

HOW CUSTOMARY IS CUSTOMARY INTERNATIONAL LAW?

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INTRODUCTION

The ambiguity of the lawmaker has long been a central problem in international law. Writing in the positivist tradition, H.L.A. Hart famously doubted that international law is law at all because it lacks not only a single sovereign lawmaker but also a system of “secondary rules” for the making and alteration of legal norms.¹ Treaties bind by consent, but only between the parties. Even when large majorities of countries sign on to multilateral agreements, we often lack any authoritative method for determining those agreements’ meaning or guaranteeing consistent enforcement. In any event, treaty law leaves large gaps,² and often those gaps exist in those areas with the most pressing need for law. In an earlier age, international lawyers frequently turned to natural law to fill these gaps,³ but a revival of the natural law tradition seems unlikely at a time when countries with widely varying religious, philosophical, and political traditions aspire to agree on one international law.⁴

Enter custom—the only form of law without a lawmaker still recognized in our post-lapsarian world. At certain times and places in world history, custom is thought to have given rise to a coherent and effective set of legal norms “from the bottom up”—that is, without the command of a single sovereign.⁵ If merchants operating across state borders over time can produce a set of customary rules

1. H.L.A. HART, *THE CONCEPT OF LAW* 209 (1961). Professor Hart’s specific take on international law masks a considerably more complicated relation between his rethinking of positivism and the notion of customary law. See generally Frederick Schauer, *The Jurisprudence of Custom*, 48 *TEX. INT’L L.J.* (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2176807.

2. See Andrew T. Guzman, *Saving Customary International Law*, 27 *MICH. J. INT’L L.* 115, 116 n.2 (2005).

3. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT’L L. J.* 1, 11 (1999) (discussing naturalist writers on international law such as Grotius and Pufendorf).

4. But see Bruce P. Frohnen, *Multicultural Rights? Natural Law and the Reconciliation of Universal Norms with Particular Cultures*, 52 *CATH. U. L. REV.* 39 (2002) (arguing for such a revival).

5. See, e.g., Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 *YALE J. INT’L L.* 125, 129 n.7 (2005) (describing “bottom-up lawmaking” as “a process whereby discrete groups of transnational practitioners translate their practices and customs into code-like rules that ultimately harden into law”).

to govern their transactions, even without formal consent or the intervention of a sovereign authority,⁶ then perhaps independent nations similarly can derive binding norms of conduct from their own practices. Conventional wisdom in international law thus holds that the international community has developed a set of definable rules through custom that nations must accept as law.⁷ This wisdom rests on extrapolation from the historical success of custom in commercial law. On this view, customary international law derives its appeal not only from a fear that it may be the only game in town but also from a widely held sense that it is, well, *customary*.

We question that latter assumption in this Article by comparing early theories of custom with the debates in which publicists engage today. Article 38(1)(b) of the Statute of the International Court of Justice asserts that custom, defined as “evidence of a general practice accepted as law,” forms a fundamental part of international law.⁸ This assumption about the role of custom has a well-known history extending back to the writings of the Spanish theologian Francisco Suárez (1548-1617), who equated the law of nations with custom in his *Treatise on Laws and God the Lawgiver* of 1613.⁹ This history, however, has a prehistory that modern scholars do not know as well, and that prehistory sheds some interesting light on current debates about the usefulness of the standard definition of custom.

The value of studying history lies not in any claim that premodern jurists had better answers than do scholars today, but rather in a historical perspective on the problem of how custom functions as law. That problem, then as now, remains largely intractable. The debates among jurists of the thirteenth and fourteenth centuries mirror the debates in which their intellectual descendants engage hundreds of years later. The story of custom, in both its past and present manifestations, thus underscores contemporary doubts

6. *But see* Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1177-81 (2012) (arguing that premodern merchant custom was not transnational but rather local).

7. *See, e.g.*, Gerald Postema, *Custom in International Law: A Normative Practice Account*, in THE NATURE OF CUSTOMARY LAW 279, 279, 282 (Amanda Perreau-Saussine & James B. Murphy eds., 2007).

8. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, 1060, 33 U.N.T.S. 993.

9. 2 FRANCISCO SUÁREZ, SELECTIONS FROM THREE WORKS OF FRANCISCO SUÁREZ 351 (bk. 2, ch. 20, § 1) (Gwladys L. Williams, Ammi Brown & John Waldron eds. & trans., 1944).

about the usefulness of customary law on the international plane. Part I of this Article surveys the historical development of customary law. Part II ventures some suggestions as to what that history can tell us about current debates over customary international law.

I. AN INTELLECTUAL GENEALOGY

Following the parameters laid down in Roman law,¹⁰ the medieval jurists believed that custom consisted of acts, repeated with some degree of frequency over some period of time, that the community—or some part thereof—understood itself to be obligated to continue performing due to its *tacitus consensus*, a phrase usually translated as “tacit consent.”¹¹ Scholars of customary international law today begin, whether in support or opposition, from nearly identical premises.¹²

Nearly, that is, but not quite identical, for modern publicists generally use the principles of state action plus *opinio iuris* (the sense of being bound) to define custom.¹³ Some publicists have claimed that the nineteenth-century replacement of tacit consent with *opinio iuris* represented a distinct caesura with a premodern approach of lesser sophistication and usefulness.¹⁴ The older so-called consent

10. For the Roman definition, see 2 CORPUS IURIS CIVILIS: CODEX IUSTINIANUS Cod. 8.52(53).1-2, at 362 (Paul Krueger ed., 1906); 1 THE DIGEST OF JUSTINIAN, primarily Dig. 1.3.32-35, at 13 (Alan Watson ed., 1985).

11. See, e.g., Raphael M. Walden, *The Subjective Element in the Formation of Customary International Law*, 12 ISR. L. REV. 344, 344 (1977).

12. See, e.g., David J. Bederman, *Acquiescence, Objection and the Death of Customary International Law*, 21 DUKE J. COMP. & INT'L L. 31, 44 (2010) (“[T]he combined objective and subjective inquiries for CIL formation (state practice and *opinio iuris*) remain the crucial algorithm for establishing whether a norm really rises to the level of international custom.”); Postema, *supra* note 7, at 281-82, 285, 287-88 (criticizing the traditional theory and offering a new theory that still speaks of “normative,” habitual behavior that the agent understands ought to be followed).

13. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) cmt. c (1987); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 757-58 (2001).

14. See, e.g., Paul Guggenheim, *L'Origine de la notion de "opinio juris sive necessitatis" comme deuxième élément de la coutume dans l'histoire du droit des gens*, in HOMMAGE D'UNE GÉNÉRATION DE JURISTES AU PRÉSIDENT BASDEVANT 258, 259-60 (1960); Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 95 (2001); see also ALAN WATSON, *THE EVOLUTION OF WESTERN PRIVATE LAW* 92 (expanded ed. 2001) (discussing the roots of the concept of *opinio iuris*).

theory suggested a sort of contractual basis to custom. The medieval jurists did sometimes describe the workings of custom in contractual language, speaking of *tacitus consensus* and asking, for example, whether all members of a community, including those lacking capacity to contract, had to give their consent.¹⁵ But the Latin word *consensus* had subtler meanings than just “consent” in a purely contractual sense. One of the leading Latin dictionaries defines the word variously as “agreement, accordance, unanimity, [and] concord.”¹⁶ The jurists’ discussions of custom make clear that they did not hold simplistic, contractual views of custom formation. In fact, modern scholars will hear in the voices of the medieval jurists much that will sound familiar.

The medieval jurists recognized that humans engaged in many types of repeat behavior, not all of which rose to the level of custom as law.¹⁷ Individuals acquired habits; family, social, or occupational groups developed preferred practices; courts and chanceries established styles, for instance for documents or procedures. None of these habits, usages, practices, or styles constituted customary law, despite the fact that in colloquial speech any of them might be referred to as a custom.¹⁸ The jurists needed a way to distinguish mere nonbinding practices from binding customary law, and they found this in the interlocking criteria of duration, repetition, and *tacitus consensus*.

Duration proved to be the least controversial issue, though not for lack of options. Custom was, by its nature, defined by tradition. As the great fourteenth-century Italian jurist Bartolus de Sassoferrato (1313-1357) wrote, “A statute obtains [its] consent expressly, and therefore does not require other conjectures [about its existence].

15. Walter Ullmann, *Bartolus on Customary Law*, 52 JURID. REV. 265, 269-70, 272-73 (1940).

16. CHARLTON T. LEWIS & CHARLES SHORT, A LATIN DICTIONARY: FOUNDED ON ANDREWS’ EDITION OF FREUND’S LATIN DICTIONARY 428 (1955).

17. See, e.g., Ullmann, *supra* note 15, at 265-66. We will call custom having the force of law “customary law,” but this should not be confused with other uses of that term to indicate, for example, written and codified customs. Cf. JAMES M. DONOVAN, LEGAL ANTHROPOLOGY: AN INTRODUCTION 85-86 (2008) (discussing the anthropological use of the term “customary law” as referring to the “artificial construction by colonial administrators to rule according to the practices of the subjugated peoples”).

18. BARTOLUS, IN PRIMAM DIGESTI VETERIS PARTEM COMMENTARIA 19r. (Turin, Nicholaus Beuilaquam 1574) (*repetitio ad Dig. 1.3.32, §§ 6, 10*).

But custom requires tacit [consent]. Therefore a long passage of time is necessary, so that [the custom] may become apparent through the consent of the people and their perseverance [in the act].”¹⁹ Although some jurists initially thought that the duration requirement meant “since time immemorial,”²⁰ and others argued for the canon law rules of forty years, the scholarly consensus soon coalesced around ten years²¹ “provided that uniform and frequent acts occurred within this period.”²² A longer period, of course, made the existence of the custom more certain, but only a decade was needed.²³

Frequency of acts proved more difficult to pin down, but the requirement was important because the jurists saw repetition of behavior as a key indicator of *tacitus consensus*.²⁴ According to Bartolus, “[T]he people are not understood to have consented, unless the act occurs frequently.”²⁵ How many times during a decade did an act have to be repeated in order for its repetition to establish the requisite consent? Certainly “as many concrete instances would have to be proved as would sufficiently indicate the tacit consent of the people.”²⁶ The Ordinary Gloss, the authoritative commentary

19. Ullmann, *supra* note 15, at 275 (“Lex habet consensum expressive, et ideo non requiritur alia conjectura ... sed consuetudo requirit tacitum; ergo diuturnitas temporis necessaria est, ut apparet de consensus populi et eius perseverantia.” (quoting Bartolus *repetitio ad* Cod. 8.52.2, § 17)).

20. PLACENTINUS, *SUMMA CODICIS* 416 (photo. reprint 1962) (1536) (commenting on Cod. 8.52(53).1 and arguing that “custom is of long standing if it exceeds human memory” [“consuetudinem esse longaeuam, hominumq[ue] excedere memoriam”]).

21. 1 ODOFREDUS, *LECTURA SUPER DIGESTO VETERI* 16r. (photo. reprint 1967) (1550) (*repetitio ad* Dig. 1.3.32, § 15); see also BARTOLUS, *supra* note 18, at 19v. (*repetitio ad* Dig. 1.3.32, § 14); GLOSSA ORDINARIA at Dig. 1.3.32, v. *inveterata*; *id.* at Cod. 8.52(53).1 ad v. *quae sit longa consuetudo*; Laurent Mayali, *La coutume dans la doctrine romaniste au Moyen Age*, in 52 *LA COUTUME* 11, 25 (1990).

22. Ullmann, *supra* note 15, at 275.

23. BARTOLUS, *supra* note 18, at 19v. (“If [the custom] is sanctioned by a long time, how much more strongly by a very long time.” [“[S]i inducitur longo tempore, multo fortius longissimo.”]).

24. See Ullmann, *supra* note 15, at 269, 276 (noting that “[t]he binding force of customs was, therefore, ascribed to ... tacit consent” and describing frequency of a given act as an indicator of consent).

25. *Id.* at 276 (citing Bartolus *repetitio ad* Cod. 8.52.2, § 12: “populus non videtur consensisse, nisi frequenter illum actum exercent”); BARTOLUS, *supra* note 18, at 19r. (*repetitio ad* Dig. 1.3.32, § 10) (discussing [“tacit consent, which is gathered from usage and practices”] “tacitus co[n]sensus, quod colligit[ur] ex usu, & moribus”).

26. Ullmann, *supra* note 15, at 279.

written in the margins around the texts of the Roman law and completed around 1230 by the Italian law professor Franciscus Accursius (c. 1182-1263), promoted the idea that “twice makes a custom,”²⁷ but not everyone agreed. Some thought that when the Roman law text on which they were all commenting said “*frequentur*” it literally meant “frequently,” and twice was not frequent.²⁸ On the other end of the spectrum, the thirteenth-century French law professor Jacques de Révigny (c. 1230-1296) effectively foresaw the concept of “instant custom” when he offered this hypothetical about the creation of the custom of primogenitor:

Assume that the whole population of a city, or a majority of it, tacitly performs one act. We are at the beginning of the introduction of that custom by which the oldest son inherits everything. At a certain time, that whole city went to war. All or almost all the men were killed. On one day [their] sons adopt the usage that the oldest son takes everything, and thus the people, or a majority of them, have tacitly consented by one act. Is this legislation? Certainly not, because something becomes a statute by the means of express discussion among the community about what shall be law in the future.²⁹

As long as the community continued to maintain the usage of primogenitor, he said, then the single act introduced a custom.³⁰

But even if the jurists accepted the Gloss’s maxim that “twice makes a custom,” they fretted over how that corresponded to the duration requirement. For example, they argued over the custom-creating efficacy of the following situation: An act happens on day one, and is repeated the next day. Then ten years go by and the act is not repeated again, though no one has opposed it. Is there a

27. GLOSSA ORDINARIA at Dig. 1.3.32 ad v. *inveterata*.

28. BARTOLUS, *supra* note 18, at 19r. (*repetitio ad* Dig. 1.3.32, § 11).

29. L. WAELKENS, LA THÉORIE DE LA COUTUME CHEZ JACQUES DE RÉVIGNY 485 (*repetitio ad* Dig. 1.3.32, § 2) (1984) (“Pone quod totus populus huius ciuitatis uel maior pars utuntur uno actu tacite. Simus in initio introductionis illius consuetudinis quod maior natu habet totum. Tota ista ciuitas quadam die iuit in exercitum. Omnes uel fere omnes mortui sunt. Filii una die sic utuntur quod maior totum habet et sic tacite habetur consensus populi uel maioris partis uno actu. Estne statutum? Certe non, quia statutum est habito tractatu in communi et expresso quod sit ius in futurum.”).

30. *Id.* at 485-86.

custom?³¹ Odofredus (d. 1265), who taught at the University of Bologna in the first half of the thirteenth century, wrote that his predecessors Johannes Bassianus (late twelfth century) and Azo Porcius (fl. 1150-1230) believed that such a scenario did introduce a custom.³² But Odofredus's teacher, Jacobus Balduinus (d. 1225), "hounded master Johannes and Azo to the ends of the earth,"³³ arguing that "this certainly cannot be, because custom is said to be a habitual practice, but can two acts or three be said to be a habitual practice? Certainly not, because lawmakers disdain what happens once or twice, and rights are adjusted to that which happens frequently."³⁴ Odofredus, however, sided with Johannes and Azo.³⁵

Frequency of acts was important because the jurists held that the requisite *tacitus consensus* was "deduced from usage and practice."³⁶ But they also realized that repeated acts may not be enough to establish consent. This realization led them to raise the Austinian question whether a custom needed to be decided in litigation before it could be recognized as law.³⁷ Some jurists believed that it did,³⁸ and, according to Révigny, that was also the way ordinary people thought. When confronted with a supposed custom, he said, "[L]aymen ask, 'Have you ever seen it judged?'"³⁹ Révigny himself disagreed with this proposition, pointing out that customs that were

31. BARTOLUS, *supra* note 18, at 19v. (*repetitio ad* Dig. 1.3.32, § 17); 1 ODOFREDUS, *supra* note 21, at 16r. (*repetitio ad* Dig. 1.3.32, § 13).

32. 1 ODOFREDUS, *supra* note 21, at 16r. (*repetitio ad* Dig. 1.3.32, § 13).

33. *Id.* (*repetitio ad* Dig. 1.3.32, § 14) ("scandalizavit dominus Johannem et Azonem usque ad extremos indos").

34. *Id.* ("[C]erte hoc esse non potest. quia [con]suetudo d[icitu]r usus co[n]suetus: sed potest ne dici usus co[n]suetus binus usus vel trin[us] vsus certe no[n]: q[ui]a que semel aut bis accidunt despiciunt legislatores & ad ea que frequen[ter] accidunt iura adaptantur.").

35. *Id.*

36. BARTOLUS, *supra* note 18, at 19r. (*repetitio ad* Dig. 1.3.32, § 10) ("tacitus co[n]sensus, quod colligit[ur] ex usu, & moribus").

37. SIEGFRIED BRIE, *DIE LEHRE VOM GEWOHNHEITSRECHT: EINE HISTORISCH-DOGMATISCHE UNTERSUCHUNG* 109-11 (Breslau, M. & H. Marcus 1899) (discussing the importance of this issue to the medieval jurists); WATSON, *supra* note 14, at 95.

38. 1 ODOFREDUS, *supra* note 21, at 15v.-16r. (*repetitio ad* Dig. 1.3.32, §§ 13-14); *see also* PLACENTINUS, *supra* note 20, at 416 ("Likewise a custom is more proved and more outstanding if it had been confirmed in some contentious litigation." ["Item probatior erit at[que] pr[ae]stantior consuetudo, si aliquando fuit confirmata contradicto iudicio."]).

39. WAELKENS, *supra* note 29, at 487 (*repetitio ad* Dig. 1.3.32, § 3) ("Unde quando dicitur esse consuetudinem, querunt isti laici: 'Vidistis unquam iudicare?'").

so universally followed that they had never been litigated were the ones that demonstrated the greatest degree of consent.⁴⁰

Nonetheless, the standard trope about ascertaining the existence of custom included the assumption that litigation would play a role. The Ordinary Gloss, repeated by other jurists, asked, “[I]n what way is a custom introduced during a decade? Answer: if it was twice adjudicated in that time, or a judge rejected a libellus or a complaint arguing against such custom.”⁴¹ In addition, Révigny floated the argument that tacit consent was established if someone did an act contrary to the custom and the community sanctioned him for it.⁴²

Eventually, the jurists settled upon the rule that two judicial decisions within ten years sufficed to establish a custom.⁴³ But what role did those decisions play? Were they evidence of a preexisting custom, or were they constitutive of it? The jurists debated the question. The Ordinary Gloss could only explain that a suit over the existence of a custom is not judged by examples (*exemplis*)—which could mean proof or could mean prior judgments⁴⁴—but by custom, which is proved by examples (again, *exemplis*). But the Gloss goes on to admit on this point that, “yes, what is not conceded directly is to some extent conceded indirectly.”⁴⁵ Odofredus stated that “[i]f the judge should rule the custom is that you cannot sue for that which you seek from me, then it is declared by that judgment whether there is a custom ... because the sentence should declare [the

40. *Id.* at 488 (*repetitio ad Dig. 1.3.32, § 3*) (“[M]aior est consensus quam si esset sic inter plures et pluries iudicatum.”).

41. GLOSSA ORDINARIA at Dig. 1.3.32 ad v. *inveterata* (“[Q]ualiter decennio consuetudo introducitur? Respon. si bis fuerit iudicatum in illo tempore, vel libellus, vel querimoniam propositam contra talem consuetudinem spreuerit iudex.”); 1 ODOFREDUS, *supra* note 21, at 16r. (*repetitio ad Dig. 1.3.32, § 16*).

42. WAELKENS, *supra* note 29, at 488-90 (*repetitio ad Dig. 1.3.32, § 4*) (arguing both sides of the proposition).

43. Mayali, *supra* note 21, at 30; cf. Gordon R. Woodman, *Some Realism About Customary Law: The West African Experience*, 1969 WIS. L. REV. 128, 133 (comparing theory that multiple court decisions are required before custom is “notorious” with reality that reference to a single prior decision concerning custom is nonprecedential but influential evidence of its existence).

44. The Latin texts are ambiguous on this issue because the word used to describe the earlier opinions, “exemplum,” could be translated variously as “example,” “evidence,” “proof,” or “precedent.”

45. GLOSSA ORDINARIA at Cod. 8.52(53).1 ad v. *quae sit longa consuetudo* (“Nunquid ergo iudicatur exemplis? Respon. non ... sed ex consuetudine, qua probatur exe[m]plis & sic conceditur aliquid per obliquum, quod directo non conceditur.”).

custom].”⁴⁶ A later jurist explained, “It is true that a judicial act introduces a custom, not ... because the judgment is the cause of the custom but because from these acts it is easier to identify the tacit consent of the people.”⁴⁷

Despite the leading role played by judges in establishing custom, the community did not entirely lose its voice. While the litigants were bound to the holding,⁴⁸ the rest of the community was not. If a judge expressed a custom, his ruling became an authoritative statement of the law only if the community remained silent about it.⁴⁹ Objecting to the decision removed the presumption of consent that the opinion created.⁵⁰

To offer one final example, the medieval jurists even identified the paradox that some recent authors have pointed out is inherent in the act-plus-*opinio iuris* definition of custom.⁵¹ If custom requires acts and either consent to be bound or a sense of obligation, then the first actor cannot be following a custom; if he believes he is bound, he would be in error, and according to the Romans, custom cannot be founded on error.⁵² The second actor is also in error if he believes that he is bound because the first person creates a custom, and

46. 1 ODOFREDUS, *supra* note 21, at 16r. (*repetitio ad* Dig. 1.3.32, § 16) (“Si iudex pronu[n]ciat co[n]suetudinem esse q[uo]d no[n] possis petere id q[uo]d a me petis: ex isto iudicio declaratur si consuetudo est ... quia s[e]n[tent]ia debet declarare sicut.”); *cf.* Walden, *supra* note 11, at 359 (“The principle of *opinio iuris* has been formulated in different ways by different publicists, but what most of them have in common is the belief that a practice, in order to be the expression of a custom, must be applied in the conviction that it is already binding.... What all these approaches ... share is the belief that custom does not create new obligations, but merely expresses existing ones; it is declaratory, not constitutive.”).

47. BARTOLUS, *supra* note 18, at 17v.-18r. (*repetitio ad* Dig. 1.3.32, § 12) (“[V]eru[m] est q[uo]d actus iudiciales inducunt [con]suetudine[m], no[n] ... iudicium sit ca[usa] [con]suetudinis, sed q[ui]a ex illis actibus faciliter co[m]prehe[n]ditur tacitus consensus populi.”); *see* Ullmann, *supra* note 15, at 276-77 (explaining Bartolus’s view).

48. Mayali, *supra* note 21, at 23 (quoting the jurist Cinus da Pistoia); Ullmann, *supra* note 15, at 273.

49. Ullmann, *supra* note 15, at 273.

50. *Id.* at 277-78; *cf.* J.A. Barnes, *History in a Changing Society*, 11 RHODES-LIVINGSTONE J. 1, 5-6 (1951) (Eng.) (explaining that when a judge decided a case based on a new interpretation of the custom, the new version would become the custom unless someone in the community objected to the decision).

51. *See, e.g.*, Curtis A. Bradley & G. Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 210-11 (2010).

52. 1 THE DIGEST OF JUSTINIAN, *supra* note 10, Dig. 1.3.39, at 14. This difficulty persists under contemporary theories of customary international law.

likewise the third actor, and so on.⁵³ Bartolus encountered this paradox when asking when the time period needed to establish a custom began:

Some say on the day of the second act, for that is when the people begin to consent. Before that no agreement, which does not [yet] exist, can be established. But certainly the people are not seen to consent by the second act, unless a certain amount of time intervenes. The gloss and the doctors [jurists] are seen to hold that it is the act on the first day.⁵⁴

He could not, however, come up with an answer himself, falling back on the observation that “it shall suffice if within ten years there is a judgment. For through the running of time and repetition of the acts the tacit consent is established that introduces a custom.”⁵⁵

This introduction to the medieval juristic debates offers a glimpse at the types of disputes that arose over the definition of custom. Even these few examples reveal that the jurists spoke of customs as defined things that could be captured in a judicial opinion and made into a formal rule.⁵⁶ The historical evidence we have about medieval custom suggests, however, that any given custom was not a defined thing but rather a more or less indeterminate set of possible conforming behaviors.⁵⁷

Take, for example, the sixteenth-century custom of the town of Douai that a testament made by a sick person was invalid unless the sick testator was able to cross the drainage ditch in the middle of the street without assistance.⁵⁸ Suppose that the validity of a test-

53. DAVID J. BEDERMAN, *CUSTOM AS A SOURCE OF LAW* 20 (2010); WATSON, *supra* note 14, at 93-94.

54. BARTOLUS, *supra* note 18, at 19v. (*repetitio ad* Dig. 1.3.32, § 15) (“Dicu[n]t q[ui]dam, a die secundi actus, tunc [e]n[im] populus incipit [con]sentire. Ante [e]n[im] no[n] po[tes]t p[rae]scribi [con]sensus, qui non est.... Sed certe, nec p[er] s[ecundu]m actu[m] v[ide]tu[r] populus [con]sentire, nisi interuenerit cursus t[em]p[or]is. Gl[ossa] & docto[res] v[ide]n[tu]r tenere, q[uo]d a die primi actus.”) (citations omitted).

55. *Id.* (“Quod patet ex eo q[uo]d hic dicit, q[uo]d sufficiat, si intra decennium sit s[e]n[tent]iatum. Ex cursu [e]n[im] t[em]p[or]is & frequentia actu[m] inducit tacitus [con]sensus, q[uo]d parit [con]suetudine[m].”).

56. See *supra* notes 46-47 and accompanying text.

57. See *supra* notes 48-49 and accompanying text.

58. John Gilissen, *Loi et coutume: quelques aspects de l'interpénétration des sources du droit dans l'ancien droit belge*, 21 *TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS* 257, 287 (1953) (Neth.).

ament was litigated, and the issue turned on whether the testator had properly followed the ditch-crossing custom. First, the court had to determine what the custom was. Witnesses from the community called to attest to its content might have described the behavior variously as crossing the ditch unaided, jumping over the ditch unaided, walking unaided from the house—or the sickbed—to the other side of the ditch, or just crossing the street unaided. Testators who had performed any of these behaviors may have assumed that they met the required obligation, and their particular performance would have colored the understanding of the custom among the people who had witnessed their acts. In addition, acting entirely in good faith, witnesses in pending litigation could have reported the custom as it had been in the past when the testator acted, as it was practiced at the time of the litigation, or as they believed it ought to be practiced.⁵⁹ All of these variants represented, at some level, the custom of the community. If the litigation concerned a sick testator who did no more than take a single step across the ditch unaided, did that fall within the custom? What about the testator who walked unaided across a street that had no drainage ditch in the middle? What about a testator who, some time earlier, had stepped over the drainage ditch when the custom had since evolved to require jumping over? Witnesses, relying only on their own experiences and memories, might not have agreed on the answers.

Without the aid of written rules, decrees of a lord or community council, or decisions of a court, the fact that a community had engaged in a behavior for a very long time—perhaps even feeling at some unarticulated level that it must engage in that behavior—did not necessarily mean that the members of the community were consciously aware of what constituted conforming behavior—that is, of what acts fell within or without the boundaries of the custom. Thus, custom often had far greater malleability and indefiniteness than we, who are used to more bounded rules of law, might anticipate.

Such flexibility allowed medieval courts and juries to introduce equity into their decision making.⁶⁰ In the courts of English manors,

59. Sally Falk Moore, *History and the Redefinition of Custom on Kilimanjaro*, in *HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY* 277, 299 (June Starr & Jane F. Collier eds., 1989).

60. See, e.g., Lloyd Bonfield, *The Nature of Customary Law in the Manor Courts of*

for instance, the juries “remembered” custom in a way that resulted in the outcome they preferred given the facts of the case and the status of the litigants.⁶¹ They sought to craft a solution that they perceived as optimal for the future, while justifying that decision based on a claim that it represented continuity with the past.⁶² Such a practice suggests that appeals to custom were little more than a way to place limits around the community’s sense of fairness and equity.

Because custom arose from behavior not necessarily expressed in words, it was ripe for manipulation—even invention—when the time came to prove a custom in a dispute. Medieval litigants, after all, chose to adduce or deny customs for the same reason that modern litigants choose to adduce or deny the applicability of laws: they did what they thought necessary to win their suits.⁶³ In the preface to his thirteenth-century *Customs of Lérida*, Guillelmus Botetus claimed that he had been moved to collect the city’s customs in writing in order to stop the evil machinations of “those who, when the custom was in their favor, affirmed the custom. But in a similar case, when the custom went against them, they declared it was not the custom.”⁶⁴ Such strategic maneuvering is evident in an 1197 charter of Guilhem VIII of Montpellier, who, in order to remove his daughter and sole legitimate child from the line of succession, claimed an “undoubted and age-old custom” that females could not

Medieval England, 31 COMP. STUD. IN SOC. & HIST. 514, 521 (1989); R.C. van Caenegem, *Aantekeningen bij het middeleeuwse gewoonterecht*, 64 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 97, 106 (1996) (Neth.).

61. See Bonfield, *supra* note 60, at 521, 531.

62. David Ibbetson, *Custom in Medieval Law*, in THE NATURE OF CUSTOMARY LAW, *supra* note 7, at 151, 174-75 (“That something was customary was a backward-looking reason for a forward-looking conclusion, and the more the conclusion was desired the flimsier might be the reason provide[d] for treating it as law.”).

63. Cf. Moore, *supra* note 59, at 287 (“It goes without saying that the Chagga know as well as anyone else that there are occasions when it is convenient to invoke tradition to obtain property. For other purposes, the very same people are likely to say that times have changed and new ways of doing things are more appropriate. The choice of the ‘modern’ perspective or the ‘traditional’ is often clearly a matter of strategy.”).

64. GUILLELMUS BOTETUS, *COSTUMBRES DE LÉRIDA* 17 (Pilar Loscertales de Valdeavellano ed., 1946) (“dedi aliquantulam operam ut consuetudines ciuitatis uarias et diuersas in unum colligerem et scriptis comprehenderem ut auferretur quibusdam occasio malignandi qui quando erat pro eis consuetudo et esse consuetudinem affirmabant. Si contra eos in consimili casu allegabatur non esse consuetudinem asserebant.”).

inherit real property or jurisdiction.⁶⁵ The actual custom, however, appears to have been the opposite.⁶⁶

One also finds the common run of cases in which the opposing parties asserted, with witnesses, two generally contrary statements of a supposed custom. In a 1319 appeal from a lower court ruling concerning the repayment of debts, each side alleged contrary but supposedly notorious procedural customs. The Parlement of Paris ordered an inquest to be taken from witnesses for each side. The witnesses for the plaintiff all agreed to his version of the custom. However, the witnesses for the defendant could not unanimously agree on the statement of the custom he had proposed, so he lost his case.⁶⁷

As the juristic commentaries suggested, to turn a constellation of conforming behaviors—ones that the community tacitly understood itself to be bound to perform—into a legal rule, the custom probably had to be raised in a dispute before a sanctioning body, such as a lord, a court, or even just the opinion makers of the community. At this point, some designated members of the community would have to articulate the acts making up the behavior, but, as discussed above, they could do so in multiple ways while remaining true to their perception of the custom. This possibility would account for the variations—whether made in good or bad faith—in the description of a custom that litigants might offer. The sanctioning body took the articulation, or articulations, and formed a formal, express rule from it. Thus, once a court, for instance, opined on the terms of a custom, that custom took on a more rule-like nature. Each subsequent lawsuit served to further define the boundaries of this rule-custom

65. LIBER INSTRUMENTORUM MEMORALIU: CARTULAIRE DES GUILLEMS DE MONTPELLIER 353 (Montpellier, La Société Archéologique de Montpellier 1884) (“indubitata et inveterata consuetudo”).

66. See LE PETIT THALAMUS DE MONTPELLIER art. 13, at 8 (Jean Martel ainé, La Société Archéologique de Montpellier 1840). Professor Kadens thanks Elizabeth Haluska-Rausch for these references.

67. 2 LES OLIM OU REGISTRES DES ARRÊTS 678-81 (J-C. Beugnot ed., Imprimerie Royale 1842); see also 2 SELECT CASES CONCERNING THE LAW MERCHANT 86-88 (Hubert Hall ed., 1930) (describing a fourteenth-century dispute over a custom concerning distraining a foreign merchant's goods); Alain Wijffels, *Business Relations Between Merchants in Sixteenth-Century Belgian Practice-Orientated Civil Law Literature*, in FROM LEX MERCATORIA TO COMMERCIAL LAW 255, 270 (Vito Piergiovanni ed., 2005) (describing a sixteenth-century dispute over an Antwerp custom concerning a thief in the chain of title).

in a process very similar to the functioning of the English common law.

However, stating custom as a rule did not necessarily mean that the constellation of conforming behaviors disappeared. The statement of the custom as a legal rule may well have progressively narrowed the allowable variance within which the behaviors could be viewed as conforming, but that variance continued to allow for some degree of evolution that could be incorporated into reformulating the rule each time it was litigated. Consequently, the two forms influenced each other, as Philippe de Beaumanoir, a thirteenth-century French judge and government official, noted. The author of a major compilation of the customs of the county of Clermont, Beaumanoir lamented that, although the customs of the county were as he stated them when he wrote his customal, they might evolve into something different in the future.⁶⁸

All of this assumes that a custom will get litigated. Yet, custom flourishes as a source of law in small and closely knit communities, which often do not share the modern needs for fixed laws and winners and losers.⁶⁹ These communities are, instead, generally more concerned with maintaining relationships, which tends to mean that disputes are resolved equitably with an eye toward restoring the peace rather than establishing rights and rules.⁷⁰ In such a society, the number of lawsuits brought about well-known customs might be very small, thus limiting the opportunity to fix the terms of custom as a legal rule.⁷¹ Indeed, one might even conjecture that the only times well-established customs were litigated were at moments when social, economic, or political changes caused the community's consensus about the custom to break down. In other words, as long as the custom functioned well, it might not have been contested. Thus, variant yet acceptably conforming behaviors might have been permitted to flourish under the rubric of "the custom." This was, apparently, the situation in early twentieth-century

68. PHILIPPE DE BEAUMANOIR, *THE COUTUMES DE BEAUVAISIS OF PHILIPPE DE BEAUMANOIR* ¶ 1982, at 725 (F.R.P. Akehurst ed. & trans., 1992); see also David Ibbetson, *Law and Custom: Insurance in Sixteenth-Century England*, 29 J. LEGAL HIST. 291, 305 (2008) (discussing customs concerning life insurance that changed in the twenty years after a compilation of insurance customs was written in London in the late sixteenth century).

69. WATSON, *supra* note 14, at 98.

70. *Id.*

71. *Id.* at 98-99.

Andorra. Attempting to record the Andorran customs, the French archivist J.A. Brutaills asked “prominent people, magistrates, former magistrates, and judges to enunciate a widow’s rights in the property of her deceased husband, [and] he received five different answers.”⁷² Such custom might come into question only when consensus about some related right or duty began to break down.

Thus, the theory of custom developed by the medieval jurists proved unsatisfying not only in the abstract school discussions but also in its relationship with the reality of custom as lived in medieval society. The neat distinctions over which the jurists skirmished did not usefully describe the distinction between the customs people followed in their daily lives and those same customs expressed as legal rules in judicial opinions. And yet it was this medieval theory, designed to explain the local law governing individuals in small communities in which the citizens could mimic and police each others’ behavior, that the early modern jurists adopted, by way of analogy, to explain the law governing states.⁷³ The theory did not, as one of the fathers of international law would discover, make for a particularly smooth transition.

Over three centuries after the heyday of the medieval debates about custom, Francisco Suárez wrote in his *Treatise on Laws and God the Lawgiver* that the *ius gentium*—the law of nations—consisted of customs to which the nations of the world agreed and adhered.⁷⁴ Suárez arrived at this theory in two steps. First he divided law into two mutually exclusive categories: “natural and positive, properly so called, or into divine and human law.”⁷⁵ The *ius gentium* could not be natural law because natural law was necessary, mandatory, and immutable, whereas the law of nations was not immutable in that human institutions and human needs created

72. *Id.* at 96-97.

73. See Edwin DeWitt Dickinson, *The Analogy Between Natural Persons and International Persons in the Law of Nations*, 26 YALE L.J. 564, 564-80 (1917); see also Randall Lesaffer, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 EUR. J. INT’L L. 25, 40-46 (2005) (discussing the use of the Roman private law concept of *res nullius* in customary international law adjudication over territorial rights).

74. 2 SUÁREZ, *supra* note 9, at 347 (bk. 2, ch. 19, § 8) (stating that one type of *ius gentium* “is the law which all the various peoples and nations ought to observe in their relations with each other”).

75. *Id.* at 344 (bk. 2, ch. 19, § 4).

it.⁷⁶ Consequently, the *ius gentium* had to be human and positive law.⁷⁷

The *ius gentium* was distinguishable from the civil law because the latter governed only individual states *intra se* whereas the *ius gentium*, properly understood,⁷⁸ governed the interactions of states *inter se*.⁷⁹ In addition, whereas civil law could be written (*lex*) or unwritten (custom) the *ius gentium* was only unwritten. As only customary law was unwritten, the *ius gentium* had to arise from custom.⁸⁰

In addition to discussing the *ius gentium*, Suárez devoted another hundred pages to explaining what he meant by custom. He closely followed the lines set out by the earlier jurists.⁸¹ Indeed, Suárez repeatedly cited not the legal writers of his time but the civil- and canon-law jurists of the thirteenth, fourteenth, and fifteenth centuries, including the Romanists Bartolus; Bartolus's famous student, Baldus de Ubaldis (1327-1400); Baldus's contemporary, Antonius de Butrio (1338-1408); and Rochus Curtius (fl. 1470-1515); and the canonists Henry of Segusio, usually called Hostiensis (c. 1200-1271); and Nicolaus de Tudeschis, usually called Panormitanus (1386-1445). Relying on these sources, Suárez rehearsed the medieval arguments about the distinction between repeat usage and customary law,⁸² distinguishing between the factual aspect of frequent acts repeated over a long duration and what he called the "moral" or "binding" aspect that created law.⁸³ This binding aspect derived from the requirement of tacit consent.⁸⁴

76. *Id.* at 342 (bk. 2, ch. 19, § 2).

77. *Id.* at 343 (bk. 2, ch. 19, § 3).

78. *Id.* at 347 (bk. 2, ch. 19, § 8); *id.* at 351 (bk. 2, ch. 20, § 1) (explaining that the *ius gentium* "properly so called" is that which arises to govern the interactions between states).

79. *Id.* at 345 (bk. 2, ch. 19, § 5).

80. *Id.* at 345 (bk. 2, ch. 19, § 6).

81. Walden, *supra* note 11, at 345 (mentioning Suárez's theory as "characteristic" of the medieval approach to custom).

82. 2 SUÁREZ, *supra* note 9, at 442-45 (bk. 7, ch. 2, §§ 1-4).

83. *Id.* at 445-46 (bk. 7, ch. 2, § 5); 1 *id.* at 772 (bk. 7, ch. 3, § 4) ("[M]oralem facultatem, aut vinculum, quod ius appellamus.").

84. 2 *id.* at 511 (bk. 7, ch. 8, § 9) (duration); *id.* at 529 (bk. 7, ch. 10, § 1) (repetition); *id.* at 531 (bk. 7, ch. 10, § 3) (frequency). In addition, Suárez analyzes other matters discussed by the jurists, such as whether custom had to be unwritten, the distinction between custom and prescription, the role of judges, and the relationship between custom and statute law. In each of these he followed the late medieval writers.

Suárez arrived at the same conclusion as his medieval authorities: that custom functioned as law when a community with law-making power came to freely accept as binding reasonable acts repeated over time.⁸⁵

Suárez claimed that the *ius gentium* was true custom. It was unwritten law introduced by usages, and the same definition that he applied to local customs he held also to be “strictly applicable to the *ius gentium*.”⁸⁶ In the chapter on the law of nations, he described the *ius gentium* as arising from usage and tradition, “gradually introduced throughout the whole world, through a successive process, by means of propagation and mutual imitation among the nations, and without any special and simultaneous compact or consent on the part of all peoples.”⁸⁷ This description suggests that Suárez shared the medieval jurists’ image of the evolutionary formation of customary law. But the description does not fully square with his other statements about the customary law of nations.

Upon returning to the question of the *ius gentium* in the chapter on custom, Suárez hesitated to equate it fully with what he denominated “common” or local custom.⁸⁸ He explained that the *ius gentium* was “a certain kind of custom”⁸⁹ that differed from the customs of towns or provinces in that, being related to the natural law, it was both universal and necessary “since on no other basis than that of necessity could it be introduced by mankind.”⁹⁰ The characteristic of necessity permitted Suárez to explain how all nations of the world could arrive at the same custom: they had to have this custom to function as part of the community of nations.⁹¹ In the same way, Suárez spoke of a sort of quasi-*ius gentium* composed of civil laws that all nations shared: a “*ius gentium intra se*.”⁹² The similarities in that case were merely coincidental—and not always more than superficial⁹³—and could be traced not to

85. *Id.* at 444-47 (bk. 7, ch. 1, §§ 4-8); *id.* at 462 (bk. 7, ch. 3, § 10).

86. *Id.* at 459 (bk. 7, ch. 3, § 7).

87. *Id.* at 351 (bk. 2, ch. 20, § 1).

88. *Id.* at 459 (bk. 7, ch. 3, § 7).

89. 1 *id.* at 779 (bk. 7, ch. 3, § 7) (“re vera ius gentium consuetudo quaedam est”).

90. 2 *id.* at 459-60 (bk. 7, ch. 3, § 7).

91. *Id.* at 342 (bk. 2, ch. 19, § 2).

92. *Id.* at 351 (bk. 2, ch. 20, § 1).

93. *Id.* (“[T]he resemblance is not always perfect, but lies only in a certain general and

countries' needs to have a law governing their relations with each other but rather to the fact that similar countries had similar needs in their internal laws.⁹⁴ However, the characteristic of necessity, which Suárez also attributed to natural law, created the problem that nations could neither give their free consent nor develop their law through repeat behavior if that law was, from the first, necessary. But if the *ius gentium* truly were custom, it would have to rest precisely on repeat acts and voluntary, tacit consent.

Perhaps understanding this paradox, in his chapter on the *ius gentium*, Suárez specifically pointed out that the law of nations was not, in fact, fully necessary, at least not in the same way natural law was, because the *ius gentium* was not immutable “to the same degree as the natural law.”⁹⁵ “[I]mmutability,” wrote Suárez, “springs from necessity; and therefore, that which is not equally necessary cannot be equally immutable.”⁹⁶ Natural law was absolutely necessary; it could not be changed by the decisions of men. If a nation failed to follow the natural law, the nation was in error.⁹⁷ By contrast, the *ius gentium* was “subject to change, in so far as it [was] dependent upon the consent of men,” and it was dependent upon consent, because that was part of what made it human and positive law.⁹⁸ Men could change the law of nations because “the things prohibited by the *ius gentium* are not, absolutely speaking, evil (in themselves and intrinsically).”⁹⁹ Indeed, countries could, without repercussions, choose not to observe the *ius gentium* because it was “not observed always, and by all nations, but [only] as a general rule, and by almost all Hence, that which is held among some peoples to be *ius gentium*, may elsewhere and without fault fail to be observed.”¹⁰⁰

But this acknowledgement that the *ius gentium* was not, in practice, universal or fully necessary created other conflicts with the claim that it arose from custom. First, in the medieval juristic theory that Suárez otherwise endorsed, custom was established

common character.”).

94. *Id.*

95. *Id.* at 342 (bk. 2, ch. 19, § 2).

96. *Id.*

97. *Id.*

98. *Id.* at 354 (bk. 2, ch. 20, § 6).

99. *Id.* at 355.

100. *Id.* at 342 (bk. 2, ch. 19, § 2).

through tacit consent that bound all the members of the community—even when only a majority of them agreed that the custom was obligatory. However, if the *ius gentium* were customary, and the community of nations were the community bound to the custom, then all nations should be bound to follow the custom as law—whether they wanted to or not—once the requisite majority of states had tacitly agreed that the behavior in question was a custom. Should a country not follow the custom, it *would* be at fault. Suárez, however, emphasized that it was not.¹⁰¹ He pointed, for example, to the custom, which was part of the law of nations, that the citizens of states vanquished in war could be enslaved. He allowed, nonetheless, that it was perfectly acceptable for states to pass internal laws prohibiting such slavery.¹⁰² He also discussed the process by which the *ius gentium* could change, describing specifically how states could act contrary to an existing custom and over time generalize that new behavior.¹⁰³ Yet if the *ius gentium* were binding custom, then the countries adopting the new behavior would be in violation of the law.

Second, Suárez assumed that nations adopted the *ius gentium* customs because these customs facilitated interactions with other states, and also in part because the customs accorded with reason. These customs were the “few” rules that states would choose to follow merely as a matter of common sense.¹⁰⁴ But this is different

101. *Id.* at 466-67 (bk. 7, ch. 4, §§ 6-7).

102. *Id.* at 356 (bk. 2, ch. 20, § 8); *id.* at 466 (bk. 7, ch. 4, § 6).

103. *Id.* at 356 (bk. 2, ch. 20, § 8).

104. *See id.* at 349 (bk. 2, ch. 19, § 9) (“[A]lthough a given sovereign state ... may constitute a perfect community in itself ... nevertheless, each one of these states is also ... a member of [the] universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse Consequently, such communities have need of some system of law whereby they may be directed and properly ordered with regard to this kind of intercourse and association; and although that guidance is in large measure provided by natural reason, it is not provided in sufficient measure and in a direct manner with respect to all matters; therefore, it was possible for certain special rules of law to be introduced through the practice of these same nations. For just as in one state or province law is introduced by custom, so among the human race as a whole it was possible for laws to be introduced by the habitual conduct of nations. This was the more feasible because the matters comprised within the law in question are few, very closely related to natural law and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself that, while this derivation [if the law of nations from natural law] may not be self-evident—that is, not essentially and absolutely required for moral rectitude—it is nevertheless quite in accord with nature, and universally

from saying that the nations tacitly agreed that they must abide by these behaviors.

Not all early modern jurists accepted Suárez's equation of the *ius gentium* and custom.¹⁰⁵ Nearly one hundred years after Suárez wrote, another natural law theorist, Christian Thomasius (1655-1728), attacked Suárez's theory on several grounds. First, Thomasius was skeptical that the *ius gentium* could arise from custom. In his 1688 *Institutes of Divine Jurisprudence*, he tried out the argument that "[t]here is no unwritten law outside of a commonwealth. For custom is law because of the tacit approbation of the prince. When that is lacking, the custom is called [of fact]. Yet where among nations do we find the tacit approbation of a prince?"¹⁰⁶

Seventeen years later, in his *Foundations of the Law of Nature and Nations*, Thomasius took a slightly different tack. While still concluding that custom could not produce the *ius gentium*, he focused on the lack "of a deed by the nations from which [the necessary] tacit agreement could be proved."¹⁰⁷ He also argued that imitation does not "produce an obligation in matters that are freely chosen."¹⁰⁸ Finally, he made a point that directly attacked Suárez's analysis: because custom reflects a longstanding behavior, it gives permission to continue that behavior but does not create an obligation to continue or even to undertake it.¹⁰⁹

These two well-known texts do not exhaust Thomasius's criticism of the idea that the law of nations was customary law. In 1699, he presided over the dissertation of a student, Peter Herff, for the degree of license in law.¹¹⁰ In the dissertation text, Herff—who made it clear that he was following Thomasius—disdained those who claimed that the *ius gentium* derived from custom:

acceptable for its own sake.").

105. Walden, *supra* note 11, at 346-47.

106. CHRISTIAN THOMASIIUS, *INSTITUTES OF DIVINE JURISPRUDENCE, WITH SELECTIONS FROM FOUNDATIONS OF THE LAW OF NATURE AND NATIONS* 107, § 109 (Thomas Ahnert ed. & trans., 2011).

107. *Id.* at 620, § 77.

108. *Id.*

109. *Id.* at § 78.

110. CHRISTIAN THOMASIIUS & PETRUS HERFF, *DISSERTATIO INAUGURALIS IURIDICA, SISTENS CONIECTURAS DE IURE CONSUEITUDINIS ET OBSERVANTIAE* 8 (Halle Magdeburg, Christiani Ludovici Sympheri 1740) (originally 1699).

[T]hey wished to imagine the *ius gentium* to be a species of human law, but being at a loss, sought refuge in customary law and thought, for example, that certain nations had uniformly introduced by uniform acts the inviolability of ambassadors, and thus the rest [of the nations] should be bound to the same law because custom is a type of unwritten law.¹¹¹

This could not be true, he concluded, because “customary law does not exist among nations.”¹¹² Indeed, he added, “customary law is not as great as commonly imagined even within the commonwealth.”¹¹³

Thomasius was something of an iconoclast. He was, for example, the first person to give his law lectures in German rather than in Latin.¹¹⁴ But in the case of the *ius gentium*, Thomasius was on to something. If hundreds of years of juristic debate could not come up with a satisfactory yardstick by which to measure whether certain behavior constituted a custom, and if the apparent customs declared by premodern judges really amounted to the selection of one expression among a range of possible conforming behaviors, then why should we expect international custom to be any easier to define and any more certain than the customs of a small, homogeneous world in which custom formed the most vital source of law?

II. THE HISTORY OF CUSTOM AND CURRENT DEBATES ABOUT CUSTOMARY INTERNATIONAL LAW

What, if anything, can this survey of the historical development of customary law tell us about current debates over the content and import of customary international law? As we hope to have made clear, the history of customary law indicates a longstanding struggle to find a cogent and functional definition of custom. The signal lesson is one of indeterminacy. For present purposes, we focus on

111. *Id.* (“Quamuis enim deprehensi fuerint viri quidam eruditi, qui, dum Ius Gentium Iuris humani speciem effingere voluerunt, & iis aqua haesit, in iure consuetudinario refugium quaesiverunt, atque putarunt v.g. quod gentes quaedam uniformiter legatorum inviolabilitatem uniformibus actibus introduxerint, & sic reliqui obligati sint ad idem ius, cum consuetudo sit species iuris non scripti.”).

112. *Id.* (“Consuetudinarium jus inter Gentes nullum esse.”).

113. *Id.* (“Consuetudinarium jus inter Gentes nullum esse. Quodsi iam deduxerimus, consuetudinarium ius etiam in ciuitate tanti non esse, quanti communiter esse fingitur, majus inde responsioni robur accedet.”).

114. THOMASIVS, *supra* note 106, at xi.

three salient uncertainties: First, the jurists could not satisfactorily explain how a mere practice turned into a binding custom. Second, the contrast between the medieval jurists' theories of custom and the actual practice of courts and juries both undermines whatever clarity one might glean from the theories themselves and highlights the malleability of customary law in practice. Third, the striking difference between the type of issues typically governed by custom and the substance of current disputes about customary international law calls into question whether a legal theory designed for one type of society can appropriately be translated to a markedly different context.

A. Practice and the Extra Ingredient

As the medieval jurists recognized, not every practice creates a binding custom.¹¹⁵ Professor Young buys a medium size (*grande*) vanilla latte with skim milk nearly every morning, but even though he is profoundly a creature of habit he nonetheless does not feel *bound* by this practice.¹¹⁶ The central problem of custom concerns the “extra ingredient” necessary to transform a repetitive practice into a binding norm.¹¹⁷ And a central lesson of our historical discussion is that this has *always* been the central problem. At various times, jurists have relied on (1) the practice's antiquity (has it been done “from time immemorial?”); (2) the sense that the practice is done out of a sense of legal obligation (*opinio iuris*); (3) the practice's substantive virtue (for example, its reasonableness or consistency with natural law); or (4) the tacit consent of actors to be bound by the practice.

The accepted formulation in current international practice is that customary international law derives from state practice plus *opinio iuris*. The American Restatement, for example, says that “[c]ustomary international law results from a general and consistent practice

115. See *supra* notes 17-18 and accompanying text.

116. It is conceivable that, some fine morning, he might go crazy and buy a white chocolate mocha. With whipped cream and sprinkles, even.

117. See, e.g., BEDERMAN, *supra* note 53, at 4 (“A theme that runs throughout this volume is to identify ... the ‘extra ingredient’ that converts a helpful or gracious usage or practice into a binding norm of customary law.”).

of states followed by them from a sense of legal obligation.”¹¹⁸ That, as we have said, was the way that the Roman jurists defined custom, but that formulation was then unpacked into the various factors just listed. At various times, different commentators—and sometimes the *same* commentators—stressed different elements. Suárez, for instance, emphasized consent in certain places and, in other places, the “necessity” of the practice.¹¹⁹

The same problems plague contemporary discussions. As Patrick Kelly has observed, “[c]ustomary law theory is indeterminate, not just because its application requires discretion, but because there is no common understanding of how to determine customary norms.”¹²⁰ Sometimes *opinio iuris* is inferred from regular practice, which follows the medieval jurists’ focus on acts but effectively does away with the subjective element altogether.¹²¹ More often nowadays, *opinio iuris* is found in normative statements—U.N. General Assembly Resolutions, aspirational treaty language, and the like.¹²² Such statements, which are generally divorced from actual state practice, are more like statements about the moral obligation or reasonableness of a principle than they are an account of why states do what they do.¹²³ Moreover, phenomena like *ius cogens* norms, which are supposedly not subject to consent or derogation,¹²⁴ look a lot like natural law to laypeople not steeped in international law theory.¹²⁵ Yet acts now prohibited by the *ius cogens* norms, such as

118. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

119. See *supra* notes 88-91, 95-101 and accompanying text.

120. J. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 516 (2000); see also Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT’L L. 365, 385-91 (2002).

121. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTRALIAN Y.B. INT’L L. 82, 88 (1992) (“What international courts and tribunals mainly did in fact was to trace the subjective element by way of discerning certain recurrent patterns within the raw material of State practice and interpreting those patterns as resulting from juridical considerations.”).

122. See, e.g., Roberts, *supra* note 13, at 758; Simma & Alston, *supra* note 121, at 89-90.

123. See, e.g., Anthony D’Amato, *Trashing Customary International Law*, 81 AM. J. INT’L L. 101, 102 (1987) (criticizing the World Court’s decision in *Nicaragua v. United States*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 181 (June 27), for allowing abstract statements of *opinio iuris* to trump actual practice).

124. See, e.g., LOUIS HENKIN, GERALD L. NEUMAN, DIANE F. ORENTLICHER & DAVID W. LEEBRON, HUMAN RIGHTS 355 (1999); Simma & Alston, *supra* note 121, at 103-05.

125. And sometimes even to international law experts. Cf. Louis Henkin, *International*

slavery, may, a few centuries ago, have been fully acceptable elements of international law.¹²⁶

Each of the potential extra ingredients identified in the historical literature has its problems when we try to apply it to contemporary matters of customary international law. Antiquity, although useful in some contexts, is unlikely to appeal to most advocates of international custom, who tend to see customary international law as an instrument of reform.¹²⁷ The point of international human rights litigation seeking to enforce customary international law, for example, is not to preserve existing arrangements and practices but rather to overthrow unjust practices in the name of an emerging—and more morally appealing—international consensus.¹²⁸ Custom, however, is by definition backward looking and conservative. It represents the behavior of a community over a long period of time. The sad truth in much of the world may be that practices dating from time immemorial are customs we would prefer to forget, but to call more acceptable but new practices “custom” is to undermine the meaning of the word.¹²⁹

Law: Politics, Values and Functions: General Course in Public International Law, 216 RECUEIL DES COURS 61-62 (1989) (Neth.) (“[P]rinciples common to legal systems often reflect natural law principles that underlie international law.”).

126. See *supra* notes 73-83 and accompanying text.

127. See, e.g., Frohnen, *supra* note 4, at 40 (“International law increasingly is aimed at changing the practices of local cultures to bring them more in line with universal principles of human rights.”); Simma & Alston, *supra* note 121, at 83, 88-90 (discussing the strong tendency in contemporary international law to depart from historical conceptions of custom in order to spur reform of practices detrimental to human rights).

128. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2009) (considering Alien Tort Statute (ATS) suit challenging war crimes by the Sudanese government as violations of international human rights law); *John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (considering ATS suit challenging human rights abuses by the Myanmar military committed in conjunction with the building of a natural gas pipeline); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (challenging torture by the Paraguayan government under principles of customary international law).

129. See Simma & Alston, *supra* note 121, at 96 (“[I]t is surely open to doubt whether the concept of custom should be so fundamentally reshaped in a manner which disregards its intrinsic limitations (and some would say, virtues) in order to accommodate a desired (and highly admirable) policy outcome.”). A parallel problem arises in American constitutional law when the Due Process Clause is invoked to strike down measures such as antisodomy laws. As Cass Sunstein has explained, due process protects customary or traditional rights against outlier jurisdictions that may wish to infringe on them, while the Equal Protection Clause requires the revision of existing social norms to include previously excluded minority perspectives. See Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). Due

Opinio iuris, as we have already suggested and as the jurists realized, is hard to measure directly. If it is inferred from practice, then it simply begs the question which practices should be considered binding. If it is based on abstract statements, then it is not really an account of customary behavior at all and risks giving legal effect to “cheap talk.”¹³⁰ Moreover, too loose a conception of *opinio iuris* risks creating counterproductive incentives whereby states may avoid engaging in desirable behavior at all lest that behavior come to be seen as legally binding upon them.

If we focus instead on the reasonableness of a custom or its consistency with broader notions of morality or natural law, we run into Thomasius’s problem: the lack of any central authority to determine what is reasonable or moral.¹³¹ Certainly, as the community of nations to be bound by norms of customary international law expands, we can expect ever less consensus on general principles of reasonableness, let alone on the content of a natural law.¹³²

Finally, there are serious difficulties with the very idea of tacit consent regardless of how that consent is measured. That is particularly true for Americans, whose Constitution is practically obsessed with the particular forms and procedures by which binding law is generated.¹³³ What is the point, for example, of requiring two-thirds of the Senate to ratify a treaty if the President may also bind the nation to an international obligation simply by engaging or declining to engage in a particular practice, or by failing to object to

process, in other words, is ordinarily a form of customary law, while equal protection generally undermines custom in the name of reform. That is not to say that due process may not be used to upset traditional restrictions on rights. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (striking down a Texas antisodomy law under the Due Process Clause). But in order to do so it must be cut loose from its customary moorings and transformed into a relatively abstract principle of “liberty.” *See id.* at 558-62.

130. *See* D’Amato, *supra* note 123, at 102 (“[*Opinio iuris* is a psychological element associated with the formation of a customary rule as a characterization of state practice.”).

131. *See supra* notes 106-07 and accompanying text.

132. *Cf.* BEDERMAN, *supra* note 53, at 42 (noting that “scholars question whether custom is inimical to modern legal cultures characterized by a large, diffuse, mobile, technologically sophisticated, and diverse society”); Robert P. George, *Natural Law*, 52 AM. J. JURIS. 55, 64 (2007) (acknowledging that “in circumstances of political liberty reasonable people of goodwill can be expected to develop divergent views even about some profoundly important moral matters”).

133. *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 951-59 (1983) (striking down the “legislative veto” procedure on the ground that it departed from the very specific law-making procedures set forth in Article I of the Constitution).

the emergence of a practice in other countries? A similar problem bedevils any democratic regime committed to notions of parliamentary sovereignty, whereby the people's elected representatives retain the right to unmake any legal obligation that they can make.¹³⁴ More generally, process safeguards that restrict the formation of binding law often operate to ensure deliberation and widespread participation, including by less powerful groups.¹³⁵ More informal forms of norm generation, such as the formation of international custom through tacit consent, may sacrifice these values.¹³⁶ It is no surprise, for example, to encounter concerns that customary norms may reflect the practices and preferences of strong nations, because weaker states may have little opportunity and strong disincentives to object.¹³⁷

Our basic point, however, is that while the details may have changed, the thrust of these critiques of customary-law formation have been around for more than half a millennium. There is, if you will, no settled customary practice governing how to define customary rules of law.

B. The Theory and Practice of Custom

The second ambiguity that emerges from our historical discussion deals with the disconnect between theory and practice in the historical materials. While the jurists debated the proper ingredients of custom, judges and juries applied custom as a form of rough justice in particular cases, informed by the particular values of the

134. See, e.g., Bradley & Gulati, *supra* note 51, at 204-05, 218-19. Of course, a treaty may also bind a government in a way that prohibits a successor government from easily withdrawing. But at least in that instance, most governments will have built-in safeguards for entering into treaties. They will also have the opportunity—and frequently the incentive—to negotiate specific exit options in the treaty itself. *Id.* at 204.

135. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001).

136. See Kelly, *supra* note 120, at 517 (charging that customary law formation “violates fundamental procedural values, including democratic governance, and cannot function ... in a decentralized community with widely different values and perceptions”).

137. See, e.g., Bradley & Gulati, *supra* note 51, at 230-31; Kelly, *supra* note 120, at 472 (“The practices and attitudes of Japan, China, and the many nations of Africa, Asia, and Latin America are virtually ignored in the Western literature.”); Roberts, *supra* note 13, at 767 (“[M]ost customs are found to exist on the basis of practice by fewer than a dozen states.”).

frequently small and close-knit communities in question.¹³⁸ Although this approach may have reached fair results in individual cases, it failed to generate a determinate body of rules.¹³⁹

This historical disconnect raises problems of both indeterminacy and community. The indeterminacy problem is that, in the absence of clear rules of custom, individual courts are likely to emulate medieval juries and impose their own sense of rough justice. The lack of a settled methodology for deriving customary rules in the first place,¹⁴⁰ of course, exacerbates the problem. Given the wealth of practices and statements of *opinio iuris* from which to choose, courts are likely to find some support for the results that they may wish to reach on more intuitive grounds.¹⁴¹

Within a small and close-knit community, a form of customary law derived from the community's sense of justice may be accepted as legitimate.¹⁴² But as we extend the sphere of that law's application to the international "community" at large, courts are less likely to find either shared values or a broader sense of reciprocity that would allow for give and take in particular disputes.¹⁴³ In the famous *Sabbatino* case,¹⁴⁴ for example, Justice Harlan was reluctant to review the Castro regime's seizure of private property under customary international law norms barring expropriation:

There are few if any issues in international law today on which opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens. There is, of course, authority, in international judicial and arbitral decisions, in the expressions of national governments, and among commentators for the view that a taking is improper under international

138. See *supra* notes 69-72 and accompanying text.

139. See *supra* notes 58-62 and accompanying text.

140. See, e.g., Kelly, *supra* note 120, at 475 ("[T]here is no methodology that has the capacity to determine whether states have, in fact accepted a norm as law.").

141. See, e.g., Bradley & Gulati, *supra* note 51, at 213 & nn.40-43 (noting the various ways in which *opinio iuris* is determined by different parties); Kelly, *supra* note 120, at 484-86 (discussing "new CIL" theory that uses UN resolutions as indicators of custom).

142. See Ullmann, *supra* note 15, at 265-66 (noting that each individual Italian community and village possessed its own distinct and individual customs).

143. See, e.g., Simma & Alston, *supra* note 121, at 94-95 (criticizing the current Restatement's treatment of human rights under customary international law as reflecting "normative chauvinism" because it "assum[es] that American values are synonymous with those reflected in international law").

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

law if it is not for a public purpose, is discriminatory, or is without provision for prompt, adequate, and effective compensation. However, Communist countries ... commonly recognize no obligation on the part of the taking country. Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect 'imperialist' interests and are inappropriate to the circumstances of emergent states.¹⁴⁵

There was, in other words, no international "community" with respect to the issue of expropriation, notwithstanding the availability of much traditional evidence of a custom sharply limiting the practice.¹⁴⁶

The community problem plagues any system of law that purports to operate at a level that lacks either a shared sense of political and cultural identity or a common set of democratic institutions. The literature on the European Union, for example, has long wrestled with the EU's lack of a common *demos* and the corresponding "democratic deficit" of law promulgated at the European level.¹⁴⁷ This problem may be minimized in treaty law, in which more particular communities may explicitly consent to specific obligations through defined procedures. The difficulty creeps back in as treaties become broader, more multilateral, and more abstract. In such cases, vague terms will often have to be given content through the same kinds of analysis that are used to define custom.¹⁴⁸ In any event, the problem reaches its maximum with pure customary law. Historical experience suggests that the success of such law may depend on a much thicker set of communal ties than the abstract theories of the jurists

145. *Id.* at 428-30 (footnotes omitted).

146. See Ernest A. Young, *The Story of Banco Nacional de Cuba v. Sabbatino: Federal Judicial Power in Foreign Relations Cases*, in *FEDERAL COURTS STORIES* 415, 429-32 (Vicki Jackson & Judith Resnik eds., 2009) (discussing the Court's reasons for avoiding customary international law in *Sabbatino*).

147. See, e.g., NEIL FLIGSTEIN, *EURO-CLASH: THE EU, EUROPEAN IDENTITY, AND THE FUTURE OF EUROPE* 2-6 (2008); Amitai Etzioni, *EU: Closing the Community Deficit*, 43 *INTERECONOMICS* 324 (2008).

148. Cf. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985) (finding that Articles 55 and 56 of the U.N. Charter "are phrased in broad generalities" and thus "do not create rights enforceable by private litigants in American courts").

might suggest. The prospects for international custom must be assessed in light of actual experience, not just theory.

C. Customary Law and Contemporary Human Rights

The last set of difficulties arises not so much from the historical record itself but rather from the striking differences between the settings in which customary law traditionally arose and the issues on which it spoke, on the one hand, and the contemporary settings in which advocates of customary international law seek to employ customary norms, on the other. Simply put, the fact that relatively small and homogeneous communities have sometimes been able to rely on something they called custom—but which may in reality have been little more than non-rule-based, equitable decision making—to decide disputes about intestate succession of property or commercial dealings at merchant fairs does not mean that custom is a good way to handle international human rights, which is currently the most important area in which lawyers and scholars seek to employ customary international law.¹⁴⁹ Some of the most pressing questions in international human rights litigation, for example, are simply not questions that custom can readily answer. Other questions are not the sort of matters on which international actors are likely to accept a customary answer simply because it is settled; indeed, a model of adherence to settled practices may be antithetical to what human rights advocates hope to achieve. Finally, the decentralized mechanisms by which judges seek to define custom and enforce it in particular cases may be a poor institutional approach to resolving disputes about international human rights.

Consider, for instance, the issue raised by *Kiobel v. Royal Dutch Petroleum Co.*, which the Supreme Court reheard in October 2012.¹⁵⁰ *Kiobel* involved allegations that Royal Dutch Petroleum and its subsidiaries aided and abetted human rights violations by the

149. Cf. Simma & Alston, *supra* note 121, at 83-84 (noting the sensitivity of human rights issues to states and the concomitant lack of strong enforcement, and concluding that “if, for systemic or regime reasons, we really consider human rights treaties to be different from ‘normal’ international treaties, we should, for those very reasons, approach the question of the existence, or rather, the viability, of an extensive *customary* law of human rights with equal caution”).

150. 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011), and *reh’g ordered*, 132 S. Ct. 1738 (2012).

Nigerian government, including extrajudicial killings, torture, arbitrary arrest and detention, and destruction of property.¹⁵¹ These violations allegedly occurred as part of an effort, encouraged by the oil companies, to suppress resistance to oil exploration by indigenous people in the Ogoni region of Nigeria.¹⁵² Residents of that region filed suit in the United States District Court for the Southern District of New York under the Alien Tort Statute (ATS),¹⁵³ which confers jurisdiction on the federal district courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁵⁴ The question on which the Supreme Court initially granted certiorari is whether the ATS permits suit against a corporation, as opposed to individual defendants.¹⁵⁵

Judge Cabranes’s opinion for the panel majority in the Second Circuit sought to answer this question as a matter of customary international law. He considered the rulings of various international tribunals, such as the Nuremberg judgments and rulings by the international criminal tribunals in Yugoslavia and Rwanda, noting that no such tribunal had ever issued a judgment against a corporate defendant.¹⁵⁶ He likewise found little evidence in other sources of international law, such as international treaties and scholarly writings, for corporate liability.¹⁵⁷ The important point for present purposes, however, is simply that this sort of question—about who can violate international law and the reach of legal remedies—is hardly the same sort of question as who can inherit property or how to treat a merchant’s failure to deliver the right kind of goods. Nor is it the same as the matters of fundamental sovereignty, such as the treatment of ambassadors, that formed the earliest and most widely recognized customary international laws.¹⁵⁸

151. *Id.* at 123.

152. *Id.*

153. *Id.* at 124.

154. 28 U.S.C. § 1350 (2006).

155. For a brief statement of the questions presented and links to the briefs and other relevant materials, see *Kiobel v. Royal Dutch Petroleum*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/> (last visited Jan. 15, 2013).

156. *Kiobel*, 621 F.3d at 132-37.

157. *Id.* at 137-39, 142-45.

158. See Kelly, *supra* note 120, at 480.

Judge Cabranes did not seek to give legal effect to the practices of nonjudicial actors; rather, he looked for a *legal* custom, as it were.

The point is not that Judge Cabranes was wrong to look to international law;¹⁵⁹ it is, rather, that the *customary practices* of nations could not provide the answer to his question. Scholars have generally distinguished customary law from *common* law—that is, law made by courts rather than derived from the practices of nonjudicial actors.¹⁶⁰ As we have already discussed, the medieval jurists did not consider judicial decisions themselves to establish custom.¹⁶¹

It is true that courts must frequently answer the sort of question posed by *Kiobel*. Procedural and remedial schemes frequently have gaps, and courts must fill them as needed to establish a functioning legal system. But in the federal system that inquiry is ordinarily done as a matter of federal common law; courts fill statutory gaps by reference to the purposes and policies of the legal system, not generally by reference to practices extraneous to that system.¹⁶² Hence, in *Sabbatino*, Justice Harlan articulated a federal common law “act of state” doctrine as a means of protecting the separation of powers values associated with political-branch control of foreign policy—not because the act of state doctrine could be derived from international custom.¹⁶³ When an international court decides whether to impose liability on a corporate defendant, for example, it may be interpreting its own enabling treaties or simply relying on general principles and policies, but it is not a participant in the formation of customary law in the same way that a nation is. And

159. To the extent that the law of nations limits who can be a defendant, the ATS would seem to incorporate any such limitation. That is *not* to say, however, that domestic law considerations should not *also* play a role in describing the federal right of action in ATS cases. This is not the place to examine the proper resolution of *Kiobel*'s question. Our point is simply that that question was of a different order than the matters to which customary practice can speak.

160. *See, e.g.*, BEDERMAN, *supra* note 53, at 27-37 (observing that although English jurists sometimes viewed the common law itself as a customary regime, in practice the central issue concerned when local customs and practices ought to be allowed to derogate from the common law as found by judges).

161. *See supra* notes 38-50 and accompanying text.

162. *See generally* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 607-742 (6th ed. 2003).

163. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 421-23 (1964).

when a nation's domestic courts make this determination in ordinary domestic litigation, they will not generally be doing so as part of an internationally directed process, much less out of any *opinio iuris* sense that their resolution of the question is directed by international law.

Many of the critical questions in international human rights litigation have this sort of nonsubstantive quality. They involve the scope of liability and the remedies available for violations of international law, not the first order questions of what conduct violates that law.¹⁶⁴ It is unclear that customary practices will be much help in answering these questions. And to the extent that a body of international common-law principles does emerge purporting to govern these issues, it will require some ground of authority other than international custom.

A second quality of the issues historically settled by custom is that they were worked out through interactions among the participants in the customary regime and, in most cases, it was more important that the relevant principles be settled than that they be settled *right*. This was certainly true of many commercial customs, which can after all be contracted around if the participants only knew what the baseline entitlements were. But as Bruno Simma and Philip Alston have pointed out, human rights norms generally arise in contexts in which states interact with individuals, not other states; they thus lack the “essential” element of iterative interaction among the parties to be bound by customary practice.¹⁶⁵ More important, principles of human rights—like many of the subjects upon which contemporary internationalists invoke customary norms—implicate serious normative disagreements that participants in the legal system are unlikely to compromise in the interest of establishing a settled rule.

William Fletcher's work on the general law merchant in the nineteenth-century United States, for example, suggests that the

164. See *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. 1738 (2012) (ordering the parties to brief additional issues on reargument).

165. Simma & Alston, *supra* note 121, at 99 (“[O]ne reason why the claims to the existence of ... substantive human rights obligations under customary law remain unconvincing, and even do violence to some degree, to the established formal criteria of custom, can be seen in the fact that an element of interaction ... is intrinsic to, and essential to, the kind of State practice leading to the formation of customary international law.”).

*Swift v. Tyson*¹⁶⁶ regime—under which state and federal courts shared the development of the general commercial law without any single tribunal having authority to bind the others—held together as well as it did because the subject matter placed a premium on stability and did not implicate strong normative commitments.¹⁶⁷ Many of the issues upon which customary international law is invoked today, however, do not have this quality; indeed, they involve some of the most strongly normative principles imaginable.¹⁶⁸ Customary law cases will thus frequently involve deep normative disagreements—for example, the legitimacy of expropriation or capital punishment, the scope of religious liberty, or race and gender equality. Few will agree that it is more important that these questions be settled than that they be settled right, and diverse actors are thus far less likely to acquiesce in the development of customary norms to govern such matters.¹⁶⁹

A related point concerns the office that customary law is expected to perform vis-à-vis the subjects that it regulates. In a classic intravillage dispute decided according to customary principles, the idea is that the parties' dispute should be resolved according to the ways things have generally been done. Custom's purpose, in other words, is to reflect practice—not reform it—and the court's job is simply to resolve a disagreement about what the normal way of doing things actually is. As we have already noted, however, the role of international human rights law is frequently to *challenge* existing arrangements and practices. It is an odd thing, to say the least, to invoke *custom* to challenge conditions in oppressive societies or the abuses of long-entrenched despotic regimes. That is no doubt why human rights advocates so frequently seek to define the content of customary law by reference to aspirational documents like General

166. 41 U.S. 1, 8-9 (1842).

167. See William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1562-63 (1984).

168. See Simma & Alston, *supra* note 121, at 85 (describing international human rights as "a field ... torn by ideology and politics, and ... replete with hypocrisy, double standards and second thoughts"); Young, *supra* note 120, at 498-503 (applying Fletcher's framework to contemporary CIL issues).

169. See, e.g., Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792 (1997) (noting that the *Swift* regime fell apart when courts sought to extend the "general common law" beyond the relatively narrow compass of commercial cases to more normatively contested matters, such as tort law).

Assembly resolutions or the open-ended provisions of treaties like the Universal Declaration of Human Rights.¹⁷⁰ But these are aspirations, not practices, and therefore not customs. Aspirational declarations surely have their place, and there is reason to believe that over the long term they create pressure for reform.¹⁷¹ Our point is simply that calling such principles “customs” is a misnomer, and we might achieve the laudable purposes of international human rights law more simply by forthright efforts to tighten the binding force of international agreements embodying reformist principles.¹⁷²

Finally, there is the institutional question: Are domestic courts a good instrument for enforcing international human rights law, especially in cases involving foreign defendants or conduct occurring in a foreign nation? As Professor Young has described at greater length elsewhere, the ATS is effectively a civil-side, universal jurisdiction statute. It arguably permits U.S. courts to address human rights abuses anywhere in the world so long as the federal court can find some hook for personal jurisdiction over the defendant.¹⁷³ As such, the ATS is unique in all the world. But as Justice Harlan warned in *Sabbatino*, calling upon federal courts to distill international custom, especially on divisive issues and in the absence of clear rules of international law, may undermine the national political branches’ ability to conduct foreign policy.¹⁷⁴ After all, Article I designates Congress as the primary branch with authority

170. See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>. On the force of the Declaration, compare ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 299 (1986) (insisting that “in formal terms, [the Universal Declaration] is not legally binding, but possesses only moral and political force”), with Frederic L. Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 147-48 (1987) (asserting that “the Universal Declaration of Human Rights has come to be regarded as an authoritative articulation of customary international law, at least with respect to the most fundamental rights, *no matter how widespread or persistent the nonconforming state conduct may be*” (emphasis added)).

171. See, e.g., JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 263-64 (2005) (citing aspirational views of democracy as important driving factors to ending the Cold War).

172. Cf. Simma & Alston, *supra* note 121, at 87 (suggesting that nations that have been reluctant to ratify or strengthen the enforcement provisions of human rights treaties are unlikely to vigorously act to enforce *customary* norms of human rights).

173. See Ernest A. Young, Universal Civil Jurisdiction and the Alien Tort Statute (unpublished manuscript) (on file with authors). For some cautions about universal jurisdiction, see Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 323-26.

174. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427-28 (1964).

not only to “punish” but also to “define ... offenses against the law of nations.”¹⁷⁵

Anyone reviewing the facts and implications of a case like *Sabbatino* or *Kiobel* can hardly ignore how very far we have strayed from the classic disputes resolved under customary law in the Middle Ages. This observation is not necessarily to say that contemporary human rights disputes should *not* be resolved under principles derived from the practice and policy statements of nations rather than from express international agreements; it *is* to say that such resolutions would not be *customary*.

CONCLUSION

The contemporary practice of customary international law derives much of its force from the assumption that it is a continuation of long-standing theories and practices. That is quite true, but perhaps not in the way that modern scholars have assumed. Our project here has been to demonstrate that medieval jurists had the same disputes, and the same doubts, about custom that plague contemporary lawyers, and they never came to an adequate resolution that can serve as a foundation for contemporary practice. The modern practice, moreover, has stretched the bounds of custom into territory where those doubts become all the more salient. It may well be that unwritten principles of international law can be justified on grounds other than custom, or even that a theory of international custom can be developed on grounds other than the historical account. Without such an effort, however, the customary international law of human rights rests on a shaky foundation.

175. U.S. CONST. art. I, § 8, cl. 10.