Preemption at Sea

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Contents

Introduction .................................................................................. 274
I. Cross Currents ........................................................................... 279
   A. Admiralty Law .................................................................. 279
   B. Federal Common Law ...................................................... 284
   C. Preemption .................................................................... 288
II. At the Intersection: *Southern Pacific Co. v. Jensen* and Its Posterity ......................................................... 291
   A. The *Jensen* Case ............................................................ 291
   B. Into the Fog: Applying Jensen .......................................... 294
      1. Rights and Remedies ................................................... 295
      2. The “Gap” Theory ....................................................... 296
      3. Maritime but Local ..................................................... 297
      4. Balancing and Accommodation .................................... 299
      5. American Dredging ..................................................... 300
   C. *Jensen’s* Future .............................................................. 302
III. *Erie* and All That ............................................................... 306
   A. The *Erie* Opinion .......................................................... 306
   B. *Erie’s* Implications for Admiralty ................................. 310
   C. Uniformity and the Purpose of the Admiralty Grant ........ 312
      1. Prizes, Crimes, and Revenue ....................................... 314
      2. The Law of the Sea ..................................................... 318
   D. Implications ................................................................. 325
IV. Maritime Preemption and State Sovereignty .......................... 328
   A. State Interests in Maritime Matters ................................. 329
   B. The Political Safeguards of Federalism and the Presumption Against Preemption ........................................... 333
   C. Judicial Preemption and the Rule of Completeness ........... 337
   D. The Argument for Uniformity ......................................... 341
V. Living Without Maritime Preemption ....................................... 346
   A. “Translating” the Maritime Law ....................................... 347
   B. Uniformity Without Jensen .............................................. 349
      1. Maritime Statutes ....................................................... 349
      2. The Dormant Commerce Clause .................................. 351
      3. The Conflict of Laws ................................................. 353
Conclusion ................................................................................... 358

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Although Erie Railroad v. Tompkins put an end to the "general federal common law," a form of general common law lives on in admiralty. The interaction of that law with state regulatory authority in maritime cases has given rise to one of the thorniest questions in federal courts law—the problem of maritime preemption. Because admiralty law remains largely a "brooding omnipresence over the sea," maritime preemption affords a unique opportunity to explore the implications of both pre- and post-Erie approaches to judge-made law for our modern system of federalism.

In this Article, Professor Young proposes that the present approach to maritime preemption should be abandoned. That approach—under which the general maritime law made by federal courts almost always preempts state law—has never crystallized into a coherent or workable rule. And any broad rule of maritime preemption is inconsistent not only with Erie, but also with the founding generation's assumptions about maritime law and with modern preemption doctrine. Professor Young concludes that admiralty law should have no preemptive effect, and that other mechanisms can adequately protect the legitimate federal interests that exist in maritime cases.

Introduction

Most lawyers know two things about admiralty: It has something to do with ships, and it is governed by federal common law. Because of the first thing, most have not thought much about the second—or whether it squares with our basic notions of federalism. In fact, admiralty is often assumed to be the paradigm case of truly legitimate federal common law. But the truth is that admiralty harbors the last surviving species of "general" federal common law—that is, law made by federal courts without any grounding in a statute or constitutional provision. Admiralty is also the only area in which "general" common law is routinely held to preempt contrary state law without any action by Congress. This problem of maritime preemption—the relationship of the general maritime law to state law governing marine events—


2 State courts, on the other hand, continue to make “general” law all the time. See infra pp. 338-39.

3 See, e.g., Maryland Dep’t of Natural Resources v. Kellum, 51 F.3d 1220, 1224-28 (4th Cir. 1995) (holding state rule of strict liability for damage to oyster beds preempted by rule of negligence for maritime torts); Wahlstrom v. Kawasaki Heavy Indus., 4 F.3d 1084, 1087-88 (2d Cir. 1993) (holding that maritime law preempted state remedies for wrongful death of non-seaman in territorial waters); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1031-32 (5th Cir. 1985) (en banc) ("It is well-settled that the invocation of federal admiralty jurisdiction results in the application of federal admiralty law rather than state law."). Wahlstrom seems no longer to be good law after Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996).

The Supreme Court has even held that Congress may not delegate regulatory authority to the states in ways that threaten the uniformity of the federal maritime law. See Washington v. W.C. Dawson & Co., 264 U.S. 219, 222-23 (1924); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 164-65 (1920). The conventional wisdom is that these cases would not be followed today, see, e.g., Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 629 n.8 (3d Cir. 1994); Paul M. Bator et al., Hart and Wechsler’s The Federal Courts and the Federal System 893 n.5 (3d ed. 1988) [hereinafter Hart & Wechsler]; but at least one scholar has called for a revival of the nondelegation doctrine in admiralty. See David J. Boden, Uniformity, Delegation and the Remnant Admiralty Clause, 23 Harv. J. L. & Corp. 1, 10-22 (1990).
has given rise to over fifty Supreme Court decisions since 1917 and a set of
doctrines that Professor David Currie aptly called “the Devil’s Own Mess.”

Three cases illustrate the problem arising from admiralty’s insistence on
its own common law: A little girl is killed when her jet ski slams into another
vessel at an island resort; a ship spills oil into a busy harbor, disrupting fishing
and tourism; a houseboat on a lake burns, causing a dispute between the
vessel’s owners and their insurance company. If these events happen on
land, they will be governed primarily by state law under the doctrine of Erie
Railroad v. Tompkins. To the extent that a federal statute is in the picture—
a federal pollution law, for example—modern preemption doctrine imposes a
high threshold before finding that state regulatory authority has been
ousted. But because these events occur on navigable waters (but still within
state territory), they all fall within the federal admiralty jurisdiction and are
subject—at least potentially—to the general maritime law.

The best known species of “general” law was the general commercial
law applied under Swift v. Tyson. That species, however, met its end in
Erie’s declaration that “[t]here is no federal general common law.” Now
federal common law must come from somewhere—it is not, as Justice
Holmes said, “a brooding omnipresence in the sky.” Holmes said that,
however, in dissent, and the case he was in the process of losing was Southern
Pacific Co. v. Jensen, the leading decision on maritime preemption to this
day. Because it historically has derived much of its content from the “law of
the sea”—a branch of the law of nations—maritime law remains in many
ways “a brooding omnipresence over the sea.”

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Ct. Rev. 158 (taking the line from Henrik Ibsen’s play, The Wild Duck, see 8 The Collected
Works of Henrik Ibsen 263 (Frances E. Archer trans., Charles Scribner’s Sons 1911)); David
W. Robertson, The Applicability of State Law in Maritime Cases after Yamaha Motor Corp. v.
sources of law in admiralty is very old. See, e.g., G. Edward White, The Marshall Court &
Cultural Change 1815-1835, at 427-28 (abridgment ed. 1991) (noting that many basic issues of sover-
eignty and sources of law addressed during the founding era surfaced for the first time in admir-
alty cases).

5 The cases are Yamaha Motor Corp. v. Calhoun, 516 U.S. 199 (1996); Ballard Shipping
Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994); and Wilburn Boat Co. v. Fireman’s Fund
Insurance Co., 348 U.S. 310 (1955), respectively.

6 304 U.S. 64 (1938).

7 See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (requiring a clear
statement of Congress’s intent before finding preemption of state law); Rice v. Santa Fe Elevator

8 Federal admiralty jurisdiction depends on the incident’s link to “traditional maritime
activity” as well as its locale, see infra notes 41-44 and accompanying text, but each of these cases
easily meets that additional requirement. See Yamaha, 516 U.S. at 206; Wilburn Boat, 348 U.S.
at 313; Ballard Shipping, 32 F.3d at 625.


10 Erie, 304 U.S. at 78.

11 Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). I cosider
the precise application of this idea to admiralty at pages 292-93, infra.

12 244 U.S. 205 (1917).

13 David W. Robertson, Admiralty and Federalism: History and Analysis of
Problems of Federal-State Relations in the Maritime Law of the United States 193
In order to understand the doctrine of maritime preemption, then, we have to think our way back into pre-\textit{Erie} notions of general law and explore how those notions interacted with the constitutional division of state and federal authority. Maritime preemption thus raises a complex problem of "translation"—of maintaining fidelity to an original set of institutional arrangements in a world in which much of the context of those arrangements has changed.\textsuperscript{14}

Maritime preemption also poses, in a particularly stark way, basic problems of preemption doctrine. In keeping with the Supreme Court's emphasis on the states' representation in Congress as the primary protection for federalism,\textsuperscript{15} preemption doctrine has focused on the issue of legislative intent; by demanding a "clear statement" from Congress before finding preemption of state law, courts ensure that state regulatory authority is not ousted unless the "political safeguards of federalism" have had a chance to operate.\textsuperscript{16} And yet, preemption frequently occurs at the behest of courts and administrative agencies, neither of which incorporates those "political safeguards." In these situations, traditional preemption doctrine's focus on legislative intent is of little help. Maritime preemption affords a unique opportunity to address this problem because it poses the "purest" case of preemption by a nonrepresentative body without any statutory command.\textsuperscript{17}

These questions are of more than academic interest. Maritime commerce, the core concern of federal maritime law, remains critical to our economy and our relations with the world.\textsuperscript{18} And the state interests in maritime cases can be equally important. After all, compensating tort victims, cleaning up pollution, and regulating insurance are right at the core of what states do in twentieth-century America. As the Framers of the Constitution understood, the states' ability to perform services that make a difference in their citizens' everyday lives is the key to the states' survival in the constitutional scheme. People who care about federalism should therefore worry when the federal government makes inroads on such central state legislative functions.


\textsuperscript{16} See, e.g., LAURENCE H. TRIBE, \textit{American Constitutional Law} § 6-25, at 480 (2d ed. 1988) (explaining that the presumption against preemption is designed to ensure that preemption decisions are made by Congress, which is politically accountable to the states).

\textsuperscript{17} Cf. David W. Robertson, \textit{Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court}, 29 J. MAR. L. & COM. 275, 277 (1998) ("[A]dmiralty is our most interesting and promising private-law federalism laboratory.").

\textsuperscript{18} See, e.g., B.J. Haecck, Note, Yamaha Motor Corp. v. Calhoun: \textit{An Examination of Jurisdiction, Choice-of-Laws, and Federal Interests in Maritime Law}, 72 WASH. L. REV. 181, 181 (1997) (noting that, "[i]n 1994, $517 billion worth of goods were transported to and from the United States via waterborne shipping. This figure represents almost half the value of all U.S.
I propose here that there should be no special preemption doctrine in admiralty. Each incarnation of such a doctrine raises substantial practical difficulties, and each fails to satisfy the basic constitutional objection that federal courts are generally able to make law—much less to preempt state law—only in the interstices of duly enacted federal statutes or constitutional provisions.\textsuperscript{19} The usual justification for a broad rule of maritime preemption is that development of a uniform federal law of admiralty was the historical basis for the constitutional grant of admiralty jurisdiction in Article III.\textsuperscript{20} That claim, however, is historically suspect; the evidence indicates that admiralty jurisdiction was created primarily to cover certain specialized sorts of cases—prize and revenue cases, crimes on the high seas—that have little to do with the private commercial disputes that typify admiralty litigation today.\textsuperscript{21} Nor does a related answer—that the Admiralty Clause was intended to adopt a preexisting, uniform “Law of the Sea”\textsuperscript{22}—justify the broad preemptive effect of modern federal maritime law. Like the “general common law” applied in the era of \textit{Swift v. Tyson},\textsuperscript{23} the law of the sea did not emanate from any particular sovereign and did not qualify as “federal” law in the sense that we now understand the term.\textsuperscript{24}

Recent federal courts scholarship has recognized that the forms of general law that survived the demise of \textit{Swift}—including, for example, customary international law as well as admiralty law—cannot simply be lumped into the category of federal common law.\textsuperscript{25} Judge-made federal common law is legitimate because of—and only to the extent of—its connection to democratic enactments; most of the general maritime law’s applications, however, cannot meet this standard. \textit{Preemption} by judge-made law is even more problematic than simple common lawmakers; given our system’s primary reliance on Congress as the protector of state regulatory prerogatives, preemption is extremely difficult to justify in the absence of legislative action. And although the law of maritime preemption has grown up largely apart from broader debates about the federal-state balance, preemption, and federal common law,\textsuperscript{26} nothing about admiralty warrants an exception to these basic princi-

\textsuperscript{19} Even those who generally take a broad view of the common law powers of federal courts would generally limit those powers to cases in which the court can “point to a federal enactment, constitutional or statutory, that it interprets as authorizing the federal common-law rule.” Martha A. Field, \textit{Sources of Law: The Scope of Federal Common Law}, 99 \textit{Harv. L. Rev.} 881, 887 (1986). Professor Field does not challenge the traditional view that, unlike the diversity grant, the jurisdictional grant covering admiralty cases confers power to fashion substantive rules of law; she suggests, however, that the rationale for the distinction is shaky. \textit{See id.} at 916.

\textsuperscript{20} \textit{See}, e.g., \textit{Madruga v. Superior Court}, 346 U.S. 556, 566 (1954) (Frankfurter, J., dissenting); \textit{Curris, supra} note 4, at 163-64.


\textsuperscript{22} \textit{See} Henry M. Hart, Jr., \textit{The Relations Between State and Federal Law}, 54 \textit{Colum. L. Rev.} 489, 531 (1954).

\textsuperscript{23} 41 U.S. (16 Pet.) 1 (1842).


\textsuperscript{25} \textit{See}, e.g., Bradley & Goldsmith, \textit{supra} note 14; Clark, \textit{supra} note 1.
bles. There is, as Professor Stolz argued thirty-five years ago, "nothing magical about the water's edge." 27

Perhaps at least partly because of these tensions, the Supreme Court has spent the eighty years since Jensen struggling to define some role for state law in admiralty. But none of the Court's attempts to formulate a workable rule has proven satisfactory. 28 Happily, we can do without this confusion; even without a doctrine of maritime preemption, adequate safeguards exist to protect federal interests in maritime cases. Congress increasingly governs maritime issues by statute, 29 and normal preemption rules apply to such laws. 30 Absent action by Congress, the dormant Commerce Clause precludes state regulation that discriminates against or unduly burdens interstate commerce, including maritime commerce. And familiar choice of law principles can ensure that federal maritime law will still govern cases in which there is a strong federal policy interest. The contortions of Jensen and its progeny are thus strong candidates for Ockham's Razor. 31

This Article proceeds in five parts. Part I briefly sketches three bodies of doctrine that come together in maritime preemption cases: the contours of the admiralty jurisdiction, the general limits on federal common lawmaking, and the interpretive rules governing preemption issues. 32 Part II demonstrates the failure of the Supreme Court's maritime preemption jurisprudence to develop a coherent boundary between state and federal authority. 33 Part III raises a more fundamental objection by demonstrating the conflict between any broad doctrine of maritime preemption and the constitutional limit on federal common lawmaking recognized in Erie Railroad v. Tompkins. 34 I also consider—and reject—the historical arguments for an exception to Erie's rule. 35 Part IV addresses the failure of maritime preemption jurisprudence to respect state sovereignty, by short-circuiting the "political safeguards of federalism" as well as the practical limitations on congressional lawmaking. 36 Finally, Part V considers what life might be like without any special rule of maritime preemption. Jensen, I argue, is best viewed as a

Cir. 1995) (discussing maritime preemption law at length but not mentioning general principles of preemption law).

28 See, e.g., Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 146 (2d ed. 1990) ("[T]he Supreme Court has failed in its efforts to develop guiding principles to distinguish when federal and state law are to be applied.").
31 See, e.g., Professor Wertheimer's paraphrase of the Ockham's Razor principle: "[W]hen a problem in our society requires a solution and there are several solutions from which to choose, the simplest solution may be the most effective." Ellen Wertheimer, Ockham's Scalpel: A Return to a Reasonableness Standard, 43 Vill. L. Rev. 321, 321 (1998).
32 See infra pp. 279-91.
33 See infra pp. 291-306.
34 304 U.S. 64, 78 (1938).
36 See infra pp. 229-45.
failed effort to “translate” maritime law into a jurisprudential context that has largely rejected the idea of “general” law. I suggest that we would do better to follow 
Erie by largely abandoning the effort to construct federal common law rules in admiralty cases that arise within state territorial waters, and to revive the concept of non-preemptive “general” law for those limited pockets of general maritime law that would remain. I conclude by demonstrating that such a course would leave ample safeguards in place to protect federal interests in maritime cases where they are truly significant.\(^{37}\)

I. Cross Currents

There is a substantial body of precedent and commentary concerning the common lawmaking powers of the federal courts. There is also a great deal of law, although not quite so much academic literature, on federal preemption of state law. And there is a surprisingly extensive body of literature on the specific question of when federal common law rules of admiralty can preempt state rules of decision. The problem, however, is that—with limited exceptions—neither judges nor commentators in each of these areas tend to take the other bodies of law into account. This tendency to treat these overlapping areas in isolation contributes to the confusion surrounding the question of maritime preemption. Before attempting a synthesis, however, I need to sketch out the general framework of principles that has developed in each area.

A. Admiralty Law

The “Admiralty Clause” of the Constitution is in Section 2 of Article III, and provides that “[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction.”\(^{39}\) The Articles of Confederation included no general admiralty powers, although they gave Congress authority to make rules for prize cases.\(^{40}\) By and large, the subject had been left to state admiralty tribunals, and their performance was widely perceived to have been unsatisfactory.\(^{41}\) Whatever the disagreement over other aspects of Article III, then, the Admiralty Clause appears to have aroused little controversy: “Amid all the questions on which our ancestors wrangled,” an early commen-

\(^{37}\) See infra pp. 346-58.


\(^{39}\) U.S. Const. art. III, § 2.

\(^{40}\) See Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 1-4, at 11 n.37 (2d ed. 1975). Pursuant to this authority, Congress created a “Court of Appeals in Cases of Capture” to adjudicate such cases. Id. The Articles also conferred power to create courts “for the trial of piracies and felonies committed on the high seas,” but this authority was never used. Id.

\(^{41}\) See Waring v. Clarke, 46 U.S. (5 How.) 441, 457 (1847) (“There was but one opinion concerning the grant [of admiralty jurisdiction to the federal courts], and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately.”); Robertson, supra note 13, at 1
tator wrote, "this is one of the few that was conceded to the common
government without a groan."\textsuperscript{42}

Congress implemented the constitutional grant of jurisdiction by enacting section 9 of the Judiciary Act of 1789, which provided that "the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction."\textsuperscript{43} Justice Story set out the scope of the admiralty jurisdiction in De Lovio v. Boit,\textsuperscript{44} holding that the jurisdiction covers "all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality; the former extends over all contracts . . . which relate to the navigation, business or commerce of the sea . . . ."\textsuperscript{45} The lines have not been altogether clear, particularly in maritime tort.\textsuperscript{46} Under the "locality test," a tort fell within the maritime jurisdiction if it occurred on navigable waters.\textsuperscript{47} Congress extended the jurisdiction in 1948 to cover injuries caused by vessels on navigable waters to persons or property on land.\textsuperscript{48} And the Court has qualified the "locality test" for maritime injuries by requiring, in

\textsuperscript{42} Frederick Bauman, Admiralty and Maritime Jurisdiction, 36 Am. L. Rev. 182, 186 (1902); see also Romero v. International Terminal Operating Co., 358 U.S. 354, 361 (1959) ("[i]t was recognition of the need for federal tribunals to exercise admiralty jurisdiction that was one of the controlling considerations for the establishment of a system of lower federal courts."); Robertson, supra note 13, at 2 ("Indeed, the debates in the First Congress on passage of the Judiciary Act of 1789 indicate that the controversial issue was thought by some to be whether to broaden the powers of the federal admiralty courts, which it was generally conceded had to be created, to embrace other sorts of cases."). The reasons behind this consensus, and their implications for admiralty preemption, are explored infra pp. 314-17.

\textsuperscript{43} Ch. 20, 1 Stat. 76-77 (1789). The modern version, 28 U.S.C. § 1333 (1994), provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction."

\textsuperscript{44} 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).

\textsuperscript{45} Id. at 444; see also Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816) ("[t]he admiralty jurisdiction embraces all questions of prize and salvage, in the correct adjudication of which foreign nations are deeply interested; it embraces also maritime torts, contracts, and offences, in which the principles of the law and comity of nations often form an essential inquiry."). Initially, admiralty jurisdiction extended only to tidal waters, that is, only so far upstream from the ocean as the ebb and flow of the tide could be discerned. See The Thomas Jefferson, 23 U.S. (10 Wheat.) 428 (1825). By 1851, however, the jurisdiction had been extended to all navigable waterways. See Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 456-57 (1851). See generally Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214, 1215-26 (1954) (recounting the Admiralty Clause's "tortuous history" in this regard).

\textsuperscript{46} They have not been clear for maritime contracts either. See, e.g., Sisson v. Ruby, 497 U.S. 358, 372 (Scalia, J., concurring) (asserting that "[t]he impossibility of drawing a principled line" defining maritime contracts "has brought ridicule upon the enterprise"). But the courts appear to have reached fairly settled conclusions for the most common sorts of cases. See David W. Robertson, Admiralty and Maritime Litigation in State Court, 55 La. L. Rev. 685, 694 (1995).

\textsuperscript{47} See, e.g., Thomas v. Lane, 25 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902) (Story, J., on Circuit). "Navigable," for purposes of admiralty jurisdiction, means that "in its present condition the body of water—either by itself or by its connection with other waters—can be traveled by boat to another state or the ocean." Robertson, supra note 46, at 689 (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871)). Originally, the injury had to be "wholly" sustained on navigable waters; in The Plymouth, 70 U.S. (3 Wall.) 20, 32 (1865), for example, the Court held that the owner of a warehouse destroyed in a fire that started on board a ship docked nearby could not sue under the admiralty jurisdiction.

addition, that the injury have a "connection with traditional maritime activity." Courts have applied this test fairly broadly in practice; the jet-ski accident giving rise to *Yamaha Motor Corp. v. Calhoun*, for example, was held within the admiralty jurisdiction virtually as a matter of course.

The Admiralty Clause is a grant of jurisdiction; there is no corresponding grant of legislative power to Congress in Article I. One could thus plausibly read the clause as conferring no lawmaking power whatsoever. That is not how it has been read, however. Justice Frankfurter observed that "[f]rom the admiralty clause of the Constitution, this Court has drawn probably greater substantive law-making powers than it exercises in any other area of the law," and it is now commonplace that "[w]ith admiralty jurisdiction . . . comes the application of substantive admiralty law." Indeed, the Court has gone so far as to infer, from the mere grant of federal jurisdiction to adjudicate, an affirmative congressional power of lawmaking. The Court summed up the conventional view in *Romero v. International Terminal Operating Co.*: 49

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49 See Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 533-34 (1995). This connection turns on two issues: First, the court "assess[es] the general features of the type of incident involved . . . to determine whether the incident has 'a potentially disruptive impact on maritime commerce.'" *Id.* at 534 (quoting Sisson v. Ruby, 497 U.S. 358, 364 & n.2 (1990)). Second, the court asks "whether the general character of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.'" *Id.* (quoting Sisson, 497 U.S. at 364, 365 & n.2).


51 See *id.* at 206 ("Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain."). See generally Sisson, 497 U.S. at 373 (Scalia, J., concurring in the judgment) (arguing that the substantive component of the test is so easily met in practice as to make jurisdiction turn on locality, so long as a vessel is involved); Robertson, *supra* note 46, at 690-93 ("[C]ourts seem to conclude generally that admiralty tort jurisdiction exists if the injury either occurred on navigable water or was caused by a vessel on navigable water."). The upshot is that admiralty is, practically speaking, a place rather than a subject matter. *But see* Haek, *supra* note 18, at 209-10 (suggesting that, in light of *Yamaha's* willingness to apply state law, admiralty jurisdiction should be restricted to cases in which federal interests will warrant application of federal law).

52 By conferring power on Congress to "make Rules concerning Captures on Land and Water," U.S. Const. art. I, § 8, cl. 11, Article I does give Congress power to regulate what was an important aspect of maritime law in the 18th and early 19th centuries.


54 *Yamaha*, 516 U.S. at 206 (quoting East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986)); *see also* White, *supra* note 4, at 445 ("Under modern admiralty practice the 'subject matter jurisdiction' question is, as a practical matter, inseparable from the choice of law question."). *But see* Robertson, *supra* note 17, at 289-91 (arguing that the Court's recent decisions have "dissolved" the connection between the jurisdiction and choice of law inquiries).

55 *See* Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924). In that case, the Court noted that

although containing no express grant of legislative power over the substantive law, the provision was regarded from the beginning as implicitly investing such
Article III impliedly contained three grants. (1) It empowered Congress to confer admiralty and maritime jurisdiction on the "Tribunals inferior to the supreme Court" which were authorized by Art. I, § 8, cl. 9. (2) It empowered the federal courts in their exercise of the admiralty and maritime jurisdiction which had been conferred on them, to draw on the substantive law "inherent in the admiralty and maritime jurisdiction," and to continue the development of this law within constitutional limits. (3) It empowered Congress to revise and supplement the maritime law within the limits of the Constitution. 56

Despite the existence of legislative power, federal admiralty law remains "judge-made law to a great extent."57 Unlike most federal common law, moreover, judge-made maritime law is generally treated as a free-standing corpus, rather than a set of interstitial principles intended to flesh out the meaning of a federal statutory scheme.58 The sources of this corpus range from Roman law and the ancient maritime codes to "rules and concepts improvised to fit the needs of this country."59 The untethered nature of this law makes it difficult to fit into the general jurisprudential framework governing the relationship between federal and state law.60

State law enters into maritime cases through the "saving clause" in the 1789 Act's grant of admiralty jurisdiction.61 The saving clause qualifies the exclusive grant of jurisdiction by "saving to suitors, in all cases, the right of a

and the courts, including this Court, gave effect to it. Practically therefore the situation is as if that view were written into the provision.

Id. But see Note, supra note 45, at 1230-37 (demonstrating that Congress's legislative power was not seen as implied from the Admiralty Clause itself until In re Garrett, 141 U.S. 1, 12 (1891)). The practical significance of this extraordinary implication is limited because most legislative action pursuant to the admiralty grant would likely also qualify as a legitimate exercise of the commerce power. But see id. at 1235-36 (suggesting that the distinction between admiralty and commerce is important because (1) "it cautioned against the direct application to land commerce of doctrines developed for water commerce," and (2) it led to the development of the nondelegation doctrine in admiralty, under which Congress may not delegate power to regulate marine commerce to the States in ways that would be valid under the Commerce Clause). Congress's power has also sometimes been attributed to the Necessary and Proper Clause, operating in conjunction with the Admiralty Clause. See Panama R.R., 264 U.S. at 387.

56 Edmondson v. Compagnie Generale Transatlantique, 443 U.S. 256, 259 (1978) (footnotes omitted). This is not, however, as true as it once was. For example, as Judge Becker noted in Yamaha, "the federal law of maritime deaths has become increasingly defined by statute, and the federal statutory schemes have taken a preeminent role in shaping the federal maritime death remedies, including those provided by federal common law." Calhoun v. Yamaha Motor Corp., 40 F.3d 622, 630 n.10 (3d Cir. 1994), aff'd 516 U.S. 199 (1996); see also Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) (making the same observation).

57 See Robertson, supra note 13, at 140-41.

58 Gilmore & Black, supra note 40, §§ 1-2 to 1-3, at 3 to 7, § 1-16, at 47; see also East River, 476 U.S. at 864-65 ("Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules."). In East River, for example, the Supreme Court for the first time recognized "products liability, including strict liability, as part of the general maritime law." Id. at 865.


60 See, e.g., Robertson, supra note 13, at 18-19 (asserting that the saving clause "has been
common law remedy, where the common law is competent to give it."\textsuperscript{62} This "common law" remedy may be sought in a state court or in a federal court under some other head of jurisdiction.\textsuperscript{63} Because common law courts traditionally had concurrent jurisdiction with admiralty courts over most subjects, the saving clause means that federal admiralty jurisdiction is exclusive only with respect to proceedings in rem, that is, proceedings directly against a vessel or other item of property in order to determine its ownership or enforce a lien.\textsuperscript{64} Federal admiralty courts also have exclusive jurisdiction over certain statutory actions, including petitions under the Limitation of Vessel Owner's Liability Act\textsuperscript{65} and suits against the United States under the Suits in Admiralty Act.\textsuperscript{66} In all other cases, the saving clause affords plaintiffs the option of suing under state law in state court without reference to admiralty.\textsuperscript{67}

Like the jurisdictional grant itself, the saving clause has been read to have substantive as well as jurisdictional significance. Justice Holmes suggested in 1907 that, in deciding saving clause cases, "state courts in their decisions would follow their own notions about the law and might change them from time to time."\textsuperscript{68} The advent of a strong doctrine of maritime preemption in the \textit{Jensen} case, however, called this view into question; it is now

\textsuperscript{62} Judiciary Act of 1789, ch. 20, § 9(a), 1 Stat. 77. In \textit{New Jersey Steam Navigation Co. v. Merchant's Bank of Boston}, 47 U.S. (6 How.) 344, 389-90 (1848), and \textit{Waring v. Clarke}, 46 U.S. (5 How.) 441, 460-61 (1847), the Court rejected the possibility that this language could be read to carve out cases of common law jurisdiction from the grant of jurisdiction, rather than qualify the exclusivity of that grant. The modern version of the saving clause in 28 U.S.C. § 1333 (1994) eliminates the reference to the "common law," and "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." But this change, as well as other changes to the grant of federal maritime jurisdiction, has been held to have no substantive effect. \textit{See Madruga v. Superior Court}, 346 U.S. 556, 560 & n.12 (1954); \textit{Gilmore & Black, supra} note 40, § 1-13, at 39 & n.130.

\textsuperscript{63} A state suit may be founded on state law altogether, or may seek a state law remedy for a violation of a maritime right. \textit{See} Brainerd Currie, \textit{The Silver Oak and All That: A Study of the Romero Case}, 27 U. Chi. L. Rev. 1, 57 (1959). Suing in federal court on diversity or federal question grounds has certain procedural consequences under Federal Rule of Civil Procedure 9(h), which sets forth certain special rules for admiralty practice, but should not result in different choice of law or preemption rules than if the case had been brought on the "admiralty side" of the federal court's docket. \textit{See Currie, supra, at 11; see also Robertson, supra note 4, at 85 (asserting that "Rule 9(h) is an exhaustive list of the differences between the admiralty side and the law side").}

\textsuperscript{64} \textit{See Madruga}, 346 U.S. at 560; \textit{Robertson, supra} note 13, at 19. State courts generally are barred from entertaining marine suits in rem because "[t]he common law as it was received in the United States at the time of the adoption of the Constitution did not afford a remedy in rem in suits between private persons." \textit{C.J. Hendry Co. v. Moore}, 318 U.S. 133, 137 (1943). \textit{In rem} suits, in other words, are not a "common law remedy" within the meaning of the saving clause. \textit{But see id.} at 153 (holding that state courts may hear marine suits in rem in government forfeiture actions because the common law courts had concurrent jurisdiction over such suits in the 18th century). For a recent example of a maritime action in rem, see \textit{California v. Deep Sea Research, Inc.}, 118 S. Ct. 1464 (1998). Finally, it is worth noting that the limitation of state judicial competence to "common law" actions has not been held to exclude state courts from hearing suits for equitable relief. \textit{See Red Cross Line v. Atlantic Fruit Co.}, 264 U.S. 109, 123-24 (1924); \textit{Gilmore & Black, supra} note 40, § 1-13, at 38.

\textsuperscript{65} \textit{See} 46 U.S.C. app. § 185 (1994).

\textsuperscript{66} \textit{See id.} § 742.

\textsuperscript{67} \textit{See Gilmore & Black, supra} note 40, § 1-13, at 37.
widely agreed that the same substantive law should govern whether a case within the maritime jurisdiction is brought in state or federal court, and Jensen indicated that this law would almost always be federal. But the Court has significantly qualified the Jensen principle, too, and it is now generally accepted that the saving clause “assured that state law would continue to play some role in maritime affairs.” Just what that role ought to be is the subject of this Article.

B. Federal Common Law

Outside admiralty, the general rule is that “[f]ederal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision.” This principle dates back at least as far as the 1812 case of United States v. Hudson, which rejected the notion of a federal common law of crimes. In the modern era, of course, the leading authority is Erie Railroad v. Tompkins, which held 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.”

Paradoxically, it is equally well established that some federal common law is inevitable. Judge Friendly famously observed that

(noting that Justice Holmes’s statement “expressed the then current view that the saving clause saved recourse to state courts and to state substantive law”).

69 See, e.g., Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986) (describing “a so-called ‘reverse-Erie’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards”); Currie, supra note 63, at 11 (“[O]n thing is reasonably clear: In all maritime cases the same law, state or federal, is applied whether the action is in a state court or a federal court, and, if in a federal court, whether on the ‘law side’ or the ‘admiralty side.’”).

70 See infra pp. 268-89.

71 Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1279 (1st Cir. 1993); see also Romero v. International Terminal Operating Co., 358 U.S. 354, 362 (1959) (declaring that the saving clause represented a recognition “that some remedies in matters maritime had been traditionally administered by common-law courts of the original States”); Robertson, supra note 4, at 84 (stating that the saving clause “expresses] what the Court has taken as a quasi-constitutional commitment to achieving the proper mix of state and federal law in the maritime realm”).


74 304 U.S. 64, 78 (1938).

75 Id. at 78.

76 See United States v. Standard Oil Co., 332 U.S. 301, 308 (1947) (noting that “there remains what may be termed, for want of a better label, an area of ‘federal common law’ . . . untouched by the Erie decision’); HART & WECHSLER, supra note 3, at 849 (“The proposition that the corpus of federal law legitimately includes a body of judge-made law . . . is, today, no
by 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.\(^{77}\)

This "new federal common law" differs from pre-*Erie* practice in that its content derives from federal statutes or the Constitution.\(^{78}\) Although this form of federal common law is well accepted, there is little agreement on its first principles.\(^{79}\)

The cases generally reflect a two-part test consisting of a "power stage" and a "choice stage":

>[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.\(^{80}\)

If the answer to the second question is "no," then "state law may be incorporated as the federal rule of decision."\(^{81}\)

In delimiting the sphere of judicial power to create federal common law, courts have tended to recite a laundry list of subject areas rather than to articulate a set of defining principles.\(^{82}\) Those areas "fall into essentially two

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\(^{79}\) See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 6.1, at 336 (2d ed. 1994) ("[F]ederal common law has developed in an ad hoc fashion in a number of different areas. The Court has devoted little attention to developing general principles for when federal common law may or may not be created."). There is, to begin with, disagreement as to the definition of federal common law. Compare, e.g., HART & WECHSLER, supra note 3, at 863 (defining federal common law "to refer generally to federal rules of decision whose content cannot be traced by traditional methods of interpretation to federal statutory or constitutional command"), and Clark, supra note 1, at 1247 (adopting this definition), with Field, supra note 19, at 890 ("federal common law" is "any rule of federal law created by a court . . . when the substance of that rule is not clearly suggested by federal enactments") (emphasis omitted), and Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985) (defining federal common law more broadly, to include "any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense"). Because I am concerned with the power to fashion federal maritime law wholly apart from any federal statute, it is unnecessary to address the point at which "interpretation" shades over into "lawmaking."

\(^{80}\) Field, supra note 19, at 886; see also Friendly, supra note 77, at 410 (extracting these two distinct questions from the Court's opinion in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)). Professor Field is generally critical of the two-stage inquiry. See Field, supra note 19, at 888 (arguing that "the second prong—judicial choice—is alone determinative").


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.”

In the first category are cases involving the foreign relations of the United States, conflicts among the states, and the proprietary interests of the federal government. The second category includes cases in which Congress has explicitly or implicitly delegated authority to the federal courts to develop a body of federal common law under specific statutes, as well as cases in which the federal courts have implied private rights of action under federal law. These are examples only, and federal common law power has been and may be recognized in any number of other areas.

Finding power to create a rule of federal common law, however, does not end the inquiry. As noted above, a court must still ask whether it should adopt a state law rule instead of fashioning a federal rule. That issue is governed by a set of considerations articulated by Justice Marshall in United States v. Kimbell Foods, Inc.:

Undoubtedly, federal programs that by their nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules. Conversely, when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so, we must fashion special rules solicitous of those federal interests. Finally, our choice-of-law inquiry must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law.

In essence, “the Court balances the need for federal uniformity and for special rules to protect federal interests against the disruption that will come from creating new legal rules.”

84 See Sabbatino, 376 U.S. at 427.
85 See Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).
88 See Touche Ross & Co. v. Redington, 442 U.S. 560, 579 (1979) (creating private right of action only where there is affirmative evidence of Congress’s intent to permit such suits). See generally Chemerinsky, supra note 79, § 6.3, at 358-64 (discussing the evolution of the Court’s approach to private rights of action).
89 See United States v. Standard Oil Co., 332 U.S. 301, 305-06 (1947) (federal common law governing the relationship between the federal government and members of the armed forces).
Despite the substantial momentum behind Judge Friendly's "new federal common law," both courts and commentators continue to acknowledge that such law raises substantial questions of legitimacy. Because the Constitution vests lawmaking power in the legislative branch rather than the judicial, the exercise of that power by unelected judges raises concerns of separation of powers and electoral accountability. Because federal common law tends to supplant otherwise applicable state law rules of decision, moreover, federal common lawmaking may undermine the constitutional balance between state and federal authority. Finally, some commentators have argued that federal common law may violate the Rules of Decision Act, which provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States where they apply." As a result of these concerns, the Court continues to insist that the instances of appropriate federal common lawmaking are "few and restricted." Federal common law is generally viewed as interstitial in character, devoted primarily to filling in the gaps in federal statutory and constitutional law.

(1997) (noting that "a significant conflict between some federal policy or interest and the use of state law . . . is normally a precondition" for fashioning a rule of federal common law) (internal quotation and citations omitted); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87 (1994) (same).

92 See, e.g., HART & WECHSLER, supra note 3, at 863 (noting that "[f]or several decades following Clearfield, the development of federal common law was explosive," although "[t]hat trend has been slowed by Supreme Court decisions of the past ten years").


94 See Clark, supra note 1, at 1248-49; see also Merrill, supra note 79, at 19-27. Professor Merrill points out that "[n]either the text of the Constitution nor the history of the Federal Convention gives any indication that the federal courts are to partake of an advisory, amending, or supplementary role in the formulation of legislation." Id. at 21.

95 See Clark, supra note 1, at 1249; Merrill, supra note 79, at 13-19; see also Field, supra note 19, at 931 (suggesting that "these federalism issues that a system of broad federal common law raises . . . are far more serious than are any separation of powers issues").


97 Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)); see also Field, supra note 19, at 885 ("The received academic tradition on federal common law assumes that . . . after Erie, federal common law power is the exception, not the rule.").


99 Id. at 1251-52.
This situation, as Professor Hill has observed, is the mirror image of that pertaining under state law:

In most areas of private law, state legislative enactments have affected the corpus of judge-made law only interstitially, or else the statutes have been essentially codifications of law developed in the first instance by judges. In the case of law-making on the federal level, the converse is generally true. Characteristically, the judge-made law is interstitial, while the constitutional or statutory law is primary in the sense of providing the basic and controlling rules.\(^9\)

This interstitial aspect of federal common law does not characterize federal judicial lawmaking in admiralty.\(^10\) For that reason, the constitutional objections to federal common lawmaking in the maritime area are uniquely compelling. Before turning to those concerns, however, I consider the third and final piece of the puzzle: the doctrinal framework that has grown up around Congress’s power, through federal legislation, to preempt state lawmaking authority.

C. Preemption

Preemption occurs when federal law trumps state lawmaking authority, either because the state law conflicts with federal law, or because Congress is taken to have intended that no state should regulate the particular area at issue.\(^11\) *Gibbons v. Ogden*,\(^12\) for example, recognized that

[as] to such acts of the State Legislatures . . . [that] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution, . . . [i]n every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.\(^13\)

Preemption is peculiarly an issue of concurrent power: The problem arises only where both the federal and state governments are assumed, in the absence of action by the other, to have authority to regulate the particular issue involved.\(^14\)

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99 Hill, supra note 78, at 1024.

100 See supra notes 58-60 and accompanying text; see also Robertson, supra note 17, at 295 (arguing that “some guidance on admiralty law can be expected from Congress, and the state legislatures are expected to help out at the margins. But by constitutional structure and institutional habits, the principal source of admiralty law must be the federal admiralty courts”); Hill, supra note 78, at 1032-35 (identifying admiralty as a special area of “constitutional preemption”).

101 Professor Gardbaum draws a sharp distinction between “preemption” and “supremacy.” See Stephen A. Gardbaum, *The Nature of Preemption*, 79 Cornell L. Rev. 767, 770-73 (1994). “The supremacy of federal law,” he argues, “means that valid federal law overrides otherwise valid state law in cases of conflict between the two.” Id. at 770. “Preemption,” on the other hand, “means (a) that states are deprived of their power to act at all in a given area, and (b) that this is so whether or not state law is in conflict with federal law.” Id. at 771. In this Article, I follow the overwhelming tendency of both the academic literature and the case law by grouping both of these concepts under the label of “preemption.” Hopefully, the sense in which the word is used at any given point will be clear from the context.

102 22 U.S. (9 Wheat.) 1, 209 (1824).

103 Id. at 211.

104 See Gardbaum, supra note 101, at 770.
The basic principles of preemption law are well established, if not entirely free from theoretical dispute.\textsuperscript{105} A typical formulation runs as follows:

The Supremacy Clause of Art[icle] VI of the Constitution provides Congress with the power to pre-empt state law. Preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.\textsuperscript{106}

These categories generally reduce to three: express, field, and conflict pre-emption.\textsuperscript{107} It is critical to remember, however, that the various categories of preemption analysis are simply tools used to identify Congress’s intent in a particular context; that intent thus remains “the ultimate touchstone in every pre-emption case.”\textsuperscript{108}

In analyzing Congress’s intent, the Court frequently invokes a presumption against preemption. As Justice Douglas explained in *Rice v. Santa Fe Elevator Corp.*, “we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”\textsuperscript{109} The Court has continued to

\textsuperscript{105} See id. at 808-12 (arguing that only express preemption is legitimate); Louise Weinberg, *The Federal-State Conflict of Laws: “Actual” Conflicts*, 70 Tex. L. Rev. 1743, 1750 (1992) (applying choice of law principles to preemption cases).


\textsuperscript{107} See Gardbaum, supra note 101, at 808. As Professor Tribe points out, “[t]hese three categories of preemption are anything but analytically air-tight.” Tribe, supra note 16, § 6-25, at 481 n.14. There may also be a fourth category of “frustration” preemption that exists when state law frustrates the purposes of a federal statute, see, e.g., Perez v. Campbell, 402 U.S. 637, 649-52 (1971), but this is often considered a subspecies of “conflict” preemption. See, e.g., Gade v. National Solid Waste Management Ass’n, 505 U.S. 88, 105-06 (1992).


\textsuperscript{109} 331 U.S. 218, 230 (1947); see also *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (“The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”) (citing *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960)); Mintz v. Baldwin, 289 U.S. 346, 350 (1933) (“The purpose of Congress to supersede or exclude state action . . . is not lightly to be inferred. The intention to do so must definitely and clearly appear.”). In *Rice*, Justice Douglas prefaced his statement of the presumption by noting that “Congress legislated here in a field which the States
invoke this presumption in its recent preemption cases.\textsuperscript{110} The presumption applies not only "to the question whether Congress intended any pre-emption at all," but also to "questions concerning the scope of its intended invalidation of state law."\textsuperscript{111}

Preemption analysis as just described did not exist prior to the New Deal. The Court did not unequivocally recognize a congressional power to preempt state law until this century,\textsuperscript{112} and early preemption doctrine held that congressional action in a given field automatically preempted that field.\textsuperscript{113} Only in the 1930s did the Court begin to inquire into Congress's specific intent instead of assuming that "every exercise of federal power is inherently exclusive."\textsuperscript{114} Professor Gardbaum has persuasively argued that "[t]his new requirement of intent was . . . a logical result of the restructuring of American federalism that began with the New Deal in 1933 and that was judicially affirmed in 1937."\textsuperscript{115} This restructuring transformed a regime of separate federal and state spheres of legal authority into a new world of concurrent powers,\textsuperscript{116} and the new preemption doctrine accommodated that change by acknowledging that both federal and state authorities could (at least sometimes) regulate the same subject matter at the same time.\textsuperscript{117}

In moving to this more flexible regime, however, the Court necessarily sacrificed a certain degree of clarity in preemption determinations. As Justice Douglas admitted in \textit{Rice}, the existence and extent of preemptive congressional intent "is often a perplexing question."\textsuperscript{118} That question gets no

limits the scope of the presumption, however, as preemption cases by definition arise in areas where the states would otherwise have power to regulate. \textit{See Medtronic}, 518 U.S. at 485 (suggesting that the presumption applies "[i]n all pre-emption cases") (emphasis added). Even in maritime cases—a sphere of traditional federal authority—the preemption problem generally arises because that sphere has come to overlap with traditional state concerns, such as health and safety regulation. \textit{See infra} pp. 321-25.


\textsuperscript{111} \textit{Medtronic}, 518 U.S. at 485; \textit{see also Cipollone}, 505 U.S. at 518, 523.

\textsuperscript{112} \textit{See} Gardbaum, \textit{supra} note 101, at 787.

\textsuperscript{113} \textit{See} Southern Ry. v. Reid, 222 U.S. 424, 436 (1912); David E. Engdahl, \textit{Preemptive Capability of Federal Power}, 45 U. COLO. L. REV. 51, 53 (1973) ("[A]ny concurrent power over a particular matter that might have been left to the states . . . ceased to exist the moment Congress exerted its own power over that matter."); Gardbaum, \textit{supra} note 101, at 801-05.

\textsuperscript{114} Engdahl, \textit{supra} note 113, at 54.

\textsuperscript{115} Gardbaum, \textit{supra} note 101, at 806; \textit{see also Lessig, Federalism, supra} note 14, at 167-68 (suggesting that the New Deal transformation of preemption doctrine, with its emphasis on congressional intent, was a means whereby "the Court could shift responsibility for this preemption to Congress and away from itself"). Professor Engdahl, by contrast, suggests that "[t]his change in the Court's approach apparently originated from poor analysis of the precedents and was so subtle that, in addition to having escaped general recognition, on occasion it has been vehemently denied." Engdahl, \textit{supra} note 113, at 54. He agrees, however, that the change was "salutary." \textit{See} \textit{id.} at 54 n.10.

\textsuperscript{116} \textit{See, e.g.}, Lessig, \textit{Federalism, supra} note 14, at 137-44 (demonstrating that this transition arose from changes in the structure of the American economy that eliminated most enclaves of exclusive state authority).

\textsuperscript{117} \textit{See} Gardbaum, \textit{supra} note 101, at 806.

\textsuperscript{118} \textit{Rice v. Santa Fe Elevator Corp.}, 331 U.S. 218, 230 (1947).
easier when preemptive authority is exercised by a federal court, rather than Congress, in the context of federal maritime law.

II. At the Intersection: Southern Pacific Co. v. Jensen and Its Posterity

Admiralty rules are generally considered a paradigm case of legitimate federal common law, and it is often said that "post-Erie federal common law is truly federal law in the sense that, by virtue of the Supremacy Clause, it is binding on state courts." That is basically what the Supreme Court held in the 1917 case of Southern Pacific Co. v. Jensen. But although Jensen remains the leading decision on maritime preemption, it has never produced a principled—or even workable—boundary between federal and state authority in maritime cases. I will argue in Parts III and IV that any strong form of maritime preemption is unconstitutional. As a prelude to that discussion, however, it will help to trace the Jensen doctrine’s development in some detail.

A. The Jensen Case

Christian Jensen was a longshoreman who died of injuries sustained while unloading a steamship at the port of New York City. When Jensen’s widow sought and obtained an award of compensation from the New York Workmen’s Compensation Commission, the employer objected on the grounds that New York’s compensation act was inconsistent with federal maritime law. The Supreme Court agreed, and held that for cases within the maritime jurisdiction, courts could not constitutionally apply the act.

Writing for the Court, Justice McReynolds began by noting that “in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.” The Constitution, he said, presupposed “a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been [the intention] to place the rules and limits of maritime law under the disposal and regulation of the

120 19 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4514, at 453 (2d ed. 1996); see also Field, supra note 19, at 897 (“Although at one point there was some doubt, it is now established that a federal common law rule, once made, has precisely the same force and effect as any other federal rule. It is binding on state court judges through the supremacy clause.”).
121 244 U.S. 205 (1917).
123 See Robertson, supra note 4, at 88 (citing a “steady barrage of criticism by the U.S. Supreme Court”).
124 Jensen, 244 U.S. at 208.
125 See id. at 209-10.
126 See id. at 212.
several States." Justice McReynolds admitted, however, that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. That this may be done to some extent cannot be denied." After noting a number of instances in which courts might apply state law, and some in which they might not, the Court articulated the rule that has formed the starting point, at least, for all subsequent discussions of maritime preemption:

[Plainly, we think, 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 harmony and uniformity of that law in its international and interstate relations.]

Applying this standard, the Court observed that "[t]he work of a stevedore[,] in which the deceased was engaging[,] is maritime in its nature," and that therefore the case raised "matters clearly within the admiralty jurisdiction." If the several states were allowed to impose workmen's compensation obligations upon ship owners in such situations, "[t]he necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded." The Court thus concluded that New York's "legislature exceeded its authority in attempting to extend the statute under consideration to conditions like those here disclosed. So applied, it conflicts with the Constitution and to that extent is invalid."

Justices Holmes and Pitney wrote dissenting opinions. Justice Holmes's dissent was the occasion for his famous remark that "[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . that can be identified." Although this statement is

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128 Id. (quoting The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874)).
129 Id. at 216.
130 See id. (noting that state law may create a lien upon a vessel for repairs in her own port, fix pilotage fees, and provide a remedy for wrongful death).
131 See id. (noting that state law may not contravene federal statutes, authorize proceedings in rem, or create liens for repairs on foreign ships).
132 Id.
133 Id. at 217 (citing Atlantic Trans. Co. v. Imbrovek, 234 U.S. 52, 59-60 (1914)).
134 Id.
135 Id. at 217-18. The Court also noted that New York's compensation statute was "not consistent with the policy of Congress to encourage investments in ships[,] manifested in the Acts . . . which declare a limitation upon the liability of their owners." Id. at 218 (citations omitted). Emphasizing this passage would make Jensen simply another statutory preemption case. As I have noted, see supra notes 112-114 and accompanying text, the preemption doctrine of that era held that congressional action in a particular field—here, the imposition of liability on ship owners for accidents—completely ousted the states of regulatory authority. Such a holding would no longer be good law in light of the post-New Deal requirement that Congress must be shown to have specifically intended to preempt state law. See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 229-31 (1947). But that is not how the case has been read.
136 Justices Brandeis and Clarke joined both dissents. See Jensen, 244 U.S. at 255.
137 Id. at 221 (Holmes, J., dissenting).
generally taken as a condemnation of "general" common law, it is important to distinguish between two different senses of that term. Common law might be "general" in the sense that it is neither state nor federal in origin, or in the sense that it cannot be traced to statutes or constitutional provisions. Although the maritime law had been "general" in the first sense prior to Jensen, the Jensen majority transformed the law of the sea into preemptive federal law. Justice Holmes's objection was to according preemptive status to law that remained "general" in the second sense—that is, not traceable to federal statutes or constitutional provisions. "If admiralty adopts common law rules without an act of Congress," he argued, "it cannot extend the maritime law as understood by the Constitution. It must take the rights of the parties from a different authority, ... [and t]he only authority available is the common law or statutes of a State."

Justice Pitney agreed that general maritime law should not be treated as "federal." He added that after surveying the historical evidence, he had been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either federal or state.

As Justice Pitney's dissent made clear, Jensen is a rule of preemption, not of federal admiralty practice. That is, it ousts state law in both federal and state courts, which may hear cases falling within the admiralty jurisdiction under the saving clause. The Court underlined this fact in Chelentis v. Luckenbach Steamship Co., which held that maritime law limits on tort recovery preempted application of state tort law in a saving clause suit in state court. "Plainly," the Court said,

under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing wherein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law.

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138 In this sense, Justice Holmes's dissent is a precursor of Erie. See infra p. 310.
139 See infra Part III.C.2.
140 Id. at 221 (Holmes, J., dissenting). Justice Holmes's primary objection to the majority's holding may have been narrower still. Some language of the dissent focuses on the fact that no preexisting rule of admiralty actually conflicted with the state's worker's compensation remedy. According to Justice Holmes, "this court has believed the very limited law of the sea to be supplemented as in England by the common law, and that here that means, by the common law of the state." Id. Justice Holmes's complaint would thus be that the majority had treated federal admiralty law as a complete system, under which gaps are filled by creation of new and preemptive federal rules, rather than by supplementation with state law. See infra Part IV.C.
141 Jensen, 244 U.S. at 228 (Pitney, J., dissenting).
142 247 U.S. 372 (1918).
This holding is the origin of the frequently invoked principle that substantive maritime law applies whenever admiralty jurisdiction is present.144

The Jensen decision was criticized soon after its announcement,145 and it has not worn well with time.146 Reports of Jensen’s death, however, have been exaggerated.147 I survey the many forms that Jensen’s doctrine of maritime preemption has taken in the next section.

B. Into the Fog: Applying Jensen

Probe the “Jensen rule” for a moment, and one quickly realizes there is no “rule.” Jensen itself recognized that the extent to which the maritime law “may be changed, modified, or affected by state legislation” “would be difficult, if not impossible, to define with exactness.”148 Three quarters of a century later, Justice Scalia admitted that “[i]t 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.”149 As Judge Boudin put it in Ballard Shipping, “[d]iscerning the law in this area is far from easy; one might tack a sailboat into a fog bank with more confidence.”150

In this Section I briefly sketch some of the approaches that the Court has taken in defining the line between federal and state regulatory authority in admiralty over the years since Jensen. The very terminology warns of indeterminacy ahead: the Court and commentators speak of “gaps” in the maritime law;151 issues that are “maritime and local”;152 “characteristic features” of admiralty;153 “twilight zones” of potentially overlapping authority.154

\[144\] See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 (1986); Robertson, supra note 4, at 88.

\[145\] See, e.g., E. Merrick Dodd, Jr., The New Doctrine of the Supremacy of Admiralty Over the Common Law, 21 Colum. L. Rev. 647, 665 (1921) (suggesting that Jensen’s limitations on state authority in maritime cases “are without substantial support either in the language of the federal Constitution or in the previous judicial history of the subject”).

\[146\] According to Justice Frankfurter, “no 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.” Kossick v. United Fruit Co., 365 U.S. 731, 742 (1961) (Frankfurter, J., dissenting) (citation omitted). By 1943, Justice Black was ready to declare that “the Jensen case has already been severely limited, and has no vitality beyond that which may continue as to state workmen’s compensation laws.” Standard Dredging Corp. v. Murphy, 319 U.S. 306, 309 (1943).

\[147\] See, e.g., Askew v. American Waterways Operators, Inc., 411 U.S. 325, 344 (1973) (acknowledging that “Jensen . . . has vitality left”). One commentator goes so far as to claim that since Askew, “[t]he rule of Jensen has not . . . been seriously questioned. In the courts of appeals and district courts, it has been given broad application in a number of different contexts.” Bederman, supra note 3, at 13.


\[150\] Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994); see also Rodrigue v. LeGros, 563 So. 2d 248, 253 (L.a. 1990) (observing that “the Court has generally stated only its conclusion as to whether the application of state law was permissible, and these conclusions have not always been theoretically consistent”).

\[151\] See Currie, supra note 4, at 167.

\[152\] See Western Fuel Co. v. Garcia, 257 U.S. 233, 242 (1921) (emphasis added).
does any of the theories put forth to organize this body of law accurately
describe, much less explain, more than a fraction of the decided cases. In
the end, it is hard to disagree with Professors Gilmore and Black, who con-
cluded that “[t]he concepts that have been fashioned for drawing [the line
between state and federal authority] are too vague . . . to ensure either pre-
dictability or wisdom in the line’s actual drawing.”

1. Rights and Remedies

An early attempt at line drawing took place in Chelentis v. Luckenbach
Steamship Co., in which a seaman injured on board a ship brought a com-
mon law negligence action against the owner in state court. Noting that ad-
miralty law limited the plaintiff to maintenance and cure, without providing
an action for negligence, the Court held that the plaintiff could not evade this
limitation by suing under the saving clause. “The distinction between rights
and remedies is fundamental,” Justice McReynolds wrote for the majority.
While the saving clause contemplates that “a right sanctioned by the mari-
time law may be enforced through any appropriate remedy recognized at
common law,” it does not permit “the defendant’s liability [to] be measured
by common law standards rather than those of the maritime law.”

Justice McReynolds’s words came back to haunt him six years later in
Red Cross Line v. Atlantic Fruit Co. That case considered whether a New
York statute permitting enforcement of agreements to arbitrate by specific
performance could be applied validly to a maritime contract, where the gen-
eral maritime law did not provide such a remedy. Justice Brandeis, writing
for the majority, said it could; admiralty law recognized the validity of arbit-
tration agreements, and states were free to provide additional remedies as
long as they did not purport to alter the parties’ substantive rights under the
maritime law. In dissent, Justice McReynolds also emphasized “the essen-
tial relationship between rights and remedies.” Noting that “[n]othing can
be more material to the obligation than the means of enforcement,” he con-
cluded that, “[u]nder the guise of providing remedies no state statute may
add to or take from the obligations imposed by the contract within the admi-
ralty jurisdiction.”

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155 See Robertson, supra note 4, at 91-96 (tabulating 53 cases decided by the Supreme
Court since Jensen, and concluding that “none of the traditionally posited patterns is actually
reflected in the United States Supreme Court’s work”).
156 GILMORE & BLACK, supra note 40, § 1-17, at 49.
158 Id. at 384.
159 Id.
160 264 U.S. 109 (1924).
161 See id. at 122-25.
162 Id. at 127 (McReynolds, J., dissenting). Justice McReynolds also pointed out that spec-
ific performance for arbitration agreements was unknown to the common law, and therefore
not within the language of the saving clause. See id. at 129-31.
To post-Legal Realist readers, Justice McReynolds's dissent in *Red Cross Line* is surely more persuasive than his majority opinion in *Chelentis*.

Perhaps unsurprisingly, later cases generally fail to rely on a right/remedy distinction, although one occasionally finds references to the distinction in lower court opinions.

2. The "Gap" Theory

In *Western Fuel Co. v. Garcia*, the Court allowed a maritime plaintiff to sue for negligence under a state wrongful death statute, even though no such cause of action existed under the general maritime law. The Court reasoned that state law could apply because “[t]he maritime law as generally accepted by maritime nations leaves the matter untouched.” Commentators sought to explain this and similar cases in terms of a “gap theory”: “Where the maritime law provided a rule of decision, whether affording or denying recovery, state law had no place. But there were ‘gaps’ or ‘voids’ in the general law, and in these voids the state law could validly be applied.”

The gap theory built upon Justice Holmes’s insight that “[t]he maritime law is not a corpus juris—it is a very limited body of customs and ordinances of the sea.” But Chief Justice Hughes soundly rejected this theory for a majority of the Court in 1941 as “a subtlety which we think does not merit judicial adoption.” As Justice Harlan later explained, state wrongful death statutes do not “fill a void” in the maritime law; “there is a ‘void’ only in the sense that there is an absence of a right of action in such cases; admiralty does not lack a rule on the subject.” In other words, the gap theory begs

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164 See, e.g., KARL N. LLEWELLYN, A Realistic Jurisprudence—The Next Step, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 21-22 (1962) (suggesting that a right does not extend “beyond the remedy actually available”).

165 See Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 639 (La. 1992) (“Louisiana may afford a remedy not traditionally found in the maritime law, provided that the remedy neither conflicts with substantive maritime law nor impermissibly interferes with the requirement of uniformity.”); see also Burrell, *supra* note 122, at 80 (arguing that “supplementation by state law generally appears to have as its purpose the allowance of remedies that maritime law expressly withholds. Circumvention might be a more appropriate term than supplementation”). The Court appears to have rejected the right/remedy approach in *The Tungus v. Skovgaard*, 398 U.S. 588, 590-91 (1959), which held that a state wrongful death statute could not provide a remedy for the breach of a federal duty to maintain a seaworthy ship; rather, the plaintiff's right to relief depended upon whether state law imposed a similar duty. The Court did not cite *Chelentis* or *Red Cross Line*. In dissent, Justice Brennan complained that “[t]he Court has simply failed to grasp the important distinction here between duties and remedies.” *Id.* at 600-01 (Brennan, J., concurring in part and dissenting in part). It may be, however, that the Court instead simply failed to find that distinction persuasive.

166 257 U.S. 233 (1921).

167 *Id.* at 240.

168 Currie, *supra* note 4, at 167.

169 Southern Pac. Co. v. Jensen, 244 U.S. 205, 220 (1917) (Holmes, J., dissenting); see also Just v. Chambers, 312 U.S. 383, 390 (1941) (“[T]he maritime law was not a complete and perfect system and . . . in all maritime countries there is a considerable body of municipal law that underlies the maritime law as the basis of its administration.”).

170 *Just*, 312 U.S. at 391.
the question of whether admiralty's failure to recognize a right is really a "gap," or if it represents an affirmative policy to foreclose that right.\textsuperscript{172}

Federal admiralty courts have frequently filled "gaps" in the maritime law by formulating new maritime rules of decision.\textsuperscript{173} In\textit{Wilburn Boat}, for example, the Court recognized that even if there were no "judicially established federal admiralty rule" governing the marine insurance policies at issue in that case, the Court would still have to decide whether to fashion such a rule.\textsuperscript{174} The nonmaritime case law concerning the creation of federal common law recognizes this choice—in essence, whether to adopt a state rule of decision or fashion a federal one—as the central one, as federal power to supply a rule is rarely in doubt.\textsuperscript{175} Unfortunately, the gap theory offers no guidance on that issue.\textsuperscript{176}

3. \textit{Maritime but Local}

\textit{Western Fuel Co.} produced a second major strand of admiralty preemption cases, based on the Court's statement that "[t]he subject [of wrongful death remedies] is maritime and local in character."\textsuperscript{177} Under this "maritime but local" doctrine, "states may legislate freely on shipping matters that are of predominantly local concern, but . . . they may not so act as to interfere with the uniform working of the federal maritime legal system."\textsuperscript{178} The problem, of course, is that "maritime but local" is just a phrase; it does not itself

\begin{footnotes}
\item[172] See Burrell, supra note 122, at 64 (arguing that the gap theory permits judges to manipulate choice of law to reach favored results); David W. Robertson, \textit{Displacement of State Law by Federal Maritime Law}, 26 J. MAR. L. & COM. 325, 341 (1995) ("The gap theory cannot tell us the difference between 'no rule of recovery' and 'rule of no recovery.'"); see also Currie, supra note 4, at 168 ("The gap theory . . . appeared to make the result depend on whether the issue had been previously adjudicated, ignored the policies of the states and of the admiralty, and to a great extent denied the creative powers of admiralty courts. Moreover, it failed to explain the cases.").
\item[173] See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1958) (creating a maritime rule that ship owners owe a duty of reasonable care to all those on board for purposes not inimical to the vessel's interests, and applying that rule to exclude contrary state tort law).
\item[175] See supra notes 90-91 and accompanying text.
\item[176] See Robertson, supra note 172, at 340-41.
\item[177] Western Fuel v. Garcia, 257 U.S. 226, 242 (1921). Even though the gap theory and the maritime-but-local concepts both appear—apparently for the first time—in\textit{Western Fuel Co.}, there is considerable tension between the two ideas. As Professor Robertson has observed, "[t]he thrust of the gap theory is toward state-law application whenever no existing rule of maritime law can be found to answer the matter at issue, whether that matter is deemed local or not. In contrast, the maritime-but-local approach would tend to allow state law to apply even in the face of a conflicting maritime rule provided the matter at stake is local enough." Robertson, supra note 172, at 340.
\item[178] GILMORE & BLACK, supra note 40, § 1-17, at 50. Justice Frankfurter, for example, would have rested the decision in\textit{Wilburn Boat} to apply state law to an insurance coverage dispute arising out of a houseboat fire on an inland lake on the ground that the dispute implicated no federal concern. See\textit{Wilburn Boat}, 348 U.S. at 322 (Frankfurter, J., concurring in the result); see also Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 643 (La. 1992) (finding that a state strict liability statute should apply rather than federal maritime law, on the ground that
\end{footnotes}
provide any criteria for determining what subjects are sufficiently "local" to permit application of state law. As a result, the Court admitted in 1962 that

[n]o dependable definition of the area—described as "maritime but local," or "of local concern"—where state laws could apply ever emerged from the many cases which dealt with the matter in this and the lower courts. The surest that could be said was that any particular injury might be within the area of "local concern," depending upon its peculiar facts.

Moreover, it is not obvious that the local character of a particular injury is the right question. Ever since Wickard v. Filburn, courts have assessed the local character of individual acts under the Commerce Clause by assessing the impact of the entire class of activity on interstate commerce. The proper question, therefore, may be whether wrongful death cases, in the aggregate, have an appreciable impact on maritime commerce. Viewed that way, it is hard to imagine any incident being truly "maritime but local" in character.

Despite its problems, the "maritime but local" concept captured an important truth—that not every maritime transaction or tort implicates the federal government's interest in uniformity. The next two sections examine more sophisticated attempts to give content to that idea.

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179 See Robertson, supra note 172, at 341.
181 317 U.S. 111, 127-28 (1942) (holding that home-grown wheat consumed on the farm, aggregated across the nation, had a sufficient impact on interstate commerce to justify federal regulation).
182 See, e.g., United States v. Lopez, 514 U.S. 549, 619-23 (1995) (Breyer, J., dissenting) (showing that guns in schools have an effect far beyond the local sphere); see also Sisson v. Ruby, 497 U.S. 358, 364 (1990) (noting that for purposes of admiralty jurisdiction, the court considers the impact of the class of activity at issue on maritime commerce). The thorniest problems in deciding what is "local" and what is not arose in cases concerning state worker's compensation laws. Jensen had held such a law preempted by the general maritime law, see Southern Pac. Co. v. Jensen, 244 U.S. 205, 218 (1917), and the Court later struck down two attempts by Congress specifically to permit application of state compensation schemes in maritime cases. See Washington v. W.C. Dawson & Co., 264 U.S. 219, 222-23 (1927); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920). Congress finally enacted the Federal Longshore and Harbor Workers' Compensation Act in 1927, section 3(a) of which provided a federal recovery only if no recovery could validly be had under state law. See Federal Longshore and Harbor Workers' Compensation Act, § 3(a), 44 Stat. 1426 (1927); Gilmore & Black, supra note 40, § 6-49, at 419 (noting that section 3(a) "was generally ... taken to have built the ... 'maritime but local' category into the Act's coverage"). Many states enacted mirroring statutes, so that state or federal law might apply, depending on which side of the constitutional divide a given case fell. See generally Thomas J. Schoenbaum, Admiralty and Maritime Law § 5-4, at 329-32 (2d ed. 1994). The results, not surprisingly, were all over the map. See Davis v. Department of Labor & Indus., 317 U.S. 249, 253 (1942) ("It is fair to say that a number of cases can be cited both in behalf of and in opposition to recovery here."). In Davis, the Court finally threw up its hands and acknowledged "a twilight zone" of close cases, in which it would defer to the conclusion of either the state courts or the federal administrative authorities below. See id. at 256-57. This was less a doctrine than an admission of defeat, but the "twilight zone" analysis still exists in the area of maritime worker's compensation. See Hetzel v. Bethlehem Steel Corp., 50 F.3d 360, 364-67 (5th Cir. 1995).
4. Balancing and Accommodation

In Kossick v. United Fruit Co.,\textsuperscript{183} the Court considered whether New York's statute of frauds should apply to a maritime contract. Although framing the "controlling" question as "whether the alleged contract, though maritime, is 'maritime and local,'"\textsuperscript{184} Justice Harlan's majority opinion took the occasion to reconsider thoroughly "the doctrines of the uniformity and supremacy of the maritime law" announced in Jensen:

Perhaps the most often heard criticism of the supremacy doctrine is this: the fact that maritime law is—in a special sense at least—federal law and therefore supreme by virtue of Article VI of the Constitution carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.\textsuperscript{185}

Finding that the contract at issue was "such . . . as may well have been made anywhere in the world," that it therefore should be governed by a uniform rule, and that New York had no uniquely local interests at stake, the Court elected to apply the general maritime law.\textsuperscript{186} Kossick recognized the critical point that both the federal and state governments have legitimate interests at stake in maritime preemption cases.\textsuperscript{187} The problem is that Kossick's interest analysis has frequently been read as a generalized "balancing" test.\textsuperscript{188} While such tests surely have their uses,\textsuperscript{189} the

\textsuperscript{183} 365 U.S. 731 (1961).
\textsuperscript{184} Id. at 738.
\textsuperscript{185} Id. at 738-39 (citing Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) for the "special sense" in which maritime law is federal).
\textsuperscript{186} Id. at 741-42.
\textsuperscript{187} See Currie, supra note 4, at 169 ("An issue created by such a conflict of interests can be resolved only by reference to those interests and by an attempt to maximize the effectuation of the proper concerns of both state and nation.").
\textsuperscript{188} See, e.g., Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 638 (La. 1992) (citing Kossick for the proposition that "state law may be applied where the state's interest in a matter is greater than the federal interest"); Robertson, supra note 172, at 343.
interests to be weighed in maritime preemption cases seem sufficiently incommensurable to make a simple balancing analysis inappropriate.\textsuperscript{190} The First Circuit’s decision in \textit{Ballard Shipping} illustrates the point. In deciding whether a maritime common law rule barring recovery of economic losses in maritime tort cases\textsuperscript{191} should trump a state statute providing for recovery of such losses arising from an oil spill in territorial waters, the court set out to weigh two interests: the state’s interest in deterring pollution and compensating its victims, and the federal government’s interest in promoting maritime commerce by limiting liability for maritime disasters.\textsuperscript{192} Although the court was able to say that the state’s interest was strong because of the serious threat posed by oil pollution, and that the federal interest was less weighty than it might otherwise have been because the state law did not address primary conduct, these modifiers did not allow the court to assign concrete values to either interest for comparison.\textsuperscript{193} Indeed, the court was ultimately able to resolve the case only by noting that \textit{Congress} had weighed similar interests in enacting the Oil Pollution Act of 1990,\textsuperscript{194} and had come out on the side of non-preemption.\textsuperscript{195}

In most cases, of course, there will be no prior legislative weighing to which a court may defer, and the court will have to weigh the interests itself in the first instance. In many situations either the state or federal interest will clearly be stronger. But in close cases, a pure interest balancing test can provide little guidance as to the correct outcome.

5. \textit{American Dredging}

The Court articulated its latest framework for maritime preemption cases in \textit{American Dredging Co. v. Miller}.\textsuperscript{196} Rather than reading \textit{Jensen} as a general mandate for uniformity in the maritime law, Justice Scalia’s majority

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\textsuperscript{190} \textit{See}, e.g., \textit{Bendix Autolite Corp. v. Midwesco Enters.}, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (arguing, in a Commerce Clause case, that balancing analysis is frequently “like judging whether a particular line is longer than a particular rock is heavy”); \textit{see also} Steven F. Friedell, \textit{Searching for a Compass: Federal and State Law Making Authority in Admiralty}, 57 L.A. L. Rev. 825, 841 (1997) (asserting that balancing “requires courts to weigh incommensurable policies”); Robertson, \textit{ supra} note 172, at 343-44 (same).

\textsuperscript{191} \textit{See} \textit{Robins Dry Dock & Repair Co. v. Flint}, 275 U.S. 303, 308-09 (1927).

\textsuperscript{192} \textit{See} \textit{Ballard Shipping Co. v. Beach Shellfish}, 32 F.3d 623, 629-30 (1st Cir. 1994). One commentator has criticized \textit{Ballard Shipping} for citing “no authority for its balancing approach except for Professor David Currie’s article and the court’s perception of what recent Supreme Court maritime jurisprudence \textit{really} means.” Peter Thompson, \textit{State Courts and State Law: A New Force in Admiralty?}, 8 U.S.F. Mar. L.J. 223, 248 (1996). It is, however, somewhat odd to criticize a lower court for relying on its perception of what binding Supreme Court precedent “\textit{really} means.”

\textsuperscript{193} \textit{See} \textit{Ballard Shipping}, 32 F.3d at 629.


\textsuperscript{195} \textit{See} \textit{Ballard Shipping}, 32 F.3d at 630-31 (noting that 33 U.S.C. § 2718(a) expressly saved from preemption state laws providing for additional liability in oil spill cases). The Oil Pollution Act did not govern \textit{Ballard Shipping} because the spill at issue occurred before its effective date. \textit{See id.} at 631.
opinion took seriously Jensen’s statement that state law is invalid if it “works material prejudice to the characteristic features of the general maritime law.”

Justice Scalia thus began by asking whether the federal maritime rule asserted to preempt state law—the doctrine of forum non conveniens—was a “characteristic feature” of the maritime law. The Court held that it was not, because the doctrine neither originated in admiralty nor has exclusive application there.

The Court then asked whether application of state law—which did not recognize a forum non conveniens doctrine—would “interfere[] with the proper harmony and uniformity of the maritime law” in its international and interstate relations. Recognizing the difficulty that the Court had encountered in approaching this issue in the past, the Court found a shortcut:

Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of forum non conveniens, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

The Court thus found no threat to maritime uniformity, and no reason not to apply the state rule.

American Dredging’s distinction between substance and procedure may well be an adequate proxy for a uniformity analysis in the cases in which it applies.

The problem is that it will not decide most of the cases. As Justice Scalia noted, the Court’s previous maritime preemption cases had generally involved substantive rules. So long as those rules are not “characteristic features” of admiralty in the Court’s narrow sense, American Dredging provides no guidance to courts facing the difficult issue of whether application of state law would “interfere[] with the proper harmony and uniformity of the

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198 See American Dredging, 510 U.S. at 449-50; see also Aurora Maritime Co. v. Abdullah Mohamed Fahem & Co., 85 F.3d 44, 47 (2d Cir. 1996) (finding that maritime attachment procedures are a “characteristic feature” of maritime law); Ballard Shipping, 32 F.3d at 627-28 (determining that the bar to recovery of purely economic losses recognized in Robins Dry Dock neither originated in admiralty nor has exclusive application there).

199 American Dredging, 510 U.S. at 451 (quoting Jensen, 244 U.S. at 216).

200 Id. at 453.

201 See id. at 457-58 (Souter, J., concurring) (“I agree that in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive pre-emption analysis.”). Justice Souter warned, however, that

[the distinction between substance and procedure will . . . sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.

Id. at 458. For a “close case,” see Aurora Maritime, 85 F.3d at 48 (finding that failure to apply maritime attachment procedures would threaten “the power of federal admiralty courts . . . to enforce substantive admiralty law”).
maritime law." In *Ballard Shipping*, for example, the First Circuit confronted an "indisputably substantive" state rule that did not meet *American Dredging*’s "characteristic features" test. As a result, the court was thrown back on *Kossick*’s balancing test to determine whether that rule was preempted.204

In the end, *American Dredging* adds some interesting twists to the pre-existing law on maritime preemption, but makes little effort to straighten out the central tangle: When may a substantive state rule be applied in a maritime case, and when does the federal interest in maritime uniformity require preemption?

C. Jensen’s Future

*American Dredging*, as well as the Court’s more recent pronouncement in *Yamaha*, demonstrates the extent to which the *Jensen* doctrine is still up for grabs.205 In his *American Dredging* concurrence, Justice Stevens called for overruling *Jensen*, asserting that "*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York*206 would be in a case under the Due Process Clause." Noting that the issue had not been briefed, the majority rejected this suggestion. "Since we ultimately find that the Louisiana law meets the standards of *Jensen* anyway," Justice Scalia wrote, "we think it inappropriate to overrule *Jensen* in dictum, and without argument or even invitation."208

203 Id. at 451 (quoting Southern Pac. Co. v. *Jensen*, 244 U.S. 205, 216 (1917)).
204 See *Ballard Shipping*, 32 F.3d at 628-29. One might also quarrel with the *American Dredging* Court’s definition of "characteristic features." As Justice Kennedy argued in dissent, "[t]he issue here is not whether forum non conveniens originated in admiralty law, or even whether it is unique to that subject, but instead whether it is an important feature of the uniformity and harmony to which admiralty aspires." *American Dredging*, 510 U.S. at 463 (Kennedy, J., dissenting); see Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part II)*, 28 J. MAR. L. & COM. 555, 589 (1997) (noting that "[t]he ball neither originated nor has exclusive application in basketball, but no one doubts it is a ‘characteristic feature of the game.’ Try playing without one."). In other words, *American Dredging* may have taken Justice McReynolds’s choice of words in *Jensen* too seriously, as there seems little reason to accord special protection to "characteristic" features of admiralty law except to the extent that those features are uniquely important to maritime uniformity in general or to particular maritime policies.

205 The Court’s decision in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995), also casts doubt on *Jensen* in the course of deciding an issue of maritime jurisdiction. In *Grubart*, Justice Souter’s majority opinion rejected an argument for "synchronizing the jurisdictional enquiry with the test for determining the applicable substantive law." Id. at 546. That approach, Justice Souter wrote, "would discard a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law." Id. Professor Robertson characterizes the *Grubart* analysis as "a radically new thought." Robertson, supra note 17, at 290.

206 198 U.S. 45 (1905).
207 *American Dredging*, 510 U.S. at 458 (Stevens, J., concurring in part and in the judgment).
208 Id. at 447 n.1; see also Bederman, supra note 3, at 16 ("*American Dredging* . . . illustrates that there still remain strong disagreements within the Court on the parameters of a dormant Admiralty Clause doctrine."); Charles S. Haight, Jr., *Babel Afloat: Some Reflections on Uniformity in Maritime Law*, 28 J. MAR. L. & COM. 189, 200-01 (1997) (commenting, in reference to
American Dredging at least grappled with the Jensen rule; in Yamaha, the Court ignored Jensen entirely. In holding that state law remedies for wrongful death may apply to cases involving nonseamen arising in state territorial waters, the Court limited itself to interpreting the contours of the maritime wrongful death remedy established in Moragne v. States Marine Lines, Inc. The Court acknowledged, as it had in American Dredging, that “[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence.” The Court insisted, however, that “[w]e attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was Moragne’s design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.”

Despite Yamaha’s limited holding, the general thrust of Justice Ginsburg’s majority opinion was hospitable to state law in admiralty cases. The Court recognized that “[f]ederal maritime law has long accommodated the States’ interest in regulating maritime affairs within their territorial waters,” and that “[s]tates have thus traditionally contributed to the provision of environmental and safety standards for maritime activities.” The Court’s reading of Moragne, moreover, was inconsistent with the notion that the presence of a federal rule or remedy preempts the field, foreclosing application of alternate state regimes. And the Court’s suggestion that preemption would exist in instances where Congress had “prescribed a comprehensive tort recovery regime to be uniformly applied,” reflects standard land-based preemption principles. Admiralty commentators are therefore right to suggest that Yamaha may have a “great potential impact” by “confirm[ing] the Court’s recent trend toward upholding state law.”

209 See Robertson, supra note 4, at 100 (noting that “[i]n light of the recent hint in American Dredging that Jensen’s days are numbered . . . the omission [of any reference to Jensen in Yamaha] may itself be regarded as significant”).


212 Id.; see also Robertson, supra note 4, at 99 (noting that “Justice Ginsburg sought to make as little law as possible”).

213 Yamaha, 516 U.S. at 215 n.13. The Court noted, however, that “[p]ermissible state regulation . . . must be consistent with federal maritime principles and policies.” Id. (citing Romero v. International Terminal Operating Co., 358 U.S. 354, 373-74 (1959)).

214 See id. at 214 (quoting the Third Circuit’s statement below that “Moragne . . . showed no hostility to concurrent application of state wrongful-death statutes”).

215 Id.

216 See supra notes 105-108 and accompanying text.

217 Robertson, supra note 4, at 99; see also id. at 100-02 (identifying five aspects of Yamaha that “will fuel arguments for state law”); Friedell, supra note 190, at 826 (Yamaha “raises the possibility that state law will have a much greater role to play in admiralty cases”); Haack, supra note 18, at 182 (arguing that “[t]he Yamaha decision damages the uniformity of admiralty law that the Court has emphasized in its past decisions”). But see Burrell, supra note 122, at 75-76 (suggesting that Yamaha merely reflects a trend seeking to separate recreational boating cases
If American Dredging and Yamaha foreshadow the final abandonment of Jensen, it would hardly be too soon. Although the Supreme Court has not itself held that the federal common law of admiralty preempts state law in over thirty years,218 the lower federal courts have proven far more attached to Jensen’s broad view of maritime preemption.219 This pattern has persisted even in the wake of American Dredging and Yamaha.220 Moreover, while the Court has turned away from Jensen as a practical matter, it has provided neither a coherent rationale for doing so nor a principled approach to take Jensen’s place.

The special maritime preemption doctrine represented by Jensen has some superficial appeal, based largely on two arguments. The first is a syllogism running something like this: Federal courts have broad common law-making powers in admiralty; such lawmaking is now considered indistinguishable from other forms of federal common law; and federal common law—like federal law generally—ordinarily preempts contrary state law under the Supremacy Clause. The second argument is a more practical appeal to the value of uniformity fostered by a general federal common law of admiralty that trumps the multiplicity of state laws. In order for maritime commerce to thrive, the argument goes, maritime commercial enterprises must not be subjected to a multitude of varied and possibly even conflicting state regulatory regimes.221

218 See Robertson, supra note 4, at 97. The last case appears to have been Kossick v. United Fruit Co., 365 U.S. 731 (1961). State law prevailed in 29 of the 53 post-Jensen cases tabulated by Professor Robertson. See Robertson, supra note 4, at 89-90. But the recent trend—at least in the Supreme Court—has been unmistakably toward application of state law. See id. at 96-97.

219 See Maryland Dep’t of Natural Resources v. kellum, 51 F.3d 1220, 1224 (4th Cir. 1995) (holding that state law creating strict liability for damage to oyster beds was preempted by general maritime rule of negligence for maritime torts); IMTT-Gretina v. Robert E. Lee SS, 993 F.2d 1193, 1195 (5th Cir. 1993) (finding that maritime law bars purely economic losses preempts state tort law permitting recovery of such losses).

220 See, e.g., In re Amtrack “Sunset Ltd.” Train Crash, 121 F.3d 1421, 1425 (11th Cir. 1997) (holding that the general maritime law preempted a state wrongful death statute providing for punitive damages, and commenting that “Yamaha, by emphasizing [Jensen’s principles of uniformity and harmony] yet again, has affirmed their continuing vitality”); Friedman v. Cunard Line Ltd., 996 F. Supp. 303, 309-13 (S.D.N.Y. 1998) (holding that a state law claim for loss of society and consortium was preempted by federal admiralty law); In re Goose Creek Trawlers, Inc., 972 F. Supp. 946, 949-50 (E.D.N.C. 1997) (reading Yamaha to permit application of state law only in cases involving non-seamen).

221 See, e.g., Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924) (“The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see.”); Haeck, supra note 18, at 199 (“[F]oreign commerce interests need to be able to act with a degree of certainty when shipping goods to and from the United States. . . . The uniformity of maritime tort law continues to be instrumental in ensuring that vessel operators can predict the consequences of their conduct through adherence to uniform rules of conduct enforced through a uniform system of remedies.”); see also Haight, supra note 208, at 195-96 (noting that “a general maritime law, to which state courts and legislatures must conform, has important implications for international uniformity as well”). Moreover, the intrusion of a multitude of state regulatory regimes—most of which impact admiralty merely incidentally in the course of generally regulating torts, insurance, or pollution—threatens the very existence of admiralty as an autonomous legal discipline. It is thus no surprise to find that “[a]dmiralty people”—maritime practitioners and scholars—“are prone to emphasize the huge significance of the
The doctrinal confusion I have described in this section forecloses any defense of *Jensen* based on adherence to settled precedent. There is simply nothing “settled” about the law in this area—no judicially manageable standards which the courts have employed, and no basis for justifiable reliance by marine actors.\(^{222}\) The confusion undermines the argument for a “uniform” system of federal law governing maritime commerce as well, as the difficulty in predicting when such rules will be held to apply suggests that we are not presently seeing any benefits from uniform federal rules.\(^{223}\)

None of these rationales for *Jensen*'s special maritime preemption doctrine, moreover, stands up to the ordinary principles applied in nonmaritime cases involving federal common law or preemption. The ordinary rule is that federal common law authority is interstitial, and not to be derived simply from the existence of jurisdiction to decide a case or a policy imperative for uniform rules.\(^{224}\) Even where authority to formulate federal common law exists, courts must weigh the federal interests against factors that may favor incorporation of a state rule of decision. These limits on federal common lawmaking stem from basic concerns of federalism and separation of powers, and those concerns exist in maritime cases (at least inside state territorial waters) as in any other.

Likewise, the general rule is that preemption will not be found absent clear evidence of congressional intent to displace state law.\(^{225}\) At least since the New Deal, the mere presence of federal regulation in an area does not preempt all state lawmaking authority in that area, absent a finding of clear congressional intent to preempt the entire field of regulatory activity. These limits stem from the belief that the principal safeguard for state lawmaking authority lies in the states’ representation in Congress: If Congress has not addressed the preemption issue, then the “political safeguards of federalism” have had no chance to operate. Preemption by unelected federal judges, wholly apart from any statutory authority, is therefore profoundly suspect.

The usual answer to these sorts of concerns is that admiralty, in light of its history, is just different—that is, admiralty's historical concern for uniformity justifies an exception to the ordinary limits on federal court authority.\(^{226}\) I address that assertion in the next section. My conclusion is that although the history *does* support some relaxation of those limits in admiralty

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\(^{222}\) See Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.) (noting that precedent is less compelling where it fails to articulate manageable standards and people have not reasonably relied upon it); Robertson, *supra* note 17, at 299 (suggesting that admiralty lawyers may have committed “legal malpractice” in relying on a blanket rule of maritime preemption).


\(^{224}\) See *supra* notes 97-100 and accompanying text.

\(^{225}\) See *supra* notes 109-111 and accompanying text.

\(^{226}\) See generally Theodore F. Stevens, Erie R.R. v. Tompkins and the *Uniform General
cases, the same evidence denies that the maritime law should have any broad preemptive effect.

III. Erie and All That

A cornerstone principle of modern American law is 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.” 227 It is well settled, for instance, that Article III’s grant of jurisdiction over diversity cases confers no affirmative lawmaking power. 228 Nothing in the text of the admiralty grant suggests a different result in maritime cases. 229

It is probably too late in the day, however, to argue that the admiralty grant should not be at least somewhat different. 230 The admiralty and diversity grants have different histories, and that divergence has given rise to longstanding differences in practice. 231 But the divergent maritime practice has failed to settle into a coherent or workable doctrine, making it difficult to support Jensen as a matter of precedent. Although the Framers may have intended federal courts to exercise common law powers in maritime cases, the historical record provides no support for the proposition that federal common law may wholly supplant state regulatory authority over maritime activity.

A. The Erie Opinion

Erie held 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

227 Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938); see also Field, supra note 19, at 920 (“T]he scheme we have inherited from Erie and developed since has become such a fundamental part of our way of thinking about the boundary between state and federal power that many of our suppositions, constitutional and otherwise, are built upon it.”).

228 See Texas Indus. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981) (“The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.”); Field, supra note 19, at 923 (“[T]he firm holding of Erie is that the existence of diversity jurisdiction does not provide a basis for making federal common law.”).

229 It is frequently said that this is “the only grant of jurisdiction in the Constitution that identifies an area of substantive law.” John R. Brown, Admiralty Judges: Flotsam on the Sea of Maritime Law? 24 J. MAR. L. & COM. 249, 251 (1993). But such statements—if meant to justify applying federal law in all admiralty cases—beg the question whether the text of the Admiralty Clause refers to a particular body of substantive law or simply to cases meeting the requirements for admiralty jurisdiction. Although Professor Robertson suggests that “[d]uring the colonial period the word ‘jurisdiction’ was frequently used to refer to a general authority to govern, and not just to the scope of judicial authority,” he concedes that “it is reasonably clear, from both the wording of the Constitution and the legislative history, that the Constitutional Convention meant to refer to judicial authority only.” Robertson, supra note 4, at 136.

230 But see Redish, supra note 28, at 146-47 (arguing that the federal courts should abandon the maritime common law).

231 See Currie, supra note 4, at 162-63 (“The plain fact is that while the grant of jurisdiction to the federal courts in ‘Cases of admiralty and maritime Jurisdiction’ gives the federal courts power to evolve and apply a national substantive law, the grant of jurisdiction over ‘Controversies’ gives them power to develop law per se.”).
State."\(^{232}\) The Court's ruling seemed to rest on two distinct grounds: (1) that the Rules of Decision Act\(^ {233}\) requires federal courts to apply state law in the absence of applicable federal positive law;\(^ {234}\) and (2) that creation of federal common law based solely on the grant of diversity jurisdiction exceeds the constitutional limits of the federal judicial power.\(^ {235}\) The Court accordingly overruled its prior decision in *Swift v. Tyson*,\(^ {236}\) which had held that a federal court sitting in diversity may apply a "general commercial law" rather than state law.\(^ {237}\)

*Erie*’s reliance on the Rules of Decision Act offers an initial ground for distinguishing cases in admiralty from those resting on other bases of federal subject matter jurisdiction. At the time of *Erie*, after all, the Act only applied to "trials at common law," which was not thought to include admiralty cases.\(^ {238}\) The constitutional ground of *Erie* remains, however; indeed, Justice Brandeis rejected Justice Story's narrower reading of the Rules of Decision Act in *Swift* because that reading amounted to "an unconstitutional assumption of powers by the Courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct."\(^ {239}\) The exclusion of admiralty cases from the Rules of Decision Act thus cannot free federal admiralty courts from the obligations of *Erie*.\(^ {240}\)

\(^{232}\) *Erie*, 304 U.S. at 78.

\(^{233}\) *Judiciary Act of 1789*, ch. 20, §. 34, 1 Stat. 92. ("The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."). The modern version, 28 U.S.C. § 1652 (1994), provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

\(^{234}\) See *Erie*, 304 U.S. at 71-76.

\(^{235}\) See id. at 77-79.

\(^{236}\) 41 U.S. (16 Pet.) 1 (1842).

\(^{237}\) See id. at 18-19; *Erie*, 304 U.S. at 79 ("disapproving" the *Swift* doctrine).

\(^{238}\) See United States v. Burr, 25 F. Cas. 187, 188 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.); Fletcher, *supra* note 24, at 1551 ("[T]here was never any suggestion that [the Rules of Decision Act] might prevent a federal court from using the general common law in an admiralty case."); Merrill, *supra* note 79, at 29 (noting that the Act's language "[b]y implication" excluded cases in admiralty). The modern language is broader, applying to "civil actions," but the revision notes indicate only that this is to reflect subsequent judicial holdings applying the Rules of Decision Act to suits in equity. See 28 U.S.C. § 1652 (historical and statutory note).

\(^{239}\) *Erie*, 304 U.S. at 79 (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

\(^{240}\) See Merrill, *supra* note 79, at 29 ("Unless the concerns of federalism, separation of powers, and electoral accountability are satisfied, judicial lawmaking should be deemed just as illegitimate in these classes of cases [excluded from the Rules of Decision Act] as in "trials at common law."). Some commentators have suggested that *Erie*'s constitutional holding was dictum, and ill-considered dictum at that. See, e.g., Field, *supra* note 19, at 920. Professor Field posits that [b]ecause *Erie*'s constitutional discussion was unnecessary to the decision; because its reasoning was ambiguous; because it did not address the main objections that might be leveled against it (for example, its inconsistency with admiralty and interstate disputes); and because there has been no occasion to reexamine or fortify it, one cannot be certain of the extent to which Congress would be capable of changing *Erie*'s result.

*Id.* Judge Friendly has rejected this interpretation, however, noting that "[t]he court's stated and.
The heart of Justice Brandeis’s constitutional argument in *Erie* is his statement 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. And no clause in the Constitution purports to confer such a power upon the federal courts.241

Nowadays, of course, Congress almost surely would have the power to promulgate as a federal statute the rule at issue in *Erie*. That rule imposed upon railroads a duty of care to pedestrians traveling along a railroad right of way. Even in 1938, it seems likely that the Court would have upheld such a statute as a valid exercise of Congress’s power over instrumentalities of interstate commerce.242

The key to *Erie*’s constitutional holding may therefore lie in Justice Brandeis’s emphasis on the power of the federal courts. *Erie* has been read as announcing a principle of *judicial* federalism whereby “the 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.”243 Judicial federalism thus denies the federal courts power to “go first” in making law, even if the same law would not be beyond the legislative competence of Congress.244

Professor Weinberg has dismissed this “judicial federalism” view of *Erie* as a “prudential distinction between the judiciary and the legislature that seems irrelevant in any direct way to federalism.”245 The distinction, how-

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241 *Erie*, 304 U.S. at 78.


243 Texas Indus., v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981); see also Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1478-93 (1997); Clark, *supra* note 1, at 1259-64 (explaining that “*Erie*’s conception of judicial federalism rests upon mutually reinforcing principles of federalism and separation of powers”); Merrill, *supra* note 79, at 15-16; Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 11-12 (1975) (“[*Erie*] recognizes that federal judicial power to displace state law is not coextensive with the scope of dormant congressional power. Rather, the Court must point to some source, such as a statute, treaty, or constitutional provision, as authority for the creation of substantive federal law.”). But see Field, *supra* note 19, at 926 (asserting that “*Erie* is consistent with allowing federal common lawmaking power as broad as Congress’s”).

244 See Field, *supra* note 19, at 924 (“States’ interests, and the scope of state lawmakers’ power, could be mightily affected by a declaration that courts’ power to make federal common law was as broad as Congress’s lawmaking power, even if the courts could not go beyond the congressional sphere.”).

ever, is neither "prudential" nor "irrelevant" to federalism. Two of the primary ways in which the Constitution protects federalism are by ensuring that the states are represented in the legislative process, and by making that process difficult to navigate. By avoiding the legislative process entirely, "general" federal common law circumvents the political safeguards of federalism. And by circumventing the constraints on legislative lawmaker imposed by Article I, "general" federal common law can encroach on state regulatory authority much more freely — and frequently — than federal statutory law. That is why the Supreme Court has said that the existence of Congressional power to regulate a subject by statute "is by no means enough" to justify the fashioning of federal common law by courts. Under regard is that, in the absence of a governing federal rule, a federal court must apply state law whether the law is articulated by a state legislature or a state court. See 304 U.S. at 73 (reading the Rules of Decision Act to require federal courts to apply "the law of the state, unwritten as well as written"). This idea protects federalism by guaranteeing a state's freedom to order its internal structure as it wills, without being subject to the federal separation of powers. Nothing in Erie, however, denies the fact that the separation of powers does impose important distinctions between legislative and judicial lawmaker at the federal level. And those distinctions, as I show infra, have important implications for federalism.

See generally Herbert Wechsler, The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954). I discuss the relevance of the "political safeguards of federalism" further infra, notes 397-421 and accompanying text.

See Clark, supra note 1, at 1261 ("[T]he founders incorporated these features [e.g., checks and balances] in order to make the exercise of [federal] governmental authority . . . more difficult. The Constitution thus reserves substantive lawmaker power to the states and the people both by limiting the powers assigned to the federal government and by rendering that government frequently incapable of exercising them."); see also The Federalist No. 70, at 426 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("In the legislature, promptitude of decision is often an evil than a benefit."); Cynthia R. Farina, Statutory Interpretation and the Balance of Power in the Administrative State, 89 COLUM. L. REV. 452, 523-24 (1989) (observing that the Framers' experience with state governments "which moved too quickly in establishing and altering policy" during the Confederation period led them to "deliberately creat[e] a lawmaker process that was slow, even cumbersome").

See Clark, supra note 1, at 1489 ("Strict adherence to the principles of judicial federalism recognized in Erie is necessary to ensure that the political safeguards of federalism serve their intended function."); Merrill, supra note 79, at 16-17.

See infra Part IV.C.

Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966). It follows a fortiori that Professor Weinberg's own view — that the existence of a "legitimate national governmental interest" is sufficient to authorize the creation of federal common law, see Weinberg, supra note 245, at 813 — cannot be the law. This view requires Professor Weinberg to reject the idea that federal powers must be enumerated in the Constitution as hopelessly outdated. See id. ("One hopes that few today think that since the nation is one of expressly delegated powers it can act only within the confines of an express Constitutional grant of power and not upon its perceived needs."). But see United States v. Lopez, 514 U.S. 559, 559-61 (1995). Ironically, the only authority cited for Professor Weinberg's contention that "national lawmaker power will be implied . . . when the national interest so requires" is Jensen. See Weinberg, supra note 245, at 813 & n.46.

Professor Weinberg's view is a strange inversion of the founding generation's belief that legislative and judicial power must be coextensive. See Weinberg, supra note 245, at 813 ("[O]ur courts are, and must be, courts of coordinate powers. The judiciary must have presumptive power to adjudicate whatever the legislature and the executive can act upon."); infra note 333 and accompanying text (describing the Framers' view). As I discuss further, see infra notes 326-
the regime established in *Erie*, “[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress.”

B. *Erie’s Implications for Admiralty*

Justice Brandeis’s opinion in *Erie* aroused some initial concern that *Erie* would threaten the uniformity of federal maritime law. Justice Holmes, after all, had uttered his most famous indictment of the pre-*Erie* understanding of the common law in an admiralty case. Dissenting in *Southern Pacific Co. v. Jensen*, Holmes declared that “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.” Brandeis joined that dissent, and he echoed Holmes’s reasoning in *Erie* itself. If federal courts lacked authority to apply *Swift’s* “general commercial law” or “law merchant,” then it was not at all obvious why they would retain power to apply the “general maritime law” or “law of nations.”

Justice Brandeis quickly made clear, however, that not all jurisdictional grants should be construed to confer lawmaking powers on the federal courts. On the same day that *Erie* was handed down, his opinion in *Hinder-*

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251 *Wallis*, 384 U.S. at 68.

252 See *Friendly*, supra note 77, at 404 (noting that this fear was “now seen to have been wholly misplaced”).

253 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

254 See *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938). In *Erie*, Justice Brandeis noted that “[t]he fallacy underlying the rule declared in *Swift v. Tyson* is made clear by Mr. Justice Holmes. The doctrine rests upon the assumption that there is “a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,” that federal courts have the power to use their judgment as to what the rules of common law are; and that in the federal courts “the parties are entitled to an independent judgment on matters of general law”: “[b]ut law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State . . . is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else.”

*Id.* (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533-34 (1928)); see also *Friendly*, supra note 77, at 404 (speculating that “[p]erhaps the suspicion [behind fears that *Erie* would be applied in admiralty] was that the approving quotation of the jurisprudential views in Holmes’s opinions in the *Kuhn* & *Black & White* cases implied endorsement of his application of similar thinking to the relation of state and federal law in the maritime area in his *Jensen* dissent”).

255 See, e.g., *Clark*, supra note 1, at 1280-83 (noting the common origins of the “law merchant” applied under *Swift* and the general maritime law in the “law of nations”); *Fletcher*, supra note 24, at 1553 (noting that the substantive law applied under *Swift* and in admiralty cases
lider v. La Plata River & Cherry Creek Ditch Co.,\textsuperscript{256} upheld federal common lawmaking powers in cases of interstate disputes.\textsuperscript{257} Sixteen years later, in Pope & Talbot, Inc. v. Hawn,\textsuperscript{258} the Court soundly rejected an Erie-based argument for applying state law in a maritime case.\textsuperscript{259} The argument for state law in Pope & Talbot rested on the fact that the case was brought on the "law side" of the federal court docket—i.e., jurisdiction was predicated on diversity of citizenship—even though the case included maritime claims.\textsuperscript{260} Apparently, it was already generally assumed that Erie would not apply where federal jurisdiction was based solely on the maritime nature of the claims. Justice Black's opinion in Pope & Talbot held that grounding jurisdiction in diversity could not change the applicable law:

[W]e are asked to use the Erie-Tompkins case to bring about the same kind of unfairness it was designed to end. Once again, the substantial rights of parties would depend on which courthouse, or even on which "side" of the same courthouse, a lawyer might guess to be in the best interests of his client. We decline to depart from the principle of equal justice embodied in the Erie-Tompkins doctrine. Of course the substantial rights of an injured person are not to be determined differently whether his case is labeled "law side" or "admiralty side" on a district court's docket.\textsuperscript{261}

Pope & Talbot's reasoning is unobjectionable as far as it goes. That the case was pleaded as a diversity case should make no difference; after all, Erie has generally been interpreted to apply regardless of the basis of federal subject matter jurisdiction.\textsuperscript{262} Erie's imperative that the same law should govern regardless of what court hears the suit\textsuperscript{263} has thus given rise in state court suits under the "saving to suitors" clause to "a so-called 'reverse-Erie' doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards." But Pope & Talbot's underlying premise—that the grant of admiralty jurisdiction, unlike the grant of diversity jurisdiction, gives federal courts the power to formulate federal common law

\textsuperscript{256} 304 U.S. 92 (1938).
\textsuperscript{257} See id. at 110; Clark, supra note 1, at 1322-31 (considering the basis for federal common law in interstate disputes); Field, supra note 19, at 916 (suggesting that "interstate controversies are thought to be different in that there appears to be no other source of rules to govern them").
\textsuperscript{258} 346 U.S. 406 (1953).
\textsuperscript{259} See id. at 410-11.
\textsuperscript{260} See id. at 410.
\textsuperscript{261} Id. at 411.
\textsuperscript{262} See, e.g., Friendly, supra note 77, at 408 (rejecting the "oft-encountered heresy" that Erie applies only in diversity cases, and affirming that "the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law") (quoting Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F.2d 538, 541 n.1 (2d Cir. 1956)); Jay, Federal Common Law II, supra note 73, at 1315 (noting that the basis for subject matter jurisdiction in a case and the law applicable to particular issues are unrelated questions).
\textsuperscript{263} Cf. Hart, supra note 22, at 489 (arguing that only a "single system of law" is applicable to any given issue).
\textsuperscript{264} Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 223 (1986); see also Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 384 (1918); Currie, supra note 4, at 181-82; Friendly, supra note 77, at 404-05; Robertson, supra note
rules of decision that must apply in a maritime case despite the existence of contrary state law—requires further examination.

C. Uniformity and the Purpose of the Admiralty Grant

There is no obviously relevant difference in the texts of the diversity and admiralty jurisdictional grants. The most prevalent explanation for the stark disparity in the common lawmaking power derived from the two clauses has instead been that the Framers intended the grant of admiralty jurisdiction to facilitate the development of a uniform law of maritime commerce, while they intended the Diversity Clause to provide an unbiased forum for out-of-state litigants:

That we have a maritime law of our own, operative throughout the United States cannot be doubted . . . . The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention [of the Framers] to place the rules and limits of maritime law under disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Justice Kennedy recently argued that the Framers sought to establish a uniform system of maritime law, under the supervision of the federal courts, for two reasons. First, "[a]t the time of the framing, it was essential that our prospective foreign trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other." Second, "[t]he confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to

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265 See U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction; . . . to Controversies . . . between Citizens of different States . . . ").

266 The Lottawanna, 88 U.S. (21 Wall.) 558, 574-75 (1874); see also Madruga v. Superior Court, 346 U.S. 556, 566 (1954) (Frankfurter, J., dissenting) ("[T]he need for a body of maritime law, applicable throughout the Nation and not left to the diversity of the several States, was the one basis for the creation of a system of inferior federal courts, authorized by the Constitution, which was recognized by every shade of opinion at the Philadelphia Convention."); Currie, supra note 4, at 163; Hart, supra note 22, at 531 (ascrying the differential treatment to "the quasi-exclusive grant of jurisdiction to the federal courts, the absence in the states of any complete system of maritime law and remedies, and the tradition of the maritime law as a separate corpus of law claiming the respect of all maritime nations"). The Lottawanna's declaration of the uniformity principle was merely "elegant dictum," however. Haight, supra note 208, at 197. The case actually held that states could modify the general maritime law by creating liens that would be enforceable in a maritime action. See The Lottawanna, 88 U.S. (21 Wall.) at 581 ("It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted . . . the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions.").

see. . . . [T]he Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control." 268

Despite the widespread view that the admiralty jurisdiction was created for the purpose of creating and preserving a uniform maritime law, 269 that assumption is not free of dispute. For example, Justice Pitney's dissent in 

_ Jensen_ insisted that the historical purpose of the admiralty grant—that of the diversity grant—was to "avoid[ ] the influence of local opinion." 270 Much more recently, the Court was unwilling to rule out 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. . . . After all, if uniformity of substantive law had been Congress's only concern, it could have left admiralty jurisdiction in the state courts subject to an appeal to a national tribunal. 271

More important, two historical considerations qualify the Framers' concern for uniformity in the maritime law. First, the Framers appear to have viewed the federal admiralty jurisdiction as concerned primarily with three kinds of public law cases—captures of foreign vessels, criminal actions, and enforcement of revenue laws—rather than with private civil disputes. 272 Their concern for uniformity, especially in dealings with foreign relations, was likewise limited primarily to these contexts. Second, the history suggests that the general maritime law to be developed and enforced in the federal courts was not "federal" law in the sense in which we think of it today. 273 Like the "law merchant" applied in 

_Swift v. Tyson_, the general maritime law was a supranational body of legal principles shared in common by the courts of many sovereignties—including the States. The "law of the sea" was simply "law"—not federal common law to be accorded preemptive effect under the Supremacy Clause. If history is to justify the expansive lawmaking powers of

268 _Id._ (quoting Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924)).

269 See, e.g., Haec, _supra_ note 18, at 183 (stating, without citation, that "[t]he U.S. Constitution and the Judiciary Act of 1789 established federal jurisdiction over maritime torts in order to provide a uniform set of rules for those who wished to conduct maritime commerce").

270 Southern Pac. Co. v. _Jensen_, 244 U.S. 205, 249 (1917) (Pitney, J., dissenting); see also Field, _supra_ note 19, at 917. The assumption that the diversity grant was meant solely to avoid such prejudice—rather than to permit the development of a uniform commercial law—has been questioned as well. See _Clark, supra_ note 1, at 1348-49; _Currie, supra_ note 4, at 160-61 (noting that Justice Story did seek, through _Swift v. Tyson_, to use the diversity grant to foster a uniform commercial law); Field, _supra_ note 19, at 917-18. If correct, this point would undermine the basis for treating diversity and admiralty differently in terms of the substantive lawmaking authority they confer upon the federal courts.

271 Jerome B. Grubart, Inc. v. _Great Lakes Dredge & Dock Co._, 513 U.S. 527, 546 n.6 (1995) (citations omitted). The Court went on to point out that Congress had imposed just such a system for federal-question jurisdiction until 1875, and that the Articles of Confederation had used a similar approach with cases of prize and capture. See _id.; see also_ Bederman, _supra_ note 3, at 2-4 (acknowledging that there is little evidence of concern for uniformity of maritime law in commercial cases until _The Lottawanna_ in 1874).

272 _See infra_ Part III.C.1.
the federal admiralty courts, then basic historical assumptions underlying the
grant of admiralty jurisdiction must likewise qualify those powers.

1. Prizes, Crimes, and Revenue

I have already noted the broad consensus among the founding genera-
tion in favor of conferring admiralty jurisdiction on the federal courts.\(^\text{274}\) That consensus rested, however, on a view of the primary purposes and con-
cerns of the admiralty jurisdiction that differs substantially from the modern
understanding. Professor Casto’s leading historical study of the Admiralty
Clause’s origins demonstrates that “[t]he Founding Generation’s vision of
maritime activities was dominated by privateers, smugglers, and pirates”—
not by civil litigants with maritime tort or contract claims.\(^\text{275}\) Edmund Ran-
dolph’s report to Congress on the newly created federal judicial system, pub-
lished in 1790, listed four categories of admiralty cases in descending order of
importance:

1. the “condemn[ation of] all lawful prizes in time of war”
2. “criminal sea law”
3. “offenses on water against the revenue laws”
4. “claims for specific satisfaction on the body of a vessel, as for mariners’ wages, &c.”\(^\text{276}\)

Only the last of these categories falls within the class of private civil litigation
that now dominates the admiralty docket of the federal courts. Randolph’s
emphasis on prize, criminal, and revenue cases is consistent with the pre-
Revolutionary practice in the colonial vice-admiralty courts, in the state adm-
iralty courts prior to 1789, and in the federal admiralty court under the
Articles of Confederation.\(^\text{277}\)

Prize, criminal, and revenue cases all directly implicate the sovereign in-
terests of the national government. The capture of foreign ships and the
commission of crimes upon the high seas both had the potential to affect
significantly the foreign relations of the United States.\(^\text{278}\) Revenue cases
were also important, given the new federal government’s almost total finan-
cial dependence on customs duties on maritime commerce.\(^\text{279}\) That the Fram-
ers had these objects on their minds is clear from Article I, which specifically
conferred on Congress the power “To lay and collect Taxes, Duties, Imposts

\(^{274}\) See supra notes 39-42 and accompanying text.

\(^{275}\) Casto, supra note 21, at 155.

\(^{276}\) Id. at 120 (quoting H.R. REP. NO. 1-17, 3d Sess. (Dec. 31, 1790), reprinted in 1 AM.
STATE PAPERS: MISCELLANEOUS 21 (Walter Lowrie & Matthew St. Clair Clarke eds., 1834)).
Professor Casto concludes that the categories are ranked in descending order of importance by
the relative attention devoted to each category in the remainder of the report. See id. at 120-21.

\(^{277}\) See id. at 122-29.

\(^{278}\) See id. at 133; Clark, supra note 1, at 1334 (“Historically, prize cases were arguably the
most important cases within the federal courts’ admiralty and maritime jurisdiction because they
had the greatest potential to affect the public peace.”).

\(^{279}\) See Casto, supra note 21, at 134 n.92 (indicating that between 1789 and 1801, 87% of
federal revenue came from customs duties) (citing DAVIS R. DEWEY, FINANCIAL HISTORY OF
and Excises, . . . To define and punish Piracies and Felonies committed on the
high Seas, . . . [and] To . . . make Rules concerning Captures on Land and
Water."²²⁰ Three early drafts of the judicial article, moreover, articulated the
admiralty jurisdiction in terms of prize, criminal, and revenue cases rather
than as covering a general category of maritime cases.²²¹ Although the Com-
mittee of Detail ultimately opted for the more general formulation in Article
III, there is no indication that the Committee rejected Randolph's widely
held view of the central importance of prize, criminal, and revenue cases.²²²

This view explains why even those who feared that the federal courts
would "absorb and destroy the judiciaries of the several States,"²²³ were will-
ing to concede that the federal courts "ought to have judicial cognizance . . .
in cases of maritime jurisdiction."²²⁴ Alexander Hamilton summarized the
general consensus in The Federalist No. 80:

The most bigoted idolizers of State authority have not thus far
shown a disposition to deny the national judiciary the cognizance of
maritime causes. These so generally depend on the laws of nations
and so commonly affect the rights of foreigners, that they fall within
the considerations which are relative to the public peace. The most
important part of them are by the present Confederation, submitted
to federal jurisdiction.²²⁵

The reference to the Articles of Confederation makes clear that Hamilton is
speaking primarily of prize cases, for that was the limit of the federal courts'

²²⁰ U.S. Const., art. I, § 8, cl. 1, 10 & 11.
²²¹ See Casto, supra note 21, at 131-32 (discussing the Virginia and New Jersey plans, as
well as a draft submitted by Alexander Hamilton).
²²² Id. at 135. Professor Casto notes that "[e]ven if the change was essentially a matter of
style, members of the Committee of Detail undoubtedly understood that the general language
selected expanded federal admiralty jurisdiction beyond the paradigmatic trilogy of public law
litigation that dominated eighteenth century minds." Id. He insists, however, that "[t]his sparse
documentary record cannot be read plausibly as a rejection of the central importance of cases of
capture, crimes, and revenue collection." Id. And even the single member of the Committee
whom Casto suggests may have had something broader on his mind—James Wilson—appears to
have later defended the admiralty provision at the Pennsylvania ratifying convention solely in
terms of prize, criminal, and revenue cases. Id. at 135-36 & n. 99.
²²³ George Mason, Objections to the Constitution, reprinted in 1 The Debate on the Con-
²²⁴ 3 Elliot's Debates 523 (2d ed. 1836) (statement of George Mason, Virginia Conven-
tion). See generally Casto, supra note 21, at 137 (describing Mason's position). According to
Professor Stolz,

the prize jurisdiction probably explains the general acquiescence in the grant of
admiralty jurisdiction to the federal courts. Prize cases required judicial appraisal
of the legitimacy of a seizure at sea, and this in turn posed questions of interna-
tional law—for example, the rights of neutrals and belligerents, and the status of
particular nations and nationals. If the national government was to have exclusive
control over foreign relations and war, it must have seemed obvious to the draft-
smen of the Constitution that the courts of the central government should also have
prize—and hence admiralty—jurisdiction.

Stolz, supra note 27, at 669.
prior jurisdiction.\textsuperscript{286} Similarly, Madison's statement that the federal courts should have "exclusive jurisdiction" over "the exposition of treaties, ... cases affecting ambassadors and foreign ministers, [and] admiralty and maritime cases" because "our intercourse with foreign nations will be affected by decisions of this kind,"\textsuperscript{287} makes sense mostly in terms of prize and criminal cases.\textsuperscript{288}

The Framers also perceived federal jurisdiction as posing less of a threat to the general legislative competence of the states than, for instance, the diversity jurisdiction. Because a uniform "law of the sea" had long governed maritime cases, there could be little state objection to federal jurisdiction over such matters.\textsuperscript{289} This distinction is viable, however, only if admiralty jurisdiction is viewed as consisting primarily of prize, criminal, and revenue cases. Private maritime disputes, by contrast, had been within the existing jurisdiction of the state common law and admiralty courts.\textsuperscript{290} If the federal admiralty courts had been perceived as significantly encroaching on this jurisdiction, it seems unlikely that Hamilton's "most bigoted idolizers of state authority" would have failed to protest. In any event, as Professor Casto points out, "the entire surviving documentary record of the ratification process" contains only "a single, obscure" reference to private maritime disputes.\textsuperscript{291}

\textsuperscript{286} See Clark, supra note 1, at 1337 n.440. Professor Clark also notes that private admiralty litigation

\textsuperscript{287} \textit{Id.} at 1337. As noted above, see supra note 40, the Confederation Congress also had an unused criminal jurisdiction, and one might therefore read Hamilton as referring to criminal cases as well.

\textsuperscript{288} 3 E\textsc{lliott}'s D\textsc{ebates}, supra note 284, at 532 (statement of James Madison, Virginia Convention); see also Currie, supra note 4, at 163-64 ("[B]ecause of the innumerable contacts with foreign interests, unequalled in land transactions, the preservation of harmony between our law of the sea and those of other nations was a strong desideratum."); \textit{Rediske, supra} note 28, at 139 ("Uniformity was necessary so that the nation could present a unified front in dealing with foreign nations.").

\textsuperscript{289} See Casto, supra note 21, at 139. It is true that private commercial disputes may sometimes threaten the foreign relations of the nations—whether through a single inflammatory incident or through a trading partner's general perception that its nationals are not receiving fair treatment in American courts. See Clark, supra note 1, at 1281 n.168 (noting that "[t]he public view of the admiralty courts was such that it could create tensions among nations and even lead to war"). As argued below, however, this phenomenon no longer forms a basis for treating maritime private disputes differently from those involving commerce on land, through the air, or over communications networks. See infra notes 470-485 and accompanying text.

\textsuperscript{290} See Currie, supra note 4, at 163.

\textsuperscript{291} See Casto, supra note 21, at 137; see also Clark, supra note 1, at 1355-60 (concluding that most private maritime claims are within the general legislative competence of the states).

\textsuperscript{291} Casto, supra note 21, at 136. The single reference was by Luther Martin, who complained that the extension of admiralty jurisdiction to cover private disputes would create the potential for harassing appeals. See \textit{id.} at 136 n.100; see also Stoltz, supra note 27, at 670 (noting that "[t]he civil jurisdiction of the admiralty courts was only occasionally adverted to in the
Professor Jonathan Gutoff has demonstrated convincingly that the Framers were aware that private maritime disputes would be part of the admiralty docket.292 As he points out, "[p]rivate law cases . . . formed a major part of the docket" in the state courts of admiralty and the colonial vice admiralty courts.293 Moreover, the Framers may well have recognized that these cases, too, could have foreign policy implications.294 Finally, the Framers were familiar with the English distinction between "prize" and "instance" courts, the latter of which dealt with private civil maritime disputes,295 and they could easily have excluded the "instance" jurisdiction from Article III if they had wished.296

None of this, however, proves that the Framers envisioned a national, uniform substantive law governing private maritime disputes. Although the Framers may well have been concerned to ensure fair treatment for foreigners in private maritime disputes, this concern is similar to the concern for out-of-state American litigants that underlies the diversity jurisdiction.297 To that extent, the history justifies a federal forum for private maritime claims—not a federal substantive law. Article I provides the best measure of the Framers' desire to provide for uniform federal substantive rules, by giving Congress affirmative power to "define and punish Piracies and Felonies committed on the high Seas,"298 "make Rules concerning Captures on Land and Water,"299 and "lay and collect Taxes, Duties, Imposts and Excises."300

The Framers may, of course, have expected that some level of uniform substantive law would be achieved simply by conferring power upon the federal courts to apply the law of the sea in private maritime cases. As I demonstrate in the next section, however, that expectation does not support any intent to federalize that law or, more specifically, to give it preemptive effect.


293 Gutoff, supra note 38.

294 See Gutoff, supra note 292, at 2178 n.25 (noting several early district court opinions dismissing libels against foreign vessels that would have interrupted their voyages).

295 See generally Le Caux v. Eden, 99 Eng. Rep. 375, 386 n.1 (K.B. 1781) (quoting Lindo v. Rodney (K.B. 1781) (unpublished decision)) ("The Court of Admiralty is called the Instance Court; the other the Prize Court. The manner of proceeding is totally different. The whole system of litigation and jurisprudence in the Prize Court is peculiar to itself: it is no more like the Court of Admiralty, than it is to any Court in Westminster-Hall.").

296 See Gutoff, supra note 292, at 2178 n.25; Gutoff, supra note 38.

297 See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 546 n.6 (1995) (reading Hamilton's argument in The Federalist No. 80 as indicating "a concern with local bias similar to the presupposition for diversity jurisdiction"). As Professor Gutoff points out, extending the admiralty jurisdiction to private law claims was necessary to avoid a possible loophole in the diversity jurisdiction, because many maritime suits involving significant foreign interests would be in rem actions ostensibly between a U.S. citizen and a ship, rather than a foreign citizen. See Gutoff, supra note 38.

298 U.S. Const. art. I, § 8, cl. 10.

299 Id. cl. 11.
2. The Law of the Sea

Late eighteenth-century maritime practice also differed from ours in its assumptions about the available categories of law. Although Justice Holmes would later deride the idea of “general” law as a “brooding omnipresence in the sky,” pre-Erie practice acknowledged that law might be neither state nor federal in nature. As Justice Story put it in Swift v. Tyson, federal courts were authorized to derive and apply “the general principles and doctrines of commercial jurisprudence.” Likewise, the absence of any express grant of legislative power to Congress to make rules governing private maritime activity highlights the Framers’ expectation that the “law of the sea” or the general maritime law would primarily govern these activities.

It is a bit unfair to describe this category of “general” law as a “brooding omnipresence.” Rather, the law of nations—of which both Swift’s “law merchant” and the general maritime law were branches—“was an identifiable body of rules and customs developed and refined by a variety of nations over hundreds and, in some cases, thousands of years.” Holmes’s critique was essentially correct, however, insofar as early American courts relied

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301 Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

302 41 U.S. (16 Pet.) 1, 19 (1842).

303 See, e.g., Gilmore & Black, supra note 40, § 1-16, at 46 (“[I]t was assumed at first, and later expressly stated, that those courts to which judicial jurisdiction over maritime cases was granted were thereby empowered and obligated to apply to such cases, in the absence of statute, the rules of the general maritime law.”); Robertson, supra note 13, at 138 (“It is clear that as to maritime matters the prevailing assumption has been that the constitutional grant of admiralty jurisdiction to the federal courts presupposed the existence of an at-large body of substantive principle to be drawn upon in deciding maritime cases.”); see also Alfred Paul LeBlanc, Jr., Note, United States v. Alvarez-Machain and the Status of International Law in American Courts, 53 LA. L. REV. 1411, 1475 (1993) (suggesting that the Framers intended the federal courts to apply the preexisting law of the sea because “given the commercial and diplomatic impact of [admiralty] cases . . . , the United States could not afford an ‘interregnum’ of the law, with the federal code silent on any given matter because Congress had not yet spoken to it”).

304 See Clark, supra note 1, at 1280-81 (explaining that “[t]he law of nations had three principal branches—the law merchant, the law maritime, and the law governing the rights and duties of sovereign states”); see also Gilmore & Black, supra note 40, §§ 1-2 to 1-4, at 3-11 (sketching the development of the general maritime law); Fletcher, supra note 24, at 1517 (“The 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.”). Peter Du Ponceau captured both the admiralty’s common law roots and its distinctiveness in 1824, noting that “admiralty is governed by a peculiar law of its own, which may be called (as it is the fashion to call every thing) a part of the common law; still it is not the common law in its usual and more restricted acceptation.” Peter Du Ponceau, A Dissertation on the Nature and Extent of the Jurisdiction of the Courts of the United States 10-11 (1824), quoted in White, supra note 4, at 451.

305 Clark, supra note 1, at 1279; see also Gilmore & Black, supra note 40, § 1-16, at 46 (“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 marine law.”); Stewart Jay, The Status of the Law of Nations in Early American Law, 42 VAND. L. REV. 819, 832 (1989) (“Courts and others seeking to apply the law of nations assumed without hesitation that
upon the law of the sea without any perceived need to attribute it to either a state or federal source.\[^{306}\]

The critical question for my purposes is whether the founding generation viewed the general law of the sea as “federal” for purposes of the Supremacy Clause.\[^{307}\] The evidence, unfortunately, is somewhat murky. The only clear statement is from Chief Justice Marshall’s opinion in *American Insurance Co. v. Canter*, in which the Court held that “[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.”\[^{308}\] Aside from this, however, there is remarkably little direct discussion of the issue.\[^{309}\] There is, however, strong circumstantial evidence concerning the law of the sea’s jurisprudential status.

\[^{306}\] See Fletcher, supra note 24, at 1517; see also Gilmore & Black, supra note 40, § 1-3, at 6 (“[U]ntil the rise of modern states it would have been inconceivable to look on maritime law as deriving its force from a territorial sovereign, and these, like other sea-codes of the time, purported not so much to enact law for any territory as to state what was conceived already to be law by the custom of the sea.”). As Professor Robertson points out, “a great part of the federal-state choice-of-laws tangle in maritime cases is intimately involved with the notion that the federal maritime law is in some sense a brooding omnipresence over the sea.” ROBERTSON, supra note 13, at 138.

\[^{307}\] I have no wish to become embroiled in the brewing controversy over the relevance of legal positivism to *Erie’s* ultimate rejection of the idea of “general law.” See generally Goldsmith & Walt, supra note 78 (arguing that legal positivism was irrelevant to *Erie*). Although Holmes may well have meant much more, I use the “brooding omnipresence” metaphor to signify only judge-made law that need not be placed in either a “federal” or “state” box. As Professors Goldsmith and Walt point out, some of *Swift’s* defenders were positivists, and legal positivism is “consistent with the view that the sovereign requires federal courts to develop a national common law that is based on similar sources as state common law but that is neither state law nor federal law within the meaning of Article VI.” Id. at 695. One might, of course, justify “general” law on nonpositivist grounds. See, e.g., William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 Tul. L. Rev. 907, 921-27 (1988) (describing rise of legal positivism and its criticism of *Swift*). My concern, however, is wholly with distinguishing “general” from federal law—not with the underlying jurisprudential basis for applying “general” law in federal court.

\[^{308}\] 26 U.S. (1 Pet.) 511, 545-46 (1828). On the significance of *Canter*, see White, supra note 4, at 447 (“It would appear from [*Canter*] that the Court regarded federal admiralty cases as clearly distinct from federal common law cases . . . . But practice was much less clear-cut than the theoretical structure established by Marshall’s [discussion] would suggest.”).

The Court would reach a similar conclusion over a century later in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 362-72 (1959). But see Kossick v. United Fruit Co., 365 U.S. 731, 738-39 (1961) (stating “maritime law is—in a special sense at least—federal law and therefore supreme by virtue of Article VI of the Constitution”) (citing *Romero*). Because *Romero* turned on an interpretation of 28 U.S.C. § 1331 rather than Article III, it did not decide whether admiralty law is supreme for purposes of the Supremacy Clause. See Currie, supra note 63, at 12 n.42. But there is no indication that Kossick considered any of the earlier historical evidence concerning the nature of “general” common law and its cousin, the “general maritime law.”

\[^{309}\] See Robertson, supra note 13, at 149 (“Prior to the twentieth century there was not much concern in the admiralty courts about the theory of sources of the law to be applied to maritime causes, and the common law cases are even less enlightening.”); Hart, supra note 22, at 531 n.161 (“The question . . . was seldom faced squarely, and it is difficult to be certain what the
The most helpful evidence concerns the treatment of the maritime law's close relation, the general commercial law applied under the doctrine of Swift v. Tyson. Swift's general commercial law—also known as the "law merchant"—and the general maritime law were both drawn from the law of nations, and no clear lines marked where one left off and the other began. Justice Story thus used the terms interchangeably in stating his hopes for a unified "commercial law," observing that "[f]rom mutual comity, from the natural tendency of maritime usages to assimilation, and from mutual convenience, if not necessity, it may reasonably be expected, that the maritime law will gradually approximate to a high degree of uniformity throughout the commercial world."311

The law merchant's authority derived from ancient usage and common acceptance, not from the federal or state governments.312 Hence, as Professor Jay has shown,

a federal court's authority to make an independent interpretation of general law did not depend on its being considered a form of federal law. . . . Swift was based on the notion that unwritten law was something to be discovered and was merely evidenced by judicial opinions, irrespective of whether they were issued by state, federal, or foreign tribunals.313

And because commercial law did not stem from "the Constitution, and the Laws of the United States which shall be made in Pursuance thereof," or from "Treaties made . . . under the Authority of the United States,"314 federal interpretations of commercial law did not bind state courts under the Supremacy Clause.315

In Delmas v. Insurance Co.,316 for example, the Court held that the commercial issue in the case—whether Confederate money actually circulating at the time a contract was made could constitute valid consideration—was not reviewable on appeal from a state supreme court:

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312 See Clark, supra note 1, at 1276 ("At the time Swift was decided, the states did not clearly conceive of 'general commercial law' as state law. Rather, state and federal courts appeared to be jointly administering a customary body of rules common to many jurisdictions."); Bradley & Goldsmith, supra note 14, at 851 ("A series of early nineteenth-century decisions established that the unwritten common law applied by federal courts was not federal law.").
313 Jay, Federal Common Law II, supra note 73, at 1265.
314 U.S. Const. Art. VI.
315 See generally Jay, Federal Common Law II, supra note 73, at 1274 ("Nothing like the theory [of federal common law "[h]aving the force of federal sovereignty behind" it and therefore "binding on state judiciaries"] was generally accepted until far into the nineteenth century."); Merrill, supra note 79, at 6-7 ("Federal common law, as its name suggests, is federal law. Consequently, the Supreme Court is the final arbiter of its content, and the resulting rules are binding on state courts under the supremacy clause of the Constitution. This serves to distinguish federal common law from the 'general' common law developed by federal courts under the regime of Swift v. Tyson, which was binding on federal courts but not on state courts.").
The proposition involved . . . does not itself raise one of those Federal questions which belong to this court to settle conclusively for all other courts. . . . Like in many other questions of the same character, the Federal Courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.317

Similarly, Professor Fletcher has demonstrated in the marine insurance context that “the state courts regarded the decisions of the federal courts in marine insurance cases in the same way the federal courts themselves did—as decisions under the general law of marine insurance that the federal and state courts jointly administered.”318 Although state courts frequently followed rulings of the United States Supreme Court on such questions, they did so because of the prestige of that Court and a general awareness of the importance of uniformity—not because those decisions were binding precedent.319

The example of marine insurance demonstrates the functional overlap between Swift’s general commercial law and the law of the sea; such insurance, after all, is “the world-wide maritime subject par excellence.”320 Nonetheless, there is no indication that state courts deciding marine insurance or other maritime issues viewed themselves as functioning as “admiralty courts”;321 indeed, there is strong evidence that the founding generation’s experience with state admiralty courts under the Articles of Confederation led them to deny “admiralty powers” to state courts.322 William Rawle, for ex-

317 Id. at 665-66; see also Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 638 (1874) (stating that the Court had “no authority to inquire” whether a claim “to be determined by the general principles of equity jurisprudence” was “decided well or otherwise by the State court”); Jay, Federal Common Law II, supra note 73, at 1274 n.220 (“It was well established that an issue of general common law presented no federal question for purposes of the Supreme Court’s jurisdiction.”).

318 Fletcher, supra note 24, at 1549. It so happened that most, but not all, federal court marine insurance cases were brought in diversity rather than under the admiralty jurisdiction. See id. at 1553 & n.197. This was a tactical choice on the part of merchant plaintiffs wishing to preserve their right to a jury trial, however; there was no doubt that these marine contracts fell within the admiralty jurisdiction. See id.

319 For example, Professor Fletcher quotes the following statement by Chief Justice William Tilghman of the Pennsylvania Supreme Court:

The decisions of the Supreme Court of the United States have no obligatory authority over this court, except in cases growing out of the constitution, of which this is not one. Yet so great is the importance of preserving uniformity [sic] of commercial law, throughout the United States; and so great the respect which I feel for the highest tribunal in the union, that I shall always be inclined to adopt its opinions . . . unless when I am well satisfied, it is in the wrong.

Id. at 1561 (emphasis omitted) (quoting Wahn v. Thompson, 9 Serg. & Rawle 115, 122 (Pa. 1822)); see also Hart, supra note 22, at 505 n.47 (noting that “Justice Story no doubt counted [in Swift] upon the prestige of the Supreme Court to induce the state courts to accept its views [on questions of “general” law]. Sometimes this happened, but more often it did not.”).

320 GILMORE & BLACK, supra note 40, § 1-17, at 49.

321 But cf. Dodd, supra note 145, at 651 (suggesting that state courts deciding cases involving maritime subject matter looked to the federal admiralty courts for persuasive guidance).

322 See, e.g., Waring v. Clarke, 46 U.S. (5 How.) 441, 457 (1847) (asserting that the consensus in favor of the Admiralty Clause arose from “the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty juris-
ample, declared that "[t]he whole system of maritime affairs with its connexions and dependencies is withdrawn from the several states by their own consent, and vested in the general government." Placed in historical context, such statements appear to have meant only that state courts had been deprived of jurisdiction to apply the general maritime law—not that "admiralty law had been federalized." Professor Jay thus concludes that "[i]n referring to admiralty cases, legal writers would not call the applicable unwritten law 'federal.'" The law of the sea, in other words, was "general" in its jurisprudential origins but only federal courts could administer it.

A second important piece of evidence suggesting that the founding generation viewed the law of the sea as "general" rather than "federal" is that the maritime law—like the law merchant—was never subjected to the general hostility to "federal" common law that prevailed in the early years of the Republic. Erie's rejection of any general federal common law echoed a tradition of opposition to investing the federal courts with broad common law powers that dates back to early clashes between Federalists and their opponents. During the ratification debates, Anti-Federalists worried that federal courts might extend their powers to create a general and unlimited jurisdiction through the use of common law "fictions." By combining this unlimited jurisdiction with the power of the Supremacy Clause, moreover, federal courts could announce common law rules of decision that would be binding in both federal and state courts. In response to these fears, the Constitution's supporters insisted that federal judicial power could extend no further than federal legislative power, and that the Constitution had accomplished no general reception of the British Common Law.

324 Jay, Federal Common Law II, supra note 73, at 1266; see also Southern Pac. Co. v. Jensen, 244 U.S. 205, 226 (1917) (Pitney, J., dissenting) ("[T]he framers of the Constitution intended to establish jurisdiction, . . . and not to prescribe particular codes or systems of law.").
326 See generally Seminole Tribe v. Florida, 517 U.S. 44, 137-42 (1996) (Souter, J., dissenting) (reviewing the history); Jay, Federal Common Law I, supra note 73, at 1039-1111 ("Federal common law was to Republicans a symbol of a consolidated national government, the achievement of which seemed the evident goal of scheming Federalists."); Jay, Federal Common Law II, supra note 73, at 1233 (explaining that Republicans viewed the federal courts' common law powers as "a vital component in their quarrel with Federalists over the national union").
327 See 4 Elliot's Debates, supra note 284, at 164 (statement of Samuel Spencer, North Carolina Convention) (asserting that the federal courts "must in time take away the business from the state courts entirely"), quoted in Jay, Federal Common Law II, supra note 73, at 1257; Jay, Federal Common Law II, supra note 73, at 1257-58 & n.138.
328 See Jay, Federal Common Law II, supra note 73, at 1257 (citing Letters of Agrippa, reprinted in 4 The Complete Anti-Federalist 71-78 (Herbert J. Storing ed., 1981)).
329 John Marshall, for example, asked: "Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state? Can they go beyond the delegated powers?" 3 Elliot's Debates, supra note 284, at 553 (statement of John Marshall, Virginia Convention), quoted in Jay, Federal Common Law II, supra note 73, at 1260.
330 See Jay, Federal Common Law II, supra note 73, at 1258-59. A constitutional declaration that the common law was in force, Madison argued, "would have broken in upon the legal Obligations Secured by the Constitution, & would have introduced new Disturbances into the Constitution itself."

This debate resurfaced in the middle and late 1790s amidst controversy over whether the federal courts possessed a common law criminal jurisdiction. Beginning with prosecutions for breach of President Washington’s policy of neutrality, escalating with the debate over the Alien and Sedition Acts and the Judiciary Act of 1801, and culminating with the case of United States v. Hudson, Federalists maintained that indictments could be sustained in federal court under the common law, despite the absence of any federal statute defining the crime at issue. In response, Republicans renewed the charge that the common law powers purportedly claimed by the federal courts would broadly supersede the lawmaking powers of the states. Madison thus charged in his Report on the Alien and Sedition Acts that the consequences of admitting the common law as the law of the United States, on the authority of the individual States, is as obvious as it would be fatal. As this law relates to every subject of legislation, and would be paramount to the Constitutions and laws of the States, the admission of it would overwhelm the residuary sovereignty of the States, and by one constructive operation new model the whole political fabric of the country.

Madison’s position ultimately prevailed with the Republican electoral triumph in 1800. By the time the Supreme Court decided Hudson, Justice Johnson—speaking for a majority of Republican appointees—could state that the nonexistence of a federal common law of crimes had "been long since settled in public opinion." Justice Johnson asserted that "[t]he course of reasoning which leads to this conclusion, is simple, obvious, and admits of but little illustration".

even the ecclesiastical Hierarchy itself, for that is a part of the Common law." Letter from James Madison to George Washington (Oct. 18, 1787), in 3 The Records of the Federal Convention of 1787 app. A, at 130 (Max Farrand ed., 2d ed. 1937), quoted in Jay, Federal Common Law II, supra note 73, at 1259; see also Seminole Tribe, 517 U.S. at 137-42 (Souter, J., dissenting) (concluding that the federal Constitution was not intended to receive the common law).

331 11 U.S. (7 Cranch) 32 (1812).
332 See Jay, Federal Common Law I, supra note 73, at 1016.
333 Undergirding this charge was the assumption—apparently accepted by both sides of the debate—that judicial and legislative authority must be coextensive. See, e.g., St. George Tucker, Appendix to 1 William Blackstone, Commentaries 380 note E (St. George Tucker ed., 1803) ("If it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the federal courts must be co-extensive with it; or, in other words, unlimited: so also, must be the jurisdiction, and authority of the other branches of the federal government; that is to say, their powers respectively must be, likewise, unlimited."). The Federalists may, however, have simply meant that within the jurisdiction established by Congress and the Constitution, federal courts were free to apply the common law—not that the limits of that law would mark out the limits of federal jurisdiction in the first place. See Jay, Federal Common Law II, supra note 73, at 1262, 1282. That view would be consistent, for example, with regarding the maritime law as administered by the federal courts but not federal in its substantive nature.
335 Hudson, 11 U.S. (7 Cranch) at 32.
The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions . . . . All [courts other than the Supreme Court] created by the general Government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general Government will authorize them to confer.\textsuperscript{337}

Absent a statute conferring power to punish crimes at common law, the Court concluded, the federal courts could possess no such jurisdiction.\textsuperscript{338}

In light of this history, why did both Republicans and Federalists accept the federal courts’ power to apply the general common law in cases like Swift? Despite the furor that preceded Hudson, it appears that “there was never any question about the existence of a general noncriminal common law or the ability of the federal courts to apply it.”\textsuperscript{339} The reason is that the general common law was neither state nor federal in origin; it was simply “law,” to be “discovered” by judges and “merely evidenced” by judicial opinions issued by state and federal courts.\textsuperscript{340} “To assert that the law merchant constituted ‘Laws of the United States’ for Article III jurisdiction,” on the other hand, “would have provoked the same forces that opposed a federal common law of sedition on grounds of interference with state sovereignty.”\textsuperscript{341} By avoiding any such assertion, Swift’s regime of “general common law” coexisted peacefully with the Court’s assertion that “[i]t is clear, there can be no common law of the United States.”\textsuperscript{342}

Although there is less direct evidence, the “law of the sea” likely survived the founding era’s general hostility to federal common law for the same reason: like Swift’s “general common law,” the maritime law was not “federal” in nature. The early nineteenth century did see hostility to the federal admiralty courts, and in particular to the gradual expansion of their jurisdiction; such opposition, however, appears to have stemmed primarily from the

\textsuperscript{337} Id.
\textsuperscript{338} See id. at 33-34.
\textsuperscript{339} Fletcher, supra note 24, at 1525; see also Hart, supra note 22, at 505 (noting that at the time “Swift v. Tyson was decided, the conception of questions of general commercial law as depending essentially upon the discerning ascertainment and wise application of principles common to the English-speaking world, rather than upon any ‘law’ peculiar to a particular jurisdiction, was ‘congenial to the jurisprudential climate of the time.’” (quoting Guaranty Trust Co. v. York, 326 U.S. 99, 103 (1945))); Lessig, Erie-Effects, supra note 14, at 1791-92.
\textsuperscript{340} See Jay, Federal Common Law II, supra note 73, at 1266; see also Merrill, supra note 79, at 13 n.55 (noting that the federal courts’ power “to explicate rules of decision in the common law tradition” was understood “to be exercised concurrently with the state courts”).
\textsuperscript{341} Jay, Federal Common Law II, supra note 73, at 1279. Professor Jay goes on to explain that [i]nasmuch as it would have been absurd then to suggest that Congress had authority to legislate as to purely intrastate commercial transactions, creating a common law authority in the same area would have been perceived as a usurpation of states’ rights. The conflict with the states would have been, if anything, more acute than it was with the exercise of jurisdiction over common law crimes.
\textsuperscript{Id.}
advantages that federal admiralty jurisdiction afforded to creditors seeking to attach vessels in satisfaction of debts.\textsuperscript{343} It seems unlikely that the federal courts' lawmaker powers in admiralty could have survived the Republican "revolution" after 1800 if the courts' work product had been perceived as "federal" in the same sense as the stillborn federal common law of crimes.\textsuperscript{344}

The idea of a "general" common law, neither state nor federal in nature, yet striving for uniformity in \textit{all} fora, did not survive \textit{Erie}. While \textit{Erie}'s reference to the diverse laws of the states replaced \textit{Swift}'s general common law, however, maritime law was incorporated—implicitly in \textit{Jensen} and \textit{Chelentis} and later explicitly in \textit{Pope & Talbot}—into the emerging "new" federal common law. This law, unlike the "general" law of \textit{Swift}, is truly "federal" because "under the supremacy clause, it is binding in every forum."\textsuperscript{345} \textit{Erie} was thus read to extend federal maritime law uniformly to cover both state and federal court.\textsuperscript{346}

\textbf{D. Implications}

It is possible to view \textit{Jensen} and \textit{Chelentis} as an attempt to respond to some of the same concerns that, by 1938, would render the \textit{Swift} regime untenable. As the states replaced general commercial doctrines with local regulatory measures, the federal courts' articulation of "general" common law diverged from the law applied in state courts.\textsuperscript{347} \textit{Jensen} itself is an example of a similar occurrence in admiralty: The State of New York had supplanted the common law tort rules for workplace injuries—reflected in the maritime law as well as the common law generally—with a worker's compensation law.\textsuperscript{348} Sensitivity to the need for a single law regardless of forum would have left the Court with a choice of applying the state law in federal admiralty suits, or holding the state statute preempted even in saving clause actions in state court. It refused to do the former in \textit{Jensen}, and opted for the latter rule in \textit{Chelentis}.\textsuperscript{349}

The \textit{Jensen} regime, however, only partially accommodated the pressures that would ultimately lead to \textit{Erie}. Those pressures stemmed not simply from disparate results in federal and state court, but from more fundamental

\textsuperscript{343} See generally Note, supra note 45, at 1218-21.

\textsuperscript{344} Cf. White, supra note 4, at 458-60 (noting how the controversy over the federal common law of crimes made Chief Justice Marshall reluctant to take an aggressive nationalist position on the status of admiralty law).

\textsuperscript{345} Friendly, supra note 77, at 405.

\textsuperscript{346} See id. at 404-05; Comment, The Tangled Seine: A Survey of Maritime Personal Injury Remedies, 57 YALE L.J. 243, 245 (1947) (describing \textit{Jensen} as "the \textit{Erie} v. Tompkins of the admiralty field except that the shoe is on the other foot, the state courts being obliged to follow 'substantive' law as declared by the Supreme Court, but left free to apply their own 'procedure'")).

\textsuperscript{347} See Erie R.R. v. Tompkins, 304 U.S. 64, 75-76 (1938); Clark, supra note 1, at 1290 ("[S]tate courts increasingly abandoned reliance on the general law merchant in favor of truly localized commercial doctrines . . . [and] no longer conceived of their task . . . as applying a general body of law common to many jurisdictions.").

\textsuperscript{348} See Southern Pac. Co. v. Jensen, 244 U.S. 205, 210-11, 216-17 (1917).
challenges to the federal courts’ authority to articulate and apply “general” law:

Two questions were increasingly difficult to avoid. The first was the question about source (what we could call the positivist’s question): what is the source of the common law when it becomes rationalizing or activist? The second was the question about constraint (the realist’s question): whatever the source, to what extent was this activist common law tracking its source, and to what extent did the source really constrain it?350

Holmes posed the first question in the strongest possible form in his Jensen dissent,351 and other critics of the decision have implicitly raised the second by suggesting that ideological hostility to worker’s compensation laws motivated Jensen and many of its progeny.352

Jensen addressed the critique of “general” law by effectively incorporating the general maritime law into what would become Judge Friendly’s new federal common law—in other words, by firmly placing the law of the sea in the category of “federal” law for purposes of Article VI. This incorporation might amount to an effort to “translate” the Framers’ conception of maritime law into a context in which assumptions about the available categories had changed.353 This translation, however, rests on the historical claim that the Admiralty Clause was intended to incorporate the law of the sea into the corpus of federal law. Whatever other arguments might support the post-Erie view of the maritime law as both federal and supreme, I hope that the preceding discussion has demonstrated that history cannot bear that weight.

The Framers viewed admiralty as “special” because of the prize, criminal, and revenue cases with which, in their view, the admiralty jurisdiction would be primarily concerned. These areas lie largely outside the lawmaking competence of the states,354 and are encompassed within the area of exclusive admiralty jurisdiction not covered by the saving clause. Federal common lawmaking in these areas is unlikely to come into conflict with state law, and thus raises little federalism concern.355 To the extent that the Framers also envisioned private civil litigation as falling within the admiralty jurisdiction,

350 Lessig, Erie-Effects, supra note 14, at 1793; see also Casto, supra note 307, at 921-27 (describing the rise of legal positivism and its criticism of Swift). As noted above, nothing in my argument turns on whether one uses the term “positivist” to describe the first question’s challenge to the idea of “general” law. See id.

351 See Jensen, 244 U.S. at 221 (Holmes, J., dissenting).

352 See, e.g., Dodd, supra note 145, at 660.

353 See Bradley & Goldsmith, supra note 14, at 852 (noting that after Erie, “all law applied by federal courts must be either federal law or state law”). See generally, Lessig, Fidelity, supra note 14 (describing the process of translating legal concepts into new contexts).

354 See, e.g., Clark, supra note 1, at 1388 (“[P]roper resolution of prize cases was ‘a necessary appendage to the power of war, and negotiation with foreign nations”—power committed exclusively to the federal government.”) (quoting Joseph Story, Commentaries on the Constitution of the United States § 866, at 615 (Ronald D. Rotunda & John E. Nowak eds., 1987) (1833)).

355 See generally Clark, supra note 1, at 1274 (noting that federal common lawmaking outside the legislative competence of the states does not undermine federalism, because “[b]y
however, their concern with private law cases was far too marginal to support a broad rule of preemption in the many such cases which would otherwise fall within state lawmakers making competence.\textsuperscript{356} Rather, the history supports Justice Pitney's insistence, in his \textit{Jensen} dissent, "that the Constitution does not, \textit{proprio vigore}, impose the maritime law upon the States except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution; that is to say, in the prize jurisdiction, and the peculiar maritime process \textit{in rem}.''	extsuperscript{357}

Even worse, the Framers' conception of the general maritime law suggests that they gave it no preemptive force. The Framers' identification of the general maritime law with \textit{Swift's} general \textit{commercial} law indicates that, like the latter, the maritime law was neither state nor federal. Indeed, the political context of the founding era strongly suggests that if the Framers \textit{had} viewed the general common law as "federal" in nature, they would have resoundingly rejected it along with the federal common law of crimes. And although the relative infrequency during that period of private civil admiralty cases and of state efforts to regulate maritime activity might have resulted in a lesser outcry over a \textit{federal} common law of admiralty, nothing in the jurisprudential assumptions of the Framers indicates that they could have viewed the two cases as differing in principle. The history suggests, instead, that the general maritime law and the general commercial law were jurisprudentially identical, and that the Framers viewed neither as "federal" in the sense we think of today.

Equating maritime law with the general commercial law is extremely damaging to the \textit{Jensen} view of maritime preemption. Emphasizing that the Supremacy Clause applies only to "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof,''	extsuperscript{358} Professor Jay argues that "the supremacy clause of the Constitution ... was not designed to apply to common law cases":

For the same reasons that the Constitution could not have contained a general reception clause for the common law, the supremacy clause could not have made a reference to unwritten law that would be binding on the states. Moreover, it would have made no sense to do so. General common law was already 'binding' on the states by the very nature of its transnational character; local common law naturally was entirely the affair of a particular jurisdiction.\textsuperscript{359}

\textsuperscript{356} See Casto, \textit{supra} note 21, at 154 ("Asking what the Founding Generation thought about federal admiralty jurisdiction over private claims is a fruitless question. When they thought of federal admiralty jurisdiction, they thought of public—not private—litigation.").

\textsuperscript{357} Southern Pac. Co. v. Jensen, 244 U.S. 205, 251 (1917) (Pitney, J., dissenting); see also id. (Pitney, J., dissenting) ("Congress, so far from enacting legislation of this character, has from the beginning left the state courts at liberty to apply their own systems of law in those cases where prior to the Constitution they had concurrent jurisdiction with the admiralty, for the saving clause in the Judiciary Act necessarily has this effect.").

\textsuperscript{358} U.S. Const. art. VI.

\textsuperscript{359} Jay, \textit{Federal Common Law II}, \textit{supra} note 73, at 1275; see also Bradley & Goldsmith, \textit{supra} note 14, at 823 ("[G]eneral common law was not part of the 'Laws of the United States'
In short, nothing in the history indicates that the Framers intended for the general maritime law to have the preemptive effect entailed by Judge Friendly's "new federal common law."\(^{360}\)

It is true, of course, that the historical case against *Jensen* is largely circumstantial; there is very little direct evidence of how the Framers thought admiralty and state law should interact. Rather than draw strong conclusions, the better course may be to doubt whether the Framers really had occasion to think these particular matters through as a matter of theory.\(^{361}\) What I hope to have shown, however, is that there is no strong affirmative historical case for *Jensen*'s effort to transform the law of the sea into supreme federal law. Modern admiralty's attempt at "translation," moreover, suffers from a second fundamental difficulty: its treatment of the "new federal common law" of admiralty is inconsistent with modern rules governing preemption and federal common law generally. Viewed in the context of those rules, as I demonstrate in the next Section, the case for any special rule of maritime preemption simply falls apart.

### IV. Maritime Preemption and State Sovereignty

Preemption strikes at the heart of state autonomy. While the federal government interferes with that autonomy by subjecting states to generally applicable laws\(^{362}\) or suit in federal court,\(^{363}\) or by commandeering state officials to implement federal policy,\(^{364}\) preemption takes away a state's ability to perform its own basic function: making and enforcing its own law for the benefit of its citizens.\(^{365}\) For that reason, the Supreme Court traditionally has been careful to ensure that preemption occurs only as the result of a political

\(^{360}\) Professor Robertson asserts that "it now seems to be accepted that the supremacy clause itself covers judge-made federal maritime law." Robertson, *supra* note 172, at 327 n.5 (citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961); *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 316 (5th Cir. 1987), *rev'd on other grounds*, 486 U.S. 140 (1988)). But Kossick recognized that maritime law is "federal law and therefore supreme by virtue of Article VI" only "in a special sense at least." 365 U.S. at 739. *Kossick* rejected the need to give maritime law preemptive effect, stating that "the process is surely rather one of accommodation." *Id.* And the Court concluded that "the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight." *Id.* As I explain further in Part V, *infra*, Kossick's approach is quite close to what would result from the abandonment of *Jensen* and the rejection of any preemptive effect for general maritime law.

\(^{361}\) Cf. Friendly, *supra* note 77, at 397 n.65 ("It would not be strange if the fathers and the framers of the first Judiciary Act failed to anticipate every problem that would arise or saw some of these matters in a different aspect; we may err by attributing to them certainties they did not possess.").


\(^{365}\) See Gardbaum, *supra* note 101, at 771 (explaining that preemption "means ... that..."
process in which the states are represented. Jensen’s maritime preemption doctrine, however, turns that process on its head.

A. State Interests in Maritime Matters

Although the federal admiralty jurisdiction covers navigable inland waters, that jurisdiction coexists with well-established state sovereignty over those waters. State regulatory jurisdiction likewise covers the waters of the “territorial sea,” which extends outward from shore for a distance of one nautical league—about three miles. The Court disposed of the argument that the grant of admiralty jurisdiction itself ousted state regulatory authority over territorial waters early on, holding in 1818 that the Commonwealth of Massachusetts had jurisdiction to punish a murder committed on a ship in Boston harbor. In 1953, moreover, Congress formally ceded title to lands beneath the territorial sea to the coastal states in the Submerged Lands Act. Although the Court has recognized that the Submerged Lands Act’s transfer of rights “was in no wise inconsistent with paramount national power,” the Act makes clear that the states have at least concurrent regulatory interests in the territorial sea. The situation thus mirrors that on land, where Congress’s “paramount national power” over interstate commerce does not, except in limited respects, preempt the states’ own regulatory authority.

In addition to the Submerged Lands Act, other federal statutes make state law applicable even beyond the three mile limit, and state law may

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366 See, e.g., Idaho v. Coeur d’Alene Tribe, 117 S. Ct. 2028, 2041-42 (1997) (recognizing state sovereignty over navigable waters, subject only to certain rights relinquished to the federal government); In re Amtrak “Sunset Ltd.” Train Crash, 121 F.3d 1421, 1426 (11th Cir. 1997) (stating that “[i]t goes without saying that the State of Alabama has a sovereign interest” concerning a train crash into a navigable inland waterway).


[In describing the judicial power, the framers of our constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction. It is not questioned, that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction, is in the government of the Union. . . . Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away.

Id. at 388-98; see also Clark, supra note 1, at 1355-56 (discussing Bevans).


This statute provides that

the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf.

Id. In the case of the OCSLA, however, state law is incorporated into federal law rather than applying of its own force. See Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352, 357 (1969); Ball,
have extraterritorial application even in the absence of an express congressional grant.\textsuperscript{372} Conversely, even when conduct takes place within state territorial waters, a state's regulatory power will depend upon the nature of the conduct at issue and its relationship to matters of exclusive federal authority.\textsuperscript{373} It is thus clear that "[n]either an invisible line drawn three miles from shore nor the fiction of national external sovereignty satisfactorily distinguishes state from national interests in the sea."\textsuperscript{374}

State regulatory interests in maritime activity arise in a wide variety of contexts. As Professors Gilmore and Black have observed,

\[ \text{[t]he nation as a whole has a vital interest in the shipping industry as a whole, but states such as New York and Washington are also deeply concerned with the local problems created by the shipping that touches their ports, and they have articulated this interest in a mass of legislation dealing with shipping matters.}\textsuperscript{375} \]

Much of this legislation falls within the states' police powers, under which "the States traditionally have had great latitude . . . to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."\textsuperscript{376} The Court has recognized, for example, that the states may impose "reasonable, nondiscriminatory conservation and environmental protection measures" on shipping,\textsuperscript{377} as well as safety regulations such as pilotage requirements.\textsuperscript{378}

A particularly salient example in the last quarter century has been state regulation of oil spills. In \textit{Askew v. American Waterways Operators, Inc.},\textsuperscript{379} the Court held that neither the Water Quality Improvement Act\textsuperscript{380} nor federal maritime law preempted a Florida law imposing strict liability for oil spills in state waters.\textsuperscript{381} The Court recognized the vital state interests implicated by such spills: "A State may have public beaches ruined by oil spills. Shrimp may be destroyed, and clam, oyster, and scallop beds ruined and the

\textsuperscript{372} See Skiriotes v. Florida, 313 U.S. 69, 77 (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."); State v. Bundrant, 546 P.2d 530, 554-56 (Alaska 1976) (upholding a state restriction on king crab season beyond territorial waters, based on the need to regulate extraterritorially in order to preserve fishery within state waters), appeal dismissed, 429 U.S. 806 (1976); Ball, \textit{supra} note 367, at 632-33.

\textsuperscript{373} See Clark, \textit{supra} note 1, at 1356. For example, the Court has acknowledged exceptions to state territorial sovereignty "when the matter in question directly implicates the conduct of foreign relations." \textit{Id.} at 1354 n.541 (citing Zschernig v. Miller, 389 U.S. 429, 432-34 (1968)).

\textsuperscript{374} Ball, \textit{supra} note 367, at 637.

\textsuperscript{375} GILMORE & BLACK, \textit{supra} note 40, §1-17, at 47-48.


\textsuperscript{378} See \textit{Ray}, 435 U.S. at 159-60.

\textsuperscript{379} 411 U.S. 325 (1973).

livelihood of fishermen imperiled.”\footnote{382} Citing several studies of recent spills and their effects on shore interests, the Court reasoned that “[t]he damage to state interests already caused by oil spills, the increase in the number of oil spills, and the risk of ever-increasing damage by reason of the size of modern tankers underlie the concern of coastal States.”\footnote{383} The Court thus rejected the district court’s holding that the general maritime law—which provided no remedy—preempted attempts by states to deal with the problem. “To rule as the District Court has done,” the Court said, “is to allow federal admiralty jurisdiction to swallow most of the police power of the States over oil spillage.”\footnote{384}

The facts of \textit{Yamaha} and \textit{Wilburn Boat} illustrate a somewhat different phenomenon: general state regulatory schemes that have their primary applications on land, but which also govern conduct falling within the maritime jurisdiction of the federal courts.\footnote{385} \textit{Yamaha}, as a traditional tort case, implicated a familiar cluster of state interests: the states’ interest in prescribing tort rules to govern conduct within their borders;\footnote{386} states’ “traditional authority to provide tort remedies to their citizens”\footnote{387} in order to ensure that

\footnote{382} Id. at 332-33.
\footnote{383} Id. at 335.
\footnote{384} Id. at 328-29. Because the Court ultimately rested its holding on an interpretation of the Admiralty Extension Act, 46 U.S.C. § 740 (1970), \textit{Askew} did not conclusively establish the concurrent right of states to regulate oil spills. \textit{See Askew}, 411 U.S. at 344. The Fifth Circuit, for example, has held that a common law maritime rule barring recovery for purely economic losses in maritime tort cases preempted a state environmental statute. The state law would have permitted recovery for such losses arising from a disastrous chemical spill at the outlet of the Mississippi River. \textit{Louisiana ex rel. Guste v. M/V Testbank}, 752 F.2d 1019, 1031-32 (5th Cir. 1985) (en banc). And although Congress has since passed the Oil Pollution Act of 1990 (“OPA”), 33 U.S.C. §§ 2701-2761 and 26 U.S.C. §§ 4611, 9509, which expressly preserves state oil pollution laws, see 33 U.S.C. § 2718(a)(1) (declaring that the Act shall not be construed to affect state authority to impose additional liability or requirements with regard to oil pollution), the OPA does not explain exactly how potentially conflicting state and federal laws are to interact. \textit{See} Steven R. Swanson, \textit{Federalism, the Admiralty, and Oil Spills}, 27 J. MAR. L. & COM. 379, 380 (1996). Indeed, Professor Swanson argues that the OPA—despite its express nonpreemption clause—renders any state interest in protecting territorial waterways redundant. \textit{See id.} at 414. That argument assumes that the states’ interest is only in a substantive result, and not in the opportunity to achieve that result through the states’ own regulatory authority. In any event, the OPA’s nonpreemption provisions rather clearly ratify \textit{Askew}’s recognition that issues of marine pollution fall within the traditional police power concerns of state governments. \textit{See} Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442 (1960) (“In the exercise of [the police] power, the states . . . may act, in many areas of interstate commerce and maritime activities, concurrently with the federal government.”); Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 629 (1st Cir. 1994) (“No one can doubt that the state’s interest in avoiding pollution in its navigable waters and on its shores, and in redressing injury to its citizens from such pollution, is a weighty one.”).

\footnote{385} See, e.g., Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1530 (11th Cir. 1990) (district court opinion, adopted by court of appeals) (“Countervailing state interests [in admiralty cases] include the interest in being permitted to regulate independently matters of local concern without interference by the federal government . . . and in having state-created rights and obligations protected and enforced in actions in federal court.”) (citations omitted).
\footnote{386} See, e.g., Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 543 (1995) (recognizing that, even in admiralty cases, “[s]tates have a strong interest in applying their own tort law” to accidents “near shore”).
they are fairly compensated and do not become a "charge on society"; and 
(at least potentially) a forum state's "legitimate interests" in applying its own 
law to disputes in its courts. Federal courts have thus often recognized the
states' "traditional authority to determine the rules of liability in tort." 389

Likewise, in Wilburn Boat, the Court noted that
the whole judicial and legislative history of insurance regulation in
the United States warns us against the judicial creation of admiralty
rules to govern marine policy terms and warranties. The control of
all types of insurance companies and contracts has been primarily a
state function since the States came into being. 390

The McCarran-Ferguson Act 391 recognizes "the supremacy of the States in
the realm of insurance regulation" and guards the states' traditional authority
over insurance regulation from federal incursions. 392 Wilburn Boat has been
strenuously criticized, 393 and marine insurance has been described as "the
world-wide maritime subject par excellence." 394 Whether or not the criticisms
of Wilburn Boat are correct, however, it is important to be clear about what
the proponents of a uniform federal law of marine insurance are asking for: a
maritime "carve out" from an area that is generally one of unquestioned state
regulatory authority.

Wilburn Boat, Yamaha, and Askew all illustrate the myriad state interests
that may come into play in cases within the federal admiralty jurisdiction.
Even putting aside direct state regulation of maritime commerce, general
state concerns about pollution, tort liability, insurance regulation, or any
number of other subjects may arise in any given maritime case. The increasing
level of conflict between state and maritime law may be, in part, a result

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judgment). Whether or not the state's interest extends to a case in federal court sitting within its
borders is beyond the scope of this article. Because tort cases like Yamaha clearly fall within the
saving clause, however, they can be brought in state court and would, in that event, clearly
implicate the state's interest as forum.

389 South Carolina Pub. Serv. Comm'n v. Federal Energy Regulatory Comm'n, 850 F.2d
788, 792 (D.C. Cir. 1988); accord Easterwood v. CSX Transp., Inc., 933 F.2d 1548, 1555 n.4 (11th
Cir. 1984); Cedar-Riverside Assoc's., Inc. v. City of Minneapolis, 606 F.2d 254, 258 (8th Cir.
1979); see also Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring in the judg-
ment) (expressing reluctance to federalize, under 42 U.S.C. § 1983, questions of tort law better
left to state legal systems).

390 Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 316 (1955); see also Bank of
San Pedro v. Forbes Westar, Inc., 53 F.3d 273, 275 (9th Cir. 1995) (holding that federal admiralty
courts should avoid interference with state regulation of marine insurance).


393 See, e.g., GILMORE & BLACK, supra note 40, § 2-8, at 68 (describing the case as "persistence-
ently problematic"); Burrell, supra note 122, at 65-66; Currie, supra note 4, at 216 (noting that
"[t]he general reaction to Wilburn was highly negative."). In fact, the most recent study of Wil-
burn Boat concludes that the case "is even more problematic than previously pointed out."
Goldstein, supra note 204, at 398.

394 GILMORE & BLACK, supra note 40, § 1-17, at 49; see also Wilburn Boat, 348 U.S. at 333
of the vast expansion in general regulatory activity—at both the federal and state levels—since the New Deal. In any event, these examples ought to suggest that state concerns implicated by maritime activity are simply too numerous, too varied, and too important to be ignored simply because a case falls within the jurisdiction of a federal admiralty court.

B. The Political Safeguards of Federalism and the Presumption Against Preemption

The “presumption against preemption” recognizes that “the States are independent sovereigns in our federal system,” and that “the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” This demand that preemption rest upon a clear legislative decision reflects the Court’s emphasis on the political process as the primary protection of state sovereignty. In Garcia v. San Antonio Metropolitan Transit Authority, the Court announced that “the fundamental limitation that the constitutional scheme imposes on the Commerce Clause . . . is one of process rather than one of result.” Noting that “the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress,” the Court found that the states’ representation in Congress and role in selecting the

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396 See Stolz, supra note 27, at 712 (noting “the danger of regarding the water’s edge as the conclusive determinant of the question whether state or federal law should be applied. That kind of mechanistic thinking leads inevitably to disregarding legitimate state interests for no discernable federal purpose.”).


398 In the last several years, the Court has handed down a number of decisions widely perceived as reviving judicial protection of States’ rights. See, e.g., Printz v. United States, 117 S. Ct. 2365, 2384 (1997) (holding that Congress may not “commandeer” state executive officials to enforce federal law); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 47 (1996) (holding that Congress may not abrogate states’ Eleventh Amendment immunity from suit in federal court); United States v. Lopez, 514 U.S. 549, 551 (1995) (striking down the federal Gun-Free School Zones Act as beyond Congress’s authority under the Commerce Clause). These decisions may well represent a new direction in the Court’s jurisprudence. Only Lopez, however, deals directly with the central issue of the federal government’s power to make laws that may have the effect (although the law at issue in Lopez did not) of superseding state regulatory authority. And Lopez, in my view, stands chiefly for the proposition that there is some limit on federal authority, without denying that federal power to invade traditional areas of state regulation remains very broad indeed. The “political safeguards of federalism,” see generally Wechsler, supra note 246, thus remain the primary bulwark of state authority.

Whether these “political safeguards” are an adequate bulwark is, of course, another question. See, e.g., Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 564-67 (1985) (Powell, J., dissenting); William W. Van Alstyne, The Second Death of Federalism, 83 Mich. L. Rev. 1709, 1722-27 (1985). It is enough for present purposes to characterize the preservation of political safeguards as a minimal floor beneath which constitutional protection for federalism ought not to be allowed to slip.

President is sufficient "to insulate the interests of the States." In so holding, the Court relied on Professor Wechsler's conclusion that "the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states, whose representatives control the legislative process and, by hypothesis, have broadly acquiesced in sanctioning the challenged Act of Congress." 

James Madison's similar argument in The Federalist Nos. 45 and 46 concluded that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them." Madison found the foremost protection for state governments, however, in the loyalty of the people themselves. Beyond the institutional arrangements conferring state power over the federal government, Madison identified "[m]any considerations" that "seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States." These considerations included the fact that "[b]y the superintending care of these [state governments], all the more domestic and personal interests of the people will be regulated and provided for." Although the powers of the federal government "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce," Madison observed that "[t]he powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

To paraphrase, Madison viewed the ultimate "political safeguard of federalism" as the general regulatory authority of the states. In America, all political power flows from the people, and the people will be most loyal to the level of government that safeguards the interests that are closest to home. "[A] necessary part of the Federalists' larger theory," according to

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401 Id. at 550-51.
402 Wechsler, supra note 246, at 559.
404 See The Federalist No. 46, at 294 (James Madison). Madison asserted that [t]he adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject . . . . They must be told that the ultimate authority . . . resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. Truth, no less than decency, requires that the event in every case should be supposed to depend on the sentiments and sanction of their common constituents.

Id.
405 Id. at 294.
406 Id. at 294-95.
407 The Federalist No. 45, at 292 (James Madison).
408 Id. at 292-93.
409 See Robert F. Nagel, Federalism as a Fundamental Value: National League of Cities in Perspective, 1981 Sup. Ct. Rev. 81, 100 ("[T]he Federalists understood and emphasized that influence through electoral politics presupposes that state governments would exist as altern-
Professor Nagel, was the assumption that "to be able to protect themselves in the political process states would need (and were assured under the proposed Constitution) the capacity to elicit loyalty by providing for the needs of their residents." By diminishing state regulatory competence over such core responsibilities as health and safety regulation, contractual rights, and compensation for injury, federal preemption undermines the states' place in the constitutional structure.

That is why modern preemption analysis focuses exclusively on Congress's intent in passing the law alleged to have preemptive effect. It is also why we have a presumption against preemption. As the Court explained in *Gregory v. Ashcroft*,

[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."  

Decisions to encroach on the states' critical power to provide for the welfare of their own citizens, in other words, must be made by a body in which the states are represented. And to ensure that that representation has been effectual, Congress must actually focus on the preemption problem.

Congress's critical role in preemption decisions makes preemption by federal common law highly suspect. Both courts and commentators have noted the federalism concerns raised by formulation of federal law by a federal judiciary that incorporates none of the political safeguards of federalism; after all, "the States are represented in Congress but not in the federal political representatives understand that states are entitled to claim governmental prerogatives and unless they perceive states as legitimate, separate governments, there will be no impulse to use political influence to protect the interests of states as governmental entities.").

410 *Id.* at 103.


413 Some commentators have suggested that "[t]he Supreme Court's devotion to its presumptions [against preemption] . . . can only be described as fickle." S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. Rev. 685, 733 (1991). A comprehensive analysis of when the Court invokes the presumption, and when it does not, is beyond the scope of this Article. My normative contention is that, given the centrality of state regulatory authority to the political structure of federalism, the presumption should always apply in preemption.
courts.\textsuperscript{414} The “Wechsler-Garcia version of judicial federalism” thus suggests that federal courts “should not promulgate federal common law rules that intrude upon [the states’ traditional] domain unless they have been authorized to do so by an enacting body in which the states are represented.”\textsuperscript{415} Preemption via federal common law simply adds another layer of difficulty by exacerbating the intrusion on state sovereignty without the sanction of a politically accountable body.\textsuperscript{416} Our “fundamental political assumption,” in other words, is that “normally the basic decision to exercise powers granted to the federal government and to displace state law ... should be in the hands of Congress rather than the courts.”\textsuperscript{417}

Judicial preemption is less problematic where federal common law is created pursuant to “some congressional authorization to formulate substantive rules of decision.”\textsuperscript{418} In such cases, Congress has at least made the initial decision to delegate lawmaking authority, and the contours of the federal


\textsuperscript{415} Merrill, supra note 79, at 17; see also Clark, supra note 1, at 1262 (recognizing the states’ “right to have state law govern matters within the legislative competence of the states unless and until the federal government—acting pursuant to the various and often cumbersome means prescribed by the Constitution—adopts ‘supreme Law of the Land’ to displace state law”).

\textsuperscript{416} See, e.g., Hoke, supra note 413, at 716 (arguing that private parties should not be allowed “to achieve through litigation the preemptive impact that the political institution did not, and perhaps because of internal disagreement could not, reach. This substitution of judicial policymaking for political decision undermines democratic accountability and public decision-making at the national level, as well as the democratic process and regulatory space of states and localities.”).

Professors Bradley and Goldsmith have noted, in the related context of preemption by rules of customary international law treated as common law by federal courts, that “[i]t makes no sense ... to require Congress to jump over these procedural hurdles [i.e., the clear statement rule] before legislating against the states, yet to permit federal courts to apply international community norms against the states in the absence of any congressional authorization.” Bradley & Goldsmith, supra note 14, at 869. This argument has provoked a number of international law scholars to defend the federal status of customary international law. See, e.g., Harold Hongju Koh, Is International Law Really State Law?, 111 Harv. L. Rev. 1824 (1998). Professor Koh’s rebuttal relies on two primary points: first, that both Erie and the Tenth Amendment envision an allocation of lawmaking authority between state and federal spheres (with international law falling into the latter), see id. at 1831-32, 1848, and second, that the practice of treating customary international law as federal is simply too well established to abandon it now. See id. at 1852. Whether or not these points adequately rebut the Bradley-Goldsmith thesis, neither is particularly persuasive in the related context of admiralty law. Both the existence of the saving clause, see supra notes 61-71 and accompanying text, and the presence of significant state interests in and regulatory authority over maritime activity, see supra Section IV.A, demonstrate that admiralty is a sphere of largely concurrent jurisdiction. Nor can federal common law in admiralty be defended on an “if it ain’t broke, don’t fix it” rationale. As I hope to have demonstrated in Section II.B, supra, the Jensen regime of maritime preemption is broke.

\textsuperscript{417} Hart & Wechsler, supra note 3, at 861; see also Atherton v. FDIC, 519 U.S. 213, 218 (1997) (“Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.”) (quoting Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1966)).

\textsuperscript{418} Texas Indus., v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981). Such cases include, for present purposes at least, cases in which federal common lawmaking may be viewed as akin to interpretation or filling in the interstices of federal statutes. See, e.g., United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) (“[T]he inevitable incompleteness presented by all legislation means that interstitial federal lawmaking is a basic responsibility of the federal
statute will more or less confine the scope of judicial lawmaking (and pre-
emptive) authority. A much more difficult case arises, however, "where
the United States seeks to oust state substantive law on the basis of an amor-
phous doctrine of national sovereignty divorced from any specific constitu-
tional or statutory provision." Maritime preemption cases fit this latter
pattern, as they generally involve announcement and application of common
law rules wholly apart from any federal statute.

C. Judicial Preemption and the Rule of Completeness

Requiring that preemption occur by statute protects the states not only
by giving them a voice in the process, but also simply by making the process
difficult. Every schoolchild learns the many procedural obstacles to a bill's
becoming a law, and the practical difficulties of marshaling political sup-
port in both houses of Congress means that the national legislature's atten-
tion can, at any given time, be focused on only a limited number of issues. In
a world of largely concurrent state and federal power, then, state regulatory
authority is protected less by the doctrine of limited federal powers than by
the reality of a limited federal agenda. And as long as the lawmaking pow-
ers of federal courts are tied closely to federal statutes, the constraints on
congressional lawmaking will likewise limit the scope of judicial preemption.

"Open-ended federal common lawmaking by courts," however, short-
circuits these safeguards. The problem is acute in admiralty, where the

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The problem is acute in admiralty, where the interpretation of federal statutes or constitutional provisions, "so long as interpretation is understood to mean a search for the specific intentions of the enacting body".

419 I do not mean to suggest that these cases are free from difficulty; rather, I mean only that the problems they raise are somewhat less stark and sufficiently different from the maritime preemption situation to be appropriately the stuff of another article.

420 Little Lake Misere, 412 U.S. at 592 n.10 (internal quotation omitted). The Court has suggested that the presumption against preemption is not so weighty in areas of "unique federal concern" warranting the creation of federal common law. See Boyle v. United Techs. Corp., 487 U.S. 500, 507-08 (1988). But maritime preemption cases frequently occur in contexts where spheres of traditional federal and state authority overlap. See supra Part IV.A. And outside the maritime sphere, the lower courts have not taken the existence of important federal concerns as a broad warrant to create preemptive federal common law. See, e.g., Karl Rove & Co. v. Thorne-
burgh, 39 F.3d 1273, 1281-83 (5th Cir. 1994) (refusing to create federal common law rule, with preemptive effect, to govern personal liability of candidates for federal office for debts incurred by their campaigns).

421 See, e.g., Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623 (1st Cir. 1994) (consider-
ing whether a maritime common law tort rule barring compensation for purely economic losses, originally articulated in Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 309 (1927), trumped state legislation providing for such recovery in oil spill cases). Interestingly enough, when a federal maritime statute is in the picture, the Court tends to treat the preemption issue under the standard framework devised for land-based preemption cases, including the presumption against preemption. See Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978).

422 See, e.g., I'm Just a Bill, in Schoolhouse Rock! (America Rock 25th anniversary ed.

423 See Clark, supra note 1, at 1261 ("The Constitution ... reserves substantive lawmaking
power to the states and the people both by limiting the powers assigned to the federal govern-
ment and by rendering that government frequently incapable of exercising them.").

424 Id. at 1269.
classical view is that "[t]he grant of judicial power to the federal courts . . . imposes the duty on admiralty judges to exercise that power . . . [and] declare the governing principles of maritime law."426 Discussions of this "duty" by admiralty scholars and practitioners are striking to nonspecialists accustomed to courts' usual deference to legislatures. As one experienced admiralty practitioner put it, "[d]eference to a co-equal branch of government is one thing, but actually saying that the Court is limited in the field of maritime law by what Congress decides is quite another."427

The idea of a judicial "duty" to fashion common law rules in maritime cases highlights a more fundamental problem with preemption by courts generally, and by "common law" courts in particular. Although legislatures may always decide not to act—and in fact do not act on most issues, most of the time—courts are obligated to decide the cases that litigants bring to them.428 As Chief Justice Marshall observed in Cohens v. Virginia, "[w]ith whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us."429

This obligation to decide every case entails the duty to fashion a rule of decision if no preexisting rule is available.430 As a jurisprudential matter, this

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426 Brown, supra note 229, at 251; see also The Tungus v. Skovgaard, 358 U.S. 588, 611 (1959) (Brennan, J., concurring in part and dissenting in part) ("Admiralty law is primarily judge-made law. The federal courts have a most extensive responsibility of fashioning rules of substantive law in maritime cases."); Goldstein, supra note 204, at 590 (criticizing the Supreme Court's "recent retreat from its role as expositor of general maritime law"); Robertson, supra note 172, at 366 ("Admiralty's traditions emphasize the authority and duty of federal judges to create maritime law."); Stolz, supra note 27, at 718 ("From the beginning admiralty judges have retained the inventiveness and initiative characteristic of common-law courts in private law areas.").

427 John D. Kimball, Miles: "This Much and No More . . .", 25 J. Mar. L. & Com. 319, 332 (1994) (criticizing Justice O'Connor's statement for the majority in Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990), that "[m]aritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them").

428 See, e.g., Hart, supra note 22, at 493. Professor Hart thought this obligation made courts particularly effective "agencies of creative legal development": [C]ourts have the great virtue of being accessible, regularly and as of right. Litigants with an appropriate interest are free always to come before them . . . seeking clarification or correction of the law. Legislatures, in contrast, meet only in intermittent and short sessions, with much of their attention devoted to tasks of governmental housekeeping having no direct bearing on the body of permanent law. With respect to this body of law, they have and must have a crucially important discretion to legislate or not to legislate.

Id.

429 19 U.S. (6 Wheat.) 264, 404 (1821).

430 See Steven D. Smith, Courts, Creativity, and the Duty to Decide a Case, 1985 U. Ill. L. Rev. 573, 580 (1985) (noting that Chief Justice Marshall's statement in Cohens "would be no less imperative merely because a determinative rule was unavailable in advance. Furthermore, if the judiciary cannot decline to decide a case, then the judiciary cannot avoid adopting its own rule of decision when one does not exist"); see also William A. Edmundson, Transparency and Indeterminacy in the Liberal Critique of Critical Legal Studies, 24 SETON HALL L. Rev. 557, 588 (1993) ("Rather than respond 'non liquet' (i.e., the law is not clear) when the law is not clear, Anglo-
duty arises from "the proposition that there are no gaps in the law," i.e., "that the legal system covers every question that might be brought up within it."\textsuperscript{431} Although this proposition has been thought to be true of American law generally, it is generally not true of federal law standing alone.\textsuperscript{432} Rather, federal law has been thought to be "generally interstitial in its nature":

[Federal law] rarely occupies a legal field completely, totally excluding all participation by the legal systems of the states. . . . Federal legislation, on the whole, has been conceived and drafted on an \textit{ad hoc} basis to accomplish limited objectives. It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. Congress acts, in short, against the background of the total \textit{corpus juris} of the states in much the way that a state legislature acts against the background of the common law, assumed to govern unless changed by legislation.\textsuperscript{433}

The imperative for federal admiralty courts to fill in all existing gaps in the general maritime law through federal common lawmaking thus cuts against the basic nature of federal law, which generally presumes that state law will govern in the absence of an applicable federal statute.

All this is not meant to deny "power in the federal courts to declare, as a matter of common law . . . rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."\textsuperscript{434} And it may be impossible to draw a completely bright line between

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\textsuperscript{432} See, e.g., Hart, supra note 22, at 492 ("[T]he principles of decision guiding the courts of the forty-eight states, are the great and immensely valuable reservoirs of underlying law in the United States, available for the resolution of controversies for which otherwise there would be no law.").

\textsuperscript{433} Hart & Wechsler, supra note 3, at 533; see also Atherton v. FDIC, 519 U.S. 213, 218 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 90 (1994) (Stevens, J., concurring) ("Federal courts, . . . 'unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.'" (quoting Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981))).

\textsuperscript{434} United States v. Little Lake Misere Land Co., 412 U.S. 580, 593 (1973) (quoting Paul Mishkin, \textit{The Variousness of "Federal Law": Competence and Discretion in the Choice of Na-
untethered federal common lawmaking and filling in the interstices of federal statutes.\textsuperscript{435} Differences in degree, however, may be so pronounced as to amount to a difference in kind.\textsuperscript{436} Certainly, the general perception of courts and commentators alike is that federal admiralty courts are often engaged in a qualitatively different enterprise from the ordinary filling in of statutory interstices.\textsuperscript{437}

In Robins Dry Dock & Repair Co. v. Flint,\textsuperscript{438} for example, the Court announced a rule against recovery of purely economic losses occasioned by maritime torts.\textsuperscript{439} The opinion neither cites nor even mentions any federal statute; rather, it simply adopts into the maritime law "a traditional, if not invariable, 'general principle denying liability for purely economic loss in the law of negligence.'"\textsuperscript{440} And yet, subsequent courts have repeatedly applied the Robins Dry Dock rule with preemptive effect.\textsuperscript{441} Nor is Robins Dry Dock an isolated example; rather, federal admiralty courts regularly fashion federal maritime law wholly apart from any federal statute, and such rules are routinely applied to the exclusion of state law.\textsuperscript{442}

Federal admiralty courts tend to behave, in other words, as though the maritime law were itself a closed system that is subject to the rule of completeness.\textsuperscript{443} Admiralty courts do not recognize an obligation to "make" new law only when neither the federal nor state legal system provides an applicable rule of decision.\textsuperscript{444} The assumption that federal maritime law is itself

\textsuperscript{435} See, e.g., Hart & Wechsler, supra note 3, at 863 ("Statutory interpretation shades into judicial lawmaking on a spectrum ").

\textsuperscript{436} See, e.g., Smith, supra note 430, at 577 n.17 (arguing that the distinction between statutory interpretation and judicial lawmaking is critically important despite difficulties in line drawing).

\textsuperscript{437} See, e.g., Northwest Airlines, 451 U.S. at 95 ("A narrow exception to the limited lawmaking role of the federal judiciary is found in admiralty."); Hart, supra note 22, at 496-97 (observing that maritime law is one of the few areas in which "the federal courts, like their state counterparts, have assumed a responsibility for the initial development of law, prompted only by a grant of jurisdiction. . . . In such cases Congress has been left in the position characteristic of the state legislatures, reviewing and supplementing, by the techniques of enactment, the underlying body of federal decisional law").

\textsuperscript{438} 275 U.S. 303 (1927).

\textsuperscript{439} See id. at 309.

\textsuperscript{440} Ballard Shipping v. Beach Shellfish, 32 F.3d 623, 628 (1st Cir. 1994) (quoting Patrick Atiyah, Negligence and Economic Loss, 83 L.N.W. Q. Rev. 248, 250 (1967)); see also Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1022 (5th Cir. 1985) (en banc) ("Robins broke no new ground but instead applied a principle, then settled both in the United States and England, which refused recovery for negligent interference with 'contractual rights.'").

\textsuperscript{441} See IMTT-Gretta v. Robert E. Lee S.S., 993 F.2d 1193, 1195 (5th Cir. 1993); M/V Testbank, 752 F.2d at 1032.

\textsuperscript{442} See, e.g., Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630-32 (1959) (fashioning a standard of care for ship owners "in the performance of the Court's function in declaring the general maritime law," and refusing to apply "inappropriate common-law concepts" from state law).

\textsuperscript{443} See Stolz, supra note 27, at 662 n.6 ("[A]dmiralty is the only body of federal law that makes any pretension towards being comprehensive.").

\textsuperscript{444} See, e.g., Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 95 (1981) (contrasting admiralty practice with the general principle that federal courts lack "open-ended lawmaking powers"). The "gap theory" discussed above, see supra Part II.B.2, was an attempt to
complete thus focuses the inquiry, in cases in which no preexisting admiralty rule exists, on the question of what the new admiralty rule should be, rather than on whether state law should provide the rule of decision. And because courts fashion the new federal rule—by definition—wholly apart from any federal statute, the traditional preemption analysis, with its emphasis on congressional intent, seems wholly out of place.

All this suggests that the objection to preemption by way of federal common law runs deeper than the fact that the states are not directly represented on the federal bench. The problem is that federal admiralty courts have come to view their role as articulating a complete system of maritime rules that, in theory at least, answers every question that might arise in an admiralty case. This means that the frequency and scope of maritime preemption is purely a function of the cases brought before the federal admiralty courts; those courts have no discretion not to decide those cases, and once they are decided, the results will preempt contrary state law. The pragmatic limitations on Congress's legislative agenda, as well as Congress's discretion to decide that a matter within its power should nonetheless be left to the states, have no parallels in the process by which federal maritime law is formed.

D. The Argument for Uniformity

One might object to the preceding argument by pointing out that federal courts have not, in practice, viewed their obligation to decide cases falling within the maritime jurisdiction as solely involving the development of federal maritime law. The Court warned in *Romero v. International Terminal Operating Co.* against “a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce,” and I have already discussed the Court's extended effort to define some scope for state law under *Jensen.* But the logic of the argument most frequently advanced in favor of a special rule of maritime preemption—that the federal government has a strong interest in ensuring that uniform rules govern maritime commerce—strongly favors treatment of admiralty law as a closed and complete system. That argument is the subject of the present Section.

I have already discussed the historical claim that “[a]dmiralty jurisdiction was given to the federal courts to insure a uniform application of the law to encourage trade and foster the United States maritime industry's growth.” That claim, I have argued, must be qualified in light of the Fram-

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445 *Cf. M/V Testbank*, 752 F.2d at 1021-32 (devoting 11 pages to whether the *Robins Dry Dock* rule should be retained as a principle of federal maritime law, then concluding that that rule automatically preempts state law).

446 See Hoke, *supra* note 413, at 728 (noting that when preemption is accomplished via federal common law, courts often ignore “the formal analytic preemption framework,” and other indicia of conventional preemption decisionmaking).


448 See *supra* Part II.
ers’ limited view of the jurisdiction’s primary scope and their assumption that maritime law would not be federal for purposes such as preemption.\textsuperscript{450} But whether or not the history of the jurisdictional grant actually reflects a purpose to establish and enforce a uniform maritime law, one may state the argument for uniformity simply as a current federal policy interest.\textsuperscript{451} Professors Gilmore and Black, for example, have suggested that the point of admiralty jurisdiction is to provide “a special-industry court for the maritime industry.”\textsuperscript{452} Because ships must call in ports of many states, the argument goes, they need uniform rules in order to assure predictability in their affairs.\textsuperscript{453}

In theory, Congress could itself assure uniformity by enacting a comprehensive statutory scheme of maritime commercial law. Advocates of a strong federal common lawmaking role in admiralty reject this possibility, however, on the ground that “in the real world, uniformity is unlikely to happen if the federal judiciary withdraws from an area. Congress simply has other matters higher on its agenda than setting rules to govern private maritime transactions.”\textsuperscript{454} These scholars thus conclude that “the governing law is more likely

\textsuperscript{450} See supra Part III.C.

\textsuperscript{451} See, e.g., Swanson, supra note 384, at 380 (“The goal of maritime law is to create an efficiently functioning set of rules that is uniform and predictable.”) (citing De Lovio v. Boit, 7 F. Cas. 418, 443 (C.C.D. Mass. 1815) (No. 3,776)). Professor Goldstein has advanced a different policy argument, based on the usefulness of federal common law in admiralty as a vehicle for allowing the federal courts generally, and the Supreme Court in particular, to participate in the ongoing development of common law doctrine in areas like contracts and torts. See Joel K. Goldstein, Reconceptualizing Admiralty: A Pedagogical Approach, 29 J. MAR. L. & Com. 625, 631-33 (1998) (noting prominent common law cases decided by federal admiralty courts). In the past, federal admiralty courts have been in the vanguard of progressive common law development, particularly in the field of tort law. See, e.g., Gilmore & Black, supra note 40, § 6-1, at 274-75 (noting how the Supreme Court, through its jurisdiction over maritime torts, participated in “the judicial revolution which has reshaped our law of civil obligations during the post-World War II period”). But given the small volume of admiralty cases as we near the century’s end, see Goldstein, supra, at 628-29, it appears much more likely that admiralty will move forward less quickly than parallel state law, so that maritime preemption becomes a barrier to progressive legal development. The Robins Dry Dock rule at issue in the Ballard Shipping case, see supra notes 438-442, for instance, has been “assailed by both the courts and commentators,” Louisiana & Nashville R.R. v. The Tug M/V Bayou Lacombe, 597 F.2d 469, 473 n.2 (5th Cir. 1979) (Wisdom, J.), and abandoned in some states. See People Express Airlines, Inc. v. Consolidated Rail Corp., 495 A.2d 107, 109-18 (N.J. 1985). Yet the Supreme Court had not had occasion to revisit the issue as a matter of maritime law since 1927. And to the extent that Professor Goldstein seeks a “dialogue” between federal and state courts on common law subjects, that is equally likely to occur under an Erie regime where federal courts inevitably predict how state courts might decide open issues. See Clark, supra note 1, at 1495, 1497 (noting that federal courts have considerable latitude in “predicting” state law). In any event, other leading admiralty scholars have strongly criticized the present Supreme Court as fundamentally incompetent to hold up its end of the conversation. See Robertson, supra note 17, at 295-303 (blaming it all on the law clerks).

\textsuperscript{452} Gilmore & Black, supra note 40, § 1-10, at 30.

\textsuperscript{453} See, e.g., Washington v. W.C. Dawson & Co., 264 U.S. 219, 228 (1924); Burrell, supra note 122, at 54-55 (justifying the uniformity rule on grounds of fairness and predictability); Goldstein, supra note 426, at 556 (“A principal interest behind maritime jurisdiction is the promotion of maritime commerce, an end predictability serves. To the extent maritime law is uniform in its national and international applications, maritime commerce is encouraged.”).
to be uniform if federal courts aggressively create federal common law in admiralty than if they play a passive role.\textsuperscript{455}

Although this way of stating the issue has the virtue of candor, it goes a long way toward showing why federal admiralty rules should not have preemptive effect. Legislative preemption, the argument runs, is too hard—it takes time and effort to muster a congressional majority to override state law, and it is not likely to happen very often on maritime issues. But it is just such a legislative decision—made by a body in which the states are represented, after jumping through all the hoops that the Framers created to make wholesale preemptive action difficult—that is essential for a finding of preemption. That federal common lawmaking offers a convenient way to short-circuit this process is a strong hint that such lawmaking is illegitimate.

Interestingly enough, similar arguments—that interstate business needed uniform commercial rules pronounced by federal courts throughout the country—were made in support of \textit{Swift v. Tyson} in the late nineteenth century.\textsuperscript{456} Yet \textit{Erie} rejected all that, and \textit{Erie}'s principle of judicial federalism bars any argument—in most contexts, at least—that federal courts may impose uniformity where Congress has chosen not to act.\textsuperscript{457} The Court has thus been highly skeptical of "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity."\textsuperscript{458} Rather than accepting generic uniformity claims as a basis for fashioning common law rules, the Court has demanded "a specific, concrete federal interest" before displacing state law.\textsuperscript{459}

No such interest arises simply because a case falls within the federal admiralty jurisdiction. While maritime commerce was once, no doubt, unique in its mobility and contact with foreign nations, both airborne and electronic commerce surely equal or surpass it in those respects today. And even domestic land-based commerce is now dominated by large multi-state firms that must deal with a diverse patchwork of state laws in their day-to-day operations.\textsuperscript{460} There is no longer anything special about maritime commerce that

\textsuperscript{455} \textit{Id.}

\textsuperscript{456} \textit{See} Railroad Co. v. National Bank, 102 U.S. 14, 41-42 (1880) (Clifford, J., concurring); \textit{Tony Freyer, Harmony \& Dissonance: The Swift \& Erie Cases in American Federalism} 82-84 (1981); Casto, \textit{supra} note 307, at 916.

\textsuperscript{457} \textit{See supra} pp. 303-05. As discussed previously, \textit{see} notes 82-89 and accompanying text, pure uniformity concerns—that is, concerns not linked to a federal legislative scheme—have carried the day primarily in the limited contexts of the federal government's proprietary dealings, \textit{see} Clearfield Trust Co. v. United States, 318 U.S. 363 (1943), and foreign relations. \textit{See} Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).


\textsuperscript{459} \textit{Id.; see also} Atherton v. FDIC, 519 U.S. 213, 220 (1997) ("To invoke the concept of 'uniformity,' . . . is not to prove its need."); United States v. Kimbell Foods, Inc., 440 U.S. 715, 730 (1979) (rejecting "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs"). A unanimous Court in \textit{O'Melveny} likewise discounted the claim that uniformity "eliminat[es] state-by-state research and reduc[es] uncertainty": "[I]f the avoidance of those ordinary consequences qualified as an identifiable federal interest," the Court said, "we would be awash in 'federal common-law' rules." \textit{O'Melveny}, 512 U.S. at 88.

\textsuperscript{460} \textit{See, e.g.,} Atherton, 519 U.S. at 222 (noting that the daily activities of national banks are
demands a unique and largely judge-made body of uniform federal law.\textsuperscript{461} Rather, as Justice Harlan said in \textit{Kossick}, "the claim of federal supremacy [in admiralty cases] is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight."\textsuperscript{462}

On land, the "dormant" aspect of the Commerce Clause generally protects the federal interest in uniformity.\textsuperscript{463} The Court's Commerce Clause cases, however, have long acknowledged a concurrent state regulatory power over commercial activities\textsuperscript{464}—even in an age in which one can show virtually any intrastate activity to have interstate economic effects.\textsuperscript{465} And although the Court has occasionally invalidated state regulation simply for placing too great a burden on interstate commerce, the main thrust of dormant Commerce Clause jurisprudence has been directed toward preventing state discrimination against out-of-state business.\textsuperscript{466} In other words, the Court has been willing to permit a far greater degree of regulatory disuniformity re-

\textsuperscript{461} See \textit{Redish}, supra note 28, at 146 ("The federal courts would . . . be well advised to recognize the modern day similarities between land-based and maritime commerce, and to treat them in a similar manner."). Professor Redish concludes that, "[i]f this were done, the so-called 'law of the sea' would be generally abandoned (with the possible exception of cases arising on the high seas), and replaced by applicable state legal principles." \textit{Id. Cf.} Musson Theatrical, Inc. v. Federal Express Corp., 89 F.3d 1244, 1249-51 (6th Cir. 1996) (refusing, in the absence of statutory authorization, to create a uniform federal cause of action concerning the pricing practices of airborne freight carriers). It is likewise hard to think of any noncommercial federal interests unique to maritime situations that demand such a body of law. \textit{See Smith}, \textit{supra} note 430, at 606 ("As a class, cases that arise from incidents occurring at sea do not necessarily implicate federal interests any more than cases arising on land.").

\textsuperscript{462} \textit{Kossick} v. United Fruit Co., 365 U.S. 731, 739 (1961).

\textsuperscript{463} The Court has sometimes likened the maritime preemption enquiry to a Commerce Clause analysis. \textit{See, e.g.}, Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 324 (1955) (Frankfurter, J., concurring) (observing that the maritime preemption enquiry is "not unlike [that] involved when the question is whether a State, in the absence of congressional action, may regulate some matters even though aspects of interstate commerce are affected"); Davis v. Department of Labor & Indus., 317 U.S. 249, 257 (1942); \textit{see also} American Dredging Co. v. Miller, 510 U.S. 443, 453 n.3 (1994) (arguing that "[t]he no-harm-to-commerce theme is of course familiar to the ear—not from our admiralty repertoire, however, but from our 'negative Commerce Clause' jurisprudence"). But modern dormant Commerce Clause doctrine—unlike admiralty law—has rarely focused on uniformity for its own sake.

\textsuperscript{464} \textit{See} \textit{Cooley} v. Board of Wardens, 53 U.S. (12 How.) 299, 320 (1851) (recognizing that Congress's commerce power is not exclusive of state regulation); \textit{see also} Zschernig v. Miller, 389 U.S. 429, 458-59 (1968) (Harlan, J., dissenting) ("Prior decisions have established that in the absence of a conflicting federal policy or violation of the express mandates of the Constitution the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations."); Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28, 38 (1948) ("[T]he Cooley criterion has been applied so frequently in cases concerning only commerce among the several states that it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce.")


\textsuperscript{466} \textit{See generally} Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 574-75 (1997) (striking down a state property tax exemption for charitable businesses directed at institutions benefiting mostly in-state residents); Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (striking down a state tax on stock in corporations doing business outside the state); \textit{cf.} Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (striking down a facially neutral fruit packaging require-
speaking land-based commerce than *Jensen* would permit for maritime commerce.\(^{467}\)

Congress has similarly recognized that, even in a modern economy in which interstate and international commercial linkages grow closer all the time, there is ample room for state regulatory diversity. The McFadden Act and Electronic Funds Transfer Act, for example, continue to permit substantial divergence among state regimes in the fields of branch banking and electronic financial transactions, despite the fact that modern banks may well do business in all fifty states and many foreign countries at the same time.\(^{468}\) Nor has congressional tolerance for diverse state regulatory schemes stopped at the water’s edge: The Oil Pollution Act of 1990, for example, contains an express nonpreemption clause preserving the states’ freedom to tailor their remedial schemes for oil spills in territorial waters.\(^{469}\)

Both the Commerce Clause cases and the many instances in which Congress has chosen not to preempt varied state regulatory regimes bear witness to the fact that the diversity of fifty separate legal systems will often be a strength, rather than a weakness. As Justice Brandeis famously observed, “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\(^{470}\) There is, of course, a vast literature debating the pros and cons of Justice Brandeis’s position. The point here, however, is simply that there is no *a priori* reason to think that regulatory diversity is any more or less valuable, or that uniformity is any more or less important, simply because the regulated

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\(^{467}\) Ironically, *Jensen* itself relied upon an analogy to the dormant Commerce Clause to justify its rule of preemption. The Court quoted its prior holding in *Bowman v. Chicago & N.W. R. Co.*, 125 U.S. 465, 507 (1888):

> Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.

*Jensen*, 244 U.S. at 216-17. The modern Commerce Clause doctrine, of course, is considerably more circumscribed. See ROBERTSON, *supra* note 13, at 188 (“[T]he admiralty cases following *Jensen* have not been as pragmatic or as successful in working out the federal-state allocation as have the cases involving the commerce clause.”).

\(^{468}\) *See* McFadden Act, 12 U.S.C. § 36(c); Electronic Funds Transfer Act, 15 U.S.C. § 1693q; *see also* Atherton v. FDIC, 519 U.S. 213, 219-20 (1997) (rejecting the argument that the need for uniformity in banking warrants creating federal common law governing activities of national banks). *See generally* Currie, *supra* note 4, at 191 (“In many areas of the law the Court has upheld acts of Congress tying federal law to the changing laws of the several States. In many instances there is utility in having federal laws correspond with those of the state in which a transaction takes place; and because of the state interest in these matters, and the declaration by Congress that uniformity is not of grave importance, even the Commerce Clause’s injunction of uniformity has been overridden.”).

\(^{469}\) 33 U.S.C. § 2718(a); *see also* Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994) (discussing this aspect of the Oil Pollution Act).

\(^{470}\) New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting that federalism “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and
activity occurs on navigable waters rather than on land.\textsuperscript{471} There is likewise no reason to depart from the Court’s well-established doctrines for protecting the federal interest in uniformity—in particular, its dormant Commerce Clause and general preemption jurisprudence—simply because a federal court happens to be sitting in admiralty.

It is important to recognize just how far the uniformity argument may go. As the First Circuit has recognized, “[a]ll state laws, if given effect in admiralty cases, will interfere to a degree with the uniformity of admiralty law.”\textsuperscript{472} In any event, the cases make clear that the uniformity principle has never been taken as far as it might go.\textsuperscript{473} Justice Frankfurter’s general summary of the situation in 1959 remains largely accurate today:

Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the courts, to claim that all enforced rights pertaining to matters maritime are rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.\textsuperscript{474}

Ironically, the Court’s failure to define the scope of state authority—while insisting that it exists—undermines the very predictability upon which \textit{Jensen} depends for its justification. It is time to ask whether we can do better by abandoning \textit{Jensen} altogether.

V. Living Without Maritime Preemption

As doctrine, \textit{Jensen} has serious problems: In over eighty years, the Supreme Court has yet to come up with a coherent formula that produces predictable results. As principle, \textit{Jensen} contravenes some of the basic tenets of federalism and federal courts law: that jurisdictional grants do not confer power to fashion substantive rules of decision; that federal common law is fundamentally interstitial in nature; that state regulatory authority is not preempted unless Congress has made a clear decision to do so. And as history, \textit{Jensen} lacks the firm grounding in traditional practice that might otherwise offset or even overcome its liabilities. Both judges and commentators have

\textsuperscript{471} See Currie, 	extit{supra} note 4, at 191 (“Again the insistent question is posed: Why is uniformity any more critical in maritime matters?”).

\textsuperscript{472} Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1279 (1st Cir. 1993); see also Gilmore & Black, 	extit{supra} note 40, § 9-57, at 719 (noting that the uniformity theory, “if carried to its logical extreme, would require the federalization of all aspects of [maritime] law”).

\textsuperscript{473} See, e.g., Just v. Chambers, 312 U.S. 383, 389 (1941) (“The grounds of objection to the admiralty jurisdiction in enforcing liability for wrongful death [under state law] were similar to those urged here; that is, that the Constitution presupposes a body of maritime law, that this law, as a matter of interstate and international concern, requires harmony in its administration and cannot be subject to defeat or impairment by the diverse legislation of the States, and hence that Congress alone can make any needed changes in the general rules of the maritime law. But these contentions proved unavailing . . . .”).
recognized Jensen's liabilities before, and many have suggested new approaches designed to minimize them.\textsuperscript{475} I want to ask a more fundamental question, however: Do we need a special doctrine of maritime preemption at all?

The answer, I think, is no. In the following sections, I sketch what a Jensen-less admiralty world would look like, and what protections for the federal interest in uniformity would remain.

A. "Translating" the Maritime Law

Earlier I described Jensen's incorporation of maritime law into the new federal common law as an attempt to "translate" the eighteenth-century idea of "general" law into a new context where "state" and "federal" law are the only available categories.\textsuperscript{476} Translation seeks to preserve fidelity to original texts—here the Admiralty Clause of Article III and section 9 of the Judiciary Act of 1789—by reading those texts in such a way as to preserve the meaning

\textsuperscript{475} See, e.g., Sturley, supra note 223, at 324-27 (outlining a range of alternatives). The most sophisticated proposal is by Professor Robertson, who argues that in federal court, state law should not apply to any maritime issue that is (a) controlled by a valid Act of Congress; (b) procedural in nature; (c) controlled by an extant rule of general maritime law; or when (d) the state rule would significantly impair maritime commerce. In state court, by contrast, state law would not apply only to issues that (a) are controlled by a valid Act of Congress; or (b) are substantive and are controlled by an extant clear rule of general maritime law. See Robertson, supra note 172, at 357. As Professor Robertson acknowledges, this proposal runs against the general current of insisting that the same law apply in maritime cases regardless of the forum. See id. at 381; see, e.g., Currie, supra note 63, at 11 ("[O]ne thing is reasonably clear: In all maritime cases the same law, state or federal, is applied whether the action is in a state court or a federal court, and, if in a federal court, whether on the 'law side' or the 'admiralty side.'"); supra notes 65, 265-271, 354-356 and accompanying text. More fundamentally, Professor Robertson does not adequately justify why, in any forum, common law maritime rules should have preemptive effect at all or why the standard for preemption should be different from that accorded Acts of Congress. Professor Robertson would justify special rules for admiralty on the ground "that admiralty courts are unique in having constitutional power to create federal common law." Robertson, supra note 4, at 98 n.138. That assertion, however, depends on the historical gloss on Article III's jurisdictional grant that I have dealt with previously. See supra Part III.C.

Professor Stolz has suggested a different approach focusing on "the commercial nature of admiralty":

If the case presents a problem in which the maritime industry is concerned, and in which a diversity of law would seriously interfere with the efficient operation of the business, federal law should be applied. Conversely, if the case does not involve the industry, and if the state's interest is substantial . . . then state law should be applied.

Stolz, supra note 27, at 704. Such a differentiation has been criticized as unworkable in practice, see Burrell, supra note 122, at 76-78. The Supreme Court's cases marking out the limits of admiralty jurisdiction, moreover, have made clear that noncommercial activity itself implicates the federal interest in maritime commerce. See Sisson v. Ruby, 497 U.S. 358, 367 (1990) (stating that the federal interest in protecting maritime commerce "cannot be fully vindicated" without regulating "all operators of vessels on navigable waters"); Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675 (1982) (noting "the potential effect of noncommercial maritime activity on maritime commerce"). Most fundamentally, Professor Stolz never explains why the shipping industry needs a uniform body of federal law, but the insurance, banking, and air transport industries do not.
of those texts' applications in their original context.477 In other words, if the Framers intended the Admiralty Clause to permit the federal courts to develop and apply the law of the sea in certain sorts of cases, and to maintain a certain sort of relationship between admiralty and state law, then the translator's job is to come up with a conception of maritime law that meets those objectives and also harmonizes with the changed jurisprudential framework of modern times. Jensen failed in that enterprise because the new relationship it constructed between state and federal law fits neither the current legal framework governing preemption and federal common law generally nor the Framers' presupposition that the general maritime law would not have preemptive effect.478

Doing away with Jensen's special doctrine of maritime preemption would obviate both these problems. The Admiralty Clause empowered federal courts to develop and apply the law of the sea, but it did not "federalize" that law except, perhaps, in the public law areas related to foreign affairs where federal jurisdiction would generally be exclusive.479 Holding that maritime law is not "supreme" within the meaning of Article VI would re-create the Framers' critical presupposition concerning the relationship between state and maritime law; moreover, it would eliminate a particularly confusing exception to the general rules that federal common law is interstitial and pre-emption occurs only after a deliberate choice by Congress. Because my proposal does not propose fashioning any new rule of maritime preemption in place of Jensen, my proposal is less a "translation" than a recovery of the maritime law's original meaning.480

Subjecting admiralty to general post-Erie rules concerning state-federal choice of law would, however, work a fairly significant change in the scope of the maritime law. Those rules would confine application of maritime law to cases that fall outside the legislative competence of the states (such as most cases arising outside territorial waters) or where some compelling federal interest (such as the conduct of foreign affairs) required preemption of otherwise applicable state law.481 If the federal admiralty courts' power to fashion

477 See Lessig, Fidelity, supra note 14, at 1184-85.

478 Professor Lessig defines a "presupposition" as the elements of an author's context that are "relied upon in just the sense that had they been other than when the author first used these words, then the author would have used words other than she did." Id. at 1179-80. I take the furor over the "federal" common law in the early Republic as strong evidence that, had the Framers understood the Admiralty Clause as written to receive the law of the sea as federal law, they would have written it differently. See supra notes 326-342 and accompanying text.

479 This public law sphere—which primarily concerned prize cases—has declined in importance. See Stolz, supra note 27, at 669 (noting that "civilization has matured to the point where ships are sunk rather than stolen"). Any residuum fits comfortably under the federal courts' acknowledged authority to articulate federal common law dealing with the conduct of foreign relations. See, e.g., Clark, supra note 1, at 1292-1311 (noting that federal common law in this area raises few separation of powers or federalism concerns).

480 My approach is consistent with Professor Lessig's principle of conservatism, which holds that "[t]he translator is to find the accommodation that makes the smallest possible change in the legal material and still achieves fidelity." Lessig, Fidelity, supra note 14, at 1213.

481 See Clark, supra note 1, at 1354 ("In the admiralty context, . . . states generally possess authority over matters that take place within their territorial waters, and generally lack competence over matters that occur on the high seas.").
general rules of common law in private law cases were a presupposition of the Admiralty Clause, then fidelity would require accommodating that assumption through some special exception to *Erie*. But the history indicates that private law cases were an afterthought to the Framers of the Admiralty Clause, and there is no evidence that the States were any less free to depart from the law of the sea by statute or common law decision than they were to depart from *Swift*'s law merchant. In any event, the inability to formulate general rules for maritime commerce is a threat to federal interests only if an adequate level of uniformity cannot be achieved through other means. I explore three of those means in the next section.482

B. Uniformity Without Jensen

*Jensen*'s defenders sometimes speak as if, without that case’s uniquely strict preemption doctrine, the states would be free to impose a crazy-quilt of restrictions that would bring maritime commerce to a virtual halt. Two reasons that does not happen in other areas of interstate or international commerce are, first, Congress’s power to impose uniformity by statute, and, second, the Constitution’s prohibition on measures that discriminate against or unduly burden commerce between the states or with other nations. Both these constraints would remain in a post-*Jensen* world. Moreover, traditional conflict-of-laws principles would permit a significant—albeit reduced—role for maritime law in cases raising a strong federal interest.

1. Maritime Statutes

*Jensen*'s special maritime preemption doctrine typically applies either where state law conflicts with a maritime common law rule, or where there is no federal rule at all but state regulation is said to interfere with maritime commerce.483 The preemptive effect of federal maritime statutes, by contrast, has typically been analyzed under traditional preemption doctrine, including the presumption against preemption.484 In *Huron Portland Cement Co. v. City of Detroit*,485 for example, the Court considered whether a Detroit smoke abatement law could constitutionally be applied to ships docked at the Port of Detroit. The ship owner argued that the City’s law was preempted

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482 Substantive law, moreover, is not the only component of uniformity. To the extent that saving clause cases (unlike cases in federal admiralty court) have always been triable to a jury, the Framers must have expected and been willing to tolerate a certain disparity of result in cases affecting maritime commerce. Indeed, it was this expected disparity of result that largely motivated the 19th century struggles over the scope of the admiralty jurisdiction. See *Note*, supra note 45, at 1218-26; see also *White*, supra note 4, at 433 (noting that marine insurance claims were generally brought in state court, rather than in federal admiralty court, because of the perception that state juries were hostile to underwriters).

483 The latter situation is sometimes referred to as the “dormant Admiralty Clause.” See generally Bederman, *supra* note 3, at 5-7.

484 See, e.g., *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634, 639 (La. 1992) (“Where Congress has spoken in a particular area, courts engage in the familiar preemption analysis.”).
because ship boilers that were legal under federal maritime inspection statutes would be illegal under the local smoke abatement code.\textsuperscript{486} The Court rejected this argument, finding that the federal statutes were addressed to safety concerns in navigation, and that the City could validly pursue its pollution concerns without creating a conflict with the federal law.\textsuperscript{487} In so holding, the Court noted that

the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. ... [S]uch intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.\textsuperscript{488}

The need for a special maritime preemption doctrine thus declines as maritime law increasingly becomes a creature of statute. Although the process is no doubt incomplete, statutory rules now appear to govern many, if not most, of the “core” concerns of admiralty,\textsuperscript{489} leaving \textit{Jensen} increasingly applicable to more peripheral issues.\textsuperscript{490} To the extent that abandoning \textit{Jensen} would nonetheless produce some confusion on core admiralty issues, the industry interests affected are sufficiently cohesive that one would expect Congress to take notice of the problem.\textsuperscript{491} Where Congress does choose to act, of course, it may preempt contrary state law simply by expressing a clear intent to do so, and federal courts may flesh out the interstices of such enactments.

\textsuperscript{486} See \textit{id.} at 441-42.

\textsuperscript{487} See \textit{id.} at 442.

\textsuperscript{488} \textit{Id.} at 443 (quoting \textit{Savage v. Jones}, 225 U.S. 501, 533 (1912)); see also \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151, 167-68 (1978) (holding that the federal Ports and Waterways Safety Act of 1972 preempted those portions of a Washington state law that restricted the design and size of oil tankers operating in state waters, but not the state law’s requirement that such tankers have local pilots on board and be escorted by tugboats); \textit{Kelly v. Washington ex rel. Foss Co.}, 302 U.S. 1, 10 (1937) (reversing a state court determination that another Washington tugboat law was unenforceable as applied to navigable waters).

In \textit{Ray}, the Court began its preemption analysis by quoting the classic statement of the presumption against preemption from \textit{Rice v. Santa Fe Elevator Corp.}, 331 U.S. 218, 230 (1947). \textit{See Ray}, 435 U.S. at 157. Likewise, in \textit{Kelly}, the Court said that state police power “is superseded only where the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.” \textit{Kelly}, 302 U.S. at 10 (citations and internal quotation omitted). The Court illustrated its holding with a number of nonmaritime preemption cases. \textit{See id.} at 10-13. \textit{But see Offshore Logistics, Inc. v. Tallentire}, 477 U.S. 207, 220-33 (1986) (holding that admittedly ambiguous provisions of the Death on the High Seas Act preempted state remedies for wrongful death outside territorial waters, without applying presumption against preemption).

\textsuperscript{489} See Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990) (noting that “[m]aritime tort law is now dominated by federal statute”)

\textsuperscript{490} See, e.g., \textit{Yamaha Motor Corp. v. Calhoun}, 516 U.S. 199, 201-02 (1996) (pleasure boating accidents); \textit{Ballard Shipping Co. v. Beach Shellfish}, 32 F.3d 623, 624 (1st Cir. 1994) (pollution). As these examples indicate, the “periphery” may be perceived as central to admiralty law. See, e.g., \textit{Stolz, supra} note 27, at 704 (arguing that admiralty law need not govern pleasure boating cases).

under normal principles of federal common lawmaking. Although abandoning *Jensen* would permit broader application of state law to maritime disputes, then, Congress retains the power to mandate uniformity on those issues that truly require it.492

The legislative solution is likely to be superior for at least two reasons (aside from being constitutionally sound): First, Congress has a "superior ability to weigh the very practical considerations" at issue in preemption decisions, given its broad factfinding capabilities and greater political accountability.493 One of the primary virtues of placing all maritime preemption decisions under the traditional preemption doctrine, then, is that this would return central responsibility for ensuring maritime uniformity to the institution best suited to make such decisions. Second, as I have said, the instability of existing doctrine under *Jensen* itself presents a significant threat to maritime uniformity by failing to provide any coherent rule for when state law may apply.494 In the long run, only legislative action pursuant to normal preemption rules can provide both uniform substantive rules and the requisite certainty that such rules will be applied in maritime cases.

2. *The Dormant Commerce Clause*

Even where Congress has not acted, abandonment of *Jensen* would not leave maritime commerce at the mercy of diverse and disruptive state regulations. As in other areas of concurrent state and federal regulatory authority, state regulation would 495 Under familiar doctrine, state laws that facially discriminate against interstate commerce—whether on land or water—are

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492 See, e.g., Carriage of Goods by Sea Act of 1936, ch. 229, 49 Stat. 1207 (codified as amended at 46 U.S.C. §§ 1300-1315 (1994)); Federal Maritime Lien Act, ch. 373, 36 Stat. 604 (1910) (codified as amended at 46 U.S.C. §§ 971-975 (Supp. V 1987)) (repealed 1988), amended by 46 U.S.C. §§ 31341-31343 (1994). The assumption that Congress's power to enact these statutes may be implied from Article III's *jurisdictional* grant strikes me as bootstrapping, but I have no need to challenge it for the purposes of this Article. In any event, it seems likely that any issue posing a serious enough threat to maritime commerce to warrant congressional attention would be within Congress's power under the Commerce Clause. Finally, even in the absence of federal action, significant uniformity can be achieved through state adoption of uniform laws. See *Gilmore & Black*, supra note 40, §§ 3-1 to 3-5, at 93-100 (noting the use of the Uniform Commercial Code in governing bills of lading).

493 Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 631 (1st Cir. 1994); see also General Motors Corp. v. Tracy, 519 U.S. 278, 309 (1997) ("Congress has the capacity to investigate and analyze facts beyond anything the Judiciary could match, joined with the authority of the commerce power to run economic risks that the Judiciary should confront only when the constitutional or statutory mandate for judicial choice is clear.").

494 See supra Parts III.B, III.C. The confusion in the Supreme Court case law is somewhat misleading, in that the lower courts have more reliably applied *Jensen* to preempt state law. See supra notes 219-219 and accompanying text. But as Professor Robertson has acknowledged, the Supreme Court's cases—and especially its most recent decision in *Yamaha*—threaten to destabilize that consensus over time. See supra note 217 and accompanying text.

495 See, e.g., Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (recognizing that the Commerce Clause forecloses certain sorts of commercial regulation by states). Although the Court analyzed *Cooley* under the Commerce Clause, its subject matter—pilotage regulations on navigable waters—clearly falls within the admiralty jurisdiction. See *Gibbons v. Ogden*, 22 U.S.
“virtually per se invalid.”  

By barring discrimination against out-of-staters, the Commerce Clause eliminates an important incentive for state departures from maritime uniformity; because states are not permitted to create special commercial rules benefiting their own residents, they may be less likely to depart from fairly standardized rules at all.  

Nondiscriminatory regulation is subject to a more deferential standard, but will still be struck down if “the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.”  

The standard has been read to apply even more strictly to state action “touching foreign commerce,” and the foreign affairs power has been held to preempt state regulation that interferes with the conduct of foreign relations.  

The dormant Commerce Clause thus creates a significant impediment to any state regulation likely to impede maritime commerce, and the constitutional bar is even higher when foreign commerce and foreign relations—historically a central concern of the Admiralty Clause—are at issue.  

As noted earlier, the Court has frequently—beginning in Jensen itself—acknowledged parallels between the dormant Commerce Clause and the maritime preemption doctrine.  

Moreover, the Court has sometimes applied a straight-up Commerce Clause analysis as a substitute for Jensen in maritime cases, albeit without explicitly repudiating Jensen or explaining the reasons for its departure. In Huron Portland Cement, for example, the Court inquired whether Detroit’s smoke abatement ordinance imposed an “undue burden” on interstate commerce in violation of the Commerce Clause.  

Similarly, in Ray, the Court upheld Washington’s tug-escort requirement against a Commerce Clause challenge after finding that the law at issue “is not the type of regulation that demands a uniform national rule.”  

These safeguards have proven adequate to protect interstate and international commerce from undue state regulatory interference across a wide range of commercial contexts. In light of that experience, it is difficult to justify the additional encroachment on state authority involved in Jensen’s special doctrine of maritime preemption.

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496 See, e.g., Fulton Corp. v. Faulkner, 516 U.S. 325, 331 (1996); see also Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970) (noting that de facto protectionism has been held “virtually per se illegal”).

497 Cf. Cruzan v. Missouri Dep’t of Health, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (observing that the primary check on unwise or unjust state legislation is the Equal Protection Clause’s antidiscrimination principle, which requires “the democratic majority to accept for themselves and their loved ones what they impose on you and me”).

498 Pike, 397 U.S. at 142.

499 See Tribe, supra note 16, § 6-21, at 469.

500 See Zschernig v. Miller, 389 U.S. 429, 440-41 (1968) (striking down an Oregon probate law providing that property left to aliens in countries likely to confiscate the property would escheat to the State).

501 See supra notes 278-288 and accompanying text.

502 See Southern Pac. Co. v. Jensen, 244 U.S. 205 216-17 (1917); supra note 463.

3. The Conflict of Laws

I have posited a regime in which admiralty law exists, but has no preemptive force. Jensen is primarily a rule of preemption—not of lawmaking competence—and abandoning that rule would mean simply that maritime law would not automatically trump state law in the event of a conflict. In that sort of world, maritime law would bear the same relation to state law that the laws of different states bear to one another: conflicts would be resolved not through preemption, but through the application of traditional principles of the conflict of laws.

The Court has recognized that conflicts principles are a well-established part of maritime law:

International or maritime law in such matters as this does not seek uniformity . . . . However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved.\footnote{505}

Although the Court has most frequently applied conflicts principles in cases involving conflicts between domestic law and that of other nations,\footnote{506} it has occasionally applied a similar analysis to maritime "preemption" cases. In Kossick, for example, Justice Harlan observed that the preemption inquiry ought to be "somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern."\footnote{507} Conflicts analysis thus offers a means of preserving a lawmaking role for federal admiralty courts, in keeping with constitutional tradition, while treating admiralty law consistently with the original assumptions behind the Admiralty Clause.

Choice of law analysis generally begins with a consideration of the potentially applicable laws to determine whether there is an actual conflict between them.\footnote{508} Only if such a conflict exists does a court weigh contacts or

\footnote{505} Lauritzen v. Larsen, 345 U.S. 571, 582 (1953). A federal admiralty court would, under settled law, apply federal common law choice of law principles in making this determination. See American Home Assurance Co. v. L&L Marine Serv., Inc., 153 F.3d 616, 618 (8th Cir. 1998); Chan v. Society Expeditions, Inc., 123 F.3d 1287, 1296 (9th Cir. 1997); Schoenbaum, supra note 182, § 6-13, at 280-82. Use of federal choice of law rules in such cases would appear to be warranted by the fact that a federal court must recognize separation of powers limits on its substantive lawmaking authority—i.e., its authority to decide the case by creating forum law—that do not constrain a state court. Moreover, federal conflicts rules would help to protect the federal preemptive interests—such as foreign affairs—that do exist in maritime cases.

\footnote{506} See, e.g., Lauritzen, 345 U.S. at 582-93 (considering conflict between U.S. and Danish law).


\footnote{508} See Eugene F. Scolès & Peter Hay, Conflict of Laws §2.6, at 17 (2d ed. 1992) (discussing "true" and "false" conflicts); Larry Kramer, Rethinking Choice of Law, 90 COLUM. L. REV. 277, 311 (1990) ("[T]he court's first task in addressing a choice of law problem is to deter-
“balance” interests. It is the antecedent question, however—the existence of an “actual” or “true” conflict—that is likely to be critical.\footnote{509} In many cases, courts will find one jurisdiction to lack any real interest in the dispute, or courts will determine that they can adequately accommodate the interests of both jurisdictions without choosing one jurisdiction’s law over the other. The Court has sometimes explicitly applied such an analysis in admiralty cases,\footnote{510} and the reasoning of other cases is readily analyzed in these terms.\footnote{511}

Actual conflicts analysis may be the best way to understand the Court’s latest maritime preemption case, Yamaha Motor Corp. v. Calhoun.\footnote{512} In Yamaha, the parents of a young girl killed in a jet-ski accident in territorial waters off Puerto Rico sued the jet-ski’s manufacturer under state wrongful death and survival statutes.\footnote{513} Yamaha argued that the common law maritime wrongful death remedy recognized in Moragne v. States Marine Lines, Inc.,\footnote{514} which would probably have afforded more limited damages than the state causes of action, preempted state remedies.\footnote{515} The Court held that the state remedies were not preempted.\footnote{516}

Acknowledging that “[i]ts precedent does not precisely delineate [the] scope” of permissible state regulation of maritime affairs, the Court focused on “the modest question whether it was Moragne’s design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.”\footnote{517} The Court’s approach asked, in essence, whether there was any actual conflict between the policies embodied in the maritime wrongful death action under Moragne and the state survival and wrongful death statutes. To answer this question, the Court carefully parsed the uniformity concerns that led the Court to create a maritime remedy in Moragne. That remedy, the Court found, was designed to achieve uniformity among federal remedies for maritime injuries—not to eliminate diversity among state remedies.\footnote{518}

\footnote{509} See Weinberg, supra note 105, at 1747 n.14 (“Most American courts today . . . will identify true conflicts by construing the law of the forum and other concerned states to see whether the likely policy purposes of the laws at issue would support application on the particular facts.”).

\footnote{510} See East River S.S. Corp. v. Transamerica Delaval Inc., 476 U.S. 858, 864 n.2 (1986) (noting that there was no reason to apply state law rather than maritime law because the potentially relevant State “lacks any ‘pressing and significant’ interest” in the case, and the outcome under state and maritime law would be the same (citing Kossick, 365 U.S. at 739)).

\footnote{511} See, e.g., Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 445-46 (1960) (finding no actual conflict between the federal interest in safety and the local interest in pollution control).

\footnote{512} 516 U.S. 199 (1996).

\footnote{513} See id. at 201-02.

\footnote{514} 398 U.S. 375 (1970).

\footnote{515} See Yamaha, 516 U.S. at 209.

\footnote{516} See id. at 216.

\footnote{517} Id. at 210 n.8.

\footnote{518} See id. at 211-12 (explaining that Moragne sought to eliminate three anomalies in federal maritime law: the availability of a maritime remedy in territorial waters for injuries, but not
“Moragne,” the Court concluded, “centered on the extension of relief, not on the contraction of remedies.”519 Although the Court did not put it this way, the divergence of potential recoveries under state and maritime law in *Yamaha* presented only a false conflict, as *Moragne* embodied no maritime policy of limiting plaintiffs’ recoveries. Under traditional choice of law rules, then, a federal admiralty court would be free to apply state law.

Many other maritime preemption decisions can, without a great deal of alteration, be recast as conflict of laws decisions. In *Ballard Shipping*, for example, the First Circuit could well have said that the Oil Pollution Act of 1990, with its broad nonpreemption clause, indicated a congressional judgment that there was no substantial federal interest in a uniform rule concerning the availability of economic losses in oil spill cases.520 There would thus have been no actual conflict between the state and maritime rules at issue, and state law would apply.521 Similarly, the Court could have said in *Wilburn Boat* that a fire on a houseboat in Lake Texoma implicated no significant maritime interests, or that the McCarran-Ferguson Act represented a congressional denial of any federal interest in uniform rules for insurance cases, so that there was only a false conflict between state and federal law.522

*Kossick* shows how the same analysis might sometimes require choice of a uniform maritime rule over state law. There, the Court considered whether an alleged oral agreement by a ship owner to assume responsibility for any improper medical treatment of a seaman in a public hospital should be governed by New York’s statute of frauds, rather than the maritime rule recognizing oral contracts.523 Because the seaman was injured at sea, the Court noted that New York had only marginal interests at stake in the case; on the other hand, because the contract was such “as may well have been made anywhere in the world” and “should be judged by one law wherever it was made,” the Court found that the case did implicate the maritime interest in uniformity.524 The Court therefore applied the maritime rule and upheld the contract.

It is important to recognize that this is not a preemption analysis. Even when preemption is approached as a choice of law issue, federal law applies

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519 Id. at 213.
520 See *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 630-31 (1st Cir. 1994) (discussing the legislative judgment embodied in the Oil Pollution Act).
521 Cf. Weinberg, *supra* note 105, at 1753-54 (noting that, even in a preemption context, “[c]onflict is a true requirement of a choice of federal law . . . . Without antecedent preemption of an area of law, dual governance is presumed . . . . The state has presumptive parallel power, and there is nothing on which the Supremacy Clause can act. Only if state law becomes incompatible with federal law must a state rule fall, under the Supremacy Clause.”).
522 See *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955) (noting that “the [McCarran-Ferguson] Act contains a broad declaration of congressional policy that the continued regulation of insurance by the States is in the public interest”); id. at 422 (Frankfurter, J., concurring) (“It is reasonable to conclude that the interests concerned with shipping in its national and international aspects are substantially unconcerned with the rules of law to be applied to such limited situations.”).
in all cases of actual conflict, no matter how minimal the federal interest.\footnote{See Weinberg, supra note 105, at 1753, 1757 ("[O]nce 'actual' conflict is ascertained, the Supremacy Clause potentially resolves the conflict in favor of primary governance by the nation"; as a result, "balancing should be unavailable under the Supremacy Clause.").} Justice Harlan’s opinion in \textit{Kossick} denied, however, "the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant."\footnote{Kossick, 365 U.S. at 739.} Rather, \textit{Kossick} applied the maritime rule because maritime interests were more directly implicated than state interests—much as the Court might have applied the law of one state rather than another in a traditional choice of law case. \textit{Kossick} thus demonstrates that courts may resolve conflicts between state and maritime law without invoking traditional notions of federal supremacy.

To be sure, cases presenting "actual conflicts"—that is, cases in which both federal and state policies are directly implicated—will be more difficult to resolve than \textit{Yamaha} or \textit{Kossick}. In such cases, some "second-order principle" is needed to determine which law should apply,\footnote{See Kramer, supra note 508, at 311.} and neither courts nor commentators on the conflict of laws have always agreed as to what that principle should be.\footnote{See Weinberg, supra note 105, at 1747 n.14 ("The eclectic modern approach seems to be to apply 'better' law, which is usually plaintiff-protective, defendant-deterrent, risk-spreading, or validating law. . . . Some authorities would use the law of the place of conduct or injury as a tie-breaker in true conflicts of tort law. . . . Earlier authorities tended to favor the view that the interested forum should apply its own law, as in any event it generally does.") (citations omitted).} Although it may be impossible to avoid "weighing" interests in some cases, presumptive rules or "canons" can help to minimize the number of cases in which outright balancing is necessary and guide the balancing inquiry when it is unavoidable.\footnote{See generally Kramer, supra note 508, at 318-38 (advocating the use of canons in conflicts analysis generally). Cf. Cass R. Sunstein, \textit{After the Rights Revolution: Reconceiving the Regulatory State} 147-59 (1990) (arguing that the use of background assumptions is inevitable in any attempt at legal interpretation, and that the use of explicitly articulated canons enhances transparency and predictability). I would reject the tendency, characteristic of many interest-balancing approaches to the conflict of laws, to indulge a presumption in favor of forum law. See Weinberg, supra note 105, at 1747 n.14 (describing this tendency); Brainerd Currie, \textit{Selected Essays on the Conflict of Laws} 188 (1963) (arguing that the forum state's law should apply in cases of true conflicts). As I have noted above, there are good reasons to prefer that the same law govern maritime cases whether the case is brought in federal or state court. See Lauritzen v. Larsen, 345 U.S. 571, 591 (1953) ("The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum."); supra notes 237-239 and accompanying text. In perhaps the most vigorous defense of forum law, Professor Weinberg argues that forum law will almost always be \textit{substantively} superior because it will favor the plaintiff (who presumably has forum shopped in order to secure favorable law). See Louise Weinberg, \textit{Against Comity}, 80 Geo. L.J. 53, 65-67 (1991). But where the choice is between a state and a federal forum—like the admiralty court—Professor Weinberg's assumption that it will always be the plaintiff who has chosen the forum does not necessarily hold true. See, e.g., Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 624 (1st Cir. 1994) (defendant forced state court plaintiffs to
First, there should be a presumption in favor of state governance. Although the familiar presumption against preemption operates primarily to ensure that Congress—in which the states are represented—retains responsibility for preemption decisions, it also reflects a more basic judgment that state regulatory authority should be disturbed only in exceptional circumstances. This is in keeping with Madison’s insight that the ultimate survival of the federal system turns on the ability of state governments to retain the loyalty of the people by using state regulatory powers to supply their most basic needs and wants. State law should yield, therefore, only to a strong countervailing federal maritime policy.

Second, federal maritime interests should prevail only when they are somehow related to the “special” nature of admiralty. The Robins Dry Dock rule against recovery of damages for pure economic loss, for instance, does not arise out of any special maritime circumstance; rather, it became a rule of admiralty simply because the case presenting the issue happened to be brought under the admiralty jurisdiction. The case for deference is strongest when a maritime rule implicates the original purposes of the Admiralty Clause—for example, the need to speak with a unified federal voice in cases potentially affecting foreign affairs. By contrast, there is no special federal admiralty interest in ensuring uniformity in the general rules of maritime commercial conduct; the value of uniformity is no less significant in cases concerning airborne or electronic commerce, and yet the federal courts have never administered an autonomous regime of common law in those areas. In such cases, state law should govern in the absence of congressional action imposing a uniform rule or a federal interest weighty enough to meet the general standard for creating federal common law.

Replacing Jensen with a conflicts analysis comes close to trading one doctrinal morass for another. The short answer to this concern, of course, is that whether or not a conflicts regime is more administrable than Jensen (it seems unlikely to be less so), such a regime is significantly more consistent with constitutional principle. There is reason to hope, moreover, that weeding out “false conflicts” and establishing certain presumptions will signifi-

§ 185 (1994)). In any event, the idea of comity, which is fostered by canons that may permit deference to foreign law, see Weinberg, supra, at 105, seems more important where, as in admiralty cases inside the three-mile limit, two sovereigns share jurisdiction over a common territory.

530 See, e.g., Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (noting that courts “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress”) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); Wechsler, supra note 246, at 544 (“National action has . . . always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case.”).

531 See supra notes 403-410 and accompanying text.

532 See, e.g., Ballard Shipping Co. v. Beach Shellfish, 32 F.3d 623, 627-28 (1st Cir. 1994) (noting that no special marine aspect of the Robins Dry Dock rule made it a “characteristic feature” of admiralty law).

533 See supra notes 285-301 and accompanying text.

534 See Kramer, supra note 508, at 279 (observing that “there is probably less consensus about the choice of law process than ever before”); see also Michael H. Gottesman, Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes, 80 Geo. L.J. 1, 11-13 (1991)
cantly reduce the number of hard cases; the fact that *Yamaha*, *Kossick*, *Wilburn Boat*, and *Ballard Shipping* can all be described in “false conflict” terms, for example, indicates that this hope may well be realistic. If that is the case, we will have made significant headway toward extricating ourselves from “the Devil’s Own Mess.”

**Conclusion**

It is high time that federal courts scholars rediscovered admiralty law, and vice versa. There can ultimately be no doubt that admiralty is special: Article III’s assumption that there is such a thing as a “general maritime law,” not ultimately attributable to any particular sovereign, creates a profound tension with the post-*Erie* view of the relationship between state and federal law. In attempting to “translate” the maritime law into our post-*Erie* world, however, proponents of a broad view of maritime preemption have lost sight of the Framers’ presuppositions concerning the admiralty courts and the law of the sea. Judges and commentators have assumed that maritime law could be readily assimilated into “the new federal common law”—which ordinarily preempts contrary state law—without asking whether the constitutional basis for a common law of admiralty could be stretched this far.

That mistake—embodied most prominently in the Court’s *Jensen* decision—has had its price. Preemption of state law by judge-made maritime rules, which need not be tied to any enactment of the federal legislature, encroaches on important state interests while bypassing the “political safeguards of federalism” altogether. And because the Court quickly had to acknowledge that such preemption must have its limits, we have been left with a constantly shifting and ultimately unsatisfying grab bag of results that undermines the very uniformity that *Jensen* sought to preserve.

Better to abandon the idea of special rules for maritime preemption altogether. Stripping maritime law of its preemptive effect, while retaining the federal courts’ authority to apply that law in cases of unique federal interest, would be faithful both to the Framers’ assumptions about the relationship between state and “general” law, and to the modern legal regime governing preemption and federal common law generally. The federal interest in maritime commerce, moreover, should be adequately protected as long as Congress remains free to mandate uniformity by statute and the dormant Commerce Clause precludes discriminatory or unduly burdensome state regulation. After all, no other industry has its own system of federal courts and federal common law, despite the increasing globalization of all commercial sectors. In the end, cutting through the morass of present maritime preemption law may yield benefits of certainty that the attempt to impose a uniform maritime law never achieved. The interaction of the ancient law of the sea with America’s much newer experiment in federalism is unlikely ever to be simple, but *Jensen’s* special doctrine of maritime preemption is a complication we can readily do without.

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535 See supra note 4 at 169.