

Admiralty and Federalism: History and Analysis of Problems of Federal-State Relations in the Maritime Law of the United States.
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The legal mind rarely, if ever, resists the temptation to make things appear to be neater, tidier and, above all, more logical than in truth they are, have been or ever will be. Perhaps it is our function, as scholars, judges, even as practitioners, to spend our lives making sense out of nonsense, reducing real chaos to apparent order, finding patterns in the formless waste and imposing our own brand of rationality on the irrational and the absurd. Perhaps it is even a useful function.

The history and current state of American maritime law and of the jurisdiction of the federal courts sitting "in admiralty" make up a story which might have furnished excellent material to the authors of *H.M.S. Pinafore*. There is an engaging idiocy in the story line as it unfolds which reassures us as to its essential truth: no one would have had the wit to invent anything on this level of fantasy. The mind indeed boggles at the contemplation of such constructs as the maritime lien unknown to the maritime law, created by a state statute, which cannot, however, be enforced in the state courts but can be enforced only in the federal courts on the admiralty "side."¹

The idea that the law applicable to a national industry such as shipping should be federal law, nationally uniform, makes a great deal of sense. If the framers of the Constitution and the draftsmen of the Judiciary Act of 1789 had provided that maritime law was to be a federal specialty administered exclusively by federal admiralty courts, we would have no difficulty understanding what they had done and why they had done it. No doubt, if shipping had been so handled in the late eighteenth century, the problems of transportation by rail in the nineteenth century and by road and air in our own century would from the beginning have been looked on as federal law problems and as federal specialties. What the eighteenth century artisans of our legal and

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¹ This is the end result of the sequence of cases which starts with *The General Smith*, 17 U.S. (4 Wheat.) 438 (1819), and ends with *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

political system in fact did with shipping and its law left the relationship between state and federal law, as well as the relationship between the state and federal court systems, in a state of utter confusion and impenetrable mystery. "The judicial Power [of the United States]," said the Constitution,² "shall extend . . . to all Cases of admiralty and maritime Jurisdiction" "[T]he [federal] district courts," said the Judiciary Act of 1789,³ ". . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. . . ." Fitting some kind of meaning to these essentially meaningless provisions has been part of the business of the Supreme Court of the United States for nearly two hundred years. Since the mid-1940's, the Court has devoted an inordinate amount of its time and energy to the resolution of these mysteries, with results which have occasionally been such as to make the observer despair of the judicial process itself.⁴ During this period the Court has been split, violently and bitterly, between factions which, with a great deal of oversimplification, can be referred to as the "federal supremacy" faction (whose spokesman in many of the cases was Justice Black) and the "states rights" faction (for which Justice Frankfurter, during his tenure on the Court, often spoke). Occasionally the two factions seem, mysteriously, to exchange positions. There are perhaps indications that the current Court, because of changes in membership or simply because of exhaustion after a quarter of a century of in-fighting, is preparing to drop its long-standing affair with the admiralty and maritime jurisdiction.⁵

In his *Admiralty and Federalism* Professor Robertson addresses himself to the federal-state problem, both in its historical development and in the light of the Supreme Court's mid-twentieth century revolution. It may be that Professor Robertson, like the rest of us,⁶ makes more sense of his subject than is really there. However, it is eminently helpful to have the scattered bits and pieces of the jigsaw put back together by so competent and knowledgeable a puzzle-solver.

Professor Robertson's book is about half history and half current events. In his first two chapters he explores what is known of the back-

² U.S. CONST. art. III, § 2.

³ Ch. 20, § 9, 1 Stat. 77.

⁴ See, e.g., Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 SUP. CT. REV. 158.

⁵ See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), discussed briefly at the end of this review.

⁶ See, e.g., G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* (1957), *passim*, to say nothing of this review.

ground of the constitutional grant and the jurisdictional provision of the Judiciary Act of 1789. Most discussion of these matters has contented itself with a few well-known secondary sources, with each generation of commentators repeating what the previous generation had said. Professor Robertson has gone back to wrestle with the primary sources, for which he is entitled to much credit. What emerges from his discussion is that precious little is known, or ever will be known, about either the constitutional grant or the jurisdictional provision. We know neither how they came to be drafted the way they were nor, having been so drafted, what they were meant to mean. Professor Robertson would no doubt have been happy if his historical researches had turned up something more dramatic. For the rest of us it is most helpful to know how unhelpful the sources are. Perhaps the unresolved tensions and conflicts of the 1780's led both the constitutional and legislative draftsmen to the conclusion that the part of wisdom was to talk in riddling terms of the "admiralty and maritime jurisdiction," leaving to later generations the task of working out a solution in the light of whatever social, economic and political realities might have come to pass.

There follows a chapter which recounts the well-known story of the loss by the English admiralty courts during the seventeenth century of their once extensive jurisdiction. It is hard to see what this material adds to Professor Robertson's argument. Two more chapters trace the jurisdiction of the vice-admiralty courts during the colonial period and of their successors during the period of the Revolution and of the Confederation. This material is historically relevant since one of the reasons, first put forward by Justice Story,⁷ for taking an expansive view of the constitutional grant of "admiralty and maritime jurisdiction" was the argument that the vice-admiralty courts and their successors had exercised a jurisdiction much broader than that of the admiralty courts in England after the seventeenth century. However, except from an antiquarian point of view, it really makes little difference whether Story was right or wrong. And, indeed, since the surviving court records are scattered, incomplete, illegible and confused, we shall never know the truth of the matter anyhow.

Returning, after these digressions, to the history of federalism, Professor Robertson devotes a series of four chapters to the nineteenth century developments, both as to jurisdiction, exclusive or concurrent, and as to the substantive rules of maritime law. This is excellent stuff—an interesting story well told. Professor Robertson's discussion, I am happy to note, seems to be consistent with what has become my own

⁷ See *DeLovio v. Boit*, 7 F. Cas. 418 (No. 3776) (C.C.D. Mass. 1815).

hobbyhorse with respect to the commercial law of the period: that is, that, to an astonishing degree, national uniformity in the law was in fact achieved and maintained over a long period of time. This was done under the superintendence of the Supreme Court of the United States, in its self-appointed role as announcer of the general federal commercial law under the doctrine of *Swift v. Tyson*⁸ (or, in the maritime field, as the only true interpreter of the constitutional grant of "admiralty and maritime jurisdiction"). However, during this period the Supreme Court rarely, if ever, described what it was doing as "fashioning a federal rule." A currently controversial question would be referred to the Court. The Court would propose its own best synthesis of conflicting views. Not always but in a surprising number of cases the Supreme Court's synthesis proved acceptable to everyone. The state courts followed the Supreme Court, not because they were bound to do so but because what the Court did usually made a great deal of sense and, in any event, the obviously desirable goal of national uniformity could be achieved only in this fashion.⁹ Theoretically, any number of conflicts could have arisen between the two independent court systems. In fact almost no conflicts ever did arise—whether in the *Swift v. Tyson* area of general commercial law or in the constitutionally protected area of "admiralty and maritime jurisdiction." Theoretically, it has often been said, if a plaintiff with a maritime cause of action elected, under what came to be the received meaning of the "saving to suitors" clause, to bring his action in a common law court and if the common law court had a rule of substantive law inconsistent with a rule of maritime law, the common law court would apply its own common law rule. Almost the only case which is ever cited to illustrate the proposition is *Belden v. Chase*,¹⁰ a collision case in which the New York Court of Appeals was upheld in applying the common law contributory negligence rule in lieu of the maritime divided damages rule. A proposition which is supported by the ritual citation of a single case is at best a doubtful proposition. Perhaps some industrious researcher will look into the matter and discover that throughout the nineteenth century the common law courts were following the Supreme Court's lead in the maritime cases as they were in the commercial law cases. At least that is my hunch and nothing that Professor Robertson has turned up seems inconsistent with it.

The balance of Professor Robertson's book (Chapters X-XVI) is

⁸ 41 U.S. (16 Pet.) 1 (1842).

⁹ For an example of this process, in the context of railroad and industrial equipment financing, see 2 G. GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* 743-76 (1965).

¹⁰ 150 U.S. 674 (1893).

devoted to current events, or, more precisely, to the story of the twentieth century controversy about what has often been referred to as the doctrine of the supremacy of federal maritime law. That is, that a common law court in adjudicating a maritime cause of action, plaintiff having elected to sue outside the admiralty under the saving to suitors clause, should, at least in some types of cases and in some situations, apply maritime law, not common law. After twenty-five years of almost continual litigation, the Supreme Court has not succeeded in making clear what types of cases the doctrine applies to or under what circumstances the doctrine applies or even if there is such a doctrine as distinguished from a controversy about the doctrine. It may be that the Supreme Court will never make these things clear and that the controversy will be allowed to die down or fade away without the issues which initially prompted it ever having been settled one way or the other.

Professor Robertson accepts the reconstruction under which the Supreme Court set the stage for the great controversy in *Southern Pacific Co. v. Jensen*¹¹ and *Chelentis v. Luckenbach S.S. Co.*¹² Then there was a twenty-five year stage-wait before the curtain went up. Finally, shortly after the *Erie* case had apparently committed the Court to a broad view of state law supremacy the Court began experimenting with the reverse idea of federal law supremacy in maritime matters. *Garrett v. Moore-McCormack Co.*¹³ seems to have been one of the first cases of this type. A few years after *Garrett* the Supreme Court converted the traditional maritime law remedy for unseaworthiness into "a species of liability without fault . . . a form of absolute duty owing to all within the range of its humanitarian policy" and extended the remedy to harborworkers (as well as to seamen in the primitive sense).¹⁴ A host of plaintiffs and their counsel enthusiastically accepted the invitation to carry out the humanitarian policy of the maritime doctrine of absolute liability for unseaworthiness in actions brought in common law courts conveniently equipped with juries.

Professor Robertson successively reviews the Court's efforts to work out the "federal law supremacy" problem in the context of the Longshoremen's and Harbor Workers' Compensation Act (Chapter XII), in

¹¹ 244 U.S. 205 (1917) (New York Workmen's Compensation statute unconstitutional as applied to harbor worker killed on navigable waters).

¹² 247 U.S. 372 (1918) (in seaman's personal injury action brought in common law court on theory of negligence, maritime law rule which allows seaman to recover indemnity for unseaworthiness but not for negligence applies so that the action does not lie).

¹³ 317 U.S. 239 (1942) (maritime rule on burden of proof as to invalidation of release executed by seaman, not contrary Pennsylvania common law rule, applies in personal injury action under Jones Act brought by injured seaman in Pennsylvania court).

¹⁴ Both these results were achieved in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946). The quotations are from *id.* at 94-95.

actions for wrongful death (Chapter XIII), and in actions for personal injury (Chapter XIV). On the whole he seems to give the Supreme Court higher marks than most other commentators have given or than I would be inclined to give. Professor Robertson is perhaps the first person to defend not only the policy of the majority's decision in *Calbeck v. Travelers Insurance Co.*¹⁵ but the semantics and logical structure of Justice Brennan's opinion as well;¹⁶ the Brennan opinion is analyzed and approved at length both in the text of the treatise and in an Appendix which originally appeared in that interesting periodical, *Modern Uses of Logic in Law (M.U.L.L.)*.¹⁷

Professor Robertson credits the Court, or some of its members, with what he calls an "interest balancing analysis."¹⁸ That is, with respect to the choice of state or federal law in a maritime case, the proper approach is to weigh the federal or national interest against the state or local interest. If the national interest outweighs the local interest, then (per *Jensen*) the federal rule of maritime law should prevail. Contrariwise, if the local interest outweighs the national interest, then (under the so-called "maritime but local" "exception" to *Jensen*) the state common law (or statutory) rule should prevail. Professor Robertson seems to feel that this is a good approach and that, if the majority of the Court would consistently adhere to it, a satisfactory state of law would soon develop. My own trouble with this theory is that I have no idea how to go about balancing national interests against local interests, I doubt that Professor Robertson knows how to go about it, and I am not even convinced that a majority of the justices of the Supreme Court knows how to go about it. (For example, a majority of the Court held, in 1917, that the national interest so outweighed the local interest with respect to *Jensen's* death that the New York Workmen's Compensation Act could not be constitutionally applied to afford *Jensen's* widow the

¹⁵ 370 U.S. 114 (1962).

¹⁶ Section 3(a) of the Longshoremen's and Harbor Workers' Compensation Act of 1927 § 3(a), ch. 509, § 3(a), 44 Stat. 1424 (1927), as amended 33 U.S.C. § 903(a) (1964), provided in substance that disability and death payments under the Act could be made only with respect to accidents which occurred on navigable waters of the United States and, furthermore, "if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The pre-*Calbeck* commentary, which was extensive, assumed without exception that the "may not validly be provided" language incorporated the so-called "maritime but local" "exception" to the *Jensen* doctrine of maritime law supremacy (Professor Robertson collects the authorities at p. 213 n.45). Justice Brennan's *Calbeck* opinion (which Justice Stewart, dissenting, 370 U.S. at 132, referred to as "judicial legerdemain") said that "may not validly be provided" did not incorporate "maritime but local," with, apparently, the result that the only condition to recovery under the federal Act is that the accident took place on navigable waters. 370 U.S. at 126.

¹⁷ P. 214 n.53.

¹⁸ Pp. 195 *et seq.*

statutory remedy which the Act provided. Why? Or, for that matter, why not?)

Professor Robertson cites, as one of the Court's most successful applications of the "interest balancing analysis," *Kossick v. United Fruit Co.*,¹⁹ majority opinion by Justice Harlan, dissents by Justice Frankfurter (joined by Justice Stewart) and by Justice Whittaker. Kossick alleged that the defendant, his employer, had orally agreed that if Kossick accepted treatment at a United States Public Health Hospital for a disease contracted while Kossick was employed on one of defendant's ships the defendant would indemnify Kossick for any further injury he might suffer as the result of negligent or incompetent treatment at the hospital. Relying on this agreement, Kossick entered the hospital, received negligent or incompetent treatment, and was further injured. Kossick brought his action under the saving to suitors clause in federal court on the civil side, federal jurisdiction being grounded on diversity of citizenship. The district court²⁰ and the Second Circuit²¹ ruled against Kossick on the ground that the alleged "contract," even if made, was unenforceable under the New York Statute of Frauds. In the Supreme Court a six-man majority reversed on the ground that maritime law under which oral contracts are enforceable should prevail over the assumed New York rule under the local Statute of Frauds. Justice Harlan's majority opinion said that the determination whether the federal maritime rule or the state rule should govern in a case like Kossick's is one of "accommodation"— or "interest balancing" in Professor Robertson's phrase. Having weighed the interests and perhaps the equities, Justice Harlan concluded that in Kossick's case the national or maritime elements outweighed the local elements so that the lower courts had been in error in applying the New York Statute of Frauds. "In summary," Professor Robertson writes at the end of a long and approving discussion of the Harlan opinion, "the *Kossick* case is a classic application of the reverse-*Erie* interest-balancing process. . . ."²²

So far, so good. One can agree or disagree (as three of his colleagues did) with the way in which Justice Harlan juggled his weights and balances. However, there seems to have been more to the case than has so far appeared. According to the two lower court opinions, Kossick could not have brought an action in admiralty because his admiralty action would have been time-barred.²³ He therefore brought his "common-

¹⁹ 365 U.S. 731 (1961).

²⁰ 166 F. Supp. 571 (S.D.N.Y. 1958).

²¹ 275 F.2d 500 (2d Cir. 1960).

²² P. 257.

²³ 166 F. Supp. at 573; 275 F.2d at 501. The assumed time-bar was the three-year statute of limitations under the Jones Act. I do not myself understand why Kossick's action if

law" action in order to get the benefit of the New York contract statute of limitations which had not yet run. It seems not unreasonable to conclude that the lower courts felt that if Kossick wanted the benefit of the state statute of limitations, he also had to carry the burden of the state Statute of Frauds. (Alternatively, they could have ruled against Kossick on the ground that the maritime rules applied to his common law action, so that he was still time-barred.) The only reference Justice Harlan makes to the admiralty time-bar is the off-hand comment, "A different conclusion should not be reached . . . because of any suspicion that this complaint may have been contrived to serve ulterior purposes" (citing the passages of the lower court opinions which had stated that the admiralty action was time-barred).²⁴ (Curiously, neither of the dissenting opinions mentions the point.) Thus Justice Harlan apparently accepted the conclusion that the three-year Jones Act statute of limitations would have applied to Kossick's action, had he brought it in admiralty, but that, for some reason, his common law action is to be looked on as an action for breach of contract subject to the state contract statute of limitations but, because the contract allegedly breached was a "maritime" contract, not subject to the state Statute of Frauds. If this is, as Professor Robertson puts it, "a classic application of the reverse-*Erie* interest-balancing process," the process is far too subtle for my poor wits.

Another approach to *Kossick* might be to say that it stands for the proposition that a maritime plaintiff who brings a common law action may, when confronted with inconsistent federal maritime and state common law (or statutory) rules, choose whichever rule is more favorable to his recovery—thus in *Kossick's* case he may choose the maritime rule on the enforceability of oral contracts along with the applicable state statute of limitations. We shall return to this possible explanation presently.

Professor Robertson in his chapters on "The Amphibious Worker" (XII), "Wrongful Death" (XIII), and "Personal Injury" (XIV) stresses the consistency with which the Court, particularly in recent years, has followed the "interest-balancing" analysis. The chief stumbling block in his way is the 1947 case of *Caldarola v. Eckert*,²⁵ which, after a lengthy discussion, he disposes of on the ground that "arguably" the contract involved in *Caldarola* was non-maritime. The contract in

brought in admiralty would have been looked on as a Jones Act action or why, if that is assumed, his action outside the admiralty ceases to be a Jones Act action. Nevertheless, not only does the district court say this and the Second Circuit repeat it, but Justice Harlan (*see* text at note 24 *infra*) seems to assume that it is true. Rightly or wrongly, therefore, the admiralty time-bar is in the case.

²⁴ 365 U.S. at 742.

²⁵ 332 U.S. 155 (1947).

question was the so-called "General Agency" agreement under which, during World War II, private shipping lines operated government-owned vessels as "general agents" of the United States. The closest analogy to the General Agency agreement would seem to be some kind of charter-party, which, everyone would agree, would be "maritime." On the whole, Professor Robertson's suggested *Caldarola* distinction does not persuade me. Closer to the mark, I should think, would be a recognition that the Supreme Court cases from the 1940's through the 1960's simply cannot all be arranged in a logically consistent pattern. Most of the time the Court split five to four. The majority was shifting and unstable. Occasionally (as perhaps in *Caldarola*) the group which was usually in the minority picked up an extra vote and was able to announce "the opinion of the Court." And the group which was usually in the majority seems never to have been firmly enough in control flatly to overrule such uncomfortable precedents as *Caldarola*.

Professor Robertson segregates for discussion in his next-to-last chapter a group of three "Miscellaneous Cases" which, he says, "are perhaps slightly less amenable to the interest-balancing analysis suggested than *Kossick* and the recent personal injury cases."²⁶ In *Levinson v. Deupree*²⁷ it was held that, in an action brought by an administrator of an estate for wrongful death, the federal court sitting in admiralty was not bound by all the "procedural niceties" of state law. The "procedural niceties" would have required the action to be dismissed. The opinion was by Justice Frankfurter for a unanimous Court—one of the few admiralty cases through the entire period from which there was no dissent. In *Maryland Casualty Co. v. Cushing*²⁸ four justices (in an opinion by Justice Frankfurter) thought that the policy of the federal Limited Liability Act required that wrongful death actions brought against a shipowner's casualty insurer, under a Louisiana statute providing for "direct actions" against such insurers, should, the shipowner having petitioned for limitation of liability, be dismissed. Four other justices (in an opinion by Justice Black) thought that the "direct actions" should be allowed to proceed, despite the pendency of the limitation proceeding. Justice Clark thought that the "direct actions," instead of being dismissed, should be stayed until the conclusion of the limitation proceeding and then allowed to proceed. If the Court had divided four to four, the result, by letting stand the disposition of the case in the Circuit Court of Appeals, would have been the one for which the Black group argued. The Frankfurter group therefore reluctantly

²⁶ P. 253.

²⁷ 345 U.S. 648 (1953).

²⁸ 347 U.S. 409 (1954).

joined Justice Clark to provide a majority for reversal. In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*²⁹ it appeared that a houseboat on Lake Texoma (a landlocked artificial lake between Texas and Oklahoma) had been destroyed by fire and also that certain "warranties" in the insurance policy which covered the houseboat had been breached. The breaches of warranty, it was found, were not causally connected with the destruction of the boat. A Texas statute allowed recovery against insurers, despite the breach of warranties, unless it appeared that the breach was causally connected with the loss. Justice Black, speaking for a majority of six, said in effect that there was no rule of maritime law on this issue, that the Court declined to "fashion" such a rule and that, under these circumstances, there was no reason why the Texas statute should not apply. Justices Reed and Burton dissented and so in effect did Justice Frankfurter although he chose to label his separate opinion a concurrence.

I do not entirely understand why Professor Robertson's three "Miscellaneous Cases" do not fit into the interest-balancing analysis, but that may be because I do not understand interest-balancing. I suggested earlier that it is possible to take the *Kossick* case as standing for the proposition that plaintiff, faced with inconsistent federal and state rules, gets the best of both worlds. Our three Miscellaneous Cases seem to dovetail nicely with that explanation of *Kossick*. In *Levinson* the admiralty court was directed to disregard "procedural niceties" of state law which would have barred plaintiff's recovery. In *Cushing* the plaintiffs in the wrongful death action were allowed to bring direct actions against the insurer under the state statute—not, it is true, immediately (as four members of the Court thought they should be able to do) but at least as soon as the limitation proceeding should be concluded. In *Wilburn Boat* plaintiff recovered against the insurer under the state statute even though (as Justice Black put it) there was no established rule of maritime law covering the case or (as everyone else who has written about the case has put it) there was a long established rule of maritime law under which plaintiff could not recover. The principal case which does not fit into this or any other schematic analysis which has so far been proposed is *Caldarola v. Eckert*, previously discussed, in which the New York Court of Appeals was allowed to apply a rule of state law which was fatal to plaintiff's recovery. But if *Caldarola* represents the Court's one serious fall from grace—that is, from consistency—in a quarter of a century, it has done extremely well.

Is there anything to be said for the proposition which I have attributed to the Court in the bulk of its cases since 1940? The proposition

²⁹ 348 U.S. 310 (1954).

is that plaintiff's recovery will be favored and that defenses available either under maritime law or under common law will be cut back if not abolished and that, as between a common law rule and a maritime rule, plaintiff may elect whichever is more favorable to his case. So put, the proposition seems offensive to our ideas of evenhanded justice. The law is no respecter of persons; this is a government not of men but of laws (or, as it is sometimes put, not of laws but of lawyers); it is not only true but right that both rich men and poor men are forbidden to sleep under bridges. However that may be, it can be argued that the most notable feature of our law of civil obligations, alike in contract and in tort, during the past quarter of a century or so has been a dramatic expansion of liability for the consequences of social action. What has been going on within the esoteric confines of the "admiralty and maritime jurisdiction" is very much of a piece with what has been going on across the waterfront. In converting the maritime remedy for unseaworthiness into "a species of liability without fault" in the 1940's the Supreme Court was merely a few years ahead of the state courts which, in the 1950's, converted the manufacturer's liability toward users of his defective products into the same sort of strict or no-fault liability.³⁰ And the extension of the unseaworthiness remedy to harbor workers may be thought to parallel the development in the "products liability" cases under which remote users of a product may bring actions directly against the manufacturers, in tort, thus bypassing the once powerful defenses of "no privity of contract" or "disclaimer of warranty." A hundred years ago our law of civil obligations seems to have been dedicated to the proposition that, ideally, no one should be liable to anyone for anything. Today plaintiffs who have been disappointed in their contractual expectations or who have suffered financial loss or personal injury find themselves traveling a broad, well-paved highway which leads smoothly to the happy hunting ground of damage recoveries generously calculated by sympathetic juries.

There are, of course, those—particularly among our brethren in the field of economics³¹—who deplore these developments and still yearn for the good old ways of the good old days. Nevertheless it is obvious that there has been a reversal in the allocation of risks which seemed to make sense fifty or seventy-five years ago. It may be of some intellectual comfort to us that, at least arguably, the Supreme Court, in carrying

³⁰ On these developments, see *Symposium—Products Liability: Economic Analysis and the Law*, 38 U. CHI. L. REV. 1 (1970). For my own views, see *id.* at 103. In addition to the Chicago symposium, there has been a flood of writing on the "products liability" developments over the past ten years or so.

³¹ See, e.g., McKean, *Products Liability: Trends and Implications*, the principal article in *Symposium, supra* note 30, at 3.

out its constitutional mandate of declaring "the admiralty and maritime jurisdiction," has been, perhaps obscurely, responding to the same forces which have led our courts generally, during the period since World War II, to preside over an astonishing expansion of our theories of civil liability. Exactly what those forces were escapes our contemporary vision; a later generation of historians will solve our puzzles and unriddle our riddles. But I do think that it is possible and helpful to set the problem of what has been going on in the admiralty since the 1940's in the context of the law of civil obligations generally rather than in the narrower context of maritime law itself.

Professor Robertson concludes his book with the suggestion that in the future a greater role should be played both by state rules of substantive law and by the state courts themselves. He picks up a suggestion put forward by Professor Charles Black in 1950³² which was that all maritime personal injury litigation should be handled by the state courts, with the federal admiralty courts retaining an exclusive jurisdiction over "contractual, commercial and property adjustment." "Admiralty and maritime jurisdiction," Professor Robertson comments, "will, it seems clear, eventually become a relatively minor independent ground of federal jurisdiction. . . . Conceptualistic, quasi-religious regard for the sanctity and separateness of the maritime law ought correspondingly to wither. . . . Much of the substantive law applicable in maritime cases could be state law without doing undue damage to general or specific uniformity interests. . . . [T]here is every reason to afford as wide a scope as practicable to state competence in private law matters."³³

These are all arguable, and interesting, points. My own thought is that our course is probably set in the opposite direction and that there is to be an increasing federalization of our private law generally (including our maritime law). So far as the maritime law itself is concerned, the Supreme Court's most recent notable pronouncement in *Moragne v. States Marine Lines, Inc.*³⁴ (decided after Professor Robertson's book had gone to press) suggests an expansive rather than a restrictive approach to admiralty and maritime questions. In *Moragne* the Court was finally scrambling out of the dreadful pit it dug for itself in the infamous series of cases beginning with *The Tungus v. Skovgaard*.³⁵ It is

³² Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950),
³³ P. 283.

³⁴ 398 U.S. 375 (1970).

³⁵ 358 U.S. 588 (1959). Professor Robertson discusses the *Tungus* series in his chapter on recovery for wrongful death (Chapter XIII). The issue was the degree to which state wrongful death statutes were to be "borrowed" to give a cause of action for wrongful death in the light of the holding in *The Harrisburg*, 119 U.S. 199 (1886), that there was no

interesting to note, however, that the solution to the *Tungus* disaster was a federal law solution and that in *Moragne*, for what may have been the first time in many years, the Court was unanimous in a major admiralty decision. *Moragne*, it seems to me, is the most hopeful sign we have yet had that the long controversy is nearing its end—or has perhaps ended.³⁶ Professor Robertson's current events, it may be, have already become history.

action for wrongful death under maritime law. The *Moragne* case overruled *The Harrisburg*, created or "fashioned" a wrongful death cause of action under maritime law and thus abolished the problem which had led the Court to such acrimonious dispute in the *Tungus* series.

³⁶ Another hopeful sign, of somewhat earlier vintage, may have been *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963), in which the Court unexpectedly laid to rest the awful complexities which had been revealed in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959).