ADMIRALTY JUDGES: FLOTSAM ON THE SEA OF MARITIME LAW?[†]

The Honorable John R. Brown[*]

I. INTRODUCTION

The United States Constitution and Congress have expressly granted admiralty and maritime jurisdiction to the federal courts. Exercising this authority, admiralty judges have enunciated principles of maritime law that provide both certainty to commercial shipping and protection to those who risk life or property at sea. Moreover, the image of the great maritime judges and their opinions have been a beacon to judges in other areas of the law.

After two centuries of leadership, the tide has begun to turn on admiralty judges. The Supreme Court—whose members are admiralty judges when they hear admiralty appeals—has recently abandoned its Constitutional duty of enunciating maritime law in favor of conforming admiralty law to Congressional enactments and filling in gaps in maritime law only when authorized by Congress. Apparently admiralty judges should now assume the role of followers rather than leaders. Have admiralty judges become flotsam on the sea of maritime law?

[†] Editor's Note: The Hon. John R. Brown died on January 23, 1993. On November 5, 1992, he had delivered the inaugural biennial Nicholas J. Healy Lecture on Admiralty Law at New York University's School of Law. This article is based on the paper from which Judge Brown gave his lecture. [*Houston Journal of International Law* Editor's Note: We wish to express our sincere appreciation to the *Journal of Maritime Law and Commerce* for granting the *Houston Journal of International Law* permission to republish this article, as it originally appeared at 24 J. MAR. L. & COM. 249.]

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II. WHAT IS ADMIRALTY AND MARITIME LAW?

A. The Power and Authority of Admiralty Judges

The importance of the admiralty judge in the United States precedes the adoption of the United States Constitution. Admiralty courts sat in the colonies that bordered the sea long before the Declaration of Independence.[1] After the colonies declared their independence, admiralty courts were established in all of the states to adjudicate admiralty claims.[2] Even when the colonies were governed by the Articles of Confederation, however, the states recognized the necessity of uniform admiralty law. Thus, the Articles conferred on the Continental Congress the authority to establish courts for appeal of maritime matters.[3]

The weakness of the central government under the Articles of Confederation was felt in the judicial and maritime areas as strongly as in any other realm. Justice Pitney noted that "one of the chief weaknesses of the Confederation was in the absence of a judicial establishment possessed of general authority."[4] It was not enough for the Continental Congress to establish a maritime court of appeals to hear appeals from state courts. "The weak point of the system was the absence of power in the central government to enforce the judgment of the appellate tribunal if it had to reverse the decree of the state court."[5]

When the Constitutional Convention was held in 1787, the Founding Fathers had to address the necessity of a system of federal courts and whether such federal courts should be granted jurisdiction over admiralty cases. Although there was substantial debate over the extent of power and jurisdiction of federal judges, the grant of admiralty jurisdiction to the federal

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1. Putnam, How the Federal Courts Were Given their Admiralty Jurisdiction, 10 Cornell L.Q. 460 (1925) [hereinafter Putnam].

2. 1 Benedict on Admiralty § 91, at 6–5 (7th ed. 1992).

3. Putnam, supra note l, at 464. The areas addressed included prize and capture cases, piracies and felonies committed on the high seas.

4. Southern Pac. Co. v. Jensen, 244 U.S. 205, 232 (1917) (Pitney, J., dissenting).

5. Id. at 233.

courts was added "without controversy."[6] Alexander Hamilton stated the following:

> [The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.] These so generally depend on the laws of nations and so commonly affect the rights of foreigners that they fall within the considerations which are relative to the public peace. The most important part of them are, by the present Confederation, submitted to federal jurisdiction.[7]

The result of the Constitutional Convention was a strong affirmation of the need of federal authority over admiralty: "The judicial Power shall extend . . . to all Cases of admiralty and maritime jurisdiction . . ."[8] The significance of this power given to the federal judiciary to hear admiralty and maritime cases is demonstrated by the fact that this is the only grant of jurisdiction in the Constitution that identifies an area of substantive law. Federal authority over admiralty and maritime law is addressed only in the Judicial Article. Oddly, the Constitution does not contain a similar grant of specific authority to Congress over admiralty and maritime law.

The grant of judicial power[9] to the federal courts in Article III of the Constitution also imposes the duty on admiralty judges to exercise that power.[10] This duty requires that the admiralty judges declare the governing principles of maritime law. "Jurisdiction is the power to adjudicate a case upon the merits, and dispose of it as justice may require."[11]

When admiralty judges declare the governing principles of admiralty and maritime law they are doing more than carrying out their Constitutional duty. The admiralty law that they declare carries the authority of the very Constitution itself. The Constitutional underpinning of the admiralty law as enunciated

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6. Putnam, supra note 1, at 469.
7. The Federalist, No. 80, at 478 (Alexander Hamilton).
8. U.S. Const. art. III, § 2, cl. 1.
9. The St. Lawrence, 66 U.S. (1 Black) 522, 526 (1862).
10. Id.
11. The Resolute, 168 U.S. 437, 439 (1897).

by the admiralty judges was initially expressed by justice Bradley as follows:

> That we have a maritime law of our own, operative throughout the United States, cannot be doubted. The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."[12]

Justice McReynolds explained that "the Constitution itself adopted the rules concerning rights and liabilities applicable therein."[13] Therefore, as admiralty judges decide maritime cases, they determine rights and liabilities adopted by the Constitution.

True, the Constitution adopted a system of general maritime law; however, the Constitution did not specify the details of that law. Despite the important influence of the English admiralty judges on the development of maritime law, American judges developed admiralty law from principles, codes and decisions from all of the maritime nations.[14] Justice Marshall described the source of the governing law: "These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."[15]

American admiralty judges also declared their independence from the English courts on the matter of jurisdiction. The political climate in England had restricted the jurisdiction of its admiralty courts while expanding the authority of the common-law courts. Initially, some admiralty judges in the United States took the position that the grant of "admiralty and maritime jurisdiction" in the Constitution "must be taken to refer to the admiralty and maritime jurisdiction of England (from whose

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12. The Lottawanna, 88 U.S. (21 Wall.) 558, 574 (1875).

13. Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 161 (1920).

14. The Scotia, 81 U.S. 170 (1872); The Lottawanna, 88 U.S. at 572–73.

15. American & Ocean Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 545-46 (1828).

code and practice we derive our systems of jurisprudence)."[16] The turning point was Justice Story's powerful opinion in *DeLovio v. Boit*.[17] Although Justice Story recognized the "importance and novelty of the questions"[18] involved in the case, he could not have anticipated the impact of his opinion.

The underlying admiralty jurisdiction issue in *DeLovio v. Boit* was the jurisdiction of the federal courts over a dispute on a marine insurance contract. The English courts, with their limited admiralty jurisdiction, would not have had jurisdiction over the case. Justice Story reasoned not only that the language of the clause of the Constitution conferred "admiralty" jurisdiction but also that the word "maritime" had been "superadded"[19] to the grant. In light of the intentional use of the words "admiralty and maritime" in the Constitution, Justice Story rejected a narrow construction of the jurisdictional grant that would engraft "the restrictions of English statutes, or decisions at common law founded on those statutes, which were sometimes dictated by jealousy, and sometimes by misapprehension, which are often contradictory, and rarely supported by any consistent principle."[20] To the contrary, Justice Story believed the language of the Constitution would "warrant the most liberal interpretation" and that it would "not be unfit to hold" that the phrase "admiralty and maritime" referred to the following:

> [T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short, which collecting the wisdom of the civil law, and combining it with the customs and usages

16. United States v. McGill, 4 U.S. (4 Dall.) 426, 429–30 (1806).

17. 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3,776) (Story, Circuit Justice).

18. Id. at 418.

19. Id. at 442.

20. Id. at 443.

> of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.[21]

Justice Story concluded that it "seems little short of an absurdity" to extend the restrictions in English statutes to the broader language of the Constitution.[22] Therefore, "without the slightest hesitation,"[23] Justice Story extended the federal jurisdiction to include "all maritime contracts, torts and injuries."[24]

The influence of Justice Story's analysis of the grant of admiralty and maritime jurisdiction is found not only in the words of *support* from *admiralty judges* for his opinion,[25] but in the expansive reading *subsequently given* the clause by the *Supreme Court*. Despite the controversy caused by Justice Story's broad interpretation of the grant,[26] the Supreme Court broadly held that the federal admiralty jurisdiction was *not* "*restricted* to the subjects cognizable in the English Courts of Admiralty at the date of the Revolution."[27] Instead of providing a limited authority over maritime matters, the jurisdiction of the admiralty judges was extended to encompass "every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers. . . ."[28]

The wisdom of investing admiralty judges with broad

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21. Id.

22. Id.

23. Id. at 444.

24. Id.

25. Justice Bradley referred to the "learned and exhaustive opinion of Justice Story" and stated that it "will always stand as a monument of his great erudition." Insurance Co. v. Dunham, 78 U.S. (1 Wall.) 1, 35 (1871). Similarly, Judge Ware concurred in Justice Story's "very learned and masterly opinion." Drinkwater v. The Spartan, 7 F. Cas. 1085, 1087 (C.C.D. Maine 1828) (No. 4,085).

26. While noting that Justice Story's opinion was "celebrated for its research, and remarkable, in my opinion for its boldness in asserting novel conclusions", Justice Daniel stated that "I believe I express a general, if not universal opinion of the legal profession in saying that the judgment was erroneous." Jackson v. The Magnolia, 61 U.S. (20 How.) 296, 335–36 (1857).

27. The Belfast, 74 U.S. 624 (7 Wall.) 624, 636 (1868).

28. The Lottawanna, 88 U.S. at 576.

authority to declare the admiralty law of the United States is reflected throughout the jurisprudence of the great admiralty judges. Initially, when the United States was confined to a group of coastal states that were tied to the sea, the admiralty jurisdiction was similarly bound to the ebb and flow of the tide.[29] As trade and commerce moved inland, the admiralty judges expanded the maritime jurisdiction with the march of the pioneers.[30] When commerce moved past the tidal waters, the Supreme Court recognized that admiralty law could no longer be confined: "For if it be the construction, then a line drawn across the River Mississippi would limit the jurisdiction, although there were ports of entry above it, and the water as deep and navigable, and the commerce as rich, and exposed to the same hazards and incidents, as the commerce below."[31] Noting that admiralty courts "have been found necessary in all commercial countries,"[32] Justice Taney extended the authority of the admiralty judges to any navigable waters.[33]

As admiralty jurisdiction expanded with the progress of the pioneers, the admiralty judges developed the principles of maritime law that fostered the growth of commercial activity while protecting the rights of the laborers who faced the hazards of maritime activity. These principles, which were carefully crafted by innovative admiralty judges such as Justice Story, continue to influence the course of admiralty and maritime law a century and a half later. Justice Story authored three opinions in his capacity as a circuit judge that exemplify his contribution to the development of the admiralty law.

Certainly the most quotable opinion from Justice Story is *Harden v. Gordon.*[34] Despite the colorful language, however, the principles underlying *Harden v. Gordon* remain the basis for

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29. The Thomas Jefferson, 23 U.S. 428 (1825). Justice Taney pointed out: "In the old thirteen States the far greater part of the navigable waters are tide waters." The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 455 (1851).

30. Waring v. Clarke, 46 U.S. (5 How.) 441 (1847); The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837).

31. *The Genesee Chief,* 53 U.S. at 456–57.

32. Id. at 454.

33. Id. at 457.

34. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

much of the law of seamen's remedies today. William Harden, a mate on the *Brig Enterprise*, took ill in a foreign port and brought a libel seeking to recover the expenses that were occasioned by his sickness. Justice Story faced a challenge to the jurisdiction of the court and defenses based on statute and contract.

The first issue was the jurisdiction of the court to hear the seaman's claim, particularly since the common-law courts had also taken jurisdiction of claims arising out of seamen's contracts. In England the dispute between admiralty courts and common-law courts had led to the erosion of the power of admiralty courts to hear many traditional maritime matters. Rather than "troubling ourselves to find out the origin of" the common-law jurisdiction, Justice Story analyzed the issue in terms of the power and authority of the admiralty courts.[35] As the obligation to provide cure for the seaman arises out of the seaman's articles "and is a material ingredient in the compensation for the labour and services of the seamen,"[36] Justice Story did not hesitate to extend the American admiralty jurisdiction to encompass the claim despite the restrictive English authorities cited by the shipowner. "[U]ntil I am better informed by the highest tribunal, which I am bound to obey, I shall continue to seek for the true exposition of admiralty jurisdiction in the instructive labours of admiralty judges."[37]

Second, to determine whether admiralty substantive law should provide a remedy for the seaman who took sick in a foreign port, Justice Story found support for his answer both in intrinsic equity and in the protection of shipping. His oft-quoted discourse as to the seamen's habits forms the foundation for the principle cited below that seamen are the wards of the admiralty:

> Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence,

35. Id. at 481.

36. Id.

37. Id. at 481–82.

> carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt.[38]

Justice Story was not content to anchor his analysis solely on the necessity to protect indulgent seamen. He also recognized the needs of shipowners and maritime commerce and the necessity that the law properly combine with the customs and usages of the sea:

> On the other hand, if these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the serious hours of suffering and despondency. Beyond this, is the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation. . . . Even the merchant himself derives an ultimate benefit from what may seem at first an onerous charge. It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages. It diminishes the temptation to plunderage upon the approach of sickness; and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw.[39]

Third, once Justice Story convincingly established that the

38. Id.

39. Id.

general maritime law should afford a remedy to Mr. Harden, he had to address the role of Congress in formulating maritime law. Congress had legislated on the subject of cure and that legislation included a provision requesting the vessel owner to provide a medicine chest. In the absence of a proper medicine chest, the master was required to provide medicine and medical care in any port where the vessel called.[40] The vessel owner contended that the statute acted to repeal a general maritime remedy when the shipowner *actually provided a medicine chest as required by law*. The statute did not, however, expressly prohibit a maritime remedy and at most only contained "a strong implication" against the granting of the maritime remedy.[41] Unless there was language that was "inconsistent with or repugnant to" the maritime law remedy, the statute would be interpreted as cumulative of such a remedy.[42] The "affirmative words" of the statute would not be construed to vary the antecedent maritime rights of the parties.[43]

One problem with the application of a maritime law remedy in Harden's case was the provision of the seaman's articles that the seaman would pay for all medical aid further than the medicine chest. In evaluating the shipping articles, Justice Story articulated the standard by which admiralty judges would treat seamen thereafter:

> Every court should watch with jealousy an encroachment upon the rights of seamen because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying; and are easily over reached. But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their

40. Id. at 484.
41. Id.
42. Id.
43. Id.

> expectations, wards with their guardians, and cestuis que trust with the trustees.[44]

Harden was unaware of the stipulation and gave no consideration for it. Thus, Justice Story considered it his duty, as an admiralty judge, to set aside the provision.

Similarly, the fact that the seaman had signed a receipt in full for all demands when he departed the vessel was held to not bar his maritime claim. Deviating from the common law rule, Justice Story reasoned "that courts of admiralty in the administration of their duties, seek to follow the general principles of justice, rather than technical rules, and consequently avail themselves more of doctrines founded in general equity . . . ."[45] Therefore, as the Supreme Court would hold a century later[46] in *Garrett v. Moore-McCormack*, Justice Story held that the receipt presented no bar to the maritime law claim.[47]

Justice Story continued his development of maritime remedies in *Reed v. Canfield*.[48] Several crew members of the *Albion* went ashore in the ship's home port of New Bedford to take supper at the home of friends of the vessel's helmsman. While the crew members were returning to the vessel, they became trapped in drifting ice after a great change in wind and weather. Crew member William Canfield's feet were so severely frozen that his toes had to be amputated.

Citing common-law principles, the vessel owners contended that they could not be liable for the injury in the vessel's home port "any more than a mechanic or manufacturer at home for like injuries in the service of his employer."[49] Justice Story distanced maritime law from common law, however, because the seamen are "in some sort co-adventurers upon the voyage."[50] For this reason, seamen are subject to different discipline and suffering than landsmen and are entitled to "peculiar rights,

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44. Id. at 485.
45. Id. at 487.
46. Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942).
47. Harden, 11 F. Cas. at 488.
48. 20 F. Cas. 426 (C.C.D. Mass. 1832) (No. 11,641).
49. Id. at 428.
50. Id.

privileges, duties and liabilities."[51] Consequently, Justice Story rejected analogy to common law in favor of the "more enlarged principles, which guide and control the administration of the maritime law."[52]

In determining the extent of the remedy, Justice Story was not unmindful of the principles of maritime law that guided him in granting relief. He held that the vessel owners were liable for expenses until Canfield reached the completion *of his cure* as far as ordinary medical means extended. Thereafter, the owners were not responsible.[53] A century later the Supreme Court would ratify Justice Story's analysis.[54]

The final defense asserted by the vessel owner was that the seaman's negligence barred his claim. Once again, Justice Story departed from common-law doctrines in favor of maritime rules that do not visit a forfeiture when there has been ordinary negligence. "It is rather the tendency of the law to wink at slight offenses, and to punish those only which are gross and deeply injurious to the ship's service."[55] Without any "gross negligence, or any unreasonable and intentional delay on the part of the boat's crew, in wilful disobedience of orders," Mr. Canfield would receive his cure.[56] The Supreme Court also ratified this holding a century later.[57]

The rejection of common-law remedies for all co-adventurers on the voyage in *Reed v. Canfield* became the basis for a more important legal definition in Justice Story's opinion in *United States v. Winn*.[58] Prior to the advent of steamships, admiralty judges used navigational duties as the basis for determining who was a seaman or crew member.[59] When steam replaced sail as the main motive power for vessels, the duties of the laborers on the voyage changed. While seamen originally had to *"hand,*

51. Id.
52. Id.
53. Id. at 429.
54. Farrell v. United States, 336 U.S. 511 (1949).
55. Reed, 20 F. Cas at 430.
56. Id.
57. Warren v. United States, 340 U.S. 523 (1951).
58. 28 F. Cas. 733 (C.C.D. Mass. 1838) (No. 16,740).
59. E.g., Black v. The Louisiana, 3 F. Cas. 503 (C.C.D. Pa. 1804) (No. 1,461).

reef and steer" their vessels,[60] the new steamships required laborers who worked with boilers, fuel, and a host of new cargoes.[61] In *Winn*,[62] Justice Story freed the word "crew" from restriction to laborers with navigational duties to include the ship's company.[63] After *Winn*, the definition of the terms crew member and seaman became based on the worker's connection to the vessel and were expanded to encompass all the officers and common workers who labored on the voyage.[64] Justice Story's analysis "opened the door to permit such workers as bartenders, horsemen and muleteers, coopers, pursers, cooks and stewards, and a host of others to attain seaman status."[65] By the end of the Nineteenth Century, most admiralty judges,[66] including such important admiralty judges as Judge Henry Billings Brown (who as Justice Brown subsequently authored *The Osceola*[67]) and Judge Learned Hand,[68] had adopted the rule that it is the connection to the vessel that is the important issue, so that all of the "co-laborers in the leading purpose of the voyage" had status as seamen.

As the twentieth century unfolded, the courts developed a "myriad of standards and lack of uniformity in administering the elements of seaman status" that finally received the attention of the Supreme Court in *McDermott International, Inc. v. Wilander*.[69] Although the Supreme Court did not resolve all of the questions of seaman status, the Court did return to the

60. The Canton, 5 F. Cas. 29, 30 (C.C.D. Mass. 1858) (No. 2,388).

61. Erastus Benedict, The American Admiralty § 241, at 134 (1st ed. 1850).

62. Engerrand & Bale, Seaman Status Reconsidered, 24 S. Tex. L.J. 431, 434 (1983).

63. Winn, 28 F. Cas. at 734. Justice Story had previously foreshadowed this result and departed from requiring navigational duties in his opinion in United States v. Thompson, 28 F. Cas. 102 (C.C.D. Mass. 1832) (No. 16,492).

64. Id.

65. Engerrand & Bale, Seaman Status Reconsidered, 24 S. Tex. L.J. at 434–35.

66. The Ocean Spray, 18 F. Cas. 558, 560 (C.C.D. Ore. 1876) (No. 10,412); Saylor v. Taylor, 77 F. 476, 479 (4th Cir. 1986); The Buena Ventura, 243 F. 797, 799 (S.D.N.Y. 1916).

67. 189 U.S. 158 (1903).

68. The Minna, 11 F. 759, 760 (E.D. Mich. 1882); The J.S. Warden, 175 F. 314, 315 (S.D.N.Y. 1910).

69. 111 S. Ct. 807, 816 (1991) (quoting Engerrand & Bale, Seaman Status Reconsidered, 24 S. Tex. L.J. at 432–433).

fundamental principle enunciated more than a century earlier by Justice Story and rejected tests based upon a worker's navigational duties.[70] "It is not the employee's particular job that is determinative, but the employee's connection to a vessel."[71]

The admiralty judges of the twentieth century have taken the helm from their nineteenth century brethren and have continued to advance the principles that set admiralty law apart from the common law. The leadership of the admiralty judges is exemplified by Judge Learned Hand's opinion in *The T.J. Hooper*.[72]

Two coal barges in coastwise tow of the tugs *Montrose* and *T.J. Hooper* were lost in a gale off the coast of New Jersey in March, 1928. Each tug sailed with fair weather and there were no signs of any impending problems. During the voyage, however, both tows encountered gale force winds that caused the loss of the end barge of each tow. Had the tugs carried radio receivers, they would have received weather reports during the voyage that predicted an increase in winds from fresh to strong. The masters of the tugs indicated that, had they received a storm warning, they would probably have put into a safe port. The issue was the liability of the tugs for failing to carry radio receiving sets by which they could have received warnings in time to seek shelter from the gale.

The owners of the tug contended that they could not be liable because there was no general custom of coastwise carriers to equip their tugs with radio receivers. Judge Hand recognized that admiralty judges have often equated industry standards with proper diligence and that reasonable prudence may, in many cases, be common prudence.[73] However extensive the industry practice may be, Judge Hand declared, it is the duty of the courts to "say what is required."[74] Under the circumstances Judge Hand declined to follow the custom of the industry and declared the tugs unseaworthy for lack of proper equipment.[75]

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70. 111 S. Ct. at 817.
71. Id.
72. 60 F.2d 737 (2d Cir. 1932), cert. denied, 287 U.S. 662 (1932).
73. Id. at 740.
74. Id.
75. Id.

The rejection of common-law technicalities and distinctions has led admiralty judges not only to dispense equity[76] in admiralty cases but also to set a course for their land-locked brethren to jettison some of the doctrines that have encumbered the common law. A classic example is Justice Stewart's opinion in *Kermarec v. Compagnie General Transatlantique*.[77] While paying a social call on a crew member of the S.S. *Oregon*, Joseph Kermarec fell and sustained injuries because of the defective manner in which a canvas runner had been tacked to a ladder. Believing Kermarec to be "a gratuitous licensee," the district judge applied the substantive law of New York and set aside the jury's verdict in favor of the plaintiff because there was no evidence that the shipowner had actual knowledge of the defective condition.

The Supreme Court initially held that New York law did not apply to the case and that the rights and liabilities were "measurable by the standards of maritime law."[78] This required Justice Stewart to determine what standard of care was imposed by the general maritime law on vessel owners in the case of injuries to social guests. In his role as an admiralty judge, Justice Stewart recognized that "[t]he issue must be decided in the performance of the Court's function in declaring the general maritime law, free from inappropriate common-law concepts."[79] The common-law distinctions between licensees and invitees, which "were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism,"[80] are "foreign" to the fundamental principles of admiralty law which are based on "traditions of simplicity and practicality."[81] Consequently, Justice Stewart would not import

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76. One admiralty judge expressed it: "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense as would his landlocked brother, that which equity and good conscience impels." Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co., 303 F.2d 692, 699 (5th Cir. 1962), cert. denied, 371 U.S. 942. [Editor's note: The admiralty judge was Judge Brown.]

77. 358 U.S. 625 (1958).

78. Id. at 628.

79. Id. at 630.

80. Id.

81. Id. at 631.

such distinctions into the admiralty law:

> The incorporation of such concepts appears particularly unwarranted when it is remembered that they originated under a legal system in which statutes depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea.[82]

Following the maritime law's ancient "traditions of simplicity and practicality," Justice Stewart declared that the vessel owes a duty of reasonable care under the circumstances of each case for all those on board the vessel for purposes not inimical to the vessel's legitimate interests.[83]

The *Kermarec* decision has had an enormous impact on common-law judges who are no longer willing to abide feudal distinctions in twentieth century society. Sailing in *Kermarec*'s wake, the California Supreme Court in *Rowland v. Christian*[84] "stripped away" the same "ancient concepts as to the liability of the occupier of land" as were decried by Justice Stewart.[85] Echoing "the failings of the common law rules" which were eloquently invoked by Justice Stewart,[86] the California Supreme Court concluded that the historical justifications for the common-law distinctions are no longer "justified in the light of our modern society."[87] As in *Kermarec*, the California Supreme Court held that the plaintiff's status was not determinative, and that the possessor of land would be judged "as a reasonable man in view of the probability of injury to others."[88] Subsequently, other common-law courts have adopted the simplicity of the maritime rule announced in *Kermarec*.[89]

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82. Id. at 631–32 (footnote omitted).

83. Id. at 632.

84. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

85. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

86. 69 Cal. 2d at 116, 443 P.2d at 566, 70 Cal. Rptr. at 102.

87. 69 Cal. 2d at 117, 443 P.2d at 567, 70 Cal. Rptr. at 103.

88. 69 Cal. 2d at 119, 443 P.2d at 568, 70 Cal. Rptr. at 104.

89. These cases are collected in Gulbis, Annotation, Modern Status of Rules Conditioning Landowner's Liability Upon Status of Injured Party as Invitees, Licensees, or Trespassers, 22 A.L.R. 4th 294, 301–10 (1983).

The role of the admiralty judge is best summarized by the eloquent opinion of Justice Chase, sitting as Circuit Judge in *The Sea Gull*.[90] The steamers *Sea Gull* and *Leary* collided, causing the death of a stewardess on the *Leary*. The husband of the stewardess brought a libel against the *Sea Gull* to recover damages for the losses he sustained which were caused by the death of his wife. The *Leary* contended that the stewardess' cause of action died with her. Justice Chase acknowledged that the common law supported the vessel's position; however, he pointed out that "the common law has its peculiar rules in relation to the subject, traceable to the feudal system and its forfeitures."[91] Although "the weight of authority in common-law courts seems to be against the action," Justice Chase believed that "natural equity and the federal principles of law are in favor of it."[92] In contrast to the common-law approach, Justice Chase stated that "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[93] Consequently, the court entered a decree in favor of the libellant for the losses he sustained.

B. The Role of Congress in Formulating General Maritime Law

The Constitution does not contain any express grant of authority to Congress over admiralty law that is similar to the judicial power contained in Article III. In fact, the authority of Congress to regulate navigation was contested early in *Gibbons v. Ogden*.[94] The dispute originated in New York legislation that granted Robert Fulton and Robert Livingston the exclusive right to navigate steamboats in New York waters. Fulton and Livingston had assigned their rights to Aaron Ogden. Thomas Gibbons had two steamboats that were licensed by the United States, pursuant to Congressional statute, to engage in

90. 21 F. Cas. 909 (C.C.D. Md. 1865) (No. 12,578).

91. Id. at 910.

92. Id. (quoting Cutting v. Seabury, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3,521)).

93. 21 F. Cas. at 910.

94. 22 U.S. (9 Wheat) 1 (1824).

coastwise trade. The New York courts enjoined Gibbons from navigating his vessels between New York and Elizabethtown in violation of the rights granted under New York law to Fulton and Livingston.

Ogden argued that the Constitution did not delegate to Congress any powers over navigation, and that the authority granted to Congress by the Constitution to regulate commerce[95] was limited to buying, selling and exchanging commodities.[96] Chief Justice Marshall responded that the term "commerce" encompassed "something more: it is intercourse."[97] Once "intercourse between nations" was held to fall within the definition of commerce, the door was opened to most admiralty matters: "The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admissions of the vessels of one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling, or of barter."[98] Thus, Chief Justice Marshall upheld the federal licenses granted to Gibbons (under the Act of Congress) and dissolved the state injunction.[99]

Once the Constitution granted Congress authority over admiralty and maritime law, delineation of the relationship of the boundaries between Congress and the admiralty judges in maritime matters became necessary. The division of such powers initially was addressed in the context of admiralty jurisdiction and procedure. The conflict arose because Article III, Section 2, provides that the federal judicial power shall extend to admiralty and maritime cases, and Article III, Section 1 invests the judicial power in the Supreme Court and such inferior courts as Congress shall establish. Thus, Congress has the power to create federal courts that are granted jurisdiction derived from the Constitution. In the Judiciary Act of 1789, Congress dually established federal district courts and granted

95. U.S. Const. art. I, § 8.
96. Gibbons, 22 U.S. at 198.
97. Id.
98. Id. at 190–91.
99. Id. at 239–40.

admiralty and maritime jurisdiction to them.[100]

Justice Taney described the relationship between Congress and the admiralty judges of the federal courts in *The St. Lawrence*.[101] Although Congress may prescribe the forms and mode of pleading in the courts,[102] Congress may not enlarge the boundaries of the court's admiralty jurisdiction nor "make it broader than the judicial power may determine to be its true limits."[103] The boundary of the courts' power "is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument, and the purpose for which admiralty and maritime jurisdiction was granted to the Federal government."[104] Justice Bradley expanded on Justice Taney's analysis in *The Lottawanna*.[105] He explained that "the true limits of maritime law and admiralty jurisdiction" are "exclusively a judicial question."[106] For this reason "no state law or Act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be."[107]

After addressing the authority of the admiralty judges in determining their Constitutionally defined jurisdiction, Justice Bradley turned to the substantive admiralty and maritime law. Justice Bradley declared that the substantive law that the Constitution intended for admiralty judges to apply referred to the foreign law and codes of France, Germany and Italy as well as the legal history, legislation and adjudications in the United States.[108] Justice Bradley then defined the Constitutional role of the admiralty judge as follows: while the admiralty judges are constitutionally bound to declare the law, in reference to the

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100. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73. 77 (codified at 28 U.S.C. § 1333(1)).

101. 66 U.S. (1 Black) 522 (1861).

102. See The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459-60 (1851).

103. 66 U.S. at 527.

104. Id.

105. 88 U.S. 558 (1875).

106. Id. at 576.

107. Id.

108. Id.

international and American sources of admiralty and maritime law, the judges do not "make the law."[109] In the event that changes in the general maritime law become necessary, his advice was for the parties to look to Congress. Expanding on Justice Marshall's analysis in *Gibbons v. Ogden*, Justice Bradley stated that "Congress, undoubtedly, has authority under the commercial power, if no other, to introduce such changes as are likely to be needed."[110] Justice Bradley emphasized, however, that there is a difference between the grant of judicial authority over admiralty and maritime law and Congressional power over commerce. "The scope of the maritime law, and that of commercial regulation are not coterminous."[111] He concluded that commercial regulation would embrace "much the largest portion of ground covered by" the maritime law.[112] With regard to the issue in *The Lottawanna*—repairs furnished to a vessel in her home port—Justice Bradley did not "doubt that Congress might adopt a uniform rule for the whole Country."[113]

Justice Bradley, in *Butler v. Boston & Savannah Steamship Co.*,[114] reiterated his support for Congressional modification of general maritime law. Although recognizing that "the limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, and cannot be affected or controlled by legislation, whether state or national,"[115] Justice Bradley did acknowledge that Congress may, within the Constitutional boundaries, amend and modify the maritime law as declared by the Supreme Court.[116]

By the early twentieth century, decisions such as *Butler* led the Supreme Court to conclude that "considering our former opinions, it must now be accepted as settled doctrine that, in consequence of these provisions,[117] Congress has paramount

109. Id. at 576–77.
110. Id. at 577.
111. Id.
112. Id.
113. Id.
114. 130 U.S. 527 (1889).
115. Id. at 557.
116. Id.
117. The Court referred to the Constitutional grant of admiralty and maritime

power to fix and determine the maritime law which shall prevail throughout the country."[118] Emphasizing how much is in the hands of admiralty judges in the absence of a controlling statute, however, "the general maritime law, as accepted by the federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction."[119]

While recognizing the authority of Congress over maritime substantive law, the Supreme Court did enforce Constitutional limitations on Congress' power. In *Southern Pacific Co. v. Jensen*,[120] the Supreme Court dealt with a state worker's compensation claim arising out of the death of a longshoreman on the gangway of a vessel. Justice McReynolds states the governing principle with regard to state authority over maritime law as to others:

> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.[121]

Applying this principle, Justice McReynolds emphasized that the application to foreign ships of a different statute in every state would destroy the uniformity established by the Constitution so that "freedom of navigation between the states and with foreign countries would be seriously hampered and impeded."[122] Consequently, Congressional application of the state workers' compensation law to a maritime accident was unconstitutional.

The absence of a compensation remedy for maritime workers led Congress to enact an amendment to the grant of admiralty jurisdiction to the federal courts,[123] saving "to claimants the

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jurisdiction and the grant of power to Congress to make all laws "necessary and proper for carrying into execution the foregoing powers." U.S. Const. art. I, § 8.

118. Southern Pac. Co. v. Jensen, 244 U.S. 205, 215 (1917).

119. Id.

120. Id.

121. Id. at 216.

122. Id. at 217.

123. 28 U.S.C. § 1333(1) (1964).

rights and remedies under the Workmen's Compensation Law of any state."[124] The constitutionality of this provision was successfully challenged in *Knickerbocker Ice Co. v. Stewart*.[125] As in *Jensen,* a state worker's compensation claim was asserted in connection with the death of a maritime worker.

After reviewing the Constitutional principles that led the Court to invalidate the application of the state law in *Jensen*, the Court stated that "the field was not left unoccupied; the Constitution itself adopted the rules concerning rights and liabilities applicable therein."[126] Thus, substantive principles of admiralty law carry the authority of the Constitution itself and Congress can modify such principles only in a limited manner. Justice McReynolds described the role of Congress in changing the maritime law adopted by the Constitution: "To preserve adequate harmony and appropriate uniform rules relating to maritime matters and bring them within control of the Federal government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere."[127]

The Congressional purpose of the enactment reviewed in *Knickerbocker Ice Co. v. Stewart* was to permit application of state compensation statutes to maritime injuries. The object of the grant of admiralty and maritime jurisdiction to the federal government, however, "was to commit direct control to the Federal government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."[128] The authorization by Congress of state compensation statutes would, as in *Jensen*, "inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established."[129] Consequently, the Congressional attempt to circumvent *Jensen* violated the uniformity mandated by Article III, Section 2 and was unconstitutional.

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124. Act of Oct. 6, 1917, ch. 97, 40 Stat. 395.
125. 253 U.S. 149 (1920).
126. Id. at 161.
127. Id. at 160.
128. Id. at 164.
129. Id.

Still determined to provide a Congressional mechanism, Congress, after the decision in *Knickerbocker Ice*, again amended the admiralty jurisdiction statute. The intent was to preserve "to claimants for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State, District, Territory or possession of the United States, which rights and remedies when conferred by such law shall be exclusive . . . ."[130]

The Supreme Court addressed the constitutionality of this latest Congressional enactment in *Washington v. W.C. Dawson & Co*.[131] As in *Knickerbocker Ice*, the statute made "no attempt to prescribe general rules. On the contrary, the manifest purpose was to permit any state to alter the maritime law, and thereby introduce conflicting requirements."[132] The Supreme Court reiterated the restricted role that the Constitution gave to Congress to modify the general maritime law:

> Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.[133]

Congress had not acted within its role of providing uniform national duties or obligations in the amendment to the admiralty jurisdiction statute. Consequently, the statute was unconstitutional. Justice McReynolds emphatically advised Congress as follows:

> To prevent this result the Constitution adopted the law of the sea as the measure of maritime rights and obligations. The confusion and difficulty, if vessels were compelled to comply with the local statutes at every

130. Act of June 10, 1922, ch. 216, 42 Stat. 634.

131. 264 U.S. 219 (1924).

132. Id. at 228.

133. Id. at 227–28.

> port, are not difficult to see. Of course, some within the states may prefer local rules; but the Union was formed with the very definite design of freeing maritime commerce from intolerable restrictions incident to such control. The subject is national. Local interest must yield to the common welfare. The Constitution is supreme.[134]

The limitation that Congress may enact modifications of the maritime law only if they are uniform throughout the country is not the only Constitutional restriction on the power of Congress. In his role as admiralty judge, Justice Henry Billings Brown reviewed centuries of maritime codes and decisions in order to declare the remedies of seamen in *The Osceola*.[135] Following settled principles of maritime law, Justice Brown concluded that seamen who fall ill or are injured are entitled to maintenance and cure, wages to the end of the voyage and an indemnity for injuries caused by the unseaworthiness of the vessel.[136] He concluded, however, that seamen are not entitled to an indemnity for the negligence of the master or crew.[137] Congress enacted the Jones Act in 1920[138] to create the negligence remedy that the maritime law did not provide. The Act grants seamen the right to maintain an action for damages at law based on the statute conferring a negligence remedy to railway employees.[139]

The Supreme Court addressed the constitutionality of the Act in *Panama RR Co. v. Johnson*.[140] Andrew Johnson was injured while ascending a ladder from the deck to the bridge. He brought an action as a seaman under the Jones Act against his employer on the common-law side of the federal district court.

Justice Van Devanter began his analysis by reviewing the Constitutional foundation for general maritime law. "As there could be no cases of 'admiralty and maritime jurisdiction' in the absence of some maritime law under which they could arise, the

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134. Id. at 228.
135. 189 U.S. 158 (1903).
136. Id. at 175.
137. Id.
138. 46 U.S.C. app. § 688 (1992).
139. Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (1988).
140. 264 U.S. 375 (1924).

provision presupposes the existence in the United States of a law of that character."[141] The framers of the Constitution were familiar with the principles of general maritime law and placed this subject under national control. Although the Constitution contained "no express grant of legislative power over the substantive law," the commentators, courts and Congress believed the Constitution had implicitly given power to Congress. "Practically, therefore, the situation is as if that view were written into the provision."[142] Consequently, the substantive admiralty law was considered to be "subject to power in Congress to alter, qualify, or supplement it as experience or changing conditions might require."[143]

While giving wide discretion to Congress, the Court acknowledged that the power was also subject to limitations:

> One is that there are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them, or including a thing falling clearly without. Another is that the spirit and purpose of the constitutional provision require that the enactments—when not relating to matters whose existence or influence is confined to a more restricted field . . . shall be coextensive with and operate uniformly in the whole of the United States.[144]

Justice Van Devanter did not find any constitutional impediment to altering maritime rules to bring them into relative conformity with the common law or in permitting rights founded on the maritime law to be enforced in actions on the common-law side of the courts, such as in an *in personam* action.[145]

The shipowner contended that the Jones Act ran afoul of the Congressional limitations because the statute allowed "a seaman asserting a cause of action essentially maritime to

141. Id. at 385.
142. Id. at 386.
143. Id.
144. Id. at 386–87.
145. Id. at 388.

withdraw it from the reach of the maritime law and the admiralty jurisdiction and to have it determined according to the principles of a different system, applicable to a distinct and irrelevant field."[146] The Supreme Court did not, however, read the Jones Act literally. First, Justice Van Devanter held that the Jones Act added to the general maritime law a new right—the negligence remedy. This action could be brought as a maritime action on the admiralty side of the court.[147] This action would be tried by the court like any other general maritime law claim brought on the admiralty side of the court.[148] Justice Van Devanter acknowledged that this provision was "not in so many words made part of that law; but an express declaration was not essential to make them such."[149] However, it was the duty of the court to construe the statute so as to avoid the conclusion that it was unconstitutional.[150] Once the new admiralty action was established, Congress granted seamen an election to bring the action on the law side of the court with a trial by jury.[151] "Rightly understood," the Jones Act was not unconstitutional because it "neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so."[152] In essence the seaman was granted an election "between alternatives accorded by the maritime law as modified, and not between that law and some nonmaritime system."[153]

Finally, Justice Van Devanter did not believe that the adoption of the railway workers' negligence remedy violated the Constitutional requirement of uniformity. As construed by the Court, the statute provides a uniform maritime remedy and "neither is nor can be deflected therefrom by local statutes or local views of common-law rules."[154]

In conclusion, admiralty judges and Congress are both given

146. Id. at 387.
147. Id. at 391.
148. Id.
149. Id. at 389.
150. Id. at 390.
151. Id. at 391.
152. Id. at 388.
153. Id. at 388–89.
154. Id. at 192.

authority in admiralty and maritime cases. Admiralty judges were given the final authority over matters of the Constitutional grant of jurisdiction, but Congress was given the power to modify the body of substantive maritime law adopted by the Constitution. This power was, however, subject to Constitutional limits. Congress may not exclude matters from the general maritime law nor include matters within it that are not maritime. Further, any Congressional enactment must operate uniformly throughout the United States. Congressional efforts have been repeatedly scrutinized by the admiralty judges to insure harmony between the principles of maritime law incorporated by the United States Constitution and the power to regulate commerce granted to Congress. In this context the words of Justice Story in *Harden v. Gordon*[155] provide the greatest illumination. When Congress legislates affirmatively in an area, the statute should not be read as varying or repealing the existing general maritime law. There must be something inconsistent or repugnant to the maritime law principle before the statute impugns a doctrine that is Constitutionally based.[156] As in *Panama R.R. Co. v. Johnson*, the Court should endeavor to construe all Congressional enactments consistently with the governing principles of general maritime law.

III. THE DEMISE OF THE ADMIRALTY JUDGE

The decision of the Supreme Court in *The Harrisburg*[157] was unfortunate for two reasons. First, the Court declined to follow the enlarged principles which guide and control the administration of the general maritime law and instead adopted the common-law rule which declined to afford a cause of action for wrongful death. Second, because Congress legislated in the area in response to the inequity of the Court's decision, the Supreme Court has subsequently compounded its initial failure to act by abdicating its Constitutional authority in this area.

The steamer *Harrisburg* and the schooner *Marietta Tilton* collided in Massachusetts waters on May 16, 1877. The widow

155. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6,047).

156. Id. at 484.

157. 119 U.S. 199 (1886).

and child of Silas Richards, First Officer of the schooner, brought an *in rem* action against the *Harrisburg* seeking to recover damages caused by the negligence of the steamer. Chief Justice Waite began his analysis with the common-law rule that "no civil action lies for any injury which results in death."[158] Despite the intervention of statutes such as Lord Campbell's Act in England, Chief Justice Waite found "no country that has adopted a different rule on this subject for the sea from that which it maintains on the land; and the maritime law, as accepted and received by maritime nations generally, leaves the matter untouched."[159] Adding these two propositions together, Chief Justice Waite concluded the following:

> Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law.[160]

In answer to *The Harrisburg*, Congress in 1920 enacted the Death on the High Seas Act (DOHSA)[161] to provide a remedy for deaths caused on the high seas**,** beyond a marine league from shore.[162] Congress did not legislate a federal remedy for state waters but chose rather to leave "unimpaired the rights under state statutes as to deaths on waters within the territorial jurisdiction of the States."[163] Use of state remedies by admiralty judges to provide a remedy for deaths caused in territorial waters (as envisioned by Congress) was sanctioned by the Supreme Court in *Western Fuel Co. v. Garcia*.[164] Simultaneously

158. Id. at 204 (quoting Mobile Life Ins. Co. v. Brame, 95 U.S. 754, 756 (1877)).
159. 119 U.S. at 213.
160. Id.
161. 46 U.S.C. app. §§ 761–767 (1992).
162. Id. at § 761.
163. S. Rep. No. 216, 66th Cong., 1st Sess. 3 (1919).
164. 257 U.S. 233 (1923).

with the passage of DOHSA, Congress enacted the Jones Act, which provides a negligence remedy to injured seamen. The Act also grants a wrongful death remedy when seamen are killed as a result of their employer's negligence.[165] The Jones Act did not provide a remedy for the wrongful death of a seaman caused by breach of the warranty of seaworthiness under the general maritime law, and the Supreme Court declined to allow state wrongful death statutes to fill the gap and provide such a remedy.[166]

The combination of Congressional and state statutes provided a partial patchwork of remedies which left Edward Moragne's widow without a remedy when he died while working as a longshoreman aboard the vessel *Palmetto State* in Florida waters. Justice Harlan's opinion—a superb piece of judicial craftsmanship—in *Moragne v. States Marine Lines, Inc.*[167] exemplifies how admiralty judges should respond to an inequity in the maritime law. Rather than placing one more patch on a flawed system, Justice Harlan proceeded directly to the source of the problem—the decision in *The Harrisburg*. Finding that the opinion in *The Harrisburg* created "an unjustifiable anomaly in the present maritime law,"[168] the Court overruled it in favor of the creation of a general maritime remedy for death caused by violation of maritime duties[169] (including seaworthiness).

Justice Harlan did not lightly overturn the established precedent. He revisited the analysis originally cited in support of *The Harrisburg* decision and determined that the common-law rule it adopted "was based on a particular set of factors that had, when *The Harrisburg* was decided, long since been thrown into discard even in England, and that had never existed in this country at all."[170] Justice Harlan chided his predecessors for their blind adherence to the common law. "Without discussing any considerations that might support a different rule for admiralty, the Court held that maritime law must be identical

165. 46 U.S.C. app. § 688 (1992).

166. Lindgren v. United States, 281 U.S. 38 (1930).

167. 398 U.S. 375 (1970).

168. Id. at 378.

169. Id. at 409.

170. Id. at 381, 386.

in this respect to the common law."[171] In contrast to Chief Justice Waite's restrictive interpretation, Justice Harlan believed that the application of the fundamental principles of maritime law "suggest that there might have been no anomaly in adoption of a different rule to govern maritime relations, and that the common-law rule, criticized as unjust in its own domain, might wisely have been rejected as incompatible with the law of the sea."[172]

Regardless of the validity of *The Harrisburg* at the time it was decided in 1886, the development of the law thereafter demonstrated that "the rule against recovery for wrongful death is sharply out of keeping with the policies of modern American maritime law."[173] Therefore, Justice Harlan found "no present public policy against allowing recovery for wrongful death."[174]

After sweeping away any substantive objections to the establishment of a general maritime wrongful death remedy, Justice Harlan believed it was appropriate to review the maritime statutes enacted by Congress to insure the appropriateness of application of a general maritime wrongful death remedy on the facts of that case.[175] But he did not stop there. He was not satisfied with finding and then applying an act of Congress to supply the remedy. But in deference to Congress, Justice Harlan also looked beyond the specific subject of the legislation to determine "the compass of the legislative aim" so that the Court could declare maritime law consistent with the "direction" given by Congress.[176]

The purpose of Congress in enacting DOHSA was to eliminate the "disgrace" of *The Harrisburg* and to "bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea."[177] Congress has not attempted to "pre-empt the entire field" and

171. Id. at 388.

172. Id. at 387.

173. Id. at 388.

174. Id. at 390.

175. Id. at 392–93.

176. Id.

177. Id. at 397 (quoting S. Rep. No. 216, 66th Cong., 1st Sess., 3, 4 (1919); H.R. Rep. No. 674, 66th Cong., 2d Sess. 3, 4 (1920)).

destroy remedies that previously existed such as state wrongful death statutes.[178] Congress only legislated in DOHSA to cover the high seas. The decision not to extend the statute to territorial waters was based on "lack of necessity" and did not reflect "an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act."[179]

Justice Harlan also found no preclusion in the Jones Act, which provides only a statutory wrongful death remedy for the death of a seaman caused by his employer's negligence and which does not affect the seaman's general maritime law unseaworthiness remedy. While Edward Moragne was a longshoreman and the Jones Act did not apply to his widow's suit, Justice Harlan recognized that the creation of a general maritime law remedy for death "seems to be beyond the preclusive effect of the Jones Act."[180] The seaman's representative would have a statutory negligence remedy under the Jones Act and a cause of action for unseaworthiness under the general maritime law for which a wrongful death remedy was afforded by DOHSA in the event the death was caused on the high seas and a general maritime wrongful death remedy pursuant to *Moragne* in the event the death was caused in territorial waters.[181] Justice Harlan stated that "the existence of a maritime remedy for death of seamen in territorial waters will further, rather than hinder, 'uniformity in the exercise of admiralty jurisdiction.'"[182]

In summary, Justice Harlan found no "compelling evidence" to presume that Congress affirmatively intended to "freeze" into the maritime law the distinctions that arose from the patchwork of legislation enacted to circumvent *The Harrisburg*.[183] "There should be no presumption that Congress has removed this Court's traditional responsibility to vindicate the policies of

178. Moragne, 398 U.S. at 398.

179. Id. at 398–99.

180. Id. at 396, n.12.

181. Id.

182. Id. (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 155 (1964)).

183. Moragne, 398 U.S. at 396.

maritime law by ceding that function exclusively to the States."[184] Finding that Congress had no intention "of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law,"[185] Justice Harlan overruled *The Harrisburg* and held "that an action does lie under general maritime law for death caused by violation of maritime duties."[186]

Justice Harlan did not "spell out" all of the elements of the maritime wrongful death remedy in *Moragne*.[187] This process began in *Sea-Land Services, Inc. v. Gaudet*.[188] As in *Moragne*, *Gaudet* involved the death of a longshoreman in state waters. The first issue was whether the decedent's recovery for his personal injuries would bar a subsequent wrongful death action. Justice Brennan recognized that "a majority of courts interpreting state and federal wrongful-death statutes have held that an action for wrongful death is barred by the decedent's recovery for injuries during his lifetime."[189] This includes the FELA and, by incorporation, the Jones Act.[190]

The policy underlying a wrongful death remedy is to compensate the decedent's dependents "for their losses."[191] Therefore, from a policy standpoint, "the remedy should not be precluded merely because the decedent, during his lifetime, is able to obtain a judgment for his own personal injures."[192] Justice Brennan found no statutory language that would "require a contrary conclusion," so he was guided by the *Sea Gull* maritime principle that "it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules."[193]

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184. Id.
185. Id. at 400.
186. Id. at 409.
187. Id. at 405.
188. 414 U.S. 573 (1974).
189. Id. at 579.
190. Mellon v. Goodyear, 277 U.S. 335, 345 (1928).
191. Gaudet, 414 U.S. at 583.
192. Id.
193. Id. (quoting Justice Chase's opinion in The Sea Gull, 21 F. Cas. 909, 910

Justice Brennan similarly analyzed the question as to the elements of damages available in the general maritime remedy. Both the Jones Act and DOHSA limited awards to pecuniary losses so that loss of society could not be recovered under those statutes.[194] Despite these limitations, the Court held that loss of society is an element of the maritime wrongful death remedy. Justice Brennan concluded that "our decision is compelled if we are to shape the humanitarian policy of the maritime law to show 'special solicitude' for those who are injured within its jurisdiction."[195]

Justices Harlan and Brennan declared the maritime law in *Moragne* and *Gaudet* in a fashion consistent with their Constitutional role as admiralty judges, while acknowledging the power of Congress to alter the maritime law. There was no Congressional intent in any federal statute to preclude a general maritime remedy or to prescribe the element of such a remedy in the situation of Edward Moragne or Awtrey Gaudet—the death of a longshoreman in state waters. A more difficult situation, however, involved deaths on the high seas—the precise situs to which DOHSA applies.

When the pilot and passengers were killed in a helicopter crash on the high seas off the coast of Louisiana, the Supreme Court was presented with the opportunity to address the relationship between DOHSA and the maritime wrongful death remedy, in *Mobil Oil Corp. v. Higginbotham*.[196] Four years after *Gaudet* and only eight years after *Moragne*, the majority of the Court doffed the admiral's hats they had worn in *Moragne* and *Gaudet* and donned the common-law robes that they wore in 1886 when they froze the maritime law in *The Harrisburg*.

The issue in *Higginbotham* was whether to award damages for loss of society, as was allowed in *Gaudet* under the general maritime law wrongful death remedy in the case of deaths

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(C.C.D. Md. 1865) (No. 12,578)).

194. Congress expressly limited recovery under DOHSA, 46 U.S.C. app. § 762 (1992). The Supreme Court judicially limited claims under the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60, the remedy incorporated by the Jones Act. See Michigan Cent. R.R. v. Vreeland, 227 U.S. 59, 67 (1913).

195. Gaudet, 414 U.S. at 558 (footnote omitted).

196. 436 U.S. 618 (1978).

caused on the high seas. The parties presented alternative policy arguments to the Court as to the substantive issue, but the majority of the Court concluded that "we need not pause to evaluate the opposing policy arguments. Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses."[197] The majority viewed the pecuniary loss limitation in DOHSA as Congress' considered judgment on the issue of damages and reasoned that when Congress "speaks directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly that the Act becomes meaningless."[198] The majority drew a distinction between "filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[199] In view of the express pecuniary loss limitation in DOHSA, the majority believed that they had "no authority to grant a non-statutory maritime remedy in this case."[200]

The Court also addressed the plaintiffs' argument that application of DOHSA's limitation would violate the uniformity of the maritime law. While the Court recognized the "value of uniformity," the majority considered the award of different recoveries depending on whether the death was caused in territorial waters or on the high seas to pose "only a minor threat to the uniformity of maritime law."[201] However, the Court concluded that "even if this difference proves significant, a desire for uniformity cannot override the statute."[202]

In dissent, Justice Marshall returned to the analysis used by Justice Harlan in *Moragne* and reviewed Congress' purpose in enacting DOHSA. Justice Harlan found "no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law."[203] Similarly, Justice Marshall concluded from the legislative history that "Congress

197. Id. at 623.
198. Id. at 625.
199. Id.
200. Id. at 626.
201. Id. at 624.
202. Id.
203. Id. at 629 (Marshall, J., dissenting).

was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover at least their pecuniary loss."[204] In the absence of "congressional directive to foreclose nonstatutory remedies," Justice Marshall believed that "maritime law principles require us to uphold the remedy for loss of society at issue here."[205] There was no established and inflexible rule that precluded that maritime law recovery. There was "at most" an expression by Congress of a "minimum recovery" for deaths on the high seas.[206] As "Congress did not mean to exclude the possibility of recovery beyond pecuniary loss," Justice Marshall would have effectuated the maritime policy favoring the granting of the remedy.[207]

Justice Marshall based his analysis on the principles set out by Justice Chase in *The Sea Gull* and Justice Story in *Harden v. Gordon* which envision a different role for the admiralty judge than the restrictive view that the Supreme Court adopted in *Higginbotham.* Justice Marshall did not point out that the majority also failed to account for the Constitutional limit that Congressional intervention in the general maritime law must have uniform application. In view of the availability of damages for nonpecuniary losses under the general maritime law in state waters and the limitation on damages on the high seas, the application of the statutory limitation resulted in a non-uniform geographic patchwork with regard to recoverable damages. The majority simply answered this challenge with circular reasoning that "a desire for uniformity cannot override the Statute."[208]

Prior to *Moragne* the three-mile limit had been the line at which recovery might be granted or denied based on reasons wholly unrelated to the merits of the claim. Justice Harlan in *Moragne* wisely rejected such a fortuitous circumstance as the basis for recovery. Eight years later in *Higginbotham*, the Court sailed full circle and returned to the three-mile limit as the fortuitous dividing line between recovery of pecuniary and nonpecuniary losses.

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204. Id.
205. Id.
206. Id. at 630.
207. Id.
208. Id. at 624.

While the deference shown to Congress by the Court in *Higginbotham* is perhaps more understandable in view of the coverage of DOHSA and the limitation on damages contained in that statute, the self-imposed limitation on the power of admiralty judges in *Miles v. Apex Marine Corp.*[209] is more troublesome. When Ludwick Torregano was stabbed to death by a fellow crew member on a vessel in the harbor of Vancouver, Washington, his mother brought a wrongful death action against the vessel's owner, operators and charterer seeking to recover for negligence under the Jones Act and unseaworthiness under the general maritime law. The Fifth Circuit reversed the jury's finding of 7% negligence and held that the vessel was unseaworthy as a matter of law. The Court of Appeals affirmed awards for loss of support and services and for the decedent's pain and suffering (elements of damages which may be recovered under the Jones Act), and affirmed the denial of any award for loss of society on the ground that a nondependent parent may not recover for loss of society in a general maritime law wrongful death action.[210] The Supreme Court affirmed the ruling that loss of society was unavailable in the general maritime law action for a different reason.

In arriving at this result, however, the Court reversed the Constitutional roles of admiralty judges and Congress. Justice O'Connor began her opinion in *Miles* by stating that "legislation has always served as an important source of both common law and admiralty principles."[211] She then noted that Congress may place limits on admiralty judges and they may not go beyond those limits.[212] In the field of wrongful death remedies, Justice O'Connor reviewed at length Justice Harlan's analysis in *Moragne* that DOHSA was created to fill a void on the high seas so there was no proscription against creation of a maritime wrongful death action for territorial waters.[213]

After reviewing the history of DOHSA, Justice O'Connor analyzed the unseaworthiness action asserted under the general

209. 111 S. Ct. 317 (1990).

210. Miles v. Melrose, 882 F.2d 976 (5th Cir. 1989).

211. Miles v. Apex Marine Corp., 111 S.Ct. at 321.

212. Id.

213. Id.

maritime law in *Miles*. When DOHSA and the Jones Act were enacted in 1920, the seaman's general maritime law unseaworthiness remedy was undeveloped and largely ignored. It was only after the Supreme Court transformed unseaworthiness into a doctrine of strict liability in 1944[214] that the doctrine practically superseded the Jones Act as a basis for recovery by seamen.[215] It was the emergence of unseaworthiness (for which the general maritime law at that time declined to provide a wrongful death remedy) that resulted in the manifestation of anomalies that led to the *Moragne* decision. First, a seaman who was injured by unseaworthiness in state waters could recover damages, but if he died his claim died with him. Second, the location of the injury causing a seaman's death by unseaworthiness would determine whether there was a recovery; (no recovery if in state waters; recovery under DOHSA if on the high seas). Third, the representatives of a longshoreman killed by unseaworthiness in state waters could recover if the state statute granted a wrongful death remedy, but those of a true seaman could not.[216] Justice O'Connor acknowledged that Congress could not have anticipated the emergence of the unseaworthiness remedy.[217] At least in usual terms of statutory construction, it would be even more mystifying if in 1920, Congress could have anticipated that unseaworthiness would become a basis for liability for death, so much so that whatever limitation—here pecuniary losses—would be imposed on death recoveries now, was then an undeveloped remedy for unseaworthiness. Consequently, she concluded that nothing in DOHSA "or in the Jones Act could be read to preclude this Court from exercising its admiralty power to remedy nonuniformities that could not have been anticipated when those statutes were passed."[218]

After wearing the admiral's hat as an admiralty judge and establishing a general maritime law wrongful death remedy for a seaman killed by unseaworthiness, Justice O'Connor did not

214. Mahnich v. Southern S.S. Co., 321 U.S. 96 (1944).

215. Miles, 111 S. Ct. at 322.

216. Moragne, 398 U.S. at 395–96.

217. Miles, 111 S. Ct. at 322 (citing Moragne, 398 U.S. at 399).

218. 111 S. Ct. at 322.

believe that she was empowered to apply the general maritime rule of damages (from *Gaudet*) for violation of the warranty of seaworthiness in state waters. In contrast to Justice Harlan's analysis in *Moragne*, Justice O'Connor changed the focus of the Constitutional role of admiralty judges and Congress:

> We have described *Moragne* at length because it exemplifies the fundamental principles that guide our decision in this case. We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these [70 year old] legislative enactments for policy guidance. We may supplement these statutory remedies when doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes [which could not have anticipated the development of recovery based on unseaworthiness] both direct and delimit our actions.[219]

Applying the concept that admiralty judges may only enunciate principles that vindicate or are consistent with statutory policies, Justice O'Connor found nothing in the Jones Act that evinces "general hostility to recovery under maritime law."[220] Thus, the Jones Act does not preclude a separate wrongful death action for unseaworthiness based either upon DOHSA on the high seas or under the general maritime law (*Moragne*) in state waters.[221]

On the issue of damages, the Jones Act and the FELA are silent. However, the Supreme Court had judicially declared that the FELA provides recovery only for pecuniary losses.[222] In doing so, the Supreme Court pointed out that, like the FELA, Lord

219. Id. at 323.

220. Id. at 324.

221. Id.

222. Michigan Cent. R.R. v. Vreeland, 227 U.S. at 59, 69–71.

Campbell's Act did not use the word "pecuniary" to limit the damages which could be recovered.[223] However, despite the absence of specific limitation, Lord Campbell's Act "and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage."[224]

As the pecuniary loss limit of FELA recoveries was in effect at the time the Jones Act was enacted, "Congress must have intended to incorporate the pecuniary limitation on damages as well."[225] But oddly, Congress must not have intended to incorporate the DOHSA limitation to pecuniary losses. Thus, recovery in a Jones Act negligence action is limited to such losses. The final step in Justice O'Connor's analysis applies the limitation on recovery, which Congress impliedly placed on the seaman's statutory Jones Act cause of action based on negligence, to the seaman's separate cause of action under the general maritime law for breach of the warranty of seaworthiness. Justice O'Connor concluded that it would be "inconsistent" with the role of the Court in the Constitutional scheme if the Court sanctioned a more expansive remedy in a judicially created cause of action than in the action enacted by Congress.[226] Consequently, the Court denied recovery under the general maritime law for loss of society for the death of a seaman killed by unseaworthiness in territorial waters.[227]

The decision of the Supreme Court to bar recovery of nonpecuniary damages in an unseaworthiness claim under the general maritime law, based on the old statute providing a negligence remedy which was enacted under Congress' power to regulate commerce, leads to the most strained preemption holding ever reached by an American admiralty judge. In essence, the *implied* effect of the *implied* provision in a statute enacted under an *implied* power of Congress served to eliminate a remedy declared by the admiralty judges of the Supreme Court in exercise of their power conferred directly by the Constitution. Moreover, Justice O'Connor's preemptive interpretation of the

223. Id. at 71.
224. Id.
225. Miles, 111 S. Ct. at 325.
226. Id. at 326.
227. Id.

Jones Act now directly implicates the Constitutionality of the application of that statute. The Supreme Court had to give the Jones Act a strained construction in *Panama R.R. Co. v. Johnson*,[228] so as to avoid the conclusion that the statute withdrew a cause of action from the general maritime law in order to have it determined according to the principles of a different system. By interpreting the Jones Act as providing a new negligence remedy, enforceable in admiralty and at law, Justice Van Devanter avoided a successful Constitutional attack on the statute.

In *Moragne* and *Gaudet*, the Supreme Court established that when a longshoreman's widow brought an unseaworthiness action for death in state waters, she was entitled to recover nonpecuniary losses. The holding in *Miles* withdraws the element of nonpecuniary losses from the unseaworthiness cause of action in the case of the death of a seaman solely because Congress impliedly followed Lord Campbell's Act when it enacted the Jones Act. While the Supreme Court upheld the constitutionality of the Jones Act when it was construed as establishing a negligence cause of action in admiralty, the constitutionality of the Act is subject to question when it is applied to withdraw an element of damages from a seaman's separate general maritime law cause of action for breach of the warranty of seaworthiness. The removal of nonpecuniary losses from the recovery available for breach of the warranty of seaworthiness and the limitation on those damages based on principles derived from interpretation of an English statute (Lord Campbell's Act) contravene the Constitutional limits of Congress' power over admiralty law.

IV. CONCLUSION

The decisions in *Higginbotham* and *Miles* represent a complete reversal of the roles of admiralty judges and Congress. Prior to these decisions, admiralty judges exercised their Constitutional duty to declare the admiralty and maritime law based on enlarged principles of justice combined with the customs and usages of the sea. Admiralty judges were not bound

228. 264 U.S. 375 (1924).

by technical rules, common law distinctions, feudal concepts or limitations imposed by jealousy-based wars about jurisdiction in England. Seamen were considered to be wards of the admiralty court and were treated with special solicitude by admiralty judges.

In the past fifteen years the justices of the Supreme Court have abandoned their role as admiralty judges. Justice O'Connor's words could not evince the sentiment any clearer: "We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection."[229] Justice O'Connor advised that admiralty judges should look primarily to the legislature for policy guidance and should supplement the statutory remedies only to achieve uniform vindication of legislative policies.[230] In other words, admiralty judges are no longer charged with declaring principles of maritime law based on the customs and usages of the sea or based on the policies of furthering commerce and protecting maritime workers. Instead, they must look way back over their shoulders so as not to step on the penumbras of legislation that might apply to some related area.

The reversal of roles articulated by the current Supreme Court denigrates not only the Constitutional duty entrusted to admiralty judges; it also turns back two centuries of leadership of both the admiralty law and the common law. The mere fact that Congress has legislated in an area is insufficient to preempt maritime remedies in the absence of Congressional purpose to do so. The affirmative intervention of Congress in the maritime field should be interpreted in a positive and supportive fashion and should not be used to emasculate the power of admiralty judges to declare admiralty law. As Justice Story concluded, even strong implication by Congress is insufficient to deprive admiralty judges of their duty to enunciate the law in conformity with governing maritime principles. Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution.

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229. Id. at 323.

230. Id.

In contrast to the previous interpretation given to federal statutes by the admiralty judges of the Supreme Court, Justice O'Connor's construction of DOHSA and the Jones Act prevents recovery of damages available under the general maritime law despite the absence of any Congressional intent to preclude maritime remedies. Moreover, the proposition that admiralty judges may not declare uniform principles of admiralty law has fostered inconsistency between maritime remedies and Congressional enactments.[231]

In his role as an admiralty judge in *Moragne*, Justice Harlan predicted that the granting of a general maritime law wrongful death remedy would bring more "placid waters"[232] to the subject. The decisions of the Supreme Court have engendered instead a flood of cases seeking to turn the maritime law into traditional common law, incorporating restrictions and limitations such as those in Lord Campbell's Act. This process will only continue as long as the Justices of the Supreme Court—who are and must continue to be the leading American admiralty judges—abdicate their role to declare maritime law as admiralty judges.

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I will conclude as did Lord Nottingham in the great case of the Duke of Norfolk,[233]

> I have made several decrees since I have had the honor to sit in this place, which have been reversed in another place; and I was not ashamed to make them, nor sorry when they were reversed by others.[234]

Whether an appeal to fellow judges is helpful may be doubtful. While noting that Justice Story's opinion in *De Lovio v. Boit* was celebrated for its research and remarkable in its boldness in asserting novel conclusions, in *Jackson v. The Magnolia*,[235] Justice Daniel stated that "I believe I express a

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231. For example, as a result of *Miles* the recovery for the death of a seaman in territorial waters will be limited to pecuniary losses, while the recovery for the death of a longshoreman caused by the negligence of a shipowner or other third party will include nonpecuniary damages.

232. Moragne, 398 U.S. at 408.

233. 3 Ch. Cas. 52.

234. Id. at 444.

235. 61 U.S. (20 How.) 296, 335–336 (1857).

general, if not universal opinion of the legal profession in saying that the judgment was erroneous."