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J. B. Ruhl, Finding Federalism in the Admiralty: "the Devil's Own Mess" Revisited, originally published in 12 Tul. Mar. L.J. 263 1987.

FINDING FEDERALISM IN THE ADMIRALTY: "THE DEVIL'S OWN MESS" REVISITED*

by J. B. Ruhl**

The federalism aspect of the United States Supreme Court's admiralty jurisprudence has long been adrift.[1] No feature of admiralty law illustrates the Court's difficulties in this regard better than maritime wrongful death remedies. From the beginning of the Court's involvement with maritime wrongful death remedies in *The Harrisburg*[2] to its most recent decision on the subject in *Offshore Logistics v. Tallentire*,[3] the Court's jurisprudence in this area has been characterized by inconsistency. For example, and as indicative of the problem, a landmark decision such as *The Harrisburg* was followed consistently for almost 100 years only to be suddenly overruled without warning,[4] and conflicts between the justices have led to open bickering resulting in fractious decisions.[5] Moreover, there are curious aberrations which

* Use of the term "the devil's own mess" is taken from Professor (then judicial clerk) David P. Currie's landmark article entitled *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158. It would be difficult to improve upon Professor Currie's insightful and comprehensive analysis of the issue; rather, following a detailed discussion of the major United States Supreme Court maritime wrongful death remedy cases through 1960, the author in this article picks up where Professor Currie left off to determine whether, since 1960, the role of federalism in admiralty law has become any clearer. Thus, Professor Currie's article is highly recommended reading.

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1. The author promises that this is his only use of a maritime metaphor in the article; this one was too hard to resist.

2. 119 U.S. 199 (1886).

3. 477 U.S. 207, 1986 AMC 2113 (1986).

4. *See, e.g.*, Moragne v. States Marine Lines, 398 U.S. 375, 409, 1970 AMC 967, 993 (1970), *overruling*, The Harrisburg, 119 U.S. 199 (1886); *see infra* notes 8-11.

5. *See, e.g.*, Goett v. Union Carbide Corp., 361 U.S. 340, 1960 AMC 550 (1960) (per curiam); Hess v. United States, 361 U.S. 314, 1960 AMC 527 (1960); The Tungus v. Skovgaard, 358 U.S. 588, 1959 AMC 813 (1959). This trilogy of cases addresses the question—important only prior to the creation in *Moragne*, 398 U.S. 375, 1970 AMC 967, of a federal maritime law remedy for wrongful death—of the extent to which state law could be

HeinOnline -- 12 Tul. Mar. L.J. 263 1987

exist in a twilight zone: although never overruled or criticized, such cases have rarely been followed.[6] Hence, despite the Court's efforts to achieve a uniform remedy for maritime wrongful death, we are left with a virtual patchwork of remedies for maritime wrongful death[7] and no clear idea of where the next case decided by the Court will lead us.

A sympathetic student of the Court's jurisprudence of maritime wrongful death remedies might conclude that the present state of affairs was inevitable as a result of the Court's bad start in *The Harrisburg*, where it refused to recognize a federal common law cause of action for maritime wrongful death under the general maritime law.[8] For almost one hundred years, that decision prevented the Court from shaping a uniform maritime wrongful death remedy, leaving the problem to Congress and, to a lesser degree, the States to fashion remedies where and when they could.[9] Yet even when it attempted to

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borrowed or applied by federal admiralty courts to provide rights and remedies for wrongful deaths occurring in the States' territorial waters. In these three cases, it took the same nine justices ten separate opinions to work through the problem and yet, no clear answer was provided. Thankfully, *Moragne* mooted the question, albeit leading to several more in its stead. *See infra* text accompanying notes 61-72, 75-86.

6. *See, e.g.*, Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); The Hamilton, 207 U.S. 398 (1907). Both of these cases were decided prior to the flurry of federal legislation aimed at filling in the holes left by the Court. *See infra* note 9. In *Knickerbocker Ice*, the Court held that Congress could not incorporate state workmen's compensation law rights and remedies into federal admiralty law as a way of providing a federal maritime law remedy for worker accidents and deaths. The Court reasoned that the admiralty clause of the Constitution, which extends "[t]he judicial power . . . to all cases of admiralty and maritime jurisdiction," U.S. CONST. art. III, § 2, requires a greater degree of uniformity of law than incorporation of divergent state laws would permit. *See* 253 U.S. at 160-61. By contrast the Court concluded in *The Hamilton* that a state wrongful death statute could apply to a claim for death on the high seas. *See* 207 U.S. 403-04. Despite the obvious conceptual conflict between the two cases, the Court decided *Knickerborcker Ice* as if *The Hamilton* had not existed, and it has virtually ignored both cases since then even when dealing with similar or identical issues. *See infra* text accompanying notes 43-46.

7. *See* Schill, *The Unsolvable Puzzle of Maritime Personal Injury Litigation: One False Move and You're Out*, 24 HOUS. L. REV. 635 (1987) [hereinafter Schill]. Schill provides the most current, comprehensive and accurate survey of maritime personal injury remedies available.

8. 119 U.S. at 213.

9. Largely in response to the decision in *The Harrisburg*, Congress enacted the Jones Act in 1920 to provide seamen an action based on negligence against employers, 41 Stat. 1007 (1920), 46 U.S.C. § 688(a) (1982 & Supp. III 1986), and the Death on the High Seas Act to provide a high seas wrongful death remedy, 41 Stat. 537 (1920), 46 U.S.C. §§ 761-768 (1982 & Supp. III 1986). Other federal statutes controlling maritime personal injury and wrongful death remedies in certain circumstances include the Longshore and Harbor Workers Compensation Act, 33 U.S.C. §§ 901-950 (1982 & Supp. III 1985), and the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356 (1982 & Supp. III 1985). *See generally* Schill, *supra* note 7.

correct that problem in *Moragne v. States Marine Lines*,[10] holding that "an action does lie under the general maritime law for death caused by violation of maritime duties,"[11] the Court failed to fit that remedy into its then present-day context or to give it the sorely needed definition to shape what inevitably would follow in maritime wrongful death litigation.[12]

A more critical student might characterize the Court's law of maritime wrongful death as a history of missed opportunities. Indeed, the Court unquestionably had opportunities and the power to set straight its doctrine. After all, admiralty is one of the few areas in which federal common law still is constitutionally permitted to reign in the absence of conflicting federal legislation.[13] The Court, as the final draftsman of federal common law, was and is in a position to actively shape maritime wrongful death remedies to meet the constitutional goal of uniformity in admiralty law. A strong spirit of federalism would have driven the Court in that direction; instead, however, the Court developed a crazy-quilt approach to maritime wrongful death remedies which evidences little faith in the federalist creed.

This article examines the impact of federalism on the law of maritime wrongful death remedies. Its purpose is not to provide a survey of this area of the law. Rather, as did Professor Currie's article in 1960,[14] it is an attempt to determine whether there remains a doctrinal core of federalism in the admiralty around which the Court could reshape and clarify maritime wrongful death remedies.

Part I of this article provides a history of the jurisprudence of maritime wrongful death remedies prior to 1960. That history illustrates the growing, finally intense, conflict that the Court's decisions engendered between uniformity of law through federalism and diversity of law through incorporation of state remedies. It was at the pinnacle of that conflict when Professor Currie penned his critique of the Court's approach to federalism and the admiralty. Part II of this article picks up where Professor Currie left off, in 1960, in his attempt to define federalism as the proper driving force of admiralty law. Part III of this article provides the background for and explanation of the

10. 398 U.S. 375, 1970 AMC 967 (1970).

11. *Id.* at 409, 1970 AMC at 993.

12. The *Moragne* Court left the task of defining the particular parameters of the general federal maritime law remedy it created—such as the measure of damages—to "further sifting through the lower courts in future litigation." 398 U.S. at 408, 1970 AMC at 993.

13. *See* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640-41 (1981).

14. *See* Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CT. REV. 158 [hereinafter Currie].

HeinOnline -- 12 Tul. Mar. L.J. 265 1987

Court's 1986 decision in *Offshore Logistics, Inc. v. Tallentire*,[15] the case which presented the Court with a long sought opportunity to depart from its patchwork approach to maritime wrongful death remedies and inject a strong dose of federalism into its admiralty jurisprudence. However, because this opportunity was missed, Part IV of this article assesses where the Court should go on the issue of federalism and the admiralty, and whether there is a way out of "The Devil's Own Mess."

I. THE EARLY DEVELOPMENT OF MARITIME WRONGFUL DEATH REMEDIES—UNIFORMITY OF THE WRONG KIND

It is curious that, in a 1981 decision addressing the right of antitrust defendants to contribution from their joint tortfeasors, the Court singled out admiralty cases as belonging to one of the "narrow areas" in which the federal courts still may formulate "what has come to be known as 'federal common law,' " meaning that "our federal system does not permit the controversy to be resolved under state law."[16] What makes this broad, powerful statement so curious is that many of the Court's admiralty decisions dealing with maritime wrongful death remedies betray no such respect for the exalted status of federal common law. To be sure, the Court's admiralty decisions have recognized the inherently federal nature of admiralty law. Early in its jurisprudence, the Court took note of the Constitution's extension of "[t]he judicial Power . . . to all cases of admiralty and maritime jurisdiction."[17] The effect of this extension was explained in *The Lottawanna*:[18]

> [o]ne thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed. . . .[19]

15. 477 U.S. 207, 1986 AMC 2113 (1986).

16. *Texas Industries*, 451 U.S. 630, 640-641 (1981).

17. U.S. CONST. art. III, § 2.

18. 88 U.S. (21 Wall.) 558 (1874).

19. *Id.* at 575. The Admiralty Clause thus "empower[s] the federal courts . . . to draw on the substantive law 'inherent in the admiralty and maritime jurisdiction' . . . and to continue the development of this law within constitutional limits." Romero v. International Terminal Operating Co., 358 U.S. 354, 360-61, 1959 AMC 832, 837 (1959) (quoting Crowell v. Benson, 285 U.S. 22, 55, 1932 AMC 355, 371 (1932)). Furthermore, "[i]t empower[s] Congress to

HeinOnline -- 12 Tul. Mar. L.J. 266 1987

Nonetheless, the early development of a maritime wrongful death remedy was marked by one dominant question: To what degree would state law control "the rules and limits of maritime law."[20]

A. *The Court Gets Off To A Bad Start*

What set the paradox of federalism and the admiralty in motion was undoubtedly the decision in *The Harrisburg*.[21] There, a widow brought suit to recover damages for her husband's death against the steamer HARRISBURG, a vessel registered in Philadelphia. The death was allegedly caused by the negligence of the decedent's vessel in colliding with the schooner MARIETTA TILTON off the Massachusetts coast. It was not specified whether the death took place in territorial waters or on the high seas, a point which would become of critical importance in later cases. The deceased was an officer of the schooner and a resident of Delaware. Suit was brought under the Pennsylvania and Massachusetts state wrongful death laws and under general maritime law. Suit was filed in federal district court under its admiralty jurisdiction.[22]

The statutory actions were found to be untimely by the lower court;[23] thus, the Supreme Court addressed only the general maritime law claim. In that regard, the Court asked whether "a suit in admiralty may be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving a right of action therefor?"[24] After concluding that the then current rule in England and the United States did not provide for a general common law wrongful death remedy,[25] the Court decided that no different rule had been or should now be applied in admiralty.[26] Hence, the Court concluded that "in the absence of a statute giving the right . . . no such action

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revise and supplement the maritime law within the limits of the Constitution." *Id.* at 361, 1959 AMC at 837. These principles are consistent with the views of the Constitution's framers. *See* 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 532 (1836). (For example, Governor Randolph stated in the Virginia Debates that "[c]ases of admiralty and maritime jurisdiction cannot, with propriety, be vested in particular state courts."). *Id.* at 571.

20. 88 U.S. at 575.

21. 119 U.S. 199 (1986).

22. *See id.*

23. *Id.* at 214.

24. *Id.* at 204.

25. *Id.* at 204-05.

26. *Id.* at 205, 213.

will lie in the courts of the United States under the general maritime law."[27] Significantly, the Court appears to have contemplated the application of state statutes and to have made no distinction between territorial waters and the high seas.

The invitation in *The Harrisburg* to apply statutory remedies to maritime wrongful deaths was taken up initially not by Congress but by the Court itself in its decision in *The Hamilton*.[28] The steamship HAMILTON collided on the high seas with THE SAGINAW, killing three crewmembers as well as a passenger of THE SAGINAW. Both vessels belonged to Delaware corporations and both were found to be negligent in the collision. The decedents' representatives brought wrongful death actions in federal district court under the Delaware wrongful death statute.[29] The Court took the case as presenting the question of "whether the Delaware statute applies to a claim for death on the high seas, arising purely from tort, in proceedings in admiralty."[30] As a constitutional matter, the court found that a state statute could so apply based on the following reasoning:

> Apart from the subordination of the State of Delaware to the Constitution of the United States there is no doubt that it would have had power to make its statute applicable to this case. . . . The first question, then, is narrowed to whether there is anything in the structure of the National Government and under the Constitution of the United States that takes away or qualifies the authority that otherwise Delaware would possess.
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> The power of Congress to legislate upon the subject has been derived both from the power to regulate commerce and from the clause in the Constitution extending the judicial power to "all cases of admiralty and maritime jurisdiction." Art. III, § 2. The doubt in this case arises as to the power of the States where Congress has remained silent.
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> That doubt, however, cannot be serious. The grant of admiralty jurisdiction, followed and constructed by the Judiciary Act of 1789, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it," Rev. Stats. § 563, cl. 8, leaves open

27. *Id.* at 213.
28. 207 U.S. 398 (1907).
29. *See id.* at 402-03.
30. *Id.* at 403.

HeinOnline -- 12 Tul. Mar. L.J. 268 1987

> the common law jurisdiction of the state courts over torts committed at sea.[31]

By injecting the "saving to suitors" clause of the Judicial Code[32] into the analysis, *The Hamilton* created even more confusion on the subject than had *The Harrisburg*. The "saving to suitors" clause provides that federal courts have exclusive jurisdiction of all maritime cases "saving to suitors in all cases all other remedies to which they are otherwise entitled."[33] However, this clause could be interpreted in different ways depending on the influence of federalism on admiralty. It may mean that all state law rights and remedies are available independent of federal admiralty law. It may also mean that federal admiralty law incorporates all state remedies for enforcement of federal rights. Finally, it may mean that states which provide a remedial forum for maritime wrongs may hear maritime cases, but must apply federal maritime law. As the Court stated later in *Caldarola v. Eckert*,[34] the essential issue is "[w]hether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerned only with 'saving' to the States the power to use their courts to vindicate rights deriving from the maritime law to the extent their common law remedies may be available. . . ."[35] In short, the issue is whether state law "is the source of the right or merely affords a means for enforcing it."[36]

The decision in *The Hamilton* implied rather strongly that state law could be the independent source of maritime wrongful death rights and remedies. No doubt the Court saw this result as necessary to ameliorate the harsh results created by *The Harrisburg*. However, the constitutional objective of a uniform admiralty remedy guided by federal common law should have directed a contrary interpretation,

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31. *Id.* at 403-04.
32. Codified at 28 U.S.C. § 1331(1) (1986).
33. *Id.*
34. 332 U.S. 155, 1947 AMC 847 (1947).
35. *Id.* at 157, 1947 AMC at 848-49.
36. *Id.* at 158, 1947 AMC at 849. The Court has more often endorsed the latter interpretation. *See, e.g.*, Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918), where the Court stated:

> under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liablility shall be measured by common-law standards rather than those of the maritime law.

Id. at 384.

HeinOnline -- 12 Tul. Mar. L.J. 269 1987

requiring that *The Harrisburg* be overruled and a federal common law or statutory maritime wrongful death remedy be provided. Instead, by appearing to sanction state law as the source of both right and remedy, the Court opened the way for fifty years of consititutional struggle.

Despite its decision in *The Hamilton*, the Court used a stronger federalism-based approach in *Southern Pacific Co. v. Jensen.*[37] In *Jensen*, a dockworker was killed in an accident on a berthed vessel's gangway. Suit was brought against the deceased's employer, Southern Pacific Company, in New York state court under New York's Workmen's Compensation Act. Southern Pacific challenged that Act as an unconstitutional intrusion on federal admiralty jurisdiction.[38] Accordingly, the Court considered whether "the Workmen's Compensation Act conflicts with the general maritime law."[39] In concluding that it did, the Court looked again to the Constitution's so-called admiralty clause[40] and pronounced:

> [I]t must now be accepted as settled doctrine that in consequence of these provisions Congress has paramount power to fix and determine the maritime law which shall prevail through the country. . . . And further, that in the absence of some controlling statute the general maritime law constitutes . . . part of our national law applicable to matters within the admiralty and maritime jurisdiction. . . . Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits.
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> And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself.[41]

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37. 244 U.S. 205 (1917).
38. *Id.* at 210.
39. *Id.* at 212.
40. *Id.* at 215-16.
41. *Id.*

HeinOnline -- 12 Tul. Mar. L.J. 270 1987

Jensen thus appears to have set up a three-part test for determining when state law may validly operate in the maritime context. *First*, state law may not be inconsistent with federal statutes. *Second*, state law may not be inconsistent with general maritime law. *Finally*, state law may not interfere with the harmony and uniformity of maritime law in its international and interstate relations.

However, the *Jensen* Court inexplicably reconciled that test with the result in *The Hamilton* by including, in dicta, "the right to recover in death cases"[42] as one of the categories qualifying under the three-part test for application of state law. The *Jensen* Court thus proclaimed that application of state wrongful death remedies on the high seas was not inconsistent with federal statutes or general maritime law and would not interfere with the harmony or uniformity of general maritime law in its international and interstate relations. It is this idea—one which is wholly repugnant to the concept of a uniform federal remedy for wrongful death—which came under intense criticism in later cases.

Indeed, in *Knickerbocker Ice Co. v. Stewart*,[43] the Court reviewed a law Congress enacted on the heels of *Jensen* which affected federal admiralty jurisdiction by saving "to [admiralty] claimants the rights and remedies under the workmen's compensation law of any State."[44] By ensuring through federal statutory law that the first of Jensen's three tests would be satisfied, Congress apparently hoped to avoid the problem that had caused the state law in *Jensen* to be held unconstitutional. But the *Knickerbocker Ice* Court found that *Jensen* stated a constitutional principle that could not be circumvented by this sort of legislative decree. As the Court explained:

> The Constitution itself adopted and established, as part of the laws of the United States, approved rules of the general maritime law and empowered Congress to legislate in respect of them and other matters within the admiralty and maritime jurisdiction. Moreover, it took from the States all power, by legislation or judicial decision, to contravene the essential purposes of, or to work material injury to, characteristic features of such law or to interfere with its proper harmony and uniformity in its international and interstate relations. To preserve adequate harmony and appropriate

42. *Id.* at 216.
43. 253 U.S. 149 (1920).
44. *Id.* at 156.

> uniform rules relating to maritime matters and bring them within control of the Federal Government was the fundamental purpose; and to such definite end Congress was empowered to legislate within that sphere.[45]

In essence, the *Knickerbocker Ice* Court used the three-part test enunciated in *Jensen* to create a higher level of preemption than ever before (or since) conceived—a preemption of constitutional magnitude which prevented even Congress from acting to diminish its effects. Indeed, the Court explicitly recognized that no mere commerce power preemption was at play in its admiralty cases, explaining that "[t]he distinction between the indicated situation created by the Constitution relative to maritime affairs and the one resulting from the mere grant of power to regulate commerce without more, should not be forgotten."[46]

Yet forgotten it promptly was, in *Western Fuel Co. v. Garcia*[47] as the Court again attempted to mold its increasingly complex rules to a new situation. In *Garcia*, a stevedore was killed in the hold of a Norwegian vessel which was anchored in San Francisco Bay. The decedent's widow sued under the California Workmen's Compensation Act in state court. The California court found the action to be

45. *Id.* at 160.

46. *Id.* at 161. Along with *Knickerbocker*, the Court has applied the *Jensen* preemption analysis in several cases to prevent application of state law in admiralty. *See, e.g.*, Washington v. W. C. Dawson & Co., 264 U.S. 219, 1924 AMC 403 (1924) (workmen's compensation); Peters v. Veasey, 251 U.S. 121 (1919) (workmen's compensation); Union Fish Co. v. Erickson, 248 U.S. 308 (1919) (employment contract); Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) (indemnification); Clyde S.S. Co. v. Walker, 244 U.S. 255 (1917) (workmen's compensation). In numerous other cases, however, the Court had denied application of state law without reference to the *Jensen* preemption analysis. *See, e.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 1961 AMC 833 (1961) (statute of frauds); Kermarec v. Compagnie Generale, 358 U.S. 625, 1959 AMC 597 (1959) (comparative negligence); Maryland Casualty Co. v. Cushing, 347 U.S. 409, 1954 AMC 837 (1954) (direct action statute); Messel v. Foundation Co., 274 U.S. 427, 1927 AMC 1047 (1927) (personal injury suit); Robins Dry Dock Co. v. Dahl, 266 U.S. 449, 1925 AMC 182 (1925) (same); Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) (same). *See also* The Roanoke 189 U.S. 185 (1903) (maritime liens); Workman v. New York City, 179 U.S. 552 (1900) (municipal immunity law). Nonetheless, the Court has been particularly tolerant of state law setting the standards and remedies for some forms of conduct in the maritime sphere. Generally this has been true where there has been no federal law addressed to the object sought to be achieved by the state law, as is often the case with environmental and safety regulations. *See, e.g.*, Ray v. Atlantic Richfield Co., 435 U.S. 151, 1978 AMC 527 (1978) (conservation and environmental protection measures); Askew v. American Waterways Operations, Inc., 411 U.S. 325, 1973 AMC 811 (1973) (state pollution liability law); Huron Cement Co. v. Detroit, 362 U.S. 440, 1960 AMC 1549 (1960) (state anti-pollution law).

47. 257 U.S. 233 (1921).

HeinOnline -- 12 Tul. Mar. L.J. 272 1987

untimely. Suit was then brought in federal court under admiralty jurisdiction, again pursuant to the state law.[48] Both the federal district and appeals courts upheld the action against a motion to dismiss for untimeliness.[49] Ultimately, the Supreme Court dismissed the case on the ground of untimeliness.[50] For reasons unstated, however, the Court first reviewed its jurisprudence on the issue of admiralty preemption—explaining the holdings in *The Harrisburg*, *The Hamilton*, *Jensen*, and *Knickerbocker Ice*[51]—and addressed the hypothetical question of whether the state law remedy could have applied in the admiralty action had it been timely brought. Concluding that state law could apply, the Court explained:

> As the logical result of prior decisions we think it follows that, where death upon such waters results from a maritime tort committed on navigable waters within a State whose statutes give a right of action on account of death by wrongful act, the admiralty courts will entertain a libel *in personam* for the damages sustained by those to whom such right is given. The subject is maritime and local in character and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations.[52]

Nonetheless, there was no reason for the Court to address this constitutional issue when the state limitations law disposed of the case. The Court apparently took the opportunity to give substance to the dicta in *Jensen*, where it had cited *The Hamilton*, and confirmed that the ruling in *The Hamilton*, at least with respect to actions for deaths in territorial waters, withstood the test of *Jensen*. This shows that *Jensen* did impose a new test for application of state law to maritime wrongful death remedies; if it had not, *Garcia* could have been decided on the basis of *The Hamilton* alone. The maritime and local standard announced in *Garcia* thus served as a shorthand way for the Court to say that no inconsistency with federal statutory or general maritime law would result by applying state wrongful death statutes

48. *Id.* at 238-39.
49. *Id.* at 239-40.
50. *See id.* at 243-44.
51. *Id.* at 241-42.
52. *Id.* at 242.

HeinOnline -- 12 Tul. Mar. L.J. 273 1987

in *territorial waters*. Of course, by explicitly adopting the *Jensen* test, *Garcia* impliedly left open the question whether this maritime and local finding would sustain *The Hamilton* out on the *high seas*.

The Court's decisions through *Garcia* do not make clear whether its analysis decided an issue of state legislative power or federal judicial power. The failure to elaborate on that distinction left situations arising on the high seas uncertain in 1920. In *The Hamilton*, the Court appeared to have decided the issue as one of preemption, ruling in effect, if not expressly, that a state law could apply on the high seas by its own force. Because it involved state regulation and a state court remedy, *Jensen* could also be characterized as a preemption case. However, *Jensen* may be regarded as a preemption case only in terms of its new-found special meaning in admiralty, and not in terms of the straightforward commerce clause preemption which, arguably, was what decided *The Hamilton*. *Garcia* confirmed that *Jensen* requires a specialized preemption analysis for admiralty questions and applied that analysis to maritime wrongful death remedies in state territorial waters, but not on the high seas. After *Garcia*, then, it was not entirely clear how the Court would have decided the facts of *The Hamilton* in 1920, i.e., whether it would have strained *Jensen*, and the constitutional objective of uniformity through federalism, to characterize wrongful deaths on the high seas as maritime and local. In all likelihood, the Court would have extended state remedies to the high seas, since otherwise no remedy at all would have been available. Such a case, however, never reached the Court, for Congress took the next initiative.

B. Congress Tries To Patch Things Up, But The Court Makes A Bigger Mess Elsewhere

The Death on the High Seas Act (DOHSA)[53] represented a much-delayed legislative reaction to the decisions in *The Harrisburg* and *The Hamilton*. Although the Court may have intended to foster harmony, practitioners found that reliance upon state law as a remedy for maritime death, particularly those occuring on the high seas, was unsatisfactory for many reasons. Inherent limitations on state legislative jurisdiction, conflicting state legal standards, and the absence of clear rules governing choice of law produced confusion.[54] In

53. 46 U.S.C. §§ 761-768 (1982).

54. State wrongful death remedies vary widely on such fundamental issues as duty of care, measure of damages, theories of liability, defenses, immunities, classes of beneficiaries and statutes of limitations. *See* Sea-Land Services v. Gaudet, 414 U.S. 573, 586-87, 1973 AMC

HeinOnline -- 12 Tul. Mar. L.J. 274 1987

response, several early bills were introduced to Congress which attempted to establish a uniform and exclusive federal wrongful death remedy for all navigable waters.[55] These bills repeatedly failed as they collided with the desire of local practitioners to maintain state remedies for state territorial waters.[56] Thus begining in 1915, the Maritime Law Association proposed a series of bills aimed at establishing a uniform federal remedy solely for the high seas, while leaving the state remedies free to operate on state territorial waters.[57] In 1920, after extensive redrafting of and debates on a proposed statute, the DOHSA was enacted.[58] DOHSA established a cause of action in admiralty for any wrongful death "occuring on the high seas beyond a marine league from the shore of any State."[59] Although DOHSA succeeded in creating a federal law of wrongful death exclusively for the high seas, its impact on the overall scheme was negligible. Admiralty courts continued to adopt and apply state wrongful death statutes in territorial waters after 1920, because territorial waters were untouched by DOHSA and maritime torts occuring in such waters had been determined by *Garcia* to be local in character.[60] Eventually, however, litigants placed increasing pressure on the Court by seeking incorporation of larger aspects of state law than could be justified under the plain meaning of *Garcia* and *Jensen*.

Facing such claims, the Court's jurisprudence began to unravel, in *The Tungus v. Skovgaard*.[61] While docked in New Jersey, a vessel's cargo pumps broke down. The repairman called to fix them slipped

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2572, 2583-84 (1974); STUART M. SPEISER, RECOVERY FOR WRONGFUL DEATH §§ 3.1, 3.45 (2d ed. 1975 & Supp. 1985). Moreover, there is not an established rule or intuitively correct procedure for determining which state's wrongful death statute should govern a situation as complex as may occur in maritime areas; for example, where decedents resided in states A, B and C, joint tort-feasors reside in states C and D, survivors reside in states A, B and E, and the accident occurred nearest the waters of State F. *See generally* Currie, *The Choice Among State Laws in Maritime Death Cases*, 21 VAND. L. REV. 297 (1968).

55. For a history of congressional and professional proceedings leading to enactment of DOHSA complied by one of the proponents of a federal statute, see Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 116-19 (1921). *See also* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 220-30, 1986 AMC 2113, 2135-45 (1986).

56. For a thorough discussion of the developments and political forces leading up to DOHSA's enactment written in the context of the issues raised in *Tallentire*, see Motion of Kenneth G. Engerrand for leave to file Amicus Curiae Brief and Brief in Support of the Position of Petitioners, Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 1986 AMC 2113 (1986) (No. 85-202) (hereinafter Amicus Curiae Brief).

57. *See, e.g.*, S. 4288, 64th Cong., 1st Sess. (1916); H.R. 9919, 64th Cong., 1st Sess. (1916).

58. 46 U.S.C. §§ 761-768 (1982 & Supp. III 1986).

59. *Id.* at 761.

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

61. 358 U.S. 588, 1959 AMC 813 (1959).

and fell to his death. His widow commenced suit in admiralty to recover damages for wrongful death under the New Jersey statute.[62] DOHSA provided no remedy since the death occured in state territorial waters. Accordingly, the Court confirmed that the New Jersey wrongful death statue must be applied.[63] It was unclear, however what law governed the right under which the state law remedies could be sought; that is, whether the application of state wrongful death laws in territorial waters flowed from a recognition of state legislative competence in that area or from some loosely-defined federal practice of borrowing or incorporating state remedies as federal rights. In *The Tungus*, the majority concluded that where state law was recognized as providing a remedy for wrongful death, it would also "determine the circumstances under which that right exists. The power of the State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not."[64] In *The Tungus,* the action was based on a claim of unseaworthiness of the vessel, and although it was uncertain whether the state law provided a cause of action for unseaworthiness,[65] the majority concluded it did. Thus, the Court held that an action could be brought in admiralty in that case.[66] The dissenters, however, viewed the state law as merely supplying a remedy to be incorporated by federal substantive maritime law, just as state statutes of limitation often are incorporated as the federal rule of law.[67] The dissenters saw their approach as assisting the objective of uniformity required by *Jensen*.[68]

In two cases following shortly after *The Tungus*, the dispute among the Justices over how much state law had to be borrowed, or how much state law avoided preemption, generated eight separate opinions. The "borrowing-preemption" distinction was central to the debate. For example, in *Hess v. United States*,[69] Justice Harlan's dissent argued that *The Hamilton* was a case decided on preemption grounds in which "state-created rights [were allowed to be] asserted *only by federal permission*."[70] By contrast, Justice Whittaker's dis-

62. *See id.* at 589-90, 1959 AMC at 814-15.

63. *See id.* at 591, 1959 AMC at 815-16.

64. *Id.* at 594, 1957 AMC at 818.

65. *See id.* at 595-96, 1959 AMC at 818-19.

66. *See id.* at 596, 1959 AMC at 819.

67. *See id.* at 604, 1959 AMC at 825-26 (Brennan, J., dissenting).

68. *See id.* at 601, 1959 AMC at 823-24.

69. 361 U.S. 314, 1960 AMC 527 (1960).

70. *Id.* at 335, 1960 AMC at 546 (Harlan, J., dissenting).

HeinOnline -- 12 Tul. Mar. L.J. 276 1987

senting opinion in *Goett v. Union Carbide Corp.*[71] indicated that he thought the majority in *The Tungus* had conceived of federal admiralty law merely as "*remedially* supplemented" by the borrowing of state law.[72]

It was in respect to this confused context that Professor Currie attempted to make sense of the Court's jurisprudence. Speaking of federalism in admiralty in general, and not just to maritime wrongful death remedies, he reached a telling, albeit cynical, conclusion as to where the Court's decisions had led:

> An examination of the Court's treatment of maritime cases in the past twenty years leaves little room for any explanation other than that the Court is seeking the best of both worlds; it makes use of state law when it feels that law desirable as a supplement to maritime law. If the maritime rule is undersirable, the Court is usually reluctant to change it; often the reason is that the decision would be "legislative." If the state law would impair a federal right, . . . it is never applied. If it would create a right that is undesirable for other reasons, it will be ignored. . . . If it creates a right that is desirable, . . . it will be applied; the interest in uniformity will be ignored, a contrary federal rule will be conveniently slipped under the rug, the wrongful death . . . cases will be earnestly cited, and the subject will be declared "untouched" by maritime law. If . . . state law is not favorable and the old maritime rule is inadequate, the Court will resort to judicial creativity.[73]

To a large extent, this critique remains applicable today; yet, Professor Currie's vision for how the Court should correct these deficiencies is even more timely. He posited:

> When the Supreme Court takes a more active view of its responsibilities in developing a rational common law to the sea, and when it pays more attention to relevant state and federal interests and to consistency between decisions, it may escape the tangle and seaweed which has long obstructed the development of this branch of the law. . . .[74]

Unfortunately, this vision has not yet come to be.

71. 361 U.S. 340, 1960 AMC 550 (1960).
72. *Id.* at 345 (Whittaker, J., dissenting) (emphasis in original).
73. Currie, *supra* note 14, at 219.
74. *Id.* at 221.

II. FROM *MORAGNE* TO *HIGGINBOTHAM*—A NEW UNIFORMITY LEADS TO ANOTHER NONUNIFORMITY

Hess and *Goett* illustrated the futility of relying on state law as the source of maritime wrongful death remedies; if uniformity is the goal of the admiralty clause of the Constitution, reliance on state law would never accomplish the task. Apparently, however, it was not until *Moragne v. States Marine Lines Inc.*[75] that the Court realized that *The Harrisburg* had prevented them from ever taking advantage of the uniformity a federalism-based approach offered.

Moragne, a longshoreman, was killed while working aboard a vessel within the territorial waters of Florida. Suit was brought in federal district court in Florida against the shipowner to recover damages for wrongful death. The complaint alleged both negligence and unseaworthiness of the vessel as the cause of the accident. The district court held that the Florida wrongful death law did not encompass unseaworthiness as a basis of liability.[76] Although this issue was decided in *The Tungus*,[77] the *Moragne* Court nonetheless heard the case "to consider whether *The Harrisburg*, . . . in which this Court held in 1886 that maritime law does not afford a cause of action for wrongful death, should any longer be regarded as acceptable law."[78] Hence, the problems inherent in *The Tungus* were seen as symptoms of *The Harrisburg*.[79]

Sensibly, *The Harrisburg* was overruled on the ground that wrongful death remedies had become widely available since *The Harrisburg* was decided.[80] The more important holding, however, was "that Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy for wrongful death. . . ."[81] Commenting on the evolution of the law in this field, the Court stated that

> [t]he void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem.

75. 398 U.S. 375, 1970 AMC 967 (1970).
76. *See id.* at 376-77, 1970 AMC at 969.
77. 358 U.S. 588, 1959 AMC 813 (1959).
78. 398 U.S. at 375-76, 1970 AMC at 968-69 (citations omitted).
79. As the Court stated, "[t]he primary source of the confusion is not to be found in *The Tungus* but in *The Harrisburg*. . . ." *Id.* at 378, 1970 AMC at 970.
80. *See id.* at 380-93, 1970 AMC at 970-81 (providing a discussion of the history of wrongful death remedies in the United States).
81. *Id.* at 393, 1970 AMC at 981.

HeinOnline -- 12 Tul. Mar. L.J. 278 1987

> The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act preempted the entire field, destroying the state remedies that had previously existed.[82]

The Court thus expressed its belief that the "recognition of a right to recover for wrongful death under general maritime law will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."[83] Apparently, the Court had finally realized that "[f]ederal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law."[84] The real breakthrough, however, was the characterization of the duties, not merely the remedies, as "federally imposed."[85]

Nevertheless, because the remedy created in *Moragne* was poorly defined, it reduced the potency of the federalism which the Court had injected into the analysis. Indeed, the *Moragne* Court expressly stated that many of the issues left unresolved by *Moragne* (e.g., its application to deaths arising on the high seas) would be "grist for the judicial mill."[86] *Sea-Land Services, Inc. v. Gaudet*[87] was the mill for one such issue. In *Gaudet*, the Court considered whether *Moragne* allows recovery for damages beyond those authorized by DOHSA when the wrongful death occurs in state territorial waters. Based on its analysis of rules applied by the majority of the States, the Court authorized recovery for loss of support and services, as allowed by DOHSA, but also for loss of society and funeral expenses, neither of which are authorized by DOHSA for high seas cases.[88] The Court felt this interpretation of *Moragne* was not contrary to congressional intent in enacting DOHSA:

> [w]e concluded in *Moragne* that Congress expressed "no intention . . . of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Nothing in the legislative

82. *Id.* at 398, 1970 AMC at 985.
83. *Id.* at 401, 1970 AMC at 987.
84. *Id.* at 401 n.15, 1970 AMC at 987-88 n.15.
85. *Id.*
86. *Id.* at 408, 1970 AMC at 993.
87. 414 U.S. 573, 1973 AMC 2572 (1974).
88. *See id.* at 584-92, 1973 AMC at 2581-86.

HeinOnline -- 12 Tul. Mar. L.J. 279 1987

> history of the Act suggests that Congress intended the Act's statutory measure of damages to preempt any additional elements of damage for a maritime wrongful death remedy which this Court might deem "appropriate to effectuate the policies of general maritime law." To the contrary, Congress' insistence that the Act not extend to territorial waters, indicates that Congress was not concerned that there be a uniform measure of damages for wrongful deaths occuring within admiralty's jurisdiction, for in many instances state wrongful death statutes extending to territorial waters provided a more liberal measure of damages than the Death on the High Seas Act.[89]

Curiously, however, the Court precluded awards for mental anguish or grief as such non-pecuniary losses are "not compensable under the maritime wrongful death remedy."[90]

Gaudet thus created the potential for a new kind of confusion, one in which certain non-pecuniary losses were uniformly available under a *Moragne* type action versus the uniform unavailability of such damages in a DOHSA action. Predictably, lower courts reached conflicting results.[91] This conflict was addressed by the Court in *Mobil Oil Corp. v. Higginbotham*,[92] which presented the question of "whether, in addition to the damages authorized by federal statute, a decedent's survivors may also recover damages under general maritime law."[93] In *Higginbotham*, after a helicopter crashed on the high seas killing its crew and passengers, one passenger's widow brought suit in admiralty seeking damages under DOHSA and recovery for "loss of society" under *Moragne*.[94] Following a recap of the previous century's legal developments in this area,[95] the Court proceeded to limit *Gaudet's* effect to territorial waters and thus the requested damages were denied.[96] The Court's rationale focused on the distinction between the legislative and common law sources of maritime law:

> The Death on the High Seas Act . . . announces Congress'

89. *Id.* at 588 n.22, 1973 AMC at 2583-84 n.22 (citations omitted).
90. *Id.* at 585 n.17, 1983 AMC at 2582 n.17.
91. *Compare* Barbe v. Drummond, 507 F.2d 794, 1975 AMC 204 (1st Cir. 1974) (no *Gaudet* remedy on high seas) *with* Law v. Sea Drilling Corp., 523 F.2d 793, 1977 AMC 2394 (5th Cir. 1975) (*Gaudet* does apply on the high seas).
92. 436 U.S. 618, 1978 AMC 1059 (1978).
93. *Id.* at 618, 1978 AMC at 1060.
94. *See id.* at 619, 1978 AMC at 1060-61.
95. *Id.* at 620-23, 1978 AMC at 1061-63.
96. *Id.* at 621-26, 1978 AMC at 1063-66.

HeinOnline -- 12 Tul. Mar. L.J. 280 1987

> considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages. The Act does not address every issue of wrongful death law but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless.
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> * * * *
>
> There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries.[97]

Thus, *Higginbotham* simultaneously preserved uniformity of maritime wrongful death remedies on the high seas while creating a disparity between such remedies and the *Moragne/Gaudet* remedy available in state territorial waters. While this disparity would seem to have violated the constitutional principles underlying *Moragne*—i.e., achieving the uniformity of remedy mandated by the Constitution—the *Higginbotham* Court attempted to reconcile the resultant lack of uniformity on policy grounds:

> *Moragne* proclaimed the need for uniformity in a far more compelling context. When *Moragne* was decided, fatal accidents on the high seas had an adequate federal remedy, while the same accidents nearer shore might yield more generous awards, or none at all, depending on the law of the nearest State. The only disparity that concerns us today is the difference between applying one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land.[98]

Hence, the Court replaced one disjointed system with another.

Clearly, the law of maritime wrongful death remedies after *Gaudet* and *Higginbotham* was not what Professor Currie had hoped to encourage in his critique of the Court's admiralty jurisprudence. An approach based truly on the objective of uniformity through federalism would have relied on DOHSA to provide the parameters of wrongful death remedies for the high seas and for territorial waters. *Higginbotham* correctly prevented federal common law from under-

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97. *Id.* at 625, 1978 AMC at 1065 (citations omitted).
98. *Id.* at 624 n.18, 1978 AMC at 1064 n.18.

HeinOnline -- 12 Tul. Mar. L.J. 281 1987

mining the legislative directive of uniformity for high seas remedies. But *Gaudet* distorted the *Moragne* action for deaths in territorial waters by relying on state law as the source for the content of the general federal maritime remedy. The fact that the Court was inclined to look landward to fluctuating, uncertain notions of state law rather than seaward to the federal legislature's fixed, uniform maritime death remedy indicates that the Court was not yet fully committed to achieving uniformity through federalism. Consequently, as *Gaudet* and *Higginbotham* concerned only the content of the federal remedies, the overarching question of the law of maritime wrongful death remedies remained unanswered: could state law provide an independent source of maritime wrongful death action as regards both rights and remedies?

III. Coming Full Circle—*Tallentire* Presents the Opportunity to Achieve the Long Sought-After Uniformity Through Federalism

Although *Higginbotham* and *Gaudet* did not explicitly address the role of state law as an independent source of right and remedy for maritime wrongful death, the very notion of allowing state law to apply a remedial system parallel to that provided by federal law through the *Moragne* and DOHSA remedies was irreconcilable with the rationales behind both of them. Although *Gaudet* incorporated state law as the *Moragne* remedy on territorial waters, it did so uniformly by adopting state law as the rule for all territorial waters. Presumably, had the *Gaudet* Court believed that each state's law could provide an independent source of right and remedy for wrongful deaths in each state's respective territorial waters, it would not have constricted the *Moragne* remedy. Similarly, the result in *Higginbotham*—preventing application of the *Moragne* remedy on the high seas as a supplement to or definitive source for DOHSA remedies—is repugnant to the notion of applying diverse state laws on the high seas separately from or as a definitive source for interpreting DOHSA. Accordingly, and until the Fifth Circuit's decision in *Tallentire v. Offshore Logistics Inc.*,[99] courts construed *Moragne* and DOHSA as pre-

99. 754 F.2d 1274, 1986 AMC 23 (5th Cir. 1985), *rev'd*, 477 U.S. 207, 1986 AMC 2113 (1986). Curiously, the Fifth Circuit had concluded only three years prior, albeit in *dicta*, that state wrongful death remedies probably could not apply to high seas deaths. *See* Vaz Borralho v. Keydril Co., 696 F.2d 379, 384 n.6, 1984 AMC 728, 731 n.6 (5th Cir. 1983). Moreover, the Fifth Circuit had specifically held that DOHSA preempts state law remedies, only to have that decision reversed by the Supreme Court on other grounds. *See* Dore v. Link Belt Co., 391

HeinOnline -- 12 Tul. Mar. L.J. 282 1987

empting the application of state law in any such manner to maritime wrongful death remedies.[100]

A. The Court of Appeals: The Hamilton Revived

In *Tallentire*, a helicopter transporting offshore oil platform workers to the mainland crashed approximately 35 miles off the coast of Louisiana, killing all onboard.[101] The survivors of two workers filed wrongful death suits in the Louisiana federal district court against the owner of the helicopter, raising claims under DOHSA and the wrongful death law of Louisiana.[102] The state remedy provided for recovery of certain nonpecuniary damages, such as loss of consortium, service

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F.2d 671, 1968 AMC 1454 (5th Cir. 1968), *rev'd on other grounds sub nom.* Rodrigue v. Aetna Casualty & Surety Co., 395 U.S. 352, 1969 AMC 1082 (1969). Neither of these prior decisions were found to be controlling or persuasive in the Fifth Circuit's treatment of *Tallentire*. *See* 754 F.2d at 1278 n.4, 1282, 1986 AMC at 26 n.4.

100. For cases preventing state law from applying to maritime deaths in territorial waters after the *Moragne* remedy was created, see, e.g., Nelson v. United States, 639 F.2d 469, 473 (9th Cir. 1980). For cases preventing state law from applying to high seas deaths, see Nygaard v. Peter Pan Sea Foods, Inc., 701 F.2d 77, 80, 1985 AMC 2085, 2088 (9th Cir. 1983); Barbe v. Drummond, 507 F.2d 794, 801 n.10, 1975 AMC 204, 213 n.10 (1st Cir. 1974); *see also* Wilson v. Transocean Airlines, 121 F. Supp. 85, 91, 1954 AMC 1697, 1707 (N.D. Cal. 1954) (collecting district court cases). Scholarly consensus both predicted and agreed with these opinions. *See* Day, *Maritime Wrongful Death and Survival Recovery: The Need for Legislative Reform*, 64 COLUM. L. REV. 648, 651 (1964); Comment, *Maritime Wrongful Death After Moragne: The Seaman's Legal Lifeboat*, 59 GEO. L.J. 1411, 1417 (1971); Comment, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 YALE L.J. 243, 271 (1947); Robinson, *Wrongful Death in Admiralty and the Conflict of Laws*, 36 COLUM. L. REV. 406, 410 n.19 (1936); Magruder & Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 422-23 (1926); Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 119 (1921). *See generally* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 231 n.3, 1986 AMC 2113, 2132-33 n.3 (1986) (recognizing the weight of scholarly opinion).

101. 754 F.2d at 1276, 1986 AMC at 24.

102. LA. CIV. CODE ANN. art. 2315 (West Supp. 1986). A claim also was made that the Outer Continental Shelf Lands Act (OCSLA), which requires use of state tort law as surrogate federal law for artificial islands and fixed structures in the outer Continental Shelf, *see* 43 U.S.C. § 1333(a)(2)(A) (1986), would apply because the decedents were platform workers being transported from oil platforms (artificial islands) over the high seas to their mainland homes and thus died in connection with matters more related to OCSLA than to DOHSA. *See* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 217-18, 1986 AMC 2113, 2122 (1986). The Court, however, ruled that application of state law under OCSLA is purely an issue of location, not of status or purpose. *Id.* at 218, 1986 AMC at 2123. Moreover, OCSLA will apply only to "fatalities intimately connected with the decedents' work on the platform" where there is also a close "proximity of the workers' accidents to the platforms." *Id.* at 219, 1986 AMC at 2123. Furthermore, the fact that the deaths took place in a helicopter, rather than a more traditional maritime conveyance, was not deemed relevant to the choice between OCSLA and DOHSA, for "that helicopter was engaged in a function traditionally performed by waterborne vessels: the ferrying of passengers from an 'island,' albeit an artificial one, to the shore." *Id.*, 1986 AMC at 2122-23 (citations omitted).

and society,[103] which are not available under DOHSA.[104] The district court granted the defendent's motion for summary judgment precluding recovery under the state law, thus limiting the possible damages to those authorized under DOHSA. On appeal by the survivors, however, the Fifth Circuit reversed the district court and held that the state law remedy applied to the high seas deaths "of its own force."[105]

In a manner reminiscent of *The Hamilton*, the Fifth Circuit's holding focused on two questions: whether the state has legislative jurisdiction to promulgate rights and remedies for high seas deaths and, if so, whether Congress through DOHSA had acted to preempt or in any way limit such power.[106] In answering the first question affirmatively, the Fifth Circuit ignored entirely the "maritime and local" test enunciated in *Garcia*[107] but instead relied on precedent affirming the authority of states to enact *criminal* statutes applying to conduct of their respective citizens on the high seas.[108] Given this novel approach to the issue, the Fifth Circuit concluded that whatever is true in respect of legislative jurisdiction for criminal laws is "equally applicable to wrongful death statutes."[109]

Thus by glossing over what should have been the fundamental issue for analysis, the Fifth Circuit was free to examine the statutory preemption issue in the context of a hopelessly ambiguous federal law. As a caveat to the operation of the statute as a high seas wrongful

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103. LA. CIV. CODE ANN. art. 2315(B).

104. 46 U.S.C. § 762 (limiting recovery to "compensation for . . . pecuniary loss").

105. 754 F.2d at 1277, 1986 AMC at 24.

106. *Id.* at 1279-86, 1986 AMC at 28-40. The court of appeals treated these questions in reverse order, thereby answering the question of preemption before concluding that the state was competent to legislate for the high seas.

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

108. 754 F.2d at 1285-86, 1986 AMC at 37-38. *See also* Skiriotes v. Florida, 313 U.S. 69, 1941 AMC 825 (1941). *Skiriotes* rested squarely on the same "maritime and local" analysis employed in *Garcia*. Skiriotes, a Florida citizen, was charged with violating a Florida criminal statute for collecting sponges while on the high seas off the coast of Florida. In holding that the state criminal statute could apply, the Court reasoned that the state could "govern the conduct of its citizens upon the high seas with respect to matters in which the state has a legitimate interest and where there is no conflict with acts of Congress." *Id.* at 77, 1941 AMC at 831. Significantly, the federal government has not passed a fully comprehensive criminal code for the admiralty and maritime jurisdiction and thus, criminal activity on the high seas is an appropriate subject for state regulation where a legitimate state interest can be shown.

109. 754 F.2d at 1286, 1986 AMC at 39. The court of appeals asserted that, since the Court in *Skiriotes* had referred to *The Hamilton*, it had thereby endorsed the result in *The Hamilton*. *Id.*, 1986 AMC at 38-39. However, there was serious doubt after *Moragne* and *Higginbotham* as to whether application of the "maritime and local" test to high seas deaths would have confirmed the result in *The Hamilton*, and that issue clearly was not taken up in *Skiriotes*.

HeinOnline -- 12 Tul. Mar. L.J. 284 1987

death remedy, Section 7 of DOHSA[110] provides that "[t]he provisions of any state statute giving or regulating rights of action for remedies or death shall not be affected by this chapter."[111] For the Fifth Circuit, had it not been for an extremely confused legislative history and a wealth of authority interpreting the statute to the contrary, this "seemingly simple provision"[112] would have been "broad enough on its face to support [the] argument that if a state statute grants a right to recover for a high seas death, it is not preempted by DOHSA."[113] Nonetheless, finding no authority to be controlling,[114] the Fifth Circuit turned to the hopeless task of discerning the legislative intent of Section 7 of DOHSA.

Indeed, the history of Section 7 leaves considerable room for argument on either side. As originally drafted, the exception was limited to "causes of action accruing within the territorial limits of any state."[115] An amendment proposed by Representative Mann, and ultimately approved by Congress, dropped that limiting language.[116] Ostensibly because of the uncertainty surrounding Representative Mann's intent, and because the "debate at the time reflected considerable confusion among the members of Congress concerning the effect of the amendment,"[117] the Fifth Circuit concluded that the plain words of the statute must control and that they clearly provide that "a state statute which is effective to grant rights resulting from deaths on the high seas is not preempted by DOHSA."[118]

Notably, the Fifth Circuit recognized that its holding "[did] not promote the uniformity in the maritime law which the Supreme Court has nurtured for many decades."[119] The resulting "anomaly of allowing state statutes to operate on the high seas but not in territorial

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110. 46 U.S.C. § 767.

111. *Id.*

112. 754 F.2d at 1279, 1986 AMC at 28.

113. *Id.*

114. *Id.* at 1282-84, 1986 AMC at 32-36.

115. 59 CONG. REC. 4482 (1920).

116. *Id.* at 4484.

117. 754 F.2d at 1279-80, 1986 AMC at 29. The court of appeals further acknowledged that the "congressional debate reflects a number of differing concerns and beliefs on the part of the legislators" and that the "debate is not couched in the most precise legal terminology." *Id.* at 1280, 1986 AMC at 30. For further discussion of the content of the debates, see *infra* notes 124-125.

118. 754 F.2d at 1282, 1986 AMC at 32.

119. *Id.* at 1284, 1986 AMC at 36. In his dissent, Judge Garza went so far as to say that the outcome of the case was "as damaging to uniformity in wrongful death actions as it is illogical." *Id.* at 1289, 1986 AMC at 45 (citation omitted).

waters is apparent,"[120] but in order for Section 7 to be interpreted as a "symmetrical whole with other developments in maritime wrongful death law, the artisan must be Congress and not this court."[121] Hence, a new trial was ordered on the issue of nonpecuniary damages as authorized by the state wrongful death law.[122]

By approaching the problem in this manner, it is ironic that the Fifth Circuit revived the decisions Congress unquestionably had sought to put to rest by enacting DOHSA. After *The Harrisburg* and *The Hamilton*, courts had little choice but to extend state laws to the high seas or provide no remedy at all. DOHSA thus provided uniformity where none had existed before. The subject matter had long demanded a federal response simply by virtue of its scope. After all, no state could be said to have an interest equal or paramount to that of the federal government as regards the high seas. Therefore, DOHSA represented, in legislative form, the negation of any "local" interest in high seas deaths and the affirmation of the federal interest which, absent legislative direction, would have authorized rules by federal common law. The Fifth Circuit virtually ignored the constitutional dimensions of this problem. Of more concern, however, is the Supreme Court's seeming approval of the Fifth Circuit's method of analysis, despite reaching a different result.

B. Supreme Court: Torturing DOHSA In Order to Save It

The Supreme Court recognized in *Tallentire*[123] that it had before it the culmination of the "tortuous development of the law of wrongful death in the maritime context."[124] Yet its decision, reversing the Fifth Circuit's holding on the ground that Section 7 of DOHSA "acts as a jurisdictional saving clause, and not as a guarantee of the applicability of state substantive law to wrongful deaths on the high seas,"[125] does little to reverse an already tortuous development of the law. The

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120. *Id.* at 1282-83, 1986 AMC at 34. In his special concurrence Judge Jolly addressed this concern more pointedly, asserting:

> The result we reach in this case creates significant problems in the field of maritime law becuase it defies reason, runs contrary to the principles of general precedent in the field, and creates all sorts of internal inconsistencies in the prosecution of cases dealing with death on the high seas.

Id. at 1289, 1986 AMC at 44.

121. *Id.* at 1284, 1986 AMC at 36.

122. *Id.* at 1288-89, 1986 AMC at 44.

123. Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 1986 AMC 2113 (1986).

124. *Id.* at 212, 1986 AMC at 2116.

125. *Id.* at 232, 1986 AMC at 2134.

HeinOnline -- 12 Tul. Mar. L.J. 286 1987

Court attempted to do what all other courts previously confronted with the issue admitted they could not—make sense of Section 7 of DOHSA. Although the Court gave meaning to that provision of the statute, it nonetheless all but stripped the analysis of its constitutional dimensions.

Agreeing with the court of appeals that "the congressional debates on Section 7 were exceedingly confused and often ill-informed,"[126] the Court nonetheless embarked on the exercise of discerning the legislative intent of the provision. Drawing an analogy to the "saving to suitors" clause,[127] the Court found that Representative Mann's amendment of Section 7 was meant only to have "extended the jurisdictional saving clause to the high seas but in doing so, it did not implicitly sanction the operation of state wrongful death statutes on the high seas in the same manner as the saving clause did in territorial waters."[128] Although some excerpts from the legislative debates support this view,[129] others imply a more substantial role for Section 7.[130]

126. *Id.* at 225, 1986 AMC at 2127.

127. *Id.* at 222, 1986 AMC at 2125.

128. *Id.* at 227, 1986 AMC at 2129.

129. The House and Senate Judiciary Committee reports on DOHSA stated that the remedy provided by DOHSA "is made exclusive for deaths on the high seas" and that "[t]his is for the purpose of uniformity, as the States cannot properly legislate for the high seas." S. REP. No. 215, 66th Cong., 1st Sess. 3 (1919); H.R. REP. No. 674, 66th Cong., 2d Sess. 3 (1920). However, both reports were printed prior to the debate over and adoption of Representative Mann's amendment to Section 7 of DOHSA.

In a brief by the author's lead counsel, the petitioner in *Tallentire* presented a thorough discussion of the legislative debates. *See also* Amicus Curiae Brief, *supra* note 56. As is explained therein, the short debate over the Mann amendment was marked by confusion. Representative Mann admitted that he had "not examined the report of this bill carefully." 59 CONG. REC. 4484 (1920). In his most elaborate explanation of his amendment, which apparently was not prepared in advance of its presentation on the floor, Representative Mann combined his concern about an unduly narrow construction of the phrase "territorial limits" with a desire to preserve the right to proceed in state court:

> I was under the impression that the bill was not intended to take away any jurisdiction which can now be exercised by any State court. . . . If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had [a] cause of action and could get service, he could sue in a State court and not be required to bring suit in the Federal court.

Id. This statement by Representative Mann, read in isolation, is ambiguous and confused. But when the statement is juxtaposed with his earlier statements on a prior version of the bill, it appears that Representative Mann did not intend to require enforcement of state law on the true high seas.

At the time similar legislation had been proposed in a preceding Congress, Representative Mann had acknowledged that admiralty courts have "jurisdiction of accidents upon the high seas, where no States have jurisdiction," and that "[i]f an accident occurs on the high seas, you

HeinOnline -- 12 Tul. Mar. L.J. 287 1987

In fact, a careful reading of the debates indicates that no clear intent

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cannot bring a suit anywhere else than in the admiralty court." 51 CONG. REC. 1928 (1914). Thus, Representative Mann appears to have believed that a state court had jurisdiction only over suits for wrongful deaths occuring within the state's legal boundaries. Arguably, in 1920, Representative Mann was merely seeking to preserve that existing state court jusidiction. His purpose in proposing deletion of the phrase "territorial limits" from Section 7 may simply have been to avoid the possibility that the phrase might be construed as designating a rigid three-mile line rather than referring to a state's actual legal boundary.

Only a few members were on the floor of the House at the time the Mann amendment was offered and debated. No one spoke in favor of the amendment other than Representative Mann. Representatives Dewalt and Reed indicated their understanding that the amendment was addressed solely to the preservation of the right to a jury trial in state court. *See* 59 CONG. REC. 4484-85 (1920). Three other members of the House expressed the conviction that adpotion of the amendment would have no legal consequences with respect to the high seas because, as a constitutional matter, the uniform federal remedy established by section 7 would be exclusive wherever it applied. Thus, Representative Igoe informed Representative Mann that a suit could not be maintained pursuant to state law "under your amendment if the . . . death occurred on the high seas. . . . If we pass a law for admiralty jurisdiction in the United States, it is exclusive in certain cases." *Id.* at 4484. Representative Goodykoontz stated, more generally, that "[i]f the amendment prevails, my judgement is that the State courts and their decisions will be superseded by the exclusive power and authority of the admiralty courts. . . ." *Id.* at 4486. *See also id.* at 4485 (Rep. Volstead: "whenever Congress acts I have no doubt it excludes the power on the part of the State to pass laws on the same subject.").

The Mann amendment initially was defeated, twelve votes to ten. *Id.* at 4486. It then was passed on a roll call vote, without any further explanation of its content or purpose being given to those members who had not been on the floor earlier. There is no suggestion in the debate or the votes taken that the House as a whole intended, by its adoption of the Mann amendment, to upset the compromise that had been achieved after years of legislative effort and to defeat the stated purpose of establishing a uniform and exclusive federal remedy for death on the high seas.

130. For example, Representative Mann expressed his belief that:

> If the amendment which I have suggested should be agreed to, the bill would not interfere in any way with rights now granted by any State statute, whether the cause of action accrued within the territorial limits of the State or not. In other words, if a man had a cause of action and could get service, he could sue in a State court and not be required to bring suit in Federal court.

59 CONG. REC. at 4484. Also, as an example of the effect of the Mann amendment, Representative Volstead agreed with Representative Sanders that:

> the widow of a person who had been killed on the high seas, . . . may now bring an action in personam in the State court . . . [but] if this act is passed . . . it will give that widow the right to elect as to whether she shall proceed under the terms of the act conferring jurisdiction upon the Federal courts with reference to this matter, or whether she shall proceed under the State statute. . . .

Id. at 4485. Strictly as a matter of statutory interpretation, it would not be unreasonable, in light of such remarks, to conclude that DOHSA was intended to add to, rather than supplant, state wrongful death remedies for high seas deaths. The federal remedy thereby would provide a uniform minimum recovery in all cases, with state remedies, where made available by state legislatures and by the circumstances of each case, present to augment the federally prescribed minimum recovery. The constitutional objective of uniformity of remedy, however, would find such an arrangement to be as offensive as the application of diverse statutes with no federal remedy at all.

HeinOnline -- 12 Tul. Mar. L.J. 288 1987

can be found. And, like the "saving to suitors" clause, the plain meaning of Section 7 is in fact meaningless outside of its constitutional context.

Indeed, the Court's reliance on Section 7 of DOHSA as the basis for its decision can be said to be "tortuous" in its own right. At best, Section 7 states a neutral principle, one which merely confirms that state wrongful death statutes may apply wherever federal law is thought to be inadequate. If that appears to beg the question, it is because the question really ought not to have been whether Section 7 was intended to permit application of state laws, but whether a state wrongful death law is competent in any event to apply on the high seas. To be sure, the latter is a question of constitutional interpretation, and the former one of statutory jurisdiction which the Court normally would favor as the basis of decision.[131] However, as with its

131. *See* United States v. Clark, 445 U.S. 23, 27 (1980) (courts "[should] not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided."). As an additional statutory argument for its construction of Section 7 of DOHSA, the Court pointed to Section 4 which provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occuring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. § 764. The *Tallentire* Court construed this provision as evidence that "when Congress wanted to preserve the right to recover under the law of another sovereign for whatever measure of damages that law might provide . . . it did so expressly." 477 U.S. at 222, 1986 AMC at 2125. As Section 7 contains "much more ambiguous" language, *id.*, the Court declined to construe it as allowing state remedies to be applied in areas where DOHSA applies.

In his dissent, Justice Powell revealed several weaknesses in the majority's statutory arguments. First, Justice Powell pointed to the language in Section 7 extending its terms to state statutes "giving or regulating rights of action or remedies for death," 46 U.S.C. § 767, as the very sort of explicit terms the majority found present in Section 4 but lacking in Section 7. *See* 477 U.S. 207, 236-38, 1986 AMC 2113, 2139-42 (1986) (Powell, J., dissenting). Justice Powell found the majority's analogy to the saving to suitors clause inapposite. The majority, he observed, found that Section 7 "as originally proposed, ensured that the Act saved to survivors of those killed on territorial waters the ability to pursue a state wrongful death remedy in state court," but then posited that the Mann amendment "extended the jurisdictional saving clause to the high seas." *Id.* at 239, 1986 AMC at 2139. As Justice Powell observed:

> It is not easy to understand how § 7 was transformed from a provision that preserved both state jurisdiction and state rights of action in territorial waters, into a mere "jurisdictional saving clause" with no power to preserve state rights of action on the high seas. The Mann Amendment did nothing more than remove a territorial restriction; all other clauses of § 7 remained intact.

Id., 1986 AMC at 2139-40. Overall, the meaning of Section 7, as read only in the context of the legislative debates and the statutory language as a whole, depends on which way you look at it. Read in light of the constitutional objective of uniformity, however, Section 7 can have only one meaning.

HeinOnline -- 12 Tul. Mar. L.J. 289 1987

decisions interpreting the "saving to suitors" clause,[132] interpreting Section 7 is nothing short of a constitutional inquiry. In other words, Section 7 should have been interpreted as preserving for state law whatever could withstand the constitutional analysis as defined by *Jensen* and *Garcia*.[133] Beyond that, Section 7 is irrelevant to the central issue of whether the states can legislate high seas wrongful death remedies. Although a decision on this basis would inevitably have led to the same outcome as did the Court's statutory analysis, only through such an examination of the constitutional issues could the Court have hoped to quiet the "tortuous" development of law in this area. Those issues—the extent of a "local interest" in high seas deaths and the preclusive effect of the federal interest in uniformity of remedy—should have provided the basis for the Court's decision in *Tallentire*.

C. *An Interest Analysis Resolution Of Tallentire: The Framework For Federalism In The Admiralty*

Admiralty is one of the special areas of law subject to regulation by federal common law.[134] As such, it would have been appropriate for the *Tallentire* Court to have based its decision on the underlying constitutional themes of admiralty law rather than on the strained statutory analysis it used. By construing DOHSA as consistent with the constitutional objectives of admiralty—i.e., uniformity of remedy—the Court could have fostered a lasting commitment to federalism in the admiralty while still reaching the correct result. Where the role of federalism is involved, a balancing of state and federal interests is a central constitutional theme.[135] *Tallentire* presented as near to perfect a case as the Court could have wished for playing out that constitutional theme.

132. *See supra* text accompanying notes 31-35.

133. *See supra* text accompanying notes 36-41, 46-51.

134. *See supra* note 16; *infra* note 142.

135. The adoption of federal common law necessarily involves the presence of a potential "significant conflict between some federal policy or interest and the use of state law." Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 68 (1986). Even a substantial federal interest must be balanced against the interest of applying state law before an area can be deemed appropriate for regulation by federal common law. *See* Miree v. De Kalb County, 433 U.S. 25, 31-33 (1977). In maritime law, "[t]he true inquiry thus becomes one involving the nature of the state interest . . . [and] the extent to which such interest intrudes upon federal concerns." Hess v. United States, 361 U.S. 314, 331, 1960 AMC 527, 543 (1960) (Harlan, J., dissenting). *See generally* Currie, *supra* note 14, at 168-70.

HeinOnline -- 12 Tul. Mar. L.J. 290 1987

1. The State Interest—Maritime, But Not Local

As grounds for exercising jurisdiction over high seas deaths, states might advance as sufficient interests the desire to establish and maintain relative geographical boundaries,[136] and the desire to protect and regulate their respective citizens.[137] However, neither interest is actually sufficient when closely examined under the light of high seas deaths. For example, with respect to establishing and maintaining geographical boundaries, the extrapolation of existing land boundaries for coastal states would result in criss-crossing and conflicting boundaries. In as much as such problems plague national boundary lines,[138] they would cause the states to be riddled with even more confusion and conflict. The line demarking the end of territorial waters avoids such problems.

But that reason alone hardly suffices as an answer to the important issue of maritime wrongful death remedies, for state boundaries could, presumably, be approximated in wrongful death cases with reasonable accuracy. The territorial waters line thus also serves the purpose of defining the limit of state regulatory interests. For example, if extrapolated, Florida's boundaries would extend well into the Atlantic Ocean and California's into the Pacific Ocean. It is for this reason that the geographical limits of a state's regulatory interests are thus appropriately defined through a device such as the territorial waters line.

A state's interest in protecting and regulating its citizens suffers from similar problems of manageability. All else being equal, a Maine citizen's death in the far South Pacific would have less immediate impact on Maine than it would have if the citizen had died off of Maine's coast. It would be unwieldy at best if each citizen were to carry along the remedies and responsibilites of her state's wrongful

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136. The Court's original jurisdiction has been invoked to resolve disputes between states over their adjacent lateral seaward boundaries. *See, e.g.*, Texas v. Louisiana, 426 U.S. 465 (1976).

137. The court of appeals in *Tallentire* took note of the uniform connection of relevant circumstances—e.g., residence of decedent, tortfeasor, and survivors, route and destination of travel and limited its opinion accordingly. *See* Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1286, 1986 AMC 23, 39-40 (5th Cir. 1985). The court of appeals appears to have believed that the critical factor is the residence of the tortfeasor, basing its ruling on what it concluded to be "the power of a state to attach legal consequences to the acts of their [sic] own citizens on the high seas." *Id.* 1986 AMC at 39.

138. *See, e.g.*, U.N. CONVENTION ON THE LAW OF THE SEA, Part II, Section 2 (1983) (provisions defining the limits of the territorial seas, with rules for drawing boundaries, incorporating reefs, rivers, bays, ports, adjacent coasts).

HeinOnline -- 12 Tul. Mar. L.J. 291 1987

death law around the globe. A decedent's survivor, moreover, may or may not be a citizen of the decedent's state. Likewise, the decedent and tortfeasor could be from different states. Finally, a similar patchwork would result if the applicable law were based on the location of the death rather than on the citizenship of the parties. Thus, no particular state's interest may be deemed superior to another's simply by virtue of the residence of the decedent, the survivors, or the tortfeasor, or by the location of the death.

Indeed, accidents of the high seas often are multi-state or multinational in contact.[139] Even the choice of which nation's law should apply may be difficult in some cases.[140] If further choices had to be made among state laws based on the location of the death or the diverse citizenships of those individuals, the matter could become hopelessly complicated.[141] Such complexities demonstrate more than just the difficulties that may be encountered in developing a system for choosing among state laws for high seas deaths. They suggest more pointedly the rather weak nature of any given state's interest in being the law-giver for high seas wrongful deaths. No one state, it would seem, has a paramount interest over other states in the outcome of high seas wrongful death cases. Hence, the territorial waters line marks a sensible absolute limit to the permissible seaward influence of each state over its citizens.

This discussion indicates that there was something to *Garcia's* "maritime and local" standard after all. The *Tallentire* Court could have applied such a test to the circumstances before it and ruled that the remedy for high seas wrongful deaths, albeit maritime in nature, is anything but local. Such non-local character, in light of the constitutional principles set forth in *Jensen*,[142] would have precluded application of state law, and the Court's arduous, ultimately fruitless task of understanding Section 7 could have been avoided. To fully address such an interest analysis, however, the Court also would have had to consider whether the exercise of state interests in high seas death

139. *Tallentire* is unique among the Court's maritime wrongful death cases for presenting circumstances in which all relevant contacts were with the same state. More typical would be the circumstances encountered in *The Harrisburg*, where the vessels were of Pennsylvania registry, the decedent was a resident of Delaware, and the accident took place in the waters off of Massachusetts. *See supra* note 22.

140. *See* Hellenic Lines v. Rhoditis, 398 U.S. 306, 308-09, 1970 AMC 994, 996-97 (1970); Lauritzen v. Larsen, 345 U.S. 571, 583-91, 1953 AMC 1210, 1219-26 (1953).

141. *See supra* note 53.

142. *See* text following note 40.

HeinOnline -- 12 Tul. Mar. L.J. 292 1987

cases, however tenuous they may be, would conflict with the federal interest in exclusive regulation of high seas deaths.

2. The Federal Interest—Moving to Uniformity Through Preemption.

The federal interest in applying DOHSA as an exclusive high seas death remedy derives from the objective of providing for and adhering to a uniform body of national law that generates consistent and predictable results. Applying state laws to high seas death cases would prevent uniformity. It would also create a disparity between the remedies available on territorial waters and on the high seas.

This latter point is perhaps the most significant in the analysis. The Court in *Higginbotham* recognized that, after *Moragne's* creation of a federal common law wrongful death remedy in territorial waters, there was "one national rule [for] fatalities in territorial waters."[143] The lower courts interpreted this to mean that the *Moragne* remedy, as the manifestation of federal common law, had preempted application of state law on the territorial waters.[144] Such rulings were compelled by the principle that implementation of federal common law dictates that "state law cannot be used."[145]

It follows, therefore, that if the federal interest in maritime death remedies is so powerful as to override state remedies in state territorial waters, it must also preclude application of state remedies on the high seas. To hold otherwise would result in one national rule for territorial waters and a patchwork of state and federal remedies on the high seas. As even the Fifth Circuit acknowledged in *Tallentire*, "the anomaly of allowing state statutes to operate on the high seas but not in territorial waters is apparent."[146]

In *Tallentire*, the Fifth Circuit reconciled that anamoly by applying a strange twist to the concept of preemption. Under the hierarchy of preemption in the context of federal common law, federal common law preempts state law and federal statutory law preempts federal common law. Thus, the Fifth Circuit reasoned pursuant to *Higginbotham* that, on the high seas, "[t]he general maritime law preempts

143. Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 624 n.18, 1978 AMC 1059, 1064 n.18 (1978).

144. *See supra* note 100.

145. Milwaukee v. Illinois, 451 U.S. 304, 313 n.7 (1981).

146. Tallentire v. Offshore Logistics, Inc., 754 F.2d 1274, 1282-83, 1986 AMC 23, 34 (5th Cir. 1985), *rev'd*, 477 U.S. 207, 1986 AMC 2113 (1986).

HeinOnline -- 12 Tul. Mar. L.J. 293 1987

state law, but DOHSA preempts the general maritime law."[147] This hierarchy permitted state law to return to the scene. In other words, the Fifth Circuit concluded that DOHSA preempted not only the application of federal common law, but also the preemptive effect of the federal common law's place in maritime wrongful death remedies.

Such reasoning turns the hierarchy of preemption inside out. Clearly, were DOHSA repealed today, the *Moragne* remedy would prevail on the high seas just as surely as it does in territorial waters. However, its preemption by DOHSA does not mean that the federal interest which leads to the use of federal common law in admiralty is in any way diminished. That interest is constitutional in origin and cannot be reduced by Congress or the courts. Nor can the mere enactment of federal legislation, absent a specific provision, enhance the state interest to a point where it may play a role concurrent with the federal interest. In short, *Moragne* represents the dormant but substantial power of the federal interest in maintaining uniformity of maritime wrongful death remedies. That interest should have guided the *Tallentire* Court to achieve a result which solidified the significance of federalism in the admiralty. Instead, the Court's reliance on an interpretation of the legislative intent of Section 7 of DOHSA invites further speculaton on the interplay between state law, federal common law, and federal statutory law for other maritime law issues.

IV. Conclusion: In Need of a Life Raft for Federalism in the Admiralty

When the history of maritime wrongful death remedies from *The Harrisburg* to *Tallentire* is laid out as above, it is difficult not to dwell upon the irony of the Court's touting of admiralty as an area of federal common law in non-admiralty cases, when all along its maritime wrongful death cases have conveyed a much different message. The piecemeal decisional approach taken by the Court has reduced the subject of maritime personal injury remedies to one of ever-narrowing inquiry which has almost wholly lost sight of the broad constitutional themes that surfaced in such early decisions as *Jensen* and *The Lottowanna*. *Tallentire* extends that approach one step further, and thus it can only be assumed that still narrower issues will soon crystallize in the lower federal courts and eventually work their way up to the Supreme Court. There is little reason to anticipate escape from this quagmire any time soon.

147. *Id.* at 1283, 1986 AMC at 34.

HeinOnline -- 12 Tul. Mar. L.J. 294 1987

To be fair to the Court, the relentless narrowing of issues seems in part due to an apparent inability of the lower federal courts and admiralty practioners to see the proverbial forest through the trees. The fact that litigants ignore the broad import of the Court's decisions by forcing questions one step removed from the last answered by the Court can only contribute to the Court's increasingly complicated scheme of maritime wrongful death and personal injury remedies. Sadly, the lower federal courts appear to be capable of reading the Court's opinions solely for their precise content rather than for their full message. As such, the Fifth Circuit was able to distinguish *Tallentire* from the *Higginbotham* decision in a few mere sentences,[148] when in fact the decision reached by the Fifth Circuit is contrary to all of the clear implications of *Higginbotham*.[149] Indeed, except for the absence of the exact words precluding application of state remedies to high seas deaths, *Higginbotham* all but decided the issue later considered in *Tallentire*.

On the other hand, the Court has not yet gone out of its way to discourage the very process which has in large part been the demise of federalism in the admiralty. It has steadfastly avoided issuing a decision addressing federalism broadly, and has often made a point of reserving certain issues for further decisions although all rights could and should have been addressed along with the questions decided.[150]

148. For example, the Fifth Circuit disregarded the implications of *Higginbotham* merely because the precise question of "[w]hether DOHSA preempts state wrongful death remedies was not addressed in the decision." 754 F.2d at 1282, 1986 AMC at 34.

149. The Court in *Higginbotham* proclaimed that when DOHSA "does speak directly to a question, the courts are not free to 'supplement' Congress' answer so thoroughly the Act becomes meaningless." Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625, 1978 AMC 1059, 1065 (1978). DOHSA speaks directly and clearly as to the measure of damages. Thus, the Court concluded that, following its decision not to extend the *Moragne* remedy to the high seas, maritime wrongful death remedies would involve the application of "one national rule to fatalities in territorial waters and a slightly narrower national rule to accidents farther from land." *Id.* at 624 n.18, 1978 AMC at 1064 n.18. The description of the remedial framework is incompatible with the notion that state wrongful death statutes could apply to high seas deaths.

150. Thus, in *Tallentire*, the Court specifically reserved the issue of "whether the DOHSA recovery for the beneficiaries' pecuniary loss may be 'supplemented' by a recovery for decedent's pain and suffering before death under the survival provision of some conceivably applicable state statute that is intended to apply on the high seas." Offshore Logistics, Inc., v. Tallentire, 477 U.S. 207, 215 n.1, 1986 AMC 2113, 2119 n.1 (1986). However, if federalism and the objective of uniform maritime remedies have any place at all in the admiralty, then there is no reason why, in the absence of express federal legislation, that the outcome should be any different for the wrongful death and survival remedies. By reserving the survival remedy issue in this manner, the Court further diluted the role of federalism in its decision and reinforced its reliance on a piecemeal approach to maritime law issues.

HeinOnline -- 12 Tul. Mar. L.J. 295 1987

Moreover, *Tallentire* reverses a trend seen in *Moragne, Gaudet* and *Higginbotham* of moving toward an increasing reliance on federalism principles and the Court's federal common law powers in admiralty. Although *Higginbotham* and *Tallentire* decided similar issues as both cases addressed the degree of supplementation permissible under DOHSA, they are nonetheless strikingly dissimilar opinions. Had the *Tallentire* court extended rather than truncated the trend started in *Moragne*, the tenuous reliance on legislative history and statutory structure would have been unnecessary. Whatever ambiguity is left by Section 7 on the question of state law—and there is plenty of ambiguity—is fully resolved in favor of an exclusive federal remedy when read in light of the constitutional objective of uniformity of remedy.

Undoubtedly the Court will face the question of federalism and the admiralty when the issues left open in *Tallentire* work their ways up through the judicial "grist mill."[151] Were it not for the approach taken in *Tallentire*, it would seem almost inconceivable that state law would be permitted to supplement the *Moragne* remedy in state territorial waters. However, the Court has not spoken explicitly on the subject and it remains unclear how that question will be resolved. Similarly, the application of state survival action laws is a question now thrown up for grabs. DOHSA is silent on these two issues, and thus the Court might actually be forced to consider the questions in their constitutional framework. Viewed narrowly, such a decision would be of as little guidance as *Tallentire*. Viewed broadly, however, and the Court could return us to the course set by *Moragne, Gaudet* and *Higginbotham*.

A broad view of federalism's role in the admiralty is the prescription for the Court's ailing maritime jurisprudence. State law need not be eliminated altogether, but even as Justice Powell recognized in his dissent in *Tallentire*, adoption of state law usually will unsettle "the exclusive, federal character of most aspects of admiralty law."[152] Professor Currie's words thus ring true today as loudly as they did in 1960:

> It cannot be gainsaid that the area of federalism and the admiralty is plagued with inconsistencies. This is, in part, the unfortunate result of the Court's being called upon to determine, as in numerous other areas of constitutional litigation, the relative strengths of competing interests—often

151. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 408, 1970 AMC 967, 993 (1970).
152. 77 U.S. at 240, 1986 AMC at 2141.

HeinOnline -- 12 Tul. Mar. L.J. 296 1987

> clearly a matter of preference rather than of reasoning from established premises. Moreover, in searching for a touchstone to aid in the process of decision, the Court has developed diverging lines of precedent which obscure the necessity for an earnest inquiry into the merits of the state and federal interests in new cases. Still worse, the ancient decisions which form the base of each line were often the products of entirely distinct theories of legal reasoning.
>
> Thus two criticisms seem warranted: the Court should assume a more creative role in formulating a cohesive maritime law, and it should pay more attention to the competing policies of nation and state.[153]

Almost thirty years after he issued that advice, we seem no closer to its fruition. If admiralty is to become a consistent body of law, another thirty years cannot be let to pass.

153. Currie, *supra* note 14, at 220.

HeinOnline -- 12 Tul. Mar. L.J. 297 1987

HeinOnline -- 12 Tul. Mar. L.J. 298 1987