SUPREME COURT OF THE UNITED STATES

No. 91–1950

AMERICAN DREDGING COMPANY, PETITIONER *v.* WILLIAM ROBERT MILLER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

[February 23, 1994]

JUSTICE STEVENS, concurring in part and concurring in the judgment.

It is common ground in the debate between the Court and JUSTICE KENNEDY that language from the majority opinion in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), correctly defines this Court's power to forbid state tribunals from applying state laws in admiralty cases. See *ante*, at 3, *post*, at 2. In my view, *Jensen* is just as untrustworthy a guide in an admiralty case today as *Lochner* v. *New York*, 198 U. S. 45 (1905), would be in a case under the Due Process Clause.

In the *Jensen* case, five Members of this Court concluded that the State of New York did not have the authority to award compensation to an injured longshoreman because application of the state remedy would interfere with the "proper harmony and uniformity" of admiralty law. 244 U. S., at 216. Justice Holmes' dissenting opinion in *Jensen*, no less eloquent than his famous dissent in *Lochner*, scarcely needs embellish-

ment. See *id.*, at 218–223.[1] Nonetheless, like *Lochner* itself, *Jensen* has never been formally overruled. Indeed, in *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920), the same majority that decided *Jensen* reached the truly remarkable conclusion that even Congress could not authorize the States to apply their workmen's compensation laws in accidents subject to admiralty jurisdiction. See also *Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219 (1924).

As Justice Brandeis stated in dissent in *Washington*, it takes an extraordinarily long and tenuous "process of deduction" to find in a constitutional grant of judicial jurisdiction a strong federal pre-emption doctrine unwaivable even by Congress. See *id.*, at 230–231. *Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation—even state legislation approved by Act of Congress—without any firm grounding in constitutional text or principle. In my view, we should not rely upon and thereby breathe life into this dubious line of cases.

Jensen asks courts to determine whether the state law would materially impair "characteristic features"

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[1]The central theme of Holmes' dissent was that nothing in the Constitution or in the Judiciary Act's grant of jurisdiction over admiralty cases to the district courts prevented New York from supplementing the "very limited body of customs and ordinances of the sea" with its statutory workers' compensation remedy. *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 220 (1917). Holmes' *Jensen* dissent was the source of his famous observations that "judges do and must legislate, but they can do so only interstitially[,]" *id.*, at 221, and that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified[,]" *id.*, at 222.

of federal maritime law. 244 U. S., at 216. The unhelpful abstractness of those words leaves us without a reliable compass for navigating maritime pre-emption problems. As JUSTICE KENNEDY demonstrates, the *forum non conveniens* doctrine may be classified as a "characteristic feature" of federal admiralty jurisprudence even though it did not *originate in*, nor is it *exclusive to*, the law of admiralty. Compare *ante*, at 5–7 with *post*, at 2–6. There is, however, no respectable judicial authority for the proposition that every "characteristic feature" of federal maritime law must prevail over state law.

As JUSTICE KENNEDY observes, *post*, at 1–2, it is not easy to discern a substantial policy justification for Louisiana's selective "open forum" statute, which exempts only federal maritime and Jones Act claims from the State's general *forum non conveniens* policy. The statute arguably implicates concerns about disruptive local restrictions on maritime commerce that help explain why admiralty has been a federal subject. I am not persuaded, however, that the answer to those concerns lies in an extension of the patchwork maritime pre-emption doctrine. If this Court's maritime pre-emption rulings can be arranged into any pattern, it is a most haphazard one. See generally Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960 S. Ct. Rev. 158. Such a capricious doctrine is unlikely to aid the free flow of commerce, and threatens to have the opposite effect.

In order to decide this case, it is enough to observe that maritime pre-emption doctrine allows state courts to use their own procedures in Savings Clause and Jones Act cases, see *Offshore Logistics, Inc.* v. *Tallentine*, 477 U. S. 207, 222–223 (1986), and that *forum non conveniens* is, as the Court observes, best classified as a kind of secondary venue rule.[2] Equally

[2]Even if we were to impose a *forum non conveniens* rule on Louisiana, the resulting standard would be

significant is the fact that Congress, which has unquestioned power to decree uniformity in maritime matters, has declined to set forth a federal forum convenience standard for admiralty cases. *Ante*, at 12–15. It also appears to have withheld from Jones Act defendants the right of removal generally applicable to claims based on federal law. See 28 U. S. C. §1445(a); 46 U. S. C. App. §688(a); *In re Dutile*, 935 F. 2d 61, 62 (CA5 1991). Congress may "determine whether uniformity of regulation is required or diversity is permissible," *Washington*, 264 U. S., at 234 (Brandeis, J., dissenting). When relevant federal legislation indicates that Congress has opted to permit state "diversity" in admiralty matters, a finding of federal pre-emption is inappropriate. Just as in cases involving non-maritime subjects, see, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 505 U. S. ___, ___ (slip op., at 9) (1992), we should not lightly conclude that the federal law of the sea trumps a duly enacted state statute. Instead, we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law, or, perhaps, whether federal maritime rules, while not directly inconsistent, so pervade the subject as to preclude application of state law. We should jettison *Jensen*'s special maritime pre-emption doctrine and its abstract standards of "proper harmony" and "characteristic features."

The *Jensen* decision and its progeny all rested upon the view that a strong pre-emption doctrine was

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altogether different from the federal version because Louisiana has chosen to bear the various costs of entertaining far-flung claims. See *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508–509 (1947) (forum's own interests must be weighed in *forum non conveniens* balancing test). Instead, *forum non conveniens* would operate simply as an admonition to take heed of the inconvenience to the foreign defendant.

necessary to vindicate the purpose of the Admiralty Clause to protect maritime commerce from the "unnecessary burdens and disadvantages incident to discordant legislation[.]" *Knickerbocker Ice Co.*, 253 U. S., at 164. See also *Washington*, 264 U. S., at 228; *Jensen*, 244 U. S., at 217. Whether or not this view of the Clause is accurate as a historical matter, see Castro, The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers and Pirates, 37 Am. J. Legal Hist. 117, 154 (1993) (original purpose of Clause was to ensure federal jurisdiction over prize, criminal and revenue cases; private maritime disputes were viewed as matters for state courts), protection of maritime commerce has been a central theme in our admiralty jurisprudence. While I do not propose that we abandon commerce as a guiding concern, we should recognize that, today, the federal interests in free trade and uniformity are amply protected by other means. Most importantly, we now recognize Congress' broad authority under the Commerce Clause to supplant state law with uniform federal statutes. Moreover, state laws that affect maritime commerce, interstate and foreign, are subject to judicial scrutiny under the Commerce Clause. And to the extent that the mere assertion of state judicial power may threaten maritime commerce, the Due Process Clause provides an important measure of protection for out-of-state defendants, especially foreigners. See *Asahi Metal Industry Co.,* v. *Superior Court of California, Solano County.*, 480 U. S. 102 (1987); *Helicopteros Nacionales de Colombia* v. *Hall*, 466 U. S. 408 (1984).[3] Extension of the ill-advised doctrine of *Jensen* is not the appropriate remedy for unreasonable state venue rules.

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[3] Petitioner asserted such a defense in the trial court, but has not asserted a personal jurisdiction challenge before this Court.

Accordingly, I concur in the judgment and in Part II-C of the opinion of the Court.