PARTICIPANTS:

Welcome:

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Introduction:

WILLIAM M. TREANOR
Dean, Georgetown University Law Center

Moderator:

JOHN MANNING
Dean, Harvard Law School

Panel Discussion:

JUSTICE SAMUEL ALITO
U.S. Supreme Court

JUDGE DAVID BARRON
First Circuit

JUDGE BRETT KAVANAUGH
D.C. Circuit

JUDGE DEBRA LIVINGSTON
Second Circuit

JUDGE SRI SRINIVASAN
D.C. Circuit

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We have a great program laid out for you over the next two days. We’ll start today with the Judicial Perspective Panel and continue tomorrow with three additional panels on the law of nations and the federal courts, the federal common law, and in a historical context. Without further ado, it is my pleasure to welcome Dean Treanor to introduce the symposium and the panelists. (Applause)

DEAN TREANOR: Thanks very much, Jennifer. I have to say it’s really a privilege to welcome you to a signal event, not only for the Law Center but for constitutional discourse. Over the next two days we will be hosting what I anticipate will be a landmark discussion about the status of customary international law under the Constitution and the role of such law in U.S. courts. And it’s a discussion that’s going to occur in light of the framework that’s advanced by Professor A.J. Bellia and Professor Brad Clark in a book that is really a path-breaking book, The Law of Nations and the United States Constitution. So at the very beginning I would like a round of applause for Professor Bellia and Professor Clark. (Applause).

For at least the past thirty years, legal scholars have debated with great ferocity the status of customary international law in U.S. courts, and there have been three schools of thought. The modern position claims that judges should treat all customary international law as federal law. The revisionist position claims that courts should not apply any customary international law unless it’s adopted by the political branches as federal law through a federal statute or treaty, or by the state as state law. And a third school of thought argues that all forms of customary international law should be treated as non-preemptive general law.

So three different schools of thought. Each seeks justification in historical understandings and practice in Supreme Court precedent. And that’s really been the debate for a very long period of time. Professor Bellia and Professor Clark advance a theory that also is based on historical understandings and practice in Supreme Court precedent, but the framework they advance is radically different from previous scholarship. They argue that—and I’m quoting from their book—“the law of nations has not interacted with the Constitution in any single overarching way.” In particular they contend that the Constitution “was designed to interact in distinct ways with each of the three traditional branches of the law of nations that existed when the Constitution was adopted”: the law merchant, the law of state to state relations, and the law maritime. This tripartite traditional framework and the evolution of customary international law are really the keys to their analysis. As they conclude, given that the Constitution was designed to interact with the three traditional branches of the law of nations in distinct ways, it’s not surprising that modern customary international law does not fit neatly into the constitutional design and cannot simply be analogized to one of these three traditional branches. Rather, to determine
the role of modern customary international law in U.S. courts, lawyers and judges
must evaluate such law on its own terms and determine in every case how it inter-
sects with the Constitution’s precise text and structure.

So I think it’s really a path-breaking analysis, it’s profoundly original, and
we’re going to be hearing people debate it. So we’re going to have two days of
really interesting discussion. Tomorrow, we’re going to have a group of leading
scholars. We’ll be hearing panels on the Law of Nations and the Federal Courts,
Historical Context. These panels bring together really a remarkable group of
scholars who are both specialists in customary international law as well as federal
courts, constitutional history and structure, and foreign relations. So it’s really
going to be a path-breaking day of conversation. So that’s tomorrow.

Today, we begin with an amazing panel. This first panel—and I’m not going to
 go into detail because they’re all so amazing—the first panelists are going to be
Justice Samuel Alito of the United States Supreme Court, who actually just
appeared on this stage relatively recently to talk to our third-year class; an extra-
ordinary talk about Constitutional law and careers in law. He’s coming back and
I’m just so grateful. And he’s going to be joined by an amazing panel of leading
appellate judges. Judge David Barron of the First Circuit, formerly of Harvard
Law School, who co-authored with our Professor Marty Lederman two classic
articles in the Harvard Law Review, including The Commander in Chief at the
Lowest Ebb. He will be here. Judge Debra Livingston of the Second Circuit, who
is also the Paul J. Kellner Professor at Columbia Law, Judge Brett Kavanaugh of
the D.C. Circuit will be joining us, and Judge Sri Srinivasan of the D.C. Circuit.
It’s an amazing group and it will be presided over by one of the leading constitu-
tional law scholars, one of the leading scholars of statutory interpretation of our
time, Dean John Manning of Harvard Law School.

So you’re all in for a treat. And so I’d like you to welcome to the stage our
Judges Panel. (Applause)

DEAN MANNING: Hello, everybody. My name is John Manning. I want to
start by thanking Dean Treanor for his generous welcome and The Georgetown
Law Journal for hosting this panel and putting on the symposium.

We’re here to discuss this book, The Law of Nations and the United States
Constitution, which is available at popular prices (laughter). It’s a very important
book written by Professors Bellia and Clark, and I believe Dean Treanor gave
you some of the background of the debates that this book informs. What’s so
interesting about this book, what makes it so important is that it disaggregates the
different kinds of international law and examines how each kind interacts with
the Constitution and federal law. It moves the debate away from a sort of one size
fits all approach and it focuses it on the background context provided by the dif-
ferent branches of the law of nations that existed at the time that the Constitution
was drafted and adopted.

So, there are three main branches: the law merchant, the law of state-state re-
tions, and the law maritime. The Constitution interacts with these branches of the
law of nations in very different ways, and so the relationship of the Constitution to international law, at least at the time of the founding, was not a unitary question but actually represented three different kinds of questions. Accordingly, the question of the status of modern customary international law—whether it is federal constitutional law, whether it is state law, whether it’s something else—doesn’t fit neatly into any one category. This is the central argument of the book.

What the authors claim in the book is that the status of modern customary international law really depends on how the particular question or matter at issue interacts with the Constitution. And really it depends a lot on whether the rule in question, the rule that is being asserted, is to be enforced against a foreign nation, the United States, or a U.S. state. So they focus mainly on the law of state-to-state relations which encompasses categories like head of state immunity and the right to neutral use of the high seas. And they say that that branch of the law of nations played a central role in the Constitution’s allocation of powers among the political branches and, more importantly, between the political branches, on the one hand, and the judiciary, on the other. And what they argue in particular is that there are two default rules that you can infer from the Constitution’s structure read in light of the history and context at the time of adoption.

The first default rule is that the courts must uphold the rights of recognized foreign nations under the law of state-to-state relations unless the political branches clearly direct otherwise. What that means is that whatever background rules are out there under that branch of the law of nations are for the elected branches of government and not the unelected judiciary to displace for all sorts of reasons relating to both tradition and to the interest in not provoking international conflict. And this also helps to prevent contradiction of the political branch’s exclusive power over foreign relations.

The second default rule is that the Constitution prohibits courts from enforcing the rights of the United States under the law of state-state relations against foreign nations without clear authorization from the political branches to do so. This idea helps ensure that courts don’t usurp the political branches’ exclusive power to decide whether, when, and how the U.S. should respond to violations of U.S. rights.

So these default rules, the authors argue, are pretty clearly inferable from history, from the relationship of the structure of government to the background rules of the law of nations, and they don’t obviously apply to the other branches of the law of nations or to most of what is now thought of as customary international law.

One of the things that’s interesting about this book, among many, is that it provides a really good historical background, but it also provides extensive analysis of the Supreme Court’s treatment of customary international law throughout the last couple of hundred years. The authors argue that their understanding of the allocation of Constitutional power is consistent with almost all of the Court’s decisions from the very beginning of the republic until the present day.

Today, we’re going to hear some very distinguished federal judges, including one member of the Supreme Court, talk about this book and about the issues
raised by the book. And tomorrow we’ll hear some of the nation’s leading academics talk about the issues, the book, and the challenges of customary international law. I’m going to sit down now and stop talking and let these very distinguished jurists do the talking. I’m going to bring some questions and I’m going to get the ball rolling and see where things go.

All right. So, now, I’m walking over here. (Laughter) I like to narrate things.

Hello, Your Honors. How are you?

JUSTICE ALITO: Good.

DEAN MANNING: Excellent. Okay. So I want to start with a very basic question. And I’m not going to call on anybody, so you can relax (laughter).

JUDGE BARRON: But we have to answer.

DEAN MANNING: I’m going to hope that we get volunteers. (Laughter) And so here’s my question: What has been your experience in applying customary international law to the cases that have come before you during your careers?

JUSTICE ALITO: Are we going to be graded for class participation?

DEAN MANNING: I think we have a volunteer. (Laughter) Judge Livingston.

JUDGE LIVINGSTON: I’ll go, but you guys have to help after this. I would say my experience is fairly limited. And that, in and of itself, is of interest to the importance of this really fantastic book. My limited experience is interesting because I sit in a circuit in which customary international law is frequently invoked. Many of the cases before the Supreme Court in recent years have come from the Second Circuit. We are the Circuit that decided Filártiga after all, and if you read the academic commentary about this decision, you know that it’s the foundation of modern transnational public law litigation—or, alternatively, it’s a decision that appeared not to understand the precedents on which it was relying.

That said, I can think of maybe four cases in which customary international law has come up in the over ten years I’ve been on my Circuit. There’s a case called Balintulo, for instance, that was brought by South African citizens who sued multiple corporations—some domestic, some foreign—for aiding and abetting atrocities during the apartheid era in South Africa. We held that the plaintiffs had not plausibly alleged relevant conduct in the United States sufficient to rebut the presumption against extraterritoriality.

My other major experience is that as a young lawyer I had the occasion to travel to Manila and to get a waiver of former head of state immunity and then to argue the effectiveness of that waiver before what later became my own court, the Second Circuit. Because head of state immunity figures in the discussion of just what customary international law is in this book, I particularly enjoyed those portions of the book.

But when you think about judges applying customary international law, I think the background assumption—I think there will probably be agreement on this—that you should have is that judges will have limited experience. While generally
that is true of a lot of the areas that we’re asked to decide questions in, it may be particularly salient in this area given the most expansive claims for what customary international law is and how it should be applied in litigation.

DEAN MANNING: Judge Kavanaugh?

JUDGE KAVANAUGH: I’ve had it arise in four areas in my eleven years on the D.C. Circuit. So the first are Alien Tort Statute cases where there’s a claim that customary international law provides a norm that is enforceable under the Alien Tort Statue—this is pre-Kiobel and pre- the recent cases addressing issues of corporate liability under the Alien Tort Statute [ATS]). I was benefitted in the case from having this unbelievably fantastic advocate argue the case for the defendants, Sri Srinivasan (laughter), who did such a great job in the case that he got one vote—mine. (Laughter)

SPEAKER: Bravo.

JUDGE KAVANAUGH: And I would have held that there was no corporate liability under the ATS and that there was a presumption against extraterritoriality that applied in that case.

The other areas were in our Guantanamo docket, which has been extensive over the last eleven years. Second, does international law inform the scope of the government’s detention power under the [Authorization for Use of Military Force], AUMF. I wrote a long opinion in a case called Al-Bihani saying that international law was not relevant to the scope of the President’s detention authority.

The third was a military commissions case where the statute itself incorporated international law but did so in a general phrasing, the law of war. What does the law of war mean in Section 821 for the purposes of the military commission statute? And that’s a question the Supreme Court had in Hamdan. We had Hamdan on remand and had to figure out exactly what the content of the law of war was, what is the international law of war, what does that consist of.

And, finally, also a military commissions case: does the Constitution itself limit military commissions to trying offenses under international law and, if so, what are those offenses under international law? Two challenging questions that our Court dealt with en banc in Al Bahlul that were decided over the last couple of years on our Court.

So there are four distinct categories of cases in which I’ve confronted the question and will get into the difficulties of doing this. But one of the big difficulties is what is the content of international law in these various cases.

JUDGE BARRON: Judge Kavanaugh’s comments about the Guantanamo cases sort of remind me that really the experience I’ve had with international customary law was really before I was a judge. As a judge I think I may have had one case that was the act of state doctrine, but it hasn’t really been much of our docket. But when I was at the Office of Legal Counsel these issues about customary and international law in the national security realm and the law of war was the steady diet of the Executive Branch. And that’s one point that I think we shouldn’t lose sight of. The book is such a thoughtful book on different ways in
which this question arises. But the question of whether there’s law there is not the same question as whether there are judges there to apply that law.

Even if you just think about it as political branches, political branches themselves have to engage with the question of whether it’s law that they have to take account of. And for the last fifteen years for sure, and given the nature of the conflict that the country is engaged in for the foreseeable future, there are lawyers who are engaging with international customary law everyday and making extremely consequential decisions that have nothing to do with a particular tort claim. And I don’t know if there’s as much reflection in the Executive Branch as to some of the sort of basic questions: is this law at all? My sense is that’s taken as a given, which does give you some thought about how does that fact fit with the account in the book, which raises a very good question, which is: Is this law from a domestic perspective?

DEAN MANNING: When you say law, law that you felt that was binding on the Executive Branch?

JUDGE BARRON: Yes. Well, law that we were interpreting, which it would have made little sense for us to be interpreting if it was obvious that it wasn’t binding.

DEAN MANNING: Judge Srinivasan?

JUDGE SRINIVASAN: Sure, I’ll chime in, because I think the general—I’m sure this is true of the audience—that generally you all are here to hear from Court of Appeals Judges before the Supreme Court Justice, so I’ll go ahead and chime in. (Laughter) Yes, on this question of whether it’s law, I’m going to harken back a little bit to my days as an advocate because I haven’t been on the bench quite as long, and I’ll combine both experiences—both as an advocate and as a judge. And let me start by saying congratulations on the book. And, John, I’m glad you summarized the book because I inadvertently read the wrong book, but now I know what that one says. No, I actually read it, I actually read it. (Laughter) It’s very insightful. And so I guess I’d divide up into three categories the lenses through which I’ve dealt with customary international law issues. And, apropos of the book, they all involve situations in which the political branches have already taken an action that makes international law salient. And so one of them was the Alien Tort Statute, where the statute itself speaks about the law of nations. And I not only argued the Doe case before Judge Kavanaugh, but also argued the Balintulo case before Judge Livingston. And I think actually both of you voted in favor of my client, which shows that strong arguments can overcome mediocre advocacy, I think. (Laughter) So that is one cache of cases in which I ran across it.

Another cache of cases involves the laws of war. And so when I was in the Solicitor General’s Office—I see Bill here and we’ve had some interactions over the years on that score, too, but in a prior iteration of the Solicitor General’s Office was the initial wave of cases in the wake of 9/11. And the Supreme Court had to construe the Authorization for Use of Military Force. And one issue that comes up in the context of that construction is what principles of international
law are bound up in the authorization to use military force, what is presupposed by military force. Does detention follow? So issues of that nature I litigated as well.

And then the third cache is another statute, which is the Foreign Sovereign Immunities Act. As a judge, I had a case called *Simon v. Republic of Hungary* that involved the construction of a provision of the Foreign Sovereign Immunities Act which, like the Alien Tort Statute, by its terms incorporates international law. It provides an exception to foreign sovereign immunity for cases involving claims where there’s a taking of property in violation of international law. And so, again, the statute itself made reference to international law, and it’s something that we as a panel had to construe in determining whether those claims could go forward in the face of the FSIA.

DEAN MANNING: So all of your experience is incorporation by reference into a statute, express incorporation?

JUDGE SRINIVASAN: I think so. I can’t recall an experience that involved an effort to directly apply international law through something other than a statute.

DEAN MANNING: Justice Alito, does this conform with your experience?

JUSTICE ALITO: Yes, it does. I think you have heard from judges on the two courts of appeals where this issue comes up the most frequently, and that would be the Second Circuit, which has had a lot of Alien Tort Statute cases and some other cases raising issues that are related, and the D.C. Circuit, which has had cases concerning Guantanamo and military commissions. So I think those are the areas where it has come up the most frequently. I look back when I was on the Third Circuit and I can’t recall any case in which customary international law came up. Now, if I did a search of my cases I might find one, but it wasn’t prominent. And I think that will be the experience of judges around the country. It will be the experience of judges on most of the courts of appeals, not to mention most of the district courts. So when an issue of customary international law comes up, it’s very likely to come up before a judge who has little, if any, prior experience dealing with the subject. And, therefore, it’s very important for those judges to have access to materials that can give them a quick course so that they can get up to speed. This is one of the many ways in which I think the book will make a major contribution. Whether you agree with its analysis or not, it does not distort the cases in any way, and its argument is presented in a way that’s quite understandable.

I looked back also over the cases that have come before me during my time on the Supreme Court in which there was at least some mention of customary international law. There’s been a pretty steady supply, maybe on average about a case or so a year. The Alien Tort Statute cases are probably the most prominent. We’ve had a number of those. We have one pending before us right now on the second round of the issue of corporate liability under the Alien Tort Statute. And during the oral argument in that case an article written by the authors of this book was very prominently mentioned. So if you follow this issue, there’s been some
follow-up discussion among academics about the thesis of Bellia and Clark’s article in the *University of Chicago Law Review*.

I was on the Court for the *Hamdan* case. In most of the other cases where customary international law has come up, it has come up somewhat obliquely—cases involving, for example, the Foreign Sovereign Immunities Act. There we’re dealing with a statute that has codified the rules of foreign sovereign immunity, but customary international law is still in the background. There have been some other cases that are somewhat similar to that.

We had a really fascinating case last term that raised the question of the source of the cause of action being asserted by a party who is suing a foreign sovereign for expropriating property overseas. A case like that falls within an exception to sovereign immunity under the Foreign Sovereign Immunities Act, but where does the cause of action come from? When the Solicitor General’s office briefed the case, they said well you don’t need to decide that question. And so we didn’t, but it’s a question that’s really very important. The question is, I think, central to the main argument of this book, and it’s a question that will come up eventually in the courts—namely, what is the status of customary international law under the Constitution.

JUDGE KAVANAUGH: I want to underscore one thing, which is the difference between a statute that expressly incorporates international law, such as the Military Commissions Act, which refers to the law of war, and a statute that does not refer to international law expressly, but an argument is made that the statute should be interpreted in light of international law principles. And that’s the famous *Charming Betsy* canon: Interpret ambiguities in statutes so as to conform to international law. I think the book does a nice job of explaining that at least for modern customary international law principles, that canon may be on shaky ground in terms of whether courts should really be advancing that canon, should really be using that canon in that way. And that’s where the book does a fantastic job—as Dean Manning said—of distinguishing the different kinds of international law that historically existed from the modern notion of customary international law, which are rights of individuals against their own states. So, for me, that’s a big distinction, and the *Charming Betsy* canon is a huge issue in a number of cases that we’ve had in the military detention context.

DEAN MANNING: Well, so let’s imagine now you have a case where you feel that you need to ascertain customary international law, what’s the law of war, you’re applying the FSIA, you’re figuring out how to read the AUMF, and you have to sit back, and you have to say, all right, what is the content of customary international law? So how do you go about it? What are the challenges in figuring out what customary international law is?

I’d like to start with Judge Barron, if he’s willing, because (laughter) –

JUDGE BARRON: He volunteers, he volunteers.

DEAN MANNING: Because when you said that you did a lot of this at OLC it sounds as if you struggled with defining the content of these matters that would constrain your client and the conduct of the business of the United States. And so
how did you go about ascertaining what customary international law was there or on the bench?

JUDGE BARRON: You know, I have very good law clerks, but I don’t have a State Department. And at the Justice Department I had a State Department. We were in touch with the State Department all the time to try and get a sense of what the Executive Branch . . .

DEAN MANNING: This sounds like a dodge to me, but (laughter) . . .

JUDGE BARRON: The point is that in the context of adjudication, particularly when these cases arise from private parties—and they arise in the immigration context frequently—you’re initially stuck with the briefs. And even if one wanted to go figure out on your own what it was, it’s not how adjudication operates. I mean it’s not unique to the problem of international law. Sometimes we have a question of what does the statute mean, and you don’t really have very good insight into the legislative history or the historical understanding of the statute or anything because the briefs haven’t teed it up or seen that particular issue, and you face a similar dilemma.

One way to handle it is to be cautious about diving into these issues, which I think makes a huge amount of sense. It does mean for those people litigating these issues that if you want to tee up that issue you need to be aware, as Justice Alito was saying, of whom you’re dealing with, which is people who don’t know very much. And if you want them to engage on the issue you really need to supply them with a fair amount of material to be able to get them to feel comfortable to even tackle the issue.

JUDGE LIVINGSTON: I went back and looked at the cases from Filártiga to today on this issue of sources as they’ve been assessed in the Second Circuit, and it’s really interesting. If you look at the decision in Filártiga in 1980 we were extremely confident about torture being prohibited by customary international law, and we relied on the work of jurists and professors. We specifically cited three international law professors—Richard Falk, Thomas Franck, and Myres McDougal—as evidence that this is a prohibition extant in customary international law. Fast forward two decades later, to a case called United States v. Yousef, and we’re taking a very different position. We say that the notion that professors of international law enjoy a special competence to prescribe the nature of customary international law is without merit. We have to determine the content of customary international law by looking to the official actions of states. And to the question whether the states undertake these actions out of a sense of obligation—we have to figure that out. We can look secondarily to law professors, but I would say that this is very difficult, and we’re having trouble discerning the practice of states by looking particularly at scholarly exchange.

I don’t know if others have seen this in your case law.

JUDGE SRINIVASAN: I do remember arguing one case where the question came up whether a norm had attained the status of customary international law. And I cited a reference point for it which was—and I don’t want to unfairly malign a source because I frankly can’t remember which source it was, but let’s just say it
was the Restatement Sixth—I know there’s no such thing, but let’s just say that. And one of the panelists just sort of scoffed and said, well that’s not an accredited source of international law. And so it’s really a challenge to determine—

JUSTICE ALITO: Was that me?

JUDGE SRINIVASAN: It was not you. (Laughter) It was not you actually.


JUDGE SRINIVASAN: Thankfully. And then there’s treaties, there’s instruments of international law to look at, but one lesson in this area that came home in a case that we had recently in our court is it’s often helpful to know what Executive Branch history has been with respect to a particular statute, even if the Executive Branch is not involved in the case.

DEAN MANNING: So that’s Judge Barron’s State Department consultation?

JUDGE SRINIVASAN: Right. And you can get that effectively even if you don’t have your own State Department by looking at previous State Department submissions or Justice Department/State Department filings, including in Supreme Court cases. And so obviously sometimes courts can ask the government to weigh in, but if you don’t ask the government to weigh in you can still do the research to try to figure out whether the government has weighed in on a similar issue in similar circumstances. And sometimes private parties, I think very helpfully, find that the government has weighed in on an issue and can cite the brief or quote the brief and let us know. And that’s obviously not dispositive, but it’s germane and it’s helpful to know, particularly—and again alluding to the book—because the government’s in a particularly advantageous position from which to discuss the state to state implications of a particular interpretation with the benefit of that kind of experience of diplomacy and history. And so that sort of knowledge is very illuminating and enlightening for us as judges, no matter where it comes from.

DEAN MANNING: So now I’ve heard Executive practice, I’ve heard practices of nations, for law professors not so much, treaties, restatements. That’s a lot of sources. Are there any others?

JUDGE KAVANAUGH: The ICJ. This is one of the problems, I think, a practical problem with modern customary international law and how courts are supposed to go about it. And I’ve said in an opinion that customary international law has a make-it-up-as-you-go-along feel to it. And that was a genuine feeling on my part after trying to discern the content in a particular case of what exactly was the international law principle. Not new problems. Gouverneur Morris at the Constitutional Convention said that international law was often too vague and deficient to supply a rule, that’s one of the reasons why the Define and Punish Clause was put into the Constitution. But it’s a huge problem if as a judge you’re supposed to say that the government loses in a military case in a time of war because of a very vague principle of international law that seems uncertain and that maybe a couple of professors have articulated, or maybe the ICJ, which is judges mostly, fourteen of the fifteen from foreign countries. Moreover, to hold someone liable for millions of dollars because of some principle that is not clearly
articulated seems to raise fair notice concerns. So, for me, I’ve articulated a lot of those concerns about the vagueness of international law. There’s not a book you can pick up that says here are the norms, here are the rules, here are the principles that govern tort liability, that govern military relations, military actions, and the like. At least for me.

DEAN MANNING: Justice Alito?

JUSTICE ALITO: Well, I think most of this has been covered. Where would I look? I would look to briefs. On the Supreme Court, we would have the advantage of having a great many tremendous briefs that would provide us with sources. And the contrast between the resources that we have available and the resources that are available to the average federal judge, including me in a prior incarnation when I was in my chambers in Newark, is quite striking.

One thing that occurs to me based on this conversation is how different our understanding of the sources of customary international law is from the prevalent, or at least the very common, understanding of the source of international law at the time when the Constitution was adopted. Because I think at that time it was very widely thought that international law was related to natural law, that these rules about the relationship between nations were self-evident truths and you could look them up in the leading treatise of the day. But because our understanding of the nature of law has changed so much since then, it’s a more difficult inquiry now.

DEAN MANNING: Well, so as I listened to all of you and, you know, I hear all these different sources and I think there’s lots of different evidence about what the custom is, right, if you’re thinking about what customary international law is. So how do you sort and decide what weight to attach to these different sources? Is there one that stands out as particularly strong? So if the State Department has a strong view on the content of international law is that something that judges should defer to? So is it the restatement, is that particularly strong? The views of international tribunals, how much weight are you going to give to those?

JUDGE BARRON: One thing—just before we get too downbeat about the possibility of figuring this out—is that it is a pervasive problem in legal decision making outside the context of international law, for example, if you just think about the scope of the Article II power, and the extent to which that’s a historical question, as it often is. You start running into the same types of questions: Do I look at the Federalist Papers? Do I look at certain decisions? Do I look at what presidents actually did? Do I care if when the president did it he thought he was doing the right thing or the wrong? Do I care how Congress reacted to it? I mean that’s a difficult inquiry that we have to engage in with many, many sources of law. That’s not to say that that solves the problem. And there’s all kinds of doctrines of deference and hesitancy and political questions that arise as a consequence of those difficulties. But I don’t know that they distinguish necessarily any customary body of law, which most historical law is, from this particular body of law.
JUDGE LIVINGSTON: I think the question might be a little bit more complicated—at least that’s how I’ve experienced it in the customary international law context—to the extent that you’re asking how do states behave, and are they behaving this way out of a sense of felt obligation, and is this a deep rooted sense of obligation such that this is a principle of customary international law. The question borders on being empirical/legal. And when you get presented with briefs—and I think one of the things we’re thinking about is how could lawyers potentially be of more assistance to courts in these cases—a lot of time the briefing just throws all these citations into a brief, and they’re not really addressing that underlying question in a systematic and careful way. With respect to many other legal problems, we already have a more developed structure for thinking about the questions.

JUSTICE ALITO: I think what Judge Barron said about the relationship between this inquiry and other inquiries that look to custom or practice is absolutely true. But those are also very difficult. They don’t come up that frequently in the course of ordinary federal litigation. One of the two cases he mentioned does relate to customary international law because it involved the question whether the Constitution gives the president the sole power of recognition or whether that power is shared with Congress. And we had tremendous briefs that went through the whole history of many, many, many, many things that presidents and congresses have done in this area for 200 years. Without briefs from experts on that history, there would be no way for a judge to assess it.

The other, similar case had to do with recess appointments, and the whole practice of recess appointments over a 200-year period. Any assessment of custom and practice in connection with an issue like that is very, very difficult.

DEAN MANNING: Well, that leads me to—oh, go ahead, Judge Kavanaugh.

JUDGE KAVANAUGH: I think the problem that Justice Alito talked about in the international law context is magnified because the sources are so many. You’re used to doing historical research on American practice. The problem of discerning the content of customary international law is much more difficult for me at least, in terms of the diversity, the sources, and the relative weight of the sources of international law. That’s not distinguished in kind but certainly in degree for me from the kind of thing we do with U.S. practice. But also the functional problem, or the practical problem, with figuring the content of international law raises the formal question what is the status of international law, legally speaking. We can’t avoid interpreting Article II, but is customary international law, at least modern customary international law, part of our law as the Paquete Habana case said, or is it not? And I think the book says that post-Erie international law, at least modern customary international law, is not part of our law. That’s not to say that the book is or I am hostile to international law. Rather what it is saying is that instead of courts doing this on our own in the first instance and making up or trying to discern what the international law principle is, it’s for Congress and the president in the first instance to figure out what they want to put into positive U.S. law, what international law principles they want to borrow,
whether it’s the Foreign Sovereign Immunities Act, the Alien Tort Statute, or the law of war military commissions statute. And there are lots of statutes where Congress has borrowed from international law.

The practical problem and the formal question of the status of international law, to me, reinforce one another as problems with the judicial function in international law cases.

DEAN MANNING: So some members of the panel said that this problem is more pervasive and extends to hard constitutional questions. Does the same sort of question—it’s very difficult to discern the meaning —apply more generally throughout the law? Or is it particularly international law that gives you concern about this?

JUDGE KAVANAUGH: Well, I think it’s harder, but I agree with what Judge Barron and Justice Alito said. It’s hard in the Article II cases, and in many other constitutional cases, to figure out what the historical practice of the United States was. And I’ll do a shout out to Judge Barron, who’s written a great book called *Waging War* that does the historical practice from George Washington to the present day about the historical practice of presidents and congresses in the war context. It’s enormously valuable that he did that, but that was a ton of work and that’s what we have to rely on. There’s hard work to be done in our constitutional cases where the relevant legal test depends on historical practice, as it often does.

JUSTICE ALITO: And it’s too long for an opinion, too. (Laughter)

DEAN MANNING: It is a great book though. Judge Srinivasan?

JUDGE SRINIVASAN: Yes. On the question of whether it’s law at all, I’ll go back to the point that if you have a statute that speaks generically about international law or the law of nations, it becomes law by everybody’s estimation. And then the question is how do you define what the content of that law is. And one distinction between that enterprise when you’re dealing with a term such as “law of nations” or “international law” and the Article II enterprise, or other areas in which there’s some indistinctness, is precedent. Because, as Judge Livingston started out saying, there’s not a wealth of precedent on how to determine what the norms of customary international law are, whereas in other areas there’s at least precedent that’s analogous. So you know to some extent there’s a roadmap on the sources to look to, the methodology of the inquiry, how to go about it. With international law it’s trickier because you don’t have a body of precedent that you can look to and say, okay, here’s a decision in an analogous area and here’s the methodology that the court undertook, and if it’s a court that sets the precedent for us that we need to follow, that’s a chart that we’re bound to adhere to. We don’t have that to the same extent.

DEAN MANNING: So how much is it a chicken-egg problem, in the sense that you’ve all described you’ve decided very few cases, maybe had some experience in the Executive Branch, maybe had some experience as an advocate, but not a lot of these cases come up? And so if there were more cases, if it were recognized as federal law more firmly than it is now, would you develop the set of precedents, the practices, that would enable you to sort through these complicated materials in a firmer way?
JUDGE BARRON: Well, one thing in the book that I thought was striking is that it’s very helpful in disaggregating these three different types of law—the law merchant, the maritime law, and the law of state-state relations. It’s very helpful in doing that. And a big theme of the book and a powerful observation is the way the law of nations has changed in modern human rights law because it’s not focused on state-to-state relations. It’s focused on individual-to-state, or individual-to-individual, relations. But, of course, the law merchant has the same characteristic in that sense. I mean you can think of it as an early, early version of a kind of human rights law. It had a commercial aspect to it, but in form it’s not respecting sovereignty in the way that the classic idea of two states dealing with one another is.

And yet it was understood to be discernible. Now there is that point Justice Alito makes, which is true, about pre-Erie law and 19th century law and ideas of law generally, which is that it wasn’t positivist in the way that we now often think of law. You could have a treatise on the Constitution which included all state constitutions, as if that was constitutional law, that there was a general body of constitutional law. That would be unintelligible to us today given the way we’ve been educated, given the legal culture we inhabit. And that creates a difficulty. But we still do apply maritime law, and we seem to not have an inability to do that. It’s different than modern law, but in form there’s really nothing that I think on its face distinguishes it in its inherent nature from modern and national human rights law.

JUSTICE ALITO: There’s a danger I think in interpreting the few precedents that exist in this area. And that is as a lawyer reading these cases—and you have to do this as a lawyer and I did it—you examine every sentence under a microscope and you assume that there’s great hidden wisdom in every word in the opinion and that all the implications were carefully thought out. But after you’ve written some opinions and you’ve (laughter) read opinions that others have written, you know how the sausages are made and you’re unwilling to attribute so much meaning to a few phrases here and there. But it’s hard to get away from that.

JUDGE LIVINGSTON: That’s one of the great contributions of this book, and I think the professors have done us a great service by helping the generalist judges to understand more about the law of nations at the founding and to think about the complications of these three branches of customary international law. And the claim is made in the book very clearly and very well: You can’t extrapolate from any one of these how customary international law should interact with the Constitution or be part of our law today. Under some of the broadest claims—and I’ll just posit the most expansive claim; I don’t know if anybody actually makes this one—the claim that customary international law, every whit and parcel of it, is a matter of domestic law at this moment. The full implications of such a claim for domestic law, including contrary state law, would be significant. I think judges have intuited that these implications seem problematic for principles of democratic governance, for separation of powers, and particularly for foreign
relations in different contexts. But judges didn’t have a theory to help them understand the specific ways in which these implications might be problematic. And this shows the great value of scholarship, that you really can read something, whether you agree with all of it or not, and you feel better grounded when you’re thinking about the application of customary international law.

JUDGE KAVANAUGH: To draw the distinction again between—as Judge Srinivasan pointed out—between Congress enacting a statute that incorporates international law and judges just taking international law and bringing it into our law, I think it’s very important to remain focused on this distinction. I have skepticism, as I’ve expressed, about the judges bringing it into our law, at least post-Erie. I think that’s a dangerous function.

On Congress incorporating it into statutes, I do think Congress could do a better job of bringing in clearer principles rather than just cross-referencing, say, the law of war or the law of nations. The Alien Tort Statute refers to the law of nations, some of the military statutes refer to the law of war. That leaves us still at sea, as Judge Srinivasan pointed out, regarding what exactly is the content. In the Military Commissions Acts of 2006 and 2009, after Hamdan, Congress said we’re not going to just leave it up to judges case by case; we’re going to tell you what offenses are triable by military commission. In other words, Congress itself defined it much more specifically. I think when Congress can be more specific about exactly what parts of international law it wants to bring into U.S. law—and I realize the difficulty with law making—it is performing a valuable service, saving judges from having to hunt around the forest trying to figure out exactly what Congress means when it just cross references the law of war or the law of nations without further definition.

JUDGE SRINIVASAN: There’s also a fascinating temporal dimension to this, because if you have a statute that references international law, there’s an underlying question of whether it references international law at the time that the statute is enacted or whether it incorporates the concept of international law as an evolving enterprise. And so with the Alien Tort Statute, it was part of the First Judiciary Act from ages ago, but after Sosa it is interpreted to incorporate the law of nations as it develops over time, including—and the book discusses this—the innovation in the 20th century where international law norms cease to be just about state-state relations but deal with the relationship of states to their own citizens. The Foreign Sovereign Immunities Act, too, has come to be interpreted, I think, as requiring application of an evolving body of law rather than law frozen at the time the Congress enacted it, which is not exactly how one would construe statutes in the main.

JUDGE KAVANAUGH: We lower court judges have a different role in this because we, Justice Alito, do hang on every footnote and every word of footnote twenty and footnote twenty-one of Sosa, and Justice Breyer’s concurrence. I’ve referred to the seven norms that are recognized under the ATS, and I’ve called them the Blackstone Three and the Breyer Four (laughter) based on Justice Breyer’s concurrence in Sosa. I said this is as good as anything I have, so they’re
now fair game. A case like *Sosa* was such a rich case with so many interesting footnotes that have bedeviled the lower courts since and been interesting. But that’s part of our role—to first figure out what the Supreme Court has said, and we all try to do that as faithfully as we can.

**JUSTICE ALITO:** An interesting historical fact that the book brings out is that issues of customary international law came up very frequently in the early years of the Supreme Court and the federal judiciary as a whole I think primarily because there were so many prize cases in those years and so that brought these issues up. So the lesson there is that Congress should start once again issuing letters of marque and reprisal (laughter) and that would bring these cases into federal court. And having said that, I can just see a story about this talk—“Alito recommends that Congress commission pirates.” (Laughter)

**DEAN MANNING:** So that leads me to my next question. Very, very nice segue. How much of this is constitutional law and how much of this is international law? If the book’s claims are correct, the interconnection between the Constitution and the law of nations is really pretty dramatic. Judge Barron was saying, when you interpret the Constitution, there are all sorts of tools. You look at some history, you look at the Federalist Papers, you look at the practice of presidents. Does this tell us that the law of nations provides a deep context for understanding the allocation of power under the separation of powers in the original Constitution? And should we adapt constitutional law to reflect that a little bit?

**JUDGE BARRON:** Well, in some way your question is the opposite of the thesis of the book, which is that you should adopt our interpretations of the law of nations to some extent to conform to presuppositions in the Constitution, which is a perfectly plausible position. But there’s a lot of scholarship lately, I think a sort of rediscovery from the founding period, that they were immersed in an understanding of themselves as participating in the law of nations. After all, they were engaged in creating a nation. So it would have been a very natural thing for them to have been conversant with before they would have been conversant with the Constitution, which of course didn’t exist when they were first thinking about creating the nation. The idea that that’s a deep context for the Constitution itself is an increasing theme in modern scholarship. How that translates into doctrine is another matter. As Judge Srinivasan points out, all of us as lower court judges, particularly when we’re sitting with a Supreme Court Justice, emphasize we’re bound by Supreme Court precedent (laughter). I wouldn’t say that theme in modern scholarship is a dominant theme in the precedents of the Supreme Court and how it has understood the Constitution.

So I think if you were just applying the precedents, you wouldn’t see that as a rich vein of doctrinal development. It doesn’t mean over time new understandings might not shift. But it’s a striking development for those of you interested in it—how much that understanding of our pre-constitutional history has come back into the fold.

**JUDGE KAVANAUGH:** As Judge Barron says, the founders were immersed in the law of nations, international law principles. I concur, and the book does a great job of explaining that.
To your question about constitutional law and international law, think about the separation of powers. So many questions of separation of powers involve who decides, who decides a particular issue. And I think that’s a question the book raises about modern customary international law: Who decides whether that’s part of American law, and who decides what it is? Is that for judges to do or is that for judges to say no, that’s not for us to do, that’s for Congress to do, and if Congress does it then of course as judges we’ll apply it however Congress chooses to adopt and define it. So I think the “who decides” question that’s ubiquitous in separation of powers law generally is foundational also for this question of international law and really at the heart, as I see it, of one of the critical insights of the book in terms of the status of modern customary international law.

JUSTICE ALITO: I mean all of the authority that federal judges exercise comes from the Constitution. And so in considering any issue of customary international law or any other issue I think a federal judge has to examine it through the lens of the Constitution. And this is one of the valuable contributions of the book. Whether you agree with the book or not, you have to start with the Constitution, which is our fundamental law, and understand how customary international law fits into the constitutional framework. There are many provisions of the Constitution that refer to international law concepts. And not just the clause that authorizes Congress to punish crimes against the law of nations, but the concept of a treaty, what is a treaty, the scope of the war power, and what can you do pursuant to a treaty. Those concepts incorporate an understanding of international law.

On the other hand, I think there are provisions of the Constitution that quite clearly have no relationship to customary international law, not to mention foreign practice at the time of the adoption of the Constitution or today. So the inquiry has to be where and how does it fit within this framework.

DEAN MANNING: Any other? Okay.

JUDGE LIVINGSTON: I’d say a huge contribution of the book is making the point that these questions cannot be answered without regard for the structure of the Constitution. The book does a wonderful job of pulling out that once you understand the Constitution, you understand that the Founders were maybe even obsessed with the law of nations and making sure that the Constitution handled that law in a way that would protect the young country, that it armed the political branches with the ability to carry on foreign relations in the way that the young nation needed, that they provided for jurisdiction in courts to avoid problems with foreign states because of the treatment of aliens who might find themselves here. For judges who are educated in law schools and for all the law students in the room, the Constitution has a ton to say about customary international law, as these two professors have brought to the table, but this is not something that is really generally discussed in a constitutional law course. I was a professor for fifteen years before I became a judge, and this is the problem with law school—we can’t teach everything at once, so we split off all these different areas and the professors specialize in them. And so after reading this book and reflecting back on
your education you could ask yourself: Do I think, huh, do I think I got a good grounding in how the Constitution might treat or think about customary international law? And I suspect most American law students would say not really. And this is not faulting the constitutional law professors, it’s just faulting the need to separate a curriculum into different parts.

DEAN MANNING: A dangerous move that they tell litigators never to do is to ask a question you don’t know the answer to, but I’m going to do it anyway. How helpful is academic scholarship—let’s bracket this book, which we’ve all acknowledged, let’s concede it’s very helpful—how helpful is academic scholarship generally when you’re dealing with a question like this, a hard question of understanding customary international law, understanding its relationship to the Constitution? You know, basically deciding the cases that you need to decide on this set of questions.

JUDGE SRINIVASAN: I think very, I would say. At least potentially very. It obviously depends on the particular treatment at issue. But it can be highly helpful and particularly if the audience in mind—and this is obviously from a self-absorbed perspective because of the people who are up here right now—the audience in mind at least in part is a judicial tribunal. Because if it’s academic scholarship that synthesizes an area of law and that assimilates it through the lens of doctrine and through the lens of actual cases, I think you definitely want to read it, and I definitely encourage my law clerks to read it. I read it myself because it’s a deeply valuable input, and probably the product of a great deal of research and institutional expertise that maybe we don’t have but we can benefit from. So academic treatments can be terribly useful as long as they’re grounded in a way that’s translatable for judges.

JUDGE KAVANAUGH: Yes. I think it’s enormously useful. So I have a view on this based on my actual practice and citation practice in my opinions. I dig into the legal scholarship on the particular issue that’s in front of me. Not all legal scholarship, as Judge Srinivasan points out, is relevant, but on most difficult issues there’s a lot of relevant legal scholarship. I’ve relied heavily in my Guantanamo cases on Marty Lederman and David Barron’s articles in the Harvard Law Review, those on the meaning of Youngstown and the history of Youngstown and the application of Youngstown, Professor Manning on statutory interpretation. I could go on, but it’s very valuable because people spent months or years thinking about a problem we might have days or weeks to really focus intensely on. And so it can be enormously helpful for me to ground my thinking in the expertise and experience of others even if—and maybe even especially if—I end up disagreeing with them. I’ve been forced to confront the research, the scholarship, the analysis of people who’ve spent a long time thinking about it.

I’ve found it very valuable and so I’m grateful to all the academics out there for producing great work that’s valuable for me in my judging.

JUDGE BARRON: Having just left teaching after fifteen years, I’m not going to say anything other than what people have said. And my father, who’s here, taught at George Washington Law School. But I’m here honestly because my
mother is a graduate of Georgetown Law School. She’s here as well. I’m sure he would not want me to say that academic scholarship was meaningless. (Laughter)

The only thing I would want to add to it is that there’s really two different levels at which I think it can be influential on judges. One is direct, in the way that Judge Srinivasan and Judge Kavanaugh are describing. You have a particular case, somebody has organized the issues surrounding that case, done an enormous amount of research, which is very helpful. There’s another way, though, which I think it can be quite influential on judges over time, which is much less immediate and much more indirect, which is that we’re just all products of particular legal cultures at the time. We’re educated in certain ways, certain ideas about what law is. I mean we were talking earlier, one of the ways in which this problem, that the book is confronting, arises is I really think deeply connected to a point both Justice Alito and Judge Srinivasan said, which is you have a statute, the ATS statute, which talks about the law of nations, and yet their understanding of what law was when they refer to the law of nations is so different than what we even think law is now because of realist insights and positivism and post-Erie understandings of how law gets made and roles of judges.

Well, that doesn’t come from any particular article that organized cases in a particular way. That’s a much more theoretical set of propositions that you’re learning in your classes that your professors are doing, and theoretical articles, which I think we can misapprehend. Not to say you were suggesting it, but although not speaking to judges, I think they do actually have an enormous impact over time, you know, when they’re done well.

JUDGE LIVINGSTON: And you think of the revival of the ATS in 1980. So in the scholarship from 1980 to today, it’s not surprising that we see rich books like this and other books in this field because there would be a deficit of understanding and a need to go back and think about these issues as a result of change in the courts, new decisions.

JUDGE KAVANAUGH: We have to rely on the scholarship, too. We don’t always get all the amicus briefs that the Supreme Court will get on a tough issue. In fact, lots of times we won’t get any. An issue might get a couple of pages of attention in a single brief and it’s a major issue. We almost have to go out and find our own amicus briefs, in essence, by finding scholarship that might be relevant to the issue, taking competing positions on it, and really informing ourselves about the richness of a particular issue. In part, so we don’t make mistakes in our opinions. One of my fears as a judge is always writing something that makes a mistake or that the lawyers get it and say he didn’t really understand this, or that an academic reads it and says he didn’t understand it. So I don’t want to make that mistake. I want to know everything I can.

And one practice tip would be for practitioners: Don’t ignore the scholarship. Rely on what’s out there, at least be aware of it. You may get good ideas from there. Sometimes I think as a practitioner you’re so focused on the case law you forget about maybe approaches that are in academic scholarship. I wouldn’t suggest leading with that because we’re bound by precedent, a system of law. But
DEAN MANNING: So apart from citing more law review articles in their briefs, what else can lawyers do—

JUDGE KAVANAUGH: Sorry. (Laughter)

DEAN MANNING: What else can lawyers do to help you all deal with these very difficult questions? How can lawyers help?

JUSTICE ALITO: I think the general challenge that lawyers have when they write a brief in an area in which most judges don’t have a lot of background is to provide the background in a way that is easily understandable to the judge but doesn’t signal to the judge that you think that this particular person is an ignoramus. (Laughter) So I think that’s the challenge. You can’t assume—if you’re an expert in any particular practice area, maybe it’s bankruptcy or it’s patent law, or whatever it may be—you can’t assume that the judge hearing your case has that background. And so you need to educate the judge, but at the same time, even if you think that the judge is dim, you don’t ever want to convey that impression.

JUDGE BARRON: One practical problem at the court of appeals level that occurs to me is, you know, we don’t pick an issue and then have briefing and focused attention on that issue. So the lawyers may have embedded in their case a potential issue implicating international law or customary international law, but it’s one of ten issues. And they don’t know when they’re writing that brief that that issue touching on international law is going to have saliency, whether they’re better off invoking a different canon, not Charming Betsy. So how much do you really develop that argument? Because if you have to provide a lot of background on it you’re sort of also signaling I think that this is our best argument. They may not think it’s the best argument they want you to focus on particularly. So it is a difficulty I think that just arises from the lack of familiarity judges have with this body of law and the complexity of describing this body of law. That sort of getting into a brief in a kind of normal way—you know, canons you can do shorthand, we understand what they are, you reference it, we got it. If you want to refer to this particular canon, to actually do the work that you’d have to do to make it so we’d really feel comfortable then applying it, it can eat up a lot of the brief and signal something about what you think your argument is you may not even intend. I think that’s just a difficulty for advocates. You would know better than I.

JUDGE SRINIVASAN: No, I completely agree. When you’re a lawyer your goal isn’t to be most helpful to the judges; your goal is to be most helpful to your client in a way that’s going to persuade the judges. And I guess understanding that—and all the students here, you know this already or you’ll discover it soon enough—understanding that means that you understand that you want to advance your client’s cause in a way that is going to receive a favorable audience amongst people like us.

On international law in particular, just three things spring to mind. One is to reinforce something Justice Alito said, which is not to assume too much
knowledge. I say this a lot to practitioners anyway. I think there’s a tendency to assume greater comprehension and knowledge on the part of judges and maybe Justices than maybe ought to be assumed, if for no other reason than there’s a lot going on and a lot of cases. So in this area in particular I’d assume less knowledge. I think contextualizing international law concepts is very important because for a lot of the reasons we’ve discussed already, there’s not the same basic grounding that would allow you to think that everybody understands the context in which this issue arises, so doing some work in contextualizing I think is really important.

And then the other point is I’ve often thought there are two ways to argue a case. One is to argue it by telling the tribunal you have to rule for me for the following reasons. The other way to argue a case is to tell the tribunal you should want to rule for me for the following reasons. I think it’s almost always advantageous to be in the second box rather than the first. If you’re going to win because precedent dictates it, obviously that’s a great position to be in. But a lot of times, with appellate tribunals in particular, and definitely with the Supreme Court, a lot of the argument and a lot of the persuasive force comes from understanding why ruling for you is a good idea within the bounds of precedent, within the bounds of legal stricture, within the bounds of all the sources that we all need to look to. And international law is an area where this concern it seems to me would be particularly ripe because we have less experience with looking at the sources. Imagine you look at a source and it begets a principle that serves a particular side, and your immediate instinct is, boy, that just doesn’t make sense to me. I know that you’re telling me that that’s the principle that wins the case for you, and I don’t know that much about international law, and you’re citing a particular provision in a particular convention that at least on its text maybe suggests that that’s a plausible understanding in your favor, but it just doesn’t make sense to me. I would think a lot about how do I persuade you that this is actually a sensible understanding. You should want to construe this in a way that inures to the benefit of my client because it makes sense about the world, about the way nations deal with each other, about principles of diplomacy that have stood the test of time. I think in this arena those kinds of considerations seem especially significant to me.

JUDGE LIVINGSTON: Yes. Sosa says that we lower courts should think carefully, among other things, about the collateral consequences of recognizing private rights of action as we consider norms of customary international law that are pressed upon us. That seems to me a fruitful area for lawyers trying to develop good arguments. And you always have these page limitations, and now you’re talking about policy ramifications. And it may be easier just to look back at those early Supreme Court cases that say international law is part of our law and wave a flag. But I think under the ATS—and more broadly because judges do pause when they’re thinking about customary international law—to the extent that you get thoughtful arguments on both sides as to these collateral consequences, you will both serve the public interest by informing the bench and you will service your client. Because if you don’t make those arguments, the judges will be speculating about them. So you should make the best case for your client’s position.
DEAN MANNING: So I think we have time for one more question, and here it is. (Laughter) Judge Srinivasan and Judge Barron both alluded to this, which is this book has a very rich history that starts with the Founding of the Constitution. And if you look at the structure of the Constitution and the assumptions about the three different branches of the law of nations, you see a pretty clear understanding that there are certain categories of cases that are going to be governed by certain well recognized, widely shared international norms, including the Swift v. Tyson law merchant cases in diversity.

And so, as Judge Barron said, some things about the world have changed. One thing is international law means something very different from what it meant in 1789. The whole conception of law is very different. We’ve got the influence of positivism, right. As Holmes said, law is not a brooding omnipresence in the sky. We know that it emanates from some sovereign, that it’s not something that is just out there to be found.

And then third, as this panel said earlier, it’s harder to find what the international law is. You’re not just going to go out and get [Emer de] Vattel or [Jean-Jacques] Burlamaqui and figure out what the governing rule is. And so how do you translate what Bellia and Clark found into the 21st century?

JUSTICE ALITO: How do you? (Laughter) I mean there are two people who know the answer, right?

DEAN MANNING: So perhaps I asked one question too many. (Laughter)

JUDGE SRINIVASAN: Whenever I hear a question like that I’m tempted to answer res ipsa loquitur and just leave it at that because it sounds profound and as if that really says something when it doesn’t. (Laughter)

DEAN MANNING: How do you make sense—well, let me rephrase it—how do you make sense of an 18th century Constitution in a 21st century world?

JUDGE KAVANAUGH: Well, I think one of the theses is that you should be careful about assuming that international law as understood at the time of the founding means the same thing now. And, therefore, you should be careful, especially post-Erie. Law has to have a source of authority, a sovereign source of authority. Be careful about simply assuming that modern customary international law is part of our law in the way that judges can incorporate it into U.S. law rather than Congress doing so. So that’s one of the lessons I took away from it. I also took away a lesson on the Charming Betsy canon, to think more carefully about that, which I’ve done before, but they’ve certainly provided much more of a foundation. And, again, don’t assume that international law today is the same as the different branches of international law at the Founding. And I think that they point out the modern position, as it’s called, simply would assume all international law today should be treated by courts in the same way as one part of the law of nations was treated at the founding.

I think the lesson of the book for me is don’t do that without thinking about it and be careful about doing that because you may be making a category mistake by doing that.

JUSTICE ALITO: I think what your question highlights is that issues about the role of customary international law are intimately connected with the really big
issues about constitutional interpretation and legal interpretation. It’s not, as Judge Livingston was saying, a separate thing because it’s taught in a separate course. What you think about customary international law is inextricably connected to what you think about the Constitution, what the Constitution means, and how do we determine what the Constitution means. Depending on your answer to those questions, you’ll provide a different answer to the questions about international law.

So scholarship that doesn’t treat this as an autonomous area of the law I think is very valuable. And if this is the direction in which scholarship moves in the future—and I hope it will be—whether you agree or disagree with the conclusions drawn in this book, unifying those two areas is very valuable.

DEAN MANNING: Anyone else? All right. Well, let’s thank Professors Bellia and Clark and these wonderful judges for a great book and a great discussion. (Applause).