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Article

Law of the Land, Law of the Sea:
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Customary International Law and
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This Article proposes a different way of thinking about the question of whether customary international law is the “law of the land.” It looks back to the nineteenth century and to the once-parallel treatment of customary international law and general maritime law, finding that the two were linked closely by the end of the century. But, in the twentieth century, their treatment diverged dramatically as Supreme Court decisions “constitutionalized” the general maritime law and did not do the same for customary international law. General maritime law is supreme under Article VI of the Constitution and preempts contrary state law, but it does not automatically allow matters arising under it to be characterized as federal questions. This Article proposes that customary international law be re-linked to general maritime law and share both its status as “law of the land” and its implied preemption of state law.

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INTRODUCTION

To a surprising degree, many critical issues pertaining to the foreign affairs law of the United States remain unresolved, even after over 220 years of experience under the Constitution. The distribution of war powers between the President and Congress, limits on the President's power to make, suspend, or terminate obligations under treaties and other international agreements, as well as the proper role of the federal courts in adjudicating foreign relations disputes, all remain open — and highly contested — matters in contemporary legal discourse. Perhaps the most contentious issue in current debates is also the most fundamental: the very status of customary international law as part of the law of the United States.¹ The question of whether customary international law (CIL) is a species of federal law, state law, or something in between has spawned a lively polemic, extending well beyond the ruminations of academics² to the central corridors of power in this country.³

As with much constitutional discourse, we continue to re-live arguments of great historical pedigree and salience. But something confounds the current conversation as to the status of CIL in U.S. courts: The noted absence of any sustained consideration⁴ of the

1. For the purposes of this Article, by “customary international law,” I mean non-treaty-based sources of international legal obligation. Treaties and other international agreements of the United States are expressly recognized as part of U.S. law under the Supremacy Clause. *See* U.S. CONST. art. VI, cl. 2.

2. In addition to the sources cited *infra* at note 4, see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 cmt. d (1987) (“Customary international law is considered to be like common law in the United States, but it is federal law.”). *See generally* T. Alexander Alienikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004) (arguing that international law should be treated as neither federal or state law, but as a *tertium quid*); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that CIL must be federal law); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT’L L. 555 (2002) (arguing that international law should be treated as general common law outside of federal law but incorporated within it); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665 (1986) (arguing that CIL is of limited effectiveness and largely applied by the political branches rather than the judiciary).

3. For recent Supreme Court decisions dealing with this question, see, for example, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

4. For the handful of contributions that have drawn a connection between customary international law and the general maritime law, see Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 915–19 (2007); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1332–60 (1996); David Ginn, *The Domestic Legal Status of Customary International Law in the United States: Lessons from the Federal Courts’ Experience with General Maritime Law*, 4 J. INT’L L. & REL. 105, 145–48 (2008); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L.

relevance and applicability of principles concerning the general maritime law (GML) — that body of non-statutory, non-treaty, and judge-made law that governs the substantive obligations and procedural remedies of seafarers and those involved in maritime commerce. This contribution attempts to rectify that omission and rediscover the now largely forgotten set of connections between CIL and the GML. Although it will require resurrecting fragments of doctrinal history, this is no mere antiquarian exercise — it is the legal historian’s equivalent of an archaeologist conducting a dig at a long-lost ruin.⁵ Indeed, for reasons that will become readily apparent, the fruits of this excavation have a startling consequence: a simple, elegant, and historically valid solution to the question of whether CIL is part of the “law of the land”⁶ of the United States.

My thesis here is straightforward enough: CIL should be accorded the same status as the GML in the United States — no more, and no less. Crucial to this conclusion is linking the doctrinal and intellectual history of the GML with the key observation that its status as the “law of the land” is not an all-or-nothing, “binary” proposition.⁷ And, indeed, the GML has been regarded as federal law for some purposes, but not for others. Specifically, the judge-made GML is considered “supreme” within the meaning of the Constitution’s Article VI as the “law of the land;”⁸ preempts contrary state law (both decisional and statutory) that conflicts with its essential attributes and demand for uniformity;⁹ permits the Supreme Court to review state court decisions involving

REV. 393, 425–27 (1997); G. Edward White, *A Customary International Law of Torts*, 41 VAL. U. L. REV. 755, 787–89 (2006); Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 277–78 (1999).

5. This project is complicated by shifting sets of legal terminologies over time. The “law of nations” has been transformed into the modern “international law,” including both treaty-based and custom-based sources of obligation. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 1, 101; David J. Bederman, *The Reparation for Injuries Case: The Law of Nations is Transformed into International Law*, in INTERNATIONAL LAW STORIES 307, 333–36 (John E. Noyes, Laura A. Dickinson & Mark W. Janis eds., 2007). Additionally, the phrases “general law” and “general common law” have also been substantially modified in content over time. See, e.g., Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1792 (1997). Because much of the “legal archaeology” in this Article depends on the context of doctrinal statements made in court decisions and treatise literature, these are quoted at length. This is necessary because of the discursive style of previous generations of writers.

6. U.S. CONST. art. VI, cl. 2.

7. See Ramsey, *supra* note 2, at 556; Ernest A. Young, *Sorting out the Debate over Customary International Law*, 42 VA. J. INT’L L. 365, 369 (2002).

8. See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 382 (1918); see also David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325, 333 (1995). Supremacy should be treated distinctly from preemption. See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994); Ginn, *supra* note 4, at 131–32.

9. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215–16 (1917).

GML matters¹⁰ when such cases are brought in state court under the “savings to suitors” clause;¹¹ but does not allow matters arising under the GML to be automatically characterized as federal questions for the purposes of that source of jurisdiction, absent some other basis of jurisdiction (such as a cause of action based on a treaty or statute).¹² I argue here that CIL should have precisely the same attributes of the “law of the land” as the GML.

Although federal judges have widely dismissed both foreign relations law and maritime law as “exceptional” categories, or enclaves, of law-making,¹³ analogies of GML to CIL are rejected because admiralty is viewed as a legal realm that is — because of historical and practical considerations — weird and different.¹⁴ But the historical and intellectual links between the two domains remain under-theorized and not well understood. This piece attempts to demystify these assertions of exceptionalism and provide a coherent, chronological account of the doctrinal unity of GML and CIL, focusing on the main currents of doctrinal change in the status of CIL and GML as law in the United States.¹⁵ After examining in Part I the role and function of CIL and GML in the early years of the Republic (up to the Civil War), I devote substantial attention in Part II to the period between 1860 and 1900, where arguably the greatest transformation occurred in judicial characterizations of these subjects as they each reached their apogee in judicial recognition and both CIL and GML were reconciled.¹⁶ Part III

10. See 28 U.S.C. § 1257 (2006) (allowing Supreme Court review of state court decisions).

11. 28 U.S.C. § 1333 (2006) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled”); see *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 242–48 (1942). See generally Jonathan M. Gutoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking*, 70 TUL. L. REV. 2169 (1996) (rebutting claims that the Supreme Court does not have the authority to review state court GML decisions).

12. 28 U.S.C. § 1331 (2006); see also *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 359–81 (1959); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828); Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 2–3 (1959).

13. Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096–97, 1104–05 (1999); G. Edward White, *Observations on the Turning of Foreign Affairs Jurisprudence*, 70 U. COLO. L. REV. 1109, 1114–17 (1999); Ernest A. Young, *It’s Just Water: Toward the Normalization of Admiralty*, 35 J. MAR. L. & COM. 469, 471, 517–18 (2004).

14. See Young, *supra* note 4, at 305 (“[A]dmiralty, in light of its history, is just different.”).

15. As a matter of intellectual history, I concede that what I am essaying here is an “interior,” doctrinal account of legal history, largely disassociated from larger social and cultural trends. See John Fabian Witt, *A Social History of International Law*, in *THE U.S. SUPREME COURT AND INTERNATIONAL LAW: CONTINUITY OR CHANGE?* (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., forthcoming 2011) (manuscript at 3–12) (criticizing the “insider approach” to the history of international law).

16. See, e.g., *The Paquete Habana*, 175 U.S. 677, 694 (1900); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574 (1874).

considers the period from 1900 to 1959, the time when the happy marriage between CIL and GML was irretrievably broken because of unreconciled differences, largely attributable to the Supreme Court's rulings in two cases: *Southern Pacific Co. v. Jensen*¹⁷ and *Erie Railroad Co. v. Tompkins*.¹⁸ These two decisions contributed to the dilemma we face today in reconciling the jurisprudential bases of GML and CIL as law in the United States. Part IV explores the contemporary debate about the status of CIL, particularly as reflected through the Supreme Court's discussions in such cases as *Banco Nacional de Cuba v. Sabbatino*¹⁹ and *Sosa v. Alvarez-Machain*.²⁰ I conclude by offering a possible way forward in achieving the full doctrinal rapprochement between CIL and GML as the "law of the land."

I. OPENING POSITIONS, 1780–1860

In the early legal history of the United States, CIL and the GML were often assumed to be one and the same. Even before the ratification of the Constitution, state courts often recognized the unity in the character of CIL and the GML.²¹ Many of the disputes of this period involved the adjudication of "prizes," maritime captures on the high seas conducted in accordance with both maritime law and international law.²² But in addition to prize cases — the perfect intersection of CIL and GML — U.S. courts adjudicated admiralty cases that had no public international law component (such as disputes about salvage, collisions, mariner's wages, or home-port liens and mortgages)²³ and, likewise, decided international law questions that had no maritime element (like diplomatic and sovereign immunities).²⁴ To a degree that would be considered astounding today, however, American courts of the early Republic treated CIL and the GML as simply two sides of the same coin: the *ius gentium*, or law of nations, in both its public and private

17. 244 U.S. 205 (1917).

18. 304 U.S. 64 (1938).

19. 376 U.S. 398 (1964).

20. 542 U.S. 692 (2004).

21. See, e.g., *Talbot v. Commanders & Owners of Three Brigs*, 1 U.S. (1 Dall.) 95, 98 (Pa. 1784) (referring to a Pennsylvania statute granting jurisdiction to Pennsylvania's admiralty court over all maritime cases and directing that the court "thereupon shall decree as the maritime law, the law of nations, and the laws of this Commonwealth shall require").

22. See *The Schooner Andeline*, 13 U.S. (9 Cranch) 244, 284 (1815) (stating that a prize tribunal is a "Court of the law of nations"); *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814) ("The law of prize is part of the law of nations."); see also David J. Bederman, *The Feigned Demise of Prize*, 9 EMORY INT'L L. REV. 31, 41–52 (1995) (reviewing 11 J.H.W. VERZIJL ET AL., INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE: THE LAW OF MARITIME PRIZE (1992)).

23. See, e.g., *The Steamboat New York v. Rea*, 59 U.S. (18 How.) 223, 224 (1856).

24. See, e.g., *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111, 114 (Phila. Ct. Oyer & Terminer 1784).

aspects.²⁵

As for the sources of the GML, courts of the early American republic acknowledged a debt to European antecedents. For example, in *Thirty Hogsheads of Sugar v. Boyle*,²⁶ the issue for the U.S. Supreme Court in 1815 was whether to allow the condemnation in prize of property based on its enemy character.²⁷ Chief Justice Marshall applied a recent precedent of the English High Court of Admiralty that would have characterized the property at issue as that of an enemy. Marshall's consideration of this source of the GML and CIL is worth setting out at length:

The law of nations is the great source from which we derive those rules, respecting belligerent and neutral rights, which are recognized by all civilized and commercial states throughout Europe and America. This law is in part unwritten, and in part conventional [treaty-based]. To ascertain that which is unwritten, we resort to the great principles of reason and justice: but, as these principles will be differently understood by different nations under different circumstances, we consider them as being, in some degree, fixed and rendered stable by a series of judicial decisions. The decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect. The decisions of the Courts of every country show how the law of nations, in the given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this [case].²⁸

U.S. courts followed English admiralty precedents, especially in the area of prize law,²⁹ but this was without prejudice, as Chief Justice Marshall indicated, to “receiv[ing], not as authority, but with respect,” “[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country.”³⁰ American courts often cited the positions of European maritime powers in deciding cases, so

25. See 1 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 375 (Bird Wilson ed., 1804) (stating that the maritime law was “not the law of a particular country, but the general law of nations”); Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–822 (1989); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231, 1261 (1985). For more on the *ius gentium*, see David J. Bederman, *World Law Transcendent*, 54 EMORY L.J. 53, 62–64 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132–37 (2005).

26. 13 U.S. (9 Cranch) 191 (1815).

27. *Id.* at 195.

28. *Id.* at 198.

29. See *id.*

30. *Id.*

long as the decisions did not contradict U.S. precedents.³¹ This was consistent with what Justice Story referred to as “the golden chain, which connects the nations of the earth, and binds them together in the closest union.”³² This interlinkage of citations to admiralty decisions of the great maritime powers was one distinctive feature of the authority of the GML. Another was the reliance by U.S. courts on the treatises of maritime law publicists,³³ which actually defined (for English courts, at least) maritime law as “general law.”³⁴

It is no surprise, then, that in many decisions emanating from the early Republic era, CIL appears to be directly incorporated into U.S. law. One often cited example is Edmund Randolph’s 1792 opinion as Attorney General, addressed to Secretary of State Thomas Jefferson, concerning the legality of an arrest of a servant in the household of the Dutch minister to the United States. Randolph famously observed that “[t]he law of nations, although not specifically adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference.”³⁵ But

31. *See, e.g.*, *Morgan v. Ins. Co. of N. Am.*, 4 U.S. (4 Dall.) 455, 458 (Pa. 1806) (“These ordinances, and the commentaries on them, have been received with great respect Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration.”) (discussing the Marine Ordinance of Louis XIV). For more recent citations, see *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960, 962 (4th Cir. 1999) (quoting Rhodian sea law); *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263 (5th Cir. 1987) (citing the Laws of Oleron). *See also* Ginn, *supra* note 4, at 128–29 (discussing use of ancient and medieval maritime codes); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 391–92 & n.123 (2000) (collecting early American cases).

32. Joseph Story, *The Inauguration of the Author as Dane Professor of Law*, in *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 312 (Steve Sheppard, ed., 1999).

33. Later American courts routinely cited to the publicists of maritime law (often favoring French writers). *See* *Robertson v. Baldwin*, 165 U.S. 275, 285 (1897) (citing Malynes’ and Molloy’s treatises); *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 496–501 (1886) (citing the French treatises of Valin, Emerigon, Pardessus, Boulay-Paty, Dufour, and Bedarride); *The Scotland*, 105 U.S. 24, 28 (1881) (citing Emerigon’s treatise); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 452 (1869) (“Reference is then made to the principal continental treatises, usually referred to here, and frequently recognized by this court as the sources from which the rules of the maritime law were drawn.”). Citations also included historic compilations of maritime laws of antiquity (including the Rhodian sea code). *See* *Ralli v. Troop*, 157 U.S. 386, 394, 396 (1895); *The Scotia*, 81 U.S. (14 Wall.) 170, 187–88 (1871) (“The Rhodian law is supposed to have been the earliest system of marine rules. It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations.”). For more on the sources of GML, see William Tetley, *The General Maritime Law — The Lex Maritima*, 20 SYR. J. INT’L L. & COM. 105, 108–17 (1994).

34. *See* *Prins Frederik*, (1820) 165 Eng. Rep. 1543 (Adm.) 1549; 2 Dods. 451, 468 (Eng.) (examining the writings of “civilians whose language and reasoning is frequently adopted by the writers on general law”).

35. *Who Privileged from Arrest*, 1 Op. Att’y Gen. 26, 26–27 (1792); *see also* *Military*

Randolph was careful to opine that the conduct alleged — a creditor entering the Dutch Minister’s residence in order to distrain a deadbeat servant — was made punishable under an act of Congress.³⁶ Inasmuch as Congress had criminalized the alleged conduct, Randolph noted that it “appear[ed] to have excluded every resort to the law of nations.”³⁷

From this one might infer that, insofar as Congress was granted the power under Article I of the Constitution to “define and punish . . . Offenses against the Law of Nations,”³⁸ once such a codification occurred, the applicable rule of CIL was incorporated into U.S. law and such a statutory enactment substituted entirely for the international offense. This was actually a striking departure from English precedents, which had held that the law of nations (which in its fullest extent was and formed part of the law of England) was the rule of decision in relevant cases, particularly those on diplomatic immunities.³⁹ Indeed, English law went further and held that acts of Parliament were “only declaratory of the antient [sic] universal *jus gentium*,”⁴⁰ and that inasmuch as the “law of nations was in full force in these Kingdoms,”⁴¹ “Parliament . . . did not intend to alter, nor can alter the law of nations.”⁴² Authorities from the early American republic seemed to

Commissions, 11 Op. Att’y Gen. 297, 299 (1865) (ruling on the legality of trial by military commission of President Lincoln’s assassins); ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS 15 (Richard Loss ed., Scholars’ Facsimiles & Reprints 1976) (1845).

36. See Act of Apr. 30, 1789, ch. 9 §§ 25–27, 1 Stat. 112, 117–18 (1790) (codified as amended at 18 U.S.C. § 2381 (2006)).

37. Who Privileged from Arrest, 1 Op. Att’y Gen. at 28.

38. U.S. CONST. art. I, § 8, cl. 10. For more on this Clause, see generally J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (arguing that the Clause should be understood more broadly to allow Congress to punish conduct by foreign actors or U.S. states that violates international law); Eugene Kontorovich, *The “Define and Punish” Clause and the Limits of Universal Jurisdiction*, 103 NW. U. L. REV. 149 (2009) (arguing that the Clause should be understood to sharply limit Congress’ power to punish conduct without a U.S. nexus); Beth Stephens, *Federalism and Foreign Affairs: Congress’s Power to “Define and Punish . . . Offenses Against the Law of Nations,”* 42 WM. & MARY L. REV. 447 (2000) (tracing the history of the Clause and its significance to the founding generation).

39. *Barbuit’s Case*, (1737) 25 Eng. Rep. 777 (Ch.) 777–78 & n.1; Cases T. Talb. 281, 281 (Eng.); see also *Triquet v. Bath*, (1764) 97 Eng. Rep. 936 (K.B.) 937–38; 3 Burr. 1478, 1481 (Eng.).

40. *Barbuit*, 25 Eng. Rep. at 778; Cases T. Talb. at 282.

41. *Lockwood v. Coysgarne*, (1765) 97 Eng. Rep. 1041 (K.B.) 1043–44; 3 Burr. 1676, 1678 (Eng.).

42. *Heathfield v. Chilton*, (1767) 98 Eng. Rep. 50 (K.B.) 51; 4 Burr. 2015, 2016 (Eng.) (“[T]he law of nations . . . is part of the common law of England.”). For more on these cases, see Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 29–32 (1952); Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT’L L. 239, 253–58 (1932); Harold H. Sprout, *Theories as to the Applicability of International Law in the Federal Courts of the United States*, 26 AM. J. INT’L L. 280, 282–84 (1932).

repudiate these notions that CIL was immune from alteration by legislative action.

In a similar vein, Chief Justice Marshall, writing in the 1815 case of *The Nereide*,⁴³ had occasion to discuss the position of CIL and the GML in the domestic legal order. The issue at hand was the lawfulness of a confiscation of cargo owned by Spanish subjects on board a British vessel captured by an American privateer. The Spanish claimants argued that under the 1795 Treaty of Friendship between Spain and the United States, the cargo should be immune from capture. The captors replied by suggesting that, if the situation were reversed, Spanish courts would not be so gracious, and, therefore, notwithstanding the treaty provision, the cargo should be condemned.⁴⁴ Marshall made short work of this argument and held in favor of the Spanish claimants:

[T]he Court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. . . . Even in the case of salvage, a case peculiarly within the discretion of Courts, because no fixed rule is prescribed by the law of nations, congress has not left it to this department to say whether the rule of foreign nations shall be applied to them, but has by law applied that rule. If it be the will of the government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations which is a part of the law of the land.⁴⁵

It is evident that “the law of nations” referred to by Chief Justice Marshall in this passage was a provision in the 1795 treaty, which would, in any event, be accorded presumptive weight under the Constitution’s Supremacy Clause.⁴⁶ Nevertheless, by also referring to the maritime law doctrine of salvage, Marshall seems to be suggesting that such general maritime rules can be directly applied by U.S. courts,

43. 13 U.S. (9 Cranch) 388 (1815).

44. *Id.* at 421.

45. *Id.* at 422–23; *see also* *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 281 (1796) (“When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 474 (1793); *United States v. Worrall*, 28 F. Cas. 774, 778 (C.C.D. Pa. 1798); *Henfield’s Case*, 11 F. Cas. 1099, 1100–01, 1117 (C.C.D. Pa. 1793).

46. U.S. CONST. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”); *see also* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Political Branches and the Law of Nations*, 85 NOTRE DAME L. REV. (forthcoming 2010) (analyzing *The Nereide*); A.M. Weisburd, *State Courts, Federal Courts and International Cases*, 20 YALE J. INT’L L. 1, 32 (1995) (suggesting that Marshall was not endorsing the law of nations as part of the law of the land).

provided no contrary direction has been made by Congress. Because Congress had not directed any retaliatory action against Spain, U.S. courts were not at liberty to deviate from the law-of-nations norm otherwise protecting such cargoes from capture.

The courts of the new American Republic also rejected another aspect of English law. In England, there seemed to have been a sharp distinction between the “law of the land” — the common law or “general law”⁴⁷ — and the “law of the sea,” the *lex maritima*.⁴⁸ This disjunction was attributable to the historic rivalry between the Westminster courts (such as Kings (or Queens) Bench and Common Pleas), which exercised common-law jurisdiction, and the royal prerogative of the Lord High Admiral, as delegated to the High Court of Admiralty (and subordinate tribunals), which applied civil law and exercised maritime jurisdiction.⁴⁹ Because admiralty jurisdiction was made an express part of the grant of judicial power to the federal courts in the Constitution,⁵⁰ it was just a matter of time before the Supreme

47. See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 13 n.40 (2009) (collecting English cases of the seventeenth and eighteenth centuries).

48. The English High Court of Admiralty, when sitting in prize, asserted that “this Court is properly and directly a Court of the law of nations only, and not intended to carry into effect the municipal law of this or any other country.” *The Walsingham Packet*, (1799) 165 Eng. Rep. 244 (Adm.) 246; 2 C. Rob. 77, 82 (Eng.); see also *The Maria*, (1799) 165 Eng. Rep. 199 (Adm.) 202; 1 C. Rob. 340, 350 (“[T]he law [of nations] itself has no locality.”). This was also reflected in colonial American experience. Among the grievances of the American colonies was the exercise of jurisdiction by colonial Vice-Admiralty courts, sitting without juries, in revenue matters. See New York Petition to the House of Commons, reprinted in PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS OF THE STAMP ACT CRISIS, 1764–1766, at 8, 13 (Edmund Sears Morgan ed., 1959) (“Vice-Admiralty Courts . . . proceed not according to the wholesom[e] Laws of the Land.”).

49. See 4 WILLIAM BLACKSTONE, COMMENTARIES *67–*69 (“[I]n all marine causes . . . the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too in all disputes relating to prizes, to shipwrecks, to hostages and ransom-bills”); 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (photo. reprint 1979) (1642) (noting that “*lex terrae*” did not extend to legal occurrences “done upon the high sea”); 4 *id.* 134 (London, W. Clarke & Sons 1817) (1644) (“[T]hat of all manner of contracts, pleas and querels and of all other things done or arising within the bodies of counties, as well by land as by water . . . shall be tried, determined, discussed and remedied, by the laws of the land, and not before or by the admiral.”); see also Bellia & Clark, *supra* note 47, at 22–24; Sprout, *supra* note 42, at 292–93.

50. See U.S. CONST. art. III, § 2, cl. 3 (“The judicial Power shall extend to all Cases . . . of admiralty and maritime Jurisdiction.”). For an even more expansive position, see Alexander Hamilton’s remarks as “Pacifcus” that the law of nations was included in “the laws of the land.” Alexander Hamilton, *Pacifcus No. 1 (June 29, 1793)*, in 15 PAPERS OF ALEXANDER HAMILTON 34 (Harold C. Syrett ed., 1969). For the debate on the original scope of the Admiralty Clause, compare Robert Casto, *The Origins of Federal Admiralty Jurisdiction in the Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEG. HIST. 117, 118 (1993) (arguing that admiralty jurisdiction was originally limited to prize and revenue cases), and Young, *supra* note 4, at 312–28 (maintaining that even if the Framers intended admiralty jurisdiction to extend to private disputes, such did not also convey an intent for a national, uniform body of law, preemptive of state law), with DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM 136 (Harold W. Jones ed., 1970)

Court swept away the geographical limitations that English courts had imposed on admiralty jurisdiction and, instead, embraced the notion that the admiralty power was concomitant with a strong, centralizing impulse for the federal government to regulate interstate and international commerce.⁵¹

This jurisprudential move helps explain the 1828 case of *American Insurance Co. v. Canter*,⁵² where the particular status of the GML was seemingly called into doubt.⁵³ At issue was the validity of a salvage award issued by a Florida territorial court sitting at Key West. This tribunal was erected under authority granted by Congress in 1823,⁵⁴ pursuant to Congress's authority under Article IV of the Constitution to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States."⁵⁵ The salvage decree was challenged on the theory that a territorial court was powerless to rule in admiralty and maritime matters because cases of admiralty and maritime jurisdiction were within the exclusive jurisdiction of the federal courts under Article III of the Constitution. A simple solution to this problem would have been to read Section 8 of the 1823 statute,⁵⁶ creating the Florida territorial government, to permit the Key West tribunal to exercise admiralty jurisdiction.

But there was a catch to this quick fix: The jurisdiction exercised had to be "cases arising under the laws and Constitution of the United States."⁵⁷ Chief Justice Marshall rejected such an easy dodge and instead concluded:

If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution

(noting that the Constitution's use of the word "jurisdiction" included "general authority to govern") and Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. MAR. L. & COM. 361, 373 (1999) (suggesting that admiralty jurisdiction extended to private, "instance" disputes involving maritime issues).

51. *Compare* *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825) (accepting English courts' geographical limitations on the extent of admiralty jurisdiction to those waters affected by the ebb and flow of the tide), *with* *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 457 (1852) (rejecting that rule and, instead, applying admiralty jurisdiction to any incident occurring on navigable waters).

52. 26 U.S. (1 Pet.) 511 (1828).

53. *Id.* at 543.

54. Act of Mar. 3, 1823, ch. 28, 3 Stat. 750, 752.

55. U.S. Const. art. IV, § 3, cl. 2.

56. Act of Mar. 3, 1823, 3 Stat. at 752 ("That each of the said superior . . . courts [of the Florida territory] shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and constitution of the United States, which . . . was vested in the court of Kentucky district.").

57. *Id.*

declares, that “the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction.”

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise. It is not then to the 8th section of the territorial law, that we are to look for the grant of admiralty and maritime jurisdiction, to the territorial Courts.⁵⁸

As an alternative, Marshall then adopted his now-famous theory of “legislative courts” and concluded that:

Although admiralty jurisdiction can be exercised in the states in those [federal] Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.⁵⁹

Quite obviously, Marshall’s characterization of the GML as not “aris[ing] under the Constitution or laws of the United States” was dicta, in light of the Court’s alternate reliance on Congress’s Article IV powers. But that still leaves the question of what he intended by that enigmatic statement and his description of the GML as being derived from a law “as old as navigation itself,” and that “the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”⁶⁰ The passage suggests a body of law that pre-existed the Constitution and that could be applied independently by judges, without

58. *Canter*, 26 U.S. (1 Pet.) at 545–46.

59. *Id.* at 546.

60. *Id.* at 545–46; see also G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815–1835*, at 427–28 (abr. ed. 1991) (offering more on Marshall’s intent in *Canter*); Jay, *Origins*, *supra* note 25, at 1309–10.

the necessary requisite of congressional enactment or sanction. This articulation of the GML (and, for that, matter, CIL) as a form of “general law” directly influenced Justice Story’s 1842 opinion in *Swift v. Tyson*⁶¹ and its recognition of a “general commercial law” co-extensive with the entire nation, if not the entire civilized world.⁶²

The implications of Marshall’s position were enormous. Most significantly, it indicated that the GML could be widely preemptive of contrary state laws, even in fields where Congress had not legislated. This was made express in cases from the mid-nineteenth century. For example, in *The Steamboat New York*,⁶³ the question was whether a provision of New York’s navigation laws (requiring the display of a light from the ship’s rigging, as a collision-avoidance measure) could be applied in an accident involving a foreign vessel.⁶⁴ The Court, Justice Nelson writing, answered emphatically in the negative:

This is a rule of navigation prescribed by the laws of New York, and is doubtless binding upon her own courts, but cannot regulate the decisions of the federal courts, administering the general admiralty law. They can be governed only by the principles peculiar to that system, as generally recognized in maritime countries, modified by acts of congress independently of local legislation.⁶⁵

In this succinct statement, we have a summary of the status and character of the GML in early American courts: It is an autonomous body of law, linked to the practices of other maritime nations, subject to override or modification by Congress, but certainly superior to (and preemptive of) any contrary state law. It is no wonder that the majority’s opinion in *The Steamboat New York* would be met with a sharp dissent by Justice Daniel, who was a frequent critic of any expansion of federal admiralty jurisdiction at the expense of state authority.⁶⁶ For Justice Daniel, the threat posed by the GML to the law-

61. 41 U.S. (16 Pet.) 1, 18–19 (1842).

62. *Id.* at 18–19. For more on the effect of *Swift* on the development of general maritime law, see William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513, 1517 (1984) (noting that maritime law was “an even more comprehensive and eclectic general law than the law merchant”); see also WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 202 (photo. reprint 2009) (1829) (“[T]he whole system of maritime affairs with its connexions and dependencies is withdrawn from the several states by their own consent, and vested in the general government. . .”).

63. *The Steamboat New York v. Rea*, 59 U.S. (18 How.) 223 (1856).

64. *Id.* at 225–26; see also Clark, *supra* note 4, at 1279–80; Theodore F. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246, 247–51 (1951).

65. *Steamboat New York*, 59 U.S. (18 How.) at 225–26.

66. See, e.g., *Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 463 (1852) (Daniel, J., dissenting).

making autonomy of states of the Union was precisely implicated by the potentially wide expanse of admiralty jurisdiction and its amorphous, inchoate, and cosmopolitan character.⁶⁷

On the eve of the Civil War, American jurisprudence seemed to have embraced the notion of a fundamental unity between CIL and the GML, as, respectively, the public-law and private-law sides of the same “law of nations” coin. The early Republic decisions seem to be more focused on the transnational nature of CIL and GML, rather than any preoccupation with the positive or natural law nature of these sources (which is discussed further in the next Part). Likewise, it would seem that CIL and GML’s recognition as a species of law subject to congressional control and revision, and inherently superior to state law, was taken as beyond question by the courts of that period. But, although the GML’s disqualification as a basis of federal-question jurisdiction in Chief Justice Marshall’s opinion in *Canter* solved the jurisdictional and constitutional problem in that case, it sowed the seeds of substantial doubt in the years to come and would foreshadow a major jurisprudential sea-change in the latter part of the nineteenth century.

II. THE TRANSFORMATIVE PERIOD, 1860–1900

A. *The Nature and Character of CIL and GML*

The U.S. Supreme Court’s CIL and GML decisions between 1860 and 1900 are striking for their relative lack of introspection as to the character of CIL, in contrast with their searching analysis of the nature of the GML. The Supreme Court of this period seemed genuinely confused as to whether CIL or GML (or both) were rooted in natural law or positive law, and how they would be enforced practically in U.S. law. Ultimately, a positivist basis for CIL and GML prevailed.

Beginning with the talismanic *Prize Cases*⁶⁸ at the commencement of this period, Justice Grier, writing for the Court, had the opportunity to connect the substantive issue of CIL before the Court (when is war presumed to have been initiated) with the constitutional matter for which the case is famous (the President’s power to unilaterally initiate hostilities to suppress a rebellion).⁶⁹ After a brief canvassing of sources on the relevant content of CIL — including an obliging citation to Vattel and to an English High Court of Admiralty decision — the Court reached this conclusion as to the interplay of CIL and the President’s powers:

67. See *Steamboat New York*, 59 U.S. (18 How.) at 226 (Daniel, J., dissenting).

68. *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. (2 Black) 635 (1863).

69. *Id.* at 666.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her Courts, established a revolutionary government, organized armies, and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors, in order to dismember and destroy it, is not a war because it is an “insurrection.”⁷⁰

What could Justice Grier possibly have meant or intended by his elliptical statement that “[t]he law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world”?⁷¹ On the surface, this seems a deliberate mixing of natural and positive idioms for international law, neatly balanced in equipoise. Natural law is reflected in “the common sense of the world,” a more modern formulation of the “right reason” that Grotius would have understood as the basis of international law obligations.⁷² But, in equilibrium with this language is a positivist basis for international law, which is rooted in “common consent.” Justice Grier does not elaborate on whether that “common consent” is based on the practices of nations, or on the views of other political actors, or derived from a consensus of other sources. Based on the *Prize Cases* Court’s use of both foreign municipal decisions and publicists’ writings as evidence of a rule of CIL (in this instance, that President Lincoln could impose a blockade on Southern ports without a formal declaration of war),⁷³ it is by no means clear what evidence constituted “the common consent . . . of the world.”⁷⁴

Nor can the *Prize Cases* be considered an aberration with respect to the continued adherence or loyalty of the Court to natural-law principles in the framing of international norms. Justice Bradley’s opinion in *The Lottawanna*⁷⁵ may actually reflect the most mature statement of naturalist norms for CIL during this period.⁷⁶ Admittedly, the relevant discussion in the case concerns the content of GML norms with respect

70. *Id.* at 670.

71. *Id.*

72. See HUGO GROTIUS, DE JURE BELLI AC PACIS (The Law of War and Peace) 38 (Francis W. Kelsey trans., Carnegie Inst. of Wash. 1925) (1625) (“The law of nature is a dictate of right reason . . .”).

73. See *Prize Cases*, 67 U.S. (2 Black) at 667–69.

74. *Id.* at 670.

75. 88 U.S. (21 Wall.) 558 (1874).

76. *Id.* at 558.

to whether a party who extended credit to the account of a vessel in its home port (for supplies, repairs, or “other necessaries”) could enforce such by a maritime lien within the admiralty jurisdiction of U.S. federal courts.⁷⁷ The *Lottawanna* was a U.S.-registered vessel, so there was not even a private international law angle to the case (as would have been true if it had been foreign-flagged and the lien for necessaries had been made in a foreign port, but enforcement for which was sought in a U.S. court).⁷⁸

Nevertheless, the Supreme Court characterized the case as being governed by the GML, and noted that the GML was characterized as a legal system that

[S]hould be a uniform law founded on natural reason and justice. Hence the adoption by all commercial nations (our own included) of the general maritime law as the basis and groundwork of all their maritime regulations. . . . It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. . . .

This view of the subject does not in the slightest degree detract from the proper authority and respect due to that venerable law of the sea, which has been the subject of such high encomiums from the ablest jurists of all countries; it merely places it upon the just and logical grounds upon which it is accepted, and with proper qualifications, received with the binding force of law in all countries.⁷⁹

The Court’s significant caveat that the GML must be incorporated by individual nations, and thereby subject to subsequent unilateral changes, will be considered below because it has significant ramifications for understanding the binding nature of all international norms, including CIL. But the important point here is that the Court understood the nature of the GML to be premised on “natural reason and justice” and “upon . .

77. *See id.* at 571 (“[B]y the general maritime law, those who furnish necessary materials, repairs, and supplies to a vessel, upon her credit, have a lien on such a vessel therefor, as well when furnished in her home port as when furnished in a foreign port, and that the courts of admiralty are bound to give effect to that lien.”).

78. *See id.* at 560–61.

79. *Id.* at 572–73, 574.

. just and logical grounds,” as confirmed in the “high encomiums from the ablest jurists of all countries.”⁸⁰ As in the *Prize Cases*, the prevailing approach employed by the Court in *The Lottawanna* was to determine the content of an international norm (or a domestic norm having transnational effects) by reference to first principles. This did not, of course, preclude recourse to actual State practice (however manifested), but the rhetoric of these two opinions is by no means an unqualified endorsement of purely positivist conceptions of international law.

This ambiguity in invoking natural and positive tropes for CIL was to prove to be a major leitmotif of Supreme Court decisions of this period. In *The Peterhoff*,⁸¹ one of the last Civil War-era prize cases rendered, Chief Justice Chase offered this pithy assessment of the legality of “paper blockades” — proclaimed restrictions of entry into enemy ports unsupported by actual naval force or interdiction power: “It must be premised that no paper or constructive blockade is allowed by international law. When such blockades have been attempted by other nations, the United States have ever protested against them and denied their validity. Their illegality is now confessed on all hands.”⁸² Chief Justice Chase’s vision of CIL appears to be more positivist than that reflected in the earlier holding in the *Prize Cases*. The emphasis here appears to be with respect to the actual positions taken by nations in response to assertions of authority by other countries. The surest evidence of a norm of CIL, according to this account, is whether it is acquiesced to, or remonstrated against, by other nations. Justice Chase’s assessment shares much in common with Chief Justice Marshall’s famous formulation of a “struggle for law” in *Church v. Hubbard*,⁸³ where he opined that if a coastal State’s assertions of control were “such as unnecessarily to vex and harrass [sic] foreign lawful commerce, foreign nations will resist their exercise. If they are . . . reasonable and necessary to secure their laws from violation, they will be submitted to.”⁸⁴ Justice Chase’s rhetorical stress on whether a norm of CIL has been “confessed on all hands”⁸⁵ would appear to demand a high degree of uniformity or consensus, based on the actual practice of nations.

Just a few years later, the next Chief Justice, Morrison Waite, made much the same point in what has come to be known as *Wildenhus’s Case*,⁸⁶ a case that combined both GML and CIL elements. The issue

80. *Id.*

81. 72 U.S. (5 Wall.) 28 (1866).

82. *Id.* at 50.

83. 6 U.S. (2 Cranch) 187 (1804).

84. *Id.* at 235.

85. *The Peterhoff*, 72 U.S. (5 Wall.) at 50.

86. *Mali v. Keeper of the Common Jail of Hudson County, N.J. (Wildenhus’s Case)*, 120 U.S. 1 (1887).

presented in that matter was whether the crime of murder, committed on board a foreign-flagged vessel, where neither the perpetrator nor victim were U.S. nationals, was nonetheless within the jurisdiction of U.S. courts to prosecute and punish.⁸⁷ In concluding that it was, the Court made reference to “the law of civilized nations.”⁸⁸ Likewise, in *Hilton v. Guyot*,⁸⁹ the problem for the Court was whether a foreign judgment (in the literal sense of a decree rendered by a non-U.S. tribunal) was enforceable in the United States.⁹⁰ Justice Horace Gray wrote for the Court, in what would be the first in a series of opinions that would fundamentally delimit the scope of international law as applied in this country at the turn of the last century. As a first step, in *Hilton*, Justice Gray defined the term “international law” in words that would resonate in the decisions that would follow:

International law, in its widest and most comprehensive sense — including not only questions of right between nations, governed by what has been appropriately called the law of nations; but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation — is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.⁹¹

As was clear from what would follow in the opinion, Justice Gray was referring to “international law” in juxtaposition to an obligation contained in a treaty or statute:

The most certain guide, no doubt, for the decision of such

87. *Id.* at 11 (“The claim of the [Belgian] consul is that, by the law of nations, and the provisions of this treaty, the offence with which Wildenhuis was charged is ‘solely cognizable by the authority of the laws of the Kingdom of Belgium,’ and that the State of New Jersey was without jurisdiction in the premises.”); see also Symeon C. Symeonides, *Cruising in American Waters: Spector, Maritime Conflicts, and Choice of Law*, 37 J. MAR. L. & COM. 491, 497–99 (2006) (offering more background on this issue).

88. *Wildenhuis’s Case*, 120 U.S. at 11 (“It is part of the law of civilized nations that, when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement”); see also *id.* at 19 (“[W]henver the act . . . constitutes a crime by common law, [*droit commun*, the law common to all civilized nations,] the gravity of which does not permit any nation to leave it unpunished, without impugning its rights of jurisdictional and territorial sovereignty.” (quoting I ORTOLAN, *DIPLOMATIE DE LA MER* 455, 456 (4th ed. 1864)) (interpolation added by the Court)).

89. 159 U.S. 113 (1895).

90. *Id.* at 162–63.

91. *Id.* at 163.

questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations.⁹²

Not only does Justice Gray seem to distinguish CIL from treaty law, he notes that the proper sources of CIL are an amalgam of publicist commentary, municipal judicial decisions, and positive “acts and usages” of States.

It is with these significant premises established that we come to the Supreme Court’s 1900 decision in *The Paquete Habana*.⁹³ Inasmuch as it offers a statement as to the nature of CIL, Justice Gray’s opinion is derivative of earlier rulings, but unquestionably his focus is on the positive aspects of actual State practice. The opinion consistently refers to a rule of CIL emerging out of the “general consent of civilized nations.”⁹⁴ Directly addressing the legal question presented by the case — whether small fishing vessels, belonging to enemy nations, were exempt from capture under the law of naval prize — Justice Gray reached this conclusion:

This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of [fishermen], and of the mutual convenience of belligerent States, that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.⁹⁵

Embedded in this passage is the distinction between a rule of CIL (based on the “general consent” of States) and an express provision of a “treaty or other public act.” And while a norm of CIL may be “founded

92. *Id.*

93. 175 U.S. 677 (1900).

94. *Id.* at 701; *see also id.* at 700 (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 15 (8th ed. Boston, Little, Brown & Co. 1866)).

95. *Id.* at 708.

on considerations of humanity” and be of “mutual convenience of belligerent states,” such did not render it as mere “comity,” for which States could deliberately opt out.

Indeed, the crucial move in Justice Gray’s opinion in *The Paquete Habana*, after the exhaustive⁹⁶ (and, for the reader, exhausting) review of State practice and the writings of publicists, was his conclusion that the norm against capture of fishing smacks was binding as CIL and, unlike the norm of enforcing foreign judgments (at issue in *Hilton*), was not optional. So, Justice Gray concluded, even if there was ambiguously contrary state practice from the period of the Napoleonic Wars, the norm against capture had matured in international practice. Indeed, the prevailing metaphor in this part of the opinion was of a ripening custom: “But the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law.”⁹⁷

The overall impression that one can glean from the Supreme Court’s cases in this period is a decisive shift to a positivist footing for CIL norms. Indeed, what is perhaps most surprising is the degree to which naturalist motifs for CIL persisted in such decisions as *The Prize Cases* and *The Lottawanna*. But, by the time that Justice Gray penned the duet of opinions in *Hilton* and *The Paquete Habana*, the unifying trope of analysis was overwhelmingly that CIL was derived from the actual practice of nations. Despite the persistence of naturalist visions of international law, albeit in a weaker form, in judicial decisions after the Civil War, it was only by the end of the nineteenth century that the complete conversion to positivism was accomplished.

What explains this decisive shift? As already intimated, members of the Supreme Court during this period were not terribly introspective or reflective on the subject, at least inasmuch as they were directly addressing cases implicating CIL. For a more complete picture, one must turn to the Court’s handling of admiralty cases under the GML. As noted with respect to the decision in *The Lottawanna*, when the Court was ruling on the content of GML, it was not always in the context of foreign shipowners or interests. Such a context would certainly have been subsumed in the justices’ understanding of private international

96. For more on Justice Gray’s stature as a legal historian, see Robert M. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 AM. J. LEG. HIST. 181 (1968) (reviewing Gray’s biography and legal scholarship). See also Bellia & Clark, *supra* note 47, at 78–79.

97. *The Paquete Habana*, 175 U.S. at 694; see also *id.* at 686 (“By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”).

law — the ordering of affairs as between transnational actors, relationships, and incidents — which they viewed as a proper topic of regulation by CIL.⁹⁸ But the GML could arise in a strictly domestic context, and even so, considerations of consistency between U.S. maritime law and foreign law were paramount. The set of significant GML cases decided by the Supreme Court from the late nineteenth century is large (nearly a dozen in number) and, taken as a whole, provides the missing context for the Court’s jurisprudence on the nature of CIL.

The dual character of GML (as both an international and domestic body of law) was described in the first significant maritime case decided by the Court after the Civil War. In *The China*,⁹⁹ the question was whether a shipowner (in personam) or the ship itself (in rem) should be liable for the navigational faults of a compulsory pilot in charge of the vessel at the time of an accident.¹⁰⁰ In *The China*, the vessel in question was foreign-flagged.¹⁰¹ In reaching the conclusion that the vessel remained liable in rem, despite the non-culpability of the shipowner or master, Justice Swayne noted that “[m]aritime jurisprudence is a part of the law of nations. We have been impressed with the importance of its right administration in this case.”¹⁰² Even more pertinently, he observed that “[t]he maritime law as to the position and powers of the master, and the responsibility of the vessel, is not derived from the civil law of master and servant, nor from the common law. It had its source in the commercial usages and jurisprudence of the middle ages.”¹⁰³

The China’s characterization of GML was that it reflected a private branch of international law with its historic roots in “commercial usages and jurisprudence.”¹⁰⁴ Viewed another way, if CIL was positively driven by the practice of nations, GML was directed by the usages of merchants as validated by other sources (the writings of publicists or the decisions of municipal tribunals). This hybrid character of GML was

98. See *Hilton v. Guyot*, 159 U.S. 113, 163 (1895) (“International law . . . includ[es] . . . questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation”); see also *The Belgenland*, 114 U.S. 355, 362 (1885) (“[Acts of salvage or collision], when acted on the high seas, between persons of different nationalities, come within the domain of the general law of nations, or *communis juris*, and are prima facie proper subjects of inquiry in any Court of Admiralty”).

99. 74 U.S. (7 Wall.) 53 (1868).

100. *Id.* at 61.

101. *Id.* at 58.

102. *Id.* at 69.

103. *Id.* at 68.

104. *Id.*

consistently emphasized by Supreme Court decisions of this period.¹⁰⁵ For example, there was an extended discussion of the relationship between GML and the law of nations in Justice Bradley's 1870 decision in *Insurance Co. v. Dunham*,¹⁰⁶ deciding that contracts of marine insurance were within the admiralty jurisdiction of federal courts:

The admiralty courts were originally established in [England] and other maritime countries of Europe for the protection of commerce and the administration of that venerable law of the sea which reaches back to sources long anterior even to those of the civil law itself; which Lord Mansfield says is not the law of any particular country, but the general law of nations; and which is founded on the broadest principles of equity and justice, deriving, however, much of its completeness and symmetry, as well as its modes of proceeding, from the civil law, and embracing, altogether, a system of regulations embodied and matured by the combined efforts of the most enlightened commercial nations of the world.¹⁰⁷

As in the Supreme Court's CIL decisions in *The Prize Cases* and in *The Lottawanna*, there was a deliberate blending here of positive and natural law idioms. On the one hand, there is emphasis on "a system of regulations . . . by the combined efforts of the [world's] most enlightened commercial nations," which resonates with the Court's positivist mantra that CIL is "the acts and usages of civilized nations."¹⁰⁸ But there is also a persistent invocation that the GML, like CIL, is "founded on the broadest principles of equity and justice,"¹⁰⁹ without necessary reference to the views of maritime law commentators, the decisions of foreign admiralty courts, or the decrees of maritime powers.

Indeed, it was the continued — and amorphous — role of natural law principles in the formation of GML rules that drew Justice Clifford's dissent in *The Lottawanna*.¹¹⁰ In that case, as will be recalled, the question for resolution was whether maritime liens could enforce loans to procure necessities for a vessel in its home port. The majority, Justice Bradley writing, held that the GML — even if proved as

105. See, e.g., *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 452 (1869) ("[M]aritime law . . . partakes more the character of international law than any other branch of jurisprudence" (citing 1 GEORGE JOSEPH BELL, COMMENTARIES ON THE LAWS OF SCOTLAND 864 (6th ed. Edinburgh, T. & T. Clark 1858))).

106. 78 U.S. (11 Wall.) 1 (1870).

107. *Id.* at 23.

108. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

109. *Dunham*, 78 U.S. (11 Wall.) at 23.

110. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 595–96 (1874) (Clifford, J., dissenting).

supporting home-port liens — could not supplant prior, established U.S. law on the subject.¹¹¹ The GML was viewed by the majority as the product of “natural reason and justice” and based “upon . . . just and logical grounds.”¹¹² It was on these same grounds that the Court rejected the idea of home-port liens.¹¹³ In response, Justice Clifford’s dissent emphasized that a lack of uniformity in the maritime law would “lead to unparalleled mischiefs and perplexities. Commerce requires more sensible rules of decision, and those whose interests are embarked in such perilous pursuits are entitled to better protection than such rules of decision afford.”¹¹⁴ Justice Clifford went on to challenge the majority’s assumption that foreign commercial practices could, in the absence of a binding code or treaty on maritime law, be ignored in favor of the “just and logical grounds” of the American position against home-port liens:

Unless the principles embodied in the ordinances, treatises, sea laws, digests, and codes adopted by the countries where the civil law prevails, constitute, to the extent that they concur in the rule of decision, the general maritime code as known in judicial investigation, it is difficult even to imagine what does, as it is known to every legal reader of judicial history that those countries never convened, as in a congress of nations, and ordained a system of maritime regulations which can properly be regarded as the standard authority upon that subject.

Such a maritime code as that referred to . . . does not exist; and if not, [are] all the codes of the respective countries which adopt the civil law . . . to be regarded as mere local laws[?]¹¹⁵

Justice Clifford’s last rhetorical point was significant because there was a need to distinguish the *lex terrae* or “local law” of particular maritime nations from the widely applicable GML. If a norm was truly validated as GML, it was not to be regarded as some species of foreign law.¹¹⁶

Ultimately, Justice Clifford prevailed in his views that the GML was purely positive in character and could be demonstrated by the actual

111. *Id.* at 572.

112. *Id.* at 572, 574.

113. *Id.* at 572–74; *see also* *The Elfrida*, 172 U.S. 186, 203 (1898) (observing that in a case about salvage contracts, “the maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence”).

114. *The Lottawanna*, 88 U.S. (21 Wall.) at 594–95 (Clifford, J., dissenting).

115. *Id.* at 595–96 (Clifford, J., dissenting).

116. *See, e.g.,* *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 443–44 (1889) (“[The decisions relied upon by the appellant] do not appear to have been based on general maritime law, but largely, if not wholly, upon provisions or omissions in the codes of the particular country.”).

practices of merchants as recognized by maritime nations.¹¹⁷ This position was largely validated in Justice Strong's 1871 majority opinion for the Court in *The Scotia*,¹¹⁸ which concerned a collision between an American vessel and British ship on the high seas, where the British ship's navigational fault for failure to display the proper running lights was at issue.¹¹⁹ *The Scotia's* discussion of the GML as part of international law was to have a profound impact on later decisions, most notably in *The Paquete Habana*.¹²⁰ Especially trenchant was this passage from Justice Strong's opinion:

[W]hat was the law of the place where the collision occurred, and at the time when it occurred[?] Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. . . . And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of

117. See, e.g., *City of Washington*, 92 U.S. 31, 31 (1875) ("Usages, called sea laws, having the effect of obligatory regulations, to prevent collisions between ships engaged in navigation, existed long before there was any legislation upon the subject, either in this country or in the country from which our judicial system was largely borrowed.")

118. *The Scotia*, 81 U.S. (14 Wall.) 170 (1871).

119. *Id.* at 173–77.

120. *The Paquete Habana*, 175 U.S. 677, 711–12 (1900); see also William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, in *INTERNATIONAL LAW STORIES* 175, 195–96 (John E. Noyes et al. eds., 2007).

navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations?¹²¹

This passage's thrust is that the GML, like all CIL, is premised on "generally accepted . . . rule[s] of conduct." Only the "general assent" or "concurrent sanction" of nations can convert a practice or usage into "universal obligation" and "sanction."¹²² CIL's jurisprudential position as a positive source of law — embraced in the *Hilton* and *The Paquete Habana* decisions — was fully anticipated by the Court in its earlier GML opinions. Even though the Court noted in *Ralli v. Troop*¹²³ that the "maritime law, or law of the sea, [was to be] distinguished from the municipal law, or law of the land,"¹²⁴ in truth, the GML was simply the *lex maritima* version of the law of nations, subject to the same strictures as to its formation, application, and proof.

B. Reception of CIL and GML Into U.S. Law

It remains to be determined how the Court came to its famous conclusion in *The Paquete Habana* that "[i]nternational law is part of our law."¹²⁵ As many scholars have observed,¹²⁶ there was nothing new in this declaration. Indeed, Justice Gray cribbed from his own earlier opinion in *Hilton v. Guyot*, where he wrote: "[i]nternational law, in its widest and most comprehensive sense . . . is part of our law, and must be ascertained and administered by the courts of justice as often as such questions are presented in litigation between man and man, duly submitted to their determination."¹²⁷ It is beyond the scope of this Article to trace the intellectual origins of Justice Gray's declaration back to its *locus classicus*. Rather, my objective here is to situate the holdings in *The Lottawanna*, *Hilton*, and *The Paquete Habana* in the CIL decisions of the Supreme Court after 1860. Particularly relevant in this regard was how the post-Civil War Supreme Court conceived the GML's applicability in U.S. law.

How were judges of this period supposed to receive, and apply,

121. *The Scotia*, 81 U.S. (14 Wall.) at 187–88.

122. See *The Harrisburg*, 119 U.S. 199, 213 (1886) ("[T]he maritime law, as accepted and received by maritime nations generally, has established a . . . rule for the government of the courts of admiralty . . .").

123. 157 U.S. 386 (1895).

124. *Id.* at 393; cf. *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828) (holding that admiralty cases do not "arise under the Constitution or laws of the United States . . . [but] are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise").

125. *The Paquete Habana*, 175 U.S. at 700.

126. See, e.g., Dodge, *supra* note 120, at 189–91 (collecting views of other writers).

127. *Hilton v. Guyot*, 159 U.S. 113, 163 (1895).

evidence of a CIL norm in cases where it “must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination”?¹²⁸ The Court had previously answered this question in the 1871 case of *The Scotia*,¹²⁹ where the issue was whether a foreign-flagged vessel was negligent in not displaying the proper collision-avoidance lights.¹³⁰ In examining foreign statutory enactments as part of its determination of the content of a GML norm, the Court made clear that:

This is not giving to the statutes of any nation extraterritorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.¹³¹

This statement not only confirms the Court’s treatment of GML as a form of CIL, but it also makes clear that the law of nations is not typically required to be proven as fact in U.S. judicial proceedings. As part of the law of the United States, it is, instead, subject to judicial notice.¹³² This passage from *The Scotia* was approvingly quoted by Justice Gray in *The Paquete Habana*,¹³³ and it also helps to explain his comment that “[t]his rule of international law [immunizing fishing vessels from capture] is one which prize courts administering the law of nations are bound to take judicial notice of, and to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.”¹³⁴ Of course, whether a court should take judicial notice of a rule of CIL begs the question of whether “questions of right depending upon it”¹³⁵ are truly at issue. In *Hilton*, that was the fundamental thrust of Justice Fuller’s dissent: “[The] application of the doctrine [of comity for foreign judgments] is in accordance with our own jurisprudence, and it is not necessary that we should hold it to be required by some rule of international law.”¹³⁶

128. *The Paquete Habana*, 175 U.S. at 700.

129. 81 U.S. (14 Wall.) 170 (1871).

130. *Id.* at 173–77.

131. *Id.* at 188.

132. See *Brown v. Piper*, 91 U.S. 37, 42 (1875) (“Among the things of which judicial notice is taken are the law of nations; the general customs and usages of merchants . . .”).

133. See *The Paquete Habana*, 175 U.S. at 711–12.

134. *Id.* at 708.

135. *Id.* at 700.

136. *Hilton v. Guyot*, 159 U.S. 113, 229 (1895) (Fuller, J., dissenting).

The far more fundamental question was how CIL was situated in the matrix of U.S. constitutional order. Justice Gray, of course, made clear that CIL was subordinate to any “treaty [or] controlling executive or legislative act or judicial decision.”¹³⁷ That raises questions of the reception of CIL and GML norms, and the extent to which they can be altered by Congress or by state laws.

How the United States received these norms was not just a matter of theoretical or antiquarian interest for members of the Supreme Court of this period. Justice Swayne, writing for the Court in *The Siren*,¹³⁸ one of the last prize cases from the Civil War period, offered this fairly narrow account:

While the American colonies were a part of the British empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities.¹³⁹

By contrast, Justice Bradley offered this broader vision of reception in *The Lottawanna*:

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.” But by what criterion are we to ascertain the precise limits of the law thus adopted? The Constitution does not define it. It does not declare whether it was intended to embrace the entire maritime law as expounded in the treatises, or only the limited and restricted system which was received in England, or lastly, such modification of both of these as was accepted and recognized as law in this country.¹⁴⁰

But whether the GML was received from exclusively English sources or was also derived from the larger *lex mercatoria* of maritime nations, it was still subject to adoption by U.S. legal institutions — whether by

137. *The Paquete Habana*, 175 U.S. at 700.

138. 80 U.S. (13 Wall.) 389 (1871).

139. *Id.* at 392–93 (citing *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815)).

140. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 574 (1874).

recognition through the decisions of U.S. courts or by affirmative codification or alteration by act of Congress.

In this respect, Justice Bradley's opinion in *The Lottawanna* would exercise a profound impact on the subsequent course of CIL and GML cases in this country. He wrote emphatically that

it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. . . . Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. . . . Each state adopts the maritime law, not as a code having any independent or inherent force, *proprio vigore*, but as its own law, with such modifications and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law. And thus it happens, that, from the general practice of commercial nations in making the same general law the basis and groundwork of their respective maritime systems, the great mass of maritime law which is thus received by these nations in common, comes to be the common maritime law of the world.¹⁴¹

Very significantly in this passage, Justice Bradley equated CIL and GML inasmuch as each was required to be adopted into United States law and could be modified by U.S. legal institutions. *The Lottawanna's* formulation was accepted by every other justice on the Court who considered the question during this period, including Justice Gray.¹⁴² This extended to disputes in both public and private international law contexts, irrespective of whether the custom or usage to be adopted was that of States or of private actors.¹⁴³

141. *Id.* at 572–73; *see also* *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828) (holding that admiralty cases do not “arise under the Constitution or laws of the United States”).

142. *See, e.g., Butler v. Bos. & Savannah S.S. Co.*, 130 U.S. 527, 556–57 (1889) (indicating agreement with this conclusion by all members of the Court over a twenty year period).

143. *See, e.g., The Elfrida*, 172 U.S. 186, 203 (1898) (“[T]he maritime usages of foreign

If the GML — and, by implication, CIL — must be “adopted . . . and qualified” as part of our law, that leads to the necessary conclusion that Congress can alter it. This, too, was made clear in Justice Bradley’s opinion in *The Lottawanna*:

But we must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department. It cannot be supposed that the framers of the Constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.¹⁴⁴

Or, as Justice Bradley also wrote in a later opinion, “whilst the rule [of shipowner limitation of liability] adopted by Congress is the same as the rule of the GML, its efficacy as a rule depends upon the statute, and not upon any inherent force of the maritime law.”¹⁴⁵

As has already been suggested, the implications of these holdings far transcended problems of delimiting the outward boundaries of admiralty jurisdiction of U.S. federal courts or the substantive content of the GML. Rather, they went to the heart of applying *any* international law norm (not otherwise codified in a statute or treaty), whether in the realms of public or private international law, as seen in *The Paquete Habana* or in *Hilton*. So, when *The Paquete Habana*’s mantra that “international law is part of our law” is read against the backdrop of the Court’s prior decisions, what Justice Gray really meant was that CIL could be judicially noticed as a rule of decision upon proper proof of the usage (whether as State practice or the *lex maritima*), provided that the norm had been “adopted” into U.S. law. At a minimum, an ostensible CIL norm could not be “qualified” into the law of the United States if it directly contradicted a relevant treaty obligation or an act of

countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well-settled principles of English and American jurisprudence.” (citing *The John G. Stevens*, 170 U.S. 113, 126 (1898)); *Liverpool & G.W. Steam Co. v. Phenix Ins. Co.*, 129 U.S. 397, 444 (1889) (“The general maritime law is in force in this country, or in any other, so far only as it has been adopted by the laws or usages thereof . . .”); *N.Y. Life Ins. Co. v. Hendren*, 92 U.S. 286, 287–88 (1875) (Bradley, J., dissenting) (“[I]nternational law has the force of law in our courts, because it is adopted and used by the United States. It could have no force but for that, and may be modified as the government sees fit.”).

144. *The Lottawanna*, 88 U.S. (21 Wall.) at 576–77.

145. *The Scotland*, 105 U.S. 24, 29 (1881); see also *Butler v. Bos. & Savannah S.S. Co.*, 130 U.S. 527, 556–57 (1889) (“[W]hile the general maritime law, with slight modifications, is accepted as law in this country, it is subject to such amendments as congress may see fit to adopt.” (citations omitted)); *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 496 (1886) (“If the rule of the maritime law is different, the statute must prevail.”).

Congress.¹⁴⁶ Justice Gray and his contemporaries on the Court never expressly stated whether more was required to “adopt” and “qualify” a CIL or GML norm into U.S. law, and that remains an enduring problem for our law of foreign relations.

Likewise, the post-Civil-War Court was ambiguous in answering the question of whether, properly speaking, a norm of CIL or GML was one of federal law or state law. As noted previously, this has preoccupied the finest minds of American foreign-relations law for the past decade.¹⁴⁷ Without wading too far into this debate, suffice it to say here that the three cases that have become the chief exhibits in support of the proposition — that CIL was (even before *Erie*) properly regarded as general common law (and not federal law) for purposes of “federal question” jurisdiction and Supreme Court review¹⁴⁸ — originate from the period under review here: *New York Life Insurance Co. v. Hendren*,¹⁴⁹ *Ker v. Illinois*,¹⁵⁰ and *Huntington v. Attrill*.¹⁵¹

In *Hendren*, the problem was whether a state court decision upholding a beneficiary’s demand that she be paid on a life-insurance policy presented a sufficient federal question such as to allow U.S. Supreme Court review.¹⁵² Stated in this way, as the majority of the Court did,¹⁵³ the answer was obviously “no.” But the complication, of course, was that the insured under the life policy was a resident of a state in rebellion from the United States, and the insurance company refused to pay on the grounds that to do so would violate international law norms against nonintercourse of belligerents. The majority, Chief Justice Waite writing, still declined jurisdiction, and distinguished this case from others where a federal question was based on the “constitution, laws, treaties, or executive proclamations, of the United States.”¹⁵⁴ Chief Justice Waite implied that, inasmuch as the insurance company was relying exclusively on a CIL norm of nonintercourse (and

146. Courts applying the *Charming Betsy* canon will typically refrain from finding such a contradiction unless they have no other option. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

147. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849–52 (1997); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 380 (1997); Stephens, *supra* note 4, at 435–36; Weisburd, *supra* note 46.

148. See Bradley & Goldsmith, *supra* note 147, at 824 n.48; see also Bradley, Goldsmith & Moore, *supra* note 4, at 911–13.

149. 92 U.S. 286, 286–87 (1875).

150. 119 U.S. 436, 444–45 (1886).

151. 146 U.S. 657, 683 (1892).

152. *Hendren*, 92 U.S. at 286–87.

153. See *id.* at 286.

154. *Id.* at 286–87 (distinguishing *Matthews v. McStea*, 91 U.S. 7 (1875)).

not on a presidential proclamation modifying such), the case “present[ed] questions of general law alone”¹⁵⁵ that were not cognizable by the Supreme Court in reviewing a matter of purely state law. And, if there were any doubt over what the Court was arguing about, such was dispelled in Justice Bradley’s dissent:

When a citizen of the United States claims exemption from the ordinary obligations of a contract by reason of the existence of a war between his government and that of the other parties to it, the claim is made under the laws of the United States by which trade and intercourse with the enemy are forbidden. It is not by virtue of the State law that such intercourse is forbidden; for a separate State cannot wage war: that is the prerogative of the general government. It is in accordance with international law, it is true; but international law has the force of law in our courts, because it is adopted and used by the United States. . . . [T]he laws which the citizens of the United States are to obey in regard to intercourse with a nation or people with which they are at war are laws of the United States. These laws will be the unwritten international law, if nothing be adopted or announced to the contrary; or the express regulations of the government, when it sees fit to make them. But in both cases it is the law of the United States for the time being, whether written or unwritten.¹⁵⁶

This seemed also to be the thrust of the Supreme Court’s ruling in *Ker*, in which it was noted that “the decision of that question [whether the forcible abduction of a criminal defendant abnegates jurisdiction] is as much within the province of the state court as a question of common law, or of the law of nations, of which that court is bound to take notice And, though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.”¹⁵⁷

What does remain in question, though, is the extent to which state courts or legislatures can alter the substantive content of CIL or GML norms, as opposed to merely declaring them, as was certainly the case in *Ker*.¹⁵⁸ While the post-Civil-War Court was emphatic that CIL is not, properly speaking, federal law for purposes of establishing federal-question jurisdiction or authorizing removal (a result that was later

155. *Id.* at 286.

156. *Id.* at 287–88 (Bradley, J., dissenting).

157. *Ker v. Illinois*, 119 U.S. 436, 444 (1886).

158. *Id.* (citing English and U.S. authorities for the proposition that forced apprehension of a criminal suspect does not abrogate a court’s jurisdiction).

made clear for the GML),¹⁵⁹ that is certainly not the same as holding that CIL was not supreme and that states are at liberty to change that law at their whim. Indeed, that appears to be the import of the Court's holding in *Huntington*:

The question [of enforcing foreign judgments] is not one of local, but of international, law. . . .

In this country, the question of international law must be determined in the first instance by the court, state or national, in which the suit is brought. If the suit is brought in a circuit court of the United States, it is one of those questions of general jurisprudence which that court must decide for itself, uncontrolled by local decisions. . . . If a suit on the original liability under the statute of one state is brought in a court of another state, the constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court.¹⁶⁰

So, the safer reading of *Huntington*, *Ker*, and *Hendren* is that, while CIL norms are not federal law for purposes of federal-question jurisdiction either under the 1875 Judiciary Act¹⁶¹ or for Supreme Court review, they still remain supreme as "law of the land." Nor did anything in this trilogy of cases contradict the idea that a rule of CIL or GML, as recognized by the Supreme Court, was preemptive of contrary state law.

Aside from the trilogy of *Huntington*, *Ker*, and *Hendren*, there are other important authorities from this period. A prime example is Justice Bradley's opinion in *The Lottawanna*, which the Supreme Court later relied upon to justify a sweeping preemption of state maritime laws. Justice Bradley wrote:

That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted was most certainly intended and referred to when it was declared in that

159. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 359–80 (1959); see also *The Western Maid*, 257 U.S. 419, 432 (1922) ("[W]e must realize that however ancient may be the traditions of maritime law . . . it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic overlaw to which even the United States must bow.").

160. *Huntington v. Attrill*, 146 U.S. 657, 683 (1892) (citing *Hendren*, 92 U.S. at 286); see also *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874) ("What the law is within . . . [judicially determined] limits, assuming the general maritime law to be the basis of the system, depends on what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it." (citing *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526–27 (1861))).

161. Act of Mar. 3, 1875, § 1, 8 Stat. 470 (codified as amended at 28 U.S.C. § 1331).

instrument that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.” . . . One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.¹⁶²

From this language emphasizing the “uniformity and consistency” of the GML came *Southern Pacific Co. v. Jensen’s*¹⁶³ controversial holding (discussed in detail below) that the Constitution’s grant of admiralty jurisdiction to the federal courts dormantly preempted contrary state legislation that had the effect of “work[ing] material prejudice to the characteristic features of the GML, or interfer[ing] with the proper harmony and uniformity of that law in its international and interstate relations.”¹⁶⁴ This result is confirmed in the handful of original-jurisdiction cases in which the post-Civil-War Court applied CIL norms against states, even when such norms had not been incorporated through treaties or statutes.¹⁶⁵

One is left with the overall impression that Justice Gray’s famous declaration in *The Paquete Habana* did not conclusively resolve CIL’s position in the American legal order. On the two matters addressed here — precisely how a CIL norm was incorporated into U.S. law and how such transformation affected CIL’s status as general law — the Court appeared studiously agnostic or, worse, contradictory. Perhaps this is not surprising since, except in a handful of contexts presented by the application of the GML,¹⁶⁶ these issues were not directly before the

162. *The Lottawanna*, 88 U.S. (21 Wall.) at 574–75 (quoting U.S. CONST. art. III, § 2, cl. 1).

163. 244 U.S. 205 (1917).

164. *Id.* at 216. For more on *Jensen* and its jurisprudential impact, see David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 5–35 (1997); Clark, *supra* note 4, at 1354–61; Ernest A. Young, *The Last Brooding Omnipresence: Erie R.R. Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349 (1999); Young, *supra* note 4, at 291–306.

165. *See, e.g.*, *New Hampshire v. Louisiana*, 108 U.S. 76, 90 (1883) (“There is no principle of international law which makes it the duty of one nation to assume the collection of the claims of its citizens against another nation, if the citizens themselves have ample means of redress without the intervention of their government.” (citing 2 SIR ROBERT PHILLIMORE, COMMENTARIES UPON INTERNATIONAL LAW 12 (2d ed. London, Butterworth 1871))); *Iowa v. Illinois*, 147 U.S. 1, 8–10 (1893) (relying on international law sources for the *thalweg* rule of delimitation on river boundaries).

166. *See Mali v. Keeper of the Common Jail of Hudson County, N.J. (Wildenhus’s Case)*, 120

Court. Nevertheless, the post-Civil-War Court's CIL jurisprudence — whether appearing as holding or dicta — would prove enormously influential for subsequent justices.

III. THE GREAT DIVORCE, 1900–1959

The Paquete Habana decision is generally acknowledged as the high-water mark for CIL's direct influence in U.S. courts as a rule of decision.¹⁶⁷ Despite the intensely positivist footing upon which CIL and GML was situated within the structure of U.S. law in the post-Civil-War period, both were deemed to be autonomous sources of legal norms and there was a definitive sense of an historical and functional connection between the two. This all started to change in the years that followed. Two key decisions marked the divorce between CIL and GML, reflecting tectonic shifts in jurisprudence. The first, as already mentioned, was the Court's 1917 decision in *Southern Pacific Co. v. Jensen*, which "constitutionalized" the uniform GML.¹⁶⁸ The second was the Court's 1938 ruling in *Erie Railroad Co. v. Tompkins*,¹⁶⁹ which prescribed state law as the rule of decision in diversity cases.¹⁷⁰

Before exploring the extent to which the Supreme Court's early-twentieth-century jurisprudence marked a profound disjunction with past precedents, it is worth explaining the points of continuity with previous periods. One of these grounds of commonality was that the origins and justifications for a GML were tied to a broad, uniform conception of the law of the sea. Even where justices disagreed as to the preemptive consequences of the GML in relation to state law, they acknowledged its uniform force. This was the tack taken by Justice Brewer in his dissent in *The Robert W. Parsons*,¹⁷¹ concerning the validity of a New York law on the enforcement of liens for ship repairs.¹⁷² Even while taking issue with an assertion of federal admiralty jurisdiction, and the consequent application of the GML to an incident otherwise to be controlled by state law, Brewer observed that the GML

grew up out of the fact that the ocean is not the territorial property of any nation, but the common property of all; that vessels engaged in commerce between the different nations

U.S. 1, 19 (1887); *The Lottawanna*, 88 U.S. (21 Wall.) at 572–77; *The Scotia*, 81 U.S. (14 Wall.) 170, 185–86 (1871).

167. See Dodge, *supra* note 120, at 175–76, 192, 205–06.

168. *Jensen*, 244 U.S. at 212.

169. 304 U.S. 64 (1938).

170. *Id.* at 78.

171. 191 U.S. 17 (1903).

172. *Id.* at 23–24.

ought, so far as possible, to be subject to a uniform law, and not annoyed by the conflicting local laws and customs of the several nations which they visit. I do not mean that the several maritime nations did not establish different rules, or that there is not some dissimilarity in their maritime laws, for, as long as each nation is the master of its own territory, it may legislate as it sees fit in reference to maritime matters coming within its jurisdiction, and yet this does not abridge the fact that admiralty grew up out of the thought of having a common law of the seas.¹⁷³

The Supreme Court's rhetoric of the GML as the "common law of the seas" — which was quite typical of this period¹⁷⁴ — most certainly did not mean, however, any reconsideration of the Court's earlier holdings as to the subordination of the GML to U.S. law, as *The Lottawanna* held. This jurisprudential gambit, however, led even accomplished jurists into trouble. Justice Holmes was thus prepared to hold in cases like *Ocean Steam Navigation Co. v. Mellor*¹⁷⁵ — better known to us today as *The Titanic Limitation Case* — that the GML allowed the application of U.S. limitation-of-liability statutes to a British vessel (or, rather, what remained of it) that had collided with an iceberg and sunk on the high seas.¹⁷⁶ And yet, in *The Western Maid*,¹⁷⁷ where the issue was whether the United States could invoke sovereign immunity in a maritime claim, Justice Holmes was harsh in both his characterization and application of GML:

In deciding this question we must realize that however ancient may be the traditions of maritime law, however diverse the sources from which it has been drawn, it derives its whole and only power in this country from its having been accepted and adopted by the United States. There is no mystic over-law to which even the United States must bow. When a case is said to be governed by foreign law or by general maritime law that is only a short way of saying that for this purpose the sovereign power takes up a rule suggested from without and makes it part of its own rules.¹⁷⁸

As will be seen shortly, Justice Holmes's critique of the character of the

173. *Id.* at 48–49 (Brewer, J., dissenting).

174. *See, e.g.*, *Farrell v. United States*, 336 U.S. 511, 517 (1949) ("The law of the sea is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States."); *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924) ("[T]he Constitution adopted the law of the sea as the measure of maritime rights and obligations.").

175. 233 U.S. 718 (1914).

176. *Id.* at 734.

177. 257 U.S. 419 (1922).

178. *Id.* at 432 (citing *The Lottawanna*, 88 U.S. (21 Wall.) 558, 571 (1874)).

GML was decisive for his position on its place in the normative hierarchy of U.S. law.¹⁷⁹

Other cases from this period acknowledged the hybrid character of the GML — an amalgam of medieval,¹⁸⁰ English,¹⁸¹ and foreign¹⁸² law norms, refashioned for the needs of American maritime commerce.¹⁸³ That the GML was derived as a product of foreign law occasionally confused courts as to whether it was subject to mere judicial notice or to formal proof.¹⁸⁴ Nevertheless, no justice of this era appeared to labor under the misapprehension that the GML was “a complete and perfect system,” but rather recognized that “in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration.”¹⁸⁵ For that reason, the GML cases from the twentieth century repeat a basic premise from earlier decisions: Congress is free to alter the substantive content of the judge-made maritime law.¹⁸⁶

179. See Louise Weinberg, *Back to the Future: The New General Common Law*, 35 J. MAR. L. & COM. 523, 539–40 (2004); Louise Weinberg, *Federal Common Law*, 83 NW. U. L. REV. 805, 832 (1989).

180. See *Farrell v. United States*, 336 U.S. 511, 513–14 (1949) (citing and quoting medieval authorities on maintenance and cure, although holding that “the old-time law [construed with liberality] cannot be made to cover the facts of this case”).

181. See *Standard Oil Co. v. United States*, 340 U.S. 54, 59 (1950); *Aetna Ins. Co. v. United Fruit Co.*, 304 U.S. 430, 438 (1938) (“We recognize that established doctrines of English maritime law are to be accorded respect here . . .”).

182. See *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 49 n.11 (1934) (citing a variety of foreign law sources).

183. See, e.g., *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385–86 (1924) (“[The law applied by American admiralty courts] embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic.”); see also *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 314 (1955) (“[I]n the absence of controlling Acts of Congress this Court fashioned a large part of the existing rules that govern admiralty.”); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (“[A] seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.”); *United States v. Flores*, 289 U.S. 137, 148 (1933) (“[A]dopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the Colonies . . .”).

184. See *Black Diamond S.S. Corp. v. Robert Stewart & Sons*, 336 U.S. 386, 396–97 (1949) (explaining that international rules that have passed into GML are subject to judicial notice, while less widely recognized rules of foreign maritime law must be proven as fact).

185. *Just v. Chambers*, 312 U.S. 383, 390 (1941) (citing *The Blackheath*, 195 U.S. 361, 365 (1904)).

186. See *O’Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40 (1943) (“There is nothing in that grant of jurisdiction — which sanctioned our adoption of the system of maritime law — to preclude Congress from modifying or supplementing the rules of that law as experience or changing conditions may require.”); see also *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 821 (2001) (Ginsburg, J., concurring) (“I see development of the law in admiralty as a shared venture in which ‘federal common lawmaking’ does not stand still, but ‘harmonizes with the enactments of Congress in the field.’” (quoting *Am. Dredging Co.*, 510 U.S. 443, 455

There were two caveats, however. One was straightforward: Congress would not be presumed, in legislation, to alter the substantive maritime law unless such a purpose was manifest.¹⁸⁷ The second limit on congressional power, expressed in the 1924 *Panama Railway Co. v. Johnson*¹⁸⁸ ruling, was that Congress could not alter the essential contours of the admiralty jurisdiction of the federal courts.¹⁸⁹ It was one thing, then, to change the substantive maritime law; it was quite another to strip the federal courts of their admiralty jurisdiction.¹⁹⁰ Related to this was the affirmative limitation on Congress's power that, when it did legislate as to substance, "the spirit and purpose of the constitutional provision require that the enactments, — when not relating to matters whose existence or influence is confined to a more restricted [geographic] field, . . . shall be coextensive with and operate uniformly in the whole of the United States."¹⁹¹

Panama Railway's admiralty-jurisdiction-stripping prohibition is probably uncontroversial, inasmuch as the allocation of that power resides in Article III of the Constitution as the only subject-matter grant. But the bar on Congress legislating in a non-"uniform" fashion is most peculiar. For that proposition, the *Panama Railway* Court relied on the authority of the 1917 decision in *Southern Pacific Company v.*

(1994)); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 164 n.59 (1996) (Souter, J., dissenting) ("When the Constitution has received such general principles into our law, for example, in the Admiralty Clause's adoption of the general 'law of nations' or 'law of the sea,' those principles have always been subject to change by congressional enactment." (citing *Panama R.R. Co.*, 264 U.S. 375 (1924), and *The Nereide*, 13 U.S. (9 Cranch) 388 (1815)); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 455 (1994) ("While there is an established and continuing tradition of federal common lawmaking in admiralty, that law is to be developed, insofar as possible, to harmonize with the enactments of Congress in the field."); *Warren v. United States*, 340 U.S. 523, 527 (1951) ("Much of this body of maritime law had developed through the centuries in judicial decisions."); *Swift & Co. Packers v. Compania Colombiana del Caribe, S.A.*, 339 U.S. 684, 690 (1950) (noting that "[n]ot the least creative achievement of judicial law-making is the body of doctrines that has been derived from" the Constitution's grant of admiralty jurisdiction).

187. *See Isbrandtsen Co. v. Johnson*, 242 U.S. 779, 783 (1952) ("Statutes which invade the common law or the general maritime law are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.").

188. 264 U.S. 375 (1924).

189. *See id.* at 386 ("[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."). For an earlier basis of this holding, see *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 526–27 (1861) ("[N]o State law can enlarge it [admiralty jurisdiction], nor can an act of Congress or rule of court make it broader than the judicial power may determine to be its true limits.").

190. *See Crowell v. Benson*, 285 U.S. 22, 55 (1932) ("In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction." (citations omitted)).

191. *Panama R.R. Co.*, 264 U.S. at 386–87 (citations omitted).

Jensen,¹⁹² which (as already mentioned) is the *locus classicus* of the doctrine that the GML impliedly, or dormantly,¹⁹³ preempts contrary state legislation or common law rules of decision. The issue for the Court was the constitutionality of New York state's workers' compensation scheme as applied to maritime workers.¹⁹⁴ In striking that state statute down, the *Jensen* Court, Justice McReynolds writing, intoned:

Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country. [A]nd further, that in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction. . . .

In view of these constitutional provisions and the federal act it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. . . . [S]tate statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. . . . And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purpose for which such law was incorporated into our national laws by the Constitution itself.¹⁹⁵

A careful reading of this passage — the nub of the Court's holding in *Jensen* — indicates that the key authority justifying this constitutionalization of the GML was Justice Bradley's majority opinion in *The Lottawanna*.¹⁹⁶ And Bradley's opinion expressly linked the GML

192. 244 U.S. 205 (1917).

193. See Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 J. MAR. L. & COM. 517, 524 (2001) (Nicholas J. Healy Lecture) (preferring "implied preemption" terminology). See generally Bederman, *supra* note 164 (using this expression).

194. See *Jensen*, 244 U.S. at 209–14.

195. *Id.* at 215–16 (citations omitted).

196. See *id.* at 216–17 (offering many citations and then noting "[t]hese purposes [of the Constitution's Admiralty Clause] are forcefully indicated in the foregoing quotations from *The Lottawanna*").

with “a uniform law founded on natural reason and justice.”¹⁹⁷

It was precisely this invocation of an intellectual lineage for the GML that drew opposition. Justice Pitney’s dissent in *Jensen* emphasized the lack of historic evidence for the proposition that the Framers intended Article III’s Admiralty Clause as a free-standing grant of law-making power to the courts — judicial law-making that would automatically preempt state statutory and common law.¹⁹⁸ Even more direct — and scathing — was Justice Holmes’s now-legendary dissent in *Jensen*:

No doubt there sometimes has been an air of benevolent gratuity in the admiralty’s attitude about enforcing state laws. But of course there is no gratuity about it. Courts cannot give or withhold at pleasure. If the claim is enforced or recognized it is because the claim is a right, and if a claim depending upon a state statute is enforced it is because the State had constitutional power to pass the law. Taking it as established that a State has constitutional power to pass laws giving rights and imposing liabilities for acts done upon the high seas when there were no such rights or liabilities before, what is there to hinder its doing so in the case of a maritime tort? Not the existence of an inconsistent law emanating from a superior source, that is, from the United States. There is no such law. The maritime law is not a corpus juris — it is a very limited body of customs and ordinances of the sea. . . .

I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions. . . . If admiralty adopts common-law rules without an act of Congress it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, just as it does when it enforces a lien created by a State. The only authority available is the common law or statutes of a State. For from the often repeated statement that there is no common law of the United States . . . the natural inference is that in the silence of Congress this court has believed the very limited law of the sea to be supplemented here as in England by the common law, and that here that means, by the common law of the State.

The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that

197. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 572 (1874).

198. *See Jensen*, 224 U.S. at 228 (Pitney, J., dissenting) (“I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code . . . for the determination of controversies . . . , much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either federal or state.”).

can be identified.¹⁹⁹

The fighting issue in *Jensen* was thus the fundamental character of the GML and its placement in the matrix of American law. Holmes's dissent obviously presaged the Court's holding in *Erie* and its ostensible rejection of federal general common law. But the residuum of *Jensen* carried on — as it does to this day. If anything, *Jensen* set in motion a set of ever more astonishing rulings, each necessitated by its core holding, that a federal, uniform GML impliedly preempted state law. If that is so, the Court ruled three years later in *Knickerbocker Ice Co. v. Stewart*,²⁰⁰ Congress could not willy-nilly delegate to the states the power to make nonuniform maritime law.²⁰¹ And if power cannot be delegated, Congress cannot itself legislate nonuniform rules, as the Court indicated in *Panama Railway*.²⁰²

How *Jensen*'s implied preemption principle has played out in practice — and, specifically, what sorts of state enactments will be held violative of this dormant Admiralty Clause power — is beyond the scope of this contribution.²⁰³ The significance here of *Jensen* and its progeny lies, instead, in its creation of a crucial uniformity rule as fulfilling the GML's role “in [the United States'] international and

199. *Id.* at 221–22 (Holmes, J., dissenting); see also *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (describing and criticizing the general common law as “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute . . .”).

200. 253 U.S. 149 (1920).

201. *Id.* at 163–64 (“[W]e must conclude that [maritime law] may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion — not for delegation to others.”); see also *Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 227–28 (1924) (“Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment . . . [B]ut it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.”).

202. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 386–87 (1924).

203. Compare, however, *Just v. Chambers*, 312 U.S. 383, 388–89 (1941), which allowed enforcement of a state wrongful death action, with *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953), which ruled against application of state law on injuries for stevedores. For later decisions commenting on how to reconcile the *Jensen* doctrine with its “maritime but local” exception (allowing for the application of state law in appropriate circumstances), see *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996); *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995) (finding that the exercise of admiralty jurisdiction “does not result in automatic displacement of state law”); *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994) (“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence . . .”). For a sampling of the extensive academic commentary on the subject, see David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158; Robert Force, *Choice of Law in Admiralty Cases: “National Interests” and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1451–63 (2001); Young, *supra* note 13.

interstate relations.”²⁰⁴ As already noted, the Supreme Court of this period made clear that this was a constitutional command.²⁰⁵ These links with international law raise the obvious question of both GML’s and CIL’s status in American jurisprudence after *Erie*. That decision’s categorical rejection of a “federal general common law”²⁰⁶ seems to be squarely at odds with the *Jensen* doctrine and earlier articulations of the content and sources comprising GML, a contradiction that some justices after the Second World War quite frankly acknowledged.²⁰⁷

The *Erie* paradox was partially resolved, at least with respect to GML, in the 1959 decision of *Romero v. International Terminal Operating Co.*²⁰⁸ Ostensibly, the issue in *Romero* was a narrow one: whether matters that were brought exclusively under the GML were removable from state court to federal court.²⁰⁹ But implicit in the question presented was the GML’s status as “law” in the United States, and, specifically, as federal law such as to justify jurisdiction under the “federal question” grant. Justice Frankfurter, writing for the Court, concluded that “[m]aritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.”²¹⁰ And, *Jensen* notwithstanding, Justice Frankfurter held that support for the proposition that all GML cases necessarily present federal questions was “empty logic, reflecting a formal syllogism.”²¹¹

Ironically, the dissents in *Romero* did not really rebuke Frankfurter’s approach, nor seek to extol *Jensen*’s potentially overweening impact on federal jurisdiction. Justice Brennan turned instead to the intellectual transformations of GML in American jurisprudence, and he offered this

204. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215–16 (1917).

205. *See Sw. Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959) (“The issue is one of importance in the development of the law maritime, as to which we have large responsibilities, constitutionally conferred . . .”).

206. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State And no clause in the Constitution purports to confer such a power upon the federal courts.”); *see also* Weinberg, *Back to the Future*, *supra* note 179, at 527–33. Compare Guttoff, *supra* note 31, at 393–95 (arguing that *Erie* was an unwarranted rejection of previous precedent holding that maritime law was federal in character), *with* Young, *supra* note 13, at 484 (noting that prior to *Jensen*, there was no such authority).

207. *See, e.g., Am. Dredging Co.*, 510 U.S. at 452 (“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence”); *Pope & Talbot*, 346 U.S. at 418 (Frankfurter, J., concurring) (noting that the issue in the case “raises subtle issues of such judicial lawmaking as is the main source of maritime law”); *see also* Stevens, *supra* note 64, at 257–63.

208. 358 U.S. 354 (1959); *see also* David J. Bederman, *Admiralty’s Greatest Hits: Romero’s Enduring Legacy*, 39 J. MAR. L. & COM. 27, 31–35 (2008).

209. *See Romero*, 358 U.S. at 355–58.

210. *Id.* at 374.

211. *Id.* at 377.

summary:

It is true that early in our history maritime law was thought to be an international law merchant which was impartially administered by the several maritime nations of the world. This concept was expressed by Chief Justice Marshall's language in *American Ins. Co. v. Canter*. . . . But that this did not mean that there was some supranational law, by which American courts were bound, was made clear by Mr. Justice Bradley in *The Lottawanna*

The sovereign power which determines the rules of substantive law governing maritime claims of the sort which petitioner asserts here is federal power, speaking through Congress . . . or through this Court in the case of judicially defined causes of action. *Southern Pacific Co. v. Jensen, supra*. This is an area where the federal courts have defined substantive rules themselves, and have not applied state law.²¹²

Justice Brennan further articulated the view that Chief Justice Marshall's opinion in *Canter* should be broadly read to justify all maritime actions qualifying as federal questions.²¹³

In any event, the clear import of the *Romero* decision was that the GML had a weird, schizophrenic character: For jurisdictional purposes, it was not federal law, and properly filed²¹⁴ maritime cases in state courts thus were not removable. And yet, under *Jensen*, the substantive maritime law to be applied to GML cases was the federal judge-made law, which impliedly preempted contrary state law. This mirrored the position for cases raising customary international questions (for example, involving diplomatic or sovereign immunities) filed in state court and sought to be removed to federal court.²¹⁵ But, aside from that similarity, the general posture of GML and CIL could not have been any more different by the mid-1900s. The substantive principles of the GML had been constitutionalized by *Jensen* and required no further

212. *Id.* at 391–92 (Brennan, J., dissenting in part and concurring in part).

213. *Id.* at 399–403 (Brennan, J., dissenting in part and concurring in part).

214. *See id.* at 362 (majority opinion). Such cases are allowed under the savings-to-suitors caveat of the grant of federal admiralty jurisdiction. *See* 28 U.S.C. § 1333 (2006) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.”). For more on the savings-to-suitors clause, see Gutoff, *supra* note 11.

215. *See* *Oliver Am. Trading Co. v. Mexico*, 264 U.S. 440, 442–43 (1924) (“[A federal question] is not presented where the question of jurisdiction to be decided turns upon matters of general law applicable alike to actions brought in other tribunals. The question of sovereign immunity is such a question of general law” (citations omitted)).

implementation or sanction by Congress.²¹⁶ No such move had been made for CIL.

IV. IMPLICATIONS FOR CONTEMPORARY JURISPRUDENCE

Moving to contemporary legal developments and implications of the relationship between GML and CIL, it is important to realize that certain assumptions have now become ingrained in the debate. For the Supreme Court, at least, the character of the GML may have subtly shifted away from its internationalist roots. In distinguishing between principles of “maritime law” and “common law” in order to determine the meaning of the phrase “employees” in the context of federal statutes, the Court in *United States v. W.M. Webb, Inc.*²¹⁷ noted that “[m]aritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea.”²¹⁸ More generally, the Court observed in *Moragne v. States Marine Lines, Inc.*²¹⁹ that:

[m]aritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law.²²⁰

Even more directly, the Court in a 1986 decision noted that “[w]ith admiralty jurisdiction comes the application of substantive admiralty law. Absent a relevant statute, the GML, as developed by the judiciary, applies. Drawn from state and federal sources, the GML is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.”²²¹ In this formulation, there was no express invocation of international sources for the substantive GML, even though such may have been implicit by the doctrinal context in later Supreme Court decisions.²²²

216. *See, e.g.*, *Warren v. United States*, 340 U.S. 523, 526 (1951) (“[T]he exceptions permitted by paragraph 2 [of the Shipowners’ Liability Convention of 1939] are operative by virtue of the general maritime law and that no Act of Congress is necessary to give them force.”).

217. 397 U.S. 179 (1970).

218. *Id.* at 191.

219. 398 U.S. 375 (1970).

220. *Id.* at 386–87 (footnote omitted).

221. *E. River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 864–65 (1986) (citations and footnotes omitted).

222. *See, e.g.*, *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25–26 (2004) (acknowledging lower federal courts’ rulings relating to multimodal transport of goods); *id.* at 28 (“Applying state law to cases like this one would undermine the uniformity of general maritime law. The same liability limitation in a single bill of lading for international intermodal transportation often applies both to

A number of contemporary decisions laid to rest any lingering doubts that *Erie* cast into question the status of the GML as federal common law. In a 1981 decision, the Court accepted as beyond cavil that

a narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty. We consistently have interpreted the grant of general admiralty jurisdiction to the federal courts as a proper basis for the development of judge-made rules of maritime law. Because “the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law,” “[a]dmiralty law is judge-made law to a great extent.”²²³

In another context, the Court confirmed in *Texas Industries, Inc. v. Radcliff Materials, Inc.*²²⁴ that admiralty cases are among “those in which a federal rule of decision is ‘necessary to protect uniquely federal interests.’”²²⁵ The Court elaborated by noting that,

absent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, either because the authority and duties of the United States as sovereign are intimately involved or because the interstate or international nature of the controversy makes it inappropriate for state law to control.²²⁶

This line of decisions thus reunited the GML and CIL into an uneasy, post-marriage partnership of convenience. As the *Texas Industries* Court made clear, the source of this reconciliation was the 1964 decision in *Banco Nacional de Cuba v. Sabbatino*.²²⁷ At issue there was

sea and to land”); see also *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 137, 142 (2005) (referring not only to treaty obligations, but also to more generic “international obligations” relating to the question of regulation of passengers’ access to cruise ship facilities).

223. *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95–96 (1981) (footnotes omitted) (quoting *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20–21 (1963), and *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1979)); see also *Young*, *supra* note 4, at 310–12.

224. 451 U.S. 630 (1981).

225. *Id.* at 640–41 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)).

226. *Id.* at 641 (footnotes omitted) (citing, in relation to admiralty cases, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), and *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16 (1963)).

227. 376 U.S. 398 (1964).

the application of the act of state doctrine in a suit brought in the context of an immensely contentious international dispute: revolutionary Cuba's expropriation of U.S. interests on the island. But could a federal, judge-made doctrine supplant state-law rules of decision? The majority in *Sabbatino* believed it could:

The Court in the pre-*Erie* act of state cases, although not burdened by the problem of the source of applicable law, used language sufficiently strong and broadsweeping to suggest that state courts were not left free to develop their own doctrines (as they would have been had this Court merely been interpreting common law under *Swift v. Tyson*, supra). . . . We are not without other precedent for a determination that federal law governs; there are enclaves of federal judge-made law which bind the States. . . . Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests

In *Hinderlider v. La Plata River Co.*, in an opinion handed down the same day as *Erie* and by the same author, Mr. Justice Brandeis, the Court declared, "For whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." The problems surrounding the act of state doctrine are, albeit for different reasons, as intrinsically federal as are those involved in water apportionment or boundary disputes. . . . We conclude that the scope of the act of state doctrine must be determined according to federal law.²²⁸

And, perhaps most trenchantly of all, Justice Harlan noted that "[v]arious constitutional and statutory provisions indirectly support this determination, by reflecting a concern for uniformity in this country's dealings with foreign nations and indicating a desire to give matters of international significance to the jurisdiction of federal institutions."²²⁹ Prominent among the constitutional and statutory bases for a uniformity imperative was the Constitution's Admiralty Clause and the grant of admiralty jurisdiction to the federal courts in 28 U.S.C. § 1333.²³⁰

Sabbatino's delphic language — and equally opaque citation of

228. *Id.* at 426–27 (footnotes and other citations omitted).

229. *Id.* at 427 n.25 (citing U.S. CONST. art. I, § 8, cls. 3, 10; art. II, §§ 2, 3; art. III, § 2; 28 U.S.C. §§ 1251(a)(2), (b)(1), (b)(3), 1332(a)(2), 1333, 1350, 1351).

230. *Id.*; see also Force, *supra* note 203, at 1475–82 (discussing the division of the interests protected by the Admiralty Clause into sovereignty, transnational, international, and maritime commerce dimensions).

authority — have spawned a remarkable debate on the current status of CIL in U.S. jurisprudence.²³¹ Most recently, Justice Souter in *Sosa v. Alvarez-Machain*,²³² which concerned the application of the Alien Tort Statute in granting jurisdiction for torts “committed in violation of the law of nations,” wrote that:

Erie did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations.²³³

Justice Souter, in characterizing the *Sabbatino* holding, was clear that, while it did not directly apply international law (as opposed to using a judge-made principle of abstention in international litigation), it “endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts.”²³⁴ That noted commentator, none other than Professor Philip Jessup (who would later serve on the International Court of Justice), was adamant that the long tradition of regarding CIL as federal law was rooted in the admiralty and maritime decisions of U.S. courts.²³⁵

And, in a weird resonance with the Court’s 1959 decision in *Romero*, Justice Souter — in replying to Justice Scalia’s critique of his opinion in *Sosa*²³⁶ — noted:

Our position does not . . . imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350). Section 1350 was

231. See, e.g., Bellia & Clark, *supra* note 47, at 84–90; Bradley & Goldsmith, *supra* note 147, at 859–60; Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1559–61 (1984).

232. 542 U.S. 692 (2004).

233. *Sosa*, 542 U.S. at 729 (citing and quoting *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Nereide*, 13 U.S. (9 Cranch) 423 (1815)).

234. *Id.* at 730 n.18 (citing *Sabbatino*, 376 U.S. at 425 (citing Philip Jessup, *The Doctrine of Erie Railroad v. Tompkins Applied to International Law*, 33 AM. J. INT’L L. 740 (1939))); see also Bradley, Goldsmith & Moore, *supra* note 4, at 907–08.

235. See Jessup, *supra* note 234, at 742–43 (discussing law of the sea controversies); see also Bellia & Clark, *supra* note 47, at 82–83.

236. See 542 U.S. at 745 (Scalia, J., concurring) (“At the time of the [Alien Tort Statute]’s enactment, the law of nations, being part of general common law, was not supreme federal law that could displace state law.”); see also *id.* at 744–45, 749 (Scalia J., concurring) (stating that *Erie* effectuated an “avulsive change” in rejecting the Framers’ views of the status of customary international law).

enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, as a more expansive common law power related to 28 U.S.C. § 1331 might not be.²³⁷

Put simply, Justice Souter was reiterating that questions of CIL — as with matters of the GML — could not be assimilated to “federal questions” for purposes of federal jurisdiction absent some other, independent ground (such as a treaty or act of Congress).

Even more significantly, both the majority and dissenting opinions in *Sosa* grasped the significance of the historic relationship between CIL and the GML. In discussing the early status of CIL as common law, Justice Souter, writing for the majority, drew a distinction between two sides of the law of nations. The first “cover[ed] the general norms governing the behavior of national states with each other,”²³⁸ but

[t]he law of nations included a second, more pedestrian element . . . that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated “in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . ; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills.” The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from “ancient usage among civilized nations, beginning centuries ago, and gradually ripening

237. *Id.* at 731 n.19 (majority opinion) (cross-references omitted). *But see id.* at 745 (Scalia, J., concurring) (“[A] judicially created federal rule based on international norms would be supreme federal law. Moreover, a federal-common-law cause of action . . . would ‘arise under’ the laws of the United States, not only for purposes of Article III but also for purposes of statutory federal-question jurisdiction.”).

238. *Id.* at 714 (citing BLACKSTONE, *supra* note 49, at *68) (“[O]ffences against” the law of nations are “principally incident to whole states or nations.”); *see also* Alfred P. Rubin, *U.S. Tort Suits by Aliens Based on International Law*, 18 FLETCHER F. WORLD AFF. 65, 69–70 (1994) (offering a gloss on this passage from Blackstone).

into a rule of international law”²³⁹

The dissent exploited the key element of this observation — that the “law of nations” had included both public and private aspects — and drew this conclusion: “*Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the ‘law merchant,’ then a subset of the law of nations.”²⁴⁰ Justice Scalia also noted that the power of federal courts to create a federal general common law within certain “enclaves,”²⁴¹ “havens of specialty,”²⁴² or “interstitial areas of particular federal interest”²⁴³ was quite limited, and the admiralty power was the exception that quite literally proved the rule:

The rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction is subject to exceptions, some better established than others. The most firmly entrenched is admiralty law, derived from the grant of admiralty jurisdiction in Article III, § 2, cl. 3, of the Constitution. In the exercise of that jurisdiction federal courts develop and apply a body of general maritime law, “the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men.”²⁴⁴

The significance of all these statements in *Sosa* has been the subject of substantial controversy.²⁴⁵ But virtually no commentators have connected the dots with the historic relationship between CIL and GML.²⁴⁶ Those who have drawn the connection have nonetheless disclaimed the analogy between international law and admiralty.²⁴⁷ One counterargument is that admiralty is an acceptable enclave of federal judicial law-making because “much of federal admiralty law today is

239. *Sosa*, 542 U.S. at 715 (quoting BLACKSTONE, *supra* note 49, at *67, and *The Paquete Habana*, 175 U.S. 677, 686 (1900)).

240. *Id.* at 741 (Scalia, J., dissenting) (citing Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1280–81 (1996)).

241. *Id.* at 729 (majority opinion).

242. *Id.* at 694, 726.

243. *Id.* at 726.

244. *Id.* at 742 (Scalia, J., dissenting) (quoting *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999)).

245. See, e.g., Bradley, Goldsmith & Moore, *supra* note 4; William S. Dodge, *Bridging Erie: Customary International Law in the U.S. Legal System After Sosa v. Alvarez-Machain*, 12 TULSA J. COMP. & INT’L L. 87 (2004); Martin S. Flaherty, *The Future and Past of U.S. Foreign Relations Law*, 67 LAW & CONTEMP. PROBS. 169, 173 (2004); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 132.

246. But see Bradley, Goldsmith & Moore, *supra* note 4, at 915–18; White, *supra* note 4, at 785.

247. See Bradley, Goldsmith & Moore, *supra* note 4, at 918.

found in statutes or treaties and not exclusively in the common law.”²⁴⁸ According to this approach, “interstitial gap-filling” by federal courts is “uncontroversial,” but “wholesale incorporation” is not.²⁴⁹ Moreover, “admiralty is only one small subset of CIL, and it is a subset in which federal common law is used selectively to promote the policies adopted by the political branches.”²⁵⁰ This all damns the GML with faint praise, seeking to disqualify it as a worthy partner in the far-bigger-stakes game of CIL’s status in U.S. law. Despite the Supreme Court’s desire to harmonize the GML with congressional enactments,²⁵¹ that has not led to the demise or limitation of judge-made maritime law by federal courts,²⁵² as even Justice Scalia acknowledged in *Sosa*.²⁵³ Just as important, the issue for both CIL and GML *is* interstitial law-making and its legitimacy. To argue against wholesale incorporation of either CIL or GML into U.S. law is to shadowbox with a phantom opponent. No one can seriously deny that Congress retains the power to modify the substantive contours of both, and thus affect their domestic application, as authorities from the nineteenth century make amply clear.²⁵⁴

Another group of scholars have sought to break the CIL-GML axis from the other direction: Extol admiralty and trash international law. Notwithstanding the historic pedigree of the GML as part of the law of nations, one writer has argued that, “despite the growing number of international conventions, protocols, and agreements that have emerged since, one can hardly say that CIL has attained anything like the doctrinal thickness and specificity of admiralty or maritime law.”²⁵⁵ According to this commentator, the *lex maritima*, like the law merchant,

248. *Id.*

249. *Id.* (citing Young, *supra* note 13, at 477).

250. Bradley, Goldsmith & Moore, *supra* note 4, at 919.

251. See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 820 (2001) (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994), for the proposition that federal common law-making in admiralty should “harmonize with the enactments of Congress in the field”); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990) (“In this era [in which Congress has legislated extensively on admiralty matters], an admiralty court should look primarily to these legislative enactments for policy guidance.”); *Nw. Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 97 n.40 (1981) (“[E]ven in admiralty we decline to fashion new remedies if there is a possibility that they may interfere with a legislative program.”).

252. See *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 206 (1996) (“[G]eneral maritime law [is] a species of judge-made federal common law.”); *Am. Dredging Co.*, 510 U.S. at 455 (“[T]here is an established and continuing tradition of federal common lawmaking in admiralty.”); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 259 (1978) (stating that federal admiralty law remains “judge-made law to a great extent”).

253. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 742 (2004) (Scalia, J., dissenting).

254. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900); *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576–77 (1874); *The Nereide*, 13 U.S. (9 Cranch) 388, 422–23 (1815).

255. White, *supra* note 4, at 789.

really *is* based on a “specialized body of customs and practices — the products of longstanding, on-going practices in distinctive professions,”²⁵⁶ while the law of nations has no such character. Putting aside this dubious contrast between merchant practice and State practice,²⁵⁷ this view ignores the historic pedigree of both CIL and GML.²⁵⁸ And, while admiralty and maritime jurisdiction was expressly provided in the grant of powers to the federal courts in Article III and effectuated through the Judiciary Act of 1789,²⁵⁹ the Constitution’s grant of power to Congress to “define and punish . . . Offenses against the Law of Nations”²⁶⁰ certainly implies that, at a minimum, there is a substantive body of law that Congress can apply.²⁶¹

Those who would seek to break the analogy between GML and CIL usually assert that Article III’s grant of jurisdiction over admiralty and maritime cases was not accompanied by a similar, sweeping grant over all cases involving the law of nations.²⁶² But such may have been regarded as unnecessary by the Framers,²⁶³ inasmuch as jurisdiction was granted in “all cases affecting ambassadors, other public ministers and consuls,” as well as disputes “between a state, or the citizens thereof, and foreign states, citizens or subjects.”²⁶⁴ To suggest, therefore, that originalist grounds for exceptionalism in admiralty as “law of the land” are *stronger* than the constitutional basis for disputes arising under the law of nations seems wholly extravagant. Put another way, there seems to be no sensible originalist argument for according the GML greater jurisprudential status than CIL.

That leaves the question of how to effectuate the full reconciliation of CIL and GML. The Supreme Court’s decision in *Sosa* offers a way

256. *Id.* at 787.

257. For more on this issue, see DAVID J. BEDERMAN, CUSTOM AS A SOURCE OF LAW 117–34 (2010).

258. *See, e.g.*, *The China*, 74 U.S. (7 Wall.) 53 (1868); *see also supra* text accompanying notes 99–103.

259. *See White, supra* note 4, at 788 (citing 1 Stat. 76–77 (1789)).

260. U.S. CONST. art. I, § 8, cl. 10.

261. *See sources cited supra* note 38.

262. *See* Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 334 (1997); *White, supra* note 4, at 788. *But see* Stephens, *supra* note 4, at 419–25 (arguing in favor of a link between GML and CIL).

263. *See* THE FEDERALIST NO. 80, at 538 (Alexander Hamilton) (Jacob Cooke ed., 1961) (“The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizances of maritime causes The most important part of them are, by the present Confederation, submitted to federal jurisdiction.”); *see also* Jay, *Status, supra* note 25, at 830 (noting that James Wilson’s proposal before the Philadelphia Convention’s Committee on Detail to add an express provision of jurisdiction for all cases involving the law of nations was rejected as unnecessary) (citing 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 157 (M. Farrand ed., 1911)).

264. U.S. CONST. art. III, § 2, cls. 2 & 8.

forward inasmuch as the majority opinion suggests²⁶⁵ that CIL's "attributes [as federal law] can be disaggregated and treated separately," as has already been recognized for the GML.²⁶⁶ As discussed previously,²⁶⁷ status as "law of the land" actually has four²⁶⁸ components: supremacy, preemption of contrary state law, Supreme Court review of state court decisions, and federal-question characterization. Today,²⁶⁹ the federal judge-made GML is supreme, impliedly preemptive of state law, and permissive of direct Supreme Court review of state court decisions as to its content, but it does not constitute a federal question for the purposes of that head of jurisdiction. This combination of attributes allows GML matters to be litigated in state court, subject to the state court's application of substantive federal rules of decision and the possibility of Supreme Court review of aberrant decisions. Under this schematic, interests of federalism (and federal-state judicial cooperation) are neatly balanced with the goals of uniformity and consistency of the substantive maritime law.

What would be the doctrinal and practical consequences of applying the GML's status as "law of the land" to CIL? The first result would be an elegant solution to an historical problem that has bedeviled advocates of the so-called "modern" position that CIL is federal law for all purposes.²⁷⁰ Most of the authorities relied upon by the "revisionist"

265. Compare *Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004) (noting that CIL may be federal common law for purposes of the Alien Tort Statute, but not for federal question jurisdiction under § 1331), with *id.* at 745 (Scalia, J., concurring) (arguing that, if accepted, CIL would "arise under the laws of the United States, not only for purposes of Article III but also for purposes of statutory federal-question jurisdiction" (emphasis in original)).

266. Ginn, *supra* note 4, at 147-48; see also Dodge, *supra* note 245, at 96-97 ("[T]he Court seems to prefer a more particularized approach that looks at the incorporation of customary international law into the U.S. legal system issue-by-issue.").

267. See *supra* text accompanying notes 8-13.

268. An argument could be made that there is a fifth element: having something be characterized as part of the "law of the land" makes it subject to the President's obligation to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. This has been raised as an issue by those scholars who have criticized the modern view that CIL is federal law for all purposes. See Bradley & Goldsmith, *supra* note 147, at 817. I do not further consider this aspect of the potential analogy of CIL to GML as the law of the land. For cases in which the Supreme Court has addressed the issue, see *The Paquete Habana*, 165 U.S. 667, 710-11, 715-16 (1900) (discussing the President's power to violate CIL), and *Brown v. United States*, 12 U.S. (8 Cranch) 110, 123, 128 (1814).

269. Understandably, this may not have been the status of GML in the early years of the Republic. The implied preemption doctrine and direct Supreme Court review of state court decisions exclusively involving GML (and not a statutory or treaty right) were not firmly established until the early twentieth century with the *Jensen* and *Chelentis* decisions. As for general "supremacy" concerns, despite stray opinions which disclaimed the GML's status as "law of the land," *Ralli v. Troop*, 157 U.S. 386, 393 (1895), the majority view of jurists from various periods indicates that it was. See *The Nereide*, 13 U.S. (9 Cranch) 388, 423 (1815); *Military Commissions*, 11 Op. Att'y Gen. 297, 299 (1865).

270. See RESTATEMENT (THIRD) FOREIGN RELATIONS LAW OF THE UNITED STATES § 111

school tend to focus on CIL's disqualification as a basis of federal question jurisdiction, and (to a lesser degree) the unavailability of direct Supreme Court review.²⁷¹ Recognition that certain nonstatutory, nontreaty CIL causes of action could still be brought in state court, without being subject to removal as federal questions, goes a long way to resolving the federalism concerns implicit in the revisionist attack on the modern position.²⁷² Aside from some peculiar cases involving sovereign and diplomatic immunities,²⁷³ there may not be many CIL cases that could remain in state court as not involving diverse parties or not raising federal statutory or treaty rights.²⁷⁴

The second implication of my proposal is, I admit, far more controversial. That is borrowing maritime law's implied preemption doctrine, derived from the dormant Admiralty Clause, and applying it to CIL issues. Such a result has already been vigorously criticized in the academic literature.²⁷⁵ But it is worth recalling that the Supreme Court has already tacitly or expressly endorsed some form of implied preemption doctrine in the foreign relations field.²⁷⁶ And, despite the criticisms of *Jensen* and its progeny — which are legion²⁷⁷ — the implied preemption doctrine remains good law, at least for the moment.²⁷⁸ Obviously, the impact of impliedly preempting state law

cmt. d (1987); see also sources cited *supra* notes 2 & 147.

271. See, e.g., Bradley & Goldsmith, *supra* note 147, at 822–26 (discussing pre-*Erie* position of CIL).

272. See Ginn, *supra* note 4, at 110, 145–48.

273. For examples from New York, see *Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969); *Anonymous v. Anonymous*, 252 N.Y.S.2d 913 (N.Y. Fam. Ct. 1964). For such a case that was removed based on diversity jurisdiction, see *Bergman v. DeSieves*, 170 F.2d 360 (2d Cir. 1948).

274. I am agnostic as to the question of whether proceedings under the “violation of the law of nations” prong of the Alien Tort Statute, 28 U.S.C. § 1350, could be initiated in state court by analogy to the savings to suitors clause of § 1333.

275. See Ramsey, *supra* note 2, at 558, 575–80.

276. See *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417–20 (2003) (discussing tacit acceptance of implied preemption in foreign relations field); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000); *Zschernig v. Miller*, 389 U.S. 429, 432 (1968) (providing an express endorsement of the doctrine). See generally Sarah H. Cleveland, *Crosby and the 'One-Voice' Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975 (2001) (calling into question the basis in the Constitution and actual practice for an implied statutory preemption doctrine in foreign affairs); Carlos Manuel Vázquez, *W(h)ither Zschernig?*, 46 VILL. L. REV. 1259 (2001) (arguing that the Supreme Court's decision in *Crosby* did not undermine the dormant foreign affairs doctrine).

277. See sources cited *supra* note 203.

278. But see *Am. Dredging Co.*, 510 U.S. at 447 n.1 (noting that *Jensen*'s vitality was not at issue, since no party had raised the question). Justice Stevens has previously advocated overturning *Jensen*. See *id.* at 458 (Stevens, J., concurring) (“*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* would be in a case under the Due Process Clause.” (citation omitted)); see also John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 6–9 (1983). Obviously, in the event the implied preemption doctrine

contrary to a judge-made, federal CIL would be immense and would far outweigh any residual reservations of state court jurisdiction over a small class of CIL controversies. But, again, this is consistent with the so-called “reverse-*Erie*” doctrine in admiralty, under which state courts (pursuant to the savings to suitors clause of § 1333) can apply state procedural law to a dispute but must also follow federal substantive maritime law.²⁷⁹ Such a result for CIL is thus not only plausible, but it is consistent with principles of coordinate federalism.

The final conclusion one might draw from analogizing CIL to GML is that historical experience with integrating extranational legal sources into the hierarchy of U.S. law is a surer guide than dogmatic assertions. As has been observed by other writers,²⁸⁰ having CIL embrace the same attributes of law as GML would return the debate over the proper place of CIL to a more sensible — and realistic — footing. Allowing state courts to have a coordinate role in deciding CIL cases will not deleteriously affect the uniformity and coherence of that body of law.²⁸¹ But neither will the fashioning of a body of law by (usually) federal judges result in a wholesale incorporation of internationalist doctrines, at the expense of state authority.²⁸²

In this particular realm of U.S. foreign relations law, Justice Holmes — who, along with Chief Justice Marshall and Justices Story, Bradley, Clifford, Gray, and Frankfurter, are the main protagonists of the jurisprudential tale narrated here — was certainly correct: “[A] page of history is worth a volume of logic.”²⁸³ But, in this instance, we really have volumes of maritime and international legal history trumping scant pages of structural constitutional logic. In construing the law of the land, as with the law of the sea, history matters. Judges, policy-makers, and scholars would be well-advised to heed its lessons.

for maritime law were ever to be overruled, my conclusion as to its application for CIL would also need to be re-examined.

279. See *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223 (1986) (“[T]he extent to which state law may be used to remedy maritime injuries is constrained by a so-called ‘reverse-*Erie*’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.”). See generally Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1 (2006) (discussing reverse-*Erie* doctrine); David W. Robertson, *Admiralty and Maritime Litigation in State Court*, 55 LA. L. REV. 685, 700–05 (1995) (reviewing the operation of reverse-*Erie* doctrine in maritime law cases).

280. See, e.g., Ginn, *supra* note 4, at 110–11, 145.

281. Cf. Koh, *supra* note 2, at 1828 (taking that position).

282. Cf. Bradley & Goldsmith, *supra* note 147, at 817, 868 (taking that position).

283. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

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