

## FEDERAL COURTS, PRACTICE & PROCEDURE

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### RE-EXAMINING CUSTOMARY INTERNATIONAL LAW AND THE FEDERAL COURTS: AN INTRODUCTION

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Legal scholars have debated intensely the role of customary international law in the American federal system. The debate involves serious questions surrounding the United States's constitutional structure, foreign relations, and human rights. Despite an impressive body of scholarship, the debate has stood at an impasse in recent years, without either side garnering a consensus. This symposium—*Re-examining Customary International Law and the Federal Courts*—aspires to help advance the debate over the status of customary international law in the federal courts.

The symposium received thoughtful and constructive contributions from Professors Curtis A. Bradley, Bradford R. Clark, Andrew Kent, Carlos M. Vázquez, and Ingrid Wuerth. The authors presented early versions of their papers at the annual meeting of the Federal Courts Section of the American Association of Law Schools in New Orleans, Louisiana on January 7, 2010. The papers address the general status of customary international law in the federal system and, more specifically, the scope and effect of the Alien Tort Statute (ATS), which confers jurisdiction upon federal courts to hear an important category of cases involving customary international law.

#### I. THE DEBATE OVER CUSTOMARY INTERNATIONAL LAW

For over a decade, two diametrically opposed positions have dominated debate over the role of customary international law in the fed-

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eral system.<sup>1</sup> The so-called “modern” position holds that national and state courts should enforce customary international law as supreme federal law regardless of whether the political branches (Congress and the President) have adopted it through constitutional lawmaking processes.<sup>2</sup> Adherents of this position contend that courts should recognize customary international law as a form of federal common law, preemptive of state law and sufficient to establish federal “arising under” jurisdiction in Article III courts.<sup>3</sup> The “revisionist” position, by contrast, holds that customary international law is supreme federal law only to the extent that the political branches have properly incorporated it; otherwise, it may operate as state law if a state has incorporated it.<sup>4</sup> Some scholars reject both the modern and revisionist positions in favor of a third approach: that courts should treat customary international law not as state or federal law, but as a source of nonbinding transnational law.<sup>5</sup>

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1 The following summary of this debate is taken in substance from Anthony J. Bellia Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 1–5 (2009).

2 See, e.g., Lea Brilmayer, *Federalism, State Authority, and the Preemptive Power of International Law*, 1994 SUP. CT. REV. 295, 295; Ryan Goodman & Derek P. Jinks, *Filartiga’s Firm Footing: International Human Rights and Federal Common Law*, 66 FORDHAM L. REV. 463, 472 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1825 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371–72 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 393–94 (1997).

3 See *Filartiga v. Pena-Irala*, 630 F.2d 876, 886–87 (2d Cir. 1980) (stating that “[t]he law of nations forms an integral part of the common law, and . . . became a part of the common law of the United States upon the adoption of the Constitution” and that “[f]ederal jurisdiction over cases involving international law is clear” (emphasis omitted)). Proponents of the modern position argue that customary international law qualifies as “Law[ ] of the United States” for purposes of the Supremacy and Arising Under Clauses. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–60 (1984).

4 See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 870 (1997); see also Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 670–73 (1986) (“[C]ustomary international law has not traditionally been applied by American courts, nor should it be.”).

5 See MICHAEL D. RAMSEY, *THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS* 342–61 (2007) (recognizing that the law of nations is enforceable in federal courts as a rule of decision if it “does not displace otherwise-constitutional state or federal law”); Ernest A. Young, *Sorting Out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 369–70 (2002) (arguing customary international law is neither state nor federal law, but “general” law that “would remain available for both state and federal courts to apply in appropriate cases as determined by traditional principles of the conflict of laws”); see also Arthur M. Weisburd, *The Executive Branch and International Law*, 41

Professor Bradford Clark and I have summarized the fundamental tension between the modern and revisionist positions:

Critics of the modern position maintain that it is in tension with basic notions of American representative democracy because when a federal court applies customary international law as federal common law, it is not applying law generated by U.S. lawmaking processes. These critics contend that the modern position disregards the historical reality that before the Supreme Court decided *Erie Railroad Co. v. Tompkins* in 1938, customary international law was not regarded as federal law, but as a species of nonpreemptive “general law.” *Erie*, they say, banished general law from federal courts and established that state law applies except in matters governed by the Federal Constitution or by Acts of Congress.

In response, critics of the revisionist position argue that it fails to account for the Constitution’s assignment of foreign relations authority to the federal government rather than the states. In their view, the revisionist position contravenes the Constitution’s basic allocation of foreign affairs power by allowing states to determine the force and effect of customary international law. In addition, they contend that the revisionist position disregards a long line of statements, stretching back to the founding, by federal judges and public officials that the customary law of nations—today known as “customary international law”—is “part of the law of the land.” The critics argue that these public actors necessarily understood the law of nations to be preemptive of state law (and perhaps even federal statutes) as well as sufficient to generate Article III arising under jurisdiction. In light of the vast gap between these competing claims and critiques, the debate over the role of customary international law in the American federal system has reached something of a stalemate.<sup>6</sup>

Professor Clark and I recently have argued that the law of nations has occupied a different place in the American constitutional system than adherents of the modern and revisionist positions have recognized.<sup>7</sup> After the Constitution was ratified, judges and other public officials debated a similar question to the one that dominates debates over customary international law today: whether federal courts have

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VAND. L. REV. 1205, 1251 (1988) (contending American courts cannot force the President to comply with international law); A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 48–49 (1995) (analogizing customary international law to “the law of a foreign country,” only applicable in “American courts in appropriate cases”).

6 Bellia & Clark, *supra* note 1, at 4–5 (internal quotation marks and citations omitted).

7 See generally *id.* at 1–93.

power under Article III to adopt the law of nations—a species of general law—as part of a common law of the United States. Ultimately, public debate moved past this question. After the Supreme Court decided in 1812 that the constitutional structure precludes courts from unilaterally recognizing and applying a federal municipal common law of crimes, the Court came to enforce certain principles of the law of nations as a means of implementing the Constitution’s allocation of foreign relations powers to the federal political branches. At the Founding, if one nation violated another’s “perfect rights” under the law of nations, the offended nation had just cause to retaliate through war. In the first decades following ratification, the Court respected perfect rights of foreign sovereigns to ensure that any decision to commit the United States to war would rest with the political branches, not with the judiciary or the states. In recovering this lost context, Professor Clark and I identified an approach grounded in the Constitution’s allocation of powers that explains how important aspects of the law of nations have interacted with the federal system in significant cases throughout American history. This approach helps alleviate the apparent tension between the Constitution’s allocation of foreign relations powers to the federal government (emphasized by proponents of the modern position) and the Constitution’s required lawmaking procedures (stressed by proponents of the revisionist position).

That said, Professor Clark and I did not attempt to work out all the implications of our analysis for present-day interactions between customary international law and the federal system. In the twentieth century, customary international law underwent a transformation, recognizing violations—especially by a nation against its own citizens—that were unknown for most of U.S. history. Moreover, under customary international law today, violations generally do not give an offended nation just cause for war. Finally, in *Erie Railroad v. Tompkins*,<sup>8</sup> the Supreme Court came to reject the idea of general law, generating confusion about the status of customary international law in federal and state courts. These developments (and others) pose challenges for applying historical practice to contemporary interactions between customary international law and the federal system.

Three articles from this symposium seek to advance the debate over the role of customary international law in the federal system. In *The Political Branches and the Law of Nations*, Professor Clark and I discuss the power of the political branches to depart from the law of nations. We explain that the Supreme Court has long assumed,

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8 304 U.S. 64 (1938).

expressly and implicitly, that the Constitution grants Congress and the President—in some combination—discretion to depart from the law of nations in the exercise of their assigned powers. Although we do not attempt to provide a full account of the respective powers of the political branches to depart from the law of nations, we offer a separation of powers rationale for why the Court has sometimes limited executive power according to the law of nations while leaving Congress free to depart from such law.

In *The Constitution and the Laws of War During the Civil War*, Professor Andrew Kent examines Supreme Court decisions involving the laws of war during the Civil War era. He attempts to recover forgotten rules and theories surrounding the relationship between the Constitution and the laws of war. He details how certain theories rose to prominence in public debate during the Civil War era—and ultimately to acceptance by the three branches of the U.S. government. Professor Kent describes tensions between these materials and present-day Supreme Court practice.

Finally, in an article that was originally presented at this symposium but that will be published in Volume 86, Issue 4 of the *Notre Dame Law Review—Customary International Law as U.S. Law: A Critique of the Intermediate Positions and Defense of the Modern Position*—Professor Carlos Vázquez provides a systematic critique of the customary international law debate, concluding that the modern position is more consistent with the constitutional structure, original meaning, and pre- and post-*Erie* judicial practice than the revisionist position. In so doing, Professor Vázquez generally endorses the allocation of powers approach that Professor Clark and I have advanced, but argues that we have not gone far enough in recognizing the substantial support that it provides for the modern position.

## II. THE ALIEN TORT STATUTE AND CUSTOMARY INTERNATIONAL LAW

The ATS is one mechanism through which customary international law has provided rules of decision in federal courts. Accordingly, this symposium's re-examination of customary international law and the federal courts appropriately includes analyses of the scope and operation of this important statute.

The ATS, as originally enacted in 1789, provided “[t]hat the district courts . . . shall . . . have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of

nations or a treaty of the United States.”<sup>9</sup> The statute was rarely invoked for almost two centuries. In 1980, lower federal courts began using the ATS to allow foreign citizens to sue U.S. or other foreign citizens for violations of modern customary international law.<sup>10</sup> Courts and commentators have struggled to interpret the ATS in light of changes in the scope and content of customary international law. In 2004, in *Sosa v. Alvarez-Machain*,<sup>11</sup> the Supreme Court interpreted the statute to leave the door “open to a narrow class of international norms today,”<sup>12</sup> stressing the need for “judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute.”<sup>13</sup> According to the Court, “federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted.”<sup>14</sup>

Several questions regarding the scope and effect of the ATS remain after *Sosa*. One involves the state action requirement under international law. Several ATS plaintiffs have brought suit against private corporations alleged to have participated in government abuses. In *State Action and Corporate Human Rights Liability*, Professor Curtis Bradley examines the state action requirement as a potential obstacle to such suits. He argues that federal courts should not apply state action doctrine developed under 42 U.S.C. § 1983, a domestic civil rights statute, to ATS cases. Moreover, he contends that § 1983 jurisprudence, even if applied, does not support corporate aiding and abetting liability in ATS cases.

Lower courts also have struggled after *Sosa* with the extent of secondary liability, the availability of punitive damages, and the necessity of exhaustion, among other issues, in ATS cases. Under a binary approach, international law would govern some of these issues and federal common law would govern others. In *The Alien Tort Statute and Federal Common Law: A New Approach*, Professor Ingrid Wuerth argues that courts should reject a binary approach and instead understand federal common law to apply to all such aspects of ATS litiga-

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9 Act of Sept. 24, 1789, § 9, 1 Stat. 73, 76–77.

10 See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

11 542 U.S. 692 (2004).

12 *Id.* at 729.

13 *Id.* at 725.

14 *Id.* at 732. According to the Court, these paradigms consisted of “torts corresponding to Blackstone’s three primary offenses [against the law of nations]: violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 724; see 4 WILLIAM BLACKSTONE, COMMENTARIES \*68–73.

tion, including the substantive standard of liability. Under her approach, some ATS issues would be governed by federal common law that is closely tied to international law, while other issues would be governed by federal common law divorced from international law. Professor Wuerth contends that by understanding some form of federal common law to govern all such issues, courts would avoid difficult choice of law questions, more effectively implement international norms, and better fulfill congressional intent.

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I am grateful to all participants in this symposium for their thoughtful contributions and constructive efforts to advance the debate over the place of customary international law in the American federal system.

