

**THE LAST BROODING OMNIPRESENCE: *ERIE RAILROAD CO. v. TOMPKINS* AND THE UNCONSTITUTIONALITY OF PREEMPTIVE FEDERAL MARITIME LAW**

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Justice Holmes said in 1917 that “[t]he common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . that can be identified.”<sup>1</sup> This understanding is central to the way we think about law today, and it laid the groundwork for Justice Brandeis’ later pronouncement, in *Erie Railroad Co. v. Tompkins*, that “[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law.”<sup>2</sup>

What people outside the admiralty community tend to forget, however, is that Holmes was in dissent. The fight he was losing was *Southern Pacific Co. v. Jensen*, which held that the general common law of admiralty preempted contrary state law, even though no federal statute or constitutional provision spoke to the question at issue.<sup>3</sup> And while Holmes’ condemnation of brooding omnipresences in *Jensen* is no less accepted today as a matter of general jurisprudence than his rejection of economic substantive due process in *Lochner v. New York*,<sup>4</sup> the *Jensen* doctrine remains good law in admiralty.<sup>5</sup>

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

2. 304 U.S. 64, 78 (1938).

3. 224 U.S. at 217-18.

4. 198 U.S. 45 (1905). See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (rejecting economic substantive due process).

5. See *American Dredging Co. v. Miller*, 510 U.S. 443, 447 n.1 (1994) (refusing “to overrule *Jensen* in dictum, and without argument or even invitation”). Of course, with endorsements like this, *Jensen* may not need critics.

The result is that despite *Erie*, there remains a general federal common law of admiralty that exists wholly apart from federal statutes or constitutional provisions. There is still, in David Robertson's phrase, a "brooding omnipresence" over the sea.<sup>6</sup>

The *Jensen* rule reflects the federal courts' effort to fit the "general" common law of admiralty into a post-*Erie* framework that recognizes only two kinds of law: state and federal.<sup>7</sup> By shoehorning maritime law into the "federal" box, *Jensen* created a broad rule of preemption that allows federal courts to preempt state regulatory authority without grounding their decisions in a federal statute or constitutional provision. My argument is that this broad rule of maritime preemption is unconstitutional.

It may help to start with a concrete case that can serve as a basis for discussion. In 1989, a tanker inappropriately named the "World Prodigy" ran aground in Rhode Island's Narragansett Bay, spilling over 300,000 gallons of heating oil into the bay. Although authorities did a fairly good job of promptly cleaning up the spill, the cleanup operation basically shut down the Bay for a period of two weeks. Because much of Rhode Island's economy depends on the Bay, many people were hurt by even the temporary shutdown of access. In *Ballard Shipping Co. v. Beach Shellfish*, a group of shellfish dealers who lost money because of the spill sued the shipping company to recover their losses.<sup>8</sup>

The shellfish dealers based their claims on Rhode Island's Compensation Act,<sup>9</sup> which held shipowners liable for any harms arising from negligence or violations of state pilotage and pollution laws, including purely economic losses.<sup>10</sup> The problem with the plaintiffs' state law claim was that federal maritime law dictated a contrary result. In the 1927 case of *Robins Dry Dock & Repair Co. v. Flint*—ironically also authored by Justice Holmes—the Supreme Court said that the general maritime law did not permit recovery of purely economic losses in cases of maritime tort.<sup>11</sup> The question in *Ballard*

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6. DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 193 (1970).

7. In this sense, Justice Holmes misunderstood the majority's project in *Jensen*: Justice McReynolds' majority opinion in fact *rejected* the idea of law as a "brooding omnipresence" that need not be grounded in either a state or federal source. *Jensen* is to this extent a precursor of *Erie*. But Justice Holmes was also condemning the idea of law that was "general" in the sense of untethered judicial lawmaking. In that sense, Holmes's view *prevailed* in *Erie*—federal courts generally have no lawmaking power apart from federal statutes—and *Jensen* is the anomaly.

8. 32 F.3d 623, 624 (1st Cir. 1994).

9. *Id.* at 624 (citing Rhode Island Environmental Injury Compensation Act, R.I. GEN. LAWS § 46-12-3 (1998)).

10. By purely economic losses, I mean losses to persons who can't show any physical injury to their property. The shellfish dealers, for instance, didn't *own* the Bay or the beaches that were hurt; they simply couldn't purchase shellfish from fishermen in the Bay as a result of the spill.

11. 275 U.S. 303, 309 (1927).

*Shipping* was whether the *Robins Dry Dock* rule preempted the Rhode Island statute.

*Ballard Shipping* poses the central problem of maritime preemption very starkly. The *Robins Dry Dock* rule is purely a rule of general common law – it has no even arguable relationship to any federal statute or constitutional provision. The Rhode Island Compensation Act is a classic state police power statute, protecting what may be Rhode Island’s most vital resource. Preemption of state law ordinarily requires not only a federal statute but also a clear statement of Congress’s intent to preempt state law.<sup>12</sup> Nonetheless, under *Jensen*, the shipping company had a strong argument for preemption of the Rhode Island statute.

### I. THE ADMIRALTY LAW BACKGROUND

Article III, § 2 of the Constitution extends “[t]he judicial Power” “to all Cases of admiralty and maritime jurisdiction.”<sup>13</sup> Note that there’s no *substantive* grant of lawmaking authority either here or in Article I. The federal courts’ common lawmaking powers in admiralty have been implied from the jurisdictional grant, and Congress’s own lawmaking authority has been implied from that of the courts.<sup>14</sup>

The Judiciary Act of 1789 implemented the jurisdictional grant by conferring “exclusive original cognizance of all civil causes of admiralty and

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12. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

13. U.S. CONST. art. III, § 2.

14. See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360-61 (1959). I resist Professor Friedell’s suggestion that the admiralty grant is uniquely “based not on the status of the parties but on the subject matter of the dispute.” Steven F. Friedell, *The Diverse Nature of Admiralty Jurisdiction*, 43 ST. LOUIS U. L.J. 1389, 1391 (1999). See also J. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 251 (1993) (making the same point). After all, Article III defines the general federal question jurisdiction in subject-matter terms, yet the courts have soundly rejected the proposition that this confers a general common lawmaking power on the federal courts. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (noting that federal common lawmaking powers are “few and restricted”). Moreover, the current version of the “subject matter” test for admiralty jurisdiction is administered so loosely as to make admiralty jurisdiction largely a question of locality. See *Sisson v. Ruby*, 497 U.S. 358, 373 (1990) (Scalia, J., concurring in the judgment); Thomas C. Galligan, *The Admiralty Extension Act at Fifty*, 29 J. MAR. L. & COM. 495, 506 (1998) (“When water is present it will be a rare case in which a party asserting maritime jurisdiction will not be able to at least make a colorable argument for jurisdiction based upon its characterization of the relevant incident and activity.”). Admiralty, in other words, is largely a *place*—not a subject. Finally, even if Professor Friedell’s suggestion were correct, the subject-based nature of the jurisdictional grant would be significant for preemption purposes only if the subject were inherently *federal*. The Supreme Court held early on that it was not. See *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545-46 (1828) (Marshall, C.J.).

maritime jurisdiction” on the federal district courts.<sup>15</sup> The exclusivity of this grant was qualified, however, by something called the “Saving Clause,” which “sav[es] to suitors, in all cases, the right of a common law remedy where the common law is competent to give it.”<sup>16</sup> The Saving Clause is generally taken to mean two things. Most maritime claims can be brought in state court; and there is at least some potential role for state law in admiralty cases whether in state court or federal court.<sup>17</sup>

*Jensen* narrowed the role of state law in admiralty by holding that “no [state] legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>18</sup> There has been some dispute about what that formula means precisely, but two points stand out: First, it is frequently interpreted—especially by lower courts—to mean that federal common law governs whenever admiralty *jurisdiction* is present, regardless of contrary state law.<sup>19</sup> And second, however *Jensen* is construed, its preemption rule is different from the rules that govern preemption questions in all other contexts—and considerably broader.

The *Jensen* question goes straight to the nature of federal common law generally. As I’ve said, admiralty law is the last survivor of an earlier way of thinking about law. It is, in other words, another form of “general” common law much like the general commercial law articulated in the Nineteenth Century under *Swift v. Tyson*.<sup>20</sup> For this reason, the legitimacy of *Jensen* must be evaluated within a broader context that includes both the historical learning about general law under *Swift* and modern constitutional doctrine concerning federal common law and preemption.

## II. THE PRIMA FACIE CASE AGAINST *JENSEN*

The “prima facie” case against *Jensen*’s strong rule of maritime preemption begins with *Erie*, which I read as announcing a principle of *judicial* federalism: While the Commerce Clause would probably have covered the law

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15. Ch. 20, 1 Stat. 76-77 (1789). The modern version is codified at 28 U.S.C. § 1333 (1994).

16. Judiciary Act of 1789, ch. 20, § 9(a), 1 Stat. 77 (1789).

17. See, e.g., Brainerd Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 57 (1959) (discussing state court suits); David W. Robertson, *Federalism and Uniformity in Maritime Laws: The Applicability of State Law in Maritime Cases after Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 84 (1996) (suggesting that the saving clause “express[es] what the Court has taken as a quasi-constitutional commitment to achieving the proper mix of state and federal law in the maritime realm”).

18. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 216.

19. See, e.g., *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1031-32 (5th Cir. 1985) (en banc).

20. 41 U.S. (16 Pet.) 1 (1842).

at issue in *Erie*, even in 1938, courts have no power to *go first* in making federal law.<sup>21</sup> In a post-*Garcia* world, the separation of powers principle that only Congress makes federal law protects federalism as well by channeling lawmaking decisions into the institution where the States are represented directly.<sup>22</sup>

Of course, it wasn't long after *Erie* before courts and commentators acknowledged the continued existence of what Judge Friendly called the "new federal common law."<sup>23</sup> Unlike the "general" common law that existed prior to *Erie*, this law was tied either to federal statutes (like the antitrust laws) or to particular federal interests like foreign relations or the proprietary dealings of the federal government itself. Also unlike the "general" common law, this law is "federal" within the meaning of the Supremacy Clause and therefore has preemptive effect.

The new federal common law raises few separation of powers or federalism concerns so long as courts are simply filling in the gaps of a federal statute. The reason is that Congress has made the primary legislative judgment in such cases and the states are politically represented in that process. In admiralty, however, courts generally make law wholly apart from any federal statute, and the separation of powers and federalism problems become more compelling.

In his introduction, Professor Goldstein rightly points out that *Erie* has not generally been applied to admiralty.<sup>24</sup> But it is insufficient simply to cite *Pope & Talbot*<sup>25</sup> and conclude that "the *Erie* limitation did not apply at sea."<sup>26</sup> The

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21. See 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); Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 924 (1986). See also *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 640 (stating the ordinary rule that instances of appropriate federal common lawmaking are "few and restricted").

22. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985) (holding that federalism is protected primarily through the states' representation in Congress, rather than through substantive judicial review of federal legislation); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954) (making a similar argument).

23. Henry J. Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

24. Joel K. Goldstein, *Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange*, 43 ST. LOUIS U. L.J. 1337, 1344 (1999). It might not be unfair, however, to characterize such decisions as *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), as doing exactly that.

25. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). As I have pointed out elsewhere, *Pope & Talbot* did not directly address the basic *Erie* issue – whether *Erie* would not apply as given. See Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 311-12 (1999). In any event, asserting that *Erie* not apply simply because it wasn't an admiralty case is rather like saying *Erie* was decided on a Tuesday, while *Pope & Talbot* came down on a Wednesday. It is the scope of the underlying justification that matters.

question is why this should be so. My argument is that this limitation on Erie rests on two equally shaky pillars: a generalized policy argument for uniformity that has been increasingly rejected as a basis for federal common law in other areas,<sup>27</sup> and a set of historical assumptions about the nature of maritime law in the 18th and 19th centuries that is simply mistaken.<sup>28</sup> The continuing confusion in the area of maritime federalism<sup>29</sup> reflects the inadequacy of these foundations, which have failed to resolve the basic underlying tension between *Jensen* and the structural principles that Erie recognized.

Professor Goldstein also seeks to minimize this tension by harmonizing *Jensen*'s strong rule of maritime preemption with the "process federalism" doctrine of *Garcia*.<sup>30</sup> Goldstein's argument is that *Jensen*'s maritime preemption regime satisfies *Garcia*, since Congress is always free to override federal common law created by admiralty courts.<sup>31</sup> But Goldstein concedes that

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26. Goldstein, *supra* note 24, at 1344. See also Theodore F. Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950) (arguing prior to *Pope & Talbot* that *Erie* should not be applied to admiralty).

27. Professor Stevens, for example, rested his argument against importing *Erie* into admiralty upon this ground. See Stevens, *supra* note 26, at 268-70. But the Court has shown little sympathy for such generalized pleas for uniformity as a basis for federal common law, particularly in recent years. See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 220 (1997) ("To invoke the concept of 'uniformity' . . . is not to prove its need."); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1994) (rejecting "that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity"); *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").

28. See *infra* Part II.A. My argument concerning the 19th century practice under *Swift v. Tyson* is not so much that *Jensen* is "a relic of the rejected *Swift v. Tyson* era," Goldstein *supra* note 24, at 1341, but rather that *Jensen* is unfaithful even to the practice of that time. See *infra* at Part III.B. see also Young, *Preemption at Sea*, *supra* note 25, at 318-28. For that reason, *Jensen* can find no historical warrant in the historical treatment of maritime law during the 19th century.

29. See *infra* Part III.B.

30. See *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528 (1985). While it is always a pleasure to find areas of agreement with my friend Joel Goldstein, his suggestion that I share his "admiration" for *Garcia* may be going a little far. Goldstein, *supra* note 24, at 1344. By suggesting that "process federalism" is a sufficient protection for state autonomy and authority, *Garcia* undermined the foundations of constitutional government. See *Garcia*, 469 U.S. at 566-67 (Powell, J., dissenting); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985). But it is equally true that critics of *Garcia* may have overlooked process federalism's potential to support more secure protections for state authority than currently exist in many areas of the law. See generally Ernest A. Young, *State Sovereign Immunity and the Future of Federalism*, 2000 SUP. CT. REV. \_\_ (forthcoming). The area of maritime preemption is a good example, since the current regime under *Jensen* would be unconstitutional even under *Garcia*.

31. Goldstein, *supra* note 24, at 1345. Some of Professor Goldstein's admiralty colleagues might argue that Congress *cannot*, in fact, override the common law of admiralty – especially if Congress is acting to restore regulatory authority to individual state governments. See, e.g.,

*Jensen* shifts the burden of overcoming legislative inertia from those who would have federal law trump state law – who must shoulder it under traditional preemption principles – to those who would revive superseded state authority.<sup>32</sup> This difference is by no means “trivial and inconsequential”;<sup>33</sup> indeed, it ignores the important sense in which legislative inertia, as well as the difficult institutional barriers that any legislative proposal must overcome before being enacted in federal law under Article I, are the primary “political safeguards of federalism.”<sup>34</sup>

Frequently, admiralty judges are particularly eager to circumvent these safeguards because they view the maritime law as a complete common law system. Most common law systems are supposed to have “no gaps in the law” — questions of first impression are to be answered by inference from the resolution of related issues, policy judgments, and the like.<sup>35</sup> Courts don’t give a *non liquet* judgment – “the law is not clear.”

This is the way state legal systems work. State statutes are largely interstitial additions to the background common law framework. It is emphatically *not* the way federal law works. Congress legislates interstitially against the background of state law, and federal common law is made in the interstices of federal statutes.<sup>36</sup>

This highlights the primary constraint on federal law – the practical limits on Congress’s ability to get things done. These limits ensure that there *are* gaps in federal law, and those gaps leave breathing space for state regulatory

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*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164-65 (1920) (striking down federal statute explicitly permitting application of state workers’ compensation statutes to maritime cases). The conventional wisdom – in the federal courts community, at least – is that *Knickerbocker Ice* was a product of the *Lochner* period and would not be followed today. See, e.g., PAUL M. BATOR ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 893 n.5 (3d ed. 1988). The fact that the *Knickerbocker Ice* view is still taken seriously in admiralty circles, see, e.g., David J. Bederman, *Uniformity, Delegation and the Dormant Admiralty Clause*, 28 J. MAR. L. & COM. 1, 19-33 (1997); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 1-1, at 6 (2d ed. 1994), shows how far these two segments of legal academia have diverged on basic issues of federalism and separation of powers.

32. Goldstein, *supra* note 24, at 1345.

33. *Id.*

34. See Young, *State Sovereign Immunity*, *supra* note 30; Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1261 (1996) (observing that the Art. I process is designed “to make the exercise of [federal] governmental authority . . . more difficult. The Constitution thus reserves substantial lawmaking 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”).

35. See, e.g., CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 67 (1981); Steven D. Smith, *Courts, Creativity, and the Duty to Decide a Case*, 1985 U. ILL. L. REV. 573 (1985).

36. See BATOR, *supra* note 31, at 533.

authority even in a world where state and federal regulatory jurisdiction largely overlap.

But admiralty is very different. The law of the sea is a freestanding common law system, and it has generally been treated as subject to the rule of completeness. When an admiralty case raises a question on which there is no preexisting rule, federal admiralty judges tend to act like Ronald Dworkin's Hercules, creating a new rule by drawing on the more general principles and policies of the maritime law.<sup>37</sup> They don't always do this, of course, but when they don't admiralty scholars tend to take the judges to task for not living up to their responsibilities.<sup>38</sup>

In other words, federal admiralty courts aren't like Congress, which may decide to respect state interests by not legislating at all and which, in any event, is constrained by inertia from regulating very much. Admiralty courts are instead like little lawmaking machines which can't help but create the law necessary to answer any question that is put to them. *Robins Dry Dock* is an example: There was no deliberate decision in that case that a *federal* rule was necessary on the issue of purely economic losses. Rather, the issue simply came up in an admiralty case, and the Court was obliged to provide an answer. But once that rule was out there, it had a potentially preemptive effect on the ability of states to answer the question differently.<sup>39</sup>

The last piece of the puzzle is the rules that ordinarily govern preemption cases. The old rule was one of automatic field preemption—any federal involvement in a field preempted that field. This rule became untenable when the federal government became involved in numerous fields under the New Deal.<sup>40</sup>

The modern rule allows preemption of state law only where Congress specifically intends it to occur.<sup>41</sup> And there is a presumption in interpreting federal statutes that Congress does not intend to preempt unless it clearly says so.<sup>42</sup> By forcing a deliberate decision by Congress before preemption occurs, the presumption ensures that the political safeguards of federalism have a chance to operate. As the Court explained in *Gregory v. Ashcroft*:

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37. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977) (describing Hercules' methodology).

38. See, e.g., Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide* (Part II), 28 J. MAR. L. & COM. 555, 580 (1997) (criticizing the Supreme Court's "recent retreat from its role of expositor of general maritime law").

39. See, e.g., *IMTT-Gretna v. Robert E. Lee S.S.*, 993 F.2d 1193, 1195 (5th Cir. 1993).

40. See generally Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

41. See *id.* at 805. See, e.g., *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986); Gardbaum, *supra* note 40, at 805.

42. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996); *Cipollone*, 505 U.S. at 516; *Santa Fe Elevator*, 331 U.S. at 230.



[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. 'To 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.'<sup>43</sup>

*Jensen* turns this rule on its head. If Congress passes a law, the presumption is that it does *not* preempt state law. But if a federal judge makes up a rule of admiralty, it almost always *does* preempt state law even though Congress has never acted at all.

It should not be surprising that *Jensen* works this way – when it was decided, the rule was that preemption broadly follows from any federal involvement in the field. So because admiralty was clearly a “federal” field for some purposes, it had to be federal for all. But that isn't the way preemption works anymore, and the maritime practice has failed to reflect that.

That's the *prima facie* case against a strong, special rule of maritime preemption. Such a rule violates *Erie*'s principle of judicial federalism by permitting federal courts to displace state law even though they do not purport to be interpreting or filling in the gaps of a federal statute. And *Jensen*'s rule also violates modern preemption rules by permitting preemption without a clear showing that Congress intended such preemption to occur.

### III. THE HISTORY

Admiralty people tend to answer these kinds of criticisms with a historical argument. That argument can take one of two forms: An originalist argument, based on the claim that the Framers intended the admiralty clause to provide a uniform substantive law governing maritime commerce, or a more evolutionary argument, emphasizing the years of precedent and practice that have built up around *Jensen*'s rule.<sup>44</sup> Even taking these arguments on their own methodological terms,<sup>45</sup> neither one is persuasive.

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43. 501 U.S. 452, 464 (1991) (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480 (2d ed. 1988)).

44. I am not, as Professor Force suggests, *see* Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1368-9 (1999), arguing that a correct historical construction of the Admiralty Clause should trump pragmatic considerations. Rather, history and pragmatics are two distinct sorts of arguments usually advanced by *Jensen*'s defenders to justify a departure from generally accepted rules governing preemption and federal common law. In any event, as I explain below, pragmatic considerations actually favor abandoning *Jensen*. *See infra* Part IV.A.

45. Of course, one need not accept the originalist premises of *Jensen*'s defenders. I, for one, do not. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994) (offering a conservative critique of originalism). For example, there are strong arguments for strictly enforcing the limits on preemption and federal common law embodied in current case law as a necessary counterweight

### A. *Originalist History*

My review of the history leads me to accept the proposition that the Framers intended for federal courts to apply a common law of admiralty, sometimes called the “Law of the Sea.” But this doesn’t justify a broad rule of maritime preemption for two reasons:

#### 1. The Purpose of the Admiralty Grant

First, the general purpose of the admiralty grant appears to have been intended to cover three types of specialized cases which can be grouped together as “public law” cases: (1) prize and capture cases; (2) crimes committed on the high seas, such as piracy; and (3) offenses against the federal revenue laws, which at that time relied heavily on maritime commerce.<sup>46</sup> These public law categories are relatively unimportant to the modern admiralty docket, which is dominated by *private* law claims. We have little need for prize jurisdiction, as Preble Stolz pointed out, because “civilization has matured to the point that ships are sunk rather than stolen.”<sup>47</sup> If the sorts of cases that motivated the drafters of the Admiralty Clause are largely gone today, it seems difficult to justify a departure from *Erie* and the normal preemption rules on originalist grounds.

The best answer to this point is that the Framers were pretty clearly aware that the admiralty grant would also cover private maritime claims. We know this from Jonathan Gutoff’s work demonstrating that there were already a good number of these cases in the admiralty courts by 1789.<sup>48</sup> But the reasons for creating *federal* admiralty jurisdiction seem to have had much more to do with the need to treat foreigners fairly and to speak with a unified national voice on issues that might affect foreign relations. These rationales apply primarily to the “public law” sorts of cases. To the extent that fair treatment of foreigners in private law cases was a concern – for instance, in international trade cases, analogous to modern-day COGSA, charter-party, and marine insurance litigation involving parties from different nations – that concern seems

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to the Twentieth Century expansion of federal power, regardless of whether the Framers actually envisioned those particular limitations on the federal government. Cf. Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125. In any event, the originalist evidence actually undermines *Jensen*’s validity.

46. See Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 CAL. L. REV. 661, 669-70 (1963). See generally William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 AM. J. LEGAL HIST. 117 (1993). Professor Casto’s account relies heavily on Attorney General Edmund Randolph’s report to Congress on the newly created federal judicial system. See H.R. REP. NO. 1-17 (1790), reprinted in 1 AM. STATE PAPERS: MISCELLANEOUS 21 (Walter Lowrie & Matthew St. Clair Clarke eds., 1834).

47. Stolz, *supra* note 46, at 669.

48. See also Jonathan M. Gutoff, *Admiralty, Article III, and Supreme Court Review of State-Court Decisionmaking*, 70 TUL. L. REV. 2169, 2178 n.25 (1996).

identical to the concern for out-of-state American litigants that gave rise to the diversity jurisdiction.<sup>49</sup> In other words, the Framers' awareness of private law admiralty claims may justify a federal *forum*, but not a uniform federal *law* governing such claims.

## 2. The Nature of the Law of the Sea

The second—and more important—point is that the *nature* of maritime law in the Founding era provides a compelling originalist argument *against Jensen*.<sup>50</sup> While the Framers assumed that the admiralty courts would apply the Law of the Sea in maritime cases, that law was a branch of the law of nations – much like the law merchant applied in commercial cases under *Swift v. Tyson*.<sup>51</sup>

There is abundant research to show that the law merchant was not viewed as federal in nature – rather, it was a system jointly administered by state and federal courts.<sup>52</sup> Although all courts strove for uniformity, state courts were not bound to follow federal decisions construing the law merchant, and vice versa.<sup>53</sup>

Although the evidence is limited regarding the maritime law, it is clear that the Law of the Sea was also derived from the law of nations.<sup>54</sup> Indeed, in many cases — such as marine insurance — the maritime law dealt with the same sorts of issues. For that reason, adherence to the original understanding would mean treating the general maritime law as neither state nor federal, even though that law was primarily administered by the federal courts. As Chief Justice Marshall put it: “A case in admiralty does not, in fact, arise under the

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49. See *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 n.6 (1995) (reading Hamilton's argument for federal admiralty jurisdiction in THE FEDERALIST NO. 80 as indicating “a concern with local bias similar to the presupposition for diversity jurisdiction”). Uniformity concerns exist, of course, in private international trade cases. But as I later argue, these concerns are no different from those that exist, say, in multinational *non*-marine insurance transactions, or in other multinational transactions arising from an increasingly global economy. Moreover, it is important to realize that the federal diversity courts' role in land-based commercial cases also had a uniformity component in the Nineteenth Century. See, e.g., *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). That role ended with *Erie* in diversity cases, and the history provides no justification for why admiralty should be treated differently. See *infra* Part IV.B.

50. It is important to underscore the fact that this argument is wholly independent of the Casto-Guttoff debate about the sorts of cases upon which the Framers' focused in drafting the Admiralty Clause.

51. 41 U.S. (16 Pet.) 1 (1842).

52. See, e.g., William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

53. See, e.g., *Delmas v. Insurance Co.*, 81 U.S. (14 Wall.) 661, 665-66 (1871) (holding that a commercial issue on appeal from a state supreme court did not raise a federal question); *Waln v. Thompson*, 9 Serg. & Rawle 115, 121-22 (Pa. 1822) (holding that the U.S. Supreme Court's interpretation of general commercial law was only persuasive authority).

54. See, e.g., Clark, *Federal Common Law*, *supra* note 34, at 1280-81.

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.”<sup>55</sup>

The best evidence for this view is the fact that the general maritime law survived the founding era at all. This was a time of great hostility to the very idea of *federal* common law, illustrated by Madison’s Report on the Virginia and Kentucky Resolutions and culminating in the Court’s rejection of a federal common law of crimes in *United States v. Hudson and Goodwin*.<sup>56</sup> Madison’s discussion makes clear that one reason for this hostility was fear that extensive federal common law would broadly preempt state regulatory authority:

[T]he consequence 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.<sup>57</sup>

This hostility was never directed at *Swift*’s law merchant, precisely because that law was not perceived as “federal” or preemptive. I submit that the reason that maritime law survived is the same: it was not perceived as “federal” either.

What happened with *Jensen*, I think, is that changing jurisprudential attitudes created a need to shoehorn admiralty law into either a “state” or “federal” box. For Holmes, it belonged in the state box; meanwhile, the *Jensen* majority, the “federal” box. Either way, this was a new development in 1917, and admiralty law history cannot be used to justify it.

### B. Common Law History

Whatever the original intent of the Admiralty Clause, a more evolutionary or “common law” perspective on history<sup>58</sup> might still try to justify *Jensen*’s strong rule of maritime preemption with a different argument. The claim would be that it is simply too late in the day to uproot the decades of practice and precedent that have grown up in this area since 1917.<sup>59</sup> I’m a good enough

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55. *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828).

56. 11 U.S. (7 Cranch) 32, 34 (1812). For discussion of the hostility to federal common law during this period, see generally *Seminole Tribe v. Florida*, 517 U.S. 44, 137-42 (1996) (Souter, J., dissenting); Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); Stewart Jay, *Origins of Federal Common Law: Part Two*, 133 U. PA. L. REV. 1231 (1985).

57. Report on the Resolutions, House of Delegates, Session of 1799-1800, in 6 WRITINGS OF JAMES MADISON 381 (Gaillard Hunt ed., 1906).

58. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CH. L. REV. 877 (1996); Young *Rediscovering Conservatism*, supra note 45.

59. Professor Friedell raises a related point by suggesting that Congress somehow ratified *Jensen*’s extension of federal judicial authority in passing the Admiralty Extension Act (“AEA”),

Burkean not to quarrel with this argument in principle: If it ain't broke, we should think twice before we try to fix it.

The problem is that maritime preemption is broke. The Supreme Court has decided fifty-three cases on this issue since *Jensen*. Yet each of the most recent cases includes an apology from the Court for the conflicting law it has created in this area.<sup>60</sup> If you go through the post-*Jensen* case law, you can count at least five different analytical frameworks to explain when state law might apply in admiralty. The Court has, at various times, distinguished between maritime "rights" and "remedies;"<sup>61</sup> identified "gaps" in the maritime law that may be filled by state law;<sup>62</sup> cordoned off subjects that are "maritime and local,"<sup>63</sup> resorted to "balancing" and "accommodation;"<sup>64</sup> and drew a line between substance and procedure.<sup>65</sup> But, none of these frameworks explains more than a small fraction of the cases, and even advocates of a strong federal judicial lawmaking role in admiralty concede that the Court has yet to settle on

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46 U.S.C. § 740. Friedell, *supra* note 14, 1389-90. It is an open question whether Congress could delegate *carte blanche* lawmaking power to federal courts; such a delegation would evade the Article I limitations that normally cabin federal lawmaking. See Clark, *supra* note 21, at 1461 (noting the difficulty of negotiating the Article I process functions as a substantial constraint on federal regulatory power). At the very least, the Court has required a clear statement of Congress' intent to delegate so broadly, and the Admiralty Extension Act says nothing at all about substantive lawmaking authority. See, e.g., *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion). Nor does the Act purport to convey *any* powers to federal courts in cases arising within the pre-Extension Act jurisdiction.

It is plausible, moreover, that the Admiralty Extension Act was intended primarily to provide that the *same* law govern actions arising on navigable waters and at the waterside, not that this law necessarily be federal. See, e.g., Galligan, *supra* note 14, at 512 ("It is clear from its legislative history that the primary purpose of the Act was to eliminate the inconsistent and unfair results that could arise from adjudicating the cross claims in allision cases according to different and conflicting legal principles."). Professor Galligan seemingly assumes that inconsistencies would be eliminated by applying federal maritime law across the board, rather than state law, but neither the text of the statute nor the legislative history he quotes says this. In fact, the statute is carefully worded to say simply that Extension Act suits will be brought "according to the principles of law and the rules of practice obtaining" in maritime cases generally, without entering into the *Jensen* debate about whether those principles should be federal in all cases. 46 U.S.C. app. § 740 (1994). While the drafters of the AEA may have had some expectation that the extension of maritime jurisdiction would have certain substantive consequences, that unexpressed intention is hardly sufficient to foreclose general reconsideration of federal common lawmaking authority in admiralty. See Galligan, *supra* note 14, at 514-15.

60. See, e.g., *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 210 n.8 (1996); *American Dredging*, 510 U.S. at 452.

61. *Chelentis v. Luckenbach Steamship Co., Inc.*, 247 U.S. 372, 384 (1918).

62. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 241 (1921).

63. *Id.* at 242.

64. *Kossick v. United Fruit Co.*, 365 U.S. 731, 739-40 (1961).

65. *American Dredging*, 510 U.S. at 452-53.

a workable approach.<sup>66</sup> Most memorably, Professor David Currie's influential treatment of this subject is entitled *The Devil's Own Mess*.<sup>67</sup>

So the accumulation of precedent is hardly a compelling reason to abrogate the general *Erie* and preemption rules—if anything, the record of *Jensen*'s progeny cuts in the opposite direction.

#### IV. UNIFORMITY AND MARITIME COMMERCE

The other argument that admiralty experts generally raise in defense of *Jensen* is the policy argument for federal uniformity in maritime law: Maritime commerce will suffer, they say, if it is subject to fifty different state legal regimes. I think this argument proves little even if true, and it rather dramatically exaggerates the risks involved in bringing vertical choice of law rules in admiralty in line with those governing the other heads of federal jurisdiction.

##### A. *The Significance of Disuniformity*

The short answer is that *Jensen* is unconstitutional, and no policy arguments will change that. Our system of government leaves us little choice, as Gary Lawson has said, but to “hold fast to the Constitution though the heavens may fall.”<sup>68</sup> While pragmatic concerns enter into constitutional law in a number of contexts, the fact that a particular legal regime is more efficient or represents better policy will rarely save an otherwise unconstitutional law.<sup>69</sup> The Constitution frequently chooses other values—such as democracy, decentralization, and checks and balances—over efficiency, and nowhere is this more accurate than in the fields of federalism and separation of powers.

There are, moreover, good reasons to doubt whether the heavens will really fall if *Erie* is applied in admiralty. Uniformity is not any more important in maritime commerce than it is in interstate or international financial transactions, interstate trucking, or air commerce. Yet, we do not have a special, uniform body of law that governs these areas to the exclusion of state

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66. See Robertson, *supra* note 17, at 91-97 (surveying the case law); Michael F. Sturley, *Federal-State Relations: Was Preble Stolz Right?*, 29 J. MAR. L. & COM. 317, 323 (1998) (observing that “[t]his mess is causing real confusion for the lower courts and the bar”).

67. David P. Currie, *Federalism and the Admiralty: “The Devil’s Own Mess,”* 1960 SUP. CT. REV. 158.

68. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1249 (1994).

69. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995) (striking down the Gun-Free School Zones Act over a dissent emphasizing the critical importance of gun-free schools); *INS v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating the legislative veto over a dissent extolling the pragmatic virtues of the procedures).

law.<sup>70</sup> Would each of these areas benefit (pragmatically speaking) from a set of uniform federal rules? Perhaps. But that is not the question. The relative health of many industries involving multi-jurisdictional activity that remain subject to diverse state legal regimes suggests that adding maritime commerce to this category would not prompt the sort of catastrophe that might tempt us to bend the rules of federalism and separation of powers.<sup>71</sup>

Finally, it is critical to recognize that the various exceptions and qualifications that have arisen to permit *some* use of state law under *Jensen* have scotched any hope of predictability in this area, so that we aren't really getting the benefit of uniform federal rules anyway. For example, the confusion caused by applying state law to marine insurance (sometimes) has been an open scandal for decades.<sup>72</sup> It seems likely that freely embracing *Erie* would at least clear up the confusion as to the applicable choice of law rules. In any event, the fact that marine undertakings continue to be insured despite the uncertainties caused by *Wilburn Boat* suggests that maritime commerce is more resilient in the face of diverse legal regimes than *Jensen's* defenders seem willing to concede. But if the defense of *Jensen* ultimately comes down to Professor Friedell's concession that "[t]he law in this area is a mess. But it is our mess, and it serves a purpose,"<sup>73</sup> then the strong uniformity argument for *Jensen* seems fundamentally misplaced.

#### B. Uniformity Without Jensen

Where uniformity *is* essential, there are other means of preserving it. Maritime law is increasingly governed by federal statute<sup>74</sup> – and one suspects that these statutes are passed to cover the issues in which Congress thinks that

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70. See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 222 (1997) (noting that the daily activities of national banks are governed primarily by state law); *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). Interestingly enough, the uniformity of the general commercial law was probably the most powerful argument for adhering to the *Swift* regime in the Nineteenth century. See *Railroad Co. v. National Bank*, 102 U.S. 14, 41-42 (1880) (Clifford, J., concurring); TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* & *ERIE* CASES IN AMERICAN FEDERALISM 82-84 (1981). Yet, commercial law has muddled through despite the revolution worked by *Erie*.

71. Cf. *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 [specific] federal programs").

72. See, e.g., Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395, 398 (1997); Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. MAR. L. & COM. 41, 42-43 (1998).

73. Friedell, *supra* note 14, at 1393.

74. See, e.g., *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990) (discussing maritime tort law).

uniformity is *most* important. Although I question the bootstrapping theory that bases Congress' "admiralty" power on *judicial* jurisdiction, it is clear that these statutes are permitted under the Commerce Clause. Normal preemption rules should apply to these statutes, and in fact that is the way the Court has generally treated them.<sup>75</sup> Although enacting federal legislation is always a difficult process—as the Framers most surely intended—the maritime industry seems precisely the type of focused, cohesive interest group that has traditionally been effective at getting things done on Capitol Hill.<sup>76</sup>

As Professor Force points out, critical areas of maritime law remain dominated by common law rather than federal statutes.<sup>77</sup> In some of these areas, state law may be an adequate substitute—particularly in those areas where the various state laws are already relatively uniform due to adoption of Restatements or uniform laws.<sup>78</sup> It seems likely that abandonment of *Jensen* might encourage similar further efforts in the maritime area; my colleague Michael Sturley, for example, has urged adoption of a Restatement of Marine Insurance Law as a solution to the problems arising from *Wilburn Boat*.<sup>79</sup>

In areas where the dominance of federal maritime law has left state law undeveloped, it is important to remember that a decision overruling *Jensen* would not require that prior admiralty opinions be expunged from the federal reports. Those decisions would remain available to state courts and to federal courts sitting in admiralty as potentially persuasive statements of maritime law, much as federal commercial decisions were available as persuasive authority to state courts deciding commercial issues under *Swift v. Tyson* in the Nineteenth Century.<sup>80</sup> Here, again, the project of compiling a Restatement of maritime principles in particular areas would aid the development of state law governing these issues and help to ensure some degree of uniformity.<sup>81</sup>

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75. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978); *Kelly v. Washington ex rel. Foss Co.*, 302 U.S. 1, 10 (1937). It is, of course, highly ironic that the presumption against preemption *already* applies in the areas where Congress feels uniformity is *most* important, but preemption is *favored* in areas that Congress has chosen to leave alone.

76. See, e.g., Jonathan R. Macy, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230 (1986) (suggesting that small, cohesive interests are most effective at getting favorable legislation passed).

77. See, e.g., Force, *supra* note 44, at 1371-72 (discussing charter parties).

78. See, e.g., GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* §§ 3-1 to 3-5, at 93-100 (2d ed. 1975) (noting the use of the Uniform Commercial Code in governing bills of lading).

79. See Sturley, *supra* note 66, at 42.

80. See Fletcher, *supra* note 52, at 1549. As Judge Fletcher's research demonstrates, the *Swift* model—under which both state and federal courts strove for uniformity despite not being directly bound by the others' decisions—was relatively successful so long as it was confined to a relatively narrow subject area. See *id.* at 1554.

81. I have reservations about Professor Sturley's project as it applies to marine insurance in particular. Because of *Wilburn Boat*, Professor Sturley suggests, the federal admiralty courts



Nor would adoption of *Erie* require federal courts wholly to abandon their own substantive lawmaking jurisdiction. Those courts would continue to make maritime law in cases that fall outside the legislative competence of the States — where the events at issue happen outside the three-mile limit, for example. As long as this body of law exists, it is available to govern cases of particularly strong federal interest under normal conflicts of law principles. In essence, I would treat the maritime law as the law of a coequal state, rather than as preemptive “federal” law.<sup>82</sup> This is largely consistent with the status of “general” law prior to *Erie* and *Jensen*. And it should ensure that in cases where there is some federal interest unique to admiralty — and not just an undifferentiated interest in uniformity — federal courts would retain their power to protect that interest by making rules of common law.<sup>83</sup>

The problem remains of deliberate state departures from uniformity. But here the dormant Commerce Clause is available to police state efforts to interfere with maritime commerce.<sup>84</sup> Maritime commerce is no less “commerce” because it is maritime.<sup>85</sup> And state attempts to discriminate against such commerce or impose excessive burdens on it would be unconstitutional under established Commerce Clause doctrine with or without *Jensen*.<sup>86</sup>

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have *not* developed a uniform law of marine insurance. See Sturley, *supra* note 66, at 54-55. If that is the case, then what would a Restatement re-state? To the extent that admiralty courts have been applying general principles of state insurance law to marine cases, this will limit the American Law Institute’s ability to formulate a set of rules optimized for the marine insurance industry. The persuasive authority of the Restatements, after all, has always depended largely on the assumption that these documents represent a distillation of the decisional law as it already exists. Restatement authors, of course, frequently must choose the “best” among conflicting rules, and the kind of knowledgeable consideration that the ALI could bring to this task would likely be of great benefit to courts. Those courts must recognize, however, that their authority to adopt a Restatement view that differs from state law in the marine insurance field is no greater than, say, in the field of torts or contracts. A Restatement approach thus seems quite limited in its ability to serve as an alternative to the messy and onerous route of legislation. See *id.* at 53 & n.105.

82. For a fuller discussion, see Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273, 353-58.

83. Such interests might dictate, for example, that federal law governs cases implicating foreign relations; however, these cases might be better described as subject to the doctrine of foreign affairs preemption. See, e.g., *Zschernig v. Miller*, 389 U.S. 429, 432 (1968).

84. Likewise, as already noted, some such laws would be preempted by federal control over foreign affairs. See *id.* at 440-41. Given the pervasive international implications of state regulation in a global economy, of course, the foreign affairs preemption doctrine is badly in need of a limiting principle. That problem is beyond the scope of this discussion.

85. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 193 (1824) (holding that “commerce” includes navigation).

86. See, e.g., *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141-42 (1970).

## CONCLUSION

In concluding, I want to emphasize that much of what I have said is not new. No one has demonstrated the present doctrinal disarray in this area more persuasively than David Robertson.<sup>87</sup> And Preble Stolz argued over thirty-five years ago that, at least in some areas, admiralty was ousting state regulatory authority in areas of important state interests.<sup>88</sup> But while the pages of the *Journal of Maritime Law & Commerce* have been filled with various proposals for charting a course between federal and state dominance — Professor Robertson alone has two different entries<sup>89</sup> — I'm proposing that it's time to abandon ship. There is simply no constitutional mandate for treating the basic common law powers of the federal courts differently here than in other areas, or for applying different rules of preemption in admiralty. Nor will the sky fall, as a practical matter, if *Erie* is applied in maritime cases.

I think this is where the Court is headed after *American Dredging* and *Yamaha*. *American Dredging* offered only the most tepid of endorsements in refusing to overrule *Jensen*, while *Yamaha* ignored *Jensen* entirely.<sup>90</sup> And even my colleagues on this panel, who have adopted a more traditional view of the supremacy of federal maritime law, seem unwilling to defend *Jensen* itself.<sup>91</sup> But even if *Jensen* is teetering on the brink of extinction, it could still use a good strong push. And any regime that replaces *Jensen* will succeed only if it is consistent with the general principles of federalism and separation of powers that order vertical choice of law problems generally.

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87. See generally Robertson, *supra* note 17; David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995).

88. See Stolz, *supra* note 46, at 661-65.

89. See Robertson, *Displacement of State Law by Federal Maritime Law*, *supra* note 86, at 357; David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 292-95 (1998).

90. *American Dredging*, 510 U.S. at 447 n.1 (1994); *Yamaha*, 516 U.S. at 215 n.13 (1996) (noting state authority over maritime cases without mentioning *Jensen*).

91. See Force, *supra* note 44, at 1384-87; Friedell, *supra* note 14, at 1390, 1393.