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." 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."  

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.  

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, the Jensen doctrine remains good law in admiralty.  

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2. 304 U.S. 64, 78 (1938).
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.6

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.7 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.8

The shellfish dealers based their claims on Rhode Island’s Compensation Act,9 which held shipowners liable for any harms arising from negligence or violations of state pilotage and pollution laws, including purely economic losses.10 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.11 The question in *Ballard*

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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.
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. 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.” Note that there’s no substantive grant of lawmaker authority either here or in Article I. The federal courts’ common lawmaker powers in admiralty have been implied from the jurisdictional grant, and Congress’s own lawmaker authority has been implied from that of the courts.

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


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 lawmaker power on the federal courts. See Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981) (noting that federal common lawmaker 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. The exclusivity of this grant was qualified, however, by something called the “Saving Clause,” which “saves to suitors, in all cases, the right of a common law remedy where the common law is competent to give it.” 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.

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.” 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. 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. 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


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

at issue in *Erie*, even in 1938, courts have no power to *go first* in making federal law. 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.

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.” 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. But it is insufficient simply to cite *Pope & Talbot* and conclude that “the *Erie* limitation did not apply at sea.” The

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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, and a set of historical assumptions about the nature of
maritime law in the 18th and 19th centuries that is simply mistaken. The
continuing confusion in the area of maritime federalism 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. 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. But Goldstein concedes that

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,
(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.\textsuperscript{32} This difference is by no means “trivial and inconsequential”\textsuperscript{33} 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.”\textsuperscript{34}

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.\textsuperscript{35} 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 legislate interstitially against the background of state law, and federal common law is made in the interstices of federal statutes.\textsuperscript{36}

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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\textsuperscript{32} Goldstein, supra note 24, at 1345.

\textsuperscript{33} Id.

\textsuperscript{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”).


\textsuperscript{36} See BATOR, supra note 31, at 533.

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.

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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.\(^{37}\) 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.\(^{38}\)

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.\(^{39}\)

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.\(^{40}\)

The modern rule allows preemption of state law only where Congress specifically intends it to occur.\(^{41}\) And there is a presumption in interpreting federal statutes that Congress does not intend to preempt unless it clearly says so.\(^{42}\) 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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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.
Inasmuch 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."\footnote{501 U.S. 452, 464 (1991) (quoting Laurence H. Tribe, American Constitutional Law § 6–25, at 480 (2d ed. 1988)).}

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.\footnote{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.} Even taking these arguments on their own methodological terms,\footnote{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} neither one is persuasive.
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. 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." 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. 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


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. 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. 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.

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. Although all courts strove for uniformity, state courts were
not bound to follow federal decisions construing the law merchant, and vice
versa.

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. 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

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
Castro-Gutoff debate about the sorts of cases upon which the Framers’ focused in drafting the
Admiralty Clause.


52. See, e.g., William A. Fletcher, The General Common Law and Section 34 of the

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.55

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.56 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.57

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 history58 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 1917.59 I’m a good enough

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.\textsuperscript{60} 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”;\textsuperscript{61} identified “gaps” in the maritime law that may be filled by state law;\textsuperscript{62} cordon off subjects that are “maritime and local,”\textsuperscript{63} resorted to “balancing” and “accommodation;”\textsuperscript{64} and drew a line between substance and procedure.\textsuperscript{65} 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

\textsuperscript{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. \textsuperscript{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.

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


\textsuperscript{63} Id. at 242.

\textsuperscript{64} Kossick v. United Fruit Co., 365 U.S. 731, 739-40 (1961).

\textsuperscript{65} American Dredging, 510 U.S. at 452-53.
a workable approach. Most memorably, Professor David Currie’s influential treatment of this subject is entitled *The Devil’s Own Mess.*

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.” 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. 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 Stoll Right?, 29 J. MAR. L. & COM. 317, 323 (1998) (observing that “[i]t this mess is causing real confusion for the lower courts and the bar”).


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.

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. 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,” 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 — 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*.


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.\textsuperscript{75} 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.\textsuperscript{76}

As Professor Force points out, critical areas of maritime law remain dominated by common law rather than federal statutes.\textsuperscript{77} 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.\textsuperscript{78} It seems likely that abandonment of \textit{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 \textit{Wilburn Boat}.\textsuperscript{79}

In areas where the dominance of federal maritime law has left state law undeveloped, it is important to remember that a decision overruling \textit{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 \textit{Swift v. Tyson} in the Nineteenth Century.\textsuperscript{80} 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.\textsuperscript{81}

\textsuperscript{75} See, e.g., \textit{Ray v. Atlantic Richfield Co.}, 435 U.S. 151, 157 (1978); \textit{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.


\textsuperscript{77} See, e.g., \textit{Force}, supra note 44, at 1371-72 (discussing charter parties).

\textsuperscript{78} See, e.g., \textit{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).

\textsuperscript{79} See \textit{Sturley, supra note 66, at 42}.

\textsuperscript{80} See \textit{Fletcher, supra note 52, at 1549}. As Judge Fletcher's research demonstrates, the \textit{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.

\textsuperscript{81} I have reservations about Professor Sturley's project as it applies to marine insurance in particular. Because of \textit{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. 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.

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. Maritime commerce is no less "commerce" because it is maritime. 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*.

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.


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).

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. 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. 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 — 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. 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. 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.

88. See Stolz, supra note 46, at 661-65.
91. See Force, supra note 44, at 1384-87; Friedell, supra note 14, at 1390, 1393.