The Limits of Custom in Constitutional and International Law

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I. INTRODUCTION

Arguments based on customary practices abound in legal discourse. Although most often associated with common law adjudication, custom arguments are especially prominent in two other areas, constitutional law and international law. Constitutional law’s most famous invocation of
custom is probably Justice Felix Frankfurter’s concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, arguing that longstanding executive practices can provide a “gloss” upon the Constitution’s grant of “executive Power.”¹

The most common form of modern unwritten international law is customary international law, which is said to rest upon the longstanding practices of nations done out of sense of legal obligation.²

This Article suggests, however, that even if one accepts the legal authority of custom, arguments from custom have less scope than is often supposed. In particular, many claims styled as appeals to custom do not rest on custom alone and as a result require justification on the basis of authority other than (or in addition to) custom. Legal appeals to customary practices take at least two different forms, only one of which is properly termed purely an argument from custom. As developed in subsequent Parts, one version of argument from custom is that certain practices have been accepted in the past and should be understood to establish law with respect to those practices in the future. The second version is that certain practices have been accepted in the past and should be understood as the basis for law regarding other practices in the future, either because the other practices are (somewhat) analogous or because the prior practices support a general principle that can then be applied to new circumstances.

My suggestion here is that only the first of these forms of argument is purely an argument from custom. Unlike the second form, it does not require contested value judgments to administer it (other than the initial judgment that custom itself should have legal force).³ The questions that arise in its application are factual (is there evidence of a customary practice?) or definitional (such as, must the practice be “unquestioned”?)⁴. In contrast, the second form of argument necessarily involves value judgments, not just with respect to the force of custom but also on the question whether a particular customary practice should be extended to a new circumstance. Put another way, the first form of argument rests, as a

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⁴ On the latter point, see Frankfurter’s demanding standard of “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned.” *Youngstown*, 343 U.S. at 610. One might question whether this formulation overstates the required showing. See Bradley & Morrison, supra note 1, at 432–38 (exploring how “acquiescence” in a historical practice should be established).
normative matter, only on the proposition that custom can or must be binding; the second involves further normative determinations regarding the particular new circumstances at issue, external to the idea of custom in the abstract.

An objection may be made that these two forms of argument cannot cleanly be separated into distinct categories. No future event is exactly like a past set of events. Thus, it may be said, all customary arguments call for extensions of law from prior practices to different future practices. That is, they all fall into what I have described as the second category of argument. As explained below, this objection has elements of truth, such that the categories I have described are perhaps better understood as end points of a continuum than as two rigidly distinct classifications. Nonetheless, the distinction remains useful because some arguments from custom contain a minimum of external value judgments whereas others contain substantial external value judgments. My contention can thus more precisely be rephrased to say that arguments containing more than a minimum of external value judgments—or, perhaps, more than a minimum of contested external value judgments—are not merely arguments from custom. They contain other situation-specific normative elements that cannot be demonstrated solely by appeal to custom.

Although customary arguments in the United States are most immediately associated with common law, the distinction I suggest here lacks direct implications for common law argumentation and adjudication as we understand them today. It is a commonplace that modern common law reasoning has an element of external value judgment. We routinely say that common law judges “make” law by extending (or refusing to extend) a customary rule to new and arguably distinct circumstances. Indeed, this view of common law is so ordinary that it can safely be called the modern common law process. As David Strauss describes,

[W]hen the precedents are not clear, the judge will decide the case before her on the basis of her views about which decision will be more fair or is more in keeping with good social policy. This is a well-established aspect of the common law: it is not simply a matter of following precedent. There is a legitimate role for judgments about things like fairness and social policy.5

5. David A. Strauss, The Living Constitution 38 (2010). As Strauss quotes Benjamin Cardozo, “[W]hen [common law judges] are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance.” Id. at 39.
Thus, it may not be of much theoretical significance whether a common law argument rests on what I will call “pure custom” or whether it combines elements of custom and external value judgments (the latter being the common law process Professor Strauss describes). Both types of argument are accepted within the core of common law reasoning.

In contrast, in constitutional law and customary international law, the distinction between pure custom and contested extensions of custom has greater force. Neither field so readily accepts that adjudicative decisionmakers have authority to “make” law on the basis of, in Strauss’s words, “fairness and social policy.” To be sure, in both fields there are academic arguments that law should be made in a common law fashion by extensions of custom; Strauss, for example, makes this argument expressly with respect to constitutional law. But as discussed below, the common law approach is problematic—or, at least, is more problematic than arguments based on pure custom—in these fields because, unlike in common law adjudication, it raises troublesome questions of authority. To take the more obvious example of customary international law, it is said that customary practices establish law between nations because, by their practices, sovereigns consent to longstanding ways of acting. International law adjudication, in this formulation, does not make law but rather finds it on the basis of past practice. To the extent sovereign consent provides the authority for unwritten international law, arguments depending on extensions of custom lack this authority and must draw authority from some other less congenial source.

6. See id. at 38.

7. See id. at 1–5; see also Sir Hersch Lauterpacht, The Development of International Law by the International Court 37–47 (1958) (discussing the role of judge-created norms in international law).

8. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 135 (June 27) (“[In international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise . . . .”); David J. Bederman, The Spirit of International Law 94 (2002) (“We take it as an article of faith that the modern law of nations derives its legitimacy from the consent of states.”); id. at 14 (“The doctrine of consent generally teaches that the common consent of states voluntarily entering the international community gives international law its validity. States—and presumably other international actors—are said to be bound by international law because they have given their consent.”); Andrew T. Guzman, Against Consent, 52 Va. J. Int’l L. 747, 748 (2012) (“International Law is based on the consent (express or implied) of states,” (quoting Anthony Aust, Handbook of International Law 4 (2005)) (internal quotation marks omitted)); Louis Henkin, International Law: Politics, Values and Functions, 216 Recueil des Cours 9, 27 (1989) (“[A] State is not subject to any external authority unless it has voluntarily consented to such authority.”); see also Guzman, supra, at 749 n.3 (citing additional authorities). But see Guzman, supra, at 783–90 (noting problems of a consent-based international system and arguing for a move to alternative approaches).
Similarly, in constitutional law, arguments from custom may draw authority from the nation’s (or a branch’s) consent to (or acquiescence in) a practice manifested by longstanding acceptance of it, even if the practice is not consistent with the Constitution’s text. Again, to the extent an argument is based not upon pure custom but upon an extension of custom, the argument has changed the basis of its authority because it no longer arises solely from the discoverable fact of widespread historical consent. It instead arises from a normative judgment. One may fairly then ask, on what authority can it be based?

These points have contemporary practical relevance. Consider two apparently unrelated modern controversies: presidential war power and secondary (aiding and abetting) liability for international human rights violations. In constitutional law, the President has claimed independent power to initiate low-level armed conflict, as reflected for example in the 2011 intervention in Libya. That claim has been justified by the President mainly on grounds of custom. Although some scholars argue that the Constitution’s original meaning grants this power, that view is not widely accepted and in any event it is not the primary basis of the President’s defense. Rather, the President and academic defenders have generally relied on arguments from custom: whatever the Constitution’s original meaning, it is said, a longstanding practice has emerged of the President engaging in low-level hostilities without congressional authorization, and this common practice has acquired the force of law superseding the Constitution’s text.

In customary international law, a substantial modern debate concerns the extent to which foreign investors should be legally responsible for human rights atrocities committed by the governments of countries in which they do business. Plaintiffs have brought numerous suits in U.S. courts

9. See Bradley & Morrison, supra note 1, at 432–38. Bradley and Morrison suggest other reasons for the authority of custom, including most prominently the Burkean idea of wisdom in past practices. See id. at 455–56. For purposes of this Article, Burkean justifications appear subject to an assessment similar to consent-based justifications (namely, that their appeal is much less persuasive for extensions that are justified by contested analogies).


under the Alien Tort Statute (ATS)\textsuperscript{14} raising these sorts of claims. In one version of the analysis, it is argued that the investors’ actions violate a customary international law rule recognizing secondary liability for entities that aid and abet international law violations.\textsuperscript{15}

In the terms suggested by this Article, neither of these claims is an argument from pure custom. As explained below, it is doubtful that a specific custom exists of presidents unilaterally initiating the use of force in circumstances equivalent to the Libya intervention, and in any event, the President’s defense does not rest on such a claim. Rather, the President’s defense depends on extending custom by finding a general principle allowing presidents to use low-level force without congressional authorization. The defense then applies that principle to validate the Libya intervention, even though the principle arises for the most part from distinct circumstances that do not present the same set of value judgments. Similarly, there is no specific custom of secondary responsibility of commercial enterprises for human rights violations by the governments of nations in which they do business.\textsuperscript{16} The argument for liability depends on the twin propositions that customary international law recognizes secondary responsibility in other circumstances such as wartime actions of individuals and that this principle should be applied to create secondary commercial responsibility for business activities that indirectly assist governmental abuses.\textsuperscript{17}

To be clear, this Article does not contend that arguments for extension of custom are illegitimate. Instead, it makes two more limited claims. First, there is an important difference between arguments from pure custom and arguments for the extension of custom, with the latter being more properly called common law arguments. Second, the legitimacy of common law arguments in some fields, especially constitutional law and international law, is substantially more problematic than the legitimacy of arguments from pure custom.

The Article develops as follows. Part II sets out in greater detail the proposed distinction between arguments from pure custom and arguments for extension of custom. Part III illustrates the distinction by reference to the constitutional debate over the President’s military intervention in Libya and to the customary international law debate over the secondary

\textsuperscript{15} Chimène I. Keitner, Conceptualizing Complicity in Alien Tort Cases, 60 Hastings L.J. 61, 75–77 (2008).
\textsuperscript{16} See 1 Expert Legal Panel on Corporate Complicity in Int’l Crimes, Int’l Comm’n of Jurists, Corporate Complicity & Legal Accountability: Facing the Facts and Charting a Legal Path 3 (2008) (noting “considerable confusion and uncertainty about the boundaries of [the concept of corporate complicity] and in particular when legal liability, both civil and criminal, could arise”).
\textsuperscript{17} See Ramsey, supra note 13, at 305–18.
liability of multinational corporations. These Parts are intended to be only descriptive, to illustrate the need to reconsider the general category of arguments from custom. Part IV then turns to normative considerations, and in particular argues that questions of legitimacy are substantially different for the two types of arguments described in the prior Parts: arguments from pure custom have more secure legitimacy than arguments for the extension of custom because the former but not the latter can be said to rest on general consent. This Part further argues that the concern is especially acute for customary international law because traditionally, customary international law grounds its legitimacy in consent. Arguments not grounded in consent require a complete reformulation of the authority of customary international law. In contrast, the message for constitutional law is less certain because constitutional law is more conflicted regarding the theoretical source of its legitimacy.

II. PURE CUSTOM AND EXTENSIONS OF CUSTOM: GENERAL CONSIDERATIONS

A. Overview

This subpart develops my general claim that there are two types of legal arguments based on customary practices, only one of which is purely an argument from custom. To begin, we should consider what constitutes an argument from custom. By arguments from custom, I mean claims that past practices, whether within a society or across societies, establish law (or contribute to shaping law) that becomes binding without—and even contrary to—positive written enactment. I intend this definition to be broad and nontechnical, recognizing that some might define customary law more narrowly or precisely.\(^\text{18}\) I also leave aside questions about how a potentially binding custom is established with respect to a particular practice, thus avoiding issues such as how long the practice must continue and the extent to which it must be uncontested.\(^\text{19}\) I further assume that claims based on custom can or should establish binding law, although that also might easily be disputed. My purpose is to examine the structure of arguments from customary practices, not to say whether such arguments should succeed.


\(^{19}\) See David J. Bederman, Custom as a Source of Law 172–73 (2010).
To restate the general proposition sketched at the outset, my primary claim is that there are two distinct forms of argument from custom. The first form entails no contested external value judgment (that is, external to the general question of the binding nature of past practices). It rests upon past practices that are in all relevant respects equivalent to the present circumstance in which the asserted customary rule is to be applied. This sort of argument involves only (a) a factual claim about what has been done in the past and (b) a normative claim that, as a general proposition, present conduct should be governed by past practices.\textsuperscript{20} In contrast, the second form of argument from custom has three steps: (a) a factual claim about what has been done in the past; (b) a normative claim that, as a general proposition, present conduct should be governed by past practices; and (c) a further claim that, although no past practice exists with respect to the particular present conduct at issue, the present conduct is sufficiently similar to other past conduct that the rule indicated by custom for the past conduct should also be applied to the present conduct.

The immediate difficulty with this proposed dichotomy is that all customary arguments, strictly speaking, take the second form. No present practice is \textit{exactly} like a past practice. There will always be a question whether there are relevant differences, and the affected person always may claim there is \textit{some} difference that justifies not applying the past practice to the new case.

Although technically correct, this objection should not obscure the fact that there are two very different processes of argumentation at work. First consider the situation in which no one would think the factual differences carried normative weight. It is true that in this case there are strictly speaking the three steps to the argument outlined above, but nothing turns on the third step—and indeed it will rarely even be confronted—because there is no material disagreement. A decisionmaker, evaluating the arguments, will not face a meaningful choice at the third step, and thus as a practical matter, the argument has only the two-step structure. Now consider a situation in which reasonable people will disagree on the normative weight of the factual differences. A decisionmaker evaluating the argument here, in contrast, will face a significant choice at the third step: even if there is substantial consensus on the first two steps, the ultimate decision will be sharply contested.

\textsuperscript{20} To be clear, both of these inquiries may be problematic. See LaCroix, \textit{supra} note 3, at 77–81.
B. Illustrations: Constitutional Law

It will be useful to consider specific situations as illustrations. I begin with some examples from constitutional law—specifically foreign relations law, because that is an area of sparse judicial decisionmaking where appeals to nonjudicial custom have particular prominence—and then turn to customary international law. Although these fields of law are different in many respects, I suggest that my description fits customary arguments in both areas.

The Constitution’s Article II, Section 2 says that the President may make treaties “by and with the Advice and Consent of the Senate.” Assume that, as a matter of the Constitution’s original meaning, that section directs the President to consult with Senators throughout the negotiation process for their “Advice” and then to present the completed treaty again for their “Consent.” (I do not think this is what the original meaning requires but scholars have argued to the contrary, and it is useful to assume it here for purposes of illustration.) In his initial implementation of the treatymaking clause, President Washington consulted the Senate in the early stages of treaty negotiation to discuss the matter with the Senators. Washington soon decided that this approach was inefficient and altered course. Thereafter he did not consult the Senate formally prior to signing treaties and instead submitted only the fully negotiated treaty to the Senate for formal approval or disapproval. Following Washington’s example, subsequent presidents uniformly signed first and sought approval afterwards, rather than seeking advice along the way. The “Advice and Consent” function became in practice one of after-the-fact consent only.

Further assume, as appears to be true, that presidents after Washington concluded many sorts of treaties in this way and that they did not conclude

23. Ramsey, supra note 21, at 151–52.
24. Id. at 152–54.
25. See generally Bestor, supra note 22 (recounting and criticizing this history).
treaties with formal advice throughout the process at all. Then assume two further hypothetical events occur: academic scholarship demonstrates, to the satisfaction of the relevant decisionmaker, that the clause’s original meaning requires advice throughout the process, and the President negotiates a new treaty without continuous Senate advice. Is a decisionmaker justified in regarding the new treaty’s process as unconstitutional, or does custom establish the constitutionality of the President’s approach?

I think as a practical matter we would say that the decisionmaker faces only two questions. The first is whether the facts establish a constitutional custom with respect to the way the President negotiates treaties (and this seems a fairly easy affirmative). The second is whether a constitutional custom of this strength should establish the Constitution’s modern meaning. The second question is a difficult one, of course, but it is just a specific version of the general question whether past practices create rules for the future with respect to materially identical conduct.

It would presumably be the case, of course, that the hypothetical proposed treaty is not exactly like any past treaty. Perhaps, then, one could argue that the past practices of Senate nonparticipation should not establish rules for the new treaty. But in the ordinary course it would be hard—impossible, I think—to identify any normatively relevant differences. If the past practice encompassed a wide variety of treaties, as we are assuming it did, it is not likely that the present treaty is different, on any scale that anyone would think normatively significant, from past treaties. Of course the new treaty will differ in some ways, but these will not be ways that affect anyone’s views of how the Senate should be involved. Thus, we can say with great confidence that when past actors embraced the custom of presidential treatymaking for prior treaties, they would have embraced it for the present treaty as well.

Now consider a different example from the same field. The Constitution’s text does not expressly identify any way the United States can enter into international agreements other than through Article II, Section 2’s treatymaking clause (that is, with the advice and consent of two-thirds of the Senate). However, modern presidents have commonly entered into international agreements with the consent of a majority of both houses of Congress (so-called congressional-executive agreements). As above,

26. For purposes of this Article, it is irrelevant whether the decisionmaker is a judge or someone in the executive or legislative branch.

27. One could imagine a wholly unprecedented sort of treaty for which a different conclusion might be possible, such as a treaty ceding territory or putting the United States under the sovereignty of another nation.

we will assume that (a) the practice is sufficient to show a custom that—if one credits customary arguments—could be a rule for future agreements; (b) new research conclusively establishes that the Constitution’s original meaning does not permit congressional-executive agreements; and (c) the President enters into a new congressional-executive agreement. Is the new agreement constitutional?

At first this situation may seem parallel to the advice-and-consent argument described above. It may be that the evidence of custom is somewhat less conclusive, but that is a question of what factual evidence is required (step one in the framework above); thus, one might argue that in fact there is not a sufficient custom of congressional-executive agreements to establish a rule overriding the text. Step two should be the same—either one regards customary practice as generative of legal rules or not. But here, unlike in the advice-and-consent situation, there is a possibility of a third argument. Assume, as is generally the case, that major past congressional-executive agreements have typically been trade or financial agreements, such as the North American Free Trade Agreement (NAFTA), and that other major nontrade agreements have been approved as treaties. Suppose the new agreement is not a trade agreement; for example, suppose that the President decides to submit the proposed Convention on the Law of the Sea as a congressional-executive agreement, relying on the past practice of approving agreements by a majority of Congress.

At this point one could argue that the Law of the Sea agreement is not like the past agreements in all normatively relevant respects. That is, its opponents could concede a custom of congressional-executive agreements on trade-related matters and concede that custom can generate legal commitments (and even that custom has generated legal commitments

29. See Bradley & Morrison, supra note 1, at 468–75 (discussing historical practice arguments in the context of congressional-executive agreements).

30. See id.


with respect to trade agreements) and still plausibly argue that the Law of the Sea agreement must be approved as a treaty.\footnote{33 See Spiro, supra note 31, at 962–63 (making an argument for limiting congressional-executive agreements in this manner); John C. Yoo, Laws as Treaties?: The Constitutionality of Congressional-Executive Agreements, 99 Mich. L. Rev. 757, 759–60 (2001) (same).} Congress may be thought to have particular constitutional authority in trade-related matters. Further, for tariff-related agreements such as NAFTA, Congress can accomplish the substance of the agreement through reciprocal trade legislation (legislation that lowers U.S. trade barriers conditional upon other countries lowering theirs). And Congress can override trade agreements through subsequent legislation, so they may not appear to involve substantial constraints on U.S. policymaking. Thus, constitutional objections to trade-related congressional-executive agreements may appear more formalistic than substantive.\footnote{34 See Ramsey, supra note 21, at 216–17 (arguing for the unconstitutionality of congressional-executive agreements under the Constitution’s original meaning but acknowledging this point).} The Law of the Sea agreement does not share these characteristics of trade agreements (or does not share them to the same extent).

As a result, one could not say, regarding the Law of the Sea agreement, that a customary consensus stood behind its approval as a congressional-executive agreement. Because plausibly relevant differences exist between the Law of the Sea agreement and the prior trade agreements, it is possible that the customary consensus extends only to trade treaties and not to the Law of the Sea agreement. A decisionmaker who claimed a broader prior consensus would be engaging in speculation. Of course, a decisionmaker might say that in the decisionmaker’s assessment there is no meaningful difference between trade agreements and the Law of the Sea agreement, and thus, the latter could be approved as a congressional-executive agreement. But this conclusion must rest upon the decisionmaker’s own normative assessment, not upon the decisionmaker’s factual assessment of the prior consensus. In sum, equating trade agreements and the Law of the Sea agreement, for purposes of the constitutional approval process, requires an additional normative assessment—not merely that custom should generate legal commitments but also that legal commitments generated by custom should be extended to an arguably distinct situation.

In contrast, suppose the new proposed agreement is not the Law of the Sea agreement but a new free trade agreement with, say, Brazil. Now we are back to a two-step analysis—whether there is a custom of approving trade-related agreements by a majority of Congress and whether custom can generate legal rules. It will not do to argue that no prior trade agreement
with Brazil has been approved by a mere majority of Congress. Even though a trade agreement with Brazil is different in some sense from past agreements with Mexico, Costa Rica, or Colombia, there is not a plausible normative difference. The decisionmaker, if satisfied on the first two points, can say as to the third that there is no doubt that the prior consensus embraces the Brazil agreement as well. This is not the decisionmaker’s assessment of the normative difference but the decisionmaker’s assessment of the consensus assessment of the normative difference. Hence in this case, but not in the Law of the Sea example, we can fairly say the decisionmaker is finding, not making, law.

Before turning to international law, I will consider a potential counterargument. Perhaps one could claim that the customary practices with respect to prior specific events have customarily been understood to establish a general rule. The general rule then might be applied to new analogous circumstances, even ones that are arguably normatively different, on the claim that the custom is not to recognize the possible normative differences. To take the Law of the Sea agreement as an example, perhaps one could argue that custom reflects a general rule of “interchangeability” allowing (but not requiring) congressional-executive agreements in all cases. Even if all the actual examples of prior congressional-executive agreements are trade agreements, perhaps that is only coincidence—it might be the case that all the relevant actors over time have accepted the general rule of interchangeability. Under this argument, allowing the Law of the Sea agreement to be approved by a mere congressional majority is not an extension of custom; it is an application of custom, but of a custom agreed at a more generalized level. Thus, this application does not require any external value judgment and is no different from the advice-and-consent example.36

36. Put another way, one might ask whether customs establish merely practices, or instead principles, and if the latter, at what level of generality we should characterize the principle for which a custom or a set of arguably related customs stands. If practices are taken to establish a principle at a high level of generality, they may be read to create a rule that goes far beyond anything that has actually happened in practice. But that is exactly the point: without a close and specific tie to practices, one cannot say that there is consent (or acquiescence) to the general principle. The abstract principle does not,
I think this is a possible situation in theory, and I would not deny its occasional existence in practice. However, it seems difficult to demonstrate in most cases. Congressional-executive agreements are an example of the difficulty. Although one could make the argument suggested above, it would seem difficult if not impossible to substantiate it. It is possible that people in the past accepted congressional trade agreements because they accepted a broader rule of interchangeability, but it is also possible that they accepted congressional trade agreements because they thought Congress had a unique role in trade regulation that did not extend to international agreements generally. Or, more likely, various people expressed various positions, while others did not consciously adopt any particular explanation but merely accepted the immediate resolution for reasons of immediate political interest. Absent a very wide and unanimous body of literature on the point, any generalization beyond the specific practices appears to be no more than speculation. The arguments for interchangeability seem more accurately characterized as normative arguments for extending the specific custom regarding trade agreements to international agreements generally.

One may similarly object that in the advice-and-consent situation considered earlier, we are abstracting from past practices a general rule that consultation with the Senate is never required (just as we might attempt to abstract a general rule that interchangeability is always permitted). The difference, though, is that there is a broad set of historical practices with respect to advice and consent that seems to cover almost the full range of normative situations. Thus, for advice and consent, but not interchangeability, customary convergence on a general rule is a plausible, nonspeculative conclusion.37

C. Illustrations: International Law

Similar points can be made using international law examples showing that this is not a claim merely about constitutional custom. Consider the idea of head-of-state immunity. Here it is said that under customary practice, sitting heads of state cannot be subject to civil or criminal

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37. If advice-and-consent practice did not cover the full range of normative situations or if an advice-and-consent issue arose in the context of a treaty that seemed normatively different from all prior treaties, this response would not hold, and the advice-and-consent claim might indeed also appear to be an argument for extending custom.
adjudication in foreign nations with respect to their official or private acts. (A similar custom historically applied to diplomatic personnel, although that rule is now codified by treaty.) Assume a sitting foreign head of state is prosecuted in U.S. court and claims this customary international law immunity. That would be plausibly characterized as an argument from pure custom in two ways. First, the defense likely could demonstrate that the act on which the prosecution is based, when committed by a head of state, has customarily given rise to immunity. True, the exact act presumably has not previously been committed and therefore has not been subject to immunity, but it is likely that immunity has been found for acts that are not normatively distinct (that is, acts that no one would think could be normatively distinct). Alternatively, perhaps the defense could demonstrate that there is a customary practice stated more generally that all head-of-state acts, regardless of description, give rise to absolute immunity. Thus, even if there are possible normative distinctions between the present suit and prior ones, we can say with confidence that the custom would disregard them. As noted above, the latter argument is more difficult to prove, but head-of-state immunity is one area where it might well be demonstrable as a practical matter—it appears that there is a very broad range of descriptive writings and official statements setting forth the custom at a general level. If that could be demonstrated, regardless of the specific subject of the suit in question, custom seems to call for immunity.

41. See Wuerth, supra note 38, at 731–32.
42. Note, however, that this claim is highly subject to the historical showing that can be made with respect to head-of-state immunity. Consider two variations, both present in the leading U.S. case Ye v. Zemin. 383 F.3d 620 (7th Cir. 2004). First, does head-of-state immunity persist after the leader leaves office? The court in Ye implicitly found that it did, on the strength of an executive branch suggestion of immunity. See id. at 624–25. But as a matter of customary law, that conclusion should turn on the specific inquiry whether immunity has actually been accorded to former heads of state, not whether the rationale underlying sitting head-of-state immunity fairly encompasses former heads of state. Second, does head-of-state immunity extend to violations of jus cogens norms of international law? The plaintiffs in Ye argued that it did not, but the court directly found to the contrary, also relying on the executive branch suggestion. See id. at 625–26. Again, to support an argument from pure custom, the inquiry should be
In contrast, consider a related but distinct claim of immunity. Suppose a claim of absolute immunity from prosecution is made by a nation’s minister of foreign affairs, who is neither the head of state nor an accredited diplomat. Assume there is no specific custom with respect to ministers of foreign affairs, the issue not having previously arisen. The minister’s argument would be that a minister of foreign affairs is similarly situated to a head of state or diplomat. The basis of the custom of absolute immunity for the latter persons is to prevent disruption of peaceful interactions among states, and (it is argued) that interest similarly supports immunity for foreign ministers. Thus, the minister attempts to invoke a general rule that immunity should apply as necessary to prevent disruption of peaceful interactions among states.

This argument involves a contested extension of custom, not a pure application of custom. It is possible that the customary practices we can observe with respect to heads of state and diplomats show a more general implicit agreement of states along the lines the minister suggests, but that seems only speculation. Because immunity sharply conflicts with the attainment of justice, one might instead think that it should be applied very narrowly and not be extended to new offices that are similar but not normatively identical to those where it has already been recognized. Immunity for foreign ministers may further the interest underlying head-of-state immunity, but it is not essential to that interest and thus not normatively identical. In the absence of actual specific practices or widespread theoretical agreement on foreign minister immunity, there is

whether immunity has historically been extended for such violations (or whether the immunity was stated so broadly in the past that it necessarily would have been understood to extend to such violations).


43. See Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 1, at 6 (Feb. 14) (considering legality under customary international law of Belgium issuing an arrest warrant for the Congo’s foreign minister). I assume here that the minister could not invoke a more general immunity for official acts and that the question—as in the Arrest Warrant case, see id. ¶ 50, at 20—is whether the minister has absolute immunity even for nonofficial acts as a result of his office.

44. In the Arrest Warrant case, the International Court of Justice (ICJ) found that there was such an immunity, see id. ¶ 54, at 22, but its opinion was conclusory without citing specific historical practice, and the dissent argued to the contrary. See id. ¶¶ 14–15, at 146 (Van den Wyngaert, J., dissenting); supra notes 42–43 and accompanying text.
little basis for finding a state consensus on immunity. Of course, one may say that the rationale underlying head-of-state immunity ought to include foreign ministers, but that requires something beyond the identification of an existing custom. It is a statement about how the current decisionmaker thinks the interests of justice and diplomacy should be balanced, not about how custom has balanced them.

In the Arrest Warrant case in the International Court of Justice (ICJ), the dissent made exactly this point. The ICJ majority held that the Congo’s foreign minister had absolute customary law immunity, but its opinion was unclear whether it found this immunity as a matter of actual practice. In response, ad hoc Judge Van den Wyngaert argued,

I disagree with the proposition that incumbent Foreign Ministers enjoy immunities on the basis of customary international law for the simple reason that there is no evidence in support of this proposition. Before reaching this conclusion, the Court should have examined whether there is a rule of customary international law to this effect. It is not sufficient to compare the rationale for the protection from suit in the case of diplomats, Heads of State and Foreign Ministers to draw the conclusion that there is a rule of customary international law protecting Foreign Ministers: identifying a common raison d’être for a protective rule is one thing, elevating this protective rule to the status of customary international law is quite another thing.

In the present case, the Judgment of the International Court of Justice proceeds from a mere analogy with immunities for diplomatic agents and Heads of State.

Judge Van den Wyngaert went on to stress the potential normative differences between foreign ministers and others who had previously been granted immunity:

There are fundamental differences between the circumstances of diplomatic agents, Heads of State and Foreign Ministers. The circumstances of diplomatic agents are comparable, but not the same as those of Foreign Ministers. Under the 1961 Vienna Convention on Diplomatic Relations, diplomatic agents enjoy

45. As such, it might be thought of as a proposal or suggestion for the creation of a new rule of international law, and it would become one if states accepted it. However, if the decisionmaker is (like the ICJ) authorized to apply only existing international law, a decision would not be appropriate on this basis. In contrast, a state might decline to prosecute (where prosecution would otherwise be appropriate) on the basis that an immunity should be recognized. That would be an entirely appropriate proposal for an extension of custom, and other states would be free to accept or reject it.

immunity from the criminal jurisdiction of the receiving State. However, diplomats reside and exercise their functions on the territory of the receiving States whereas Ministers normally reside in the State where they exercise their functions. Receiving States may decide whether or not to accredit foreign diplomats and may always declare them persona non grata. Consequently, they have a “say” in what persons they accept as a representative of the other State. They do not have the same opportunity vis-à-vis Cabinet Ministers, who are appointed by their Governments as part of their sovereign prerogatives.

Likewise, there may be an analogy between Heads of State, who probably enjoy immunity under customary international law, and Foreign Ministers. But the two cannot be assimilated for the only reason that their functions may be compared. Both represent the State, but Foreign Ministers do not “impersonate” the State in the same way as Heads of State, who are the State’s alter ego. State practice concerning immunities of (incumbent and former) Heads of State does not, per se, apply to Foreign Ministers.47

Thus, head-of-state immunity appears to be an example of pure custom; foreign minister immunity may be (if the Arrest Warrant case’s dissent is correct on the facts)48 an example of an extension of custom. The former does not involve a contested value judgment apart from the bindingness of custom; it involves only a factual determination that head-of-state immunity has been applied in normatively identical circumstances. The latter, if the dissent is correct, involves the additional normative decision that the rationale underlying head-of-state immunity applies with sufficient force to foreign ministers that foreign ministers should receive the same treatment, notwithstanding the plausible countervailing normative concerns that immunity be kept as narrow as possible and the plausible normative differences between heads of state and resident diplomats on one hand and foreign ministers on the other.

At this point it may be objected that I am not describing two types of argument from custom but rather just describing a convincing use of custom and an unconvincing use of custom. I think that oversimplifies. Assume that in the foregoing example there is no specific history of foreign minister immunity. Even so, the foreign minister’s argument, properly understood, is not necessarily a weak argument from custom—it could be a different sort of custom-based argument. It relies on custom to establish part, but not all, of its claim. Custom establishes that a concern

47. Id. ¶¶ 15–16, at 146–47 (footnotes omitted). Judge Van den Wyngaert further argued that even if foreign ministers had some historical immunity, they should not have immunity for serious human rights abuses (the charge in the Arrest Warrant case was incitement of racial violence). Id. ¶¶ 26–27, at 152–55.

48. For present purposes I do not take a position on the merits of the question whether there is a historical immunity for foreign ministers. My point is that the dissent highlights the two forms of argument: the majority might have been claiming to have identified a specific historical immunity or it might—as the dissent charged—have been proceeding implicitly by analogy to heads of state and resident diplomats.
for facilitating diplomatic exchanges justifies immunity in some circumstances, despite countervailing concerns for justice. That is the rationale for diplomatic and head-of-state immunity. In this description, it would not be convincing to argue against the foreign minister that immunity itself is immoral as injurious to justice. Custom recognizes a place for immunity. Thus, the minister relies to some extent on custom. But custom is not all of the argument because custom does not establish immunity in the particular case—it may suggest it, but it does not require it. Thus, the minister’s argument is an argument from custom, but it is not an argument from pure custom. And a court accepting this argument would be making law in common law fashion rather than simply finding a custom.

III. FURTHER EXAMPLES: WAR POWERS AND SECONDARY LIABILITY

To develop the argument in greater detail, this Part applies the distinction outlined in Part II to two contemporary debates where it may be more controversial: presidential war powers and secondary liability for human rights violations.

A. War Powers and the Libya Intervention

In March 2011 President Obama directed U.S. airstrikes against Libyan government positions during an uprising against the rule of Muammar Qadhafi. The stated goal was to protect Libyan civilians, especially in the city of Benghazi, from attack by Qadhafi forces, although in fact the actions of the United States and its allies appeared to go somewhat beyond that, ultimately providing substantial air support for rebel fighters and contributing to Qadhafi’s overthrow. Congress did not approve any aspect of this operation, leading to charges that the President acted in violation of the Constitution, specifically of the clause giving Congress power to “declare War.”

In a memorandum dated April 1, 2011, the Office of Legal Counsel (OLC) defended the constitutionality of the intervention on various grounds. Most relevant here, the OLC memorandum invoked custom. In particular, the memorandum relied on

the “historical gloss” placed on the Constitution by two centuries of practice. “Our history,” this office observed in 1980, “is replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.” . . . This historical practice is an important indication of constitutional meaning, because it reflects the two political branches’ practical understanding, developed since the founding of the Republic, of their respective roles and responsibilities with respect to national defense . . . . In this context, the “pattern of executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties, ‘evidence the existence of broad constitutional power.’”52

Elsewhere the memorandum noted OLC’s previous conclusion that the relationship between Congress’s declare-war power “and the President’s authority as Commander in Chief and Chief Executive has been . . . ‘clarified by 200 years of practice.’”53 Applying these observations to the circumstances of the Libya intervention, the memorandum concluded that “applicable historical precedents demonstrate that the limited military operations the President anticipated directing were not a ‘war’ for constitutional purposes” and thus did not require congressional approval.54

The memorandum principally relied on four sources to establish the decisive “200 years of practice.” First, Robert Jackson’s 1941 opinion as attorney general in Training of British Flying Students in the United States noted that “the President’s authority has long been recognized as extending to the dispatch of armed forces outside the United States, either on missions of good will or rescue, or for the purpose of protecting American lives or property or American interests.”55 Second, a 1980 OLC memorandum, prepared in the course of the Iran hostage crisis, concluded that the President had independent authority to rescue the hostages and retaliate against Iran.56 Third, the Congressional Research Service’s compilation Instances of Use of United States Armed Forces Abroad

52. See 2011 OLC Mem., supra note 10, at 7 (citations omitted); see also Bradley & Morrison, supra note 1, at 461–68 (discussing the memorandum’s appeals to custom).
54. Id. at 13.
contains numerous examples of such use without congressional approval.57
Finally, additional OLC memoranda in 1992, 1994, and 1995 (regarding
actions in Somalia, Haiti, and Bosnia, respectively) contain general
language about the President’s longstanding independent ability to use
force abroad.58
Notably, the 2011 memorandum did not argue that any of the historical
uses of force mentioned by these sources closely resembled the Libya
intervention.59 Had it wanted specific historical support, some might
have been available. It is true that early post-ratification precedent points
sharply in the other direction. The 1798 “quasi-war” with France and the
naval actions against the Barbary powers under Presidents Jefferson and
Madison, examples of limited force directed against foreign sovereign
powers, have close parallels with the Libya intervention. In both cases,
broad contemporaneous consensus held that Congress had to authorize
them (with the partial exception of Tripoli in 1801, where a declaration
of war had already been made by the other side).60 But beginning in the
erly twentieth century, presidents used limited force without congressional
authorization against weak nations in the Americas to bring about the
overthrow of unfriendly regimes. At minimum, one might count Theodore
Roosevelt’s actions to support Panama’s secession from Colombia,61
Woodrow Wilson’s interventions in Haiti and Mexico, and various
interventions in Nicaragua.62 As with Libya, these interventions were based

57. See Richard F. Grimmett, Cong. Research Serv., R41677, Instances of
Mem., supra note 10, at 7.
59. See id. The memorandum did discuss the proposed Haiti intervention in 1994
and the bombing of Serbia in 1999, which have important parallels to the Libya
intervention, but those recent events do not support the idea of “200 years” of “historical
gloss.” See id. at 6–11.
60. See David P. Currie, The Constitution in Congress: The Federalist
Period, 1789–1801, at 239–44 (1997); David P. Currie, The Constitution in Congress:
implications of the Tripoli events, see Ramsey, supra note 21, at 244–45.
61. See David McCullough, The Path Between the Seas: The Creation
of the Panama Canal, 1870–1914, at 361–86 (1977). In 1903, U.S. forces, without
congressional approval, intervened against the Colombian military to assure the success
of the independence movement in Panama (then part of Colombia). Louis Fisher,
Presidential War Power 59–60 (2d ed. rev. 2004). This action was undertaken to
secure a route for constructing the Panama Canal, not in response to an attack on the
United States or to protect American lives or property. Id.
loosely on U.S. national interests but did not involve rescues or responses to attacks.

These episodes carry more than a whiff of U.S. imperialism, making reliance on them possibly distasteful for the Obama Administration, and perhaps they are not sufficient to establish a specific custom supporting the Libya intervention in any event. Among other things, at least some of them were regarded in their time as exceeding the President’s constitutional power. The central point here, however, is that the 2011 OLC memorandum did not attempt to find reasonably close historical analogies, even though some may have been available.

Rather, the memorandum’s argument developed in a different manner. To it, the whole historical array of presidential uses of force—some concededly quite distinct factually and normatively from the Libya intervention—established a broader proposition that the President could use force abroad without congressional authorization. The memorandum then identified one limit on this power—the President’s unilateral use of force could not be a “‘war’ for constitutional purposes”—but concluded the Libya intervention was not a “war” in this sense because it shared some characteristics of prior unauthorized uses: it did not involve ground troops, it had a “limited mission,” and it did not “aim at the conquest or occupation of territory.”

The 2011 memorandum differs in this regard from OLC’s 1980 memorandum, which the 2011 memorandum cited. The 1980 memorandum described its inquiry specifically:

We have considered the President’s existing power to employ the armed forces in any of three distinct kinds of operations: (1) deployment abroad at some risk of engagement . . . ; (2) a military expedition to rescue the hostages or to retaliate against Iran if the hostages are harmed; (3) an attempt to repel an assault that threatens our vital interests in that region.

The memorandum then proceeded to analyze each question separately and specifically, with reference to prior practice that involved similar circumstances. “Operations of rescue and retaliation,” it continued, “have also been ordered by the President without congressional authorization even when they involved hostilities. Presidents have repeatedly employed troops abroad in defense of American lives and property.” The memorandum then listed nine separate instances of rescue and retaliation,

63. See Fisher, supra note 61, at 58–66; McCullough, supra note 61, at 381–83.
64. 2011 OLC Mem., supra note 10, at 13 (quoting Proposed Deployment of United States Armed Forces into Bosnia, supra note 53, at 332) (internal quotation marks omitted).
65. 1980 OLC Mem., supra note 56, at 185–86.
66. Id. at 187.
starting with “President Jefferson’s use of the Navy to suppress the Barbary pirates.”

Thus, unlike the 2011 memorandum, the 1980 memorandum attempted to establish that the same sorts of actions had been done without congressional authorization in the past.

Of course, one might simply say that the 2011 memorandum makes a poor case for support from custom. My point instead is that the 2011 memorandum and the 1980 memorandum reflect two different sorts of arguments. The 1980 memorandum is an argument from pure custom. It asserts that the actions the President was then contemplating (a rescue mission) were effectively identical in their material facts to prior actions taken by prior presidents without congressional approval (other rescue missions). It was in that sense that the memorandum invoked “constitutional practice over two centuries.”

The 1980 memorandum’s argument would be defeated if one could show that prior incidents actually presented normatively distinct circumstances from the situation the memorandum confronted.

As noted above, a similar argument could have been deployed in the 2011 memorandum, relying on the early twentieth-century interventions; whether it would have been persuasive is another matter, but the key point is that the 2011 memorandum did not make this argument. Instead, the 2011 memorandum is an argument for extending custom by attempting to abstract a general principle from prior practice and then apply the general principle to a new set of normatively distinct circumstances. For the 2011 memorandum, the significant point was that presidents historically had used military force without authorization in a variety of circumstances. The memorandum did not need to establish that these prior uses closely resembled the Libya intervention because that was not part of its argument. Its argument was that prior practice supported a general principle that the President could use low-level force without authorization and that Libya was an instance of low-level force.

Notably,

67. Id. As noted, the “Barbary pirates” episode is actually not a persuasive precedent on this point. See Ramsey, supra note 21, at 244–45.
68. 1980 OLC Mem., supra note 56, at 187.
69. See 2011 OLC Mem., supra note 10. One might argue that the 2011 memorandum was asserting that all (or most) of the historical instances were the same in their material facts as the Libya intervention. That assertion, though, would have been plainly incorrect: there are substantial normative differences between the Libya intervention and cases of the President using force unilaterally to respond to an attack, to rescue Americans, or to protect lives and property against disorder in a way that does not
the memorandum also used prior practice to establish a general principle limiting the President’s use of force: the idea of (1) engagement of ground forces and (2) broad, ambitious objectives. Although the memorandum did not spell out the source of this limit, the thinking presumably was that these general principles described prior situations in which authorization had been sought (that is, the full-scale wars in which the United States has been involved).

In sum, the 2011 memorandum is not an example of a poor argument from custom; it is simply not an example of an argument from pure custom. It is an example of common law reasoning to extend custom. It extracts a general principle from past practice and then finds the current situation to conform, not with past practice itself but with the general principle. To be sure, one could extract a narrower general principle from past practice, such as that the President can act without authorization in an emergency situation where lives and property are threatened. The existence of a narrower principle does not defeat a common law argument, however. As discussed, the essence of common law reasoning, at least as it is understood today, is a value choice among a variety of possible principles drawn from past practice. Once the 2011 memorandum is understood in this way, there is nothing faulty about its reasoning: it chooses a plausible principle and offers policy reasons why this principle is a good one (for example, that ground troops greatly escalate the need for authorization because of the difficulties of withdrawal once they are committed). One can disagree with where it draws the line, but that is a disagreement rooted in value judgment, not a disagreement rooted in logic or history. Put another way, unlike the 1980 memorandum, the 2011 memorandum, properly understood as a common law argument, cannot be defeated merely by showing that prior episodes were not materially equivalent to the present situation.

Nonetheless, the 2011 memorandum has a crucial weakness once it is understood as a common law argument. It cannot rely on consent. Some of its general language invokes consent, in the sense of the agreement of the political branches upon a particular division of war power. The history, the memorandum asserts, “reflects the two political branches’ practical understanding . . . of their respective roles” in a way that supports the memorandum’s ultimate conclusion.

That is not so. For there to be a shared “practical understanding,” the memorandum’s conclusion would have to follow inevitably, or at least

implicate the sovereign authority of the foreign nation. See Glennon, supra note 51, at 3–7. Thus, I think it is not plausible that the memorandum was making this assertion.

70. See STRAUSS, supra note 5, at 38; supra text accompanying notes 5–6.
uncontroversially, from the history. This is what the 1980 memorandum attempted to show with respect to rescues: the President had engaged in exactly this action in the past, and because it was not contested at the time, Congress (and the people) must have consented to it.\textsuperscript{72} So long as the President’s contemplated action in 1980 was equivalent, in terms of policy considerations, to past actions, then one can find a type of consent—or at least acquiescence—in the prior actions. That is the power of an argument from pure custom.

But the 2011 memorandum is not an argument from pure custom. It does not assert that the Libya intervention is essentially equivalent to prior presidential actions such that no reasonable normative judgment could distinguish them. Nothing in the memorandum makes that argument. By not making that argument, however, the 2011 memorandum must give up its claim to rest on consent. The fact that Congress and the people in the past may have assented to normatively \textit{different} unauthorized uses of force by the President does not mean they assented to uses such as the Libya intervention. To be sure, the 2011 memorandum finds \textit{plausible} common principles uniting the Libya intervention and prior uses of force. But the existence of plausible common principles does not show that other actors would necessarily choose those principles, as opposed to some other ones. As a result, the 2011 memorandum is an argument for constitutional evolution; it is not an argument from consent based on custom because it cannot be assumed that everyone had or would have consented to this particular evolution.

To repeat, that does not make the 2011 memorandum an illegitimate argument (although Part IV will argue that it is a problematic argument in several respects). It simply makes it a different kind of argument—one based on deploying common law reasoning to reach constitutional decisions. In other words, it appeals not to Felix Frankfurter, despite its invocation of Frankfurter’s celebrated concurrence,\textsuperscript{73} but to David Strauss.

\textsuperscript{72} I express no opinion on whether the 1980 memorandum succeeded in demonstrating this equivalence. Perhaps the scale of the proposed Iranian rescue, or the extent of foreign sovereign involvement in opposition, distinguished it from prior episodes. My point is that the 1980 memorandum saw itself as arguing from their equivalence.

\textsuperscript{73} See 2011 OLC Mem., \textit{supra} note 10, at 7.
B. Secondary Investor Liability Under Customary International Law

In various high-profile suits in U.S. court, principally under the Alien Tort Statute (ATS), multinational corporations have been sued for human rights violations committed abroad. Typically, although not uniformly, the human rights violations were committed by a foreign government, and the corporate defendant, through its business operations, allegedly aided and abetted the government’s action. Because the ATS authorizes suits “by an alien for a tort only, committed in violation of the law of nations,” a central question in these cases is whether international law recognizes secondary liability for business operations that have some indirect relationship to human rights violations by others (and if so, how close international law requires that relationship to be).

Supporters of business liability in these circumstances make two principal arguments. First, they argue that the post-World War II trials of Nazi war criminals established an international custom of secondary business liability. In several of these trials, defendants were businessmen who had collaborated with the Nazis—most famously, the suppliers of Zyklon B gas to concentration camps. Thus, there appears to be some direct practice of business liability for human rights abuses. Second, they argue that secondary liability for human rights violations, as a general proposition, has been established both by the Nazi-era trials and more recently by the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Typically these arguments are combined, but in the terms outlined above, they are distinct: the first of

76. 28 U.S.C. § 1350.
77. See Ramsey, supra note 13, at 275–83. An alternative argument not considered here is that federal common law might impose secondary liability even if international law does not. See Khulumani, 504 F.3d at 288 & n.5 (Hall, J., concurring). I am concerned here only with the question whether and to what extent international law contains a principle of secondary liability in the commercial context. In Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1669 (2013), the U.S. Supreme Court substantially limited ATS liability on the distinct ground that the ATS does not authorize suit for foreign conduct that does not “touch and concern” U.S. territory.
79. See Keitner, supra note 15, at 91–92 (relying heavily on the Zyklon B case to support secondary business liability).
80. See Khulumani, 504 F.3d at 270 (Katzmann, J., concurring); Keitner, supra note 15, at 90–96.
these arguments is, at least in part, an argument from pure custom; the second is an argument for extending custom.

Some Nazi-era trials did appear to contemplate that business activities could give rise to secondary criminal liability under international law. The most famous of these is the Zyklon B case, in which several business executives were convicted for selling Zyklon B gas to the Nazis, expressly for the purpose of using it for mass murder in the concentration camps. In another case, a banker was prosecuted for making loans to Nazi entities. Although he was acquitted, the tribunal did not wholly reject the proposition that business relations could give rise to international law liability; the acquittal turned on his lack of sufficient mental state or his lack of substantial contribution to the crimes (or both). Arguably, the decision stands for the proposition that indirect assistance to human rights violators can under some circumstances violate international law.

To the extent modern cases contain facts substantially parallel to these cases, an argument for liability could rest upon pure custom. It might have difficulties in proof. There are only a few such cases from the Nazi war crimes era, and they were not duplicated in any subsequent international prosecution, so one might conclude that they are too isolated to provide evidence of longstanding custom. Further, the most important of them, the Zyklon B case, contains extreme facts that are unlikely to be approximated in modern cases, and in the other principal case, the main defendant was acquitted. Nonetheless, these cases provide some basis for an argument from pure custom because they have the possibility of close parallels with at least some modern claims.

In contrast, invocation of the ICTY and ICTR cases requires a different sort of argument. I will focus on the ICTY, although the ICTR cases are similar, and there are also some similar cases from the Nuremberg era. The argument for corporate liability here emphasizes the fact that the

81. Trial of Bruno Tesch and Two Others (Zyklon B Case), *reprinted in* 1 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 93, 93–94, 102 (1947).


83. *See id.* at 622.

84. In particular, the principal defendant apparently participated with the Nazis in planning the specific use of the gas. *See* Ramsey, *supra* note 13, at 306–07 & n.150.


ICTY has recognized secondary liability under international law for human rights violations.\textsuperscript{87} If the ICTY decisions are evidence of custom—a point I assume here—then that shows (it is said) that secondary liability can attach for business operations as alleged in the ATS cases.\textsuperscript{88}

This argument skips an important step. The ICTY prosecutions did not involve business operations. Rather, they typically involved joint membership in paramilitary groups during the Yugoslavian civil war; human rights violations were committed by some members of the group with the assistance of others, and those giving assistance were successfully prosecuted on theories of secondary liability. For example, in the leading \textit{Furundžija} case, the defendant was part of a Croatian irregular military unit operating in Bosnia and was prosecuted for complicity in a rape committed by another member of the unit.\textsuperscript{89} Another prominent case, \textit{Vasiljević}, involved a paramilitary defendant who held prisoners at gunpoint and prevented their escape while other members of the group executed them.\textsuperscript{90}

The difficulty from the perspective of establishing custom for the ATS cases, however, is that ICTY prosecutions such as \textit{Furundžija} and \textit{Vasiljević} reflect very different circumstances and normative considerations from the ATS commercial liability cases. The ICTY cases address a fundamentally different question: they ask when one individual can become criminally liable for the misdeeds of another individual in the context of war (or a war-like situation) in which the individuals involved are acting as part of a criminal group or operation. Most of the key cases, including \textit{Furundžija} and \textit{Vasiljević}, involved individuals acting together in a joint paramilitary enterprise according to a common plan to violate international law, with the defendants acting as direct participants in the offenses and sharing the broader criminal intent of the group. That is not at all the same question as whether a commercial operation should be civilly liable for the misdeeds of a host government where it does business, although there is surely some overlap. In particular, in the commercial liability situation, it is usually not the case that the business and the host government are partners in a joint criminal enterprise, as in the ICTY cases (although that may sometimes be true). Reasonable people


\textsuperscript{88} See Keitner, supra note 15, at 90–96.

\textsuperscript{89} \textit{Furundžija}, Case No. IT-95-17/1-T, ¶¶ 2, 38.

may disagree as to the moral and practical implications of the contextual differences.91

Further, a fundamental question in the commercial liability cases is the extent to which investment in abusive host regimes should be encouraged or discouraged. Secondary commercial liability is controversial in part because of its uncertain effect on international economic development. The ATS claims appear likely to have a chilling effect on foreign commerce and investment in developing nations. At least in their broadest versions, they may require no more business wrongdoing than simply operating in nations whose governments commit known human rights abuses. Even if some further wrongdoing is required, it is hard to know in advance what acts would trigger liability or insulate a business operation from it. As a result, if secondary commercial liability becomes widely recognized, the perceived costs and risks of developing-world venture may rise and such investment may be substantially deterred.92 Of course, one response is that operations in nations with abusive regimes should be deterred as a means of undermining them or encouraging them to change their approach. But there is substantial debate over the best way to encourage abusive governments to reform, with various strategies being endorsed or enacted for various specific regimes. Among other things, one might wish to encourage (or at least not discourage) foreign investment in developing nations, even where the host government has a poor human rights record. On some theories of development, increases in national wealth reduce human rights abuses, and some theories of international relations hold that calibrated withholding of investment can improve an abusive environment.93

No parallel considerations exist with respect to the rogue paramilitaries at issue in cases like Vasiljević and Furundžija. Thus, one might readily believe that criminal secondary liability is appropriate in the context of paramilitary groups but not support an extension to civil liability for normal business relationships with abusive governments. As a result, ICTY-derived custom provides partial but not complete support for

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93. See Ramsey, supra note 13, at 316–17.
secondary business liability for human rights violations. ICTY practice may show that, as a matter of custom, secondary liability is sometimes appropriate. But it does not show that custom has embraced secondary liability in the context of business operations because that context was not at issue in the ICTY prosecutions and the situations are not normatively equivalent. An ICTY-based argument requires the additional step of concluding that secondary liability should be extended from the paramilitary war crimes context to the business context and from criminal to civil trials. Of course, many people think it should be extended. But that is a normative conclusion, not a result derived from custom.

In sum, there are two ways to use custom to argue for secondary corporate liability in the international human rights context. The first approach is to show that particular types of business involvement in rights violations have given rise to secondary international law liability in the past. The difficulty with this argument is its factual basis—there appear to be few such examples. But conceptually, it fits well with the idea of argument from pure custom. The second approach is to show that secondary liability for rights violations has been recognized in other contexts, principally by the ICTY and the ICTR, and argue for its extension to business liability. This second approach, however, is not an argument from pure custom because the contexts are potentially normatively distinct: it is plausible although not inevitable that a reasonable observer would find normatively significant differences. Like the arguments surveyed above, it relies on custom for part but not all of its propositions.94

IV. IMPLICATIONS

The foregoing Parts have presented what is intended as a descriptive assessment of arguments from custom. To restate, they argue for a fairly simple proposition: some arguments rest on pure custom (that is, the use of prior practices to generate law for normatively indistinguishable future practices); others involve extensions of custom (that is, the use of prior practices plus normative analogies to generate law for new situations). This Part turns to the implications of this distinction.

Whether this distinction matters depends substantially upon the source of authority on which a law is said to rest. As suggested at the outset, the distinction appears not to matter greatly in a common law regime because modern common law accepts a judge’s authority to make common law rules

94. For present purposes I express no opinion on whether either of these arguments is persuasive; I have argued elsewhere that they are not, see id. at 303–20, but nothing argued here depends on that conclusion.
for a new situation based on a combination of analogies to past practices and normative arguments for extensions.\textsuperscript{95}

For constitutional law, the implications are mixed because constitutional law is more conflicted as to the theoretical source of its legitimacy. Pure originalists might equally reject both versions of custom as generative of constitutional law (or at least as generative of law that overrides the original meaning of the Constitution’s text). Theorists such as David Strauss have argued for the legitimacy of common law reasoning in constitutional law and thus would accept the legitimacy of both.\textsuperscript{96} However, it is likely that there is a substantial middle ground that would accept pure custom as a basis of constitutional law but would not accept normative extensions of custom. Justice Frankfurter’s claim of historical gloss\textsuperscript{97} is a powerful one, especially within a system that also recognizes judicial precedent. Custom-based arguments can draw substantial authority from the twin ideas of past consensus as a form of consent and the expectations-based hesitation to deviate from settled practice.\textsuperscript{98} They may also seem more suited for the judicial role in a constitutional system because they do not involve judicial value judgments (aside from the acceptance of custom as law-generating).

It is important to recognize, however, that past consensus and expectations have full force only with respect to arguments from pure custom. Arguments for extension of custom cannot rest on consent or acquiescence because it cannot be established beyond mere speculation whether the past consensus, observable with respect to certain practices, would have extended to other normatively distinct practices if the question had presented itself.\textsuperscript{99} Similarly, expectations-based concerns are not implicated because there is no uniform expectation of how and whether the custom would be extended. Moreover, arguments for the extension of custom \textit{do} rely on situation-specific value judgments. As Strauss

\begin{footnotesize}
\begin{itemize}
\item[95.] See Strauss, supra note 5, at 38–39.
\item[96.] Id.
\item[97.] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).
\item[98.] See generally Bradley & Morrison, supra note 1 (assessing variations of this position).
\item[99.] This point is important because some extensions-of-custom arguments wrongly rely on past consensus and expectations. As discussed above, OLC’s defense of the Libya intervention makes this error: it invokes Justice Frankfurter’s use of custom as well as the idea that practice indicates a settled political branch agreement on the allocation of constitutional war powers. See supra Part III.A.
\end{itemize}
\end{footnotesize}
acknowledges, in common law constitutional analysis, the decision whether or not to extend a precedent is to a significant extent a policy decision. That raises the difficult issue of authority to override the Constitution’s text on the basis of contemporary value judgments.

In sum, there is a fundamental difference between Frankfurter’s pure custom and Strauss’s constitutional common law, based on the need in the latter but not the former for contested situation-specific value judgments. That is not to say that arguments for extensions of custom in constitutional law are illegitimate, but they require a different sort of theoretical justification than can be invoked for arguments for pure custom. The two should not be conflated.

The implications for international law are more fundamental, on at least two grounds. The first concerns the theoretical foundation of international law, while the second concerns its democratic legitimacy.

Customary international law traditionally grounds its legitimacy in consent.100 This of course was not always the case: in the eighteenth century and before, international law was frequently regarded as a form of natural law, deducible by reason.101 But the waning of natural law theories of obligation generally and specific doubts about international law associated most pointedly with the nineteenth-century writings of John Austin forced international law to seek an alternate foundation. Austin argued that international “law” was not truly law because it lacked, among other things, a supreme sovereign lawmaking power; its supposed obligations, therefore, represented only “[i]nternational [m]orality.”102 That was consistent with the broader nineteenth-century move from naturalism to positivism as a description of law; natural law came to be seen more as an expression of morality, debatable and lacking authoritative expression—

100. See, e.g., sources cited supra note 8. International law’s reliance on consent has been criticized. See, e.g., Guzman, supra note 8, at 790 (arguing that “[t]he overcommitment to state control over events creates a suffocating status quo bias that does more harm than good” and proposing that “from where we are today, it is imperative that we move toward a system in which there is more rather than less nonconsensual rule-making”). It may also be overstated: particularly after World War II, important aspects of international law emerged—especially in the human rights field—that may owe more to naturalist than positivist bases. See Bederman, supra note 8, at 8–10; MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 8–9 & n.41 (2008) (arguing that “international law scholars have never wholly rejected natural law theory” and that “there is much about international law that transcends the material, positive acts such as consent”). As noted elsewhere, to the extent international law does not rely on consent or some related version of state practices, it does not depend on custom and thus is outside the scope of this Article (but it also is subject to greater uncertainty as to its legitimacy).


in contrast to sovereign rules (often written rules) that formed the basis of “real” law.\textsuperscript{103}

International law’s response was to emphasize sovereign consent. Eighteenth-century writing had acknowledged sovereign consent as a basis for international law but generally regarded it as less important than natural law bases.\textsuperscript{104} Under pressure from Austin and others, consent came to the forefront because it offered a partial response. Austin overreached in thinking that there had to be a single sovereign lawmaker: law could be created by agreement, including implicit agreement; rules for sovereigns could be created by sovereign consent; and implicit agreement could be shown from sovereigns’ customary practices. Austin’s charge that international law lacked a sovereign lawmaker was answered by saying that it was made by all sovereigns collectively; his charge that it had no existence beyond the particular version of morality espoused by any given interpreter was answered by saying that it could be found not in contested conceptions of right and wrong but in the (factual) longstanding practices of nations. Thus, what was called the “law of nations” in the eighteenth century became “customary international law” in the nineteenth century.\textsuperscript{105}

Pure custom, however, has drawbacks as a basis of law among nations. It is hard to generalize and hard to apply to new circumstances or new issues. Strict adherence to it as a basis for law is likely to lead to the conclusion that large areas of international relations are not governed by international law at all because no conclusive custom can be identified.\textsuperscript{106} As a result, there is pressure to adopt what this Article has called arguments for extension of custom. If international courts and international lawyers can use analogies and appeals to abstract principles to generate rules, international law’s coverage will be more complete and more able to provide answers to new issues. Thus, particularly in the twentieth century and continuing to the modern era, this form of argumentation

\begin{itemize}
  \item \textsuperscript{103} Bederman, supra note 8, at 5–8
  \item \textsuperscript{104} See, e.g., Vattel, supra note 39, at 75–76, 77–78.
  \item \textsuperscript{105} See David J. Bederman, Customary International Law in the Supreme Court, 1861–1900, in \textit{International Law in the U.S. Supreme Court: Continuity and Change} 89, 91–112 (2011). This summary oversimplifies a number of points not relevant to the present discussion, including the question whether consent had to come from all nations or merely from an overwhelming number. As elsewhere, I use consent to potentially include acquiescence and without addressing what is necessary to manifest consent.
\end{itemize}
has become increasingly common. Though it retains the title “customary international law,” it is something more than “a general and consistent practice of states followed by them [out of] a sense of legal obligation.” Instead, in this way international law acquires attributes of common law, akin to the constitutional common law prescribed by David Strauss. International lawyers, commentators, and judges use their own situation-specific value judgments to fill in the considerable gaps in pure custom.

The difficulty is that, unlike arguments from pure custom, this type of “customary” law cannot rest on sovereign consent. When a rule is said to arise from an extension of custom, rather than from custom itself, we do not know whether sovereigns generally would consent to that extension. As discussed above, these situations involve contested value judgments external to the general idea of binding custom. And because they are contested, any suggestion that the consensus of sovereigns would support the intuition of any particular decisionmaker in any particular situation is no more than speculation. But if “international common law” does not rest on sovereign consent, it needs a different response to Austin’s challenge, and it is not clear what that response can be. As a result, the distinction between arguments from pure custom and arguments for extension of custom is critical to the theoretical viability of international law claims.

The distinction is important to international law’s legitimacy in another respect. A practical criticism of customary international law is that it

109. For a discussion of this point in the context of secondary corporate liability, see Ramsey, supra note 13, at 314 (footnote omitted):
If the question is what nations have tacitly adopted through their conduct with respect to indirect investor liability, the only sound approach is to investigate what nations have actually done with respect to investor liability. Other approaches are mere speculation as to what rule nations might adopt. To be sure, if we can establish what nations have done (and thus tacitly agreed to do) with respect to individuals’ responsibility for war crimes of other associated individuals . . . we can speculate that nations might think (a) that generally applicable principles could be derived from that practice; and (b) that those abstract principles would apply to investor liability in a particular way. But until we see nations actually apply these principles, we can make no more than a guess.

As noted, arguments for extending custom are wholly legitimate as proposals for creation of new law. If accepted by states, they can become custom. But in themselves they are not custom until actually followed.
110. To be clear, my argument here is not that international law claims not directly based on custom are illegitimate—only that establishing their legitimacy is more difficult and in any event cannot rely on state practice and consent.
unclear why a particular society—especially a society based on democratic values—should follow it. It arises outside of the society, without assurance that it reflects the society’s values. For a democratic society such as the United States, that concern is compounded by the lack of democracy at the international level. Many countries that participate in the formation of international law are not internally democratic. Most persons and entities that participate in expounding international law, in organizations such as the United Nations, international courts, and international legal elites, are not democratically accountable—certainly not to the people of the United States and generally not to any popular body. As a result, it is said, we should have very serious reservations about the content of international law.111

A response to these objections is that if international law arises from sovereign consent, then it depends on the consent of the United States, usually through the actions of the democratically accountable President. It also depends on the consent of other democratic societies that generally share U.S. values. Thus, the traditional account of international law provides substantial assurance that international law will not diverge too greatly from democratic values or from the values of any of the societies—the United States included—that participate in its formation. International law will be a common way of solving common problems,112 but by definition cannot be too great a threat to any society’s sovereignty or values. Customary international law is in this respect much like the other core source of international law: treaties. Like customary international law, treaties are sometimes criticized as threats to sovereignty and democracy, but that critique lacks compelling foundation. Any treaty rule that binds the United States does so because of decisions of democratically accountable U.S. actors and thus has as much claim to

111. *E.g.*, John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 Notre Dame L. Rev. 1739, 1741 (2009) ("International law is often enacted through the influence of nondemocratic governments and unaccountable, unrepresentative elites from democratic states. Even the assent of democratic governments to international human rights norms is often ‘cheap talk,’ because that assent does not reflect a willingness to have these norms directly enforced. . . . One of the key structural problems is that the institutions interpreting such norms are not democratic, but bureaucratic and oligarchic and, thus, often hostile to basic economic and personal liberties."); *see also* John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 Stan. L. Rev. 1175, 1193–1223 (2007) (discussing international law’s “democracy deficit”).

reflecting social values as ordinary legislation. Customary international law, though somewhat more opaque and contested than treaties, should be able to offer similar assurances.

That is true, however, only to the extent that customary international law rests on sovereign consent. And as this Article has argued, there are two forms of customary arguments, only one of which actually rests on sovereign consent. International law that rests on extensions of custom does not depend on sovereign consent and so lacks these assurances. Thus, the democracy critique has much greater force applied to arguments for extension of custom.

In sum, international law’s custom-based response to Austin’s critique works only to the extent international law arguments are based on pure custom. To be sure, that observation does not necessarily render international law based on extensions of custom illegitimate. But the latter should be understood as international common law, not—despite its name—customary international law. And substantial legitimacy issues remain for it to address.

V. CONCLUSION

This Article argues that we should recognize two types of custom-based legal arguments. The first, which I have called “pure custom,” depends only on a showing that certain practices have been adopted in the past and a general normative conclusion that past practices can generate legal rules for equivalent present circumstances. The emphasis here is that the past practices involve circumstances that are not normatively distinct—or rather, are not arguably normative distinct—from the present circumstances. The argument may involve contested views of historical facts and contested views of whether, in general, past practice should have such legal force, but it does not require the decisionmaker to undertake specific value judgments. The second type of argument, which I have called “extensions of custom,” involves the additional contention that practices established for one set of circumstances should be extended to a different set. That question, in contrast, necessarily involves a value judgment by the decisionmaker. Thus, although it rests in part on custom, it does not proceed from custom alone. It is, rather, a form of common law lawmaking.

This Article’s purpose is principally descriptive, but several conclusions seem to follow from it. The first is that the two types of arguments—often conflated in the description “arguments from custom”—should be assessed separately. That is so because normative arguments available to support one type of argument are not available to support the other. Arguments from pure custom may rest on claims of consent and settled
expectations; arguments for the extension of custom cannot. Because arguments for the extension of custom involve situation-specific value judgments, one cannot be confident that prior decisionmakers, when establishing the custom, would have endorsed its extension to other arguably distinct circumstances. Nor can one be confident that settled expectations would anticipate an extension. Rhetorically it may be useful to conflate the two arguments to give the second the benefits of the first, but that move should not be persuasive once we are attentive to the distinctions between them.

A second and related conclusion is that custom alone has a much narrower scope than may often be imagined. Many claims that rhetorically proceed as customary arguments in fact combine custom with external value judgments in the nature of modern common law. As this Article explains, arguments from pure custom can succeed only where there is no plausible normative difference between the past practice and the current circumstances. But that condition may be relatively rare, especially in areas of rapid development or substantial controversy. Arguments from pure custom are not often useful in providing legal solutions to new problems.

A third implication is that arguments for extensions of custom have a firmer normative grounding in constitutional law than in international law. David Strauss’s recent work caps a line of scholarship developing the theoretical legitimacy of constitutional common law—in effect a system built on arguments for extensions of custom. In contrast, international law tends to remain rhetorically and theoretically linked to the idea of pure custom, resting as it does on sovereign consent. Although international law may in practice be adopting a common law-like system in many respects, that system as yet lacks widely accepted theoretical and practical justification. Recognizing the difference between arguments from pure custom and arguments from extensions of custom will help to separate international law arguments with firm theoretical grounding from those whose status may be more in doubt.