The Domestic Legal Status of Customary International Law in the United States: Lessons from the Federal Courts' Experience with General Maritime Law

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I. Introduction

The institutional dimension of state behaviour has received insufficient attention in the international law and international relations literature. Scholars typically assume that states are unitary actors driven by discrete motivations; for most states, however, national authority over foreign affairs is distributed across many different government bodies. In the United States, for example, authority over the interpretation,

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implementation, and enforcement of international treaties is shared by Congress,[1] the President,[2] the federal judiciary,[3] and various state institutions.[4] Commentators who ignore these internal arrangements may misunderstand some of the complex processes that determine state behaviour on the international plane.

A new generation of political scientists and international law scholars has taken this insight to heart. Casting aside explanations of national behaviour that assume a unitary state, these scholars have begun to explore the role of domestic institutions in foreign relations.[5] They have paid particularly close attention to the activities of courts, which are thought to 'create mechanisms for ensuring that a state abides by its international legal commitments whether or not particular government actors wish it to do so.'[6] Legislators and executive officers may also contribute to international legal compliance

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[1] See e.g., *Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, §* 506, 18 U.S.C. § 2340A (2000) (implementing the United States' obligations under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment).

[2] See e.g., Memorandum from Jay S. Bybee to Alberto R. Gonzales, Counsel to the President, Re Status of Taliban Forces under Article 4 of the Third Geneva Convention of 1949 (7 Feb , 2002), online: <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html> (interpreting the Geneva Convention Relative to the Treatment of Prisoners of War).

[3] See e.g., *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (interpreting the Vienna Convention on Consular Relations).

[4] See e.g., *Ex parte Medellin*, 223 S.W.3d 315 (Tex. Crim. App. 2006) (considering the binding effect of a decision of the International Court of Justice).

[5] See Oona A. Hathaway, "*Hamdan v. Rumsfeld:* Domestic Enforcement of International Law", *in International Law Stories*, John Noyes et al., eds. (New York: Foundation Press, 2007) (describing the role of the Supreme Court in enforcing international legal norms in the war on terrorism); Oona A. Hathaway, "Between Power and Principle: An Integrated Theory of International Law" (2005) 72 U. Chi.. L. Rev. 469 at 499. [Hathaway, *Integrated Theory*] (arguing that international law 'creates a more strongly observed obligation in states in which the government is constrained by independent courts that allow extragovernmental actors to challenge state action'); Karen J. Alter, *Establishing the Supremacy of European Law: the Making of an International Rule of Law in Europe* (Oxford: Oxford University Press, 2001) (exploring the role of national courts in the development of the legal supremacy of the European Court of Justice over European Community member states).

[6] Hathaway, *Integrated Theory*, *supra* note 5 at 497.

by enforcing international legal norms against other government actors.

Building on this body of work, this article explores the significance of domestic institutions by focusing on the reception of customary international law (CIL)[7] into the domestic legal system of the United States. Because there are few international mechanisms for enforcing CIL against states, domestic enforcement of CIL is crucial to ensuring compliance. States that grant their domestic institutions significant enforcement authority will likely comply with CIL more consistently than states that withhold such authority.[8] The status of CIL in the United States legal system is thus of great importance: if CIL is binding domestic law, enforceable in domestic courts, then the United States will be more likely to comply with international legal norms; if CIL is not binding domestic law, the President and other government actors will enjoy greater discretion in deciding how to respond to international legal problems.

Despite the importance of this question, the domestic legal status of CIL is hotly contested. Until recently, it was widely assumed that CIL automatically operated of its own force as a type of federal common law[9] in United States courts. Professor Louis Henkin, for example, has written that customary international law 'is "self-executing" and is applied by courts in the United States without any need for it to be enacted or implemented by Congress.'[10] The *Restatement (Third) of the Foreign Relations Law of the United States* echoes this view: '[c]ustomary international law is considered to be like

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[7] Customary international law is a type of binding international law that arises out of the consistent practices of states, rather than by virtue of any formal legal instrument. See Part II.A.

[8] *Cf.* Eric Neumayer, "Do International Human Rights Treaties Improve Respect for Human Rights?" (2005) 49 J. Conflict Resol. 925 at 950 (finding a correlation between the strength of a country's democracy and its compliance with international human rights treaties).

[9] The term 'federal common law' refers to federal rules of decision that are not derived from the Constitution, statutes, or treaties of the United States. For more discussion, see Part II.D.

[10] Louis Henkin, "International Law as Law in the United States" (1984) 82 Mich. L. Rev. 1555 at 1561.

common law in the United States, but it is federal law'[11] which can 'supersed[e] inconsistent State law or policy.'[12] With few exceptions, the federal courts have adopted a similar stance.[13]

This view, which has been dubbed the 'modern position' by its detractors,[14] has more than just theoretical significance. Its adoption by the federal judiciary has permitted a flourishing of human rights litigation under the Alien Tort Statute, which grants the federal courts jurisdiction over actions by aliens for torts committed in violation of international law.[15] If, as the modern position holds, CIL is part of federal law, then claims based on CIL 'aris[e] under . . . the Laws of the United States'[16] for the purposes of Article III of the federal Constitution.[17] The constitutionality of the Alien Tort Statute's extension of the federal judicial power thus depends upon the correctness of the modern position. If the statute does not satisfy the terms of the Arising Under Clause, it may be unconstitutional as

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[11] *Restatement (Third) of the Foreign Relations Law of the United States* § 111 cmt. d (1987) [*Restatement*].

[12] *Ibid*. § 115 cmt. e.

[13] See e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

[14] Curtis A. Bradley & Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position" (1997) 110 Harv. L. Rev. 815 at 816.

[15] See 28 U.S.C. § 1350 (2000).

[16] U.S. Const. art. III, § 2.

[17] Article III delimits the outer constitutional boundaries of the jurisdiction of the federal judiciary. Among other things, it extends the federal judicial power 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.' *Ibid*. The Supreme Court has interpreted this provision broadly to permit federal jurisdiction over any case in which any of the aforementioned sources of law 'forms an ingredient of the original cause.' *Osborn v. Bank of the United States*, 22 U.S. 738, 823 (1824). In the case of CIL, the question is whether CIL is part of 'the Laws of the United States.' If it is not, then the federal courts may only exercise jurisdiction in cases based solely on CIL if the parties fit within one of the other heads of jurisdiction in Article III—for example, if the United States is a party or if one of the parties is a citizen of a state. See *supra* note 16.

applied to parties that do not fit within any of the other Article III heads of jurisdiction.[18]

In 1997, Professors Curtis Bradley and Jack Goldsmith challenged the modern understanding of CIL in a prominent article.[19] Arguing that the modern position was based on a flawed understanding of history and the proper powers of federal courts, these 'revisionists' claimed that CIL 'had the status of federal common law only in the relatively rare situations in which the Constitution or the political branches authorized courts to treat it as such.'[20] Underlying the revisionists' critique seems to be a fear that, if left with a free hand, federal courts will apply newly developed CIL human rights norms to invalidate state activity in a number of controversial areas. Thus, norms 'prohibit[ing] certain applications of the death penalty, restrictions on religious freedom, and discrimination based on sexual orientation'[21] might be used to impose supposedly liberal internationalist policies on the unwilling states.

This paper draws from the federal courts' experience with general maritime law to argue that both views are mistaken. General maritime law – that is, the body of legal traditions and customs collected and passed down by seafaring nations that American courts apply in admiralty cases – provides an interesting basis for comparison for several reasons. General maritime law and CIL share a common origin as two of the historical branches of the law of nations. Both bodies of law are customary in nature: they are comprised of legal norms that have developed over long periods of time through tradition, practice, and tacit agreement among nations. All nations are theoretically bound by the two bodies of law, and all nations

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[18] See *Filartiga v. Pena-Irala,* 630 F.2d 876 at 885–89 (2d Cir. 1980) (considering the constitutionality of the exercise of federal jurisdiction over a tort committed in a foreign country by a foreign national against another foreign national).

[19] See Bradley & Goldsmith, *supra* note 14. The Bradley & Goldsmith article was preceded by several lesser-known articles criticizing the modern position. See also Phillip R. Trimble, "A Revisionist View of Customary International Law" (1986) 33 UCLA L. Rev. 665; A.M. Weisburd, "State Courts, Federal Courts, and International Cases" (1995) 20 Yale J. Int'l L. 1.

[20] Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, "Customary International Law, and the Continuing Relevance of *Erie*" (2007) 120 Harv. L. Rev. 869 at 871.

[21] Bradley & Goldsmith, *supra* note 14 at 818.

theoretically have a role in developing and administering them. In addition, both general maritime law and CIL are thought to be incorporated into the American legal system as species of federal common law.

Moreover, there is a substantial corpus of American legal decisions dealing with general maritime law from which to draw lessons. The federal courts have had a number of significant and direct opportunities to consider the role of general maritime law in the US constitutional system. In contrast, because the federal courts have only has occasional opportunities to address the role of CIL, they have done so in an oblique and inconclusive manner. American admiralty decisions thus function as a large data set from which to draw tentative conclusions about the role of customary forms of law in the domestic legal system.

Drawing from this body of decisions, the paper identifies and criticizes two flawed predictions made by participants in the CIL debate. On the one side, modernists wrongly assume that denying the wholesale incorporation of CIL into domestic law will effect 'the near complete ouster of customary international law rules from federal judicial interpretation.'[22] On the other side, revisionists wrongly assume that permitting federal judges to incorporate CIL without clear statutory or constitutional authorization will cause the constitutional system to be unbalanced by '*unelected federal judges* apply[ing] customary law made by *the world community* at the expense of state prerogatives.'[23]

The federal courts' experience with the general maritime law demonstrates that neither of these scenarios is likely to come to pass. With respect to the modernists' worry that CIL will be ousted from the federal courts, admiralty provides a helpful comparison. The US Supreme Court (Supreme Court) has clearly stated on numerous occasions that the general maritime law is only part of federal law to the extent that it is incorporated by Congress, the President, or the judiciary – precisely what modernists fear. Nevertheless, US admiralty

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[22] Harold Hongju Koh, "Commentary, Is International Law Really State Law?" (1998) 111 Harv. L. Rev. 1824 at 1828.

[23] Bradley & Goldsmith, *supra* note 14 at 868.

law remains remarkably faithful to its international roots. As one text has said of comparisons between American and foreign admiralty law, 'In place of the radical incomprehensibility, to the common-law man, of the whole frame of reference of a French treatise on, say, Property, one finds oneself in a familiar world of one-to-one correspondence with the well-known.'[24] The general maritime law is alive and well in US law. This suggests that requiring affirmative incorporation by American institutions will not necessary relegate CIL to second-rate status.

On the other hand, the admiralty experience also demonstrates that the revisionists' fears of a CIL-based jurisprudence that concentrates power in the federal judiciary at the expense of federalism and separation of powers will not necessarily materialize. Belying the revisionists' suggestion[25] that allowing CIL to become federal law will necessarily mean that CIL will preempt inconsistent state law, support Article III 'arising under' jurisdiction,[26] bind the President under the Take Care Clause,[27] and so forth, the federal courts' approach to the general maritime law has been measured and context-sensitive. General maritime law exhibits 'federal' attributes in some circumstances – for example, for purposes of supremacy under Article VI – but lacks such attributes in others – for example, for purposes of statutory federal question jurisdiction. In each case, the courts have tailored the result to fit the particular textual, historical, and policy factors in play. This suggests that CIL need not possess all or even most of the typical attributes of federal law

The remainder of this article fleshes out this argument in three stages. Part II introduces and explains the ideas of CIL and federal common law. Particular attention is paid to the uncertain boundaries of the federal courts' power to make common law. Part II then reviews the CIL debate in more detail. After describing the various positions, it suggests that the major disagreements between modernists and

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[24] Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, 2d ed. (New York: The Foundation Press, 1975) at 46–47.

[25] See Bradley & Goldsmith, *supra* note 14 at 817.

[26] See *supra* note 16.

[27] See *ibid.* § 3.

revisionists can be expressed in four key questions: (1) How does CIL become part of US law? (2) If CIL is automatically part of US law, how much of CIL is part of US law? (3) What are the characteristics of CIL once it is part of US law? (4) If courts can incorporate CIL into US law, what circumstances permit them to do so?

Part III argues that the first, second, and third questions could be settled relatively easily. The issues these questions raise are not unique to CIL, and the CIL debate could benefit from a comparative look at the closely related issues that have arisen in the context of admiralty law. Part III asks how the federal courts have addressed each of the three questions in the context of general maritime law. The first two questions can be answered together: the general maritime law is only part of federal law to the extent that it is incorporated by Congress, the President, or the judiciary. The third question draws an interesting answer, described above: the general maritime law exhibits some, but not all, of the typical characteristics of federal law. The fourth question – under what circumstances may courts incorporate CIL into US law? – represents the truly difficult issue at the heart of the incorporation debates. As this article shows, this question remains unresolved in the context of general maritime law, which makes it difficult to draw any lessons for CIL.

Though Part III is comparative, its purpose is not to suggest that the federal courts should treat CIL in exactly the same way they treat general maritime law. There are factors unique to each body of law that counsel against such a wholesale transposition. At the same time, because CIL and the general maritime law are so similar, the federal courts' experience with the latter has clear relevance to the CIL debate.

Finally, Part IV draws two modest, but important, conclusions. First, it is possible for CIL to be treated as federal common law without either incorporating it wholesale or effectively banishing it from the federal courts. Second, if CIL is understood to be federal common law, it need not have all the same attributes as other types of federal common law or as federal statutes. It might even be possible for different CIL norms to be treated separately. Ultimately, the American experience with general maritime law demonstrates that federal courts can take a flexible approach to the incorporation of a foreign body of

norms into federal law. There is little reason to think that the federal courts' approach toward CIL would not be similarly flexible.

II. The Domestic Legal Status of Customary International Law

This Part provides background to the debate over the domestic legal status of CIL. First, for readers who may not have a background in international law, it describes the notion of CIL and how it relates to countries' domestic legal systems at the most general level. The key point is that countries are required under international law to comply with CIL norms, but international law leaves the details of compliance to the countries themselves. International law does not specify a particular role for CIL in a country's domestic legal system; the questions at issue in this paper must be resolved by reference to American law rather than international law.

The article then describes the debate between proponents of the modern position, who argue that CIL is 'part of our law,'[28] and revisionists, who claim that CIL is only federal law to the extent that it is incorporated into law by Congress or the President. The review is intended to give an overview of the issues involved.

Because CIL has traditionally been conceived of as a type of federal common law, the third section addresses the debate about the proper scope and nature of the federal courts' ability to make common law rules. As will be explained, there is significant uncertainty about the federal courts' power to make such rules, and, to the extent that the power exists at all, when the federal courts should exercise it.

After laying out these two debates, this Part attempts to clarify the points of disagreement by isolating four key questions that lie at the heart of the CIL debate. I argue that three of the four questions have been satisfactorily resolved with regard to general maritime law, and that there is no reason why they could not be similarly resolved in the context of CIL. As for the remaining question, I suggest that its resolution depends upon larger issues relating to the legitimacy and scope of federal common law. It should thus be engaged as part of the

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[28] *The Paquete Habana*, 175 U.S. 677 at 700 (1900).

broader federal common law debate rather than in isolation among foreign relations scholars.

A. Customary International Law

Customary international law was historically considered to be a branch of the law of nations. Blackstone described the law of nations as:

> a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance frequently occur between two or more independent states, and the individuals belonging to each.[29]

This system of rules, which emerged from tacit agreement and consistent practice, was traditionally divided into three parts: the law merchant, governing commercial matters; the law maritime, governing matters on the seas; and the law of states, governing the rights and duties of nations with respect to one another.[30] This latter branch, in a somewhat modified form, is what is now referred to as public international law.[31]

Under the modern system, public international law has three sources: treaties and other international agreements; 'general principles common to the main legal systems of the world'; and customary international law.[32] CIL, in turn, is defined as 'a general and consistent practice of states followed by them from a sense of legal obligation.'[33] A practice or custom must therefore satisfy two criteria for it to become a binding rule under international law. It must be

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[29] William Blackstone, 4 Commentaries *66.

[30] See Edwin § Dickinson,, "The Law of Nations as Part of the National Law of the United States" (1952) 101 U. Pa. L. Rev. 26 at 27.

[31] *Ibid*. at 29.

[32] *Supra* note 11 at § 102(1).

[33] *Ibid*. at § 102(2).

'general and consistent' and it must be 'followed . . . from a sense of legal obligation.'[34]

CIL norms, as with all sources of international law, are binding on nations, and nations are obligated to follow them.[35] Beyond that, however, 'how a [nation] accomplishes that result is not of concern to international law or to the state system.'[36] CIL norms bind the nation as a whole, not any particular institution or person.[37] The CIL debate is primarily about how the American constitutional system distributes the authority to enforce CIL obligations – in particular, whether and in what circumstances federal courts are authorized to enforce binding CIL norms.

B. The CIL Debate

As noted in the introduction, it used to be accepted wisdom among judges and scholars that CIL is incorporated as a whole into federal law. This 'modern position' finds strong support in a number of 19th and early 20th century US Supreme Court cases. In perhaps the most famous of these cases, the Court declared that '[i]nternational law is part of our law, and 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.'[38] This and other judicial statements led the drafters of the *Restatement (Third) of Foreign Relations Law* to conclude that '[c]ustomary international law is considered to be like common law in the United States, but it is federal law.'[39] Moreover, CIL, because it is federal law, 'supersedes inconsistent State law or policy.'[40] This position has more

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[34] This latter requirement is referred to as *opinio juris*.

[35] See Lori F. Damrosch et al., *International Law: Cases and Materials*, 4th ed. (St. Paul: West Group, 2001) at 159.

[36] *Ibid*. at 160–61.

[37] *Ibid*. at 159.

[38] *The Paquete Habana*, *supra* note 29 at 700. See also *The Nereide*, 13 U.S. 388 at 423 (1815) (Marshall, C.J.) ('Till [a relevant] act be passed, the Court is bound by the law of nations which is a part of the law of the land.').

[39] *Supra* note 11.

[40] *Ibid*. § 115 cmt. e.

than just theoretical significance. As explained in the introduction, its acceptance by the judiciary permitted a blossoming of international human rights litigation under the Alien Tort Statute.

The modern position was forcefully criticized in a 1997 article by Professors Curtis Bradley and Jack Goldsmith.[41] Professors Bradley and Goldsmith, advancing what has come to be known as the 'revisionist position', argue that the modern position rests on a fundamental misunderstanding of the domestic legal status of CIL in the 19th century and the changes that *Erie Railroad v. Tompkins*[42] wrought in the relations between federal and state courts. According to them, CIL as conceived by the pre-*Erie* courts was precisely the type of general common law that *Erie* did away with. In the post-*Erie* legal system, federal courts cannot apply CIL as a federal rule of decision without permission from some sort of positive authority – either the Constitution or a federal statute. Because neither the Constitution nor any federal statute authorizes a wholesale incorporation of CIL, federal courts can only apply CIL as a federal rule of decision to the extent that particular statutes or constitutional provisions authorize them to do so. If this means that 'CIL in some instances "[would not be] United States law at all!"'[43] the revisionists do not seem troubled.

A number of positions between the two extremes have emerged. Professor A.M. Weisburd has proposed treating CIL 'as neither state nor federal law, but rather as . . . international law . . . made . . . collectively by the world's nations and available to American courts in appropriate cases.'[44] Professor Weisburd would treat CIL as analogous to the law of a foreign country, and would avert to traditional choice of law principles to determine when it should be applied.[45] Professors Ernest Young and Alexander Aleinikoff have adopted a similar tack, arguing, respectively, that CIL should be treated as 'general law' and applied by federal courts according to somewhat

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[41] See Bradley & Goldsmith, *supra* note 14.

[42] 304 U.S. 64, 78 (1938) [*Erie*].

[43] Curtis A. Bradley & Jack L. Goldsmith, "Federal Courts and the Incorporation of International Law" (1998) 111 Harv. L. Rev. 2260 at 2260.

[44] Weisburd, *supra* note 19 at 49.

[45] See *ibid*.

modified choice of law principles[46] or as non-preemptive, non-federal law that can be used as a rule of decision in federal court but should be applied in all appropriate cases rather than according to the choice of law balancing approach.[47] Finally, Professor Michael Ramsey has argued that CIL has indeed been incorporated as 'the law of the land.'[48] However, he maintains that CIL does not fall within the text of the Supremacy Clause and so should be considered non-preemptive federal law.[49]

The Supreme Court itself has entered the fray, albeit in a cautious and ultimately inconclusive manner. In *Sosa v. Alvarez-Machain*, the Court considered, *inter alia*, whether the Alien Tort Statute authorizes federal courts to create a cause of action for violations of the CIL right against arbitrary detention.[50] Writing for the majority, Justice Souter recognized that the Statute was 'enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations ... .'[51] Nevertheless, because the norm against arbitrary detention was not 'so well defined as to support the creation of a federal remedy,'[52] the plaintiff's request for relief was denied.[53] The *Sosa* ruling meant, at a minimum, that certain statutes can be read to authorize federal courts to apply CIL as federal common law in certain circumstances,. Beyond that, less is clear. Some argue that *Sosa* confirms the modern position,[54] others claim that *Sosa* merely repudiated the revisionist

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[46] See Ernest A. Young, "Sorting Out the Debate over Customary International Law" (2002), 42 Va. J. Int'l L. 365 at 370.

[47] See T. Alexander Aleinikoff, "International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate" (2004) 98 Am. J. Int'l L. 91 at 97–98.

[48] See Michael D. Ramsey, "International Law as Non-Preemptive Federal Law" (2002) 42 Va. J. Int'l L. 555 at 557–58.

[49] See *ibid.* at 558.

[50] See *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) [Sosa].

[51] *Ibid.* at 724.

[52] *Ibid.* at 738.

[53] See *ibid.*

position,[55] and still others maintain that *Sosa* rejected the modern position's view of CIL's domestic legal status.[56] *Sosa* thus leaves open key questions at the core of the CIL debate.

C. Federal Common Law

Some participants in the CIL debate argue that CIL should be understood as federal common law, but it is not always clear what is meant by this argument. Federal common law is notoriously hard to define.[57] For the purposes of this paper, the term 'federal common law' will be used broadly to mean '*any* federal rule of decision that is not mandated on the face of some authoritative federal text . . . .'[58] Note that this definition is wide enough to encompass some rules of decision that might also be understood to be the result of statutory or constitutional interpretation,[59] depending upon one's view of the limits of interpretation.[60]

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[54] See Ralph G. Steinhardt, "Laying One Bankrupt Critique to Rest: *Sosa v. Alvarez-Machain* and the Future of International Human Rights Litigation in U.S. Courts" (2004) 57 Vand. L. Rev. 2241 at 2259 ('Customary international law was and remains an area in which no affirmative legislative act is required to "authorize" its application in US courts.').

[55] See Harold Hongju Koh, "The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law" (2004) 12 Tulsa J. Comp. Int'l L. 1 at 12 ('I know of no court that has followed the Bradley/Goldsmith position, while all of the other circuits have gone the other way (and now the US Supreme Court has as well, in the *Alvarez-Machain* case).').

[56] See Bradley, Goldsmith & Moore, *supra* note 20 at 904 (*Sosa*'s 'approach to judicial incorporation of CIL is fatal to the modern position that all of CIL is federal common law').

[57] Compare Martha A. Field, "Sources of Law: The Scope of Federal Common Law" (1986) 99 Harv. L. Rev. 883 at 890 *with* Richard H. Fallon, Jr. et al., Hart & Wechsler's The Federal Courts and the Federal System, 5th ed. (New York: Foundation Press, 2003) at 685 (federal common law means 'federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional commands').

[58] Thomas W. Merrill, "The Common Law Powers of Federal Courts" (1985) 52 U. Chi. L. Rev. 1 at 5.

[59] See *ibid.*

[60] For the purposes of this paper, it is better to adopting an overly broad definition rather than an overly narrow one. '[I]nterpretation shades into judicial lawmaking on a spectrum.' Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System*, 5th ed. (New York: Foundation Press, 2003) at 685. Whereas some

The source and scope of the federal courts' power to make common law is hotly contested. [61] Under the traditional account of federal common law, federal courts felt free throughout the 18th and 19th centuries to apply a body of 'general common law' that was neither state nor federal. This freedom, exemplified by the infamous decision *Swift v. Tyson*,[62] permitted federal courts to resolve disputes by rules of their choosing without preempting inconsistent state law. In 1938, however, the Supreme Court purported to banish the general common law from federal courts, holding in *Erie Railroad v. Tompkins*[63] that '[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.'[64] From that point onward, federal courts were theoretically supposed to ground the rules of decision applied in their cases in either an authoritative federal text or state law.

However, the post-*Erie* legal landscape did not submit neatly to the commands of *Erie*. As federal courts scholars like to point out, Justice Brandeis, the author of *Erie*, wrote an opinion the same day that *Erie* came down declaring that a dispute involving the

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theorists choose to define federal common law narrowly and explain the majority of federal courts' creative work as 'interpretation,' see e.g., Alfred Hill, "The Law-Making Power of the Federal Courts: Constitutional Preemption" (1967) 67 Colum. L. Rev. 1024 at 1026, the adoption of a broad definition has the virtue of forcing scholars to confront the wider implications of their theories. It is a bit too clever to gerrymander the definition of federal common law to fit one's preferred theory, while bracketing off a large amount of indistinguishable judicial work as a matter for scholars of 'interpretation' to consider on another occasion.

[61] Compare Field, *supra* note 57 at 887 ('the only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule') *and* Merrill, *supra* note 58 at 47 (arguing that federal common law is legitimate only to the extent that there is 'evidence, based again on the specific intentions of the draftsmen of an authoritative federal text, that lawmaking power with respect to this issue has been delegated to federal courts in a reasonably circumscribed manner') *with* Martin H. Redish, "Federal Common Law, Political Legitimacy, and the Interpretive Process: An 'Institutionalist' Perspective" (1989) 83 Nw. U. L. Rev. 761 at 766 ('all federal "common law" . . . constitutes an illegitimate judicial rejection' of the goals of the Rules of Decision Act).

[62] 41 U.S. 1 (1842).

[63] 304 U.S. 64, 78 (1938).

[64] *Ibid*. at 78.

apportionment of water between two states was governed by 'federal common law.'[65] This new breed of law was apparently federal in nature, at least to the extent that it could be used to support federal question jurisdiction.[66] Thus began the modern era of federal common law.[67] Federal courts under the new regime apply federal common law in cases where strong federal interests demand a federal rule of decision. As one commentator put it, 'Unto each Caesar, State or federal, is thus rendered that which properly belongs to that particular Caesar, supreme in its distinctive field.'[68]

Despite early optimism about the 'beautifully simple'[69] logic of the post-*Erie* paradigm, the Supreme Court has failed to develop a coherent or compelling approach to federal common law. Indeed, the Court has rarely even attempted to describe the underlying rationale for its federal common law jurisprudence, and, in those few cases where it has, the reasons it has offered give little guidance beyond stating that federal common law should control in 'essentially federal matters.'[70] As a consequence, the standards governing when federal courts may properly apply common law have become, as one

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[65] *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) [*Hinderlider*].

[66] See *ibid.*

[67] See Henry J. Friendly, "In Praise of Erie - And of the New Federal Common Law" (1964) 39 N.Y.U.L Rev. 383 at 405. ('The clarion yet careful pronouncement of *Erie*, "There is no federal general common law," opened the way for what, for want of a better term, we may call specialized federal common law.') (citation omitted).

[68] Armistead M. Dobie, "The Conflict of State and Federal Judicial Power," Lecture Delivered Before the Association of the Bar of the City of New York (26 Feb., 1941) (quoted in Friendly, *ibid.* at 407–08).

[69] Friendly, *supra* note 67 at 422.

[70] *United States v. Standard Oil Co.*, 332 U.S. 301, 307 (1947) [*Standard Oil Co.*]. *See also Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 640 (1981) (legitimate areas of federal common law 'fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law') (citations omitted); *Standard Oil Co.*, 332 U.S. at 307 (federal common law properly governs 'matters exclusively federal, because made so by constitutional or valid congressional command, or others so vitally affecting interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings')

commentator somewhat generously put it, 'highly confused.'[71] Even the revisionists concede that the Court's federal common law decisions 'do not lend themselves to ready synthesis.'[72]

The closest the Supreme Court has come to announcing clear limits on the federal common lawmaking power has been the identification of several narrow 'enclaves' within which the federal courts may permissibly fashion common law rules:

> [A]bsent 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.[73]

As commentators have pointed out, however, the enclaves approach is unsatisfying in several respects. First, it provides no reasoned explanation for why federal common lawmaking is permissible in these areas but not others. Because the federal courts' authority is based in substantial part on their ability to justify their decisions through careful exposition, they risk being perceived as illegitimate when they pass judgment without being able to explain the result. Second, it fails to account for more recent cases where the Supreme Court has applied federal common law outside of the established enclaves.[74] If the Court can add new categories whenever it

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[71] Field, *supra* note 57 at 927., Other commentators have been less generous. See e.g., Larry Kramer, "*The* Lawmaking Power of the Federal Courts" (1992) 12 Pace L. Rev. 263 at 27. ("the Court's decisions are inconsistent (to say the least)"); Louise Weinberg, "Federal Common Law" (1989) 83 Nw. U. L. Rev. 805 at 828 (the development of the federal common law after Erie 'became . . . a hopeless muddle').

[72] Bradley & Goldsmith, *supra* note 14 at 855.

[73] *Tex. Indus. v. Radcliff Materials*, 451 U.S. 630, 641 (1981) [*Tex. Indus.*]. *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964) (identifying several 'enclaves of federal judge-made law which bind the States'); Hill, *supra* note 60 at 1025 (identifying four areas where the Constitution preempts state law and allows federal common lawmaking).

[74] See e.g., *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 US 497 (2001). *See generally* Jay Tidmarsh & Brian J. Murray, "A Theory of Federal Common Law" (2006) 100 Nw. U.L. Rev. 585 at 593.

can muster the votes, the enclaves approach ceases to be a limit on common lawmaking power at all. Instead, it becomes simply a list of areas where the Court has previously made common law.[75]

In the absence of satisfactory guidance from the Supreme Court, the academy has busied itself crafting theories of federal common law of its own. At one end of the spectrum are theories that very closely circumscribe the power and discretion of the federal courts to fashion federal common law rules of decision. Professor Redish, for example, believes that all federal common lawmaking is illegitimate.[76] At the other end of the spectrum are theories that assert that the federal courts have very broad power to adopt common law rules. Thus Professors Martha Field believes that 'the only limitation on courts' power to create federal common law is that the court must point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common law rule.'[77] Note, however, that even the most expansive theories of federal common law argue that the federal courts' broad power to make federal common law should be exercised rather sparingly.[78]

Most judges and commentators agree that federal courts can sometimes employ rules of decision that derive from neither federal enactments nor state law; however, as discussed, there is vast uncertainty surrounding the limits of this power. Because the propriety of federal common lawmaking is hotly debated, the traditional analogy between CIL and federal common law is not terribly useful. Even if everybody agreed that CIL is a type of federal common law, the agreement would resolve little about the extent to which CIL can or should be part of the domestic legal system. In order to overcome this persistent uncertainty, the following section frames the questions underlying the CIL debate in more specific terms.

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[75] *Cf.* Tidmarsh & Murray, *supra* note 74 ('A definition that simply adds new categories as time goes by is not a definition, but rather a list.').

[76] See Redish, *supra* note 61 at 766.

[77] Field, *supra* note 57 at 887.

[78] See *ibid.* at 950 (arguing that there is a 'presumption in favor of using state law' when federal courts decide whether to make common law).

D. Isolating the Important Questions

In an attempt to clarify the inquiry, this section isolates four questions that are at the core of the CIL controversy. Courts and commentators often frame their inquiry in terms of whether CIL is federal common law.[79] However, because of the unsettled boundaries and ambiguous status of federal common law, it is unhelpful to focus exclusively on this question. There are at least four distinct questions that underlie the CIL-as-federal-common-law inquiry: (1) How does CIL become part of US law? (2) If CIL is automatically part of US law, how much of CIL is part of US law? (3) What are the characteristics of CIL once it is part of US law? (4) If courts can incorporate CIL into US law, what circumstances permit them to do so? This section explains each of these questions in greater detail. By shifting the focus to these narrower underlying issues, commentators can clarify the inquiry and separate out their various points of agreement and disagreement.

First, and most obviously, proponents of the modern position and revisionists disagree about how CIL becomes part of US law. Is CIL a species of automatically self-executing US law? Can CIL only become US law through incorporation by valid legislative or executive enactment? In what circumstances can the judiciary properly incorporate CIL norms into US law? Are state institutions free to incorporate CIL into their law?

Second, if one assumes that CIL is automatically or necessarily part of US law, it is not clear *how much* of CIL is part of US law. Is all of CIL automatically part of US law? Or is only some subset of CIL – for example, *jus cogens* norms – automatically part of US law?

Third, regardless of how CIL becomes part of US law, it is not necessarily clear what effects and attributes it has once it is part of US law. Recent articles have suggested the possibility that CIL might be (or become) part of US law without sharing precisely the same characteristics as 'normal' federal law.[80] For instance, Professor Michael Ramsey argues that CIL is part of federal law for purposes of

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[79] See *Filartiga v. Pena-Irala*, *supra* note 18 at 885; *Restatement*, *supra* note 11; Bradley & Goldsmith, *supra* note 15 at 816.

[80] See Aleinikoff, *supra* note 47; Young, *supra* note 46; Ramsey, *supra* note 48; Weisburd, *supra* note 19 .

Article III jurisdiction but not for purposes of Article VI supremacy.[81] This raises a number of intriguing possibilities, which will be explored at length in the following Part. If CIL is (or can become) part of US law, is it federal law, 'general law,' or something else entirely? What characteristics does CIL have once it is part of US law? Does it provide a basis for federal 'arising under' jurisdiction? Is it considered the 'Supreme Law of the Land'? In what circumstances does it preempt inconsistent state law?

Finally, those who argue that courts can incorporate CIL into US law must grapple with the difficult question of what circumstances permit federal courts to do so. This question is very closely tied to the federal common law debate described above, and can be conceived in terms of two separate prongs of inquiry: when federal courts have the power to incorporate CIL and when they should exercise that power to incorporate CIL.[82] Are federal courts required to point to an authorizing enactment before incorporating CIL into US law? If so, how clear must the authorization be? Must courts wait for express textual authorization? Is congressional intent sufficient, and, if so, must the intent be specific or can it be more general? Can courts base their power to incorporate CIL on the general structure of the constitution and federal enactments? If courts have a broad power to deploy CIL in appropriate circumstances, what exactly constitute appropriate circumstances?

In the following part, I argue that the federal courts' experience with the general maritime law suggests that the first, second, and third questions can be settled fairly non-controversially. General maritime law, which is very similar to CIL in both origin and nature, has successfully dealt with these questions without unbalancing the constitutional system. The fourth question – when can federal courts incorporate CIL as federal common law? – is the true sticking point in the CIL debate. It is best understood as a close relation of the more general questions about federal common law: how much discretion do courts have to create federal common law and what principles should guide that discretion?

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[81] See Ramsey, *ibid.*

[82] *Cf. United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979) [*Kimbell Foods*].

III. The Domestic Legal Status of General Maritime Law

This Part explores possible answers to the four questions outlined in the preceding section by drawing from the federal courts' experience with admiralty law. Admiralty provides a uniquely helpful basis for comparison. By most accounts, it represents an entirely legitimate instance of federal common lawmaking.[83] At the same time, its history is intimately connected with foreign and international law, and its content draws heavily from international sources. The basis of American admiralty law is what is known as the general maritime law, a body derived from legal traditions and customs collected and passed down by seafaring nations over thousands of years. Both general maritime law and CIL were traditionally considered to be branches of the 'law of nations.'[84] Indeed, many prominent cases addressing the role of international law in the US legal system are admiralty cases.[85] Finally, there is a very large number of reported admiralty decisions from the federal courts, meaning that there is a significant amount of evidence regarding the status of general maritime law in the US legal system.

While these factors should not be taken to mean that the lessons of the federal courts' experience with admiralty can be directly applied to the CIL question, viewing the issues from the lens of admiralty will help to clarify the debate. A number of problems that are controversial with respect to CIL are quite settled with respect to admiralty. First, it is clear from admiralty that non-federal sources of law do not automatically become part of US law, no matter how distinguished their pedigree. The general maritime law is only part of US law to the extent that it has been recognized as such through an authoritative act by one of the branches of government. As a corollary to this, not all of the general maritime law is part of US law. Again, the three branches are free to choose not to adopt a given maritime rule. Finally, general maritime law does not behave like 'typical' federal law in many respects. The question of maritime law's characteristics is

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[83] See e.g., *Tex. Indus.*, *supra* note 73 at.

[84] See Dickinson, *supra* note 30 at 27 .

[85] See e.g., *The Paquete Habana*, *supra* note 29; *The Nereide*, *supra* note 38..

much more complex than simple references to its federal nature would suggest. Courts engage in a separate inquiry each time they are faced with questions about a particular attribute of the general maritime law, and they can often resolve the relevant issues as a matter of statutory interpretation rather than by resort to constitutional or jurisprudential principles.

A. How does Maritime Law Become Part of US Law? How Much of Maritime Law is Part of US Law?

The general maritime law derives its content from ancient codes and practices that have little connection to the US political system. Beginning with the island nation of Rhodes around 900 BC,[86] a succession of seafaring cultures developed legal codes that regulated sea-based activity. This collection of codes from centuries past – Justinian's Corpus Juris Civilis, the Rules of Oleron, the Laws of Wisby, the Marine Ordinances of Louis XIV, and so forth – forms the foundation of the general maritime law that is applied in federal and state courts today.

Courts still cite these foreign codes on occasion,[87] but federal admiralty decisions are now so numerous that courts tend to rely more on their own precedents.[88] As one text puts it, 'only the rare case now requires recourse to the Rules of Oleron or Cleirac or Bynkershoek.'[89] Yet the reader should not be fooled. The US law of admiralty remains remarkably faithful to its roots in historic foreign and international materials.

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[86] Most writers assume that the law of Rhodes was an early precursor of the modern general maritime law. See e.g., *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 960 (4th Cir. 1999) [*R.M.S.Titanic*]. According to one text, however, 'the existence of such a code has been pretty well cast in doubt.' Gilmore & Black, Jr., *supra* note 24 at 46. In either case, the roots of the general maritime law are undeniably quite old.

[87] See e.g., *Dowdle v. Offshore Express, Inc.*, 809 F.2d 259, 263 (5th Cir. 1987) (citing Laws of Oleron).

[88] See Gilmore & Black, Jr., *supra* note 24 at 46. ('As the nineteenth century wore on, the bases of the substantive maritime law became settled in this country, and the emergent problems came to be more and more those arising out of special national conditions. For both these reasons, overt reliance on foreign authorities diminished . . . ')

[89] *Ibid*.

In a certain sense, judgments that rest upon these codes – either explicitly or through several generations of judicial opinions – have even less democratic legitimacy than those that rest on CIL norms. Whereas the United States has a chance to participate in the formation and evolution of CIL, the maritime codes were adopted well before the nation's founding. But to jump to that conclusion is to misunderstand the nature of maritime law in the US legal system. The general maritime law may derive much of its *content* from non-US sources, but it derives all of its *authority* from acts of US political institutions. Maritime law is authoritative US law only to the extent that it has been declared to be law by Congress, the President, or the courts.

Some examples can helpfully illustrate the distinction between sources of content and sources of authority. Federal law relating to minerals on public lands provides that rights of possession shall be determined 'according to the local customs or rules of miners in the several mining districts.'[90] Local mining customs, of course, have no federal legal force on their own. Nevertheless, they have become authoritative federal rules of decision through incorporation by Congress.[91] The mining customs are the source of the law's content, but the Act of Congress is the source of its authority.

Courts also incorporate non-authoritative bodies of rules into US law. In cases involving the rights and obligations of the United States, for example, federal courts often craft common law rules of decision in order to protect US interests.[92] Sometimes the courts choose to apply state law as the federal rule of decision.[93] They do this as 'a matter of judicial policy' quite apart from any application of *Erie*

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[90] 30 U.S.C. § 22.

[91] See *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 at 512 (1900) (noting that the Supremacy Clause requires states to adhere to the law, even though it does not necessarily provide a basis for federal question jurisdiction).

[92] See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

[93] See *Kimbell Foods*, *supra* note 82; see also *Standard Oil Co.*, *supra* note 70 at 308 ("in many situations, and apart from any supposed influence of the *Erie* decision, rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically").

or federal statute.[94] Thus, state law, which does not operate of its own force in such cases, can be incorporated by judges as the authoritative rule of decision. Similarly, in interstate cases, 'federal, state and international law are considered and applied'[95] even though the rules of decision are clearly federal in nature.[96]

The general maritime law derives its authority within the US legal system in precisely this way. As one text puts it, 'it is only by voluntary adoption and with such qualifications as our jurisprudence and statutes have made in it that it becomes our law.'[97] It is an open question whether the earliest judges conceived of the relationship between the general maritime law and US law in this way. As discussed previously, early American judges may have believed themselves to be bound by a body of general common law originating outside of the US Certainly, an impressive amount of judicial rhetoric supports this view. But some early admiralty decisions evidence a bit more nuance.[98] At the very least, general maritime law was understood

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[94] *Kimbell Foods*, *ibid.* at 728.

[95] *Connecticut v. Massachusetts*, 282 U.S. 660 at 670 (1931).

[96] See e.g., *Hinderlider*, *supra* note 65 at 110.

[97] Erastus C. Benedict *et. al.*, *Benedict on Admiralty* 7th ed. revised, volume 1, looseleaf (New York: Matthew Bender & Co. 2007) at s. 104.

[98] An 1806 decision of the Supreme Court of Pennsylvania, for example, notes that foreign codes have been received in US courts 'not as containing any authority in themselves, but as evidence of the general marine law.' *Morgan v. Insurance Co. of North America*, 4 U.S. 455 at 458 (Sup. Ct. of Pa. 1806) [*Morgan*]. Though such foreign authorities 'are not to be respected' when they are 'contradicted by judicial decisions in our own country,' they are 'worthy of great consideration' on matters of first impression. *Ibid.* Ultimately, the court adopts the rule laid out in a foreign treatise on the grounds that the court 'think[s] [the rule] reasonable' and 'most agreeable to reason and justice.' *Ibid.* The court here seems to be aware that it is exercising independent judgment about the proper rule to apply in the case.

Even the early Supreme Court case holding that maritime law does not 'arise under the Constitution or laws of the United States' for the purposes of a statute establishing the jurisdiction of territorial courts in Florida is not unequivocal on this point. In *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. 511 (1828), Chief Justice Marshall wrote that cases in admiralty '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.' *Id.* at 545. This is often taken to mean that maritime law is a separate system of general common law binding upon the United States. But note Marshall's focus on the federal courts, which 'appl[y]' maritime law 'to the cases as they arise.' If the phrase 'is applied' is taken to be merely descriptive rather than mandatory, Marshall's view could be understood to

not to be synonymous with the foreign codes and decisions from which it was derived.[99] Beyond that, less is clear. It is difficult to ascertain whether judges believed general common law to be an objectively 'discoverable' body of rules that was binding of its own force, or whether they recognized that it had legal authority only as applied by the courts and other political institutions of each nation.

In any case, whether or not the earliest decisions support the positivist view of the general maritime law, later decisions clearly do. Indeed, contrary to the standard account of general common law, the Supreme Court had explicitly adopted this position well prior to the *Erie* decision. Perhaps its clearest expression came in the 1875 case, *The Lottawanna*.[100] In that case, which dealt with the law of maritime liens, Justice Bradley gave 'the first complete analysis of the admiralty law since the days when it was viewed as a branch of the law of nations.'[101] Describing the relation between the general maritime law and nations' domestic legal systems, Justice Bradley wrote:

> Each [nation] 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.[102]

The Court echoed these same notions in a later case, noting that 'the general maritime law is in force in this country, or in any other, so far only as administered in its courts, or adopted by its own

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embrace the positivist position staked out in later cases. Marshall does not say that courts are never free to refuse to apply the general maritime law; he merely suggests that courts generally apply it. See also *The Genesee Chief*, 53 U.S. 443 (1851) (rejecting the longstanding English tradition confining admiralty jurisdiction to tidewaters in favor of a distinctly American navigability rule).

[99] See *Morgan*, *ibid*. at 458.

[100] *The Lottawanna*, 88 U.S. 558 (1875).

[101] David W. Robertson, *Admiralty and Federalism*, (Minneola, NY: The Foundation Press Inc., 1970) at 137.

[102] *The Lottawanna*, *supra* note 100 at at 572.

laws and usages.'[103] And Justice Holmes lent his characteristically memorable phrasing to the idea in a 1922 case:

> 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.[104]

Numerous other decisions restate this same basic position in one form or another.[105] It is clear that the general maritime law is – quite independently of the *Erie* decision – only operative in US insofar as it is incorporated by one of the branches of government.

For the majority of US history, maritime law was predominantly incorporated by federal courts acting without any legislative guidance.[106] Indeed, until the 1900s it was not settled that Congress had the power to regulate maritime matters at all.[107] Over the

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[103] *The John G. Stevens*, 170 U.S. 113 at 126–27 (1898).

[104] *The Western Maid*, 257 U.S. 419 at 432 (1922).

[105] See e.g., *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 at 245 (1942) ('The source of the governing law applied is in the national, not the state, government.'); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 at 215 (1917) ('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') (emphasis added). For a more modern restatement of the basic position, see *R.M.S. Titanic, supra* note 86 at 960 ('the Constitution conferred admiralty subject matter jurisdiction on federal courts and, by implication, *authorized the federal courts to draw upon and to continue the development* of the substantive, common law of admiralty when exercising admiralty jurisdiction') (emphasis added).

[106] State courts also have a role under the Saving to Suitors Clause. See 28 U.S.C. § 1333 ('The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*.') (emphasis added).

[107] See *Panama R. Co. v. Johnson*, 264 U.S. 375 (1924); Gilmore & Black, Jr., *supra* note 24 at 47.

past century, however, Congress has assumed a significant role in incorporating maritime law into US law. Many rights and duties in admiralty are now governed by statute rather than judge-made law.[108] But the role of courts in deciding how much of the general maritime law will be incorporated into US law should not be minimized. A substantial portion of admiralty is still governed purely by judge-made law.[109]

All of this is to say that the general maritime law becomes US law only to the extent that it is incorporated by US political institutions – Congress, the President, or the Judiciary. The two questions outlined in the heading to this section are thus connected: the general maritime law becomes US law through incorporation by US political institutions, and elements of the general maritime law that have not been incorporated are not part of US law. However, this should not be taken to suggest that the general maritime law has limited application in US law. The federal courts have historically felt free to incorporate nearly all of the general maritime law. There might even be a presumption that general maritime rules should be incorporated as new cases arise. But none of this changes the fundamental conclusion that the general maritime law does not operate of its own force.

B. What are the Characteristics of General Maritime Law under US Law?

Much of the CIL debate seems to assume that CIL must either be federal law or something else entirely. As Professor Michael Ramsey has helpfully pointed out, however, the concept of 'federal law' is not necessarily monolithic: 'Federal law has at least three distinct attributes that are also claimed for international law: it serves as a rule of decision, it is preemptive of state law and it is the basis of federal jurisdiction.'[110] Professor Ramsey hypothesizes that the different

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[108] See e.g., *Jones Act*, § 33, 41 Stat. 1007, (codified at 46 U.S.C. § 30104 (1920)); *Carriage of Goods by Sea Act*, 49 Stat. 1208 (codified at 46a U.S.C. § 1303 (1936)).

[109] See generally Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 St. Louis L.J. 1367 (1999) (cataloguing the sources of admiralty law's content in various subject-matter areas).

[110] Ramsey, *supra* note 48 at 559.

wording of the grant of 'arising under' jurisdiction in Article III and the Supremacy Clause in Article VI might demand that a single legal rule be treated differently under each clause.

This section explores the idea that the attributes of federal law can be disaggregated and considered separately. It explores the characteristics of the general maritime law in some depth. As it turns out, the general maritime law does not behave like 'typical' federal law in certain respects. It is the 'Supreme Law of the Land' under Article VI. It can preempt state law in some cases, but it does not conform to the normal rules of preemption. It does not provide a basis for federal question jurisdiction. It might not provide a basis for Supreme Court review of state court judgments. And so forth. The inescapable conclusion, which will be fleshed out further in the final section of this Part, is that designating a legal rule as 'federal' does not necessarily mean that it possesses all of the attributes of a typical federal statute. Each aspect must be considered separately, in light of the relevant statutory or constitutional provisions.

1. Supremacy. — The issues of Supremacy and preemption are often confused, but they are in fact two distinct – albeit related – ideas.[111] The Supremacy Clause contains two relatively narrow obligations: state court judges are obligated to apply federal law in cases where it applies ('Judges in every State shall be bound thereby')[112] and, in cases of conflict between federal and state law, federal law prevails ('any Thing in the Constitution or Laws of any State to the Contrary notwithstanding').[113] Preemption is related to Supremacy, of course – non-Supreme law cannot preempt state law – but it has a much broader reach: it means '(a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law.'[114] Whereas Supremacy is a general constitutional command, preemption must be determined on a case-by-case basis by assessing the features of the federal rule in question. In the statutory context, for example,

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[111] See Stephen A. Gardbaum, "The Nature of Preemption" (1994) 79 Cornell L. Rev. 767.

[112] *Supra* note 16 art. VI.

[113] *Ibid*.

[114] *Supra* note 111 at 771.

Congress can decide whether, and to what extent, each provision will preempt state law by expressly stating its intention.[115] However, even statutes that are expressly non-preemptive are nevertheless part of the Supreme Law of the Land.

Turning to admiralty, it is clear that the general maritime law as received by federal courts is part of the Supreme Law of the Land. State courts hearing admiralty cases *in personam*[116] are under an obligation to follow federal maritime precedents where applicable. As the Supreme Court has put it, this 'so-called "reverse-*Erie*" doctrine . . . requires that the substantive remedies afforded by the States conform to governing federal maritime standards.'[117] Though the Supreme Court has not stated it in so many words, the principle finds its roots in the half of the Supremacy Clause that declares that 'Judges in every State shall be bound' by the 'the supreme Law of the Land.'[118] How else to explain the obligation of state courts to follow federal decisions on matters of general maritime law?[119]

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[115] See *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 at 203 ('It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.').

[116] The state courts are able to hear admiralty cases under the so-called saving-to-suitors clause: 'The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled*.' 28 U.S.C. § 1333 (emphasis added).

[117] *Offshore Logistics v. Tallentire*, 477 U.S. 207 at 222 (1986). See also *Carnival Corp. v. Carlisle*, 2007 Fla. LEXIS 287, *4–*5 (Fla. Sup. Ct. Feb. 15, 2007) ('Both federal and state courts must apply federal maritime law that directly addresses the issues at hand.'); David W. Robertson, "Displacement of State Law by Federal Maritime Law" (1995) 26 J. Mar. L. & Com. 325 at 333.

[118] *Supra* note 16 art. VI. See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918) (holding that federal courts should apply maritime law and not the common law in maritime diversity actions and approvingly quoting language in the lower court opinion to the effect that the law applied 'must be the same in every court, maritime or common law'); David W. Robertson, "Displacement of State Law by Federal Maritime Law" (1995) 26 J. Mar. L. & Com. 325 at 333 [Displacement]. ('[t]he reverse-Erie metaphor . . . has long served as useful shorthand for the state courts' supremacy clause obligation in maritime cases').

[119] *Cf. Cooper v. Aaron*, 358 U.S. 1 at 17–18 (1958) ('the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States').

The Court has not felt the need to probe too deeply into how the general maritime law becomes part of 'Laws of the United States which shall be made in Pursuance [of the Constitution].'[120] Saying that the supremacy of general maritime law derives from the federal constitution, does not speak to why the federal constitution requires that the general maritime law be supreme. Indeed, the face of the Article VI, which refers to 'Laws . . . made in Pursuance' of the Constitution, does not seem to embrace a body of law that originated long before that document was ratified.

Fortunately, the Court's maritime supremacy cases suggest a source for the doctrine: principles derived from the structure of the constitution. In the first true maritime supremacy case, *Chelentis v. Luckenbach*, the Court held that federal courts sitting in diversity should apply maritime law rather than the common law,[121] despite the language of the jurisdictional statute 'saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.'[122] Writing for the majority, Justice McReynolds quoted extensively from *The Lottawanna*:

> 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.[123]

Note the heavy emphasis on constitutional policies. The Court did not simply ask whether the general maritime law is 'federal' and therefore supreme. Rather, it focused on the unique situation of admiralty

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[120] *Supra* note 16 art. VI.

[121] See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 [*Chelentis*].

[122] Act March 3, 1911, § 256, 36 Stat. 1092, 1161 (1911). The current language remains largely unchanged.

[123] *Chelentis, supra* note 121 at 382 (quoting *The Lottawanna*, *supra* note 100 at 575).

jurisdiction in the constitutional scheme, concluding that the constitutional requirement of national uniformity required that maritime law be treated as supreme.

The other major maritime supremacy case, *Pope & Talbot, Inc. v. Hawn*,[124] echoes the *Chelentis* language and reasoning. There the Court held that the maritime tort on which the plaintiff sued was to be governed by the flexible maritime comparative negligence rule rather than the 'harsh' state contributory negligence rule.[125] The majority described the maritime tort as 'a type of action which the Constitution has placed under national power to control in "its substantive as well as its procedural features . . ."' and found that it must therefore be governed by national maritime principles.[126] Again, key to the Court's analysis was admiralty's unique constitutional position rather than anything having to do with the origins or sources of the general maritime law. Because the Constitution entrusts maritime law primarily to the national government and presumes a uniform application of the maritime law, maritime law 'as accepted by the federal courts'[127] is binding upon state courts and supreme over contrary state law.

2. Preemption. — The question of preemption of state law by the general maritime law is a bit thornier than the supremacy question. For nearly 100 years, the federal courts have upheld a controversial doctrine whereby otherwise valid state law can be displaced in both federal and state court 'if it . . . 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.'[128] The precise textual origins of this doctrine are unclear. In the original maritime preemption case, *Southern Pacific Co. v. Jensen*, the Supreme Court struck down New York's application of its workers' compensation laws to the wrongful death of a

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[124] *Pope & Talbot, Inc. v. Hawn,* 346 U.S. 406 (1953).

[125] See *ibid.* at 408–11.

[126] *Ibid*. at at 409 (quoting *Panama R. Co. v. Johnson*, 264 U.S. 375 at 386 (1924)).

[127] *Southern Pac. Co. v. Jensen*, 244 U.S. 205 at 215 (1917) [*Jensen*].

[128] *Ibid*. at 216.

stevedore.[129] Anticipating the later maritime supremacy cases, the *Jensen* Court focused on the need for national uniformity in the application of maritime law. The majority quotes *The Lottawanna* for the proposition that leaving the regulation of maritime matters to the states 'would have defeated the uniformity and consistency at which the Constitution aimed.'[130] From there it concludes that the Constitution must necessarily put limits on the extent to which the general maritime law can be modified or supplemented by state legislation.[131]

Rather than displace state substantive law from the admiralty jurisdiction entirely, however, the Court decided that it 'cannot be denied'[132] that state law can affect maritime matters to at least some extent. The trick, of course, is how to locate the line between permissible and impermissible state interference with the general maritime law – a line that the Court admits is 'difficult, if not impossible, to define with exactness.'[133] In the end, the Court settled for the test described above, which seems to have been patterned loosely on the Court's dormant commerce clause jurisprudence.[134]

The *Jensen* decision gave birth to a long and ignominious line of cases attempting to fix the proper boundaries of maritime preemption. Though the Supreme Court and commentators have attempted to supplement the rather vague rule announced in *Jensen* with various other tests,[135] it remains largely a matter of guesswork which state laws will be preempted and which will not. As one

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[129] See *ibid.*

[130] *Ibid*. at 215 (citing *The Lottawanna*, *supra* note 100 at 575).

[131] See *ibid.* at 215–16.

[132] *Ibid*. at 216.

[133] *Ibid*. at 216.

[134] *Ibid.* at 216–17 (describing the dormant commerce clause and noting that 'the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved').

[135] See Ernest A. Young, "Preemption at Sea" (1999) [Preemption], 67 Geo. Wash L. Rev. 273 at 294-302; Robertson, Displacement, *supra* note 118 at 338-347.

observer put it, 'It cannot be gainsaid that the area of federalism and admiralty is plagued with inconsistencies.'[136]

In any case, there are two observations worth making. First, the doctrine of maritime preemption bears little resemblance to the doctrines that are typically applied in federal preemption cases.[137] Second, the preemptive power of maritime law seems to be rooted in the admiralty grant in Article III rather than the Supremacy Clause.[138] In this sense, it is much more like the dormant commerce clause than like statutory preemption. There do not seem to be any cases that suggest that particular principles of maritime law have preemptive force of their own accord. Indeed, unlike in statutory cases, the maritime preemption inquiry is primarily focused on the state law. For better or for worse, maritime preemption is a completely unique creature, invented out of a perceived need to protect the peculiar situation of admiralty in the federal system.

3. Federal Question Jurisdiction. — The operation of the general maritime law as a basis for federal subject matter jurisdiction is well established. The Constitution provides that '[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.'[139] Pursuant to the constitutional grant of jurisdiction, Congress has provided that '[t]he district courts shall have original jurisdiction . . . [of] [a]ny civil case of admiralty or maritime jurisdiction.'[140] Of course,

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[136] David P. Currie, "Federalism and Admiralty: 'The Devil's Own Mess'" (1960) Sup. Ct. Rev. 158 at 220.

[137] Compare Young, Preemption, *supra* note 135, at 294–302 (describing the maritime preemption doctrines), with Caleb Nelson, "Preemption" (2000), 86 Va. L. Rev. 225 at 226-229 (describing the doctrines applied in cases of statutory preemption).

[138] But see *In re Air Crash at Belle Harbor*, 2006 AMC 1340 (S.D.N.Y. 2006) ('Under the Constitution's Supremacy Clause, Article VI, Cl. 2, and Article III, § 2, granting the Supreme Court the judicial power to declare federal maritime law, the issue is always whether federal maritime law displaces or preempts state law or allows supplementation with non-conflicting state law.'); *Cobb Coin Co. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 525 F. Supp. 186 at 201 (S.D. Fla. 1981) ('This Court takes it as settled doctrine that in admiralty, state legislation that conflicts with federal maritime principles cannot be given effect under the supremacy clause of the United States Constitution, article VI, paragraph 2.')

[139] *Supra* note 16.

[140] 28 U.S.C. § 1333. The original grant, which used nearly identical language, was part of the *Judiciary Act of 1789*. *Judiciary Act of 1789*, ch. 20, § 9, 1 Stat. 73 at 76–77 (1789).

the term 'admiralty or maritime jurisdiction' is not self-defining. It might not necessarily include causes of action under the general maritime law. Nevertheless, there does not ever seem to have been a doubt that such actions could be heard under the grant of admiralty jurisdiction.[141]

The more interesting question is whether causes of action under the general maritime law fall under the district courts' federal question jurisdiction. For most of the history of the Republic, claims under general maritime law have been brought in the federal district courts in two different ways. As noted above, they can be brought under the admiralty jurisdiction. In addition, they can be brought under the federal courts' diversity jurisdiction if the parties are, in fact, diverse.[142] For a brief period in the 1950s, there were also suggestions that general maritime claims could be brought under federal question jurisdiction, which, as originally written, granted the lower federal courts jurisdiction 'of all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United States . . . .'[143] The theory was that the preemption line of cases revealed that 'the Constitution itself adopted [the general maritime law] and

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[141] See Gilmore & Black, Jr., *supra* note 24 at 20. See also *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794) ('every District Court in the United States, possesses all the powers of a court of Admiralty'); *DeLovio v. Boit*, 7 Fed. Cas. 418, No. 3776 (C.C.D. Mass. 1815) (Story, J.) (the admiralty and maritime jurisdiction 'comprehends all maritime contracts, torts, and injuries,' most aspects of which were governed exclusively by the general maritime law as received by US courts).

[142] See *Norton v. Switzer*, 93 U.S. 355 at 355–56 (1876) ('Parties in maritime cases . . . may resort to their common-law remedy in . . . the Circuit Court, if the party seeking redress and the other party are citizens of different States.').

[143] *Judiciary Act of 1875* (codified at 28 U.S.C. § 1331). This issue was more than just theoretical because federal courts had separate procedures for admiralty suits until 1966. Unlike claims brought in admiralty, which were tried by the court, claims brought on the 'law side' of the federal courts could be tried by a jury. This difference in treatment began to cause difficulties in the 1950s as three-count seaman's injury cases became popular. The count for negligence under the *Jones Act* was triable by jury, whereas the counts for unseaworthiness and maintenance and cure under the general maritime law were not. Courts were forced to consider whether they could entertain all three claims in a single trial by jury – either because all three fell under their original jurisdiction on the "law side" or because they could be brought in under the courts' pendent jurisdiction. See Brainerd Currie, "The Silver Oar and All That: A Study of the Romero Case" (1959) 27 U. Chi. L. Rev. 1 at 18.

established [it] as part of the laws of the United States.'[144] Consequently, 'a suit . . . on a claim under the general maritime law, is a "civil action" which "arises under the Constitution" within the meaning of 28 U.S.C. § 1331.'[145] Three federal courts of appeals considered the question. The First Circuit concluded that actions brought under general maritime law 'aris[e] the Constitution or laws of the United States';[146] the Second and Third Circuits came to the opposite conclusion.[147]

The Supreme Court addressed this split of authority in *Romero v. International Terminal Operating Co*,[148] holding that claims under the general maritime law do not arise under the Constitution for purposes of statutory federal question jurisdiction. Justice Frankfurter, writing for the majority, made it clear that the issue was one of statutory interpretation: 'the problem is the ordinary task of a court to apply the words of a statute according to their proper construction.'[149] He expressly left open the possibility that Congress could constitutionally include maritime cases within a future revision of the federal question statute, noting, 'It is a statute, not a Constitution, we are expounding.'[150]

The precise reasoning of the case is unimportant, but it is worth emphasizing that the holding rested on a highly contextual and historically contingent interpretation of the federal question statute rather than a broad attempt to classify the general maritime law as 'federal' or 'not federal.' For the Supreme Court, at least, it is not

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[144] *Doucette v. Vincent*, 194 F.2d 834 at 844 (1st Cir. 1952).

[145] *Ibid*.

[146] See *ibid.*

[147] See *Paduano v. Yamashita Kisen Kabushiki Kaisha*, 221 F.2d 615 (2d Cir. 1955); *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

[148] 358 U.S. 354 (1959).

[149] *Romero v. International Terminal Operating Co*., 358 U.S. 354 at 360 (1959) [*Romero*].

[150] *Ibid*. at 379. See also Currie, *supra* note 143 at 12 n.42 ('The decision is not a construction of Article III of the Constitution and is not placed on constitutional grounds. The authority of Congress to treat maritime cases as cases arising under federal law is expressly recognized.').

enough to rely on 'wooden'[151] categorizations. Frankfurter derides such attempts as 'empty logic, reflecting a formal syllogism.'[152] Instead, the Court encourages readers to be attentive to the 'interpretive setting of history, legal lore, and due regard for the interests of our federal system.'[153] CIL would presumably trigger the same contextual analysis; declaring it to be federal common law does not mean that it will necessarily support federal question jurisdiction.

4. Supreme Court Review. – Intriguingly, the Supreme Court has held that the general maritime law *can* support the Supreme Court's jurisdiction to review state court judgments. The jurisdictional statute, of course, is worded quite differently from the federal question statute:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.[154]

Note the conspicuous absence of the 'arising under' language found in Article III and the federal question statute. Setting aside cases where a federal or state statute is called into question, the proper inquiry seems to be whether 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.'[155]

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[151] *Romero, ibid*. at 379.

[152] *Ibid*. at 377.

[153] *Ibid*. at 379.

[154] 28 U.S.C. § 1257.

[155] *Ibid*.

The Supreme Court addressed this question once, but the precise holding in that case is somewhat unclear.[156] In *Garrett v. Moore-McCormack Co.*,[157] the plaintiff brought an action in state court against his employer for damages under the *Jones Act* and maintenance and cure under the general maritime law. He alleged that injuries he sustained while working on one of his employer's vessels were caused by the employer's negligence. When the employer produced a full release that the plaintiff had executed, the plaintiff alleged that he had signed the release while under the influence of pain medication and under duress from the employer.

The relevant question in the state courts was which party should bear the burden of proof with respect to the validity of the release. Under state law, the party who attacks the validity of a release bears the burden of proof. Under admiralty law, by contrast, the party who sets up a seaman's release must prove that the release was executed freely. The state supreme court applied its local rule on the ground that the burden of proof on releases 'is merely procedural, and is therefore controlled by state law.'[158]

The Supreme Court reversed, writing that 'the state court was bound to proceed in such manner that all the substantial rights of the parties under controlling federal law would be protected. Whether it did so raises a federal question reviewable here under [28 U.S.C. § 1257].'[159] It is not entirely clear from this passage whether the Supreme Court can review the application of the general maritime law itself or whether the Court will only review the application of the federal choice of law principles that govern whether maritime law will apply in the first place – as on the *Garrett* facts.[160] Yet if the *Garrett* Court had adopted the latter, more restrictive view, it presumably would have reversed the state court's judgment on the ground that federal admiralty law applied and then remanded to the state court for the

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[156] See generally Jonathan M. Gutoff, "Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking" (1996) 70 Tul. L. Rev. 2169.

[157] 317 U.S. 239 (1942) [*Garrett*].

[158] *Ibid*. at 242.

[159] *Ibid*. at 245.

[160] See Gutoff, *supra* note 156 at 2189.

application of the general maritime law. Instead, the Court proceeded to review and define the seaman's rights under general maritime law with great precision.[161] This suggests that the Court does not view its jurisdiction as confined to choice of law questions.[162]

In either case, *Garrett* supports the disaggregation thesis. If the Supreme Court can review state court interpretations of general maritime law, the inconsistency between federal question jurisdiction and Supreme Court appellate jurisdiction shows that not all 'federal' law is treated the same. And if the Supreme Court lacks the power to review state court maritime judgments, then the inconsistency is between Supreme Court review and supremacy.

5. Miscellaneous. – There are numerous other questions that might be asked about the characteristics of maritime law. Is it binding on the President and/or lower executive branch officials? If so, can the President overcome this obligation through an authoritative executive act? Is general maritime law binding on the legislature? Once a maritime right is identified, does it necessarily create a cause of action or might the right be defensive only? Can a new right under the general maritime law supplant a prior statute under the last-in-time rule?[163] What remedies, if any, attach to maritime rights?[164]

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[161] *Supra* note 157 at 246–48.

[162] This interpretation is further supported by the language preceding the quoted passage. The Court points out that '[t]he source of the governing law applied is in the national, not the state, government,' then states that if 'the state court were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would . . . actually deny, federal rights . . . .' *Ibid.* at 245. It then suggests that its intended result is the inverse of that achieved in *Erie*, implying that the federal courts should have ultimate control over the content of the general maritime law, just as the state courts have ultimate control over the content of state law. *Ibid.*

It is possible that *Romero* altered this, but the *Romero* Court did not give any indication that it was distinguishing or overruling *Garrett*. The majority's sole citation was in a footnote discussing the Court's maritime preemption jurisprudence. More generally, it is uncontroversial that federal question jurisdiction and Supreme Court appellate jurisdiction do not necessarily have the same contours. To take one example, the well-pleaded complaint rule does not apply to Supreme Court review. Because the two types of jurisdiction are not necessarily linked, it would take more than a decision based on a close historical analysis of the federal question statute to change the ambit of the appellate jurisdiction statute.

[163] See e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19 at 24 (1990) [*Miles*] ('Congress, in the exercise of its legislative powers, is free to say "this much and no more." An admiralty

In each case, as in the cases discussed in the previous sections, the inquiry is context-sensitive. Courts ask what factors unique to the general maritime law make it more or less suitable to possess the attribute in question. This necessarily entails an examination of the text, underlying policies, and history of the statute or constitutional provision that enables the attribute.

C. Under What Circumstances May Courts Incorporate General Maritime Law into US Law?

Of course, analogies between general maritime law and CIL are only useful to the extent that the relevant features of general maritime law are well-settled. If the courts and Congress have not authoritatively passed on a particular issue in the maritime context, there is little that may be drawn upon to clarify the CIL debate. It is thus important to note one important respect in which the relationship between general maritime law and the US legal system remains unsettled: the Supreme Court has not yet clearly delineated the circumstances under which courts may incorporate general maritime law into US law.

Prior to the twentieth century, courts exercised this power without worrying much about its propriety. As Congress took a more active role in shaping admiralty law, however, the judiciary increasingly struggled to define the limits of its own power. In *Moragne v. States Marine Lines*,[165] which raised the issue of whether there should be a cause of action for wrongful death under the general maritime law, the Supreme Court considered the tension between the traditional authority of the admiralty courts to create their own rules of decision, on the one hand, and the more recent emphasis on statutory remedies, on the other. Writing for the majority, Justice Harlan characterized the task of an admiralty court as being similar to that of a traditional common law court: it must be able to 'perceive the impact

court is not free to go beyond those limits.'); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 at 393–403 (1970) [*Moragne*] (searching for congressional direction before creating a new maritime remedy).

[164] See e.g., Gilmore & Black, Jr., *supra* note 24 at 627–33 (listing claims that give rise to maritime liens, and thus support jurisdiction and remedies *in rem*); *ibid*. at 40–43 (describing the availability of equitable remedies in federal admiralty courts).

[165] *Moragne, supra* note 163.

of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles.'[166] The courts are thus free to incorporate new rules of maritime law to the extent that such rules are consonant with the relevant federal statutes. Within this zone of discretion, the courts may exercise their power in accordance with the principles of *stare decisis* and as dictated by policy considerations.[167]

Yet the boundaries of the zone of discretion have proven difficult to map. At one point, the trend seemed to be toward a heavily circumscribed judicial power. In *Miles*, the Court suggested that for areas of law that are now predominantly statutory, such as tort actions brought on behalf of seamen, 'an admiralty court should look primarily to these legislative enactments for policy guidance.'[168] Though the courts may 'supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate,' judges must be sure to 'keep strictly within the limits imposed by Congress.'[169] Unsurprisingly, the lower federal courts and state courts have struggled to determine what policies and limits have been imposed by Congress. To take one example, the courts are divided on the availability of non-pecuniary damages for personal injury and wrongful death actions based on general maritime law.[170] Even the Supreme Court has given mixed signals; despite the warnings in *Miles*, it extended the *Moragne* action for wrongful death in the face of a substantial body of federal statutory law.[171]

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[166] See *ibid.* at 392.

[167] See *ibid.* at 403–04 ('We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act. Because the refusal of maritime law to provide such a remedy appears to be jurisprudentially unsound and to have produced serious confusion and hardship, that refusal should cease unless there are substantial countervailing factors that dictate adherence to *The Harrisburg* simply as a matter of *stare decisis*.').

[168] *Miles, supra* note 163 at 27.

[169] *Ibid.*

[170] See Robert Force, "The Legacy of *Miles v. Apex Marine Corp.*" (2006) 30 Tul. Mar. L. J. 35 at 41–45.

[171] See *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

The breadth of the courts' power to incorporate general maritime law into US law thus remains unsettled and cannot properly serve as the basis for a comparison of the judicial incorporation of CIL. Yet this uncertainty can help clarify the proper scope of the CIL debate. As with general maritime law, the most important and controversial issues in the CIL debate are best understood as arguments about the bounds of judicial discretion. These questions raise important concerns about the relative institutional competence of the three branches of government and the proper distribution of authority between them. As the following Part will explain, participants in the CIL debate should focus their attention on the question of judicial discretion and encourage the courts to settle the other questions as they have settled them in the general maritime law context.

IV. The Domestic Legal Status of Customary International Law Reconsidered

This section addresses the implications of the preceding analysis for the CIL debate. As noted, the previous section was not meant to suggest that CIL should be treated in exactly the same manner as the general maritime law. Many salient differences between the two bodies of law counsel against the wholesale mapping of the features of one onto the other. Nevertheless, it is possible to draw some lessons from the federal courts' experience with admiralty.

With respect to how and how much of CIL becomes part of US law, the maritime experience shows that courts need not choose between incorporating CIL wholesale into US law or effectively banishing it from the federal courts. As with general maritime law, particular CIL norms should not become part of US law unless they are incorporated as such by an authoritative act of one of the three branches of government. Congress and the President may incorporate CIL norms into US law, just as they already do.[172] Importantly, however, the federal courts should also be able to incorporate CIL norms into US law on their own initiative, that is, without any explicit statutory or constitutional authorization. The circumstances under

[172] See e.g., 18 U.S.C. § 2441 (incorporating a portion of the international laws of war into the U.S. criminal code).

which the courts would properly be able to do so are open to debate; this question, which corresponds to the fourth key question outlined above, is inextricably linked to the larger issue of federal common law and might be profitably addressed by a collaboration between experts in foreign relations law and experts in the law of federal courts.

There are indications that CIL's relationship to US law has historically been conceived in precisely this way. The early case *Brown v. United States*,[173] for instance, concerned the government's power to seize and condemn property during wartime. Chief Justice Marshall reasoned that 'proceedings to condemn [enemy property] can be sustained only upon the principle that they are instituted in execution of some existing law.'[174] After deciding that no Act of Congress authorized seizure in question, Marshall considered whether the international laws of war could directly authorize the seizure:

> This argument must assume for its basis the position that modern usage [of the law of nations] constitutes a rule which acts directly upon the thing itself by its own force, and not through sovereign power. This position is not allowed. This usage is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet is may be disregarded.[175]

Justice Bradley offered a similar observation sixty years later in *The Lottawanna*.[176] Arguing that general maritime law does not directly bind the US courts, Bradley drew an analogy to international law. 'In this respect,' he wrote, general maritime law '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.'[177]

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[173] 12 U.S. 110 (1814).

[174] *Ibid*. at 123.

[175] *Ibid*. at 128.

[176] 88 U.S. 558 (1875).

[177] *Ibid*. at 572.

The second important point also draws from the maritime paradigm: even if a particular CIL norm is incorporated as federal law, it need not have all the same attributes as 'normal' federal law. Courts can and should remain highly sensitive to context in determining whether CIL can satisfy the requirements of Article III 'arising under' jurisdiction or statutory federal question jurisdiction; whether and in what circumstances CIL should preempt inconsistent state law; and so forth. Allowing courts to incorporate CIL into US law opens the dialogue about CIL's characteristics rather than closes it. It might even be possible for courts to treat different CIL norms in different ways; for example, fundamental *jus cogens* norms might have a stronger effect in domestic law than other CIL norms.

Again, there are indications that the characteristics of CIL have always been treated in this disaggregated fashion. Even during the pre-*Erie* CIL heyday, CIL was generally not thought to be supreme over state law[178] and could not form the basis of jurisdiction for Supreme Court review.[179] And the Supreme Court's recent decision in *Sosa* appears to support the idea that CIL's attributes can be disaggregated and treated separately.[180] This approach suggests that revisionists' fears of a CIL-based jurisprudence that concentrates power in the federal judiciary at the expense of federalism and separation of powers are off-base. The federal courts' approach to the attributes of general maritime law has always been measured and

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[178] See Bradley & Goldsmith, *supra* note 14 at 816 (describing early cases where the federal government denied that it had the power to enforce CIL against the states).

[179] See e.g., *Ker v. Illinois*, 119 U.S. 436 at 444 (1886) ('[T]he decision of [the question whether forcible seizure in foreign country is grounds to resist trial in state court] 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, as it is of the courts of the United States. 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.').

[180] See William S. Dodge, "Bridging Erie: Customary International Law in the U.S. Legal System after Sosa v. Alvarez-Machain" (2004), 12 Tulsa J. Comp. Int'l L. 87 at 96-97 ('In contrast with the all-or-nothing approach of Justice Scalia, and of Professors Bradley and Goldsmith, the 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. Customary international law may be federal common law for purposes of the ATS, but not for the purposes of 1331.').

context-sensitive, and there is no reason why CIL will not be treated similarly.

As I noted at the outset, these observations will not resolve the debate over CIL's status. The most important question – when courts should exercise their discretion to incorporate CIL into US law – remains unresolved in the context of both general maritime law and federal common law, and there is no reason to think that it can be resolved more easily with respect to CIL. The purpose of this paper is to clarify the CIL debate by drawing attention away from the three easy questions and focusing it on the narrow, difficult question of the federal courts' discretion to make federal common law.

I am optimistic that the CIL debate can be resolved without either ousting CIL from US law or allowing the 'world community' to determine US policy. As the American experience with general maritime law demonstrates, federal courts have taken a flexible approach to the incorporation of a foreign body of norms into federal law. There is little reason to think that the federal courts' approach toward CIL would not be similarly flexible.