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THE BEDERMAN LECTURE ON LAW AND JURISPRUDENCE

PUBLIC LAW AND CUSTOM

David J. Bederman^{*}

Law professors love puzzles. Give us a legal doctrine that does not make sense, or appears counterintuitive, or does not appear to comport with some methodological assumption, and we can spend months (if not years) plumbing its depths and producing reams of paper in exploring its contours. The good news today is that my exegesis shall be limited to the length of this lecture. Let me first set out the character of the puzzle and see if I cannot solve it in the time allotted.

I. THE PUZZLE

Today's puzzle can be simply stated: can public law rules be made or modified by custom?

At the outset, let us define some terms. By "custom," I mean legal rules which are "unofficial" and "unenacted" inasmuch as they do not receive their sanction from a statute adopted by a duly constituted legislature or from a decision handed down by a judge of a court of competent jurisdiction. Custom is simply the practices and usages of distinctive communities. One peculiarity of the modern law school curriculum is that we do not give much reflection to the sources of law in contemporary legal culture, and law students reflexively assume that all law must be derived from a legislature passing statutes or judges deciding cases. In short, we implicitly train law students from virtually their very first day of studies that law is a top-down social construct, consistent with John Austin's vision of authoritative commands.¹ Custom, by contrast, is

^{*} K.H. Gyr Professor in Private International Law, Emory University. This text is adapted from the author's lecture on the same subject, held on September 26, 2011, as the inaugural Bederman Lecture on Law and Jurisprudence. The author thanks all those whose generous support made this ongoing lecture series possible (along with a traveling fellowship for Emory Law students to attend the Hague Academy of International Law). The material presented in this lecture is drawn from the author's *Custom as a Source of Law*.

¹ See 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 536 (Robert Campbell ed., London, John Murray 5th ed. 1885); JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 30, 163–64 (Isaiah Berlin et al. eds., Weidenfeld & Nicolson 1954) (1832).

a bottom-up dynamic, where legal rules are being made by the actual participants in the relevant legal community.

“Public law” is the domain of legal relations dictated by the state. It stands in contrast with what we call “private law,” the ordering of affairs between individuals in contract, tort, and property—the bedrock of the first-year law school curriculum. The core of public law is often viewed as administrative, criminal, and constitutional law. But the boundaries between public and private law are increasingly being blurred. As the terms of more and more private relations are being dictated by government action—say, a statute that imposes a limit on how much interest can be charged on a loan or a regulatory scheme that governs communications between banks and individual credit-card holders—the domain of purely private law may be shrinking. I doubt that proposition, but that is an issue for another day—and another lecture. In any event, public law norms are those sets of rules at the heart of any polity. And while not all public law norms are “rule[s] of recognition,” in the sense that the eminent legal scholar H.L.A. Hart employed,² the dictates of public law would seem to have a higher stature—or, at a minimum, a different character—than those of private law relationships between individuals.

Many prominent legal theorists have asserted that even if custom should be recognized as a source of legal obligation, there are limits to its domain, and one of these is that customary norms cannot remake public law. James Coolidge Carter³ and T.F.T. Plucknett⁴ both contended that custom cannot change public law. Plucknett’s assertion was made as part of his great survey of the English common law; Carter’s discussion was in relation to what he viewed as an ideal legal system. So, the notion that custom can have no effect on public law rules has been stated as both a matter of description in legal history and a preferred norm in the design of legal systems. There are many skeptics of custom as a source of law. Within this group, most are adamant that public law is just too important to be influenced by customary lawmaking processes.

Both the descriptive and normative claims of those that would refute a role for custom in public law are quite wrong, and the goal of this lecture is to tell you why and how. Indeed, I will accomplish this jurisprudential feat without

² H.L.A. HART, *THE CONCEPT OF LAW* 100–10 (2d ed. 1994).

³ See JAMES COOLIDGE CARTER, *LAW: ITS ORIGIN GROWTH AND FUNCTION* 120–21 (1907).

⁴ See THEODORE F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 307–13 (Little, Brown & Co. 5th ed. 1956) (1929).

reference at all to the role of custom in public international law—that set of norms governing behavior between actors in the international community. And while it might be strange for an academic whose primary area of study is international law to preclude examples from his chosen field, for the purposes of today’s lecture, I am content with confining my proofs to examples drawn from domestic law. Indeed, to use international law to make my case that custom can create public law is a bit like shooting fish in a barrel. Legal lectures ought to have some creative tension; there should be some uncertainty as to whether the speaker can really be held to his proofs and make his case. Doubt me, and let me persuade you.

Public law rules have historically been made and modified by custom. This is nothing new. But, just as significantly, I would argue here that significant advantages accrue for those legal systems that allow public law norms to mutate in response to the needs of their polities, irrespective of the constitutional or administrative impediments to their creation. In other words, bottom-up lawmaking for public norms—based on the consistent experience and acquiescence of participants in that legal system—is an appropriate mechanism for change. To explore these propositions, I will look at doctrinal examples drawn from sources as varied as the common law of property in Oregon, family law in South Africa, and separation-of-powers principles in United States constitutional law.

II. OREGON, BEACH ACCESS, AND PROPERTY RIGHTS

In the United States, there is a constitutionally entrenched guarantee to property rights.⁵ A key question for “takings” jurisprudence—a public law doctrine rooted in our constitutional law—is whether an essential property right has been confiscated by the government or regulated in such a way as to deny the property owner all use of his property. As the U.S. Supreme Court observed in the 1992 landmark decision of *Lucas v. South Carolina Coastal Council*:

Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title

⁵ See U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

to begin with. . . . [A state] must identify background principles of nuisance and property law that prohibit the [landowner's] uses⁶

So here we have the nub of the problem: does a public easement, created by custom of (assumptively) long-standing character, but only first recognized by a court much more recently, become part of the state's "background principles of . . . property law"? If the custom has merged with those principles, a property owner never had the right to build on her land in a way that interfered with the public's rights. In short, the state took nothing when it regulated consistent with the custom. But if the custom only adheres at the time it is first positively recognized in the public law—through a judicial precedent or statute—then the owner's right to build had vested, and she should be entitled to just compensation if the state purports to later bar improvement of her property.

Courts in Oregon have radically transformed the English common law doctrine of local custom in property. That doctrine, as best exemplified in William Blackstone's *Commentaries on the Laws of England*, allowed for the imposition of an inchoate servitude on land within a particular locality upon proof of an exacting set of conditions.⁷ This customary servitude was announced for the first time in Oregon law in the 1969 decision of *State ex rel. Thornton v. Hay*.⁸ The Oregon Supreme Court, in delocalizing customary easements and applying them to *all* beaches in the state, was obliged to reformulate Blackstone's doctrinal elements, particularly to overcome the limiting factors of antiquity, certainty, and reasonableness.⁹ That court offered this paean to custom:

⁶ 505 U.S. 1003, 1027, 1031 (1992). I should disclose that I served as counsel to David Lucas in the Supreme Court, as well as to Jeanette Stevens in the *Cannon Beach* case, discussed below. *See infra* notes 13–23 and accompanying text.

⁷ *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *74–78.

⁸ 462 P.2d 671, 676 (Or. 1969) ("Because many elements of prescription are present in this case, the state has relied upon the doctrine in support of the decree below. We believe, however, that there is a better legal basis for affirming the decree. The most cogent basis for the decision in this case is the English doctrine of custom. Strictly construed, prescription applies only to the specific tract of land before the court, and doubtful prescription cases could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region. Ocean-front lands from the northern to the southern border of the state ought to be treated uniformly.")

⁹ *See id.* at 678 n.6 ("The English law on customary rights grew up in a small island nation at a time when most inhabitants lived and died without traveling more than a day's walk from their birthplace. Most of the customary rights recorded in English cases are local in scope. The English had many cultural and language groups which eventually merged into a nation. After these groups developed their own unique customs, the unified nation recognized some of them as law. Some American scholars, looking at the vast geography of this continent and the freshness of its civilization, have concluded that there is no need to look to English

Because so much of our law is the product of legislation, we sometimes lose sight of the importance of custom as a source of law in our society. It seems particularly appropriate in the case at bar to look to an ancient and accepted custom in this state as the source of a rule of law. The rule in this case, based upon custom, is salutary in confirming a public right, and at the same time it takes from no man anything which he has had a legitimate reason to regard as exclusively his.¹⁰

It was inevitable that Oregon's custom of public beach access would be challenged as an unconstitutional "judicial taking," an unexpected pronouncement of a rule of property law that had been hitherto unknown in the jurisdiction.¹¹ Oregon courts deflected that assertion. In *McDonald v. Halvorson*, the Oregon Court of Appeals considered such an argument and simply ruled:

In *Thornton*, the Supreme Court merely confirmed the public's right of use in the "dry-sand area" of Oregon's beach land, which the public has always assumed to be a part of the public beach. Although the "dry-sand area" belongs to the property owners, it has always been subject to the public's recreational easement. . . .

. . . State law is the source of the sticks that constitute a property owner's bundle of rights. . . . Thus, the court in *Thornton* merely declared a right of use which the public always had Defendants have no protected property interest in the public's easement over the "dry-sand area," and therefore there can be no "taking."¹²

In subsequent cases, culminating in *Stevens v. City of Cannon Beach*,¹³ this logic was repeated: *Thornton* merely declared a preexisting custom, there was no change in Oregon property law, and no taking was effected. *Thornton* was only "an expression of state law that the purportedly taken property interest

customary rights as a source of legal rights in this country. Some of the generalizations drawn by the text writers from English cases would tend to limit customary rights to specific usages in English towns and villages. But it does not follow that a custom, established in fact, cannot have regional application and be enjoyed by a larger public than the inhabitants of a single village." (citations omitted).

¹⁰ *Id.* at 678.

¹¹ For more on the notion of judicial takings, see Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990). For U.S. Supreme Court cases considering the issue, see *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010); *Hughes v. Washington*, 389 U.S. 290, 296–98 (1967) (Stewart, J., concurring); and *Muhlker v. New York & Harlem R.R.*, 197 U.S. 544 (1905).

¹² 760 P.2d 263, 268–70 (Or. Ct. App. 1988) (footnote omitted), *rev'd in banc on other grounds*, 780 P.2d 714 (Or. 1989).

¹³ 835 P.2d 940 (Or. Ct. App. 1992), *aff'd in banc*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

was not part of plaintiffs' estate to begin with. Accordingly, there was no taking within the meaning of the Oregon or United States Constitutions."¹⁴

The Oregon Supreme Court put an even finer point on this rejection of judicial takings in *Stevens*. It did not matter, the court said, that the landowners had acquired their property before the decision in *Thornton* was handed down; "[r]ather, the question is when, under *Thornton's* reasoning, *the public rights came into being*. The answer is that they came into being long before plaintiffs acquired any interests in their land."¹⁵ The Oregon Supreme Court then used the language of the decision of the U.S. Supreme Court in *Lucas* and noted that "*Thornton* merely enunciated one of Oregon's 'background principles of . . . the law of property.'"¹⁶ The custom declared in *Thornton* was not, according to the *Stevens* court, an unconstitutional judicial taking because the custom was not, again in the words of *Lucas*, "newly legislated or decreed," but rather "inhere[d] in the title itself, in the restrictions that background principles of the State's law of property and nuisance already placed upon land ownership."¹⁷

Despite the takings concerns implicated in the Oregon Supreme Court's decision, the U.S. Supreme Court denied certiorari in the *Stevens* case.¹⁸ Justice Scalia (joined by Justice O'Connor) penned a vigorous dissent from the denial of review, concluding that "[t]o say that this case raises a serious Fifth Amendment takings issue is an understatement."¹⁹ Justice Scalia began his analysis with a review of Oregon custom jurisprudence after *Thornton* and was forced to conclude that Oregon's "new-found 'doctrine of custom' is a fiction."²⁰ "[T]he Supreme Court of Oregon's vacillations on the scope of the doctrine of custom," he wrote, "reinforce a sense that the court is creating the doctrine rather than describing it."²¹ The dissent noted:

¹⁴ *Id.* at 942.

¹⁵ *Stevens*, 854 P.2d at 452 n.9.

¹⁶ *Id.* at 456 (alteration in original) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)).

¹⁷ *Id.* (quoting *Lucas*, 505 U.S. at 1029) (internal quotation marks omitted). For more on *Stevens's* possible impact on *Lucas*, see Melody F. Havey, Note, *Stevens v. City of Cannon Beach: Does Oregon's Doctrine of Custom Find a Way Around Lucas?*, 1 OCEAN & COASTAL L.J. 109, 121 (1994); and Peter C. Meier, Note, *Stevens v. City of Cannon Beach: Taking Takings into the Post-Lucas Era*, 22 ECOLOGY L.Q. 413 (1995).

¹⁸ *Stevens*, 510 U.S. 1207.

¹⁹ *Id.* at 1212 (Scalia, J., dissenting).

²⁰ *Id.* at 1208-10, 1213.

²¹ *Id.* at 1212 n.4.

[J]ust as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas* . . . would be a nullity if anything that a state court chooses to denominate “background law”—regardless of whether it is really such—could eliminate property rights.²²

Justices Scalia and O’Connor would have had the Court grant review to consider whether Oregon—under the guise of recognizing a private law property doctrine—had effectuated a deprivation of property.²³ But, make no mistake, Oregon courts had clearly allowed a customary regime (the rights of an inchoate public to beach access) to modify a public law rule (the constitutionally entrenched rights of property owners to exclude others from their land).

There seems to be no doubt that customary claims to public rights will increase in the coming years, especially as governments discover the benefits of the approach. Nor are there likely to be many avenues of redress. Even though a plurality of Justices on the U.S. Supreme Court, as recently as 2010, appeared to endorse the doctrine of judicial takings—allowing courts to examine whether judge-made changes to property law could so fundamentally unsettle expectations as to constitute a taking of property in violation of the Fifth Amendment²⁴—this means of constitutional review remains speculative. And although the *Stop the Beach Renourishment* decision did not address custom and public rights in property, the issue will certainly arise again in jurisdictions other than Oregon and in contexts other than beach access.²⁵ Custom is a cheap and easy solution to the nagging problem of public rights in

²² *Id.* at 1211 (citation omitted).

²³ *See id.* at 1214 (“Particularly in light of the utter absence of record support for the crucial factual determinations in that case, whether the Oregon Supreme Court chooses to treat it as having established a ‘custom’ applicable to Cannon Beach alone, or one applicable to all ‘dry-sand’ beach in the State, petitioners must be afforded an opportunity to make out their constitutional claim by demonstrating that the asserted custom is pretextual. If we were to find for petitioners on this point, we would not only set right a procedural injustice, but would hasten the clarification of Oregon substantive law that casts a shifting shadow upon federal constitutional rights the length of the State.”); *see also* Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 140 n.225 (1995).

²⁴ *Stop the Beach Renourishment, Inc. v. Fla. Dep’t of Env’t. Prot.*, 130 S. Ct. 2592, 2601–02 (2010) (plurality opinion).

²⁵ *See* Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 239–41 (2006); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

private property. Custom is ancient. Custom extols community. Custom makes us feel good. What could possibly be wrong with a doctrine like this?

Custom's bright and cheery demeanor has been forcefully espoused by many legal writers as "support[ing] government regulations restricting" property rights and advancing communal interests in property.²⁶ And one would have to be a bit of a boor not to feel some favor for a doctrine that allows the rustic villagers to dance around the maypole on the manor lawn,²⁷ permits hardy fishermen to dry their nets on the shore as they have from time immemorial,²⁸ and, yes, gives you and your loved one the right to take a midnight stroll on a windswept beach. All this, one might suppose, is precisely the evil of custom. Custom can be a blunt instrument against the property rights of the minority—a sharp sanction against economic holdouts and political dissidents.

III. SOUTH AFRICAN FAMILY LAW

Oregon's experience with custom and public law illustrates one possible dynamic: a customary norm is being used to advance a public good, even in the face of a possible constitutional objection. Another vector for the penetration of custom into a public law system is exemplified by South Africa's experience. South Africa is a legal system where determinations of status (especially family status) combine both public and private law elements. South African law is strongly pluralistic, drawing strength and sustenance not only from civil law sources and traditions²⁹ but also from indigenous customary regimes which exerted a profound influence on family and property law as well as local governance.

During the colonial and apartheid periods of South Africa, custom was a matter of fact to be proven, unless it was so notorious as to be subject to judicial notice.³⁰ By statute today in South Africa, a customary norm is subject to judicial notice provided that "such law can be ascertained readily and with

²⁶ Hope M. Babcock, *Has the U.S. Supreme Court Finally Drained the Swamp of Takings Jurisprudence?: The Impact of Lucas v. South Carolina Coastal Council on Wetlands and Coastal Barrier Beaches*, 19 HARV. ENVTL. L. REV. 1, 30–31 (1995).

²⁷ See *Hall v. Nottingham*, [1875] 1 Exch. Div. 1 (Eng.); *Abbot v. Weekly*, (1665) 83 Eng. Rep. 357 (K.B.); 1 Lev. 176.

²⁸ See *Mercer v. Denne*, [1904] 2 Ch. 534 (Eng.), *aff'd*, [1905] 2 Ch. 538 (Eng.).

²⁹ South Africa was, like other British colonies (including Sri Lanka and Québec), formerly French or Dutch, and thus governed by civil law.

³⁰ See TW BENNETT, *CUSTOMARY LAW IN SOUTH AFRICA* 48–49 (2004).

sufficient certainty.”³¹ Absent that, the custom may be proven by the parties to a case by competent evidence.³² Post-colonial courts have been broadly eclectic in their selection of evidence for proof of custom, relying on sources as varied as those provided by ethnographers, local elders, chiefs, or other assessors, or the testimony of the parties themselves.³³

Assuming a custom could be proved, what happened in the case of a conflict with a public law norm? In British colonial practice, customs at variance with English common law were permissible but would be stricken if deemed to be contrary to natural justice, equity, good conscience, or public policy.³⁴ Despite this wide formulation, only those “customs as inherently impress[ed a court] with some abhorrence or [we]re obviously immoral in their incidence” were struck as repugnant.³⁵ In apartheid South Africa, at least, customary law was declared repugnant in only a handful of cases.³⁶ Today in South Africa, repugnancy has been statutorily narrowed to situations where “indigenous law [is] opposed to the principles of public policy and natural justice.”³⁷ The repugnancy doctrine has thus remained a check on what a polity might regard as atavistic customs, although increasingly such determinations will be made in the context of entrenched or constitutional values.

Aside from the constitutional transformation of customary family law, the other way that custom can be altered is more straightforward: through legislative codification or judicial pronouncement. In most of the pluralistic legal systems of Africa and the Pacific that have recognized custom as a source of law, statutes are increasingly being employed to codify the substantive norms of customary family law or, at a minimum, to establish the boundaries and limits of its recognition.³⁸ During the British colonial period, it was understood that the act of codification transmuted a body of living custom into

³¹ Law of Evidence Amendment Act 45 of 1988 § 1(1) (S. Afr.).

³² See *id.* § 1(2); BENNETT, *supra* note 30, at 44–48; Jill Zimmerman, *The Reconstitution of Customary Law in South Africa: Method and Discourse*, 17 HARV. BLACKLETTER L.J. 197, 214 & n.92 (2001).

³³ See A.N. Allott, *The Judicial Ascertainment of Customary Law in British Africa*, 20 MOD. L. REV. 244, 246–52 (1957).

³⁴ See ANTONY ALLOTT, *NEW ESSAYS IN AFRICAN LAW* 158–71 (1970); TW BENNETT, *HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION* 19 (1995).

³⁵ See *Chiduku v. Chidano*, 1922 SRLR 55, 58 (S. Rhodesia).

³⁶ See BENNETT, *supra* note 30, at 68 & nn.246–49 (citing cases dealing with customs allowing marriage without consent and succession by illegitimate children, among others).

³⁷ Law of Evidence Amendment Act § 1(1).

³⁸ See *Native Marriages Act* 23 of 1950 (S. Rhodesia); John Y. Luluaki, *Customary Marriage Laws in the Commonwealth: A Comparison Between Papua New Guinea and Anglophonic Africa*, 11 INT’L J.L. POL’Y & FAM. 1, 10 & 33 n.12 (1997).

an “official” code, very much the same way that a bug is frozen in time in a block of amber.³⁹

In some jurisdictions, this process of codification was fairly limited. In South Africa, especially under the white apartheid regime, the codification dynamic was anything but benign. The 1927 Black Administration Act was an early lynchpin of the apartheid legal structure because it created a separate justice system to administer customary law among the black population of the country.⁴⁰ Under this statute, a broad body of case law was developed by native commissioners (overseen by a Native Appeal Court) that, over time, managed to create an official body of customary family law.⁴¹ If that was not enough, South African regimes sanctioned the promulgation of codes for Natal and Zululand, as part of the infamous homeland or Bantustan initiatives, and these enactments covered family law norms in the form of a restatement.⁴²

Today, this edifice of “official” customary law has been partially demolished by the 1998 Recognition of Customary Marriages Act (RCMA), which repealed the Black Administration Act and the Natal Code of Zulu Law.⁴³ The RCMA has substantive provisions on the formalities, requirements, and consequences of customary marriages,⁴⁴ as well as a grant to the South African Minister of Justice of the power to issue further regulations,⁴⁵ but it does not purport to articulate every aspect of the customary laws of marriage in the country.

In African customary family law, a traditional aspect of marriage has been the payment of brideprice—the transfer by the groom (or his family) to the wife’s family of an amount of wealth (usually livestock) reflecting the reproductive capacity of the woman over her lifetime.⁴⁶ For some scholars, brideprice really reflects the value of male children to be born to a marriage and represents an interfamilial transfer of wealth. In South Africa, the marriage practice of brideprice (there known as *lobolo*, *rovoro*, or *bogadi*) has been

³⁹ See T. OLAWALE ELIAS, *THE NATURE OF AFRICAN CUSTOMARY LAW* 207–11 (1956).

⁴⁰ Black Administration Act 38 of 1927 § 11(1) (S. Afr.) (repealed 1986).

⁴¹ See BENNETT, *supra* note 30, at 41–42, 141–47.

⁴² See *id.* at 46–49, 70–74.

⁴³ Recognition of Customary Marriages Act 120 of 1998 § 13 & sched. (S. Afr.).

⁴⁴ See *id.* §§ 3–10.

⁴⁵ See *id.* § 11.

⁴⁶ See BENNETT, *supra* note 30, at 220–24; John Comaroff, *Introduction to THE MEANING OF MARRIAGE PAYMENTS* 1, 36–37 (J.L. Comaroff ed., 1980); A.R. Radcliffe-Brown, *Introduction to AFRICAN SYSTEMS OF KINSHIP AND MARRIAGE* 1, 46 (A.R. Radcliffe-Brown & Daryll Forde eds., 1950).

recognized in the RCMA as a nonrepugnant custom.⁴⁷ Where marriages are contracted only upon partial payment of brideprice (with the rest to be paid over time), South African courts have enforced those subsequent payments by effectuating customary remedies of dissolution of the marriage or the forced return of the wife and her children.⁴⁸ Even though South Africa's RCMA does not expressly make the payment of brideprice an element of a valid customary marriage, refunds of *lobolo* are often the most contentious issue in customary divorces. The amount of a refund will often depend on the number of children produced from the marriage (i.e., the more procreation, the less the refund) and the conduct of the parties in the marriage (i.e., the less creditable the conduct of the wife, the greater the refund).⁴⁹

Closely allied with the institution of brideprice is the nature of family property in African customary law. In South Africa, customary rules of family and house property have been reformed by the 1998 RCMA. Under that statute, the default regime for all future customary monogamous marriages is that marital estates are in community of property for purposes of profit and loss.⁵⁰ Prospective spouses may contract around the community property default by prenuptial agreements,⁵¹ but the RCMA was recognized as a major reform because it placed wives in a position of equality with husbands as to property rights in marriage.

Indeed, the primary motivating force for reform of customary marriages in Africa has been the perception that traditional institutions discriminate against women in all stages of their lives (whether as girls about to enter into matrimony, as wives managing within a family property regime, or as widows after the loss of a husband). While brideprice institutions have generally evaded challenge under the new constitutional or human rights standards of gender equality (despite the appearance that women are commodified by such payments⁵²), restrictive rules of family property and primogeniture have not.⁵³

In South Africa, however, constitutional values of gender equality have prevailed over any ostensible rights claimed under customary law. The South

⁴⁷ See Recognition of Customary Marriages Act §§ 2–3.

⁴⁸ See BENNETT, *supra* note 30, at 232–33.

⁴⁹ See *id.* at 277–78.

⁵⁰ See Recognition of Customary Marriages Act § 7(2).

⁵¹ *Id.*

⁵² See BENNETT, *supra* note 30, at 235.

⁵³ See, e.g., *Bangindawo v. Head of the Nyanda Regional Authority* 1998 (3) SA 262 (Tk) (S. Afr.).

Africa Constitution of 1996 enshrined a right to culture,⁵⁴ which has been generally construed to extend to claims existing under customary law.⁵⁵ Such rights, according to the constitution, “may not be exercised in a manner inconsistent with any [other] provision of the Bill of Rights.”⁵⁶ As has been noted by the South Africa Constitutional Court, “[C]ustomary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution.”⁵⁷ After some fits and starts,⁵⁸ South African courts have limited the application of customary family law regimes where they clearly infringed on the equality rights of women, whether under the constitution or by statute.⁵⁹ In *Bhe v. Magistrate, Khayelitsha*, the Constitutional Court struck down the Native Administration Act inasmuch as it countenanced a custom by which a deceased man’s estate (having no male issue) devolved to his father or nearest male relative, and not his spouse or daughters.⁶⁰ The court found that the primogeniture custom—with the concomitant obligation upon a male heir to support the decedent’s wife (or wives) and daughter(s)—was being undermined by modern living conditions in South Africa, especially the trend toward urbanization and nuclear families.⁶¹

Although not directly implicated in the *Bhe* case, the thorniest issue of customary family law was nevertheless present. Polygyny—and the analogous institution of concubinage—is a consistent feature of most customary family law regimes in Africa and the Pacific Basin. In southern African custom, the legal effect of polygynous marriages was to create distinct household units

⁵⁴ See S. AFR. CONST., 1996 § 31(1) (“Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture . . .”).

⁵⁵ See BENNETT, *supra* note 30, at 78, 86–90. See generally S. AFR. CONST., 1996 § 15(3)(a) (allowing “legislation recognising . . . systems of personal and family law under any tradition”).

⁵⁶ S. AFR. CONST., 1996 § 31(2). By way of contrast, the Constitution of Zimbabwe inverted these constitutional values: the customary law of succession prevailed over gender equality. ZIM. CONST., 1981 § 23(3)(b); see also *Magaya v. Magaya* 1999 (1) ZLR 100 (S) at 109 (Zim.).

⁵⁷ *Bhe v. Magistrate, Khayelitsha* 2005 (1) SA 580 (CC) at 604 para. 41 (S. Afr.).

⁵⁸ In *Mthembu v. Letsela* 2000 (3) SA 867 (SCA) (S. Afr.), the South Africa Supreme Court of Appeal avoided a constitutional challenge to a custom in which property of a decedent with no male children reverted back to the decedent’s father, leaving the wife and female children with nothing. The court concluded that there had been no valid customary marriage and that any proposed reforms of the custom were best accomplished by the legislature or Law Commission. *Id.* at 883 para. 40; accord Jelili A. Omotola, *Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture*, 15 INT’L & COMP. L. REV. 115 (2004); Zimmerman, *supra* note 32, at 226.

⁵⁹ See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 pmbL, §§ 1(xxviii)(b)(ii), 3(2)(b), 8(d) (S. Afr.) (including customary practices as within the scope of the Act).

⁶⁰ 2005 (1) SA 580 (CC) (S. Afr.).

⁶¹ See *id.* at 618–19 paras. 80, 82.

(“houses”) within a larger family.⁶² A husband was obliged to treat all his spouses with equal respect due their rank (based on the seniority of the marriage).⁶³ In contemporary South Africa, polygyny remains a robust institution, especially with male migrant workers having, simultaneously, rural and urban spouses.⁶⁴

After a great deal of debate by South Africa’s Law Commission, polygyny was recommended as not being an atavistic custom that should be abrogated by statute.⁶⁵ The 1998 RCMA accepted this position by statutorily recognizing preexisting polygynous marriages under customary law⁶⁶ and by permitting subsequent polygynous marriages, provided they comply with the terms of the Act.⁶⁷ The most important of these conditions was that, if a husband wished after his first marriage to contract subsequent marriages, it required a court order approving a marital property system for all the wives and houses involved.⁶⁸ Such an order must take into account the circumstances of all the family groups affected by the new marriage and ensure an equitable distribution of the estate.⁶⁹ If such cannot be safeguarded, the court can refuse to allow the subsequent marriage.⁷⁰ The RCMA does not, however, provide whether a polygynous marriage concluded in contravention of its terms is void *ab initio* or merely voidable.⁷¹ In subsequent debates in the Law Commission and South African Civil Society, strong arguments have been advanced that polygynous marriages may, in certain circumstances, benefit rural women, so long as their property rights (in the event of divorce or the spouse’s death) are safeguarded.⁷²

⁶² See BENNETT, *supra* note 30, at 243.

⁶³ See *id.* at 243–45.

⁶⁴ See Tracy E. Higgins et al., *Gender Equality and Customary Marriage: Bargaining in the Shadow of Post-Apartheid Legal Pluralism*, 30 *FORDHAM INT’L L.J.* 1653, 1684–91 (2007) (collecting extensive empirical data on polygyny in South Africa).

⁶⁵ See BENNETT, *supra* note 30, at 246–47.

⁶⁶ See Recognition of Customary Marriages Act 120 of 1998 § 2(3) (S. Afr.). Interestingly, South African law does not sanction polygynous marriages under Islamic law, although equal succession rights for wives in such marriages are recognized. See *Hassam v. Jacobs* 2009 (5) SA 572 (CC) (S. Afr.).

⁶⁷ See Recognition of Customary Marriages Act § 2(4).

⁶⁸ *Id.* § 7(6).

⁶⁹ *Id.* § 7(7)(a)(ii)–(iii).

⁷⁰ *Id.* § 7(7)(b)(iii).

⁷¹ See BENNETT, *supra* note 30, at 247–48.

⁷² See S. AFRICAN LAW COMM’N, *THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW: REPORT ON CUSTOMARY MARRIAGES* ch. 6 (1998); Penelope E. Andrews, “Big Love”? *The Recognition of Customary Marriages in South Africa*, 64 *WASH. & LEE L. REV.* 1483 (2007).

In South Africa, we have the full range of contemporary legal responses to traditional custom: accommodation and transformation, codification and precedent. Far from withering away, customary family law regimes and institutions appear to be thriving in a handful of pluralistic legal cultures where they were acquiesced in during the colonial period and not suppressed in an urge toward legal modernization. In societies as diverse as Nigeria, South Africa, Papua New Guinea, and the Solomon Islands, customary law will remain an essential source for substantive rules of marriage, divorce, child custody, succession, and traditional governance. Custom has resisted what would otherwise be strong impulses toward codification and harmonization of essential rules of family status, relationships, and transactions. So even in a legal domain as freighted with public law (and even constitutional) dimensions as family law, in those cultures where customary regimes have taken root, they are likely to flourish.

IV. U.S. CONSTITUTIONAL LAW AND SEPARATION-OF-POWERS JURISPRUDENCE

Constitutional law is the most public of domestic public law topics. Indeed, the entire notion of a polity's fundamental law would seem to be the ultimate exemplar of a legal domain that should, in the construct of writers such as James Coolidge Carter, H.L.A. Hart, and T.F.T. Plucknett, be utterly immune from customary influences. Inasmuch as constitutions are a *lex scriptum*, custom should, under this theory, play no role in their construction, application, or interpretation. Yet, even in this most public of legal arenas, customary regimes can survive and flourish. Any explanation for this ostensible paradox must account not only for the historic origins of custom and the common law but also for the continued relevance of the practices of political branches in the resolution of structural or institutional disputes within domestic polities. Constitutional custom is not only a historical construct, it is a phenomenon associated with the common law of government official prerogatives, as well as a pragmatic approach to the resolution of separation-of-powers disputes.

Can the actual practices of governmental branches be reliable evidence for resolution of separation-of-powers controversies? In other words, can a governmental practice—one “deeply embedded in the history and tradition of th[e] country”⁷³—legitimize that usage as constitutional? It appears from the

⁷³ Marsh v. Chambers, 463 U.S. 783, 786 (1983).

U.S. Supreme Court's jurisprudence that evidence of the "practical exposition"⁷⁴ or "practical construction"⁷⁵ of powers granted under the Constitution by the respective branches can be dispositive of separation-of-powers disputes.

Indeed, as early as 1803, in *Stuart v. Laird*, the Supreme Court indicated:

Another reason [suggested] for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.⁷⁶

This language has been revisited by later Supreme Courts in a variety of separation-of-powers contexts⁷⁷ and has been recognized by a number of commentators.⁷⁸ While the idea of "practical construction" of the Constitution's separation-of-powers provisions would seem most often to implicate the balance of authority between the political branches (Congress and the Executive), that is not invariably so. *Stuart*, after all, involved the power of Supreme Court Justices to "ride circuit" and sit on lower courts created by Congress.⁷⁹

At the outset, it is important, though, to distinguish the various techniques for employing custom in constitutional interpretation. One of these is to use evidence of the "practical construction" of a constitutional provision by the political branches from the early years of the Republic (before 1820) as a

⁷⁴ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

⁷⁵ *Fairbank v. United States*, 181 U.S. 283, 306 (1901).

⁷⁶ 5 U.S. (1 Cranch) at 309.

⁷⁷ *See, e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 688–90 (1929); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915).

⁷⁸ *See, e.g.*, Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 115 (1984); Jason T. Burnette, Note, *Eyes on Their Own Paper: Practical Construction in Constitutional Interpretation*, 39 GA. L. REV. 1065 (2005).

⁷⁹ 5 U.S. (1 Cranch) at 303–06; *cf.* *Mistretta v. United States*, 488 U.S. 361, 400–01 (1989) (addressing the constitutionality of service by federal judges on the U.S. Sentencing Commission and providing post-Founding-period examples of extrajudicial service).

proxy for the views of the Founders in constitutional interpretation.⁸⁰ This is just another form of originalism—the school of constitutional interpretation that seeks to recapture the understandings of the Constitution’s drafters and ratifiers and so to anchor the application of those provisions. When used in this way, constitutional customary norms are not based on usage and practice at all—they are merely an embodiment of original understanding. If constitutional custom has any real meaning, though, it must be extrinsic to the constitutional text and to any original understandings as to the meaning of that text.

There are a number of canonical decisions where the Supreme Court has ruled that Congress has progressively acquiesced in the President’s acquisition of power. These are especially evident in the foreign relations field⁸¹ but have also been significant in the realm of the President’s authority to remove officials he has appointed—a question finally settled in the Supreme Court’s 1926 *Myers v. United States* decision.⁸² But, quite curiously, the customary crank for separation of powers may ratchet in only one direction. The Supreme Court has, on no less than two occasions, struck down well-documented “practical constructions” of constitutional provisions running in *favor* of congressional power as being contrary to express textual commands.

In *Fairbank v. United States*, the Court ruled unconstitutional a statute authorizing a stamp tax on exports as violative of the textual prohibition on such duties, even though there was evidence (dating from the First Congress) that such imposts were permissible.⁸³ In response, the Court held that the practical construction of a constitutional provision by legislative action is entitled to no force except in cases of doubt, and in that case, there was none.⁸⁴ This was exactly the tack taken by the Court in 1983, in *INS v. Chadha*, of striking down the practice of “legislative vetoes.”⁸⁵ These were statutory

⁸⁰ See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 200–02 (2003) (reviewing early congressional action with respect to copyrights to determine the meaning of the constitutional grant of power); *Printz v. United States*, 521 U.S. 898, 905–07 (1997) (examining early congressional statutes as to limits on the power to commandeer state officials); *Myers v. United States*, 272 U.S. 52, 136 (1926) (exploring whether Congress can block the removal from office of presidential appointees).

⁸¹ See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 415–16 (2003) (settlement agreement); *Dames & Moore v. Regan*, 453 U.S. 654, 678–84 (1981) (same); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936) (imposition of embargoes).

⁸² See 272 U.S. at 150, 170–71 (citing historical precedents for unilateral presidential removal).

⁸³ 181 U.S. 283, 306–07, 312 (1901).

⁸⁴ *Id.* at 308, 311–12; *accord Inland Waterways Corp. v. Young*, 309 U.S. 517, 525 (1940) (“Even constitutional power, when the text is doubtful, may be established by usage.”).

⁸⁵ 462 U.S. 919 (1983).

provisions that granted power to the Executive Branch to carry out certain actions with the proviso that both congressional houses (or even just one) could cancel that action.⁸⁶ This ostensibly violated the Constitution's Presentment Clause,⁸⁷ which requires that every congressional action having the force of law be presented to the President for his approval or veto.⁸⁸ Despite a long history of legislative vetoes as part of the accommodation by Congress with the regulatory state created by the New Deal,⁸⁹ the Court adhered to a formalistic notion of separation of powers and struck down such provisions.⁹⁰

In a separation-of-powers dispute, how does a party prove a binding constitutional custom? The Supreme Court has recognized two broad components. The first element is the objective extent, duration, and consistency of the practice.⁹¹ Tracing the historical pedigree of a usage back to the founding of the Republic seems to be irrelevant unless the constitutional custom is being used as a surrogate for a showing of the Framers' original intent. That a practice can be dated to the early Republic is obviously helpful, as in *Dames & Moore*, where at issue was the President's power to conclude settlement agreements with other nations, and a prime exhibit was President Washington doing just that in 1799.⁹² But a consistent practice over a shorter duration is also fine.⁹³ Otherwise, showing "[s]cores and hundreds" of iterations of the practice will do.⁹⁴ Conversely, failing to prove even a threshold level of occurrence for a practice will usually be fatal to a constitutional custom claim,⁹⁵ as will a finding that the practice was isolated.⁹⁶

⁸⁶ *Id.* at 925.

⁸⁷ *Id.* at 956–59.

⁸⁸ U.S. CONST. art I, § 7, cl. 2–3.

⁸⁹ See *Chadha*, 462 U.S. at 942 n.13 (noting that presidents have signed bills containing such legislative vetoes, even as they protested their constitutionality); *id.* at 967–74 (White, J., dissenting) (narrating the history of nearly two hundred statutes containing legislative-veto provisions).

⁹⁰ *Id.* at 959 (majority opinion).

⁹¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) (holding that a constitutional customary norm must be "systematic, unbroken, . . . [and] long pursued").

⁹² 453 U.S. 654, 679 n.8 (1981).

⁹³ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 322–28 (1936) (giving additional weight to a practice of over 140 years); *Ex parte Grossman*, 267 U.S. 87, 118–19 (1925) (noting that eighty-five years of presidents pardoning criminal contempts "strongly sustains the construction [the practice] is based on"); *The Laura*, 114 U.S. 411, 414–17 (1885) (determining that acquiescence to pardons of lesser executive officials for nearly a century "fixed the construction").

⁹⁴ *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915); *accord Zemel v. Rusk*, 381 U.S. 1, 8–9 (1965) (affirming the Secretary of State's authority to impose area restrictions on travel with passports).

⁹⁵ See, e.g., *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 205 (1928) (rejecting an assertion as being based on a "limited number" of incidents).

Even if the objective element of constitutional custom can be overcome, something more is required. Although it would be a mistake to think that this extra ingredient is *opinio juris*—in the sense of requiring a governmental entity to accept a practice as law⁹⁷—the subjective element in U.S. constitutional law boils down to whether the opposing branch in the separation-of-powers struggle has actually accepted or acquiesced in the practice.⁹⁸ Or, as Justice Frankfurter put the matter in his *Youngstown* concurrence, the executive practice must be “long pursued to the knowledge of the Congress and never before questioned.”⁹⁹ The problem, though, is how to interpret what may be a branch’s silence, for in situations where it is Congress extending its power by statute, an executive branch response may be indeterminate (as with signing a bill but still asserting its unconstitutionality). Likewise, when it is the presidency that seeks to expand its power, short of a statute resisting such an assertion (overriding a veto),¹⁰⁰ Congress may have little scope for positive action, and its objection to the practice may be ambiguous.¹⁰¹

For these reasons, the Supreme Court has appeared to require that the branch making the assertion of authority do so in the form of an act that places the coordinate branch on notice of its position and requires a response.¹⁰² Effective notice of the practice is thus essential.¹⁰³ When an objection is forthcoming from the opposing branch, its effect may still be uncertain. In *Chadha*, the fact that eleven of thirteen presidents from Woodrow Wilson to Ronald Reagan objected to the legislative veto seemed to be decisive for the

⁹⁶ See *Myers v. United States*, 272 U.S. 52, 170–71 (1926).

⁹⁷ See Helen Silving, “Customary Law”: *Continuity in Municipal and International Law*, 31 IOWA L. REV. 614, 622–23 (1946).

⁹⁸ See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (“[P]ractice and acquiescence under it for a period of several years . . . affords an irresistible answer, and has indeed fixed the construction.”).

⁹⁹ 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

¹⁰⁰ This occurred with the enactment of the War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541–1548 (2006)).

¹⁰¹ See *Dames & Moore v. Regan*, 453 U.S. 654, 669 (1981) (noting that support for, or objection to, executive action may range from “explicit congressional authorization to explicit congressional prohibition”); see also Glennon, *supra* note 78, at 139–41.

¹⁰² See, e.g., *Haig v. Agee*, 453 U.S. 280, 315–16 (1981) (Brennan, J., dissenting) (noting that the Executive Branch must have actually exercised discretion, not merely have possessed it, for there to be congressional acquiescence); *Kent v. Dulles*, 357 U.S. 116, 124–25 (1958) (rejecting an executive branch assertion of a customary practice because it was stated as a mere policy).

¹⁰³ See, e.g., *Dames & Moore*, 453 U.S. at 686 (“Past practice does not, by itself, create power, but ‘long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent’” (alterations in original) (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915))); *Midwest Oil*, 236 U.S. at 475, 481 (determining that Congress’s silence in the face of ninety-two orders for withdrawals of public lands amounted to acquiescence).

Court.¹⁰⁴ Yet, in *Haig v. Agee*, that Congress had declined the Executive Branch's earlier request to authorize it to revoke passports on national security grounds did not apparently matter.¹⁰⁵ The President's authority in that respect was upheld by the Court (although perhaps premised on the President's independent foreign relations powers).¹⁰⁶

Whether the acquiescence requirement for a binding constitutional custom unduly favors the presidency in its separation-of-powers struggles with Congress remains hotly contested.¹⁰⁷ It is evident that Congress can impliedly ratify presidential assertions, and such will be “[c]rucial” in any separation-of-powers calculus.¹⁰⁸ This will especially be so in the realm of the President's war powers¹⁰⁹ and treaty authority.¹¹⁰ Yet, despite the pervasive role of constitutional custom in separation-of-powers controversies, potent critiques remain. Aside from concerns about the acquiescence requirement's modalities for congressional responses to executive power,¹¹¹ there is a philosophical concern that this doctrine embeds some form of “Burkean minimalism” into separation-of-powers discourse,¹¹² a path dependence leading us down a road to constitutional infidelity and perdition. Yet, we need not fear to trod this path. If anything, courts have been more likely—as seen in *Chadha*—to heed Justice Frankfurter's warnings that practice “cannot supplant” a clear constitutional requirement¹¹³ and that “[i]llegality cannot attain legitimacy

¹⁰⁴ 462 U.S. 919, 942 n.13 (1983).

¹⁰⁵ 453 U.S. at 317 n.7 (Brennan, J., dissenting).

¹⁰⁶ See *id.* at 307–10 (majority opinion).

¹⁰⁷ See, e.g., Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 45, 61–74 (1993); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 872–86 (1996) (reviewing LOUIS FISHER, *PRESIDENTIAL WAR POWER* (1995)); Matthew Baker, Comment, *The Sound of Congressional Silence: Judicial Distortion of the Legislative–Executive Balance of Power*, 2009 BYU L. REV. 225, 231–43.

¹⁰⁸ *Dames & Moore*, 453 U.S. at 680.

¹⁰⁹ See Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 733–35 (2008); Stromseth, *supra* note 107, at 882–86.

¹¹⁰ See *Goldwater v. Carter*, 444 U.S. 996 (1979) (leaving open the question of the President's power to unilaterally terminate treaties which had earlier received advice and consent by the Senate).

¹¹¹ See Glennon, *supra* note 78, at 140–42; Stromseth, *supra* note 107, at 881 & n.187; Michael J. Glennon, *Constitutional Custom Reconsidered: Historical Practice and the President's War Powers* 3–5 (Oct. 8, 2011) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930352.

¹¹² See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 375 (2006); Note, *Congressional Restrictions on the President's Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1929–31 (2007).

¹¹³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (Frankfurter, J., concurring).

through practice.”¹¹⁴ Or, as the patristic writers of the canon law tradition observed, “Custom without truth is only error grown old.”¹¹⁵

V. THE PUZZLE SOLVED

These three examples of custom in public law were chosen with great care for this lecture. Each confirms that the usages and practices of communities (whether it is the beach-going public in Oregon, tribal or clan groups in South Africa, or the coordinate branches of the U.S. federal government) can make a custom in the face of substantial public law restraints. In the instances of property rights in Oregon and separation-of-powers disputes, the constraint is nothing less than the United States Constitution itself, whether in its structural aspects or its rights-granting features. In South Africa, we have an additional statutory overlay, what with a partial codification of custom in the RCMA and the tension inherent with the dual command of the South African Constitution to promote both customary law and gender equality.

The illustrations of custom I have discussed today come with substantial controversy. We may well legitimately disagree whether certain customs are even desirable. Open beach access through the property law doctrine of an inchoate public always having had such a customary right seems—at least to me (and Justice Scalia¹¹⁶)—a pretext or fiction for judges to declare their preference for public rights over private property and to deny any redress. Viewed with North American eyes and values, we might question whether the South African family law customs of brideprice and polygyny are truly atavistic and must be affirmatively suppressed to promote gender equality in that society. Even the structural constitutional proposition that the balance of power between the branches of the federal government can be modified, over time, by a consistent set of practices actually acquiesced in by the coordinate branches may sound like heresy to some.

And, yet, despite these serious objections to these customs as a matter of public law design, they have persisted. Oregon’s common law doctrine of custom has not been found to be an unconstitutional judicial taking. *Lobolo* is still routinely being paid as a condition for contracting marriages in South Africa, and the institution of polygynous marriages is alive and well in that

¹¹⁴ *Inland Waterways Corp. v. Young*, 309 U.S. 517, 524 (1940).

¹¹⁵ S. Thascii Caecilii Cypriani, *Epistola S. Cypriani ad Pompeium Contra Epistolam Stephani*, in 3 PATROLOGIAE CURSUS COMPLETUS 1174, 1182 (J.-P. Migne ed., 1844) (unofficial translation from Latin).

¹¹⁶ *See Stevens v. City of Cannon Beach*, 510 U.S. 1207, 1212–13 (Scalia, J., dissenting).

country. U.S. courts, in making separation-of-powers determinations, will often have recourse to the historic practice of the political branches of the federal government and will validate such usages unless they are plainly contrary to the constitutional text or unsupported by the other branches. In each of these instances, a customary regime has stood its ground against a significant public law value and has managed to change it.

According to legal theory orthodoxy as reflected in the writers mentioned here—Blackstone, Austin, Carter, Plucknett, and Hart—that is just not supposed to happen. But it has. Custom has managed to overcome its relatively weak status as a source of law. Custom has even been able to penetrate that great jurisprudential citadel of public law. Even constitutions, statutes, and administrative regulations are not immune from cross-reading and analysis in light of the usages and practices of relevant legal communities.

And, irrespective of what we might think about the merits of the underlying practice that may be at issue in a controversy, I believe it is desirable that the public law can bow in the face of custom. As a matter of design for legal systems, custom—like the original conception of the judge-made common law—allows for flexibility or “play in the joints.” Bottom-up lawmaking may introduce some uncertainties into a legal system, and (on occasion) a serious lack of uniformity, but such can always be compensated for by further legislative action. In any event, custom as an expression of legal will by communities can play an important role in sustaining democratic and pluralistic values in a legal system. And while the public law is a repository for such values, it is often by the implementation of a community’s expectations through customary practices that they are truly, and lastingly, achieved.