

Spring 2013

Jonesing For a Taste of Competition: Why an Antiquated Maritime Law Needs Reform

William H. Yost III
Roger Williams University School of Law

Follow this and additional works at: http://docs.rwu.edu/rwu_LR

Recommended Citation

Yost, William H. III (2013) "Jonesing For a Taste of Competition: Why an Antiquated Maritime Law Needs Reform," *Roger Williams University Law Review*: Vol. 18: Iss. 1, Article 4.
Available at: http://docs.rwu.edu/rwu_LR/vol18/iss1/4

This Notes and Comments is brought to you for free and open access by the Journals at DOCS@RWU. It has been accepted for inclusion in Roger Williams University Law Review by an authorized administrator of DOCS@RWU. For more information, please contact mwu@rwu.edu.

Jonesing For A Taste of Competition: Why an Antiquated Maritime Law Needs Reform

William H. Yost III*

INTRODUCTION

The Merchant Marine Act of 1920, commonly referred to as the Jones Act, is perhaps America's most revered piece of admiralty legislation. The historic law is best known for providing seamen—the “Wards of Admiralty”¹—with a mechanism to sue their employers in court for negligence.² Lesser known provisions of the Jones Act, however, serve as the basis of America's

*Candidate for Juris Doctor, Roger Williams University School of Law, 2013; B.A., Fairfield University, 2006. The author would like to thank Jonathan Gutoff, an invaluable resource for all things maritime, Sheila O'Rourke and the Notes and Comments team for their thoughtful feedback and encouragement during the drafting process, and the Articles Editors who worked diligently on the final preparations of this article. Many thanks also to my parents who encouraged me to attend law school and have helped me along the way.

1. *See generally* *The Arizona v. Anelich*, 298 U.S. 110, 123 (U.S. 1936) (“The [Jones Act] was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty.”).

2. “A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.” 46 U.S.C § 30104 (2006). Contrast this with the majority of employment scenarios wherein an injured employee can recover workers' compensation benefits, but is prohibited from bringing a direct negligence claim against his employer.

cabotage, or “coastwise” laws, which regulate the transportation of goods between two points in the same country.³ These sections of the Jones Act mandate that only U.S.-owned ships transport goods from one port in the United States to another.⁴ In addition, U.S. ships engaged in coastwise trade must be purchased in America, must receive maintenance and be repaired only in U.S. shipyards and must employ crews in which seventy-five percent of the members are U.S. citizens.⁵ While popular and vigorously defended in America’s maritime community, the Jones Act is a facially protectionist law that has had damaging effects on America’s economy as a whole and, in fact, may actually serve to restrict the maritime industry in this current era of expected maritime growth.

This Comment argues that the Jones Act is an antiquated law, troubled since its passage over ninety years ago, no longer serving either its intended purpose or its modern justifications for existence, and should be reformed. Part I considers the legislative intent of the Jones Act, its treatment in courts, and the modern security-related justifications for the law. Part II examines the detrimental economic impact the Jones Act imposes on three groups: cargo shipping companies, consumers, and shipbuilders. Part III argues that the Jones Act is both a potential obstacle to environmental disaster response and an impediment to a developing area of expected maritime growth. Part IV sets forth proposals for Jones Act reform which are based primarily on comparisons between the Jones Act to the cabotage law of other nations.

I. THE BACKGROUND AND PURPOSE OF THE JONES ACT, ITS TREATMENT IN COURTS, AND MODERN JUSTIFICATIONS

A. Historical Background

While the Merchant Marine Act was passed in 1920, cabotage

3. The word cabotage comes from the French word, *caboter*, which means to sail coastwise or by the capes—the visible points on the shore. Kathleen Magee, *U.S. Cabotage Laws: Protective or Damaging?* M.A. Project, Monterey Institute of Institutional Studies (Apr. 2002), available at http://www.commercialdiplomacy.org/pdf/ma_projects/magee.pdf.

4. 46 U.S.C § 55102 (2006).

5. *Id.*

laws have existed in the United States for as long as it has enjoyed independence.⁶ In 1789, the first Congress passed “An Act Imposing Duties on Tonnage,” which levied a duty on foreign ships for coastwise trade of fifty cents per ton, while the duty for U.S. ships was six cents per ton.⁷ In 1817, Congress passed “An Act concerning the navigation of the United States,” which explicitly reserved coastwise trade to only U.S.-flagged vessels on penalty of forfeiture of the merchandise.⁸ While various other pieces of legislation were passed prior to the Jones Act to prevent circumvention of the basic protectionist principle set forth in the 1817 Act,⁹ the historical underpinnings that contributed to and necessitated the Jones Act were distinct from that purpose.¹⁰

In the years leading up to World War I, Congress established the Shipping Board and provided it with funding to construct vessels for U.S.-flag steamship services.¹¹ However, by the time Congress declared war on Germany on April 6, 1917, the Shipping Board was faced with a shipping crisis: the United States simply lacked the ships necessary to transport and supply its troops for a war in Europe.¹² In response, it created a subsidiary, the

6. See Constantine G. Papavizas & Bryant E. Gardner, *Is the Jones Act Redundant?* 21 U.S.F. MAR. L.J. 95, 97 (2008-09), available at http://winston.com/siteFiles/Publications/15%20Papavizas_Gardner%2021.1.pdf.

7. *Id.*; *An Impact Imposing Duties on Tonnage*, 1 Stat. 27 (1789), available at YALE LAW SCHOOL, http://avalon.law.yale.edu/18th_century/qw08.asp. Tonnage refers to the cargo carrying capacity of a vessel. *Id.*

8. Papivas, *supra* note 6, at 99; Magee, *supra* note 3, at 20.

9. See Papivas, *supra* note 6, at 100.

10. See RENE DE LA PEDRAJA, *THE RISE & DECLINE OF U.S. MERCHANT SHIPPING IN THE TWENTIETH CENTURY* 53-63 (1992).

11. *Id.* at 53.

12. The following excerpt provides an apt illustration of this crisis:

The shipping difficulties were tremendously compounded by the U.S. entry into World War I. [Edward N.] Hurley [chairman of the Shipping Board] inherited the large and apparently insoluble problem of carrying and supplying U.S. troops. To transport General John J. Pershing and the vanguard of the American Expeditionary Force to France, the Shipping Board had to strip the coastwise and intercoastal steamship companies like Luckenbach, American-Hawaiian, and the Ward Line of their passenger liners and add three of the navy's four troop transports, one of the U.S.-flag passenger liners of the International Mercantile Marine, and two passenger-cargo ships of the United Fruit Company. The motley flotilla sailed under U.S. Navy escort on 14 June but it was unable to

Emergency Fleet Corporation, and together embarked on a historic shipbuilding campaign.¹³ Just as the shipbuilding program was gaining traction, the war unexpectedly ended on November 11, 1918, and the Emergency Fleet Corporation suddenly needed to decide the fate of over one thousand partly-constructed ships.¹⁴

The Jones Act, signed on June 5, 1920, enabled the Shipping Board to sell the excess ships at deeply discounted prices to private operators in an effort to create and benefit American steamship companies.¹⁵ It has been argued that the true original intent of the Jones Act had little to do with cabotage laws, and was actually concocted mainly as a solution to deal with this government-controlled surplus of merchant vessels.¹⁶ Ironically, the shipping market collapsed in 1920, not long after the passage of the Jones Act, because many of the shipping companies that had purchased vessels in 1919 did so at considerably higher prices on borrowed money, and went into bankruptcy in 1920.¹⁷

B. Purpose

In order to determine if the Jones Act is still a necessary law, it is important to understand the legislative purpose and intent of the act and whether those concerns and objectives remain true today. The Merchant Marine Act, passed in 1920, was written with a clear objective:

It is necessary for the national defense and the development of the domestic and foreign commerce of the United States that the United States have a merchant marine—(1) sufficient to carry the waterborne domestic commerce and a substantial part of the waterborne

carry the whole force. As only one of the ships had been designed for transatlantic travel, they were simply too small. Reluctantly the Shipping Board had to turn to British-flag ships, including those of the International Mercantile Marine, to transport the overwhelming majority of the American Expeditionary Force, with Navy escorts along part of the voyage being the only U.S.-flag participation.

Id. at 55-56.

13. *Id.* at 54.

14. *Id.* at 58.

15. *Id.* at 62.

16. Papavizas, *supra* note 6, at 104.

17. PEDRAJA, *supra* note 10, at 63.

export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the waterborne domestic and foreign commerce at all times; (2) capable of serving as a naval and military auxiliary in time of war or national emergency.¹⁸

Thus, it seems as though the legislature was primarily concerned with its ability to maintain a strong and stable merchant marine, and wanted the capability to summon American merchant vessels to serve the military in times of war or national emergency.¹⁹

C. Treatment in Courts

The judicial branch, over the years, has seemingly lost touch with the stated purpose (or the historical underpinnings) of the Jones Act—to promote a merchant marine capable of serving the military—and instead has interpreted it as having a clear, protectionist purpose.²⁰ For example, in 1970, the United States Court of Appeals for the Second Circuit, in *Marine Carriers Corp. v. Fowler*, referred to the cabotage provisions of the Jones Act as “unabashedly protectionist.”²¹ It noted that the aims of the Jones Act are “to protect the American shipping industry already engaged in the coastwise trade, to provide work for American shipyards, and to improve and enhance the American Merchant Marine.”²² In fact, Circuit Judge Irving R. Kaufman opined that:

18. 46 U.S.C.S. § 50101 (2006). The remaining objectives include: (3) owned and operated as vessels of the United States by citizens of the United States; (4) composed of the best-equipped, safest, and most suitable types of vessels constructed in the United States and manned with a trained and efficient citizen personnel; and (5) supplemented by efficient facilities for building and repairing vessels. *Id.* The Merchant Marine Act is commonly referred to as the Jones Act and is named after Senator Wesley L. Jones who was the Chairman of the Senate Committee on Commerce in 1920. Papaviza, *supra* note 6, at 96.

19. Query whether this *service* could violate the Third Amendment.

20. See *Marine Carriers Corp. v. Fowler*, 429 F.2d 702, 708 (2d Cir. 1970).

21. *Id.* The case concerned whether a rebuilt vessel was eligible for coastwise trade, and involved a factual dispute as to whether it was a rebuilt American vessel or a rebuilt foreign vessel. *Id.* at 704.

22. *Id.*; see also *Bethlehem Steel Corp. v. United States*, 4 C.I.T. 229, 233, 551 F. Supp. 1148, 1151 (Ct. Int'l Trade 1982) (“The Merchant Marine

Like all maritime nations of the world, the United States treats its coastwise shipping trade as a jealously guarded preserve. In order to participate in this trade, a vessel's credentials must be thoroughly American. The ship must have been built in an American shipyard and be owned by American citizens. Moreover, it must not have trifled with its American heritage.²³

Even when courts have accurately articulated the legislative intent of the Jones Act, such articulations seem of dubious practicality for our nation's current security needs. In *Pennsylvania Railroad Co. v. Dillon*, the District of Columbia Court of Appeals correctly noted that "the broad congressional purpose underlying [the Jones Act] was to stimulate and encourage resort to domestic shipyards and thus ensure them sufficient business so that their facilities would be adequate in times of national emergency."²⁴ Similarly, in 1982, the D.C. Circuit noted, "[w]e require a sound merchant marine to protect foreign trade and to provide support for the armed forces in times of war or national emergency. We also require a modern, efficient shipbuilding industry capable of providing military vessels in times of stress."²⁵

D. Modern Justifications—Maritime Security

Perhaps the most compelling argument in favor of preserving the Jones Act is that it promotes the security of the United States, but even this argument is frustrated by the existence of modern maritime security-related legislation. Certainly, the Jones Act was intended to ensure the existence of a merchant marine ready and capable to assist the military in times of war or emergency. In the words of the American Maritime Partnership:

A strong domestic maritime industry is vital to promoting

Act is designed to protect the American shipping industry engaged in coastwise trade, to provide work for American shipyards and to improve the American merchant marine.").

23. *Fowler*, 429 F.2d at 703.

24. *Pennsylvania Railroad Co. v. Dillon*, 335 F.2d 292, 295 (D.C. Cir. 1965). At issue in this case was whether a vessel with a foreign-made midsection was eligible for coastwise trade. *Id.* at 293.

25. *Independent U.S. Tanker Owners Committee v. Lewis*, 690 F.2d 908, 911 (D.C. Cir. 1982).

national, homeland and economic security. The Jones Act establishes a U.S. merchant marine of skilled seafarers and U.S.-flagged vessels essential for maintaining the flow of domestic waterborne commerce that is also capable of serving as a naval and military auxiliary in times of war or national emergency. The U.S. Navy considers the Jones Act “critical to national security” and every U.S. President of this generation has supported the maritime law.²⁶

In addition, there has emerged a post 9/11 national security argument which asserts that repealing the Jones Act would permit increased access to our ports by international fleets, and could enable infiltration by terrorists.²⁷ The Lexington Institute, a non-profit think tank which focuses on national security among other issues, has published a report about the Jones Act’s contributions to national security in which it states:

Since September 11, the United States has sought to create a multi-layered system to protect the United States from state-based and terrorist attack while continuing to permit the free flow of legitimate goods, services and people across the nation’s borders. A key element in the national strategy to secure the homeland is to gain sufficient visibility into movement of goods and people to the United States so as to uncover and interdict any attempt to use the global transportation network to launch an attack. Although the Jones Act was not written with today’s threats to homeland security in mind, its provisions provide an important base on which to build the systems, processes and procedures needed to secure America. The provisions in the Jones Act regarding vessel ownership and manning simplify efforts to ensure that

26. *News, Governor Rick Perry Expresses Support For Jones Act*, AMERICAN MARITIME PARTNERSHIP (Nov. 3 2011), <http://www.mctf.com/news/2011/Gov%20Perry%20Jones%20Act%20Statement.html>. The American Maritime Partnership is a broad-based coalition that represents the interests of the domestic maritime industry. *Id.*

27. Dr. Daniel Goure, *The Contribution of The Jones Act To U.S. Security*, The Lexington Institute (Oct. 2011), available at http://www.lexingtoninstitute.org/library/resources/documents/Defense/Contribution_of_the_Jones_Act.pdf.

rogue regimes and international terrorists cannot strike at this country via its ports and waterways. One could readily assert that were there no Jones Act, Congress would have to invent one.²⁸

In response to the 9/11 attacks, maritime vulnerabilities with respect to terrorism have been mitigated, or at least addressed, by both international and domestic agreements and legislation.²⁹ The International Ship and Port Facility Security Code (“ISPS”), signed by parties to the International Convention on the Safety of Life at Sea (“SOLAS Convention”), came into force in 2004 and has mandated that ships and ports engaged in international trade implement ship and port security plans respectively.³⁰ These plans require strict documentation of all security procedures and the continuous monitoring for and recording of security irregularities.³¹ Domestically, the Maritime Security Act of 2002 mandates that U.S. vessels follow the ISPS Code.³² In addition, the Coast Guard requires all vessels, regardless of their country of registration to submit a notice of arrival to a given U.S. port 96 hours in advance.³³ This advanced notice provides the port with the opportunity to investigate that vessel’s origin and recent destinations to determine if it has traveled to any ports around

28. *Id.* The Lexington Institute’s mission is, in pertinent part, to:

[i]nform, educate, and shape the public debate of national priorities in those areas that are of surpassing importance to the future success of democracy, such as national security, education reform, tax reform, immigration and federal policy concerning science and technology. By promoting America's ability to project power around the globe we not only defend the homeland of democracy, but also sustain the international stability in which other free-market democracies can thrive.

Mission, The Lexington Institute, <http://www.lexingtoninstitute.org/mission>.

29. See JOSEPH AHLSTROM, VESSEL SECURITY OFFICER, Cornell Maritime Press, 1-2, 49 (2006).

30. *Id.* The SOLAS Convention is an international convention concerning the safety of merchant ships. Its first version came in 1914 in response to the Titanic disaster, and has been updated periodically ever since. *International Convention for the Safety of Life at Sea (SOLAS), 1974*, INTERNATIONAL MARITIME ORGANIZATION, [http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-\(solas\)-1974.aspx](http://www.imo.org/about/conventions/listofconventions/pages/international-convention-for-the-safety-of-life-at-sea-(solas)-1974.aspx).

31. AHLSTROM, *supra* note 29, at 2.

32. *Id.*

33. *Id.* at 49.

the world which have recently experienced a security incident before it grants entry.³⁴

In terms of international access to actual port facilities and cargo, it may be a surprise that the majority of port terminals in the United States are actually leased to foreign shipping companies by the particular port authorities.³⁵ Despite this, the cargo is actually handled—loaded and unloaded—by longshoremen who are American, unionized dockworkers.³⁶

Therefore, between the Maritime Transportation Security Act, Coast Guard regulations, and the existence of unionized dockworkers, there is little reason to believe that liberalizing domestic cabotage laws would increase America's vulnerability to terrorist attacks.

II. THE ECONOMIC DANGERS OF PROTECTIONISM

*"It is important to recognize that while protectionist legislation may offer relief to a specific domestic industry, the interests of corporate America are not served by the protectionist revival."*³⁷

*"Once protectionist tariffs were for infant industries; now they are for the old and putatively senile."*³⁸

During the past decade, there has been a robust and growing discussion in America about the benefits and implications of free trade, and whether to liberalize this nation's trade policy.³⁹ At the forefront of this debate is determining the proper role of tariffs in foreign trade, which are widely considered the preeminent tool of protectionist lawmaking. While the Jones Act is not a tariff in the

34. *Id.*

35. See The Committee on Int'l Trade, *The Ramifications of the Port Security Legislation on Trade and National Security*, 63 THE REC., 161, 165 (2008) [hereinafter *Ramifications*].

36. *Id.* at 167.

37. LOUIS E. V. NEVAER AND STEVEN A. DECK, *THE PROTECTIONIST THREAT TO CORPORATE AMERICA* 67 (1989).

38. *Id.* (quoting John Kenneth Galbraith, a noted economist).

39. See Alan Wm. Wolff, *America's Trade Policy Agenda and the Future of U.S. Trade Negotiations: Testimony Before the House Ways and Means Committee* 1, 12 (Feb. 29, 2012), available at <http://waysandmeans.house.gov/UploadedFiles/WolfftestFC229.pdf>; Rachel Brewster, *The Surprising Benefits to Developing Countries of Linking International Trade and Intellectual Property*, 12 CHI. J. INT'L L. 1, 15 (2011).

traditional sense, its protectionist effects can hardly be disputed. Yet, there is also little dispute that the outright repeal of the Jones Act would create an immediate, and perhaps lasting, loss of jobs in America's maritime industry. Former Vice-Chairman of the Federal Reserve Robert W. Ferguson once commented that when "[b]alancing the pain for a few against the lasting gains for the economy as a whole, economists generally view the latter as outweighing the former, but it is admittedly difficult for many individuals in American society to share this assessment."⁴⁰

There is, perhaps, no better example of how this "pain for a few" has been the driving force in maintaining a protectionist policy than with the U.S. Merchant Marine's unified voice in preserving the Jones Act.⁴¹ However, it is no secret that protectionist policies have adverse impacts on the economy and nation as a whole. As Ferguson noted, protectionist actions "reduce variety and raise costs for consumers; they distort the allocation of resources in the economy by encouraging excessive resources to flow into protected sectors; and they foster inefficiency by reducing the extent of competition."⁴² While Ferguson was speaking generally about the consequences of import tariffs, an easy analogy can be drawn to protectionist coastwise trade laws; in fact, two of the three of consequences Ferguson highlights are strikingly consistent with the effects of the Jones Act.⁴³

40. Roger W. Ferguson, Jr., Vice Chairman, Fed. Res., Remarks at the Conference on Trade and the Future of American Workers (Oct. 7, 2004), available at <http://www.federalreserve.gov/boarddocs/speeches/2004/20041007/default.htm>.

41. *See About Us: Objectives*, TRANSPORTATION INST. (last visited Sept. 13, 2012), <http://www.trans-inst.org/index.html> (the Transportation Institute is a maritime organization dedicated to maintaining a strong U.S. merchant marine and advocates for the preservation of the Jones Act).

42. Ferguson, *supra* note 40. Ferguson also noted other "highly egregious consequences" of protectionist policies, including:

First, by raising the cost of goods that are inputs for other producers, import barriers may destroy more jobs in so-called 'downstream' sectors than they save in protected sectors. According to one study, the 2002 steel safeguard program contributed to higher steel prices that eliminated about 200,000 jobs in steel-*using* industries, whereas only 187,500 workers were employed by U.S. steel-*producers* in December 2002.

Id.

43. The second consequence, "they distort the allocation of resources in

A. Reduced Variety and Increased Costs for Consumers

When considering Ferguson's point regarding reduced variety and increased costs for consumers, there are at least two groups of consumers directly impacted. The first group is the coastwise shippers—companies that own or charter shipping vessels to transport cargo. These companies are required not only to purchase American-made vessels, but also must have all subsequent repairs performed in America.⁴⁴ The second group is the everyday American consumer—any person that purchases goods that, at some point, were shipped from one port in this country to another. Because of the Jones Act, the shipping company, which cannot purchase foreign-made, competitively-priced ships or repair its ships in more competitive, foreign shipping yards, is saddled with higher capital costs. Not surprisingly, a portion of these higher capital costs are passed on to the American consumer in the form of higher prices for goods on the shelves and at the pump.

1. *Shippers*

The U.S.-build requirement of the Jones Act not only raises the capital expenditures for existing shipping companies in theory, but also creates barriers of entry making it difficult for prospective shipping companies to enter the market. In terms of cost, it is estimated that the expense of constructing a Jones Act ship in America is roughly three to four times what it would cost for the construction of an equivalent ship in Asia.⁴⁵ In addition, the mandates for maintenance and repair to be performed only in the United States impose additional costs for this group and make it difficult for shippers to compete with land-based alternatives for cargo transport like trucks and rail.⁴⁶ In fact, comparable ships in

the economy by encouraging excessive resources to flow into protected sectors," more aptly applies to government subsidies. *Id.*

44. See 46 U.S.C. § 12112 (2012).

45. Paul Slater, *Maritime Leader: Throw Out Jones Act Requirement for US Built Ships*, HAWAII FREE PRESS, May 3, 2011, <http://hawaii-freepress.com/ArticlesMain/tabid/56/articleType/ArticleView/articleId/4219/categoryId/52/Maritime-Industry-Leader-Throw-out-Jones-Act-requirement-for-US-Built-ships.aspx>.

46. William O. Gray, *Performance of US Shipyards in the 20th / 21st Century*, 24[4] J.OF SHIP PRODUCTION, 202 (2008).

Third World nations are able to replace vessels with less frequency than in the U.S. because maintenance and repair costs are less cumbersome enabling a longer ship lifespan.⁴⁷

Not surprisingly, many American shipping companies have avoided replacing their Jones Act-eligible vessels for as long as possible, but that trend likely will forcibly end in the near future.⁴⁸ In fact, the average deep-draft ocean-going shipping vessel servicing the noncontiguous United States (Alaska, Hawaii, and Puerto Rico) is twenty-eight years old.⁴⁹ Comparatively, most foreign shipping companies replace equivalent vessels after twenty-five years.⁵⁰ While this may not seem like a significant difference, it should be emphasized that this is not an apples to apples comparison; rather, it compares the average age of American ocean-going vessels currently in operation (many of which are owned by shipping companies facing serious financial straits) with the average replacement age of equivalent foreign vessels. When American shipping companies finally decide to invest in a new construction out of necessity, they are faced with numerous difficulties:

The major U.S. shipbuilding yards do not deliver new ships [with foreign-inspired innovations] because they have become uncompetitive under the protectionist shield of the Jones Act. The cost of building large oceangoing ships in the United States is at least three times greater than at the internationally competitive shipyards in Japan and South Korea. The process of contracting for a commercial oceangoing ship from a major U.S. shipbuilding yard is cumbersome, fraught with difficulties and subject to delays in delivery and significant cost overruns. These contracting practices reflect the U.S. shipyards' heavy reliance on military

47. DE LA PEDRAJA, *supra* note 10, at 137.

48. See Michael Hansen, *US-Build Requirement For Ships: Dilemma for Hawaii, Guam, Alaska, and Puerto Rico*, HAWAII FREE PRESS, Jan. 26, 2012, <http://hawaiifreepress.com/ArticlesMain/tabid/56/articleType/ArticleView/articleId/5974/USBuild-requirement-for-ships-Dilemma-for-Hawaii-Guam-Alaska-and-Puerto-Rico.aspx>. [hereinafter Hansen *Dilemma*].

49. *Id.*

50. Slater, *supra* note 45.

construction.⁵¹

An illustrative example of the adverse effects of the Jones Act's U.S.-build requirement on an American shipping company involves one of the nation's leading shipping companies, Horizon Lines. Horizon Lines currently owns or leases twenty containerships and is one of two main shipping companies that services Hawaii.⁵² However, it is also in the midst of a financial crisis and needs to determine what will become of its fleet of containerships which are an average of thirty-five years old.⁵³ A few years ago, the company tried to solve the problem by replacing some of its aging Jones Act ships with Korean-made ships to service the Guam-Far East trade route (which does not require Jones-Act ships).⁵⁴ This move, however, caused them to lose market share of the more profitable Hawaii-West Coast trade to their main competitor, Matson Navigation, since the Korean-built vessels were not eligible for that trade route.⁵⁵ The Hawaii-West Coast trade route is more profitable in large part because of the limited number of shipping companies that service that trade route, and by replacing some of its fleet with ineligible Korean-made vessels Horizon Lines limited its ability to service that market.⁵⁶ Currently, it is estimated that Horizon Lines needs to raise at least \$2 billion to replace its Jones Act-eligible fleet.⁵⁷ If they are unable to do this then Matson Navigation could end up with a near monopoly on the Hawaii-West Coast trade, which could have serious implications on the cost of goods.

Regardless of the outcome of this particular matter, it is clear that the U.S.-build requirement of the Jones Act is imposing unnecessary costs on shipping companies, and, while their plight may fall on deaf ears, their towering capital costs will eventually

51. Hansen *Dilemma*, *supra* note 48.

52. *About Us*, HORIZON LINES (last visited Sept. 13, 2012), <http://www.horizonlines.com/About-Horizon.aspx>; Michael Hansen, *Horizon Lines Troubles Show Need For Reform of US Build Requirement*, Hawaii Reporter, Sept. 12, 2011, available <http://www.hawaiireporter.com/horizon-lines-troubles-show-need-for-reform-of-us-build-requirement/123>. [hereinafter Hansen *Horizon*].

53. Hansen *Dilemma*, *supra* note 48; Hansen *Horizon*, *supra* note 52.

54. Hansen *Horizon*, *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

trickle down and impact the next group, consumers.

2. Consumers

The US International Trade Commission (“USITC”) has periodically attempted to quantify the economic impact of the Jones Act and other protectionist legislation on the American economy.⁵⁸ In 1995, it investigated and attempted to quantify the economic effects of U.S. trade restraints, including the Jones Act, on the U.S. economy.⁵⁹ These findings have generally been updated every two years. In 2002, the USITC estimated that complete liberalization of the cabotage provisions of the Jones Act would create a U.S. economic welfare gain of \$656 million,⁶⁰ and in 2009, it calculated that figure at \$1.32 billion.⁶¹ The commission explained that this figure is the “annual reduction in real national income imposed by the Jones Act.”⁶² The potential savings of liberalizing the cabotage laws—or the costs imposed from maintaining these laws (depending on your prospective)—are attributed to the fact that shipping services in the U.S. cost 22 percent more than equivalent services abroad.⁶³ In applying the words of Ferguson, the Jones Act’s imposition of high capital costs on domestic shipping has *reduced the variety* of shipping companies available and in turn has *raised costs for consumers*.⁶⁴

B. Inefficiency by Reducing the Extent of Competition

1. Shipping Companies

Despite the Jones Act, there has been a gradual but steady decline in the number of coastwise shipping companies since the 1930s—an era which marked the rise of the railroad industry.⁶⁵

58. U.S. INT’L TRADE COMMISSION, PUB NO. 3201, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS I (1999), *available at* <http://www.usitc.gov/publications/332/pub3201.pdf> [hereinafter 1999 ECONOMIC EFFECTS].

59. *Id.*

60. U.S. INT’L TRADE COMMISSION, PUB NO. 3519, THE ECONOMIC EFFECTS OF SIGNIFICANT U.S. IMPORT RESTRAINTS XVIII (2002), *available at* <http://www.usitc.gov/publications/332/pub3519.pdf>.

61. 1999 ECONOMIC EFFECTS, *supra* note 58, at 98.

62. *Id.*

63. *See id.*

64. *See* Ferguson, *supra* note 40.

65. DE LA PEDRAJA, *supra* note 10, at 53.

While one of the purported intentions of the Jones Act was to foster the continued existence of the U.S. merchant marine, in reality this law has created significant barriers to entry for the domestic shipping industry and has stymied competition in the marketplace.⁶⁶ As federal judge Gustavo A. Gelpi has explained, “[b]ecause of U.S. law governing cabotage, which imposes extensive requirements for vessels engaged in maritime shipping between U.S. ports, it is difficult for new firms to enter the market.”⁶⁷ These barriers to entry are born out of the Jones Act either explicitly or consequentially.

Since the Jones Act prohibits non-U.S.-built, owned, and operated vessels from engaging in coastwise trade, foreign shipping companies are explicitly barred from entering the U.S. market.⁶⁸ As a consequence of the Jones Act, a prospective company seeking to enter the U.S. coastwise shipping market must make a sizable capital investment to order the construction of a Jones Act-eligible vessel from a U.S. shipping yard.⁶⁹ Such an investment would be two to four times larger than the investment necessary to purchase an equivalent vessel from a foreign shipping yard.⁷⁰ In addition, this hypothetical prospective shipping company would need to wait approximately three unfeasible years for the U.S. shipbuilder to design and construct the vessel before it could begin its operations.⁷¹ Thus, existing U.S. coastwise shipping companies, while not directly subsidized by the government, are akin to Amtrak in terms of receiving government-created protection from competition.⁷²

An apt illustration of this lack of competition exists in Hawaii, where cargo owners must choose between just two main shipping companies Horizon Lines and Matson Navigation. Recently, a

66. See Jackson Thies, *The Long Case for Horizon Lines*, SEEKING ALPHA (last visited Sept. 13, 2012), <http://seekingalpha.com/article/136845-the-long-case-for-horizon-lines>.

67. *Rivera-Muñiz v. Horizon Lines Inc.*, 737 F.Supp.2d 57, 60 (D.P.R. 2010).

68. 46 U.S.C. § 55102 (2006).

69. Thies, *supra* note 66.

70. *Id.*

71. *Id.*

72. See Tad DeHaven, *Privatizing Amtrak*, THE CATO INSTITUTE, (June 2010), <http://www.downsizinggovernment.org/transportation/amtrak/subsidies.pdf>.

group of Hawaiian business owners, who either directly or indirectly utilize the shipping services of these two companies, brought an action against the United States alleging that the cabotage provisions of the Jones Act created a frivolous obstruction to interstate commerce in Hawaii in violation of the Commerce Clause.⁷³ Specifically, the plaintiffs sought to suspend the Jones Act in Hawaii, arguing it caused citizens of Hawaii “irreparable harm as a result of artificial high prices and restrictions on Hawaiian commerce.”⁷⁴ One of the plaintiffs, a former bakery owner whose business went bankrupt, argued that the high shipping costs between Hawaii and the U.S. mainland was a significant factor in the demise of his business.⁷⁵ He noted that the fees charged by Matson Navigation Co. and other U.S. carriers exceeded the fees charged by foreign shippers in similarly-distanced world ports by forty percent.⁷⁶ In an unpublished opinion, the District Court dismissed the plaintiffs’ claims, holding they could not satisfy any of the three standing requirements—*injury in fact, causation, and redressability*.⁷⁷

Similarly, disgruntled consumers in Puerto Rico, where 80% of all consumer goods are shipped from the U.S. mainland by sea and air, filed a class action in 2009 against the three main coastwise shipping companies, alleging anti-competitive conduct including price-fixing which elevated the prices of goods shipped to Puerto Rico.⁷⁸ The plaintiffs asserted that the defendant shipping companies, Horizon Lines, Sea Star Lines and Crowley Liner Services, which combined to control 87% of Puerto Rican cabotage, uniformly increased their shipping rates since 2003.⁷⁹

73. *Kauai Kunana Dairy, Inc. v. United States*, 2009 U.S. Dist LEXIS 114123 at *3, *9 (D. Haw. Dec 8, 2009).

74. *Id.* at *3, *4.

75. *Id.* at *10.

76. *Id.*

77. *Id.* at *10-15. Specifically, the court found first that the plaintiffs failed to assert specific imminent harm to themselves sufficient to show injury in fact. *Id.* at *10-14. Next, the court found that at best the plaintiffs demonstrated a correlation between the Jones Act and their companies’ demise, but the speculative affidavits used for this showing fell short of establishing causation. *Id.* at *14-15. The court concluded that the plaintiffs failed to demonstrate that their purported injury would be addressed by a favorable decision. *Id.* at *14-15.

78. *Rivera-Muñiz*, 737 F.Supp.2d at 59-60, 62.

79. *Id.* at 60. Horizon provides approximately 35% of Puerto Rican

Unlike the plaintiffs in *Kauai Lunana Dairy*, the plaintiffs here did not question the validity or constitutionality of the Jones Act; despite this, the court noted *sua sponte*, that U.S. cabotage laws obstruct new companies from entering the market.⁸⁰ Therefore, a reasonable inference can be made that the Jones Act promotes or at least enables anti-competitive practices among shipping companies, which negatively impact consumers.⁸¹

2. *Ship Builders*

During World War II, the United States embarked on a prolific shipbuilding campaign which, by the end of the war, enabled the nation to proclaim itself the proud possessor of the world's largest merchant fleet—an ostensibly enviable distinction.⁸² In reality, the superfluous U.S. merchant fleet of five thousand vessels destroying demand in the market, combined with the innovative Japanese rebuilding their shipyards from scratch with cheap labor, created a crisis for U.S. shipbuilders from which it has never recovered.⁸³ After World War II, the Japanese shipbuilders eventually captured market share from foreign nations by implementing greater efficiencies and reinvesting profits into new technologies.⁸⁴ In contrast, it is not unfair to characterize American shipbuilding as inferior to foreign

cabotage, Crowley accounts for approximately 31%, and Sea Star accounts for approximately 21%. *Id.* The remaining 13% is provided by Trailer Bridge Inc. who was not a defendant in the lawsuit. *Id.* The court indicated that Trailer's small market share was not sufficient to moderate shipping rates. *Id.* at 62.

80. *Id.* at 60.

81. *See id.* In *Rivera-Muñiz*, the plaintiffs prevailed past the pleading stage as the court dismissed the defendants' motion to dismiss with regards to the price fixing claim. *Id.* at 62. Ultimately, the parties settled out of court for multi million dollars. *Horizon Lines Reaches Puerto Rico Class Action Settlement Agreement*, THE MARITIME EXECUTIVE, (Mar. 9, 2011), <http://www.maritime-executive.com/article/horizon-lines-reaches-puerto-rico-class-action-settlement-agreement>; <http://southflorida.citybizlist.com/6/2011/4/11/Sea-Star-Line-Crowley-Liner-to-Pay-1.7M-Each-to-Settle-Class-Action-over-Price-Gouging--cbl.aspx>.

82. DE LA PEDRAJA, *supra* note 10, at 136-47.

83. *Id.* at 147; Bruce Nolan, *Avondale Closing News is No Surprise to Maritime Experts*, NOLA (Jul. 18, 2010, 1:00PM), http://www.nola.com/business/index.ssf/2010/07/avondale_closing_news_is_no_su.html.

84. Nolan, *supra* note 83.

shipbuilding in terms of both quality and cost.⁸⁵ The Jones Act's U.S.-built requirement is essentially a government-created monopoly that disincentivizes (or at least removes any incentives for) U.S. shipbuilders from pursuing innovation; as a result, American shipbuilding quality has lagged its counterparts in Europe and Asia.⁸⁶ MIT Professor Ernst Frankel once explained, "It is a basic finding of economics that government subsidies, aids, protection, and regulation of an industry will cause its productivity to decline."⁸⁷

Ironically, as the demand for U.S.-built ships has waned over the decades, most U.S. shipyards have been acquired by Northrop Grumman or General Dynamics, both of which are large, defense contractors.⁸⁸ These companies are widely known for their military contracts, not commercial ship production.⁸⁹ Since these two primary U.S. shipbuilders exist in large part because of their contracts with the military, it seems that the Jones Act's original concern—to ensure the adequacy of domestic shipyard facilities in times of emergency—will either always be satisfied or has been completely frustrated depending on how it is considered. While the two main U.S. shipbuilders are capable and practiced in constructing naval ships, the current Jones Act fleet in existence today—182 self-propelled vessels (including just 7 tankers and 23 containerships)—would be of little use to the military in a hypothetical conflict.⁹⁰

III. MODERN DAY CRITICISM

A. The BP Oil Spill

On April 20, 2010, a massive blowout and fire in the well of

85. Gray, *supra* note 46, at 202, 209.

86. *See id.* at 203.

87. *Id.*

88. Joseph Darcy, *Short Sea Shipping: Barriers, Incentives, and Feasibility of Truck Ferry*, (June 2009) (unpublished thesis, Massachusetts Institute of Technology) (on file with Massachusetts Institute of Technology Library, Massachusetts Institute of Technology), *available at* <http://hdl.handle.net/1721.1/49879>.

89. *Id.*

90. The Committee on International Trade, *The Ramifications of the Port Security Legislation on Trade and National Security*, 63 *The Record*, 161, 165 (2008). [hereinafter *Ramifications*].

70 ROGER WILLIAMS UNIVERSITY LAW REVIEW [Vol. 18:52]

the Deepwater Horizon drilling rig in the Gulf of Mexico caused the worst oil spill in the nation's history, left 11 men dead, and grabbed front-page headlines across the country for months.⁹¹ While the primary discussion focused on the precise dollar figure for which to hold BP accountable, just beneath the radar was a robust debate about the effects that the Jones Act had on the disaster. Reports surfaced that foreign nations, such as the Netherlands and Belgium had offered oil skimmers and other vessels to aid in the cleanup, but these vessels were prohibited from participating because of the Jones Act.⁹² The Obama Administration was also criticized for its purported failure to waive the Jones Act to allow participation from foreign-flagged vessels.⁹³ Among the critics was Hawaii Representative Charles Djou, who along with representatives from Florida and Texas, sent the President a letter in mid-June urging him to waive the Jones Act and allow assistance from foreign vessels.⁹⁴

Others, however, claimed that reports about the President's failure to waive the Jones Act were completely false. According to the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, while the federal government did reject certain offers of assistance from foreign nations, the decisions were based on operational circumstances, not the Jones Act.⁹⁵ For example, the Commission noted that it would have taken several weeks for certain Dutch ships to get outfitted and travel to the Gulf region.⁹⁶ The Commission also indicated that the National Incident Commander, Admiral Thad Allen, "appear[ed] to have

91. See Ben Casselman, Russel Gold, & Angel Gonzalez, *Blast Jolts Oil World—Gulf Rig Explodes...*, WALL ST. J., April 22, 2010, at A1; Jerry Markon, *Criminal Charges Considered in BP Oil Spill*, WASH. POST, March 29, 2011, www.washingtonpost.com.

92. Paul H. Rubin, *Why is the Gulf Cleanup so Slow?*, WALL ST. J., July 1, 2010, <http://online.wsj.com/article/SB10001424052748703426004575339650877298556.html>.

93. *Id.*

94. *Djou Calls for Obama to Waive Jones Act to Aid Oil Spill Clean-Up*, THE ASSOCIATED PRESS, June 16, 2010, available at <http://www.staradvertiser.com/news/breaking/96443164.html?1d=96443164>.

95. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling*, (2011), available at http://www.oilspillcommission.gov/sites/default/files/documents/DEEPWATER_ReporttothePresident_FINAL.pdf at 142.

96. *Id.* at 143.

granted waivers and exemptions when requested,” although it did not cite any examples.⁹⁷

Still others claimed the Jones Act waiver issue had absolutely no effect on the cleanup efforts. For instance, H. Clayton Cook Jr., former general counsel of the U.S. Maritime Administration, pointed out in an op-ed in the Wall Street Journal that the Jones Act permits foreign-flagged vessels to operate in U.S. waters to assist in oil cleanups without a waiver.⁹⁸ In fact, as Cook noted, 46 U.S.C.S. § 55113 does permit a foreign-flagged vessel to operate in U.S. waters to assist in the cleanup of an oil spill as long as there is not an adequate number of U.S.-flagged vessels available to clean the oil in a timely manner.⁹⁹ The National Commission also noted that the Jones Act was largely inapplicable because it does not prevent a vessel from loading up with oil and transporting it to more than three miles off the coast.¹⁰⁰

Even if the Jones Act defenders were right in their claims that the Jones Act did not disrupt the oil spill cleanup efforts, it is evident that a hypothetical America facing a comparable oil spill without the Jones Act would be less filled with conjecture, finger pointed, and red tape and better able to concentrate on the relief efforts.

97. *Id.*

98. H. Clayton Cook Jr., *Don't Blame Delays on the Jones Act*, WALL. ST. J., July 10, 2010, at A12, available at [http://online.wsj.com/article\\$B10001424052748703636404575353423992842474.html](http://online.wsj.com/article$B10001424052748703636404575353423992842474.html).

99. *Id.*; 46 U.S.C.S. § 55113 (2006). The statute provides:

Notwithstanding any other provision of law, an oil spill response vessel documented under the laws of a foreign country may operate in waters of the United States on an emergency and temporary basis, for the purpose of recovering, transporting, and unloading in a United States port oil discharged as a result of an oil spill in or near those waters, if--(1) an adequate number and type of oil spill response vessels documented under the laws of the United States cannot be engaged to recover oil from an oil spill in or near those waters in a timely manner, as determined by the Federal On-Scene Coordinator for a discharge or threat of a discharge of oil; and (2) the foreign country has by its laws accorded to vessels of the United States the same privileges accorded to vessels of the foreign country under this section.

100. National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, *supra* note 95, at 143.

B. Short Sea Shipping

The U.S.-build requirement of the Jones Act will potentially restrict development in one of the few areas where maritime growth is expected: short-sea shipping. Prior to World War II, “short-sea shipping,” which encompasses shipping operations along the coasts and inland waterways, was a robust enterprise in America.¹⁰¹ However, following World War II, America enjoyed an extensive development of its highway system which enabled the proliferation of trucking as the preferred and most cost-effective means of transporting goods around the country.¹⁰² Given the prohibitive costs imposed by the Jones Act, including the employment of only U.S. crews and use of only American-built vessels, short-sea shipping struggled to compete with trucking, especially because trucking was benefited by relatively low fuel costs and minimal traffic congestion for several decades.¹⁰³ Recently, because of high fuel costs, paralyzing highway congestion, a dearth of truck drivers, and an inadequate highway system, which is no longer expanding, there has been a renewed interest in the viability of increased short-sea shipping.¹⁰⁴

Today, short-sea shipping is a part of an intermodal transportation network.¹⁰⁵ The first part of the process is referred to as “drayage,” which is the transportation of goods a short distance by truck from their origin to a nearby port.¹⁰⁶ Next, a vessel transports the goods over a medium or long distance to another port where they are subsequently picked up by another truck which brings the goods a short distance to their final destination.¹⁰⁷ This process is streamlined by the use of roll on,

101. See Global Insight, U.S. DEPARTMENT OF TRANSPORTATION OFFICE OF THE SECRETARY/MARITIME ADMINISTRATION, *Four Corridor Case Studies of Short-Sea Shipping Services*, U.S. Dept of Trans. Office of the Secretary / Maritime Administration, (Aug. 15, 2006), at 1, available at [http://www.marad.dot.gov/documents/USDOT_-_Four_Corridors_Case_Study_\(15-Aug-06\).pdf](http://www.marad.dot.gov/documents/USDOT_-_Four_Corridors_Case_Study_(15-Aug-06).pdf) [hereafter *Four Corridor*].

102. *Id.* at 1-2.

103. *Id.* at 2.

104. *Id.*

105. Anastassios N. Perakis & Athanasios Denisis, *A Survey of Short Sea Shipping and its Prospects in the USA*, 35 MARIT. POL'Y & MGMT. 591, 595 (2008), available at <http://intermodalmarine.com/pdfs/Survey%20of%20SSS%20Prospects%20in%20the%20U.S..pdf>.

106. *Four Corridor*, *supra* note 101, at 1.

107. *Id.*

roll off vessels, called Ro-Ro vessels, which allow trucks or other cargo to be easily transferred on and off the vessel.¹⁰⁸

In 2007, optimism for increased short-sea shipping grew when President Bush signed the Energy Independence and Security Act of 2007, which included a Short Sea Transportation Initiative.¹⁰⁹ The Act set forth that “The Secretary of Transportation shall establish a short sea transportation program and designate short sea transportation projects to be conducted under the program to mitigate landside congestion.”¹¹⁰ However, despite its sensible purpose and strong industry and political support, the initiative has been slow to create traction for short-sea shipping since it did not authorize additional funding or account for some prohibitive obstacles.¹¹¹ One necessity is investing in the infrastructure to support short-sea shipping—this includes alterations to port facilities so that they can accommodate increased vessel traffic. In addition, while current sea ports are designed mainly for large, oceangoing vessels which utilize cranes to transfer cargo, short-sea shipping vessels will require ramps and wide dock space so trucks can roll on and off the vessels.¹¹² Not surprisingly, some stakeholders have blamed the U.S.-build provisions of the Jones Act for impeding the economic viability of a meaningful development in short-sea shipping.¹¹³ Most of these complaints focus on the increased start-up costs for short-sea shipping, since purchasing a vessel from the global market is substantially less

108. Perakis, *supra* note 105, at 595. Ro-Ro vessels are contrasted with Lo-Lo vessels (lift on, lift off), which are generally smaller containerships which require cranes to lift cargo onto and off of the vessel. *Id.* at 593.

109. David J. Farrell Jr., *America’s Marine Highway a/k/a Short-Sea Shipping: A Win-Win Proposition*, 5 BENEDICT’S MAR. BULL., 221, 221 (3rd/4th Quarter 2007), available at <http://www.sealaw.org/documents/ShortSeaShipping.pdf>. Farrell cites truck pollution and traffic as the impetus for the short-sea shipping initiative, and notes that, “Americans annually lose 3.7 billion hours, wasting 2.3 billion gallons of fuel, at a cost of \$200 billion just sitting in traffic.” *Id.* at 222.

110. Short Sea Transportation, 46 U.S.C. § 55601(a) (2007 & Supp. 2012).

111. Bryant E. Gardner, *Short Sea Shipping Steams Ahead*, 7 BENEDICT’S MAR. BULL., 112, 113 (2nd /3rd Quarter 2009), available at http://www.winston.com/siteFiles/Publications/Gardner_2.pdf.

112. U.S. Gov’t Accountability Office, *Freight Transportation: Short Sea Shipping Option Shows Importance of Systematic Approach to Investment Decisions*, at 13-14 (July 2005), available at <http://www.gao.gov/new.items/d05768.pdf> [hereinafter GAO 2005 Report].

113. Garnder, *supra* note 111, at 115.

expensive than purchasing the equivalent vessel from a U.S. shipyard.¹¹⁴

IV. PROPOSALS

Reform of the Jones Act is required if America is serious about pursuing certain maritime-related goals, reducing highway congestion and pollution, promoting a swift response to coastal disasters, and benefiting its economy as a whole. The first step is repealing the U.S.-build requirement of the Jones Act.¹¹⁵ For shipping companies, replacement of their aging Jones Act fleets will be a critical issue in the coming years, and obtaining financing for new vessel construction in our current stagnant economy could prove an insurmountable challenge.¹¹⁶ Given that foreign-made vessels, equivalent if not superior in quality, could be purchased at a fraction of the cost, it seems contrary to America's general economic principles to prohibit such purchasing. Not only will repealing the U.S.-build requirement of the Jones Act benefit existing shipping companies, it may foster an era of new shipping companies which can provide the industry with much-needed competition. Furthermore, it may serve as the catalyst that America's complacent shipbuilding companies need to innovate and streamline their operations.

Secondly, the United States should liberalize its cabotage laws with the goal of achieving a middle ground on the global spectrum of cabotage regimes. Despite purportedly embracing liberal economic policies, the United States' approach to cabotage laws is much more closely aligned with the Chinese's ultra-restrictive cabotage regime than it is with the moderate approach implemented by the European Union or the liberal policies employed in Australia and New Zealand.¹¹⁷ Similar to America, China prohibits international shipping companies from transporting goods between Chinese ports; although, the Chinese government takes things a step further by also setting shipping

114. GAO 2005 Report, *supra* note 112, at 13.

115. 46 U.S.C. § 55102 (2006).

116. See Hansen, *Dilemma*, *supra* note 48, at 4.

117. Mary R. Brooks, *Liberalization in Maritime Transport*, Int'l Transp. Forum (2009), available at <http://www.Internationaltransportforum.org/Pup/pdf/09FP02.pdf>.

prices—a socialist practice repugnant to America.¹¹⁸ Other nations with restrictive cabotage laws include Japan, which restricts its coastwise shipping, including among its many islands, to just Japanese shipping companies.¹¹⁹ Interestingly, because of its high labor rates, Japanese cargo companies will send large quantities of its international cargo to nearby Korea for transshipment to the United States and Europe to take advantage of the lower rates offered by international Korean shipping companies.¹²⁰

At the opposite end of the spectrum are countries like Australia and New Zealand, which have very liberal cabotage regimes.¹²¹ In Australia, coastwise trade, referred to locally as “coasting” trade, is open to foreign ship operators and regulated by a permit and licensing system.¹²² Coasting trade, governed by the Navigation Act of 1912,¹²³ was liberalized in 1998, partly because the nation was forced to turn to international freight service since it was not equipped to meet demand.¹²⁴ Australia’s clever licensing system includes requirements designed to prevent foreign-labor abuses and advantages—an aspect of certain concern in the United States. To be issued a permit, a foreign shipping company is mandated to pay its crew Australian wages and cannot be subsidized by its government while it operates on the Australian coast.¹²⁵ In addition, security is addressed by mandating that foreign shipping companies and their vessels must satisfy the requirements of the International Maritime Organization¹²⁶ and the International Labor Organization.¹²⁷

In the middle of the spectrum is the European Union, which liberalized its coastwise trade laws in 1992 to permit any EU-

118. *Id.* at 15.

119. *Id.* at 14.

120. *Id.*

121. *Id.* at 6-8.

122. *Id.* at 6-7.

123. Navigation Act of 1912, Part VI – THE COASTING TRADE, available at http://www.austlii.edu.au/au/legis/cth/consol_act/na1912123/.

124. Brooks, *supra* note 117, at 6.

125. *Id.* at 7.

126. Navigation Act of 1912, Part VB – OFF-SHORE INDUSTRY VESSELS AND OFF-SHORE INDUSTRY MOBILE UNITS, Division 283J., available at http://www.austlii.edu.au/au/legis/cth/consol_act/na1912123/.

127. See *Labour Standards*, INT’L LABOUR ORG. (2006), <http://www.ilo.org/global/standards/lang--en/index.htm>.

76 *ROGER WILLIAMS UNIVERSITY LAW REVIEW* [Vol. 18:52]

flagged vessel to transport goods to any port in the European Union.¹²⁸ Prior to 1992, several northern European nations¹²⁹ already had open, liberal cabotage laws, while southern European nations¹³⁰ had closed, restrictive laws.¹³¹ Despite its liberalization, the European Union's approach to cabotage is still considered a middle ground between Australia and the United States/China as it allows member nations to impose crew nationality requirements, vessel ownership restrictions, and other fiscal requirements.¹³² The European Union, in an effort to improve efficiency of road freight, also has liberalized its road cabotage laws to allow a hauler to conduct three cabotage operations within a seven day period after unloading international cargo.¹³³ This provision seeks to prevent trucks from being driven long distances without carrying any freight, which wastes fuel and contributes to traffic congestion.¹³⁴

America's new regime should be a combination of Australia's licensing program and the European Union's road cabotage policies. Using this system as a model, the United States should sell licenses to foreign shipping companies that would permit them to deliver goods to the United States and then complete up to three cabotage operations before departing for an international port. This regime would provide the U.S. government with some revenue in the form of licensing fees and would promote coastwise shipping competition between American and foreign nations likely without destroying the U.S. merchant marine entirely. While maritime jobs may be lost initially, existing American shipping companies, which already service the domestic shipping market, will have a natural competitive advantage—a tremendous head start—over new, foreign competitors. This valuable advantage

128. Brooks, *supra* note 117, at 10.

129. These countries included the United Kingdom, Denmark and Germany. *Id.*

130. These countries included Greece, Italy, France, Spain, and Portugal. *Id.*

131. *Id.*

132. *Id.* at 10.

133. European Comm'n Regulation No. 1072/2009, Article 8, *available at* <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32009R1072:EN:HTML:NOT>.

134. European Comm'n *Transport: Cabotage*, (last visited Sept. 24, 2012), http://ec.europa.eu/transport/road/haulage/cabotage_en.htm.

2013]

A TASTE OF COMPETITION

77

combined with a repeal of the U.S.-build requirement of the Jones Act should give domestic shipping companies the tools it needs to implement efficiencies, innovate, and compete. Competition and innovation are inherently American principles, and it is time to funnel these principles into the maritime industry by reforming the Jones Act.

V. CONCLUSION

The American ideal is a nation of progressive ideas and innovation. Since this country was founded, Americans have been able to invent, improve, perfect, and prosper in large part because the nation's laws did not stand in their way. However, no legislature is perfect, and at times certain laws have had unintended negative consequences. Certainly, the intention of the Merchant Marine Act of 1920 was not to inflate the prices of consumer goods, or to create insurmountable barriers of entry for domestic shipping companies, or to foster the decline of the quality and quantity of American shipbuilding. A vibrant, robust U.S. merchant marine does not need to be relegated to the confines of a footnote in a history book, but that is where it is headed. The domestic shipping industry has become increasingly complacent in its diminishing role, and Jones Act reform will provide the spark needed to reverse this course.