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THE DIVERSE NATURE OF ADMIRALTY JURISDICTION

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The issue is whether the grant of admiralty jurisdiction gives federal courts a power to make law. The law at present is that federal courts generally have the power to make admiralty law except in those areas where states have a strong interest.¹ It is sometimes said that state law will also be applied where federal law has been silent.² This differs from the diversity case in two respects: state law has a limited role to play and state courts are bound by admiralty law. These two aspects of admiralty jurisdiction are known as the “reverse-*Erie*” principle.

We know very little about the intentions of the Constitution’s drafters when it comes to this issue. One could imagine a universe where federal courts would apply one set of substantive rules in admiralty cases, but leave states free to apply another. One could also imagine a world where federal courts would leave the law making power in admiralty cases to the states. I think the first possibility, which was the structure in the nineteenth century,³ is undesirable.⁴ To that extent I agree that the teaching of *Erie v. Tompkins*⁵ is right. Both the *Erie* and the reverse-*Erie* doctrines aim at achieving uniformity between federal and state courts. The second possibility, which would treat admiralty cases no differently from any diversity cases, would be manageable if Congress were given the power to protect the federal interests. Given the active role that federal courts have played in fashioning admiralty law, however, I think it is simply too late to turn this power over to the states. Moreover, Congress has affirmed the power of federal courts to make admiralty law. The Admiralty Extension Act⁶ is premised on the notion that

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1. *East River S.S. Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858, 865 n. 2 (1986), citing *Kossick v. United Fruit Co.*, 365 U.S. 731, 739, 81 S.Ct. 886, 892, 6 L.Ed.2d 56 (1961).

2. *E.g.*, *Palestina v. Fernandez*, 701 F.2d 438 (5th Cir. 1983).

3. *See Belden v. Chase*, 150 U.S. 674, 14 S. Ct. 264 (1893); *Steamboat Company v. Chase*, 83 (16 Wall.) U.S. 522 (1872); *Kalleck v. Deering*, 161 Mass. 469, 37 N.E. 450 (1894).

4. For a contrary view, see David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. MAR. L. & COM. 325 (1995).

5. 304 U.S. 64 (1938).

6. 46 U.S.C. app. § 740 (1948), which provides in part:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable

substantive admiralty law, not the law of the various states, will be applied to cases within the admiralty jurisdiction.⁷ Moreover, the large role that federal courts play in fashioning admiralty law has become a fixture in the planning of federal and state law-making bodies. When Congress enacted the Harter Act,⁸ the Salvage Act⁹ and COGSA,¹⁰ it did so with the assumption that it was amending admiralty law made and interpreted largely by federal courts. As the Supreme Court was fond of saying, "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law."¹¹ Congress has shared that view and has embedded it in admiralty law by enacting several statutes in this area.

If we were to debate the issue in terms of first principles we might phrase it in the following terms: what makes an admiralty case different from a diversity case? Should *Erie's* teaching and the revolution that it created be extended to admiralty cases?

Theoretically one could answer that *Erie* was wrong and that *Jensen's* teaching¹² should be applied to diversity cases. I do not want to make that argument. It would destroy our concept of federalism for state courts to be generally bound by federal courts' determinations of law. But why, then, are state courts bound by the federal courts' determination of admiralty law?

water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water.

For a discussion, see Thomas C. Galligan, Jr., *The Admiralty Extension Act at Fifty*, 29 J. MAR. L. & COM. 495 (1998).

7. Congress understood that expanding admiralty jurisdiction would have the effect of displacing state law. The Senate report noted:

As a result of the denial of admiralty jurisdiction in cases where injury is done on land, when a vessel collides with a bridge through mutual fault and both are damaged, under existing law the owner of the bridge, being denied a remedy in admiralty, is barred by contributory negligence from any recovery in an action at law. But the owner of the vessel may by a suit in admiralty recover half damages from the bridge, contributory negligence operating merely to reduce the recovery. . . . The bill under consideration would correct these inequities.

See S. Rep. 80-1593 at 2 (1948), reprinted in 1948 U.S.C.C.A.N. 1898.

8. 46 U.S.C. app. §§ 190-196 (1893).

9. 46 U.S.C. app. §§ 727, 729-731 (1912).

10. 46 U.S.C. app. §§ 1300-1315(1936).

11. *Fitzgerald v United States Lines Co.*, 374 U.S. 16, 20 (1963), quoted in *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 96 (1980); *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975); *Sea-Land Servs. v. Gaudet* 414 U.S. 573, 588 (1974); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 405 n. 17 (1970).

12. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

One could say that admiralty is an exception to *Erie*. *Erie* did not eradicate the federal common law, and admiralty is a part of that law.¹³ Admiralty jurisdiction is different from anything else. Unlike diversity cases, the grant of admiralty jurisdiction is the only grant in Article III that is based not on the status of the parties but on the subject matter of the dispute. It is at least conceivable that the drafters thought that this subject matter—admiralty and maritime jurisdiction—possessed its own set of rules that ought to be applied.¹⁴ Salvage cases, undoubtedly part of the admiralty jurisdiction from the beginning, are governed by admiralty law. Where else were courts to look? There was no state law of salvage. The same can be said of general average, unseaworthiness or maintenance and cure. It strains credulity to assume that the drafters meant for salvage cases to be decided by common law so that no salvor would have recovery.

I would not want to make too much of this argument. It is doubtful that the drafters intended the federal courts having admiralty jurisdiction to apply admiralty substantive law to areas like bills of lading, charter parties, contracts to repair ships and the like. In England, there was no admiralty law governing these substantive areas. These areas were governed by common law. In addition, cargo cases were not part of the jurisdiction of England's High Court of Admiralty. They were tried in the common law courts according to common law.

One could argue that the drafters did not limit their frame of reference to the English practice but also had in mind the European nations that recognized a set of rules governing maritime contracts. That was part of Justice Story's theory,¹⁵ and it might have been part of what the framers had in mind. The framers may not have conceived of the problem in the way we do. That is, rather than thinking of the source of the law in, say, a bill of lading case, as being common law as opposed to admiralty law, or the law of New York as opposed to the law of the United States, the drafters may have simply thought that law was law. They may have thought that all judges, regardless of their title, were charged with doing the same thing: trying to determine the law governing a case. We debunk natural law as a fiction. But what if the drafters believed in natural law? They might well have expected a federal judge sitting in admiralty to consult all relevant decisions and statutes, foreign as well as domestic, and determine as best he could what those sources revealed the true rule of law to be.

13. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 201 (1996).

14. *See also Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 386 (1970) (“[m]aritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law. . .”).

15. *See De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776).

This of course proves too much. It would justify not only the federal courts' power to make admiralty law, but it would require that state courts be free to make their own law in admiralty cases that they tried. If *Erie* does anything, it destroys the natural law conception. It forces us to say whether a rule of law is federal or state law, and it prohibits the application of different substantive rules in state and federal court. The *Jensen* doctrine actually foreshadowed *Erie* in this important respect.

Another way of phrasing the objection to federal courts' law-making authority in admiralty is the teaching of *Erie* that federal courts lack the power to make law generally because Congress lacks the power to do so. Since the Constitution gives limited law making authority to Congress, it would violate the Constitution for courts to exercise a general law making role. Although this is a valid concern with respect to the common law, it is not a bar to the exercise of judicial law-making authority in admiralty cases. Congressional power over admiralty law is much different. Congress has the power, not only under the Commerce¹⁶ and Necessary and Proper Clauses,¹⁷ but under the grant of Admiralty Jurisdiction in Article III to amend admiralty law made by the courts.¹⁸ Still, it does seem inconsistent with *Erie* to give Congress and the courts a general law making authority in admiralty matters that they lack in diversity cases. Even though there is a federal interest that is sufficient to justify federal law making in admiralty, the same can be said of much of the diversity docket. The answer, I think, is to be found in our history that recognized a large role for the federal courts and for Congress to play in shipping matters. The issue here is not being considered in a vacuum. It is being played out against a record of substantial federal involvement going to the heart of maritime commerce in this country.

Either we allow state and federal courts to apply different substantive rules or we do not. If we require uniformity between state and federal courts, then it is too late to divest federal courts of their law-making power in admiralty. Neither can we deprive the states of their power to make law generally, nor should we deprive states of that power when important state interests are implicated in an admiralty case. The states and the federal government each have important roles to play in the development of admiralty law. There will be fierce arguments at the margins, and there will be disagreement over how to express the test or tests for allocating power, but it is too late for either the federal or state governments to have exclusive power in this field. I do not think this issue can be resolved as a matter of logic. Nor do I think that a single verbal formula will adequately address the myriad of issues that can

16. *Executive Jet Aviation, Inc. v. City Of Cleveland*, 409 U.S. 249, 274 (1972).

17. *Southern Pac. Co. v. Jensen*, *supra* note 12, at 214-15.

18. *See Romero v. International Terminal Operating Co.*, 358 U.S. 354, 360 (1959).

arise. Luckily the drafters have left the matter sufficiently open that a variety of approaches can be tried.

Although I generally favor flexibility over a rigid, doctrinaire approach, I recognize that sometimes there can be too much flexibility which results in confusion. This has happened in the wrongful death area. *Jensen* recognized that states might apply their wrongful death statutes even when death occurred on the navigable waters, and the Supreme Court later applied state wrongful death law even when a case was brought within the admiralty jurisdiction.¹⁹ This led to all sorts of confusion as the Supreme Court was sharply divided over how to apply state wrongful death law when the state did not recognize a maritime tort like unseaworthiness.²⁰ In *Moragne*,²¹ decided in 1970, the Supreme Court overturned that part of *Jensen* by creating a new wrongful death remedy. For a time, this seemed to clear up most of the confusion. In *Foremost Ins. Co. v. Richardson*,²² all of the justices recognized that if federal courts had jurisdiction over pleasure boating accidents causing injury or death, federal rules would displace state law. Ignoring that view, a unanimous Supreme Court recently held in *Yamaha Motor Corp. v. Calhoun*²³ that state wrongful death law may supplement the remedy created in *Moragne*. Not to be undone, the Eleventh Circuit refused to apply *Yamaha* to a case of wrongful death caused by a vessel in navigation,²⁴ citing *Jensen* as support. The irony is that the *Jensen* court approved of the use of state wrongful death laws.

The wrongful death cases are not pretty to look at. I do not, however, think they are typical, and I think courts will eventually sort them out. For the most part, courts, lawyers and those regularly engaged in shipping have a fairly clear idea about the source of law to be applied to their case, and state legislatures have the ability to regulate much of maritime commerce where state interests are seriously affected.

That is what we have at the moment. The law in this area is a mess. It is, however, our mess, and it serves a purpose. It allows federal and state interests to be given effect and it recognizes that no single verbal formula can adequately resolve the complex issues that arise in a variety of contexts. It also leaves the courts some room to adjust the admiralty law to the shifting approaches to the proper allocation of authority between state and federal governments in a federal system.

19. *Western Fuel Co. v. Garcia*, 257 U.S. 233, 242 (1921).

20. *See The Tungus v. Skovgaard*, 358 U.S. 588 (1959); *Hess v. United States*, 361 U.S. 314 (1960).

21. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

22. 457 U.S. 668 (1982).

23. 516 U.S. 199, 201 (1996).

24. *In re Amtrack "Sunset Limited" Train Crash In Bayou Canot*, 121 F.3d 1421, 1997 AMC 2962 (11th Cir. 1997), *cert. denied*, 118 S. Ct. 1041 (1998).

