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## *Lochner, Liquor and Longshoremen: A Puzzle in Progressive Era Federalism*

Barry Cushman\*

### I INTRODUCTION

In 1890, the Supreme Court shocked and thrilled the civilized world with the announcement that dry states could not prohibit the sale of liquor shipped in from outside the state. So long as the out-of-state goods remained in their "original packages," the Court held, they retained their character as interstate commerce subject only to federal regulation.<sup>1</sup> The consequences for the cause of local sobriety were, predictably, catastrophic. The proliferation in temperance territory of "original package saloons," at which one could purchase liquor free from the superintendence of local liquor authorities, was appalling to dry eyes.<sup>2</sup> Members of Congress immediately proposed a bill to authorize the states again to regulate such sales. It was enacted only over strenuous objections that such legislation unconstitutionally delegated congressional authority to regulate interstate transactions and thereby authorized unconstitutional disuniformity in the regulation of interstate commerce.<sup>3</sup> While the Court would consistently approve this and other similar congressional legislation, the debate over constitutional constraints on such congressional authorizations would persist over the course of the next half-century.<sup>4</sup> It is only fairly recently that such measures became "unexceptionable."<sup>5</sup>

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<sup>1</sup>Leisy v. Hardin, 135 U.S. 100 (1890).

<sup>2</sup>See R. Hamm, *Shaping the Eighteenth Amendment* (1995).

<sup>3</sup>See *infra*, text at nn.100-11.

<sup>4</sup>See *infra*, text at nn.112-46.

<sup>5</sup>New York v. United States, 505 U.S. 144, 171 (1992).

A parallel debate unfolded in the more recondite domain of admiralty, with strikingly different results. In 1917, in the controversial case of *Southern Pacific Co. v. Jensen*,<sup>6</sup> the Supreme Court held that New York's workmen's compensation statute could not constitutionally apply to a workplace injury sustained over navigable waters. The Court relied upon its dormant Commerce Clause decisions in the liquor context in holding that such an application of the state statute would interfere with the uniformity of maritime law contemplated by Article III's grant of admiralty jurisdiction to the federal courts. Yet when Congress enacted legislation authorizing the application of state workmen's compensation statutes to maritime workplace injuries, the Court invalidated the statute on the ground that it delegated congressional authority to regulate maritime matters and thereby authorized unconstitutional disuniformity in the substantive law of admiralty.<sup>7</sup> The contention that had failed in the Commerce Clause context prevailed in admiralty.

This curious asymmetry in the Court's federalism jurisprudence has never been satisfactorily explored. Admiralty scholars, content for the most part to explain *Jensen* and its progeny as manifestations of judicial hostility to worker-friendly Progressive legislation, have paid scant attention to cognate developments in Commerce Clause jurisprudence. Similarly, historians of constitutional federalism, perhaps viewing admiralty jurisprudence as an occult science, have largely neglected the field. Yet an excursion into interdoctrinal comparative law promises to shed new light on both subjects. This article challenges the traditional interpretation of the *Jensen* line of cases, while at the same time integrating these developments in admiralty law into the larger story of cooperative federalism and legal and social reform in the Progressive Era. In addition to offering a reinterpretation of these leading admiralty decisions, the article aims to identify the salient features of the political and constitutional landscape within which distinctive forms of cooperative federalism emerged in the Progressive Era, and to illuminate the manner in which those features helped to shape the asymmetric constitutional law of federal-state cooperation.

The article proceeds as follows. Part II first outlines the established historiographical treatment of the *Jensen* line of cases, and then shows why that conventional view cannot withstand scrutiny. This critique is designed to create sufficient intellectual space for an alternative interpretation, to the

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<sup>6</sup>244 U.S. 205 (1917).

<sup>7</sup>See *infra*, text at nn. 46-94.

construction of which the balance of the article is devoted. Parts III and IV set out what I take to be the central puzzles posed by *Jensen* and its progeny. Part III sketches the first puzzle: why did the Court hold that the Admiralty Clause of Article III imposed greater disabilities on state regulatory authority than did the dormant Commerce Clause? Part IV lays out the second puzzle: why did the Court hold that Congress was restrained by uniformity and nondelegation norms in attempting to remove disabilities imposed by the Admiralty Clause, but not when removing those created by the dormant Commerce Clause? The remainder of the article explores possible solutions to these puzzles. Part V reviews contemporary explanations of *Jensen* and finds them ultimately unsatisfactory. Parts VI and VII offer my own solution. In Part VI, I argue that in order to understand the impulses animating these admiralty decisions one must first situate them in the broader context of the movement for uniform laws in which leaders of the bar, and at least some of the Justices, were heavily invested. In the concluding Part VII, I venture some speculations on how the anomalies might better be accounted for by linking the uniformity impulse to the distinctive context of temperance reform, tort reform, and cooperative federalism in which the cases were decided.

## II

### *JENSEN AND THE LOCHNER ANALOGY*

In his recent concurrence in *American Dredging Co. v. Miller*, Justice Stevens opined that “*Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner v. New York* . . . would be in a case under the Due Process Clause.”<sup>8</sup> This analogy to *Lochner* is open to at least two interpretations, and both are represented in the *Jensen* historiography. The first, rooted in the separation of powers concerns undergirding our preoccupation with the countermajoritarian difficulty, suggests that the decision constituted an unwarranted judicial usurpation of state legislative authority.<sup>9</sup> The second is grounded in the potent mixture of Legal Realism and Progressive historiography that has served as the dominant paradigm in constitutional history for much of this century.<sup>10</sup> This interpretation insinuates that in both *Lochner* and *Jensen* the Court was pouring its own substantive values into the constitutional text, and that those values were those of conservative, laissez-

<sup>8</sup>510 U.S. 443, 458 (1995) (Stevens, J., concurring).

<sup>9</sup>See, e.g., *id.* at 459 (Stevens, J., concurring).

<sup>10</sup>See, e.g., F. Rodell, *Nine Men* (1955); B. Wright, *The Growth of American Constitutional Law* (1942); R. McCloskey, *The American Supreme Court* (1960); A. Mason, *The Supreme Court from Taft to Warren* (1958).

faire, Social Darwinist, anti-labor reactionaries bent on enacting Mr. Herbert Spencer's Social Statics. The case for this interpretation of *Jensen* is advanced in no small measure by the fact that its author was James Clark McReynolds, an apostle of Lochnerism and quite possibly the least attractive person ever to sit on the Supreme Court of the United States.<sup>11</sup>

This second interpretation of *Jensen* can be found in admiralty treatises and journal articles written from *Jensen*'s immediate aftermath to the present day. Listen to Merrick Dodd, writing in the pages of the Columbia Law Review in 1921: "As a matter of fact, the division of the court, with Justices Holmes, Brandeis and Clarke, together with one other Justice deciding in favor of the employee and the remainder of the court under the leadership of the conservative Mr. Justice McReynolds upholding the contentions of the employer, is so familiar as to suggest that, whether consciously or not, it was not primarily the question of uniformity which determined the court's decision . . . . A comparison of [*Jensen*] with recent decisions such as *Hammer v. Dagenhart* invalidating the federal child labor law, *Evans v. Gore* impliedly denying the power of Congress under the Sixteenth Amendment to tax state bonds, and *Gilbert v. Minnesota*, upholding state interference with freedom of speech in matters of national concern, may give ground for certain ironical reflections as to the purposes for which the doctrine of federal supremacy is invoked."<sup>12</sup> In his 1970 treatise, David Robertson reported that *Jensen* had "been explained in any number of ways, among the least reassuring of which has been the intimation that a lack of sympathy for maritime plaintiffs was involved."<sup>13</sup> And just recently, another distinguished admiralty scholar has written: "It is necessary to apply a broader context than admiralty jurisdiction to understand the majority opinion, written by Justice McReynolds, one of the most conservative justices to sit on the Supreme Court, who would later be thought of as one of the four horsemen (of the apocalypse) because of his total opposition to any governmental regulation of business activity. Thus, McReynolds would adopt any rationale to extirpate confiscatory legislation that deprived the employer of its three common law defenses to employee injuries: contributory negligence, assumption of the risk, and fellow servant negligence."<sup>14</sup>

Both the analogy to *Lochner* and the persistence of the Progressive interpretation of *Jensen* are something of a curiosity. For starters, admiralty was one area in which the doctrine of "liberty of contract" never acquired a

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<sup>11</sup>See J. Bond, *I Dissent: The Legacy of Chief [sic] Justice James Clark McReynolds* (1992).

<sup>12</sup>Dodd, *The New Doctrine of the Supremacy of Admiralty Over the Common Law*, 21 Colum. L. Rev. 647, 660, 665 (1921).

<sup>13</sup>D. Robertson, *Admiralty and Federalism* 193 (1970).

<sup>14</sup>Sweeney, *The Admiralty Law of Arthur Browne*, 26 J. Mar. L. & Com. 59, 120-21 (1995).

foothold.<sup>15</sup> Yet there is a deeper level at which both the analogy and the interpretive perspective upon which it rests have become problematic. Over the past generation, a wave of revisionist scholarship on the history of substantive due process has displaced the Progressive interpretation as the dominant understanding. On further investigation, it appeared that there were simply too many decisions that could not be reconciled with the conventional story line.<sup>16</sup> Liberty of contract and substantive due process are now seen by most scholars of the period as the constitutional manifestations of an array of antebellum ideological commitments: northern free labor ideology, the Madisonian aspiration to a faction-free politics, and the Jacksonian revulsion against special legislation.<sup>17</sup> Yet one detects no similar erosion of the Progressive interpretation of *Jensen*. Indeed, much of contemporary admiralty scholarship proceeds as if no such transformation in our understanding of substantive due process had occurred. Yet this interpretation of *Jensen* can

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<sup>15</sup>See *Robertson v. Baldwin*, 165 U.S. 275 (1897) (upholding statute requiring seamen to carry out the contracts contained in their shipping articles); *Patterson v. Bark Eudora*, 190 U.S. 169 (1903) (upholding statute prohibiting advance payment of seamen's wages); *Thompson v. Lucas*, 252 U.S. 358 (1920) (Van Devanter and McReynolds join opinion upholding provisions of Seamen's Act providing for payment of one-half wages on demand by seaman at port); *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920) (Van Devanter and McReynolds join opinion upholding provisions of Seamen's Act providing for payment of one-half wages on demand by seaman at port).

<sup>16</sup>See, e.g., Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Sup. Ct. Hist. Soc. Y.B. 53, 70 ("[H]ostility to protective legislation was just not the norm in the Progressive era"); Phillips, *How Many Times Was Lochner-Era Substantive Due Process Effective?*, 48 Mercer L. Rev. 1049 (1997); Cushman, *Lost Fidelities*, 41 Wm. & Mary L. Rev. 95, 100-05 (1999); Cushman, *The Secret Lives of the Four Horsemen*, 83 Va. L. Rev. 559, 561-71, 586-638 nn. 22-121 (1997) (cataloging the many working hours regulations, wage and payment regulations, occupational licensing statutes, state child labor laws, utility regulations, and federal, state and local taxation and police power statutes upheld by the Court during the "*Lochner* era"). For contemporary recognition of these deficiencies in the progressive interpretation, see, e.g., Powell, *The Judiciality of Minimum Wage Legislation*, 37 Harv. L. Rev. 545, 555 (1924) ("the catalogue shows that the Court has sustained many more regulatory statutes than it has annulled"); Warren, *The Progressiveness of the United States Supreme Court*, 13 Colum. L. Rev. 294, 294-95 (of the 560 cases rising under the Fourteenth Amendment between 1887 and 1911, only three invalidated social and economic regulation); Brown, *Due Process of Law, Police Power, and the Supreme Court*, 40 Harv. L. Rev. 943, 944-45 (1927) (Court invalidated six of 98 police regulations challenged on due process grounds between 1868 and 1912, seven of 97 between 1913 and 1920, and fifteen of 53 between 1921 and 1927).

<sup>17</sup>See, e.g., McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of 'Laissez-faire' Constitutionalism, 1863-1897*, 61 J. Am. Hist. 970 (1975); H. Gillman, *The Constitution Besieged* (1993); M. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (1992), 19-31; Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 Law & Hist. Rev. 293, 298, 304-31 (1985); O. Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993), 156, 160; Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 Va. L. Rev. 187, 189-92 (1984); Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888-1921*, 5 Law & Hist. Rev. 249, 278 (1987); Sunstein, *Lochner's Legacy*, 873 Colum. L. Rev. 873, 878-89 (1987).

no more withstand scrutiny than has the Progressive interpretation of *Lochner* itself.

If the claim is made at the institutional level—that the Court itself (or at least a majority of the Justices) was motivated by animus or callousness toward workers—several cases handed down the same term as *Jensen* immediately pose explanatory difficulties. In *Bunting v. Oregon*,<sup>18</sup> by a vote of 5-3 with Justice Brandeis not participating, the Court upheld a maximum hour law for workers in mills, factories and manufacturing establishments. In *Wilson v. New*,<sup>19</sup> a closely divided Court upheld a national maximum hour and minimum wage law for railway workers. In *Stettler v. O'Hara*,<sup>20</sup> an equally divided Court with Justice Brandeis not participating affirmed a lower court decision upholding Oregon's minimum wage law for women. And in *Mountain Timber Co. v. Washington*,<sup>21</sup> the Court upheld that state's workmen's compensation statute.

"Fair enough," the Progressive historian might reply. "My claim can't be sustained at the institutional level. But note that McReynolds and Van Devanter, the two Four Horsemen who sat on the *Jensen* Court, dissented in each of the pro-worker cases you just mentioned. None of those cases impeaches my claim with respect to them."

That's true. But there is no shortage of cases in which McReynolds and Van Devanter voted in ways that *do* impeach the Progressive interpretation. Van Devanter wrote the opinions upholding the Federal Employers' Liability Act<sup>22</sup> and the Federal Safety Appliance Act,<sup>23</sup> and he, McReynolds,

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<sup>18</sup>243 U.S. 426 (1917).

<sup>19</sup>243 U.S. 332 (1917).

<sup>20</sup>243 U.S. 629 (1917).

<sup>21</sup>243 U.S. 219 (1917).

<sup>22</sup>Second Employers' Liability Cases, 223 U.S. 1 (1912). Commonly known as the Federal Employers's Liability Act, the Act of April 22, 1908, 35 Stat. 65 is codified (as amended) at 45 U.S.C. §§ 51-60.

<sup>23</sup>*Southern Ry. v. United States*, 222 U.S. 20 (1911). The railway challenged the Safety Appliance Acts, i.e., the Act of Mar. 2, 1893, 29 Stat. 85, as amended by the Act of Mar. 2, 1903, 32 Stat. 943. As subsequently amended, those Acts are codified at 45 U.S.C. §§ 1-12. See also *United States v. California*, 297 U.S. 175 (1936) (all Four Horsemen join opinion holding that state-owned railroads were subject to the Act); *New York Cent. R.R. v. United States*, 265 U.S. 41 (1924) (Van Devanter, McReynolds, and Sutherland join Butler's opinion reading expansively the duty imposed by the Act on railroads to have their cars equipped with power brakes for the safety of their employees); *United States v. Northern Pac. Ry.*, 254 U.S. 251 (1920) (Van Devanter and McReynolds join opinion rejecting the claim that the Act does not apply to "transfer trains" operating within rail yard and not on main track); *Spokane & I. Emp. R.R. v. United States*, 241 U.S. 344 (1916) (Van Devanter joins opinion holding that street railway cars employed in interstate traffic were subject to the Act) (McReynolds takes no part).

Sutherland and Butler voted in favor of workers in dozens of cases brought under those two acts<sup>24</sup>—often straining to find that the injured plaintiff was

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<sup>24</sup>See, e.g., *Brady v. Terminal R.R. Ass'n.*, 303 U.S. 10 (1938) (McReynolds and Butler join opinion upholding award under FSAA); *Swinson v. Chicago, St. P., M. & O. Ry.*, 294 U.S. 529 (1935) (all Four Horsemen join opinion reversing directed verdict for defendant under FSAA); *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205 (1934) (upholding federal court's jurisdiction of employee's injury claims under the FSAA in connection with FELA by reversing a lower court determination adverse to employee, with all Four Horsemen joining opinion); *Rocco v. Lehigh Valley R.R.*, 288 U.S. 275 (1933) (Van Devanter and Sutherland join opinion upholding award under FELA) (McReynolds and Butler dissent); *Jamison v. Encarnacion*, 281 U.S. 635 (1930) (Van Devanter, McReynolds, and Sutherland join Butler's opinion affirming award under FELA for injuries sustained by stevedore assaulted by his foreman); *Chicago, R.I. & Pac. Ry. v. Ward*, 252 U.S. 18 (1920) (Van Devanter and McReynolds join opinion affirming award under FELA); *Louisville & Nash. R.R. v. Holloway*, 246 U.S. 525 (1918) (Van Devanter and McReynolds join opinion affirming award under FELA); *Union Pac. R.R. v. Hadley*, 246 U.S. 330 (1918) (Van Devanter and McReynolds join opinion affirming judgment for employee under FELA); *Great N. Ry. v. Donaldson*, 246 U.S. 121 (1918) (Van Devanter and McReynolds join opinion affirming award under FELA); *Union Pac. R.R. v. Huxoll*, 245 U.S. 535 (1918) (Van Devanter and McReynolds join opinion affirming award under FELA and FSAA); *Washington Ry. & Elec. Co. v. Scala*, 244 U.S. 630 (1917) (Van Devanter and McReynolds join opinion affirming award under FELA); *New York Cent. & H.R. R.R. v. Tonsellito*, 244 U.S. 360 (1917) (Van Devanter joins McReynolds' opinion affirming award under FELA); *Minneapolis & St. L.R.R. v. Gotschall*, 244 U.S. 66 (1917) (Van Devanter and McReynolds join opinion affirming award under FELA); *St. Joseph & G.I. Ry. v. Moore*, 243 U.S. 311 (1917) (Van Devanter and McReynolds join opinion affirming award under FELA and FSAA); *Illinois Cent. R.R. v. Williams*, 242 U.S. 462 (1917) (Van Devanter and McReynolds join opinion affirming award under FSAA); *Baltimore & O.R.R. v. Wilson*, 242 U.S. 295 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Baltimore & O.R.R. v. Whitacre*, 242 U.S. 169 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Spokane & I. Emp. R.R. v. Campbell*, 241 U.S. 497 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA and FSAA); *San Antonio & Ark. Pass Ry. v. Wagner*, 241 U.S. 476 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA and FSAA); *Chicago & N.W. Ry. v. Bower*, 241 U.S. 470 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Chesapeake & O. Ry. v. Proffitt*, 241 U.S. 462 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Seaboard Air Line Ry. v. Renn*, 241 U.S. 290 (1916) (McReynolds joins Van Devanter's opinion affirming award under FELA); *Louisville & Nash. R.R. v. Stewart*, 241 U.S. 261 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Chesapeake & O. Ry. v. Carnahan*, 241 U.S. 241 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *St. Louis & S.F.R.R. v. Brown*, 241 U.S. 223 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Minneapolis & St. L.R.R. v. Bombolis*, 241 U.S. 211 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916) (Van Devanter and McReynolds join opinion affirming award under FSAA); *Seaboard Air Line Ry. v. Kenney*, 240 U.S. 489 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Great N. Ry. v. Knapp*, 240 U.S. 464 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA); *Illinois Cent. R.R. v. Skaggs*, 240 U.S. 66 (1916) (Van Devanter and McReynolds join opinion affirming award under FELA notwithstanding error in contributory negligence instruction); *Chicago, R.I. & Pac. Ry. v. Wright*, 239 U.S. 548 (1916) (McReynolds joins Van Devanter's opinion affirming award under FELA); *Chicago & A.R.R. v. Wagner*, 239 U.S. 452 (1915) (Van Devanter and McReynolds join opinion affirming award under FELA and invalidating company's attempt to contract out of liability under the Act); *Seaboard Air Line Ry. v. Koennecke*, 239 U.S. 352 (1915) (Van Devanter and McReynolds join opinion affirming award under FELA); *Great N. Ry. v. Otos*, 239 U.S. 349 (1915) (Van Devanter and McReynolds join opinion affirming award under FELA and FSAA); *Norfolk S.R.R. v. Ferebee*, 238 U.S. 269 (1915) (Van Devanter and McReynolds join opinion affirming



engaged in interstate commerce.<sup>25</sup> In 1917 both McReynolds and Van Devanter joined opinions upholding the New York<sup>26</sup> and Iowa workers' com-

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award under FELA); *New York Cent. & H.R.R.R. v. Carr*, 238 U.S. 260 (1915) (Van Devanter and McReynolds join opinion affirming award under FELA); *Yazoo & Miss. Valley R.R. v. Wright*, 235 U.S. 376 (1914) (Van Devanter and McReynolds join opinion affirming award under FELA); *Southern Ry. v. Crockett*, 234 U.S. 725 (1914) (Van Devanter joins opinion affirming award under FELA and FSAA); *Grand Trunk W. Ry. v. Lindsay*, 233 U.S. 42 (1914) (Van Devanter joins opinion affirming award under FELA); *Chicago, R.I. & Pac. Ry. v. Brown*, 229 U.S. 317 (1913) (Van Devanter joins opinion affirming award under FELA and FSAA); *Norfolk & W. Ry. v. Earnest*, 229 U.S. 114 (1913) (Van Devanter writes opinion affirming award under FELA); *Philadelphia, B. & W.R.R. v. Schubert*, 224 U.S. 603 (1912) (Van Devanter joins opinion affirming award under FELA and invalidating company's attempt to contract out of liability under the Act); *Chicago Junction Ry. v. King*, 222 U.S. 222 (1911) (Van Devanter joins opinion affirming award under FSAA); *Chicago, B. & Q. Ry. v. United States*, 220 U.S. 559 (1911) (Van Devanter joins opinion upholding award under FSAA).

<sup>25</sup>See, e.g., *Baltimore & O.S.W. R.R. v. Burtch*, 263 U.S. 540 (1924) (Van Devanter, McReynolds, and Butler join Sutherland's opinion holding that bystander enlisted by conductor to unload heavy freight at station was employed in interstate commerce); *Erie R.R. v. Szary*, 253 U.S. 86 (1920) (McReynolds joins opinion holding that an employee whose duty it was to dry sand in stoves in a small structure near the tracks and to supply it to locomotives used in both inter-and intrastate commerce, injured while returning from getting a drink of water when returning from an ash-pit whither he had gone to dump ashes taken by him from one of the stoves after sanding locomotives bound for other states, was employed in interstate commerce) (Van Devanter dissents); *Erie R.R. v. Collins*, 253 U.S. 77 (1920) (McReynolds joins opinion holding that employee injured while running a gasoline engine to pump water into a tank for use by locomotives was employed in interstate commerce) (Van Devanter dissents); *Kinzell v. Chicago, M. & S.P. Ry.*, 250 U.S. 130 (1919) (Van Devanter and McReynolds join opinion holding that employee injured while removing dirt and stones from track was employed in interstate commerce); *Southern Ry. v. Puckett*, 244 U.S. 571 (1917) (Van Devanter and McReynolds join opinion holding that employee who tripped in a train yard while on his way to assist in the rescue of a fellow employee trapped under a wrecked car was employed in interstate commerce); *Minneapolis & St. L.R.R. v. Winters*, 242 U.S. 353 (1917) (Van Devanter and McReynolds join opinion upholding judgment for injured employee notwithstanding fact that employee was not engaged in interstate commerce at time of injury, because defendant did not object to the application of FELA at trial); *Pedersen v. Delaware, L. & W.R.R.*, 229 U.S. 146 (1913) (Van Devanter writes opinion holding that an employee injured while carrying bolts to be used to repair a railroad bridge used by interstate trains was employed in interstate commerce); *Philadelphia, Baltimore & Washington R.R. v. Smith*, 250 U.S. 101 (1919) (Van Devanter and McReynolds join opinion upholding FELA award for cook injured while preparing food for a crew of railroad bridge carpenters).

<sup>26</sup>*New York Cent. R.R. v. White*, 243 U.S. 188 (1917) (Van Devanter and McReynolds join opinion upholding New York's statute). See also *Staten Island Rapid Transit Ry. v. Phoenix Indem. Co.*, 281 U.S. 98 (1930) (all Four Horsemen join opinion upholding provisions of New York's statute); *R.E. Sheehan Co. v. Shuler*, 265 U.S. 371 (1924) (all Four Horsemen join opinion upholding provisions of New York's statute); *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922) (Van Devanter joins opinion upholding provisions of New York's statute) (McReynolds dissents); *New York Cent. R.R. v. Bianc*, 250 U.S. 596 (1919) (Van Devanter joins opinion upholding provision of New York's statute) (McReynolds dissents).

pensation statutes;<sup>27</sup> they and their fellow horsemen would subsequently vote to uphold other states' statutes<sup>28</sup> and side with injured workers in contested workers' compensation cases.<sup>29</sup> McReynolds and company rendered many pro-plaintiff decisions in tort litigation involving injured employees,<sup>30</sup> and routinely upheld statutes abrogating the unholy trinity of common law defenses: contributory negligence, assumption of risk, and the fellow servant

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<sup>27</sup>Hawkins v. Bleakly, 243 U.S. 210 (1917) (Van Devanter and McReynolds join opinion upholding Iowa's statute).

<sup>28</sup>See, e.g., Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532 (1935) (all Four Horsemen join opinion upholding provisions of California's statute); Booth Fisheries Co. v. Industrial Comm'n, 271 U.S. 208 (1926) (all Four Horsemen join opinion upholding provisions of Wisconsin's statute); Cudahy Packing Co. v. Parramore, 263 U.S. 418 (1923) (Van Devanter joins Sutherland's opinion upholding provisions of Utah's statute) (Butler and McReynolds dissent); Madera Sugar Pine Co. v. Industrial Accident Comm'n, 262 U.S. 499 (1923) (all Four Horsemen join opinion upholding provisions of California's statute); Lower Vein Coal Co. v. Industrial Bd., 255 U.S. 144 (1921) (Van Devanter and McReynolds join opinion upholding provisions of Indiana's statute).

<sup>29</sup>See, e.g., Ohio v. Chattanooga Boiler & Tank Co., 289 U.S. 439 (1933) (all Four Horsemen join opinion upholding award); Boston & Me. R.R. v. Armbrugg, 285 U.S. 234 (1932) (all Four Horsemen join opinion upholding award); Bountiful Brick Co. v. Giles, 276 U.S. 154 (1928) (Van Devanter, McReynolds, and Butler join Sutherland's opinion upholding award); see also United States v. Anner, 287 U.S. 470 (1933) (Van Devanter, Sutherland, and Butler join McReynolds' opinion upholding award under World War Veterans' Act).

<sup>30</sup>See, e.g., Vandenberg v. Owens-Ill. Glass Co., 311 U.S. 538, 543 (1941) (McReynolds concurs in result of opinion reversing dismissal of employee's action); Fillippon v. Albion Vein Slate Co., 250 U.S. 76 (1919) (Van Devanter and McReynolds join opinion reversing judgment for employer on grounds that jury instruction was erroneous); Erie R.R. v. Purucker, 244 U.S. 320 (1917) (Van Devanter and McReynolds join opinion affirming judgment for employee); Ohio River Contract Co. v. Gordon, 244 U.S. 68 (1917) (Van Devanter and McReynolds join opinion affirming judgment for employee); Louisville & Nash. R.R. v. Layton, 243 U.S. 617 (1917) (Van Devanter and McReynolds join opinion affirming judgment for employee); Erie R.R. v. Welsh, 242 U.S. 303 (1916) (Van Devanter and McReynolds join opinion affirming judgment for employee); Louisville & Nash. R.R. v. Parker, 242 U.S. 13 (1916) (Van Devanter and McReynolds join opinion affirming judgment for employee); Brown v. Pacific Coast Coal Co., 241 U.S. 571 (1916) (Van Devanter and McReynolds join opinion affirming judgment for employee); Chicago, B. & Q.R.R. v. Harrington, 241 U.S. 177 (1916) (Van Devanter and McReynolds join opinion affirming judgment for employee); Osborne v. Gray, 241 U.S. 16 (1916) (Van Devanter and McReynolds join opinion affirming judgment for employee); Myers v. Pittsburgh Coal Co., 233 U.S. 184 (1914) (Van Devanter joins opinion affirming judgment for employee); Gila Valley, G. & N. Ry. v. Hall, 232 U.S. 94 (1914) (Van Devanter joins opinion affirming judgment for employee); Texas & Pac. Ry. v. Harvey, 228 U.S. 319 (1913) (Van Devanter joins opinion affirming judgment for employee); George A. Fuller Co. v. McCloskey, 228 U.S. 194 (1913) (Van Devanter joins opinion affirming judgment for employee). One finds similar evidence in tort cases outside the employment context. See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (McReynolds joins opinion overturning contempt conviction of plaintiff for refusing to submit to a physical examination); Fairport, P. & E.R.R. v. Meredith, 292 U.S. 589 (1934) (Van Devanter, McReynolds, and Butler join Sutherland's opinion affirming judgment for plaintiff notwithstanding her contributory negligence); Pokora v. Wabash Ry., 292 U.S. 98 (1934) (all Four Horsemen join opinion reversing a judgment directing a verdict for the defendant); Best v. District of Columbia, 291 U.S. 411 (1934) (all Four Horsemen join opinion reversing judgment directing a verdict for the defendant); Miller v. Union Pac. R.R., 290 U.S. 227 (1933) (Van Devanter, McReynolds, and Butler join Sutherland's opinion reversing judgment dismissing plaintiff's petition); Atlantic Coast L.R.R. v. Ford, 287 U.S. 502 (1933) (Van Devanter, McReynolds, and Butler join Sutherland's

rule.<sup>31</sup> And it bears emphasis that many of these decisions vindicated the rights of maritime plaintiffs.<sup>32</sup>

Nor can the Progressive interpretation adequately account for the post-*Jensen* decisions invalidating congressional attempts to amend the "saving

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opinion affirming judgment for plaintiff and upholding statute creating rebuttable presumption of railroad's negligence); *Seaboard Air Line Ry. v. Watson*, 287 U.S. 86 (1932) (Van Devanter, McReynolds, and Sutherland join Butler's opinion dismissing defendant's appeal notwithstanding trial court's erroneous refusal to instruct the jury on the issue of contributory negligence, and upholding statute creating rebuttable presumption of railroad's negligence); *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927) (all Four Horsemen join opinion affirming judgment for plaintiff and upholding statute allowing punitive damage awards in respondent superior wrongful death cases); *Union Pac. R.R. v. Burke*, 255 U.S. 317 (1921) (Van Devanter and McReynolds join opinion affirming judgment for plaintiff and ruling that railroad carriers cannot limit their common law liability by contracting for exemption from the consequences of their own negligence); *Panama R.R. v. Toppin*, 252 U.S. 308 (1920) (Van Devanter and McReynolds join opinion affirming judgment for plaintiff); *New York Cent. R.R. v. Mohney*, 252 U.S. 152 (1920) (McReynolds joins, Van Devanter concurs in opinion affirming judgment for plaintiff); *Chicago, R.I. & Pac. Ry. v. Cole*, 251 U.S. 54 (1919) (Van Devanter and McReynolds join opinion affirming judgment for plaintiff); *Norfolk S.R.R. v. Chatman*, 244 U.S. 276 (1917) (Van Devanter and McReynolds join opinion affirming judgment for plaintiff and voiding stipulation in drover's pass exempting carrier from liability for personal injuries caused by its own negligence); *Chicago & A.R.R. v. McWhin*, 243 U.S. 422 (1917) (McReynolds joins Van Devanter's opinion affirming judgment for plaintiff); *McAllister v. Chesapeake & O. Ry.*, 243 U.S. 302 (1917) (Van Devanter and McReynolds join opinion reversing dismissal of plaintiff's action); *Memphis St. Ry. v. Moore*, 243 U.S. 299 (1917) (Van Devanter and McReynolds join opinion affirming judgment for plaintiff); *Munsey v. Webb*, 231 U.S. 150 (1913) (Van Devanter joins opinion affirming judgment for plaintiff); *Texas & Pac. Ry. v. Stewart*, 228 U.S. 357 (1913) (Van Devanter joins opinion affirming judgment for plaintiff); *Southern Pac. Co. v. Schuyler*, 227 U.S. 601 (1913) (Van Devanter joins opinion affirming judgment for plaintiff); *Doullut & Williams Co. v. United States*, 268 U.S. 33 (1925) (Van Devanter, Sutherland, and Butler join McReynolds' opinion reversing judgment dismissing libels for want of admiralty jurisdiction).

<sup>31</sup>See, e.g., *Phillips Petroleum Co. v. Jenkins*, 297 U.S. 629 (1936) (Van Devanter, McReynolds, and Sutherland join Butler's opinion affirming judgment for employee and holding constitutional an Arkansas statute abrogating the fellow servant rule in cases involving corporate defendants); *Bowersock v. Smith*, 243 U.S. 29 (1917) (Van Devanter and McReynolds join opinion affirming judgment for employee and upholding provisions of a Kansas statute abrogating the fellow servant rule and the doctrines of contributory negligence and assumption of risk); *Jeffrey Mfg. Co. v. Blagg*, 235 U.S. 571 (1915) (Van Devanter and McReynolds join opinion affirming judgment for employee and upholding Ohio statute abrogating the fellow servant rule and the doctrines of contributory negligence and assumption of risk); *Chicago, Ind. & L. Ry. v. Hackett*, 228 U.S. 559 (1913) (Van Devanter joins opinion affirming judgment for employee and upholding Indiana statute abrogating fellow servant rule in railroad cases); *Missouri Pac. Ry. v. Castle*, 224 U.S. 541 (1912) (Van Devanter joins opinion affirming judgment for employee and upholding Nebraska statute abrogating the fellow servant rule and the doctrine of contributory negligence in railroad cases).

<sup>32</sup>See, e.g., *Carlin Constr. Co. v. Heaney*, 299 U.S. 41, 1936 AMC 1677 (1936) (Van Devanter, Sutherland, and Butler join McReynolds' opinion upholding award despite claim that it intruded upon the maritime jurisdiction); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933) (all Four Horsemen join opinion upholding award under Longshoremen's and Harbor Workers' Compensation Act); *Millers' Indem. Underwriters v. Braud*, 270 U.S. 59 (1926) (Van Devanter, Sutherland, and Butler join McReynolds opinion affirming state workmen's compensation award); *State Indus. Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922) (Van Devanter joins McReynolds' opinion reversing judgment vacating award); *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 1932 AMC 168 (1932) (Van Devanter, Sutherland, and McReynolds join Butler's opinion upholding award under Longshoremen's and Harbor Workers'

to suitors” clause<sup>33</sup> so as to permit the application of state workers’ compensation statutes to maritime injuries.<sup>34</sup> By the time the Court decided *Washington v. W.C. Dawson & Co.*<sup>35</sup> in 1924, the other two horsemen of the apocalypse—Pierce Butler and George Sutherland—had joined the Court and McReynolds’ majority. Any attempt to explain their votes as efforts to scuttle workers’ compensation for maritime employees encounters similar confounding evidence. For we know that Butler had been a leader in the campaign for workers’ compensation in his home state of Minnesota;<sup>36</sup> and we also know that, while serving as a United States Senator from Utah, Sutherland had been a principal proponent of a system of workers’ compen-

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Compensation Act); *Warner v. Goltra*, 293 U.S. 155, 1934 AMC 1415 (1934) (all Four Horsemen join opinion reversing dismissal of employee’s action under Merchant Marine Act of 1920); *Vancouver S.S. Co. v. Rice*, 288 U.S. 445, 1933 AMC 487 (1933) (Van Devanter, McReynolds, and Sutherland join Butler’s opinion affirming judgment giving decedent stevedore’s administratrix a cause of action enforceable in admiralty in rem against the vessel on which the injuries were sustained); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 1933 AMC 9 (1932) (all Four Horsemen join opinion holding that failure to furnish adequate care to a seaman stricken with pneumonia was a personal injury giving the seaman’s administrator a cause of action against the employer under the Merchant Marine Act of 1920); *Urvavic v. F. Jarka Co.*, 282 U.S. 234, 1931 AMC 239 (1931) (all Four Horsemen join opinion interpreting broadly the term “seaman” in the Merchant Marine Act so as to create a cause of action for a stevedore injured while unloading a ship flying the German flag); *Gonsalves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171, 1924 AMC 1539 (1924) (Van Devanter, Sutherland, and Butler join McReynolds’ opinion interpreting jurisdiction of admiralty court widely enough to allow it to hear an employee’s personal injury claim); *Great Lakes Dredge & Dock Co. v. Kierejewski*, 261 U.S. 479, 1923 AMC 441 (1923) (Van Devanter, Sutherland, and Butler join McReynolds’ opinion upholding federal district court’s jurisdiction to entertain wrongful death action); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 1939 AMC 1 (1939) (Butler joins opinion affirming judgment for injured seaman and holding that assumption of risk was not a defense under the Jones Act) (McReynolds dissents, contending that the trial court erroneously refused defendant’s request for a jury instruction on the availability of an assumption of risk defense); *Beadle v. Spencer*, 298 U.S. 124 (1936) (all Four Horsemen join opinion affirming judgment for injured seaman and holding that neither assumption of risk nor contributory negligence were defenses in actions under the Jones Act or the maritime law); *The Arizona v. Anelich*, 298 U.S. 110, 1936 AMC. 627 (1936) (all Four Horsemen join opinion affirming a judgment for an injured seaman and holding that assumption of risk was not a defense under the Jones Act); *International Stevedoring Co. v. Haverty*, 272 U.S. 50, 1926 U.S. 1638 (1926) (all Four Horsemen join opinion holding that a stevedore engaged in maritime work was a “seaman” within the meaning of the Jones Act, and the fellow servant rule therefore did not apply); *The Admiral Peoples*, 295 U.S. 649, 1935 AMC 874 (1935) (holding that an allegation of negligence against a ship was in admiralty and as a result the suit could go forward, with all Four Horsemen joining opinion).

<sup>33</sup>Originally enacted as part of section nine of the first judiciary act. Sept. 24, 1789, 1 Stat. 76, the saving to suitors clause was reenacted as part of the Act of Mar. 3, 1911, 36 Stat. 1091. The current version is codified at 33 USC § 1333(1).

<sup>34</sup>40 Stat. 385 (1917); 42 Stat. 634 (1922).

<sup>35</sup>264 U.S. 219 (1924).

<sup>36</sup>D. Danelski, *A Supreme Court Justice is Appointed* 18 (1964); F. Brown, *The Social and Economic Philosophy of Pierce Butler* 96-97 (1945). The same was true of former President, then Chief Justice, William Howard Taft. See J. Weinstein, *The Corporate Ideal in the Liberal State, 1900-1918* (1968) at 55.

sation for the employees of interstate carriers,<sup>37</sup> an ardent supporter of the Seaman's Act of 1915,<sup>38</sup> and a friend and political ally of Andrew Furuseth, the president of the Seaman's Union.<sup>39</sup> Moreover, McReynolds' opinion in *Dawson* made explicit what he had suggested in his earlier opinion in *Knickerbocker Ice v. Stewart*:<sup>40</sup> "Without doubt," he wrote, "Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injuries."<sup>41</sup> Congress accepted the counsel of this advisory opinion when it enacted the Longshoremen's and Harbor Workers' Compensation Act in 1927;<sup>42</sup> when the Act's constitutionality was challenged in *Crowell v. Benson*<sup>43</sup> in 1932, all four horsemen joined the opinion upholding it. As it would in other contexts during the tenures of Taft and Hughes, the Court here was seeking not to obstruct legislative reform, but instead to channel it into prescribed forms.<sup>44</sup>

*Jensen* is, then, the *Lochner* of admiralty after all. Like *Lochner*, *Jensen* has for decades been understood through the lens of a Progressive interpretation that cannot withstand scrutiny. This is not to say, of course, that *Jensen* was "correctly decided." Nor does the mere discrediting of the Progressive interpretation offer an adequate explanation of a decision that so many at the time and since have thought was not merely unfortunate but clearly wrong.<sup>45</sup> Indeed, as I suggest in Part III, another analogy, that between *Jensen* and the Court's contemporary Commerce Clause jurisprudence,

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<sup>37</sup>J. Paschal, Mr. Justice Sutherland: A Man Against the State 63, 65-71 (1951).

<sup>38</sup>38 Stat. 1164 (1915) (codified as amended in scattered sections of 22, 33, & 46 U.S.C.).

<sup>39</sup>Paschal, *supra* note 37, at 71-72, 97, 125.

<sup>40</sup>253 U.S. 149 (1920).

<sup>41</sup>264 U.S. 219, 227 (1924). That same term of Court, Van Devanter wrote the unanimous opinion upholding the Jones Act, *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 1924 AMC 551 (1924).

<sup>42</sup>44 Stat. 1424 (1927).

<sup>43</sup>285 U.S. 22, 1933 AMC 200 (1932).

<sup>44</sup>See Cushman, *The Hughes Court and Constitutional Consultation*, 1998 J. Sup. Ct. Hist. 79.

<sup>45</sup>For contemporary criticism of *Jensen*, see Editorial, 3 Va. L. Reg. 290 (1917); Note, 17 Col. L. Rev. 703 (1917); Comment, 6 Cal. L. Rev. 69 (1917); Comment, 15 Mich. L. Rev. 657 (1917); Comment, 27 Yale L. J. 255 (1917); Comment, 31 Harv. L. Rev. 488 (1918); Note, 35 Harv. L. Rev. 743, 746 (1922); Comment, 2 Minn. L. Rev. 145 (1917); Comment, 28 Yale L. J. 281 (1918); Note, 85 Cent. L. J. 57 (1917); Note, 6 Ill. L. Q. 157, 159 (1924); Dodd, *supra* note 12; E. Fell, *Recent Problems in Admiralty Jurisdiction* 20 (Johns Hopkins, 1922) ("This opinion in the *Jensen* case constituted in the minds of many lawyers a most striking departure from the general principles of admiralty and maritime jurisprudence heretofore developed under the American system"); Morrison, *Workmen's Compensation and the Maritime Law*, 38 Yale L. J. 476 (1929) ("to those steeped in the tradition, the *Jensen* decision brought a decided shock"); Conlen, *Ten Years of the Jensen Case*, 76 U. Pa. L. Rev. 926, 933 (1928) (the decision of the Court was severely criticized"); Wylie, *Admiralty Versus Compensation*, 52 Am. L. Rev. 63, 66 (1917) ("it is hardly conceivable that the Supreme Court of the United States would render a decision so far-reaching and so contrary to well-established principles").

brings to light some anomalies that present *Jensen's* defenders with some explanatory difficulties. And as Part IV's examination of contemporary developments in Commerce Clause doctrine growing out of liquor regulation controversies reveals, those anomalies were only exacerbated by subsequent decisions invalidating congressional attempts to permit application of state workmen's compensation statutes to maritime workplace accidents.

### III

#### **JENSEN AND THE COMMERCE CLAUSE ANALOGY**

One of the most striking facts about *Jensen* is that it was not initially conceptualized as a case about admiralty jurisdiction. The case was tried and appealed through the New York state court system. Mr. Jensen's widow did contend that the state statute was "not in conflict with the jurisdiction of the admiralty courts, for Congress has not yet made the jurisdiction of admiralty over torts on navigable waters exclusive of all actions by the states."<sup>46</sup> But Southern Pacific does not appear to have asserted the contrary,<sup>47</sup> and the Court of Appeals of New York did not take up the question at all. Indeed, neither the parties nor the court seem to have anticipated the ground upon which the Supreme Court of the United States would ultimately dispose of the case. That Court had not yet placed its imprimatur upon state workmen's compensation laws, and thus Southern Pacific's principal contention before the Court of Appeals of New York was that the statute deprived the employer of property without due process of law. This contention, which raised what the New York court saw as "perhaps the most important question in the case," accordingly attracted the greatest portion of the court's attention.<sup>48</sup> Before quickly disposing of Southern Pacific's claim that the case was controlled by the Federal Employers Liability Act<sup>49</sup> and then moving to the due process question, however, the court turned its attention to the other principal issue in the case: whether the application of the state statute to employers and employees engaged wholly in interstate commerce would impose an unconstitutional burden on such commerce. That is, to the extent that the case was initially conceived as presenting a question concerning the boundary between state and federal regulatory jurisdiction, it was viewed as raising the issue not under the Admiralty Clause of Article III, but instead under the dormant Commerce Clause.

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<sup>46</sup>109 N.E. 600 (N.Y. 1915).

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 602-04.

<sup>49</sup>*Id.* at 602.

The precedents did not hold out much hope that Southern Pacific's position would be sustained. *Cooley v. Port of Wardens*, which had established in 1851 that state and local governments might regulate "local" aspects of interstate commerce in the absence of congressional action, had upheld Philadelphia's regulation of pilotage in its port.<sup>50</sup> More recently, and more to the point, *Sherlock v. Alling*<sup>51</sup> had followed *Cooley* in upholding application of an Indiana wrongful death statute to an accident occurring where admiralty law and jurisdiction otherwise reached. The plaintiff in error had contended that, as liability for injury resulting in death had existed neither at common law nor under the maritime law, the statute enlarged the liabilities of tortfeasors in such cases and thereby burdened interstate commerce. Justice Field had written: "General legislation of this kind, prescribing the liabilities or duties of citizens of a State, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or inter-state commerce . . . [W]ith reference to a great variety of matters touching the rights and liabilities of persons engaged in commerce, either as owners or navigators of vessels, the laws of Congress are silent, and the laws of the State govern . . . [I]t may be said, generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state . . . Until Congress, therefore, makes some regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of opinion that the statute of Indiana applies."<sup>52</sup>

Following the wrongful death precedents, state and lower federal courts had "held almost uniformly that the [workmen's compensation] acts would be applicable" to maritime workplace injuries.<sup>53</sup> The New York Court of Appeals was no exception, relying on *Sherlock* and related dormant Commerce Clause decisions in holding that "the statute does not purport directly to regulate or impose a burden upon commerce, but merely under-

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<sup>50</sup>53 U.S. (12 How.) 299 (1851). See also *Steamship Co. v. Joliffe*, 69 U.S. (2 Wall.) 450 (1865); *Ex parte McNiel*, 80 U.S. (13 Wall.) 236 (1872); *Wilson v. McNamee*, 102 U.S. 572 (1880); *Olsen v. Smith*, 195 U.S. 332 (1904); *Anderson v. Pacific Coast S.S. Co.*, 225 U.S. 187 (1912).

<sup>51</sup>93 U.S. 99 (1876).

<sup>52</sup>*Id.* at 103-04. See also *The Hamilton*, 207 U.S. 398 (1907) (upholding application of Delaware's wrongful death statute to a claim of death due to negligence on the high seas); *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1873) (upholding application of Rhode Island statute giving a right of action to a suit for death in the admiralty jurisdiction notwithstanding the contention that the claim was maritime in nature).

<sup>53</sup>Note, 6 Ill. L. Q. 157, 158-59 (1924).

takes to regulate the relations between employers and employees in this state. Such regulation may, and no doubt does, indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action.”<sup>54</sup>

On appeal to the U.S. Supreme Court from the New York Court of Appeals’ decision in *Jensen*, Southern Pacific devoted thirty of its brief’s eighty pages to the claim that the statute violated due process,<sup>55</sup> allotting eleven pages to the dormant Commerce Clause argument.<sup>56</sup> Southern Pacific did briefly contend that the application of the state statute “infringes upon the exclusive admiralty jurisdiction of the United States,”<sup>57</sup> but the argument was purely statutory. “Such jurisdiction is *by the provisions of the Judicial Code* made exclusive except in so far as there may be saved to suitors ‘the right of a common law remedy, where the common law is competent to give it.’”<sup>58</sup> The remedy provided by the state statute was not one the common law was competent to give, the brief contended, and accordingly was not saved to suitors under the saving clause. The brief did not so much as suggest that application of the statute was precluded by force of Article III alone, nor that Congress might not amend the saving clause so as to allow the state statute to apply to maritime workplace injuries. The lone references that Southern Pacific made to the requirement that the law of admiralty be uniform appeared in quotations from two cases<sup>59</sup> cited in support of an equal protection argument, not an Article III claim.<sup>60</sup> In short, the prevailing party in *Jensen* had not yet divined the rationale upon which its victory would be predicated. As one observer put it, “The point upon which the case was ultimately decided was hardly touched in the briefs on either side, and . . . until

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<sup>54</sup>109 N.E. at 601.

<sup>55</sup>See Brief of Plaintiff-in-Error on Reargument, pp. 16-46.

<sup>56</sup>See *id.* at 46-57. *Jensen*’s answer to this contention consisted almost entirely of an extensive quotation from *Sherlock v. Alling*. See Brief of the New York State Industrial Commission at 52-57.

<sup>57</sup>*Id.* at 66-69.

<sup>58</sup>*Id.* at 67 (emphasis added).

<sup>59</sup>See *id.* at 59-60, quoting from *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), and *Workman v. New York City*, 179 U.S. 552, 558 (1900).

<sup>60</sup>The claim here was that the statute treated maritime employers differently from employers on land. The statute substituted the workmen’s compensation remedy for the common law remedy against employers on land, but could not do so for maritime employers, as substitution of the statutory for the admiralty remedy would destroy the uniformity of the maritime law. Accordingly, maritime employers remained amenable to a suit in admiralty for injuries caused by negligence, whereas an employer on land was insulated from such a suit at common law by the statute. *Id.* at 57-66. *Jensen*’s widow responded first, that as Southern Pacific claimed that it had not been negligent, neither the common law nor admiralty would have afforded her any remedy, and accordingly the state statute provided her with her sole remedy in this case; and second, that even assuming there were a remedy available in admiralty, the



the *Jensen* case the reported decisions of the court show not a trace of any such question raised.”<sup>61</sup>

In light of the Court’s unanimous decision earlier in the term upholding the New York statute against the contention that it violated the Due Process Clause,<sup>62</sup> McReynolds declared that “only two of the grounds relied on for reversal now demand special consideration.” The first was the claim that the case was controlled by the Federal Employers’ Liability Act. The second “of the grounds relied on for reversal” was in fact suggested nowhere in the briefs: “As here applied, the Workmen’s Compensation Act conflicts with the general maritime law, which constitutes an integral part of the federal law under Art. III, section 2, of the Constitution, and to that extent is invalid.”<sup>63</sup>

It was the second of these grounds upon which the majority opinion would rest. By virtue of the provision of Article III extending the judicial power to “all cases of admiralty and maritime jurisdiction” and the Necessary and Proper Clause of Article I, Section 8, McReynolds explained, “Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country,” and “in the absence of some controlling statute the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction.” Moreover, McReynolds maintained, “The Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been intended to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity

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statute left maritime employers no worse off than they had been under the common law. Before the statute’s enactment, the plaintiff would have had a remedy at common law and a remedy in the admiralty; the statute merely substituted the workmen’s compensation remedy for the common law remedy, leaving the maritime plaintiff with two remedies as he had had before. In both instances, where there were two remedies, “there may be only one recovery. The Workmen’s Compensation Law requires that the claimant shall sign a release of any other right or cause and assign to the person or corporation liable for such compensation all his right, title and interest in any cause of action.” Brief of the New York State Industrial Commission at 50-52. The maritime plaintiff’s remedy in admiralty would thus be extinguished not by force of the state statute, but instead by a release executed in connection with the plaintiff’s election to recover under the state statute.

<sup>61</sup>Brief in Behalf of the State Industrial Commission of New York, *Knickerbocker Ice Co. v. Stewart*, p. 31.

<sup>62</sup>*New York Central R.R. Co. v. White*, 243 U.S. 188 (1917).

<sup>63</sup>244 U.S. at 212. The company had initially objected to the award on the ground “that the Act is unconstitutional in that it violates Article III, Section 2, of the Constitution conferring admiralty jurisdiction upon the courts of the United States.” That contention, which is distinct from the issue framed by Justice McReynolds, does not appear to have been argued to and was not addressed by the New York Court of Appeals, and was not raised before the Supreme Court.

and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.”<sup>64</sup>

By the same token, however, it was clear that the power of Congress to prescribe substantive maritime law was not exclusive, and that it might to some extent be “changed, modified, or affected by state legislation.”<sup>65</sup> For example, state law could impose a lien for repairs done to a vessel in her home port,<sup>66</sup> and could as well create a cause of action for wrongful death occurring in the admiralty.<sup>67</sup> But “no such legislation is valid,” McReynolds declared, “if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.”<sup>68</sup> As applied to a maritime workplace injury, McReynolds concluded, the New York workmen’s compensation statute “conflicts with the Constitution and is to that extent invalid.”<sup>69</sup> For if New York could “subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded.”<sup>70</sup>

While McReynolds did not take up the petitioner’s claim that the New York statute offended the dormant Commerce Clause, he was prepared to rely upon analogy to that body of jurisprudence in order to leverage his innovative interpretation of Article III. “A similar rule in respect to interstate commerce deduced from the grant to Congress of power to regulate it is now firmly established,” he observed. “‘Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the States, such as transportation between the States, including the importation of goods from one State into another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free.’ And the same character of reasoning which supports this rule, we

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<sup>64</sup>244 U.S. at 215, quoting *The Lottawanna*, 81 U.S. (21 Wall.) 558, 575 (1875).

<sup>65</sup>*Id.* at 216.

<sup>66</sup>*Id.* at 216, citing *The Lottawanna*, 81 U.S. (21 Wall.) 558 (1875), and *The J.E. Rumbell*, 148 U.S. 1 (1892).

<sup>67</sup>*Id.*, citing *The Hamilton*, 207 U.S. 398 (1907).

<sup>68</sup>*Id.*

<sup>69</sup>*Id.* at 218.

<sup>70</sup>*Id.* at 217.

think, makes imperative the stated limitation upon the States to interpose where maritime matters are involved."<sup>71</sup>

Justice Pitney filed a learned and exhaustive dissent in which he rejected McReynolds' analysis at virtually every turn. Initially, he greeted with skepticism McReynolds' attempt to conjure a kind of dormant Admiralty Clause from an analogy to the Court's dormant Commerce Clause jurisprudence. The majority opinion, Pitney observed, contended that "just as the absence of an act of Congress regulating interstate commerce in some cases is equivalent to a declaration by Congress that commerce in that respect shall be free, so non-action by Congress amounts to an imperative limitation upon the power of the States to interpose where maritime matters are involved."<sup>72</sup> "This view," Pitney maintained, "is so entirely unsupported by precedent, and will have such far-reaching consequences, that it ought not to be accepted without the most thorough consideration."<sup>73</sup> And after extremely thorough consideration, Pitney concluded that "neither the Constitution nor the Judiciary Act was intended to prescribe a system of substantive law to govern the several courts in the exercise of their jurisdiction, much less to make the rules of decision, prevalent in any one court, obligatory on others, exercising a distinct jurisdiction, or binding upon the courts of the states when acting within the bounds of their respective jurisdictions."<sup>74</sup> In Pitney's view, Justice Bradley's opinion in *The Lottawanna*, the principal authority upon which McReynolds relied for the uniformity requirement, referred solely to the maritime law "as administered in the courts of admiralty," and did not purport to prescribe rules of decision for courts of common law.<sup>75</sup>

Pitney did not deny the power of Congress to prescribe preemptive substantive rules to govern the adjudication of maritime controversies. "I freely concede the authority of Congress to modify the rules of maritime law so far as they are administered in the federal courts, and to make them binding upon the courts of the States so far as they affect interstate or international relations," he wrote. But he maintained "that the Constitution does not, *proprio vigore*, impose the maritime law upon the states [except in cases of prize and *in rem* ], and that as to civil actions *in personam* having a maritime origin, the courts of the States are left free, except as Congress by Legislation passed within its legitimate sphere of action may control them."<sup>76</sup>

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<sup>71</sup>Id. at 216-17, quoting *Bowman v. Chicago & Northwestern Ry. Co.*, 125 U.S. 465, 507-08 (1888).

<sup>72</sup>Id. at 224.

<sup>73</sup>Id. at 224-25.

<sup>74</sup>Id. at 237.

<sup>75</sup>Id. at 241. See Palfrey, *The Common Law Courts and the Law of the Sea*, 36 Harv. L. Rev. 777, 778 (1923).

<sup>76</sup>244 U.S. at 250-51.

The relevant precedents seemed to Pitney to make this amply clear. *The Lottawanna* had upheld the application of state statutory law to a maritime lien for repairs. "It seems to be settled in our jurisprudence," Justice Bradley had written, "that so long as Congress does not interpose to regulate the subject, the rights of material-men furnishing necessaries to a vessel in her home port may be regulated in each State by State legislation."<sup>77</sup> "It would undoubtedly be far more satisfactory to have a uniform law regulating such liens, but until such a law be adopted . . . the authority of the States to legislate on the subject seems to be conceded by the uniform course of decisions."<sup>78</sup> The losing party in *The Hamilton* had proposed precisely the theory upon which McReynolds' opinion rested. "Next to the natural justice of its principles," the petitioner had contended, "the highest value of the maritime law consists in its uniformity and general acceptance . . . that law is not subject to the change or modification of state legislatures. Indeed, one of the controlling reasons for conferring on the general government the exclusive jurisdiction of all admiralty and maritime causes was to secure the greatest benefits which must inevitably result from uniformity in the maritime law."<sup>79</sup> The respondent had countered with *The Lottawanna*, the pilotage cases, and the wrongful death cases,<sup>80</sup> and Justice Holmes had written for a unanimous Court holding that the Delaware wrongful death statute applied in the absence of congressional legislation on the subject.<sup>81</sup> In Pitney's view, *The Hamilton* was "a controlling authority upon the question now presented."<sup>82</sup> "In the argument of the present case and companion cases," he concluded, "emphasis was laid upon the importance of uniformity in applying and enforcing the rules of maritime law, because of their affect upon interstate and foreign commerce. This, in my judgment, is a matter to be determined by Congress."<sup>83</sup>

Having dissected McReynolds' contention that the general maritime law had preemptive effect on state law comparable to that of the dormant Commerce Clause, Pitney next confronted the majority's dormant Commerce Clause analogy. He noted pointedly that McReynolds had chosen not to rest the decision on the dormant Commerce Clause arguments outlined in the petitioner's brief. This he took to be a tacit concession "that in the absence of applicable legislation by Congress the express grant of

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<sup>77</sup>81 U.S. at 579.

<sup>78</sup>Id. at 581.

<sup>79</sup>207 U.S. at 401.

<sup>80</sup>Id. at 401-02.

<sup>81</sup>Id. at 404.

<sup>82</sup>244 U.S. at 248.

<sup>83</sup>Id. at 243.

authority to regulate such commerce, as contained in the Constitution, does not exclude the operation of the state [workmen's compensation] law."<sup>84</sup> Indeed, as Pitney made clear, maintaining the contrary would have been utterly implausible. The pilotage and wrongful death cases were only the tip of the iceberg.<sup>85</sup> "In a great number and variety of cases," Pitney observed, "state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained in this court, in the absence of conflicting legislation by Congress." Pitney offered numerous examples,<sup>86</sup> but the most trenchant concerned regulation of workplace accidents in interstate commerce. "Certainly there is no greater need for uniformity of adjudication in cases such as the present than in cases arising on land and affecting the liability of interstate carriers to their employees," he asserted. "And, although the Constitution contains an express grant to Congress of the power to regulate interstate and foreign commerce, nevertheless, until Congress had acted, the responsibility of interstate carriers to their employees for injuries arising in interstate commerce was controlled by the laws of the States. This was because the subject was within the police power, and the divergent exercise of that power by the States did not regulate, but only incidentally affected, commerce among the States."<sup>87</sup> As Justice Hughes had observed in his recent opinion in the *Minnesota Rate Cases*, "In some states the so-called fellow-servant rule obtained; in others it had been abrogated [by state statute]." Such "differences in the applicable laws created inequalities with respect to interstate transportation, but each State exercised the power inherent in its territorial jurisdiction, and the remedy for the resulting

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<sup>84</sup>Id. at 251.

<sup>85</sup>Id. at 245-47.

<sup>86</sup>"Laws requiring locomotive engineers to be examined and licensed by the state authorities; requiring such engineers to be examined for defective eyesight; requiring telegraph companies to receive dispatches and transmit and deliver them diligently; forbidding the running of freight trains on Sunday; regulating the heat of passenger cars; prohibiting a railroad company from obtaining by contract an exemption from the liability which would have existed had no contract been made. . . statutes prohibiting the transportation of diseased cattle in interstate commerce; statutes requiring the prompt settlement of claims for loss or damage to freight, applied incidentally to interstate commerce. . . statutes regulating the character of headlights used on locomotives ." "All of these cases affected the responsibility of interstate carriers." 244 U.S. at 244-45 (citations omitted). Moreover, it was "settled that a State, in the absence of conflicting legislation by Congress, may construct dams and bridges across navigable streams within its limits, notwithstanding an interference with accustomed navigation may result. So as to harbor improvements; improvements and obstructions to navigation; [and] inspection and quarantine laws." Id. at 246. See Conlen, *supra* note 45, at 931-32 (1928).

<sup>87</sup>Id. at 243-44. See Comment, 2 Minn. L. Rev. 145 (1917).

diversity lay with Congress, which was free to substitute its own regulations.”<sup>88</sup> Indeed, “Until now,” Pitney pointed out, “Congress has passed no act concerning [interstate carriers’] responsibility for personal injuries sustained by passengers or strangers, or for deaths resulting from such injuries, so that these matters still remain subject to the regulation of the several States.”<sup>89</sup>

In each of these cases, wrote Pitney, “the state regulation had an incidental effect upon the very conduct of navigation in interstate and foreign commerce. If in such cases the States possess the power of regulation in the absence of inconsistent action by Congress, much more clearly do they possess that power where Congress is silent, with respect to a liability which arises . . . through the accidental injury or death of an employee engaged in a maritime occupation.”<sup>90</sup> For “[s]urely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject matter can be raised by implication, can, in the absence of legislation, have greater effect in limiting the powers of the States than that which resulted from the express grant to Congress of an authority to regulate interstate commerce.”<sup>91</sup> After all, “the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject matter.” To give the maritime law greater preemptive effect than the dormant Commerce Clause was to give “a greater potency to an implied power than to a power expressly conferred,” a potency so great that it would “deprive the several States of their police power over navigable waters lying wholly within their respective limits, and of their authority to regulate their intrastate commerce so far as it is carried upon navigable waters.”<sup>92</sup>

The majority opinion, as Pitney’s dissent made clear, had in peculiar fashion sought to achieve through an analogy to the Court’s dormant Commerce Clause jurisprudence what it could not have achieved by relying on that

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<sup>88</sup>230 U.S. 352, 409-10 (1913): “Interstate carriers, in the absence of a Federal statute providing a different rule, are answerable according to the law of the State for nonfeasance or misfeasance within its limits. Until the enactment [of FELA], the laws of the States determined the liability of interstate carriers by railroad for injuries received by their employees while engaged in interstate commerce, and this was because Congress, although empowered to regulate the subject, had not acted thereon.”

<sup>89</sup>244 U.S. at 245.

<sup>90</sup>Id. at 247.

<sup>91</sup>Id. at 251.

<sup>92</sup>Id. at 251-52. This point is echoed in *Fell*, supra note 45, at 35. *Fell*, who understood *Jensen* to overrule *Sherlock v. Alling* sub silentio, characterized *McReynolds*’ “analogy to interstate commerce as an argument . . . an extremely unfortunate and ill conceived one.” *Id.* In fact, *McReynolds* would soon write an opinion following *Sherlock* in upholding application a state wrongful death statute to a maritime accident. See *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

jurisprudence directly. The minor premise of the syllogism—that workplace accidents in domains subject to federal regulation were national in nature and therefore could not be regulated by the state—was obviously in considerable tension with the weight of Commerce Clause precedent.<sup>93</sup> The most that could be said was that the major premise of the syllogism was familiar. Some maritime matters were “national” in character and subject solely to congressional regulation; other maritime matters (pilotage, wrongful death, liens for home-port repairs) were “local” and could be regulated by the states unless or until Congress had acted on the subject.<sup>94</sup>

#### IV DELEGATION AND UNIFORMITY IN COMMERCE CLAUSE JURISPRUDENCE

It would not be long, however, before the Commerce Clause analogy would be placed under even further strain. In the autumn of 1917, Congress enacted the Johnson Amendment to the saving clause, saving to suitors not only common law remedies but also “rights and remedies under the workmen’s compensation law of any State.”<sup>95</sup> The New York Court of Appeals held the Johnson Amendment constitutional,<sup>96</sup> but the Supreme Court reversed by a vote of five to four. McReynolds again wrote for the majority, further embellishing the *Jensen* rationale. “The Constitution,” he reiterated, “itself adopted and established, as part of the laws of the United States, approved rules of general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.”<sup>97</sup> “The field was not left unoccupied; the

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<sup>93</sup>See Fell, *supra* note 45, at 24 (accusing McReynolds of having, “without any definitely expressed reasoning, relegated the matter of workmen’s compensation to the class of laws requiring national legislation and therefore prohibited to the States”); Wright, *Uniformity in the Maritime Law of the United States* (II), 73 U. Pa. L. Rev. 223, 249 (1925).

<sup>94</sup>The Commerce Clause analog to this rule, first articulated in *Cooley*, had been applied in variety of cases from 1851 to the time that *Jensen* was decided. See Cushman, *Formalism and Realism in Commerce Clause Jurisprudence*, 67 U. Chi. L. Rev. 1089 (2000).

<sup>95</sup>40 Stat. 395.

<sup>96</sup>*Stewart v. Knickerbocker Ice Co.*, 123 N.E. 382 (N.Y. 1919).

<sup>97</sup>*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920).

Constitution itself adopted the rules concerning rights and liabilities applicable therein; and certainly these are not less paramount than they would have been if enacted by Congress.”<sup>98</sup>

After *Jensen*, this much, at least, was not surprising. But McReynolds then proceeded to infer from this that the Johnson Amendment was “beyond the power of Congress.” The object of the grant to Congress of the power to legislate concerning the rights and liabilities within the maritime jurisdiction and remedies for their enforcement “was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union. Considering the fundamental purpose in view and the definite end for which such rules were accepted, we must conclude that in their characteristic features and essential international and interstate relations, the latter may not be repealed, amended or changed except by legislation which embodies both the will and deliberate judgment of Congress. The subject was intrusted to it to be dealt with according to its discretion—not for delegation to others . . . such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated but actually established—it would destroy the very purpose of the grant.”<sup>99</sup> The Johnson Amendment was thus unconstitutional because it delegated congressional authority over a “national” admiralty matter to the states, thereby authorizing them to disrupt the uniformity of regulation contemplated by the Constitution.

The Court’s insistence that workmen’s compensation legislation for maritime employees had to come from Congress rather than from the states rested uneasily next to decisions in which the justices had upheld federal statutes allowing state legislation to apply in instances in which the dormant Commerce Clause would otherwise have precluded diverse local regulation. In 1890, the Court had held in *Leisy v. Hardin* that Iowa’s prohibition on sales of liquor could not constitutionally apply to beer that had been shipped from Illinois and was still in its original package.<sup>100</sup> Interstate traffic in merchandise, explained Chief Justice Fuller, was a subject matter “national in its character,” which “must be governed by a uniform system.” “The power controlling it” was therefore “vested exclusively in Congress, and cannot be

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<sup>98</sup>Id. at 161.

<sup>99</sup>Id. at 164.

<sup>100</sup>135 U.S. 100 (1890).



encroached upon by the States.”<sup>101</sup> As it would in *Jensen*, the Court in *Leisy* employed an engrafted uniformity requirement to divest the states of a regulatory jurisdiction they had long had reason to believe they might exercise.

*Leisy* overruled longstanding precedent<sup>102</sup> and, like *Jensen*, it elicited a vigorous dissent.<sup>103</sup> Like *Jensen*, *Leisy* provoked a firestorm of criticism in the legal periodicals.<sup>104</sup> But *Leisy* was unlike *Jensen* in one significant respect. Whereas McReynolds’ *Jensen* opinion offered no indication that Congress might permit diverse local regulation of workplace injuries in the admiralty jurisdiction, Fuller’s *Leisy* opinion was peppered with suggestions that Congress might remove the dormant Commerce Clause disability under

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<sup>101</sup>Id. at 109. See id. at 108-09 (“Where the subject matter requires a uniform system as between the States, the power controlling it is vested exclusively in Congress”); id. at 109-10 (“interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled”); id. at 112 (“the transportation of passengers or of merchandise from one State to another is in its nature national, admitting of but one regulatory power”); id. at 119 (“the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive”).

<sup>102</sup>The License Cases, 46 U.S. (5 How.) 504 (1847).

<sup>103</sup>See 135 U.S. at 125-60, dissenting opinion of Justices Gray, Brewer, and Harlan, relying, inter alia, on *Sherlock v. Alling*, 93 U.S. 99 (1876).

<sup>104</sup>Howland, *The Police Power and Inter-State Commerce*, 4 Harv. L. Rev. 221 (1890); Note, *The Original Package Case*, 24 Am. L. Rev. 678, 682 (1890) (“Did the founders of the constitution ever intend that certain foreign manufacturers and dealers in deleterious substances should have rights of commerce therein which should override the local law of other States? It is difficult to see how any one who has even a tolerable knowledge of the constitution and its history can come to such a conclusion. The subject is thrown into the clearest light by the masterly dissenting opinion of Mr. Justice Gray, which is a complete refutation of the extraordinary position taken by the majority”); Note, *Original Packages: Constitutionality of the Wilson Law*, 25 Am. L. Rev. 651, 652 (1891) (it “remains a source of profound regret that the decision in *Leisy v. Hardin* was ever pronounced”); Snider, *Growth of State Power Under Federal Constitution to Regulate Traffic in Intoxicating Liquors*, 25 W. Va. L. Q. 42, 49 (1917); Foster, *What Is Left of the Original Package Doctrine*, 1 So. L. Q. 303, 318 (1916) (*Leisy* sacrificed “the more vital concerns of government to a barren concept of the need of uniformity in determining articles of national commerce”); J. Kallenbach, *Federal Cooperation With the States Under the Commerce Clause* 74-77 (1942); Bruce, *The Wilson Act and the Constitution*, 21 Green Bag 211-13, 215, 220-23 (1909). This criticism had been anticipated in congressional debates over the Wilson Act. See, e.g., 21 Cong. 5086-88 (remarks of Sen. Evarts); id. at 5325-30 (remarks of Sen. George); id. at 5379 (remarks of Sen. Pugh); id. at 5382 (remarks of Sen. Call); id. at 5383 (remarks of Sen. Pierce: “a somewhat singular phase of this discussion is the practical unanimity with which Senators regret the decision of the Supreme Court and desire to relieve it of its unfortunate consequences if only they can do so without violating the Constitution themselves”); App. at 435-37 (remarks of Mr. Culbertson); App. at 493-95 (remarks of Mr. Rogers); App. at 461 (remarks of Mr. Wike: “nine-tenths of both Houses of Congress condemn this latest decision as unwarranted”); App. at 491 (remarks of Mr. Cummings); App. at 507 (remarks of Mr. Breckenridge); App. at 517-18 (remarks of Mr. LaFollette); App. at 518 (remarks of Mr. Picker).

which the states' liquor regulation laws otherwise labored.<sup>105</sup> Congress accepted the invitation to do so later that same year. The Wilson Act provided that alcoholic beverages transported into any State or Territory "shall, upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers," even if the beverages remained in their original packages and would therefore otherwise be subject to exclusive congressional control.<sup>106</sup>

The bill provoked a vigorous and exhaustive debate in Congress, at the center of which were claims by opponents that the bill delegated the congressional power to regulate interstate commerce to the states and thereby authorized disuniformity in the regulation of interstate commerce in violation of the Constitution.<sup>107</sup> "Congress can not delegate any of its exclusive constitutional powers to any of the States," argued Senator Vest of Missouri. "For it to do so here would be to destroy the interstate-Commerce Clause of the Constitution and all the purposes for which it was enacted originally, and so far from having uniformity we should have diversity and hostility . . . there would be chaos from one end of the Union to the other."<sup>108</sup> Whereas "the very object of this clause in the Constitution was to create uniformity," the Wilson bill "would destroy all uniformity."<sup>109</sup> Such a delegation, agreed Senator Coke of Texas, would result in the "destruction" of "symmetry and uniformity."<sup>110</sup> "Uniformity in the exercise of every branch of power that is

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<sup>105</sup>See *id.* at 108 ("a subject matter which has been exclusively confided to Congress by the Constitution is not within the jurisdiction of the police power of the State, unless placed there by congressional action"); *id.* at 109-10: ("interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as Congress does not pass any law to regulate it, or allowing the States so to do, it thereby indicates its will that such commerce shall be free and untrammelled"); *id.* 110: ("importation cannot be prohibited without the consent of Congress"); *id.* at 114 (a state "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of other States of the Union"); *id.* at 119 ("as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress"); *id.* at 123-24 ("the responsibility is upon Congress, so far as the regulation of interstate commerce is concerned, to remove the restriction upon the State in dealing with imported articles of trade within its limits").

<sup>106</sup>26 Stat. 313 (1890). There was some precedent for legislation of this sort. See 1 Stat. 54 (1789), authorizing the continued operation of existing state pilotage laws; 1 Stat. 474 (1796) and 1 Stat. 619 (1799), consenting to the enforcement of state quarantine laws; 14 Stat. 81 (1866), authorizing state regulation and exclusion of interstate shipments of explosives; 10 Stat. 112 (1852), authorizing construction of a bridge across the Ohio River; 13 Stat. 99 (1864), permitting nondiscriminatory state taxation of national bank shares. See Kallenbach, *supra* note 104, at 79-80, 342-65.

<sup>107</sup>See, e.g., H. Rept. 2604 (51-1), *Views of the Minority*, pp. 7, 9; 21 Cong. Rec. 4955-61, 4965-66, 5425-28 (remarks of Sen. Vest); *id.* at 5324-25 (remarks of Sen. Coke); *Id.* at 5330-32 (remarks of Sen. Eustis); *id.* at 5378 (remarks of Sen. Faulkner).

<sup>108</sup>21 Cong. Rec. at 4957.

<sup>109</sup>*Id.* at 4966.

<sup>110</sup>*Id.* at 5324.

confided to the Congress of the United States, seems to be a constitutional prerequisite of its exercise, and it ought to be," maintained Senator Morgan of Alabama, and "the bill before us now . . . can not possibly have a general and uniform bearing among the States of the American Union."<sup>111</sup>

Charles Rahrer challenged the constitutionality of the Wilson Act in two briefs filed with the Supreme Court at its 1890 Term.<sup>112</sup> In each, he offered an extensive attack on the Act as a delegation of congressional authority giving rise to a lack of uniformity.<sup>113</sup> *Leisy* had held that the interstate liquor trade was commerce of a national character requiring a uniform system of regulation. The authority to regulate such commerce being vested exclusively in Congress, Rahrer maintained, the Wilson Act's authorization of state regulation of the subject constituted "a license to violate the constitution."<sup>114</sup> Moreover, such a delegation produced a lack of uniformity, which "is an indispensable requisite of the regulation of inter-State commerce."<sup>115</sup> Justice Johnson had remarked in *Gibbons v. Ogden* that, under the Articles of Confederation, there had grown up "a conflict of commercial regulations destructive to the harmony of the States." Johnson had observed that "a resolution of Virginia, appointing her commissioners to meet commissioners from other States, expresses their purpose to be, 'to take into consideration the trade of the United States, to consider how far a uniform system in the

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<sup>111</sup>Id. at 5369. These criticisms were echoed in the House debate. See id. at 7488-89 (remarks of Mr. Chipman); App. at 436-37 (remarks of Mr. Culberson); App. at 493-94 (remarks of Mr. Rogers); App. at 462 (remarks of Mr. Wike); App. at 482 (remarks of Mr. Frank); App. at 491-92 (remarks of Mr. Cummings); App. at 507 (remarks of Mr. Breckenridge); H. Rept. 2604 (51-1) (Views of the Minority) at 4-7, 9. Such sentiments also found expression in contemporary law review commentary. See Note, Constitutionality of the Wilson Law, 25 Am. L. Rev. 107, 108-09 (1891) (discussing "the fallacy of the doctrine that Congress can confer power upon the States"); Spear, The Senate Liquor Bill, 41 Albany L. J. 473 ("Either the States can or they cannot constitutionally legislate within the domain of foreign and interstate commerce. If they can do so, then they need no permissive act by Congress to give them this power; and if they cannot do so, it is difficult to see how Congress can, by a mere legislative definition, enable them to do what the Constitution, by necessary implication, says that they shall not do"); Note, The Original Package Case, 24 Am. L. Rev. 678, 680-81 (1890) ("It is a fundamental principle of American constitutional law . . . that legislative power cannot be delegated . . . Upon what principle, then, can Congress delegate to the States any portion of the legislative authority which has been committed to it by the constitution, to be exclusively exercised by it?"); Merrill, Regulation of Interstate Commerce by the States, 50 Cent. L. J. 25, 28-29 (1900); Bruce, The Wilson Act and the Constitution, 21 Green Bag 211, 216-18 (1909).

<sup>112</sup>Brief for Appellee, filed by David Overmyer (hereinafter "Overmyer Brief"); Brief for Appellee, filed by Louis J. Blum and Edgar C. Blum (hereinafter "Blum Brief").

<sup>113</sup>See Blum Brief, pp. 3-5, 7, 17-18, 25-55; Overmyer Brief, pp. 4, 6, 15-46.

<sup>114</sup>Blum Brief at 3-4. See also id. at 7, 17-18, 25-55; Overmyer Brief at 15-17, 21, 25, 29-36, 43-46.

<sup>115</sup>Overmyer Brief at 19. See also id. at 17 ("all regulation of inter-State commerce must be by Congress itself, must express the will of Congress, and must be uniform throughout the country"), 18, 21, 22, 25, 42-43.

commercial regulations may be necessary to their common interests and their permanent harmony.’ And Mr. Madison’s resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: ‘Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations . . . .’<sup>116</sup> As the incentive for taking the power to regulate interstate commerce “away from the States and conferring it on Congress was to promote and secure to the people of all the States enlarged and uniform commercial intercourse,” Rahrer insisted, “it was contemplated by the framers of the constitution that any law enacted by Congress in the exercise of the power conferred should be uniform in its operation.”<sup>117</sup> Bearing this in mind, Rahrer inquired, “Can Congress, under the guise of limiting the effect of the regulations of commerce between the several States, so legislate as to transfer the control of inter-State transportation, which it is agreed on all hands is a thing national in its character, and requiring and admitting of but one uniform system or plan of regulation—can Congress, under any possible pretext, so legislate as to transfer the control of this feature of commerce to the varying regulations which would be suggested by the numberless interests, whims, caprices and passions of the forty-two States of this Union?”<sup>118</sup>

Apparently so. The Court unanimously rebuffed Rahrer’s delegation and uniformity arguments.<sup>119</sup> As had the bill’s proponents in Congress, the Justices of the Supreme Court refused to concede that the Act delegated congressional authority. In enacting the Wilson Act, wrote Chief Justice Fuller, “Congress has not attempted to delegate the power to regulate interstate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws dealing with such property.”<sup>120</sup> “Congress did not use terms of permission to the States to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part.”<sup>121</sup>

The issue did not die there. A series of narrow constructions of the Wilson Act soon prompted a drive for more effective regulation of the interstate

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<sup>116</sup>Overmyer Brief at 38, quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.)1, 225 (1824).

<sup>117</sup>*Id.* at 40.

<sup>118</sup>*Id.* at 6.

<sup>119</sup>In *re Rahrer*, 140 U.S. 545 (1891). Justices Harlan, Gray and Brewer, who had dissented in *Leisy*, “concurred in the judgment of reversal, but not in all the reasoning of the opinion of the court.” *Id.* at 565.

<sup>120</sup>*Id.* at 561.

<sup>121</sup>*Id.* at 564.

liquor trade.<sup>122</sup> These efforts culminated in 1913 with the enactment of the Webb-Kenyon Act, prohibiting shipment of booze into any state in which it was intended to be received, possessed or sold in violation of state law.<sup>123</sup> The statute contained no penalty for its violation, and it was, as its title indicated, simply "An Act Divesting intoxicating liquors of their interstate character in certain cases." Opponents again characterized the bill as an unconstitutional delegation of congressional power to the several states.<sup>124</sup> Then-Senator George Sutherland of Utah offered the principal constitutional argument in opposition to the bill.<sup>125</sup> "I sympathize," he began, "quite as much as the proponents of this measure with all practicable efforts which have as their object the curtailment or the prevention of the evils which we all concede follow from the use of intoxicating liquors. If I had the power to do so by my single pronouncement I would consign every drop of intoxicating liquor to the bottom of the ocean, because I believe that humanity would be far better off without it." But it was "necessary not only that a proposed piece of legislation should be wise and just, but under our form of government it is necessary that it should be in harmony with the Constitution of the United States."<sup>126</sup> And the proposed bill was out of harmony with the Constitution in two key respects. First, it was "a clear delegation of the power of Congress to regulate interstate commerce." And second, the bill "would necessarily result in a multitude of differing and conflicting systems of regulation, and this would subvert the whole intent, spirit, and purpose of the commerce clause, which is essentially to establish a uniform system."<sup>127</sup>

Attorney General Wickersham agreed. The Webb-Kenyon bill, he opined, "does not prohibit as a uniform rule [liquor's] carriage in interstate commerce. It proposes to turn over the whole subject to the conflicting laws of

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<sup>122</sup>See Hamm, *supra* note 2, 175-220.

<sup>123</sup>37 Stat. 699.

<sup>124</sup>See 49 Cong. Rec. 2899-2900 (1913) (remarks of Sen. Pomerene) ("This is not a question of the prohibition of the liquor traffic by Congress nor is it a regulation by Congress. The purpose is to have Congress delegate the power to the several general assemblies of the country to make such police regulations as to them may seem proper relative to the inspection and seizure of intoxicating liquors in interstate trade." The bill was "an effort to delegate or, if not to delegate, to abdicate the power which the people gave to the Federal Government over interstate commerce and leave it subject to the will of the several States and localities therein."); 49 Cong. Rec. 2915 (remarks of Sen. Root) ("What is proposed in this bill is that the Government of the United States shall hand over to the government of each State the right to say how and when and under what conditions interstate commerce in these articles of commerce, so treated and regarded by all the States, shall be had"); H. Rept. 1461 (62-3), Part II, p. 8; remarks of Sen. Paynter of Kentucky, 49 Cong. Rec. 2687-91; remarks of Sen. Pomerene of Ohio, 49 Cong. Rec. 2899-2903; remarks of Mr. Stanley of Kentucky, 49 Cong. Rec. 4434-39; remarks of Mr. Hardwick of Georgia, 49 Cong. Rec. 4446. The delegation objection was similarly raised in debates over comparable bills introduced in previous sessions. See Hamm, *supra* note 2, at 206-09 (1995).

<sup>125</sup>See 49 Cong. Rec. 2903-11.

<sup>126</sup>*Id.* at 2903.

<sup>127</sup>*Id.* at 2904.

48 States.” This was “not directly to exercise the power to regulate commerce in liquors but to abdicate it, and to submit the whole question in traffic in liquors to the varying decisions of the different States.”<sup>128</sup> Three years later, Wickersham would describe the Webb-Kenyon Act “as a striking example of legislation resulting from confused ideas of sovereignty . . . an attempt by Congress to abdicate a clear constitutional power vested in it and in effect delegate a portion of its own legislative powers to the states.”<sup>129</sup>

President William Howard Taft, who as Chief Justice would later join Justice Sutherland in the *Dawson* majority, vetoed the bill on that very ground. “After giving this proposed enactment full consideration,” he wrote in his veto message, “I believe it to be a violation of the interstate commerce clause of the Constitution, in that it is in substance and effect a delegation by Congress to the States of the power of regulating interstate commerce in liquors which is vested exclusively in Congress.”

One of the main purposes of the union of the States under the Constitution was to relieve the commerce between the States of the burdens which local State jealousies and purposes had in the past imposed upon it; and the inter-state commerce clause in the Constitution was one of the chief reasons for its adoption. The power was there conferred upon Congress. Now, if to the discretion of Congress is committed the question whether in interstate commerce we shall return to the old methods prevailing before the Constitution or not, it would seem to be conferring upon congress the power to amend the Constitution by ignoring or striking out one of its most important provisions. *It was certainly intended by that clause to secure uniformity in the regulation of commerce between the States.* To suspend that purpose and to permit the States to exercise their old authority before they became States, to interfere with commerce between them and their neighbors, is to defeat the constitutional purpose.<sup>130</sup>

As late as 1913 there was considerable, respectable opinion holding that federal legislation authorizing state regulation of interstate transactions violated uniformity and nondelegation constraints governing exercises of the commerce power.<sup>131</sup>

<sup>128</sup>Opinion of Hon. George W. Wickersham of New York, Appointed March 5, 1909, Department of Justice, Constitutionality of Proposed Legislation Divesting Intoxicating Liquors of Their Interstate Character in Certain Cases, 30 Op. Atty. Gen. 88 (February 28, 1913).

<sup>129</sup>Wickersham, Confused Sovereignty, 11 Ill. L. Rev. 225, 236 (1916).

<sup>130</sup>49 Cong. Rec. 4291-92 (emphasis added).

<sup>131</sup>See also Kerr, The Webb Act, 22 Yale L. J. 567, 579-81 (1913) (Congress has provided in the Webb-Kenyon Act “that the United States will permit any State to exercise the prerogative of the United States and deprive liquor of its interstate attributes and thus enable it to enforce its local laws. In doing so it clearly delegated its sovereign power over commerce to the individual States, a thing which it as clearly is unable to do”); Note, 17 Col. L. Rev. 145, 146-47 (1917) (it “seems fundamental that if Congress cannot enlarge the powers of the state by directly delegating power, it cannot do so indirectly”); Rogers, Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act, 4 Va. L. Rev. 288, 304 (1917). For a defense of the Act against the charge of delegation, see Snider, *supra* note 104, at 54-55 (1917); McGovney, The Webb-Kenyon Law and Beyond, 3 Iowa Law Bull. 145, 151-52 (1917).

When Congress voted to override Taft's veto,<sup>132</sup> the question of the Act's constitutionality passed to the courts. By the time that question had come to the Supreme Court of the United States, however, it was evident that the Act's opponents did not anticipate a favorable ruling. When *Clark Distilling Co. v. Western Maryland Ry. Co.*<sup>133</sup> was initially argued at the 1914 Term, the company's brief devoted fewer than two of its seventy-one pages to the claim that the Act constituted an unlawful delegation of congressional power to the states.<sup>134</sup> At the 1915 Term's reargument, the Appellant's brief focused solely on its principal statutory construction claims, and again made no claim that exercises of the commerce power must produce uniformity.<sup>135</sup> For the 1914 Term, the State of West Virginia devoted fewer than four pages of its brief to the delegation issue, most of which consisted of an extensive quotation from a Fourth Circuit opinion upholding the Act.<sup>136</sup> Content to rely on *Rahrer*, the state made no mention of the uniformity issue.<sup>137</sup> When the case was reargued, the state's brief devoted fewer than three of its eighty-seven pages to the delegation issue, and again said nothing whatever about uniformity. As counsel maintained, the Webb-Kenyon Act had "been declared constitutional and valid by every State Supreme Court, the United States Circuit Court of Appeals, and all of the upper courts in the State and Federal government which have passed upon its constitutionality."<sup>138</sup> An amicus brief filed in the 1915 Term by the attorneys general of fifteen states remarked that "[t]he assault upon the Webb-Kenyon Bill by counsel for the appellant in the former brief is so weak and so meagre, that we cannot think that coun-

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<sup>132</sup>49 Cong. Rec. 4299, 4447.

<sup>133</sup>242 U.S. 311 (1917).

<sup>134</sup>Brief for Appellant, October Term, 1914, pp. 69-70.

<sup>135</sup>Brief for Appellant on Reargument, October Term, 1915.

<sup>136</sup>*West Virginia v. Adams Express Co.*, 219 F. 794, 802 (4<sup>th</sup> Cir. 1915).

<sup>137</sup>Brief for the State of West Virginia, Appellee (submitted by Fred O. Blue), October Term, 1914, pp. 18-22. In a second brief filed that term, counsel for the state had similarly been content to dispose of the delegation question with a brief quotation from *Rahrer*. Brief for the State of West Virginia, Appellee (submitted by W.B. Wheeler), October Term, 1914, pp. 25-26.

<sup>138</sup>Brief for State of West Virginia, Appellee (submitted by W.B. Wheeler), October Term, 1915, pp. 8-9, citing, inter alia, *Southern Express Co. v. State*, 66 So. 115 (Ala. 1914); *Southern Express Co. v. Whittle*, 69 So. 652 (Ala. 1915); *West Va. v. Adams Express Co.*, 219 F. 794 (4<sup>th</sup> Cir. 1915); *State v. Seaboard A.L. Ry.*, 84 S.E. 283 (N.C. 1915); *Glenn v. Southern Express Co.*, 87 S.E. 136 (N.C. 1915); *State v. Doe*, 139 P. 1169 (Kan. 1914); *Am. Express Co. v. Beer*, 65 So. 575 (Miss. 1914); *United States v. Oregon & Wash. R. & Nav. Co.*, 210 F. 378 (D. Ore. 1913); *Van Winkle v. Delaware*, 91 A. 385 (Del. 1914); *Taylor v. Commonwealth*, 85 S.E. 499 (Va. 1915); *Atkinson v. Southern Express Co.*, 78 S.E. 516 (S.C. 1913); *Adams Express Co. v. Kentucky*, 169 S.W. 603 (Ky. 1914). See also Brief for State of West Virginia, Appellee (submitted by Fred O. Blue), October Term, 1915, pp. 53-55 (essentially reproducing his argument of the preceding year); and Brief for State of West Virginia, Appellee (submitted by W.B. Wheeler), October Term, 1914, pp. 39-40, citing additional state cases upholding the Act, including *Ex parte Peede*, 170 S.W. 749 (Tex. Crim. App. 1914); *State v. United States Express Co.*, 145 N.W. 451 (Iowa 1914); and *Palmer v. Southern Express Co.*, 165 S.W. 236 (Tenn. 1913).

sel had any serious expectation of having the Webb-Kenyon Law declared to be invalid.”<sup>139</sup> By 1916, the state’s reply brief simply observed that “[t]he last brief filed [for the appellant] gives the impression that opposing counsel have lost faith in the efficacy of their argument against the constitutionality of the Webb-Kenyon law.”<sup>140</sup>

Chief Justice White’s opinion for the Court in *Clark Distilling* disposed of the delegation argument in two sentences. “The argument as to delegation to the States rests upon a mere misconception,” he wrote. “It is true that the regulation which the Webb-Kenyon Act contains permits state prohibitions to apply to movements of liquor from one State into another, but the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply.”<sup>141</sup> Much the same might have been said of the Johnson Amendment. If *Jensen* barred state regulation of workplace accidents in the admiralty jurisdiction, then state workers compensation statutes could have no application should Congress repeal the amendment. The will that caused the state statutes to be applicable was that of Congress.

White employed a comparable conceptual strategy in finessing the uniformity issue.<sup>142</sup> “So far as uniformity is concerned, there is no question that the act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the States,—so that the question really is a complaint as to the want of uniform existence of things to which the act

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<sup>139</sup>Brief filed by permission of the court, on behalf of the State of West Virginia, appellee, by the Attorneys-General (as amici curiae) of the several states as shown at the end of the brief, October Term, 1915, p. 15. See Rogers, *The Virginia Prohibition Law and the Commerce Clause of the Federal Constitution*, 3 Va. L. Rev. 483, 489 (1916) (“it would be surprising should the Supreme Court agree with President Taft . . . and declare that Congress did not have the authority to pass the measure. Such a decision would overrule the opinions of twelve state and several federal courts”); Roberts, *State Legislation Under the Webb-Kenyon Act*, 28 Harv. L. Rev. 225, 226 (1915) (while the constitutionality of the Act had not yet “been passed upon by the Supreme Court of the United States, little doubt exists, I take it, that the decision there will be favorable”).

<sup>140</sup>Reply Brief for the State of West Virginia, Appellee, October Term, 1916, p. 2. This brief cited additional intervening cases in which state courts had sustained the Act. See *id.* at pp. 7-12, citing *inter alia*, *Gottstein v. Lister*, 153 P. 595 (Wash. 1915); *State v. Mo. Pac. Ry. Co.*, 152 P. 777 (Mo. 1915); *Brennan v. Southern Express Co.*, (S.C. 1915) [*sic*].

<sup>141</sup>242 U.S. at 326.

<sup>142</sup>Kallenbach notes that “[c]ontemporary comment upon the Webb-Kenyon decision, though expressing approval of the result reached, was generally critical of the reasoning advanced by the Court.” Kallenbach, *supra* note 104, at 232, n. 106. See Orth, *The Webb-Kenyon Law Decision*, 2 Cornell L. Q. 283, 292-93, 298 (1917); Rogers, *The Webb-Kenyon Decision*, 4 Va. L. Rev. 558, 570 (1917); Powell, *Validity of State Legislation Under the Webb-Kenyon Law*, 2 So. L. Q. 113 (1917). Other critical treatments of the Court’s handling of the delegation issue include Dowling & Hubbard, *Divesting an Article of Its Interstate Character*, 5 Minn. L. Rev. 100, 116-19 (1921). The authors applauded the result in *Clark Distilling*, but thought the more defensible course to be overruling *Leisy*. See 5 Minn. L. Rev. 253, 277-81 (1921).



applies and not to an absence of uniformity in the act itself.”<sup>143</sup> Again, the same might have been said of the 1917 amendment. The amendment’s provisions applied to all of the states. Employers might object that there was variation among the states concerning the existence and details of workers compensation legislation, but that was “a complaint as to the want of uniform existence of things to which the act applies, and not to an absence of uniformity in the act itself.” Just as *Jensen* had held that application of state workers’ compensation statutes to injuries occurring in the admiralty jurisdiction disrupted the proper uniformity of the law of admiralty, *Leisy* had invalidated state regulation of interstate transportation of liquor because the subject fell into that category of commerce national in character and therefore requiring a uniform system of regulation. But as White observed at length, in the Commerce Clause context the need for uniformity disabled only the states, not Congress. *Leisy* “in the most explicit terms declared that the power of Congress to regulate interstate commerce in intoxicants embraced the right to subject such movement to state prohibitions”—that Congress might remove the dormant Commerce Clause disability under which the states otherwise labored.<sup>144</sup> Congress had relied on these declarations in enacting the Wilson Act, and the Court had reaffirmed them in *Rahrer* and subsequent decisions.<sup>145</sup> Longstanding precedent clearly shielded the Act from any contention that it was invalid for want of uniformity. “But aside from this,” White continued, “it is obvious that the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States.”<sup>146</sup>

Little wonder, then, that the Johnson Amendment had sailed through Congress with no constitutional debate and without a dissenting vote.<sup>147</sup> Learned Hand, who was not stupid, thought that *Clark Distilling* provided ample and dispositive authority for the 1917 amendment. In *The Howell*,<sup>148</sup> he considered “whether the act of Congress was valid which submitted the rules of the sea, not only to existing state laws, but to possible future changes determined only by the will of the states.” “Since *Clark Distilling*,” he concluded, “I can hardly think that the question is serious. That case determined

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<sup>143</sup>242 U.S. at 326-27.

<sup>144</sup>*Id.* at 327-29.

<sup>145</sup>*Id.* at 329-30.

<sup>146</sup>*Id.* at 327.

<sup>147</sup>S. Rept. 139 (65-1) consisted of one page. There was no House Report. Discussion of the bill in both the Senate and the House occupied less than one page in the Congressional Record. 55 Cong. Rec. 7605-06; *id.* at 7843.

<sup>148</sup>257 F. 578 (S.D.N.Y. 1919).

that, as to matters over which Congress has jurisdiction, it might permit state legislation even prospectively until such time as in its own pleasure it should choose to assume explicit legislative control.”<sup>149</sup> A writer in the *Southern Law Review* agreed: “Any objection on the ground that this is an invalid delegation of power by Congress to the states, is foreclosed by the recent decision of the Supreme Court in the case of *Clark Distilling Company v. Western Maryland Ry. Co.*, in which the constitutionality of the Webb-Kenyon Act was upheld, despite the objection that Congress had thereby delegated to the states the power of prohibiting the transportation of intoxicating liquors from other states into their boundaries, which was vested in Congress by the federal constitution.”<sup>150</sup> “[O]n strictly legal grounds,” wrote another commentator, “the *Clark Distilling Case* will support the constitutionality of the amendment of the saving clause as far as the adoption of prospective legislation is concerned.”<sup>151</sup>

The argument was presented in its most complete form in an amicus brief filed by Warren Pillsbury on behalf of the Industrial Accident Commission of California in *Knickerbocker Ice*. Pillsbury’s objective was to sustain the Commerce Clause analogy suggested by McReynolds’ *Jensen* opinion. “The close parallel between the power to legislate under the Commerce Clause concerning injuries sustained by employees in interstate commerce, and under the implied grant of power over maritime law to legislate concerning injuries sustained by employees in maritime employments,” Pillsbury maintained, “is directly in point.” “Under the commerce clause,” he reminded the Court, “the States have had full authority to legislate concerning injuries sustained by employees in interstate commerce (typically railroad employees) until Congress acts.” Until the passage of the Federal Employers’ Liability Act, “[s]tate legislation in the field was of unquestioned validity.”<sup>152</sup> But there was no need to revisit the question of state power in the absence of congressional action, for here Congress had acted. Pillsbury could accordingly content himself with a more modest claim for state power to regulate maritime workplace injuries. “If the States may exercise such power for interstate

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<sup>149</sup>Id. at 579-80.

<sup>150</sup>Note, *State Workmen’s Compensation Laws—Act of Congress of October 6, 1917*, 3 So. L. Q. 76, 78 (1918). “It is submitted that there can be no question of the constitutionality of this act. It is true that the decision in the *Jensen* case was based on the ground that the adoption of article 3 of . . . the federal constitution incorporated into our national law the general system of maritime law and precluded any state from altering the characteristic features of that law; but it cannot be said that by the adoption of that provision congress was precluded from making such changes in maritime law as it saw fit. Congress could undoubtedly have enacted a compensation act for seamen engaged in work of a maritime nature; and it can, therefore, authorize the states to exercise this power.” Id. at 77-78.

<sup>151</sup>Fell, *supra* note 45, at 48. See also Kallenbach, *supra* note 104, at 370-72.

<sup>152</sup>Amicus Brief, *Knickerbocker Ice Co. v. Stewart*, at 16.

injuries under the silence of Congress," Pillsbury insisted, "they can exercise similar power over maritime injuries with the express consent of Congress."<sup>153</sup>

It was here that Pillsbury sought to make the most of McReynolds' citation to *Clark Distilling* and other liquor regulation cases in his *Jensen* opinion. "The silence of Congress with respect to State participation in maritime matters is deemed equivalent, in view of the necessity for uniformity, to a declaration by Congress that the field shall remain free from State interference." It followed from this "that Congress has power to make a declaration either for or against concurrent power by the State, else its presumed intent, deduced from its silence, would be immaterial. If Congress were powerless to authorize state participation," then the citation to *Clark Distilling* in *Jensen* "would be entirely irrelevant."<sup>154</sup> "The reference in the *Jensen* case to the grant to Congress of power to regulate commerce" was "conclusive of the constitutionality of the Johnson Amendment." There the Court had placed "the power of the States to regulate the movement of articles in interstate commerce, and to regulate maritime injuries, upon exactly the same footing."<sup>155</sup> *Leisy* had held the states powerless to regulate interstate commerce in liquor in the absence of congressional action. The Wilson Act had made liquor subject to state regulation upon arrival in the state, and the Court had upheld the Act in *Rahrer* "notwithstanding the contentions there made that the act amounted to a delegation of Federal legislative power to the States, and disregarded the uniformity desired by the Constitution to be secured by Federal control of interstate commerce." The Webb-Kenyon Act had extended the regulatory power of the states over the interstate liquor trade, and the Court had sustained the act against similar contentions in *Clark Distilling*. Pillsbury maintained that the citation of the booze precedents in *Jensen* indicated that the Court "believed Congress to have such power with respect to maritime injuries, as it held the same character of reasoning to be applicable in both cases."<sup>156</sup> "Congress has power to return to the State jurisdiction over a portion of interstate commerce otherwise exclusively Federal," Pillsbury concluded, citing *Rahrer* and *Clark Distilling*.<sup>157</sup> "The close parallel between the Johnson Amendment and the Wilson and Webb-Kenyon Acts, relinquishing to the State a portion of the Federal legislative field, is directly in point. The latter having been held constitutional, the former must be."<sup>158</sup>

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<sup>153</sup>Id. at 14-15.

<sup>154</sup>Id. at 27.

<sup>155</sup>Id. at 28.

<sup>156</sup>Id. at 29-30. See also id. at 36.

<sup>157</sup>Id. at 16.

<sup>158</sup>Id. at 15.

That's what you think, replied Justice McReynolds, who seemed fully satisfied that he had utterly demolished this position with only a few laconic declarative sentences. "The distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more," McReynolds cautioned, "should not be forgotten."<sup>159</sup> Yet the precise nature of that distinction remained elusive.<sup>160</sup> McReynolds dealt with *Rahrer* merely by citing it for the proposition that "Congress cannot transfer its legislative power to the States—by nature this is non-delegable."<sup>161</sup> Allowing the reader no time to recover from this, he then promptly turned to *Clark Distilling*, pointing out that its reasoning "proceeded upon the postulate that because of the peculiar nature of intoxicants which gives enlarged power concerning them, Congress might go so far as entirely to prohibit their transportation in interstate commerce. The statute did less."<sup>162</sup> This explanation helped little to illuminate his earlier unelaborated assertion that "[t]o say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the States to do so as they might desire, is false reasoning."<sup>163</sup> If Congress could divest interstate transactions in liquor of their interstate character so that state law might apply, why could it not similarly divest maritime workplace accidents of their maritime character so that state workmen's compensation statutes might apply?

The dissenting Justices simply could not comprehend it. Justice Holmes, who had dissented without opinion in *Clark Distilling*, remarked, "I thought that [*Clark Distilling*] went pretty far in justifying the adoption of state legislation in advance, as I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it."<sup>164</sup> Justice Brandeis attacked the assumption "that Congress, which has power to make and to unmake the general maritime law, can have no voice in determining which of its provisions require adaption to peculiar local needs and as to which absolute uniformity is an essential of the proper harmony of international and interstate maritime relations. This assumption has no support in reason; and it is inconsistent (at least in principle) with the powers conferred upon Congress in other connections. The grant 'of the . . . judicial power . . .

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<sup>159</sup>253 U.S. at 161.

<sup>160</sup>As one commentator put it, "Considerable difficulty was encountered by the Court in distinguishing the effect of [the Johnson Amendment] from a similar result obtained by the Webb-Kenyon Act." Fell, *supra* note 45, at 47.

<sup>161</sup>253 U.S. at 164.

<sup>162</sup>*Id.* at 165.

<sup>163</sup>*Id.* at 164. Perhaps he meant "false consciousness."

<sup>164</sup>*Id.* at 169.

to all cases of admiralty and maritime jurisdiction' is, surely, no broader in terms than the grant of power 'to regulate commerce with foreign nations and among the several States.' Yet as to commerce," he observed with citations to *Rahrer* and *Clark Distilling*, "Congress may, at least in large measure, determine whether uniformity of regulation is required or diversity is permissible."<sup>165</sup>

## V

### CONTEMPORARY ATTEMPTS TO EXPLAIN THE ASYMMETRY

Why, then, could Congress not do in admiralty what it could do with respect to interstate commerce? Some observers thought that the same uniformity and non-delegation rules applied in both Commerce Clause and admiralty jurisprudence, and that the liquor cases were simply aberrational. As one commentator on *Knickerbocker Ice* put it, "The commerce clause cases, however, are explainable as manifestations of a tendency to uphold legislation regulating the liquor traffic which would be invalid if applied to ordinary commodities."<sup>166</sup> This was the view taken by the Supreme Court of California in an opinion invalidating the Johnson Amendment in early 1920. "The United States supreme court has shown an unmistakable inclination to uphold restriction upon traffic in liquor without openly declaring that liquor was not an ordinary article of commerce," observed Judge Lennon. "In so doing, the court has resorted to applications of constitutional principles which would not have been applied in like manner to uphold restrictions upon traffic in lumber or cotton which were similar in their scope and effect . . . . The difference between the character of the Webb-Kenyon Act and the [Johnson Amendment], as well as the difference between the subjects of which these two laws treat, is manifest. The one deals with certain property the abuse of which is a menace to society. The other deals with ships (of whose vital importance to the welfare and even to the life of the nation the recent war furnishes a vivid reminder) . . . . [T]he subject matters of the two enactments which respondents seek to link together are so vitally and patently different in nature, purpose, history, and circumstance that we find it impossible to conceive that the question of the constitutionality of one is conclusively determined by the ruling on the constitutionality of the other."<sup>167</sup>

The amicus brief of the California Industrial Accident Commission in *Knickerbocker Ice* offered a cogent response to the distinction proposed by that state's court of last resort: "If it be argued that the constitutionality of

<sup>165</sup>*Dawson*, 264 U.S. at 234 (Brandeis, J., dissenting).

<sup>166</sup>Comment, 34 Harv. L. Rev. 82 (1920).

<sup>167</sup>*Sudden & Christenson v. Industrial Accident Comm'n*, 188 P. 803, 806 (Cal. 1920).

the Webb-Kenyon act depends solely upon the peculiar character of the articles of commerce regulated, i.e., intoxicating liquors, and that such holding is not an authority for any other case involving the relinquishment to the States of a portion of Federal jurisdiction, the answer is twofold:

- (1.) The power of Congress necessarily depends upon general rules. This court cannot legislate exceptions based upon specific articles of commerce. The decision must therefore stand upon the proposition that Congress has power to relinquish to the States in its discretion any portion of the field of regulation of interstate commerce in which the State is directly interested as a matter of self-protection.
- (2.) Alcoholic liquors and industrial injuries are in the same class in any event for the purpose of prevention and redress by State statutes, as both affect the social welfare of the State by rendering a certain portion of its residents economic liabilities instead of economic assets, and tending to make such residents and their families a burden upon States charities and institutions. The redress of both is within the police power of the State as a matter of self-protection.”<sup>168</sup>

In other words, the constitutional explanation for the validity of the Wilson and Webb Kenyon Acts was not that alcohol was *sui generis*, but instead that the prohibition of its sale, like that of other substances posing a danger to the health, safety and morals of the community, was a legitimate exercise of state police power. The Johnson Amendment did not regulate ships, as the California court would have it, but instead workplace injuries. And the Court had already upheld their regulation by the New York Workmen’s Compensation Act as a legitimate exercise of the state’s police power.<sup>169</sup>

Whatever the merits of the claim that the liquor regulation cases were *sui generis*, it did not prove to be an accurate guide to future Commerce Clause decisions. Such “booze is different” arguments were made in Congress and before the Court when Congress enacted Wilson and Webb-Kenyon Act analogs with respect to interstate commerce in prison-made goods. A challenge to the Hawes-Cooper Act,<sup>170</sup> which allowed state law to apply to original package sales of prison-made goods, contended that it was not a valid exercise of the commerce power because “The goods, the movement of which Congress seeks in this instance to regulate, are neither harmful, injurious nor deleterious.” The Ohio law forbidding the sale of prison products (in this case, men’s work shirts) in the state imposed a burden on “an article

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<sup>168</sup> Amicus Brief at 30-31.

<sup>169</sup> *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

<sup>170</sup> 45 Stat. 1084.

of commerce which cannot be denominated an 'outlaw of commerce.'"171 The Webb-Kenyon Act had been sustained only because of "the exceptional nature of intoxicating liquors."<sup>172</sup>

These views had been anticipated in the congressional debate on the bill.<sup>173</sup> Contending that the measure would delegate congressional power to the states,<sup>174</sup> opponents denied that the liquor precedents were apposite. "[N]o laws have been enacted by Congress prohibiting commodities in interstate commerce or making them subject to State laws unless there was something about the commodity itself which was deleterious either to the health or to the morals of the people," insisted Representative Ramseyer of Iowa. There was "nothing necessarily injurious in an article produced in a penitentiary." "Shirts made in a penitentiary are just like shirts made outside of a penitentiary, and corn and hogs raised on a prison farm are just like corn and hogs raised on any other farm."<sup>175</sup> Indeed, the bill's principal opponent had invoked the authority of *Knickerbocker Ice* in a speech impugning the constitutionality of the measure. "If the Congress of the United States can not pass a law which will permit the maritime jurisdiction laws of the Federal Government to be utilized by the States because it is a delegation of governmental constitutional power to a State sovereignty," argued Senator Goff of West Virginia, "then I say without the fear of successful contradiction that the Senate can not pass this bill, because in its essence it will be purely and simply a delegation to the different States that see fit to take jurisdiction by prohibition of articles that come within their borders in the course of interstate commerce."<sup>176</sup> Yet Goff's confidence proved to be misplaced. Without dissent, Justice Sutherland brushed such reservations aside, meeting the petitioner's non-delegation argument with the authority of *Rahrer*.<sup>177</sup>

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<sup>171</sup>Brief for the Petitioner, *Whitfield v. Ohio*, 297 U.S. 431 (1936), at 14.

<sup>172</sup>*Id.* at 37. See also *id.* at 43.

<sup>173</sup>See 70 Cong. Rec. 816, 853-62, 866-67 (remarks of Sen. Goff); *id.* at 864 (remarks of Sen. Borah). Senator Borah also objected that the bill "destroyed the very uniformity which it was the object and purpose of the interstate-commerce clause to accomplish." Senator Barkley pointed out that there was "no provision of the Constitution that requires commerce to be uniform throughout the United States." When Borah contradicted him, Barkley asked, "Where is it?" Borah responded, "I think it is just as implicit in the commerce clause as if it were written there." *Id.* at 867.

<sup>174</sup>See 69 Cong. Rec. 8650, 8749 (remarks of Mr. Busby); *id.* at 8655-56 (remarks of Mr. Tucker); *id.* at 8665, 10772-72 (remarks of Mr. Sproul).

<sup>175</sup>69 Cong. Rec. at 8638-39. See also *id.* at 8652, 8663 (remarks of Mr. Montague).

<sup>176</sup>70 Cong. Rec. at 861. See also *id.* at 866.

<sup>177</sup>297 U.S. at 437-41. Justices Van Devanter, McReynolds and Stone concurred in the result without opinion. Sutherland had sought to distinguish *Rahrer* in the Webb-Kenyon Act debate, though it was not clear from his remarks whether he approved or disapproved of the precedent. See 49 Cong. Rec. at 2909-10.

Similar arguments were raised in opposition to the Ashurst-Summers Act,<sup>178</sup> which made it unlawful knowingly to transport in interstate or foreign commerce goods made by convict labor into any State where the goods were intended to be received, possessed, sold, or used in violation of its laws. "Congress cannot prohibit the movement in interstate commerce of useful and harmless articles of commerce made by convict labor," contended the petitioner in *Kentucky Whip & Collar Co. v. Illinois Central R.R. Co.*<sup>179</sup> "The opinion in the *Clark Distilling Company* case shows that the Webb-Kenyon Act was sustained solely because of the nature of the article (intoxicating liquor) therein dealt with."<sup>180</sup> Once again such arguments were unavailing. There was no dissent from Chief Justice Hughes' pronouncement that "[t]he contention is inadmissible that the Act of Congress is invalid merely because the horse collars and harness which petitioner manufactures and sells are useful and harmless articles."<sup>181</sup> Congress had not "attempted to delegate its authority to the States." As it had in the Wilson and Webb-Kenyon Acts, Hughes maintained, "Congress has formulated its own policy and established its own rule. The fact that it has adopted its rule in order to aid the enforcement of valid state laws affords no ground for constitutional objection."<sup>182</sup> Hughes' opinion was joined by Van Devanter and McReynolds, who had been in the *Jensen* and *Knickerbocker Ice* majorities, and by Sutherland and Butler, who had joined their fellow horsemen in the *Dawson* majority. The convict-made goods decisions made it clear that it was not booze that was different. It was admiralty that was different.

But why was admiralty different? After struggling to distinguish the liquor regulation cases in *Knickerbocker Ice*, McReynolds had ultimately taken comfort in disanalogy. "Here," he reminded his readers, "we are concerned with a wholly different constitutional provision—one which, for the purpose of securing harmony and uniformity prescribes a set of rules, empowers congress to legislate to that end, and prohibits material interference by the States."<sup>183</sup> But certainly, as Justice Holmes pointed out in his *Knickerbocker Ice* dissent, the text of the Constitution provided no warrant for such a conclusion. "[T]he single objection that I have heard to the law is that it makes different rules for different places, and I see nothing in the Constitution to prevent that," Holmes observed. "The only matters with regard to which uniformity is provided for in the instrument so far as I now

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<sup>178</sup>49 Stat. 494.

<sup>179</sup>299 U.S. 334, 335 (1937). This contention is elaborated in Brief for the Petitioner at 12-37.

<sup>180</sup>299 U.S. at 338. See also Brief for Petitioner at 15-16, 33-34; Petition for Writ of Certiorari, p. 13.

<sup>181</sup>*Id.* at 347-48. Justice Stone did not participate.

<sup>182</sup>*Id.* at 352.

<sup>183</sup>253 U.S. at 166.



remember,”—he apparently thought it unnecessary to refresh his recollection—“are duties, imposts and excises, naturalization and bankruptcy, in Article I, Section 8. As to the purpose of the clause concerning the judicial power in these cases nothing is said in the instrument itself. To read into it a requirement of uniformity more mechanical than is deduced from the express requirement of equality in the Fourteenth Amendment seems to me extravagant.”<sup>184</sup> This view echoed what Justice White had observed for the majority in *Clark Distilling*: “the argument seeks to engraft upon the Constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States.”<sup>185</sup> “Indeed,” Holmes continued, McReynolds’ conclusion was “contrary to the construction of the Constitution” implicit in the saving clause. “The saving of a common-law remedy adopted the common law of the several States within their several jurisdictions, and, I may add by way of anticipation, included at least some subsequent statutory changes.” Accordingly, Holmes concluded, “I cannot doubt that in matters with which Congress is empowered to deal it may make different arrangements for widely different localities with perhaps widely different needs.”<sup>186</sup>

McReynolds may have been referring not to textual differences between Congress’ relative powers over interstate commerce and maritime matters, but instead to differences in the intent of the framers with respect to those two powers. “Obviously,” McReynolds wrote in *Knickerbocker Ice*, “if every State may freely declare the rights and liabilities incident to maritime employment, there will at once arise the confusion and uncertainty which framers of the Constitution both foresaw and undertook to prevent.”<sup>187</sup> He would echo this theme again in *Dawson*: “the Constitution adopted the law

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<sup>184</sup>253 U.S. at 168. Justice Brandeis echoed these observations in his dissent in *Dawson*. “In respect to bankruptcy, duties, imposts, excises and naturalization,” he observed, “the Constitution prescribes uniformity.” Yet the Court had permitted Congress to authorize disuniform state legislation even with respect to subjects on which the text required uniformity in national rules. Citing *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181 (1902), Brandeis noted that, “Still the provision in the bankruptcy law giving effect to the divergent exemption laws of the several States was held valid.” 264 U.S. at 235. As Pillsbury had argued on brief, “The maxim, *inclusio unius exclusio alterius*, as well as sound logic, indicates that the Constitution does not require uniformity of acts of Congress in respect to other powers granted.” Amicus Brief at 35.

<sup>185</sup>242 U.S. at 327.

<sup>186</sup>253 U.S. at 168-69. These views were echoed in *Morrison*, *supra* note 45, at 479 (“The Constitution says nothing about uniformity; in fact, there are no express provisions of any kind with respect to the substantive maritime law or the legislative power thereof”); and *Is Absolute Uniformity In Admiralty Law Established by the Constitution?*, 91 Cent. L. J. 43 (1920) (“in requiring that the admiralty law shall be uniform throughout the country, the Court had added something to the Constitution that is not in that instrument and to such extent has attempted to amend that instrument”).

<sup>187</sup>253 U.S. at 166.

of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port, are not difficult to see. Of course, some within the States may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme."<sup>188</sup>

George Canfield asserted much the same thing in an article published in 1926.<sup>189</sup> But like McReynolds' claim, Canfield's rested on contestable interpretation of a few sources. It did not even purport to controvert Justice Pitney's report that "In a somewhat exhaustive examination of various sources of information, including Elliot's Debates, Farrand's Records of the Federal Convention, and *The Federalist*, Nos. 80-83, I have been unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by its established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either federal or state."<sup>190</sup> As Austin Wright remarked in 1925, "remarkably little was said by [the framers] on the subject of admiralty and maritime law and jurisdiction. The grant thereof to the Federal tribunals appears in their first draft and remains unchanged to the end. There was hardly any debate upon it . . . . When the framers went forth to justify the Constitution to the states, again little was said . . . . The nature of admiralty and maritime law seems nowhere to have been discussed."<sup>191</sup>

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<sup>188</sup>264 U. S. at 228.

<sup>189</sup>Canfield, *The Uniformity of the Maritime Law*, 24 Mich. L. Rev. 544, 556-57 (1926) (Article III's Admiralty Clause "was intended to create jurisdiction and that jurisdiction would necessarily imply a particular system of law by which such cases should be judged. That system was to be binding on all the courts, since it was to supplant to diversity of systems of which the Federalist speaks. It was to be binding upon the courts of the common law as well as upon the courts of admiralty . . . . All of the state courts had been administering maritime law in different measures. It was intended that there should be a common and uniform scale. The purpose was to adopt the maritime law for all courts in which maritime causes should be litigated because in no other way could the desired uniformity be attained").

<sup>190</sup>244 U.S. at 228. Nor did it meet Holmes' point concerning the saving clause, echoed by Stanley Morrison: "The nearest thing we have to a contemporaneous interpretation—the saving clause of the original Judiciary Act—makes clear that complete uniformity is not required. For whatever may have been intended with regard to the substantive law, the saving clause makes uniformity of remedy impossible." Morrison, *supra* note 45, at 479. See also Palfrey, *supra* note 75, at 784 ("if the Constitution of the United States enacted for all courts a complete system of maritime law, it is not obvious how an act of Congress saving a common law remedy could have any effect upon the substantive maritime law"). Compare Wright, *Uniformity in the Maritime Law of the United States* (I), 73 U. Pa. L. Rev. 123, 129 (1925) (the saving clause "is at most some evidence of the framers' attitude toward the concurrency of state jurisdiction").

<sup>191</sup>Wright, *supra* note 190, at 128.

Wright did report, however, that “we do find Madison and Randolph in Virginia relating the grant of jurisdiction to the desirability of uniformity.”<sup>192</sup> Madison had said that “If, in any case, uniformity is necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can alone secure such uniformity. To the same principle may also be referred their cognizance in admiralty and maritime cases.”<sup>193</sup>

Recall from Charles Rahrer’s brief, however, Justice Johnson’s observation in *Gibbons v. Ogden*: that, under the Articles of Confederation, “the resolution of Virginia, appointing her commissioners, to meet commissioners from other States, expresses their purpose to be, ‘to take into consideration the trade of the United States, to consider how far a uniform system in the commercial regulations may be necessary to their common interests and their permanent harmony.’ And Mr. Madison’s resolution, which led to that measure, is introduced by a preamble entirely explicit to this point: ‘Whereas, the relative situation of the United States has been found, on trial, to require uniformity in their commercial regulations, as the only effectual policy for obtaining, in the ports of foreign nations, a stipulation of privileges reciprocal to those enjoyed by the subjects of such nations in the ports of the United States, for preventing animosities, which cannot fail to arise among the several States, from the interference of partial and separate regulations,’ &c. ‘therefore, resolved,’ &c.”<sup>194</sup> Just as one might be able to build a requirement of uniformity in maritime law on the remarks of Madison, so one also might build a similar requirement of uniformity in exercises of the commerce power. What McReynolds and defenders of the Court’s admiralty decisions did not construct, however, was a defense of the asymmetric imposition of the uniformity constraint.

One possible justification for the asymmetry was offered not by McReynolds but by subsequent apologists for this turn in the Court’s admiralty jurisprudence. Madison’s remarks suggest that the need for uniformity in admiralty arises principally from its frequent role in international relations. Austin Wright sounded this theme in defense of the uniformity requirement. As Wright reminded his readers, Hamilton had written in

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<sup>192</sup>Id. at 128-29. Canfield had relied almost entirely on Randolph’s remarks at the Virginia ratifying convention: “Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts, as our national tranquility and reputation, and intercourse with foreign powers, may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.” 3 Elliott’s Debates 571, quoted at Canfield, *supra* note 189, at 555.

<sup>193</sup>3 Elliott’s Debates, ed. 1845, 532, quoted at Wright, *supra* note 190, at 129, n. 15. Professor Ernest Young maintains that this concern extended principally to prize, criminal and revenue cases, and not to private civil litigation. See Young, *Preemption at Sea*, 67 Geo. Wash. L. Rev. 273, 314-28 (1999).

<sup>194</sup>*Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 225.

Federalist 80: “The most bigoted idolizers of State Authority have not thus far shown a disposition to deny the national judiciary cognizances of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners,” that they “ought not to be left at the disposal of a PART.”<sup>195</sup> Hamilton’s “tacit premise,” Wright maintained, was that uniformity in maritime law was requisite to agreeable relations with foreign nations,<sup>196</sup> and “such a reason, so far as foreigners are concerned, clearly justifies the recent decisions of the Supreme Court.”<sup>197</sup> At the very least, “there is nothing to show that the framers intended that in the exercise of [concurrent maritime] jurisdiction the state courts might apply whatever law they pleased, at least in the case of the foreign litigant, who was a defendant in state court.”<sup>198</sup>

This justification, however, failed to meet two objections raised by Stanley Morrison. First, it did not explain why uniformity was required in cases not involving international relations. As Morrison put it: “One may well wonder what practical end is gained by this requirement of geographical uniformity in the rights of injured stevedores, especially when in the service of a local independent contractor. Where both employer and employee are local residents, whose interests are local, and the service is performed wholly in a single port, little good is accomplished by the identity of the workman’s rights to compensation in New York and San Francisco. It means nothing either to employer or to employee, and the shipowner has no direct concern with the matter. Justification may be found only in the realm of pure theory, uncontaminated by reality.”<sup>199</sup> Second, divorced from a persuasive textual or originalist argument, Wright’s pragmatic explanation could not justify the allocation of institutional authority implicit in *Knickerbocker Ice*. For as Morrison pointed out, “it is hard to say that the national and international interests concerned cannot safely be intrusted to Congress . . . . It is a job for the legislative body, with its capacity for investigation and its closer contact with the world’s activities.”<sup>200</sup>

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<sup>195</sup>Wright, *supra* note 190, at 131-32. Bradford Clark points out that Hamilton may have been referring only to prize cases with this remark. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. Pa. L. Rev. 1245, 1337 (1996).

<sup>196</sup>Wright, *supra* note 190, at 133.

<sup>197</sup>Id. at 132. See also Note, 20 Colum. L. Rev. 685, 687 (1920) (“as a matter of international relations . . . there is every reason for preserving a high degree of uniformity in the maritime law”).

<sup>198</sup>Wright, *supra* note 190, at 134.

<sup>199</sup>Morrison, *supra* note 45, at 482. See, to the same effect, Chamberlain, *Legislation Now Needed to Restore Compensation to Longshoremen*, 10 Am. Lab. Leg. Rev. 241, 242 (1920) (arguing that a uniform rule is necessary for sailors but not for longshoremen).

<sup>200</sup>Morrison *supra* note 45, at 480-81.

## VI THE PASSION FOR UNIFORMITY

While McReynolds' opinions leave us with no satisfactory explanation for why admiralty is different, the postures of some of the Justices are more readily explicable than those of others. In joining *Dawson*, Taft and Sutherland were merely embracing constitutional views they had expressed with respect to delegation and uniformity in the debate over the Webb-Kenyon Act. The votes of McReynolds and Van Devanter in the Commerce Clause cases suggest the possibility of similar motivations in their cases. McReynolds concurred only in the result in *Clark Distilling*, and Van Devanter had dissented without opinion. Both would concur only in the result in *Whitfield v. Ohio*. This suggests the possibility that they voted as they did in these cases only because they felt bound, first by the authority of *Rahrer* (in the case of McReynolds), and then by that of *Clark Distilling*. That is, they may have believed with Taft and Sutherland that the Wilson and Webb-Kenyon Acts violated nondelegation and uniformity norms that properly governed exercises of the commerce power.<sup>201</sup> If so, these four (and perhaps Sanford and Butler, who would join them in *Dawson*) were merely adopting a rule in admiralty that they believed properly governed Commerce Clause jurisprudence as well, but for which they had been unable to secure a majority. Faced with a choice between reorienting federalism jurisprudence around the *Clark Distilling* heresy and isolating the booze cases as exceptions to a general rule, they chose the latter.<sup>202</sup> Having lost and conceded defeat in the battle on land, they sought to salvage a small victory at sea.

The announcement of uniformity as a constitutional imperative coincided with rising sentiment for uniformity as a matter of policy. As the writings of Madison illustrate, the desire for uniformity in commercial regulation was an animating force behind the meetings of the Annapolis and Philadelphia conventions in the 1780s.<sup>203</sup> The attraction of a general federal common law was in large measure attributable to its potential to bring uniformity, particularly to the law governing commercial transactions.<sup>204</sup> As Ed Purcell has

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<sup>201</sup>Thomas Reed Powell suggested the possibility of such a motivation for Van Devanter's dissent without opinion in *Clark Distilling*. See Powell, *supra* note 142, at 136, n. 33.

<sup>202</sup>As one observer put it, "The validity of some of these federal adoptive acts relating to commerce remains somewhat doubtful in view of the general principles which the Court has endorsed in cases involving adoptive statutes in other fields." Kallenbach, *supra* note 104, at 346-47. Kallenbach went on to observe that the admiralty decisions "represent the orthodox view on the matter of federal authority to confer power upon the states," a view that the liquor cases had "subjected to a severe strain." *Id.* at 372.

<sup>203</sup>See N. MacChesney, *Uniform Laws: A Needed Protection to and Stimulus of Interstate Investment* 3 (1911).

<sup>204</sup>See T. Freyer, *Harmony and Dissonance: The Swift & Erie Cases in American Federalism* 46-47 (1981).

observed, "One of the fundamental justifications of the federal common law was that it would allow the development of a uniform national law and thereby facilitate rational economic planning." Yet "[b]y the late nineteenth century, if not before, it seemed clear that *Swift v. Tyson*<sup>205</sup> was not achieving that goal." *Swift* "failed to bring complete uniformity" to the commercial law, and it "failed to bring any uniformity in many other areas of general law."<sup>206</sup>

It was during this period that the elite bar began to look for alternative solutions to the problem of legal heterogeneity. The formation of the American Bar Association in 1878 was motivated in part by an interest in bringing greater uniformity to the laws of the several states. Members of the state and national bar associations continued to sound this theme at annual meetings, and, in 1889, the ABA appointed a Special Committee on Uniform State Laws. Out of this grew the National Conference of Commissioners on Uniform State Laws, which held its first meeting in 1892. Over the course of the next quarter century, the Commissioners adopted twenty-one uniform acts, most of which pertained to commercial transactions, wills, deeds and domestic relations.<sup>207</sup> By 1911, an editorial in the *Green Bag* would declare, "The movement for uniformity of state laws has gathered such headway that the desire of the readers of the *Green Bag* to help it in every possible way may be taken for granted, and it is hardly necessary to present any arguments to show why it should receive the support of the bar. The evils of diversity in state laws are obvious," and "All that legal conservatism which resists the progress of this movement is foredoomed to defeat."<sup>208</sup>

As these remarks suggest, the movement for uniform state laws was driven by frankly instrumental impulses. ABA members were agreed that "variant and conflicting laws produce in all the states the special evils or inconveniences of perplexity, uncertainty, and confusion, with consequent waste, a tendency to hinder freedom of trade and to occasion unnecessary insecurity of contracts, resulting in needless litigation and miscarriage of justice,"

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<sup>205</sup>41 U.S. (16 Pet.) 1 (1842).

<sup>206</sup>E. Purcell, *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958* (1992), at 63.

<sup>207</sup>W. Hobson, *The American Legal Profession and the Organizational Society, 1890-1930* 240-48 (1986); W. Armstrong, *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* 11-22 (1991); Purcell, *supra* note 206, at 356, n. 77; *Constitution and By-Laws of the National Conference of Commissioners on Uniform State Laws* (1915); L. Brewster, *Uniform State Laws* 1 (1898); C. Terry, *Uniform State Laws Ann.* (1920); MacChesney, *supra* note 203, at 5; J. Colby, *Uniformity of State Laws* 24-26 (1892); Smith, "Outlook for Uniformity of Legislation," 23 *Green Bag* 619 (1911); Brewster, *The Promotion of Uniform Legislation*, 6 *Yale L. J.* 132, 132-33 (1897).

<sup>208</sup>Editorial, *The Uniformity of State Laws*, 23 *Green Bag* 653 (1911).

and that "greater uniformity is desirable and most urgently and immediately needed in matters affecting directly the business common to and coextensive with the whole country."<sup>209</sup> As one leader of the movement put it, "[t]he constantly increasing inter-state trade and traffic, inter-state migration, and the wonderful development of the means of intercommunication fuse, and unite all interests and localities. Variance, dissonance, contradiction, nay, any unnecessary diversity in the fifty subdivisions of the one American people, in the general laws affecting the whole people in their business and social relations, cannot but produce perplexity, uncertainty, and damage. Such diversity, always an annoyance, is often a nuisance." Having fifty different systems of law for the regulation of commercial transactions was as "harmful and injudicious . . . as it would be for us to have fifty different languages, or fifty different metric systems." Our increasingly vibrant interstate trade was "entitled to the protection and advantage of substantially uniform laws."<sup>210</sup> As Lawrence Friedman has observed, "The United States was, or had become, a gigantic free-trade area; businessmen needed fair, uniform laws of commerce to take advantage of this huge, rich domestic market."<sup>211</sup>

This instrumental defense of uniformity was echoed in McReynolds' *Jensen* opinion. If New York could "subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute, other States may do likewise. The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish; and freedom of navigation between the States and with foreign countries would be seriously hampered and impeded."<sup>212</sup> "The confusion and difficulty, if vessels were compelled to comply with the local statutes at every port," he remarked in *Dawson*, "are not difficult to see."<sup>213</sup> As he wrote in *Knickerbocker Ice*, the Constitution

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<sup>209</sup>Armstrong, *supra* note 207, at 20. These sentiments were echoed widely. See W. Snyder, *The Problem of Uniform Legislation in the United States* 3 (1892); J. Beale, *The Diversity of Laws* 17 (1916); Moore, *The Passion for Uniformity*, 62 U. Pa. L. Rev. 525, 539-40 (1914); Brewster, *Uniform State Laws*, *supra* note 207, 1-2, 4, 18-19; MacChesney, *supra* note 203, at 3-4; Colby, *supra* note 207, at 23; Wheeler, *The Necessity for Uniform Laws Governing Commercial Paper in the United States*, 13 *Banking L. J.* 694 (1896); Taylor, *The Unification of American Law*, 22 *Green Bag* 267 (1910); Brewster, *Promotion*, *supra* note 207, at 139-40; Lapp, *Uniform State Legislation*, 4 *Am. Pol. Sci. Rev.* 576, 576-77 (1910); Jones, *Uniformity of Laws*, 11 *Banking L. J.* 137 (1894); *Progress of the Movement for Uniform State Laws*, 14 *Law Notes* 101 (1910); Scott, *Uniformity of State Laws*, 8 *The Am. Mag. of Civics* 303 (1896); Dembitz, *Uniformity of State Laws*, 168 *N. Am. Rev.* 84 (1899); Walsh, *Uniform Laws and Court Procedure*, 3 *Law. and Bank. and Bench & Bar Rev.* 165 (1910).

<sup>210</sup>Colby, *supra* note 207, at 29, quoting Lyman Brewster.

<sup>211</sup>L. Friedman, *A History of American Law* 408 (2d ed. 1985). See MacChesney, *supra* note 203 at 26.

<sup>212</sup>244 U.S. at 217.

<sup>213</sup>264 U.S. at 228. A prominent spokesman for the uniform laws movement had issued a call for the enactment of a national code of maritime law as early as 1894. See Jones, *Uniformity of Laws through National and Interstate Codification*, 28 *Am. L. Rev.* 547, 566 (1894).

aimed “to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation.”<sup>214</sup> And while industrial accident law had not been an initial priority of the uniform laws movement, it would soon become one. The Federal Employers’ Liability Act, which abolished the fellow-servant rule and the assumption of risk defense and replaced contributory negligence with a comparative negligence regime, was a conscious attempt to bring uniformity to the law governing railway workplace accidents. As the House report noted, “by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees . . . . A Federal statute of this character will supplant numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer’s liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.”<sup>215</sup> Yet all other workplace accident cases that might be litigated in state or federal court remained subject to the very patchwork of common law and state statute that FELA aimed to replace with a single uniform rule.

In 1908, the National Civic Federation turned its attention to the new and controversial subject of workmen’s compensation. As concern over the lack of uniformity among the various state laws grew over the next few years,<sup>216</sup> the Federation set up a variety of committees to study the issue and to develop model legislation that might be introduced in all of the states. Working in cooperation with the National Conference of Commissioners on Uniform

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<sup>214</sup>253 U.S. at 164.

<sup>215</sup>H. Rept. 1386 (60-1), at 1, 3.

<sup>216</sup>See Robbins, *Uniformity in Workmen’s Compensation Laws*, 81 Cent. L. J. 228, 228-29 (1915) (“Probably no subject of law shows such wide variation in the different states as do the various Workmen’s Compensation Laws. This great lack of uniformity has opened the eyes of businessmen to the great need of a uniform law on this subject.” There were “rapidly developing problems resulting from the lack of uniformity in the more than thirty state workmen’s compensation laws . . . . An enormous amount of office clerical work is already involved, particularly in covering an employer, for example, whose operations extend over several states or all of the states in which compensation laws are in force . . . not only is lack of uniformity a great burden on the insurance companies, but . . . it more directly affects the public in increasing the cost to the purchaser of workmen’s compensation insurance, and also complicates the process of settlement of claims, because of which friction and uncertainty the public may suffer frequent losses in the course of such settlements”); *Lack of Uniformity in Workmen’s Compensation Laws*, 24 Case & Com. 230 (1916) (“the laws of the various states reveal curious and glaring inconsistencies”); *Correspondence, Suggestion for Uniform Compensation Legislation*, 81 Cent. L. J. 282 (1915) (noting the need for “a uniform system for all the states”); *Shall There Be a Uniform Act on the Subject of Workman’s Compensation*, 75 Cent. L. J. 10 (1912) (“there is no doubt that it would be of great advantage for some competent body or commission to consider carefully all the proposed laws and to draw up a draft for adoption by the states. Such an act should be uniform throughout the country”); *Incurable Diversities in State Laws*, 14 Law Notes 205 (1911) (“At the annual meeting of the National Civic Federation last month Andrew Carnegie said there was great need of uniform legislation in the matter of compensation for industrial accidents”); *Parker, Uniform State Laws*, 19 Yale L. J. 401, 407-08 (1910) (citing the need for uniform workmen’s compensation legislation).



State Laws, by 1914 they had produced a Uniform Workmen's Compensation Act.<sup>217</sup> The Chairman of the National Civic Federation's Committee on Uniform Legislation Upon Workmen's Compensation was none other than Senator George Sutherland. As James Weinstein reports, Sutherland "was instrumental in helping draw up legislation for both the states and for the federal government."<sup>218</sup>

Sutherland's role at the federal level grew out of his 1911 appointment by President Taft to chair the joint Congressional Commission on Workmen's Compensation. The Commission held hearings throughout the year and in February of 1912 produced its final report. The Commission's report proposed enactment of a federal statute creating a system of workmen's compensation for employees of interstate carriers.<sup>219</sup> The report enjoyed the support of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Railways Trainmen, and the National Civic Federation.<sup>220</sup> Henry Rogers Seager, President of the American Association for Labor Legislation, saluted the bill proposed by Sutherland's Commission, seeing "good reason to hope that from it will emerge a federal compensation law that may serve as a useful model for state legislation and give an impetus to the movement toward uniformity, which has thus far been sadly lacking except in academic discussions of the problem."<sup>221</sup> Sutherland's bill also enjoyed the vigorous endorsement of President Taft, an enthusiastic supporter of the NCF's campaign for uniform state laws in a variety of areas, including workmen's compensation (in 1909 he told a group of White House visitors including Samuel Gompers that, next to his own work, uniform legislation was "the most important proposition now before the public").<sup>222</sup> In addition to vouching for the bill's constitutionality, Taft's message urging enactment of Sutherland's bill remarked, "One of the great objections to the old common-law method of settling questions of this character was the lack of uniformity in the recoveries made by injured employees and by the representatives of those who suffered death . . . Now,

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<sup>217</sup>M. Green, *The National Civic Federation and the American Labor Movement, 1900-1925* (1973), at 245-55; C. Terry, *Uniform State Laws Annotated* 447-83 (1920).

<sup>218</sup>Weinstein, *supra* note 36, at 59.

<sup>219</sup>Paschal, *supra* note 37, 65-69; Weinstein, *supra* note 36, at 59; Green, *supra* note 217, at 250-53, 347.

<sup>220</sup>Weinstein, *supra* note 36, at 59.

<sup>221</sup>Seager, *Introductory Address*, 2 *Am. Lab. Leg. Rev.* 9, 13, 14 (1912).

<sup>222</sup>*Id.* at 31-32. Taft's assessment paled next to that of the report of the first meeting of the National Conference, which characterized its enterprise as "the most important juristic work undertaken in the United States since the adoption of the Federal Constitution." Armstrong, *supra* note 207, at 11.

under this system the tendency will be to create as nearly a uniform system as can be devised.”<sup>223</sup>

In joining the *Dawson* majority, then, Taft and Sutherland (and perhaps Van Devanter, McReynolds, Sanford and Butler) were not simply succumbing to the authority of *Jensen* and *Knickerbocker Ice*. They were also giving voice to a general theory under which exercises of federal power were subject to the constitutional requirements that they operate uniformly and not delegate power to the states. Not surprisingly, this constitutional theory enjoyed harmonious relations with the political commitment to uniformity they had demonstrated in work with the NCF and the National Conference, and in elective office.

## VII

### SPECULATIONS: TWO FORMS OF COOPERATIVE FEDERALISM

As I have suggested in the previous section, what was true of Taft and Sutherland in *Dawson* may well have been true of Van Devanter and McReynolds in *Knickerbocker Ice*. But some questions remain. First, the voting behavior of three of their colleagues is not as easily explained. For McKenna and Day silently joined both White’s *Clark Distilling* opinion and McReynolds’ *Jensen, Knickerbocker Ice* and (in McKenna’s case) *Dawson* opinions.<sup>224</sup> Moreover White, whose prose style has posed considerable challenges to those who would seek to understand his jurisprudence, wrote the language in *Clark Distilling* that seemed to many of his contemporaries impossible to reconcile with the *Knickerbocker Ice* opinion he joined.

Nor do we yet have an adequate explanation of why the *Jensen* majority chose to insist on greater uniformity in the admiralty context than the Court had in the past required in the dormant Commerce Clause context. A normative preference for uniformity may be part of the explanation, but here the uniformity requirement imposed in admiralty was completely alien to dormant Commerce Clause jurisprudence. Workplace injuries occurring in

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<sup>223</sup>48 Cong. Rec. 2228 (1912). The House report recommending passage of the bill echoed this theme: “Your committee is also of the opinion that, not only as a matter of wholesome and proper legislation, but as a matter of uniformity and convenience, when Congress takes jurisdiction of the subject matter of regulating the relations between employer and employee engaged in interstate commerce by railroads in all matters relating to the accidental death and injury of the employee engaged in such commerce that such jurisdiction should be complete and exclusive.” H. Rept. 1441 (62-3), at 2.

<sup>224</sup>Day’s return of Holmes’ draft dissent in *Jensen* provides a partial explanation. He wrote, “As an old sailor I stand for a uniform rule of liability on the high seas—hence I cannot agree with your view.” Holmes Papers, quoted in A. Bickel & B. Schmidt, *The Judiciary and Responsible Government, 1910-1921*, at 562, n. 49. I have discovered no similar record of how Day’s nautical background might have informed his views on temperance reform.

interstate commerce had long been governed by state common law when litigated in state court, and by any relevant state statutes when tried by a federal court sitting in diversity. It was only the enactment of FELA in 1908 that had supplanted this regime.

And perhaps therein lies the answer to our conundrum. It may be that the timing of *Jensen* helps more than the text, the original understanding, or international ramifications in explaining its outcome. For *Jensen* was decided *after* FELA had been enacted. It was no longer politically improbable that Congress would step in and enact a uniform, progressive reform of the law governing workplace accidents occurring in the federal jurisdiction. One can easily understand why, when *Sherlock v. Alling* was decided in 1876, a dormant Commerce Clause rule permitting the application of state accident law statutes to injuries sustained in interstate commerce was so appealing. As Bernard Gavit observed, "If there be no Federal Common Law covering such situations, and Congress has not acted, a contrary holding would operate to give the Commerce Clause a very destructive effect."<sup>225</sup> The first major federal statute regulating interstate transport, the Interstate Commerce Act, was still eleven years away; it would be thirty years before Congress would enact the first Employers' Liability Act. At a time of such congressional lassitude, such a contrary holding would have been "destructive" of any statutory modification or amelioration of the common law of torts. But by 1917, it was clear to the Court that interstate accident law had captured the attention of the national legislature. In 1911, Van Devanter had written the unanimous opinion (in which White, Day and McKenna had each joined) upholding FELA against constitutional attack;<sup>226</sup> he would later do the same when the Jones Act of 1920<sup>227</sup> was sustained by a unanimous Court in 1924.<sup>228</sup> That latter year McReynolds would practically request that Congress enact a uniform national workmen's compensation statute for maritime employees in his *Dawson* opinion.<sup>229</sup> And as we have seen, the Court similarly sustained the LHWCA without dissent.<sup>230</sup> The Justices were obviously receptive to uniform, progressive, national tort reform; and the *Jensen* majority may well have expected that the congressional response to the decision would be modeled not on the Webb-Kenyon Act, but instead on the sort of workmen's compensation bill for employees of interstate carriers that Sutherland had sponsored so recently in the Senate.

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<sup>225</sup>B. Gavit, *The Commerce Clause of the United States Constitution* 288 (1932).

<sup>226</sup>*Second Employers' Liability Cases*, 223 U.S. 1 (1912).

<sup>227</sup>41 Stat. 1007 (1920). That same year Congress enacted the Death on the High Seas Act, creating a maritime cause of action for wrongful death. 41 Stat. 537 (1920), codified at 46 U.S.C. App. §§ 762-68.

<sup>228</sup>*Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924).

<sup>229</sup>264 U.S. 219, 227 (1924).

<sup>230</sup>*Crowell v. Benson*, 285 U.S. 22 (1932).

The recent history of congressional reform legislation would have lent support to such an inference. For liquor regulation was not the only domain in which the Court's dormant Commerce Clause jurisprudence had threatened to compromise the efficacy of state reform legislation. And in those areas in which the states were in substantial agreement on the policy question, Congress had sought to assist them not with a Wilson Act analog, but instead through federal prohibition of the use of the channels of interstate commerce to carry on the disfavored activity.

Consider the Pure Food and Drug Act of 1906. As a principal supporter of the measure observed, "nearly every State in the Union already has a pure-food law or a code pertaining to the introduction of pure food."<sup>231</sup> Yet "in the construction of the interstate-commerce law," explained Senator McCumber, "it has been declared that the term 'commerce' not only covers an article in its transit from one State to another, but it protects and shields that article until it is sold in original packages in the State of its consumption . . . the root of the evil is planted in that territory over which the State has no control and over which Congress has complete control—that is, the jurisdiction over interstate commerce."<sup>232</sup> State officials could not "prevent the shipment into the State of an adulterated article unless it was absolutely and unquestionably of so poisonous or unfit a character that it could not be considered as a commercial product. Under the construction of the interstate-commerce clause of the Constitution goods other than those which I have mentioned may be shipped into a State contrary to the laws of the State and may be sold in the original unbroken packages in that State."<sup>233</sup> Accordingly, "Congress alone can make effective the laws of the several States prohibiting the manufacture or sale of this class of articles. The States are helpless under the law. Under the Constitution, as it has been construed by the Supreme Court of the United States, these goods may go from one State to another in unbroken packages, and it is not until the package is broken that the jurisdiction of the State attaches. The State laws are helpless. There is a cry from every State of the Union—I think I may say that I have within my possession a demand from nearly every State of the Union—that the Congress of the United States

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<sup>231</sup>Remarks of Sen. McCumber, 40 Cong. Rec. 1216; see also *id.* at 1415 ("nearly every State in the Union has passed pure-food laws"); *id.* at 2655 ("There is scarcely a State in the Union that has not got a positive law against the use of any one of the preservatives that are mentioned here"); *id.* at 2761 ("All of the States have their pure food laws"); remarks of Sen. Heyburn, 40 Cong. Rec. 895 ("Nearly every State in the Union, Mr. President, has a pure-food law. The States have undertaken to legislate upon this subject, with, I believe, but one or two exceptions. Some of the laws upon the subject are very meager; some of them are very local; some of them are adapted to the peculiar local interests of the people of the particular State, but, as a rule, the States have enacted intelligent and appropriate legislation upon this question"); *id.* at 2656 ("nearly all the States have pure-food laws").

<sup>232</sup>Remarks of Sen. McCumber, 40 Cong. Rec. 1416.

<sup>233</sup>*Id.* at 1217.

should supplement their legislation and afford relief against the impositions that come from one State to another."<sup>234</sup> That demand had been met by uniform federal legislation prohibiting the interstate shipment of impure, adulterated or mislabeled food and drugs.<sup>235</sup>

Now consider the Mann Act of 1910. "By 1900," reports Thomas Mackey, "all of the American states had written laws making keeping a bawdy house, renting a house for prostitution, and being a prostitute statutory offenses."<sup>236</sup> Yet the states faced constitutional restraints on their ability to cope with the burgeoning interstate "White Slave Trade." As the report of the Senate Judiciary Committee recommending passage of the Act explained, "It is no longer open to question that the transit of individuals from State to State is interstate commerce." "Manifestly a State could not enact that a person who induced a woman to go from one State to another for purposes of prostitution should not aid or assist in her transportation from one State to another, or that the common carrier should not transport the prostitute. To do so would be a plain attempt to regulate interstate commerce. (*Leisy v. Hardin*, 135 U.S. 100)." Transportation of persons was a subject "national in its character" and therefore requiring uniform regulation. "The subject matter of the legislation being, therefore, one over which the States have no control, it must be . . . within the domain of proper federal legislation."<sup>237</sup> President Taft

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<sup>234</sup>Id. See also id. at 1216 ("The food commissioners of the several States have been busily engaged in attempting to eradicate the evil of impure food, but they are met, Mr. President, at every point by the rules of interstate commerce and are brought face to face with a condition over which the State itself has no control"); remarks of Sen. Heyburn, id. at 895 ("the State into which they are sent is helpless against the flood of these impure articles sent in unbroken packages under that rule of law"); remarks of Sen. Money, id. at 2656, 2657 ("The State can not touch the article in the original package"; Regier, *The Struggle for Federal Food and Drugs Legislation*, 1 *Law & Contemp. Probs.* 3, 5 (1933) ("By 1906 practically all the states had pure food laws . . . It was soon apparent that only a national law would be adequate. The states, acting separately, could not protect themselves against interstate commerce"). Whether the principle of *Leisy* in fact extended to the articles regulated by the bill was a matter of debate in the House, see remarks of Mr. Bartlett, 40 Cong. Rec. 9049-51, and the Senate, see remarks of Sen. Bailey, id. at 2758-67; but the bill ultimately passed the House by a vote of 241-17, 40 Cong. Rec. 9075-76, and the Senate by a similarly lopsided vote of 63-4, id. at 2773.

<sup>235</sup>34 Stat. 768, unanimously upheld in *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911).

<sup>236</sup>T. Mackey, *Red Lights Out* 123 (Garland, 1984). See also remarks of Mr. Bartlett, 45 Cong. Rec. App. 11 (1910).

<sup>237</sup>S. Rept. 886 (61-2), 7-9; H. Rept. 47 (61-2), 3-5. See also remarks of Mr. Saunders, 45 Cong. Rec. 1040 (describing the white slave trade as "a traffic that is widespread, infamous, and degraded, one which the States are unable to deal with in all its phases, in the exercise of the police power. But that feature of the business which the States are powerless to reach, is not beyond our powers"); remarks of Mr. Russell, 45 Cong. Rec. 816-19 (arguing that the transportation of persons across state lines is interstate commerce over which Congress has exclusive jurisdiction: "Is there a State that could enact legislation like this? To ask the question is to get the negative answer. Then the only jurisdiction that can enact it is this jurisdiction here, the Congress of the United States, and it is clearly within the power granted by the Constitution to regulate commerce among the States"); remarks of Mr. Peters, 45 Cong. Rec. 1035-37 ("the transit of individuals from State to State is in itself commerce . . . a form of commerce which comes under the class

had sent a message to Congress stating, “I believe it to be constitutional to forbid, under penalty, the transportation of persons for purposes of prostitution across state and national lines,”<sup>238</sup> and the Congress had acted accordingly. Here again, the remedy for the dormant Commerce Clause disability under which the states labored in their efforts to combat prostitution was uniform, national legislation prohibiting the interstate transportation of a woman for an immoral purpose.<sup>239</sup>

In these instances in which there was virtual policy consensus among the states, then, Congress had not resorted to the sort of divesting formula employed in the liquor context.<sup>240</sup> Instead, Congress had solved the dormant Commerce Clause problem, while avoiding the sticky delegation issues raised in the Wilson and Webb-Kenyon Act debates, simply by enacting a uniform law governing the disfavored transactions occurring within the federal jurisdiction.<sup>241</sup> The Congress had developed two forms of cooperative federalism under the Commerce Clause, each responsive to a different configuration of policy preference.

Bearing this in mind, let us return now to the subject of workmen’s compensation. Before 1909, no American state had enacted such a statute. Yet the rapidity with which such measures transformed the landscape of work-

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of cases in which Congress has exclusive jurisdiction . . . . It would be obviously unconstitutional for any State to attempt to enact a law or affect such commerce or make the purchase of a ticket in one State to be used in interstate transportation constitute a crime. To Congress, therefore, must we look for aid”); Rogers, *The Power of the States Over Commodities Excluded by Congress From Interstate Commerce*, 24 *Yale L. J.* 567, 569 (“the state has no power, in the absence of congressional legislation, to prevent the importation of women for immoral purposes . . . for this reason, federal action was necessary . . . . It is extremely doubtful whether before the Mann Act the states could have kept out women who intended to engage in immoral practices”).

<sup>238</sup>45 *Cong. Rec. App.* 15 (1910).

<sup>239</sup>36 *Stat.* 825, unanimously upheld in *Hoke v. United States*, 227 *U.S.* 309 (1913).

<sup>240</sup>A substitute pure food and drug bill modeled on the Wilson Act had been rejected in the House by a vote of 188-44. See 40 *Cong. Rec.* 9061, 9075.

<sup>241</sup>Congress had similarly enacted a statute prohibiting interstate shipment of lottery tickets in 1895, 28 *Stat.* 963, by which time lotteries had been outlawed in every state of the Union save Delaware, which followed suit in 1897. See *U.S. Dep’t of Justice, The Development of the Law of Gambling: 1776-1976* (Washington D.C., 1977) at 87, 272-73, 311-14, 337, 396-98; J. Ezell, *Fortune’s Merry Wheel*, 241-70 (1960); remarks of Senator Hoar, 26 *Cong. Rec.* 4314 (1894); remarks of Mr. Gorman, 26 *Cong. Rec.* 4313 (1894); remarks of Mr. Broderick, 27 *Cong. Rec.* 3013 (1895). Indeed, Congress had, only the year before *Jensen* was decided, enacted a similar statute concerning the products of child labor—a matter on which there was far less policy consensus among the states. 39 *Stat.* 675. Lindsay Rogers maintained that such statutes effectively divested the articles in question of their character as interstate commerce, so that state police regulations could apply: “When Congress has excluded certain commodities from interstate commerce the protection of interstate commerce is taken away from these commodities and the authority of the state can attach to them while they are in transit to the extent of forbidding them entrance to the state”). Rogers, *supra* note 237, at 570-71.

place accident law was nothing short of breathtaking.<sup>242</sup> By 1915 the momentum was so great that one observer could confidently predict that “this radical departure from the common law . . . probably will be” “made in all the States of the Union.”<sup>243</sup> “It is a question of only a short time,” wrote another, “before all states will have in force statutes of this character.”<sup>244</sup> By 1917, when *Jensen* was decided, thirty-seven of the forty-eight states already had them.<sup>245</sup> By 1920, when the Court decided *Knickerbocker Ice*, the number had swelled to forty-two.<sup>246</sup> As had been the case with pure food and drugs, prostitution, and lotteries, there was a quickly emerging policy consensus among the states in favor of workmen’s compensation. And here the congressional response had tracked earlier federal initiatives in those areas.<sup>247</sup> Versions of Sutherland’s workmen’s compensation bill for employees of interstate carriers had passed the Senate in 1912 by a vote of 64 to 15,<sup>248</sup> and the House the following year by a vote of 218 to 81.<sup>249</sup> Similar bills had been introduced in the second session of the sixty-third Congress<sup>250</sup> and the first session of the sixty-fourth.<sup>251</sup> Supporters continued to see cause for optimism. As Daniel O’Donoghue wrote in 1915, “Without doubt, the same Bill will again be introduced, and should and probably will be, passed at the next session of Congress.”<sup>252</sup> The momentum at the federal level continued to build when Congress enacted a bill setting up a system of workmen’s compensation for employees of the United States in 1916.<sup>253</sup> By contrast, the prospects for uniformity of state workmen’s compensation laws were fading. By the end of 1916, only one state legislature had enacted the Uniform

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<sup>242</sup>See O’Donoghue, *Federal Accident Compensation Law*, 3 *Geo. L. J.* 17 (1915) (ascribing the movement for workmen’s compensation to “the widespread belief in the minds of the Bench and Bar, Capital and Labor, and the public generally, that the common law, and the doctrines engrafted thereon . . . are not consistent with modern industrial conditions”); Purcell, *supra* note 206, at 163; Weinstein, *supra* note 36, ch. 2; R. Lubove, *The Struggle for Social Security, 1900-1935* (1968), ch. 3.

<sup>243</sup>O’Donoghue, *supra* note 242, at 17.

<sup>244</sup>Robbins, *supra* note 216, at 228.

<sup>245</sup>24 *Case & Com.* 230-31 (1917).

<sup>246</sup>10 *Am. Lab. Legis. Rev.* 7 (1920).

<sup>247</sup>Weinstein, *supra* note 36, at 59.

<sup>248</sup>48 *Cong. Rec.* 5959.

<sup>249</sup>49 *Cong. Rec.* 4547.

<sup>250</sup>See H.R. 11243, H.R. 15700, H.R. 19310 (63-2). None of these was reported out of committee.

<sup>251</sup>See S. 4673, S. 5269, S. 14080, S. 14973 (64-1). Again, none of these was reported out of committee.

<sup>252</sup>O’Donoghue, *supra* note 242, at 23.

<sup>253</sup>39 *Stat.* 742 (1916). President Taft had similarly established a workmen’s compensation system for employees in the Canal Zone under a provision of the Panama Canal Zone Act, 37 *Stat.* 560 (1912). Paschal, *supra* note 37, at 69.

Workmen's Compensation Act.<sup>254</sup> "It has been impossible to guide these many state measures into any semblance of uniformity," lamented one observer. "[T]he task of securing uniformity seems almost a hopeless one."<sup>255</sup> On the eve of the *Jensen* decision, it appeared that the only hope for a uniform scheme of compensation for maritime workplace accidents lay in congressional action. And the Justices had good reason to anticipate that the congressional response to *Jensen* would take the form of a uniform, national workmen's compensation statute for maritime employees.<sup>256</sup>

This may in turn help to explain the divergent votes of White, McKenna, and Day. In 1890, when *Leisy* and the Wilson Act set liquor regulation and Commerce Clause jurisprudence on its course, there were only seven dry states.<sup>257</sup> As late as 1915, the Hobson Amendment, a precursor to what would become the Eighteenth Amendment, had failed even to win the necessary support of Congress.<sup>258</sup> Moreover, the Reed "Bone-Dry" Amendment, which banned interstate transportation of liquor into all prohibition territory, was not offered in the Senate until February of 1917<sup>259</sup>—a month *after* White delivered the opinion of the Court in *Clark Distilling*. As Richard Hamm reports, Reed's

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<sup>254</sup>The state was Pennsylvania. MacChesney, *supra* note 203, at 65. In 1917, W.O. Hart wrote that the Uniform Workmen's Compensation Act was among those efforts of the National Conference "probably never to be adopted as uniform laws." Hart, *The Movement for Uniform State Laws*, 8 Case & Com. 646, 652 (1917). As the Bureau of Labor Statistics observed in 1920, the "rapid growth of compensation legislation . . . has operated to prevent the adoption of any one form of law as a type, so that although a single fundamental principle underlies the entire group of laws of this class, its expression and application present great diversity of details in the different states. This is true not only of the primary factors of the laws, such as the scope and the compensation benefits, but also of the system of compensation insurance, administration, methods of election or rejection, etc." U.S. Department of Labor, Bureau of Labor Statistics, *Comparison of Workmen's Compensation Laws of the United States and Canada up to January 1, 1920* (1920), p. 7. As Allison Dunham later observed in remarking on "the lack of success" of the Uniform Workmen's Compensation Act, "when a problem arises in critical form, numerous states adopt legislation to solve it, and thereafter it is too difficult politically to induce these states to change to a uniform law . . . . Once the public has arrived at the 'there ought to be a law' stage in its thinking about a problem, the Conference procedure may make it too late for the Conference to draft a uniform law." Dunham, *A History of the National Conference of Commissioners on Uniform State Laws*, 30 Law & Contemp. Probs. 233, 244-46 (1965).

<sup>255</sup>Robbins, *supra* note 214, at 228-29 ("it seems now practically an impossibility to guide the remaining states . . . to the enactment of measures which will be any more uniform with those of each other or that of any state now in force than those now existing, but it may be safely predicted that there will be practically as many new samples of compensation laws to deal with as there are states to enact them").

<sup>256</sup>See Wylie, *supra* note 45, at 70 ("The necessity for a Federal Statute—uniform in its every particular is greater now than ever before, and until such time as this adequate measure is enacted, the present chaotic conditions will continue"). Congress had recently superseded state statutes giving a lien upon a vessel for supplies and repairs furnished in a home port with a uniform federal lien act. 36 Stat. 604 (1910). On the connection between the uniformity norm and the enhancement of the lawmaking authority of the federal judiciary, see Purcell, *supra* note 206, at 172-75.

<sup>257</sup>Hamm, *supra* note 2, at 124. By 1903, the number had contracted to three, *id.* at 125, while as of 1900 37 states had local option laws. *Id.* at 133.

<sup>258</sup>Hamm, *supra* note 2, at 228-35.

<sup>259</sup>*Id.* at 238.



proposed amendment to a Postal Appropriations bill that subjected to federal penalties any person who sent liquor ads into dry areas with state laws prohibiting liquor advertising “caught the dries by surprise.” “[T]he resolutions of the 1915 convention of the Anti-Saloon League called for barring liquor from interstate commerce” but, fearful “that such a nationalistic course would weaken southern states’-rights support for the league program,” “the league had taken no action on this proposal.”<sup>260</sup> Only after the passage of the Reed Amendment and the subsequent mobilization for war later in the year did the movement for national prohibition appear to have sufficient momentum.<sup>261</sup> State policy on the liquor question had for years been a patchwork ranging from licensure to local option to regulation to prohibition.<sup>262</sup> In January of 1917, twenty-six years after the enactment of the Wilson Act, the prospects for a uniform national policy on the liquor question still looked doubtful—certainly much dimmer than prospects for a uniform national compensation law for maritime workplace injuries must have seemed.<sup>263</sup> The diversity of local schemes of liquor regulation, coupled with the intensity of feeling on this issue, had long militated against a uniform federal solution. White, McKenna, and Day may well have been prepared to compromise the uniformity requirement on the Commerce Clause side because, given the constraints imposed by *Leisy*, it appeared to be the only politically feasible alternative to the prospect of a virtually unregulated interstate liquor market.<sup>264</sup> By contrast,

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<sup>260</sup>Id. at 238-39.

<sup>261</sup>Id. at 240-55. As Charles Merz put it, “The war did three things for prohibition. It centralized authority in Washington; it stressed the importance of saving food; and it outlawed all things German.” See T. Pegram, *Battling Demon Rum* 144-47 (1998).

<sup>262</sup>See the remarks of Representative Hill in the Wilson Act debates: “regulation and control of the liquor traffic . . . can not be done by Congress by one uniform and inflexible rule without breaking down or interfering with the laws of the various States on this important subject. The laws of no two States regulating the liquor traffic are precisely alike. Some, like Iowa and Kansas, have absolute prohibition; all the others, Illinois included, have the license system in one form or another.” 21 Cong. Rec. 7519 (1890); Snider, *supra* note 104, at 45 (1917); E. Freund, *The Police Power* 195-205 (1905).

<sup>263</sup>At the beginning of 1917, fewer than half the states were dry. Twenty-three had adopted prohibition by the start of the year; four more would fall in step before the year’s end. See E. Cherrington, *The Evolution of Prohibition in the United States* 317-64 (1920, reprint 1969); Pegram, *supra* note 261, at 136-65; J. Timberlake, *Prohibition and the Progressive Movement 1900-1920*, at 149-84 (1966). Dry victories in the 1916 elections augured well for congressional passage of the Eighteenth Amendment, but by no means assured ratification by the requisite thirty-six states. Timberlake, *supra*, at 172.

<sup>264</sup>This had been the approach taken by some reluctant proponents of the Wilson Act. Believing that *Leisy* had been incorrectly decided, they saw the Act as the only means by which the rightful police powers of the States could be restored to them, and accordingly swallowed their own conscientious nondelagation and uniformity objections to the bill’s constitutionality. See 21 Cong. 5086-88 (remarks of Sen. Evarts); *id.* at 4957-58, 5325-30, 5425-26 (remarks of Sen. George). As Thomas Reed Powell put it, *Clark Distilling* “permits Congress and the states to cooperate so that a state may be allowed to enforce its local policy without waiting till that policy receives sufficient sanction to be imposed throughout the nation. A contrary decision in the principal case would have been most regrettable.” Powell, *supra* note 142, at 139.

there appeared to be something approaching a policy consensus on the desirability of workmen's compensation for maritime injuries. The unanimous congressional support for the Johnson Amendment and its 1922 successor may have served only to reinforce a view that a compromise of the uniformity requirement was here unnecessary. It may be, then, that this constitutional divergence of Commerce Clause and admiralty jurisprudence occurred not because liquor was *constitutionally* "different," but because its *political* difference had a powerful shaping effect on Commerce Clause jurisprudence. And it was this shaping effect that provided part of the contrast making admiralty appear constitutionally "special."<sup>265</sup>

## VIII CONCLUSION

The foregoing analysis suggests some larger lessons. The first is that, despite the jurisprudential distinctiveness of maritime law, we cannot develop an adequate understanding of *Jensen* and its progeny without situating those landmark admiralty decisions in the broader context of federalism jurisprudence and law reform from which they emerged. Armed with an appreciation of the impulses animating the contemporary uniform laws movement and of the cognate developments in Commerce Clause jurisprudence prompted by other Progressive Era social reforms, we are afforded a view of the decisions unavailable from within the narrower confines of the subdiscipline of admiralty law. Second, as the debates over initiatives such as the Pure Food and Drug Act and the Mann Act illustrate, the flurry of Progressive Era congressional activity seeking to supply federal solutions to social problems was prompted in large measure by changes in the Court's dormant Commerce Clause and Admiralty Clause jurisprudence that placed novel limitations on the exercise of state police powers. These statutes and the decisions upholding them were, to be sure, manifestations of a new, nationalist impulse toward regulatory centralization in an increasingly complex and integrated national economy. But by dissociating these statutes from the dormant Commerce Clause context from which they emerged, we lose sight of

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<sup>265</sup>It is instructive to compare the case of convict-made goods, the other area in which the Court upheld Wilson and Webb-Kenyon style solutions to the dormant Commerce Clause problem. At the end of 1937, by which time the Court had upheld both the Hawes-Copper Act and the Ashurst-Summers Act, there were still fifteen states that had no law prohibiting or regulating the sale of prison-made goods. Kallenbach, *supra* note 104, at 302. Twelve states prohibited the sale or distribution of prison-made goods altogether; sixteen additional states had enacted general prohibitions with certain exemptions, and eight states specifically prohibited the sale or distribution of imported prison-made goods. 45 Monthly Lab. Rev. 1424 (1937), reprinting Prison Industrial Organization Administration, Chart and Comment on Laws Affecting the Labor of Prisoners and the Sale and Distribution of Prison-Made Products in the United States, Bulletin No. 1 (1937).

the fact that they, like the Johnson Amendment and the LHWCA, were undeniably direct responses to constitutional disabilities the Court had imposed upon state regulatory authority. Third, the underlying political realities facing particular social reform movements informed the type of cooperative solution that Congress would supply to ameliorate the predicament into which states and localities had been placed by these turns in the Court's federalism jurisprudence. Where there was virtual policy consensus among the states, as there was with respect to lotteries, impure food and drugs, prostitution, and workmen's compensation, Congress ultimately solved the dormant commerce or Admiralty Clause problem by enacting a uniform rule that applied throughout the relevant federal jurisdiction. Only where there was substantial heterogeneity in the state regulatory response, as there was in the cases of temperance and convict labor, would Congress typically employ the divesting formula of the Wilson and Webb-Kenyon Acts. Though unenforced by the Court in the Commerce Clause context, the uniformity and nondelegation norms continued to enjoy substantial endorsement from the Congress and the White House. This made uniform national legislation the preferred solution to the dormant Commerce Clause problem created by *Leisy*, and the path of least resistance for reformers in the national legislature. Fourth, as *Knickerbocker Ice* and *Dawson* teach us, those same underlying political realities would play a role in the Court's decision whether to accept the particular cooperative solution proposed by Congress, or to channel congressional action into an alternative form. Finally and, appropriately, fifth, no historian can hope to come to grips with the constitutional history of the Progressive Era without eventually turning to liquor.