243] For instance, the mutual recognition of each state's sovereignty is a princi-

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dential authority to interpret customary international law to provide democratic accountability); Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 717 (1986) (viewing the whole enterprise of judicial use of international custom as "illegitimate").

240 *Flomo*, 643 F.3d at 1016.

241 KU & YOO, *supra* note 239, at 38–39. Of course, all jus cogens violations are also violations of U.S. law, which no mainstream scholars appear to seek to change.

242 1 OPPENHEIM'S INTERNATIONAL LAW 25 (Robert Jennings & Arthur Watts eds., 9th ed. 1992); *see also* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 438 (Robert W. Tucker ed., 2d ed. 1966) ("Custom is the older and the original source of international law, of particular as well as of general international law.").

243 *See, e.g.*, David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 43–44 (2010) ("Reports of the imminent demise of customary international law, which have been circulating for decades, thus seem premature. It is highly unlikely that the treaty-making process in international law will ever completely supplant CIL . . . ." (footnote omitted)); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757 (2001) (noting that "[t]he demise of custom as a source of international law has been widely forecasted").

ple of international custom,[244] now incorporated into the United Nations Charter.[245] The legally binding status of the Charter itself, just as that of any treaty, rests on the customary rule of *pacta sunt servanda*—agreements must be kept.[246] Even treaty interpretation is governed by customary international law for some countries, such as France and the United States, because they have not ratified the Vienna Convention on the Law of Treaties[247]—and custom governs interpretation of *all* treaties that predate the entry into force of the Convention.[248] Without international custom as a source of law, the entire structure of authority of a decentralized and nonhierarchical international legal system would collapse—even though the system could function without treaties or other sources of international law.[249] But the relevance

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244 *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 369 (Anders Wedberg trans., The Lawbook Exch. 1999) (1945).

245 U.N. Charter art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

246 MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 66 (3d ed. 1999) (noting that the principle of "*pacta sunt servanda* . . . is essential to the theory of both conventional and customary international law that contracts between states be legally binding"). This customary norm was originally "confirmed by the Great Powers of the European Concert at the London conference of 1871." WOLFKE, *supra* note 67, at 101.

247 Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

248 *See* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 102, 139 (2000) (noting that the United States is "presumably . . . bound under customary international law (as evidenced by Article 18 of the Vienna Convention on the Law of Treaties)"); Marian L. Nash, *Contemporary Practice of the United States Relating to International Law*, 75 AM. J. INT'L L. 142, 147 (1981) (quoting a letter from the Legal Adviser of the Department of State to Senator Adlai Stevenson: "While the United States has not yet ratified the Vienna Convention on the Law of Treaties, we consistently apply those of its terms which constitute a codification of customary international law. Most provisions of the Vienna Convention . . . are declaratory of customary international law."); Gerald L. Neuman, *The Brakes that Failed: Constitutional Restriction of International Agreements in France*, 45 CORNELL INT'L L.J. 257, 321 n.382 (2012) (citing CONSEIL D'ÉTAT, LA NORME INTERNATIONALE EN DROIT FRANÇAIS 10 (2000)).

249 *See* DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 136–37 (2010) ("CIL norms dictate the construction and application of 'meta-norms' of public international law. These include what H.L.A. Hart would call secondary rules of recognition for other international law sources, as with principles of treaty formation, interpretation, and termination. Likewise, the substance of the international law of state responsibility and the procedures under which states make claims for redress of international wrongs are dictated by custom. So, it would appear that CIL has permeated many domains of public international law—not only particular doctrinal niches, but also the very architecture of the system." (footnotes omitted)); FRANCK, *supra* note 38, at 194 ("The legitimacy of the ultimate rule of recognition . . . cannot be demonstrated by reference to any other validating rules or procedures, but only by the conduct of nations manifesting their belief in the ultimate rules' validity . . . ."); ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 183 (2008) ("CIL is foundational . . . as the basis for obligations that undergird the entire international legal system . . . ."); KELSEN, *supra* note 242, at 446 ("The binding force of customary international law rests in the last resort on a

of custom goes significantly beyond its meta-function of holding the theoretical underpinnings of the international legal system.

Until the early twentieth century, much of international law consisted of international custom given the then "limited development of conventional law [viz., treaties] between States."[250] It arose over time based on interactions and communications between governments and other international actors through diplomatic correspondence, protests, claims, counterclaims, acts, incidents, and the like.[251] Whether in the form of *jus gentium* in ancient Rome, backed by its imperial might;[252] scholastic doctrine in medieval Europe, backed by the Church;[253] or natural law from the sixteenth to eighteenth centuries, backed by the persuasiveness of heroic jurists such as Vitoria,[254] Grotius,[255] and Vattel,[256] legally binding practice has been a continuing feature of international relations.[257] But the modern perspective on customary international law did not emerge until the rise of positivism in the nineteenth century.[258]

International custom's contemporary canonical formulation as "general practice accepted as law"[259] was conceived during debates in

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fundamental assumption: on the hypothesis that international custom is a law-creating fact. This hypothesis may be called the basic norm. It is not a norm of positive law; it is not created by acts of will of human beings; it is presupposed by the jurists interpreting legally the conduct of states."); ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 281 (rev. ed. 1954) ("Kelsen attributes binding force [of international law] above all to international custom. From the latter, the binding force of treaties is derived . . . . The binding character of international custom constitutes the initial hypothesis (*Grundnorm*) which is inherent in any legal system, but which cannot be subjected to further legal analysis . . . .").

250 Permanent Court of Int'l Justice, Advisory Comm. of Jurists, Procès-Verbaux of the Proceedings of the Committee: June 16th–July 24th, 1920, at 322 (1920) [hereinafter PCIJ Drafting Committee Proceedings], *available at* http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf.

251 *See generally* INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS (W. Michael Reisman & Andrew R. Willard eds., 1988) (explaining how customary international law develops from incidents in the relations between international actors). *See also* W. Michael Reisman, Professor of Law, Yale Law School, International Lawmaking: A Process of Communication, Luncheon Address at the 75th Anniversary Convocation of the American Society of International Law (Apr. 24, 1981), *in* AM. SOC'Y OF INT'L LAW, PROCEEDINGS OF THE 75TH ANNIVERSARY CONVOCATION 101 (1981).

252 *See* NUSSBAUM, *supra* note 249, at 13–15.

253 *See id.* at 35–39.

254 *See id.* at 79–84.

255 *See id.* at 107–14.

256 *See id.* at 156–64.

257 *Id*. at 14, 23–27, 67.

258 *See id.* at 232–34.

259 *See* ICJ Statute, *supra* note 5, at art. 38, ¶ 1; *see also* BEDERMAN, *supra* note 249, at 137 (describing the ICJ definition of custom as "canonical").

1920 regarding the subject-matter jurisdiction of the Permanent Court of International Justice ("PCIJ"), the predecessor institution to the International Court of Justice ("ICJ").[260] Surprisingly, "many of the preparatory documents for the PCIJ Statute virtually ignored the role of [customary international law] as a source of international law."[261] But during meetings of the advisory committee charged with drafting the PCIJ statute,[262] the role of custom as a source of adjudicative rules was "hotly debated,"[263] as questions emerged regarding its susceptibility to judicial recognition and enforcement. For instance, the U.S. delegate to the PCIJ drafting committee, Elihu Root,[264] was "not certain" that countries would "accept the clause relative to international customs."[265] Although Root personally supported including it in the PCIJ statute, he was concerned that nations "will not submit to such principles as have not been developed into positive rules supported by an accord between all States."[266] In particular, he argued that "in order to induce the States to accept the establishment of compulsory jurisdiction [of the PCIJ], the limits of this jurisdiction must be *clearly defined*" through predictable and determinate sources of law rather than "rules established by the Court itself, and by the interpretation of more or less vague principles."[267]

Root's view on international custom overlapped with that of the committee president Édouard Descamps,[268] who argued that "when a clearly defined custom exists or a rule established by the continual and general usage of nations . . . it is also the duty of a judge to apply it."[269]

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260 In contrast, Blackstone, reflecting the premodern conception, defined the law of nations as "a system of rules, *deducible by natural reason*, and established by universal consent among the civilized inhabitants of the world." BLACKSTONE, *supra* note 35, at 66 (emphasis added).

261 BEDERMAN, *supra* note 249, at 141. The apparent expectation during the early twentieth century may have been that treaties would mostly govern disputes among states. *Id.* at 137.

262 The Advisory Committee of Jurists, appointed by the Council of the League of Nations, consisted of ten delegates from Japan, Spain, Brazil, Belgium, Norway, France, the Netherlands, England, Italy, and the United States. It met between June 16 and July 24, 1920, and submitted its recommendations to the League Council in September 1920. *See* PCIJ Drafting Committee Proceedings, *supra* note 250, at III–IV.

263 BEDERMAN, *supra* note 249, at 141.

264 Root was a former U.S. Secretary of State and Secretary of War. 1 PHILIP C. JESSUP, ELIHU ROOT 213, 445 (1938). He also founded the American Society of International Law in 1907 and the Council on Foreign Relations in 1921. *See* 2 JESSUP, *supra*, at 473; *CFR History*, COUNCIL ON FOREIGN RELATIONS, http://www.cfr.org/about/history/cfr/index.html (last visited Aug. 11, 2014).

265 PCIJ Drafting Committee Proceedings, *supra* note 250, at 293.

266 *Id.* at 287, 293.

267 *Id.* at 286, 293 (emphasis added).

268 Descamps was a senator and Belgian Minister of State. *Id.* at III.

269 *See id.* at 322. Similarly, Arturo Ricci-Busatti, the Italian representative, observed that

In contrast, Root resisted Descamps's proposal to include "rules of international law as recognized by the legal conscience of civilised nations" and "international jurisprudence"[270] as lacking the character of a definite rule of law.[271] Similarly, Walter Phillimore, the British delegate,[272] argued that such judicial discretion would give the Court "a legislative power."[273]

On the other hand, some members of the drafting committee were open to the concept of judicial lawmaking. The Dutch delegate, Bernard Loder,[274] saw no "great difference" between custom and agreements in international law and did not consider that Root's "fears were well-founded."[275] He argued even further that for norms "not yet of the nature of positive law," it was "the Court's duty to develop law, to 'ripen' customs and principles universally recognised, and to crystallise them into positive rules; in a word, to establish an international jurisprudence."[276] The French representative, Albert de Lapradelle, suggested that judges should "define law" and even take into account "exigencies of justice and equity" to develop a legal solution.[277] Ultimately, the drafting committee rejected these broad proposals for sources of law, although it recognized judicial decisions as a "subsidiary means" for the determination of rules of law based on treaties, custom, or general principles of law.[278]

In the end, custom was included in the PCIJ statute as one of three co-equal sources of international law, along with international agreements and general principles of law.[279] One important reason for including it in the PCIJ statute was, according to Descamps, because "[i]t is a very natural and extremely reliable method of development [of international law] since it results entirely from the constant expression of the legal convictions and of the needs of the nations in their mutual intercourse."[280] This decision was subsequently reaffirmed by

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"[c]ustom, like any convention applicable to a case, must be in force between the parties in dispute." *Id.* at III, 584.

270 *Id.* at 306.

271 *See id.* at 293–94, 312.

272 Phillimore was a member of the English Privy Council. *See id.* at III.

273 *Id.* at 295.

274 Loder was a judge at the Dutch Supreme Court and later served as the first president of the PCIJ. *Id.* at III.

275 *Id.* at 294.

276 *Id.*

277 *Id.* at 295–96.

278 *Id.* at 730.

279 Statute of the Permanent Court of International Justice, *supra* note 5, at art. 38.

280 PCIJ Drafting Committee Proceedings, *supra* note 250, at 322.

the international community without much additional debate during the drafting and ratification of the ICJ statute.[281] In its report to the United Nations, the drafting committee for the ICJ statute noted that Article 38, including the provision on international custom, "has given rise to more controversies in doctrine than difficulties in practice" and that "it was not the opportune time to undertake the revision of this article."[282] But the international community's experience with international custom as a source of adjudicative rules since its modern origins has not necessarily alleviated the concerns voiced by the U.S. and U.K. delegates in the PCIJ debates[283] and echoed in contemporary debates among U.S. judges and scholars.

Indeed, there is diversity of practice among modern international courts and tribunals with respect to the use of customary international law. Following the PCIJ and ICJ, the founding documents of other international courts and tribunals—such as the International Centre for the Settlement of Investment Disputes,[284] the International Tribunal for the Law of the Sea,[285] the International Criminal Tribunal for

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281 ICJ Statute, *supra* note 5; *see* W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 14 (2004) ("Article 38 of the Statute of the International Court of Justice (ICJ) is a choice of law clause for the ICJ. Understood as such, it is a sensible formulation. The legal adviser of a government, starting from scratch, would surely propose that a tribunal apply, first, treaties to which the governments in dispute are party; second, customary law; and third, more general principles of law.").

282 XIV DOCUMENTS OF THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION: UNITED NATIONS COMMITTEE OF JURISTS 843 (1945), *available at* http://archive.org/stream/documentsoftheun008783mbp#page/n5/mode/2up.

283 *See, e.g.*, WOLFKE, *supra* note 67, at 75 ("In view of the present world political set-up, it seems that the part played by judicial organs in the formation of customary international law should be reduced to a necessary minimum. For whereas States have admittedly yielded to the necessity of giving the Court a minimum of such competence, at the same time—and this is precisely a confirmation of that fact—they still hesitate to bring their disputes before this organ of international justice. One of the reasons for that reluctance lies precisely in their fear that the Court might abuse its discretion and might base itself on rules which are not yet (or no longer) recognized by the parties.").

284 *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 42(1), Mar. 18, 1965, 575 U.N.T.S. 159 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."). The legislative history of the Convention equates "rules of international law" with art. 38(1) of the ICJ statute. *See* Int'l Bank for Reconstruction and Dev., Report of the Executive Directors on the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, ¶ 40 (1965).

285 United Nations Convention on the Law of the Sea art. 293(1), Dec. 10, 1982, 21 I.L.M. 1261 (1982) ("A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.").

the Former Yugoslavia,[286] the North American Free Trade Agreement,[287] and the International Criminal Court[288]—include international custom as a source of law. The European Court of Justice has also applied customary international law in its proceedings.[289] On the other hand, statutes of some international tribunals, such as the World Trade Organization's Dispute Settlement Body, do not reference customary international law as a source of applicable substantive rules.[290]

Likewise, the existence of international custom and its routine use by many (even if not all) international courts does not imply any uniform use of international custom by domestic courts. In England and Israel, for instance, "customary international law is part of the common law of the land that will be enforced by the courts unless contradicted by parliamentary legislation."[291] The same rule of direct effect applies in Poland.[292] In Australia, the domestic status of cus-

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286 Statute of the International Criminal Tribunal for the Former Yugoslavia art. 3, May 25, 1993, 32 I.L.M. 1203 ("The International Tribunal shall have the power to prosecute persons violating the laws or customs of war.").

287 North American Free Trade Agreement art. 1131, ¶ 1, Dec. 11–17, 1992, 32 I.L.M. 289 ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

288 Rome Statute of the International Criminal Court art. 8(2)(b), (e), Jul. 17, 1998, 2187 U.N.T.S. 90 (listing "customs applicable in international armed conflict" and "customs applicable in armed conflicts not of an international character").

289 Case C-162/96, A. Racke GmbH & Co. v. Hauptzollamt Mainz (Racke), 1998 E.C.R. I-3655, §§ 45–46 ("[T]he European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country. It follows that the rules of customary international law concerning the termination and the suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order.").

290 International custom is referenced in the WTO agreements only as an interpretive tool to "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." Agreement Establishing the World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes art. 3, ¶ 2, Apr. 15, 1994, 33 I.L.M. 1226; *see* David Palmeter & Petros C. Mavroidis, *The WTO Legal System: Sources of Law*, 92 AM. J. INT'L L. 398, 406 (1998) ("Customary international law plays a specific role in WTO dispute settlement by virtue of Article 3.2 of the Dispute Settlement Understanding, which specifies that the purpose of dispute settlement is to clarify the provisions of the WTO Agreements 'in accordance with customary rules of interpretation of public international law.' . . . These customary rules of interpretation are, so far, the only portions of customary international law to have found their way meaningfully into WTO dispute settlement.").

291 David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 90 n.17 (2005); *see also* F.A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS 121 (1986); F.A. MANN, FURTHER STUDIES IN INTERNATIONAL LAW 142–45 (1990).

292 *See* KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [CONSTITUTION] July 16, 1997, art. 9 (Pol.) ("The Republic of Poland shall respect international law binding upon it."); *see also* Mar-

tomary international law is unsettled, but "courts have exhibited less reluctance to recognize principles of customary international law without the need for statutory implementation."[293] Germany, Italy, and Japan give international custom an even higher status and enforce it as superior to domestic statutes.[294] But in France, the constitution does not incorporate international custom automatically, even though it does so with respect to treaties.[295] The choice depends on the particular structure of the domestic legal system and the purposes it seeks to serve.[296] And it also depends on whether the potential uncertainty of international custom can be addressed in a practical and normatively attractive manner.

C. Uncertainty of Custom

Notwithstanding international custom's long tradition and historical pedigree, "after nearly half a millennia of debate, [we are] no closer to conclusive answers as to what makes a binding custom among nations . . . and the process by which customary international law changes or dies."[297] Indeed, Manley Hudson pointed out that the authors of the modern formulation of international custom as general practice accepted as law "had no very clear idea as to what constituted international custom."[298] In contrast to treaties, whose interpretation is governed by the Vienna Convention on the Law of Treaties,[299] there is no authoritative statement delineating international custom beyond

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cin Kaldunski, *State Immunity and War Crimes: The Polish Supreme Court on the* Natoniewski *Case*, 30 POLISH Y.B. INT'L L. 235, 237 (2010) ("State immunity was [a] principle of customary international law which Poland was bound to abide by under Article 9 of the Polish Constitution.").

293 Hilary Charlesworth et al., *Deep Anxieties: Australia and the International Legal Order*, 25 SYDNEY L. REV. 423, 451 (2003); *see also* Justice Michael Kirby, *International Law—The Impact on National Constitutions*, 21 AM. U. INT'L L. REV. 327, 328–31 (2006).

294 ANTONIO CASSESE, INTERNATIONAL LAW 225, 229–30 (2d ed. 2005).

295 *See* FRENCH ORIGINAL TEXT OF THE CONSTITUTION OF 1958, Oct. 4, 1958, art. 55 ("Treaties or agreements duly ratified or approved shall, upon their publication, have an authority superior to that of laws, subject, for each agreement or treaty, to its application by the other party."); *see also* Stefan A. Riesenfeld, *France—Immunity from Taxation Under ICJ Statute—Effect of Customary International Law in French Administrative Courts*, 92 AM. J. INT'L L. 764 (1998).

296 For a proposal of the U.S. purpose, see *infra* Part III.C.

297 BEDERMAN, supra note 249, at 135; *see also* WOLFKE, *supra* note 67, at 169 ("[I]t is still difficult to assert the existence of a full, generally accepted conception of custom in international law, similar to the law of treaties. . . . [C]onfusion still reigns and is even growing with respect to several questions in the theory of customary international law.").

298 *Summary Records of the 40th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 4, 6, U.N. Doc. A/CN.4/Ser.A/1950.

299 Vienna Convention on the Law of Treaties art. 1, May 23, 1969, 1155 U.N.T.S. 331.

the laconic definition in the ICJ statute.[300] No single ICJ or PCIJ judgment or advisory opinion sets forth in detail the methodology necessary to prove custom. Nor has the International Law Commission ("ILC") issued a report, for the time being, on the formation and evidence of customary international law to reflect the international consensus on this question.[301] Such meta-custom on international custom could be subsequently codified as a Convention on the Law of Custom, but the international community has not yet reached the necessary level of consensus.[302] The ICJ has interpreted custom as consisting of two elements: "uniform and widespread State practice"[303] and opinio juris, defined as "a general recognition that a rule of law or legal obligation is involved."[304] But significant uncertainty remains regarding more detailed criteria for these elements and how they are demonstrated.[305]

With the discussion of the elements of custom postponed during the drafting of the ICJ statute, the United Nations charged the ILC to

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300 *See* ICJ Statute, *supra* note 5, at art. 38, ¶ 1(b).

301 The ILC is a body of thirty-four experts on international law established in 1947 by the U.N. General Assembly and elected by the Assembly for five-year terms. *See Introduction*, INT'L L. COMMISSION, http://www.un.org/law/ilc/ (last visited Aug. 13, 2014). Under Article 15 of the ILC Statute, one of the Commission's two basic functions is "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent and doctrine." Statute of the International Law Commission, U.N. Doc. A/CN.4/4/Rev.2 (1982). The Commission's current U.S. member is Professor Sean Murphy of The George Washington University Law School. *Membership*, INT'L L. COMMISSION, http://www.un.org/law/ilc/ (last visited Aug. 13, 2014). For the ILC's current work on custom, see *infra* notes 321–26.

302 On codifying primary rules of international custom, see generally Timothy Meyer, *Codifying Custom*, 160 U. PA. L. REV. 995 (2012).

303 Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malay./Sing.), Judgment, 2008 I.C.J. 14, 100 (May 23).

304 North Sea Continental Shelf Cases (Fed. Republic of Ger./Den.; Fed. Republic of Ger./Neth.), Judgment, 1969 I.C.J. 3, 43 (Feb. 20); *see also* Filartiga v. Pena-Irala, 630 F.2d 876, 880–81 & n.8 (2d Cir. 1980) (describing Article 38 of the ICJ statute as consistent with the Supreme Court's historical approach to sources of international law). The two elements, practice and opinio juris, are sometimes described as the objective and subjective criteria of custom. *See* José E. Alvarez, *A Bit on Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 57–58 (2009); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 209 (2010).

305 Rep. of the Int'l Law Comm'n, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, U.N. Doc. A/68/10; GAOR, 68th Sess., Supp. No. 10, ¶ 75 (2013) ("A number of [ILC] members noted the complexity and difficulty inherent in the topic. The view was expressed that the ambiguities surrounding the identification of customary international law had given rise to legal uncertainty and instability, as well as opportunistic or bad faith arguments regarding the existence of a rule of customary international law."); *see also* ANTHONY A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 6 (1971) (describing the "confusion and illogic surrounding the concept of customary international law"); KELSEN, *supra* note 242, at 448 ("It is a commonplace that the customary process in international law is one characterized by many uncertainties.").

clarify further this source of law. Manley O. Hudson, the ILC's first chairman, suggested four elements,[306] which after initial discussion within the Commission were amended as follows:

> [(1)] concordant practice by a number of States with reference to a situation falling within the domain of international relations;
> [(2)] continuation or repetition of the practice over some period of time;
> [(3)] conception by the States engaged that the practice is not forbidden by prevailing international law; and
> [(4)] general acquiescence in the practice by States other than those engaged.[307]

Although he presented these criteria as reflective of the international consensus,[308] he did not obtain agreement within the Commission. Surprisingly, although the ILC minutes reflected initial consensus among the Commission's members,[309] the ILC eventually voted down Hudson's proposal by seven votes to three.[310] In particular, the British international law scholar James Brierly questioned whether "it was desirable for the Commission to embark on a question of doctrine," as he "felt it would be difficult to find a formula on which all members of the Commission could agree."[311]

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306 Special Rapporteur, *Article 24 of The Statute of the International Law Commission*, Int'l L. Comm'n, U.N. Doc. A/CN.4/16 (Mar. 3, 1950) (by Manley O. Hudson), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 24, 26, U.N. Doc. A/CN.4/Ser.A/1950/Add.1 ("(a) concordant practice by a number of States with reference to a type of situation falling within the domain of international relations; (b) continuation or repetition of the practice over a considerable period of time; (c) conception that the practice is required by, or consistent with, prevailing international law; and (d) general acquiescence in the practice by other States"). He also suggested that "the presence of each of these elements is to be established . . . as a fact by a competent international authority." *Id.*

307 *Summary Records of the 74th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 273, 275 n.5, U.N. Doc. A/CN.4/Ser.A/1950. Notably, these four elements share many similarities with a definition offered by two scholars for constitutional customs in the U.S. political branches: "(1) a disagreement between branches of government over their constitutional powers that (2) ends in the total or partial acquiescence by one branch in the views of the other and that (3) creates a political precedent couched in constitutional terms." POSNER & VERMEULE, *supra* note 49, at 71.

308 *Summary Records of the 40th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 4, U.N. Doc. A/CN.4/Ser.A/1950 (Hudson stating that "[n]early all the treatises on the subject were in agreement to accept the four elements enunciated in sub-headings (a), (b), (c) and (d)").

309 *Summary Records of the 40th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 4, 6, U.N. Doc. A/CN.4/Ser.A/1950 ("The Members of the Commission as a whole shared Mr. Hudson's views, with some slight shades of difference.").

310 *Summary Records of the 74th Meeting*, [1950] 1 Y.B. Int'l L. Comm'n 273, 276, U.N. Doc. A/CN.4/Ser.A/1950.

311 *Id.* at 275. Brierly's role in the ILC's rejection of Hudson's proposal is especially ironic, given that Hudson presented his four elements as "[s]eeking with Brierly . . . 'a general recogni-

In the end, the extent of international consensus on customary international law in 1950 was limited to the types of materials that may be considered as evidence of international custom, as provided by the following nonexhaustive list: international agreements, decisions of international courts, decisions of national courts, national legislation, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations.[312] The ILC did not propose any methodology to establish international custom nor any guidance into assessing state practice and opinio juris, but merely recommended wider compilation and dissemination of reports reflecting state practice on various topics.[313]

Since the ILC's abortive attempt to clarify custom, some commentators have sought to simplify the problem by eliminating one of the elements of custom. In 2000, the International Law Association ("ILA"), a private organization of international lawyers, proposed dispensing with the requirement of opinio juris in stating that "it is not . . . necessary to the formation of such a rule to demonstrate that such a belief exists, either generally or on the part of any particular State."[314] Instead, the ILA defined international custom as a rule "which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future."[315]

In contrast to the ILA's suggestions, some scholars have proposed dispensing with state practice as a necessary element of customary international law.[316] For instance, Brian Lepard has argued that

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tion among States of a certain practice as obligatory.'" Special Rapporteur, *Article 24 of The Statute of the International Law Commission*, *supra* note 306, at 26 (quoting J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 62 (4th ed. 1949)).

312 *Report of the International Law Commission to the General Assembly*, U.N. Doc. A/1316 (1950), *reprinted in* [1950] 2 Y.B. Int'l L. Comm'n 364, 368, U.N. Doc. A/CN.4/Ser.A/1950 ("Without any intended exclusion, certain rubrics [of evidence of international custom] may be listed for convenience.").

313 *Id.* at 373.

314 INT'L LAW ASS'N, FINAL REPORT OF THE COMMITTEE ON FORMATION OF CUSTOMARY (GENERAL) INTERNATIONAL LAW 32 (2000). But the Committee did acknowledge a continuing role for opinio juris in identifying international custom. *See id.* at 33 (suggesting that "where it can be shown that an *opinio juris* exists about a practice, that will be sufficient" to show the existence of a customary norm).

315 *Id.* at 8.

316 *See* GUZMAN, *supra* note 249, at 194–95 (arguing that only opinio juris is necessary to establish custom); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 97–98 (2010).

"*opinio juris* be interpreted as a requirement that states generally believe that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain state conduct."[317] State practice, in turn, "should be viewed as requiring appropriate evidence that states believe that a particular authoritative legal principle or rule is desirable now or in the near future."[318] For Lepard, the normative belief is the sole requirement, which can be established through evidence of state practice or opinio juris.

However, the extent to which these recommendations reflect the international consensus is unclear. The ILA's work did not involve extensive consultation with governments, and its report has not been endorsed by an international organization, such as the UN General Assembly. Lepard's proposal raises the problem that custom can cease to be law by becoming detached altogether from practice.[319] And most scholarly analyses of international custom ultimately revert back to the two elements of state practice and opinio juris, without much further elaboration.[320]

In May 2012, the ILC decided to return to the topic of customary international law, and it may clarify the international perspective on this question.[321] However, a final report is unlikely for at least several years given the ILC's time-intensive process.[322] Typically, the Com-

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317 LEPARD, *supra* note 316, at 97–98 (emphasis omitted).

318 *Id.* at 98 (emphasis omitted).

319 *See* KELSEN, *supra* note 242, at 454 ("If a substantial number of states repeatedly and effectively violate a rule of custom, and particularly do so with the conviction that they are creating new law, it is difficult to maintain that the old law remains unimpaired. . . . [Lack of state practice can] deprive existent customary law of that degree of effectiveness which forms an indispensable condition of its continued validity.").

320 *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."); OPPENHEIM'S INTERNATIONAL LAW, *supra* note 242, at 27 (defining custom as "a clear and continuous habit of doing certain actions which has grown up under the aegis of the conviction that these actions are, according to international law, obligatory or right"); WOLFKE, *supra* note 67, at 173 ("[T]he only truly universally accepted ultimate criterion of the appurtenance of a customary rule to international law is the presumed acceptance of the rule by the states to be bound by it.").

321 *See* Rep. of the Int'l Law Comm'n, 64th Sess., *supra* note 61, ¶ 157.

322 The Special Rapporteur for the report, Michael Wood, estimates that the ILC will complete its work by 2016. *See* Special Rapporteur, *Formation and Evidence of Customary International Law*, Int'l Law Comm'n, U.N. Doc. A/CN.4/653 (May 30, 2012). But on some issues, establishing consensus within the ILC and the international community has taken decades. For instance, the ILC's comprehensive study of rules on state responsibility was begun in 1961 and completed in 2001, after numerous drafts and discussions within the Commission and many opportunities for governments to comment on proposed principles in order to reflect accurately the

mission researches and debates an issue, drafts findings, and invites comments by governments, which are then incorporated back into the process of research, debate, and further revisions until global consensus is reached.[323] Some topics are discontinued if there is insufficient agreement within the Commission to draft a report for the General Assembly's review and potential endorsement, as occurred during the ILC's initial debate on international custom in 1950.[324] Here, the Special Rapporteur for the report, Michael Wood, noted the daunting challenge before the Commission insofar as the "practice of States on the formation and identification of customary international law, while no doubt extensive, might not be easy to identify."[325] Moreover, the ILC has not decided yet what methodology it will pursue: whether it will give "special emphasis" to the jurisprudence of the ICJ and PCIJ, as the Special Rapporteur and some ILC members suggested, or also examine direct state practice, including jurisprudence of domestic courts and the practice of political branches, as other ILC members advised.[326]

And there is a wide range of questions to be considered with respect to each of the two elements of international custom. Consider the element of practice. How extensive does state practice have to be for it to be deemed "widespread and consistent" or "general"? Can states object to an emerging norm—preventing it from applying to them?[327] Can states withdraw from an established norm?[328] What

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actual consensus of the international community. *See* Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, U.N. Doc. A/Res/56/83 (Dec. 12, 2001); James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, UNITED NATIONS AUDIOVISUAL LIBR. INT'L L., http://legal.un.org/avl/ha/rsiwa/rsiwa.html (last visited Aug. 13, 2014). Indeed, the Commission's subsequent report noted that the Special Rapporteur "was aware that his proposal to conclude work on the topic by 2016 might not be feasible." Rep. of the Int'l Law Comm'n, 65th Sess., *supra* note 305, ¶ 105.

323 *See* B. Graefrath, *The International Law Commission Tomorrow: Improving Its Organization and Methods of Work*, 85 AM. J. INT'L L. 595, 602–03 (1991).

324 *See supra* notes 309–13 and accompanying text.

325 Rep. of the Int'l Law Comm'n, 64th Sess., *supra* note 61, ¶ 162.

326 *Id.* ¶¶ 161, 182 ("Some [ILC] members referred to the need to research and analyse relevant State practice—*including the jurisprudence of domestic tribunals*—as well as practice of other subjects of international law such as international organizations. The importance for the Commission to base its work on contemporary practice was emphasized, as well as the need to take into account the practice of States from all of the principal legal systems of the world and from all regions." (emphasis added)).

327 There is a debate over whether a state that persistently objects to a customary rule during its formation is bound by it. *See* Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRIT. Y.B. INT'L L. 1, 1 (1986); Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529, 530 (1993); David A. Colson, *How Persistent Must the Persistent Objector Be?*, 61 WASH. L. REV. 957, 958 (1986); Lynn Loschin,

sources of evidence constitute state practice? How is internally conflicting practice within a state—among the executive, legislative, and judicial branches—evaluated? What weight attaches to various indicators of executive practice, legislation, and judicial decision? How much time needs to lapse before a customary rule forms? Can there be "instant" custom?[329] Is the practice of nonstate actors relevant for the formation of international custom, or does only state practice count?[330] Is comparative law a source of customary international law?[331] Is foreign law evidence of state practice?[332]

Custom could include all forms of practice that communicate legally-relevant content. With the expansion of international custom

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The Persistent Objector and Customary Human Rights Law: A Proposed Analytical Framework, 2 U.C. DAVIS J. INT'L L. & POL'Y 147, 149 (1996); *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. d (1987) ("Although customary law may be built by the acquiescence as well as by the actions of states . . . and become generally binding on all states, in principle a state that indicates its dissent from a practice while the law is still in the process of development is not bound by that rule even after it matures. Historically, such dissent and consequent exemption from a principle that became general customary law has been rare. . . . A state that enters the international system after a practice has ripened into a rule of international law is bound by that rule." (citations omitted)).

328 *Compare* Bradley & Gulati, *supra* note 304, at 251–52 (proposing that states should be able to withdraw from an international customary rule, akin to exiting from treaty obligations, rather than having to seek to change the rule), *with* Anthea Roberts, *Who Killed Article 38(1)(b)? A Reply to Bradley and Gulati*, 21 DUKE J. COMP. & INT'L L. 173, 174–75 (2010) (arguing that states have not yet embraced this proposal as a matter of general practice). *See also* HENCKAERTS & DOSWALD-BECK, *supra* note 17, at xliv (noting that "[s]tates wishing to change an existing rule of customary international law have to do so through their *official* practice and claim to be acting *as of right*").

329 WOLFKE, *supra* note 67, at 59–60 ("For centuries the doctrine was unanimous that custom-formation is a very slow process. At present, as more recent practice shows and more and more writers agree, an international custom can arise even in a very short time. . . . The rapid acceleration of the rhythm of international life necessarily accelerates the formation of custom. . . . At present, the practice of states and their attitude to the practice of other subjects may in many fields be ascertained in the course of a single day, whereas in the times of Vattel it would require long years. To take a concrete example, the principle of sovereignty in the air space arose spontaneously at the outbreak of the First World War."); Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 35 (1965).

330 *See* DAMROSCH ET AL., *supra* note 76, at 59–61; Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 108 (2012).

331 *See* George A. Bermann et al., *Comparative Law: Problems and Prospects*, 26 AM. U. INT'L L. REV. 935, 938 (2011) (noting that "Judge Simma, in particular, but not only he, spoke of comparative law as a fundamental source of both customary international law and general principles of law").

332 *Cf.* WALDRON, *supra* note 46, at 48 (discussing state practice in the context of *jus gentium* and stating: "[W]e don't really invoke the law of particular countries one by one. Instead we take into consideration the consensus that has emerged among them all.").

over nonstate conduct[333] and the increased power of nonstate actors within the international system,[334] custom could be understood to include state and private practice, and to affect both.[335] The contemporary formulation of general practice accepted as law is broad enough to encompass private action.[336] To be sure, the jurisprudence of the ICJ and PCIJ frequently refers to state practice, but this is merely a consequence of the type of parties before the court: states. Indeed, one initial draft of the PCIJ statute defined international custom as "practice *between nations accepted by them* as law."[337] This restriction may have been deemed necessary when it was at least envisioned by some delegates that parties before the court could include individuals.[338] Once standing before the court was limited to states, and given that in any event the object of customary international law in the early twentieth century was state action, the broader conception was adopted.

Moreover, custom could include all physical and verbal acts. For instance, in the case of the law of armed conflict:

> Physical acts include . . . battlefield behaviour, the use of certain weapons and the treatment provided to different categories of persons. Verbal acts include military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international organisations and at international conferences and government positions taken with respect to resolutions of international organisations.[339]

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333 *See, e.g.*, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 446 (2001); Roberts & Sivakumaran, *supra* note 330, at 108.

334 *See* U.S. NAT'L INTELLIGENCE COUNCIL, GLOBAL TRENDS 2030: ALTERNATIVE WORLDS xiv (2012), *available at* http://www.dni.gov/files/documents/GlobalTrends_2030.pdf; *see also* JOSEPH S. NYE, JR., THE FUTURE OF POWER xii–xiii (2011).

335 *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks: Twenty-First-Century International Lawmaking (Oct. 17, 2012), *in* 101 GEO. L.J. 725 (2012), at 747 (arguing that "[t]wenty-first-century international lawmaking has become a swirling interactive process whereby norms get 'uploaded' from one country into the international system and then 'downloaded' elsewhere into another country's laws or even a private actor's internal rules").

336 WOLFKE, *supra* note 67, at xvii (stating that practice is best understood "only in its broadest sense—that is, as the conduct of all organs, even of private persons, which might have any bearing on international law").

337 PCIJ Drafting Committee Proceedings, *supra* note 250, at 306 (emphasis added).

338 *Id.* at 204–17.

339 1 HENCKAERTS & DOSWALD-BECK, *supra* note 17, at xxxviii.

In principle, practice includes public and confidential physical and verbal acts,[340] though frequently in practice only nonconfidential acts are accessible to scholars. Assessed in conjunction with physical acts, verbal acts with control intention and legal relevance[341] can be differentiated from "cheap talk" and legal pretense.[342] However, this broad conception of practice has not yet reached the level of international consensus.

Uncertainty also surrounds custom's other element. Opinio juris, sometimes defined as a "sense of legal obligation,"[343] has posed theoretical obstacles to the formation of new custom. Logically, any new custom is generated in the absence of a rule or in the breach of old custom. Either way, if custom can arise only out of general practice and a sense of legal obligation, it is worth asking: how can previously unregulated practice—or even more problematically, a breach of prior law—be conducted with a sense of legal obligation?[344] A requirement that custom arise only out of state practice done out of a sense of legal obligation "cannot explain the motivation of 'first movers': the handful of international actors that follow a new practice, or the attitudes of states in opposing a currently accepted usage."[345] Indeed, opinio juris cannot be defined as only a sense of legal obligation and must

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340 *Id.* at xxxix–xl. In contrast, purely private physical or verbal acts not communicated to other states or international actors do not constitute relevant practice. *Id.*

341 *See generally* Reisman, *supra* note 251, at 111–13 (explaining the concept of control intention).

342 JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005). Similar sources of evidence are used for constitutional customs. *See* Peter J. Spiro, *War Powers and the Sirens of Formalism*, 68 N.Y.U. L. REV. 1338, 1356 (1993) (reviewing JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993)) ("First, it is actions that count, not words; mere assertions of executive or legislative authority are largely irrelevant in the long run, the chaff of institutional bravado. Second, in order to take on lawmaking significance, the conduct must be known to the other branch; secret operations will have no constitutional significance until they are made known to Congress and it has had an opportunity to respond. Third, the other branch must have accepted or acquiesced in the action. Any conduct that satisfies (or even arguably satisfies) these requirements will become part of the precedential mix . . . .").

343 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. c (1987) ("For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law.").

344 D'AMATO, *supra* note 305, at 66 ("[It is difficult to imagine] that all states participating in custom-formation were erroneously advised by their legal counsel as to the requirements of prior international law. Indeed, it may be self-contradictory to imagine this, since states themselves ultimately decide the content of international law.").

345 BEDERMAN, *supra* note 249, at 149; *see also* H.W.A. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 48 (1972).

include a sense of legal opportunity. The full Latin phrase, *opinio juris sive necessitatis*, translates as an opinion of law *or* necessity and is more accurately reflected in this broader conception of right and requirement.[346] The original formulation of custom in the PCIJ and ICJ statutes as general practice accepted as law is also not restricted to prohibition and encompasses permission.[347] Viewed from this perspective, a breach of prior custom to establish a new one poses no theoretical problems as it is consistent with the meta-rule of customary law formation. In Hart's terms, the breach violates a primary rule of custom (e.g., claiming an exclusive economic zone in breach of freedom of the seas beyond territorial waters), but is based on a secondary rule of custom.[348] Nonetheless, ambiguity remains regarding criteria for distinguishing state practice that is a breach of international custom from one that forms a new rule.

The above critiques and the lack of international consensus on the formation of customary international law suggest a need for judicial caution in applying it even in statutory interpretation. The thick reach of international custom in U.S. law described in Part I lies on potentially thin theoretical ground and can be subject to wholesale collapse if the uncertainty and potential lack of democratic legitimacy of some customary norms contaminates and corrodes the entire field.[349] Regardless of the ongoing debates regarding international custom's elements under international law, its potential uncertainty can be alleviated for purposes of its domestic use in statutory interpretation by requiring a heightened standard of clarity and acceptance of both state practice and opinio juris.[350] Developing such a model that is responsive to the above concerns is the objective of Part III.

III. THE *SOSA-CHARMING BETSY* DOCTRINE: A FRAMEWORK FOR INTERACTIONS BETWEEN DOMESTIC STATUTES AND INTERNATIONAL CUSTOM

Given the broad interpretive reach of international custom analyzed in Part I, and the challenges surveyed in Part II, Part III of this Article offers a novel framework to address the critiques regarding

346 *Opinio Juris (International Law)*, CORNELL U. L. SCH.: LEGAL INFO. INST., http://www.law.cornell.edu/wex/opinio_juris_international_law (last visited Aug. 13, 2014).

347 *See* ICJ Statute, *supra* note 5, at art. 38, ¶ 1; Statute of the Permanent Court of International Justice, *supra* note 5, at art. 38, para. 1.

348 *See generally* H.L.A. HART, THE CONCEPT OF LAW 77–96 (1961) (explaining the theory of law as the union of primary and secondary rules).

349 *See supra* Part I.

350 *See infra* Part III.A.

international custom's lack of certainty and democratic legitimacy. The key intellectual move relies on acknowledging that contemporary international custom includes wide-ranging norms with varying degrees of clarity and acceptance, in contrast to the early nineteenth century's limited set of clear and accepted norms, and on separating established custom from emerging custom in statutory interpretation.[351]

Whereas *Charming Betsy* viewed only statutes as potentially ambiguous, and custom as fixed,[352] *Sosa* recognized that customary norms range in terms of specificity and universality, making their relationship with statutes more complex.[353] Merging the authority of both canons into the *Sosa-Charming Betsy* doctrine, Part III argues that the potential interactions between custom and statutes should be resolved as a function of the clarity of statutes, quality of custom (based on its clarity and acceptance), and the relative timing of each source of law.

A. Clarity, Quality, and Timing of Statutes and Custom

Analytically, there are four permutations of the elements of international custom, as depicted in Table 1.

TABLE 1

	No Opinio Juris	**Opinio Juris**
Limited or Inconsistent State Practice	No social or legal norms	Emerging custom
Widespread and Consistent State Practice	Social, but not legal, norms	Established custom

In practice, emerging custom and established custom are sometimes lumped together as the same type of customary international law, because it is at times difficult to determine how much state practice is necessary to qualify as widespread and consistent.[354] Even the International Court of Justice, presumably an expert institution on assessing international custom, has "often been criticized for not doing

351 *See supra* Part II.B–C.

352 *See* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (interpreting the statute at hand in light of the international custom of neutral rights); Bradley, *supra* note 25, at 494 (explaining that at the time of the *Charming Betsy* decision, "international law . . . was widely considered to be objective and discoverable").

353 *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 725–33 (2004).

354 *See supra* Part II.B.

the kind of systematic analysis of practice and *opinio juris* that [its] judges . . . recommended."[355]

Notwithstanding these potential practical difficulties, only established custom should count for purposes of judicially applicable U.S. law in statutory interpretation. Otherwise, judges would need to choose between two (or more) competing rules of emerging custom, triggering concerns about undemocratic judicial lawmaking.[356] International courts and tribunals may be less able to avoid this problem, as they may be forced to rely on international custom—clear or vague—in adjudicating a particular dispute.[357] Facing the unappealing choice of creating rules or failing to decide, international courts typically must choose the former, particularly in cases where both sides have consented to jurisdiction.[358] But domestic courts have statutory text to apply as the rule of decision in the event of vague or disputed international custom.

Moreover, a rule of emerging custom, in not reflecting widespread and consistent practice, might have been opposed by the political branches, which would raise the problem of democratic legitimacy if applied by courts in statutory interpretation. Given the *Sosa* requirement that an asserted norm be clear and accepted, courts should utilize only established custom that the U.S. political branches have already generated through state practice, because customary claims actively opposed by the U.S. political branches are most likely only

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355 REISMAN ET AL., *supra* note 281, at 15.

356 This constraint on courts, of course, would not necessarily preclude the political branches, given their democratic legitimacy, from enforcing norms of emerging custom through domestic regulation or legislation or international state practice. *See* KU & YOO, *supra* note 239, at 115 ("With bilateral or multilateral treaties, the President and two-thirds of the Senate must consent before the United States becomes legally bound. But with CIL, the United States does not participate in a democratic lawmaking process. CIL arises through the practice of states, rather than a legislative assembly where the United States is formally represented."); *see also* Bradley, *supra* note 25, at 524–25 (explaining that executive and legislative control over foreign affairs powers "reflects both formal and functional considerations. The formal considerations include the Constitution's express assignment of policymaking and foreign affairs powers to the political branches and the Executive's head-of-state role in representing the United States in relations with other nations. The functional considerations include the political branches' advantages vis-à-vis the courts in obtaining foreign affairs information and in responding to changing world conditions." (footnotes omitted)).

357 *See, e.g.*, ICJ Statute, *supra* note 5, at art. 38 (giving the ICJ authority to decide cases based on international law or *ex aequo et bono*).

358 *See* Myres S. McDougal & W. Michael Reisman, *"The Changing Structure of International Law": Unchanging Theory for Inquiry*, 65 COLUM. L. REV. 810, 818 (1965) (discussing the *non liquet* doctrine). Delegates to the PCIJ drafting committee expressed these concerns and included a comprehensive range of sources of international law to avoid the risk of *non liquet*. *See* PCIJ Drafting Committee Proceedings, *supra* note 250, at 296, 307–20.

emerging and thus inapplicable for statutory interpretation.[359] Thus, a heightened standard requiring clear and accepted international custom, based on widespread and consistent state practice and opinio juris, should alleviate problems raised by critics of custom.

This criterion for international custom's effect on statutory interpretation does not shut the door to emerging custom in U.S. jurisprudence.[360] Indeed, in any statutory interpretation in light of international custom, a court would first need to determine whether the asserted norm is emerging or established and take into account only the latter. However, in this process of adjudication, statutory interpretation should only influence emerging custom, and not vice versa.

Interactions between international custom and domestic statutes should be guided by the following two-by-two matrix (Table 2).

TABLE 2

	Ambiguous Statute	**Clear Statute**
Vague or Disputed International Custom ("Emerging Custom")	I. Customary law formation through statutory interpretation vs. classical *Charming Betsy* (construing ambiguous statutes in light of law of nations)	II. Customary law formation through statutory interpretation vs. modern *Charming Betsy* (reviewing clear statutes in light of customary international law)
Clear and Accepted International Custom ("Established Custom")	III. *Sosa-Charming Betsy* (statutory interpretation through custom) vs. classical *Charming Betsy* (construing ambiguous statutes in light of law of nations)	IV. *Sosa-Charming Betsy* (last-in-time source prevails?) vs. modern *Charming Betsy* (reviewing clear statutes in light of customary international law)

To be sure, this stylized framework might be difficult to apply at the margins where the categories intersect. But it is in keeping with the apparent contemporary preference to minimize the interpretive

359 Neuman, *supra* note 40, at 387–88 ("[T]he norm to be applied must be a genuine norm of customary international law and one validly binding on the United States. The position of the federal Executive Branch on what customary international law requires, if available, deserves considerable deference. At the same time, the normativity of law requires that once a right has been embodied in federal common law, the executive cannot retain direct control over its elaboration and application to particular cases. But the executive has subtler methods for influencing its development, and Congress can replace common law norms by statutes or repeal them altogether.").

360 Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) ("[N]othing Congress has done is a reason for us to shut the door to the law of nations entirely.").

burdens on judicial decisionmaking, particularly in the area of international law, through simplified analytical heuristics.[361]

In cases involving emerging custom (interactions I and II), courts should construe statutes (ambiguous or clear) independently of customary claims. This approach is in contrast to the classical *Charming Betsy* doctrine, which deems all international custom as relevant in interpreting ambiguous statutes, and to some modern invocations of *Charming Betsy*, in which courts use international custom when reviewing clear legislation without assessing whether the custom is vague or disputed.[362] Judicial interpretations of ambiguous statutes inevitably will entail some judicial lawmaking, which was earlier discussed as a reason against relying on vague or disputed custom.[363] But this interpretive solution minimizes problematic discretion by restricting it only to statutes, which courts are asked to apply in any event, rather than exacerbating the problem by spreading it to custom. Nonetheless, courts should also be conscious of their inevitable participation in the development of international custom and the fact that their statutory interpretation will affect customary law formation. After all, judicial decisions count as state practice in developing custom.[364] Having concluded that an alleged claim of international custom is only emerging, and having independently construed the statutory text, courts should indicate in which direction their statutory interpretation shifts the evolving customary norm.

In cases involving established custom and ambiguous statutes (interaction III), statutory interpretation should be consistent with international custom. In *Charming Betsy*, the Court recognized the presumption that Congress does not intend to violate customary international law through legislative enactments unless it clearly states so[365] because doing so may cause foreign relations problems for the United

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361 *See generally, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (construing the scope of the Alien Tort Statute based on the presumption against extraterritoriality rather than a three-part test based on territoriality, nationality, and interest in not providing safe harbor to modern-day pirates, such as perpetrators of genocide or torture); Medellín v. Texas, 552 U.S. 491 (2008) (determining self-execution of treaties based on the text rather than a multifactor test).

362 *See supra* notes 35–40 and accompanying text.

363 *See supra* note 356 and accompanying text.

364 *See Report of the International Law Commission to the General Assembly*, *supra* note 312, at 368–72 (listing "[d]ecisions of national courts" as one of seven categories of evidence of customary international law).

365 Murray v. Schooner The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("Congress cannot be intended to have prohibited [activity protected under international custom], unless that intent be manifested by express words or a very plain and necessary implication.").

States.[366] This presumption reflects modern legislative practice, which has been, at least since 1945, in general harmony with international custom.[367] However, given the limited scope of historical international custom, as discussed above, the *Charming Betsy* Court did not delineate between emerging and established custom, as the *Sosa* Court did with respect to contemporary international custom.[368] Thus, this approach is based on the integrated reasoning of the two precedents.

Conflicts between clear statutes and established custom (interaction IV) present the greatest jurisprudential difficulty, due to the lack of relevant precedent. The resolution of this question is also likely to have the least practical impact, due to the rarity of such cases. To be sure, it is well-established that Congress can override international custom based on subsequent clear legislation.[369] But it does not appear that courts have been thus far squarely presented with the inverse question.[370] The last-in-time rule has been held to apply to treaties in both directions, such that a later treaty can supersede an earlier statute and vice versa.[371] And it could be argued that courts

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366 *See* Bradley, *supra* note 25, at 495 (noting that violations of international custom "might offend other nations and create foreign relations difficulties for the United States").

367 *See supra* Part I.B.

368 The *Sosa-Charming Betsy* doctrine would not necessarily apply to the use of international custom by the executive and legislative branches, given their role as democratic lawmakers.

369 Sosa v. Alvarez-Machain, 542 U.S. 692, 731 (2004) (noting that Congress "may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such"); *see also* GOLDSMITH & POSNER, *supra* note 342, at 77 ("[P]olitical branches have the final say about whether and how [customary international law] applies in the United States and whether or not the United States will comply with it."); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). *But see generally* Jordan J. Paust, *Rediscovering the Relationship Between Congressional Power and International Law: Exceptions to the Last in Time Rule and the Primacy of Custom*, 28 VA. J. INT'L L. 393 (1988) (arguing that because customary international law is continually being renewed by the actions and beliefs of the international community, it will always be last-in-time and thus should always supersede inconsistent federal statutes).

370 The closest precedent may be the Second Circuit's decision in *Guaylupo-Moya*, which rejected the lower court's judgment in *Beharry* applying a later international custom over earlier clear statutory text, because the circuit court did not view the custom as clear and considered Congress's intent to be unambiguous; the Second Circuit did not reject the district court's overall interpretive methodology, however. *See* Guaylupo-Moya v. Gonzales, 423 F.3d 121, 124–25 (2d Cir. 2005); *see also supra* notes 191–95 and accompanying text.

371 *See* Breard v. Greene, 523 U.S. 371, 376–77 (1998) (holding that a later-enacted statute trumped an earlier treaty); Cook v. United States, 288 U.S. 102, 118–19 (1933); Empresa Cubana del Tabaco v. Culbro Corp., 399 F.3d 462, 481 (2d Cir. 2005) ("[L]egislative acts trump treaty-made international law when those acts are passed subsequent to ratification of the treaty and clearly contradict treaty obligations." (internal quotation marks omitted)); *see also* William S. Dodge, *Customary International Law, Congress, and the Courts: Origins of the Later-in-Time Rule*, *in* MAKING TRANSNATIONAL LAW WORK IN THE GLOBAL ECONOMY: ESSAYS IN HONOUR

should apply the same rule for the relationship between statutes and custom, because treaties and international custom are co-equal sources of international law[372] and treaties are co-equal with statutes.[373] Thus, under this interpretation, a clear statute at time two would prevail over an established custom at time one, and vice versa.[374] From this perspective, the relative domestic hierarchy of custom and treaties on a stand-alone basis is immaterial for this issue, as the purpose of *Charming Betsy* is to avoid conflict with international law (where custom and treaties have equal status), rather than reconcile the internal hierarchy of norms within the U.S. constitutional order among statutes, treaties, international custom, and federal common law.[375] The normative justification for this logical extension of current doctrine would mirror that for interaction III: Congress does not typically intend to legislatively violate international custom and could not have intended to do so at the time of the statute's enactment in interaction IV given that the hypothetical custom was established later. Even though the statutory *text* at time one is in clear

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OF DETLEV VAGTS 531 (Pieter H. F. Bekker, Rudolf Dolzer & Michael Waibel eds., 2010). However, some scholars question the current validity of this doctrine. *See* Wu, *supra* note 51, at 595–96.

372 *See* BEDERMAN, *supra* note 249, at 178 ("It is only in the realm of public international law that modification of treaties by supervening custom, along with the doctrine of *jus cogens*, makes custom a truly coequal source of legal obligation."); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1564 (1984) ("In international law, customary law and treaties are of equal authority . . . .").

373 *See* Whitney v. Robertson, 124 U.S. 190, 194 (1888).

374 *See* Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 933 (1986) ("[C]ourts will probably conclude that customary law, being equal to treaties in international law, has the same status as treaties in the domestic legal hierarchy as well. And since the Constitution has been read to mean that treaties and statutes are equal, customary law—now read into the Supremacy Clause and treated as law of the United States for other constitutional purposes—should be put on the same level as treaties and statutes. If so, like a treaty, a principle of customary law will not be given effect if supervening national legislation is inconsistent with it. But a supervening principle of customary law will not be denied domestic effect because of some earlier act of Congress." (footnotes omitted)).

375 *See* T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT'L L. 91, 100 (2004) (arguing for a "last-in-time rule," under which "a federal statute would yield to a norm of customary international law that crystallized after the enactment of the statute"). *But see* BRADLEY, *supra* note 47, at 330 ("Self-executing treaties can override federal statutes, . . . whereas customary international law—whatever its precise domestic status—has a lower position in the hierarchy of American law. Similarly, although courts have often affirmed that treaties can preempt inconsistent state law, there are essentially no judicial decisions giving customary international law such preemptive effect. . . . This differential domestic status between treaties and customary international law should not be surprising, given that treaties are addressed much more extensively in the U.S. Constitution and engage more directly with U.S. democratic processes.").

violation of established custom at time two, the legislative *intent* to violate international custom could be deemed to be by necessity ambiguous, unless the statute specifies that it applies notwithstanding the emergence of any future international custom. In other words, the time factor would undermine the force of textual clarity and, in effect, would place interaction IV into category III where the statute as a whole is ambiguous and the custom is established. On the other hand, courts may be reluctant to override clear statutory text with a later-in-time clear customary norm that, in contrast to treaties, lacks formal mechanisms of codification.

One way to think about the possible last-in-time rule for established custom is by analogy to the doctrine of desuetude invoked periodically (even if rarely) in U.S. jurisprudence, whereby a statute can become a dead letter based on a history of disuse, nonenforcement, or contrary practice.[376] Scholars have long-debated the status and appropriateness of desuetude in U.S. law, with divergent conclusions.[377] The legal doctrine has origins in ancient Roman law, under which "a

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376 Mangual v. Rotger-Sabat, 317 F.3d 45, 57 (1st Cir. 2003) ("A finding of no credible threat of prosecution under a criminal statute requires a long institutional history of disuse, bordering on desuetude." (citing Poe v. Ullman, 367 U.S. 497, 507 (1961) (denying standing based on an eighty-year-old "tacit agreement" by the state not to prosecute))). *But see* S.F. Cnty. Democratic Cent. Comm. v. Eu, 826 F.2d 814, 822 n.15 (9th Cir. 1987) ("[T]he aftermath of *Poe* teaches that federal courts should not lightly determine that a statute has fallen into desuetude."); Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries v. Perotti, 419 F.2d 704, 713 (D.C. Cir. 1969) ("[C]ourts are notoriously reluctant to find that statutes, and to a lesser degree regulations, have fallen into desuetude from mere disuse.").

377 *Compare* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 143–56 (2d ed. 1962), ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 96 (1990) (arguing that the sudden revival of a long forgotten law carrying harsh penalties might be challenged based on the doctrine of desuetude), GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17–30 (1982) (discussing desuetude as a way for courts to avoid application of outdated statutes), Alexander M. Bickel, *The Supreme Court 1960 Term: Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 64 (1961) ("[T]he Connecticut birth-control statute has been nullified by desuetude in its application to the use of contraceptives by a doctor's prescription."), Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 219 (1943) ("When statutes lapse into desuetude, they have ceased to be decisions in our sense of the word."), Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 45 (describing the Court's invalidation of sodomy prohibitions in *Lawrence v. Texas* as "a kind of American-style desuetude" doctrine), *and* Note, *Desuetude*, 119 HARV. L. REV. 2209, 2228–29 (2006) (arguing in favor of desuetude generally in U.S. law), *with* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 337 (2012) ("Only West Virginia cases hold that desuetude invalidates. We think they are wrong." (footnote omitted)), 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23:26, at 533 (7th ed. 2009) ("The doctrine of separation of powers prevents holding that a legislative enactment . . . is ineffective by nonuse or obsolescence . . . ."), *and* JOHN CHIPMAN GRAY, THE NATURE AND

statute could be canceled through lack of application and enforcement over a period of time."[378] At the level of international law, the equivalent principle that custom can supplant an earlier treaty is widely accepted.[379] Whether a *domestic* statute can be similarly treated based on *international* practice would be arguably a more difficult and contentious question. But here, the relevant practice is both international *and* domestic, because any established custom would by definition reflect, in part, U.S. practice in order for it to reach the heightened standard of clarity and acceptance required by *Sosa-Charming Betsy*.[380] Thus, regular U.S. enforcement of a domestic statute would undermine the argument that an international custom is established, and thereby eliminate the conflict. In turn, a desuetude argument based on the lack of domestic enforcement of a statutory provision could be strengthened by international practice in support of a contrary norm.

It might be argued that the "life of the law has not been logic: it has been experience,"[381] and that the lack of a single case in support of the last-in-time rule for established custom makes this analysis tenuous. On the other hand, there is no direct precedent against the suggested view; it is still an open issue—as it was over twenty-five years ago when the *Restatement (Third) on Foreign Relations* endorsed the last-in-time rule for international custom.[382] In such situations, lawyers and judges need to "translate the directive and spirit of . . . laws to unanticipated situations,"[383] such as reconciling two sources of positive law pointing (perhaps inadvertently) in different directions. Re-

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SOURCES OF THE LAW 197 (2d ed. 1921) (arguing that U.S. "courts would generally follow the English doctrine that a statute cannot be abrogated by desuetude").

378 D'AMATO, *supra* note 305, at 239.

379 *See* BEDERMAN, *supra* note 249, at 157 ("[S]tate practice is replete with examples of countries recognizing that their previous treaty obligations have been altered by supervening norms of customary international law. And, in at least a few decisions by international tribunals, the role of newly formed CIL has been recognized." (citing decisions by the ICJ and the Iran-U.S. Claims Tribunal as examples)).

380 *See supra* note 359 and accompanying text.

381 O.W. HOLMES, JR., THE COMMON LAW 1 (1881).

382 *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4 (1987) ("There seem to have been no cases in which a court was required to determine whether to give effect to a principle of customary law in the face of an inconsistent earlier statute or international agreement of the United States. Since international customary law and an international agreement have equal authority in international law and both are law of the United States, arguably later customary law should be given effect as law of the United States, even in the face of an earlier law or agreement, just as a later international agreement of the United States is given effect in the face of an earlier law or agreement." (citations omitted)).

383 *Cf.* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, The State Department Legal Adviser's Office: Eight Decades in Peace and War, Remarks at the Georgetown Univer-

quiring a heightened degree of clarity and acceptance for subsequent customary international law to supersede an earlier statute appears to be a faithful interpretation of the *Sosa* and *Charming Betsy* doctrines that equally considers and takes into account the authority of domestic statutes and international custom.[384]

This resolution would enable Congress to override customary international law when it in fact intends to do so, and it simultaneously would show due respect for international custom by preventing unconsidered violations of it. It would preserve ultimate control in the democratically elected political branches, as the Congress and the President can abrogate judicial interpretation of customary international law through federal legislation.[385] Admittedly, this democratic override would not be available in the limited cases of jus cogens norms, but no U.S. court has ever held that Congress has the authority to violate jus cogens norms, and at least one case expressly reserved judgment on the issue, even though it squarely held that Congress can override customary international law.[386] In any event, the category of jus cogens norms is minimal and includes prohibitions that are already precluded by U.S. law—such as genocide, extermination, and piracy—without any serious claims that they should be permitted. Even within international jurisprudence, "*jus cogens*, because of the lack of any sound practice, still remains in the sphere of hypothesis."[387] Thus, whatever abstract theoretical constraint jus cogens might pose on U.S. law would not translate into real limits in practice. Moreover, this possible resolution would be more sensitive to national sovereignty and democratic control than other adjudicative practices that have been part of U.S. jurisprudence since the nation's founding.[388] And

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sity Law Center Conference on Law and U.S. Foreign Policy (Mar. 3, 2011), *in* 100 GEO. L.J. 1747 (2012), at 1772.

384 *Cf.* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 5 (2012) (discussing "*faithful*[ ]," as opposed to "*literal*[ ]," readings of the Constitution); W. Michael Reisman, *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 YALE J. INT'L L. 316, 328 (1990) (discussing "faithful[ ]," as opposed to "mechanical," interpretations of treaties).

385 *See supra* note 369.

386 *See supra* note 207 and accompanying text; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987) ("Some rules of international law are recognized by the international community of states as peremptory, permitting no derogation. These rules prevail over and invalidate international agreements and other rules of international law in conflict with them. Such a peremptory norm is subject to modification only by a subsequent norm of international law having the same character.").

387 WOLFKE, supra note 67, at 92.

388 *See* Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 840, 842 (2007) (noting "fears of undemocratic lawmaking and a loss of national sovereignty" due to international courts reviewing the U.S. Supreme Court and state supreme

just as the doctrine of desuetude in U.S. case law is infrequently used, and treaties are rarely found to override earlier-in-time statutes,[389] a last-in-time rule for established custom, if it were ever to be adopted by federal courts, would also likely to be utilized infrequently and should be applied with great caution.[390] Ultimately, this Article is agnostic as to whether courts should adopt a later-in-time rule for customary international law, because it does not appear necessary from the perspective of the power-maximizing justification for the *Sosa-Charming Betsy* doctrine.[391]

B. Judicial Competence to Identify and Influence Custom

The distinction between established and emerging custom, and the relative function of each in statutory interpretation, helps clarify the judicial role in each area. Domestic courts have the competence to identify clear and accepted international custom, and use it in construing statutes, but should only influence vague or disputed custom through independent statutory interpretation.

Courts have a comparative institutional advantage in resolving interactions III and IV between established custom and domestic statutes, because, as Part I demonstrated, they have arguably greater contemporary experience in this respect than Congress—which rarely directly incorporates international custom into statutes or provides guidance on its interpretative role.[392] Moreover, the international

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courts, and tracing long-standing practice since the nation's founding of this type of supranational judicial review, at least in specific areas such as trade and economic relations (internal quotation marks and footnotes omitted)).

389 *See* Wu, *supra* note 51, at 595–96, 597 (arguing that "because non-self-execution or other doctrines of deference can be, and are, used to prevent a later-in-time treaty from abrogating an earlier statute, the last-in-time rule is not a full or accurate portrayal of judicial practice," and pointing out that *Cook v. United States*, 288 U.S. 102 (1933), is "the only Supreme Court case to explicitly enforce a treaty in the face of an inconsistent federal statute"—and this holding was at the *request* of the executive branch).

390 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 reporters' note 4 (1987) ("Courts in the United States will hesitate to conclude that a principle has become a rule of customary international law if they are required to give it effect in the face of an earlier inconsistent statute.").

391 *See infra* Part III.C.

392 This experience was generated notwithstanding the difficult headwinds provided in the early second half of the twentieth century by the Supreme Court in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See* Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1936 (1992) ("The immediate reaction to *Sabbatino* . . . was outrage—fueled by claims that the Court had made the United States an accomplice of gross violations of international law."); Koh, *supra* note 42, at 2363 ("*Sabbatino* . . . cast a profound chill upon the willingness of United States domestic courts to interpret or articulate norms of international law . . . ."); Myres S. McDougal, *Act of State in*

community recognizes the privileged role of courts (international and domestic) in identifying rules of international custom.[393] As Justice Benjamin Cardozo once observed, customary international law "has at times, like the common law within states, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the *imprimatur* of a court attests its jural quality."[394] Similarly, Judge Rosalyn Higgins, former President of the International Court of Justice, has noted the argument that "at the end of the day [customary] international law is what the [court] would declare it to be."[395] To be sure, custom arises out of state practice and opinio juris, in which the political branches are the primary actors.[396] But courts are also integral actors in customary law formation in three ways: (1) verifying the jural quality of an asserted norm by identifying degrees of its clarity and acceptance, (2) contributing to state practice, and (3) nudging the political process toward further deliberation and decision with respect to the norm.[397] Even if the political braches are ultimately in control over the status of international custom as U.S. law, courts can help avoid unconsidered deviations from established custom by applying it in statutory interpretation.[398]

Separating established from emerging custom also highlights new opportunities for U.S. influence over the development of international custom. Many cases discussed in Part I involved vague or disputed custom, which could be shaped through judicial interpretation of stat-

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Policy Perspective: The International Law of an International Economy, *in* PRIVATE INVESTORS ABROAD—STRUCTURES AND SAFEGUARDS 327, 341–42 (Virginia Schook Cameron ed., 1966) (observing that the impact of *Sabbatino* "can only be to embarrass and minimize the indispensable role of national courts in the making and application of international law"). Even greater experience is likely given the Court's endorsement of established custom in *Sosa*, as illustrated by recent trends.

393 *See* ICJ Statute, *supra* note 5, at art. 38, ¶ 1 ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.").

394 New Jersey v. Delaware, 291 U.S. 361, 383 (1934).

395 ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 37 (1994).

396 *See supra* notes 339–42 and accompanying text.

397 *Cf.* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

398 *Cf.* LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 94 (1979) ("[T]he law does not address itself principally to 'criminal elements' on the one hand or to 'saints' on the other. The 'criminal elements' are difficult to deter; the 'saint' is not commonly tempted to commit violations, and it is not law or fear of punishment that deters him. The law is aimed principally at the mass in between—at those who, while generally law-abiding, may yet be tempted to some violations by immediate self-interest.").

utes. Currently, however, such cases are unlikely to be registered as state practice, as they are insufficiently politically salient, even though they demonstrate strong evidence of emerging custom. Since the United States by definition has an interest in influencing international custom, which is intended to reflect the common interests within the international community,[399] this lack of awareness undermines overall U.S. power to develop international rules. In his 1950 report to the ILC on international custom, Manley Hudson noted that "[i]t would be a herculean task to assemble the decisions on questions of international law of the national courts of all States . . . . So far as [he knew], no attempt ha[d] been made to do such a job."[400] But with modern technology, and courts sensitized to their potential role in shaping international custom through statutory interpretation, these opportunities for influence are within realistic reach.[401] Indeed, the United States may be particularly well-positioned within the international community to develop these mechanisms, given its extensive and well-respected federal jurisprudence. Recognizing the judicial role in affecting emerging customary international law is fully consistent with the resistance to judicial domestic lawmaking, as it is entirely a function of independent statutory interpretation in interactions I and II, and an incidental benefit without any associated cost.

Recall, in this respect, the Court's holding in *Kiobel* that the presumption against extraterritoriality precludes claims under the Alien Tort Statute against foreign defendants for foreign conduct.[402] The presumption against extraterritoriality arose in light of concerns about violations of international law, and it should not be unmoored from that analysis.[403] The Court observed that the presumption "guards against [U.S.] courts triggering . . . serious foreign policy conse-

399 *See, e.g.*, Bart M.J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L.J. 449, 477 (2012).

400 Special Rapporteur, *Article 24 of The Statute of the International Law Commission*, *supra* note 306, at 28.

401 *Cf.* POSNER & VERMEULE, *supra* note 49, at 168 ("Citations to the high courts of foreign countries could also enhance comity and American judicial influence.").

402 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1665–69 (2013).

403 *See* Born, *supra* note 101. This logic applies with special force to the ATS, which provides a remedy for violations of U.S. international legal obligations and presumably should not be construed to violate such obligations. *See* Carlos M. Vázquez, *Alien Tort Claims and the Status of Customary International Law*, 106 AM. J. INT'L L. 531, 544 (2012) ("The case for limiting the extraterritorial scope of the [ATS] action derives greater support from the *Charming Betsy* presumption, which counsels that federal statutes should generally be construed in a way that conforms them to international law."); Ingrid Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 1931, 1941 (2010) ("Courts should also presume that Congress would be especially keen to avoid any potential *violations* of interna-

quences, and instead defers such decisions, quite appropriately, to the political branches."[404] However, any presumption is only a default rule, reflecting specific baseline concerns, and by its very terms can be overridden based on other considerations embedded in the doctrine's normative foundations.[405] Moreover, the vagueness of the international custom on extraterritorial jurisdiction—whereby "all relevant factors" should be taken into account and conflicting state interests in asserting jurisdiction should be weighed based on a standard of reasonableness and relative intensity of the state interests[406]—suggests that courts should not presume that an established international customary rule prevents extraterritorial application of U.S. law in all circumstances.

Under the framework outlined by this Article, the domestic doctrine against extraterritoriality should not be a blanket prohibition on the application of U.S. law abroad. Indeed, it can be overcome not only by statutory "text, history, [or] purpose[ ]"—as recognized by the Court in *Kiobel*[407]—but more importantly, by executive branch requests for extraterritorial projection of U.S. law. To the extent this presumption may have rested earlier on the notion that "Congress generally legislates with domestic concerns in mind,"[408] that justification should not guide future judicial interpretation of statutes at a time when the distinction between domestic and international law is increasingly tenuous.[409] Rather than assuming an exclusively nationalist focus of U.S. legislation in an era of globalization and interconnectedness,[410] courts should take cues from the political branches—Congress or the Executive—as to the geographic scope of U.S. law, as judges generally have done.

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tional law, as in the context of prescriptive jurisdiction; this general rule of statutory interpretation applies with particular force in the ATS context." (footnote omitted)).

404 *Kiobel*, 133 S. Ct. at 1669; *see also* Vázquez, *supra* note 403, at 544 (arguing that this canon of construction can be best justified based on the "idea that in our governmental system, the decision to violate international law is allocated to the federal political branches").

405 WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 883 (4th ed. 2007).

406 *See supra* notes 121–23 and accompanying text.

407 *Kiobel*, 133 S. Ct. at 1665–67.

408 Smith v. United States, 507 U.S. 197, 204 n.5 (1993).

409 *See* Hathaway, *supra* note 48, at 218.

410 *But see* SCALIA & GARNER, *supra* note 377, at 268, 272 ("It has long been assumed that legislatures enact their laws with [a national] territorial limitation in mind. Indeed, medieval law had the maxim *Statuta suo clauduntur territorio, nec ultra territorium disponunt*—'Statutes are confined to their own territory and have no extraterritorial effect.' . . . We favor restoring the presumption to its former . . . state [of nonextraterritoriality.]").

Viewed from this perspective, the ATS after *Kiobel* is potentially open to future claims against U.S. persons for conduct occurring abroad or against any person for direct liability. Ideally, the legislative branch should give greater attention to the appropriate territorial reach of U.S. law and, to the extent possible, clarify it in advance; but it rarely does so. As a second-best and more likely solution—where a statute like the ATS is ambiguous as to its extraterritorial status—courts should defer to executive branch discretion as to whether or not to apply U.S. law to conduct abroad.

Reconceptualizing the doctrine and clarifying its normative justification explains the unanimous judgment in *Kiobel*, which held that the presumption against extraterritoriality precludes ATS claims against foreign defendants where "all the relevant conduct took place outside the United States" and the claims do not "touch and concern the territory of the United States."[411] Without clear evidence of statutory text, history, or purpose in favor of extraterritoriality, the Court looked to the executive branch for signals regarding the projection of U.S. authority abroad.[412]

In an amicus brief, the U.S. government argued against construing the ATS to apply extraterritorially to foreign defendants for aiding and abetting liability for conduct committed abroad, where the alleged primary tortfeasor was a foreign sovereign committing acts within its own territory.[413] Under these circumstances, the government reasoned, "the United States cannot be thought responsible in the eyes of the international community for affording a remedy for the [foreign defendant's] actions, while the nations directly concerned could."[414]

The executive branch took a different position with respect to direct liability for foreign conduct by foreign defendants found residing in the United States.[415] It cited *Filartiga v. Pena-Irala*[416]— where a Paraguayan defendant residing in the United States was sued for alleged torture committed in Paraguay[417]—as the paradigmatic case of appropriate extraterritorial application of the ATS. "[A]fter weighing

411 *Kiobel*, 133 S. Ct. at 1669.

412 *Id.* at 1664 (noting that courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs" (quoting Sosa v. Alvarez-Machain, 542 U.S. 692, 727 (2004))).

413 Gov't Supplemental Kiobel Brief, *supra* note 124.

414 *Id.* at 5.

415 *Id.* at 4.

416 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

417 *Id.* at 878–80.

the various considerations," the government argued, "allowing suits based on conduct occurring in a foreign country in [such] circumstances . . . is consistent with the foreign relations interests of the United States, including the promotion of respect for human rights."[418]

Finally, the government left open extraterritorial application of the ATS "in other circumstances, such as where the defendant is a U.S. national or corporation, or where the alleged conduct of the foreign sovereign occurred outside its territory, or where conduct by others occurred within the U.S. or on the high seas."[419] In such instances, Congress or the executive branch would need to clarify whether the United States_fs interest in promoting respect for human rights or other considerations are sufficient to outweigh the potential foreign policy costs in asserting jurisdiction.

The government recognized that similar foreign relations concerns can arise in the case of indirect and direct liability of foreign defendants for foreign conduct.[420] But it saw weaker U.S. interests in asserting extraterritorial jurisdiction for aiding and abetting liability compared to "harbor[ing] or otherwise provid[ing] refuge to an actual torturer or other 'enemy of all mankind.'"[421] To be sure, this distinction between the relative intensity of U.S. interests in preventing one type of harm versus the other is thin, because the interest in promoting respect for human rights—proffered to justify extraterritorial jurisdiction for direct liability of foreign defendants for foreign conduct—would seem to apply equally to indirect liability. And the executive branch could have made different determinations by extending jurisdiction over all foreign conduct (as advocated by the petitioners[422]) or over no foreign conduct (as argued by the government in prior litigation[423]). But a political branch having considered and balanced the potential "serious foreign policy consequences" with countervailing

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418 Gov't Supplemental Kiobel Brief, *supra* note 124, at 4–5.

419 *Id.* at 21.

420 *See id.* at 19.

421 *Id.* (quoting *Filartiga*, 630 F.2d at 890).

422 *See* Petitioners' Supplemental Opening Brief at 17, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491) ("Only by overturning the core analysis in *Sosa* and its application of the ATS to modern human rights cases could this Court impose categorical territorial limitations on the ATS. There is no reason for this Court to do so.").

423 *See, e.g.*, Brief for the United States as Respondent Supporting Petitioner at 50, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (No. 03-339) (arguing, as an "additional reason" for case dismissal, that no cause of action may be recognized under the ATS for the conduct of foreign defendants in foreign countries); Brief for the United States as Amicus Curiae at 5–12, Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009) (No. 07-0116) (argu-

U.S. interests when the issue of extraterritoriality was squarely addressed in the case, the Court "quite appropriately" deferred to that discretionary decision.[424]

The outcome in *Kiobel* was essentially determined once the interagency process between the Departments of Justice, State, and Commerce reached the conclusion against extraterritorial application in this type of circumstance. Albeit for different reasons, all nine Justices agreed with the executive branch position. However, the government was careful to restrict its construction of the ATS to the specific facts involved: foreign defendants charged with aiding and abetting liability for conduct in foreign territory, where the alleged primary tortfeasor was a foreign sovereign committing acts within its own territory.[425] The analysis above suggests that under different circumstances—where the executive branch supports extraterritoriality against U.S. persons for conduct occurring abroad, against any person for direct liability, or against foreign defendants for indirect liability where the alleged principal tortfeasor is a state committing acts outside its own territory—the Court similarly should defer to the government and adopt its position on the extraterritorial reach of the ATS. Thus, the main battleground of advocacy for the future of transnational human rights litigation may not be in the courts, but rather in the executive branch. And the application abroad of some U.S. statutes under some circumstances, in turn, will influence the emerging international custom on extraterritorial jurisdiction in similar contexts.

C. Power-Maximizing Justification for Custom

Even if concerns over uncertainty and democratic legitimacy can be overcome, as Part III.A showed and Part III.B illustrated, what purpose does international custom serve in statutory interpretation, since it is not inherent to the judicial function[426] and is not conclusively addressed by the Constitution?[427] If legislative intent is central to the interpretive role of international custom, why should courts adopt an assumption of avoiding statutory conflict with customary international law in cases of ambiguity—as they have for over two cen-

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ing that no cause of action may be recognized under the ATS for conduct occurring in a foreign country).

424 Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013).

425 *See* Gov't Supplemental Kiobel Brief, *supra* note 124, at 21.

426 *See supra* Part II.B–C.

427 *See supra* notes 72–74 and accompanying text.

turies since *Charming Betsy*—rather than the reverse?[428] Indeed, this type of penalty default rule might lead to more accurate reflection of legislative intent, as it could be more likely to trigger congressional response in a case of error than would the assumption of conflict avoidance.[429] Moreover, a nationalist perspective seeking to assert sovereignty at any possible occasion might prefer unintended violations to unintended harmony in order to maximize demonstrations of independence from international law. On the other hand, pursuing these not implausible objectives would undermine the reciprocity necessary to influence international custom.[430] For custom, reciprocity is the functional equivalent of consent for treaties. In practice, a state can always withdraw from the international community, but then its global influence is diminished as its acts and statements are given less respect and its persuasive power is minimized. Indeed, the underlying logic for the strength and duration of international custom's interpretive role in U.S. jurisprudence lies in its potential power-maximizing effect for the United States within the international community.[431] With power understood here as the ability to achieve a specific objective, maximizing it helps maximize overall U.S. values and interests.[432]

Courts serve a dual function with respect to international custom in identifying established rules and influencing emerging norms.[433] As Part I showed, established custom's role in statutory interpretation is sometimes constraining, but at other times, it is expansive or supportive of the legislative text. More importantly, engaging in this interpretive exercise enables courts to influence emerging custom through

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428 For a general analysis of creative insights potentially gained from reversing conventional assumptions, see BARRY NALEBUFF & IAN AYRES, WHY NOT?: HOW TO USE EVERYDAY INGENUITY TO SOLVE PROBLEMS BIG AND SMALL 115–32 (2006).

429 *See Kiobel*, 133 S. Ct. at 1664 (noting that construing a statute to violate the law of nations might create "'unintended clashes between our laws and those of other nations which could result in international discord'" (quoting EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991))).

430 For a discussion of how state behavior leads to the creation of international custom, see *supra* notes 339–48 and accompanying text.

431 *See* Anthea Roberts, *Comparative International Law? The Role of National Courts in Creating and Enforcing International Law*, 60 INT'L & COMP. L.Q. 57, 58 (2011) ("Academics, practitioners and international and national courts frequently identify and interpret international law by engaging in comparative analysis of how domestic courts have approached the issue.").

432 *See* Szewczyk, *supra* note 399.

433 *Compare Report of the International Law Commission to the General Assembly*, *supra* note 312, at 368–72 (listing "[d]ecisions of national courts" as one of seven categories of evidence of customary international law), *with* ICJ Statute, *supra* note 5, at art. 38(1)(d) (listing "judicial decisions" as "subsidiary means for the determination of rules of [international] law"). *See generally* Roberts, *supra* note 431, at 62.

statutory interpretation. It can spread the norms articulated by judicial constructions of statutes through the mechanism of customary international law to the "community of courts,"[434] as well as the wider community of all international actors.

In modern times, custom is generally a more prominent feature of decisionmaking in nonhierarchical communities, which overcome the lack of a central lawmaker by treating past practice as potentially relevant to guiding future decisions.[435] Indeed, with a decline of multilateral treaties adopted in the world and a precipitous drop in the role of treaties in U.S. law,[436] customary international law may form the bulk of new international legal material for the United States and the world in the future. Given the rise of new governments around the world, which might reconsider treaties their predecessors ratified, international custom can help guide their decisions toward desired outcomes based on long-term common interests of the international community, rather than political expediency or short-term interests.[437] The intellectual challenge is to fully understand the scope of international custom and harness its potential. Part of the solution is recognizing the judicial role in stating established custom and shaping emerging custom.

Some commentators may doubt custom's effectiveness as a legal constraint on international conduct, and thereby its power-maximizing potential.[438] Jack Goldsmith and Eric Posner argue that custom often

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434 *See* Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003) (noting that national and international judges "read and cite each other's opinions, which are now available in [seminars, training sessions, and judicial organizations], on the Internet, through clerks, and through the medium of international tribunals that draw on domestic case law and then cross-fertilize to other national courts"). For a discussion of cross-fertilization in the context of international criminal law, see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 63–65 (2002).

435 *See* BEDERMAN, *supra* note 249, at 137 ("Some jurisprudes—most famously, Hans Kelsen—have maintained that, over time, treaty-based sources of international norms will dominate over customary principles."); KELSEN, *supra* note 242, at 441 ("The basis of customary law is the general principle that we ought to behave in the way our fellow men usually behave and during a certain period of time used to behave."); W. Michael Reisman, *On the Causes of Uncertainty and Volatility in International Law*, *in* THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 33, 40 (Tomer Broude & Yuval Shany eds., 2008).

436 *See supra* notes 58–59.

437 *See* D'AMATO, *supra* note 305, at 273–74 ("Scores of new states have come on the international scene in recent years at the same time that the facility of communications and the speed of travel have made the Earth seem small. International law will seem relevant to these states to the extent that its theory and underlying structure make sense."). D'Amato's observations, written in 1971, apply with even greater force to contemporary times.

438 *See* GOLDSMITH & POSNER, *supra* note 342, at 42–43.

reflects nonnormative political equilibria based on "coincidence of interest or coercion" rather than a sense of legal obligation.[439] But this objection may apply only to those theoretical perspectives on international custom that restrict effectiveness to constraint, not to broader theories that define effectiveness as achieving certain objectives based on common interest.[440] To be sure, all international decisions could be ephemeral and without any precedential value for the future; under that scenario, studying custom would be futile, as international actors would simply muddle from one issue to the next based on short-term political expediency. But long-term power and strategy requires "thinking in time"[441] and can be facilitated through customary international law. Generally, through law, with some constraint comes greater power.[442] And this principle applies with special force to international custom, sensitive as it is to the role of power. As Harold Koh points out, international custom influences conduct, and, in turn, practice makes custom[443] in a similar manner that any past precedent shapes present policy.[444] Its significance is not thereby undermined even if it does not exclusively determine decisions or predict outcomes with full certainty.[445]

Others, in turn, may object to the potential constraint of customary international law generally as inappropriate for a global economic

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439 Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1115 (1999). The same question is also raised for presidential custom. *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013); *see also* POSNER & VERMEULE, *supra* note 49, at 205 (arguing that the executive is constrained by politics and public opinion, even when not limited by legal constraints).

440 *See* 1 ROSALYN HIGGINS, *Fundamentals of International Law*, *in* THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW 108 (2009).

441 RICHARD E. NEUSTADT & ERNEST R. MAY, THINKING IN TIME: THE USES OF HISTORY FOR DECISION-MAKERS xxii (1986) (noting the importance of considering past experiences in "deciding what to do today about the prospect for tomorrow").

442 For the power and constraint duality of law, with special focus on constitutional law, see JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 xv (2012) ("[C]onstraints imposed by the watchers of the presidency can strengthen the presidency and render it more effective over the medium and long term."); Bradley & Morrison, *supra* note 439, at 1124 ("Law not only constrains government but also constitutes and enables it. . . . [L]aw inherently both empowers and constrains presidential action.").

443 *See* Harold Hongju Koh, *An Uncommon Lawyer*: *Tribute to Professor Abram Chayes*, 42 HARV. INT'L L.J. 7, 8 (2001) ("Law influences policy, which in turn makes law . . . .").

444 *Cf.* POSNER & VERMEULE, *supra* note 49, at 71–75 (describing the effect of constitutional custom on decisionmaking in the political branches).

445 *See* GUZMAN, *supra* note 249, at 15, 217.

and military power such as the United States.[446] But avoiding the constraint also foregoes the power of customary law formation.[447] In an increasingly multipolar world, where the U.S. economy is expected to be eclipsed by China's by 2030 and its military will no longer be as dominant,[448] U.S. global leadership will depend increasingly on its soft power.[449] U.S. soft power—the power of attraction, persuasion, and shaping external behavior by example[450]—can, in part, be channeled through the mechanism of customary law formation by federal courts.[451]

Customary international law has always been an important mechanism of global governance and should continue to be so in the twenty-first century. Yet, its form will be different, to reflect changes in the international system. Custom accommodates different distributions of power within the international community. For instance, in ancient Rome, with its high concentration of global power, the concept of *jus gentium* emerged to govern relations between Roman citizens and foreigners and was enforced by Roman institutions.[452] But in the contemporary world, with growing diffusion of power to numerous state and nonstate actors,[453] dilution of power from hard to soft mechanisms,[454] and especially in a potential "G-zero" environment with no global leadership,[455] international custom will increasingly rely

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446 *Cf.* Bradley, *supra* note 25, at 492–93 (explaining that, at the time of the *Charming Betsy* decision, the United States was relatively weak in comparison with European powers).

447 Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, 4 S.D. L. REV. 25, 27 (1959).

448 *See* U.S. NAT'L INTELLIGENCE COUNCIL, *supra* note 334, at iii–iv; Szewczyk, *supra* note 399, at 461.

449 *See* NYE, *supra* note 334, at 87, 100–01.

450 *See generally* JOSEPH S. NYE, JR., SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS (2004); Bart Szewczyk, *Increasing U.S. Power in an Age of Economic Decline*, NEW ATLANTICIST (June 16, 2011), http://www.atlanticcouncil.org/blogs/new-atlanticist/increasing-us-power-in-an-age-of-economic-decline.

451 *See* Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Remarks: International Law in Cyberspace (Sept. 18, 2012), *available at* http://www.state.gov/s/l/releases/remarks/197924.htm ("[C]ompliance with international law *frees* us to do more, and do more legitimately . . . in a way that more fully promotes our national interests. Compliance with international law . . . is part and parcel of our broader 'smart power' approach to international law as part of U.S. foreign policy."); *see also* Koh, *supra* note 335, at 738–39.

452 BEDERMAN, *supra* note 249, at 17–21.

453 *See* U.S. NAT'L INTELLIGENCE COUNCIL, *supra* note 334, at 15–19; Szewczyk, *supra* note 399, at 476.

454 *See* NYE, *supra* note 334, at 81–84.

455 *See generally* IAN BREMMER, EVERY NATION FOR ITSELF: WINNERS AND LOSERS IN A G-ZERO WORLD (2012); CHARLES A. KUPCHAN, NO ONE'S WORLD: THE WEST, THE RISING REST, AND THE COMING GLOBAL TURN 3 (2012).

on the power of persuasion across international and national actors, including U.S. courts.

Both of these factors—composition and distribution of global power—mean that international custom has become increasingly complex.[456] At the time of the PCIJ, there were fewer than sixty states,[457] such that a concept of general practice accepted as law—as a source of adjudicative rules—was perhaps easier to envision. With the rise of multilateral treaties and hopes for "international legislation"[458] during the twentieth century, the use of custom may have temporarily waned.[459] And in the twenty-first century—with nearly 200 states and many nonstate actors—international custom may seem antiquated and unrealistic.

However, modern technology and means of instant communication help resolve some of these challenges. International actors "increasingly . . . now develop international law more and more through diplomatic law talk—dialogue within epistemic communities of international lawyers working for diverse governments and nongovernmental institutions"—which "creates a record of state practice and builds a process of generating *opinio juris*."[460] Customary international law continues to be "a dynamic process of law-creation, yet it is also a restraint on illegal dynamism."[461] Thus, notwithstanding its limitations, this mechanism of international lawmaking should not be dismissed, as it still offers an attractive vision for the United States and the international community.

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456 JOSEPH S. NYE, JR., PRESIDENTIAL LEADERSHIP AND THE CREATION OF THE AMERICAN ERA 152 (2013) ("[T]he twenty-first century is encountering two major power shifts to which American leaders will have to adjust. One is power transition among countries, from West to East, and the other is power diffusion from governments to nongovernmental actors, regardless of whether it is East or West.").

457 *See* ALFRED ZIMMERN, THE LEAGUE OF NATIONS AND THE RULE OF LAW 1918–1935, at 513 (1998) (noting that at its peak, the League of Nations, the predecessor to the United Nations, had 58 members).

458 Robert Y. Jennings, *Treaties as "Legislation," in* JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN 159 (Philip C. Jessup et al. eds., 1979); Krzysztof Skubiszewski, *International Legislation*, *in* 5 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 97 (Rudolf Bernhardt ed., 1983); Arnold D. McNair, *International Legislation*, 19 IOWA L. REV. 177 (1934).

459 *See* W. Michael Reisman, *The Cult of Custom in the Late 20th Century*, 17 CAL. W. INT'L L.J. 133, 133 (1987).

460 Koh, *supra* note 335, at 746.

461 D'AMATO, *supra* note 344, at 12.

CONCLUSION

Looking toward the future, consider the following hypothetical scenario. The Uniformed and Overseas Citizens Absentee Voting Act of 1986[462] provides that "a person who resides outside the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States" qualifies as an "overseas voter" and can vote by absentee ballot in the last place of domicile.[463] For instance, a Virginian who moves to France can still vote as a Virginian in federal elections.[464] But if she moves to the Virgin Islands, she loses her voting rights because she is still within the "United States" under the statute, and so does not qualify as an overseas voter, but cannot vote in federal elections as a resident of a U.S. territory.[465] How, if at all, is customary international law on voting rights relevant to interpreting this statute?

The conventional wisdom response is most likely that customary international law is irrelevant to interpreting this statute. But what if the hypothetical Virginian residing in the Virgin Islands could demonstrate that an international customary norm of equal and universal suffrage for all citizens of a given country was established after the statute's enactment?[466] What if the claimant showed that the domestic statute was unenforced with respect to this particular provision and that international practice was contrary to the statutory rule? And what if the United States, in signing and ratifying the International Covenant on Civil and Political Rights ("ICCPR"),[467] did not object to

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462 Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified in scattered sections of the U.S.C.).

463 42 U.S.C. § 1973ff-6(5)(c) (2012).

464 *See id.*

465 The same fate applies to those Americans who move from a U.S. state to the District of Columbia, the Commonwealth of Puerto Rico, Guam, and American Samoa. *See* 42 U.S.C. § 1973ff-6(8); *see also, e.g.*, Romeu v. Cohen, 265 F.3d 118, 123 (2d Cir. 2001) ("Citizens living in Puerto Rico, like all U.S. citizens living in U.S. territories, possess more limited voting rights than U.S. citizens living in a State."). D.C. residents can vote only in federal elections for President. *See* U.S. CONST. amend. XXIII.

466 *Cf.* Igartúa-de la Rosa v. United States, 417 F.3d 145, 179 (1st Cir. 2005) (Torruella, J., dissenting) (arguing that customary international law establishes the equal and universal right to vote for all citizens of the same country); Statehood Solidarity Comm. v. United States, Case 11.204, Inter-Am. Comm'n H.R., Report No. 98/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 ¶¶ 2–4 (2003) (holding that the lack of representation in Congress for U.S. citizens residing in the District of Columbia violated Article XX of the American Declaration of the Rights and Duties of Man).

467 International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Article 25(b) of the Covenant provides that "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restric-

the establishment of this international norm?[468] The analysis above provides a framework to work through these types of questions, even though it does not seek to conclusively resolve them for particular legal issues.

This Article has offered a new vantage point on international custom by approaching it "from the edges, and indirectly,"[469] and dissecting it into established and emerging custom based on the degree of its clarity and acceptance. Part I has shown that customary international law *may be relevant* to any question of statutory interpretation. Part II suggested the need for judicial caution in this interpretive exercise. And Part III offered an original framework for decision—fusing the authority of *Sosa* and *Charming Betsy* into an interpretive canon reflective of contemporary U.S. jurisprudence and international custom—based on the relative balance of clarity, quality, and timing of statutes and custom.

To be sure, important questions remain regarding the sources of evidence and the uniformity of state practice, and the extent of opinio juris necessary to identify established custom. But the scholarly and judicial debate should shift to these issues, which might be resolvable only in context and through a case-by-case assessment of particular norms, rather than by seeking overall nullification of this interpretive modality. The role of international custom in statutory interpretation appears to be well-entrenched in U.S. jurisprudence, and for good reason.

The use of international custom by federal courts also has general implications for interpretive relationships between any practice and

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tions . . . [t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." *Id.* at art. 25(b); *see also* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 21 (1989) (stating that the ICCPR "embodies some rules of customary law and some rules of conventional law"); Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601, 630 (1990) (noting that the ICCPR "may . . . be regarded as having entered the process of becoming customary international law").

468 *Cf.* Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) ("Although the United States declined to ratify [Additional] Protocol I [to the Geneva Conventions on international humanitarian law], its objections were not to Article 75 thereof. Indeed, it appears that the Government regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled." (alteration in original) (internal quotation marks omitted)).

469 James Crawford, *Foreword* to MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW ix (1999) ("The central puzzles of [customary international law], which generations of its senior professionals have failed to solve, are usually better approached from the edges, and indirectly. Light may thus be shed on the centre, but there is less risk of complete failure.").

text. Recently, scholars have drawn increased attention to the role of unwritten norms in interpreting written documents[470]—such as history and conventions in constitutional interpretation,[471] domestic common law in statutory interpretation,[472] statutory interpretation by executive branch officials,[473] and administrative law.[474] The degree of clarity and acceptance of these unwritten norms may be no higher than in the case of customary international law, but they are deemed useful and appropriate in reading and understanding written legal sources. And similar theoretical and methodological challenges arise across these diverse areas of law, with valuable potential intellectual exchange among them.[475] Arguably, the field of customary international law has wrestled with these questions for at least as long as any other area of law and can contribute a unique perspective to these wider debates.

In designing the United States's constitutional system, the Founders appreciated that U.S. practice could shape international conduct.[476] Prior studies that have focused exclusively on ways in which international custom constrains U.S. law omit the reverse mechanism

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470 *See generally* BEDERMAN, *supra* note 249 (discussing use of custom in family law, property, contracts, torts, constitutional law, and international law).

471 *See* AMAR, *supra* note 384, at 7; Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1001–02 (2008) (drawing on customary international law to develop a theory of "constitutional showdowns" over authority and policy between Congress and the executive branch); Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1816 (2012) (defining "constitutional backdrops" as "rules of law that aren't derivable from the Constitution's text, but instead are left unaltered by the text, and in fact are protected by the text from various kinds of legal change").

472 *See generally* KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION (2013).

473 *See generally* Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (discussing the canon of constitutional avoidance in statutory interpretation by the executive branch).

474 *See generally* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1165 (2013) (arguing that conventions, a form of "unwritten political norms," are "central to the operation of the administrative state").

475 *See* Curtis A. Bradley & Mitu Gulati, *The Duke Project on Custom and Law*, 62 DUKE L.J. 529, 530 (2012) (identifying recurring issues across different forms of custom, such as "meaning of custom; the relationship between custom, norms, and traditions; how to determine when custom has legal status; the proper level of generality in describing custom; the effect of formalized adjudication on custom's development; and the inevitability of normative judgment when discerning how to characterize custom").

476 *See* AMAR, *supra* note 384, at 484 ("Perhaps the most difficult and interesting questions of all concern not the role of global law in reshaping America's Constitution, but rather the reverse: How might America's Constitution, written and unwritten, serve as a model for the world?"); Cleveland, *supra* note 19, at 94 (discussing an "organic originalist conception" of the role of international law in constitutional interpretation, according to which "the Framers . . . underst[ood] that the Constitution should be interpreted in light of an evolving body of international law").

of U.S. judicial statutory interpretation affecting foreign behavior through the means of customary international law. Indeed, custom's power-maximizing potential for the United States within the international community may be the secret to its empirical endurance and normative attractiveness in U.S. law.

APPENDIX

APPENDIX TABLE 1. SOURCES OF EVIDENCE OF INTERNATIONAL CUSTOM IN STATUTORY INTERPRETATION

	U.S. Cases	U.S. Cases Only	Scholarly Writings	Restatement of Foreign Relations	Treaties	State Practice	International Cases	Foreign Cases
Number	122	49	51	36	30	24	10	4
Percentage	99.2	39.8	41.5	29.3	24.4	19.5	8.1	3.3

APPENDIX TABLE 2. CATEGORIES OF CASES

	Extra-territoriality	Sovereign Immunity	Immigration	Law of Armed Conflict	Maritime	Other
Number	44	21	19	13	11	15
Percentage	35.8	17.1	15.5	10.6	8.9	12.2