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# A Sea-Change for the Classroom: Maritime Identities—Seas, Ships, and Sailors—the Law, and Teaching World History

The study of law in history at the school and college levels is not commensurate with the importance of law to historical processes and events. Historians and teachers give a nod to the odd lawmaker (Hammurabi or Hugo Grotius, for instance) and, when appropriate, mention various acts, laws, treaties, and other legal instruments (the Treaty of Tordesillas, Navigation Acts, Washington Naval Treaty, the United Nations Convention on the Law of the Sea, among others). By and large, however, they are generally mentioned in something of a contextual vacuum. Apart from historians of the law, we pay little attention to the social and political environments in which laws are made and repealed, or to their antecedents or the long-term influence of law, which can endure decades or generations—even centuries, in some cases. Until this past year, with the sudden emergence onto the world stage of critical race theory—an offshoot of critical legal studies, a theory first propounded in the 1970s—the intersection of the law and history was not widely recognized.

If studying the law is important because the consequences are so widespread and persistent, the sheer number and variety of laws make incorporating legal matters into our curricula and thinking seem daunting. And that is true even for those trained in the law. For those of us who are not, it seems positively forbidding. Certainly, it did to me when I was invited to design a bridge course in maritime legal history for the University of Maine School of Law.

When thinking about law and maritime enterprise, the first things that come to mind are black letter admiralty and oceans law. Admiralty is the body of domestic and private international law that governs navigation and disputes between parties operating or using ships, including sailors, merchants, passengers, insurers, lien-holders, and the like. Oceans law is public international law that governs topics as diverse as armed conflict and piracy,

freedom of navigation, flags of convenience, migration by sea, fisheries, navigation of the Arctic, pollution, and exclusive economic zones, or EEZs. The key document regarding the latter is the United Nations Convention on the Law of the Sea (UNCLOS), which entered into force in 1994, but the roots of which are far older.

Yet even taken together, admiralty and oceans law offer only a limited understanding of how law and the maritime world intersect, because maritime history is not just about what happens aboard ships or on the water, and terrestrial domestic laws, rulings, and customs can have equally far-reaching impacts in the maritime sphere. Significant though the arcane concepts of bottomry, charter parties, and the right of innocent passage are, a proper appreciation of the impact of law on maritime endeavor, and vice versa, requires broader and more flexible perspectives than the categories of admiralty and oceans law afford us.

To make the subject more accessible to students (whether they had any grounding in admiralty and oceans law or not) required a distinctive approach. I chose the concept of identity because it allowed me to consider a number of otherwise incompatible themes—geographical space, ships, people, and marine life and the environment—under a single heading. Through the lens of identity—with respect to geographic space, ships, and people—we can look at admiralty law, the law of the sea, and laws of the land in new ways.

## *Mare, Mare* Quite Contrary

The first challenge is to identify the sea as a legal space: What are the sea's boundaries? Who either draws or defends them? Where does the sea end and the land begin? Who has the rights to the bounty of the sea? How do we understand concepts like "freedom of the sea" or national borders in a world of exclusive economic zones?

Of universal concern and great antiquity, these questions have exercised the imagination of many whose judgments have had a profound impact on the course of human events. For the past five centuries, most debates over the division of the world ocean have treated the matter as a simple binary. On the one hand are advocates of the free sea, so-called from the title of Hugo Grotius's seminal essay *Mare Liberum* (1609).[1] On the other are advocates of the closed sea, which takes its name from John Selden's rebuttal, *Mare Clausum* (ca. 1618).[2] For an element that covers three-quarters of the world's surface and is bordered by innumerable people of vastly different cultures, legal regimes, and worldviews, the idea that there are only two ways to look at this problem is a radical oversimplification. But its roots in the early modern overseas rivalries of western European countries are clear enough.

The essence of Grotius's case is "Every nation is free to travel to every other nation, and to trade with it."[3] In so writing, he was challenging Portuguese pretensions to keep Dutch and other traders out of East and Southeast Asia on the basis of three papal bulls issued in 1493. These granted "all rights, jurisdictions, and appurtenances" over newly

discovered lands to Portugal or Spain, provided the lands were not "in the actual possession of any Christian king or prince."[4] Armed with this authority, Portugal and Spain asserted exclusive rights of navigation, trade, and colonization in Africa and Asia, and the Americas, respectively. The details were subsequently refined in bilateral treaties between Spain and Portugal. Key to understanding Grotius's argument is the fact that for all intents and purposes even Asia and Africa were accessible only by ship. Collectively these bulls and treaties are among the earliest elements of what is now known as the law of the sea, which has been defined as "a body of customs, treaties, and international agreements by which governments maintain order, productivity, and peaceful relations on the sea."[5]

While Grotius and many others have focused on the maritime orientation of the 1493 decrees, their impact was not limited to where Europeans could or could not sail. They also laid the foundation for what became known as the doctrine of discovery, by which Europeans asserted their rights to the Americas. While the legality of the navigational claims were openly repudiated in 1609, and Portugal and Spain effectively revoked the Treaties


Image 1: Map of the world by Spanish chronicler and writer Antonio de Herrera y Tordesillas (1548–1625) showing the meridian showing Spanish and Portuguese land entitlements as established by the Treaty of Tordesillas (1494). Source: In the Public Domain, courtesy of the Library of Congress, at https://commons.wikimedia.org/wiki/File:Map_of_Meridian_Line_set_under_the_Treaty_of_Tordesillas.jpg

of Tordesillas and Zaragoza in the late 1700s, the doctrine of discovery was enshrined in American law in 1823, when Chief Justice John Marshall wrote "Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives."[6] Furthermore, the United States maintained, "as all others [that is, Europeans] have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[7] The point here is that what looks like a "maritime" law can have far wider and more durable implications than it appears at first glance.

Not surprisingly, the concept of the free sea was a foundation of free trade, especially after 1815, when the great European powers exchanged competition over control of sea lanes per se for competition over maritime commerce. Yet as early as the second century CE, Roman jurists had determined that the sea was *communis omnium naturali jure*, that is, "common to all, according to natural law."[8] This view was enshrined in Justinian's sixth-century codification of Roman law. The Romans called the Mediterranean *Mare Nostrum*, "Our Sea," but that was a statement of fact not of law. With the breakup of the empire and the rise of smaller kingdoms, principalities, caliphates, emirates, and city states, claiming sovereignty over narrow stretches of sea became commonplace.

Starting in the eleventh century, the doges of Venice performed an annual wedding rite, the *sposalizio*, in which they dropped a consecrated ring into the Adriatic and declared "We wed thee, Adriatic, as a sign of our true and perpetual dominion."[9] In the thirteenth century, Venice began to demand that foreign ships sailing in the Adriatic pay tolls for the privilege, and by the fourteenth century Italian jurists were beginning to articulate legal arguments for more or less expansive (60- to 100-mile-wide) territorial seas.[10] Other states claimed comparable rights elsewhere, the best known being the Sound Tolls that the Kingdom of Denmark levied on ships passing through the narrow Øresund between Denmark and Sweden from 1429 to 1857. Some kings also lay claim to fisheries, the rights to which, according to feudal law, belonged to the sovereign.[11]

By the seventeenth century, however, most European states had come to a consensus that the extent of territorial sea was about three nautical miles, although it was not until 1794 that the United States became the first country in the world to enshrine "the marine league" (three nautical miles) as the limit of territorial sea in domestic law.[12] Early in the nineteenth century there were exceptions for the purposes of customs enforcement and fishing rights, but by and large maritime nations—including Japan, the Kingdom of Hawaii, and several Latin American countries—accepted the three-mile limit.[13]

Respect for the three-mile limit weakened following World War I, due largely to opposition from weaker maritime states who wanted a wider territorial sea to preserve their fisheries against the long-distance fleets of richer countries. At the same time, there was a growing acknowledgment that in terms of jurisdiction—for fisheries, customs, neutrality, and the like—one size did not fit all. World War II only hastened the end of the three-mile

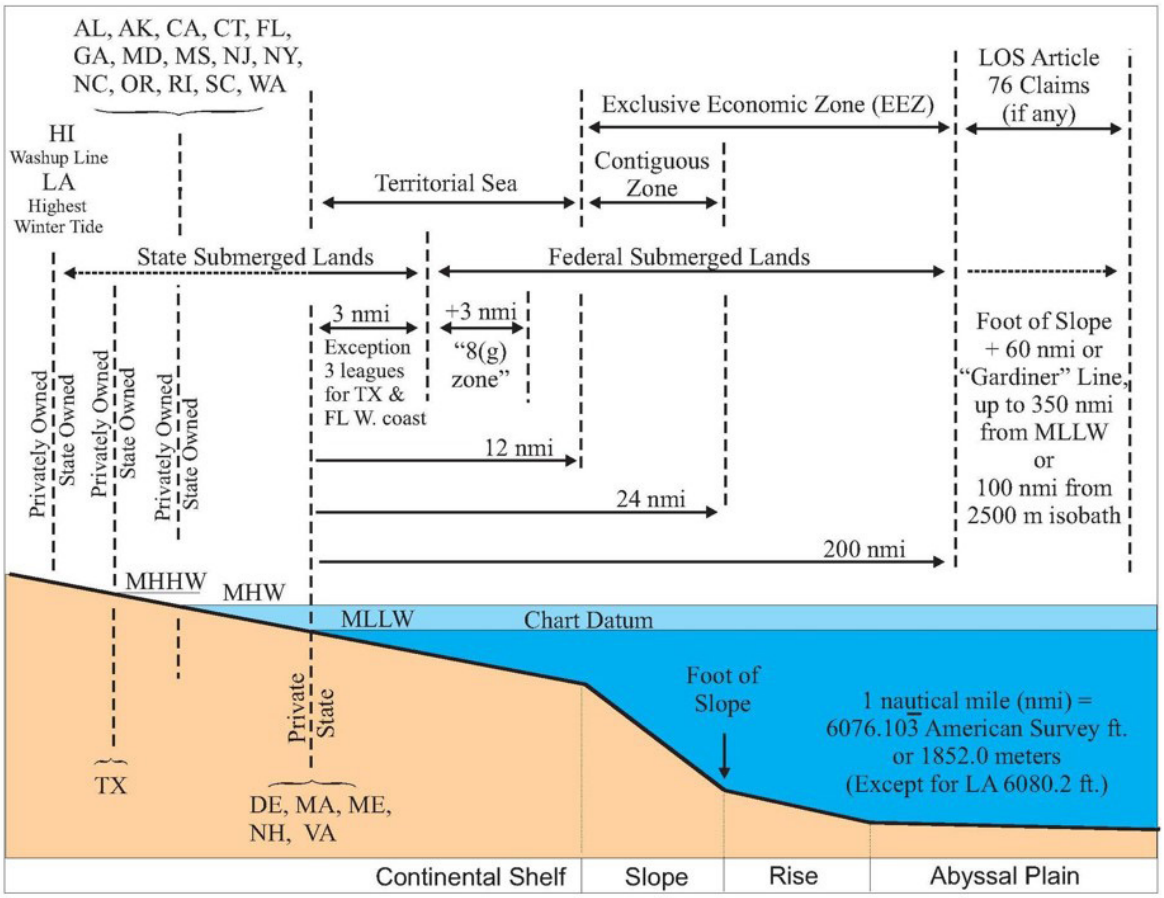


Image 2: Diagram showing limits of US state and federal ownership of the seabed. Note that state ownership varies across the United States, as it does from country to country. Abbreviations: LOS, Law of the Sea. MHHW, mean higher high water. MHW, mean high water. MLLW, mean lower low water. NMI, nautical miles. Credit: U.S. Minerals Management Service. Source: In the Public Domain, see https://www.wikiwand.com/en/Offshore_oil_and_gas_in_the_United_States

limit, which received its fatal blow on September 28, 1945. Less than a month after the Japanese surrender, the Truman administration issued two proclamations. The first, pushed by the oil industry,[14] announced that the United States "regards the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States, subject to [its] jurisdiction and control."[15] The second asserted American intent to establish "conservation zones in those areas of the high seas contiguous to the coasts of the United States wherein fishing activities have been or in the future may be developed."[16]

The Truman proclamations opened the door to a host of other claims—some more expansive both geographically and with respect to resources—over coastal waters, especially

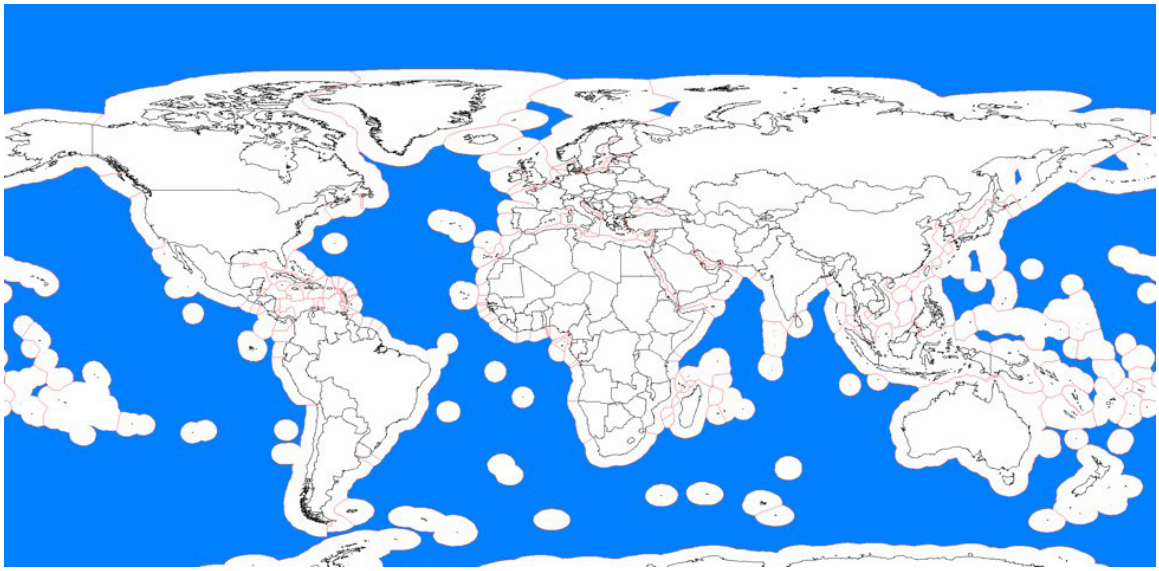

Image 3: World map showing exclusive economic zones (EEZs), out to 200 miles, bounded in red. Areas beyond national jurisdiction—high seas waters beyond the limits of EEZs—are rendered in blue. Note especially the contiguity of EEZs in the Caribbean, Pacific, and Southeast Asia. Source: Created by Kvasir at English Wikipedia; Source: Used under licensed provisions provided at https://commons.wikimedia.org/wiki/File:Internationalwaters.png.

by Latin American countries. Chile, Peru, and Ecuador, which have virtually no continental shelf to exploit, all claimed territorial waters out to 200 miles. Ultimately, the UN Convention on the Law of the Sea (1982) gave maritime states jurisdiction over four distinct marine spaces: inland waters; territorial seas out to 12 miles; a contiguous zone out to 24 miles; and an exclusive economic zone (EEZ), in which coastal states have "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living" out to 200 miles.[17] Beyond that lie the high seas.

Identifying 40 percent of the world ocean as being within the jurisdiction of one nation or another suggests a victory for the advocates of *mare clausum*, the closed sea, but it also gives us a new way of looking at the world and relations between countries. Many island nations, especially in the Pacific and Indian Oceans, have jurisdiction over sea areas many times larger than their landmasses. And the jurisdiction of many countries whose land territories are separated by water now abut one another, especially around the Mediterranean and Caribbean and in the Pacific.

With respect to where people can sail under the right of innocent passage—that is, on a voyage that is "not prejudicial to the peace, good order or security of the coastal State"—most of the ocean, including a good part of the territorial sea, remains a *mare liberum*.[18] In terms of the fisheries, however, the high seas areas beyond national jurisdiction (ABNJ) are crying out for more rather than less control. Both regulated and illegal, unregulated,

and unreported (IUU) fishing have put at severe risk a food source upon which hundreds of millions, if not billions, of people worldwide depend.

From the perspective of equity and free trade, the current regime has greater respect for the rights of poorer, less powerful countries. Yet the overall framework derives from a paradigm established in Roman law that marginalizes indigenous concepts of marine tenure, which has been defined as "any system of informal, relatively closed, communal, shared, joint, collective or even private property in fishing."[19] Roman law distinguished different categories of property, or *res*. As we've seen, the sea was considered common property, or *res communis*. In addition, there is property owned by the state and open to the public (*res publica*), private property (*res privata*), and things that can be appropriated but that have not been (*res nullius*, or nobody's thing).[20] This classification has been passed down remarkably intact over the centuries, although which category is assigned to which body of water can differ. To take one example, Roman law treats the intertidal zone between the high tide and low tide marks as public property, while today, some people hold that the intertidal zone belongs to the owners of the adjacent upland property, and others—various indigenous people in particular—consider the intertidal zone as part of a continuum from land to sea.[21]

While Roman law sees a clear distinction between land and water, coastal zones have long been areas of contestation between colonial powers and indigenous people. When it comes to delineating sea space, Western legal systems normally give the state priority over indigenous claims, which can encompass territorial, economic, and spiritual considerations. As Kingsley Palmer has written regarding debates over Aboriginal sea space in Australia, "In the absence of any diverse or comprehensive and capital-intensive fishing industry or other complex process of marine exploitation, the European mind did not easily comprehend the Aboriginal utilization of the sea, its economic importance and territorial component in Aboriginal culture."[22] As a result, in Australia, beaches are considered Crown Land, theoretically open to all, and while Aborigine groups have claimed a right to coastal waters abutting Aboriginal land out to two kilometers, the fishing industry has stifled their claim.[23]

Other indigenous people have faced similar opposition, and the experience of Native American tribes working within the American legal system is instructive. The United States expanded at the expense of Native Americans, whose land they appropriated. Because Native American tribes are legally sovereign nations, this was achieved by treaty rather than legislation. But even as tribes were coerced into ceding their territory, the operative treaties often included provisions that allowed them to retain hunting, fishing, and gathering rights, starting with the Big Tree Treaty of 1787 between the United States and the Seneca Nation.[24] Sixteen federally recognized tribes retain these rights in the Great Lakes, Upper Mississippi, and Ohio River basins. While state courts have often opposed Native American claims, federal courts are more disposed to honor the treaties.

Image 4: Joseph Lycett, *Aboriginal Australians Spearing Fish and Diving for Shellfish, New South Wales*, ca. 1817, Source: National Library of Australia, which has determined the image is out of copyright. See https://nla.gov.au/nla.obj-138500727/view.

The expansion of native rights to fisheries has been most visible on the West Coast, where the intersection of tribal rights, states' rights, and environmental issues has been thrown into high relief, and where issues of identity, access, boundaries, and the environment explicitly overlap. The two areas of greatest dissension have been salmon fishing and, more recently, subsistence whaling. In 1854–56, the United States concluded seven treaties with various tribes and bands in what are now the states of Washington and Oregon. The Stevens Treaties, as they are known, reserved for the tribes and bands "the right of taking fish at all usual and accustomed places . . . and of erecting temporary buildings for curing them."[25] As white settlers acquired title to land abutting these "accustomed places," they attempted to block access to the rivers, but the tribes challenged these restrictions early on, and between 1905 and 1977 litigated no fewer than seven cases before the U.S. Supreme Court.[26]

As well as noting that the tribes had reserved the rights to fish—as distinct from their being recipients of rights granted by the United States—and to cross private land to do so, Justice Joseph McKenna observed, in 1905, that these rights "were not much less necessary to the existence of the Indians than the atmosphere they breathed."[27] Over time, the federal

Image 5: "The King of the Seas in the Hands of the Makahs," 1910. Once a whale was landed, the long and difficult task of cutting up and dividing the valuable resource began. Photo by Asahel Curtis (1874–1941). Originally published in *Artwork of Seattle and Western Washington: Edition de luxe of Photogravures* (Racine: W. D. Harney Photogravure Publisher, 1910). Source: In the Public Domain, available at https://www.donsmaps.com/canoesnwc.html.

courts clarified the rights reserved to tribes under the Stevens Treaties. Broadly, they held that conservation measures had to account for the share of fish available to the tribes at their accustomed places. In particular, this meant ensuring the availability of fish above the mainstem dams on the Columbia and other rivers.[28] In United States v. Washington (1974), District Judge George Boldt enjoined the state to take its treaty obligations under consideration when negotiating the "time, places and manner of harvest" of offshore salmon with its Canadian partners in the bilateral Pacific Salmon Fisheries Commission.[29]

While all the Stevens Treaties addressed the right to fish, the treaty with the Makahs also included the right "of whaling or sealing at usual and accustomed grounds and stations."[30] This was an ancient hunt that antedated the arrival of Europeans in the Pacific Northwest. Although the Makahs, who live in the northwest corner of Washington's Olympic Peninsula, claimed a spiritual affinity with whales and seals, they also hunted them for both subsistence and commercial reasons. By the 1850s, they were trading tens of thousands

of gallons of whale oil per year, which settlers used for everything from illumination to lubrication.[31] Again, though, the Makah conception of sea space was alien to that held by the American negotiators. For the Americans and British, the Strait of Juan de Fuca was a border between their respective claims in the Oregon Territory and Vancouver Island. For the Makahs, the strait was both a thoroughfare and an extension of their terrestrial homeland. Certain high-ranking Makahs held proprietary rights to parts of the strait as to "names, songs, dances, games, stories, rituals, and privileges to practice particular occupations, such as whaling,"[32] a notion that flew in the face of American and European understandings of property and territory. Like the Makahs, Australian Aborigines in the Northern Territories "generally regard estuaries, bays and waters immediately adjacent to the shoreline as being part of their land."[33] And, as is true of the Makahs, these assumptions combine spiritual and proprietary interests. Other examples abound, even in Western societies, from the three-mile limit and exclusive economic zones to marine conservation areas. The difference is that these exceptions are generally viewed as pragmatic, governmental prerogatives rather than as cultural, tribal customs.

## "Thou, too, sail on, O ship of . . ."

One of the world's oldest thought experiments involves the ship of Theseus, legendary founder of Athens. After he returned from slaying the Minotaur on the island of Crete, the Athenians are said to have preserved his ship for centuries: "At intervals they removed the old timbers and replaced them with sound ones, so that the ship became a classic illustration for the philosophers . . . some of them arguing that it remained the same, and others that it became a different vessel."[34] While this remains an interesting topic of discussion for philosophers and ship preservationists, the legal identity of ships can be equally confounding.

People have anthropomorphized ships since before the time of Homer, who described the *Argo* as already well known by his time, 2,800 years ago. The practice of naming vessels is almost universal and, to complete the picture, in many cultures, sailors also adorned the bows of their vessels with painted or carved eyes, or figureheads, so that the ship could avoid danger. With the rise of the bureaucratic state came the assignment of registration numbers, ports of registry (painted on the stern), and nationality, shown by the flag they fly.

In English-speaking countries, ships have long been given the feminine pronoun, even when the ship's given name is that of a man.[35] The law also recognizes the life cycle of ships, during which they have "legal personality." As U.S. Supreme Court Justice Henry Billings Brown wrote in 1902:

> A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching, she is a mere congeries of wood and iron—an ordinary piece of personal property, as distinctly a land structure as a house. . . . In the baptism of launching, she

> receives her name, and from the moment her keel touches the water, she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. . . . She is capable, too, of committing a tort [wrongful act], and is responsible in damages therefor.[36]

There are practical reasons for granting ships legal personality. If a Peruvian sailor is injured on a ship owned by German interests but sailing in the Indian Ocean, rather than being put to the expense of suing the owner—or, more likely, owners—half a world away, the sailor can sue the ship.

National flags have long afforded ships the protection of the flag country, and they have likewise been used to advance mercantilist policies. In 1651, the English Parliament enacted the first of many Navigation Acts, according to which goods could be imported into England and its colonies only in ships belonging to and crewed mostly by "People of this Commonwealth."[37] The only exception was for ships carrying the trade of their own country. So, a French ship could carry French wine to England or New England, but it could not carry New England fish or lumber to old England. Later still, Parliament required that this trade could only be carried out in ships built in England. This led to the first ship registry to determine where a vessel was built and owned to ensure that it was in conformity with the Navigation Acts. Other countries, including the United States, enacted similar

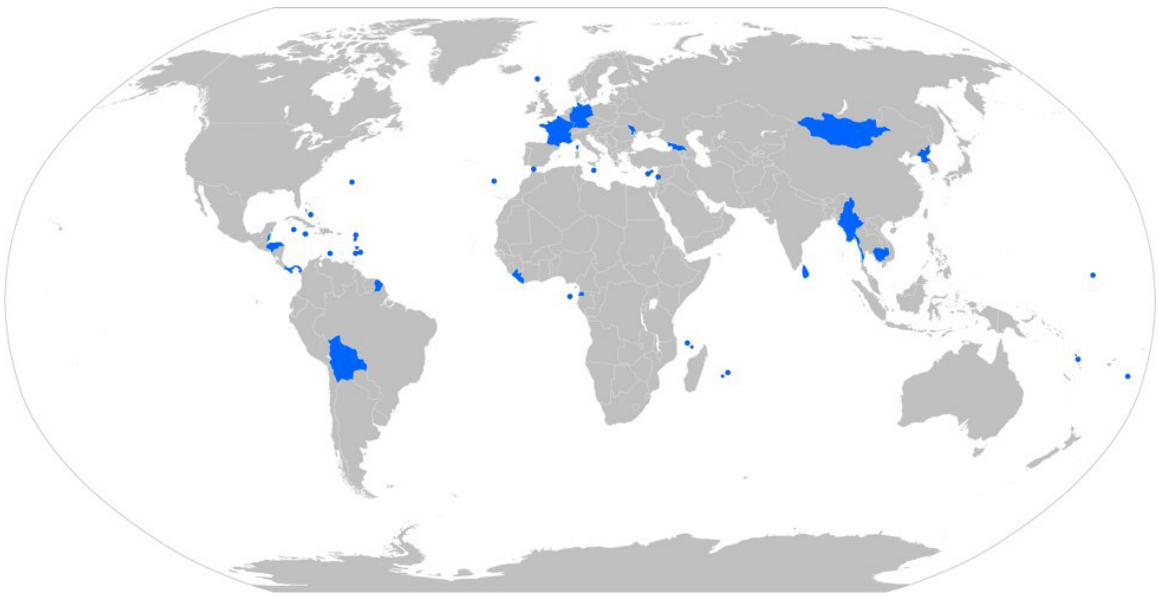

Image 6: Flags of convenience countries and territories (marked in blue), according to the International Transport Workers' Federation. Note especially the landlocked flag states of Bolivia, Moldova, and Mongolia. Source: Created by Kvasir at English Wikipedia; licensed under the provisions at https://commons.wikimedia.org/wiki/File:Internationalwaters.png.

legislation. Since the advent of steam engines in the nineteenth century, the intent of registration has focused more on ships' technical details for reasons of safety. But authorities' interests in such matters varies from country to country, a fact that shippers have eagerly exploited.

Shipowners have reflagged ships to allow them to circumvent their own countries' trade restrictions, to give them immunity from capture during wartime, or, in the modern era, to take advantage of lax rules concerning crew pay, inspections, and environmental regulations. In the sixteenth century, the only foreign vessels allowed in Ottoman ports on the Black Sea were French, and to get around this many foreigners obtained permission to fly the French flag. During the American Civil War, Confederate raiders captured or sank so many United States-flagged ships that insurance rates climbed tenfold, and American shippers transferred more than a thousand ships to foreign (neutral) registry. By this time, Britain had repealed the Navigation Acts, and most of these vessels went under the British flag. The United States shipping industry remained staunchly mercantilist in orientation, however, and after the war, the American Congress refused to allow these U.S.-built but foreign-flag ships to be repatriated.[38]

By the twentieth century, international law allowed any country (including landlocked states) to grant nationality to ships. Faced with a shipping glut after World War I, Americans began registering ships under the Panamanian flag to avoid onerous safety regulations, taxes, labor laws, and, after the start of World War II, neutrality laws. The beneficial owners were usually Americans, but the crews of these flag-of-convenience (FOC) ships were generally foreigners who were paid far less than American unions would allow. Following World War II, Americans led by the oil industry proposed the creation of a Liberian ship registry, which soon became the world's largest. Labor unions and traditional shipowning nations continue to oppose FOC registries on the grounds that ships should be subject to the "legal restraints of the nations of the owners, of the crews, or of the ports at which they [call]."[39]

While the legal regime behind FOCs—also called open and international registries—is for the most part opaque and esoteric, disasters quickly bring the associated problems into public view. The first major instance of this happened in 1967, when the supertanker *Torrey Canyon* split in two on the coast of Cornwall, spilling 123,000 tons of oil that spread across 120 miles of the English coast and 55 miles of Brittany, France. Assigning liability for the disaster was complicated by the fact that the Liberian-flagged, Italian-crewed ship had been chartered to British Petroleum by a Liberian subsidiary of an American company, while the plaintiffs hailed from Great Britain and France.

It is also worth noting that ships can retain their unique identity even in the afterlife. Many sunken warships—even those lost centuries ago—have the status of war graves and are protected under the principle of sovereign immunity. Ships of archaeological or cultural significance are also protected by international law and, in the case of the *Titanic*, among others, bilateral agreements.

## What Shall We Do with the Drunken Sailor?

For much of recorded history and in most cultures, sailors have been treated with disdain at best, and contempt at worst. While today virtually everyone on the planet is dependent to some degree on maritime commerce for necessities, in antiquity, sea trade was widely condemned for introducing unaffordable and corrupting luxuries and alien ideas. In some instances, the criticisms of merchant sailors were oblique. The fifth-century BCE *Analects of Confucius* was critical of trade in general, holding that "The gentleman is conversant with righteousness; the small man is conversant with profit." A Chinese minister of the second century BCE was more to the point, complaining (with wild inaccuracy) of merchants who "travel all around within the sea without the hardships of hunger or cold."[40]

Such ideas are not confined to what are traditionally viewed as land empires. Although the Athenian victories over the Persians at Artemisium and Salamis remain touchstones of naval strategic thought 2,500 years after the fact, the playwright Aeschylus wanted to be remembered not for his participation in those engagements, but only for his role in the land battle of Marathon. In the following century, Plato argued that death was preferable to adopting the ways of sailors, and Aristotle maintained that although cities could benefit from having a navy, there was no need for sailors to become citizens.[41] Even when Constantinople was one of the greatest ports in the world, in ninth- and tenth-century lists of Byzantine imperial precedence, admirals of the imperial fleet never ranked in the top twenty, and those of subsidiary fleets ranked near the bottom.[42]

There are exceptions to this pattern, and while naval officers were not getting their due, Byzantine merchant sailors were benefiting from a move away from sailing for fixed pay (or in the case of slaves, no pay) to sailing for a share of the profits, as we know from the *Rhodian Sea Law*.[43] In Muslim law of the same period, sailors could receive a share of the profits, provided the contract was for a term of less than two months. The usual practice was to pay sailors a fixed wage in advance, although there were exceptions, especially in wartime.[44] As the commercial revolution progressed and shipowners became richer, they increasingly hired sailors for fixed wages, as is the usual practice today.

Governments frequently raised naval crews through coercion, and again the cultural disdain for shipping out is apparent. In the seventh century CE/first century AH, Uthman, the third caliph, is said to have ordered that Muslims could not be made to fight at sea. (In time, Muslims dominated the long-distance trade of the southern Mediterranean and Indian Ocean.) In North Africa, villages, cities, and provinces were expected to provide seamen and pay for their upkeep. Elders or officials guaranteed that their sailors would "fulfill their expedition as sailors, without turning aside," or going absent without leave.[45] On occasion, prospective draftees were jailed to ensure their availability during the fighting season. Alternatively, villagers could pay someone from another area to represent them (a similar provision was available to Venetians), a practice that may have resulted in a more

professionally manned navy. Not surprisingly, throughout the Christian and Muslim Mediterranean, mercenaries and foreigners made up a large proportion of the fleet.

The flourishing of maritime trade in the medieval Mediterranean world depended on overcoming the intense antipathy between Christians and Muslims, bitter rivalries between co-religionists, and religious proscriptions on lending money at interest to people of the same faith. The last problem was solved, over the course of centuries, by the development of contracts called *qirad*s in Arabic and *commendae* in Latin. That *commendae* likely evolved from *qirad*s can be seen in the fact that Jewish merchants called them "partnerships according to Muslim law."[46]

To ensure the safety of foreigners, large ports often had special sections set aside for people from different regions. In Muslim ports, these were presided over by a "representative of the merchants" who acted as a banker, forwarded correspondence, and maintained a warehouse (*fonduk*) for his clients.[47] To encourage trade, non-Muslims were issued safe passage certificates called *aman*s, which guaranteed freedom of worship, testamentary rights, the right to provision and repair ships, abolition of the right of wreck (the sovereign's right to any goods lost in a shipwreck), extraterritoriality, and permission to address the head of the Muslim community. *Aman*s were valid even during periods of warfare between Christian and Muslim states. Trade between the Byzantine Empire and the caliphate was so important that by the late tenth century there was a mosque at Constantinople. In the next century, the Byzantine capital was also home to separate quarters for Venetian, Genoese, and Pisan merchants.[48]

Comparable situations were found elsewhere, from the *kontors* established by members of the Hanseatic League across northern Europe to Muslim enclaves on the west coast of India and in the port of Quanzhou, China, where, according to a thirteenth-century account, "There are two types of foreigners. One is white and the other black," which probably referred to Arab and South or Southeast Asians, respectively.[49] At the Musi River port of Palembang on Sumatra, houses built on rafts along the riverbank were the domain of two distinct groups: people who could not afford to buy land, and Chinese and Arab traders, who were prohibited from owning property ashore.[50] In the early seventeenth century, the Dutch East India Company administered a dual colonial settlement at Batavia (Djakarta, Indonesia), one Dutch, the other Chinese.[51] In the same period, Japanese overseas merchants had established "Japan-towns" in the Philippines, Vietnam, Thailand, Myanmar, Sumatra, and Java.

Under the Tokugawa shogunate, Japanese isolation intensified, and in the 1630s, the government instituted a policy of *sakoku*, or closed country. This limited contact with the outside world to four ports: Tsushima, for trade with Korea; Satsuma, for trade with the island kingdom of Ryukyu; Matsumae, in southwest Hokkaido, for relations with the Ainu; and Nagasaki, for merchants from China, Taiwan, and Dutch Batavia. Japanese restrictions on contact with foreigners later grew so stringent that shipwrecked foreigners could be

imprisoned, as Russians and Americans were, and so could Japanese castaways repatriated after fetching up on a foreign shore.

An appreciation of the varied forms of discrimination that different societies have shown maritime communities makes it easier to understand the legal regime that shaped sailors' identities—and peoples' perceptions of them—beginning in the early modern period. We have seen how the English Navigation Act of 1651 limited the number of foreigners allowed in a ship's crew, to guarantee employment for English sailors and ensure that in times of war—which was most of the next 165 years—there was a ready supply of experienced seamen to man the fleet. The fisheries were likewise viewed as "a continual Nursery for breeding and increasing our Mariners," as Sir Walter Raleigh put it.[52]

Prior to the war for independence, "our Mariners" included British North Americans. Legally, citizenship was defined in one of several ways: birthright, state, or choice (with or without the state's confirmation). In Britain, nationality was for the most part legally indefeasible—not able to be lost, annulled, or overturned—until 1870. As English jurist William Blackstone wrote, "it is a principle of universal law, that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former."[53] The American Revolution brought many changes, among the most important of which was how people viewed citizenship. Formerly, it had depended on outward appearance. At sea, experienced mariners could often tell the nationality of a ship by looking at the way it was built. Meeting the crew made it even more obvious, for most generally spoke the same language. Only the Dutch had heterogeneous crews, though foreigners seldom made up more than half.[54]

American independence upended normal assumptions about the relationship between sovereignty and culture and birth, and the allegiance of the shipowner and that of the crew. Because Americans and British looked, dressed, and sounded alike, judging people based on outward appearances was no longer adequate. People had to start accounting for political inclinations. This only became an issue at the start of the French Revolutionary and Napoleonic Wars, during which the Royal Navy had an almost insatiable need for sailors. At home and on the water, merchant sailors were routinely pressed into naval service from merchant ships.[55] While Britain recognized the right of Americans born in the colonies to be considered Americans, they regarded naturalized Americans as British. Between 1793 and 1815, ships of the Royal Navy impressed more than 6,000 men, and perhaps as many as 10,000, out of U.S.-flag merchant and navy ships.[56]

In an attempt to afford some protection to American sailors, Congress authorized customs collectors to issue certificates of citizenship to sailors who could provide "proof of his citizenship" as well as an affidavit from a witness who could swear either that he was born in one of the British colonies before 1783 or had become naturalized after that year.[57] These offered scant protection from press gangs, for it was difficult to distinguish American and British sailors, and even Thomas Jefferson estimated that 10 to 15 percent of the

20,000 people employed as sailors and fishermen in 1791 were foreign born.[58] Moreover, Royal Navy officers desperate for crews did not scruple to offend their erstwhile subjects, who had virtually no ability to refuse them. With the end of the Napoleonic Wars and War of 1812, Britain's need for sailors shriveled, and Americans could once again sail without fear of impressment.

Black sailors navigated a murkier world than did their white British and American counterparts. While the British held that free and enslaved blacks of African descent in British North America and the West Indies were British subjects (and thus eligible for impressment), the United States had a more complex relationship with blacks.[59] States could grant citizenship to blacks at their discretion but, as the Supreme Court made explicit with the Dred Scott Decision, this did not confer citizenship in the United States. Black Americans had "no rights which the white man was bound to respect."[60] By 1857, when Dred Scott was decided, this had been the unwritten law of the land for decades. Many free blacks in northern states were in maritime trades, and southern whites feared their presence aboard ship in southern ports, where they were apt to spread pernicious ideas about freedom to enslaved southern blacks. Following the Denmark Vesey slave revolt, in 1822 South Carolina passed An Act for the Better Regulation and Government of Free Negroes and Persons of Colour. Under this law, any black crew member in a ship landing at a South Carolina port was "liable to be seized and confined in gaol"—at the captain's expense—until the ship was ready to sail. Failure to pay could result in fines and imprisonment for the captain and any abandoned "free negroes or persons of colour [would] be deemed and taken as absolute slaves, and sold."[61]

Apart from its essential immorality, the law caused problems both internationally and domestically. Many British ships calling in South Carolina hailed from the West Indies and were manned by mostly—and in some cases exclusively—black sailors.[62] Similarly, free blacks made up a sizeable proportion of the crews of ships from northern ports, as much as 20 to 25 percent on ships from places like Philadelphia, New York, and Boston.[63] The act remained a topic of Congressional debate for more than two decades, but attempts to repeal it proved fruitless, and over the next forty years seven other states enacted similar legislation.[64]

While the British attitude towards sailors of African descent was relatively better than that of white Americans, such comparative benevolence did not extend to seamen of South Asian origin, known as lascars. Although Europeans began trading to India in the sixteenth century, lascars did not appear in ships bound for Europe in significant numbers until the late 1700s. Under a Danish law of 1780, the Ostindisk Kompagni (Danish East India Company) was held responsible for repatriating lascars, and this approach proved the model for the British, who made caring for stranded lascars the responsibility of the owners of the ships they had sailed in. Faced with a growing population of improvident

Image 7: Marine Photo Service photograph of three lascar crew aboard the Peninsular and Oriental Steam Navigation Company's RMS *Viceroy of India* standing behind the wheel of one of the ship's tenders sometime between in the 1930s. The use of the term "lascar" for sailors of South Asian origin declined along with the British Empire in the 1950s. Source: In the Public Domain at https://en.wikipedia.org/wiki/Lascar#/media/File:Three_Lascars_on_the_Viceroy_of_India.jpg.

lascars, an act of 1802 intended to ban lascars from sailing west of the Cape of Good Hope, but with the Royal Navy desperate for sailors, this was routinely ignored. Twelve years later, Parliament made the East India Company ultimately responsible for the welfare of all lascars in England.[65]

Demobilization following the Napoleonic Wars led to widespread unemployment among British seamen, and the consequent adoption of welfare schemes intended to ameliorate their condition. Mere philanthropy was inadequate to their needs, especially the sick and infirm. "Their great failing and principal occasion of all their misfortunes," according to a charitable hospital established for their care, "is an almost total absence of foresight and consideration for the morrow."[66] In 1821, a hospital ship was set up on the Thames, and in time it was emblazoned with a sign reading "Seamen's Hospital Supported by Voluntary Contributions For Seamen of All Nations."[67] The majority were British, but there were substantial numbers of mariners of all races from elsewhere in Europe, Asia, the Pacific islands, and the Americas.

The language of the Seamen's Hospital Society was clearly echoed in that of American Supreme Court Justice Joseph Story, who regarded sailors as "emphatically the wards of the admiralty," as he wrote in 1823. "Every court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily overmatched."[68] In other words, as a later writer put it, the law regarded the sailor as "improvident and incapable of protecting his rights."[69] Though it has eroded somewhat over the course of two centuries, the protection of the court endures, and it extends to sailors of other nationalities. In 2014, a U.S. District Court refused to recognize and enforce a Philippine arbitrator's award of $1,870 to a Filipino sailor who suffered burns over 35 percent of his body while working on a German-owned, Marshall Islands-flagged ship docked in an American port because "recognition or enforcement of the award would be contrary to the public policy" of the United States.[70] The court found that the tribunal failed to account for "claims for maintenance and cure, negligence, and unseaworthiness under United States general maritime law."[71]

Today, maritime labor worldwide is governed by domestic laws as well as the International Labour Organization (ILO)'s Maritime Labour Convention of 2006. These set minimum standards for employment contracts, work and living conditions, medical care, pay, and repatriation. The ILO's Work in Fishing Convention of 2007 provides similar safeguards for the estimated 38 million people who work in the "capture fisheries" worldwide. Many of these are migrants who are especially to vulnerable human traffickers and forced labor.

## Maritime Legal History: A Preliminary Verdict

The significance of law in the study of maritime history is unambiguous. This fact becomes clearer when you consider that the foregoing review barely touches on some of the more obvious topics like the slave trade, mass migration, and human trafficking by sea, privateering and privacy, or the law merchant (*lex mercatoria*) and its antecedents, to say nothing of specific instruments like the Safety of Life at Sea (SOLAS) and Maritime Pollution (MARPOL) conventions. Nor does it include some of the most contentious issues facing the world community today: nationalist claims to vast stretches of sea space, particularly in the Indo-Pacific region; the impact of sea level rise, especially but by no means exclusively on low-lying island nations; and the assertions of sovereignty and control over sea lanes and pelagic and subsea resources in the Arctic Ocean as ice coverage retreats due to climate change.

While maritime subjects do not lend themselves to every curriculum, the more important point for teachers and students is that every law, treaty, convention, bull, and opinion referred to here has an elaborate, nuanced, and above all human backstory. Far from being the product of obscure politicians and unseen lobbyists, the overwhelming majority of

legal instruments are crafted in response to explicit needs, some beneficial to the general good, some less so, and many with unforeseen and often unimaginable consequences. An appreciation of the genesis and ramifications of laws can only enrich the study of world history.

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## NOTES

1 Hugo Grotius, *The Freedom of the Sea, or the Right which Belongs to the Dutch to Take Part in the East Indian Trade*, translated by Ralph Van Deman Magoffin (New York: Oxford University Press, 1916).

2 John Selden, *Of the Dominion, or, Ownership of the Sea* (London: 1652).

3 Grotius, *The Freedom of the Sea*, 7.

4 Pope Alexander VI, Demarcation Bull Granting Spain Possession of Lands Discovered by Columbus, Rome, May 4, 1493, accessed July 29, 2021, https://www.gilderlehrman.org/collection/glc04093.

5 National Ocean Service, "What is the law of the sea?" accessed July 29, 2021, https://oceanservice.noaa.gov/facts/lawofsea.html.

6 Johnson and Graham's Lessee v. William M'Intosh, 543–605; 567, accessed July 29, 2021https://www.law.cornell.edu/supremecourt/text/21/543.

7 Johnson v. M'Intosh, 587.

8 In Sayre Archie Swarztrauber, *The Three-Mile Limit of Territorial Seas* (Annapolis: Naval Institute Press, 1972), 10.

9 In Lincoln Paine, *The Sea and Civilization: A Maritime History of the World* (New York: Alfred A. Knopf, 2013).

10 Swarztrauber, *The Three-Mile Limit*, 11.

11 Percy Thomas Fenn, Jr., *The Origin of the Right of Fishery in Territorial Waters* (Cambridge: Harvard University Press, 1926), 68.

12 "An Act in addition to the Act for the punishment of certain crimes against the United States," in Swarztrauber, *The Three-Mile Limit*, 58–59.

13 Swarztrauber, *The Three-Mile Limit*, 76.

14 The first offshore oil well was drilled in 1947 in the Gulf of Mexico. In 2019, there were about 12,000 rigs, including abandoned ones, worldwide; 2,140 of them were active. Saloni Sardana, "The number of active oil rigs around the world plunges almost 30% in April as demand dries up," *Insider*, May 1, 2020; https://markets.businessinsider.com/news/commodities/oil-rigs-in-use-drops-almost-30-percent-low-demand-2020-5 and Isabelle Gerretsen, "The new use for abandoned oil rigs," *BBC Future*, accessed August 1, 2021, https://www.bbc.com/future/article/20210126-the-richest-human-made-marine-habitats-in-the-world/.

15 Harry S. Truman, Proclamation 2667—Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf (Online by Gerhard Peters and John T. Woolley, The American Presidency Project, accessed July 31, 2021, https://www.presidency.ucsb.edu/node/231308.

16 Harry S. Truman, Proclamation 2668—Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas (Online by Gerhard Peters and John T. Woolley, The American Presidency Project, accessed August 1, 2021, https://www.presidency.ucsb.edu/node/230904).

17 UNCLOS, Article 56(1)(a), in Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (New York: Cambridge University Press, 2019), 153.

18 UNCLOS, Article 19(1), in Tanaka, *The International Law of the Sea*, 106.

19 John Cordell, "Introduction: Sea Tenure," in *A Sea of Small Boats*, ed. John Cordell, 1–32 (Cambridge: Cultural Survival, 1982), 5.

20 Percy Thomas Fenn, Jr., "Justinian and the Freedom of the Sea," *American Journal of International Law* 19, no. 4 (1925): 716–27.

21 See, for example, Orlando Delogu, *Maine's Beaches are Public Property* (Standish: Tower Publishing, 2017).

22 K. Palmer, "Status of Documentary Information on Aboriginal and Islander Fishing and Marine Hunting in Northern Australia", in S. E. Jackson, "'The Water is Not Empty': Cross-Cultural Issues in Conceptualising Sea Space," *Australian Geographer* 26, no. 1 (1995): 87–96; 89.

23 Natalie Wolfe, "Beach access rights: Is anyone allowed to actually own the beach?" news.com.au, accessed July 31, 2021, https://www.news.com.au/travel/travel-updates/travel-stories/beach-access-rights-is-anyone-allowed-to-actually-own-the-beach/news-story/5f5378a43851170893dedc7eee8150c3.

24 Angela Kappen, Timothy Allison, and Bruce Verhaaren, *Treaty Rights and Subsistence Fishing in the U.S. Waters of the Great Lakes, Upper Mississippi River, and Ohio River Basins* (Chicago: U.S. Army Corps of Engineers, 2012), 12.

25 Treaty with the Yakama, 1855, §3, for example.

26 Vincent Mulier, "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties: The History of Fishing Rights Litigation in the Pacific Northwest," *American Indian Law Review* 31, no. 1 (2006): 41–92; 42.

27 United States v. Winans, 198 U.S. 371 (1905).

28 Mulier, "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties," 54.

29 United States v. Washington (*Phase I*), 384 F. Supp. At 343 (W.D. Wash. 1974), in Mulier, "Recognizing the Full Scope of the Right to Take Fish under the Stevens Treaties," 66.

30 Treaty of Neah Bay, 1855, §2. Joshua L. Reid, *The Sea is My Country: The Maritime World of the Makahs* (New Haven: Yale University Press, 2015), 137.

31 Reid, *The Sea is My Country*, 129, 167.

32 Reid, 139; see also 37.

33 S. E. Jackson, "The Water is not Empty: Cross-Cultural Issues in Conceptualising Sea Space," *The Australian Geographer* 26, no. 1 (1995): 87–96.

34 Plutarch, *The Rise and Fall of Athens*, trans. by Ian Scott-Kilvert (Harmondsworth: Penguin, 1960), 29.

35 The practice of referring to ships as "she" in English has begun to change. In 2002, *Lloyd's List*, a leading maritime journal that began publication in 1734, announced that it would no longer refer to ships in the feminine. Different languages assign different genders to the word for ship: *le bateau* (masculine) in French, *das Schiff* (neuter) in German, *navis* (feminine) in Latin.

36 Justice Henry Billings Brown in U.S. Supreme Court, Tucker v. Alexandroff, 183 U.S. 424 (1902), accessed August 5, https://supreme.justia.com/cases/federal/us/183/424/.

37 "October 1651: An Act for increase of Shipping, and Encouragement of the Navigation of this Nation," in *Acts and Ordinances of the Interregnum, 1642–1660*, ed. C. H. Firth and R. S. Rait (London: His Majesty's Stationery Office, 1911), 559–62. British History Online, accessed October 22, 2021, http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp559-562.

38 Andrew Gibson and Arthur Donovan, *The Abandoned Ocean: A History of United States Maritime Policy* (Charleston: University of South Carolina Press, 2000), 73.

39 Rodney Carlisle, *Sovereignty for Sale: The Origins and Evolution of the Panamanian and Liberian Flags of Convenience* (Annapolis: Naval Institute, 1981), 152.

40 In Paine, *The Sea and Civilization*, 172.

41 Paine, 105.

42 Paine, 215.

43 Richard P. Jackson, "From Profit-Sailing to Wage-Sailing: Mediterranean Owner-Captains and their Crews during the Medieval Commercial Revolution" *Journal of European Economic History* 18, no. 3 (1989): 605–28; 606.

44 Khalilieh, *Admiralty and Maritime Law in the Mediterranean Sea*, 60–61.

45 Aly Mohamed Fahmy, *Muslim Naval Organisation in the Eastern Mediterranean from the Seventh to the Tenth Century A.D.*, 2nd ed. (Cairo: National Publication & Printing House, 1966),102–3.

46 S. D. Goitein and Mordechai A. Friedman, *India Traders of the Middle Ages: Documents from the Cairo Geniza, "India Book"* (Leiden: Brill, 2008), 12.

47 S. D. Goitein, *A Mediterranean Society: The Jewish Communities of the Arab World as Portrayed in the Documents of the Cairo Geniza*. 6 vols. (Berkeley: University of California Press, 1999), 1:186–92; and Olivia Remie Constable, *Trade and Traders in Muslim Spain: The Commercial Realignment of the Iberian Peninsula, 900–1500* (Cambridge: Cambridge University Press, 1994), 119–21.

48 Paine, *Sea and Civilization*, 344; John Wansbrough, "The Safe-Conduct in Muslim Chancery Practice," *Bulletin of the School of Oriental and African Studies* 34, no. 1 (1971): 20–35; and Hassan Khalilieh, *Islamic Maritime Law: An Introduction* (Leiden: Brill, 1998), 125.

49 In John Chaffee, "Diasporic Identities in the Historical Development of the Maritime Muslim Communities of Song-Yuan China," *Journal of the Economic and Social History of the Orient* 49, no. 4 (2006): 395–420; 406.

50 Lincoln Paine, "River Cultures in World History—Rescuing a Neglected Resource," *Fudan Journal of the Humanities and Social Sciences* 12, no. 3 (2019): 457–72; 464.

51 Leonard Blussé and Nie Dening, *The Chinese Annals of Batavia, the* Kai Ba Lida Shiji *and Other Stories (1610–1795)* (Leiden: Brill, 2018).

52 Walter Raleigh, "Observations Touching Trade and Commerce," in *The Works of Sir Walter Ralegh, Kt.* 2 vols. (London: 1751), 2.131.

53 William Blackstone, *Commentaries on the Laws of England* (Oxford: 1765), 1.358, accessed July 31, 2021, https://archive.org/details/lawsofenglandc01blacuoft/page/358/mode/2up.

54 Nathan Perl-Rosenthal, *Citizen Sailor: Becoming American in the Age of Revolution* (Cambridge: Belknap Press, 2015), 30–37.

55 Denver Brunsman, "Subjects vs. Citizens: Impressment and Identity in the Anglo-American Atlantic," *Journal of the Early Republic* 30, no. 4 (2010): 557–86; 572.

56 Leon Fink, *Sweatshops at Sea: Merchant Seamen in the World's First Globalized Industry, from 1812 to the Present* (Chapel Hill: University of North Carolina Press, 2011), 12.

57 Perl-Rosenthal, *Citizen Sailor*, 174–90.

58 Fink, *Sweatshops at Sea*, 11.

59 Norma Myers, *Reconstructing the Black Past: Blacks in Britain, c. 1780–1830* (London: Frank Cass, 1996), 108.

60 In Lisa Crooms-Robinson, "The United States Constitution and the Struggle for African American Citizenship: An Overview," *The Oxford Handbook of African American Citizenship, 1865–Present*, edited by Lawrence D. Bobo, Lisa Crooms-Robinson, Linda Darling-Hammond, et al., 519–22. (New York: Oxford University Press, 2012).

61 An Act for the Better Regulation and Government of Free Negroes and Persons of Colour, 1822. South Carolina—Regular Session: §3. This is also known as the Negro (or Colored) Seamen's Act.

62 "The Colored Seamen's Acts: A Case Study." In *American Constitutionalism*, Vol. 1 *Structures of Government*, ed. by Howard Gillman, Mark A. Graber, and Keith E. Whittington, 1–13 (New York: Oxford University Press, 2013), 2,

63 Fink, *Sweatshops at Sea*, 51.

64 Michael A. Schoeppner, "Peculiar Quarantines: The Seamen Acts and Regulatory Authority in the Antebellum South," *Law and History Review* 31, no. 3 (2013): 559–86; 559.

65 Conrad Hepworth Dixon, "Seamen and the Law: An Examination of the Impact of Legislation on the British Merchant Seaman's Lot, 1588–1918" (PhD thesis, University College London, 1981), 52.

66 Minute Book of the Seamen's Hospital Society, 1821, in Dixon, "Seamen and the Law," 60.

67 Dixon, "Seamen and the Law," 61.

68 Harden v. Gordon et al. 111 F. Cas. 480, 485, 2 Mason 541, 556, 2000 AMC 893, 903 (Circuit Court, District Maine. Oct. Term, 1823). (No. 6,047).

69 Martin J. Norris, "The Seaman as Ward of the Admiralty," *Michigan Law Review* 52, no. 4 (1954): 479.

70 Asignacion v. Rickmers Genoa Schiffahrts (E.D. La. Feb. 2014), 7.

71 Asignacion v. Rickmers Genoa Schiffahrts, 18.