

Saint Louis University Law Journal

Volume 43
Number 4 *A Tribute to the Honorable Theodore
McMillian (Fall 1999)*

Article 15

1999

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Recommended Citation

Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 St. Louis U. L.J. (1999).
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AN ESSAY ON FEDERAL COMMON LAW AND ADMIRALTY

ROBERT FORCE*

Today we characterize that part of substantive maritime law which is derived from judicial decisions rather than legislation as “the general maritime law.”¹ As was noted by the Court of Appeals for the Second Circuit, the general maritime law is probably the oldest body of federal common law.² Underlying the theme of this session is the question, or perhaps, challenge: by what authority do federal courts create substantive rules of maritime law? Asked differently, why should maritime, or admiralty, law be any different from other areas of private law where, in the absence of congressional legislation, state law provides the substantive rule of law?

Several articles written by non-admiralty scholars have appeared in respected law reviews, asserting that the bulk of what admiralty lawyers and teachers refer to as the general maritime law is unconstitutional.³ Their argument, stated in overly simplified terms, is that there is nothing in the Constitution that delegates to the federal government the power to legislate admiralty and maritime rules, except to the extent that such rules fall within the expressly delegated powers of Congress, such as the power to regulate interstate and foreign commerce under the commerce clause. In other words, Congress may enact maritime legislation only by exercising powers expressly delegated to it in Article I of the Constitution. The argument assumes that even if Article III, the article of the Constitution which creates the judicial branch, permits an inference of legislative authority from the grant of jurisdiction over “admiralty or maritime cases,” that delegation of powers is conferred to the legislative branch of the government. The power to legislate has been purposefully vested in the branch of government directly accountable to the people, not in a judiciary whose members are appointed for life. Furthermore,

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1. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* § 3-1 (2d ed. 1994).
2. *Zicherman v. Korean Air Lines Co.*, 43 F.3d 18, 21 (2d Cir. 1994) (citing *In re Air Disaster at Lockerbie Scotland*, 37 F.3d 804, 828 (2d Cir. 1994)).
3. See, e.g., Ernest A. Young, *Preemption at Sea*, 67 *GEO. WASH. L. REV.* 273 (1999); Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 *U. PA. L. REV.* 1245, 1341-60 (1996), and authorities cited therein.

the enactment of federal legislation inevitably implicates considerations of federalism, especially when federal rules preempt state law in order to achieve uniformity. The decision to formulate a federal rule displacing a state rule, so the argument goes, should be made by the branch of government likely to be most sensitive to the interests of the states. This analysis sets the stage for the final step of the attack on the general maritime law, that because nothing in the Constitution delegates to the federal judiciary the power to make substantive rules, *i.e.*, to legislate, the federal judiciary has no power to preempt state law. The underlying theory behind this attack is simply that the general maritime law, being nothing more than a form of federal common law, should not be an exception to the rationale of *Erie Railroad Co. v. Tompkins*.⁴ The objects of the argument are to remove the law-making and preemptive effects of the general maritime law and to “re-invest” the authority to establish maritime law in the states.

This contention is not new. It has been debated among the justices of the Supreme Court from the nation’s earliest times and has been rejected by the Court for at least 150 years. For example, in 1857, competing philosophies were expressed in *Jackson v. The Steamboat Magnolia*,⁵ a case in which a majority of the Court agreed to the assertion of federal admiralty jurisdiction over a collision on the Alabama River. The majority rejected the contention that federal admiralty jurisdiction was absent because the waters were not tidal waters and the collision occurred within the body of the county, that is, within the state. In concluding that the lower federal court could exercise jurisdiction, the Court acknowledged that it had abandoned the test of admiralty jurisdiction used in England and substituted a “navigable waters” test for admiralty jurisdiction. The new test was better suited to the geography of the United States which, unlike England, has a great inland river system.

Justice McClean briefly expressed a pragmatic view in his concurring opinion:

Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be common, chancery, or admiralty law, we should be more instructed by studying its present adaptations to human concerns, than to trace it back to its beginnings. Every one is more interested and delighted to look upon the majestic and flowing river, than by following its current upwards until it becomes lost in its mountain rivulets.⁶

4. 304 U.S. 64 (1938).

5. 61 U.S. 296 (1857).

6. *Id.* at 307.

A historical view was expressed in Justice Daniel's dissenting opinion:

But the court, after having declared the correctness of the English rule and its adoption here, go on to say, nevertheless, 'that a definition which would *at this day* limit public rivers to *tide-water rivers* is wholly inadmissible.' And why? Because the Constitution, either by express language or by necessary implication, recognizes or looks to any change or enlargement in the principles or the extent of admiralty jurisdiction? Oh, no! For no such reason as this. "But we have *now* (say the court) thousands of miles of public navigable water, including lakes and rivers, in which there is no tide." Such is the argument of the court, and, correctly interpreted, it amounts to this: The Constitution, which at its adoption suited perfectly well the situation of the country, and which *then* was unquestionably of supreme authority, we now adjudge to have become unequal to the exigencies of the times; it must therefore be substituted by something more efficient; and as the people, and the States, and the Federal Legislature, are tardy or delinquent in making this substitution, the duty or the credit of this beneficent work must be devolved upon the judiciary. It is said by the court, "that there is certainly no reason for admiralty power over a public tide-water, which does not apply with equal force to any other public waters used for commercial purposes." Let this proposition be admitted literally, it would fall infinitely short of a demonstration, that because the Constitution, adequate to every exigency when created, did not comprise predicaments not then in existence or in contemplation, it can be stretched, by any application of judicial torture, to cover any such exigency, either real or supposed.⁷

Jackson v. The Steamboat Magnolia, and the cases on which it relied, involved important issues. To some extent, the enlargement of federal jurisdiction came at the expense of the state courts. Where admiralty jurisdiction is present, suitors may bypass state courts and bring their actions in federal court. Further, in state court, the right to a jury trial is preserved in ordinary contract and tort cases. In admiralty, there is no right to a jury trial. An expansive view of federal admiralty jurisdiction permits cases which otherwise would be tried to a jury in state courts to be tried *without* a jury in federal admiralty courts. The justices who opposed a broad view of federal admiralty jurisdiction were deferential to state courts and protective of the right to a jury trial. But they also knew that another important issue was stake. Underlying the jurisdictional issue lay the question of whether federal judges had the power to make rules of admiralty and maritime law that would apply to actions arising in inland waters. If admiralty jurisdiction had been restricted to events and transactions on the high seas and tidal waters, then all litigation which arose out of events and transactions on the many rivers and lakes in the United States would have been relegated to state courts (assuming the parties

7. *Id.* at 319 (emphasis added).

were not diverse), where disputes would have been resolved under state law.⁸ In a series of decisions including *The Steamboat Magnolia*, the majority of the Supreme Court justices who extended admiralty jurisdiction also impliedly extended the authority of the Court to formulate general rules of maritime law applicable to disputes arising on *all* navigable waters of the United States, including inland waters. With the expansion of admiralty jurisdiction came the expansion of federal law, in the sense that rules of the general maritime law would apply to a wider range of cases, including those of a more localized nature.

This fact was not lost on the Court. As Justice Campbell dissenting in *The Steamboat Magnolia* bemoaned:

In the court of admiralty the people have no place as jurors. A single judge, deriving his appointment from an independent Government, administers in that court a code which a Federal judge has described as 'resting on the general principles of maritime law, and that it is not competent to the States, by any local legislation, to enlarge, to limit, or narrow it.'

If the principle of this decree is carried to its logical extent, all cases arising in the transportation of property or persons from the towns and landing-places of the different States, to other towns and landing-places, whether in or out of the State; all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, in either; all cases of supply to those engaged in the navigation, not to enumerate others, will be cognizable in the District Courts of the United States. If the dogma of judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn *ad aliud examen*, and placed under the dominion of a foreign code, *whether they arise among citizens or others*. The States are deprived of the power to mould their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged-abridged to the precise extent, that a judge appointed by another Government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State.⁹

What has transpired since those days. To put matters into perspective, I propose to take a few moments to summarize some of the most important sources of United States maritime law. Today, maritime law is a blend of congressional legislation (some of which implements international

8. Congress itself had previously intervened by conferring "admiralty and maritime jurisdiction" over the Great Lakes through the Great Lakes Act of 1845. Act of Feb. 26, 1845, 5 Stat. 726-727, c. 20 (codified as amended at 28 U.S.C. § 1873 (1994)). *See also* *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. 443 (1851).

9. *Jackson*, 61 U.S. at 341 (citation omitted).

conventions), the general maritime law, and state law.¹⁰ Let us examine various areas of maritime law.

COMMERCIAL LAW

Congress has enacted at least five statutes that deal with maritime commercial law. The Harter Act,¹¹ the Carriage of Goods by Sea Act (“COGSA”)¹² and the Pomerene Act¹³ distinctly apply variously ways to the transportation of goods by water. None of these statutes contains a comprehensive treatment of the subject matter. In fact, Harter and COGSA were designed, more or less, to address specific problems in commercial shipping. Where there is a dispute arising out of the carriage of goods and there is no rule specified in these statutes, courts create rules of general maritime law. Sometimes courts merely interpret or fill gaps, such as in devising a rule to deal with application of the COGSA package limitation of liability to cargo shipped in containers,¹⁴ or in determining the affect of a deviation on the availability of COGSA defenses and limitation of liability.¹⁵ Sometimes courts actually go beyond the bounds of legislation and formulate rules of general maritime law, such as rules for determining the validity of *Himalaya* clauses¹⁶ or the effect to be given to the incorporation of COGSA in contracts not otherwise subject to COGSA *ex proprio vigore*.¹⁷ Of course, there are some cases not governed by congressional legislation where federal courts have applied state law.¹⁸

In the commercial area, where contracts of carriage are not governed by bills of lading, such as in voyage charter parties, none of the aforementioned legislation applies as a matter of law, although the parties may incorporate all or part of COGSA into their contract of carriage. In such cases, particularly

10. There are also occasional references to ancient law, custom, English law and the laws of other countries. See SCHOENBAUM *supra* note 1, at § 3-1.

11. Harter Act, ch. 105, 27 Stat. 445 (1893) (current version at 46 U. S.C. app. §§ 190-96 (1994)).

12. Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (current version at 46 U.S.C. app. §§ 1300-15 (1994)).

13. Pomerene Act, 49 U.S.C. §§ 80101-16 (1994).

14. See, e.g., *Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636 (2d Cir. 1991).

15. See, e.g., *General Electric Co. v. S.S. Nancy Lykes*, 536 F. Supp. 687 (S.D.N.Y. 1982), *aff'd*, 706 F.2d 80 (1983), *cert. denied*, 464 U.S. 849 (1983).

16. See, e.g., *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361 (9th Cir. 1974).

17. See, e.g., *Jamaica Nutrition Holdings, Ltd. v. United Shipping Co.*, 643 F.2d 376 (5th Cir. 1981).

18. See, e.g., *Colgate Palmolive v. S/S Dart Canada*, 724 F.2d 313, 315, 316 (2d Cir. 1983), *cert. denied*, 466 U.S. 963 (1984); *All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosun*, 7 F.3d 1427, 1432 (9th Cir. 1993); *O'Connell Machinery Co. v. M/V Americana*, 797 F.2d 1130, 1137 (2d Cir. 1986); *cf. Wemhoener Pressen v. Ceres Marine Terminals, Inc.*, 5 F.3d 734 (4th Cir. 1993).

where goods are carried pursuant to charter parties, the controlling law is invariably general maritime law. Contracts of affreightment often utilize standardized forms containing standard language. Some forms are used worldwide or in particular trades, and the terms incorporated therein have developed meanings that are familiar to owners, charterers, brokers and others in the particular industry, as well as the courts.

The same may be said of other charter party agreements, demise and time charters, which are not contracts of affreightment. The meaning of standard terms in charter parties has become an important part of the general maritime law. Chartering vessels is an international business generally conducted by brokers located at various exchanges and often involves owners and charterers of different nationalities. Even where a charter party involves only local interests, *i.e.*, the owner and charterer are both local, such as is common in the charter of a barge to be used in river trade or in offshore activities in the Gulf of Mexico, the parties may still rely on standard form contracts embracing standard terms. The law applied in maritime commercial disputes, such as those involving bills of lading and charter parties, may be characterized as “transnational,” because the industry operates in a transnational mode.

There are other statutes that deal with commercial law. The Ship Mortgage Act¹⁹ and the maritime liens provisions of that Act²⁰ are two examples. The Ship Mortgage Act is quite comprehensive but the liens provisions are not. The latter deals only with liens for “necessaries” and not with tort or other liens. A considerable amount of maritime lien law, therefore, is contained in the general maritime law that has evolved over many years.

The general maritime law governs other maritime contracts. Since this area is not composed of a set of comprehensive rules, it is not unusual for courts to look to state law in the absence of federal precedent.²¹ Some contracts which appear to have a maritime flavor are nonetheless subject exclusively to state law. Thus, anomalies exist, the preeminent examples being that contracts to build vessels, mortgages to finance the building of vessels, and contracts for the sale of vessels have been held to be non-maritime contracts and are subject to state law, whereas contracts to repair vessels and to charter vessels are maritime contracts.²²

19. Ship Mortgage Act, 46 U.S.C. §§ 31301-43 (1994).

20. 46 U.S.C. § 31341. (1994).

21. *See, e.g.*, *Transatlantic Financing Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966) (citing the Uniform Commercial Code).

22. *See, e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 22-28 (2d ed. 1975).

PERSONAL INJURY AND DEATH

In the personal injury area, there is a similar pattern. Congress has enacted the Jones Act,²³ the Death on the High Seas Act (“DOHSA”),²⁴ the Longshore and Harbor Workers’ Compensation Act (“LHWCA”),²⁵ and the Outer Continental Shelf Lands Act,²⁶ all of which create remedies available to persons engaged in various aspects of maritime employment who are injured or killed. The personal injury provisions in the Jones Act and section 905(b) of the LHWCA typically create a right of action for negligence. These statutes, however, neither define “negligence” nor enumerate the damages that can be recovered. The Jones Act, by incorporation of FELA,²⁷ does prescribe the consequences of contributory negligence and assumption of risk; § 905(b) of the LHWCA does not, nor does DOHSA. There are no statutory provisions dealing with apportionment of fault in the context of joint tortfeasors, indemnity, or contribution.

There is no substantive legislation that deals with injury or death of passengers, save the provisions of DOHSA, which apply to all deaths on the high seas. Otherwise, cases involving passengers are resolved according to the general maritime law. There is no statute that applies to actions maintained by the survivors of persons killed in state territorial waters, except under the Jones Act and to a lesser extent under § 905(b) of the LHWCA.²⁸ Existing law was developed in the *Moragne v. State Marine Lines, Inc.*²⁹ decision and later expanded in *Sea-Land Services, Inc. v. Gaudet*³⁰ and *Miles v. Apex Marine*.³¹ Initially, courts accorded to seamen the right to maintenance and cure.³² Likewise, federal admiralty courts have created the seaman’s right under the general maritime law to an action for unseaworthiness, extending the remedy to *Sieracki* seamen³³ not covered by the LHWCA. The entire body of maritime products liability law is judge-made.³⁴ All of the rules relating to maritime contribution and indemnity are contained in the general maritime law.

23. Jones Act, ch. 153, 38 Stat. 1185 (1915) (current version at 46 U.S.C. app. § 688 (1994)).

24. Death on the High Seas by Wrongful Act, ch. 111, 41 Stat. 537 (1920) (current version at 46 U.S.C. app. §§ 761-67 (1994)).

25. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-48 (1994 & Supp. III 1997).

26. Outer Continental Shelf Lands Act, 46 U.S.C. §§ 1331-34 (1940) (repealed 1980).

27. Federal Employer’s Liability Act, 45 U.S.C. §§ 51-60 (1994).

28. *But see* *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996).

29. 398 U.S. 375 (1970).

30. 414 U.S. 573 (1974).

31. 498 U.S. 19 (1990).

32. *See, e.g.,* *The Osceola*, 189 U.S. 158 (1903).

33. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 99-100 (1946).

34. *See, e.g.,* *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 859 (1986).

While the position of state law in the maritime tort area may not be as significant as in the realm of contract law, it is not necessarily irrelevant. In *Yamaha Motor Corp. v. Calhoun*,³⁵ the Supreme Court held that survivors of a nonseafarer killed in state territorial waters may invoke state wrongful death remedies.³⁶ There have also been exceptional cases in which state law has been used to supplement the general maritime law by providing additional state remedies in personal injury cases.³⁷ Finally, state law has been influential in the development of the general maritime law, most recently in the newly developing tort area of maritime products liability.

COLLISION

The United States has ratified the International Regulations for Preventing Collisions at Sea ("COLREGS"),³⁸ the Safety of Life at Sea Convention ("SOLAS Convention"),³⁹ including the recent International Safety Management Code, as well as a number of other conventions designed to promote safety at sea. But the United States has *not* ratified the Collision Convention,⁴⁰ which deals with damages in collision cases, nor has it enacted comparable legislation. The entire law of collision, including the basis of liability, defenses, damages, proof of fault, presumptions and causation, is a product of the general maritime law, regardless of whether the collision occurs on the high seas, state territorial waters, or on inland waters.⁴¹

LIMITATION OF LIABILITY

The unique maritime right to limitation of liability has been established and implemented by statute,⁴² and embellished by the Supplemental Rules of Civil Procedure.⁴³ Nonetheless, much of the law of limitation is judge-made law.⁴⁴

35. 516 U.S. 199.

36. *Id.* at 207.

37. *Green v. Industrial Helicopters, Inc.*, 593 So. 2d 634 (La. 1992), *cert. denied*, 506 U.S. 819 (1992). *Cf. Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986) (stating that courts cannot supplement DOHSA); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (holding that no state worker's compensation exists for longshoremen).

38. International Regulations for Prevention of Collisions at Sea, 33 U.S.C. §§ 1601-08 (1994).

39. Safety of Life at Sea Convention, 32 U.S.T. 47, T.I.R.S. No. 9700 (1974).

40. International Convention for the Unification of Certain Rules of Law with respect to Collision Between Vessels, U.N. Regulation No. 134(a) (Brussels, September 23, 1910).

41. See GILMORE & BLACK, *supra* note 22, at ch. 7; SCHOENBAUM, *supra* note 1, at ch. 12.

42. See Limitation of Liability Act, ch. 43, §4, 9 Stat. 635 (1851) (current version at 46 U.S.C. app. §§ 181-196 (1994 & Supp. III 1997). Sections 190-96 are also familiarly known as the Harter Act. See *supra* note 11 and accompanying text.

43. Supplemental Admiralty and Maritime Claims Rule F, 28 U.S.C. (1994).

44. See GILMORE & BLACK, *supra* note 22, at ch. 10; SCHOENBAUM, *supra* note 1, at ch. 3.

GENERAL AVERAGE

In contrast, the law of general average, although based in contract, is viewed as part of the general maritime law. It is considered to be international in scope, much the same as the law of charter parties.⁴⁵

TOWAGE

The law of towage is derived from the general maritime law.⁴⁶

PILOTAGE

The law of pilotage is a blend of both federal and state regulatory law. The rules of liability, however, are found in the general maritime law.⁴⁷

SALVAGE

Salvage law,⁴⁸ that is, the rules applicable in pure salvage situations, originally consisted of rules of the general maritime law. Subsequently, the United States became a party to an international salvage convention.⁴⁹ The rules of contract salvage are contained in the general maritime law.

ENVIRONMENTAL LAW

In the environmental area,⁵⁰ there is substantial legislation not only on the regulatory aspect, but also as to liability. The United States is a party to numerous conventions that deal with the prevention of pollution. With regard to oil pollution, however, Congress has expressly declined to preempt state law.⁵¹

MARINE INSURANCE

As to marine insurance, there is no statutory scheme comparable to the British Marine Insurance Act.⁵² After the decision in *Wilburn Boat Co. v.*

45. See GILMORE & BLACK, *supra* note 22, at ch. 5; SCHOENBAUM, *supra* note 1, at ch. 15.

46. See GILMORE & BLACK, *supra* note 22, at 515-20; SCHOENBAUM, *supra* note 1, at ch. 10.

47. See GILMORE & BLACK, *supra* note 22, at 520-22; SCHOENBAUM, *supra* note 1, at ch. 11.

48. See GILMORE & BLACK, *supra* note 22, at ch. 8; SCHOENBAUM, *supra* note 1, at ch. 14.

49. The United States became a party to the International Convention on Salvage of 1910. This was superseded by the International Convention on Salvage of 1989. See Cong. Rec. S15398, Oct. 29, 1991. See also the Salvage Act, ch. 268, 31, 37 Stat. 242 (1912).

50. See SCHOENBAUM, *supra* note 1, at ch. 16.

51. See Oil Pollution Act, 33 U.S.C. §§ 2701-61 (1994 and Supp. III 1997); see generally, Robert Force, *Limitation of Liability in Oil Pollution Cases: In Search of Concursus or Procedural Alternatives to Concursus*, 22 TUL. MAR. L.J. 331 (1998).

52. Marine Insurance Act 1906, 6 Edw. 7, ch. 41 (Eng.).

Fireman's Fund Insurance Co.,⁵³ the law of marine insurance is a mixture of the general maritime law and state law.⁵⁴

MISCELLANEOUS

Finally, there is a considerable body of congressional legislation and federal administrative regulation dealing with a variety of matters including the specification of the duties and the delegation of regulatory authority to the Coast Guard, registration of vessels, customs rules, licensing and protection of seamen, etc.

This laborious exercise was not undertaken gratuitously but rather to illustrate that the law presently applied to what may be characterized as maritime activities in a broad sense represents a fairly elaborate scheme in which federal statutes, the general maritime law, and state law provide the substantive rules. Both federal and state courts play a significant role in applying those rules and sometimes in formulating the rules. The present situation is not a blueprint with a perfectly symmetrical or rational delineation of rule-creating authority, but rather a borderless jigsaw puzzle with overlapping areas of authority. The complexity of the law, however, does not mean that maritime law is not a "single body" of law, or, despite prevailing distinctions, that maritime law is not relatively uniform.

In reviewing the role of the general maritime law, one encounters similar complexity. Contemporary Supreme Court decisions illustrate the point. At one extreme, in *East River S.S. Corp. v. Transamerica Delaval, Inc.*,⁵⁵ the Court quite simply, and without fanfare, created a new maritime tort of products liability, as to which, federal law, rather than state law, will presumably be applied. At the other extreme, the *Yamaha*⁵⁶ court allowed the plaintiffs to invoke state wrongful death remedies in a case where the decedent was killed in state territorial waters. Likewise, in *Miller v. American Dredging Co.*,⁵⁷ the Court upheld the application of Louisiana's *forum non conveniens* statute to a case within admiralty jurisdiction. Using yet a different approach, the Court in *Miles v. Apex Marine Corp.*,⁵⁸ expanded the judicially-created *Moragne*⁵⁹ wrongful death remedy to include the beneficiaries of seamen killed in territorial waters as result of unseaworthy conditions. In deference to the Jones Act and in the interest of uniformity, the Court refused to allow recovery for loss of consortium. In its most recent decision, *Dooley Korean Airlines Co.*,

53. 348 U.S. 310, 321 (1955) (holding that in the absence of an established maritime rule, state law should be applied).

54. See GILMORE & BLACK, *supra* note 22, at ch. 2.

55. 476 U.S. 858, 865 (1986).

56. 516 U.S. at 199.

57. 510 U.S. 443 (1992).

58. 498 U.S. 19 (1990).

59. 398 U.S. 375, 389 (1970).

Ltd.,⁶⁰ the Court refused to exercise its power to create general maritime law by declining to follow several courts of appeals in recognizing a “survival” action as a complement to the Death on the High Seas Act.⁶¹ It concluded that if Congress had wanted to provide a survival counterpart to DOHSA, it would have done so. Therefore, it is difficult make sweeping statements about the current Court’s views on the general maritime law. Nevertheless, in areas where Congress *has* legislated, the present Court seems less willing to act as a creator of general maritime law. It is also safe to say, based on the Court’s decisions in *Miller*⁶² and *Yamaha*,⁶³ that not all judicially-created general maritime rules, whether substantive or procedural, necessarily preempt state laws.⁶⁴ Beyond these statements, one cannot divine much more from the Court’s recent opinions. That the Supreme Court appears to act inconsistently reveals the difficulty and complexity of the current debate and helps explain why issues involving the creation of general maritime law by the Court and the resultant preemption of state law have been continuously debated within the Court itself.

As to the matter at hand, the case against the general maritime law is premised on two considerations: lack of constitutional authority and federalism. A broad interpretation of the scope of United States admiralty jurisdiction, no doubt, has an impact on federalism. Not only does admiralty jurisdiction open the federal courts to litigants who otherwise would be relegated to state courts, but usually, although not invariably, it also implicates the application of substantive federal admiralty law.⁶⁵

When Congress enacts maritime legislation under the Commerce Clause or some other express power, there is no question that conflicting state law must yield to the Supremacy Clause. The same result ensues when courts put a judicial “gloss” on congressional legislation, or fill gaps in federal legislation. In the absence of legislative action, what is the status of the general maritime law? The question is, in reality, two questions: (1) do federal courts have constitutional authority to create substantive rules of maritime law?, and (2) if so, should those substantive rules preempt inconsistent state law? I maintain that the answer to the first question should be a resounding “Yes”; the answer to the second should be “It depends.”

I start with the premise that not every controversy regarding “federal common law” is susceptible of resolution by way of a single theory or formula.

60. 118 S. Ct. 1890, 1895 (1998).

61. *See, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890 (5th Cir. 1984).

62. 506 U.S. 809 (1992).

63. 516 U.S. 199 (1996).

64. *Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545 (1995) (citing *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 864 (1986)). *But see Yamaha*, 516 U.S. at 210 n.8, 216 n.14.

65. *See Grubert*, 513 U.S. at 545 (citing *East River S.S. Corp.*, 476 U.S. at 864).

The language and the history of particular provisions in the Constitution are important in trying to discover their meaning. It is submitted, however, that practical realities of particular circumstances should be given some weight. The latter statement is all the more cogent when the text of the Constitution, its "legislative history," and the objectives of the framers are unclear. Of course, the mere fact that the present system has evolved does not mean that it is the best system. A congressionally enacted, comprehensive maritime code may well provide a better approach as some countries have concluded. But that is not likely to occur. Moreover, merely because the system has evolved does not presuppose that it is "constitutional" in the context of *Erie v. Tompkins*.⁶⁶ On the other hand, simply because *Erie* is now regarded as the correct approach in diversity cases, does not necessarily signify that it should be the controlling approach in admiralty cases, despite the ease with which the logic of *Erie* might be applied to admiralty cases.

Notwithstanding the fact that the general maritime law has been characterized as part of the federal common law, it is submitted that maritime law, especially in light of the unprecedented grant of admiralty and maritime jurisdiction in Article III, is sufficiently unique so as to merit individual analysis in determining whether it is a valid creature of federal judicial power.

What then is so special about the general maritime law? There are several responses to this question.

1. The general maritime law is an invaluable legacy from the past. It reflects an evolution from the grant of admiralty and maritime jurisdiction in Article III of the Constitution to the present. The development of the general maritime law as we know it should not be undermined by arguments that may be intellectually appealing but that nevertheless completely ignore the law's historical development. The arguments for restricting the scope of the general maritime law have been considered and rejected for nearly two centuries. During that period, many Supreme Court justices have played a role in the development of the general maritime law up to its present form. We should be loathe to discount their collective experience and contributions. The Court that decided *Erie* never extended its rationale, or its holding, to the general maritime law. In fact, a subsequent Supreme Court decision expressly refused to apply *Erie* to the general maritime law.⁶⁷

2. It has been demonstrated that the admiralty and maritime jurisdiction conferred by the Constitution was intended and understood by the framers to extend not only to matters involving relations with other countries and their citizens, that is, those aspects of maritime law which are incidents of sovereignty or which derive from international law, but that it also included

66. 304 U.S. 64 (1938).

67. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 411 (1953).

ordinary private law cases, such as seamen's wage claims.⁶⁸ In the era immediately following ratification of the Constitution, lawyers regarded federal court as the appropriate venue in which to initiate admiralty and maritime actions, including private law claims.⁶⁹

3. Early cases indicate that private maritime law in the United States was contemplated to be judge-made law, and that it was treated as a single, uniform body of law regardless of whether cases were heard in federal or state court.⁷⁰ Although the expanding scope of admiralty jurisdiction and the growing complexity of maritime law have brought increasingly more "local" matters before federal courts, this does not undermine the benefits, such as uniformity, of a *single* system as compared to the pre-*Erie* dual system which existed in diversity cases.

The very existence and the language of the "saving to suitors" clause⁷¹ supports this conclusion. The statute applies where there is jurisdictional overlap between actions that could be brought as admiralty actions and those that could be brought at law. The clause creates the option for plaintiffs to bring their actions as either admiralty actions in federal court or as actions at law either in a state court or in a federal court where diversity jurisdiction is present. What the statute "saves," however, is the jurisdictional capacity to assert the claim in a common law action, which, effectuates the right to have a jury adjudicate the dispute. The clause does not purport to contemplate the application of different substantive rules depending on whether the action is brought at law or in admiralty. Courts that have entertained cases pursuant to the saving to suitors clause have applied the substantive rules of the general maritime law, except in those limited instances where it has been deemed

68. See generally, Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto Federal Common Law of Admiralty*, 30 J. MAR. L. & COM. 316 (1999); William R. Casto, *The Origin of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates*, 37 AM. J. LEG. HIST. 117 (1993). Casto asserts that the primary motive for enacting the admiralty jurisdiction clause was to confer federal jurisdiction of public law matters, but also concludes:

The most that can be said is that the drafters and the ratifiers of the Constitution's admiralty clause knew that the clause's general language encompassed private disputes but gave little thought to the matter. This combination of knowledge and indifference could be viewed as license for future generations to shape admiralty jurisdiction according to future values and needs.

Id. at 156.

69. See Gutoff, *supra* note 68, at 383-87.

70. See David W. Robertson, 184 ADMIRALTY & FEDERALISM (1970); Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, to be published in 61 U. PITT. L. REV. (forthcoming 2000).

71. 28 U.S.C. § 1333(1) (1994):

The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

appropriate for state law to supplement or fill gaps in the general maritime law.⁷²

4. The grant of admiralty jurisdiction in Article III is *sui generis*. With the exception of “federal question” jurisdiction and jurisdiction over certain land disputes, all other bases for jurisdiction enumerated in Article III are premised on the status of the litigants, rather than the substance of the dispute. Unlike federal question jurisdiction, the scope of which is at least superficially ascertainable from the text of the Constitution itself or the relevant treaty or statute, there is no similar source for determining the substantive rule of law to be applied in admiralty and maritime cases. Surely it was contemplated that federal judges, in the absence of legislation, would find appropriate sources and rules to apply in admiralty cases, just as their English and state counterparts had done before them.⁷³

5. Making admiralty law “federal law” promotes uniformity of the law. Although many areas of law might benefit from uniformity, it is particularly important in the maritime arena. First, there is an intimate relationship between maritime transportation and interstate and foreign commerce. Second, maritime law is often applied in situations involving relations between foreign nations and their citizens and the United States and its citizens. Third, the goal of uniformity in maritime matters is an international objective. This differentiates maritime law from other areas of the federal common law. From the earliest of times, judges recognized that maritime law had an international dimension and that some rules were, in modern parlance, “transnational.” The Comité Maritime Internationale and the various national maritime law associations throughout the world, including the Maritime Law Association of the United States, have been committed to achieving international uniformity in many areas of private maritime law. Today, the body of maritime law includes many international conventions; some have been subscribed to by the United States, including measures addressing private law.

6. Necessity requires the manifestation of a general maritime law. What rules would apply to matters outside the jurisdiction of any state? Although numerous statutes provide rules of maritime law, there are gaps in existing legislation, and important areas where there is no legislation at all.

If the Supreme Court applied the *Erie* rationale to the general maritime law tomorrow, assuredly there would be chaos. By and large, there is a single or unitary system of maritime law in the United States, although it is fraught with complexities. The system is based primarily on federal statutory and general maritime law and only to a limited extent on state law. If general maritime law were to disappear overnight, there would be nothing to effectively replace it. There is no state law regarding collision, charter parties, maritime liens,

72. See generally, Gutoff, *supra* note 70 and sources cited therein.

73. See Gutoff, *supra* note 68, at 378-80.

general average, etc. Whose law would apply on the high seas? The evolution of this system warrants a presumption of validity.

By contrast, the result in *Erie* was easy to assimilate. After *Erie*, in diversity cases, where federal jurisdiction is based *solely* on the citizenship of the parties, federal judges decide ordinary contract and tort cases according to the state rules that would have been applied had they been brought in state courts originally. Underlying the *Erie* decision is the notion that the formulation of substantive rules to be applied in diversity cases was a matter reserved to the states. Except to the extent that Congress legitimately entered a constitutionally designated federal area through the exercise of an appropriately delegated legislative power, federal courts had no authority to disregard state law or, let alone, to create federal law. The Rules of Decision Act⁷⁴ added authority to this conclusion. *Erie* created no chaos because the existing state rules were presently available for application by federal judges in diversity cases. State law filled the breach created by the extinction of the preexisting federal common law. The same kinds of cases that were tried in federal courts under diversity jurisdiction were also tried in state courts. That the parties to a lawsuit are diverse and may opt for a federal court are merely fortuitous factors. Prior to *Erie*, the results reached by state courts in suits between diverse parties were the same as those reached in identical disputes between non-diverse parties. After *Erie*, federal courts were charged with reaching the same result that would have been reached if the suit had been heard in state court.

The constitutional dimension of *Erie* should also be understood in the context of the text of the Rules of Decision Act. In so doing, under the original wording of the Act, there should remain no tension between *Erie* and the general maritime law. The original Act obligated federal courts to apply state law in “trials at common law.”⁷⁵ An admiralty action brought in federal court under Title 28, § 1333 of the United States Code was not regarded as an action at common law. Thus, it was not subject to either the language or spirit of the Act.⁷⁶

7. The framers of the Constitution included diversity cases within the jurisdiction of the federal courts because of their interest in the status of the parties, not because of an interest in the substance of their disputes. The framers of the Constitution included admiralty and maritime cases within the jurisdiction of the federal courts precisely because of their subject matter. At the very least, it is unquestionable that Article III of the Constitution grants jurisdiction over admiralty and maritime cases to the federal judiciary. But, does it make sense to limit the admiralty clause to nothing more than a key into

74. Judiciary Act of 1789, § 34, 1 Stat. 92.

75. *Id.*

76. See Gutoff, *supra* note 68, at 27-30, 52-53.

federal court? Consider that Article III also includes diversity jurisdiction, which embraces suits between citizens of different states and between aliens and United States citizens. Subject to congressional implementation, a federal forum would be available under diversity jurisdiction to many cases that might otherwise qualify as being within admiralty jurisdiction. It is unlikely that the admiralty provision was inserted simply to open the federal courts to private maritime disputes between citizens of the same state. Likewise, Article III includes federal question jurisdiction, which encompasses claims arising under federal statutes. Subject to congressional implementation, public law admiralty cases such as prize and revenue cases, and cases involving crimes on the high seas, could have been entertained in federal court, as they were likely to arise under federal law.⁷⁷ It is once again submitted that the admiralty jurisdiction provision was intended to confer more than mere access to the federal courts.

8. Critics of the general maritime law should take into account the various ways in which “maritime law,” in its broad sense, accommodates the interests of federalism. As heretofore articulated, limits on admiralty jurisdiction in the contractual realm leave certain matters to state law, such as contracts to construct ships and contracts for the sale of ships. State law also applies to certain preliminary contracts deemed to be non-maritime.⁷⁸ Furthermore, the Supreme Court itself has acknowledged in several recent cases that, notwithstanding the presence of admiralty jurisdiction, federal law does not always preempt state law. For example, in *Yamaha*, the Court stated:

The federal cast of admiralty law, we have observed, means that “state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system[,] [b]ut this limitation still leaves the States a wide scope.” Our precedent does not precisely delineate that scope. As we recently acknowledged, “[i]t would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence.” We attempt no grand synthesis or reconciliation of our precedent today, but confine our inquiry to the modest question whether it was *Moragne*’s design to terminate recourse to state remedies when nonseafarers meet death in territorial waters.⁷⁹

77. Although the general federal question jurisdiction provision now contained in 28 U.S.C. § 1331 was not part of the original Judiciary Act, Congress supplied specific jurisdictional grants applicable to piracy, customs matters, etc. For example, the first Judiciary Act conferred jurisdiction in the district courts over crimes and offenses within the respective districts and on the high seas. 1 Stat. § 9, Chapter 8 of that legislation made piracy a crime. The first Judiciary Act also conferred jurisdiction in the district courts over all suits for penalties and forfeitures under the laws of the United States. Chapter 35 of that legislation set up an elaborate system of customs regulations providing various forfeitures and penalties for violations thereof.

78. See GILMORE & BLACK, *supra* note 22, at 26-28.

79. *Yamaha*, 516 U.S. at 210 n.8 (internal citations omitted).

The Court later states:

The Third Circuit left for initial consideration by the District Court the question whether Pennsylvania's wrongful-death remedies or Puerto Rico's applied. The Court of Appeals also left open, as do we, the source—federal or state—of the standards governing liability, as distinguished from the rules on remedies. We thus reserve for another day reconciliation of the maritime personal injury decisions that rejected state substantive liability standards, and the maritime wrongful-death cases in which state law has held sway.⁸⁰

Subsequently, in *Grubart*, the Court explained the complexity of substantive maritime law:

[E]xercise of federal admiralty jurisdiction does not result in automatic displacement of state law. It is true that, “[w]ith admiralty jurisdiction comes the application of substantive admiralty law.” But, to characterize that law, as the city apparently does, as “federal rules of decision,” is “a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce. It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope.” (“Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules.”) Thus, the city's proposal to synchronize the jurisdictional enquiry with the test for determining the applicable substantive law would discard a fundamental feature of admiralty law, that federal admiralty courts sometimes do apply state law.⁸¹

On occasion, state tort remedies have been used to supplement maritime law, notably in the wrongful death area.⁸²

In implementing the admiralty and maritime jurisdiction conferred by Article III, Congress has reserved an important role for state courts through the “saving to suitors” clause. As interpreted, this provision enables state courts to hear the vast majority of cases that otherwise could be brought in federal court under admiralty jurisdiction. With limited exceptions, the savings to suitors proviso permits a *plaintiff* to opt for a state forum. Dictum in *Romero v. International Terminal Operating Co.*⁸³ has had the effect of limiting removal of “admiralty” cases from state court, reinforcing the role of state courts in removal cases. Furthermore, there are exceptions to the general rule that cases brought in state court under saving to suitors are nevertheless governed by

80. *Id.* at 216 n.14 (internal citations omitted).

81. *Grubart*, 513 U.S. at 545-46 (internal citations omitted).

82. *See Yamaha*, 516 U.S. at 215-16; *Green v. Industrial Helicopters, Inc.*, 593 So. 2d at 637 (construing U.S. CONST. art. III §2, cl. 1; 28 U.S.C. § 1333). *See generally id.* (supplementing admiralty law by applying a state strict liability remedy in maritime personal injury case).

83. 358 U.S. 354, 363 (1959).

substantive maritime law,⁸⁴ and it is customary for state courts to apply state law in “savings” cases when it is consistent with federal admiralty law.⁸⁵

The opportunity available to state courts to play a role in the development of the general maritime law when adjudicating admiralty cases should not be overlooked. For example, if a plaintiff exercises his or her right under saving to suitors, then a state court, although bound by federal admiralty law, may be forced to create an applicable rule of law in the absence of controlling authority. Federal courts hold no *monopoly* in the business of creating general maritime law, and state courts are bound only by the admiralty decisions of the United States Supreme Court.⁸⁶ This structure reflects the status of substantive admiralty law at the time the Constitution was adopted. Federal and state courts have developed a common body of rules. Although there are situations where lower federal courts create rules of general maritime law, federal preemption does not occur unless and until the United States Supreme Court so declares. There is nothing to suggest that the Constitution or the framers contemplated multiple systems or rules of admiralty law. For the reasons set forth, I maintain that the general maritime law is constitutional and is an appropriate subject of federal common law.

In light of the constitutional and federalism implications in the creation and application of the general maritime law, it is not surprising that some of the most controversial admiralty cases have dealt with the scope of admiralty jurisdiction and its corresponding effect, preemption of state law. As to the preemption issue, the interests of federalism demand a more flexible and principled approach. The Supreme Court has failed to develop well-calibrated rules delimiting admiralty and maritime jurisdiction that sufficiently balance national and local interests. In the same vein, the Court has failed to develop conflicts of laws rules, which are particularly essential in cases which fall only marginally within federal admiralty jurisdiction. This criticism is best illustrated by the infamous, much maligned *Southern Pacific Co. v. Jensen* case.⁸⁷ In *Jensen*, the Court held that the family of a longshoreman who was killed on a vessel in state waters could not recover benefits under a state workers’ compensation scheme. If Congress had enacted legislation prohibiting state workers’ compensation benefits for maritime workers, or, if Congress had provided its own remedy for maritime workers, there would have been a direct conflict between federal and state law, especially if the congressional remedy was more generous. Under these circumstances, the

84. *Green*, 593 So. 2d 634, 637 (1992), *cert. denied*, 506 U.S. 819 (1992).

85. *Id.*

86. *Green*, 593 So. 2d at 638 (citing *Daigle v. Coastal Marine, Inc.*, 488 So. 2d 679, 681 (1986)).

87. 244 U.S. 205 (1917). The holding in *Jensen* has been superceded by statute. See *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980).

Court's decision would have been correct. Even in the absence of congressional legislation, if the Supreme Court had created special remedies for injured maritime workers that were not available under state law, there would have been a conflict. If the judicially created remedy was more generous, then such a conflict might have justified the result. But in the *Jensen* situation, the state law filled a gap in maritime law by providing a remedy where none existed, either in the federal statute or in the general maritime law. Thus, the majority of the Court used the absence of a statutory or general maritime law remedy (a *negative* law, if there is such a thing) to preempt the state law.⁸⁸

Several factors undermine the Court's decision. First, the majority opinion does not sufficiently value the significance of the state's interest in enacting its workers' compensation statute. The statute was general legislation, covering thousands of workers in the state. This legislation did not single out or discriminate against the maritime industry. It was a state's attempt to protect its labor force and their families. The majority opinion undervalues the significant state interest in being able to pass on to employers the costs of personal injury and death generated by their industries. The majority opinion overlooks the financial impact on the state, which otherwise must bear the financial burden of providing for disabled employees and their families in case of work related injuries and death.

Second, the opinion ignores the relationship between the state and the decedent longshoreman. The "covered" longshore workers were local residents of the state. They lived and worked within the state. In contrast to seamen, they were essentially a non-mobile work force.

Third, the majority opinion glosses over the land-based dimension of longshore work. Not only do longshoremen live on the land, they also perform a substantial amount of their work on the land. They are engaged in a type of maritime employment where national interests and local interests converge. In such situations, local interests should be accorded more weight in resolving the preemption issue. This conclusion is reinforced by the fact that, if the decedent had been killed moments after having left the ship, maritime law would not have applied at all. His family would have had no remedy under maritime law. Even though he was engaged in maritime employment, they could not have satisfied the maritime locus test required to establish maritime tort jurisdiction.

Moreover, unlike seamen, who have long been the beneficiaries of protective congressional legislation and who have been deemed to be wards of the court, longshoremen and other land-based maritime workers, including ship builders and repairers, had to look to the states for protection. The state's goal in *Jensen*, compensation of injured land-based maritime workers, also implicates national concerns. Either Congress, or perhaps even the courts,

88. *Jensen*, 244 U.S. at 217.

could have created adequate remedies for workers injured or killed on the job; they did not. Yet, there was also a sufficiently important and strong state interest that justified state intervention in the absence of conflicting federal remedies. It is precisely in such situations that accommodation is required. If Congress later decided to enact comprehensive legislation that was national in scope, that would have been the time to consider preemption.

The *Jensen* majority concluded that state law could not be applied to a case otherwise subject to maritime jurisdiction if the state law either “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.”⁸⁹ It opined that Congress could enact such a law, which would apply uniformly throughout the country. But in fact, there was no contrary act of Congress. Still, the Court construed the absence of congressional legislation with the same force it would give to legislation that conflicted with state law. The state law was invalid not because it conflicted with an act of Congress, but because there *was* no act of Congress. In other words, it violated negative legislation, that is, it violated no law.

The majority opinion does not otherwise indicate in what respect the exemption of employers from liability to injured workers was a characteristic feature of the general maritime law. To the contrary, injured seamen could recover “workers’ compensation” benefits from their employers in the form of the judicially created remedy of maintenance and cure.⁹⁰ Like maintenance and cure, workers’ compensation is not based on employer fault, so the imposition of liability without fault was not in itself antithetical to the characteristics of the general maritime law.

Instead of looking at the importance of the local interest, it focused on the importance of uniformity, *i.e.*, uniformly imposing on longshoremen the risks of their employment. The Court simply omitted consideration of the local interest and punted the problem to Congress. Instead of reasoning that the lack of congressional action may have been prompted by an intent to leave matters to the states, that is, deferring to congressional wisdom that a state workers’ compensation scheme which included shore-based workers was preferable to a federal compensation remedy or to no remedy at all, the *Jensen* majority essentially ignored Congress. In fact, we know from hindsight that the Court ultimately compelled Congress to enact legislation providing maritime workers with a compensation remedy that indisputably Congress believed should have

89. *Id.* at 216.

90. *See* *The Osceola*, 189 U.S. 158 (1903) (reiterating seaman’s right to maintenance and cure).

been provided by state law and subject to state control.⁹¹ A bad decision by the Court in a case such as *Jensen*, however, should not undermine the concept of “the general maritime law” and the important role that it plays. When discussing *Jensen*, it is important to consider that no subsequent decision since *Jensen* and its progeny has taken such an extreme view on preemption. As a matter of fact, in another controversial decision that has been subject to much criticism by admiralty lawyers, *Wilburn Boat*, the Supreme Court refused to preempt state law.⁹²

In the author’s opinion, a distinction should be made between state law that purports to negate or diminish rights under federal maritime law and state law that fills in gaps or supplements federal maritime law. The state workers’ compensation scheme accomplished both. Such legislation should not be preempted in the absence of an overwhelming need for uniformity, which is difficult to conceive of in the area of personal injury or death. Even where Congress has acted, supplemental or complementary state law is not invariably preempted. For example, the Supreme Court has held that the LHWCA does not preempt state worker’s compensation laws in situations where maritime workers covered by the federal statute are injured on land.⁹³ Should a state statute, however, purport to diminish remedies created under the general maritime law, preemption would be appropriate.

A major problem with *Jensen* is that the criteria articulated in the opinion are simply not useful. In *Miller v. American Dredging*,⁹⁴ for example, the majority pays lip service to the *Jensen* test, but ultimately finds the *substantive-procedural* dichotomy more helpful. In other words, it was easier for the Court to uphold the Louisiana *forum non conveniens* statute by classifying it as procedural, holding that procedural rules were not outcome-determinative. The same substantive law would apply regardless of the forum in which the case was adjudicated.

In a step in the right direction, the Court of Appeals for the Fifth Circuit has tried to refine the *Jensen* test into more workable criteria.⁹⁵ As stated by the court:

(1) “state law is not preempted when it contains a detailed scheme to fill a gap in maritime law”⁹⁶;

(2) “state law is not preempted when the law regulates behavior in which the state has an especially strong interest”⁹⁷;

91. *Compare* *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980) with *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

92. 348 U.S. 310 (1955), *reh’g denied*, 249 U.S. 907 (1955).

93. *Sun Ship*, 447 U.S. at 723-24.

94. 506 U.S. 809 (1992).

95. *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev’d*. 486 U.S. 140 (1988).

96. *Chick Kam Choo*, 817 F.2d at 317.

(3) “maritime law preempts [state law] whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commercial actors”⁹⁸;

(4) “maritime law preempts state law when the state law impinges upon international or interstate relations”⁹⁹;

(5) the final factor, which the court admitted to be stated “badly” is “that plaintiff should win personal injury or death maritime tort claims.”¹⁰⁰

While far from perfect, this approach lends itself more towards balancing state interests with the interests that ultimately underlie the need for federal maritime law.

The author believes that the critics of the general maritime law should both examine more closely the many ways in which maritime law accommodates federalism and restudy the post-*Jensen* decisions which are more sensitive to state law. It would probably be more fruitful to help fine-tune jurisdictional criteria and the rules for resolving conflicts between federal and state law. For example, is it really necessary to exercise jurisdiction over and apply federal law in incidents involving pleasure boats in waters that are used solely for recreational purposes merely because such waters might sustain commerce? Should not the Supreme Court develop more workable choice of law rules in deciding whether admiralty courts should apply state law where state interests are important and there is no corresponding benefit to national interests? This is where I believe the focus should be and I am not alone.¹⁰¹

97. *Id.*

98. *Id.*

99. *Id.* at 318.

100. *Id.*

101. See Michael F. Sturley, *Was Preble Stolz Right?*, 29 J. MAR. L. & COMM. 317, 331 (1998).