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Pleasure Boating and Admiralty: *Erie* at Sea[†]

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PLEASURE BOATING is basically a new phenomenon, the product of a technology that can produce small boats at modest cost and of an economy that puts such craft within the means of almost everyone.¹ The risks generated by this development create new legal problems. New legal problems are typically solved first, and often finally, by extension of common law doctrines in the state courts. Legislative regulation and any solution at the federal level are exceptional and usually come into play only as a later stage of public response.²

There is no obvious reason why our legal system should react differently to the new problems presented by pleasure boating. Small boats fall easily into the class of personal property. The normal rules of sales and security interests would seem capable of extension to small boats without difficulty. The same should be true of the rules relating to the operation of pleasure boats and particularly to the liability for breach of the duty to take reasonable care for the safety of others. One would expect, therefore, that the legal problems of pleasure boating would be met with the typical response: adaptation of the common law at the state level.

Unhappily this is not likely to happen. Pleasure boating has the misfortune of presenting basic issues in an already complex problem of fed-

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¹ At the close of World War II there were less than half a million pleasure boats in the United States. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION—PROGRAM FOR 1959 at 53 (1958). That figure was a rough estimate. The Federal Boating Program of 1958, 72 Stat. 1754 (1958), 46 U.S.C. §§ 527-527(h) (Supp. 1963), requires numbering of all pleasure boats of more than 10 horsepower. As a result there are now accurate statistics. The Coast Guard reports that as of Feb. 28, 1963, there were 3,516,052 boats numbered pursuant to the 1958 statute in the United States (including Guam, Puerto Rico and the Virgin Islands). U.S. COAST GUARD, RECREATIONAL BOATING IN THE UNITED STATES, ANN. REP. (1963). That was an increase of over half a million boats from the previous year. *Id.* (1962). These figures significantly understate the total number of boats since many small boats need not be numbered.

² See Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

eralism: the relationship between federal admiralty law and state law.³ The accepted formulation of the test for admiralty jurisdiction was laid down in *The Plymouth* in 1866: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or the navigable waters, is of admiralty cognizance."⁴ That proposition has been frequently reiterated,⁵ and the Supreme Court has not chosen to re-examine it. Pleasure boating tests the proposition in a way that up to now has not been necessary.⁶

Relying on *The Plymouth* and related cases, a number of courts have held admiralty law applicable to pleasure boats.⁷ Admiralty law is federal law, and there are a number of important differences between admiralty law and the common law of the states. Perhaps the most striking conflict is between the admiralty rule that the contributory negligence of a claimant only reduces the damages⁸ and the generally applicable common law rule

³ See generally GILMORE & BLACK, ADMIRALTY §§ 1-17 (1957) [hereinafter cited as GILMORE & BLACK]; D. Currie, *Federalism and The Admiralty: "The Devil's Own Mess,"* 1960 SUPREME COURT REV. 158; Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950); Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123 (1925).

⁴ 70 U.S. (3 Wall.) 20, 36 (1866).

⁵ E.g., *Hess v. United States*, 361 U.S. 314, 318 (1960); *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959).

⁶ Airplane accidents also test the proposition but in a different context. It has been held that an admiralty court has jurisdiction of an airplane tort case simply because the plane happened to crash in navigable waters. *Weinstein v. Eastern Airlines, Inc.*, 316 F.2d 758 (2d Cir. 1963); see also *Noel v. United Aircraft Corp.*, 204 F. Supp. 929 (D. Del. 1962). The airplane cases are different from pleasure boat cases, however, in one important respect. Typically airplane cases involve crashes occurring on the high seas and are almost entirely free of the complications of federalism. No state has any substantial interest in the application of its law and the analogy to supernational origins of admiralty is compelling. Some law must be applicable, and there is no reason why it should not be the law of the United States rather than the law of New York or any other state. Furthermore, admiralty is the only body of federal law that makes any pretension towards being comprehensive, and it is, therefore, an obvious place to begin looking for analogies. It might be better if the airplane cases were viewed not as applications of admiralty law because the accident occurred on navigable waters, but rather as reference to admiralty as a useful, but not necessarily binding, source of law. Airplane accidents also have the characteristic of being fatal and many claims can thus conveniently be heard under the umbrella of the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 761-67 (1958). That statute provides for hearing in the district courts in admiralty, and there is some authority that cases under the act can only be heard in admiralty. Comment, 51 CALIF. L. REV. 389, 399-402 (1963). Pleasure boating cases, on the other hand, typically involve residents of one state and that state can legitimately assert an interest in their welfare.

⁷ E.g., *Niepert v. Cleveland Elec. Illuminating Co.*, 241 F.2d 916 (6th Cir. 1957); *King v. Testerman*, 214 F. Supp. 335 (E.D. Teun. 1963); *Cashell v. Hart*, 143 So.2d 559 (D.C.A. Fla. 1962). But cf., *McGuire v. City of New York*, 192 F. Supp. 866 (S.D.N.Y. 1961). A number of cases are collected in 63 A.L.R.2d 343 (1959). See also CALIFORNIA PLEASURE BOATING LAW (Cal. C.E.B. 1963); Cohan, *Law and Practicalities for Yachtsmen*, 32 TEMP. L.Q. 241 (1959); Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427 (1961); Note, *Pleasure Boating and the Admiralty Jurisdiction*, 10 STAN. L. REV. 724 (1959).

⁸ *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *The Max Morris*, 137 U.S. 1 (1890).

that contributory negligence precludes recovery altogether. There are, however, a number of other differences of almost equal importance. Apart from collision cases,⁹ admiralty law does not permit contribution between tortfeasors;¹⁰ many states have statutes allowing contribution.¹¹ Admiralty law holds a shipowner to a standard of reasonable care for all classes of visitors;¹² the law of many states imposes differing standards depending upon whether the visitor is a social or a business invitee.¹³ There is no statute of limitations in admiralty; there is in state law.¹⁴

Rules of this nature are basic to almost all automobile litigation. In such litigation, *Erie*¹⁵ and its progeny have made it clear that state law is generally to be looked to for the applicable rule of decision in the absence of some strong national interest that can only be protected or promoted by application of federal law. With respect to the divergent rules noted above, there is no question that if the issue were presented in an automobile diversity case, the federal court would be bound to choose the state rule rather than the federal admiralty rule.

In pleasure boat cases, however, the lower courts seem to be drifting toward an equally insistent application of the federal admiralty rule¹⁶ without considering whether that choice is consistent with the preference underlying *Erie* for local power to govern events of only local significance. No federal interest is apparent that would support such a supplanting of state law. This is not to say that there never is a federal interest in the affairs of pleasure boating. Clearly a federal interest exists with respect to such matters as the rules of navigation, right of way, and lights to be carried, which must necessarily control both big ships and little boats and as to which there is a clear virtue in national uniformity. But there remains a large area, particularly with what may be called remedial rules—such as the conflicts between admiralty and state law noted above—where there is no clearly ascertainable federal interest.

Even absent a federal interest, is there any serious objection to the

⁹ In mutual fault collision cases the damages are divided equally without regard to degree of fault. GILMORE & BLACK §§ 7-4, 7-5, 7-18. This is to some extent modified by the "major-minor" fault doctrine. *Id.* at § 7-4.

¹⁰ *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

¹¹ See PROSSER, TORTS § 46, at 248-49 (2d ed. 1955).

¹² *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

¹³ See PROSSER, *op. cit. supra* note 11, at 427.

¹⁴ The admiralty court will usually refer to the otherwise applicable statute of limitation to determine what constitutes laches. The importance of this conflict between the state rule and the federal admiralty rule can thus easily be exaggerated. Occasionally, however, it makes a difference. See *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206 (1963); *Gardner v. Panama R.R. Co.*, 342 U.S. 29 (1951).

¹⁵ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹⁶ See authorities cited note 7 *supra*.

application of admiralty law? So long as attention is confined to decisional law,¹⁷ it would have to be conceded that in general admiralty law will produce results not demonstrably less just than the application of state law. The strict rule of contributory negligence is scarcely fairer than the admiralty rule.¹⁸ Nor can the distaste for forum shopping, which explains some of the preference for state law in the *Erie* line of cases, support an argument in favor of state law. If admiralty law is applicable to pleasure boats, it will be applied whether a case is brought in a state or federal court.¹⁹

The chief objection to application of admiralty law to pleasure boating is that it implicitly prohibits the exercise of state legislative power in an area in which the local legislatures have generally been thought competent and in which Congress cannot be expected either to be interested or to be responsive to local needs. A number of states have already enacted laws applicable to pleasure boats that are inconsistent with admiralty law.²⁰ These state statutes pose most dramatically the basic question of the rela-

¹⁷ The qualification is necessary because of the Limitation of Liability Act, 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-95 (1958), which, when applied to pleasure boating, produces notably unjust results. See text accompanying notes 186-214 *infra*.

¹⁸ Conceivably a court could pick and choose between state law and admiralty depending upon the supposed superiority of the state or admiralty rule. For example, it might be held that the admiralty rule on contributory negligence and the state law on contribution between tortfeasors should be applied to pleasure boating. Such a procedure would be at war with both *Erie* and *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Furthermore it would put to courts a kind of question they are not accustomed or qualified to decide. Alternatively, it would be possible to hold that the admiralty law was applicable to pleasure boating, but that the states retained power to change the admiralty rule as to pleasure boats by statute. That was the mode of decision under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). Such a technique for choosing the applicable law would work, and probably fairly well, but it also would be inconsistent with both *Erie* and *Jensen*.

¹⁹ *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1 (1946). The same rule is applicable to a federal court sitting on the "law" side, *Pope v. Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953).

²⁰ Fourteen states have enacted imputed negligence statutes which make the owner of a vessel liable for injury or damage occasioned by the negligent operation of such vessel by another party. The owner is excused from liability if the vessel is not operated with his express or implied consent. See, e.g., CAL. HAR. & NAV. CODE § 661 (1961); IDAHO CODE ANN. § 39-2529 (1961); KY. REV. STAT. ANN. § 235.310 (1960); LA. REV. STAT. ANN. § 850.24 (1960); MICH. COMP. LAWS § 281.580 (1958); MONT. REV. CODES ANN. § 69-3515 (Supp. 1961); NEB. REV. STAT. ch. 81, § 815.16 (Supp. 1959); N.M. STAT. ANN. § 75-35-16 (Supp. 1961); N.D. REV. CODE § 61-27-12 (1960); OKLA. STAT. ANN. tit. 63, § 815 (Supp. 1960); ORE. REV. STAT. § 488.178(1) (1961); R.I. GEN. LAWS ANN. § 46-22-15 (Supp. 1960); S.C. CODE § 70-295.12 (1962); UTAH CODE ANN. § 73-18-18 (Supp. 1961).

California has enacted a statute which denies a right of action for civil damages to any person who as a guest accepts a ride in a vessel without giving compensation for the ride, unless it is established that the injury or death proximately resulted from the intoxication or wilful misconduct of the operator. See CAL. HAR. & NAV. CODE § 661.1 (Supp. 1962).

tionship between the state law and federal admiralty. If the language of some Supreme Court decisions is taken seriously, the statutes are void because they interfere with a constitutionally required uniformity of admiralty law.²¹

Only a very strong policy could justify such a result. State statutes are not declared unconstitutional merely because they are offensive to symmetry. Analysis of the cases suggests that state law is being supplanted not because of any decision of policy, but rather because of the inertia of precedent, notably *The Plymouth*, and because of a general aura of magic that surrounds admiralty. The net result is that judges have apparently been led to assume that whatever occurs on navigable water is, for that reason alone, a thing apart—something that only federal authorities are competent to control.

This article is an attempt to show that there is nothing magical about the water's edge. To do so requires probing the fundamental issue: what are the reasons for federal admiralty jurisdiction? The conclusion reached is that the original purpose and the sole modern justification for federal admiralty law is the promotion and protection of what may variously be called the business of shipping, the maritime industry, or commerce by water. In other words, there is more than a fortuitous relationship between commerce and admiralty; if there is no commercial element involved—if the people who make their living by transporting cargo or passengers could not care less—there is no reason to apply admiralty law and, unless *Erie* is wrong, every reason to apply state law. From this it follows that state law is applicable to many of the problems of pleasure boating because much of pleasure boating has no more connection with commerce (and thus with any federal interest) than has any automobile accident on a national highway.

The Supreme Court has occasionally flirted with the notion that the proper ambit of admiralty law is circumscribed by what is of concern to commerce.²² Thus far the Court has not had to face the question, because commerce by water has been involved in every case it has decided.²³ What

²¹ *E.g.*, *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

²² See *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874); *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52 (1914); see also *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 (1955) (Frankfurter, J., concurring). *But cf.* *Southern Pacific v. Jensen*, 244 U.S. 205, 252–53 (1917) (Pitney, J., dissenting).

²³ The only known exception is *Levinson v. Deupree*, 345 U.S. 648 (1952). That was a wrongful death action arising out of a collision of two pleasure boats on the Ohio River. Federal jurisdiction was based solely on the fact that the injury occurred on navigable water. The issue was whether the defective appointment of an administrator could be cured by an amendment after the statute of limitations had run. The Court held that whatever the result might be if the case were a diversity action (*i.e.*, was the relation-back doctrine "substance"

follows is an attempt to show that the Court's instinct was indeed correct and that, accordingly, state law has a much larger role to play in the affairs of pleasure boating than the lower court cases would indicate.

I

ADMIRALTY AND COMMERCE

Because pleasure boating did not exist in any meaningful sense until very recently, history cannot dictate what law should be applied to pleasure boating. To argue that since no admiralty case involving a pleasure boat can be found prior to the adoption of the Constitution, state law should, therefore, be applied, would be absurd. Nor would it be reasonable to conclude that since no early admiralty case was found that did not involve commercial activity, admiralty does not reach beyond what concerns commerce by water. The explanation for the absence of non-commercial admiralty cases is simply that there was hardly any navigation that was not commercial before the twentieth century. The conclusions that may legitimately be drawn from history are three: (1) nothing in history precludes restricting admiralty law to matters of commercial concern; (2) such a restriction is consistent with the objective of the constitutional grant of admiralty jurisdiction: to protect and promote the maritime industry; and (3) the departures from the concept that admiralty implies commerce were the result of subsequent political controversies that have long since ceased to be significant.

A. The Original Purpose

To the extent that the antecedents of the federal admiralty jurisdiction bear on the problem, they indicate the feasibility of limiting admiralty law to those matters having some connection with commerce. Admiralty writers invariably begin their works by pointing out that admiralty law traces its ancestry to remotest commercial history, occasionally claiming that the existence of admiralty law is the mark of civilization because it demonstrates the presence of trade.²⁴ The hyperbole evidences a connection be-

or "procedure"), this was an admiralty suit and the liberal pleading rules of admiralty would be applied. Because the action was for wrongful death there was no question that the "basic" substantive right (i.e., the cause of action for wrongful death) was to be determined according to state law. See note 165 *infra*.

²⁴ "Maritime courts, differing somewhat in name and somewhat in jurisdiction, have been established in all civilized nations at various periods in their history. The dates of their establishment may be said, because of the circumstances which brought them into being, to afford a very fair test of the advancement in civilization of their respective nations. In every case their establishment has been due to the same cause, the necessities of commerce." ETTING, *THE ADMIRALTY JURISDICTION IN AMERICA* 7-8 (1879).

tween the affairs of traders and admiralty courts, though there was more to English admiralty than disputes between merchants.²⁵

From its inception the admiralty court had jurisdiction over such matters as prizes and had general jurisdiction over crimes occurring at sea including piracy. These were major concerns of English admiralty from the 15th through the 18th centuries.²⁶ Although these aspects of admiralty are no longer significant,²⁷ the civil side of admiralty is. There can be no doubt that historically the civil jurisdiction of admiralty was exclusively concerned with matters arising from maritime commerce.²⁸ The campaign that began in the early 17th century by the common law judges to confine the admiralty jurisdiction succeeded in wresting much of the business away from admiralty.²⁹ Although the civil jurisdiction of English admiralty had been greatly reduced by the time the Federal Constitution was adopted,

²⁵ On the early English admiralty law, see generally Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 289 (1907); Mears, *The History of the Admiralty Jurisdiction*, in 2 *id.* 312 (1908); MARSDEN, *Introductions to 1 & 2 SELECT PLEAS IN THE COURT OF ADMIRALTY* (Selden Soc'y Pub. 1892 & 1897) [hereinafter cited as MARSDEN]; Laing, *Historic Origins of the Admiralty Jurisdiction in England*, 45 MICH. L. REV. 163 (1946).

²⁶ A table showing the subject matter of libels in the first 10 files (1530-1541) of the Admiralty court shows that perhaps two-thirds of the cases would fall within the civil jurisdiction. 1 MARSDEN LXXXIII. The largest block outside of that group are "piracy, spoil and robbery."

²⁷ The punishment of crimes occurring on navigable waters is, of course, a matter of continuing interest. The problem of choosing between state and federal law has, however, been solved by Congress. Except for the Great Lakes and connecting waters, state criminal law and state criminal jurisdiction have been vested in the state courts for all crimes on navigable waters within the territorial limits of a state. 62 Stat. 683 (1948), 18 U.S.C. § 7 (1958). Even on the Great Lakes, the substantive law for most crimes is state law by virtue of the Assimilative Crimes Act, 62 Stat. 683 (1948). 18 U.S.C. § 13 (1958). Cf. U.S. v. Gill, 204 F.2d 740 (7th Cir.), *cert. denied*, 346 U.S. 825 (1953). The end result is that state law is applicable to almost all crimes occurring on navigable waters within a state.

²⁸ The principal class of what today would be called civil cases are described by Marsden as follows:

All contracts made abroad, bills of exchange (which at this period were for the most part drawn or payable abroad), commercial agencies abroad, charter-parties, insurance, average, freight, non-delivery of, or damage to, cargo, negligent navigation by masters, mariners, or pilots, breach of warranty of seaworthiness, and other provisions contained in charter-parties; in short, every kind of shipping business was dealt with by the Admiralty Court. The law merchant, which was there administered, particularly with reference to bills of exchange, bills of lading, and charter-parties, appears to have been recognized in the Admiralty earlier and far more fully than it was in the courts of common law.

1 MARSDEN LXVII. But see note 30 *infra*.

²⁹ The classic discussion of this is by Justice Story in *DeLovio v. Boit*, 7 Fed. Cas. 418 (No. 3776) (C.C. Mass. 1815). Coke is usually regarded by advocates of the admiralty as the chief devil. Marsden's research indicates that his role may have been somewhat overstated. 2 MARSDEN XLI.

admiralty law was applicable only to the affairs of the shipping industry.³⁰

A comparable jurisdiction was exercised on this side of the Atlantic by the colonial vice-admiralty courts.³¹ These courts exercised a jurisdiction that was to some extent different from the admiralty courts in England, and the substantive law they applied seems to have been somewhat different

³⁰ As with any sweeping assertion, this one is arguably an overstatement. Two classes of cases do not easily meet the qualification of relating to the shipping business. The first is enforcement of contracts made abroad. The common law was reluctant to enforce obligations of this nature until the early 16th century and admiralty apparently granted relief, perhaps without restriction as to the nature of the contract. Holdsworth, *supra* note 25, at 313. The point is probably without practical significance, since the only substantial class of people who made contracts abroad were merchants and traders. *Id.* at 316. Furthermore, the admiralty process was generally started with an arrest of the ship or of goods, typically cargo of the defendant, thus showing the connection with the maritime industry. 1 MARSDEN lxxi. The second class of cases are personal torts committed aboard ship or abroad. Marsden has several assault and battery cases and, surprisingly, three slander actions. Two of the latter involved, apparently, the character of the plaintiff as a merchant, and, therefore, fit the general character of regulating the affairs of the industry. 1 MARSDEN 212; 2 MARSDEN 156. In the other slander action no facts are given. 2 MARSDEN 88. The assault cases, so far as appears, also involve seafaring people and probably also can be classified as relating directly to control over the industry. See note 33, *infra*.

³¹ See generally, Andrews, *Vice-Admiralty Courts in the Colonies*, in RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND 1716-1752, at 1 (Towle ed. 1936); CRUMP, COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY (1931); Hough, *Introduction to CASES IN VICE-ADMIRALTY AND ADMIRALTY*, NEW YORK 1715-1788, at xii-xxi (Hough ed. 1925); Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. J. LEGAL HIST., pts. 1-2, 250, 347 (1962). The colonial vice-admiralty jurisdiction was certainly broader than the English admiralty courts in one respect—the colonial courts were given jurisdiction to try violations of the revenue and customs law. This use of admiralty was a much protested attempt by the Crown to avoid the use of colonial juries. See Andrews, *supra* at 4-5, 78; *The Declaration of Independence*. The difficult problem is to determine the extent to which the vice-admiralty courts were confined in their civil jurisdiction, and particularly whether they were generally subject to the same limitations as their English counterparts. Justice Story in *De Lovio v. Boit*, 7 Fed. Cas. 418, 470 n.47 (No. 3776) (C.C. Mass. 1815), claimed they were not, and his view has generally been accepted by the commentators. See, e.g., Hough, *supra* at xviii; CRUMP, *op. cit. supra* at 152; 4 BENEDICT, ADMIRALTY § 714 (6th ed. 1940); see also the argument of counsel in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 8-11 (1870). It may have been as Story thought, but the point is not yet clear. Andrews shows that there was a jurisdictional dispute between the colonial vice-admiralty and the common law courts which had much in common with the English contest. Andrews, *supra* at 66-75. Hough reports a case, *Kennedy v. 32 Barrells of Gunpowder* (1754), which indicates that the colonial vice-admiral regarded himself as bound by the statutes of 13 Rich. II, c. 5 (1389) and 15 Rich. II c. 3 (1391). *CASES IN VICE-ADMIRALTY AND ADMIRALTY*, NEW YORK 1715-1788, at 82 (Hough ed. 1925). These statutes were the foundations of Coke's argument against admiralty. *But see* 4 BENEDICT, *op. cit. supra* at § 714. Furthermore, it now seems quite clear that the common law courts exercised at least a concurrent jurisdiction with respect to many matters that would otherwise be thought of as within the jurisdiction of the vice-admiral. Andrews, *supra* at 7. Definite conclusions, if they are ever possible, must thus await careful study of the admiralty business of the colonial common law courts. Professor Wroth's articles have started this. See Wroth, *supra*.

from the admiralty law developed in England.³² Nevertheless, the available records indicate that the civil jurisdiction of the vice-admiral was entirely concerned with the affairs of the maritime industry.³³

The precise reasons why the Founding Fathers gave the federal courts jurisdiction over "admiralty and maritime" cases are, of course, obscure.³⁴ One reason must have been the prize jurisdiction.³⁵ The first federal court, established under the Articles of Confederation, was created to hear appeals in prize cases.³⁶ Because civilization has matured to the point where ships are sunk rather than stolen, the prize jurisdiction is no longer regarded as important. But the prize jurisdiction probably explains the general acquiescence in the grant of admiralty jurisdiction to the federal courts. Prize cases required judicial appraisal of the legitimacy of a seizure at sea, and this in turn posed questions of international law—for example, the rights of neutrals and belligerents, and the status of particular nations and nationals. If the national government was to have exclusive control over foreign relations and war, it must have seemed obvious to the drafts-

³² Andrews, *supra* note 31, at 3, 15 n.1.

³³ See note 30 *supra*. Hough's reports of cases in the vice-admiralty court in New York are very full in their statement of facts. He has several assault cases, which indicate that these cases are basically regulations of conduct of seamen and masters aboard ship. *CASES IN VICE-ADMIRALTY AND ADMIRALTY*, *op. cit. supra* note 31, at 25, 179, 210. For example, *McFarlin v. White*, *id.* at 25 (1750), was a suit by a sailor against the master of a ship for assault. It appeared that the sailor had participated in something of a mutiny (although he was later paid his wages) and was punished. The court held the punishment justified. Similarly, *Gillaspie v. Hynes*, *id.* at 210 (1762), was a suit against the master who had assaulted a passenger. The master's defense was that the passenger was attempting to foment a mutiny. The source of the difficulty was an insufficiency of food. The court granted damages and costs to the passenger. The remaining assault case is not fully reported. All that appears is that the defendant threw a "punch" in the libellant's face "super mare altum" (on the high seas) and recovered 20 shillings damages. *Thomas v. Bryson*, *id.* at 179 (1759).

The *McFarlin* case appears to have been an exception to the rule that: "Where a sailor libeled a master for assault, the court could do no more than order the master to pay a fine to the King; for his damages the sailor had to sue the master in the common law court. This was the procedure almost always followed. Andrews, *supra* note 31, at 27. See also *Wroth*, *supra* note 31, at 350; *Spencer v. Gardner* (1727-28), in *RECORDS OF VICE-ADMIRALTY COURT OF RHODE ISLAND 1716-1752*, *op. cit. supra* note 31, at 124.

³⁴ See generally Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925).

³⁵ Justice Campbell so concluded in his dissenting opinion in *Jackson v. Steamboat Magnolia*, 61 U.S. (20 How.) 296, 333 (1857).

³⁶ Article IX of The Articles of Confederation provided that the Congress should have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining, finally appeals in all cases of captures; provided, that no member of Congress shall be appointed a judge of any of the said courts.

No trial courts were ever appointed, but an appellate court was. See HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 11 n.18 (1953).

men of the Constitution that the courts of the central government should also have prize—and hence admiralty—jurisdiction.³⁷

The civil jurisdiction of the admiralty courts was only occasionally adverted to in the debates in the Constitutional Convention and the state ratifying conventions. These comparatively casual remarks are meagre historical evidence, but those who have reviewed the history seem generally agreed that much of the justification for federal civil jurisdiction in admiralty was the protection of merchants, notably foreign traders, by having a uniform law administered by the federal courts.³⁸ Hamilton,³⁹ Madison,⁴⁰ Randolph,⁴¹ and Wilson⁴² all spoke in terms of the impact on foreigners and the necessity of a uniform system of law. No evidence of interest by the founders in the substantive content of admiralty law is known. Appar-

³⁷ The Constitution did not require the creation of federal trial courts—that issue was left for future determination by Congress. Hence, it was entirely possible that the state admiralty courts might have continued in existence after adoption of the Constitution, and, indeed, concurrent state common law jurisdiction was preserved by the “saving to suitors” clause of the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76 (now 28 U.S.C. § 1333 (1958)). See *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 334–35 (1816); 2 STORY, *UNITED STATES CONSTITUTION* § 1672 n.2 (5th ed. 1891).

³⁸ D. Currie, *Federalism and the Admiralty*, 1960 SUPREME COURT REV. 158, 163; Wright, *Uniformity in the Maritime Law of the United States*, 73 U. PA. L. REV. 123, 223 (1925); Note, 50 NW. U.L. REV. 677 (1955).

³⁹ “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 upon the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace.” THE FEDERALIST No. 80, at 497–98 (Lodge ed. 1888) (Hamilton). The “public peace” was a reference back to Hamilton’s earlier statement “that the peace of the WHOLE ought not to be left at the disposal of a PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it.” *Id.* at 495.

⁴⁰ If, in any case, uniformity be necessary, it must be in the exposition of treaties. The establishment of one revisionary superintending power can also secure uniformity. . . . To the same principles may also be referred their cognizance in admiralty and maritime cases. As our intercourse with foreign nations will be affected by decisions of this kind, they ought to be uniform. This can only be done by giving the federal judiciary exclusive jurisdiction. Controversies affecting the interests of the United States ought to be determined by their own judiciary, and not be left to partial, local tribunals.

3 ELLIOTT, DEBATES 532 (2d ed. 1900).

⁴¹ “Cases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts. As our national tranquility and reputation and intercourse with foreign nations may be affected by admiralty decisions; as they ought, therefore, to be uniform; and as there can be no uniformity if there be thirteen distinct, independent jurisdictions,—this jurisdiction ought to be in the federal judiciary.” *Id.* at 571.

⁴² “[T]he admiralty jurisdiction ought to be given wholly to the national government, as it relates to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen.” 1 FARRAND, RECORDS OF THE FEDERAL CONVENTION 124 (1911). See also his remarks in the Pennsylvania Convention emphasizing the importance of protecting merchants against improvident state law. 2 ELLIOTT, *op. cit. supra* note 40, at 490–93.

ently their chief object was the convenience of a single system of law, regardless of its content.⁴³

Commerce and uniformity go together. There is virtue in having the same rules applied to ships and their cargoes moving from port to port: uniformity promotes the free movement of trade by increasing the confidence of merchants in their ability to conduct business successfully. That, and no more, seems to have been what the framers had in mind in granting civil admiralty jurisdiction to the federal courts. But where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events occurring locally that have only local impact.

B. The Commerce Clause

The scope of federal admiralty jurisdiction has not been reassessed by the Supreme Court since shortly after the Civil War. Contemporary doctrine on the subject is a product fashioned out of the language of a handful of cases now almost a century old. The historical and political circumstances in which those cases were decided have been lost, if not forgotten. If these circumstances are brought to mind, the view that federal admiralty law is the only law applicable to events on navigable water can no longer be held with confidence. And if federal admiralty law is not exclusively the law applicable, there is of course room for state law in the regulation of pleasure boating.

The critical fact, easy to forget today, is that when the Constitution was drafted virtually all commerce was by water and most of that by sea.⁴⁴

⁴³ In the early period of steamboating on the western rivers admiralty law came to be regarded as favorable to creditors, particularly the use of the *in rem* process. See Note, 67 HARV. L. REV. 1214, 1220-21 (1954). It is conceivable, if not probable, that a pro-creditor bias was an unstated reason of the founders for desiring federal admiralty courts. A consequence of the grant of admiralty jurisdiction was the protection of merchants from the excesses of pro-debtor state legislatures. This result, however, did not automatically follow from the constitutional grant of admiralty jurisdiction, because legislation was required first to establish a system of federal trial courts and second to limit the role of state law in those courts to "trials at common law," as was done in the Rules of Decision Act, ch. 20, § 34, 1 Stat. 92 (1789) (now 28 U.S.C. § 1652 (1958)). But the founders can properly be thought to have recognized that the constitutional grant of admiralty jurisdiction would enable Congress to protect maritime creditors from the state legislatures. See also Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-97 (1928).

⁴⁴ [In 1800] the commerce of the country was almost entirely limited to the foreign and coasting trade. The only roads which existed led from the woods to the principal towns on navigable waters. There was but one connected route from North to South at the commencement of the Revolution, and this was true also when the Constitution was framed. Even in 1796 the only roads with which the States were much concerned were those which led to navigable waters; the care of "cross roads," as the roads leading from State to State were called by one who had

Men of that time could not have imagined an extensive traffic in goods by land.⁴⁵ As a practical matter, the grant of power to Congress to regulate commerce meant very little more than what today would be described as the power to regulate the shipping industry.⁴⁶ There was, thus, a factual relationship between the grant of legislative power over commerce and the grant of judicial power in admiralty. It was a constant temptation, indeed the most obvious course for systematic thought, to attribute legal signifi-

been a member of the Constitutional Convention, the States were unwilling to assume. "Fifty miles back from the waters of the Atlantic the country was an unbroken jungle." In the vigorous phrase used by Henry Clay, "the country had scarcely any interior." Turnpike roads did not come into general use until the nineteenth century.

PRENTICE, *THE FEDERAL POWER OVER CARRIERS AND CORPORATIONS*, 59-60 (1907). See also RIBBLE, *STATE AND NATIONAL POWER OVER COMMERCE* 27 (1937).

⁴⁵ The point is well illustrated by the fact that state monopolies of land transportation were common and unquestioned for thirty years after a comparable monopoly of steamboat traffic was held unconstitutional in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). See Prentice, *op. cit. supra* note 44, at 93-96; Ribble, *op. cit. supra* note 44, at 28. See also *Railroad Co. v. Maryland*, 88 U.S. (21 Wall.) 456, 470 (1874).

⁴⁶ See, e.g., 2 STORY, *UNITED STATES CONSTITUTION* § 1672 (5th ed. 1891):

So that we see the admiralty jurisdiction naturally connects itself on the one hand with our diplomatic relations and duties to foreign nations and their subjects, and on the other hand with the great interests of navigation and commerce, foreign and domestic.

Id. at 471. Story's list of appropriate subjects for the exercise of the commerce power is also revealing:

[The power to regulate commerce among the states] . . . extends to the regulation of navigation, and to the coasting trade and fisheries, within, as well as without any State, wherever it is connected with the commerce or intercourse with any other State, or with foreign nations. It extends to the regulation and government of seamen on board of American ships; and to conferring privileges upon ships built and owned in the United States in domestic as well as foreign trade. It extends to quarantine laws and pilotage laws, and wrecks of the sea. It extends as well to the navigation of vessels engaged in carrying passengers, and whether steam vessels or of any other description, as to the navigation of vessels engaged in traffic and general coasting business. It extends to the laying of embargoes, as well on domestic as on foreign voyages. It extends to the construction of light-houses, the placing of buoys and beacons, the removal of obstructions to navigation in creeks, rivers, sounds, and bays, and the establishment of securities to navigation against the inroads of the ocean. It extends also to the designation of particular port or ports of entry and delivery for the purposes of foreign commerce.

Id. § 1075 at 23-26.

A comparable discussion of the power of Congress under the commerce clause can be found in 1 TUCKER, *BLACKSTONE* app. Note D at 247-54 (1803). His discussion is also totally in terms of regulating the ocean shipping business. He was a good deal less of a Federalist than Story and expressed some doubts as to the constitutionality of the Coasting Act, 1 Stat. 55 (1789), insofar as it was applicable to the internal commerce of a state. 1 TUCKER, *op. cit. supra* at 250.

Reference should also be made to the first important case on the commerce clause, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). Chief Justice Marshall there tied commerce to "navigation" and made it perfectly clear that he regarded the ocean shipping industry as certainly the most important facet of commerce. Counsel for both sides in *Gibbons v. Ogden* argued from the admiralty clause to the commerce clause. *Id.* at 21, 90.

cance to that factual relationship by defining the judicial power in admiralty and the legislative power over commerce in coextensive terms.⁴⁷ The Court did just that at one point, limiting the admiralty jurisdiction to those transactions Congress could reach through an exercise of the commerce power.^{47a} The reverse proposition, that Congress would have power under the commerce clause over any transaction that was within the jurisdiction of federal admiralty courts, was never explicitly indulged, but it was always in the background.

Until at least the middle of the 19th century and the development of railroads, it was easy to think of "commerce" and "navigation" as essentially synonymous and probably strange to think otherwise. This conceptual framework is the key to understanding the 19th century development of admiralty jurisdiction. It explains, for example, the curious time sequence of admiralty cases in the Supreme Court. Until the 1840's the Supreme Court decided few admiralty cases, and those were treated very lightly.⁴⁸ But from then until the Civil War the Court heard a large number of admiralty cases and they consumed a large share of the Court's energy.⁴⁹

This sequence is explained by the politics of the period. The great

⁴⁷ The concept that judicial and legislative power must cover the same area was well understood at this time: "The judicial power in every government must be co-extensive with the power of legislation." 1 KENT, COMMENTARIES, LEC. XIV 296 (6th ed., 1848). "For, if it be true that the common law of England, has been adopted by the United States in their national, or federal capacity, the jurisdiction of the *federal* courts must be co-extensive with it; or, in other words, *unlimited*: so also, must be the jurisdiction, and authority of the other branches of the federal government; that is to say, their powers respectively must be likewise, unlimited." 1 TUCKER, BLACKSTONE app. Note E at 380 (1803). That concept, of course, does not require the conclusion that power under the commerce clause was co-extensive with the grant of admiralty jurisdiction. Legislative power over admiralty could also be rested on the "necessary and proper" clause. See 1 CROSSKEY, POLITICS AND THE CONSTITUTION 557-62 (1953). This latter position is supported by language in some early cases. See *United States v. Bevans*, 16 U.S. (3 Wheat.) 336, 388-89 (1818); *Janney v. Columbian Ins. Co.*, 23 U.S. (10 Wheat.) 411, 418 (1825). The "necessary and proper" theory was eventually adopted as the source of legislative power in admiralty. See note 212 *infra*.

^{47a} *Maguire v. Card*, 62 U.S. (21 How.) 248 (1858); *Allen v. Newberry*, 62 U.S. (21 How.) 244 (1858).

⁴⁸ The lack of cases was doubtless due in large part to the expense and difficulty of an appeal to the Supreme Court sitting in Washington. That does not explain the brevity of the opinions when the cases did get there. Undoubtedly the two most important decisions in terms of later history were *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), declaring the "home port" doctrine in less than a page and without a single citation, and *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825), limiting jurisdiction to tidewater in little more than a page and again without authority except to distinguish the seizure clause of the original Judiciary Act. It is possible that the terse nature of these opinions was because the Court was unable to agree on a broad formulation. See note 59 *infra*.

⁴⁹ The first big case was *Waring v. Clarke*, 46 U.S. (5 How.) 440-504 (1847), which was argued with the *Lexington* litigation, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 343-436 (1848). The latter case was reargued and decided in the next term.

political controversies before the Civil War were translated in legal terms to constitutional disputes that turned in large part around the commerce clause. The Bank,⁵⁰ internal improvements,⁵¹ a protective tariff,⁵² and (most important) state legislation relating to slavery and the threat of federal legislation on that subject⁵³ were all attacked or justified with argu-

⁵⁰ The bill establishing the first U.S. Bank was challenged as unconstitutional by Jefferson and Randolph and sustained by Hamilton in opinions given to President Washington. Hamilton's opinion was based largely on the commerce power. 4 THE WORKS OF ALEXANDER HAMILTON 104 (J.C. Hamilton ed. 1904), quoted in COMMAGER, DOCUMENTS OF AMERICAN HISTORY 156 (5th ed. 1949) [hereinafter cited as COMMAGER, DOCUMENTS]. Chief Justice Marshall agreed with Hamilton and sustained the act in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 315 (1819), but President Jackson regarded the issue as still open in 1832 when he vetoed the Bank Bill as unconstitutional, 2 MESSAGES AND PAPERS OF THE PRESIDENTS OF THE UNITED STATES 576 (Richardson ed. 1897), quoted in COMMAGER, DOCUMENTS 270.

⁵¹ Madison vetoed the Bonus Bill providing a fund for internal improvements in 1817 on the ground that Congress lacked power under the commerce clause. 1 MESSAGES AND PAPERS OF THE PRESIDENT OF THE UNITED STATES 584, quoted in COMMAGER, DOCUMENTS 211. Monroe vetoed the Cumberland Road Bill in 1822 on the same basis, 2 MESSAGES AND PAPERS OF THE PRESIDENTS OF THE UNITED STATES 142, quoted in COMMAGER, DOCUMENTS 233. Jackson followed suit, vetoing the Marysville Road Bill in 1830 for the same reason. 2 MESSAGES AND PAPERS OF THE PRESIDENTS OF THE UNITED STATES 483, quoted in COMMAGER, DOCUMENTS 253. For the contrary argument see 2 STORY, UNITED STATES CONSTITUTION §§ 1272-81 (5th ed. 1891).

⁵² See the South Carolina Protest Against the Tariff of 1828, *The Tariff of Abominations*. COMMAGER, DOCUMENTS 249. For the contrary argument, see 2 STORY, UNITED STATES CONSTITUTION §§ 1077-96 (5th ed. 1891).

⁵³ The problem with respect to slavery and the commerce clause was enormously complex: Some southern slaveholding interests were deeply concerned that the shifting balance of power in Congress would lead to direct congressional action against slavery. Accordingly, they urged a narrow construction of the commerce clause which would make any such legislation unconstitutional. See the speech by John Randolph in opposition to an internal improvements bill in 1824. 41 ANNALS OF CONGRESS 1296-1311 (1824), quoted in 1 CROSSKEY, POLITICS AND THE CONSTITUTION 248-50 (1953). Another aspect of southern concern, shared by some abolitionists in the north, was the validity of state statutes regulating (or prohibiting) slave traffic. Such a regulation was directly involved in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), and it was challenged, on the ground, *inter alia*, that it was inconsistent with the "exclusive" federal power to regulate commerce. *Cf. Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). The issue was avoided by the majority although Justice McLean faced it in a concurring opinion. A third problem, and perhaps the most difficult from the southern point of view, was raised by the statutes of some southern states prohibiting the entry of free Negroes. These statutes were thought to be essential protection against an uprising of slaves and their constitutionality was attacked on the basis of the commerce clause. 2 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 445-56 (1923); RIBBLE, STATE & NATIONAL POWER OVER COMMERCE 71-72 (1937); HOCKETT, THE CONSTITUTIONAL HISTORY OF THE UNITED STATES 1826-1876, at 169-77 (1939).

It is important to recall that before the Civil War there was no general agreement as to the effect of the commerce clause. Opinions ranged from the extreme that the states had no power over commerce, even in the absence of congressional action, to a belief that the states had full power to regulate anything which affected their internal welfare. See SWISHER, ROGER B. TANEY 396-411 (1935). The Court split badly on the issue in three cases: *New York v. Miln*, 36 U.S. (11 Pet.) 102 (1837) (three opinions); *The License Cases*, 46 U.S. (2 How.) 504 (1847) (six opinions); *The Passenger Cases*, 48 U.S. (7 How.) 283 (1849) (eight opinions). It

ments that, in large part, revolved about the commerce clause. Because federal admiralty jurisdiction could be legally conceived as coextensive with federal power over commerce, every admiralty jurisdiction case was potentially a definition of legislative power under the commerce clause. The admiralty cases were, therefore, heavily laden with political overtones⁵⁴ and, as might be expected, were regarded with the utmost seriousness in the period immediately preceding the Civil War.

For present purposes, the 19th century development of admiralty is important for two reasons. First, the few cases decided early in the century reflect a firm association of admiralty with commerce—an association that strongly suggests limiting the role of admiralty law to matters relating to the maritime industry. Second, the cases decided shortly after the Civil

was not until *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), that a majority agreed to a compromise formulation. The *Cooley* decision could not, at the time, have been regarded as finally disposing of the extreme positions. See generally HAINES & SHERWOOD, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT & POLITICS 1835-64*, at 92-192 (1957).

The relationship between admiralty and slavery was brought to public attention nicely by the *Creole* incident. The *Creole* was bound from Virginia to New Orleans in 1841 with a cargo of 135 slaves. The slaves revolted, murdered one of the owners, and forced the master to sail to Nassau where the British hung the murderers and set the other slaves free. Southern interests, fearful that this would set a dangerous precedent, demanded return of the slaves. In response, abolitionists presented resolutions to Congress in support of the doctrine: "that by the Constitution the states had surrendered to the Federal Government all jurisdiction over commerce and navigation on the high seas; Virginia ceased to have jurisdiction over the *Creole* and the persons on board once she left the territorial waters of that state; only the laws of the United States applied; and these did not sanction slavery or the coastwise slavery trade. The people on the *Creole* therefore had resumed their natural freedom." 2 BEMIS, JOHN QUINCY ADAMS AND THE UNION 439-40 (1956); Joshua Giddings, a representative from Ohio, who introduced this resolution, was promptly censured by the House and resigned his seat. *Ibid.*; HOCKETT, *op. cit. supra* 201-05.

⁵⁴ The extension of admiralty jurisdiction to inland waters, especially rivers and canals, also had potential impact on two other politically important problems of the 1840's and 50's. One was the economic struggle between water and land transportation. This struggle came to the surface when bridges were proposed that would effectively prevent steamboat traffic on the rivers. The relationship between state and federal power to authorize or prohibit the construction of bridges was involved in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852). The Court's decision in that case, declaring a bridge over the Ohio River a nuisance to navigation and requiring modifications in its design, was overturned by Congress. The Court sustained that action by Congress in *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1856). The controversy was apparently regarded as extremely important by men of that period. See 2 WARREN, *op. cit. supra* note 53, at 508-10.

The other issue was the rate structure on the state-owned and operated canals. The Ohio Canal Commission, for example, set lower toll rates for Ohio-made products, and generally set tolls on a protectionist theory. See Schreiber, *The Rate-Making Power of the State in the Canal Era: A Case Study*, 77 POL. SCI. Q. 397 (1962). It is conceivable, although no internal evidence of this has been found, that one of the reasons the Court extended admiralty jurisdiction to inland waters was to make clear that Congress had power to prohibit such obstructions to free trade among the states if such discriminatory rates were not on their face unconstitutional.

War, and especially some of their broad language to the effect that admiralty jurisdiction extends to all matters occurring on navigable waters, can best be understood as an effort to dissociate the judicial power in admiralty from the legislative power over commerce. That separation of judicial and legislative power was necessary to meet political and constitutional issues that are no longer meaningful. The language of those cases should not be read today as intending a divorce of admiralty from commerce. To show these points requires a detailed examination of the cases.

At the beginning of the century, judicial attention focused on the jurisdiction of the English admiralty courts. Those who sought a narrow scope for admiralty contended that the federal courts should have no greater jurisdiction than English admiralty courts had at the time of the Revolution; *i.e.*, over torts committed on the high seas or below the first bridge—provided that they were not *infra corpus comitatus* (within the body of a county)—and over contracts both made and to be performed at sea. This view was resisted chiefly by judges who favored a strong central government. Doctrinal leadership was supplied by Justice Story in his classic opinion in *De Lovio v. Boit*,⁵⁵ delivered on circuit in 1815. His opinion is a monument of scholarship. He contended that the constitutional grant of jurisdiction should be read to include all matters that belonged to English admiralty before the encroachments of the common law judges—the same jurisdiction that was exercised by specialized admiralty courts in other European countries. Much of the opinion was an attempt to expose the historical errors of Sir Edward Coke, and is open to some question.⁵⁶ The policy basis of Justice Story's decision, however, was clear and has not since been seriously challenged:

The advantages resulting to the commerce and navigation of the United States, from a uniformity of rules and decisions in all maritime questions, authorize us to believe that national policy, as well as juridical logic, require the clause of the constitution to be so construed, as to embrace all maritime contracts, torts and injuries⁵⁷

What was meant by "maritime contracts" was made clear in a subsequent passage:

⁵⁵ 7 Fed. Cas. 418 (No. 3776) (C.C. Mass., 1815). The holding was that suit on a marine insurance contract was within the admiralty jurisdiction. Despite the strength of his opinion, the point was not established until 55 years later in *Insurance Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870). In *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 612, 638 (1827), Justice Johnson went well out of his way to indicate his strong conviction that Justice Story was wrong. Chief Justice Taney thought the doctrine was confined to the First Circuit in 1857. *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 615 (1857) (dissenting opinion).

⁵⁶ Insofar as Story thought the common law judges wrong, and the admiralty judges right, the judgment of history appears to be in his favor. See Holdsworth, *supra* note 25, at 319. The weakest portion of his argument was the jurisdiction actually exercised in this country by the colonial vice-admiralty courts. See note 31 *supra*.

⁵⁷ 7 Fed. Cas. at 443.

[The jurisdiction] . . . extends over all contracts, (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations,) which relate to navigation, business or commerce of the sea. . . . [They include] charter parties, affreightments, marine hypothecations, contracts for maritime service in the building, repairing, supplying, and navigating ships; contracts between part owners of ships; contracts and quasi contracts respecting averages, contributions and jettisons; and, what is more material to our present purpose, *policies of insurance*.⁵⁸

The association between commerce and admiralty could not be more apparent. The connection between the commerce clause and admiralty jurisdiction became explicit not long thereafter. A suit was brought in admiralty in a federal district court in Kentucky for wages of crewmen on the first steamboat voyage up the Missouri River.⁵⁹ Justice Story held that there was no federal admiralty jurisdiction because the matter arose out of navigation on inland waters, but noted that Congress could probably extend the admiralty jurisdiction to the inland waters by an exercise of the commerce power.⁶⁰ In holding no jurisdiction over the inland waters, Justice Story was following the reasonably clear language of the grant of admiralty jurisdiction in Article III of the Constitution—"admiralty and maritime," *i.e.*, relating to the sea.⁶¹ His conclusion reflects the emphasis that the framers placed on the contact of the shipping industry with for-

⁵⁸ *Id.* at 475. Compare note 28 *supra*.

⁵⁹ The *Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). The background of the case and the trip up the Missouri are described in an excellent Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214 (1954).

It is possible that the "home port" doctrine of *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), was an earlier instance of a connection between the commerce clause and admiralty jurisdiction. There the Court, through Justice Story, held that the supplier of a vessel in its home port had no maritime lien for supplies and was thus restricted to a common law action against the owner in personam. By hypothesis this involves a transaction between local people—*i.e.*, intrastate commerce—and the lack of congressional power to reach the transaction may have suggested the lack of jurisdiction in the federal courts. The opinion in *The General Smith* nowhere states this theory, but the Court suggested in *Maguire v. Card*, 62 U.S. (21 How.) 248 (1858), that the commerce clause was the basis for the decision. Three years later, however, the Court retreated from that position in *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522 (1861).

⁶⁰ 23 U.S. (10 Wheat.) at 429. Story later sustained a federal criminal statute prohibiting stealing a wreck as an exercise of the commerce power. *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838).

⁶¹ The author of the Note, 67 HARV. L. REV. 1214 (1954), finds this decision surprising and suggests that it may have been motivated by political considerations, particularly the fact that relatives of Senator Johnson of Kentucky were financially interested in the steamboat *Thomas Jefferson*. It is, of course, impossible to prove that he is wrong, but it seems unlikely. As the author of the Harvard Note discovered, the Court decided a case against Senator Johnson personally the same term. *De Wolf v. Johnson*, 23 U.S. (10 Wheat.) 367 (1825). As a political matter, Justice Story's suggestion that the commerce clause would support an extension of admiralty was probably more significant than a decision extending the jurisdiction would have been. See note 53 *supra*.

eigners as a justification for federal admiralty. He thus limited the jurisdiction to matters relating to ocean commerce which he defined, following the English courts, as including the ebb and flow of tide.⁶²

Justice Story left the Court before the issue arose as to what was encompassed by the phrase "ebb and flow of the tide." The problem became acute with the development of steamboats which made the western rivers, such as the Mississippi, navigable far above salt water. The narrow position, advocated chiefly by Justices Woodbury and Daniel, was to confine the jurisdiction in tort to the high seas.⁶³ This position rested on the historical exclusion of admiralty jurisdiction in cases arising *infra corpus comitatus*, but it had a substantial policy basis in its favor.⁶⁴ Why should

⁶² The ebb and flow of the tides was the standard applied in *Peyroux v. Howard* (The Planter), 32 U.S. (7 Pet.) 324 (1833), and *The Steamboat New Orleans*, 36 U.S. (11 Pet.) 175 (1837). See also *United States v. Coombs*, 37 U.S. (12 Pet.) 72 (1838).

⁶³ Justice Woodbury's great effort was his dissenting opinion in *Waring v. Clarke*, 46 U.S. (5 How.) 440, 467 (1847). Justice Daniel's most elaborate opinion was his dissent in *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U.S. (6 How.) 343, 394 (1848), but he continued dissenting with increasing asperity. See, e.g., *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 307 (1857) in which Justice Daniel stated:

Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water courses, which is not liable to be arrested on its way to the next market town by the *high admiralty power*, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomentor of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.

Id. at 320-21.

⁶⁴ Dissenting in *Waring v. Clarke*, 46 U.S. (5 How.) 440, 467 (1847), Justice Woodbury covered most of the points. He urged that the jurisdiction should be confined to matters relating to ocean traffic where there was substantial contact with foreigners and where there was a great need for uniformity. *Id.* at 470. This contention was presented in terms of the right to jury trial with the justification for the absence of a jury in admiralty being the inability to draw a jury from the vicinage of the high seas. He also was apparently concerned about the applicable law; he could see no reason why federal law should be applied to purely local transactions:

Half the personal quarrels between seamen in the coasting trade and our vast shore fisheries, and timbermen on rafts, and gundalo men, and men in flat boats, workmen in the seacoast marshes, and half the injuries to their property, are where the tide ebbs and flows in our rivers, creeks and ports, though not on the high seas. But they never were thought to be cases of admiralty jurisdiction when damages are claimed,—much less when prosecuted for crimes; never in creeks, though the tide ebbs and flows there through half of our seaboard towns—never in rivers. All this is within the county, and is usually tried before State officers and by State laws.

Id. at 489-90. The same position was asserted again by Justice Brewer dissenting in *The Robert W. Parsons*, 191 U.S. 17, 47-55 (1903), discussed in text accompanying notes 136-41 *infra*.

federal law have anything to do with steamboats that were physically incapable of going on the ocean?⁶⁵ It was a good question and its answer potentially significant with respect to the power of Congress to regulate commerce on the rivers. Despite the best efforts of these judges, a broader view prevailed, and federal jurisdiction was sustained as long as it concerned matters occurring within the influence of the ebb and flow of the tide.⁶⁶ This meant that there was admiralty jurisdiction of cases arising at the mouths of the inland rivers and for some distance upstream, but not, for example, of cases arising on the upper reaches of the Mississippi or on the Great Lakes.

Before Justice Story left the Court, however, he was prevailed upon to draft a statute giving the shipping industry on the Great Lakes the benefit of the admiralty jurisdiction.⁶⁷ Passed in 1845, the act extended the jurisdiction of the federal courts to include tort and contract cases occurring on the Great Lakes and provided for trial according to the procedure and law of admiralty.⁶⁸ The statute was applicable only to steamboats and other vessels of twenty tons burden or more that were licensed for the coasting trade and employed in the business of commerce and navigation between ports and places in different states and territories.⁶⁹ Furthermore, as a hedge against the 7th amendment, the statute provided for a jury trial at

⁶⁵ *Waring v. Clarke*, 46 U.S. (5 How.) 440 (1847), involved a collision between two steamboats on the lower Mississippi River. Neither was built for ocean travel and both apparently were limited to travel within Louisiana. These facts suggested to Justice Woodbury "that this is a matter of local cognizance,—of mere State trade,—of parties living in the same county, and doing business within the State alone, and should no more be tried without a jury, and decided by the laws of Oleron and Wisby, or the Consulat del Mare, or the Black Book of Admiralty, than a collision between two wagoners in the same county." *Id.* at 499.

⁶⁶ *Waring v. Clarke*, 46 U.S. (5 How.) 440 (1847); *New Jersey Steam Nav. Co. v. Merchants' Bank (The Lexington)*, 47 U.S. (6 How.) 343 (1848). The earlier case held the admiralty courts had jurisdiction over a collision on the Mississippi above New Orleans where the flow of the river was affected by the tide. The *Lexington* sank in Long Island Sound. The Court held that admiralty had jurisdiction in personam against the owners of the vessel in a suit for breach of a contract of affreightment.

⁶⁷ Note, 67 HARV. L. REV. 1214, 1222 (1954). The background of the statute and Justice Story's role in drafting it is described in this Note. According to the sources there cited, a draft of the statute was circulated among the Justices and they then regarded it as constitutional. *Ibid.*

⁶⁸ 5 Stat. 726 (1945) (now 28 U.S.C. § 1873 (1958)).

⁶⁹ The interstate limitation was a departure from the precedent of the Coasting Acts, ch. 11, § 23, 1 Stat. 55 (1789), which had no such limitation. St. George Tucker had suggested that "the constitutionality of . . . [the Coasting] act may perhaps be questioned, so far as it relates to vessels trading wholly within the limits of any particular state." 1 TUCKER, BLACKSTONE app. Note D at 250 (1803).

the request of either side.⁷⁰ It was based upon the commerce clause and assumed to be constitutional as such.⁷¹

The 1845 statute was first construed in Chief Justice Taney's famous opinion in *The Genessee Chief*.⁷² The Chief Justice held, contrary to all the earlier cases,⁷³ that the admiralty jurisdiction of the federal courts was not limited to the ebb and flow of the tide, but reached to all navigable waters of the United States. The Chief Justice accomplished this abrupt departure from precedent by building on the relationship between admiralty and commerce:

Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor any thing in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different states or nations the reason for the jurisdiction is precisely the same. . . .⁷⁴

And certainly there can be no reason for admiralty power over a public tide-water which does not apply with equal force to any other public water used for commercial purposes and foreign trade. . . .⁷⁵

This holding has generally received the approval of legal historians and is frequently cited as proof that the Chief Justice was not without his nationalistic streak.⁷⁶ It is significant for present purposes because it related

⁷⁰ The original Judiciary Act in its provision for admiralty jurisdiction over seizures under the revenue laws "on waters which are navigable by sea by vessels of ten or more tons burthen . . . as well as on the high seas" had been troublesome because of the absence of provision for jury trial. The Court sustained the admiralty jurisdiction in *United States v. LaVengeance*, 3 U.S. (3 Dall.) 297 (1796), and in *United States v. The Betsey and Charlotte*, 8 U.S. (4 Cranch) 443 (1808), though the English admiralty courts had no such jurisdiction. The vice-admiralty courts in the colonies, however, had this jurisdiction. The vice-admiralty courts were used to collect revenue largely because the Crown could thereby avoid the hostile colonial jury. See note 31 *supra*. There was no comparable way around the tidewater limitation and it was thus necessary to provide for trial by jury. This was also politically sound, because it was the absence of a jury trial that provided most of the fuel for those who wished to confine the admiralty jurisdiction. See Note, 67 HARV. L. REV. 1214, 1222 (1954).

⁷¹ Judge Conkling of the Northern District of New York published a book on admiralty in 1848 in which he justified the act on the commerce clause basis and cited a case he had decided sustaining the constitutionality of the statute. CONKLING, *UNITED STATES ADMIRALTY* 2-8 (1st ed. 1848). In the second edition he revised his views at length. *Id.* at 2-19 (2d ed. 1857).

⁷² 53 U.S. (12 How.) 443 (1852).

⁷³ Cases cited note 62 *supra*. There were a few lower court decisions sustaining admiralty jurisdiction on inland waters. See Note, 67 HARV. L. REV. 1214, 1218 nn.28 & 29 (1954).

⁷⁴ 53 U.S. (12 How.) at 454.

⁷⁵ *Id.* at 457.

⁷⁶ E.g., 2 WARREN, *op. cit. supra* note 53, at 513-15; HAINES & SHERWOOD, *op. cit. supra* note 53, at 331-33; HOCKETT, *op. cit. supra* note 53, at 136-38; SMITH, ROGER B. TANEY: JACKSONIAN JURIST 99-101 (1936); Ransom, *Roger Brooke Taney, Chief Justice* (1836-1864), 24 GEO. L.J. 809, 832-33 (1936); Borchard, *Taney's Influence on Constitutional Law*, 24 GEO. L.J. 848, 852 (1936); Boudin, *John Marshall & Roger B. Taney*, 24 GEO. L.J. 864, 897-98 (1936). See also FRANKFURTER, *THE COMMERCE CLAUSE* 48-50 (1937). An exception to this appraisal is Professor Swisher who relegates *The Genessee Chief* to a footnote. SWISHER, *op. cit. supra* note 53, at 409 n.37. Few of these commentators note that the Chief Justice also stated

admiralty jurisdiction to commerce and expanded admiralty jurisdiction solely because of the supposed needs of commerce. The proposition should work equally well in reverse: where the needs of commerce cease, the need for applying federal law ought also to end.

There is no occasion at this point to quarrel with the conclusion that *The Genessee Chief* was one of the Chief Justice's greater opinions.⁷⁷ The ground taken for decision rendered the 1845 act superfluous to the result, for the Great Lakes, because they were navigable waters, were within the admiralty jurisdiction without reliance upon the act. This made it unnecessary to consider the constitutionality of the 1845 act as an exercise of the commerce power. But the Chief Justice did not avoid that issue. On the contrary, he stated that the 1845 statute was unconstitutional if viewed as an exercise of the commerce power.⁷⁸ This statement, unneces-

that the statute could not constitutionally be justified as an exercise of the commerce power. The omission is noteworthy because most of the commerce clause issues that came before the Taney Court did not involve an exercise of the commerce power by Congress, but rather a claim that the commerce clause itself voided state legislation. The 1845 act was an exception and its treatment at the hands of the Chief Justice therefore would seem to deserve attention.

⁷⁷ The opinion was technically deficient in not considering the problems of the continuing effect of the statute. On a broader policy basis, the Chief Justice is usually given credit for reading the Constitution liberally in the light of changed conditions. As an eloquent example of the Court's power to disregard precedent to meet new situations, the case is indeed notable. But it is not clear that there was any necessity for such extreme judicial techniques. The same result could have been achieved by sustaining the constitutionality of the 1845 statute. As a policy matter, it would not have been altogether foolish to leave to Congress the extension of admiralty to inland waters. There were many navigable rivers distant from any federal court and as to which the people were presumably content to litigate in the state courts. Furthermore, though the Chief Justice spoke glowingly of the virtues of trial by jury, the effect of his decision was to deny a jury trial in admiralty on the inland waters. Had he sustained the 1845 act, any further extension of admiralty would have had to include, as that act did, a provision for jury trial. See note 70 *supra*.

The Genessee Chief deserves to be honored, but mainly because it belongs with *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449 (1841), and *Rowan v. Runnels*, 46 U.S. (5 How.) 134 (1847), as one of the number of cases in which the Taney Court avoided a direct confrontation on the politically sensitive issue of slavery and the commerce power.

⁷⁸ The Chief Justice reached this result by asserting that: "the jurisdiction to administer the existing laws upon these subjects, [admiralty] is certainly not a regulation within the meaning of the Constitution. And this act of Congress merely creates a tribunal to carry the laws into execution but does not prescribe them." 53 U.S. (12 How.) at 452. This assertion disregarded entirely the provision in the 1845 act that "the maritime law of the United States . . . shall constitute the rule of decision in [suits brought under the act]." Act of Feb. 26, 1845, ch. 20, 5 Stat. 726. In other words, the act incorporated the law of admiralty and made it applicable to vessels engaged in interstate commerce on the Great Lakes. The constitutional base for federal jurisdiction would be the Article III power to hear cases "arising under . . . the Laws of the United States." The Chief Justice's reasoning may not have seemed so incongruous at the time, since it was not until after the Civil War that Congress amended the Judiciary Act to give the federal courts a general "arising under" jurisdiction. There were, however, a number of special instances in which the federal courts were authorized to hear cases arising under federal law. See HART & WECHSLER, *THE FEDERAL COURTS* 727-28 (1953). Cf. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

sary to the holding of the case, was probably critical to the compromise that permitted the extension of admiralty to inland waters.⁷⁹ If the statute were constitutional as an exercise of the commerce power, it would seem that Congress might similarly regulate the commerce on the inland rivers. From there it would seem to follow that Congress could prohibit certain kinds of traffic, notably in slaves.⁸⁰ To avoid that result, and to set at rest any possibility that the judicial power in admiralty might imply correlative legislative power over commerce, the Chief Justice first stated that the statute was unconstitutional and then added:

Nor can the jurisdiction of the courts of the United States be made to depend upon regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the Constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations.⁸¹

Together these statements were enough to assure the states' rights members of the Court that the extension of admiralty in no way carried with it the prospect of an expansion of the national government's legislative power under the commerce clause. Conversely, the unionist members of the Court could scarcely dissent, since the result accorded with their views and the opinion left them free to disregard later as dicta the statements about the commerce clause.⁸² The Chief Justice's opinion was, in

⁷⁹ The dictum that "if the validity of the act of 1845 depended upon the power to regulate commerce, it would be unconstitutional," 53 U.S. (12 How.) at 453, was unnecessary both because of the holding of the case, and also because in an earlier paragraph the Chief Justice had construed the statute as not having been intended by Congress to be a regulation of commerce. See text accompanying note 71 *supra*. In short, the Chief Justice went well out of his way to indicate his conviction that Congress could not extend admiralty jurisdiction through the commerce clause. There is no escape from the conclusion that this excursion was deliberate.

⁸⁰ See note 53 *supra*.

⁸¹ 53 U.S. (12 How.) at 452.

⁸² It is very difficult to reconstruct the thinking of the members of the Supreme Court on slavery and the commerce clause and to classify the Justices is even harder. The state that a judge came from or his attitude towards slavery did not necessarily carry over to a broad or narrow view of congressional power over commerce. For example Justice Wayne of Georgia was apparently deeply committed to the institution of slavery. He was not, however, apprehensive of federal action under the commerce clause because of his firm conviction that the Constitution itself protected slavery from congressional action. This conviction spared him concern about the validity of southern state legislation relating to slavery by an attack based on the doctrine of exclusive national power over interstate commerce. In his view, Congress could not constitutionally enact legislation hostile to slavery. LAWRENCE, JAMES MOORE WAYNE 97-102 (1943). Many southerners were not so confident. 2 WARREN, *op. cit. supra* note 53, at 442-56. Justice McLean, on the other hand, was something of an abolitionist from Ohio, but also had Presidential ambitions, which may have led him to ameliorate, to some extent, his nationalist leanings. He conceived it his role to strike a compromise between the conflicting

short, an adroit legal solution to an intricate political problem.⁸³

The holding of *The Genessee Chief*, that the admiralty jurisdiction extends to the inland waters, has endured to present times. The compromise on which it was built, however, fell apart quickly. The persistent difficulty that caused the collapse of the compromise involved the 1845 act, for its terms referred only to jurisdiction over large vessels engaged in interstate commerce on the Great Lakes and it provided for jury trial. Was the statute to be regarded as a limitation on admiralty jurisdiction for the Great Lakes, with the paradoxical result that federal courts sitting without a jury would have jurisdiction of intrastate vessels on inland rivers, but not on the Great Lakes?

Six years after *The Genessee Chief*, a question about the applicability of the 1845 act was presented in *Jackson v. The Steamboat Magnolia*.⁸⁴ The case arose out of a collision far above tidewater on the Alabama River between two steamboats, one travelling between points in Alabama and another enroute from New Orleans to Montgomery. Justice Grier, writing for the Court (including Chief Justice Taney), sustained the federal admiralty jurisdiction. By a flagrant misreading of the Judiciary Act of 1789, Justice Grier concluded that all of federal admiralty jurisdiction was limited by Congress to cases arising in waters "navigable from the sea."⁸⁵ Having established this as a limitation dating from 1789, he was able to conclude that the purpose of the 1845 act was to extend the admiralty jurisdiction to the Great Lakes which, he said, were not "navigable from the

positions by a very strict division of power over commerce. He read the Constitution as giving the states exclusive control of their internal affairs (including slavery) and Congress exclusive power over interstate commerce. See his concurring opinion in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 503 (1841). See also WEISENBERGER, *THE LIFE OF JOHN MCLEAN* (1937). Thus these two Justices, though from different parts of the country and with sharply differing views as to slavery, were nonetheless in agreement in many instances on the construction to be given to the commerce clause. Neither was typical of his region.

⁸³ Professor Hurst attributes the Chief Justice's dictum on the commerce power to concern that if the 1845 act had been sustained it "might justify extending federal jurisdiction to contracts and torts on land in interstate commerce." HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 12-13 (1950). Professor Hurst uses *The Genessee Chief* for illustrative purposes and does not purport to give a full discussion of the historical background of the case.

⁸⁴ 61 U.S. (20 How.) 296 (1858).

⁸⁵ The 1789 statute was quoted by Justice Grier as follows: "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction, including all seizures, &c., when they are made on waters which are *navigable from the sea* by vessels of ten or more tons burden, &c., as well as upon the high seas." 61 U.S. (20 How.) at 301 (emphasis by Court). The antecedent of the *they* arguably could be *all civil cases*, although its immediate antecedent is *seizures*. The statute, however, did not contain this ambiguity—it read as follows: "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures made under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas." Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76.

sea." Because the Alabama river *was* "navigable from the sea," the federal court had admiralty jurisdiction because it was held in *The Genessee Chief* that jurisdiction extended above the ebb and flow of the tide. Since the trial court had dismissed for lack of jurisdiction, Justice Grier did not have to face the question of jury trial, and he did not.

Justice Campbell met and destroyed Justice Grier's interpretation of the Judiciary Act, and the effect of the 1845 act, in a dissent joined by Justice Catron. Representing the states' rights position, Justices Campbell and Catron contended that *The Genessee Chief* was to be understood only as meaning that the Great Lakes were in substance the equivalent of the high seas, being an international boundary requiring the presence of a navy and serving as an international highway for commerce.⁸⁶ Justice Campbell indicated some doubt about the Mississippi, though he noted that in 1789 it was an international waterway. In any event, he had absolutely no difficulty in distinguishing the Alabama River, which he viewed as subject only to the law of Alabama. He regarded the jury trial matter as important and thought that this judicial expansion of admiralty was a dangerous invasion of the sovereignty of the states.

Justice McLean concurred in the majority opinion but was equally anxious to explain *The Genessee Chief* from what may as well be called a "unionist" view. Just as Justice Campbell was quick to affirm as "sound constitutional argument" Chief Justice Taney's rejection of the commerce clause base for the 1845 act, Justice McLean made it clear he thought that aspect of *The Genessee Chief* wrong. He stated:

[The admiralty law] is, in fact, a regulation of commerce, as it comprehends the duties and powers of masters of vessels, the maritime liens of seamen, of those who furnish supplies to vessels, make advances, etc., and, in short, the knowledge and conduct required of pilots, seamen, masters, and everything pertaining to the sailing and management of a ship. As the terms import, these regulations apply to the water, and not to the land, and are commensurate with the jurisdiction conferred.

By the Constitution, "Congress has power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." The provision "among the several States," limits the power of Congress in the regulation of commerce to two or more states; consequently, a State has power to regulate a commerce exclusively within its own limits; but beyond such limits the regulation belongs to Congress. The admiralty and

⁸⁶ Although some of the language in *The Genessee Chief* was applicable only to the Great Lakes, the opinion as a whole cannot fairly be so read. Furthermore, the Court at the same term held there was admiralty jurisdiction over the Mississippi, citing *The Genessee Chief* as authority. *Fretz v. Bull*, 53 U.S. (12 How.) 466 (1852). Later the Court did take advantage of the physical uniqueness of the Great Lakes in *Moore v. Am. Transp. Co.*, 65 U.S. (24 How.) 1 (1860).

maritime jurisdiction is essentially a commercial power, and is necessarily limited to the exercise of that power by Congress.⁸⁷

As applied to this case, Justice McLean thought the admiralty court had jurisdiction because one of the steamboats was at the time employed in interstate commerce. Justice Daniel dissented, as he had in *The Genessee Chief*, persisting in his view that there was no admiralty jurisdiction over torts *infra corpus comitatus*.

The Court came to the verge of flying apart the following term and was held together only by two ingenious if not ingenuous opinions by Justice Nelson. The first case was for breach of a contract of carriage of goods between two points in Wisconsin on the Great Lakes.⁸⁸ The second was to recover for supplies given a steamboat plying the Sacramento River, entirely within California.⁸⁹ Both cases denied admiralty jurisdiction, although in neither was the issue raised by counsel. Justice Nelson's theory was that:

[T]he exclusive jurisdiction in admiralty cases was conferred on the national government, as closely connected with the grant of the commercial power. . . . There seems to be ground, therefore, for restraining its jurisdiction, in some measure, within the limit of the grant of the commercial power, which would confine it, in cases of contracts, to those concerning the navigation and trade of the country upon the high seas and tide-waters with foreign countries, and among the several states.

Contracts growing out of the purely internal commerce of the state, as well as commerce beyond tide-waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts.⁹⁰

Accordingly, he held in both cases that there was no federal admiralty jurisdiction because Congress could not have reached the transactions by an exercise of the commerce power. His conclusion was that the Act of 1845 in its limitation to interstate shipping was "declaratory" of existing constitutional law. This was too much for Justices Catron, Wayne and

⁸⁷ *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296, 304 (1857).

⁸⁸ *Allen v. Newberry*, 62 U.S. (21 How.) 244 (1858).

⁸⁹ *Maguire v. Card*, 62 U.S. (21 How.) 248 (1858).

⁹⁰ 62 U.S. (21 How.) at 246-47. This passage was actually a quotation from Justice Nelson's earlier opinion (for himself, the Chief Justice, and Justices McLean and Wayne) in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 343, 391 (1848). It seems likely that Justice Nelson originally inserted it for Justice McLean's benefit. The following year, Justice McLean asserted a similar strict division of power over commerce in *The Passenger Cases*, 48 U.S. (7 How.) 282, 400 (1849), and this was the basis of his concurring opinion in *Groves v. Slaughter*, 40 U.S. (15 Pet.) 449, 503 (1841). In the year following *Allen v. Newberry*, 62 U.S. (21 How.) 244 (1858), and *Maguire v. Card*, *supra* note 89, Justice McLean wrote for the Court reasserting the commerce clause interstate limitation to admiralty. Nelson v. Leland, 63 U.S. (22 How.) 48 (1859).

Grier who apparently could not stomach the abrupt departure from the reasoning of the year before in *Jackson v. The Steamboat Magnolia*.⁹¹

These two opinions by Justice Nelson, though they managed to hold the Court together, were an almost complete repudiation of the compromise that underlay the decision in *The Genessee Chief*.⁹² The Court, under Justice McLean's prodding, had tied together the judicial power in admiralty with the legislative power in commerce. It had been done, to be sure, in cases that denied admiralty jurisdiction. In other words, what Justice Nelson had done was the opposite of what the Chief Justice did in *The Genessee Chief*: the Chief Justice had bought unionist support by expanding the admiralty jurisdiction and had obtained states' rights votes by dicta limiting the commerce power; Justice Nelson sought southern support by attempting to limit the admiralty jurisdiction, but looked for unionist support by language affirming the commerce power.

The advent of the Civil War brought an abrupt end to the sinuous debates. Justices McLean and Daniel, the extremists, had died, and Justice Campbell had resigned to join the South. In 1861, in a case ironically named *The Propeller Commerce*,⁹³ the Court went back to a separation of the judicial power in admiralty from the legislative power in commerce. The case arose out of a collision on the Hudson River between a schooner bound from Albany to Philadelphia and a tug and barges bound from New York City to Albany. The jurisdiction of the federal admiralty court was contested on the theory that the case did not involve interstate commerce. It would have been a sufficient answer for the Court to say, as it did, that one of the ships was engaged in interstate commerce. The case was, in this respect, identical to *Jackson v. The Steamboat Magnolia*. The Court, however, went on to add that:

Admiralty jurisdiction, however, was conferred upon the Government of the United States by the Constitution, and in cases of tort it is wholly unaffected by the considerations suggested. . . . [L]ocality, by all the authorities, is the test, in cases of tort, by which to determine the question

⁹¹ Justice Wayne dissented without opinion in both cases. Justices Catron and Grier dissented in the first case from Wisconsin, also without opinion. Why they did not dissent in the second case from California is inexplicable. Perhaps they thought their dissent in the first sufficient to indicate their disapproval of both cases. Justice Daniel concurred briefly on his usual grounds in the first case and said nothing in the second.

⁹² That these opinions represent compromises seems apparent from the quick reversals of doctrine, and the insertion of issues not raised by counsel. There is direct evidence of a similar compromise in *Cutler v. Rae*, 48 U.S. (7 How.) 728 (1849). Chief Justice Taney there held that admiralty had no jurisdiction to compel a cargo owner to contribute under principles of average after the cargo had been delivered to the consignee; thus, the plaintiff's remedy was by a suit in equity for unjust enrichment. Justice Wayne in his dissent stated that the Court was equally divided on the jurisdictional issue (Justice Catron did not participate). Chief Justice Taney, by finding a substantive defect in the cause of action (i.e., delivery to the consignee), managed to avoid the issue which divided the court.

⁹³ 66 U.S. (1 Black) 574 (1861).

whether the wrongful act is one of admiralty cognizance; and if it appears . . . that it was committed on navigable waters . . . then the case is one properly cognizable in the admiralty.⁹⁴

The Court made no effort to distinguish Justice Nelson's decisions of three years earlier linking the judicial power in admiralty with the legislative power over commerce, except to emphasize that this was a tort case and those had been contract cases.

The Propeller Commerce was followed four years later by *The Plymouth*,⁹⁵ which has since become of central importance. The facts were simple: a fire, originating by reason of alleged negligence aboard a vessel docked in the Chicago River, spread from the vessel to the wharf and adjoining packing houses. The owners of the damaged buildings sued the owners of the ship in admiralty. The Supreme Court denied admiralty jurisdiction in an opinion written by Justice Nelson. The holding was based on the conceptual ground that the wrongful act on the water was *damnum absque injuria* without the damage that occurred on land. Since an essential element of the cause of action occurred on land, the tort was not within the admiralty jurisdiction. Justice Nelson then added this dictum:

The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.⁹⁶

There should be no difficulty in determining why Justice Nelson added that bit of unnecessary language. He was doing his best to undo his own opinions tying admiralty jurisdiction to the commerce clause. It was, in other words, an effort to warn the profession not to rely upon the language in his earlier opinions suggesting that admiralty had no jurisdiction if the issue was not one Congress could reach through the commerce clause.⁹⁷ Unfortunately, in his enthusiasm, Justice Nelson rather overstated his point. Insofar as his dictum indicated that admiralty would have jurisdiction of torts unconnected with the business of shipping (commerce by water), it was unsupported by either authority or policy.

After *The Plymouth*, the Court still had to abolish the commerce clause limitation in contract cases.⁹⁸ It did not take long. Three years later

⁹⁴ *Id.* at 578–79.

⁹⁵ 70 U.S. (3 Wall.) 20 (1865).

⁹⁶ *Id.* at 36.

⁹⁷ The warning was not fully understood at the time. See 3 AM. L. REV. 597, 609–11 (1869); see also GILMORE & BLACK, ADMIRALTY § 1–11, at 28 n.99 (1957).

⁹⁸ Justice Miller might have done it in *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866). Instead he attempted to explain the purpose and effect of the 1845 statute and used some language that Justice Nelson had to overrule two years later in *The Eagle*, 75 U.S. (8 Wall.) 15 (1868).

(1868) Justice Clifford did it by a bootstrap argument derived from *The Propellor Commerce* and *The Plymouth*: since no commerce clause limitation was recognized in those tort cases, none should be applied in contract cases either.⁹⁹ Thus, the admiralty court was held to have jurisdiction over an action for breach of a contract of affreightment to carry goods between two places in the same state, though both parties were citizens of that state. The contract, though not involving interstate commerce, was, nevertheless, a maritime contract. Finally, it was left to Justice Nelson in that same year to say what Chief Justice Taney should have said, but apparently could not, in *The Genessee Chief*: the Act of 1845, except for its provision for a jury trial, was "obsolete and of no effect."¹⁰⁰

C. *The Plymouth Confined—The Test of Waters*

The Plymouth opinion established the concept that admiralty had jurisdiction of all torts on navigable waters and of no torts on land. Unfortunately that idea entered our jurisprudence at about the same time the railroad led to the decline in the relative significance of admiralty. Had the proposition been challenged in its time, the full sweep of *The Plymouth* dictum might well have been modified, by relating the jurisdiction to the purposes of admiralty, *i.e.*, commerce by water.

Something very close to that was in fact accomplished by the judicial definition of "navigable waters of the United States." In 1870 Justice Field phrased the test as follows:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.¹⁰¹

From this it followed that the federal license and inspection statutes were applicable to a steamer engaged in traffic on the Grand River because it carried cargo that traveled interstate, though the steamer itself never ventured beyond the State of Michigan. The doctrine was reiterated in

⁹⁹ *The Belfast*, 74 U.S. (7 Wall.) 624 (1868). The reasoning adopted was that of Chief Justice Chase sitting on circuit in *The Mary Washington*, 14 Am. L. Reg. 692 (C.C. Md. 1866).

¹⁰⁰ *The Eagle*, 75 U.S. (8 Wall.) 15, 24 (1868).

¹⁰¹ *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

1874, with respect to enforcement of the same statutes on the Fox River in Wisconsin, which, prior to improvement, carried very little tonnage.¹⁰² This position was extended some years later to include artificial canals wholly within a state and constructed by the state, because such a canal is "a highway for commerce between ports and places in different states."¹⁰³ It has been assumed, though never so held by the Supreme Court, that there are waters in the United States not within the admiralty jurisdiction, presumably waters wholly within one state that never have been nor are likely ever to become, sufficiently important to carry commerce.¹⁰⁴

The judicial definition of "navigable waters of the United States" was, of course, incorporated into *The Plymouth* doctrine. It signifies at least a continuing awareness of the basic connection between admiralty and commerce and stands as a qualification, however indefinite, of the broad language of *The Plymouth*.

The Plymouth, nevertheless, continues to be used as authority for the proposition that there is federal admiralty jurisdiction of all torts on navigable water and of no torts on land.¹⁰⁵ Although the proposition is frequently stated, it has never withstood a sustained assault.

The Plymouth's holding that injuries caused by a vessel to shore structures were not within admiralty jurisdiction did not long remain intact. Erosion began when the Court extended admiralty jurisdiction if the alleged fault was related to the shore structure in a suit on behalf of the vessel (though the admiralty in rem process was not available).¹⁰⁶ After some hesitation,¹⁰⁷ land-based claims for injuries occasioned by negligence on board a vessel were held to be cognizable in limitation proceedings.¹⁰⁸ Justice Holmes further chipped away at the doctrine by hold-

¹⁰² *The Montello*, 87 U.S. (20 Wall.) 430 (1874).

¹⁰³ *Ex Parte Boyer*, 109 U.S. 629, 632 (1883). This concept of navigability has far-reaching consequences that have nothing to do with admiralty jurisdiction, although there is some tendency to make the single concept serve a multitude of purposes. Navigability is critical to the power of the federal government to build dams. Ownership of the bed of a stream may also turn on navigability. See generally Laurent, *Judicial Criteria of Navigability in Federal Cases*, 1953 WIS. L. REV. 8; Waite, *Pleasure Boating in a Federal Union*, 10 BUFFALO L. REV. 427 (1961).

¹⁰⁴ 1 BENEDICT, ADMIRALTY 99 n. 40 (6th ed. 1940); GILMORE & BLACK 29. The cases are very few and date from the late nineteenth century. See also 33 C.F.R. §§ 2.10-1 to 2.99-270 (1962).

¹⁰⁵ E.g., *Hess v. United States*, 361 U.S. 314, 318 (1960); *Kermarac v. Compagnie Generale*, 358 U.S. 625, 628 (1959).

¹⁰⁶ *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867). Cf. *Philadelphia W. & B. R.R. v. Philadelphia & Harve de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859), which antedated *The Plymouth*.

¹⁰⁷ *Ex Parte Phenix Ins. Co.*, 118 U.S. 610 (1886).

¹⁰⁸ *Richardson v. Harmon*, 222 U.S. 96 (1911). On the Court's distinction of *Ex Parte Phenix Ins. Co.*, 118 U.S. 610 (1886), see GILMORE & BLACK § 10-13.

ing that injuries to land-based navigational aids could be heard in admiralty.¹⁰⁹ Those who had hoped that this presaged a complete reversal of *The Plymouth* holding were, however, disappointed for the Supreme Court declined to go further.¹¹⁰ Congress finally, and despite considerable advice that the bill was unconstitutional,¹¹¹ passed a statute explicitly giving the federal courts admiralty jurisdiction of suits for injuries occurring on land caused by vessels on navigable waters.¹¹²

The other side of *The Plymouth* doctrine, that everything off-shore was within admiralty's exclusive cognizance, was uncritically accepted as a postulate for decision in *Southern Pacific Co. v. Jensen*.¹¹³ There the Court held that a state workmen's compensation statute could not constitutionally be applied to a longshoreman injured aboard ship. The reasoning was: workmen's compensation is a substitute for tort remedies; under *The Plymouth*, the admiralty jurisdiction in tort runs to the water's edge; the Constitution requires the application of a uniform law applicable to all cases in admiralty jurisdiction; application of the state statute disrupts that uniformity; the state statute, therefore, cannot be validly applied.

Thus, if a stevedore should trip on the dock, he would have the benefits of the state workmen's compensation law; but, if he should fall aboard ship, he would have whatever remedy the federal admiralty law provided.¹¹⁴ This rule was simple and clear, but silly. It led to a splendid

¹⁰⁹ *The Blackheath*, 195 U.S. 361 (1904).

¹¹⁰ *E.g.*, *Cleveland Terminal R.R. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908). See also Brown, *Admiralty Jurisdiction of Torts*, 9 COLUM. L. REV. 1 (1909).

¹¹¹ The American Bar Association twice indicated that such an act would be unconstitutional. 55 A.B.A. REP. 307 (1930); 56 A.B.A. REP. 314 (1931). The background of the bill and its need is discussed in Farnum, *Amphibious Torts*, 43 YALE L.J. 34 (1933). The act itself was noted in 63 HARV. L. REV. 861, 868 (1950). The Supreme Court apparently regards the statute as constitutional since it relied on it in *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963). The constitutional issue, however, was not discussed. It should also be noted that the case arose in Puerto Rico, which might serve as a basis for distinction.

¹¹² 62 Stat. 496 (1948), 46 U.S.C. § 740 (1958).

¹¹³ 244 U.S. 205 (1917).

¹¹⁴ At the time of *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), federal remedies available to an injured harbor worker were limited to recovery for a maritime tort, which required proof of negligence. Since then the Supreme Court has developed the remedy of unseaworthiness, which does not require proof of fault, and, in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Court extended it to harbor workers. See also *Reed v. The Yaka*, 373 U.S. 410 (1963). In short, the federal admiralty remedies are now considerably more generous than state workmen's compensation laws. In the era of *Southern Pacific Co. v. Jensen*, *supra*, the pressure from plaintiffs was to extend state jurisdiction from land to water. In response to that pressure the Court evolved the "twilight zone" doctrine, discussed above, and the "maritime but local" concept, discussed in text accompanying notes 153-58 *infra*. Today the pressure from plaintiffs is in the other direction: to expand admiralty jurisdiction to land. The Court has yielded by building on the doctrine of *O'Donnell v. Great Lakes Co.*, 318 U.S. 36 (1943), discussed in text accompanying notes 145-52 *infra*, so that now both seamen and longshoremen have the benefit of an admiralty remedy for many injuries on land. See *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963).

series of cases of the kind generally encountered only on bar examinations. What of a man knocked off a ship who lands on the dock?¹¹⁵ Is his case distinguishable from that of a man who falls off a ship and lands in the water?¹¹⁶ What of the man fatally injured aboard ship, but who actually dies on the dock?¹¹⁷ Does it matter that the applicable death statute gives a cause of action not to the decedent's estate for his injuries but to his dependents, so that a critical element in the cause of action is the death that occurred on land?¹¹⁸ And what of a man knocked from a dock into the water?¹¹⁹ And so forth.¹²⁰

These riddles—all, it should be noted, of constitutional magnitude—occupied a substantial portion of the Court's time in the period following the *Jensen* case. In the Longshoremen's and Harbor Workers' Act,¹²¹ Congress finally provided a workmen's compensation remedy, but only for those injuries occurring on navigable waters for which an employee could not recover under any state compensation act.¹²² This provision was enacted in deference to the *Jensen* case. In 1942, the Supreme Court in a *tour de force* rewrote the statute, creating a "twilight zone" of overlapping jurisdiction.¹²³ As developed, the "twilight zone" permits a harbor worker to recover under either state or federal compensation statutes whether he was injured on the land or water¹²⁴ and has resulted in the obliteration of the water's edge as a complete answer to the jurisdictional problem.

The "twilight zone" is only one of the devices the Supreme Court has evolved for avoiding *The Plymouth* doctrine that there is admiralty juris-

¹¹⁵ No admiralty jurisdiction. *Industrial Comm'n v. Nordenholt Corp.*, 259 U.S. 263 (1922). *But cf.* *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935).

¹¹⁶ Yes. *Gonsálves v. Morse Dry Dock & Repair Co.*, 266 U.S. 171 (1924); *Great Lakes Co. v. Kierejewski*, 261 U.S. 479 (1923).

¹¹⁷ Admiralty jurisdiction. *Vancouver S.S. Co. v. Rice*, 288 U.S. 445 (1933).

¹¹⁸ No. *Ibid.*

¹¹⁹ State jurisdiction. *Smith & Son v. Taylor*, 276 U.S. 179 (1928); *cf.* *Miller's Underwriters v. Branc*, 270 U.S. 59 (1925).

¹²⁰ The same sort of difficulty with the test by waters, though not involving harbor workers, was presented in *The Admiral Peoples*, 295 U.S. 649 (1935). In that case a passenger had tripped on the gangplank and fell on the wharf. The Court held that there was admiralty jurisdiction. The opinion is also significant because the Court admitted that the holding was inconsistent with the conceptual theory of *The Plymouth*, i.e., that the injury as well as the wrongful act must occur on navigable water.

¹²¹ 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1957).

¹²² "Compensation shall be payable under this [act] . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery . . . through workmen's compensation proceedings may not validly be provided by State Law." 44 Stat. 1426 (1927), 33 U.S.C. § 903 (1957).

¹²³ *Davis v. Dep't of Labor*, 317 U.S. 249 (1942). The background of this decision is given in GILMORE & BLACK §§ 6-48 to 6-51.

¹²⁴ See *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), and cases collected in 50 CALIF. L. REV. 342 (1962).

diction over "every species of tort" on navigable water, but over no torts on land. There are several others that, in effect, impose a commercial limitation upon the scope of admiralty law. To bring these into clear focus requires first a brief excursion into the test for admiralty jurisdiction in contract.

D. The Plymouth Confined—The Contract Test

As already noted, Justice Nelson was careful in *The Plymouth* to limit his broad language to the jurisdiction of admiralty in tort cases. He did that because of the convenient fact that his earlier decisions that had tied admiralty jurisdiction to the commerce clause all happened to be contract cases.¹²⁵ He could easily distinguish those cases by saying that locality was the jurisdictional test in tort and leave unanswered the question of the test of jurisdiction in contract cases. But the question could not remain open for long. When it was answered three years later, although the Court did discard the commerce clause limitation, it adhered, as it has ever since, to a requirement of a commercial context for admiralty jurisdiction over contracts.¹²⁶

The earliest cases were concerned with the issue whether the English rule—that the contract must be made and performed at sea to be cognizable in admiralty—should be incorporated as a limitation on federal admiralty jurisdiction.¹²⁷ In the bitterly contested *Lexington* litigation in 1848,¹²⁸ the Court, though without a clear majority, rejected the English rule and adopted Justice Story's formula in *Delovio v. Boit* that the contract must be "purely maritime, and touching rights and duties appertaining to commerce and navigation."¹²⁹

In *Insurance Co. v. Dunham*, decided in 1870,¹³⁰ Justice Story's deci-

¹²⁵ *Allen v. Newberry*, 62 U.S. (21 How.) 244 (1858); *Maguire v. Card*, 62 U.S. (21 How.) 248 (1858).

¹²⁶ *The Belfast*, 74 U.S. (7 Wall.) 624 (1868).

¹²⁷ These cases were probably within the English rule or acknowledged exceptions. In any event, they were decided without extended discussion or citation. *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819) (contracts of materialmen or suppliers; *but see* *Ramsey v. Allegre*, 25 U.S. (12 Wheat.) 611, 612 (1827) (Johnson, J., concurring)); *Sheppard v. Taylor*, 30 U.S. (5 Pet.) 675 (1831) (seamen's contract); *The Hope*, 35 U.S. (10 Pet.) 108 (1836) (pilotage).

¹²⁸ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 343 (1848).

¹²⁹ The quotation is from 2 STORY, *UNITED STATES CONSTITUTION* 467 (5th ed. 1891). The court quoted or paraphrased it several times. *E.g.*, *The Eclipse*, 135 U.S. 599, 608 (1889) (contract to sell a ship—not in admiralty jurisdiction); *The Kalorama*, 77 U.S. (10 Wall.) 204, 210 (1869) (contract for supplies). Perhaps it is inaccurate to suggest that the Court adopted Story's "test" in *The Lexington*, but the Court later claimed that a "careful examination" of that opinion would support the statement in the text. *North Pac. S.S. Co. v. Hall Bros. Co.*, 249 U.S. 119, 126 (1918).

¹³⁰ 78 U.S. (11 Wall.) 1 (1870).

sion¹³¹ on circuit some 55 years earlier was sustained when the Court held that a suit on a policy of marine insurance was within the admiralty jurisdiction. Although a leading case, Justice Bradley's opinion offered no satisfactory explanation of why admiralty should hear such cases.¹³² The Court would have done better to follow the argument of counsel who suggested as a reason for putting marine insurance within the admiralty jurisdiction that it would tend

to promote uniformity of principle and practice throughout the different States in the administration of law. . . . If the admiralty cannot exercise this jurisdiction, it must be left principally to the State courts, and the differences of opinion and practice, so much deplored, will remain and increase.¹³³

Since *Insurance Co. v. Dunham*, the Court has had little occasion to discuss what is a "maritime" contract. Most of the opinions have struggled with a pre-*Dunham* decision holding that a contract to build a vessel is not maritime¹³⁴ and have attempted to draw a line distinguishing construction from repair.¹³⁵ Perhaps the closest the Court has come to a precise definition of what was, and particularly what was not, a maritime contract was in *The Robert W. Parsons*,¹³⁶ decided in 1903. The action to collect for repair services on a canal boat was brought in the New York state courts under a New York statute providing for an in rem procedure closely analogous to the admiralty process. The New

¹³¹ DeLovio v. Boit, 7 Fed. Cas. 418 (No. 3776) (C.C. Mass. 1815) quoted in text accompanying note 58 *supra*.

¹³² The crucial language in the opinion is that "the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." 78 U.S. (11 Wall.) at 26. Since the word to be construed in the Constitution was "maritime" this is not overly helpful. About all that Justice Bradley added as an indication of the rationale of the decision was an extended inquiry into whether insurance was included within the admiralty jurisdiction of other countries and some ponderous learning as to the marine origins of insurance.

¹³³ 78 U.S. (11 Wall.) 1, 13-14 (1870). Compare *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), holding that state law was applicable on an issue of breach of warranty of a marine insurance policy. *Cf. Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), where the Court treated as separate and distinct issues (1) whether a contract of a seaman with his employer whereby the latter agreed to assume responsibility for the quality of care at a public health hospital was within the admiralty jurisdiction and (2) whether the state statute of frauds was applicable to that contract.

¹³⁴ The first case was *Peoples Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1857), which has since been followed. *Roach v. Chapman*, 63 U.S. (22 How.) 129 (1859); *Edwards v. Elliott*, 88 U.S. (21 Wall.) 532 (1874); *The Winnebago*, 205 U.S. 354 (1907).

¹³⁵ See, e.g., *New Bedford Co. v. Purdy*, 258 U.S. 96 (1922), where a contract for converting a railroad car float into a floating dance palace was held to be within the admiralty jurisdiction.

¹³⁶ 191 U.S. 17 (1903).

York statute, consistent with established Supreme Court doctrine,¹³⁷ provided that if the action arose out of a "maritime contract" it could be brought only in the federal courts. The plaintiff contended that the contract was not maritime and, therefore, was within the jurisdiction of the state courts. He based this argument on the fact that the vessel involved was a very small canal boat, that it was not self-propelled, and that it was used exclusively in intrastate commerce on the Erie Canal. The New York courts agreed with the plaintiff. Justice Brown, however, speaking for a bare majority¹³⁸ of the Supreme Court, reversed, holding that federal admiralty courts had exclusive jurisdiction of such cases.

Justice Brown's opinion is substantially devoid of policy rationale. He relied chiefly upon the fact that the Erie Canal was navigable water of the United States and that, accordingly, any tort, such as a collision between two canal boats, would be within the admiralty jurisdiction. He reasoned that contracts relating to these vessels should also be within admiralty jurisdiction.¹³⁹ Justice Brown, however, also emphasized that the canal boat, though small, was engaged in commerce. He seemed to be groping toward a limitation of admiralty jurisdiction to matters having some relationship to the business of shipping when he stated:

In fact, neither size, form, equipment nor means of propulsion are determinative factors upon the question of jurisdiction, which regards

¹³⁷ In *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866), and *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866), the Court had held that the "common law remedy" saved to suitors by the Judiciary Act of 1789, did not include the in rem process, and hence the in rem procedure was exclusively available in the federal admiralty courts. This rule was applicable, however, only with respect to matters within the admiralty jurisdiction; hence a state court could provide an in rem procedure to collect non-admiralty claims, as, for example, damages caused by a vessel to land-based structures. *Martin v. West*, 222 U.S. 191 (1911); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886). The problem was most acute with the "home port" supply liens. The Supreme Court had held that these claims were not entitled to the admiralty process in *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), and adhered to that rule in *The Lottawana*, 88 U.S. (21 Wall.) 558 (1874). The states, however, could by statute give home port supply claims lien status, in which case the federal admiralty courts would honor them, *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833), but, as held in *The Hine v. Trevor*, *supra*, and *The Moses Taylor*, *supra*, only the federal courts could use the in rem process. The New York statute involved in *The Robert W. Parsons* was carefully tailored to fit all this. The full picture of this highly intricate bit of law, largely solved by the Federal Maritime Lien Act, 36 Stat. 604-05 (1910), as amended, 46 U.S.C. §§ 971-75 (1958), is given in GILMORE & BLACK §§ 9-24 to 9-29.

¹³⁸ Justice Brewer's dissent was concurred in by Chief Justice Fuller and Justice Peckham. Justice Harlan dissented but without opinion.

¹³⁹ This type of reasoning is meaningless unless the standards for tort and contract are the same. Thus, if a bridge should negligently damage a vessel in navigable water the tort is within admiralty jurisdiction, *The Rock Island Bridge*, 73 U.S. (6 Wall.) 213 (1867), but it does not follow, apparently, that admiralty has jurisdiction of a contract relating to a floating bridge—or at least that is what Justice Brown said in *The Robert W. Parsons*, 191 U.S. 17, 34 (1903).

only the purpose for which the craft was constructed, and the business in which it is engaged.

The application of this criterion has ruled out the floating drydock, the floating wharf, the ferry bridge hinged or chained to a wharf, the sailors' Bethel moored to a wharf . . . and a gas float moored as a beacon. . . .

But it has been held in England to include a fishing coble, a boat of ten tons burthen, twenty-four feet in length, decked forward only, though accustomed to go only twenty miles to sea, and to remain out twelve hours at a time . . . ; a barge . . . ; though not a dumb barge, propelled by oars only . . . ; and in America to steamers of five tons burthen, engaged in carrying freight and passengers upon navigable waters . . . ; a barge without sales or rudder, used for transporting grain . . . ; a floating elevator. . . .¹⁴⁰

Justice Brown's opinion gains significance by contrast with the arguments presented by Justice Brewer in dissent. Justice Brewer's opinion was the last serious effort to confine admiralty jurisdiction to matters having some connection with ocean commerce. Contact with foreigners seemed to Justice Brewer to be the *raison d'être* of admiralty. He asked: "Why should we be so anxious to drive parties having small claims away from their local courts to courts not infrequently held at a great distance?"¹⁴¹ Justice Brown gave no direct answer to this cogent question but his opinion suggests that uniformity of law applicable to the shipping industry is what was (or should have been) in his mind.

Justice Brewer may well have been right in thinking that history called for a limitation of admiralty to those things having at least a potential connection with foreigners—in other words, ocean commerce. He was fighting, however, a long line of decisions too well settled at the turn of the century to be disturbed. The important point is that the great debate whether admiralty law should be applicable to inland waters in no way put in issue the question whether admiralty law should be applicable to non-commercial matters. Justice Brown's opinion in *The Robert W. Parsons* proves it. Although Justice Brown was answering a formidable attack on the extension of admiralty to the inland waters, he had no hesitancy in conceding to the dissent the nexus between admiralty and commerce; the point he would not yield was that admiralty law was tied to ocean commerce. *The Robert W. Parsons* thus shows that a commercial limitation to admiralty law would be fully consistent with the extension of admiralty to the inland waters.

¹⁴⁰ 191 U.S. at 30 (many cases cited in the quoted passage were tort, not contract cases).

¹⁴¹ *Id.* at 47.

E. The Plymouth Confined—Contract and Tort Merged

The Robert W. Parsons is also significant as one of the few cases in which the Supreme Court openly merged the "locality" test for tort jurisdiction with the "subject matter" test for contract jurisdiction. In general, the Court has adhered to the idea that the two tests are distinct.¹⁴² The reasons for that distinction are remarkably obscure. The early writers, notably Story,¹⁴³ drew such a line relying on the English cases and the prohibitions which issued from the common law courts. As has been seen, most of the distinctions made in the English law of admiralty jurisdiction have been rejected; no one has attempted to explain why this one is meaningful in the context of federalism. The distinction gained transient significance when the court dissociated the scope of the commerce clause from the scope of admiralty jurisdiction. That basis for the distinction, however, became meaningless when the Court held that because no impact on interstate commerce was required for admiralty jurisdiction in tort, none should be required in contract either.¹⁴⁴ This was, of course, another case in which the Court joined the contract and tort tests for admiralty jurisdiction.

There have been a number of important instances in which the Court has breached the wall between contract and tort with the effect of making a connection with commerce, rather than the water's edge, the critical fact. In *O'Donnell v. Great Lakes Co.*,¹⁴⁵ a seaman was injured in the course of his employment but while working on the dock rather than aboard ship. He sued his employer under the Jones Act.¹⁴⁶ The defendant contended that the Jones Act was inapplicable to injuries occurring on land. Chief Justice Stone treated the argument with considerable care. As a matter of statutory construction there was no real difficulty—the Jones Act covered all injuries while the seaman was employed.¹⁴⁷ There was, however, an underlying constitutional problem. If the Jones Act were justified as an exercise of the commerce power, it, like the FELA, might be inapplicable to seamen engaged exclusively in intrastate com-

¹⁴² *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961).

¹⁴³ 2 STORY, UNITED STATES CONSTITUTION §§ 1665-72 (5th ed. 1891).

¹⁴⁴ *The Belfast*, 74 U.S. (7 Wall.) 624 (1868).

¹⁴⁵ 318 U.S. 36 (1943).

¹⁴⁶ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958). The statute extended to seamen the benefits of the Federal Employers Liability Act, 35 Stat. 65 (1908), 45 U.S.C. §§51-60 (1958).

¹⁴⁷ The Jones Act provides that "Any seaman who shall suffer personal injury in the course of his employment . . ." 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1958). Prior to the *O'Donnell* case, it was generally assumed by the profession that the Jones Act was inapplicable to shorebased injuries. See GILMORE & BLACK § 6-20.

merce.¹⁴⁸ On the other hand, if the admiralty clause were used as a justification for the statute,¹⁴⁹ the defendant's argument that the statute was inapplicable to shore-based injuries was substantial—the tort did not occur on navigable waters.¹⁵⁰

The Court met this problem by holding that the Jones Act was a modification not of maritime tort law but rather of the contractual relations between the seaman and his employer. The Chief Justice used as his prime analogy the ancient seamen's remedy of maintenance and cure. This remedy was not limited to injuries received aboard ship and was generally regarded as a form of contractual relief.¹⁵¹ The opinion is a masterpiece of legal craftsmanship, but it cannot disguise the essential fact that admiralty law was being applied to a tort that occurred on land. To that extent it was inconsistent with *The Plymouth*. But it is fully consistent with the idea that admiralty and commerce go together, since the Jones Act is confined to seamen employed by the maritime industry.¹⁵²

¹⁴⁸ Recently, the Supreme Court has greatly reduced the significance of the interstate commerce requirement in the FELA by reading the act very broadly to include, for example, a filing clerk. *Reed v. Pennsylvania R.R. Co.*, 351 U.S. 502 (1956); see also *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956). The breadth of FELA was not so clear in 1943, when the *O'Donnell* case was decided.

¹⁴⁹ See note 212 *infra*.

¹⁵⁰ The defendant had in his favor on this point some strong language by Chief Justice Hughes in *Crowell v. Benson*, 285 U.S. 22 (1932). The issue in that case was the constitutionality of the Longshoremen and Harbor Workers Act, 44 Stat. 1424 (1927), as amended, 33 U.S.C. §§ 901-50 (1958), which Hughes was careful to sustain on the admiralty power rather than the commerce clause. See 285 U.S. at 55 n.18. That statute was limited to injuries occurring on navigable waters (but compare text at notes 122-24 *supra*), and the Chief Justice relied on this fact in discussing the limitations on Congress's power under the admiralty clause:

In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside of that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute.

285 U.S. at 55. Technically the language discussing congressional power was dicta, and certainly if the theory of *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 15 (1934), were followed, it was wrong. See note 212 *infra*. The critical limitation on the legislative admiralty power is probably connection with the shipping industry.

¹⁵¹ Categorizing maintenance and cure has proved consistently difficult. See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963); *Vaughan v. Atkinson*, 369 U.S. 527 (1962).

¹⁵² Who is a "seaman" for purposes of the Jones Act is a problem not without its difficulties. See *GILMORE & BLACK* § 6-20, at 282 n.106. Since that book was published the classification of seamen has been expanded to include some rather anautical types. *E.g.*, *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) (pile driver working on construction of a Texas tower); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957) (handyman or day laborer on a dredge).

A comparable reasoning process was used to limit tort jurisdiction in *Grant Smith-Porter Ship Co. v. Rohde*,¹⁵³ decided in 1922. Five years earlier Justice McReynolds had held in *Southern Pacific Co. v. Jensen*¹⁵⁴ that a state could not constitutionally provide a workmen's compensation remedy to a stevedore injured while working aboard ship, because to do so would be offensive to the uniformity of law required by the admiralty clause of the Constitution. Twice Congress attempted to reverse the *Jensen* decision, only to be rebuffed by the Court,¹⁵⁵ but pressure from within the Court forced the development of some ameliorating doctrine.¹⁵⁶ Justice McReynolds responded to this pressure in the *Rohde* case.

Rohde, the plaintiff, was a carpenter who had been injured while working aboard an uncompleted vessel on the Willamette River in Oregon. He sued his employer in admiralty, alleging negligence and that the tort occurred on navigable waters of the United States. The employer answered with the defense of the workmen's compensation law of the state. The Ninth Circuit certified two questions to the Supreme Court: (1) was the tort within admiralty jurisdiction, and (2) was the workmen's compensation statute a defense. Justice McReynolds answered both questions affirmatively. The answer to the first question was given easily: the tort occurred in navigable waters and an action based on it was within admiralty jurisdiction. Coming to the second question, Justice McReynolds found that Rohde was employed to assist in the construction of a ship. A contract to build a ship is not a contract within admiralty jurisdiction, and thus rights under such contracts are determined by state law. Therefore, an employer engaged in ship building might contract with his employee for a workmen's compensation scheme and escape admiralty tort liability. This was, in other words, a "maritime but local" affair, which meant that although the admiralty court had jurisdiction of the tort, state law could be applied without working a "material prejudice to any characteristic feature of the general maritime law."¹⁵⁷

Thus was born the concept of "maritime but local," an unhappy amalgam of the contract test for admiralty jurisdiction and *Southern Pacific Co. v. Jensen*. It proved to be a convenient label for permitting recovery under a state workmen's compensation laws for people injured on navigable waters. Insofar as a meaningful generalization is possible, most cases finding an activity "maritime but local" concern workmen not con-

¹⁵³ 257 U.S. 469 (1922).

¹⁵⁴ 244 U.S. 205 (1917).

¹⁵⁵ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924).

¹⁵⁶ GILMORE & BLACK § 6-45 (1957).

¹⁵⁷ 257 U.S. at 476.

nected with the business of shipping.¹⁵⁸ The end result, in any event, was a sharp departure from *The Plymouth*: admiralty law is not necessarily the substantive law to be applied to all torts occurring on navigable waters. It would be more accurate to say that the contract and tort tests have been merged with the result that admiralty law is applicable only if the case bears some relationship to the maritime industry.

II

FEDERALISM AND ADMIRALTY—STATE LAW AND ADMIRALTY JURISDICTION

Hopefully, what has thus far been said has been sufficient to demonstrate that (1) throughout the history of admiralty there has been consistently recognized a basic connection between admiralty law and commerce by water and (2) insofar as *The Plymouth* indicates anything to the contrary it was wrong, it probably has been misinterpreted, and, in any event, it has not been followed. The tasks remaining are to relate this commercial limitation to some relatively recent decisions of the Supreme Court and, finally, to relate the whole to pleasure boating.

Up to this point the discussion has proceeded as if a determination that admiralty had jurisdiction necessarily carried with it the conclusion that the substantive law of admiralty rather than state law applied, and vice versa. With important exceptions to be noted shortly, that is true today, but it was not true before the decision in *Southern Pacific Co. v. Jensen* in 1917. The "saving to suitors" clause in the original Judiciary Act permitted almost all admiralty actions to be brought in the state courts if the plaintiff so desired.¹⁵⁹ That has remained true to the present

¹⁵⁸ Professor Larson analyses the cases as follows:

[Ship construction] was not deemed to affect commerce, and fell within local acts; [ship repair] bore a direct relation to the facilitation of commerce, and was therefore beyond the reach of the states when injury was over navigable waters. Loading and unloading ships was definitely related to commerce, even when the particular workman's participation in this function was intermittent or infrequent. But the following were held to be employments of local concern: removal of a submerged obstruction by a diver; building a pier from a floating raft; checking lumber on a barge; pushing a fishing boat into the water; making up logging booms in navigable water; working as a sweeper on a garbage scow; and servicing a refrigerator in a ship's galley by a local refrigerator company.

2 LARSON, WORKMEN'S COMPENSATION § 89.22 (1961).

¹⁵⁹ In rem actions against the vessel may only be brought in the federal admiralty courts. See note 137 *supra*. The same cause of action, however, could be asserted against the vessel's owners in an in personam action in the state court under the "saving to suitors" clause. See GILMORE & BLACK § 1-13. Some statutory proceedings, such as to foreclose a preferred ship mortgage, can only be brought in the admiralty court because of the provisions of the federal act.

time. Prior to 1917, however, the substantive law to be applied in such cases depended initially upon whether the suit was brought in a state court or in a federal court sitting in admiralty.¹⁶⁰ In this respect, cases within admiralty jurisdiction were not dissimilar from diversity cases before *Erie R.R. v. Tompkins*.¹⁶¹ Thus at the time *The Plymouth* was decided, the claim of admiralty jurisdiction for "every species of tort" on navigable waters did not mean that state law-making bodies were incompetent to establish the substantive law applicable to events on local waters, even for matters closely connected to the shipping industry.¹⁶² All that it meant was that if there was a difference between the state rule and the admiralty rule, the choice of which was to be applied depended in large part on whether the case was brought in the state court or the federal court sitting in admiralty.

In *Southern Pacific Co. v. Jensen* the Supreme Court held that the Constitution required a uniform rule in cases within the admiralty jurisdiction. One consequence of that decision was the doctrine, which has not since been challenged, that the same rule must be applied regardless of the choice of forum, state or federal.¹⁶³ This means that whenever federal admiralty law is applicable, state law-making bodies are constitutionally disabled from declaring the substantive rule that will control the result. That was why the workmen's compensation statutes were voided in *Southern Pacific Co. v. Jensen*. The doctrine thus added a whole new dimension to *The Plymouth*.

From the very beginning, however, the law applied in the federal admiralty courts has not always been federal admiralty law.¹⁶⁴ There were a number of important instances in which the admiralty courts looked to state law for the substantive rule. For example, admiralty law did not

¹⁶⁰ Justice Pitney, dissenting in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 223-55 (1917) collected a number of examples. The best known is *Belden v. Chase*, 150 U.S. 674 (1893), where the Court sustained an application of the New York contributory negligence rule to a collision suit that was brought in the New York state courts. See also GILMORE & BLACK § 6-58; D. Currie, *infra* note 165; Stevens, *Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950). But cf. *Caldarola v. Eckert*, 332 U.S. 155 (1947).

¹⁶¹ 304 U.S. 64 (1938).

¹⁶² Authorities cited note 160 *supra*.

¹⁶³ *Garrett v. Moore-McCormick Co.*, 317 U.S. 239 (1942); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal. 2d 365, 159 P.2d 1 (1945). The same rule is applicable to a federal court sitting on the "law" side. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953). See also *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

¹⁶⁴ The earliest known instance is *Peyroux v. Howard*, 32 U.S. (7 Pet.) 324 (1833), applying a state statute giving a lien for supplies to a ship in its home port. See also *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

give a remedy for wrongful death, but the Court early approved reference to the local state death statute by federal admiralty courts.¹⁶⁵ These exceptional instances were of interest prior to 1917; they became critical after that date because it was only in those areas that the state law-making bodies were competent to declare the controlling substantive law. In other words, if state law differed from admiralty law, the state law could constitutionally be applied in the state courts only if it was within one of the exceptional areas in which the federal admiralty courts would refer to state law.

The problem ever since has been to work out some rationalizing principle that will explain the instances in which admiralty will look to state law, and those in which it will not. The Supreme Court has generated several distinct lines of authority with respect to the role of state law in admiralty. There is the "gap" theory: if admiralty has no rule, as in death cases, state law can be applied.¹⁶⁶ Another is the antithesis of the gap theory: the absence of an admiralty rule is an "occupation of the field" prohibiting the use of state law.¹⁶⁷ State laws that limit an admiralty remedy are inapplicable;¹⁶⁸ but state laws that supplement an admiralty remedy can be used.¹⁶⁹ Application of any of these theories is made hazardous because at times the Court will devise some new admiralty doctrine to fill the supposed "gap,"¹⁷⁰ but at other times the Court will refuse to do so.¹⁷¹ Each of these formulas has substantial supporting authority behind it, but there is very little cross-citation.

Recently, in *Kossick v. United Fruit Co.*,¹⁷² the Court acknowledged the chaotic state of its precedents and recognized that, although the cases concerning the role of state law in admiralty had been compartmentalized, they represented in truth no more than conflicting solutions to a

¹⁶⁵ In *The Harrisburg*, 119 U.S. 199 (1886), the Court held that admiralty recognized no liability for wrongful death. Prior to that time the Court had sustained state court judgments for wrongful death occurring on navigable waters, *Sherlock v. Alling*, 93 U.S. 99 (1876), *Steamboat Co. v. Chase*, 83 U.S. (16 Wall.) 522 (1873), and after some doubts, see *Butler v. Boston S.S. Co.*, 130 U.S. 527 (1889), the Court held that the state wrongful death acts could be applied in the admiralty court, *The Hamilton*, 207 U.S. 398 (1907). The story is told in detail in D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUPREME COURT REV. 158. This article should be referred to for a full discussion of the matters discussed in this section.

¹⁶⁶ *E.g.*, *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955); *The Hamilton*, 207 U.S. 398 (1907).

¹⁶⁷ *E.g.*, *The Roanoke*, 189 U.S. 185 (1903).

¹⁶⁸ *E.g.*, *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919).

¹⁶⁹ *E.g.*, *Just v. Chambers*, 312 U.S. 383 (1941).

¹⁷⁰ *E.g.*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

¹⁷¹ *E.g.*, *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

¹⁷² 365 U.S. 731 (1961).

single problem. The Court suggested that what was involved was not a peculiarity of admiralty, but rather another aspect of federalism to be solved by a "weighing" process essentially similar to the mode of resolving other conflicts between state and national governments;¹⁷³ for example, state regulations of interstate commerce,¹⁷⁴ the scope of preemption by federal statutes,¹⁷⁵ or, in reverse, the role of federal law in diversity cases.¹⁷⁶

The heart of this "weighing" process is careful identification of the state or national interest in the application of its own law. Many of the problems will disappear upon recognition that there is no significant federal interest present. The application of state wrongful death statutes in admiralty is an example. The absence of an admiralty remedy for wrongful death expresses no determined policy decision but rather a reluctance to contrive judicially a remedy structure that has traditionally been created by legislation.¹⁷⁷ The states, on the other hand, have a considerable interest in providing financial support for the dependents of the victims of wrongful conduct.¹⁷⁸ There is, in short, a legitimate state concern in the application of its law, and no federal policy to be promoted by a denial of recovery for wrongful death.

The issue is more difficult where there is both a federal and state interest involved. *Southern Pacific Co. v. Jensen* illustrates the problem. Justice McReynolds was right in detecting a federal interest in the liability of employers and shipowners to stevedores. Ships move from port to port; it would be better for the shipping industry's purposes if liability for injury were fixed by a single system of law. To the extent that claims for injuries figure in the cost of doing business, a sharp difference in the nature of liability could have an impact on the allocation of business

¹⁷³ See generally M. TRAYNOR, *Conflict of Laws: Professor Currie's Restrained and Enlightened Forum*, 49 CALIF. L. REV. 845, 852 (1961).

¹⁷⁴ The Court in the *Kossick* case cited *Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960). *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945), would perhaps have been a better illustration.

¹⁷⁵ *E.g.*, *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424 (1963); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines*, 372 U.S. 714 (1963); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963).

¹⁷⁶ *E.g.*, *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958); *cf. Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952).

¹⁷⁷ See *The Harrisburg*, 119 U.S. 199 (1886). D. Currie, *supra* note 165, at 193-202, argues persuasively that the Court should fashion a federal admiralty remedy for wrongful death by analogy to the Death on the High Seas Act, 41 Stat. 537 (1920), 46 U.S.C. §§ 761-68 (1958).

¹⁷⁸ *Cf. Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

between ports. The trouble with the *Jensen* case was the Court's total disregard of the state interest that was also present. The states have an obvious and considerable interest in providing a remedy for residents injured in the course of their employment. Justice McReynolds dismissed the state interest with a casual assertion that if there is *any* federal concern, state law must mechanically bow before it. That kind of mechanical solution, the Court concluded in *Kossick*, was wrong. What was needed was a considerably more sophisticated "accommodation" of the competing interests of the state and national governments.¹⁷⁹

But even taking Justice McReynolds on his own terms, the decision in the *Jensen* case could not accomplish the result he desired because he was limited, or thought he was, by the doctrine of *The Plymouth* that admiralty has jurisdiction only of torts committed on the navigable waters of the United States. All the national interests identified with stevedores, however, are applicable no matter where the individual stevedore may have been injured. The impact of liability on the maritime industry is not less because the man was hurt while working on the dock or in the adjoining warehouse than if he were injured while working in the hold of a ship. Uniformity of compensation expense was, accordingly, impossible without expansion of admiralty jurisdiction to include injuries occurring on land.

The arbitrary character of the jurisdictional boundaries cuts both ways. The liability for collision between commercial vessels should be controlled by the federal admiralty law. The maritime industry can legitimately demand that its responsibility be fixed according to a single system of law, especially because much of the industry is owned by foreign interests, and there is no significant state interest in fixing the measure of liability. Thus, no one would dispute that the admiralty rule of divided damages in mutual fault collision cases should prevail over the California rule of contributory negligence if two ocean liners should collide on the Sacramento River. But what if the collision at the same point is between two pleasure craft on a Sunday outing? The cases thus far decided turn on the nature of the tort without regard for the character of either the

¹⁷⁹ [T]he fact that maritime law is—in a special sense at least . . .—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern.

Kossick v. United Fruit Co., 365 U.S. 731, 739 (1961).

perpetrator or the victim.¹⁸⁰ Because there is a federal interest in *some* collision cases, it has been thought that federal law must be applied to all collision cases.¹⁸¹

The recent recognition by the Court in the *Kossick* case that the problem of state law in admiralty is a problem of federalism should invite a rethinking both of the assumption that collision cases are inevitably to be decided by application of federal law and of the tort test for admiralty jurisdiction. A more refined analysis is required than the mechanical method disapproved in *Kossick*. The question remains: What lines of policy should govern this analysis?

The key to solution of the problem ought to be the commercial nature of admiralty. If the case presents a problem in which the maritime industry is concerned, and in which a diversity of law would seriously interfere with the efficient operation of the business, federal law should be applied. Conversely, if the case does not involve the industry, and if the state's interest is substantial—as evidenced, for example, by legislative action—then state law should be applied.

Resort to this sort of analysis would be perfectly consistent with the authorities discussed above. Even the broad language of *The Plymouth* could be made consistent by reading it as meaning no more than that the federal court has jurisdiction to try all cases concerning torts on navigable

¹⁸⁰ *Hess v. United States*, 361 U.S. 314 (1960), illustrates this phenomenon of thinking in classifications. That case arose out of the death of a carpenter employed by a contractor working on repairs of Bonneville Dam on the Columbia River. The death occurred on navigable water. Justice Stewart, for the Court, held that because this was a wrongful death action, state law should be applied. The Oregon law required a higher standard of care than the maritime law, and Justice Harlan dissented on the theory that applying this Oregon law would be offensive to the constitutionally required uniformity of admiralty. Neither the majority nor the dissent paid more than passing attention to the fact that the deceased was a carpenter working on a dam, not a ship (though at the moment of death he was on a barge); and that the action against the United States rested on the Federal Tort Claims Act, which specifically made the law of the locality the applicable standard. There was, in short, a minimal need for national uniformity. See D. Currie, *supra* note 165, at 201-202. Compare *Kermarec v. Compagnie Generale Transatlantique*, 258 U.S. 625 (1959), with *Cashell v. Hart*, 143 So. 2d 559 (D.C.A. 2d Fla., 1962).

¹⁸¹ See text accompanying notes 186-204 *infra*. Similarly, commentators have assumed that the admiralty law relating to maritime liens is applicable to pleasure boats. CALIF. PLEASURE BOATING LAW § 1.118-1.124 (Cal. C.E.B. 1963). Cohan, *Law and Practicalities for Yachtsmen*, 32 TEMP. L.Q. 241, 244-47 (1959); *Legal Aspects of Small Boat Financing*, 34 CALIF. S.B.J. 282 (1959); Cf. *New v. Yacht Relaxin*, 212 F. Supp. 703 (S.D. Cal. 1962), where the court required actual notice to the "legal owner" of a pleasure boat on the theory that state registration law was notice of the mortgagee's interest in the boat, and, therefore, notice to the mortgagee of the place and time of the judicial sale was necessary to enforce a maritime lien for repairs. It should be noted, however, that the lien for repairs was subsequent to the mortgage, but was given preference on the theory that admiralty law controlled.

waters, but jurisdiction to try a case does not carry with it the automatic conclusion that admiralty law is to be applied. At the time *The Plymouth* was decided no such conclusion did follow because, at that time if a case had been brought in the state courts, state law would have been applied.¹⁸² This would mean, of course, that the admiralty court would have jurisdiction though admiralty law was not to be applied. Federal jurisdiction without regard to the citizenship of the parties could, however, be justified on some theory of "protective jurisdiction,"¹⁸³ because every case will involve a question whether there is commercial (and, therefore, federal) concern with the case. That issue may be sufficient to justify jurisdiction of any case arising on navigable waters. As a practical matter, the admiralty court would only rarely be chosen as the forum for trial of pleasure boat cases.¹⁸⁴

Unfortunately, although this proposal is consistent with the Supreme Court cases, it is not in accord with the relatively few cases in the lower courts which have explicitly considered the problem of the law to be applied to pleasure boating.

III

THE FOCAL POINT—PLEASURE BOATING

There are remarkably few cases explicitly considering the question whether state or federal law should be applied to pleasure boating.¹⁸⁵ Only one point has been fully litigated: Whether the federal Limitation of Liability Act¹⁸⁶ is applicable to pleasure boats. The relevant provisions of that statute permit "the owner of any vessel" to limit his liability for any loss occurring "without the privity or knowledge of such owner" to

¹⁸² Authorities cited note 160 *supra*.

¹⁸³ See Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157 (1953); *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957).

¹⁸⁴ The plaintiff in personal injury litigation typically prefers to try his case before a jury. In pleasure boat cases he could do that by bringing the action in the state courts under the "saving to suitors" clause. In *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 371-72 (1959), the Supreme Court asserted that saving-clause actions were not removable. That proposition has been challenged, B. Currie, *The Silver Oar and All That*, 27 U. CHI. L. REV. 1, 16 n.57 (1959). Even if the Court should choose to re-examine the problem, saving-clause actions would be removable only if the defendant was not a citizen of the state in which the action was brought. 28 U.S.C. § 1441(b) (1958). In the pleasure boat context that would arise only infrequently.

¹⁸⁵ A number of pleasure boat cases are collected in 63 A.L.R.2d 340 (1958). Many of them are wrongful death actions, in which state law is concededly applicable. See D. Currie, *supra* note 165.

¹⁸⁶ 9 Stat. 635 (1851), as amended, 46 U.S.C. §§ 181-95 (1958).

the value of the vessel.¹⁸⁷ The cases, all from lower courts,¹⁸⁸ are almost unanimous in holding that limitation may be granted to owners of pleasure boats.¹⁸⁹ In concrete terms, this means that if a fifteen-year-old boy negligently rams his father's twenty-one foot motorboat into a rowboat, the father may petition to limit his liability to the value of the boat—\$3,500—though the claims of the occupants of the rowboat exceed \$300,000.¹⁹⁰ The justice of this result is not immediately apparent. It

¹⁸⁷ 49 Stat. 1479 (1936), 46 U.S.C. § 183(a) (1958). The "loss of life" amendments, subsections (b)–(f) of § 183 were added in 1935 (49 Stat. 960 (1935)) and 1936 (49 Stat. 1479 (1936)). They require the creation of a fund based on \$60 per ton of the vessel for claims arising out of loss of life or bodily injury. These provisions are applicable only to "seagoing" vessels. In subsection (f), a "seagoing vessel" is defined as not including "pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, or non-descript non-self-propelled vessels . . ." 49 Stat. 1479 (1936), 46 U.S.C. § 183(f) (1958). For vessels not within the term "seagoing," the right to limit liability under subsection (a) is unaffected. It might be argued that the failure to exclude pleasure boats from subsection (a) when they are specifically excluded from subsections (b)–(g) indicates an intention that pleasure boat owners should be included in the class of persons entitled to limit liability under subsection (a). However, that would mean, among other things, an implied reversal of *Evansville Co. v. Chero Cola Co.*, 271 U.S. 19 (1925), discussed in text accompanying note 208 *infra*, since the wharfboat in that case meets, if anything does, the description of a "non-descript non-self-propelled vessel." There is nothing in the legislative history which would support that conclusion. Furthermore, the 1935–36 "loss of life" addition, though it is in form an amendment to section 183(a), is more accurately conceived as a separate statute creating a separate fund for personal injury claims based on the size of vessels used for the business of carrying passengers for hire. The "seagoing" vessels excluded by subsection (f) have two things in common: (1) none of them are used for carrying passengers for hire, and (2) their size has no relationship to the potential liability for personal injuries. The formula for computing the fund depends on the gross tonnage of the vessel. The formula would produce an idiotically small fund for pleasure boats at \$60 per ton, and a disproportionately large fund with barges. The latter fact, particularly, would appear to explain the exclusion of pleasure boats from the "loss of life" provisions, without in any way affecting the scope of the coverage of section 183(a).

¹⁸⁸ *But cf.* *Just v. Chambers*, 312 U.S. 383 (1941); *Coryell v. Phipps* [*The Seminole*], 317 U.S. 406 (1943). *Just v. Chambers* involved a pleasure boat, but the Court denied limitation on the ground that the injury was occasioned by matters within the privity and knowledge of the owner. The issue of the applicability of the act to pleasure boats was not discussed. The issue was also not discussed in *The Seminole*, which involved a yacht. Although the Supreme Court's opinion does not so indicate, *The Seminole* was in fact used in the business of chartering. See the lower court opinion, 39 F. Supp. 142 (S.D. Fla. 1941). The Court in *The Seminole* granted limitation to the owner. The injustice of that result is discussed in GILMORE & BLACK § 10-23, as follows: "No theory can justify the results reached in *Coryell v. Phipps* or *The Trillora* [76 F. Supp. 50 (E.D.S.C., 1947)] under which the owner of a yacht or speedboat, who is provident enough to hire someone else to run the boat for him, is granted a general license to kill and destroy." *Id.* at 700.

¹⁸⁹ See cases cited note 202 *infra*.

¹⁹⁰ *Petition of Hocking*, 158 F. Supp. 620 (D.N.J. 1958). A striking disproportion between the value of the vessel and the amount of the claims is characteristic of pleasure boat limitation cases. See, e.g., *Pershing Auto Rentals v. Gaffney*, 279 F.2d 546 (5th Cir. 1960) (claims totalled \$558,000; value of the vessel \$500); *Rautbord v. Ehmann*, 190 F.2d 533 (7th Cir. 1951) (claim of \$25,000; value of the vessel \$1,300); *California Yacht Club v.*

raises the question whether so absurd a result could conceivably have been intended by Congress.

The Limitation Act has been pilloried by commentators as one of Congress's least distinguished pieces of legislation.¹⁹¹ It was enacted first in 1851 and passed without substantial debate.¹⁹² The act was based, so its authors claimed, on the English statute and was designed to permit the American merchant marine to compete successfully with its foreign rivals.¹⁹³ As originally enacted, the statute excluded canal boats, barges and lighters, and all vessels on inland waters. This provision was borrowed from the English statute and was entirely consistent with the avowed objective of equating American shipowners with their foreign competition.¹⁹⁴

In what must have been one of the first cases involving a pleasure boat, Judge Brown in 1881 read the statute as follows:

The act is limited by the intention of congress in enacting it, which was to encourage commerce and to enable American vessels to compete with those of other maritime nations whose laws extended a like protection to shipowners. This is again limited by the constitutional provision that the power of congress shall extend only to commerce between states or with foreign countries. Hence, it seems to me that, if the vessel be not engaged

Johnson, 65 F.2d 245 (9th Cir. 1933) (lower court judgment of \$1,035 reversed and limitation granted; value of the vessel \$0); *Mistral* [In re Kellogg], 50 F.2d 957 (W.D.N.Y. 1931) (claims totaled \$143,157; value of the vessel \$7,500).

The requirement that the owner of the vessel not have "privity or knowledge" of the cause of the loss in order to petition for limitation blocks many efforts at limitation in the pleasure boat context. If the owner is operating the boat or is in it, he will generally not be able to meet this requirement. See cases collected in 63 A.L.R.2d 343, 366 (1959), and GILMORE & BLACK §§ 10-20 to 10-23. If the owner is not in the boat and the accident occurs as the result of negligent operation, the owner will need to resort to limitation only if the operator can be regarded as the owner's agent, as, for example, if the operator is an employee of the owner or if the negligent operation can be imputed to him by some form of the "family purpose" doctrine.

¹⁹¹ "No doubt when more obscure statutes are drafted, the Congress will draft them, but it is difficult to believe that any future body of law makers will ever surpass this extraordinary effort." GILMORE & BLACK §10-13, at 676 (1957). This passage refers to 23 Stat. 57 (1884), 46 U.S.C. § 189 (1958), but it is not unreasonable to make it applicable to the entire Limitation Act.

¹⁹² The act was passed in response to the Lexington disaster, *New Jersey Steam Nav. Co. v. Merchants' Bank*, 47 U.S. (6 How.) 344 (1848), and much of its purpose was to protect the shipowner from claims for the loss of cargo, such as money and jewelry, when he had not been warned that the cargo was unusually valuable. The first section of the act, now 46 U.S.C. § 181 (1958), required the shipper to declare the true value of his goods. Cargo of that nature had been involved in *The Lexington*. The other provisions of the act were scarcely debated. The legislative debates are reviewed in Sprague, *Limitation of Ship Owner's Liability*, 12 N.Y.U.L.Q. 568, 577-82 (1935), and GILMORE & BLACK § 10-12.

¹⁹³ The act, however, was significantly different from the English statute. See Sprague, *supra* note 192 at 578-79.

¹⁹⁴ *Id.* at 578.

in what is ordinarily understood as maritime commerce, she is not entitled to the benefit of the act, though she may be an enrolled and licensed vessel, and subject to the navigation laws of the United States. It is true that in some sense navigation is commerce, yet I can readily conceive there may be a class of vessels navigating between states which are not within the act. Sail boats carrying passengers for hire between places in different states, as between watering places on the Atlantic Coast, as well as skiffs, canoes, and small craft, are examples of this kind. The exceptions in the act itself indicate the intention of congress to restrict its benefits to what is generally known as maritime commerce, though it may also happen to be commerce between the states.¹⁹⁵

From this the conclusion followed that the owners of a pleasure boat were not entitled to limit liability.

In 1886 Congress amended the Limitation Act, eliminating the exclusion of inland waters and extending its coverage to include "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges and lighters."¹⁹⁶ The reasons for extending the privilege of limitation to the inland shipping business are obscure.¹⁹⁷ The extension was a substantial departure from the original design to put the American merchant marine on the same footing as its foreign competitors. Apparently, Congress concluded that the doctrine of limitation was in itself desirable and, therefore, of use to the inland as well as the foreign shipping business. Giving effect to that purpose, however, need not carry with it the conclusion that the owners of any kind of vessel, regardless of use, are entitled to limitation. Judge Brown's reasoning and result would seem to be unimpaired by the 1886 amendment; *i.e.*, the use of the vessel in a commercial context was essential to the privilege to limit liability.¹⁹⁸

That, however, is not the interpretation the courts have given the act. A district court in Massachusetts announced that the effect of the amend-

¹⁹⁵ *The Mamie*, 5 Fed. 813, 819 (E.D. Mich. 1881).

¹⁹⁶ Act of June 19, 1886, ch. 421, § 4, 24 Stat. 80 (now 46 U.S.C. § 188 (1958)). An argument could be made that this provision excludes pleasure boats. As the quotation from Judge Brown shows, one meaning of the word "navigation," current in the 1880's, was "maritime commerce." See WEBSTER, *NEW INT'L DICTIONARY* (2d ed. 1958). Thus the amendment could be read as meaning: "all vessels used on lakes or rivers [and] in inland [commerce], including canal boats, barges and lighters."

¹⁹⁷ This amendment was perhaps the least significant part of a large package of miscellaneous bits of legislation relating to the shipping industry. As the bill passed the House, the amendment extended the privilege of limitation to the inland waters but it retained the exclusion of "canal boats, barges and lighters." The Senate struck "excluding" and substituted "including," and that change survived the conference.

¹⁹⁸ The only portion of Judge Brown's opinion that was affected by the 1886 amendment was his reference to exclusion of "canal boats, barges and lighters" as indicative of the kinds of vessels intended to be covered. It was initially, as the quotation in the text indicates, somewhat of a make weight argument.

ment was to make the use of the vessel unimportant.¹⁹⁹ The point was dicta in the case, but it was relentlessly followed, frequently without discussion, until in 1937, a New York district judge could state, with complete correctness, that since the 1886 amendment "it has uniformly been held by the courts that the question of the right to limitation of liability is not based upon the engagement of the vessel in maritime commerce, and further it is not based upon the question of the size of the vessel."²⁰⁰ So it has remained, with one possible exception,²⁰¹ to this day.²⁰²

This persistent mechanical reading of the statute is not compelled by the Supreme Court's treatment of the Limitation Act. Few statutes are so thoroughly riddled with insoluble puzzles. The Court has solved many of these puzzles by an unusually liberal interpretation based upon the supposed intention of Congress. The Court first filled in many gaps by holding that the statute was intended to incorporate the general maritime doctrine of limitation, not the English law on which the act's sponsors said the statute was based.²⁰³ This aid to loose construction was supplemented by the Court's pronulgation of a special set of rules for limita-

¹⁹⁹ *In re Eastern Dredging Co.*, 138 Fed. 942 (D. Mass. 1905). The case involved a barge, about which the law clearly had changed as a result of the 1886 amendment.

²⁰⁰ *Petition of Liebler [The Francesca]*, 19 F. Supp. 829, 832 (W.D.N.Y. 1937).

²⁰¹ *Kulack v. The Pearl Jack*, 79 F. Supp. 802 (W.D. Mich. 1948). The court held that the owner had privity or knowledge of the cause of the explosion, but also used language which could be read as meaning that the act should be construed as inapplicable to small pleasure boats. *Id.* at 806.

²⁰² Cases holding that the Limitation Act is applicable to pleasure boats include: *Emerson v. Holloway Concrete Products Co.*, 282 F.2d 271 (5th Cir. 1960); *Pershing Auto Rentals v. Gaffney*, 279 F.2d 546 (5th Cir. 1960); *Yacht Ronar [Rooney v. Nuta]*, 267 F.2d 142 (5th Cir. 1959); *Foo III—Fantome*, 255 F.2d 628 (7th Cir. 1958); *Petition of H & H Wheel Service Inc.*, 219 F.2d 904 (6th Cir. 1955); *Griffith v. Gardner [Vega]*, 196 F.2d 698 (9th Cir. 1952); *Rautbord v. Ehmann*, 100 F.2d 533 (7th Cir. 1951); *Schoremeyer v. Barnes*, 190 F.2d 14 (5th Cir. 1951); *Hutchinson v. Dickie [Cappy]*, 162 F.2d 103 (6th Cir. 1947); *Gunnarson v. Robert Jacob, Inc.*, 94 F.2d 170 (2nd Cir. 1938); *Feige v. Hurley*, 89 F.2d 575 (6th Cir. 1937); *Warnken v. Moody*, 22 F.2d 960 (5th Cir. 1927); *Ellen Sue*, 1961 Am. Mar. Cas. 539 (S.D.N.Y. 1960); *Petition of Follett*, 172 F. Supp. 304 (S.D. Tex. 1958); *Petition of Reading*, 169 F. Supp. 165 (N.D.N.Y. 1958); *Petition of Robertson*, 163 F. Supp. 242 (D. Mass. 1958); *Petition of Hocking*, 158 F. Supp. 620 (D.N.J. 1958); *Petition of Dunn*, 1957 Am. Mar. Cas. 577 (N.D. Ohio 1957); *Yacht Charlotte*, 124 F. Supp. 73 (D. Conn. 1954); *Petition of Davis*, 1950 Am. Mar. Cas. 1029 (N.D. Cal. 1950); *Petition of Guggenheim [Trillora II]*, 76 F. Supp. 50 (E.D.S.C. 1947); *In re Ferguson [The Trim Tool]*, 39 F. Supp. 271 (D. Mass. 1941); *In re Hutchinson [The Spare Time]*, 36 F. Supp. 642 (E.D.N.Y. 1941); *Petition of Liebler [The Francesca]*, 19 F. Supp. 829 (W.D.N.Y. 1937); *The Mistral [In re Kellogg]*, 50 F.2d 957 (D.D.N.Y. 1931); *The Lavina [In re Foss]*, 1927 Am. Mar. Cas. 327 (S.D.N.Y. 1931); *The Oneida*, 282 Fed. 238 (2nd Cir. 1922); *The Alola*, 228 Fed. 1006 (E.D. Va. 1915); *King's Adm'r v. Liotti*, 1948 Am. Mar. Cas. 476 (N.Y. 1948).

²⁰³ *The City of Norwich*, 118 U.S. 468 (1886); *Norwich & N.Y. Trans. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1859). See GILMORE & BLACK §§ 10-3, 10-29, 10-30.

tion proceedings.²⁰⁴ These rules were scarcely distinguishable from amendatory legislation.²⁰⁵ The Court, in other words, made the Limitation Act workable by disregarding its language where necessary and by supplementing it where needed.²⁰⁶

In the light of this background it is strange that the lower courts have insisted upon construing the word "vessel" so broadly as to include pleasure craft when such a construction has no relationship to the statute's purpose to encourage investment in the shipping industry. Nor would there seem to be any comparable interest, either federal or state, that would justify limitation as a means of encouraging pleasure boating at the expense of persons injured by their improper operation.²⁰⁷ Furthermore, the very word "vessel" in the 1886 amendment was considered by the Supreme Court in *Evansville Co. v. Chero Cola Co.*²⁰⁸ in 1926, and was refused a literal interpretation. The Court held that a wharfboat was not a "vessel" for purposes of the Limitation Act because a grant of limita-

²⁰⁴ The rules were first issued in 1872. 80 U.S. (13 Wall.) xii-xiv (1872). They now appear in amended form as Admiralty Rules 51-55. The necessity for issuing the rules was made apparent by one of the first cases the Supreme Court considered under the Limitation Act. *Norwich & N.Y. Trans. Co. v. Wright*, 80 U.S. (13 Wall.) 104, 125 (1872).

²⁰⁵ For example, the statute originally specified a transfer of the ship to a trustee as the method for initiating the limitation proceedings. The rules, however, also permitted the owner to post a bond for the value of the ship. Rule 54, 80 U.S. (13 Wall.) xii-xiii (1872). In 1936 the bond procedure was regularized by an amendment. 49 Stat. 1480 (1936), 46 U.S.C. § 185 (1958). See GILMORE & BLACK § 10-9 (1957).

²⁰⁶ The Court has evolved several doctrines that confine the scope of limitation under the Act without substantial aid from the statutory language. The "personal contract" doctrine makes the shipowner fully liable for certain contracts, even though he is otherwise entitled to limit under the Act. See GILMORE & BLACK § 10-26. On the theory that the Limitation Act was designed in part to provide a single forum for a multiplicity of claims, the Supreme Court has permitted a single claimant whose claim exceeds the value of the vessel to prove his claim in the state courts, leaving to the federal limitation proceeding the sole function of determining the shipowner's right to limit liability, *Langes v. Green*, 282 U.S. 531 (1931); *Ex Parte Green*, 286 U.S. 437 (1932); see also GILMORE & BLACK § 10-19. The Court has also permitted a group of claimants whose claims initially exceed the value of the vessel, to reduce their claims by stipulation, thereby gaining the right to proceed before a jury in a state court. *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957). The right to limit liability depends upon the absence of the shipowner's "privity or knowledge." These words have been given different meanings depending upon whether the owner is an individual or corporation. See GILMORE & BLACK §§ 10-20 to 10-25.

²⁰⁷ *But cf.* *Petition of Colonial Trust Co.*, 124 F. Supp. 73 (D. Conn. 1954):

There is reason behind a policy of encouraging the building of pleasure craft as well as larger commercial vessels. It gives additional work to shipyards whose men are thus enabled to preserve their skills; it gives experience to those who operate the vessel on the seas and in navigable waters and, as occurred in the early part of World War II, it provides a source of small craft available for patrol and picket duty in guarding harbors and important waterfront facilities in time of war or other emergency.

Id. at 75.

²⁰⁸ 271 U.S. 19 (1926).

tion would not further the purpose of the statute "to promote the building of ships, to encourage the business of navigation, and in that respect to put this country on the same footing with other countries."²⁰⁹

Construing the Limitation Act not to include boats used for pleasure would also be consistent with the doctrine of construing statutes to avoid constitutional problems.²¹⁰ There is no apparent source of congressional power to dispense with liability between citizens of the same state for pleasure boat accidents, any more perhaps than there would be constitutional authority for a congressional automobile guest statute applicable to all accidents on national highways.²¹¹ The commerce clause might well be held insufficient to justify such an enactment. The only different constitutional basis for the Limitation Act's application to pleasure boats is the grant of admiralty jurisdiction to the federal courts, supplemented by the necessary and proper clause.²¹² If the connection between admiralty

²⁰⁹ *Id.* at 21.

²¹⁰ See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 348 (1936) (Brandeis, J., concurring); Wellington, *Machinists v. Street: Statutory Interpretation and the Avoidance of Constitutional Issues*, 1961 SUPREME COURT REV. 49.

²¹¹ The restriction to national highways would not be required for a parallel to the Limitation Act, which is, on its face, applicable to non-navigable as well as navigable waters. The act, however, has been held inapplicable to boats used on non-navigable waters. *Petition of Madsen*, 187 F. Supp. 411 (N.D.N.Y. 1960). Literally read, the Limitation Act is also applicable to pleasure boats being hauled by a trailer on a national highway. The fact that the accident occurred on land would not alone prohibit limitation. *In re Ferguson* [The Trim Tool], 39 F. Supp. 271 (D. Mass. 1941).

²¹² At first the Limitation Act was sustained as an exercise of the commerce power. *Moore v. Am. Transfer Co.*, 65 U.S. (24 How.) 1 (1860); *Lord v. S.S. Co.*, 102 U.S. 541 (1880); *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883). The same was true of other federal acts relating to admiralty. *E.g.*, *Whites Bank v. Smith*, 74 U.S. (7 Wall.) 646 (1868) (Recording of Conveyances of Vessels Act of 1852); *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870) (License and Inspection Acts of 1838 and 1852). The Limitation Act, however, forced a re-examination of this theory. If Congressional power extended only to instruments of interstate commerce, but admiralty jurisdiction included all events on navigable waters, there would be an area where the federal courts had jurisdiction, but Congress could not control the decision. See *In re Long Island Sound Trans. Co.*, 5 Fed. 599, 605-18 (S.D.N.Y. 1881). There were three ways out of this dilemma. The first was to limit admiralty jurisdiction to those matters that could be reached through an exercise of the commerce power. That solution was rejected in *The Propellor Commerce*, 66 U.S. (1 Black) 574 (1862), and *The Belfast*, 74 U.S. (7 Wall.) 624 (1868), discussed at notes 93 & 99 *supra*. The second was to expand the legislative power under the commerce clause, unthinkable before the New Deal but now probably possible. See *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Sullivan*, 332 U.S. 689 (1948). The third method was to argue backwards from the grant of judicial power to congressional power with the aid of the necessary and proper clause. In other words, the necessary and proper clause gave Congress legislative power with respect to all powers granted to the federal government; among those powers is the judicial power in admiralty; therefore, Congress has legislative power over admiralty. See note 47 *supra*. The last was the choice made in 1889 with respect to the Limitation Act. *Butler v. Boston S.S. Co.*, 130 U.S. 527 (1889); *accord*, *In re Garnett*, 141 U.S. 1 (1891). The same theory has been applied with respect to other federal statutes in the admiralty area. *Panama R.R. v. Johnson*, 264 U.S. 375

and commerce suggested earlier is correct, even this constitutional platform is insufficient. What support there is for admiralty jurisdiction—and thus congressional power—rests largely on *The Plymouth's* proposition of jurisdiction of all torts on navigable waters. The argument here has at least cast doubt as to the validity of that proposition. Thus, even without resolving the issue concerning a connection between commerce and admiralty, there should be enough of a constitutional doubt to support a reading of the statute that would exclude pleasure boats in order to avoid the problem.²¹³

A solution to the problem presented by the Limitation Act would not require a basic rethinking of *The Plymouth* doctrine. A sound result could be reached by construing the Act as inapplicable to pleasure boats.²¹⁴ But the needless extension of the Limitation Act to pleasure boats well illustrates the danger of regarding the water's edge as the conclusive determinant of the question whether state or federal law should be applied. That kind of mechanistic thinking leads inevitably to disregarding legitimate state interests for no discernable federal purpose. If this is to be avoided, the basic premiss of *The Plymouth* must be reconsidered and a more sophisticated analysis substituted.

The problems can best be solved by a careful accommodation of the state and federal interests that necessarily meet in pleasure boating. All problems cannot be anticipated here, but some examples can be put forward to illustrate how that accommodation might be accomplished, or, in other words, what is meant by a relationship to commerce.

The easiest case for an application of federal law to pleasure boating involves the Rules of the Road: such as rules of passing and turn-

(1923) (Jones Act); *Marine Transit Co. v. Dreyfus*, 284 U.S. 248 (1931) (Arbitration Act—arguably distinguishable as a regulation of procedure rather than a change in substantive law); *Crowell v. Benson*, 285 U.S. 22 (1931) (Longshoreman and Harbor Workers Act); *Detroit Trust Co. v. Barlum*, 293 U.S. 15 (1934) (Ship Mortgage Act). The history of the shift from the commerce clause to the grant of admiralty jurisdiction as a base for congressional action is discussed in detail in Note, 67 HARV. L. REV. 1214 (1954). See also D. Currie, *supra* note 165, at 161–63, contrasting this rationale with that of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

²¹³ *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956). As Professor Wellington has pointed out, this canon of statutory interpretation rests in part on the concept that the Court should not have to face a constitutional issue unless it is clear that Congress was aware that it was legislating the result that is challenged as unconstitutional. See Wellington, *supra* note 210, at 61–63. The Limitation Act is now more than a century old; Congress could not then have imagined pleasure boating on anything like the scale that is known today. *Cf.*, *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).

²¹⁴ Professors Black and Gilmore do not agree: "The Limitation Act covers any sort of 'vessel' from a rowboat up and restriction of its coverage to commercial enterprises could be achieved only by amendment." GILMORE & BLACK § 10–23, at 701. They do not elaborate on this assertion, and this lapse, if such it be, is an exceptional departure from an otherwise thoroughly superior discussion of the Limitation Act.

ing, rules of the right of way, and rules concerning running lights.²¹⁵ By the terms of a federal statute, these rules are applicable to all vessels on navigable waters,²¹⁶ and the rules must of necessity be applicable to pleasure boats. It would be intolerable to have conflicting rules on any particular body of water; and, since commercial vessels move from state to state, the federal government can properly require that these rules have some degree of national uniformity.²¹⁷ Thus there is nothing incongruous about making their violation a criminal offense punishable in the federal courts.²¹⁸

A much more difficult question is whether the civil liability resulting from a violation of the Rules of the Road should be determined according to federal admiralty law.²¹⁹ One sanction that may be thought to promote compliance with the Rules is the possibility that the violator will have to respond in damages. Therefore, it might be argued, for example, that in mutual fault pleasure boat collisions, the admiralty rule of divided damages, rather than the state rule of contributory negligence, should be applied.

Unquestionably there is a potential federal interest in the tort recovery allowed for violations of the Rules of the Road. If any state should be so foolish as to declare that no recovery could be had for the negligent operation of a pleasure boat, such a law could be said to interfere with the federal policy that the navigation rules be obeyed. But no state has done that, or is ever likely to.²²⁰ Insisting upon application of the complete federal remedial policy in this context would be a return to the mechanical thinking that led the Court into error in *Southern Pacific*

²¹⁵ There are actually four sets of rules: the International Rules, 65 Stat. 408 (1951), 33 U.S.C. §§ 144-47(d) (1958); the Inland Rules, 28 Stat. 672 (1895), 33 U.S.C. §§ 151-232 (1957); the Great Lakes Rules, 28 Stat. 645 (1895), 33 U.S.C. §§ 241-95 (1958); and the Red River of the North Rules, 30 Stat. 96 (1897), 33 U.S.C. §§ 302-56 (1958). In large part the rules are identical. See GILMORE & BLACK § 7-3.

²¹⁶ 65 Stat. 408 (1951), 33 U.S.C. §§ 144(a), (c) (i) (1958); 30 Stat. 96 (1897), 33 U.S.C. § 154 (1958); 28 Stat. 645 (1895), 33 U.S.C. §§ 241-42 (1958); 30 Stat. 96 (1897), 33 U.S.C. §§ 301-02 (1958).

²¹⁷ Cf. note 215 *supra*.

²¹⁸ The International Rules have no criminal sanction to enforce compliance. The other Rules do. 30 Stat. 102 (1897), 33 U.S.C. §§ 158-59 (1958); 28 Stat. 649 (1895), 33 U.S.C. § 244 (1958); 62 Stat. 250 (1948), 33 U.S.C. §§ 354-55 (1957).

²¹⁹ The Inland Rules, in addition to the criminal penalty, make the "pilot, engineer, mate or master" of power boats liable "for all damages sustained by any passenger in his person or baggage" as a result of a violation of the rules. There is an additional proviso that nothing shall be regarded as relieving the owner from any liability. 30 Stat. 102 (1897), 33 U.S.C. § 158 (1958). The other Rules do not have any provision with respect to civil liability for their breach.

²²⁰ California has a motorboat guest statute, which might conceivably be declared void on this theory. CAL. HARB. & NAV. CODE § 661.1. But cf. CALIFORNIA PLEASURE BOATING LAW § 4.23 (Cal. C.E.B. 1963).

Co. v. Jensen.²²¹ No one could say that a strict contributory negligence rule is either more or less productive of carelessness than the federal divided damages rule. Indeed, they may well be entirely irrelevant to the actor's motivation. The fact that many pleasure boat owners carry liability insurance deserves at least some consideration.²²² Of course, the state rule of contributory negligence cannot be said to represent a carefully deliberated policy choice, but the same is also true of the admiralty rule of divided damages.²²³ A state statute requiring contribution among joint tort-feasors is quite another matter. Such a statute represents a remedial policy choice on the part of the state, and no federal interest would be impaired by its application to pleasure boat accidents.

The federal Rules of the Road also contain very generalized statements of the standard of care to be used in operating vessels. They require all "precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case."²²⁴ This is the same as the ordinary standard of care required by the common law of every state.²²⁵ Such general formulations have no comparative superiority of meaning in the decision of cases. They are almost meaningless outside of a particular factual context, and there is, accordingly, no reason why they should present any problem of conflict. It is possible that some state may by statute require a more stringent rule with respect to pleasure boating. If so, it is hard to see how such a rule, applicable only to pleasure boats, would in any way conflict with federal policy; and, insofar as such a requirement would seem to be a legitimate exercise of a state's power to protect its own people from injury, it deserves to be respected.²²⁶

The same kind of analysis can be applied to the Federal Motorboating Act of 1940.²²⁷ In that act, and the regulations issued pursuant to it,²²⁸ Congress has specified certain types of equipment that must be carried on almost all types of vessels: lights, life preservers, fire extinguishers,

²²¹ 244 U.S. 205 (1917). See text accompanying note 179 *supra*.

²²² See James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 N.Y.U.L. REV. 537, 547 (1952).

²²³ See GILMORE & BLACK § 7-20.

²²⁴ 65 Stat. 419 (1951), 33 U.S.C. § 147(a) (1957); 30 Stat. 102 (1897), 33 U.S.C. § 221 (1957); 28 Stat. 649 (1895), 33 U.S.C. § 351 (1957). There is also a provision in the Federal Motorboat Act of 1940, 54 Stat. 166 (1940), as amended, 46 U.S.C. 526(f) (1958), which provides that "no person shall operate any motorboat or any vessel in a reckless or negligent manner so as to endanger the life, limb, or property of any person."

²²⁵ *E.g.*, CAL. HARB. & NAV. CODE § 655.

²²⁶ *Cf.* Hess v. United States, 361 U.S. 314 (1960); D. Currie, *supra* note 165 at 206-07, 221.

²²⁷ 54 Stat. 166 (1940), as amended, 46 U.S.C. §§ 526-526(a)-(u) (1958).

²²⁸ 46 C.F.R. §§ 25.01-1 to 25.45-1 (1963). See generally CALIFORNIA PLEASURE BOATING LAW §§ 2.50-.61 (Cal. C.E.B. 1963).

etc. Violations of the act are made criminal.²²⁹ Even as to the equipment requirements, the federal interest is substantial. The Coast Guard is, of necessity, involved in rescuing those in difficulty, and the federal government can legitimately insist that the Coast Guard's functions not be made needlessly hazardous. Furthermore, efficient administration of equipment regulations may justify the imposition of a uniform rule.²³⁰

But what of the tort consequences for violations of the equipment requirements? There is an indication that the federal courts will not regard a violation of the statute as giving rise to a cause of action in tort.²³¹ Assuming that to be the federal rule, is there any reason why that decision should be binding on the states? It is difficult to see why the state courts should not be free to impose tort liability for violations of the act, if they consider such a result sound policy for their community. This is the result that has been arrived at with the Safety Appliance Act.²³² The analogy is very close.

The Motorboating Act of 1940 is not in terms restricted to navigable waters; it has, however, been construed as so limited.²³³ That restriction is unfortunate with respect to pleasure boating since it invites an absence of safety laws on non-navigable waters and creates the risk that variant rules will be imposed on pleasure boats that frequently are used in both navigable and non-navigable water.²³⁴

Congress attempted to avoid the non-navigable water problem with the Federal Boating Program of 1958.²³⁵ That statute calls for numbering of all undocumented vessels propelled by machinery of more than ten

²²⁹ 54 Stat. 166 (1940), 46 U.S.C. § 526(o) (1958).

²³⁰ Again, if the state should require additional safety equipment, it is hard to see why such provisions should be invalid.

²³¹ See *Godinez v. Jones*, 179 F. Supp. 135 (D.P.R. 1959). The case held that there was no federal question jurisdiction of a civil suit based on conduct made criminal by the Motorboat Act of 1940. Since that act makes criminal the "negligent" operation of a boat, 54 Stat. 166 (1940), 46 U.S.C. § 5261 (1958), a contrary holding would mean that almost all tort cases involving pleasure boats could be brought on "law" side of a federal court and tried before a jury. It is difficult to believe that Congress could have intended such a result. Cf. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).

²³² 32 Stat. 943 (1903), 45 U.S.C. §§ 8-10 (1958). See *Jacobson v. New York, N.H. & H. Ry. Co.*, 206 F.2d 153 (1st Cir.), *aff'd per curiam*, 347 U.S. 909 (1953).

²³³ *United States v. Ross*, 74 F. Supp. 6 (E.D. Mo. 1947). See also *Davis v. United States*, 185 F.2d 938 (9th Cir.), *cert. denied*, 340 U.S. 932 (1950).

²³⁴ The fact that pleasure boats are now carried by trailer from place to place, and particularly from non-navigable to navigable waters, could, perhaps, be used to justify a literal reading of the federal statute so that it would be applicable to non-navigable waters. California has met the problem by enacting as state law the provisions of both the 1940 act and the regulations issued pursuant to it. CAL. HARB. & NAV. CODE § 652; 14 CAL. ADM. CODE §§ 6550-76. See CALIFORNIA PLEASURE BOATING LAW § 2.61 (Cal. C.E.B. 1963).

²³⁵ 72 Stat. 1754 (1958), 46 U.S.C. § 527 (1958).

horsepower, unless a state numbering system of a type approved by the Coast Guard is established. This act was the joint product of the Council of State Governments and the House Committee on Merchant Marine and Fisheries.²³⁶ To implement this arrangement the Council included in its Suggested State Legislation Program for 1959 a State Boat Act, which provides for a state numbering system.²³⁷ Almost all of the states, including California, have adopted these provisions.²³⁸ State acts of this nature are, of course, applicable on all waters in the state, regardless of their navigability.

In its suggested State Boat Act, the Council included an "optional" provision imputing to the owner of a pleasure boat the negligence of any person operating the boat with the owner's permission.²³⁹ California has adopted it.²⁴⁰ It would be convenient if it could be argued that this imputed negligence provision was an exercise of power delegated to the states by the 1958 federal statute. Unfortunately that would be an abuse of the legislative history. There is nothing to indicate that Congress intended by the 1958 act to give to the states a general legislative competence with respect to pleasure boating.²⁴¹

²³⁶ The background of the act is discussed by the Chairman of the House Committee, Mr. Bonner in Bonner, *An Exercise in Federal-State Relations*, 32 STATE GOV'T 50 (1959).

²³⁷ COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION—PROGRAM FOR 1959, at 53–63 (1958).

²³⁸ As of Feb. 28, 1963, all but 9 states had enacted a numbering system for boats which had been approved by the Coast Guard. COAST GUARD, RECREATIONAL BOATING IN THE UNITED STATES, ANN. REP. 1963 at 3. The California statute, based on the suggested State Boat Act, is CAL. HARB. & NAV. CODE §§ 650–753.

²³⁹ COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION—PROGRAM FOR 1959, at 63 (1958). See also the statutes cited note 20 *supra*.

²⁴⁰ CAL. HARB. & NAV. CODE § 661.1. It was enacted as proposed by the Council in 1959, CAL. STAT. ch. 1454, § 1 (1959), and amended in 1961, CAL. STAT. ch. 2132, § 1 (1961), limiting the liability under the imputed negligence statute to \$10,000 and adding the guest statute. There is an equal protection problem with the imputed negligence statute. By its terms it is applicable only to vessels numbered under the act. Vessels which are documented by the United States need not be numbered and some types of pleasure boats may be documented at the option of the owner. See CALIFORNIA PLEASURE BOATING LAW §§ 2.39–2.49 (Cal. C.E.B. 1963). The constitutionality of the imputed negligence statute could probably be saved by reading it as applicable to all vessels which need not be documented and thus could be numbered under the state system. This would be consistent with the obvious conclusion that a boat which is neither numbered nor documented illegally should be considered as within the scope of the statute. The effect would be to make the imputed negligence statute applicable to all non-commercial pleasure boats. *But cf.* CALIFORNIA PLEASURE BOATING LAW, *op. cit. supra*, at § 4.19.

²⁴¹ Section 527(h) of the federal act provides:

The applicability and the jurisdiction for enforcement, upon the navigable waters of the United States . . . of the laws of the United States and of any State which require the numbering and otherwise regulate the use of undocumented vessels,

The imputed negligence provision is the most appealing example of the kind of state law that should be applicable to pleasure boating. It in no way interferes with any federal standard of care used in operating the boat, and it provides a remedy for local people in whose welfare the state has an immediate interest. The absence of a contrary federal policy is shown by the fact that there seems to be no admiralty rule on imputed negligence.²⁴² This is scarcely surprising, for the "family purpose" doctrine is meaningless in a commercial context. There is a substantial state interest present. Children and other financially irresponsible people frequently operate small boats, as they do automobiles. Surely a state should have the power to protect the victims by requiring some reasonably solvent person to respond in damages. It is hard to conceive of any federal interest that is in any way affected by this remedial policy of the states.

shall he as follows: (1) Such laws of the United States shall be applicable and enforced on such waters by law enforcement officers of the United States. (2) Such laws of any State having a numbering system approved by the Coast Guard . . . shall be applicable and enforced on such waters by law enforcement officers of the State. . . . (4) Nothing herein shall interfere with, abrogate or limit the jurisdiction of any State. . . .

72 Stat. 1754 (1958), 46 U.S.C. § 527(h) (1958).

This highly puzzling language was evidently designed to implement the legislative purpose that the federal act "not invade State jurisdiction, nor . . . increase Federal jurisdiction." S. REP. No. 2340, 85th Cong., 2d Sess. 4 (1958); 3 U.S. CODE CONG. & AD. NEWS 5228, 5231 (1958). The Council of State Governments in its introduction to the suggested state boating act added this comment:

Another significant and highly desirable provision of the federal act makes state law enforceable on the navigable waters of the United States as well as on other waters within the state's jurisdiction. Of course, federal laws will also be applicable on the navigable waters of the United States, but the express provision for the applicability of state law removes the danger of preemption in this field.

COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 239, at 54.

Fairly read, the conclusion seems inescapable that the 1958 federal act changed nothing with respect to choice of state or federal law on the issue of the civil liability of pleasure boat operators for their torts. The federal act was focused on safety and registration enforcement by criminal or administrative sanction. It should be construed as limited to such matters. This conclusion is more or less confirmed by the express provision in some state statutes that the state statutes only supplement federal maritime law and are applicable only insofar as not inconsistent with federal law. See, *e.g.*, ARK. STAT. ANN. § 21-215 (Supp. 1961); MICH. COMP. LAWS § 281.572 (1958); MISS. CODE ANN. § 8496.27 (Supp. 1960); OHIO REV. CODE ANN. § 1547.64 (1961); ORE. REV. STAT. § 488.178(1) (1961); TENN. CODE ANN. § 70-22-21 (Supp. 1961).

²⁴² The admiralty action in rem against the ship is, of course, a form of imputed liability and would, presumably, be available to the victim of a pleasure boating accident. But, as the limitation cases suggest, that is not likely to provide an adequate recovery with pleasure boats. See note 190 *supra*. The "family purpose" doctrine is not, apparently, recognized. See *Cashell v. Hart*, 143 So. 2d 559 (D.C.A. Fla. 1962).

The kinship between *Erie R.R. v. Tompkins* and *Southern Pacific Co. v. Jensen* has often been noted. The Holmes denial in *Jensen* of the existence of a "brooding omnipresence" became an important predicate of the Brandeis opinion in *Erie*. The two cases have in common a repudiation of the past and an imposition of a requirement that the same substantive law be applied whether the case is tried in a state or federal court. But *Erie* commanded that both courts apply state law, whereas *Jensen* required uniform application of federal law. That difference is in part attributable to a reversal in admiralty of the usual roles of the federal courts and Congress. For the most part, Congress carries the burden of making substantive federal law. Apart from constitutional issues, the jurisdiction of the federal courts depends upon claims originating in statutes or treaties, and the judicial role is thus largely confined to elaborating congressionally declared policies. Quite the contrary is true in admiralty. From the beginning admiralty judges have retained the inventiveness and initiative characteristic of common law courts in private law areas. The federal courts have always regarded themselves free to mold admiralty law and doctrine to meet changing conditions. Congress has enacted legislative solutions for the problems of the shipping industry but rarely, and then only to meet situations that have seemed beyond the reach of judicial solution.

This inversion of attitude for admiralty cases has worked well when the original purpose of admiralty jurisdiction—the protection and promotion of commerce by water through the imposition of a uniform law that shields the industry from provincial intrusion—has been the object of concern. It will not work with pleasure boating. Because of the availability of a jury trial in saving clause actions, too few cases will be brought in the federal courts to permit reasonably prompt evolution of new doctrine to meet new conditions. Furthermore, the concept of a uniform federal law that ignores the possibility of local variation is less than satisfactory. Because there is little federal interest in the subject, Congress has not enacted and cannot be expected to enact comprehensive uniform legislation, even if uniformity were thought desirable.

The result of extending *Jensen* to pleasure boating will be stagnation. With most of the cases tried in the state courts, but with those courts obliged to apply federal law, an anomaly is created: the state courts either apply general admiralty law, so that rules designed for the *Queen Mary* are indiscriminately applied to rowboats, or the state courts search for a nonexistent body of federal law designed for rowboats. Confronted with such a lack of law, the state courts would normally either devise a new structure of law or plead for legislative aid. But the combination of *The Plymouth* and *Jensen* seems to prohibit the exercise by the state courts of any creative powers and a state court's plea to Congress will, for prac-

tical reasons, be unavailing. A state legislature could not respond to a cry for help however much it might think the problem demanded solution. In sum, the effect of reading *Jensen* and *The Plymouth* broadly is to render impotent the one level of government that both meets the new problems of pleasure boating and is politically responsive to them.

A similar impotency of state law-making institutions under *Swift v. Tyson* was one of the reasons for *Erie*. Except for such matters as rules of navigation which must be obeyed by pleasure craft for the safety of the Queen Mary, the law of pleasure boating will develop faster and more rationally if the creative capacities of the state courts and legislatures are freed of an imaginary federal concern with anything that floats on navigable waters. In short, with pleasure boating, *Erie* should go to sea.