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The Domestic Legal Status of Customary International Law in Comparative Perspective

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THE DOMESTIC LEGAL STATUS OF CUSTOMARY INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE

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This essay considers the contested domestic legal status of customary international law. Two distinct positions have emerged in the debates about customary international law. The first position maintains that customary international law operates as a type of federal common law that is automatically incorporated into U.S. law and should be applied by courts in any appropriate case. The second position holds that only the political branches may incorporate customary international law into U.S. law, and that courts may only apply customary international law if a federal statute authorizes them to do so.

Drawing from the federal courts’ experience with admiralty law, the essay argues that both positions are mistaken. General maritime law, a body of customary law common to seafaring nations, is similar to customary international law in both form and origins and has long been applied by federal courts sitting in admiralty without any statutory authorization. At the same time, courts have never held that the general maritime law is incorporated wholesale into U.S. law. Judges have approached the incorporation of general maritime law in a flexible and context-sensitive manner. After surveying the domestic legal status of the general maritime law, this essay argues that courts can and should approach the incorporation of customary international law in a similarly context-sensitive fashion.

I. INTRODUCTION

Until recently, it was widely assumed that customary international law (CIL)¹ operated as a type of federal common law in U.S. courts. Professor Louis Henkin, for example, has written that customary international law “is ‘self-executing’ and is applied

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¹ 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 infra Part II.A.
by courts in the United States without any need for it to be enacted or implemented by Congress. The Restatement (Third) of the Foreign Relations Law of the United States echoes this view: “customary international law is considered to be like common law in the United States, but it is federal law” which can “supersede inconsistent State law or policy.” With few exceptions, the federal courts have adopted a similar stance.

This view, which has been dubbed the “modern position” by its detractors, 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. If, as the modern position holds, CIL is part of federal law, then claims based on CIL “arise under . . . the laws of the United States” for the purposes of Article III. 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 fit within the Arising Under Clause, it may be unconstitutional as applied to parties that do not fit within any of the other Article III heads of jurisdiction.

In 1997, Professors Curtis Bradley and Jack Goldsmith challenged this understanding of CIL in a prominent article.
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.”10 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”11 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. All nations are theoretically bound by the two bodies of law, and all nations 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 U.S. 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.”  

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.”

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 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

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the judiciary—precisely what modernists fear. Nevertheless, U.S. admiralty 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.” 14 The general maritime law is alive and well in U.S. law. This suggests that requiring affirmative incorporation by American institutions will not necessarily 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 15 that allowing CIL to become federal law will necessarily mean that CIL will preempt inconsistent state law, support Article III “arising under” jurisdiction, 16 bind the President under the Take Care Clause, 17 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 paper fleshes out this argument in three stages. Part II introduces and explains the ideas of CIL and federal

16 See U.S. Const. art. III, § 2.
17 See U.S. Const. art. II, § 3.
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 revisionists can be expressed in four key questions: (1) How does CIL become part of U.S. law? (2) If CIL is automatically part of U.S. law, how much of CIL is part of U.S. law? (3) If courts can incorporate CIL into U.S. law, what circumstances permit them to do so? (4) What are the characteristics of CIL once it is part of U.S. law?

Part III argues that the first, second, and fourth questions are not as controversial as they seem. 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 fourth question draws an interesting answer, described above: the general maritime law exhibits some, but not all, of the typical characteristics of federal law. 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 obvious 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, its 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 CONTESTED 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 customary international law and how CIL 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 paper then describes the debate between proponents of the modern position, who argue that CIL is “part of our law,”\(^\text{18}\) 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, the 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

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\(^{18}\) *The Paquete Habana*, 175 U.S. 677, 700 (1900).
questions have been satisfactorily resolved with regard to general maritime law, and that there is no reason why they could not be similarly resolved with respect to 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 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. As Blackstone described it, the law of nations was:

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.\(^\text{19}\)

This system of rules, which emerged from tacit agreement and consistent practice, was traditionally divided into three parts: the law merchants, 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.\(^\text{20}\) This latter branch, in a somewhat modified form, is what is now referred to as public international law.\(^\text{21}\)

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

\(^{19}\) WILLIAM BLACKSTONE, 4 COMMENTARIES *66.
\(^{21}\) Id. at 29.
customary international law. A practice or custom must therefore satisfy two criteria for it to become a binding rule under international law. It must be “general and consistent” and it must be “followed . . . from a sense of legal obligation.”

CIL norms, as with all sources of international law, are binding on nations, and nations are obligated to follow them. Beyond that, however, “how a [nation] accomplishes that result is not of concern to international law or to the state system.” CIL norms bind the nation as a whole, not any particular institution or person. 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 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

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23 Id. § 102(2).
24 This latter requirement is referred to as opinio juris.
26 Id. at 160–61.
27 Id. at 159.
their determination.”28 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.”29 Moreover, CIL, because it is federal law, “supersedes inconsistent State law or policy.”30 This position has more 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.31 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 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

28 The Paquete Habana, 175 U.S. 677, 700 (1900). See also The Nereide, 13 U.S. 388, 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.”).
30 Id. § 115 cmt. e.
that “CIL in some instances ‘[would not be] United States law at all!’”32 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.”33 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.34 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 modified choice of law principles35 or as non-preemptive, nonfederal 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.36 Finally, Professor Michael Ramsey has argued that CIL has indeed been incorporated as “the law of the land.”37 However, he maintains that CIL does not fall within the text of the Supremacy Clause and so should be considered non-preemptive federal law.38

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

34 See id.
38 See id. at 558.
Statute authorizes federal courts to create a cause of action for violations of the CIL right against arbitrary detention. 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 . . . .” Nevertheless, because the norm against arbitrary detention was not “so well defined as to support the creation of a federal remedy,” the plaintiff’s request for relief was denied. The *Sosa* ruling meant, at a minimum, that certain statutes can authorize federal courts to apply CIL as federal common law in certain circumstances, even if there is no such suggestion on the face of the statute. Beyond that, less is clear. Some argue that *Sosa* confirms the modern position, others make the more modest claim that *Sosa* decisively repudiated the revisionist position, and still others maintain that *Sosa* rejected the modern position’s view of CIL’s domestic legal status. *Sosa* thus leaves open key questions at the core of the CIL debate.

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40 Id. at 724.
41 Id. at 738.
42 See id.
44 See Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. INT’L L. 1, 12 (2004) (“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 U.S. Supreme Court has as well, in the *Alvarez-Machain* case).”).
45 See Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie*, 120 HARV. L. REV. 869, 904 (2007) (*Sosa*’s “approach to judicial incorporation of CIL is fatal to the modern position that all of CIL is federal common law”).
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 they mean by that. Federal common law is notoriously hard to define. 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 . . . .” 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, depending upon one’s view of the limits of interpretation.


48 See id.

49 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 685 (5th ed. 2003). Whereas some 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, 67 COLUM. L. REV. 1024, 1026 (1967), 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.
The source and scope of the federal courts’ power to make common law is hotly contested. 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*, 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* 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.” 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 apportionment of water between two states was governed by

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50 Compare Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 883, 887 (1986) (“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 Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. Chi. L. Rev. 1, 47 (1985) (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*, 83 Nw. U. L. Rev. 761, 766 (1989) (“all federal ‘common law’ . . . constitutes an illegitimate judicial rejection” of the goals of the Rules of Decision Act).

51 41 U.S. 1 (1842).

52 304 U.S. 64, 78 (1938).

53 Id. at 78.
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. Thus began the modern era of federal common law. 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.”

Despite early optimism about the “beautifully simple” 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.” As a consequence, the standards

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54 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).
55 See id.
56 See Henry J. Friendly, In Praise of Erie - And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 405 (1964) (“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).
59 United States v. Standard Oil Co., 332 U.S. 301, 307 (1947). 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
governing when federal courts may properly apply common law have become, as one commentator somewhat generously put it, “highly confused.”

Even the revisionists concede that the Court’s federal common law decisions “do not lend themselves to ready synthesis.”

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.

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

interests, powers and relations of the Federal Government as to require uniform national disposition rather than diversified state rulings”)


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. If the Court can add new categories whenever it 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.

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. 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.” 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. 67

The important point to take from this section is that federal courts can sometimes create federal rules of decision that derive from neither federal enactments nor state law, but that there is vast uncertainty surrounding the limits of this power. Whatever its boundaries may be, however, there is no reason to suppose that the power would not permit federal courts to incorporate CIL norms into federal law in situations where it is otherwise proper to make federal common law. The CIL debate outlined in the introduction and described in greater detail in the following section is thus, at its heart, a debate about the proper scope of the federal common lawmaking power.

D. Isolating the Important Questions

In an attempt to focus the debate, this section outlines three questions that form the core of the CIL controversy. As I outlined in the preceding section, questions about the role of CIL in the domestic legal system seem far from settled. The Supreme Court’s approach toward these questions has been inconsistent, giving scholars the opportunity to argue for many different conflicting views. Ultimately, however, all of these views must address four crucial questions: (1) How does CIL become part of U.S. law? (2) If CIL is automatically part of U.S. law, how much of CIL is part of U.S. law? (3) If courts can incorporate CIL into U.S. law, what circumstances permit them to do so? (4) What are the characteristics of CIL once it is part of U.S. law?

First, and most obviously, proponents of the modern position and revisionists disagree about how CIL becomes part of U.S. law. Is CIL a species of automatically self-executing U.S. law? Can CIL only become U.S. law through incorporation by valid legislative or executive enactment? In what circumstances can the

67 See id. at 950 (arguing that there is a “presumption in favor of using state law” when federal courts decide whether to make common law).
judiciary properly incorporate CIL norms into U.S. law? Are state institutions free to incorporate CIL into their law?

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

Third, those who argue that courts can incorporate CIL into U.S. 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. 68 Are federal courts required to point to an authorizing enactment before incorporating CIL into U.S. 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?

Finally, regardless of how CIL becomes part of U.S. law, it is not necessarily clear what effects and attributes it has once it is part of U.S. law. Recent articles have suggested the possibility that CIL might be (or become) part of U.S. law without sharing precisely the same characteristics as “normal” federal law. 69 For

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instance, Professor Michael Ramsey argues that CIL is part of federal law for purposes of Article III jurisdiction but not for purposes of Article VI supremacy. 70 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 U.S. law, is it federal law, “general law,” or something else entirely? What characteristics does CIL have once it is part of U.S. 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?

In the following part, I argue that the federal courts’ experience with the general maritime law suggests that the first, second, and fourth 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 third question—when can federal courts incorporate CIL as federal common law?—is the true sticking point in the CIL debate. It is actually the part of the same bundle of issues at the heart of the federal common law debate: how much discretion do courts have to create federal common law and what principles should guide that discretion?

III. THE SETTLED DOMESTIC LEGAL STATUS OF GENERAL MARITIME LAW

This Part explores possible answers to three of 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. 71 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—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.”72
Indeed, the most prominent cases that declare that international law
is U.S. law are admiralty cases.73 Finally, there are 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 U.S. 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 U.S.
law, no matter how distinguished their pedigree. The general
maritime law is only part of U.S. 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 U.S. 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
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.

72 See Edwin S. Dickinson, The Law of Nations as Part of the National Law of
73 See, e.g., The Paquete Habana, 175 U.S. 677 (1900); The Nereide, 13 U.S.
388 (1815).
A. How does Maritime Law Become Part of U.S. Law? How Much of Maritime Law is Part of U.S. Law?

The general maritime law derives its content from ancient codes and practices that have little connection to the U.S. political system. Beginning with the island nation of Rhodes around 900 B.C., 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, but federal admiralty decisions are now so numerous that courts tend to rely more on their own precedents. As one text phrases it, “only the rare case now requires recourse to the Rules of Oleron or Cleirac or Bynkershoek.” Yet the reader should not be fooled. The U.S. law of admiralty remains remarkably faithful to its roots in historic foreign and international materials.

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

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74 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). According to one text, however, “the existence of such a code has been pretty well cast in doubt.” Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, 3 (2d ed. 1975). In either case, the roots of the general maritime law are undeniably quite old.


76 See Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, 46 (2d ed. 1975) (“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 . . .”).

77 Id.
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 U.S. legal system. The general maritime law may derive much of its content from non-U.S. sources, but it derives all of its authority from acts of U.S. political institutions. Maritime law is authoritative U.S. 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.” 78 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. 79 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 U.S. 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 U.S. interests. 80 Sometimes the courts choose to apply state law as the federal rule of decision. 81 They do this as a matter “of federal policy” quite apart from any application of Erie or federal statute. 82 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

79 See Shoshone Mining Co. v. Rutter, 177 U.S. 505, 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).
80 See Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).
81 See United States v. Standard Oil Co., 332 U.S. 301, 308 (1947) (“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”).
82 Id. at 309.
cases, “federal, state and international law are considered and applied,” even though the rules of decision are clearly federal in nature.

The general maritime law derives its authority within the U.S. 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.” It is an open question whether the earliest judges conceived of the relationship between the general maritime law and U.S. 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 U.S. Certainly, an impressive amount of judicial rhetoric supports this view. But some early admiralty decisions evidence a bit more nuance.

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84 See, e.g., Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).
85 1-VII BENEDICT ON ADMIRALTY § 104.
86 An 1806 decision of the Supreme Court of Pennsylvania, for example, notes that foreign codes have been received in U.S. 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, 458 (Sup. Ct. of Pa. 1806). 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. Id. 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.” Id. 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 545–46. 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
the very least, general maritime law was understood not to be synonymous with the foreign codes and decisions from which it was derived.\(^{87}\) 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*. 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.”\(^{88}\) 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.\(^{89}\)

\(^{87}\) *See Morgan v. Insurance Co. of North America*, 4 U.S. 455, 458 (Sup. Ct. of Pa. 1806).

\(^{88}\) *David W. Robertson, Admiralty and Federalism 137* (1970).

\(^{89}\) *The Lottawanna*, 88 U.S. 558, 572 (1875).
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 laws and usages.” ⁹⁰ 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. ⁹¹

Numerous other decisions restate this same basic position in one form or another. ⁹² It is clear that the general maritime law is—quite independently of the Ḵeř decision—only operative in U.S. insofar as it is incorporated by one of the branches of government.

For the majority of U.S. history, maritime law was predominantly incorporated by federal courts acting without any legislative guidance. ⁹³ Indeed, until the 1900s it was not settled

⁹¹ The Western Maid, 257 U.S. 419, 432 (1922).
⁹² See, e.g., Garrett v. Moore-McCormack Co., 317 U.S. 239, 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, 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, Inc. v. Haver, 171 F.3d 943, 960 (4th Cir. 1999) (“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).
⁹³ 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,
that Congress had the power to regulate maritime matters at all.\footnote{See Panama R. Co. v. Johnson, 264 U.S. 375 (1924); Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, 47 (2d ed. 1975).} Over the past century, however, Congress has assumed a significant role in incorporating maritime law into U.S. law. Many rights and duties in admiralty are now governed by statute rather than judge-made law.\footnote{See, e.g., Jones Act, 41 Stat. 1007, § 33 (codified at 46 U.S.C. § 30104); Carriage of Goods by Sea Act, 49 Stat. 1208 (codified at 46a U.S.C. § 1303).} But the role of courts in deciding how much of the general maritime law will be incorporated into U.S. law should not be minimized. A substantial portion of admiralty is still governed purely by judge-made law.\footnote{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).}

All of this is to say that the general maritime law becomes U.S. law only to the extent that it is incorporated as such by U.S. 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 U.S. law through incorporation by U.S. political institutions, and elements of the general maritime law that have not been so incorporated are not part of U.S. law. However, this should not be taken to suggest that the general maritime law has limited application in U.S. 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 U.S. 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.” 97 Professor Ramsey hypothesizes that the different 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. 98 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”) 99 and, in cases of conflict between federal and state law, federal law prevails (“any Thing in the Constitution or Laws of any

99 U.S. CONST. art. VI.
state to the Contrary notwithstanding”). 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.”

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, Congress can decide whether, and to what extent, each provision will preempt state law by expressly stating its intention. However, even statutes that are expressly non-preemptive are 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 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.” 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

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100 Id.
102 See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 203 (“It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.”).
103 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).
bound” by the “the supreme Law of the Land.”¹⁰⁵ How else to explain the obligation of state courts to follow federal decisions on matters of general maritime law?¹⁰⁶

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].”¹⁰⁷ 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,¹⁰⁸ 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.”¹⁰⁹ Writing for the majority, Justice McReynolds quoted extensively from The Lottawanna:

¹⁰⁵ U.S. CONST. 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, 26 J. MAR. L. & COM. 325, 333 (1995) (“[t]he reverse-Erie metaphor . . . has long served as useful shorthand for the state courts’ supremacy clause obligation in maritime cases”).

¹⁰⁶ Cf. Cooper v. Aaron, 358 U.S. 1, 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”).

¹⁰⁷ U.S. CONST. art. VI.


¹⁰⁹ Act March 3, 1911, § 256, 36 Stat. 1092, 1161 (1911). The current language remains largely unchanged.
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.110

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 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, 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.111 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.112 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”113 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.” 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 stevedore. 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.” 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.

Rather than displace state substantive law from the admiralty jurisdiction entirely, however, the Court decided that it “cannot be denied” 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.” In the end, the Court settled for the test described above, which seems to have been

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116 Id. at 215 (citing The Lottawanna, 88 U.S. 558, 575 (1875)).
117 See id. at 215–16.
118 Id. at 216.
patterned loosely on the Court’s dormant commerce clause jurisprudence.\textsuperscript{119} 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,\textsuperscript{120} it remains largely a matter of guesswork which state laws will be preempted and which will not. As one observer put it, “It cannot be gainsaid that the area of federalism and admiralty is plagued with inconsistencies.”\textsuperscript{121}

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.\textsuperscript{122} Second, the preemptive power of maritime law seems to be rooted in the admiralty grant in Article III rather than the Supremacy Clause.\textsuperscript{123} In this sense, it is much more like the dormant

\textsuperscript{119} *Id.* 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”).


\textsuperscript{123} 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, 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.”)
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.” 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.” 125 Of course, 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 seem to have ever been a doubt that such actions could be heard under the grant of admiralty jurisdiction. 126

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,

125 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, 76–77 (1789).
126 See Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, 20 (2d ed. 1975). 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 U.S. courts).
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. 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 . . . .” The theory was that the preemption line of cases revealed that “the Constitution itself adopted [the general maritime law] and established [it] as part of the laws of the United States.” 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.”

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”, the Second and Third Circuits came to the opposite conclusion.

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127 See Norton v. Switzer, 93 U.S. 355, 356 (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.”).  
128 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, 27 U. Chi. L. Rev. 1, 18 (1959).  
129 Doucette v. Vincent, 194 F.2d 834, 844 (1st Cir. 1952).  
130 Id.  
131 See id.  
132 See Paduano v. Yamashita Kisen Kabushiki Kaisha, 221 F.2d 615 (2d Cir. 1955); Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950).
The Supreme Court addressed this split of authority in *Romero v. International Terminal Operating Co.*, 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.” 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.”

The precise reasoning of the case is unimportant for the purposes of this paper, but it bears emphasis 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 enough to rely on “wooden” categorizations. Frankfurter derides such attempts as “empty logic, reflecting a formal syllogism.” 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.” 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

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See also Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 12 n.42 (1959) (“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.”).
137 Id. at 377.
138 Id. at 379.
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. 139

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 “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.” 140

The Supreme Court addressed this question once, but the precise holding in that case is somewhat unclear. 141 In Garrett v. Moore-McCormack Co., 142 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.

140 Id.
142 317 U.S. 239 (1942).
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.”

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].” 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. 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 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. This suggests that the Court does not view its jurisdiction as confined to choice of law questions.

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146 Garrett at 246–48.
147 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 . . . .” Id. at 245. It then suggests that its intended result is the inverse of that achieved in Erie, implying that the federal courts
In either case, Garrett supports the disaggregation thesis. If the Supreme Court can review state court interpretations of general maritime law, the disconnect 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 disconnect 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? (Answer: it seems so.) If so, can the President overcome this obligation through an authoritative executive act? (Answer: again, it seems so.) Is it binding on the legislature? (Answer: only to the extent that it is based in the federal Constitution.) Once a maritime right is identified, does it necessarily create a cause of action or might the right be defensive only? (Answer: it is unclear.) Can a new right under the general maritime law supplant a prior statute under the last-in-time rule? (Answer: probably not.) What remedies, if any, attach to maritime rights? (Answer: it depends

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. Id.

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.

upon the right asserted and the court in which the remedy is sought.) 149

In each case, as in the cases discussed in the previous sections, the inquiry is context-sensitive. Courts must 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.

IV. SETTLING THE DOMESTIC LEGAL STATUS OF CUSTOMARY INTERNATIONAL LAW

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 U.S. law, the maritime experience shows that CIL can be treated as federal common law without either incorporating it wholesale into U.S. law or effectively banishing it from the federal courts. Particular CIL norms would not become part of U.S. law unless and until they were incorporated as such by an authoritative act of one of the three branches of government. Congress and the President would incorporate CIL norms into U.S. law, just as they already do. 150 Importantly, the federal courts would also be able to incorporate CIL norms into U.S. law on their own initiative, that is,

149 See, e.g., Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, 627–33 (2d ed. 1975) (listing claims that give rise to maritime liens, and thus support jurisdiction and remedies in rem); id. at 40–43 (describing the availability of equitable remedies in federal admiralty courts).

without any explicit statutory or constitutional authorization. The circumstances under which the courts would properly be able to do so are open to debate; this question, which corresponds to the third key question outlined above, is inextricably linked to the larger issue of federal common and is best approached by experts in foreign relations law and experts in the law of federal courts working in collaboration.

There are indications that CIL’s relationship to U.S. law has always been conceived in exactly this way. The early case *Brown v. United States*,\(^1\) 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.”\(^2\) 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.\(^3\)

Justice Bradley offered a similar observation sixty years later in *The Lottawanna*\(^4\). Arguing that general maritime law does not directly bind the U.S. 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

\(^{1}\) 12 U.S. 110 (1814).
\(^{2}\) *Id.* at 123.
\(^{3}\) *Id.* at 128.
\(^{4}\) 88 U.S. 558 (1875).
of law in no country any further than they are accepted and received as such.”

The second important point also draws from the maritime paradigm: if CIL is understood to be federal common 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 U.S. 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 heyday of CIL-in-federal-courts, CIL was generally not thought to be supreme over state law and could not form the basis of jurisdiction for Supreme Court review. More importantly, the Supreme Court’s recent decision in Sosa appears to support the idea that CIL’s attributes can be disaggregated and treated separately. This approach suggests that revisionists’

155 Id. at 572.
157 See, e.g., Ker v. Illinois, 119 U.S. 436, 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.”).
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 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 U.S. law—remains unresolved in the context of 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. Scholars of foreign relations law and scholars of federal courts can and should collaborate on the remaining difficult issue 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 U.S. law or allowing the "world community" to determine U.S. policy. As the American experience with general maritime law demonstrates, federal courts can and do 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.

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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.”).