It’s Just Water: Toward the Normalization of Admiralty

Ernest A. Young*

I

INTRODUCTION

Admiralty is special—everyone knows this. The cases are named after ships; admiralty practitioners are “proctors,” not mere lawyers; until 1966 admiralty proceedings operated under different procedural rules; and federal judges sitting in their admiralty jurisdiction are wont to display a silver oar on the bench. Most important for present purposes, admiralty has long been viewed as a unique enclave in which federal judges exercise plenary common lawmaking authority. As Preble Stolz noted forty years ago, there is “a general aura of magic that surrounds admiralty.”

The special lawmaking role of the federal admiralty courts has long had its critics. Justice Holmes argued that this authority derived from a “brooding omnipresence in the sky;” David Currie characterized the Supreme Court’s efforts to draw the line between state and federal authority as “the Devil’s Own Mess;” and Martin Redish called for abolishing maritime federal common law a quarter of a century ago. Lately, the assault seems to have intensified. The Court has been increasingly willing to depart from the rule of Southern Pacific Co. v. Jensen, which held that the federal common law of admiralty generally

*Judge Benjamin H. Powell Professor of Law, the University of Texas at Austin. J.D., Harvard University; B.A., Dartmouth College. This essay is based on remarks at a panel discussion held by the Maritime Law Section of the Association of American Law Schools Annual Meeting on January 5, 2004. I am extremely grateful to my co-panelists, Judge William Fletcher, Jonathan Gutoff, and Louise Weinberg for their participation and comments, to David Robertson for comments on the manuscript, to Amanda Tyler for research assistance, and to Allegra Young for keeping my ship afloat.

displaces state law; Justice Stevens, in particular, has called *Jensen* a vestige of the *Lochner* era and urged the Court to overrule it. And commentators—myself included—have echoed that call, insisting that federal common lawmaking in admiralty cases should be sharply curtailed or even eliminated.

While it is hard to find a staunch defender of federal maritime law on the Court, there is no dearth of them in the academy. Two of them participated in the panel discussion from which this essay derives: my colleague Louise Weinberg, who is perhaps the most ardent fan of federal common lawmaking writing today, and Jonathan Gutoff, who has sought both to refute some key revisionist historical claims about maritime jurisdiction and to articulate an alternative, firmer grounding for that jurisdiction in congressional delegation. After a brief recapitulation of the argument against judge-made federal maritime law in Part II of this essay, Parts III and IV respond to Professors Weinberg and Gutoff. While I disagree fairly fundamentally with each, it seems appropriate to acknowledge at the outset how important their work (and friendship) has been to the development of my own thinking about these problems.

The last part of the essay seeks, very briefly, to expand the discussion of federal common law in admiralty to encompass a much broader set of concerns. One might group these concerns under the loose label of “the globalization of American law.” By that I mean the fact that American legal subjects are becoming less and less autonomous as foreign and international norms begin to exert persuasive—and increasingly, binding—influence upon them. In constitutional law—my primary field of expertise—it is increasingly difficult to discuss the content of individual

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1See *Jensen*, 244 U.S. at 216, 1996 AMC at 2084 (“[N]o such [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”).

2See Am. Dredging Co. v. Miller, 510 U.S. 443, 458, 1994 AMC 913, 924-925 (1994) (Stevens, J., concurring in part and in the judgment). The *American Dredging* Court declined Justice Stevens’s invitation to reconsider *Jensen* on the ground that the question had not been briefed or argued, without reaffirming *Jensen*’s correctness. See id. at 447 n.1 (majority opinion).


rights without reference to international norms; the Supreme Court increasingly looks to other systems for persuasive insights on the nature of rights, for example, and lawyers increasingly argue that international human rights are binding on U.S. courts. Likewise, federal courts law—which arises out of the interplay between state and national legal systems in our federal arrangement—is beginning to recognize the need to account for yet a third tier of legal rules and institutions at the supranational level.10

I think admiralty law can make an important contribution to this developing discussion about globalization. Maritime law, after all, finds its origins in international law, and debates about its relation to the domestic structures of our federalism can cast light on more general issues of the reception of international law in our system. The presently raging debate about the domestic status of customary international law, for example, is almost completely parallel to the maritime law debate about Erie and Jensen. More generally, admiralty presents in microcosm the problem of “foreign affairs exceptionalism”—that is, the difficulty of dividing the world into different spheres of “foreign” and “domestic” affairs and prescribing different constitutional rules for each. The federal admiralty jurisdiction was originally justified primarily by the relation of maritime matters to foreign affairs, and we continue to see efforts to apply different rules to maritime commerce than to land commerce, based at least in part on this international connection. But maritime law also demonstrates the slipperiness of such distinctions and the difficulty of rendering them coherent in an age of globalization.

In the end, I conclude that admiralty’s “special” constitutional status cannot be justified, and that reforming admiralty may point the way toward salutary changes in our foreign affairs jurisprudence. In particular, the same basic constitutional rules about preemption and federal lawmaking that govern ordinary domestic law should govern both these areas. Both admiralty and foreign affairs law need to be “normalized.”

II

JENSEN, ERIE, AND THE REVISIONIST ARGUMENT

In 2000, Jonathan Gutoff began his defense of federal common lawmaking in admiralty with an account of how the Roman Emperor Commodus—perhaps best known as Joaquin Phoenix’s villain in

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10For my own effort in this vein, see Ernest A. Young, Institutional Settlement in Foreign Affairs Law, 54 Duke L.J. ___ (forthcoming Dec. 2004).
Gladiator—would fight only weak and disabled opponents in the arena. Admiralty, Professor Gutoff suggested, is like Commodus’s defenseless victims: Rarely taught in American law schools, even more rarely discussed by non-specialists in the academic community, admiralty law can hardly be expected to stave off rapacious “conservative federal courts scholars” bent on discrediting federal common law generally. “If you want to attack the law-making power of the federal judiciary,” Gutoff asserted, “admiralty is a particularly good place to start; for, few will bother to protest.”

It’s always fun to be compared to a Roman Emperor—even a villainous one—and there is a certain truth to Professor Gutoff’s assertion: federal common lawmaking is a good place to start if one wants to question (or even simply to analyze) the lawmaking powers of the federal courts more generally. But the reason has little to do with admiralty’s weakness; after all, a judicial prerogative with defenders like Professors Gutoff and Weinberg can hardly be said to share the plight of Commodus’s victims. More generally, it is hard to find an area where the judiciary’s common law function is more taken for granted. This was true when the Constitution was drafted, and it remains largely true today. Although the tide may be turning on the Supreme Court, that shift has lagged far behind the Court’s skepticism of federal common lawmaking in other areas, such as cases involving the commercial relations of the United States. At least for now, Jensen remains a worthy opponent.

The reasons to start with admiralty derive rather from the strengths of the field. Those strengths are both conceptual and cultural. Conceptually, federal common lawmaking in admiralty represents the purest post-Erie case of judicial lawmaking powers derived solely from a grant of jurisdiction to decide cases. As I will discuss further, other frequently-cited examples—such as federal common law powers in labor and antitrust cases—involve the extrapolation of at least some substantive policies articulated by Congress in the underlying statutes. It has always been notoriously difficult to draw a bright line between

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1Gutoff, Delegation, supra note 9, at 369.
2See, e.g., The Federalist No. 80, at 478 (Alexander Hamilton) (Clinton Rossiter ed. 1961) (“The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.”).
3The only truly comparable instance involves suits between states, in which the Court recognized federal common lawmaking authority on the same day that Erie came down. See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). But the interstate dispute situation does not raise the question of preemption in nearly the same fashion, since it is hard to say that either of the contending states’ laws should presumptively govern the dispute. See Clark, Federal Common Law, supra note 7, at 1322-31.
judicial law-making, on the one hand, and judicial interpretation of incompletely determinate statutory and constitutional texts on the other. Admiralty, however, affords us the closest thing to a polar position on this continuum. It’s therefore a good place to begin in analyzing the case for judicial lawmaking.

The cultural advantage is easiest to see by comparing the debate about federal common law in admiralty with the debate in foreign affairs and international law circles over the domestic status of customary international law. When Curtis Bradley and Jack Goldsmith suggested that customary international law should not be treated as federal law in American courts, they met with a torrent of hostility from the international law community. Much of this hostility may well be attributable to the importance of customary law for basic human rights claims involving torture, capital punishment, and the like. Questioning the status of customary international law seems to have been taken by many as equivalent to questioning the validity of the underlying human rights themselves. It is thus hardly surprising to see the debate about federal common lawmaking take on much of the nastiness of debates about other “hot button” issues like abortion or race. In admiralty, by contrast, debates about federal common lawmaking generally have been played out in less politically-charged contexts such as wrongful death remedies and marine insurance claims. There is a sense in which the stakes are in fact higher in maritime cases: Reversion to Erie in this context might well have more important practical impact than refusal to recognize

\footnote{Sec, e.g., Peter Westen & Jeffrey S. Lehman, Is There Life for Erie After the Death of Diversity?, 78 Mich. L. Rev. 311, 332 (1980) ("The difference between ‘common law’ and ‘statutory interpretation’ is a difference in emphasis rather than a difference in kind. The more definite and explicit the prevailing legislative policy, the more likely a court will describe its lawmaking as statutory interpretation; the less precise and less explicit the perceived legislative policy, the more likely a court will speak of common law. The distinction, however, is entirely one of degree.")}


\footnote{See, e.g., id. at 336 (claiming that the critique of customary international law’s federal status is “antithetical to our future in an increasingly interdependent world and the demands of countless souls for a measure of human dignity and effective human rights.")}

customary international law as federal in character. Nonetheless, differences of opinion over these sorts of rules are harder to reduce to good-versus-evil terms, thereby leaving more room for clear thought. Playful references to Russell Crowe movies is about as “nasty” as this debate is likely to get.

In that spirit, this essay addresses the defenses of federal common lawmakermaking in admiralty articulated by Professors Gutoff and Weinberg. Part II.A briefly recapitulates the target of those defenses—that is, the revisionist claim that federal common lawmakermaking in admiralty is unconstitutional. Part II.B turns to the historical debate, which focuses on the treatment of admiralty prior to the Court’s 1938 decision in Erie. Part III addresses Professor Gutoff’s claim that Congress delegated common lawmakermaking power to the federal admiralty courts in its 1946 re-enactment of the Judicial Code, and Part IV considers Professor Weinberg’s somewhat broader defense of general federal common lawmakermaking authority.

A. Erie, Jensen, and “The New Federal Common Law”

The Supreme Court said in Erie Railroad Co. v. Tompkins that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.” The core of Erie’s holding was that a mere jurisdictional grant—such as the grant of diversity jurisdiction that brought “common law” cases into the federal courts—does not empower the federal courts to make law on their own. If there is no federal statute or constitutional provision to interpret and apply, then federal courts must apply state law. Erie thus states a principle of judicial federalism: Even in areas where Congress would have the power to legislate, the federal courts have no coextensive lawmakermaking authority; state law will apply unless and until Congress actually takes legislative action.

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18The reason is that it is extremely difficult to find real cases in which customary law has been treated as federal, and most of those are now subsumed under the Torture Victims Protection Act, which federalizes torture cases by statute. See Ernest A. Young, Sorting Out the Debate Over Customary International Law, 42 Va. J. Int’l L. 365, 380-81 (2002) [hereinafter Young, Customary International Law].
19304 U.S. 64, 78 (1938).
20Many commentators—including Professor Gutoff—have sought to downplay this constitutional holding of Erie. Most leading scholars of federal common law have accepted the judicial federalism interpretation, however. See, e.g., Henry Monaghan, Foreword: Constitutional Common Law, 89 Harv. L. Rev. 1, 11-12 (1975) (observing that Erie recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power”); Martha A. Field, Sources of Law: The Scope of
This principle furthers values of both separation of powers and federalism. It insists that Congress must generally be the font of federal law, enacted through the difficult process set forth in Article I of the Constitution; the federal courts, by contrast, lack general lawmaking powers. This separation of powers principle is critical, moreover, as a protection for state autonomy in our federal system. The Court and a wide range of commentators have said that the Constitution relies primarily on “political safeguards” to protect federalism, with the chief safeguard resting in the representation of the States in Congress. It is thus critical that federal law that may trench on state authority actually be made in Congress, where the States are represented, and not on the federal bench. Moreover, the Article I lawmaking process is difficult to navigate, which cuts down on the sheer volume of federal lawmaking. To the extent that proponents of new federal laws cannot overcome the burdens of inertia and multiple consent imposed by Article I, Erie ensures that those hurdles cannot be circumvented by resort to the federal courts. This in turn leaves a wide range of areas free for state legislation even though Congress could, in theory, legislate in those areas.

Admiralty, however, took a different path. In Southern Pacific Co. v. Jensen, the Court struck down New York’s workers’ compensation regime, as applied to maritime workers, on the ground that it interfered with the constitutionally-mandated uniformity of the maritime law. Justice McReynolds’s majority opinion announced that “no such [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmo-

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Federal Common Law, 99 Harv. L. Rev. 881, 924-25 (1986) (Erie means that courts may not “go first” in making federal law). The Supreme Court seems to have read Erie that way, too. See Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) (“T[he existence of congressional authority under Art. I [does not] mean that federal courts are free to develop a common law to govern those areas until Congress acts.”). Professor Weinberg is the principle dissenter on this point, and I address her views in Part IV.


ny and uniformity of that law in its international and interstate relations."25 Where *Erie* would hold two decades later that the previous "general" common law must be treated as *state* law in land cases, *Jensen* instead federalized the general maritime law for cases arising on navigable waters. Some courts and commentators have since read *Jensen* as automatically federalizing the law to be applied in any case within the admiralty jurisdiction, while others thought it to require a complex—and constantly evolving—exercise in line drawing between state and federal authority. At a minimum, however, *Jensen* established (1) that maritime law is federal law and preempts contrary state law, and (2) that federal admiralty courts will ordinarily be free to ignore state law and formulate federal rules of decision. Although *Jensen* remains controversial today, it has become the paradigm case for the supremacy of federal maritime law and the vigorous lawmaking authority of federal admiralty courts.

To be sure, *Erie* itself has not prevented the federal courts from making federal common law in certain areas.26 The Court has said that those areas "fall into essentially two categories: those in which a federal rule of decision is ‘necessary to protect uniquely federal interests,’ and those in which Congress has given the courts the power to develop substantive law."27 The latter category includes both overt delegations—such as Federal Rule of Evidence 501, which provides that questions of privilege in federal question cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience"28—and implicit delegations of authority to fill in "gaps" in federal statutory schemes.29 For ease of exposition, it makes sense to speak of three different sorts of federal common lawmaking; "preemptive" lawmaking (where strong federal

2544 U.S. at 216.
26See Henry J. Friendly, In Praise of *Erie*—And of the New Federal Common Law, 39 N.Y.U. L. Rev. 383, 384 (1964) ("[B]y uprooting the spurious uniformity of Swift v. Tyson and insisting that federal courts defer to the states on matters outside the states' grant of power to the nation, [Erie] cleared the way for the truly uniform federal common law on issues of national concern that has developed so fruitfully and will develop more.").
28Note that the federal Rules of Evidence, unlike the Rules of Civil Procedure, were enacted directly by Congress. See 88 Stat. 1933 (1975). The same rule correspondingly prohibits federal common lawmaking in cases where state law provides the rule of decision; in those cases, federal courts must apply state privilege law as developed in the state courts.
29See, e.g., D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 470 (1942) (Jackson, J., concurring) (noting that without common lawmaking authority to fill in interstitial gaps in statutory schemes, "our federal system would be impotent" because of "the recognized futility of attempting all-complete statutory codes").
interests preclude the application of state law), "delegated" lawmaking (where Congress deliberately confers lawmaking power on the federal courts), and "interstitial" lawmaking (where courts interpreting federal statutes inevitably fill in "gaps" in those laws).

Much federal maritime law is now governed by statute, and to the extent that federal courts are filling in gaps in, say, the Jones Act or the Carriage of Goods by Sea Act, those instances of interstitial common lawmaking are relatively uncontroversial. The more difficult questions arise when federal common law is made apart from these statutory schemes. The most common approach has been to justify judge-made admiralty law as "preemptive" lawmaking, based on the need to protect strong federal interests in maritime commerce or (less commonly) foreign affairs. There are several problems with this rationale, however. First, it's hard to confine these interests to manageable scope. While the Court's test for maritime jurisdiction has generally required a "connection with traditional maritime activity" that emphasizes "potentially disruptive impact[s] on maritime commerce," that test has been applied so loosely as to encompass virtually anything that happens on navigable waters. The result is that admiralty is generally a place, not a subject

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30I borrow the terms "preemptive" and "delegated" lawmaking from Tom Merrill, who seems to follow the Court's Texas Industries opinion in including "interstitial" lawmaking as a form of delegated authority. See generally Merrill, supra note 21, at 32-46. To me, there is a significant difference between, say, Rule 501's general directive to decide federal question privilege issues "in light of reason and experience" and, by contrast, the need to fashion (or borrow) a statute of limitations for a federal statutory cause of action that omits a textual limitations period. See, e.g., DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983). The difference is obviously one of degree, but I believe it is sufficiently large to merit separate consideration.

31See, e.g., Thomas J. Schoenbaum, Admiralty and Maritime Law § 2-1, at 87 (4th ed. 2004) ("[F]ederal legislation is now the dominant source of substantive admiralty law.").

32See, e.g., Robert Force, An Essay on Federal Common Law in Admiralty, 43 St. Louis U. L. J. 1367, 1377 (1999) ("[T]here is no question that conflicting state law must yield . . . . when courts put a judicial 'gloss' on congressional legislation, or fill gaps in federal legislation"). I do not mean to suggest that the particular answers given by courts to these interstitial questions are uncontroversial—just that the courts' power to answer those questions is generally not in doubt.

33Although the maritime commerce argument is advanced more today, the foreign affairs point figured more prominently in the Founding period. See Federalist No. 80, supra note 12, at 478; Young, Customary International Law, supra note 18, at 426-28.


35See Sisson v. Ruby, 497 U.S. 358, 373, 1990 AMC 1801, 1813 (1990) (Scalia, J., concurring in the judgment); David W. Robertson, Admiralty and Maritime Litigation in State Court, 55 La. L. Rev. 685, 690-93 (1995). The breadth of the commerce test will hardly be surprising to anyone familiar with the Supreme Court's jurisprudence construing the scope of the federal commerce power. See, e.g., Wickard v. Filburn, 317 U.S. 111 (1942) (holding that production of wheat for home consumption was sufficiently commercial activity to permit federal regulation). While the Court has held recently that the commerce power does have limits, see United States v. Lopez, 514 U.S. 549 (1995) (holding that possession of a handgun at a school is not "commercial activity"), most commentators seem to agree that this test is
matter. It is difficult to define the federal interests at stake in maritime cases with sufficient precision to serve as a limiting principle on federal common lawmaking authority.

That difficulty leads to the second problem with a preemptive lawmaking approach: The approach to federal common lawmaking evident in most admiralty cases is simply incompatible with the Supreme Court’s treatment of preemptive lawmaking in other areas of important federal interests. Most of the relevant cases have involved the commercial relationships of the U.S. government, which the Court held to be at least potentially subject to federal common law in Clearfield Trust Co. v. United States. As Martha Field has explained, the Clearfield line applies a two-part test for formulation of federal common law:

[F]irst, a court should ask whether the issue before it is properly subject to the exercise of federal power; if it is, the court should go on to determine whether, in light of the competing state and federal interests involved, it is wise as a matter of policy to adopt a federal substantive rule to govern the issue.

The point of the second step is that, even in areas where federal interests are sufficiently strong generally to permit federal common lawmaking, the balance of interests may nonetheless be such as to allow “state law [to] be incorporated as the federal rule of decision.” More recent decisions have emphasized that “a significant conflict between some federal policy or interest and the use of state law . . . is normally a precondition” for federal common law-


Similar problems bedevil any effort to delimit federal common lawmaking authority by tying it to “foreign affairs” concerns. As I discuss further in Part V, virtually anything can be argued to have an impact on foreign affairs in a globalized world. See generally Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617 (1997); Ernest A. Young, Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 Geo. Wash. L. Rev. 139, 177-85 (2001) [hereinafter Young, Dual Federalism].

See, e.g., Gutoff, Delegation, supra note 9, at 377 n.48 (“At least as far as Anglo-American jurisprudence goes, the authority of the admiralty has always been as much about place as about subject matter.”); Thomas C. Galligan, The Admiralty Extension Act at Fifty, 29 J. Mar. L. & Com. 495, 506 (1998) (same).

318 U.S. 363 (1943).

Field, supra note 20, at 886. Professor Field extracted these two steps from Justice Douglas’s opinion in Clearfield itself.

United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979). Kimbell Foods refined the stage two inquiry by requiring that courts weigh the federal interest in uniformity, any specific conflict between the potentially-applicable state rule and federal interests, and any private reliance interests that would be disturbed by application of a federal rule. Id. at 728-29.
making, and the general trend has been to apply state law in a large proportion of the cases. Likewise, although many commentators have assumed that foreign affairs cases automatically warrant federal common law rules, the Court’s actual approach has been considerably more nuanced. In the leading case, Banco Nacional de Cuba v. Sabbatino, the Court developed as federal common law an act of state doctrine only after a careful explication of why federal interests required a federal rule on that particular point.

This flexible and particularistic approach stands in marked contrast to the willingness of many courts and commentators automatically to equate maritime jurisdiction with federal common lawmaking authority. If federal maritime law were a realm of preemptive lawmaking similar to government commercial cases under Clearfield or foreign affairs cases under Sabbatino, one would expect to see Clearfield’s two part test applied before state law is displaced in a maritime case. State law would govern absent a significant conflict between the particular state rule in question and specific federal interests. Indeed, the Court has made clear in the Clearfield context that it will “reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs” at issue. But “generalized pleas for uniformity” dominate the admiralty discourse; once maritime jurisdiction is found, federal common lawmaking tends to follow as night follows the day.

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43 See Young, Customary International Law, supra note 18, at 438-45.
45 Kimbell Foods, 440 U.S. at 730.
46 This has not always been the case. Indeed, one of the frustrations of the maritime jurisprudence is that the Supreme Court has wrestled for decades to find a more nuanced dividing line between federal and state law in maritime cases, even as the lower courts have more frequently applied federal law as a matter of course. Justice Harlan’s opinion in Kossick v. United Fruit Co., 365 U.S. 731, 1961 AMC 833 (1961), for example, applied a nuanced consideration of particular state and federal interests that looked much like his foreign affairs opinion three years later in Sabbatino. See id. at 738-42. But many contemporary lower courts continue to quote the automatic language of East River without a great deal of further thought. See, e.g., Mink ex rel. Ins. Co. of N. Am. v. Genmar Indus., 29 F.3d 1543, 1548, 1995 AMC 36, 43 (11th Cir. 1994) (“It follows logically as part and parcel of the need for uniformity that, once it is determined that the case involves a maritime tort, the case is governed by the substantive admiralty law. Courts have uniformly so held.”); see also State Dept. of Natural Res. v. Kellum, 51 F.3d 1220, 1223, 1995 AMC 2378, 2381 (4th Cir. 1995); Silivanch v. Celebrity Cruises, Inc., 171 F. Supp.2d 241, 252, (S.D.N.Y. 2001); Williamson v. Petroleum Helicopters, Inc., 32 F. Supp.2d 456, 459 1999 AMC 1404, 1406-1407 (S.D. Tex. 1999).
It is not clear why this should be so. There may have been a time when maritime commerce was in fact unique, both in its importance to the nation and in its relation to ticklish matters of foreign diplomacy. But, as Professor Gutoff for one acknowledges,\(^4^7\) that time is surely past. There is no obvious qualitative distinction between maritime commerce and commerce by plane or truck or electronic communication: All have a massive impact on the American economy, and all have the potential to excite international disputes.\(^4^8\) But the federal courts have been willing to leave any federalization of these areas to Congress, with the result that state law continues to play an important role. It is time we “normalized” maritime law to conform to the same pattern.

What about delegated lawmaking? Two different variants of that approach have arisen in disputes about admiralty. The most frequently-heard argument has claimed that such a delegation inheres in Article III’s grant of admiralty jurisdiction itself. A leading treatise states—without qualification or recognition of any controversy about the matter—that “[t]his idea is key in admiralty: that the constitutional grant of jurisdiction empowers admiralty judges to continue the development of the general maritime law.”\(^4^9\) Nothing in the text of Article III supports this claim; the admiralty grant looks just like the diversity grant, which *Erie* held not to entail federal common lawmaking power. This variant of the delegation argument must thus stand or fall based on historical claims about the original understanding of the admiralty grant. I address those claims briefly in Section B, below.

The more interesting variant of the delegation argument—which reflects not the conventional wisdom but rather a thoughtful attempt to rehabilitate federal maritime law in light of recent criticism—relies not on the original grant of jurisdiction in Article III but on much more recent legislation reaffirming federal judicial powers in admiralty cases. This is Professor Gutoff’s primary argument, and he relies on Congress’s re-enactment and codification of federal maritime jurisdiction in the 1948 revision of the judicial code. That revision doesn’t say anything about substantive lawmaking authority either; Gutoff’s claim is that by re-enacting the statutory grant of jurisdiction after a century in which feder-
al courts had interpreted it to confer such authority, Congress necessarily ratified that prior judicial practice. I address this argument in Part III.

**B. Two Historical Debates**

Arguments that present interpretation should be guided by historical understandings of particular constitutional provisions remain at least moderately controversial in the legal academy, so it is important to be clear about who the “originalists” are in this controversy over maritime law. The argument that I have sketched thus far is a functional one, based on contemporaneous concerns about values of federalism and separation of powers. One might also make a hard line textualist argument based on Article I and the Supremacy Clause, to the effect that the only legitimate forms of supreme federal law recognized in the latter are federal statutes that successfully navigate Article I’s gauntlet.\(^9\) Either way, the appeal to history is made by admiralty’s defenders to overcome these presentist claims: We should downplay Erie’s constitutional concerns, and at least bend Article I’s text, because the original understanding of the judicial power in maritime cases—embodied in Article III’s Admiralty Clause—encompassed the power to make federal common law. Readers not inclined to accept originalist arguments should reject this defense of maritime lawmaking out of hand (and skip the remainder of this section).

The particular claim at issue here is that the Framers understood their extension of the federal judicial power to “all Cases of admiralty and maritime jurisdiction”\(^1\) as a grant of substantive lawmaking authority to create a uniform, federal common law of admiralty. Admiralty’s critics have met that claim with two distinct historical rejoinders. First, the grant of maritime jurisdiction is said to have been understood as primarily concerned with “public law” cases involving ships seized as prizes, maritime crimes like smuggling, and vindication of revenue laws touching shipping. As William Casto has insisted, “[t]he Founding Generation’s vision of maritime activities was dominated by privateers, smugglers, and pirates;”\(^2\) on this view, then, that vision can hardly support a broad delegation of lawmaking authority to cover the private law controversies—maritime torts, insurance contracts, and the like—that

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\(^9\)For a parallel argument beginning with the Supremacy Clause, see Young, Customary International Law, supra note 18, at 392-94.

\(^1\)U.S. Const. Art. III, § 2.

dominate modern admiralty litigation. Second, the maritime law applied by courts during the Founding period and throughout the nineteenth century was "general" law, that is, a body of largely customary principles that existed as a form of private international law and that was considered neither state nor federal in nature. For that reason, no one understood admiralty law to be a form of federal common law until Jensen in the early twentieth century; indeed, the whole notion of a uniquely federal common law had been soundly rejected in the course of the bitter late-eighteenth century debate over common law crimes.

It is important to keep these two historical rejoinders separate, because while the former is controversial, the latter is not. Professors Gutoff and Casto have debated the relative significance of public and private maritime litigation during the Founding period at some length. My own read of that debate is that Casto has the better of the argument. Gutoff amply demonstrates that there was substantial private maritime litigation during the relevant period and that the Framers were aware of this litigation. That would refute any argument that the grant of admiralty jurisdiction should be construed, contrary to its text, to exclude private law cases. But that isn't the claim. What Gutoff does not prove, in my view, is that these private law cases were sufficiently important to the Founders that we should construe any delegation of law-making powers in Article III to extend to such cases. In any event, it is unclear why demonstrating that private law cases were important would establish lawmaking power; diversity cases, after all, were also important to the Founders. The Founders may well have been content to provide a federal forum for private law maritime claims as they did for diversity claims, leaving to Congress the authority to enact—under its interstate and international commerce authority—any uniform substantive rules that might later prove necessary. In this vein, the specific inclusion of Article I authority "[t]o define and punish Piracies and Felonies com-

53See Young, Preemption at Sea, supra note 7, at 314-17.
55See Young, Preemption at Sea, supra note 7, at 318-25.
57See Gutoff, Private Law Origins, supra note 9, at 383-86.
58See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 n.6, 1995 AMC 913, 928, n.6 (1995) (suggesting that "the first Congress saw a value in federal admiralty courts beyond fostering uniformity of substantive law, stemming, say, from a concern with local bias similar to the presupposition for diversity jurisdiction").
mitted on the high Seas, and Offences against the Law of Nations” suggests that the Framers’ concern for uniform federal substantive law ran primarily to public law cases.

In any event, nothing in Professor Gutoff’s critique of Professor Casto addresses the second historical argument based on the non-federal status of the maritime law prior to Jensen. Indeed, Gutoff acknowledges that the maritime law applied in the Founding period was “a general law of the sea.” This general maritime law was one of three principal branches making up the eighteenth century law of nations, the other two being the law merchant (the general commercial law) and the law governing the rights and duties of sovereign states. As William Fletcher has explained, “[t]he law merchant, usually described as part of the common law, was the general law governing transactions among merchants in most of the trading nations in the world. The maritime law was an even more comprehensive and eclectic general law than the law merchant.”

In many important areas, the law merchant and the maritime law overlapped: Judge Fletcher’s path breaking study of the law merchant under Swift v. Tyson, for example, concerned the early nineteenth century law of marine insurance. What that study—and others—make clear is that this law was not “federal” in the sense of providing a basis for Supreme Court review of state court decisions applying it, or for purposes of pre-empting state law under the Supremacy Clause. Neither Article III nor the first Judiciary Act can be read as delegating substantive lawmaking powers to the federal courts in maritime cases, because federal admi-

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60See David J. Bederman, Uniformity, Delegation, and the Dormant Admiralty Clause, 28 J. Mar. L. & Com. 1, 2-4 (1997) (acknowledging that there is little evidence of concern for uniformity of maritime law in commercial cases until The Lottawanna in 1874).

61By saying that such law was “non-federal,” I mean that it was not binding on state courts, did not afford a basis for appeal from a state court to the U.S. Supreme Court, and did not preempt contrary state law.

62Gutoff, Delegation, supra note 9, at 392. Accord Schoenbaum, supra note 31, § 2-1, at 85 (stating that Article III “empowers admiralty judges to continue the development of the general maritime law”) (emphasis added).

63See Clark, Federal Common Law, supra note 7, at 1280-81.

64Fletcher, supra note 54, at 1517. See also Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 1-16, at 46 (2d ed. 1975) (“Certainly the early opinions . . . prove that the courts looked on the maritime system they were administering as international in scope, for they are replete with citations to the continental European authorities, not for persuasive analogy but ‘as evidence of the general maritime law.’”).


67See Fletcher, supra note 54, at 1549, 1561.
ty courts did not generally apply federal maritime law. To repeat, nothing in this argument depends on the Gutoff-Casto debate about the relative priority of public and private maritime cases.

Professor Gutoff asserts that “[b]y the middle of the nineteenth century [the general maritime] law came to be regarded as a form of federal law.”68 But the evidence that he marshals establishes only that Congress and the federal and state courts viewed the maritime law as distinct from other forms of law, such as the common law—not that anyone prior to Jensen viewed this law as federal in nature. He cites, for instance, the Great Lakes Act of 1845 as making sense only if “there was ‘a maritime law of the United States’ that existed as a distinct body of rules of decision and over which the federal government had control,”69 but there is no warrant for the italicized language. The Act “makes sense” as identifying a particular, distinct body of law to be applied in cases arising on the lakes, but Gutoff cites no evidence indicating that Congress needed to make that body of law federal in a way that the general maritime law or the law merchant was not. Likewise, Gutoff cites a number of instances where, “in deciding maritime cases, state courts applied not the law of their particular states, but what they understood to be a separate maritime law.”70 But there is no indication that these courts viewed the maritime law as binding federal law, rather than as having the same effect as general law under Swift. In order to support his thesis, Gutoff would have to identify an instance in which the U.S. Supreme Court heard an appeal of a maritime issue from a state court, or where a maritime rule preempted a state law specifically directed to maritime activity. I am aware of no such instance prior to Jensen, and Professor Gutoff identifies none.71

68Gutoff, Delegation, supra note 9, at 393.
69Id. (emphasis added). For the Great Lakes Act, see Act of Feb. 26, 1845, ch. 20, 5 Stat. 726.
70Gutoff, Delegation, supra note 9, at 395.
71Moreover, Professor Gutoff's careful scholarship identifies a number of cases that run contrary to his thesis. In Gabrielson v. Waydell, 31 N.E. 969 (N.Y. 1892), the New York Court of Appeals felt free to disregard the U.S. Supreme Court's prior construction of the general maritime law—something the state court would have lacked power to do had the maritime law been federal in character, but which is quite consistent with the way state courts applied the general law under Swift. See Fletcher, supra note 54, at 1561. And in Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1873), the Supreme Court treated a state wrongful death statute as binding law under the Rules of Decision Act, notwithstanding the maritime nature of the case.

The best case for Professor Gutoff seems to be Belden v. Chase, 150 U.S. 674 (1893), in which the Supreme Court did hear an appeal from a state court on a maritime issue. Gutoff admits that "the questions the Court was considering concerned statutory, rather than judge-made rules of admiralty," Gutoff, Delegation, supra note 9, at 395 n.132 (emphasis added), but suggests that this distinction was unimportant. The distinction between statutory and judge-made law, however, makes all the difference in the world. There are no "general" federal statutes. An issue arising under a federal statute will always create
To be sure, all this changed in Jensen, where the Court essentially federalized the general maritime law by holding that it trumped a state statute that attempted to extend state workers’ compensation law to maritime workers. But if maritime law did not become federal until 1917, we can hardly read the Constitution’s initial grant of maritime jurisdiction—or the 1789 Judiciary Act’s implementation of that grant—as implicit delegations of lawmakers authority from their inception. Admiralty’s defenders must seek such a delegation in a more recent enactment, which is exactly what Professor Gutoff does. I consider that argument in the next section.

III

ADMARITALTY AS DELEGATION: A RESPONSE TO PROFESSOR GUTFLOFF

Congress codified and reorganized the statutory provisions for federal court jurisdiction in the Judiciary Act of 1948. According to Professor Gutoff, “Congress reenacted and expanded the grant of admiralty jurisdiction with the understanding that the federal judiciary had formulated a distinct law of admiralty that preempted applicable state law to the contrary. Congress thus ratified the law-making power of the federal courts in cases within the admiralty jurisdiction.” What Congress reenacted in 1948 was, of course, merely a grant of jurisdiction, without any express substantive component. Gutoff argues, however, that the admiralty grant should be treated much the same as the grant of statutory subject-matter jurisdiction in labor cases under section 301 of the Labor Management Relations Act, which the Court construed as a grant of common lawmaking authority in the Lincoln Mills case. Lincoln Mills thus stands as an important counter-example to Erie’s

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a ground for Supreme Court review of a state court ruling. So Belden hardly proves that late nineteenth century courts viewed judge-made rules of maritime as federal in character. Moreover, Belden is a case where, by Gutoff’s account, “the Court thought that a well-established rule of the general maritime law should yield to state common law in a common law action.” Id. That is hardly indicative that the court viewed maritime law as federal and supreme.

73This part also contains a much more limited response to a similar delegation argument by my colleagues David Robertson and Michael Sturley. See David W. Robertson & Michael F. Sturley, The Admiralty Extension Act Solution, 34 J. Mar. L. & Com. 209, 245-47 (2003). For my discussion of their argument, see the text accompanying notes 116-133, infra.
74Gutoff, Delegation, supra note 9, at 403.
principle that jurisdictional grants ordinarily should not be construed as licenses to make law.

This is a novel and ingenious argument, and it has the salutary effect of focusing a debate about lawmakers making authority back on the institution—Congress—that the Constitution actually vests with authority to make law. On the other hand, its very novelty forfeits one of the most significant advantages that admiralty’s traditionalists have long enjoyed, that is, the fact that Jensen’s account of maritime law has been accepted for most of the last century.78 To my knowledge, no court has ever relied on Professor Gutoff’s theory, and it thus amounts to no less radical a departure from traditional understandings of federal maritime lawmaking authority than the revisionist thesis that Gutoff opposes.

More importantly, I find the delegation account unpersuasive for five distinct reasons. First, it is not clear that Congress constitutionally could delegate such open-ended lawmaking authority to courts. Second, even if such authority could be delegated, I think Professor Gutoff’s is an unpersuasive account of what Congress actually did intend in the 1948 re-enactment of the Judicial Code (or in the Admiralty Extension Act, upon which Gutoff also relies). Third, Lincoln Mills is a particularly weak reed upon which to hang an account of admiralty jurisdiction: Lincoln Mills was itself a highly problematic case, and in any event the differences between labor law and admiralty are more compelling than the similarities. Fourth, Gutoff’s account of how his delegation theory might be implemented reveals that it avoids none of the difficulties long associated with Jensen itself. Finally, Gutoff’s reliance on Congress’s authority creates a circular tension with longstanding arguments that Congress’s own power in admiralty is parasitic on that of the courts.

A. The Nondelegation Doctrine

The first question is whether the Constitution would permit Congress to delegate a general authority to courts to fashion federal common law in maritime cases. Article I vests all legislative powers in Congress, and the Supreme Court has long interpreted that provision to mean “that Congress may not constitutionally delegate its legislative power to another branch of Government.”79 Although the doctrine has most com-

78Jensen, after all, attributed the “delegation” of lawmaking authority to the Framers in the Constitution itself. Professor Gutoff, by contrast, says that Congress itself delegated the necessary lawmaking authority to the courts through its amendment of the Judiciary Act many, many years later.

monly been invoked with respect to congressional delegations of power to executive agencies, the Court has said that "it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial branch." The delegation doctrine requires that, when conferring power on executive or judicial institutions, "Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'"

The 1948 Judicial Code obviously contains no "intelligible principle" to guide federal courts in the development of substantive maritime law. It says nothing about substantive law at all. Professor Gutoff says that the LMRA construed in Lincoln Mills provided just as little guidance, but that claim overlooks the Court's construction of the LMRA as having "adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate." This was a substantive policy articulated by Congress, and in fact the LMRA's grant of common lawmaking authority has generally been construed as limited to rules enforcing this commitment to arbitration of labor disputes. This sort of limited commitment to judicial development of a policy articulated by Congress is exactly what would be missing from any general delegation of authority to make law in admiralty cases.

Professor Gutoff also suggests that the intelligible principle requirement is "easily met where Congress delegates in a limited area with reference to a pre-existing body of law." This argument derives some support from the Court's famous delegation decision in Scheckter Poultry, which suggested that the codes of "unfair competition" that Congress authorized the President to promulgate under the National Industrial Recovery Act could have been upheld if "unfair competition" were understood to be confined to its pre-existing common law meaning. But giving more bounded content to a single open-ended term in a statute by reference to pre-existing law is quite different from telling the federal

\[\text{\textsuperscript{80}}\] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

\[\text{\textsuperscript{81}}\] American Trucking, 531 U.S. at 472 (quoting J.W. Hampton, 276 U.S. at 409) (emphasis in original).

\[\text{\textsuperscript{82}}\] See Gutoff, Delegation, supra note 5, at 389.

\[\text{\textsuperscript{83}}\] Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 455 (1957). Moreover, we should not forget that no one actually made a nondelegation argument in Lincoln Mills.


\[\text{\textsuperscript{85}}\] See Gutoff, Delegation, supra note 9, at 389.

courts to "Go forth and make federal maritime law in accord with the general law of the sea." The general maritime law is simply too open-ended to provide the necessary limit to judicial discretion. Similar concerns led James Madison emphatically to reject arguments that Article III should be read to delegate authority to the federal courts to develop a federal common law of crimes:

[I]t is . . . distressing to reflect that it ever should have been made a question, whether the Constitution, on the whole face of which is seen so much labor to enumerate and define the several objects of Federal power, could intend to introduce in the lump, in an indirect manner, and by a forced construction of a few phrases, the vast and multifarious jurisdiction involved in the common law—a law filling so many ample volumes; a law overspreading the entire field of legislation; and a law that would sap the foundation of the Constitution as a system of limited and specified powers.

Moreover, federal common lawmaking in admiralty cases is no longer confined even to the multifarious subjects once covered by the general maritime law. Now, admiralty law often purports to govern whatever happens on navigable waters. A judge-made federal maritime law finding its intelligible principle in the pre-1948 general maritime law would necessarily be considerably more limited than what we observe today.

Professor Gutoff ultimately discounts these sorts of concerns on the very practical ground that the Supreme Court has not struck down a statute on nondelegation grounds since 1935. Justice Scalia, for one, has observed that "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts." Nonetheless, the Court has repeatedly treated delegation as a live concern, and the invalidation of the line-item veto in *Clinton v. New York* may be best con-
strued as an application of the non-delegation doctrine.\textsuperscript{94} Many scholars have observed, moreover, that the Court’s retreat from enforcing the non-delegation doctrine has been made possible by a corresponding expansion in the scope of judicial review (most often under the Administrative Procedure Act) of the exercise of delegated power by executive agencies.\textsuperscript{95} Such delegations are also made more palatable by the agencies’ accountability to the electorate through the President and to Congress through various oversight mechanisms.\textsuperscript{96} None of these mechanisms operates to constrain the exercise of delegated authority by courts, however, and judicial review hardly constitutes an independent check in those circumstances. It is thus unsurprising that we rarely see broad delegations of lawmaker authority to courts or judicial decisions upholding such delegations as valid.\textsuperscript{97}

At the end of the day, Professor Gutoff may be right to suggest that faith in judicial willingness to apply the nondelegation doctrine “straight up” is quixotic. That doctrine seems likely to remain an “under-enforced” constitutional norm for the foreseeable future.\textsuperscript{98} But under-enforcement is different from irrelevance. We should be reluctant to construe the 1948 Judiciary Act to attempt a delegation that would likely be unconstitutional, even if we are confident no court would actually strike it down. Indeed, courts seem likely to view Gutoff’s interpretation of the 1948 Act with considerable skepticism for precisely this reason; as Cass Sunstein has observed, non-delegation is “alive and

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\textsuperscript{94}The majority opinion purported to rely on the plain language of Article I, Section 7 which prescribes the ordinary procedure for legislation without mentioning any line-item power. Id. at 448. The dissenters insist, however, that Congress had simply delegated to the President the authority to cancel spending; hence, “it is [the nondelegation] doctrine, and not the Presentment Clause, that is the issue presented by the statute before us.” Id. at 465 (Scalia, J., concurring in part and dissenting in part). The majority responded to this argument by citing Field v. Clark, 143 U.S. 649 (1892)—a delegation case—and concluding that, unlike the statute upheld in Field, the Line Item Veto Act placed insufficient constraints on the President’s discretion. See Clinton, 524 U.S. at 442-47 (majority opinion). That point—the crux of the case in light of the Government’s defense of the statute—is simply an application of the nondelegation doctrine.


\textsuperscript{96}See, e.g., Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2255-60 (2001) (discussing mechanisms of congressional control); id. at 2331-39 (discussing accountability through the President).

\textsuperscript{97}In addition to the LMRA, Professor Gutoff cites the Sherman Act as an example of a broad delegation of lawmaker authority to Congress. The Sherman Act doesn’t say that, however: It prescribes a substantive rule barring contracts in restraint of trade. See 15 U.S.C. § 1.

well” in the guise of canons of statutory construction.\textsuperscript{99} The non-delegation concerns that I have just discussed thus lead naturally into the statutory construction arguments in the next subsection.

\section*{B. Statutory Construction of the 1948 Judiciary Act and the Admiralty Extension Act}

Is it plausible to construe the 1948 Judiciary Act as delegating general common lawmaking powers to federal admiralty courts? Even assuming that Congress could constitutionally effect such a delegation, there are several good reasons for rejecting this interpretation as a matter of statutory construction. The first stems from the constitutional concerns discussed in the preceding subsection. As Lisa Bressman has observed, “[t]he Court has used clear-statement rules and the canon of avoidance as surrogates for the nondelegation doctrine.”\textsuperscript{100} The Supreme Court has thus required that broad delegations to administrative agencies appear clearly on the face of the relevant statute, and has read delegations of ambiguous scope narrowly in order to avoid the constitutional problems that might otherwise arise.\textsuperscript{101} This imperative ought to be even stronger when a statute is claimed to delegate broad authority to the courts themselves; in those circumstances, after all, the courts face a classic fox/henhouse problem in construing the limits of their own power.

Obviously the 1948 Act contains no such clear statement. Indeed, there would be strong reasons to doubt Professor Gutoff’s reading even in the absence of presumptions or thumbs on the scale. Although Congress could hardly have been unaware of the general way in which the federal courts had been handling admiralty cases, I have found nothing in the legislative history that acknowledges, much less purports to endorse, federal common lawmaking in maritime cases.\textsuperscript{102} William Barron’s account of the 1948 revision did mention that “[t]he rule-making power of the Supreme Court which it possesses in civil and criminal matters has been extended to proceedings in admiralty by section

\textsuperscript{99}Sunstein, supra note 98, at 315.


\textsuperscript{102}Accord Gutoff, Delegation, supra note 9, at 404 (acknowledging that “the history of the drafting of 28 U.S.C. § 1333(a) does not indicate any special consciousness of a federal common law of admiralty”).
But this is the worst of all worlds for Gutoff: Congress did mean to extend judicial powers in admiralty, but only with respect to procedural rules and only pursuant to the relatively elaborate procedures for bureaucratic deliberation congressional supervision that govern the rules of civil and criminal procedure. Gutoff cites no subsequent cases interpreting the 1948 revision as delegating substantive lawmaking authority. The one admiralty case that I have found considering the effect of that revision, Madruga v. Superior Court of California, rejected the notion that the revision worked any significant change in the relationship between state and federal courts in admiralty. Although Madruga's holding concerned the Saving to Suitors Clause and does not directly foreclose Gutoff's argument, it does seem significant that even in a case focused on the effect of the 1948 revision, Justice Frankfurter looked to Article III itself as the basis for federal common lawmaking power in admiralty—not to the legislative re-enactment.

Professor Gutoff's argument also suffers from the general weaknesses associated with claims that Congress has ratified or acquiesced in prior judicial interpretations. The claim is that, in re-enacting the grant of statutory admiralty jurisdiction, Congress somehow "ratified" the federal courts' pre-existing interpretation of their lawmaking powers. But because the re-enactment itself says nothing about federal common lawmaking in admiralty, the claim in fact rests on Congressional inaction. Congress's failure to rule out judicial lawmaking—at the same time that it was amending or re-enacting other aspects of the judicial code—is said to be enough to justify the courts' practice. But as John

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104 See 28 U.S.C. §§ 2073 (describing the role of advisory committees and the Judicial Conference), and 2074 (requiring submission to Congress for approval). These rulemaking provisions distinguish sharply between procedural and evidentiary rules, on the one hand, and substantive rules of decision. See 28 U.S.C. § 2072 (providing that the rules prescribed by the Supreme Court "shall not abridge, enlarge or modify any substantive right"). See also Barron, supra note 103, at 444-45 (noting that "[f]ormerly in admiralty, the Court was authorized to prescribe admiralty rules not inconsistent with statute. The new section authorizes rules which will supercede inconsistent statutes but such rules must be reported to Congress as were the federal rules of civil and criminal procedure").
106 See id. at 565-66 (Frankfurter, J., dissenting). The California courts in Madruga had relied primarily on the 1948 revision in holding that they had jurisdiction over the action; Justice Frankfurter's dissent was thus focused on the effect of that revision. Nonetheless, he emphasized that the "substantive law-making powers" of the federal courts in maritime cases was drawn "[f]rom the admiralty clause of the Constitution." Id. at 566. I have already explained why I think the notion that Article III itself delegated any such power is wrong. The important point for present purposes is that no one in Madruga looked to the 1948 revision itself as conferring such power.
107 See Gutoff, Delegation, supra note 9, at 403.
Manning has pointed out, "such an inference is dangerous because Congress may have many reasons for not amending a provision, other than its approval of the way that provision has been construed."\textsuperscript{108} The Court itself has expressed similar doubts:

[O]ur observations on the acquiescence doctrine indicate its limitations as an expression of congressional intent. "It does not follow . . . that Congress' failure to overturn a statutory precedent is reason for this Court to adhere to it. It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the [courts'] statutory interpretation. . . . Congress may legislate, moreover, only through the passage of a bill which is approved by both Houses and signed by the President. See U.S. Const., Art. I, § 7, cl. 2. Congressional inaction cannot amend a duly enacted statute."\textsuperscript{109}

In other words, if Congress wishes to delegate power, it must \textit{act}—not \textit{fail} to act. In any event, Professor Gutoff's specific "ratification" argument is misplaced for a final, simple reason: What was re-enacted in 1948 was the judicial code—the statutory basis for federal jurisdiction in maritime cases. But the courts had \textit{never} interpreted this provision as a grant of lawmaking power; rather, they had drawn this power from the altogether different font in Article III of the Constitution.\textsuperscript{110} The 1948 revision could not have ratified the prior view that Congress delegated lawmaking power in admiralty by statute, because that view is the original contribution of Professor Gutoff to our current debate.

Professor Gutoff does have one argument based on congressional \textit{action}, rather than inaction. 1948 saw not only the revision of the judicial code but also passage of the Extension of Admiralty Jurisdiction Act,\textsuperscript{111} which extended admiralty jurisdiction to cover torts caused by vessels on navigable waters but consummated on land—for example, where sparks from a burning ship set a wharf on fire.\textsuperscript{112} According to Gutoff:

\textsuperscript{108}John F Manning, The Eleventh Amendment and The Reading of Precise Constitutional Texts, 113 Yale L.J. 1663, 1744 n.313.


\textsuperscript{112}See Gilmore & Black, supra note 64, § 7-17 (discussing The Plymouth, 70 U.S. (3 Wall.) 20, 1999 AMC 2403 (1866)).
The legislative history of the Extension Act makes it clear that it was passed to ensure that in situations where a vessel collides with an object on land, a bridge for example, the suit by the bridge owner against the vessel owner to recover for damage consummated on land, would be covered by the same substantive law—the law of admiralty—as would the suit of the vessel owner against the bridge owner to recover for damage consummated on navigable water. The desire to have admiralty law apply to both a vessel and damage the vessel causes on land can make sense only if it is assumed that there is an admiralty law that applies to the vessel and that, if admiralty jurisdiction is extended to the injury on land, it will apply to that injury in place of the state common or statutory law that would otherwise provide the rule of decision.\(^{113}\)

Gutoff thus concludes that, "[w]hile the Extension Act only deals specifically with the law of collision, it is premised on the existence of a body of supreme federal maritime law that the federal courts had articulated."\(^{114}\)

Invoking the Extension Act does little to remedy the house-of-cards character of Professor Gutoff's argument. He does not claim that the Extension Act itself delegates lawmaking authority. Rather, Gutoff says that the Act simply confirms his reading of the 1948 Act re-enactment of the general admiralty jurisdiction statute as ratifying, in turn, not a prior interpretation of the jurisdictional statute but rather of Article III itself. In any event, Gutoff's own discussion makes clear that the key to the Extension Act is Congress's desire to have the same law—whatever that is—cover the suit by the bridge-owner as that by the ship-owner.\(^{115}\) Congress may have assumed that this law would be federal, but the purpose of the Extension Act seems equally well-served if the applicable law in both instances is state law. In any event, the fact that Congress did not undertake in the Extension Act to change or forbid the federal courts' widespread practice of making up their own federal substantive rules is simply not the same as authorizing that practice.

Since the panel discussion on which this essay is based, my colleagues David Robertson and Michael Sturley have advanced a variant of Professor Gutoff's argument, resting squarely on the Extension Act rather than the more general 1948 revision of the Judicial Code.\(^{116}\) Their argument is sophisticated and intricate, and I cannot do it justice here. Instead, I want to make three points. First, saving the general phenomenon of federal common law-

\(^{113}\)Gutoff, Delegation, supra note 9, at 404-05.

\(^{114}\)Id. at 405.

\(^{115}\)Professors Gilmore and Black suggest that the purpose was even more narrowly practical, deriving from some tactical inequities arising from asymmetric application of admiralty's divided damages rule. See Gilmore & Black, supra note 64, at 523-24. See also Robertson & Sturley, 245-47 (making a similar point about Congress's concern to redress particular litigation anomalies).

\(^{116}\)See Robertson & Sturley, supra note 73.
making in admiralty by recourse to the Extension Act is odd, given that that Act was enacted thirty-one years after Jensen federalized admiralty law. Moreover, the Act’s ability to perform this office depends on the breadth of its coverage; in order for it to be a broad warrant for common lawmaking, one would have to accept Robertson’s and Sturley’s further argument that the Act’s jurisdictional coverage should be construed quite broadly.\[^{117}\] Even their proposal, however, extends only to tort cases, and the Act is textually limited to injuries “caused by a vessel.”\[^{118}\] Reading the Extension Act as a delegation of federal lawmaking authority to courts would thus leave a substantial swath of maritime law subject to Erie.

The second point has to do with what I take to be the Robertson and Sturley article’s most interesting contribution—its discussion of the Extension Act’s constitutional basis. As they explain, the Supreme Court had held in The Plymouth\[^{119}\] that admiralty jurisdiction did not extend to damages on land. The Court had also held that the “boundaries [of admiralty jurisdiction . . . cannot be altered by legislation.\[^{120}\] The only way out of this bind was provided by The Thomas Barlum,\[^{121}\] which upheld the constitutionality of the Ship Mortgage Act.\[^{122}\] Although ship mortgages had not traditionally been held to be maritime contracts,\[^{123}\] the Court held that Congress may alter the substantive law of admiralty and, in so doing, bring a previously non-maritime matter into the admiralty jurisdiction.\[^{124}\]

Professors Robertson and Sturley thus conclude that Congress believed that the only way to make the Extension Act constitutional was to modify the substantive law of admiralty, rather than simply expanding federal jurisdiction.\[^{125}\] Their evidence that Congress actually relied on this theory is quite thin: They cite an American Bar Association committee’s reliance on support of a proposal for language identical to that ultimately adopted in the Act, but they are able to cite no statements from Congress adopting this reasoning, and thirteen years passed between the ABA’s proposal and the Act’s enactment.\[^{126}\] It is

\[^{117}\]Id. at 239-41 (proposing that the AEA should be “a stand-alone basis for admiralty jurisdiction”).

\[^{118}\]See id. at 239; 46 U.S.C. app. § 740.

\[^{119}\]70 U.S. (3 Wall.) 20, 1999 AMC 2403 (1866); see also Robertson & Sturley supra note 73 at 249 (noting that the rule “had been reaffirmed many times”).


\[^{121}\]Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 1934 AMC 1417 (1934).


\[^{123}\]See e.g., Bogart v. The John Jay, 58 U.S. (17 How.) 399 (1855).

\[^{124}\]See 293 U.S. at 48, 1934 AMC at 1432. See also Robertson & Sturley supra note 73, at 253-55 (explaining this move and concluding that “[t]he Court’s ultimate message emerges clearly: Congress can indirectly expand admiralty jurisdiction but it must expand the underlying substantive law as part of the process.”).

\[^{125}\]See Robertson & Sturley, supra note 73, at 263.

\[^{126}\]See id. at 261-62.
unclear, moreover, in what sense the Extension Act actually modified the substantive law; after all, the Act simply says that ship-to-shore cases shall be governed by the same law, whatever that is, that governs cases transpiring wholly on navigable waters. Crucially, in my view, the Ship Mortgage Act at issue in *The Thomas Barlow* actually provided explicitly for substantive federal rules of decision, while the Extension Act did not.\textsuperscript{127} That means that whether or not Congress chose to place ship mortgage cases in the admiralty jurisdiction as a statutory matter, jurisdiction over those cases is *constitutional* because they arise under federal statutory law.\textsuperscript{128} That reasoning doesn’t save the Extension Act, which provides no comparably explicit federal substantive rule of decision.

The unspoken kicker to the Robertson and Sturley argument, of course, is that if Congress did *not* authorize federal courts to apply federal maritime law in Extension Act cases, then the Act may be unconstitutional. If Congress cannot expand the scope of Article III’s admiralty grant, and it did not federalize the substantive law in Extension Act cases so that they fall within the “arising under” grant, then at least some Extension Act cases would seem to fall outside Article III. I doubt, however, that denying federal status to judge-made admiralty law need lead to that result. First, the constitutional difficulty would be confined to those cases lacking any other federal element, such as a statutory claim under the Jones Act. Second, there is reason to doubt that a modern court would construe ship-to-shore cases as outside the *constitutional* grant of admiralty jurisdiction; as Robertson and Sturley concede, “most commentators [today] would probably regard the *Plymouth* rule as a construction of the congressional grant of admiralty jurisdiction rather than a constitutional limitation.”\textsuperscript{129} If that is true, then Extension Act cases need not involve a federal question for the jurisdictional provision to be constitutional. Third, Article III does not require that the federal element needed to support constitutional “arising under” jurisdiction be either disputed or significant,\textsuperscript{130} and therefore the Act’s threshold requirement that a vessel have caused the injury, or its choice-of-law directive that the same

\textsuperscript{127}Congress also made clear in the Ship Mortgage Act that it meant for federal law to supersede state law. See 46 U.S.C. § 31307.

\textsuperscript{128}See, e.g., Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (holding that a case falls within the “arising under” jurisdiction in Article III so long as it includes a federal “element,” even one as minimal as the Bank’s capacity under federal law to sue and be sued); see generally Hart & Wechsler, supra note 41, at 832-55.

\textsuperscript{129}Robertson & Sturley, supra note 73, at 250.

\textsuperscript{130}See supra note 128.
law be applied as in navigable waters cases, may be sufficient.\textsuperscript{121} Finally, even in the absence of such an element, the Extension Act might be a case of "protective jurisdiction," providing a federal forum for claims bases wholly on state law.\textsuperscript{122}

Finally, the Robertson and Sturley discussion fails to address the basic weaknesses of Professor Gutoff's argument. They do provide further support for the proposition that Congress assumed that federal maritime law would govern Extension Act cases,\textsuperscript{13} but Congressional assumptions ought to be insufficient here. I have already discussed why we should not lightly construe statutes to grant unbounded lawmaking authority to courts, and that presumption seems especially compelling when we can reject such open-ended constructions without sacrificing the statute's core purpose. Nothing in the Robertson and Sturley article explains why what seems to me the primary purpose of the statute—providing that the same law will govern ship-to-land cases as governs comparable cases transpiring entirely on the water—is not met by applying state law in both situations. And if some element of Congress's purpose can't be met without applying a federal substantive rule, Robertson and Sturley have not explained why Congress should not have to legislate that rule in the ordinary course. At the end of the day, federal common lawmaking in admiralty is simply too big a dog for the narrow tail of the Extension Act to wag.

\textit{C. The Lincoln Mills Case}

Professor Gutoff leans heavily on his analogy between the statutory grant of admiralty jurisdiction and the jurisdictional provision of the Labor Management Relations Act,\textsuperscript{14} construed to encompass law-making

\textsuperscript{121}Compare Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (holding cases brought pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, "arise under" federal law for Article III purposes even where state law governs the claim on the merits, because satisfaction of a federal law exception to immunity is a predicate to every suit whether or not immunity is actually contested).

\textsuperscript{13}On protective jurisdiction, see Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 469-77 (1957) (Frankfurter, J., dissenting); Hart & Wechsler, supra note 41, at 846-49. I am not a big fan of protective jurisdiction, for reasons stated by Justice Frankfurter. But that is a separate debate.

\textsuperscript{14}See Robertson & Sturley, supra note 73, at 243-64 (providing support for this conclusion from the legislative history of the AEA).

\textsuperscript{14}29 U.S.C. § 171 et seq. The jurisdictional provision in \textit{Lincoln Mills} was section 301(a), which provides that:

\begin{itemize}
  \item suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
\end{itemize}
powers in *Lincoln Mills*.135 That case involved a suit by a labor union to compel arbitration of grievances. Justice Douglas’s majority opinion construed the jurisdictional provision as authorizing federal courts to fashion federal common law as needed to enforce collective bargaining agreements. The final sentence of Gutoff’s article insists that “it is *Lincoln Mills* and its progeny that supplies the best guide to the scope of federal admiralty law.”136 I suspect that the flight from Jensen to *Lincoln Mills* will strike many Federal Courts scholars as curious; I, for one, have long regarded *Lincoln Mills* as one of the more dubious opinions that I teach.137 The problem, as Justice Frankfurter pointed out in dissent, is that the legislative history favoring substantive authority was highly contestable and the text of the statute said absolutely nothing that could be construed as delegating lawmaking power.138 The Hart and Wechsler casebook thus describes the delegation argument as “uncertain” and suggests that “federal common lawmaking in *Lincoln Mills* [is] best viewed as rooted in the need to carry out the substantive policies of the federal labor laws rather than as an implication from the jurisdictional grant.”139 On this view, *Lincoln Mills* would be an instance of preemptive lawmaking, and efforts to analogize it to admiralty would turn on identifying the unique federal interests that support federal common law in maritime cases—as opposed to, say, airline or interstate trucking cases.140 In any event, this interpretation of *Lincoln Mills* offers little solace to Gutoff’s delegation argument.

Even if we do read *Lincoln Mills* as a delegation case, that delegation was far too narrow to support an analogy to the general lawmaking power enjoyed by federal admiralty courts. The “substantive” question in *Lincoln Mills* was whether federal courts had the remedial authority to compel arbitration of collective bargaining disputes under the LMRA.141 Subsequent cases have extended federal common law under the LMRA

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136Gutoff, Delegation, supra note 9, at 418.
138353 U.S. 448, 462 (1957).
139Hart & Wechsler, supra note 41, at 742. The casebook puts the quoted language as a question, but this particular text is notorious for rarely making its point in declarative sentences.
140See supra text accompanying notes 30-35; see also Young, Preemption at Sea, supra note 7, at 346-58.
141See Getman, Pogrebin & Gregory, supra note 84, at 193.
to cover not only judicial remedies for enforcement of collective bargaining agreements but also such questions as whether a strike violates a collective bargaining agreement’s obligation to arbitrate. But even as thus extended, the scope of the LMRA’s delegation remains extremely limited; it authorizes judges to create "a body of federal law for the enforcement of collective bargaining agreements." Moreover, this whole body of law is directed toward moving disputes out of the courts and into arbitration; most of the issues in LMRA cases—interpretation of the collective bargaining agreements, resolution of factual disputes, even application of the relevant principles of labor law—are in fact decided not by courts but by arbitrators. The federal common law developed under the LMRA is thus nothing like admiralty law in either its substantive sweep or in the role of the court vis-à-vis other institutions. Admiralty is not only far broader, covering both remedies and substantive obligations, torts and contracts and commercial paper, but it also features the courts as the primary adjudicators.

The only other jurisdictional provision of comparable breadth that has ever been construed to confer lawmaking authority on the federal courts is the diversity grant, during the last days of the Swift regime when the "general" common law applied in federal court had diverged so far from state practice as to be, practically speaking, a body of federal principles. That, of course, ended in *Erie*. To seize upon the outlier construction of the LMRA in *Lincoln Mills* as precedent for converting much broader jurisdictional provisions into delegations of lawmaking authority is to turn the general principle on its head—it is to mistake the exception for the rule.

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143 Id. at 103.
144 See United Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960) (holding that courts will defer to arbitration without looking to the strength of the claim on the merits); Feller, supra note 137, at 299 (observing that the thrust of *Lincoln Mills* and its progeny was to keep courts out of the substance of labor disputes in deference to arbitrators’ rulings on the merits).
145 It is thus hard to credit Professor Gutoff’s assertion that "the common law of admiralty has a limited substantive content." Gutoff, Delegation, supra note 9, at 405. Moreover, it will not do to consider only the scope of subjects that have traditionally been considered uniquely maritime in nature. Because admiralty is more a place than a subject matter for purposes of jurisdiction, and because most of admiralty’s defenders tend to favor automatic application of federal common law to cases within maritime jurisdiction, see id. at 408 (advocating "a simple and comprehensive rule of preemption"), federal admiralty must be viewed (and defended) as encompassing anything that happens on navigable waters.
147 See Field, supra note 20, at 928 ("From the point of view of federal power to make federal common law, the significant holding of *Erie* is that the grant of diversity jurisdiction cannot be the basis for creating any federal common law rule.").
D. Implementation

Professor Gutoff’s account of admiralty is not simply a defense of the status quo, but a call to action. Having grounded federal common law-making in authoritative delegation, Gutoff urges that “the Court should take seriously its law-making powers”148—apparently, in light of his examples, by moving more aggressively to create federal common law. Gutoff seems to expect two benefits from this shift: that the dividing line between state and federal authority will become more clear and predictable, and that the substantive maritime law in at least some areas—such as wrongful death—will become more “generous” or pro-plaintiff.149 I am skeptical about each of these claims; I will also argue that the implementation of Gutoff’s proposal highlights both its significant threat to federalism and its divergence from Congress’s intent. Finally, I will address Gutoff’s claim that the revisionist alternative—applying Erie in admiralty—would be unworkable.

First, clarity: While providing a clear dividing line between federal and state authority in maritime cases would not save a rule that was otherwise unconstitutional, more clarity would certainly be welcome in this area of the law. Indeed, one of the most damning arguments against Jensen is that it has failed to generate a principled and coherent test for maritime pre-emption.150 Professor Gutoff, by contrast, offers “a simple and comprehensive rule of preemption.”151 This would be achieved by “precisely identify[ing] the federal interest Congress sought to protect in delegating law-making powers to the judiciary and enforce[ing] federal rules to protect those interests.”152 But there’s the rub, unfortunately: Because Gutoff relies on a bare jurisdictional grant as delegating lawmaking power, he cannot point to any substantive interests or policies articulated in the delegating statute as guides to subsequent judicial development of common law.153

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148Gutoff, Delegation, supra note 9, at 406.
149See id. at 408.
150See, e.g., Amer. Dredging Co. v. Miller, 510 U.S. 443, 452 (1994) (“It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.”); see generally David W. Robertson, The Applicability of State Law in Maritime Cases after Yamaha Motor Corp. v. Calhoun, 21 Tul. J. Mar. L. 81 (1996) (identifying several different rubrics adopted under Jensen’s auspices and concluding that none of them have produced coherent doctrine); Young, Preemption at Sea, supra note 7, 294–306 (reaching similar conclusions and owing much to Robertson).
151Gutoff, Delegation, supra note 9, at 408.
152Id. at 406.
153Justice Frankfurter highlighted precisely the same difficulty in Lincoln Mills, upon which Professor Gutoff relies so heavily. See Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 465 (1957) (Frankfurter, J., dissenting). But the LMRA included at least some glimmerings of substantive policy; the admiralty jurisdiction statute contains none.
The most likely candidates, based on the purposes historically associated with admiralty, are a desire to protect maritime commerce or relations with foreign countries. But the latter would collapse judicial lawmaking in admiralty into the federal common law of foreign affairs endorsed in Sabbatino—a field of federal common law, moreover, that is much narrower than federal maritime law. And the former value—protection of maritime commerce—seems amply protected by the judge-made doctrine of the “dormant” interstate and foreign commerce clauses. In any event, a general desire to protect foreign relations or maritime commerce is hardly specific enough to guide the courts in determining when to make federal common law, much less what content to give to that law. Gutoff’s proposal is hardly a panacea for the confusion in current law.

It is equally unclear that Professor Gutoff’s proposal will bring about a more “generous” set of substantive rules in admiralty. Gutoff argues that “[w]ere the Court to understand that its power to formulate admi-

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154One might also hypothesize a general commitment to the uniformity of maritime law. But that uniformity has too often been a policy that the courts enforced in the teeth of Congressional resistance—not a policy that originated in Congress itself. See Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920) (striking down as unconstitutional a statutory attempt by Congress to delegate to state governments the authority to depart from the general maritime law by providing workers’ compensation for maritime workers); compare Oil Pollution Act of 1990, 33 U.S.C. § 2718(a) (expressly preserving diverse state laws imposing liability for oil spills), with Matthew P. Harrington, Necessary and Proper, but Still Unconstitutional: The Oil Pollution Act’s Delegation of Admiralty Power to the States, 48 Case W. L. Rev. 1 (1997) (arguing that the OPA is unconstitutional under Knickerbocker). Moreover, the Court has rejected “generalized pleas for uniformity” in its federal common law jurisprudence, United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979), indicating that it is not willing to impute such a generic purpose to Congress.

155Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). I have argued elsewhere that Sabbatino should not be read as a general license to make federal common law in foreign affairs cases. See Young, Customary International Law, supra note 18, at 438-45. I discuss federal common lawmaking in foreign affairs cases further in Part IV.

156For example, Professor Louis Henkin—one of the most vigorous proponents of a broad federal common lawmaking authority in foreign affairs cases—identifies in his treatise only a few questions upon which the federal courts have actually fashioned such rules, and he concludes that “one may expect that . . . [courts] will legislate sparingly.” Louis Henkin, Foreign Affairs and the U.S. Constitution 140 (2d ed. 1996).

157See, e.g., Philadelphia v. New Jersey, 437 U.S. 617 (1978); South-Central Timber Development, Inc. v. Wunnick, 467 U.S. 82 (1984). I note that the modern “Dormant Commerce Clause” operates primarily as an anti-discrimination rule, not by imposing either substantive limits on the types of regulatory policies that states may enact or, more intrusive still, by licensing courts to fashion regulatory policies of their own. This is also the dominant trend of the most effective commerce-protecting trade agreements at the international level. See John O. McGinnis & Mark L. Movsesian, The World Trade Constitution, 114 Harv. L. Rev. 511, 517-18 (2000) (arguing that an “antidiscrimination model” better protects commerce than a “regulatory model”).

158It is also unclear what weight we should give an argument that statutes (or the Constitution) should be interpreted in a particular way simply because such an approach would systematically benefit a particular class of litigants.
rality law is not a constitutionally dubious usurpation, but has its basis in congressional authority, it might formulate a more generous wrongful death scheme.\textsuperscript{159} It seems likely, however, that the primary reason we do not find a “more generous wrongful death scheme” is not the federal courts’ lack of confidence in the legitimacy of their common law-making function, but rather that the federal courts (as presently constituted) are not particularly pro-plaintiff. Further, empowering those courts might take the law in the opposite direction from where Gutoff wishes to go.

Professor Gutoff’s account disparages the legislative process as dominated by “particular interest groups who are organized and well funded,”\textsuperscript{160} and he claims that “[i]n those areas where the Court has exercised its discretion to make law, it has proved much more responsive to currents in the development of law than Congress.”\textsuperscript{161} But a primary reason for the Court’s caution in wrongful death cases has been the presence of several federal statutes in the area, requiring the courts to “legislate” in a way consistent with the extant statutory scheme.\textsuperscript{162} If Gutoff is suggesting that a more secure footing for federal common lawmaking power will (or ought to) embolden courts to discount the importance of related legislation, the irony of his proposal becomes clear: By grounding federal common lawmaking in congressional delegation, Gutoff wishes to empower courts to ignore congressional intent.\textsuperscript{163}

\textsuperscript{159}Gutoff, Delegation, supra note 9, at 409.

\textsuperscript{160}Id. at 413.

\textsuperscript{161}Id. at 412.

\textsuperscript{162}See, e.g., Miles v. Apex Marine Corp., 498 U.S. 19, 33, 1991 AMC 1, 11 (1990) (holding that there is “no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman,” based on inferences from statutory provisions in the FELA and the Jones Act); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 1970 AMC 967 (1970) (taking care to harmonize a federal common law remedy for wrongful death with the Jones Act and the Death on the High Seas Act). Miles was particularly insistent that “[i]n this era, an admiralty court should look primarily to these legislative enactments for policy guidance.” 498 U.S. at 27, 1991 AMC at 6. This sent admiralty buffs through the roof. See, e.g., Robert Force, The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking ‘Uniformity’ and ‘Legislative Intent’ in Maritime Personal Injury Cases, 55 La. L. Rev. 745, 771, 798 (1995) (describing the statement just quoted as “quite extraordinary” and insisting that judges should not yield “their unique, important, and constitutional responsibility in declaring the general maritime law” to considerations of legislative intent); John R. Brown, Admiralty Judges: Flotsam on the Sea of Maritime Law? 24 J. Mar. L. & Com. 249, 249 (1993) (accusing the Court in Miles of having “abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments” and thereby requiring that “admiralty judges should now assume the role of followers rather than leaders”). I suspect that non-admiralty specialists will find these statements by Professor Force and the late Judge Brown more “extraordinary” than the Court’s reasoning in Miles.

\textsuperscript{163}The sheer haughtiness of Judge Brown’s “image of the great maritime judges and their opinions [as] a beacon to judges in other areas of the law,” Brown, supra note 162, at 249, highlights the mismatch between the tradition Professor Gutoff seeks to defend—a tradition of judicial supremacy in the grand style—and his attempt to ground it in a dispensation from Congress.
There is a second irony as well: Professor Gutoff wants to legitimize independent federal common lawmakers so that federal courts can follow the states. He notes that "as currently understood, the federal admiralty law of wrongful death is significantly less generous than that of most states." Gutoff hopes that, by giving confidence to federal admiralty judges, his proposal will embolden them to implement similar reforms as a matter of federal law. But why not just apply the more generous state law and have done? By stifling state law in maritime cases, any variant of Jensen—including Gutoff’s—undermines the same values of federalist experimentation that Gutoff seeks to emulate. Moreover, there is at least some reason to believe that admiralty’s less progressive content is systemic. If, as Gutoff laments, "admiralty has little presence in the nation’s law schools [and] litigation dockets," then it is hard to see comparable energies devoted to its reform as are brought to bear on more mainstream fields. If that is true, then the more unique and isolated admiralty is, the less progressive its content is likely to be.

Not only does Professor Gutoff’s proposal seem unlikely to achieve the benefits he anticipates, but close attention to its nature highlights the tension between his approach and the existing jurisdictional scheme. The analogy to Lincoln Mills is again critical. Gutoff stresses that the "federal common law of admiralty has the same purpose in relation to jurisdiction over admiralty and maritime cases pursuant to 28 U.S.C. § 1333 as the federal common law of collective bargaining has to federal jurisdiction over collective bargaining agreements pursuant to section 301 of the LMRA," and he acknowledges that "Section 301 completely preempts a state law claim" if it turns on subject matter that implicates the underlying federal law. But he seems not to appreciate the significance of the “complete preemption” that the LMRA has been held to

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Gutoff, Delegation, supra note 9, at 409. Professor Force likewise lamented Miles’s creation of a disparity between maritime tort law and the remedies available under state law in comparable cases. See Force, Curse, supra note 162, at 768-70. State-law envy is not an isolated phenomenon, but few admiralty scholars embrace the obvious remedy.


See Stolz, supra note 1, at 661 (“New legal problems are typically solved first, and often finally, by extension of common law doctrines in the state courts. Legislative regulation and any solution at the federal level are exceptional and usually come into play only as a later stage of public response.”). While Professor Stolz’s generalization, penned in 1963, may no longer be true in many areas, Professor Gutoff’s complaints suggest that it is still true in admiralty.

Gutoff, Delegation, supra note 9, at 407 (emphasis added).
entail. In *Avco Corp. v. Aero Lodge No. 735, IAM*, the Supreme Court held that an employer's claim that the union had violated a collective bargaining agreement "necessarily" arose under Section 301, even though the employer had framed its case as a state-law breach of contract action. The case was thus removable to federal court under a "complete preemption" theory; as a later decision explained, "once an area of state law has been completely preempted, any claim purportedly based on that preempted state law is considered, from its inception, a federal claim, and therefore arises under federal law." The Court has never adequately explained why "completely preempted" claims in state court are not simply barred on the merits, rather than removable to federal court. The important point for present purposes, however, is that the "complete preemption" that the Court has found under the LMRA—and that Gutoff seems to say extends to admiralty—is predicated on an ouster of state law claims in a given subject area so complete that no state claim can even be pleaded; rather, any state law claim will be treated as in fact raising solely federal issues.

One problem with both *Avco* itself and also with "complete preemption" in admiralty is that the underlying statutes in each instance have so little substantive content that it is exceptionally difficult to attribute to them the "extraordinary pre-emptive power" that complete preemption requires. But admiralty uniquely raises a different problem in the Saving to Suitors Clause, which originally "sav[ed] to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" and now simply preserves "all other remedies to which [suitors] are otherwise entitled." These "common law" or "other" remedies have always been understood to include state law remedies. But the whole point of "complete preemption" is that it leaves no room whatsoever for state remedies of any kind. It is clear that federal admiralty law has never been understood to do that. The notion of

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161 Caterpillar Inc. v. Williams, 482 U.S. 386, 393 (1987); see also Hart & Wechsler, supra note 41, at 905-07.
162 Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 65 (1987). *Taylor* reaffirmed that the LMRA has such power, but its finding is much more plausible with respect to the Employee Retirement Income Security Act (at issue in *Taylor*) than with the LMRA itself. ERISA, after all, prescribes substantive federal rules of decision governing a vast swath of activity.
163 Judiciary Act of 1789, ch. 20, § 9(a), 1 Stat. 77.
165 My colleague Michael Sturley has described a scenario quite similar in effect to the application of "complete preemption" doctrine in admiralty as requiring a repeal of the Saving Clause, and has suggested that it may be "too extreme for us even to consider." Michael F. Sturley, Was Preble Stolz Right?, 29 J. Mar. L. & Com. 317, 324-25 (1998).
preemption embodied in the LMRA—upon which Gutoff relies so heavily—is thus fundamentally inapposite to maritime law.

Professor Gutoff might respond to all this by contending that the revisionist proposal—basically, to apply Erie in admiralty—has practical problems of its own. I have canvassed general arguments about the cost to maritime uniformity of applying state law in non-statutory maritime cases elsewhere; Gutoff, however, focuses on two narrower sets of cases. The first involves in rem cases and suits implicating the Limitation of Liability Act, in which federal courts have exclusive jurisdiction; the second concerns cases arising on the high seas, in which no state will ordinarily have territorial jurisdiction to apply its law. In both situations, Gutoff worries that there may simply be no state law to apply, so that without the availability of federal maritime law federal courts hearing the cases will be simply, well, at sea.

Take the in rem and Limitation Act cases first. The quick answer is that if the exclusivity of federal jurisdiction in such cases causes problems, Congress can always change it. More importantly, what presently makes federal jurisdiction exclusive in these situations is the rules governing the remedy. To the extent that the substance of the underlying claims in in rem and Limitation Act cases is not unique to those situations—if, for example, most Limitation Act claims involve issues of maritime tort or contract claim that may also arise in non-Limitation Act situations—then the federal courts can apply the law that state courts would apply in these parallel cases. Problems thus arise only if some substantive claims are uniquely likely to arise in situations where federal jurisdiction is exclusive, so that there would be no body of state law available to govern the substance of the claims, or where the federal remedial rules in exclusive jurisdiction cases are non-statutory, as in many in rem situations.

This probably leaves a non-trivial set of cases where federal jurisdiction is exclusive and the federal court must apply principles that state courts have had no opportunity to develop in other contexts. Moreover, a broader problem arises where federal jurisdiction may not be exclusive, but where the governing principles have been understood to be federal for so long that there is no pre-existing body of state law to apply. It is

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175 See Young, Preemption at Sea, supra note 7, at 346-58. Professor Gutoff appears to concede these more general uniformity arguments, acknowledging that "[t]here may be no reason why . . . the states would formulate widely divergent rules of decision. Moreover, the number of cases at stake would not be too great." Gutoff, Delegation, supra note 9, at 414.

176 See id. at 414-15.

177 If they are statutory, as under the Limitation Act, then the federal court obviously would not need to look to state law on those issues.
important to remember that this situation implicates none of the federal-
ism concerns at the heart of *Erie*, because there is no state law to displace
through the application of maritime law. Applying *Erie* to maritime cases
would not, moreover, strip all the prior maritime precedents from the law
books; rather, those holdings would simply lose their status as supreme
federal law. Maritime principles would thus remain available to fill gaps
where state law cannot supply a rule of decision. And although a federal
court would be obliged to apply state choice of law rules to such a case
under the *Klaxon* principle, there is no reason to believe that state con-
flicts rules would foreclose the application of pre-existing maritime prin-
ciples in such situations.

If this solution to the decisional “gap” identified by Professor Gutoff
sounds like “general” law, that’s because it is. I discuss Professor
Weinberg’s critique of that notion in Section IV, below. At present,
though, I just want to point out that the utility of “general law” is even
clearer in filling Gutoff’s second decisional gap, which arises in cases
on the high seas. In many—though not all—such cases, the states may
lack any legitimate claim to provide rules of decision. My argument is
that the general maritime law need not be “federal” or “supreme” in
order to govern such cases, because there is no possible conflict with
state law. We might think of the “general” maritime law as simply the
law of a fifty-first state. The federal choice of law rules that govern high
seas cases would surely permit a federal court to choose the law of this
fifty-first jurisdiction, even though that law were no more “federal” than
it was in the nineteenth century.

I want to freely acknowledge that these last hypothetical cases impli-
cate what has always been the most convoluted and difficult part of my
argument against federal common law in admiralty, and no doubt much
would remain to be worked out if the revisionist proposal were adopted.
The bottom line, however, is that the competing positions have equal—and
probably worse—practical difficulties. *Jensen* itself has been

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178See *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (requiring federal courts sitting in diver-
sity to apply the choice of law rules of the state in which they sit). One might be able to justify applying
federal choice of law rules in maritime cases, which would ease the problem discussed in text further.
See generally Douglas Laycock, Equal Citizens of Equal and Territorial States: The Constitutional

179I discussed this point at greater length in my prior article. See Young, Preemption at Sea, supra note
7, at 353-58.

180See, e.g., *Skiriotes v. Florida*, 313 U.S. 69, 77, 1941 AMC 825, 831 (1941) (“[W]e see no reason
why the State of Florida may not . . . govern the conduct of its citizens upon the high seas with respect
to matters in which the State has a legitimate interest and where there is no conflict with acts of
Congress.”).

181See Clark, Federal Common Law, supra note 7, at 1354.
viewed as unworkable for the better part of a century, and I hope to have shown in this subsection that Professor Gutoff’s delegation proposal has serious problems of its own. Practicabilities thus cannot justify—if they ever could—shutting our eyes to the basic unconstitutionality of untethered federal common lawmaking in maritime cases.

E. Something Old, Something New?

One last point about the delegation argument: Professor Gutoff’s argument meshes awkwardly with the traditional basis for Congress’s power over federal maritime law. Courts and commentators have generally viewed that legislative power as emanating not from the grants of enumerated power in Article I of the Constitution, but rather from Article III’s extension of judicial power. Hence, the Court has said that “Article III impliedly . . . empowered Congress to revise and supplement the maritime law within the limits of the Constitution.” One can trace this decidedly odd notion back to the Founding-era belief that judicial and legislative power must always be coextensive. Combining this view of legislative power with Gutoff’s argument yields the following circle:

- Federal courts have power to make federal rules of maritime law because Congress has delegated them that power.

- Congress has legislative power over maritime matters to delegate because such power is implicit in the grant of judicial jurisdiction in Article III.

One hesitates to put to much weight on this criticism of Gutoff’s argument because the idea that Congress’s power derives from Article III seems plainly ridiculous, especially when the interstate and foreign Commerce Clauses are right there in Article I to put the whole affair on a much sounder footing. My point does highlight, however, the awkward mix of old and new thinking at the heart of Gutoff’s argument. In the heyday of common law admiralty adjudication, few would have embraced the expansive notion of con-

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182See, e.g., Kossick v. United Fruit Co., 365 U.S. 731, 742, 1961 AMC 833, 843 (1961) (Frankfurter, J., dissenting) (“[N]o decision in the Court’s history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than Southern Pacific Co. v. Jensen.”).


184See Stewart Jay, Origins of Federal Common Law: Part Two, 133 U. Pa. L. Rev. 1231, 1242 (1985). Hence, the early Federalists justified Congress’s power to enact the Alien and Sedition Acts based on their claim (also ultimately rejected) that the federal courts could hear sedition cases as part of their federal common law authority.
gressional delegation upon which Gutoff’s argument relies. By insisting on a post-New Deal view of delegation, however, Gutoff invokes a world where the pure common-law function of the admiralty courts has largely been eclipsed by systems of bureaucratic expertise and legislative oversight. The result may not be self-contradictory in a strict logical sense, but it is certainly uncomfortable.

IV
GENERAL LAW AND JUDICIAL LAWMAKING: A RESPONSE TO PROFESSOR WEINBERG

This part turns to Professor Weinberg’s argument. I will primarily address her comments in the present exchange linking my view of the maritime law to a revival of the pre-

Erie phenomenon of “general law.” I also want to say a few words about Weinberg’s more general enthusiasm for federal common law. Although this is not the place to attempt a general refutation of her view, I try to situate this debate over federal judicial lawmaking in the broader controversy about federalism; that, in turn, can hopefully shed some light on what is really at stake in disputes about admiralty. In Professor Gutoff’s terms, I hope to further illuminate why a sensible Emperor might choose to fight these particular gladiators.

A. Reviving General Common Law?

I hate to disavow credit for an “intriguing” “development in legal theory,” but I’m unaware of (much less part of) any “new school” “im probably urging the revival . . . of the general common law.” The charge arises, I think, from proposals that general law might be employed in certain, relatively narrow circumstances involving maritime law or customary international law. By generalizing from those narrow circumstances to a wholesale “revival” of general law, Professor Weinberg’s discussion over-reads my considerably more modest efforts to the point of unrecognizability.

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185 See Weinberg, Back to the Future, supra note 8, at 527-529.
186 Id. at 527-529.
187 This part of both arguments has always attracted widespread skepticism, see, e.g., Michael D. Ramsey, International Law as Non-preemptive Federal Law, 42 Va. J. Int’l L. 555 (2002), so I doubt there’s any risk of a “new school” forming around it.
188 To take only the most flagrant example, I have never said that “a court would be free to apply either state law or general common law whenever it is confronted by a nonstatutory federal question.” Weinberg, Back to the Future, supra note 8 at 538.
I have proposed looking to "general law" in four discrete instances, some of which are likely to be more controversial than others. First, the revisionist proposal in admiralty would require applying state law in almost all maritime cases that do not implicate federal statutes. That proposal would no doubt extend state law to cover certain subjects that state law has not traditionally governed and for which there would not be state precedents on point. As I have already discussed, the prior general maritime law would remain as a source of guidance for state courts confronting such situations, and for federal courts as well. Although *Erie* would require federal courts to decide the case as a state court would, the federal court could look to general maritime law as long as it were convinced that a state court would also do so. The key point is that "general law" would be applied in this instance only by virtue of its persuasive authority. That law would, in other words, have exactly the same "authority" as, say, this article. There can hardly be anything unconstitutional about that.

Second, many cases arising on the high seas may be outside the prescriptive reach of state law. Since there is no state law to displace, principles of maritime law would not have to be "supreme" under the Supremacy Clause in order to apply to such a case. As I have suggested, one might simply think of the high seas as having the status of a fifty-first state, governed by general maritime law. The permissibility of such a proposal would turn on isolating exactly what was wrong with general law in *Erie*: Was it unconstitutional because "general law" simply cannot exist under our constitutional structure or jurisprudential understandings? Or was the problem that "general law" was displacing state law? I return to this question in a moment.

The other two instances involve customary international law. Professor Weinberg thus alludes to a proposal, largely similar to the revisionist proposal in admiralty, that such customary rules generally not be treated as supreme federal law. My proposal there is that rules of customary international law should be treated as "general" law—much as they were in the nineteenth century.

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190See supra text accompanying notes 178-179.
191See supra text accompanying notes 180-181.
192See generally Young, Customary International Law, supra note 18, at 467-83. Others have rejected the notion that customary international law should be treated as federal, but they have adopted affirmative prescriptions that would more sharply limit its applicability. Compare Curtis A. Bradley & Jack L. Goldsmith, Federal Courts and the Incorporation of International Law, 111 Harv. L. Rev. 2260, 2260 (1998) (requiring express authorization from Congress or state law before federal courts may apply customary international law), with Young, Customary International Law, supra note 18, at 465-67 (criticizing this view as too restrictive).
of customary international law should be treated as "general" law—much as they were in the nineteenth century. But federal courts could apply customary law if they decided, in particular cases, that the foreign affairs interests of the United States warranted adopting a customary rule as federal common law under Sabbatino. My position is thus not that customary rules may never be federalized, but rather that customary law should not automatically have that status. Here too, then, "general law" has merely persuasive force. Much as Congress was persuaded to adopt by statute general human rights norms forbidding torture in the Torture Victims Protection Act, so federal courts may adopt "general" principles of customary law as a matter of federal common law in particular cases.

I have argued that customary international law might also be applied as "general" law in any case where, under choice of law rules otherwise applicable, there is no strong case for applying some form of domestic law. Consider, for instance, a classic human rights case where Bosnians who were victims of torture, rape, and other crimes in the former Yugoslavia sue leaders of the Bosnian Serbs in either a state or federal court in some American jurisdiction. The forum state would have very little interest in applying its own law to such a dispute, and more territorial approaches to choice of law would likewise point toward applying some non-domestic law. In such a case, there is no real sense in which state law would be displaced by the application of customary international law. The situation is thus much like admiralty cases arising on the high seas: If the problem in Erie was with the displacement of state law, then use of "general law" in such situations ought to be permissible.

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193It is important to stress, however, that a principle's status as customary international law is neither a necessary nor a sufficient condition for adoption as a rule of federal common law. Sabbatino fashioned a federal common law "act of state" doctrine on the ground that it was necessary to protect federal interests and vindicate principles of separation of powers, even though the Court rejected arguments that "act of state" was a principle of international law. See 376 U.S. at 421-22. Much more recently, the Court held that federal courts should be extremely cautious before fashioning private rights of action, as a matter of federal common law, to enforce international norms of human rights. See Sosa v. Alvarez-Machain, 124 S.Ct. 2739 (2004).
194See Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).
195For accounts that also emphasize the displacement of state law, see Lessig, supra note 146, at 1795 ("Erie effected this restructuring [of "the practice of federal general common law"]. No longer would federal courts be free to ignore state courts on matters not federal; no longer would federal courts articulate a general common law. Common law lawmaking about nonfederal matters would be relegated to the states, to be allocated as the state chose either to state courts or to state legislatures."); Clark, Separation of Powers, supra note 23, at 1412 ("The shift from Swift to Erie reflects the Court's recognition... that state law governs under the constitutional structure unless and until affirmatively displaced by federal law adopted in accord with the lawmaking procedures prescribed by the Constitution.").
I think that the displacement of state law was the key to Erie. Justice Brandeis suggested as much when he declared that “Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or ‘general,’ be they commercial law or a part of the law of torts.” Several different scholars have explained that the rise and fall of the Swift regime was intimately bound up with the relation between the general common law and state law. Judge Fletcher has demonstrated that the general law was successful while it was “held in common” by the various states and the federal courts; in this period, general law did not displace state law because states were themselves willing to apply that law in appropriate cases. Later on, however, the general common law became less a reflection of custom ascertainable by both state and federal courts and more an expression of normative choices by courts; in that setting, the choices made by federal courts and state courts (and sometimes state legislatures modifying the general law by statute) began to diverge. Tony Freyer thus writes that after 1860, “it became apparent that the notion of general law was irreconcilable with the theory of the supremacy of state jurisprudence.” Moreover, according to Edward Purcell, the general common law applied in federal courts “grew distinctly more favorable toward business in the late nineteenth century and was far more favorable than the common law of many states;” as a result, it aroused opposition not only from “the states’ rights tradition that rejected both diversity jurisdiction and the federal common law as intrusions on state sovereignty,” but also from Progressives wishing to protect gains achieved at the state level.

These problems do not arise, however, where there is no applicable state law to displace. Nor do two other concerns that figure prominent-

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196Fletcher, supra note 54, at 1562.
197See Clark, Separation of Powers, supra note 23, at 1413 n.576.
198See Lessig, supra note 146, at 1792.
199Freyer, supra note 66, at 55.
200Purcell, supra note 66, at 66-67. Professor Purcell observes that by the time Erie was decided, "Swift was the private law counterpart of the public law doctrine of substantive due process—twin pillars of the activist federal judiciary that had crimped and barred progressive reforms for half a century.” Id. at 191; see also L.A. Powe, Jr., Rehearsal for Substantive Due Process: The Municipal Bond Cases, 53 Tex. L. Rev. 738, 755 (1975).
govern only "in cases where they apply," and whatever else this reservation might mean, it would seem to plainly exclude most cases arising on the high seas. That Act thus could not forbid application of general law to such a case. And Erie's concern with forum shopping arises only where state law is potentially applicable, so that bringing the case in state court would result in different governing law.

Professor Weinberg also suggests that the employment of general law is inconsistent with modern jurisprudential commitments to legal positivism. She has asserted in earlier work that "[a]lthough the heart of [Erie] was the positivistic insight that American law must be either federal or state law. There could be no overarching or hybrid third option." I have disputed this view that positivism excludes the category of general law at length elsewhere, so I will simply hit the high points here. The positivist claim relevant here is the "Social Thesis," which holds that "what counts as law in any society is fundamentally a matter of social fact." The most obvious—although not the only—sort of "social fact" would be the adoption of a given law by a governmental body through established legislative procedures. General law, by contrast, has been thought to rest on deduction from universal principles. If this view of general law is correct, then modern courts committed to positivism could not apply it to any case, regardless of whether such application would result in the displacement of state law.

I think this view of general law is plainly incorrect, however. As Jack Goldsmith and Steven Walt have demonstrated, Erie's rejection of the general common law had no necessary connection with positivism.

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203 It would also seem necessarily to exclude cases, such as the Yugoslavian war crimes example discussed earlier, where the forum state lacks plausible reasons for applying its own law under applicable choice of law principles. Cf. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 822-23 (1985) (holding that the Due Process Clause forbids application of forum law to claims that have only minimal contacts with the forum state).
204 See Weinberg, Back to the Future, supra note 8, at 539-540. Professor Weinberg goes so far as to say that the Constitution requires a positivist understanding of law. See id. at 526, 527, 539. It would be surprising to find our Constitution actually mandates a particular jurisprudential theory—particularly one that probably was not held by many of the Founders. In any event, Weinberg is wrong to suggest that I have any bone to pick with positivism.
205 Weinberg, Federal Common Law, supra note 8, at 820.
206 See Young, Customary International Law, note 17, 486-92.
I think this view of general law is plainly incorrect, however. As Jack Goldsmith and Steven Walt have demonstrated, Erie's rejection of the general common law had no necessary connection with positivism.\textsuperscript{209} Positivism requires only that the law be grounded in social practices, but the conventions for deciding marine insurance cases under \textit{Swift} documented by Judge Fletcher (to pick just one example) were exactly such practices. General law, moreover, has traditionally been \textit{customary} law—that is, not only the convention of applying it but also the substance of its particular rules has generally been derived from social practice.\textsuperscript{210} Finally, the rule I am proposing—that "general law" should be applicable in certain instances like cases arising on the high seas—is simply a choice of law rule to be adopted by the authorities in particular jurisdictions. "General law" would apply if and only if the relevant sovereign in each instance declared it to be applicable. What could be more positivist than that?\textsuperscript{211}

\textbf{B. Federal Common Law and State Autonomy}

I want to turn now to a broader argument that Professor Weinberg has made elsewhere and that she echoes in her contribution to the present panel. In her important article on "Federal Common Law," Weinberg advocates what she calls "the true position" that "there are no fundamental constraints on the fashioning of federal rules of decision."\textsuperscript{212} Obviously, I think that Weinberg's "true position" is false. As the authors of the Hart and Wechsler casebook observe, "[f]ew decisions or commentators support Weinberg's very broad view."\textsuperscript{213} I will not attempt to do justice to that longstanding debate here. I do want to explore Weinberg's view far enough to explain briefly why I think that debate—

\textsuperscript{209}I have not the space to detail the many ways in which Professor Weinberg's account of general law under \textit{Swift} diverges from the historical accounts by Judge Fletcher and others. See Fletcher, supra note 54; Purcell, supra note 66; Freyer, supra note 66. In general, those accounts describe the early uses of general law as considerably more specialized and customary, and as considerably less freewheeling than Weinberg would have it.

\textsuperscript{210}See generally Young, Customary International Law, supra note 18, at 486-92 (working through these arguments in greater depth).

\textsuperscript{211}Weinberg, Federal Common Law, supra note 8, at 805. Professor Purcell has described Weinberg's view as "[t]he boldest and most original formulation" in a cluster of attempts to support broad federal judicial lawmaking power in response to the Rehnquist Court's more narrow view. Purcell, supra note 66, at 293. I'm happy to second that characterization despite our disagreement on the merits.

\textsuperscript{212}Hart & Wechsler, supra note 41, at 697 (citing both federalism and separation of powers objections).
issues."  Likewise, in her present essay, she says that "Erie . . . was about the lack of national power over matters that had not been held to come within the nation’s legitimate sphere of governmental interest."  Weinberg’s argument thus seems to turn on the belief that there just are certain issues that are "federal" and others that belong to the states. That belief smacks of "dual federalism," which was a fundamental organizing principle of constitutional law throughout the nineteenth century and the first third of the twentieth. Dual federalism held that the Constitution requires "maintenance of the independent integrity of federal powers and state powers through separations of national and state spheres of action."  To be sure, Weinberg’s version would leave relatively little to the state sphere; she has ridiculed, for example, the view that the national government "can act only within the confines of an express Constitutional grant of power and not upon its perceived needs."  But although the ratio of occupied territory may have shifted in Weinberg’s view, the ordering principle—definition of mutually-exclusive subject matter categories—is the same.

Dual federalism was mortally wounded by the Supreme Court’s "switch in time" in 1937, and Edward Corwin famously pronounced it dead by 1950.  Although the Court has in recent years revived the notion of some substantive limits on Congress’s authority, these limits do not generally attempt to carve out exclusive domains of state power; moreover, few think that these substantive limits will ever prove very effective in confining federal authority.  I have thus argued elsewhere that if a meaningful federal balance is to be preserved, the

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Weinberg, Back to the Future, supra note 8, at 542.

John Kincaid, From Dual to Coercive Federalism in American Intergovernmental Relations, in Globalization and Decentralization: Institutional Contexts, Policy Issues, and Intergovernmental Relations in Japan and the United States 29 (Jong S. Jun & Del S. Wright eds., 1996); see also Young, Dual Federalism, supra note 33, at 143-46. Professor Weinberg uses the language of spheres of authority again when she notes "[o]f course each state retains general plenary power over all questions within its legitimate sphere of governmental interests unless preempted. Weinberg, Back to the Future, supra note 8 at 543 (emphasis added). It is hard to know what to make of this statement. It seems like the worst of all worlds, to the extent that courts must still undertake the difficult and ultimately indeterminate task of defining separate spheres of authority, but those spheres are apparently to limit only state power.

Weinberg, Federal Common Law, supra note 8, at 813.


See Young, Dual Federalism, supra note 35, at 157-63.

See supra note 35. It has not helped that the lower courts seem to have almost entirely disregarded the Court’s Commerce Clause rulings thus far. See Brannon P. Denning & Glenn H. Reynolds, Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts, 55 Ark. L. Rev. 1253 (2003).
boundary between state and federal power must be defined in other ways.221 The most promising alternative is a strong version of "process federalism," which relies on the representation of the states in the national political process,222 as well the institutional and inertial barriers to federal lawmaking.223 Many observers read the Court's emphasis on process federalism in the Garcia case224 as renouncing judicial enforcement of federalism altogether.225 But the Court has since shown itself willing to invalidate federal policies that distort the ordinary political safeguards of federalism,226 and it has imposed a variety of statutory construction rules that enhance those safeguards in cases bearing on state autonomy.227

Perhaps the most important aspect of process federalism, however, is an insistence that federal law be made through processes a) in which the states are represented and b) that do not circumvent the institutional hurdles that constrain the volume of federal lawmaking.228 Judicial lawmaking is particularly problematic under these criteria: federal judges are neither systematically drawn from nor accountable to state politics, and they fashion federal rules of decision without going through the Article I gauntlet that impedes federal legislation.229 Delegation of leg-

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221See Ernest A. Young, The Rehnquist Court's Two Federalisms, 83 Tex. L. Rev. 1 (2004) [hereinafter Young, Two Federalisms].
222See generally Wechsler, supra note 22; Young, Two Federalisms, supra note 221 (elaborating a model of process federalism).
223See generally Clark, Separation of Powers, supra note 23, at 1371 ("[F]ederal lawmaking procedures continue to preserve state prerogatives to some extent by 'impos[ing] burdens on governmental processes that often seem clumsy, inefficient, even unworkable.' In short, the 'gridlock' still decried today frequently prevents the federal government from adopting 'the supreme Law of the Land, thus leaving states free to govern.'")
226See, e.g., Printz v. United States, 521 U.S. 898, 927-28 (1997) (invalidating Congress's attempt to "commandeer" state executive officials to enforce federal laws, in part on the ground that such commandeering distorts lines of political accountability for federal policy). On Printz as an instance of process federalism, see Young, Two Cheers, supra note 23, at 1360-61.
228See Clark, Separation of Powers, supra note 23, at 1338-46; Young, Two Federalisms, supra note 221.
229See Clark, Separation of Powers, supra note 23, at 1403-22; Young, Preemption at Sea, supra note 7, at 333-41.
islative authority to federal administrative agencies is, of course, almost equally problematic from this perspective, although such agencies are somewhat more politically accountable than courts to the states’ representatives in Congress and administrative lawmaker confronts a wide array of procedural hurdles of its own. The basic point is simply that any shift of federal lawmaker authority away from Congress—whether by express delegation by Congress or by assertion of authority by the other branch—raises significant federalism concerns.

An important linchpin of Professor Weinberg’s argument, by contrast, is her claim that any “distinction between the judiciary and the legislature” in terms of federal lawmaker authority “seems irrelevant in any direct way to federalism.” I doubt whether Weinberg really means to say that political and procedural constraints on federal lawmaker don’t matter; obviously they do. Instead, I read her as simply expressing a preference for doctrinal strategies that do not rely on such constraints as a measure of the Constitution’s protection for state autonomy. The problem is that such strategies strike me as distinctly unpromising. Drawing a line between “state law issues” and “federal law issues” has proven problematic throughout our history, and the Court has sensibly abandoned it. Other strategies, such as vigorously expanding the states’ sovereign immunity under the Eleventh Amendment, offer more determinate doctrinal prescriptions but largely miss what is important about federalism.

The debate about federal common law in admiralty illustrates all of these points. As the longstanding debate over pleasure boating shows, it has been difficult to develop determinate substantive categories of inclusion and exclusion to mark the divide between state and federal power. Extending the Erie doctrine to admiralty would protect impor-

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230See, e.g., Kagan, supra note 96, at 2253-72 (discussing constraints on agency action).

231Weinberg, Federal Common Law, supra note 8, at 817. Edward Purcell has described Professor Weinberg’s view on this point as “[w]holy out of contact with the political values of Progressivism” that undergirded “Brandeis’s Erie”—in particular, the notion of judicial federalism “as a serious limitation on federal judicial lawmaker.” Purcell, supra note 66, at 295. Professor Purcell does agree with Weinberg that this principle was “prudential” in nature, but I have at disputed his interpretation on that point at length elsewhere. See Young, Customary International Law, supra note 18, at 410-14.

232See Young, Two Federalisms, supra note 221 (arguing that state sovereign immunity furthers few of the values that make federalism worth having). Professor Weinberg is hardly a fan of the immunity strategy. See Louise Weinberg, Of Sovereignty and Union: The Legends of Alden, 76 Notre Dame L. Rev. 1113 (2001).

233Regarding Preble Stolz’s famous proposal to take all “recreational boating” cases out of admiralty jurisdiction, see Stolz, supra note 1, Professor Sturley commented that

[T]he line-drawing problems seem enormous . . . . We may know that Natalie Calhoun was not a “sea-framer,” but do we know a recreational boating case when we see it? The record in Yamaha was unclear, but suppose that Natalie Calhoun’s personal watercraft had collided with a commercial vessel. Would this
tant state interests: Rhode Island's interest in protecting its waters from oil pollution in the *Ballard Shipping* case,\(^234\) for example, is a far more important interest than the interests at stake in the Court's recent Commerce Clause cases.\(^235\) At the same time, protecting those interests through a *process* rule—e.g., that federal *courts* cannot generally make federal maritime law—leaves Congress free to regulate those maritime questions that really require federal uniform rules.\(^236\) Finally, in the absence of meaningful process protections for states in maritime cases, the Court has extended its aggressive jurisprudence of state sovereign immunity to cover important admiralty disputes to the detriment of federal maritime interests.\(^237\)

Professor Weinberg would most likely object that she would not draw the relevant lines as a matter of federalism at all; indeed, she announces a new grand unified theory of *Erie* grounded in "due process."\(^238\) She states that "to accord with due process, law in American courts must be positivistically attributable to a relevant sovereign, a sovereign with a legitimate interest in governing the particular issue presented in the particular circumstances."\(^239\) To my mind, this flight to due process illustrates the extent to which modern lawyers have come to see constitutional law as consisting wholly of individual rights, while discounting the extent to which our Founders counted on the division of powers within and among governmental structures to secure

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have been a recreational boating case? On balance, the questionable benefits of this approach do not seem worth the difficulties it would create.

Sturley, supra note 174, at 329-30. Charles Black has likewise condemned the reigning subject-matter test for maritime contract jurisdiction, complaining that it involves "about as much 'principle' as there is in a list of irregular verbs." Charles Black, Admiralty Jurisdiction: Critique and Suggestion, 50 Colum. L. Rev. 259, 264 (1950).

*Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 1994 AMC 2705 (1st Cir. 1994).

*United States v. Lopez*, 514 U.S. 549 (1995), struck down the Federal Gun Free School Zones Act, but the federal measure did not preempt state regulation of the same subject and thus hardly touched fundamental state interests. *United States v. Morrison*, 529 U.S. 598 (2000), struck down a federal remedy for victims of violence against women, but the remedy was not directed at state actors and did not preempt state regulatory measures in the same area.

See *Young, Preemption at Sea*, supra note 7, at 349-51.

See *Federal Maritime Commission v. South Carolina State Ports Auth.*, 535 U.S. 743, 2002 AMC 1372 (2002) (holding that state sovereign immunity bars subjecting state governments to proceedings before the Federal Maritime Commission to enforce federal law); *Ex parte New York*, 256 U.S. 490 (1921) (arguing that state sovereign immunity applies in admiralty suits, despite the textual limitation of the Eleventh Amendment to suits "in law or equity"). I do not contend that *Jensen* has in some sense "caused" decisions like the *Ports Authority* case. I do argue that different doctrinal strategies often trade off with one another, at least to some extent, and that the Court's failure aggressively to pursue process-based approaches in a variety of areas has resulted in a turn toward less productive strategies, such as the expansion of state sovereign immunity. *Ports Authority* is, in turn, one example of that tendency.

*Weinberg, Back to the Future*, supra note 8, at 538; see also id. at 544-552 (developing this theory).

*Id.* at 526.
liberty. But when one unpacks Weinberg’s theory, it becomes clear that structure is really doing the work. I have already explained how state, federal, and general law may all be “positivistically attributable” to a sovereign; the critical questions in Weinberg’s approach, then, will involve which sovereign is “relevant,” and which has a “legitimate interest” in governing the dispute. These are most naturally questions of separation of powers and federalism; if we take seriously Weinberg’s rejection of those terms of debate, we are most likely simply to deprive ourselves of the most sensible textual, historical, and theoretical tools for resolving them.

Federalism doctrine has a hydraulic quality. The Supreme Court has made clear that it is not prepared to abandon federalism as a constitutional principle, and that it will seek doctrinal mechanisms to vindicate that principle. Shutting off one avenue of doctrinal protection creates pressure to open another; Richard Fallon has suggested, for example, that the Court’s implicit recognition that Commerce Clause doctrine is unlikely to go far in constraining federal power prompted the Court to move aggressively to expand its state sovereign immunity jurisprudence. By rejecting the crux of process federalism, Professor Weinberg would foreclose a set of doctrinal strategies that is both well-suited to the judicial role and directed toward aspects of federalism that really matter. The likely result is not simply less protection for states, as Weinberg may prefer, but rather protective doctrines either that invite the Court to pursue unsustainable lines of distinction or that endanger important aspects of federal power without an equivalent payoff in terms of meaningful state autonomy. That, to me, is a wrong turn.

V

ADMIRALTY AND THE WORLD

I began this essay with the special “magic aura” of admiralty, and most of my argument has been to say that this specialness needs to go. In this last part, I want to expand my focus to suggest that the normalization of admiralty presents in microcosm a much more general problem, involving the adaptation of domestic law to the rapidly-changing context of globalization. Foreign affairs law, too, needs to be normalized. And admiralty may be able to point the way.

The key current debate in American foreign affairs law—that is, the American domestic law governing the way the country interacts with the

See, e.g., The Federalist No. 51 (James Madison) (emphasizing these structural aspects of the Constitution).

See Fallon, supra note 35, at 482.
rest of the world—is over the legitimacy of “foreign affairs exceptionalism.” Curtis Bradley has defined foreign affairs exceptionalism as “the idea that foreign affairs powers should be subject to different, and generally more relaxed, constitutional restraints than domestic powers.” The similarity to admiralty law ought to be obvious: Admiralty judges and scholars have long maintained that the exercise of federal power in maritime cases is subject to different constitutional rules, including “more relaxed” constitutional constraints on federal judicial lawmaking. Nor should this be surprising, given that federal admiralty jurisdiction found its most compelling historical justification in concerns about foreign affairs. Indeed, the special status of admiralty might fairly be called our nation’s first instance of foreign affairs exceptionalism.

In foreign affairs law as in admiralty, “exceptionalism” has manifested itself most prominently in the assertion of extraordinary powers for courts. Peter Spiro has noted that two of critical aspects of foreign affairs exceptionalism include “the dormant foreign affairs power [and] the dormant foreign commerce power”—that is, the notion the courts may hold state laws and policies to be displaced by the mere existence of federal power in an area, even though that power remains unexercised by Congress, or “dormant.” Admiralty scholars have likewise identified a “dormant Admiralty Clause” that “limits . . . the states in legislating maritime matters in the face of Congressional silence.” But the more important point, of course, is that in both areas federal judges assert not only the power to displace state laws, but also the affirmative power to fashion federal common law rules of decision. In foreign affairs, that power is said to have two distinct components: the automatic reception into federal common law of principles of customary international law, and the additional judicial power to fashion federal

233See id. at 1226 (citing Zschernig v. Miller, 389 U.S. 429 (1968) (dormant foreign affairs power) and Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (dormant foreign commerce power)).
234Bederman, supra note 60, at 1. It is worth noting that Professor Bederman has written extensively on both maritime and foreign affairs law.
235See Restatement (Third) of the Foreign Relations Law of the United States § 111, Reporters’ Note 3 (1987) (“[T]he modern view is that customary international law in the United States is federal law and its determination by the federal courts is binding on the State courts.”); Koh, supra note 15 (agreeing with this view). This view is highly controversial, and it is probably better to treat the “Restatement” as reflecting the views of its reporter, Louis Henkin, rather than any consensus in the case law or the scholarly community. See Bradley & Goldsmith, supra note 15, at 834-37; Young, Customary International Law, supra note 18, at 450-60.
rules of decision based on the imperatives of separation of powers and national interests in foreign relations. 246

The first aspect of judicial lawmaking in foreign affairs cases—the reception of customary international law into American law—is indistinguishable from the status of maritime law in the nineteenth century. Indeed, as many scholars have observed, maritime law was customary international law in the nineteenth century. But because the maritime law, like its cousin the law merchant, was much more frequently litigated in American courts than more obscure aspects of customary international law, we know considerably more about its status and treatment in the era of "general law." 247 Maritime law thus sheds useful light on what the Supreme Court would have meant at the close of the nineteenth century when it said, in The Paquete Habana, that "(i)nternational law is part of our law." 248 The Paquete Habana actually was an admiralty case involving rights to two fishing vessels captured as prizes during the Spanish-American War. As I have detailed elsewhere, the fact that maritime law was considered "general" rather than "federal" in nature during the nineteenth century substantially undermines claims by internationalist scholars that customary international law has always had the status of supreme federal law. 249

More broadly, admiralty has long exhibited many of the problems that are more recently coming to plague other forms of foreign affairs exceptionalism. As Professor Bradley has noted, exceptionalism "distinguishes sharply between domestic and foreign affairs;" 250 in order to apply different constitutional rules in different subject-matter fields, we must be able to draw bright lines between them. The problem is that, "[a]s we enter the next century, that distinction [between domestic and foreign

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246 See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 425 (1964) (fashioning the "act of state" doctrine as a matter of federal common law); see also Daniel J. Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513 (2002) (rejecting the notion that all customary international law just is federal common law, but taking a fairly broad view of federal common lawmaking powers in situations like Sabbatino). Professor Gutoff suggests that "even those who doubt the propriety of a federal common law of commercial maritime law do not question the place of a national uniform judge-made law of international relations and interstate conflicts." Gutoff, Delegation, supra note 9, at 384. Actually, I do doubt the propriety of many assertions of judicial authority under the Sabbatino rubric. But to the extent that Sabbatino and similar cases rest on interpretations of the constitutional separation of powers, or on interstitial gap-filling among the many statutes governing foreign relations, or amount to prudential rules of judicial self-denial, then I would agree that they are legitimate. See Young, Customary International Law, supra note 17, at 438-45 (discussing Sabbatino).

247 See, e.g., Fletcher, supra note 54.

248 175 U.S. 677, 700 (1900).

249 See Young, Customary International Law, supra note 18, at 451-56.

tistinguishes sharply between domestic and foreign affairs;" in order to apply different constitutional rules in different subject-matter fields, we must be able to draw bright lines between them. The problem is that, "[a]s we enter the next century, that distinction [between domestic and foreign affairs] will become increasingly difficult to maintain." Recognition of this line-drawing problem is relatively recent in foreign affairs law, stemming from changes over the last few decades in the nature of international law. That law is now concerned not only with relations between states but also between the state and its citizens, and it covers environmental, commercial, and human rights matters as well as more traditional subjects like war and peace. Moreover, the global economy and communications network are becoming interconnected in ways that parallel the nationalization of the domestic economy early in the twentieth century.

Admiralty, on the other hand, has grappled with this problem for the better part of a century. The long history of judicial attempts to operationalize Jensen's rule—that is, to come up with principled legal tests to divide legitimate state regulation from impermissible interference with maritime uniformity—speaks to the difficulty of allocating authority into exclusive subject matter categories. And the revisionist proposal in admiralty offers a way out that is viable in both maritime law and foreign affairs more generally: Accept broad federal legislative authority, but insist that federal law be made according to constitutionally prescribed processes. The last decade has seen reason to believe that the Supreme Court is heading in this direction in maritime law, and that movement may offer guidance to emerging debates about foreign affairs law.

It is rare, of course, that influence across different legal fields travels in only one direction. The Court's most recent move on the issues discussed here has come in an important foreign affairs case handed down at the end of the Court's 2003 term. In Sosa v. Alvarez-Machain, the Court considered whether to create, as a matter of federal common law, a federal cause of action to enforce principles of the customary interna-

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251 Id.
this kind." The Court rejected a notion that customary international law just is federal law, and instead applied a careful consideration of both federal interests and judicial competence that was reminiscent both of Sabbatino and of the more general test for federal common law under Clearfield Trust and Kimbell Foods. In other words, I read Sosa as going a long way to "normalize" the federal common law of international human rights, subjecting it to the same careful rules that apply in more prosaic situations where federal courts must consider whether to fashion rules of federal common law. That is what needs to happen both in admiralty and in other areas of foreign affairs law.

VI
CONCLUSION

Peter Spiro has written that, "Globalization makes everything international. There is hardly an area of the law that can be fully understood (or taught) without some reference to international law and institutions." Most domestic legal disciplines will have to adapt to this reality, including the quintessential domestic disciplines of constitutional law and federal courts. As possibly our oldest area of "globalized" law, admiralty can make valuable contributions to that conversation.

In order to make those contributions, however, admiralty must change as well. The same characteristics that make admiralty seem "special" to some will often, to other eyes, mark it as archaic or, even worse, irrelevant to current legal developments. Admiralty's idiosyncrasies, after all, are not generally capable of export or universal application; no one would seriously suggest, for example, that federal judges (rather than Congress) should have the primary legislative role outside the specialized confines of the maritime law. What admiralty can do is to provide a model by which traditional constitutional structures of federalism and separation of powers are preserved in a context where the law must take account of developments at state, national, and international levels. To do that, admiralty must be normalized and subjected to normal constitutional rules like Erie. That may make admiralty less "special," but more viable in its own sphere and influential in others.

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324Id. at 2744.
325See supra text accompanying notes 37-43.
327Compare Brown, supra note 162, at 249; Weinberg, Back to the Future, supra note 8, at 556 ("Legislation is interstitial, and must be read against the broad background of the common law.").