

Saint Louis University School of Law

Scholarship Commons

All Faculty Scholarship

1999

Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange

Joel K. Goldstein
Saint Louis University School of Law

Follow this and additional works at: <https://scholarship.law.slu.edu/faculty>



Part of the [Admiralty Commons](#), [Common Law Commons](#), and the [Law of the Sea Commons](#)

Recommended Citation

Goldstein, Joel K., Federal Common Law in Admiralty: An Introduction to the Beginning of an Exchange. Saint Louis University Law Journal, vol. 43, no. 1337, 1999. Reprinted with permission of the Saint Louis University Law Journal © 20__ and/or 19__, St. Louis University School of Law, St. Louis, Missouri.

This Article is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in All Faculty Scholarship by an authorized administrator of Scholarship Commons. For more information, please contact ingah.daviscrawford@slu.edu.

ADMIRALTY SYMPOSIUM

FEDERAL COMMON LAW IN ADMIRALTY:

AN INTRODUCTION TO THE BEGINNING OF AN EXCHANGE

JOEL K. GOLDSTEIN*

Most scholars and practitioners of admiralty law have long relied upon two central assumptions regarding their subject. First, they have understood that uniformity was a requisite of maritime law such that, generally speaking, national, rather than state, law governed most maritime events and transactions. Second, they have believed that in order to preserve the uniformity of maritime law, federal admiralty courts are empowered to fashion federal common law.¹ The commitment to these related propositions has been attested to or illustrated by a collection of Supreme Court decisions.² For instance, in *Southern Pacific Co. v. Jensen*,³ the case that stands as the metaphor for the uniformity principle in admiralty, the Court said that federal admiralty law would displace state law which “works material prejudice to the characteristic features of the general maritime law, or interferes with the proper

* Professor of Law, Saint Louis University School of Law. Thanks to Tricia Fitzsimmons for her able research assistance and, as always, to Mary Dougherty for her patient and precise secretarial help. All shortcomings are my responsibility.

1. See e.g., Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part II)*, 28 J. MAR. L. & COM. 555, 555-68 (1997) [hereinafter Goldstein, *Wilburn Boat (Part II)*].

2. See e.g., *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942).

3. 244 U.S. 205 (1917).

harmony and uniformity of that law in its international and interstate relations.”⁴

More recently, these two tenets have come under attack. Although the Supreme Court has not abandoned them, several recent opinions sound the ominous notes of retreat. In *American Dredging Co. v. Miller*,⁵ for instance, Justice Stevens, in his concurrence, disparaged *Jensen* as “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.”⁶ Comparing something to *Lochner* is a lot closer to fighting words than to a compliment. The Court declined Justice Stevens’ invitation to abandon *Jensen* but in terms that gave little comfort to *Jensen*’s defenders. Justice Scalia thought it “inappropriate to overrule *Jensen* in dictum, and without argument or even invitation.”⁷ He proceeded to define the “characteristic features” prong of *Jensen* so narrowly as to drain it of use.⁸

Moreover, some thoughtful scholars of federal courts have recently challenged these suppositions as constitutionally unsound. Professor Martin Redish writes, for instance, that the Supreme Court should abandon any notion that admiralty courts can fashion federal common law in admiralty. The constitutional basis for such activity, he argues, “is subject to doubt.”⁹ Professor Bradford R. Clark argues that the *Jensen* uniformity principle is “difficult to square” with the text of the Constitution and with the principle he finds in *Erie R. Co. v. Tompkins*¹⁰ that Article III judicial power to decide a case does not confer the power to fashion federal common law.¹¹ More recently, Professor Ernest Young has taken broad aim at these admiralty chestnuts, firing a battery of ammunition to perforate the constitutional status of the related uniformity and federal common law-making principles.¹²

There should have been little doubt that the phenomenon of federal common law-making in admiralty was not only a central preoccupation of admiralty scholars, but was also of interest to those thinking about, and teaching, the subject of federal courts. After all, leading federal courts casebooks include generous maritime readings on the subjects,¹³ and scholars

4. *Id.* at 216.

5. 510 U.S. 443 (1994).

6. *Id.* at 458.

7. *Id.* at 447 n.1.

8. *Id.* at 447-50. I have criticized Justice Scalia’s discussion. See Goldstein, Wilburn Best (Part II) *supra* note 1, at 588-89 and n.469.

9. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 140 (2d ed. 1990).

10. 304 U.S. 64 (1938).

11. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1332 (1996).

12. Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1998).

13. See, e.g., DAVID P. CURRIE, *FEDERAL COURTS: CASES AND MATERIALS* 334-35 (4th ed.

in the field have occasionally contributed a leading article on the subject.¹⁴ The discussions by Professors Redish, Clark and Young made even more evident that the subject, far from being the proprietary right of admiralty scholars, is very much shared turf. The direction of these revisionist discussions may have caused some consternation, even pain, among maritime scholars. But the power of the assaults caused many maritime scholars to consider the constitutional merit of federal common law-making in admiralty, an enterprise, in reliance on a number of Supreme Court opinions,¹⁵ they had long assumed.

In some sense, it is not surprising that some federal courts scholars would reach conclusions so different from their admiralty colleagues. Those committed to studying the authority of federal courts naturally read a different literature than do maritime scholars. Scholars of federal courts direct their attention to general maritime law as a species of, and to discern trends in, federal common law generally. Admiralty scholars, however, focus on general maritime law as the source of much substantive maritime law. The central issue of many courses on federal courts—the constitutional basis, implications and limits of federal judicial power—leads one naturally to consider the propriety of federal common law, including its prime species, general maritime law. Admiralty scholars, however, focus on general maritime law largely for a different reason: it is the source of much of the substance of the course they teach. Thus, as Professor Force points out, much of the admiralty law concerning collisions, personal injury, towage, general average, and salvage, is based upon federal judge-made law.¹⁶ For maritime scholars, federal common law in admiralty is simply a fact; regardless of how one weighs that fact as a constitutional argument, it has implications for the way commercial shipping works and the way maritime scholars think.

1990); RICHARD H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 791-801 (4th ed. 1996); MARTIN H. REDISH & SUZANNA SHERRY, FEDERAL COURTS: CASES, COMMENTS AND QUESTIONS 894-901 (4th ed. 1998); LOUISE WEINBERG, FEDERAL COURTS: CASES AND COMMENTS ON JUDICIAL FEDERALISM AND JUDICIAL POWER 83-98 (1994).

14. In addition to those recently offered by Professors Redish, Clark and Young, see e.g., David P. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158 (1960).

15. See e.g., *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875 (1997); *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994); *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986); *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

16. Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367 (1999).

Finally, the competing approaches to the subject may have something to do with the different way *Erie R. Co. v. Tompkins*¹⁷ enters the respective courses. In Federal Courts courses, *Erie* enjoys a leading role (except in those courses where the professor dares not retrace the path students resisted in Civil Procedure). There it addresses the allocation of power between federal and state government, and between legislature and courts; the existence of an Article III grant of judicial power is insufficient to confer federal common law-making competence. In Admiralty courses, *Erie* appears as something of a foil, a pedagogical technique to help students understand how courts decide what law to apply to a particular transaction. Cases like *Jensen* and *Chelentis v. Luckenbach S.S. Co.*¹⁸ established that “the general maritime law’s limitations on recovery prohibited the application of the state tort laws.”¹⁹ In essence, general maritime law displaced state law not simply in federal courts, but in state courts, too. *Jensen* and *Chelentis* suggested that the substantive law to apply should not vary with the litigant’s choice to invoke federal or state jurisdiction. As such, they stood for the same anti-forum shopping principle *Erie* announced—and two decades earlier!

The arguments of Professors Redish, Clark and Young also suggested that perhaps some dialogue among interested scholars from the admiralty and federal courts communities would be productive. Although admiralty and federal courts scholars have navigated these common channels, they have rarely met midstream to share their varying perspectives. At the 1999 meeting of the Association of American Law Schools, the Maritime Law Section sought to begin a conversation. Its program, *Federal Common Law in Admiralty*, featured presentations by two leading maritime law scholars, Professor Robert Force, the Niels F. Johnson Professor of Maritime Law and Director of the Tulane Maritime Law Center and Professor Steven F. Friedell of Rutgers-Camden, and by Professor Young, now an Assistant Professor of Law at the University of Texas Law School, a leading new critic of general maritime law. Whereas Professors Force and Friedell both are committed to some role for federal courts in shaping federal common law in admiralty, Professor Young forcefully denies the constitutionality of that exercise.

The papers which follow consist of elaborations of the presentations Professors Force, Friedell and Young made to begin that conversation. The SAINT LOUIS UNIVERSITY LAW JOURNAL is pleased to provide these rich discussions that suggest some of the competing points on one of the most pressing contemporary issues in admiralty law.

17. 304 U.S. 64 (1938).

18. 247 U.S. 372 (1918).

19. David Robertson, *The Applicability of State Law in Maritime Law After Yamaha Motor Corp. v. Calhoun*, 21 TUL. MAR. L.J. 81, 88 (1996).

In addressing this issue, Professors Force, Friedell and Young draw upon deep understandings of their subject to offer interesting insights on many relevant areas of admiralty and federal courts law. Their papers cogently deploy different types of constitutional arguments²⁰ to address the question.

Professor Young does not keep his readers in suspense regarding his bottom line; his title, which declares the “Unconstitutionality of Preemptive Federal Maritime Law,” trumpets his conclusion. Although Professor Young believes that originalist arguments impeach, rather than support, the case for federal common law in admiralty, his argument does not lean on the framers’ intent. Instead, Professor Young believes the problem stems from *Jensen* which allows maritime law to displace state law whenever admiralty jurisdiction exists. *Jensen* represents then a relic of the rejected *Swift v. Tyson*²¹ era, a holdover of the general federal common law that *Erie* discarded. Professor Young’s argument proceeds from the principle of judicial federalism he extracts from *Erie*, sort of a hybrid of two of the Constitution’s central structural principles, federalism and the separation of powers. *Erie* tells us, Professor Young argues, that federal “courts have no power to go first in making federal law.”²² The fact that the federal government may have power to regulate an area does not justify the federal courts in creating regulations. For under *Garcia v. San Antonio Metropolitan Transit Authority*,²³ “the separation of powers principle that only Congress makes federal law protects federalism as well, by channeling lawmaking decisions into the institution where the States are represented directly.”²⁴ However, when federal courts fashion federal common law independent of any statutory authorization or guidance, as is often the case in admiralty, the political safeguards of federalism are missing. Admiralty courts see it as their mission to provide a judge-made rule to address questions which Congress has not answered. In so doing, Professor Young believes they violate constitutional arrangements. The empty space Congress leaves in federal law should not invite federal judicial activity. Rather, it signifies Congress’ inability to achieve consensus on a national rule, thereby implicitly leaving the matter to the states. Current rules of legislative preemption recognize this principle, Professor Young suggests.

20. For discussions of different modes of constitutional argument, see PHILLIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-119 (1982); NORMAN REDLICH ET AL., *UNDERSTANDING CONSTITUTIONAL LAW* 2-4 (2d ed.1999); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

21. 41 U.S. (16 Pet.) 1 (1842).

22. Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349, 1353 (1999).

23. 469 U.S. 528 (1985).

24. Young, *supra* note 22, at 1353.

They require a clear statement of Congressional intent to preempt state law. Yet federal common law-making activity “almost always does preempt state law even though Congress has never acted at all.”²⁵

Unlike Professor Young, Professors Friedell and Force believe that the Constitution empowers admiralty courts to engage in federal common law and that such activity is beneficial. Professor Friedell understands the current law to allow federal courts to fashion maritime common law except where states have a paramount interest. He argues that this resolution is appropriate. After canvassing various possible resolutions, essentially he invokes two types of constitutional arguments to justify this activity. First, Professor Friedell relies on “our history that recognized a large role for the federal courts and for Congress to play in shipping matters.”²⁶ Professor Friedell relies implicitly on two sorts of historical arguments—the substantial body of judicial doctrine that recognizes a role for federal courts in fashioning admiralty law and the ability of governmental institutions to shape constitutional meaning by engaging in a pattern of activity that gains acquiescence over a long enough period. Second, Professor Friedell makes a prudential argument. “I do not think this issue can be resolved as a matter of logic,” he writes.²⁷ And he is skeptical that we can identify “a single verbal formula” to address all issues.²⁸ In some areas (the wrongful death cases, for instance), federal common law may have left a mess, but it is a mess that federal common law can clean up. Moreover, Professor Friedell believes flexibility offers some advantage, particularly in allowing courts freedom to give appropriate weight to federal and state interests on an issue-by-issue basis.

Like Professor Friedell, Professor Force does not believe that the logic of *Erie* is necessarily transferable to, or dispositive of, the question presented here. “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.”²⁹ While he gives constitutional text and history their due, he also believes “that practical realities of particular circumstances should be given some weight.”³⁰

Whereas Professor Friedell concentrates his defense of federal common law on a limited number of modes of constitutional argument, Professor Force deploys an array of constitutional arguments to bolster the practice. Professor Force invokes originalism, citing historical evidence that the framers intended uniform maritime law to govern private maritime law matters. He relies on

25. *Id.* at 1357.

26. Steven F. Friedell, *The Diverse Nature of Admiralty Jurisdiction*, 43 ST. LOUIS U. L.J. 1389, 1392 (1999).

27. *Id.*

28. *Id.*

29. Force, *supra* note 16, at 1377.

30. *Id.* at 1378.

ongoing history and judicial doctrine to bolster his position; “[t]he arguments for restricting the scope of the general maritime law have been considered and rejected for nearly two centuries.”³¹ Federal common law facilitates uniformity of maritime law, a necessity for the operation of maritime commerce. Far from undermining federalism, Professor Force emphasizes “the various ways” maritime law “accommodates the interests of federalism.”³² To be sure, Professor Force believes that the Supreme Court “has failed to develop well-calibrated rules delimiting admiralty and maritime jurisdiction that sufficiently balance national and local interests” and “has failed to develop conflicts of laws rules, which are particularly essential in cases which fall only marginally within federal admiralty jurisdiction.”³³ In this regard, Professor Force joins Professor Young in subjecting “the infamous, much maligned *Southern Pacific Co. v. Jensen* case” to heavy criticism.³⁴ Unlike Professor Young, Professor Force does not see the enterprise of federal common law-making as inherently flawed but simply mishandled on occasion by the Court and misunderstood more often by its critics.

Professors Friedell and Force invoke on-going history to justify their belief that admiralty courts act constitutionally in fashioning federal common law. Professor Young does not dismiss the relevance of on-going history in shaping constitutional meaning. He would be prepared to accept as persuasive the reliance Professors Friedell and Force place on this type of argument if he thought the regime the evolutionary approach created was working. He concludes, however, that “maritime preemption is broke.”³⁵ Therefore, it is time to return to the drawing boards, he concludes, and the new picture should be true to the architecture *Erie* sketches.

Professors Force, Friedell and Young have offered a rich sampling of the range of constitutional arguments which might be marshalled on the subject. Their contributions here, and elsewhere, merit reading and rereading. I cannot resist the temptation to depart from my neutral role as host to offer a few observations to the debate. Although these introductory comments precede their fine papers in the pages of this Law Journal, in fact, my observations are prepared after their discussions and with the benefit of them. I hope they will forgive me for adding these brief comments.

I am already on record as advocating a fairly robust federal common law-making role for admiralty courts.³⁶ It therefore will come as no surprise that my own conclusions are closer to those of my admiralty brethren, Professors

31. *Id.*

32. *Id.* at 1382.

33. *Id.* at 1384.

34. Force, *supra* note 16, at 1384.

35. Young, *supra* note 22, at 1361.

36. See Joel K. Goldstein, *The Life and Times of Wilburn Boat: A Critical Guide (Part I)*, 28 J. MAR. L. & COM. 395 (1997); Goldstein, *Wilburn Boat (Part II)*, *supra* note .

Force and Friedell, than to my federal courts colleague, Professor Young. Although this is not the time or place for a full defense of the concept of uniformity in admiralty and the related concept of federal common law-making by admiralty courts, I would offer these skeletal points in addition to those already set forth.

First, it seems to me that Professor Young's effort to apply the logic of *Erie* to the maritime context encounters a formidable obstacle. *Erie* may suggest that a jurisdictional grant does not normally serve as a basis for legislative or federal law-making competence. But there is considerable evidence that the Court did not mean that rule to apply to admiralty. Justice Brandeis, the author of *Erie*, had joined the Court's opinion fourteen years earlier in *Panama RR. Co. v. Johnson*³⁷ which construed the Article III jurisdictional grant to admiralty courts to confer, too, legislative power on Congress. *Erie* based the lack of federal common law-making power in part on the lack of federal legislative power over diversity cases *per se*. Since *Johnson* made clear that Congress had power to legislate on maritime matters, admiralty courts need suffer no such disability. Moreover, during *Erie*'s sixty plus years, the Court not only has failed to apply this *Erie* constraint to admiralty but has repeatedly reiterated, by word and deed, that federal common law-making is routine in admiralty. Shortly after it decided *Erie*, the Court reaffirmed its adherence to this activity in maritime matters. In *Pope & Talbot, Inc. v. Hawn*,³⁸ the Court ruled that general maritime law, and not state common law, governed a maritime personal injury claim regardless of whether the case was brought on admiralty, diversity or under some other basis of jurisdiction. The Court's premise in *Pope v. Talbot*—that the jurisdictional grant in admiralty conferred federal common law-making powers—signalled that the *Erie* limitation did not apply at sea.³⁹ If admiralty were to operate under the same limitations, surely the Court would have said so.

My second quick hit relates to *Garcia v. San Antonio Metropolitan Transit Authority*⁴⁰ where the Court held that federal courts need not police the extent to which Congress could apply to the states laws that were generally applicable to private parties.⁴¹ Since Congress consisted of the representatives of the states, the political process would safeguard states' rights. The rationale of *Garcia*, Professor Young suggests, impeaches federal common law-making, which displaces state law without any political protection for the states. I am glad that Professor Young shares my admiration for *Garcia*. It seems odd,

37. 264 U.S. 375, 385-87 (1924).

38. 346 U.S. 406 (1953).

39. Professor Young discussed this point in Young, *Preemption at Sea*, *supra* note , at 310-12.

40. 469 U.S. 528 (1985).

41. *Id.* at 546-47.

however, to invoke *Garcia* these days to vindicate federalism. Some of those now in command of a five-justice federalism majority on the Court castigated *Garcia* when it was decided⁴² and have chipped away at it ever since then.⁴³ I should have thought that few decisions were so vulnerable. In recent years the Court increasingly has claimed a role in protecting the states from remedies conferred by generally applicable laws.⁴⁴

I would be delighted if *Garcia* has more vitality than I understand. But if *Garcia* retains its vigor, I think it adds little to the argument against federal common law-making in admiralty; indeed, I believe it may cut the other way. First, the issues at stake here differ from that in *Garcia*. In *Garcia*, the Court declined to find any judicially enforceable *constitutional* protections for the states from generally applicable statutes.⁴⁵ Here, the issue is not whether states have any *constitutional* immunity from generally applicable commercial statutes, but rather whether on occasions federal common law can displace state law. To the extent the issues are analogous, the political process rationale of *Garcia* essentially does operate under the current approach in maritime matters. When admiralty courts fashion maritime common law, they create law subordinate to federal legislation. If Congress, as the representative of the states, believes state prerogatives compromised, it can overturn the federal common law. If Congress believes its turf has been invaded, it can respond. In other words, federal common law in admiralty presents a small threat to state law in part because Congress, the states' protector, can always trump it. Just as Congress can rescind the extension to the states of a generally applicable law, so, too, it can reverse any federal common law rule that oppresses state interests.

To be sure, there is a difference. Outside admiralty, law does not apply to the states unless Congress says it does; a federal maritime common law rule might displace state law without legislative action. But this difference is, I think, rather trivial and inconsequential. Federal judges are not lunatics who cavalierly submerge treasured state interests in an ever-expanding sea of general maritime law. On the contrary, they act pretty cautiously in promulgating federal common law in admiralty. The amount of state law displaced is relatively tiny. The practice is to accommodate important state interests where possible, unless outweighed by some national imperative.⁴⁶

42. *Id.* at 580 (Rehnquist, C.J., dissenting) (suggesting likelihood of future overruling of *Garcia*); *Id.* at 589 (O'Connor, J., dissenting) (same).

43. *See, e.g.*, *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 119 S. Ct. 2240 (1999); *College Sav. Bank v. Florida Prepaid Educ. Expense Bd.*, 119 S. Ct. 2219 (1999).

44. *See, e.g.*, cases cited *supra* note ; REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW, *supra* note , at 67-70; *Id.* at 1-8 (2d ed. Supp. 1999).

45. *Garcia*, 469 U.S. at 547-56.

46. *See e.g.* *Kossick v. United Fruit Co.*, 365 U.S. 731, 738-42 (1961).

Surely the same federal judges who strike down congressional legislation imposing federal duties on the states or subjecting states to remedies in federal or state courts can be trusted to act judiciously in fashioning federal common law, especially since they know their action is subject to legislative override.⁴⁷

I value slightly the displacement of state law that takes place in the real world of admiralty decisions. But even if one assigns this cost greater weight, it still must be measured against an important structural or prudential argument in favor of federal common law-making in admiralty which is often overlooked. In admiralty, federal courts address basic common law subjects that in other contexts are routinely the province of the state courts. In fashioning federal common law, the Supreme Court typically displays sensitivity to the wisdom culled through the common law process by the state courts. It often considers and distills the best of the state court treatments of a subject in fashioning a federal admiralty rule.⁴⁸ Having done so, the rule announced may be binding on federal and state courts dealing with admiralty matters but otherwise lacks imperative force. Still, the Court's consideration of common law subjects in an admiralty context may advance the common law by offering the state courts non-binding examples of how an institution with the extraordinary human resources of the Supreme Court might treat these problems. The state courts are not bound to follow the Court's maritime pronouncements outside of an admiralty context, but they may do so if they are persuaded. In this way a conversation occurs between the state and federal courts on the proper treatment of common law issues (which enriches the work of both).⁴⁹

To be sure, neither the Court nor the academic community can claim anything close to perfection in addressing admiralty matters. But the deficit is often due to the difficulty of the problems, not any lack of skill of those addressing them. Moreover, admiralty is not the only area where the Court, and those of us who study it, fall short. On balance, the federal courts have contributed a great deal in their work fashioning general maritime law, both in solving admiralty problems and offering examples of common law reasoning. I tend to think the wrongful death area is less a mess than Professor Friedell suggests.⁵⁰ But it is not near the mess that has occurred when the Court has

47. Professor Young has addressed some of these issues in Young, *Preemption at Sea*, *supra* note , at 333-341.

48. See e.g., *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986) (relying on better common law approach; citing numerous common law decisions).

49. Professor Young addresses this point in Young, *Preemption at Sea*, *supra* note , at 342 n.451.

50. In my view, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), was a masterful and wholly appropriate exercise of federal common law-making in which Justice Harlan, for a unanimous Court, recognized a judge-made federal wrongful death remedy. In so doing, he eliminated several anomalies in maritime law consistent with congressional policies. The misstep

left crucial areas of maritime activity to the vagaries of state law. Witness the sorry state of the law of marine insurance resulting from the Court's disastrous decision in *Wilburn Boat*.⁵¹

Finally, Professor Young's call to give *Jensen* "a good strong push" over the precipice sends me scurrying to move it to safer ground. Although Professor Force prescribes a different remedy for *Jensen*, like Professor Young he is clearly not a fan or even a supporter of *Jensen*. They are not alone in their conclusions.⁵² *Jensen* is, of course, far from perfect; who would, after all, expect perfection from Justice McReynolds? The decision (denying relief via a state compensation statute to the family of an essentially localized decedent) was wrong, the analysis wooden, the language failed to soar. Yet at the risk of triggering a chain of knee-slapping hilarity among *Jensen*'s formidable critics ("Did you hear what that moron Goldstein said?"), let me defend as correct *Jensen*'s two fundamental insights—that maritime law should *generally* be uniform federal law (which implies a substantial federal common law role) and that the law to be applied in maritime transactions should not vary with the jurisdiction plaintiff invokes. These principles have been omnipresent (even if not brooding) in admiralty for decades.⁵³ Hopefully they will remain so. To explain why will require a longer discussion than I can now afford in this no longer brief introduction to the fine work of Professors Force, Friedell and Young. In any event, *Jensen* is the topic of the AALS maritime program in 2000. Tune in.

occurred in *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573 (1974), where the Court went beyond congressional policies, basically by adopting as the federal rule the evolving "better" state rule. Other wrongful death cases essentially adhere to congressional limits. Other than *Gaudet*, the Court's decision in *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), is troubling in its distinction between seafarers and nonseafarers and some of its dicta that questions prior decisions setting federal standards to guide primary behavior.

51. See Goldstein, *Wilburn Boat (Part II)*, *supra* note , at 556-58.

52. See e.g., GRANT GILMORE AND CHARLES BLACK, JR., *THE LAW OF ADMIRALTY* 642 (1975) (describing *Jensen* as one of two most ill-advised Supreme Court admiralty decisions); David W. Robertson, *Displacement of State Law*, 26 J. MAR. L. & COM. 325, 332 (1995) ("The present era of admiralty federalism will not end until we are free from *Jensen*'s fading but still visible shadow.").

53. This is not to say that strong state interests should not be accommodated where so doing does not interfere with some weighty federal interest. See *Kossick v. United Fruit Co.*, 365 U.S. 731, 739 (1961). Indeed, *Jensen* seems to allow for this.

