

**The Story of *The Paquete Habana*:
Customary International Law as Part of Our Law**

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“International 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.”¹ These lines from Justice Gray’s majority opinion in *The Paquete Habana* have become the classic statement of the incorporation of customary international law in the U.S. legal system and the courts’ duty to enforce that law.² There was nothing new in this declaration itself, or in *The Paquete Habana*’s statements about consulting the works of scholars and the evolving nature of international law. Each of these principles dates back to at least the eighteenth century.

But in the meantime, the underlying conception of international law had changed from a foundation in natural law to a positivism based on state practice and consent.³ *The Paquete Habana* reflects this transition, but it also stands for continuity—reiterating eighteenth-century principles in an age of legal positivism. It teaches that, despite significant changes in the international and domestic legal orders over more than two hundred years of U.S. history, courts should respect and accommodate the original understanding of customary international law as part of the domestic legal system. That teaching is just as relevant at the start of the twenty-first century as it was at the start of the twentieth.

The Paquete Habana is a formidable opinion, marshaling five centuries of state practice and the writings of scholars from ten countries to support its holding that coastal fishing vessels were exempt from capture under international law during the U.S. war with Spain.⁴ Justice Gray tried to fortify his opinion further by showing that the president had committed the United States to observe the law of nations and that other U.S. officials had recognized the exemption for coastal fishing vessels.⁵ But like Thetis dipping her son Achilles in the River Styx, Gray’s effort to strengthen his opinion left it

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¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

² See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004); *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622 (1983); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964); *Filartiga v. Pena-Irala*, 630 F.2d 876, 880, 886-87 (2d Cir. 1980); see also Mark W. Janis, *An Introduction to International Law* 99 (2d ed. 1993) (calling *The Paquete Habana*’s statement the “classic utterance by the Supreme Court” on the topic of incorporation); Michael J. Glennon, *Raising The Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 Nw. U. L. Rev. 321, 322 (1985) (referring to *The Paquete Habana* as “the leading case concerning the incorporation of international law into United States domestic law”).

³ See Mark Weston Janis, *The American Tradition of International Law: Great Expectations 1789-1914*, at 117-33 (2004); Arthur Nussbaum, *A Concise History of the Law of Nations* 232-36 (rev. ed. 1954); Edwin D. Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 Am. J. Int’l L. 239, 252-60 (1932).

⁴ *The Paquete Habana*, 175 U.S. at 686-700.

⁵ *Id.* 700-08.

with a vulnerable heel, for in emphasizing the president's agreement with the law of nations in this case he raised the possibility that president might disregard it in another: "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."⁶ As Professor Henkin has noted, this "opaque, confused, and confusing dictum"⁷ has "troubled our jurisprudence for a hundred years."⁸

How the Case Got to the Supreme Court

The Paquete Habana sailed from Havana harbor on March 25, 1898 to begin a month-long fishing expedition at the western end of Cuba. She was a 43-foot sloop, with a crew of three, operating under a license issued by the Spanish Government.⁹ The Lola left Havana on April 11 for a shorter trip to the Yucatan Peninsula. She was a 51-foot schooner with a crew of six and no fishing license.¹⁰

Cuba was a colony of Spain. For three years Spanish authorities had struggled to put down a Cuban insurgency, most notoriously with a policy of "reconcentration" that forced people from the countryside into fortified areas where thousands died from unsanitary conditions.¹¹ Reports of atrocities in the American "yellow press," reaching a public already hostile to European involvement in the western hemisphere and generally sympathetic to American expansion, produced strong anti-Spanish feelings.¹² Then, on February 15, 1898, an enormous explosion ripped through the battleship Maine, sending her to the bottom of Havana harbor, with a loss of 266 lives.¹³ "After February 15, . . . Cuban issues consumed the body politic, displacing all other concerns."¹⁴

After negotiations failed to move Spain to grant Cuba independence, President McKinley sent a message to Congress on April 11 asking for authority to intervene.¹⁵ Congress responded on April 20, 1898, with a Joint Resolution declaring "[t]hat the people of the Island of Cuba are, and of right ought to be, free and independent;" demanding "that the Government of Spain at once relinquish its authority and government in the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters;" and directing President "to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the

⁶ *Id.* at 700.

⁷ Louis Henkin, *Foreign Affairs and the United States Constitution* 235 (2d ed. 1996).

⁸ *Id.* at 240.

⁹ *The Paquete Habana*, 175 U.S. at 678-79.

¹⁰ *Id.* at 679.

¹¹ See David F. Trask, *The War with Spain in 1898*, at 1-11 (1981); Lewis L. Gould, *The Spanish-American War and President McKinley* 22 (1982).

¹² Gould, *supra* note __, at 23-25.

¹³ A U.S. investigation attributed the explosion to an external cause, while a Spanish investigation came to the opposite conclusion. Trask, *supra* note __, at 35. Later reviews of the evidence confirmed the Spanish view that the explosion was caused internally, probably by a fire in the ship's coal bunker which ignited its magazine. *Id.*; Gould, *supra* note __, at 35.

¹⁴ Trask, *supra* note __, at xiii, 29.

¹⁵ *Id.* at 52-53.

several States, to such an extent as may be necessary to carry these resolutions into effect.”¹⁶

On April 21, the Secretary of the Navy, John Davis Long, instructed Admiral William T. Sampson to “immediately institute a blockade of the north coast of Cuba, extending from Cardenas on the east to Bahia Honda on the west,”¹⁷ an area that encompassed the port of Havana.¹⁸ President McKinley proclaimed the blockade the next day and stated that the United States would maintain it “in pursuance of the laws of the United States and the law of nations applicable to such cases.”¹⁹ Congress declared war against Spain on April 25.²⁰ The declaration was made retroactive to April 21, thereby legitimizing the blockade already in effect.²¹ President McKinley followed with another proclamation on April 26, reciting “that such war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice” and setting forth detailed rules for the conduct of the blockade and the capture of prizes.²² The proclamation did not mention fishing vessels.

Unaware of these great events, the Paquete Habana had started back to Havana with approximately 8,800 pounds of live fish. On April 25, she was captured by the gunboat Castine about eleven miles from Havana. She offered no resistance and was taken to Key West, where she and her cargo were condemned as prize of war and sold for \$490.²³ The Lola was seized two days later with a cargo of about 10,000 pounds of live fish, taken to Key West, condemned, and sold for \$800.²⁴ These boats were just two of many vessels in the same circumstances.²⁵ On April 28, Admiral Sampson wrote to Secretary Long:

I find that a large number of fishing schooners are attempting to get into Havana from their fishing grounds near the Florida reefs and coasts. They are generally manned by excellent seamen, belonging to the maritime inscription of Spain, who have already served in the Spanish navy, and who are liable to further service. As these trained men are naval reserves, have a semi-military character, and would be most valuable to the Spaniards as artillerymen, either afloat or ashore, I recommend that they

¹⁶ Joint Resolution No. 24, 30 Stat. 738-39 (1898). The Joint Resolution further disclaimed “any disposition or intention to exercise sovereignty, jurisdiction, or control over said Island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people.” *Id.* at 739.

¹⁷ Annual Report of the Navy Department for the Year 1898: Appendix to the Report of the Chief of the Bureau of Navigation 175 (1898) [hereinafter Navy Report Appendix].

¹⁸ For a fuller discussion of the planning and execution of the blockade, see Scott W. Stucky, *The Paquete Habana: A Case History in the Development of International Law*, 15 U. Balt. L. Rev. 1, 8-13 (1985).

¹⁹ Proclamation No. 6, 30 Stat. 1769 (1898).

²⁰ Act of April 25, 1898, ch. 189, 30 Stat. 364 (1898).

²¹ Trask, *supra* note __, at 57.

²² Proclamation No. 8, 30 Stat. 1770-71 (1898).

²³ *The Paquete Habana*, 175 U.S. 677, 679, 713 (1900); Brief for the United States at 3.

²⁴ *The Paquete Habana*, 175 U.S. at 679, 714; Brief for the United States at 4.

²⁵ Claimants and the United States stipulated that the decisions in *The Paquete Habana* and *The Lola* would be dispositive of a total of ten other cases involving fishing vessels. See Brief for Claimants at 1, 68-71.

should be detained prisoners of war, and that I should be authorized to deliver them to the commanding officer of the army at Key West.²⁶

Secretary Long replied on April 30: “Spanish fishing vessels attempting to violate blockade are subject, with crew, to capture, and any such vessel or crew considered likely to aid enemy may be detained.”²⁷

The right of belligerent nations to capture enemy ships as prizes of war is as old as naval warfare.²⁸ In the early days, captures were made by privateers—private ships that had been granted a commission for this purpose—who were entitled to keep the proceeds from enemy ships lawfully captured as prize.²⁹ The 1856 Declaration of Paris outlawed privateering,³⁰ and although the United States did not signed this declaration, President McKinley’s April 26th proclamation stated “that the policy of this Government will be not to resort to privateering, but to adhere to the rules of the Declaration of Paris.”³¹ Thus it was U.S. naval vessels that captured enemy ships during the war with Spain. The captain and crews of these vessels were entitled to the proceeds of lawful captures, as well as to bounties established by Congress, but in theory they were also liable for damages in the event of a wrongful capture.³²

The rights and wrongs of capture had developed over centuries in the decisions of courts with jurisdiction over prize cases. Although these were national courts, they aspired to apply a uniform law of nations. Lord Mansfield noted that “[e]very country sues in these Courts of the others, which are all governed by one and the same law, equally known to each other,”³³ and Justice Story declared that “the Court of prize is emphatically a Court of the law of nations; and it takes neither its character nor its rules from the mere municipal regulations of any country.”³⁴

In 1898, the federal district courts had original jurisdiction over prize cases, with appeals lying directly to the Supreme Court. The war with Spain produced a burst of such cases, and between November 1, 1899 and the middle of January 1900 the Supreme Court heard argument in no less than nine prize cases.³⁵

²⁶ *The Paquete Habana*, 175 U.S. at 712-13 (quoting Navy Report Appendix at 178).

²⁷ *Id.* at 713 (quoting Navy Report Appendix at 178).

²⁸ 11 J.H.W. Verzijl, W.P. Heere & J.P.S. Offerhaus, *International Law in Historical Perspective: The Law of Maritime Prize* 120 (1992).

²⁹ *Id.* at 152-68. It was to this end that the U.S. Constitution gave Congress the power to “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.” U.S. Const. Art. I, § 8, cl. 11.

³⁰ Verzijl, *supra* note ___, at 169-71.

³¹ Proclamation No. 8, 30 Stat. 1770, 1771 (1898).

³² See Arnold W. Knauth, *Prize Law Reconsidered*, 46 Colum. L. Rev. 69, 70-74 (1946) (discussing prize money and bounties under U.S. law).

³³ *Lindo v. Rodney*, 99 Eng. Rep. 385, 388 (K.B. 1782).

³⁴ *The Schooner Adeline*, 9 Cranch 244, 284 (1815).

³⁵ See *The Pedro*, 175 U.S. 354 (1899); *The Guido*, 175 U.S. 382 (1899); *The Buena Ventura*, 175 U.S. 384 (1899); *The Paquete Habana*, 175 U.S. 677 (1900); *The Newfoundland*, 176 U.S. 97 (1900); *The Adula*, 176 U.S. 361 (1900); *The Panama*, 176 U.S. 535 (1900); *The Benito Estenger*, 176 U.S. 568 (1900); *The Carlos F. Roses*, 177 U.S. 655 (1900).

The Supreme Court's Opinion

Professor Fiss has noted a tendency of historians to identify a period in the Supreme Court's history with its Chief Justice and then to rate such Courts. In his volume of the *Holmes Devise History of the Supreme Court*, Fiss observes that "the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst."³⁶ It "was composed of a group of seven or eight justices who largely shared the same basic premises and outlook."³⁷ They were "business-oriented and conservative."³⁸ But for all their homogeneity on other issues, the members of the Fuller Court differed sharply in prize cases.³⁹

Before the Supreme Court, counsel for the fishermen made two principal arguments. First, he argued that by the President's proclamation of April 26, 1898, "the United States publicly declared that its policy was in full accord with the principles of modern international law."⁴⁰ Relying mostly on treatise writers, he asserted that "both by law and by uniform practice coast fishing boats are exempt from capture so long as they devote themselves exclusively to fishing."⁴¹ Second, claimants' counsel argued that, because Congress's resolution of April 20, 1898 had recognized the Cuban people as free and independent, the fishermen were entitled to the rights and privileges of neutrals or allies. "It cannot be conceived that those whom it was our policy and intention to protect and aid should suffer either in their persons or their property by reason of our warfare against the very ones from whose domination we sought to deliver them."⁴²

To the latter argument, the United States replied that a declaration by Congress that the Cuban people were free could not make them so and that under decisions dating from the Civil War any person living in a hostile state should be treated as an enemy, regardless of her sympathies.⁴³ In response to the international-law argument, the United States acknowledged the language in the President's proclamation,⁴⁴ but countered with three main points. First, while admitting that "[i]nternational law is largely to be collected from the practice of different nations and the authority of writers,"⁴⁵ the United States

³⁶ Owen M. Fiss, 8 *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Troubled Beginnings of the Modern State, 1888-1910*, at 3 (1993).

³⁷ *Id.* at 35.

³⁸ *Id.* at 31.

³⁹ Henry M. Holt, *Recent Development and Tendency of the Law of Prize*, 12 *Yale L.J.* 306, 316-17 (1903) ("It is also interesting and noticeable that dissenting views have been expressed almost invariably, and about equally whether the judgment of the court was for condemnation or restitution."). Fiss does not discuss these cases, limiting his consideration of the Spanish-American war to the *Insular Cases*. See *id.* 225-56.

⁴⁰ Brief for Claimants at 7.

⁴¹ *Id.* at 33.

⁴² *Id.* at 37. Counsel further argued that no presumption of hostile character should arise from the boats' having flown the Spanish flag, *id.* at 49-51, and that the vessels should at least have been given the opportunity to remove the Spanish flag before being condemned. *Id.* at 52-55.

⁴³ Brief for the United States at 5-9.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 14.

argued that many writers on international law—especially Continental writers, but even some English ones—went too far and did not express the law “as it is, but rather as they conceive it ought to be.”⁴⁶ Second, the United States argued that American prize law had always followed English rather than Continental rules and that “the English rule is to consider the question as discretionary with the executive and as requiring an express ordinance of exemption.”⁴⁷ In this case, “the discretion lodged in the Executive has been exercised . . . by the commanders of the capturing vessels, against the contention of the claimants.”⁴⁸ Third, the United States argued that any exemption applied only to “small open boats” and not to sloops and schooners like the *Paquete Habana* and the *Lola*.⁴⁹ Each of the government’s arguments was directed to the content of international law, and nowhere did it assert that the President or his subordinates had authority to violate that law.⁵⁰

By a vote of six-to-three, the Court reversed the condemnations on the ground that coastal fishing vessels were exempt from capture under international law.⁵¹ As senior justice in the majority, Justice Horace Gray assigned the opinion to himself. Gray was known as the Court’s “legal historian”⁵² and was renowned for his “great erudition.”⁵³ His methodological approach “emphasized the role of legal precedent: the tracing of decisions as far back as possible in order to establish their historic continuity,” an approach that gave “many of Gray’s decisions the status of monographs on the issues concerned.”⁵⁴ Certainly, *The Paquete Habana* fits that description.

As a preliminary matter, Gray had to deal with the question whether the Supreme Court lacked jurisdiction, since the amount in dispute did not exceed \$2,000 and the district court had not certified the question as one of general importance.⁵⁵ He held that the Judiciary Act of 1891 establishing the Circuit Courts of Appeals had implicitly repealed previous pecuniary limits on the Supreme Court’s jurisdiction, for the intent of Congress was “to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court.”⁵⁶ This was a subject on which Gray had an

⁴⁶ *Id.* at 16.

⁴⁷ *Id.* at 11.

⁴⁸ *Id.*

⁴⁹ *Id.* at 9-10; *see also id.* at 23-25.

⁵⁰ *See also* Jordan J. Paust, *Paquete and the President: Rediscovering the Brief for the United States*, 34 *Va. J. Int’l L.* 981 (1994).

⁵¹ In a later opinion, the Court rejected the argument that Cubans should not be treated as enemies for the purposes of prize law. *See* *The Benito Estenger*, 176 U.S. 568, 571 (1900) (“The general rule is that in war the citizens or subjects of the belligerents are enemies to each other without regard to individual sentiments or dispositions, and that political status determines the question of enemy ownership.”).

⁵² Robert M. Spector, *Legal Historian on the United States Supreme Court: Justice Horace Gray, Jr., and the Historical Method*, 12 *Am. J. Legal Hist.* 181 (1968).

⁵³ Fiss, *supra* note __, at 30.

⁵⁴ Louis Filler, *Horace Gray, in 2 The Justices of the United States Supreme Court: Their Lives and Major Opinions* 666, 668 (Leon Friedman & Fred L. Israel eds., 1997).

⁵⁵ The Court raised the issue during oral arguments and asked the parties to file supplemental briefs on the question. *See* Supplemental Brief for Claimants-Appellants; Brief for the United States on the Question of Jurisdiction.

⁵⁶ *The Paquete Habana*, 175 U.S. 677, 681 (1900).

insider's knowledge, for in 1890 he had authored a report to the Senate expressing the justices' views on various judicial reform proposals.⁵⁷

Gray then came to the principal question in the case, and he summarized his conclusion at the start: "By an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargos and crews, from capture as prize of war."⁵⁸ True to his methodological preferences, Justice Gray resolved "to trace the history of the rule, from the earliest accessible sources."⁵⁹ The earliest sources he could find were orders issued by King Henry IV of England in 1403 and 1406 implementing a treaty with the King of France.⁶⁰ A discussion of other treaties and the practices of other nations followed, down to the war between England and France following the French revolution.⁶¹ Here Gray paused, for he was faced not only with a 1798 English order expressly directing the seizure of fishing boats but also with Sir William Scott's decision in *The Young Jacob and Johanna*, in which the great admiralty judge stated that the rule against capturing "small fishing vessels . . . was a rule of comity only, and not of legal decision."⁶²

Gray's response was to observe that international law had evolved since 1798: "the period of a hundred years which has since elapsed is amply sufficient to have enabled what originally may have rested in custom or comity, courtesy or concession, to grow, by the general assent of civilized nations, into a settled rule of international law."⁶³ He followed with an account of nineteenth-century state practice through the Napoleonic wars, the Mexican-American War of 1848, the Crimean War of 1854, the Franco-Austrian War of 1859, the Franco-Prussian War of 1870, and the Sino-Japanese War of 1894.⁶⁴ French courts exempted coastal fishing vessels from capture throughout the Napoleonic Wars, and England soon changed its policy, issuing orders in council in 1806 and 1810 prohibiting the taking of vessels bringing in fresh fish.⁶⁵ During the U.S. war with Mexico in 1846, the commander blockading the east coast of Mexico expressly exempted fishing vessels, and although the commander blockading the west coast ordered the capture of "all vessels under the Mexican flag," the evidence showed that the exemption of coastal fishing vessels was observed in practice.⁶⁶ English practice during

⁵⁷ Williard L. King, Melville Weston Fuller: Chief Justice of the United States 1888-1910, at 150-51 (1950).

⁵⁸ *The Paquete Habana*, 175 U.S. at 686.

⁵⁹ *Id.*

⁶⁰ *Id.* at 687.

⁶¹ *Id.* at 687-91.

⁶² 165 Eng. Rep. 81, 81 (Adm. 1798). Scott, later Lord Stowell, was the leading admiralty judge of his day and his decisions had a great impact on American law and practice. See Henry J. Bourguignon, Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828, at 280-85 (1987).

⁶³ *The Paquete Habana*, 175 U.S. at 694.

⁶⁴ *Id.* at 694-700.

⁶⁵ *Id.* at 694-95.

⁶⁶ *Id.* at 696-98. Three days after oral arguments, the United States filed an additional statement disclosing instructions during the war with Mexico that "Mexican boats engaged exclusively in fishing on any part of the coast will be allowed to pursue their labours unmolested." Statement on Behalf of the United States

the Crimean War of 1854 was more problematic for it was conceded that England had destroyed many Russian fishing boats and storehouses, but Gray distinguished these as large commercial establishments supplying the military.⁶⁷ Thus Gray concluded that since 1806 “no instance has been found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful industry has been denied by England or by any other nation.”⁶⁸

Then came the paragraph for which *The Paquete Habana* is famous:

International 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. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.⁶⁹

This passage introduced the scholarly works to which Gray turned next. Wheaton, Kent, Pistoye and Duverdy, De Cussy, Ortolan, Calvo, Heffter, Kaltenborn, Bluntschli, Perels, De Boeck, Hall, Lawrence, Ferguson, Atlmayr, Negrin, Testa, and Fiore were all marshaled⁷⁰ to support “the established rule of international law . . . that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.”⁷¹ Justice Gray was quick to point out the limitations of this rule. It did not apply to vessels “employed for a warlike purpose, or in such a way as to give aid or information to the enemy.”⁷² It did not apply “when military or naval operations create a necessity to which all private interests must give way.”⁷³ And it did not apply to “vessels employed on the high seas” whose catch was “not brought fresh to market.”⁷⁴ But the *Paquete Habana* and the *Lola* came within the rule rather than the exceptions.⁷⁵

Relative to Exemption Allowed to Fishing Vessels in the Mexican War at 4; *see also* Supplemental Brief for Claimants-Appellants at 7-9.

⁶⁷ *The Paquete Habana*, 175 U.S. at 699-700.

⁶⁸ *Id.* at 700.

⁶⁹ *Id.*

⁷⁰ *Id.* at 700-08.

⁷¹ *Id.* at 708.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 713-14.

Justice Gray endeavored to show that the U.S. policy during the war with Spain had been to adopt rather than to violate this rule of international law. He quoted the President McKinley's April 22 proclamation that the navy would maintain the blockade "in pursuance of the laws of the United States, and the law of nations applicable to such cases"⁷⁶ and his April 26 proclamation reciting that the "war should be conducted upon principles in harmony with the present views of nations and sanctioned by their recent practice."⁷⁷ He read Admiral Sampson's April 28th message recommending the capture of fishing boats as "assum[ing] that he was not authorized, without express order, to arrest coast fishermen peaceably pursuing their calling"⁷⁸ and Secretary Long's reply as intending that coastal fishing vessels "should not be interfered with, so long as they neither attempted to violate the blockade, nor were considered likely to aid the enemy."⁷⁹ The last of these readings was a stretch because, of course, these fishing boats were attempting to violate the blockade by getting back to port, and Secretary Long expressly directed that they were "subject . . . to capture,"⁸⁰ thus ignoring the rule of international law that Justice Gray so painstakingly established.

Chief Justice Fuller dissented, joined by Justices Harlan and McKenna. He maintained that there was no such rule of international law; that even if there were, the *Paquete Habana* and the *Lola* did not fall within it; and that in any event the President was not bound by it. Fuller quoted Sir William Scott's decision in *The Young Jacob and Johanna* to the effect that the rule was one "of comity only"⁸¹ and read the nineteenth-century practice as not universally acknowledging the exemption.⁸² He dismissed the scholars that Gray cited as "lucubrations [that] may be persuasive, but are not authoritative."⁸³ Even if such a rule existed, the Chief Justice doubted that these two ships fell within it. To him they seemed more like the high-seas vessels that Justice Gray acknowledged were excluded from the rule.⁸⁴

Chief Justice Fuller's most striking assertion, though, was that a court could not enforce international law against the executive. Quoting Chief Justice Marshall's opinion in *Brown v. United States*,⁸⁵ he argued that international law does not operate directly but only "through the sovereign power."⁸⁶

⁷⁶ *Id.* at 712 (quoting Proclamation No. 6, 30 Stat. 1769 (1898)).

⁷⁷ *Id.* (quoting Proclamation No. 8, 30 Stat. 1770-71 (1898)).

⁷⁸ *Id.* at 713.

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting Navy Report Appendix at 178).

⁸¹ *Id.* (Fuller, C.J., dissenting) (quoting *The Young Jacob and Johanna*, 165 Eng. Rep. 81, 81 (Adm. 1798)).

⁸² *Id.* at 719-20 (Fuller, C.J., dissenting).

⁸³ *Id.* at 720 (Fuller, C.J., dissenting).

⁸⁴ Fuller noted the boats' sizes, the substantial distances they had traveled from Havana, and their ownership by persons other than their captains and crews. *Id.* at 718 (Fuller, C.J., dissenting). "They were engaged in what were substantially commercial ventures, and the mere fact that the fish were kept alive . . . did not render them any the less an article of trade than if they had been brought in cured." *Id.* at 718-19 (Fuller, C.J., dissenting).

⁸⁵ 12 U.S. 110 (1814).

⁸⁶ *The Paquete Habana*, 175 U.S. at 715 (Fuller, C.J., dissenting) (quoting *Brown*, 12 U.S. at 128).

“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 it may be disregarded.”⁸⁷

Fuller thus rejected the position that customary international law “*proprio vigore* limits the sovereign power in war.”⁸⁸ He concluded “that exemption from the rigors of war is in the control of the Executive. He is bound by no immutable rule on the subject. It is for him to apply, or to modify, or to deny altogether such immunity as may have been usually extended.”⁸⁹

In the majority opinion, Justice Gray admitted that there were words in *Brown v. United States*, “which, taken by themselves, might seem inconsistent with the position above maintained of the duty of a prize court to take judicial notice of a rule of international law, established by the general usage of civilized nations, as to the kind of property subject to capture.”⁹⁰ As Gray pointed out, however, *Brown* held that the executive could not condemn enemy property without express authority from Congress.⁹¹ In this case, Gray argued, there was no express authority from either Congress or the President.⁹²

To summarize, *The Paquete Habana* made four important statements about international law: first, that it is “part of our law;” second, that to ascertain it courts may look to “the works of jurists and commentators;” third, that it evolves so that a practice once resting in comity might “ripen[] into a rule of international law;” and fourth, that resort to international law might not be necessary when there was a “controlling executive . . . act.”⁹³ Of these four statements, only the last was new to American law, but each of them took on a new significance because of the transition in international law from natural law to positivism.

From Natural Law to Positivism

⁸⁷ *Id.* (Fuller, C.J., dissenting) (quoting *Brown*, 12 U.S. at 128).

⁸⁸ *Id.* at 716 (Fuller, C.J., dissenting).

⁸⁹ *Id.* at 720 (Fuller, C.J., dissenting). Fuller also read the executive’s actions differently than Gray. The reference in the President’s April 26th proclamation about “principles in harmony with the present views of nations and sanctioned by their recent practice” was limited to the government’s policy not to resort to privateering. *Id.* at 716 (Fuller, C.J., dissenting) (quoting Proclamation No. 8, 30 Stat. 1770-71 (1898)). Fuller further noted that the captures of the *Paquete Habana* and the *Lola* had been ratified by the executive branch as consistent with its policy. *Id.* at 717 (Fuller, C.J., dissenting).

⁹⁰ *Id.* at 710.

⁹¹ *Id.* at 711. See *Brown*, 12 U.S. at 129 (“It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.”).

⁹² *The Paquete Habana*, 175 U.S. at 711.

⁹³ *Id.* at 686, 700.

During the nineteenth century, American law in general underwent a shift from natural law to positivism.⁹⁴ The corresponding change in American views of international law was in some ways simpler than the overall shift, for it is not complicated by the need to account for instrumentalism or analytic jurisprudence. Eighteenth-century Americans, like the authorities on whom they relied, viewed the law of nations as resting upon the law of nature. Vattel maintained that “the *law of Nations* is originally no other than the *law of Nature applied to Nations*,”⁹⁵ and Blackstone wrote that the law of nations “depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements.”⁹⁶ Yet over the course of the nineteenth century, writers in America and elsewhere came to see the authority of international law as depending not upon the law of nature but upon the consent of states, as evidenced by their practices.⁹⁷

To illustrate the difference, one may contrast two opinions on the legality of the slave trade under international law. Sitting as a circuit justice in *United States v. The La Jeune Eugenie*, Justice Story approached the question from the perspective of natural law.⁹⁸ He wrote that “every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations.”⁹⁹ The African slave trade, Story reasoned, was “repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice”¹⁰⁰ and it was “sufficient to stamp any trade as interdicted by public law, when it can be justly affirmed, that it is repugnant to the general principles of justice and humanity.”¹⁰¹ When the same question reached the Supreme Court a few years later in *The Antelope*, Chief Justice Marshall reached the opposite conclusion by adopting a positivist approach. That the slave trade was “contrary to the law of nature,” Marshall wrote, “will scarcely be denied.”¹⁰² But for a jurist, “the test of international law” was to be found “in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made.”¹⁰³ The legality of the slave trade was supported by two centuries of practice.¹⁰⁴ While nations might renounce the trade for themselves, these renunciations could not bind others, “and this traffic remains lawful to those whose governments have not forbidden it.”¹⁰⁵

⁹⁴ See generally Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 Vand. L. Rev. 1387 (1997).

⁹⁵ Emmerich de Vattel, *The Law of Nations*, Preliminaries § 6 (1758).

⁹⁶ 1 William Blackstone, *Commentaries on the Laws of England* *43 (1769); see also 4 *id.* at 66 (“The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world . . .”).

⁹⁷ See generally the sources given *supra* note ____.

⁹⁸ See 26 F. Cas 832, 846 (C.C.D. Mass. 1822) (No. 15,551). Story’s opinion contains positivist elements as well, and he acknowledged that the law of nations could be “modified by practice.” *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² 23 U.S. 66, 120 (1825).

¹⁰³ *Id.* at 121.

¹⁰⁴ *Id.* at 121-22.

¹⁰⁵ *Id.* at 122.

To be sure, the transition in international law from natural law to positivism did not happen all at once,¹⁰⁶ but by the end of the nineteenth century there had been a decided shift from the sort of reasoning Justice Story employed in *The La Jeune Eugenie* to the sort that Chief Justice Marshall used in *The Antelope*. As we shall see, Justice Gray's opinion in *The Paquete Habana* reflects this shift but, at the same time, establishes an important continuity between the eighteenth century and the twentieth.

International Law as Part of Our Law

When Justice Gray wrote 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,”¹⁰⁷ he was saying nothing new.¹⁰⁸ In English law, the incorporation of the law of nations is generally traced to Lord Mansfield's decision in *Triquet v. Bath*,¹⁰⁹ a case involving the immunity of a foreign minister's servant from arrest. Mansfield himself traced the principle further back to Lord Talbot's decision in *Barbuit's Case*,¹¹⁰ another suit involving the immunities of public ministers. Mansfield had been counsel in *Barbuit's Case* and reported Lord Talbot as having declared “[t]hat the law of nations, in its full extent was part of the law of England.”¹¹¹ A few years later, William Blackstone (who had in turn been counsel in *Triquet*) set down the principle in his *Commentaries on the Laws of England*: “the law of nations . . . is here adopted in it's [*sic*] full extent by the common law, and is held to be a part of the law of the land.”¹¹²

The colonists carried this principle with them to America, where it was applied in a variety of circumstances. As in England, the law of nations governed the immunities of public ministers and their servants. In a 1792 opinion on this subject, Attorney General

¹⁰⁶ Certainly it did not occur dramatically between 1822, when *The La Jeune Eugenie* was decided, and 1825, when *The Antelope* came down. One writer dates the abandonment of natural law in American jurisprudence more generally to the time of the Civil War. See Feldman, *supra* note __, at 1417-21.

¹⁰⁷ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁰⁸ Indeed, Gray himself had said almost exactly the same thing five years earlier in a case involving the enforcement of foreign judgments, *Hilton v. Guyot*, 159 U.S. 113, 163 (1895):

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

¹⁰⁹ 97 Eng. Rep. 936 (K.B. 1764); see also *Heathfield v. Chilton*, 98 Eng. Rep. 50, 50 (K.B. 1767) (Mansfield, L.J.) (“The privileges of public ministers and their retinue depend upon the law of nations; which is part of the common law of England.”).

¹¹⁰ 25 Eng. Rep. 777 (Ch. 1736).

¹¹¹ 97 Eng. Rep. at 938. A note to the report of *Barbuit's Case* states that “the Court seems to have determined that . . . the law of nations (which in its fullest extent was and formed part of the law of England) was the rule of decision in cases of this kind.” 25 Eng. Rep. at 778, n.1. Mansfield, however, relied on his own note of the case. See *Triquet*, 97 Eng. Rep. at 938.

¹¹² 4 Blackstone, *supra* note __, at *67.

Edmund Randolph noted that “[t]he law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land.”¹¹³

The law of nations also formed part of the common law for the purposes of criminal prosecutions. In 1784, a French citizen was convicted by the Pennsylvania Supreme Court of having assaulted the French Consul General and thereby violated “the law of Nations,” which the court held, “in its full extent, is part of the law of this State.”¹¹⁴ In 1793, President Washington’s Neutrality Proclamation promised prosecutions “against all persons who shall, within the cognizance of the courts of the United States, violate the laws of nations, with respect to the powers at war, or any of them.”¹¹⁵ And when charging the grand jury in one of these prosecutions, Justice James Iredell stated that “[t]he Common Law of England, from which our own is derived, fully recognizes the principles of the Law of Nations, and applies them in all cases falling under its jurisdiction, where the nature of the subject requires it.”¹¹⁶ The Judiciary Act of 1789 also opened the doors of the federal courts to tort suits alleging violations of the law of nations, providing that the district courts would have cognizance “of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”¹¹⁷

Finally, the federal courts consistently applied the law of nations in cases arising under their admiralty and maritime jurisdiction. Justice Story noted that piracy was “an offence against the law of nations (which is part of the common law).”¹¹⁸ And Chief Justice Marshall declared in another prize case that “the court is bound by the law of nations which is a part of the law of the land.”¹¹⁹

If Justice Gray’s statement that “[i]nternational law is part of our law” was not new, it was nonetheless significant in affirming that this was *still* true. In the eighteenth century, both the law of nations and the common law were thought to rest upon principles of natural law, and it seemed perfectly natural for judges to articulate and apply the former in the same way that they articulated and applied the latter.¹²⁰ By the end of the

¹¹³ 1 Op. Att’y Gen. 26, 27 (1792).

¹¹⁴ *Republica v. De Longchamps*, 1 U.S. 111, 116 (Pa. 1784)

¹¹⁵ Proclamation of Neutrality (Apr. 22, 1793), in 32 *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, at 430-31 (John C. Fitzpatrick ed., 1939).

¹¹⁶ Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), quoted in Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 *Vand. L. Rev.* 819, 825 (1989).

¹¹⁷ An Act to establish the Judicial Courts of the United States, ch. 20, § 9, 1 Stat. 73, 77 (1789). See *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2754-61 (2004). See generally William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists”*, 19 *Hastings Int’l & Comp. L. Rev.* 221 (1996); Anne-Marie Burley [Slaughter], *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 *Am. J. Int’l L.* 461 (1989); William R. Casto, *The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations*, 18 *Conn. L. Rev.* 467 (1986).

¹¹⁸ *United States v. Smith*, 18 U.S. 153, 161 (1820).

¹¹⁹ *The Nereide*, 13 U.S. 388, 423 (1815).

¹²⁰ See J.L. Brierly, *The Law of Nations* 87 (6th ed. 1963) (“It was natural therefore that judges should think of the two kinds of law [international law and common law] not as two unrelated systems, but as the application to different subject matters of different parts of one great system of law.”).

nineteenth century, however, positivism had triumphed and international law was to be found in state practice and consent.¹²¹ This changed the sources to which Justice Gray would look, but it did not alter the basic principle that courts had an obligation to determine and apply international law.

The Works of Jurists and Commentators

To ascertain the rules of international law, Justice Gray wrote, “resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat.”¹²² Again, there was nothing new in the sources Gray listed, but there was a difference in his treatment of scholars, which marked the transition from natural law to positivism.

English and American courts had long consulted treatises on international law as well as the practices of states. In *Triquet v. Bath*, Lord Mansfield attributed to Lord Talbot’s decision in *Buvot v. Barbut* the principle “[t]hat the law of nations was to be collected from the practice of different nations, and the authority of writers.”¹²³ The Pennsylvania Supreme Court said precisely the same thing in 1784.¹²⁴ The law of nations concerning piracy, Justice Story wrote in 1820, “may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognising and enforcing that law.”¹²⁵

But the writers these English and American courts consulted often made little reference to state practice. This was for two reasons. First, their natural law premises led them to believe that the law of nations could be deduced from the dictates of reason.¹²⁶

¹²¹ See Nussbaum, *supra* note __, at 232 (“In the science of international law, the nineteenth century was the great era of positivism. This means, first of all, that the conception of the law of nature and the kindred one of just war were to all intents and purposes abandoned”); Dickinson, *supra* note __, at 259 (“In the 19th century the law of nations was founded increasingly upon usage sanctioned by consent.”).

¹²² *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Hilton v. Guyot*, 159 U.S. 113, 163 (stating that to ascertain the rules of international law “the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations”).

¹²³ 97 Eng. Rep. 936, 938 (K.B. 1764). There is no mention of this principle, however, in the official report of the case. See *Barbut’s Case*, 25 Eng. Rep. 777 (Ch. 1736).

¹²⁴ *Respublica v. De Longchamps*, 1 U.S. 111, 116 (Pa. 1784) (“the law of Nations . . . is to be collected from the practice of different Nations, and the authority of writers”).

¹²⁵ *United States v. Smith*, 18 U.S. 153, 160-61 (1820). See also 1 James Kent, *Commentaries on American Law* 19 (1826) (“England and the United States have been equally disposed to acknowledge the authority of the works of jurists, writing professedly on public law, and the binding force of the general usage and practice of nations, and the still greater respect due to judicial decisions recognizing and enforcing the law of nations.”); Henry Wheaton, *Elements of International Law* 20 (Richard Henry Dana ed., 8th ed. 1866) (“Text-writers of authority, showing what is the approved usage of nations, or the general opinion respecting their mutual conduct, with the definitions and modifications introduced by general consent.”).

¹²⁶ See, e.g., *United States v. The La Jeune Eugenie*, 26 F. Cas. 846 (C.C.D. Mass. 1822) (No. 15,551) (Story, J.) (“every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations”); 4 Blackstone, *supra* __, at *66 (referring to the law of nations as “a system of rules, deducible by natural reason”).

Second, records of state practice were woefully inadequate. As Professor Dickinson has warned, “if it seems to us . . . that the classical publicists built too freely upon speculative premises, it must be remembered that frequently they had nothing else to build upon.”¹²⁷ The nineteenth century witnessed not only the rise of positivism but also the systematic publication of diplomatic correspondence, treaties, and other evidence of state practice.¹²⁸ This brought about a “radical change . . . in the province of the text-writer, the change from the region of speculation to that of practice.”¹²⁹ “The modern writer on International Law,” one observer noted in 1915, “merely records the practice of States; and, if that practice is sufficiently certain and continuous, he deduces a rule therefrom.”¹³⁰ *The Paquete Habana* reflected this transition to positivism when it cautioned that “[s]uch works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”¹³¹

That courts were capable of distinguishing genuine from spurious claims under international law was demonstrated in Justice Gray’s other prize decision for the Court arising from the war with Spain. In *The Panama*, the Court rejected a claim that mail ships were exempt from capture under international law.¹³² Gray noted the limits of international agreements on the subject,¹³³ adding that “the writers on international law concur in affirming that no provision for the immunity of mail ships from capture has as yet been adopted by such a general consent of civilized nations as to constitute a rule of international law.”¹³⁴

Ripening into a Rule of International Law

There was also nothing new in the idea that international law could evolve and that “what originally may have rested in custom or comity” could grow “into a settled rule of international law.”¹³⁵ Early American jurists were well aware that ancient Greece and Rome had engaged in practices they found barbaric.¹³⁶ Early Supreme Court

¹²⁷ Dickinson, *supra* note ___, at 242.

¹²⁸ *Id.* at 242 (noting that “[i]t was only in the 19th century that more or less systematic publication of such records was commenced in earnest”).

¹²⁹ Cyril M. Picciotto, *The Relation of International Law to the Law of England and of the United States* 121 (1915).

¹³⁰ *Id.*

¹³¹ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹³² 176 U.S. 535 (1900).

¹³³ *Id.* at 541-42.

¹³⁴ *Id.* at 542. In another case, the Court split 5-4 over whether international law required that, in the case of a blockade that had not been formally declared, a ship was entitled to approach the blockade to see if it was still in effect without being captured. The majority rejected the international law argument, stating that it could not accept the opinion of a treatise writer “as overruling in particular the prior decisions of this court,” *The Adula*, 176 U.S. 361, 371 (1900), while the dissent (which Justice Gray joined) argued that the capture “was contrary to well-established principles of international law.” *Id.* at 389 (Shiras, J., dissenting).

¹³⁵ *The Paquete Habana*, 175 U.S. 677, 694 (1900).

¹³⁶ *See* 1 Kent, *supra* note ___, at 4 (“The law of nations, as understood by the European world, and by us, is the offspring of modern times.”)

decisions are full of references the “the modern law of nations,”¹³⁷ as are the papers of early American statesmen.¹³⁸ In *The La Jeune Eugenie*, Justice Story declared that “[i]t does not follow . . . that because a principle cannot be found settled by the consent or practice of nations at one time, it is to be concluded, that at no subsequent period the principle can be considered as incorporated into the public code of nations,”¹³⁹ and he noted that “[s]ome doctrines, which we, as well as Great Britain, admit to belong to the law of nations, are of but recent origin and application.”¹⁴⁰

The transition from natural law to positivism facilitated the evolution of international law, for the practices of nations could change more readily than the laws of nature. Under a natural law theory, changes in international law had to be explained by changes in political philosophy¹⁴¹ or religion.¹⁴² Under a positivist theory, changes in international law flowed from changes in state practice indicating assent to a new rule. Thus, in *The Scotia* the Supreme Court found that changes in maritime rules made by Britain and the United States and accepted by other commercial states had ripened into rules of international law.¹⁴³ “Many of the usages which prevail, and which have the force of law,” the Court said, “doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation.”¹⁴⁴ The Court further noted “that unless general assent is efficacious to give sanction to international law, there never can be that growth and

¹³⁷ See, e.g., *Ware v. Hilton*, 3 U.S. 199, 224, 229 (1796) (opinion of Chase, J.); *id.* at 269 (opinion of Iredell, J.); *id.* at 281 (opinion of Wilson, J.); *Brown v. United States*, 12 U.S. 110, 128 (1814) (Marshall, C.J.); *id.* at 139, 145, 147 (Story, J., dissenting); *The Commercen*, 14 U.S. 382, 387 (1816) (Story, J.).

¹³⁸ Proclamation of Neutrality (Apr. 22, 1793), in 32 *The Writings of George Washington from the Original Manuscript Sources, 1745-1799*, at 430-31 (J.C. Fitzpatrick ed., 1939) (referring to “the modern usage of nations”); Letter from Thomas Jefferson to Thomas Pinckney (May 7, 1793), in 7 *The Works of Thomas Jefferson* 312, 314 (P.L. Ford ed., 1904) (referring to “the principles of that law [of nations] as they have been liberalized in latter times by the refinement of manners & morals, and evidenced by the Declarations, Stipulations, and Practice of every civilized Nation.”).

¹³⁹ 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

¹⁴⁰ *Id.* Although Story approached the question of the slave trade from the perspective of natural law, he acknowledged that the law of nations could be “modified by practice,” *id.*, and one sees in these quotations the positivist strand in Story’s opinion. For further discussion of *The La Jeune Eugenie*, see *supra* notes ___ - and accompanying text.

¹⁴¹ See, e.g., Charge to the Grand Jury of Justice James Iredell for the District of South Carolina (May 12, 1794), *quoted in* Jay, *supra* note ___, at 824 (observing that the law of nations had been expounded “with a spirit of freedom and enlarged liberality of mind entirely suited to the high improvements the present age has made in all kinds of political reasoning”).

¹⁴² For example, Chancellor Kent explained:

The law of nations, so far as it is founded on the principles of natural law, is equally binding in every age, and upon all mankind. But the Christian nations of Europe, and their descendants on this side of the Atlantic, by the vast superiority of their attainments in arts, and science, and commerce, as well as in policy and government; and, above all, by the brighter light, the more certain truths, and the more definite sanction, which Christianity has communicated to the ethical jurisprudence of the ancients, have established a law of nations peculiar to themselves.

1 Kent, *supra* note ___, at 3.

¹⁴³ 81 U.S. 170, 188 (1871).

¹⁴⁴ *Id.* at 187.

development of maritime rules which the constant changes in the instruments and necessities of navigation require.”¹⁴⁵

The Paquete Habana was entirely consistent with positivist ideas of how customary international law evolves. Justice Gray found his rule in state practice, particularly over the prior century.¹⁴⁶ He looked to the writings of scholars only as “evidence of these [customs and usages],” and “not for the speculations of their authors concerning what the law ought to be.”¹⁴⁷ And he concluded on the basis of this evidence that the rule against capturing coastal fishing vessels had grown, “by the general assent of civilized nations, into a settled rule of international law.”¹⁴⁸

Acknowledging Justice Gray’s positivist approach, one may still ask whether his evidence is convincing. Two prominent critics of customary international law have recently argued that it is not.¹⁴⁹ Professors Goldsmith and Posner write: “The bulk of the evidence suggests that nations refrain from seizing fishing vessels when there is no military or economic value in doing so. *The Paquete Habana*, an important casebook symbol of the power of [customary international law], is a hollow shell.”¹⁵⁰

Both Gray and his critics agree that it is the nineteenth-century evidence of state practice that matters.¹⁵¹ Goldsmith and Posner argue that “the period from 1815 to 1900 was one of relative peace in Europe,”¹⁵² that wars like the Franco-Prussian War should not count because they were not naval wars,¹⁵³ and that “during the one war in which the fishing vessel exemption rule was clearly tested—the Crimean War—the rule was violated.”¹⁵⁴ This evaluation of the evidence, however, is highly selective. First, by beginning the nineteenth century in 1815, Goldsmith and Posner exclude evidence from the Napoleonic Wars on which Justice Gray relied.¹⁵⁵ Second, they pick on an example to which Gray devoted not even a sentence—the Franco-Prussian War¹⁵⁶—while ignoring evidence from the more relevant Mexican-American War.¹⁵⁷ And third, they fail to note that Gray read British practice during the Crimean War as consistent with his rule because the property destroyed consisted of large commercial establishments supplying the Russian military.¹⁵⁸

¹⁴⁵ *Id.* at 188.

¹⁴⁶ *The Paquete Habana*, 175 U.S. 677, 694-700 (1900).

¹⁴⁷ *Id.* at 700.

¹⁴⁸ *Id.* at 694.

¹⁴⁹ See Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 Va. J. Int’l L. 639 (2000).

¹⁵⁰ *Id.* at 672.

¹⁵¹ *Id.* at 643, 647-51; *The Paquete Habana*, 175 U.S. at 694, 700.

¹⁵² Goldsmith & Posner, *supra* note ___, at 648.

¹⁵³ *Id.* at 648-49.

¹⁵⁴ *Id.* at 649.

¹⁵⁵ See *The Paquete Habana*, 175 U.S. at 694-96.

¹⁵⁶ See *id.* at 699.

¹⁵⁷ See *id.* at 696-99.

¹⁵⁸ See *id.* at 699-700.

Goldsmith and Posner also criticize Gray's reliance on treatise writers as redundant if these writers were being consulted only for their knowledge of the state practice the Court had already discussed.¹⁵⁹ But readers may draw different conclusions from the same facts, as Goldsmith and Posner's differences with Gray over the proper interpretation of the evidence from the Crimean War illustrate. Although a court may not avoid the responsibility to evaluate the evidence of state practice itself, surely its conclusions are strengthened by agreement with experts on international law.¹⁶⁰

Finally, Goldsmith and Posner argue that the practice of exempting coastal fishing vessels from capture is better explained by self-interest than legal obligation.¹⁶¹ They argue that navies often had "more valuable opportunities to pursue—for example, defending the coastline or attacking the enemy's navy"¹⁶² and that therefore "a belligerent's refusal to seize enemy fishing vessels . . . is no more surprising than[] its refusal to sink its own ships."¹⁶³ In fact, though, both captors and their countries had substantial reasons to seize fishing vessels. The captains and crews of capturing ships were entitled to at least a part of the proceeds of the captured ship and its cargo, and in the United States to bounties as well, which Congress did not abolish until just after the war with Spain.¹⁶⁴ From the countries' perspective, the crews of coastal fishing vessels might be used in the enemy's navy (which is why Admiral Sampson sought permission to seize them¹⁶⁵) or at least feed the enemy's population. The exemption from capture that coast fishing vessels enjoyed throughout the years cannot be explained by self-interest alone but only by a sense of obligation founded, as Justice Gray wrote, "on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent States."¹⁶⁶ Rather than a "hollow shell,"¹⁶⁷ *The Paquete Habana* is a *tour de force* of ascertaining customary international law from state practice.

Controlling Executive Act

If there was much that was not new in *The Paquete Habana*, there was one thing that was—Justice Gray's suggestion that customary international law might be superseded as a rule of decision by a "controlling executive . . . act."¹⁶⁸ For the purpose of ascertaining and administering international law, he wrote, "where there is no treaty

¹⁵⁹ See Goldsmith & Posner, *supra* note __, at 650.

¹⁶⁰ See 1 Kent, *supra* note __, at 18 ("In cases where the principal jurists agree, the presumption will be very great in favour of the solidity of their maxims . . .").

¹⁶¹ See Goldsmith & Posner, *supra* note __, at 672 ("The bulk of the evidence suggests that nations refrain from seizing fishing vessels when there is no military or economic value in doing so.")

¹⁶² *Id.* at 655.

¹⁶³ *Id.* at 655-56.

¹⁶⁴ See Act of March 3, 1899, ch. 413, § 13, 30 Stat. 1004, 1007 (1899) ("And all provisions of law authorizing the distribution among captors of the whole or any portion of the proceeds of vessels, or any property hereafter captured, condemned as prize, or providing for the payment of bounty for the sinking or destruction of vessels of the enemy hereafter occurring in time of war, are hereby repealed."); see also Knauth, *supra* note __, at 70-74 (discussing prize money and bounties under U.S. law).

¹⁶⁵ *The Paquete Habana*, 175 U.S. 677, 712-13 (1900) (quoting Navy Report Appendix at 178).

¹⁶⁶ *Id.* at 708.

¹⁶⁷ Goldsmith & Posner, *supra* note __, at 672.

¹⁶⁸ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”¹⁶⁹ Later in the opinion he stated that the exemption for coastal fishing vessels was a rule of international law that courts were bound “to give effect to, in the absence of any treaty or other public act of their own government in relation to the matter.”¹⁷⁰ And later still he rejected the notion that a court could condemn coastal fishing vessels, “which are exempt by the general consent of civilized nations from capture, and which no act of Congress or order of the President has expressly authorized to be taken and confiscated.”¹⁷¹

The idea that a treaty or statute might supersede the law of nations predated *The Paquete Habana*. Of course, treaties and statutes might supplement or clarify the law of nations, and the Constitution of the United States expressly provided Congress with the power “[t]o define and punish . . . Offences against the Law of Nations.”¹⁷² More problematic were treaties and statutes that might contravene customary international law. Vattel simultaneously maintained that treaties could not change the law of nations¹⁷³ and that a treaty that did so would nevertheless be binding.¹⁷⁴ With respect to statutes, there is a good deal of evidence that eighteenth-century Americans thought positive enactments could not contravene the law of nations.¹⁷⁵ Yet some justices apparently thought that they could,¹⁷⁶ a position consistent with Chief Justice Marshall’s statement in *Murray v. Schooner Charming Betsy* that “an act of congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁷⁷ Whatever the views at the end of the eighteenth century, however, by the end of the nineteenth it was accepted that statutes could supersede treaties as domestic law,¹⁷⁸ and the extension of that principle to customary international law seems to have been uncontroversial.¹⁷⁹ The

¹⁶⁹ *Id.*

¹⁷⁰ *The Paquete Habana*, 175 U.S. at 708.

¹⁷¹ *Id.* at 711.

¹⁷² U.S. Const. Art I, § 8, cl. 10.

¹⁷³ Vattel, *supra* note __, Preliminaries § 9 (“Whence, as this law is immutable, and the obligations that arise from it necessary and indispensable, nations can neither make any changes in it by their conventions, dispense with it in their own conduct, nor reciprocally release each other from the observance of it.”).

¹⁷⁴ *Id.* (“It will appear, however, . . . that it is only by the *Internal* law, by the law of *Conscience*, such conventions or treaties are always condemned as unlawful, and that . . . they are nevertheless often valid by the external law.”).

¹⁷⁵ See Jules Lobel, *The Limits of Constitutional Power: Conflicts between Foreign Policy and International Law*, 71 Va. L. Rev. 1071, 1078-95 (1985).

¹⁷⁶ See *Ware v. Hilton*, 3 U.S. 199, 229 (1796) (opinion of Chase, J.) (“It is admitted, that Virginia could not confiscate private debts without a violation of the modern law of nations, yet in fact, she has so done, the law is obligatory on all the citizens of Virginia, and on her Courts of Justice; and, in my opinion, on all the Courts of the United States.”); *id.* at 265 (opinion of Iredell, J.) (“admitting that the Legislature had not strictly a right, agreeably to the law of nations, to confiscate the debt in question; yet, if they in fact did so, it would . . . have been valid and obligatory within the limits of the State”).

¹⁷⁷ 6 U.S. 64, 118 (1804).

¹⁷⁸ See *Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888); *Head Money Cases*, 112 U.S. 580, 597, 599 (1884). On the nineteenth-century origins of the later-in-time rule, see Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 Am. J. Int’l L. 313, 313-18 (2001).

¹⁷⁹ *But see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 Harv. L. Rev. 853, 874-78 (1987) (arguing that the reasoning of the treaty cases does not support extension of the later-in-time rule to customary international law).

transition from natural law to positivism supported the notion that statutes could violate international law, for positivism “generally elevated the status of legislative acts and weakened judicial review,”¹⁸⁰ particularly judicial review founded on concepts of natural law.¹⁸¹

The suggestion that an act of the executive alone could supersede customary international law seems to have been completely new. In the 1790s, it was accepted by writers on both sides of the debate over the neutrality prosecutions that the law of nations was among those laws that the President had a constitutional obligation to execute faithfully.¹⁸² During the War of 1812, the Supreme Court held in *Brown v. United States* that the executive could not even exercise the United States’ right under the law of nations to condemn enemy property without express authorization from Congress,¹⁸³ much less violate the law of nations. When Chief Justice Marshall wrote that the law of nations “is a guide which the sovereign follows or abandons at his will”¹⁸⁴—the remark upon which Chief Justice Fuller relied so heavily in his *Paquete Habana* dissent—Marshall simply meant that confiscation was not automatic and that Congress could choose to exercise its rights under the law of nations or not. In dissent Justice Story argued that the executive could condemn enemy property without express authorization from Congress but was even more explicit that the President could not violate international law: “he cannot lawfully transcend the rules of warfare established among civilized nations[.] He cannot lawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims.”¹⁸⁵

Certainly Justice Gray could have given a much stronger rebuttal than he did to Chief Justice Fuller’s reliance on *Brown*. Gray seems to have misread *Brown* as saying

¹⁸⁰ Lobel, *supra* note __, at 1113.

¹⁸¹ Justice Gray also listed “judicial decision[s]” as potentially “controlling.” No one seems to have maintained that judges had authority to supersede the law of nations. *See, e.g.*, *Talbot v. Seeman*, 5 U.S. 1, 18-19 (1801) (Marshall, C.J.) (criticizing British court for departing from the law of nations). And the transition from natural law to positivism would have undercut such a position since judges had no authority over the making of international law except to the extent that it was based on natural law.

¹⁸² U.S. Const. Art. II, § 3 (stating that the President “shall take Care that the Laws be faithfully executed”); *see* Alexander Hamilton, Letters of Pacificus, No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 40 (Harold C. Syrett ed., 1969) (“The Executive is charged with the execution of all laws, the laws of Nations as well as the Municipal law, which recognises and adopts those laws.”); *id.* at 43 (“the President is the constitutional Executor of the laws. Our Treaties and the laws of Nations form a part of the law of the land.”); James Madison, Letters of Helvidius, No. 2 (1793), *reprinted in* 15 *The Papers of James Madison* 86 (Thomas A. Mason et al. eds., 1985) (referring to Hamilton’s point about the law of nations as a “truth”).

¹⁸³ 12 U.S. 110, 129 (1814) (Marshall, C.J.) (“It appears to the Court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within our territory at the declaration of war.”).

¹⁸⁴ *Id.* at 128.

¹⁸⁵ *Id.* at 153 (Story, J., dissenting). In *The Schooner Exchange v. McFadden*, decided two years earlier, Chief Justice Marshall found a usage of nations exempting foreign warships from the jurisdiction of national courts, but added that “[w]ithout doubt, the sovereign of the place is capable of destroying this implication.” 11 U.S. 116, 146 (1812). In the United States context, Marshall would have understood “the sovereign” to be Congress and the President acting together, as in *Brown*, rather than the President acting alone.

that the property at issue could not be captured under the law of nations.¹⁸⁶ He therefore did not take Fuller to task for misquoting Marshall by implying discretion to violate customary international law from passages concerned solely with discretion to enforce rights under that law. Nor did he make the point that if it is for Congress rather than the President to make rules concerning the capture of enemy property consistent with the law of nations, then *a fortiori* it is for Congress to authorize any captures that would violate that law.

The nineteenth-century rise of positivism required more deference to legislative decisions to violate international law, reflected in the later-in-time rule, but it did not require more deference to the executive acting alone. Although the Supreme Court held in *The Prize Cases* that President Lincoln's declaration of a blockade during the Civil War was "conclusive evidence" of a state of war authorizing such a blockade,¹⁸⁷ the Court never suggested that the executive could violate customary international law, which it continued to ascertain and apply in case after case.¹⁸⁸ As Professor White has shown, the late-nineteenth-century orthodoxy assumed that authority over foreign affairs was fixed by the text of the Constitution.¹⁸⁹ At a time when even the notion that Congress could delegate some of its textual authority over international trade to the President was controversial,¹⁹⁰ arguing for an extra-constitutional authority in the President to supersede international law would have been difficult. As we have seen, the briefs for the United States made no such argument, asserting only that international law did not require an exemption for fishing boats (or at least not these fishing boats).¹⁹¹ Chief Justice Fuller's contention that the executive was not bound by international law in the conduct of war gathered just three votes.¹⁹² It was not until the early decades of the twentieth century that the Supreme Court would begin its expansive interpretation of executive power in foreign affairs, culminating in the *Curtiss-Wright* decision.¹⁹³ Against this background, it seems implausible that Justice Gray meant to suggest in *The Paquete Habana* that the President acting alone could violate international law.

What Gray appears to have been doing instead was emphasizing that in this particular case "no act of Congress or order of the President has expressly authorized [the

¹⁸⁶ See *The Paquete Habana*, 175 U.S. 677, 711 (1900) (referring to *Brown's* "decision that enemy property on land, which by the modern usage of nations is not subject to capture as prize of war, cannot be condemned by a prize court"). Compare *Brown*, 12 U.S. at 122 ("That war gives to the sovereign full right to take the persons and confiscate the property of the enemy wherever found, is conceded.").

¹⁸⁷ 67 U.S. 635, 670 (1862). The Court reasoned that the Civil War was a special case not requiring a congressional declaration of war, noting that "[a] civil war is never solemnly declared," *id.* at 666, and that the Constitution did not give Congress the power to declare war against a state. *Id.* at 668.

¹⁸⁸ See, e.g., *id.* at 666 ("The right of prize and capture . . . is governed and adjudged under the law of nations."); *The Springbok*, 72 U.S. 1, 21 (1866) (noting that London and Nassau were "both neutral ports within the definitions of neutrality furnished by the international law"); *The Peterhoff*, 72 U.S. 28, 56 (1866) (applying rules of international law on free trade of neutrals with belligerents).

¹⁸⁹ See G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Va. L. Rev. 1, 8 (1999).

¹⁹⁰ See *id.* at 15-18 (discussing *Field v. Clark*, 143 U.S. 649 (1892)).

¹⁹¹ See *supra* notes ___ - ___ and accompanying text.

¹⁹² See *supra* notes ___ - ___ and accompanying text.

¹⁹³ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). See generally White, *supra* note ___.

vessels] to be taken and confiscated.”¹⁹⁴ Indeed, he went on to say that “[t]he position taken by the United States during the recent war with Spain was quite in accord with the rule of international law, now generally recognized by civilized nations, in regard to coast fishing vessels.”¹⁹⁵ But by emphasizing that no executive act superseded customary international law in this case, Gray opened the door to the argument that an executive act might do so in another. He thus gave *The Paquete Habana* its Achilles heel.

The Immediate Impact of *The Paquete Habana*

On remand, the cases of the *Paquete Habana*, the *Lola*, and ten other boats were referred to a commissioner for an assessment of damages. For the *Paquete Habana*, he awarded \$4,500 and the highest price for the fish in Havana during the blockade, plus interest at eight percent,¹⁹⁶ which the District Court ordered the United States to pay.¹⁹⁷ The United States appealed on the grounds that the decrees should have gone against the captors and that the damages were excessive. Justice Gray had resigned in 1902, and the opinion was assigned to his successor Justice Holmes. Holmes held that a decree against the United States was proper because “it has so far adopted the acts of capture that it would be hard to say that under the circumstances of these cases it has not made those acts its own.”¹⁹⁸ But he also found the damages excessive and unsupported by the evidence.¹⁹⁹ The case was remanded once again to the District Court, and there is no record of the ultimate amounts paid.²⁰⁰

Other nations quickly accepted the rule that coastal fishing vessels are exempt from capture under international law.²⁰¹ In 1907 the Second Hague Conference adopted the exemption in Article 3 of Hague Convention XI.²⁰² In 1914, without deciding whether this convention applied, British courts abandoned their traditional position and concluded that the exemption had “become a sufficiently settled doctrine in the law of nations.”²⁰³ Of Justice Gray’s opinion, the British court wrote: “It is full of research, learning, and historical interest. As such an elaborate and complete resume is available in that judgment, it would be a work of supererogation for me to attempt to perform a similar

¹⁹⁴ *The Paquete Habana*, 175 U.S. at 711; see also *id.* at 700 (“where there is no treaty, and no controlling executive or legislative act or judicial decision”); *id.* at 708 (“in the absence of any treaty or other public act of their own government”).

¹⁹⁵ *Id.* at 712; see *id.* at 712-13.

¹⁹⁶ *The Paquete Habana*, 189 U.S. 453, 467 (1903).

¹⁹⁷ *Id.* at 464.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 466-67.

²⁰⁰ See Stucky, *supra* note ___, at 35 n.210.

²⁰¹ See *id.* at 36-44.

²⁰² See Hague Convention XI: Convention Relative to Certain Restrictions with Regard to the Exercise of the Right to Capture in Naval Warfare, Art. 3 (““Vessels used exclusively for fishing along the coast or small boats employed in local trade are exempt from capture, as well as their appliances, rigging, tackle, and cargo. They cease to be exempt as soon as they take any part whatever in hostilities.”), available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague11.htm>.

²⁰³ The Berlin, 2 Lloyd 43, 66 (1914).

task.”²⁰⁴ However, the rule protecting coastal fishing vessels soon became irrelevant as mines and submarines made coastal blockades of enemy ports too dangerous.²⁰⁵

The more general significance of *The Paquete Habana* for international law in the United States was quickly realized. James Brown Scott, editor of the newly founded *American Journal of International Law*, called it a “remarkable opinion,” which settled the propositions “that international law is law; that it is part of our municipal law; that our courts take judicial notice of it as such.”²⁰⁶ He also praised the opinion for sketching the sources of international law “with a masterly hand.”²⁰⁷ John Bassett Moore held the case up as the “clearest and most precise application” of the principle that international law evolves through “the general and gradual transformation of international opinion and practice.”²⁰⁸ These writers made no mention of *The Paquete Habana*’s dictum concerning “controlling executive . . . acts,” which lay dormant for more than eighty years.

The Importance of *The Paquete Habana* Today

Those eighty years were not kind to the people of Cuba. A series of elected leaders soon gave way to the dictatorships of Gerardo Machado and Fulgencia Batista. In 1959, communist forces led by Fidel Castro forced Batista from power. Economic stagnation and political repression followed.²⁰⁹

In 1980 Castro declared the port of Mariel open and more than 100,000 Cubans fled to the United States in what became known as the Mariel Boatlift. Some Mariel Cubans with criminal records were held by the United States. Others, without criminal records, were initially paroled into the United States but then had their paroles revoked and were incarcerated. A district court found that the prolonged arbitrary detention of the second group would violate international law, but that the Attorney General’s decision to hold them constituted a “controlling executive act.”²¹⁰ In *Garcia-Mir v. Meese*, the Eleventh Circuit affirmed,²¹¹ arousing a storm of controversy over whether the executive acting alone may supersede customary international law.²¹²

²⁰⁴ *Id.* at 63-64.

²⁰⁵ Stucky, *supra* note ___, at 41.

²⁰⁶ James Brown Scott, *The Legal Nature of International Law*, 1 Am. J. Int’l L. 831, 859-60 (1907).

²⁰⁷ *Id.* at 859.

²⁰⁸ John Bassett Moore, *International Law: Its Present and Future*, 1 Am. J. Int’l L. 11, 11 (1907). The author of *A Digest of International Law* (8 vols. 1906), Moore had rejoined the State Department from Columbia Law School during the war with Spain, serving as First Assistant Secretary of State and then as secretary to the Paris Peace Commission. Gould, *supra* note ___, at 60, 99.

²⁰⁹ *See generally* Clifford L. Staten, *The History of Cuba* (2003); Richard Gott, *Cuba: A New History* (2004).

²¹⁰ *Fernandez-Roque v. Smith*, 622 F. Supp. 877, 903 (N.D. Ga. 1985).

²¹¹ 788 F.2d 1446, 1453-55 (11th Cir.), *cert. denied sub nom* Ferrer-Mazorra v. Meese, 479 U.S. 889 (1986). In *Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993), the Fifth Circuit followed *Garica-Mir*, *see id.* at 1447-48, but with the important difference that it found the indefinite detention authorized by statute. *See id.* at 1446.

²¹² *See generally* *Agora: May the President Violate Customary Law?*, 80 Am. J. Int’l L. 913 (1986); *Agora: May the President Violate Customary Law? (Cont’d)*, 81 Am. J. Int’l L. 371 (1987).

More recently, the Bush administration has invoked Justice Gray's dictum to argue that detainees held at Guantanamo Bay, Cuba are not entitled to the protections of customary international law. A memorandum from the Department of Justice's Office of Legal Counsel states that "under clear Supreme Court precedent, any presidential decision in the current conflict concerning the detention and trial of al Qaeda or Taliban militia prisoners would constitute a 'controlling' Executive act that would immediately and completely override any customary international law norms."²¹³

Putting the *Paquete Habana*'s dictum to one side, its holding 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"²¹⁴ remains important. As we have seen, the Supreme Court's reiteration of this principle in spite of the transition in international law from natural law to positivism reflects a commitment to continuity in the face of legal change. That commitment was tested most recently in *Sosa v. Alvarez-Machain*,²¹⁵ in which the Supreme Court kept the door ajar for suits seeking damages for violations of the law of nations under the Alien Tort Statute.²¹⁶ Justice Scalia objected that when the statute was passed in 1789 the law of nations would have been considered part of general common law²¹⁷ and that *Erie Railroad Co. v. Tompkins*²¹⁸ had put an end to the federal courts' role in ascertaining and applying such law.²¹⁹ "[T]he creation of post-*Erie* federal common law," he wrote,

is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. Post-*Erie* federal common lawmaking . . . is so far removed from that general-common-law adjudication which applied the 'law of nations' that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.²²⁰

²¹³ Memorandum for Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense, from Jay S. Bybee, Assistant Attorney General at 35 (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>. In *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), the district court found it unnecessary to reach the issue, having concluded that all of the detainees had rights under the due process clause of the Fifth Amendment and that some might also have rights under the Geneva Conventions. *See id.* at 481. In another context, a district court has recently rejected the Bush administration's reliance on this dictum. *See In re Agent Orange Product Liability Litigation*, 373 F. Supp. 2d 7, 109-10 (E.D.N.Y. 2005) (Weinstein, J.) ("Not persuasive, however, is the government's further argument that the President's decision to use herbicides during the Vietnam War constituted a 'controlling executive act' foreclosing customary international law claims. . . . The President of the United States has no power to violate international law or to authorize others to do so.")

²¹⁴ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

²¹⁵ 124 S. Ct. 2739 (2004).

²¹⁶ 28 U.S.C. § 1350 ("The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.")

²¹⁷ 124 S. Ct. at 2770 (Scalia, J., concurring).

²¹⁸ 304 U.S. 64 (1938).

²¹⁹ 124 S. Ct. at 2773-74 (Scalia, J., concurring).

²²⁰ *Id.* at 2773 (Scalia, J., concurring).

But as in *The Paquete Habana*, the Court chose continuity over change. Quoting Justice Gray, the majority noted that “[f]or two centuries we have affirmed that the domestic law of the United States recognized the law of nations.”²²¹ The lawmakers who established the federal courts expected them to identify and enforce the law of nations under the Alien Tort Statute, and “it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism.”²²² Justice Gray—the Supreme Court’s legal historian and believer in precedent—might have smiled.

²²¹ *Id.* at 2764.

²²² *Id.* at 2765.