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BEYOND THE TIDE: BEGINNING ADMIRALTY WITH *THE STEAMBOAT MAGNOLIA*

JOEL K. GOLDSTEIN*

INTRODUCTION

Admiralty is potentially one of the richest subjects in the law school curriculum. This claim may be received skeptically by those who have neither taught nor taken the course. Yet my experience as a student in, and teacher of, the course confirms my belief that Admiralty holds that promise, especially if it is presented not simply as a vehicle to train the relatively few who hope to become maritime lawyers, but as an opportunity for students with different aspirations to explore some of the most interesting issues in law. As a crosscutting course, Admiralty offers a chance to integrate materials and concepts from other classes, including civil procedure, torts, contracts, property, constitutional law, choice of law, and federal courts. It offers a comparative lens through which to view rules and principles in land law and accordingly achieve a better understanding of doctrine explored in earlier courses. And it provides a venue to consider, in an admiralty context, some of the most interesting questions that arise across the curriculum.[1]

I first reached this surprising conclusion regarding the reach and richness of the subject when I took Admiralty in law school from Professor Donald T. Trautman. He was not an admiralty specialist, but was a leading scholar of conflicts of law with a strong interest in federal common law. He taught Admiralty in the manner here recommended, a statement which inverts cause and effect since his presentation influenced the way I later taught the course, first as an adjunct professor for four years at Washington University School of Law beginning in 1990 while practicing admiralty law, and later at Saint Louis University School of Law when I joined this faculty. The merit of that vision was confirmed each time I taught the subject.

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1. *See* Joel K. Goldstein, *Reconceptualizing Admiralty: A Pedagogical Approach*, 29 J. MAR. L. & COM. 625, 631–35 (1998).

The Steamboat Magnolia[2] was the first case I studied in Professor Trautman's admiralty class and the first case I have always covered whenever I have taught Admiralty. Until the most recent edition,[3] Jo Desha Lucas' admiralty casebook always included a gently edited version,[4] and it was there I first encountered the case, as a student and then as a teacher. To my disappointment, the casebook I co-authored does not include the case, reflecting a choice of some of my eminent co-authors.[5] They presented instead *The Genesee Chief*,[6] a practice that some other leading casebooks also follow.[7] *The Genesee Chief*, also a rich case, preceded *The Steamboat Magnolia*, which relied on Chief Justice Taney's majority opinion.[8] But *The Steamboat Magnolia* includes two lengthy and impassioned dissents and, in my view, for the reasons stated below is a better teaching tool. Accordingly, I supplement the materials our fine book contains by providing the students with a copy of it.

The Steamboat Magnolia furnishes a wonderful springboard for teaching Admiralty as an integrative/crosscutting/comparative/great issues course. It is an uncommonly rich case to teach and one which demonstrates some of the fascination in the study of admiralty law, and of law generally. And if my robust claims for Admiralty are counterintuitive, it may seem even more improbable that a case with the apparently mundane subject of *The Steamboat Magnolia* could deliver so much.

On its face, *The Steamboat Magnolia* seems to raise the most narrow and prosaic of topics, whether admiralty jurisdiction can extend to waters beyond

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

3. *See* JO DESHA LUCAS, ADMIRALTY 18–19 (Univ. Casebook Ser., 5th ed. 2003).

4. *See, e.g.*, JO DESHA LUCAS, ADMIRALTY 5–30 (Univ. Casebook Ser., 1969); JO DESHA LUCAS, ADMIRALTY 5–30 (Univ. Casebook Ser., 2d ed. 1978); JO DESHA LUCAS, ADMIRALTY 5–30 (Univ. Casebook Ser., 3d ed. 1987); JO DESHA LUCAS, ADMIRALTY 4–29 (Univ. Casebook Ser., 4th ed. 1996).

5. *See* ROBERT M. JARVIS, DAVID J. BEDERMAN, JOEL K. GOLDSTEIN & STEVEN R. SWANSON, ADMIRALTY (2004).

6. The Propeller Genesee Chief v. Fitzhugh (The Genesee Chief), 53 U.S. (12 How.) 443 (1851); ROBERT M. JARVIS, DAVID J. BEDERMAN, JOEL K. GOLDSTEIN & STEVEN R. SWANSON, ADMIRALTY 48–53 (2004).

7. *See, e.g.*, NICHOLAS J. HEALY, DAVID J. SHARPE & DAVID B. SHARPE, CASES AND MATERIALS ON ADMIRALTY 14–16, 20–24 (Am. Casebook Ser., 4th ed. 2006) (including a brief excerpt from Justice Daniel's dissent as well as *The Genesee Chief* and other cases); DAVID W. ROBERTSON, STEVEN F. FRIEDELL & MICHAEL F. STURLEY, ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 11–15 (2d ed. 2001) (using *The Genesee Chief*). *But see* 2 ROBERT FORCE, A.N. YIANNOPOULOS & MARTIN DAVIES, ADMIRALTY AND MARITIME LAW 3–13 (2008) (including *The Steamboat Magnolia*); FRANK L. MARAIST, THOMAS C. GALLIGAN, JR. & CATHERINE M. MARAIST, CASES AND MATERIALS ON MARITIME LAW (2d ed. 2009) (including neither case).

8. The Steamboat Magnolia, 61 U.S. (20 How.) 296, 299 (1857) (citing *The Genesee Chief*, 53 U.S. (12 How.) at 444).

the ebb and flow of the tide and within the boundaries of a county. So framed, it is hard to imagine a topic which seems more of a snore. In reality, the case was a battleground for some of the political and jurisprudential ideas that were hotly contested in court in the late 1850s and ultimately resolved on the battlefields a few years later. And it raises a host of questions of much more general interest which mirror some central debates regarding law which command continuing interest. What are the appropriate spheres of state and national control? Of judicial and legislative regulation? Should the Constitution be interpreted in accordance with the apparent intent of its framers or to accommodate changing conditions? What are the advantages and disadvantages of bright line rules and balancing tests? How does social change influence law? How does legal doctrine serve political ends?

I. THE CASE AND ITS CONTEXT

The case arose from a collision on the Alabama River between the Steamboat Magnolia and the Steamboat Wetumpka roughly 200 miles above tidewater.[9] The Wetumpka was navigating up-bound on that river between New Orleans and Montgomery, Alabama; the Magnolia was descending between Montgomery and Mobile, Alabama.[10] The owners of the Wetumpka filed a libel against the Magnolia in the United States District Court of the Middle District of Alabama alleging that it had tortuously collided with, and sunk, their vessel.[11] The claimants to the Magnolia moved to dismiss the case for want of subject matter jurisdiction and the district court granted their motion.[12] Although the reasons for the decision were not stated, presumably it rested upon the arguments presented to the court, namely that the collision occurred within the body of the county and above tidewater.[13] The owners of the Wetumpka appealed.[14]

On the surface, it would be hard to imagine a more bromidic set of issues than those the Supreme Court considered—whether admiralty jurisdiction extended to incidents on navigable rivers within counties of states and beyond tidewaters. The Supreme Court had addressed those issues, in a somewhat meandering, though by 1857, apparently settled path. In *The Steamboat Thomas Jefferson*, the Court, speaking through Justice Joseph Story, had held that cases involving maritime service contracts fell within admiralty jurisdiction only if those agreements were to be "substantially performed . . .

9. *Id.* at 297.
10. *Id.* at 296–97.
11. *Id.* at 296, 297.
12. *Id.* at 297–98.
13. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 298.
14. *Id.* at 296.

upon the sea, or upon waters within the ebb and flow of the tide."[15] Other decisions by the Marshall and Taney Courts followed this doctrine.[16]

Although Justice Story had made clear in *The Thomas Jefferson* that the tidewater concept limited admiralty jurisdiction, he suggested that Congress could extend federal jurisdiction to inland rivers through the Commerce Clause.[17] Political pressure built on Congress to expand admiralty jurisdiction in the 1840s[18] and ultimately it apparently followed Story's suggestion in 1845 when it adopted a statute extending federal jurisdiction to the Great Lakes and the "navigable waters" connecting to them.[19] The statute conferred the same jurisdiction in contract or tort cases on these waters as the federal courts had in cases involving vessels "in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States."[20] Although Congress did not specifically predicate the Great Lakes Act on the Commerce Clause, a number of the important framers of the statute seem to have acted with that power in mind.[21]

In the mid-1840s, the Court continued to invoke the tidewater test even when reaching results which demonstrated some imaginative fact-finding. Most notably, in *Waring v. Clarke*,[22] the Court held that admiralty jurisdiction extended to a collision between two vessels 95 miles north of New Orleans and 200 miles above the mouth of the Mississippi River.[23] The trial court had found that the tide affected the river where the collision occurred;[24] the Supreme Court held that although the tidewater limit applied, admiralty

15. 23 U.S. (10 Wheat.) 428 (1825). *Id.* at 428–29.

16. *See, e.g.*, The Steamboat Orleans v. Phoebus, 36 U.S. (11 Pet.) 175, 182–83 (1837) (using tidewater test to measure admiralty jurisdiction); Peyroux v. Howard, 32 U.S. (7 Pet.) 324, 343 (1833) (applying tidewater test but holding Mississippi River at New Orleans affected by tide).

17. *The Steamboat Thomas Jefferson*, 23 U.S. (10 Wheat.) at 430.

18. *See, e.g.*, 5 CARL B. SWISHER, THE OLIVER WENDELL HOLMES DEVISE: THE TANEY PERIOD 1836–64, at 427–29 (Paul A. Freund ed., 1974) (describing the discontent among ship owners over the lack of federal jurisdiction on rivers and the Great Lakes and their petitions asking for federal rather than state jurisdiction).

19. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (codified as amended at 28 U.S.C. § 1873 (1952)).

20. *Id.* Some suggest Story wrote the statute. *See, e.g.*, SWISHER, *supra* note 18, at 429, 430, 437; The Steamboat Magnolia, 61 U.S. (20 How.) 296, 342 (1857) (Campbell, J., dissenting) (stating Story was reputed to be the author); *see id*. at 315–16 (Daniel, J., dissenting) (noting that "a portion of this court" applied pressure to Congress to make changes).

21. SWISHER, *supra* note 18, at 430–31.

22. 46 U.S. (5 How.) 441 (1847).

23. *Id.* at 451, 464.

24. *See id.* at 450 (noting the trial court overruled the objection to its jurisdiction thereby accepting the argument that the tide ebbed and flowed at the point of the collision).

jurisdiction extended to waters within the body of a county as well as on the seas.[25]

The Court considered the constitutionality of the 1845 Act during its 1851 term in *The Genesee Chief*, a case arising from a collision between a vessel of that name and the Steamboat Cuba on Lake Ontario.[26] The lower federal court found the Genesee Chief at fault; on appeal, the Supreme Court considered whether it had subject matter jurisdiction of the case, a decision which turned on whether the Great Lakes Act was constitutional.[27] The Court held that it was, but not as an exercise of the Commerce power.[28] Instead, Chief Justice Taney wrote an elaborate majority opinion which went beyond the issues the case presented to vindicate an expansive admiralty jurisdiction.[29] Taney reasoned that Congress did not intend to rest the 1845 Act on the Commerce Clause since neither its title nor body evidenced such a disposition.[30] Moreover, Congress could not constitutionally use the Commerce Clause simply to confer jurisdiction which was a constitutional concept distinct from "regulation" of commerce.[31]

The statute was, however, within the meaning of the Admiralty Jurisdiction Clause, Taney concluded.[32] If the case had raised a question of first impression, Taney thought it would be easily resolved in favor of the statute's constitutionality since the Great Lakes were "inland seas" which supported interstate and international commerce similar to that on the oceans.[33] Limiting admiralty jurisdiction to the Atlantic states offended a structural principle implicit in the Constitution of "equal rights among all the states."[34] Logic did not dictate confining admiralty jurisdiction based on the ebb and flow of the tide; such a test was "merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."[35] If a body was "a public navigable water, on which commerce is carried on between different

25. *Id.* at 464.

26. 53 U.S. (12 How.) 443, 450, 451 (1851).

27. *Id.* at 451.

28. *Id.* at 458.

29. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 32 n.99 (Univ. Textbook Ser., 2d ed. 1975) (describing case as decided on "unnecessarily broad grounds"). *See also* DAVID W. ROBERTSON, ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF PROBLEMS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES 112–19 (Univ. Textbook Ser., 1970) (putting *The Genesee Chief* in historical context).

30. *The Genesee Chief*, 53 U.S. (12 How.) at 452.

31. *Id.*

32. *Id.* at 453 (citing U.S. CONST. art. III, § 2).

33. *Id.*

34. *Id.* at 454.

35. *The Genesee Chief*, 53 U.S. (12 How.) at 454.

States or nations, the reason for the jurisdiction is precisely the same."[36] In England, the tidewater test provided a useful surrogate since tidewater and navigability were synonyms, and the same logic fit the circumstances when the Constitution was adopted since all of the states were located on the Atlantic.[37] That reasoning explained the result in *The Thomas Jefferson* and its progeny. When those decisions were rendered, "the great importance of the question as it now presents itself could not be foreseen"; accordingly, "the subject did not therefore receive that deliberate consideration" which it now deserved.[38] Applying the tidewater test in 1851 would be "utterly inadmissible," for it would arbitrarily preclude admiralty jurisdiction from "thousands of miles of public navigable water."[39] Moreover, that definition violated the intent of the founding generation as reflected in the Judiciary Act of 1789, which extended admiralty jurisdiction to navigable waters within counties as well as on the high seas.[40] The Court would feel bound to follow *The Thomas Jefferson* if that case had decided a question of property law upon which others had relied.[41] As a mere jurisdictional decision, it commanded no such respect and must be overruled to avoid "serious public as well as private inconvenience and loss."[42] Only Justice Daniel dissented from the Chief Justice's opinion, and he did so in a two page opinion, relying primarily instead on his earlier pronouncements.[43] In the next reported case, the Court applied *The Genesee Chief's* dicta to a collision on the Mississippi River and summarily held that "the constitutional jurisdiction of the United States in admiralty was not limited by tide-water, but was extended to the lakes and navigable rivers of the United States."[44]

Taney's opinion for the Court in *The Genesee Chief,* as extended, would seem to have resolved the issue. Yet six years later, *The Steamboat Magnolia* brought those issues back to the Supreme Court.[45] And although the Court adhered to the principles in Taney's opinion in *The Genesee Chief*, this time the divisions on the Court were more palpable, not only in the 6–3 decision,[46] but in the number and intensity of opinions. Four justices felt moved to offer sometimes lengthy, and in some instances impassioned, opinions. Justice Grier, who had served on the Court since President James Polk appointed him

36. *Id.*
37. *Id.* at 455.
38. *Id.* at 456.
39. *Id.* at 457.
40. *The Genesee Chief*, (12 How.) at 457.
41. *Id.* at 458.
42. *Id.* at 458–59.
43. *Id.* at 463–65 (Daniel, J., dissenting).
44. Fretz v. Bull, 53 U.S. (12 How.) 466, 468 (1851).
45. 61 U.S. (20 How.) 296 (1857).
46. *Id.* at 303.

in 1846,[47] wrote the majority opinion in which six justices joined.[48] The seventy-two-year-old John McLean, a member of the Court since Andrew Jackson appointed him in 1829,[49] filed a concurrence "to be on one or two points somewhat more explicit" than the Court had been.[50] Justice Peter Daniel, a nominee of President Martin Van Buren,[51] dissented,[52] as did Justice John Campbell,[53] who, as a nominee of President Franklin Pierce, was the junior justice.[54] Justice John Catron, also a Jackson appointee,[55] joined Campbell's dissent.[56]

The intensity of feeling was reflected in the length and tone of the dissenting opinions. Whereas Grier presented the majority opinion in a little more than five pages, and McLean added a four-page concurrence,[57] Daniel filed a fifteen-page dissent dripping with Scalia-esque sarcasm, and Campbell added a twenty-one-page scholarly dissertation.[58] Campbell's closing lines revealed the stakes he perceived in the case and exposed the depth of his feeling. He wrote:

> I consider that the present case carries the jurisdiction to an incalculable extent beyond any other, and all others, that have heretofore been pronounced, and

47. Frank Otto Gatell, *Robert C. Grier*, *in* 2 THE JUSTICES OF THE SUPREME COURT 434, 436 (Leon Friedman & Fred L. Israel eds., rev. ed. 1997).

48. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 297.

49. Frank Otto Gatell, *John McLean*, *in* 1 THE JUSTICES OF THE SUPREME COURT 300, 305 (Leon Friedman & Fred L. Israel eds., rev. ed. 1997).

50. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 303 (McLean, J., concurring).

51. Van Buren nominated Daniel a week before leaving office. JOHN P. FRANK, JUSTICE DANIEL DISSENTING: A BIOGRAPHY OF PETER V. DANIEL, 1784–1860, at 154–55, 160 (1964). He was confirmed on March 2, 1841, a little more than a day before William Henry Harrison took the oath of office. *Id*.

52. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 307 (Daniel, J., dissenting). During his nineteen years on the Court, Daniel never wrote a majority opinion on an admiralty case, almost invariably concluding that admiralty jurisdiction was lacking. *See* FRANK, *supra* note 51, at 182. As Graydon Staring observed, Daniel "fought a losing campaign of vehement dissents . . . to retain the English restriction to tidewater in both tort and contract cases, even seven years after the issue had been conclusively decided otherwise in *The Genesee Chief*." Graydon S. Staring, *The Admiralty Jurisdiction of Torts and Crimes and the Failed Search for its Purposes*, 38 J. MAR. L. & COM. 433, 457–58 (2007).

53. *The Steamboat Magnolia,* 61 U.S. (20 How.) at 322 (Campbell, J., dissenting).

54. William Gillette, *John A. Campbell*, *in* 2 THE JUSTICES OF THE SUPREME COURT, *supra* note 47, at 462, 464. Campbell later became one of six former justices to argue before the Court after serving on it. *See* Charles T. Fenn, Note, *Supreme Court Justices: Arguing Before the Court After Resigning From the Bench,* 84 GEO. L.J. 2473, 2473–74 (1996).

55. Frank Otto Gatell, *John Catron*, *in* 1 THE JUSTICES OF THE SUPREME COURT, *supra* note 49, at 371, 378.

56. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 303.

57. *Id.* at 303–07 (McLean, J., dissenting).

58. *Id.* at 307–22 (Daniel, J., dissenting); *Id.* at 322–43 (Campbell, J., dissenting).

> that it must create a revolution in the admiralty administration of the courts of the United States; that the change will produce heart-burning and discontent, and involve collisions with State Legislatures and State jurisdictions. And, finally, it is a violation of the rights reserved in the Constitution of the United States to the States and the people.[59]

The contemporary observer cannot help but be perplexed that notwithstanding Taney's opinion in *The Genesee Chief,* constitutional issues regarding the tidewater test percolated again to the Court six years later. In part, the return was due to counsel's claim that even if the Constitution allowed admiralty jurisdiction to extend beyond the tidewater, neither the Constitution nor Congress in the 1789 act had so extended it.[60] Moreover, the incongruity may rest in part on the different American legal culture, which existed in the 1850s than that familiar to us now. Daniel Hulsebosch points out that judicial precedent, though important then, did not have the dominant status among sources of law that it later achieved following the advent of the case method by Christopher Columbus Langdell after the Civil War.[61] In any event, the return of the issue six years later, and the passions it aroused as reflected in the opinions, suggested something more was at stake than the simple issue ostensibly before the Court.

II. THEMES AND TEACHING OPPORTUNITIES IN *THE STEAMBOAT MAGNOLIA*

The issues upon which the outcome in *The Steamboat Magnolia* pivoted become anything but banal once the consequences of the dispute and the underlying jurisprudential assumptions are exposed. Moreover, the case raises enduring issues in law, which recur in admiralty and elsewhere. Although Taney's opinion in *The Genesee Chief* provided much of the basis for what Justices Grier and McLean wrote, the presence of two lengthy and impassioned dissents in *The Steamboat Magnolia*, compared to Justice Daniel's terse protest in the earlier case, makes *The Steamboat Magnolia*, in my view, the superior teaching vehicle. The remainder of this essay identifies some of the themes that the case may helpfully be used to suggest.

A. Purposive vs. Positivistic Visions of Law

The clash between Justices Grier and McLean on the one hand, and Justices Daniel and Campbell on the other, turned on their different visions of the nature of law. Grier and McLean thought law needed to be shaped in accordance with its underlying purposes. Although Grier made this argument succinctly by relying on language from the Court's decision in *The Genesee*

59. *Id.* at 342–43 (Campbell, J., dissenting).

60. ROBERTSON, *supra* note 29, at 116–17.

61. Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 CARDOZO L. REV. 1049, 1063–64 (2002).

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Chief,[62] McLean emphasized it in his concurring opinion. In England, he wrote, the ebb and flow of the tide was synonymous with navigability, and that rule had been applied initially in the United States, where navigability of the rivers which flowed into the Atlantic were similarly constrained.[63] Yet the tidewater rule had also been applied to America's western rivers, as judges deferred to "an established rule where the reason or necessity on which it was founded fails."[64] The rule made sense in England, and in the Atlantic states where "the ebb and flow of the tide marked the extent of the navigableness of rivers."[65] Inasmuch as "the navigability of our Western rivers in no instance depends upon the tide," the rule was applied unreasonably in that new context.[66]

The dissenters proceeded from a different premise. They understood law in more positivistic terms.[67] Law was law, whether reasonable or not. Justice Daniel, for instance, pointed to venerable English laws, which excluded admiralty jurisdiction from the "realm" or within "the bodies of the counties," and confined it to waters affected by the ebb and flow of the tide.[68] That was

62. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 299 ("In the case of the Genesee Chief, we have decided, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tide-water and navigable water were synonymous terms, yet that 'there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason—and, indeed, contrary to it.'") (internal citation omitted).

63. *Id.* at 303 (McLean, J., concurring).

64. *Id.*

65. *Id.*

66. *Id.* at 300–02 (majority opinion); *see also id.* at 303–05 (McLean, J., concurring). *See also* The Genesee Chief, 53 U.S. (12 How.) 443, 453–54 (1851) ("If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting waters were embraced in them. These lakes are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes. There is an equal necessity for the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other."); *Id*. at 456–57 ("But [Waring v. Clarke] showed the unreasonableness of giving a construction to the Constitution which would measure the jurisdiction of the admiralty by the tide.").

67. *See The Steamboat Magnolia*, 61 U.S. (20 How.) at 308 (Daniel, J., dissenting) (noting that the court must resist expanding the admiralty jurisdiction as incompatible with our lawful guarantees and proceeding to examine the previous cases before the court).

68. *Id.* at 312 (original emphasis omitted).

the admiralty law "at the period of separation from the American colonies," and the "admiralty law of England, according to every accurate test, was the admiralty law of the United States at the period of the adoption of the Constitution,"[69] a claim Daniel repeated at every opportunity.[70] That law had been followed by the Court's early precedents.[71]

Justice Campbell also embraced a similar conception of law. He traced the development and limitations on admiralty jurisdiction in Great Britain, which were incorporated in the North American settlements.[72] To Campbell, the appropriate question was "how would a case like that before this court have been decided in England, either at the period of the Declaration of Independence, or at the adoption of the Constitution of the United States, in the court of admiralty?"[73] His lengthy analysis makes clear his view that the jurisdiction the Court recognized in *The Steamboat Magnolia* was well beyond constitutional bounds and antithetical to the principles which animated the Declaration of Independence and the Constitution.

B. Living Law vs. Originalism

The four opinions present an impassioned dispute regarding the relative merits of the competing methods of constitutional interpretation. Although the names of the proponents differ, the arguments resemble those in contemporary opinions.

In *The Genesee Chief*, Chief Justice Taney had rejected the tidewater test based on living constitutionalism premises,[74] and the majority opinion rested in part on the need for law to accommodate changing exigencies. Two developments in particular made the tidewater test obsolete. America had expanded geographically to include the network of inland rivers.[75] Moreover, technological advances, principally the invention of the steamship, made commercial navigation on those rivers possible and advantageous.[76]

69. *Id.* at 312–13.

70. *See, e.g.*, *id.* at 313 ("Under such a state of the admiralty law, conceded to be the law of England, and as I contend, the law of the United States, . . .").

71. *Id.* at 313–15.

72. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 323–27 (Campbell, J., dissenting).

73. *Id.* at 327.

74. 53 U.S. (12 How.) 443, 451 (1851) ("The language and decision of this court, whenever a question of admiralty jurisdiction had come before it, seemed to imply that under the Constitution of the United States, the jurisdiction was confined to tide-waters. Yet the conviction that this definition of admiralty powers was narrower than the Constitution contemplated, has been growing stronger every day with the growing commerce on the lakes and navigable rivers of the western States.").

75. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 301.

76. *Id.* ("When these States were colonies, and for a long time after the adoption of the Constitution of the United States, the shores of the great lakes of the North, above and beyond the ocean tides, were as yet almost uninhabited, except by savages. The necessities of commerce and

Justice McLean espoused a version of the living law. He discounted concerns that an expanded admiralty jurisdiction in the west would be inimical to the "wishes and interests" of people in that region by noting its beneficent execution in the east.[77] "Experience is a better rule of judgment than theory," he observed, and accordingly the successful use of admiralty in the east commended its extension.[78]

Yet his strongest invocation of living law occurred in his concluding paragraph:

> Antiquity has its charms, as it is rarely found in the common walks of professional life; but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; and this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge.[79]

It was more instructive to study law's "present adaptations to human concerns, than to trace it back to its beginnings."[80]

Justice Daniel rejected any notion of a living constitution. Judges were not licensed to interpret the Constitution to accommodate changed circumstances, a process he characterized as stretching the Constitution "by any application of judicial torture, to cover any such exigency, either real or supposed."[81] Indeed, he likened the majority opinion in *The Steamboat Magnolia* to Chief Justice Marshall's statement of living constitutionalism in *McCulloch v. Maryland*,[82] an exposition that has now, of course, achieved canonical status. Daniel clearly did not appreciate Marshall's commitment to living constitutionalism in *McCulloch* but suggested that the majority's approach in *The Steamboat Magnolia* might be even more egregious.[83]

Instead, the dissenters insisted that justices were bound to adhere to the Constitution's original meaning. Justice Daniel denied that the meaning of the

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the progress of steam navigation had not as yet called for the exercise of admiralty jurisdiction, except on the ocean border of the Atlantic States.").

77. *Id.* at 305 (McLean, J., concurring).

78. *Id.*

79. *Id.* at 307.

80. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 307 (McLean, J., concurring).

81. *Id.* at 319 (Daniel, J., dissenting).

82. 17 U.S. (4 Wheat.) 316, 415 (1819).

83. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 319 (Daniel, J., dissenting) ("This argument forcibly revives the recollection of the interpretation of the phrase 'necessary and proper,' once ingeniously and strenuously wielded to prove that a bank, incorporated with every faculty and attribute of such an institution, was not in reality, nor was designed to be, a *bank*; but was essentially an agent, an indispensable agent, in the administration of the Federal Government. And with reference to this doctrine of necessity, or propriety, or convenience, it may here be remarked, that it is as gratuitous and as much out of place with respect to the admiralty jurisdiction, as it was with respect to the Bank of the United States—perhaps still more so.").

Constitution could adapt to changing exigencies.[84] Justice Campbell contended "with perfect safety" that not a single maker or ratifier of the Constitution would have thought admiralty jurisdiction extended to the case.[85] That being so, "no change in the opinion of men, nor in the condition of the country, nor any apparent expediency, can render that constitutional which those who made the Constitution did not design to be so."[86] Justice Campbell supported his originalist methodology with the language from Chief Justice Taney's recent majority opinion in *Scott v. Sandford*:

> If any of the provisions of the Constitution are deemed unjust . . . there is a mode prescribed in the instrument itself by which it may be amended; but, while it remains unaltered, it must be construed as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning, and delegates the same powers to the Government, and secures the same rights and privileges to the citizen; and as long as it continues to exist in its present form, it speaks not only in the same words, but with the same meaning with which it spake when it came from the hands of its framers, and was voted on and adopted by the people of the United States.[87]

C. Judicial Usurpation of Power

Justices Grier and McLean viewed their opinions as applying reason and constitutional principles as articulated in *The Genesee Chief* to changing circumstances. Justice Daniel, however, regarded the Court's decision quite differently. Far from an appropriate effort to accommodate reason and changed conditions, he characterized the Court's interpretation as an instance of judicial overreaching.[88] The tidewater limit was consistent with a view of government "based, in theory at any rate, upon restricted and exactly-defined

84. *Id.* at 318–19 ("And this inquiry, therefore, forces itself upon us, viz:, if the system was thus limited, and was known to be so by the framers of the Constitution, and if this instrument was designed to be applicable to the existing state of things, and was complete in itself, in all its delegations of and restrictions upon power, where is to be sought the right or power to enlarge or to diminish the effect or meaning of the instrument to make it commensurate with a predicament or state of things not merely not existing when the Constitution was framed, but which was not even within the contemplation of those by whom it was created? Such a power could not exist in the legislature, the only branch of the Government on which anything like a faculty to originate measures was conferred; much less could it be claimed by functionaries who have not, and rightfully cannot have, any creative faculties, but whose capacities and duties are restricted to an interpretation of the Constitution and laws as they should have been fairly expounded at the times of their enactment.").

85. *Id.* at 334 (Campbell, J., dissenting).

86. *Id.*

87. *Id.* (quoting Scott v. Sandford (The Dred Scott Case), 60 U.S. (19 How.) 393, 426 (1857)).

88. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 307–08 (Daniel, J., dissenting).

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delegations of power only,"[89] he claimed. *The Genesee Chief*, which six years earlier had rejected the tidewater test, was "more remarkable and more startling as an assumption of judicial power than any which the judicial history of the country has hitherto disclosed, prior to the case now under consideration."[90] Its decisions were "the most startling and dangerous innovations, anterior to that decision, ever attempted upon the powers and rights of internal government appertaining to the States."[91]

The Court's abandonment of the tidewater test, Justice Daniel insisted, constituted a usurpation of power.[92] That test was part of the original understanding. If changed circumstances made it obsolete, the remedy was to amend the Constitution, not to cure the defect through judicial interpretation.[93]

89. *Id.* at 315.

90. *Id.* at 312.

91. *Id.* at 317.

92. *Id.* at 307–08.

93. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 317–19 (Daniel, J., dissenting) ("If the experience of a pretty long official life had not familiarized me with instances, unhappily not a few, in which the meaning and objects of the Constitution and the just influence of the actually surrounding condition of the country when that instrument was framed have been lost sight of or made to yield to some prevailing vogue of the times, I confess that some surprise would have been felt at the seeming forgetfulness of the court in giving utterance to the expressions above quoted, of the facts, that when the Constitution was adopted, there was no such navigation as that on the Mississippi then known—no such river was then possessed by the United States; that the Constitution was formed by, and for, a coexisting political and civil association; was designed to be adapted to that state of things; and was in itself complete, and fully adapted to the ends and subjects to which it was intended to be applied. And but for the reason or the examples above referred to, the greater surprise would have been awakened by the disregard manifested, in the reasoning of the court, to this great fundamental principle of republican government, that if the Constitution was, at the period of its adoption, or has since, by the mutations of time and events, become inadequate to accomplish the objects of its creation, it belongs exclusively to those who formed it, and in whom resides the right to alter or abolished, to remedy its defects. No such power can exist with those who are the creatures of the Constitution, clothed with the humbler office of executing the provisions of that instrument. Suppose, at the time of its adoption, the Constitution was universally believed to be defective, in many respects essentially defective, would such a conviction have rendered it less the Constitution? Would it have lessened in any degree the obligation of obedience to it, or changed the power whence a remedy for its defects was to be derived? Could the judiciary, without usurpation, have essayed such a remedy? It is conceded by the court, that at the time of forming the Constitution the admiralty jurisprudence of England was the only system known and practiced in this country; it is admitted, also, that the English system was limited in theory and practice to the ebb and flow of the tide. It is further admitted, that at the time the Constitution was adopted, and our courts of admiralty went into operation, the definition which had been adopted in England was equally proper here. These admissions form a virtual surrender of anything like a foundation on which the decision of the court could be rested, either in the case of the Genesee Chief or in this case depending on that alone. For, if it be admitted that at the time of the adoption of the Constitution the admiralty rule in England limited the jurisdiction to tide-waters, and that the same rule was adopted and was proper here, it follows, by inevitable induction, that the jurisdiction intended to be created by the

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Justice Daniel made manifest the intensity of his feeling by repetition of the point and the Scalia-like sarcasm that colored his expression.[94]

D. Bright Line Rules vs. Principles

The opinions also presented a contest between formalism and functionalism. Justice Daniel viewed the Constitution as prescribing bright line rules to limit governmental power.[95] He argued that the tidewater and county rules provided clear guidance whereas navigability, the test the majority followed, was "vague and arbitrary, and tending inevitably to confusion and conflict" and a standard which would be "a prolific source of uncertainty, of contestation and expense."[96] He mocked the Court for abandoning these rules

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Constitution was that which was the only one then known, and which, in the language of this court, was *then proper here*, (as the Constitution cannot be supposed to establish anything unauthorized or improper,) and necessarily was complete, and adapted to the existing state of things. And this inquiry, therefore, forces itself upon us, viz: if the system was thus limited, and was known to be so by the framers of the Constitution, and if this instrument was designed to be applicable to the existing state of things, and was complete in itself, in all its delegations of and restrictions upon power, where is to be sought the right or power to enlarge or to diminish the effect or meaning of the instrument to make it commensurate with a predicament or state of things not merely not existing when the Constitution was framed, but which was not even within the contemplation of those by whom it was created? Such a power could not exist in the legislature, the only branch of the Government on which anything like a faculty to originate measures was conferred; much less could it be claimed by functionaries who have not, and rightfully cannot have, any creative faculties, but whose capacities and duties are restricted to an interpretation of the Constitution and laws as they should have been fairly expounded at the times of their enactment.").

94. *See id.* at 319 ("Such is the argument of the court, and, correctly interpreted, it amounts to this: The Constitution, which at its adoption suited perfectly well the situation of the country, and which *then* was unquestionably of supreme authority, we now adjudge to have become unequal to the exigencies of the times; it must therefore be substituted by something more efficient; and as the people, and the States, and the Federal Legislature, are tardy or delinquent in making this substitution, the duty or the credit of this beneficent work must be devolved upon the judiciary.").

95. *See id.* at 315 (describing the Constitution as creating a national government based on "restricted and exactly-defined delegations of power only").

96. *Id.* at 320 ("For this plain and rational test, this court now attempts to substitute one in its nature vague and arbitrary, and tending inevitably to confusion and conflict. It is now affirmed, that the jurisdiction and powers of the admiralty extend to all waters that are navigable within or without the territory of a State. In quest of certainty, under this new doctrine, the inquiry is naturally suggested, what are navigable waters? Will it be proper to adopt, in the interpretation of this phrase, an etymological derivation from navis, and to designate, as navigable waters, those only on whose bosoms-ships and navies can be floated? Shall it embrace waters on which sloops and shallops, or what are generally termed river craft, can swim; or shall it be extended to any water on which a batteau or a pirogue can be floated? These are all, at any rate, practicable waters, navigable in a certain sense. If any point between the extremes just mentioned is to be taken, there is at once opened a prolific source of uncertainty, of contestation and expense.").

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"in this age of progress."[97] The majority, of course, thought navigability better served the purposes of admiralty jurisdiction.[98] Rules should not be followed if their animating reason did not apply.

E. Federalism

The *Steamboat Magnolia* brings into clear focus the issues relating to national versus state power, which dominated discussions in the period before the Civil War. The debate over the proper scope of admiralty jurisdiction was a major battleground between those who thought an expanded admiralty jurisdiction would further national economic development and those who saw it as an intrusion on state authority.[99] As Preble Stolz pointed out, during the early years of the nineteenth century, "federal admiralty jurisdiction could be legally conceived as coextensive with federal power over commerce," and accordingly cases regarding the admiralty jurisdiction clause potentially implicated the definition of Congress's commerce power.[100] At a time when these issues divided the nation as the Civil War approached, *The Steamboat Magnolia* recognized a new doctrine which allowed federal judges greater power to decide cases involving a major aspect of commercial life.

The dissenters saw the expansion of admiralty jurisdiction as an aggrandizement of the power of the federal government, and one which would have fateful results. Extension of admiralty jurisdiction would send federalism cascading down a very slippery slope. Justice Daniel predicted:

> Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these watercourses, which is not liable to be arrested on its way to the next market town by the high admiralty power, . . .[101]

97. *Id.* at 316 (emphasis omitted).

98. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 302 (majority opinion).

99. *See* Robert Force, *Choice of Law in Admiralty Cases: "National Interests" and the Admiralty Clause*, 75 TUL. L. REV. 1421, 1430 (2001).

100. Preble Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 CALIF. L. REV. 661, 675 (1963).

101. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 320–21 (Daniel, J., dissenting) ("Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these watercourses, which is not liable to be arrested on its way to the next market town by the high admiralty power, with all its parade of appendages; and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.").

Some of the rhetoric in Justice Daniel's opinion foreshadowed arguments of subsequent Commerce Clause cases imagining a parade of horribles from the expansion of federal power.[102] Daniel condemned "these claims to an all-controlling central power," which were inimical to the preservation of State government.[103]

Justice Campbell was equally vociferous in denouncing this perceived assault on principles of federalism and the deleterious consequences that would flow from it. A federal judge, "deriving his appointment from an independent Government" would decide cases based on general maritime law, which states could not modify.[104] The logic of the Court's decision would subject all cases involving interstate or intrastate transportation of persons or property to the jurisdiction of federal courts. Campbell viewed such an outcome as contrary to basic democratic principles since, in his view, a judge representing a different sovereign would decide matters based on a law that the people of the state could not shape.[105]

102. *See, e.g.*, NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58, 94–95 (1937) (McReynolds, J., dissenting) ("Manifestly that view of Congressional power would extend it into almost every field of human industry. With striking lucidity, fifty years ago, Kidd v. Pearson, 128 U.S. 1, 21, declared: 'If it be held that the term [commerce with foreign nations and among the several states] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry.'").

103. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 321 (Daniel, J., dissenting).

104. *Id.* at 341 (Campbell, J., dissenting).

105. *Id.* ("A single judge, deriving his appointment from an independent Government, administers in that court a code which a Federal judge has described as 'resting upon the general principles of maritime law, and that it is not competent to the States, by any local legislation, to enlarge, or limit, or narrow it.' (2 Story R., 456.) If the principle of this decree is carried to its logical extent, all cases arising in the transportation of property or persons from the towns and landing-places of the different States, to other towns and landing-places, whether in or out of the State; all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, in either; all cases of supply to those engaged in the navigation, not to enumerate others, will be cognizable in the District Courts of the United States. If the dogma of judges in regard to the system of laws to be administered prevails, then this, whole class of cases may be drawn ad aliud examen, and placed under the dominion of a foreign code, *whether they arise among citizens or others*. The States are deprived of the power to mould their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged—abridged to the precise extent, that a judge appointed by another Government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State.").

F. Admiralty vs. Common Law

The case also juxtaposed the claims to admiralty jurisdiction as against those of common law courts. Justice Daniel, who routinely opposed assertions of admiralty jurisdiction, saw *The Steamboat Magnolia* as the most recent in a pattern of intruding into the domain of common law courts.[106] He decried "the claims advanced for the admiralty power, in its constant attempts at encroachment upon the principles and genius of the common law, and of our republican and peculiar institutions, . . ."[107] Daniel's point signals the existence of a jury/nonjury tension associated with the existence of admiralty courts in addition to the federalism vector.

G. Equal Treatment

The majority defended its result, in part, based on the argument that it would vindicate a basic principle of the Constitution, conferring "perfect equality in the rights and privileges of the citizens of the different States, not only in the laws of the General Government, but in the mode of administering them."[108] It would violate one of the "first principles" of the Union to make admiralty jurisdiction along the eastern seaboard but not to the inland states adjacent to the inland rivers.[109] The argument was not original to Justice Grier. In fact, he borrowed heavily from the more elaborate argument Chief Justice Taney had offered six years earlier in *The Genesee Chief*.[110] Justice Daniel

106. *Id.* at 311–12 (Daniel, J., dissenting).

107. *Id.* at 311. *See also id.* at 322 (Campbell, J., dissenting) ("That this court has assumed a jurisdiction over a case only cognizable at the common law, and triable by a jury.").

108. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 302 (majority opinion).

109. *Id.*

110. The Genesee Chief, 53 U.S. (12 How.) 443, 454 (1851) ("Again. The union is formed upon the basis of equal rights among all the States. Courts of admiralty have been found necessary in all commercial countries, not only for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin, but also to administer the laws of nations in a season of war, and to determine the validity of captures and questions of prize or no prize in a judicial proceeding. And it would be contrary to the first principles on which the Union was formed to confine these rights to the States bordering on the Atlantic, and to the tide-water rivers connected with it, and to deny them to the citizens who border on the lakes, and the great navigable streams which flow through the western States. Certainly such was not the intention of the framers of the Constitution; and if such be the construction finally given to it by this court, it must necessarily produce great public inconvenience, and at the same time fail to accomplish one of the great objects of the framers of the Constitution: that is, a perfect equality in the rights and the privileges of the citizens of the different States; not only in the laws of the general government, but in the mode of administering them. That equality does not exist, if the commerce on the lakes and on the navigable waters of the West are denied the benefits of the same courts and the same jurisdiction for its protection which the Constitution secures to the States bordering on the Atlantic.").

dismissed this argument as irrelevant.[111] The irony, of course, was that the Court celebrated this ideal of state equality, which Chief Justice Taney and his colleagues found in the structure of the Constitution, when, only a year earlier, the Court had been unable to find any equality principle which could allow an African American to be a citizen.[112]

H. The Impact of Changed Circumstance on Law

As previously mentioned, the issue in *The Steamboat Magnolia* arose due to two different types of changed circumstances—territorial expansion and technological change.[113] The former added the inland river system of the western states on which admiralty jurisdiction would not apply under the tidewater and not-in-the-county tests. The latter brought the steamboat, which made commercial navigation on the rivers possible as vessels could now operate commercially into, as well as with, the current. As such, the case presents an opportunity to explore two recurring themes in law—the way that demographic and scientific change present new challenges for law and put pressure on prevailing doctrine.

The dissenters were not eager to embrace this change. On the contrary, they were anxious to deploy law to preserve a Jeffersonian vision of the nineteenth century. Daniel's biographer, John P. Frank, called him a more loyal adherent to Jeffersonian principles than Jefferson himself, "an intransigent, indefatigable, stubborn outpost of eighteenth century thought in nineteenth century United States."[114]

I. Law in Context

Cases in law school are typically arranged and presented based on conceptual categories. That organization and treatment often hides the historical context in which cases arise in two respects. Not only may that

111. *The Steamboat Magnolia*, 61 U.S. (20 How.) at 321 (Daniel, J., dissenting) ("Not the least curious circumstance marking this course, is the assertion, that it produces equality amongst all the citizens of the United States. Equality it may be, but it is equality of subjection to an unknown and unlimited discretion, in lieu of allegiance to defined and legitimate authority.").

112. Scott v. Sandford (The Dred Scott Case), 60 U.S. (19 How.) 393, 406 (1856).

113. *See generally* Milton Conover, *Geography and Industry in the Development of Admiralty and Maritime Jurisdiction*, 27 BROOK. L. REV. 273 (1961) (discussing how exploration of America's rivers and lakes in the years following the Judiciary Act of 1789 highlighted the inadequacy of the old English definition and how that inadequacy was compounded by the growing importance of nagivation with advancements in science and industry). *See also* Milton Conover, *The Abandonment of the "Tidewater" Concept of Admiralty Jurisdiction in the United States*, 38 OR. L. REV. 34, 53 (1958) (calling *The Genesee Chief* "a bright page in our jurisprudence in that it demonstrates the ability of the law to adjust to political and economic growth").

114. *See* FRANK, *supra* note 51, at viii.

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approach obscure the way in which doctrine evolves from case to case over time, but an arrangement that lifts a case from the era in which it was decided may imply that topic is a more relevant category than time. Yet history also has its claims and decisions turn on surrounding societal events, the composition of the Court, and the other matters the justices are contemporaneously considering.

The *Steamboat Magnolia* presents a compelling reminder that law, even admiralty law, occurs in a larger historical context, which shapes disputes and decisions. Although students (and their teachers) often seem to assume that cases exist only in the artifical context of the surrounding pages of the casebook, history provides a more relevant backdrop. *The Steamboat Magnolia* arose only a few years before the Civil War and was decided thirteen months after *Scott v. Sandford*, a connection which Justice Campbell's citation helps make.[115] The jurisprudential debates regarding methods of constitutional interpretation, federalism, and judicial role become more vivid and consequential when students locate this collision case in the period in which it found its way onto the Court's docket. The events of the era added passion to the issues over which the justices sparred in *The Steamboat Magnolia*.

J. The Role of Mistake in Shaping Law

Law, even good law, sometimes rests on mistaken assumptions. That was certainly true in *The Steamboat Magnolia*.

Even recognizing the difficulty of attributing intent to a legislative body, Taney's argument that the Great Lakes Act rested on the Admiralty Jurisdiction Clause, not the Commerce Clause, seems dubious.[116] Recognizing an expanded Commerce Clause presented perils, particularly to those concerned that Congress might use a more robust Commerce Clause to regulate or prohibit slave trade.[117] Resting the Act on a jurisdictional clause seemed less likely to court that perceived danger.[118]

Moreover, the assumption that the tidewater test in England was a surrogate for navigability was wrong. On the contrary, English jurists did not view the two terms as synonyms[119] nor did all early American authorities.[120]

115. 61 U.S. (20 How.) at 334 (Campbell, J., dissenting).

116. *See* SWISHER, *supra* note 18, at 430–31 (noting that Story did not indicate which clause supported the bill and did not specifically identify the Admiralty Clause as a source of authority); Hulsebosch, *supra* note 61, at 1099. *Cf.* ROBERTSON, *supra* note 29, at 113 (suggesting the possibility of invoking federal question jurisdiction).

117. Hulsebosch, *supra* note 61, at 1099.

118. *Id.* at 1099, 1104–05; Stolz, *supra* note 100, at 682.

119. Hulsebosch, *supra* note 61, at 1079.

120. *Id.* at 1082. Chancellor Kent did equate them and his influence explained why many American lawyers erroneously thought tidal and navigable were equivalent terms in England. *Id.* at 1083–84, 1090.

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Ultimately, the precarious quality of some of its foundation does not undermine the contribution made by the opinions of Grier and McLean in *The Steamboat Magnolia* and of Taney in *The Genesee Chief*. They believed that rules should be applied in harmony with their purposes. And they established a more comprehensive admiralty jurisdiction, which could handle disputes on the inland rivers and lakes as well as the oceans.

CONCLUSION

The Steamboat Magnolia put to rest judicial controversy over whether admiralty jurisdiction extended beyond the ebb and flow of the tide and within the bounds of a county.[121] Yet many of the issues its opinions considered, explicitly or implicitly, continue to dominate discussions of law more than a century and a half later. Modern discussions over the propriety and scope of federal common law, in admiralty as well as elsewhere, were foreshadowed there.[122] So were issues which have larger import, such as whether the Constitution should be viewed as "living" or based on the intent of its framers, whether rules are preferable to balancing tests, and whether it is more important that law be certain or reasoned.

The *Steamboat Magnolia* thus illustrates that Admiralty is not simply about passing agreements, perils of the sea, and the ebb and flow of the tide. It is also about federalism, separation of powers, theories of constitutional interpretation, and larger jurisprudential and legal process issues relating to the very nature of law. It presents these issues through opinions which rest on premises and which advance competing visions. *The Steamboat Magnolia* alerts the admiralty student that he or she is about to navigate on an exciting journey.

That's why I begin my admiralty journey with *The Steamboat Magnolia*.

121. David J. Bederman, *Admiralty Jurisdiction*, 31 J. MAR. L. & COM. 189, 194 (2000) ("Not even today's most vociferous critics of admiralty jurisdiction can find fault in this momentous decision.").

122. *See, e.g.*, Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 ST. LOUIS U. L.J. 1367, 1368 (1999).