A TERRITORIAL SEA CHANGE:  
THE DEATH ON THE HIGH SEAS ACT AND 
THE EXTENSION OF THE TERRITORIAL SEA  

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In March 2011, the Ninth Circuit ruled that the Death on the High Seas Act provides the exclusive remedy for deaths occurring both within the United States’ territorial sea and without the states’ traditional three-mile territorial boundaries. This ruling created a split with the Second Circuit, which had handed down a different interpretation of the Act eleven years earlier.

Prior to President Ronald Reagan’s extension of the territorial sea of the United States in 1988, there was no issue regarding the operation of the Death on the High Seas Act because the statute’s three-mile scope and the nation’s boundaries were coextensive. The extension, coupled with U.S. Supreme Court deliberation over maritime wrongful death actions, created a “perfect storm” around the Act’s territorial purview, raising issues of statutory construction, preemption, and federal-state comity.

This Note examines the significant issues relevant to the Act’s application. It reviews the chief arguments proffered by the Ninth and Second Circuits, including then-Judge Sonia Sotomayor’s dissent in the latter case. The Note next considers the Second Circuit’s problematic holding and parses the opinion’s persistent contradictions and inconsistencies. It then explores recent congressional action that further bolsters the arguments against the Second Circuit’s position. The Note concludes that, absent congressional action, the Second Circuit must reconsider its holding when it next hears the issue.

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INTRODUCTION

Few people wondered at the close of the movie Titanic whether Jack Dawson’s family would be able to bring a wrongful death action to recover damages for his death. For those who did, this Note may provide some insight. In 1912, when the Titanic sank, the U.S. Supreme Court’s rule was that no action would lie under the common law for a death at sea, absent a state statute providing a remedy. In response, courts applied state death statutes to deaths occurring on both state and non-sovereign waters, with varying results. Such was the state of the law in 1912 when Rose finally “let go” of Jack’s hand. And so, of those who brought actions in the wake of the Titanic, it was said in 1914 that “they are making a desperate attempt to get some recovery, but so far without success.”

In 1920, Congress passed the Death on the High Seas Act (DOHSA), finally establishing a statutory wrongful death action for deaths occurring on the high seas. The Act applied to deaths occurring “on the high seas beyond a marine league from the shore of any State.” A marine league is equal to approximately three nautical miles. One nautical mile is equal to 1.15 land miles. In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800), 209 F.3d 200, 201 n.1 (2d Cir. 2000). Because of their rough equivalencies, this Note will employ “one marine league,” “three nautical miles,” and “three miles” interchangeably, notwithstanding when one’s usage is preferred for clarity.

In subsequent
decisions, the Court grappled with preemption issues involving DOHSA, state law, and common law remedies.\textsuperscript{9}

The present issue arises from President Ronald Reagan’s 1988 extension of the United States’ territorial sea from three to twelve miles.\textsuperscript{10} This extension created a nine-mile zone of federal territorial waters that had not previously existed. Although DOHSA provides a right of action for deaths occurring on the “high seas beyond a marine league,” territorial waters are not considered “high seas” under today’s commonly accepted definition.\textsuperscript{11} Did the Proclamation, therefore, have the effect of moving DOHSA’s territorial starting point to twelve miles from shore? Or was it the DOHSA Congress’s intent to permanently fix DOHSA’s starting point at three miles? The Second and Ninth Circuits have split over this question.

This Note proceeds in three parts. Part I addresses the history of wrongful death actions in American maritime law, including DOHSA and developments in maritime law relevant to its application. Part II examines the critical arguments behind the Second and Ninth Circuits’ interpretations of DOHSA since Proclamation 5928. Part III questions the Second Circuit’s more problematic arguments and suggests that its holding is no longer tenable due to recent developments in the law.

I. A HISTORY OF MARITIME WRONGFUL DEATH ACTIONS IN AMERICA AND RELEVANT DEVELOPMENTS IN MARITIME LAW

This part begins with a short introduction into the pertinent law, and then proceeds chronologically through the history of wrongful death actions pertaining to deaths at sea.

A. Pre-DOHSA Maritime Law and Wrongful Death Actions

1. Maritime Law

Maritime law is one of the oldest legal subjects in existence today, tracing its roots to prehistoric times.\textsuperscript{12} Specifically, maritime law refers to “the entire body of laws, rules, legal concepts and processes that relate to the use of marine resources, ocean commerce, and navigation.”\textsuperscript{13}
Admiralty and maritime jurisdiction in the United States is established in
the Constitution: “The judicial Power shall extend . . . to all Cases of
admiralty and maritime Jurisdiction.” Federal district courts today have
original jurisdiction over admiralty cases, but if the claimant is entitled to a
remedy granted by the state, the “saving to suitors” clause reserves the
claimant’s right to bring a cause of action sounding in admiralty in a state
court.

Deaths at sea may give rise to two distinct types of legal actions. A
wrongful death action allows the victim’s dependents “to recover for the
harms the dependents personally suffered as a result of the death.” In
contrast, a survival action allows the victim’s estate to recover for damages
the victim would have been able to seek but for his death. Summarily, a
wrongful death action is personal to the dependent, whereas a survival
action is not. Recovery in wrongful death actions may be for loss of
support or consortium, while survival action recovery may be for the
victim’s pain and suffering.

2. The Harrisburg

Any discussion of wrongful death actions pertaining to death at sea
invariably begins with the seminal 1886 Supreme Court case, The
Harrisburg. In May 1877, the Philadelphian steamer Harrisburg and the
schooner Marietta Tilton collided in Massachusetts state waters. Six
members of the schooner’s crew, including the first mate, perished in the
collision. Five years later, the widow and child of the deceased first mate
filed suit “to recover damages for his death, caused by the negligence of the
steamer.” Under the wrongful death statutes of Pennsylvania and
Massachusetts, the action was time-barred by a one-year statute of
limitations. The district court held, though, that a court of admiralty was
not so bound by the laws of the states and that “[i]n the admiralty
courts . . . the death of a human being . . . may be complained of as an
injury, and the wrong redressed under the general maritime law.”

16. 2 ERASTUS CORNELIUS BENEDICT ET AL., BENEDICT ON ADMIRALTY § 81 (7th ed. rev.
2008).
17. See id. (citing Sea-Land Servs. Inc. v. Gaudet, 414 U.S. 573, 575 n.2 (1974); Miles
v. Melrose, 882 F.2d 976, 985 (5th Cir. 1989)).
18. See BLACK’S LAW DICTIONARY 1583 (9th ed. 2009).
19. 119 U.S. 199 (1886).
20. See id. at 199.
22. The Harrisburg, 119 U.S. at 199.
23. See id. at 200.
24. Id. (quoting The Harrisburg, 15 F. at 611). General maritime law is “[t]he body of
U.S. legal precedents and doctrines developed through caselaw in maritime and admiralty
litigation.” BLACK’S LAW DICTIONARY, supra note 18, at 753. It “is a branch of federal
common law” and “is distinguished from statutory law.” Id. As the Supreme Court has
stated, it is “[d]rawn from state and federal sources . . . [and] is an amalgam of traditional
On appeal, the Supreme Court reversed, finally settling the issue of whether an action may lie under general maritime law to recover damages for wrongful death at sea by holding that, absent statute, no such action could be maintained. 25 The Court painstakingly reviewed myriad case law on the subject, but ultimately based its decision on its 1877 decision in Insurance Co. v. Brame,26 which held that “by the common law no civil action lies for an injury which results in death.”27 The Court determined that maritime law should not vary from the common law of the land, and found itself bound by Brame.28

The rule promulgated by Brame, and used to justify The Harrisburg, was based on the old English common law felony-merger doctrine.29 This doctrine deems that, if an action is both a felony and a tort, the felony preempts the tort.30 The historical justification for this rule was simply that once the felon was put to death, as all were, his property was forfeited to the Crown.31 There was therefore no property upon which to base a civil action once the felon had been criminally punished for his crime.32 Killings—be they intentional or negligent—were felonious, and thereby preempted any wrongful death tort that could have arisen out of the same event.33 Part I.F will return to and further discuss this concept in the discussion of Moragne.

3. After The Harrisburg

Many lower courts had long felt that a wrongful death claim should lie under general maritime law.34 Such courts, along with state legislatures eager to abrogate the harshness of The Harrisburg, employed strategies to provide remedies for relatives of those who were killed at sea.35 By 1888, most states had adopted a wrongful death statute.36 Courts craftily

26. 95 U.S. 754 (1877).
27. See id. at 204 (quoting Brame, 95 U.S. at 756).
28. See id. at 213 (“[I]n the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law . . . has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind . . . .”).
30. See id.
32. See Moragne, 398 U.S. at 382; see also Madole, supra note 31, at 471.
33. See Moragne, 398 U.S. at 382 (“[T]he punishment for the felony was the death of the felon and the forfeiture of his property to the Crown . . . . and all intentional or negligent homicide was felonious . . . .”).
34. See, e.g., Cutting v. Seabury, 6 F. Cas. 1083, 1084 (D. Mass. 1860) (No. 3,521) (“[N]atural equity and the general principles of law are in favor of [wrongful death actions].”); accord The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578) (concursing with Judge Sprague’s analysis in Cutting).
35. See Madole, supra note 31, at 472.
extended these statutes to deaths occurring on both state and non-territorial waters, and were sometimes able to "sidestep["""] The Harrisburg. In The Hamilton, two vessels owned by Delaware corporations collided in non-sovereign waters. The Supreme Court affirmed a recovery under Delaware’s wrongful death statute, holding that the statute need not be confined to deaths on land, and that state law is applicable even in non-territorial waters so long as the plaintiff and defendant are from the same state.

Reliance on the various state statutes necessarily led to “farfetched theories,” but, more importantly, to uncertainty and a lack of uniformity in wrongful death recoveries as well. Further, in the majority of cases, courts were unable to extend the death statutes to deaths occurring on the high seas. The Supreme Court did not formally hold that a state death statute could be applied to maritime deaths until 1921, one year after Congress passed DOHSA.


37. See Madole, supra note 31, at 472.
38. 207 U.S. 398 (1907).
39. Id. at 402.
40. See id. at 405 (“[W]e construe the statute as intended to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land.”).
41. See id. at 403 (“[T]he bare fact of the parties being outside the territory in a place belonging to no other sovereign would not limit the authority of the State ...”); see also Moragne v. States Marine Lines, 398 U.S. 375, 393 n.10 (1970) (noting that The Hamilton suggests that “the law of that State could be applied to a death on the high seas” if “the plaintiff and defendant were of the same State”); cf. Calvert Magruder & Marshall Grout, Wrongful Death Within the Admiralty Jurisdiction, 35 YALE L.J. 395, 409–11 (1926) (asserting that Delaware’s jurisdiction may have been warranted because the fatal injury was sustained on a Delaware vessel, rather than the fortuity of the tortfeasor and victim’s identical citizenship).
42. See John Edington Ball, Wrongful Death at Sea—The Death on the High Seas Act, 51 CALIF. L. REV. 389, 389 (1963). One such example occurred in Lindstrom v. Int’l Nav. Co., 117 F. 170 (C.C.E.D.N.Y. 1902), where the court allowed an extension of New York’s wrongful death statute to reach a death that occurred at sea. Although New York’s death statute required the act to be consummated on New York territory, the court permitted recovery because the ship from which the decedent was thrown was registered in New York and “[t]he wrongful act or omission took effect on shipboard,—that is, territory of New York.” Id. at 173.
43. See Note, Recovery for Death in Collision at Sea, 32 HARV. L. REV. 713, 713 (1919) (“Situations not covered by these statutes, where consequently an injury goes remediless, are constantly arising.”).
45. See Moragne, 398 U.S. at 393 n.10 (remarking that “probably because most state death statutes were not meant to have application to the high seas, the possibility [of courts employing farfetched theories] did little to fill the vacuum”).
B. The Death on the High Seas Act

1. The Legislative History

Only two years after The Harrisburg, federal legislators were already attempting to override the Supreme Court’s ruling. In 1888, Senator John McPherson of New Jersey introduced a bill to legislatively overrule The Harrisburg, but it made no significant progress in Congress. In 1899, the Maritime Law Association (MLA) was founded with the goal of drafting a bill that would create a wrongful death right of action in admiralty. The primary issue that arose throughout the drafting process concerned the waters over which the bill would have jurisdiction. “The main issue was, whether to make such an act apply to all navigable waters, and thus supersede state statutes within their respective boundaries, or to make it supplementary to state statutes and apply only on waters not covered by any statute.” Whereas the former had the benefit of uniformity, the justification for the latter was clarity and an aversion to the confusion that would be created by uniformity. After all, much confusion would arise from both a federal and a state statute governing the same area, especially where maritime boundaries are not easily identifiable.

Uniformity initially prevailed, and so an early draft of the bill allowed for recovery for death occurring “on the high seas, the Great Lakes, or any navigable waters of the United States.” That bill ultimately made no progress in Congress, and

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47. See Kenneth G. Engerrand, DOHSA’s Reach: What are the High Seas Beyond a Marine League from Shore?, 1 LOY. MAR. L.J. 1, 2 (2002).
48. Id.
49. See Hughes, supra note 44, at 117. Robert Hughes was a member of the MLA and much of the “final form [of DOHSA] . . . was drawn by him.” Id. at 116.
50. See id. at 117.
51. Id.
52. See id. Uniformity has long been a central tenet of American maritime law. See S. Pac. Co. v. Jensen, 244 U.S. 205, 217 (1917) (describing the “uniformity in respect to maritime matters which the Constitution was designed to establish”). Without such uniformity, “domestic and foreign participants in maritime shipping and commerce would be subject to varying state laws, and the differences resulting therefrom could have an adverse effect on the nation’s maritime shipping and commerce.” FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., ADMIRALTY IN A NUTSHELL 5 (2005).
53. See Hughes, supra note 44, at 117.
54. See id. On this issue, Robert Hughes stated at a hearing before the Committee on the Judiciary in 1916, “If you try to make it cover the same territory that the States statutes cover, then you have rules of action applying in the admiralty court for damages arising on navigable waters different from the one applying in the State court.” Right of Action for Death on the High Seas: Hearing Before the H. Comm. on the Judiciary, 64th Cong. 4 (1916) (statement of Robert M. Hughes, Member, Maritime Law Association, American Bar Association) [hereinafter 1916 Hearing]. On a similar issue, Mr. Hughes humorously added, “You can not ride two horses at the same time unless you are a circus rider.” Id. at 6.
55. AN ACT TO AUTHORIZE THE MAINTENANCE OF ACTIONS FOR NEGLIGENCE CAUSING DEATH IN MARITIME CASES § 1 (Maritime Law Ass’n, Proposed Draft 1903), reprinted in George Whitelock, A New Development in the Application of Extra-Territorial Law to Extra-Territorial Marine Torts, 22 HARV. L. REV. 403, 416 n.3 (1909).
56. See Hughes, supra note 44, at 117.
reintroduced to Congress in 1910. After hearings in the Senate and House, Congress once again took no action.

The sinking of the Titanic in 1912, and a subsequent Senate Committee on Commerce report finding that "the number of deaths at sea was increasing sharply," ultimately spurred substantial interest in the bill. In 1915, the MLA’s bill passed the House but was severely weakened by amendments made on the floor and was subsequently stifled.

The MLA soon concluded that the “simplest bill and the one that would cause the least opposition” would be one that did not overlap state statutes. The bill was drafted “simply [to] apply where no bill applies at all now—that is, a marine league from shore” and would not “affect any remedy that exists now.” The bill dropped the statutory language permitting recovery for deaths occurring on “any navigable waters of the United States” and added the requirement that the accident must occur “beyond a marine league from the shore of any State.” After many debates and amendments, the bill, which would become known as the Death on the High Seas Act, was passed in 1920.

2. The Original DOHSA

The original DOHSA had three provisions relevant to this Note: the first, second, and seventh sections of the Act. The first granted a right of action for wrongful death:

[W]henever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories

57. See id.
58. See id. The Second Circuit noted that “[t]he rest of DOHSA’s legislative history concerns the narrowing of this provision.” In re Air Crash Off Long Island, New York, on July 17, 1996 (TWA Flight 800), 209 F.3d 200, 204 (2d Cir. 2000). This was an exaggeration by the court, though, as many other provisions of DOHSA were changed throughout its drafting. See generally 1916 Hearing, supra note 54.
60. See Engerrand, supra note 47, at 3–4 (citing HENRY W. FARNAM, THE SEAMAN’S ACT OF 1915, S. DOC. NO. 64-333, at 3 (1916)).
61. See Hughes, supra note 44, at 118.
62. 1916 Hearing, supra note 54, at 11.
63. Id. at 12.
64. TWA Flight 800, 209 F.3d 200, 204 (2d Cir. 2000); see also supra note 55.
65. 1916 Hearing, supra note 54, at 12 (quoting H.R. 9910, 64th Cong. (1st Sess. 1916)).
66. See TWA Flight 800, 209 F.3d at 204–05. All in all, twenty-three bills were introduced over thirty-two years. See Engerrand, supra note 47, at 21.
67. In 2000, DOHSA was amended to include a provision for commercial aviation accidents, which is also relevant to this Note. See infra Part I.D.2.
or dependencies of the United States, the personal representative of the
decedent may maintain a suit for damages . . . . 68

The second section states that the damages recoverable may only be for
pecuniary loss,69 and the seventh—the non-application provision—states
“[t]hat the provisions of any State statute giving or regulating rights of
action or remedies for death shall not be affected by this Act.”70

The first and seventh sections of the Act, taken together, show just how
cautious Congress was to not interfere with existing state death statutes.71
The vast majority of state territorial boundaries extended approximately
three miles into the sea.72 By creating a cause of action that arises only out
of waters beyond three miles from shore, DOHSA would not interfere with
existing statutes. Noting that both the first and seventh sections preserve
state remedies, Representative Andrew Montague of Virginia asserted that
both are retained in the Act “out of abundant caution, to calm the minds’
of those who feared that DOHSA would oust state remedies.”73

C. The General Maritime Law Wrongful Death Action

1. Moragne v. States Marine Lines

In 1970, the Supreme Court heard a case arising from the death of a
longshoreman74 in Florida’s navigable waters.75 The plaintiff, the
decedent’s widow, based her claim upon negligence and unseaworthiness,76
and sought damages for wrongful death and the decedent’s pain and
suffering.77 After the plaintiff failed to prove the shipowner’s negligence,78
the defendant moved to dismiss the plaintiff’s claims, asserting that
Florida’s death statute did not include seaworthiness as a basis for liability,

68. Death on the High Seas Act, Pub. L. No. 66-165, § 1, 41 Stat. 537 (1920) (codified
69. Id. § 2.
70. Id. Today, this provision reads: “This chapter does not affect the law of a State
71. See Hughes, supra note 44, at 118–19.
72. See TWA Flight 800, 209 F.3d 200, 205 (2d Cir. 2000) (“[S]tate territorial
waters . . . traditionally lay within three nautical miles from shore.”); see also 43 U.S.C.
§ 1312 (2006) (setting original coastal states’ boundaries to three miles from shore). But see
United States v. California, 332 U.S. 19, 38 (1947) (holding that a state “is not the owner of
the three-mile marginal belt along its coast, and that the Federal Government rather than the
state has paramount rights in and power over that belt”).
73. TWA Flight 800, 209 F.3d at 224 (Sotomayor, J., dissenting) (quoting 59 CONG. REC.
4482–83 (1920) (statement of Rep. Montague)).
74. A longshoreman is “[a] maritime laborer who works on the wharves in a port,” or is
someone who “loads and unloads ships.” BLACK’S LAW DICTIONARY, supra note 18, at
1027–28.
76. Unseaworthiness is “a failure to supply and keep in order the proper appliances
appurtenant to the ship.” Madole, supra note 31, at 473 (quoting The Osceola, 189 U.S. 158,
175 (1903)). A vessel is seaworthy if it is “unable to withstand the perils of an ordinary
voyage.” BLACK’S LAW DICTIONARY, supra note 18, at 1679.
77. See Moragne, 398 U.S. at 376.
78. See Madole, supra note 31, at 473.
and that under The Harrisburg, maritime law did not permit a recovery for wrongful death.79 The district court granted the defendant’s motion.80 On appeal, the Fifth Circuit certified to the Florida Supreme Court the question whether Florida’s death statute allowed seaworthiness as a basis for recovery.81 The Florida Supreme Court answered in the negative and the Fifth Circuit affirmed.82 The Supreme Court granted certiorari “to reconsider the important question of remedies under federal maritime law for tortious deaths on state territorial waters.”83 The Court’s discussion was centered around The Harrisburg, as its premise—that no wrongful death action may lie under general maritime law84—was still controlling law.85 In reversing the Fifth Circuit, the Court finally overruled the “unjustifiable anomaly” that was The Harrisburg.86

The Moragne Court first reviewed the reasoning of The Harrisburg.87 It sought to find a persuasive justification for the harsh rule adopted by the Court in Brame and later extended to The Harrisburg.88 Relying on legal historians, the Court found that the only basis for the rule was the felony-merger doctrine.89 The Court, recognizing that it did not need to assess whether The Harrisburg had been decided correctly,90 did so nonetheless.91 The felony-merger doctrine, adopted from English jurisprudence,92 had “long since been thrown into discard” in England when The Harrisburg was decided.93 Even worse, the historical justifications for the doctrine in England never existed in the United States.94 Because forfeiture of one’s entire property was not part of a felon’s sentence, preclusion of a civil action on that basis made little sense.95

The Court also questioned why the harsh common law rule enunciated in Brame was extended to admiralty, an arm of the law that had “developed general principles unknown to the common law . . . [which often] included

79. See Moragne, 398 U.S. at 376.
80. See id.
81. See id. at 377.
82. See Moragne v. States Marine Lines, 409 F.2d 32, 32 (5th Cir. 1969).
84. See supra Part I.A.2.
85. See Moragne, 398 U.S. at 378.
86. See id.
87. See id. at 379–80.
88. See id. at 381 (“One would expect, upon an inquiry into the sources of the common-law rule [that no civil action may lie for the death of another], to find a clear and compelling justification for what seems a striking departure from the result dictated by elementary principles in the law of remedies.”).
89. See id. at 382.
90. See id. at 388; Madole, supra note 31, at 473.
91. See Moragne, 398 U.S. at 381–88.
92. See id. at 383–84.
93. See id. at 381. Indeed, Lord Campbell’s Act abrogated the harsh common law rule by providing “a civil remedy for death caused by negligence.” 2 BENEDICT ET AL., supra note 16, § 81(a) (citing Fatal Accidents Act, 1846, 9 & 10 Vict., c. 93 (Eng.)).
94. See Moragne, 398 U.S. at 384. The felony-merger doctrine was premised on the forfeiture of the felon’s possessions to the Crown. After such forfeiture, there would be no property upon which to base a civil action. See supra notes 30–33 and accompanying text.
95. Moragne, 398 U.S. at 384.
a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.” 96 After all, maritime law had a “long history” of being applied more generously than the common law. 97

The Court then veered its discussion toward public policy. 98 Finding that every state at the time had enacted a wrongful death statute, 99 and that Congress had created actions for wrongful death in a multitude of situations, 100 the Moragne Court thought it clear that wrongful death actions were not contrary to public policy. 101

Nevertheless, the Court was not yet ready to create a general maritime law action. The Court recognized that Congress’s failure to provide a remedy for this type of death—one occurring within state territorial waters—could be justified by two discrete congressional intents. 102 On one hand, “the scope of a statute may reflect nothing more than the dimensions of the particular problem.” 103 On the other hand, Congress could have legislated in such a way to “erect[] a strong inference that territories beyond the boundaries so drawn are not to feel the impact of the new legislative dispensation.” 104 Put another way, either (1) Congress declined to provide a remedy for deaths occurring in state waters because at the time of legislation, these deaths were already covered by state statutes; or (2) by excluding these deaths from the statutory recovery scheme, Congress purposely denied a remedy for these deaths. 105

The Court concluded that Congress’s intent in enacting DOHSA was to ensure a remedy for deaths occurring outside of state territorial waters. 106 Therefore, the Act’s exclusion of state territorial waters from coverage did not reflect a congressional desire to insulate those waters from remedies, but rather spoke to the superfluity of legislating those waters for which a

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96. See id. at 386–87. In this vein, Chief Justice Salmon Chase, sitting on circuit, remarked that “it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.” The Sea Gull, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578). Interestingly, Justice Chase commented that the common law rule barring wrongful death actions was derived from the “peculiar” felony-merger doctrine—a doctrine “traceable to the feudal system and its forfeitures.” Id. This “peculiar” rule, though, was affirmed twelve years later in Brame, and twenty-one years later in The Harrisburg. See supra Part I.A.2.


98. See Moragne, 398 U.S. at 390.

99. See id.


101. See Moragne, 398 U.S. at 390.

102. See id. at 392.

103. See id.

104. See id.

105. See id.

106. See id. at 397–98.
remedy was already provided.\textsuperscript{107} Based on a thorough analysis, the Court concluded that “Congress has given no affirmative indication of an intent to preclude the judicial allowance of a remedy.”\textsuperscript{108} After finding no “substantial countervailing factors” to justify keeping the rule of The Harrisburg afloat, it was cast to the sea once and for all.\textsuperscript{109}

2. Post-Moragne Wrongful Death Actions

The Moragne decision left many questions unanswered about the general maritime law action, most of which pertained to recoverable damages and preemption. After Moragne, the Supreme Court further defined what an action lying in general maritime law entailed. Sea-Land Services, Inc. v. Gaudet\textsuperscript{110} established that recoverable damages in a Moragne-type cause of action were loss of support and services, funeral expenses, and loss of society, while grief was not.\textsuperscript{111} Thus, a Moragne action could provide for a greater recovery than DOHSA. Other cases established that DOHSA was the exclusive remedy for deaths on the high seas. Mobil Oil Corp. v. Higginbotham\textsuperscript{112} held that where DOHSA applies, the general maritime law cannot provide a remedy or nonpecuniary damages.\textsuperscript{113} Similarly, Offshore Logistics, Inc. v. Tallentire\textsuperscript{114} held that where DOHSA applies, state law cannot provide a remedy or nonpecuniary damages.\textsuperscript{115} Furthermore, as a wrongful death statute, the DOHSA cause of action provides relief only for the dependents’ personal loss from the decedent’s death.\textsuperscript{116} The plaintiffs in Dooley v. Korean Air Lines Co.\textsuperscript{117} therefore contended that DOHSA, as a wrongful death statute, does not preclude a survival action under general maritime law.\textsuperscript{118} The Court denied the plaintiffs’ claim, holding that DOHSA’s design as a wrongful death statute indicated Congress’s intent to preclude all other causes of action arising from death on the high seas.\textsuperscript{119} Congress decided to limit both which relatives were allowed to recover and the damages that they could seek, and

\textsuperscript{107} See id.; Madole, supra note 31, at 473.
\textsuperscript{108} See Moragne, 398 U.S. at 393.
\textsuperscript{109} See id. at 403–09.
\textsuperscript{110} 414 U.S. 573 (1974).
\textsuperscript{111} See id. at 585–91; see also MARAIST & GALLIGAN, supra note 52, at 310.
\textsuperscript{112} 436 U.S. 618 (1978).
\textsuperscript{113} See id. at 625.
\textsuperscript{114} 477 U.S. 207 (1986).
\textsuperscript{115} See id. at 232–33.
\textsuperscript{116} 46 U.S.C. § 30302 (2006) (limiting the cause of action to the “benefit of the decedent’s spouse, parent, child, or dependent relative”). The personal representative of a plaintiff who dies during an action brought for personal injury may also proceed under DOHSA, but may only seek the wrongful death damages permitted under § 30303. See 46 U.S.C. § 30305. Although this has the façade of a survival action, it is really a “type of non-abatement statute, since it converts a pre-existing suit for personal injury by the victim into a wrongful death action by his beneficiaries.” MARAIST & GALLIGAN, supra note 52, at 314.
\textsuperscript{117} 524 U.S. 116 (1998).
\textsuperscript{118} See id. at 123.
\textsuperscript{119} See id.
in doing so “provided the exclusive recovery for deaths that occur on the high seas.”

D. Recent Changes to U.S. Maritime Law

1. Proclamation 5928’s Extension of the Territorial Sea

The Third United Nations Conference on the Law of the Sea convened in 1973. The impetus for the Conference was that “[t]he oceans were generating a multitude of claims, counterclaims and sovereignty disputes.” Nations asserted sovereignty over dissimilar lengths into the seas, and tensions and disputes arose over ownership and treatment of resources. At the time, only twenty-five nations claimed the traditional three-mile boundary for their territorial sea. Sixty-six nations had claimed a boundary of twelve miles, fifteen claimed a boundary between four and ten miles, and eight claimed a vast boundary of two hundred nautical miles for its territorial sea. The Conference’s resulting treaty, finalized in 1982, established the right of a nation to claim an outermost boundary of twelve nautical miles for its territorial sea.

Acting under such authority, President Ronald Reagan issued Proclamation 5928, which extended the territorial sea of the United States

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120. See id.
122. Id.
123. Id.
124. Id.
125. Id. A territorial sea is “the belt of water immediately adjacent to the coast of a nation” and within which “[a] nation is sovereign.” Douglas W. Kmiec, Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 1 Territorial Sea J. 1, 3 (1990).
126. See UNCLOS Historical Perspective, supra note 121.
129. In 1983, President Reagan proclaimed that the United States would “voluntarily abide by all non-seabed parts of the convention.” See Borgerson, supra note 127, at 11 (citing Proclamation No. 5030, 48 Fed. Reg. 10,605 (Mar. 10, 1983)).
from three to twelve miles. In so doing, President Reagan created a nine-mile zone of federal waters, as state maritime boundaries were not affected by this Proclamation. Also of importance in the Proclamation was the disavowal clause: “Nothing in this Proclamation . . . extends or otherwise alters existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom . . . .” The Proclamation unwittingly precipitated the issue this Note addresses.

2. DOHSA Revisited

With one major exception, DOHSA today looks much like its original version. Its main provisions are unchanged, save that where DOHSA once began “beyond a marine league from the shore,” it was amended in 2006 to begin “beyond 3 nautical miles from the shore.” In 2000, however, Congress made an amendment on a larger scale, essentially excepting commercial aviation accidents from DOHSA’s remedial scheme. This amendment provides that if death results from a commercial aviation accident occurring within the twelve-mile territorial sea, DOHSA does not apply. It also provides the only exception to pecuniary relief, permitting nonpecuniary, but not punitive, damages for deaths arising from a commercial aviation accident occurring beyond the territorial sea.

Today, litigation of maritime wrongful death actions is particularly contentious because of the drastic difference in recovery that results from whether or not DOHSA applies.

130. See TWA Flight 800, 209 F.3d 200, 213 (2d Cir. 2000) (“The Proclamation thus alters the three-mile boundary that had historically defined the territorial sea.”).
136. In Eberli v. Cirrus Design Corp., 615 F. Supp. 2d 1369 (S.D. Fla. 2009), the U.S. District Court for the Southern District of Florida found the words “commercial aviation accident” to be ambiguous. Id. at 1372–73. Such an accident could be one that “occurs during the course of aviation involving commerce, . . . or an accident that occurs during the transportation of passengers or cargo for commercial purposes.” Id. at 1373. The court held the latter to be the intended meaning. Id.
139. Id. § 30307(b). The recoverable nonpecuniary damages are limited to “loss of care, comfort, and companionship.” Id. § 30307(a).
140. See Blome v. Aerospatiale Helicopter Corp., 924 F. Supp. 805, 807–08 (S.D. Tex. 1996) (noting, after defendants moved to dismiss plaintiffs’ state wrongful death and survival claims as preempted by DOHSA, that “if federal law governs the Plaintiffs’ claims, the recovery available to them is substantially less than the recovery available under state law”); see also Jack B. Hood & Benjamin A. Hardy, Jr., Seamen’s Damages for Death and Injury 54 (1983). Damages recoverable under DOHSA are limited to loss of support,
II. A CIRCUIT SPLIT OVER DOHSA’S STARTING POINT

A conflict has arisen in DOHSA’s applicability since President Reagan issued Proclamation 5928. The cause lies at the heart of DOHSA: the qualifying language of “on the high seas beyond 3 nautical miles.” The issue is that, with the extension of the territorial sea, the zone between three and twelve miles cannot properly be termed the “high seas,” as it is not international waters. Can DOHSA be applied in this zone, as “beyond 3 nautical miles” suggests? Or must it only apply beyond twelve miles from shore, as the “high seas” suggests? The Second and Ninth Circuits have both adjudicated this issue and have reached different conclusions.

A. TWA Flight 800 and the Second Circuit

On July 17, 1996, Trans World Airlines (TWA) Flight 800 crashed into the Atlantic Ocean some eight miles off the coast of Long Island, New York. All 230 people on board were killed. The relatives and estate representatives of 213 of those passengers, seeking both pecuniary and nonpecuniary damages, filed suit against TWA, Boeing, and Hydro-Aire, a manufacturer of aircraft components. One hundred forty-five wrongful death cases were consolidated in the U.S. District Court for the Southern District of New York. The defendants moved to dismiss claims for nonpecuniary damages, asserting that DOHSA limits recovery strictly to pecuniary relief. The motion was denied and an appeal followed.

The Second Circuit affirmed the lower court’s decision, holding “that DOHSA does not apply to the United States territorial waters where the crash in this case occurred.” The arguments made by the Second Circuit were largely based on the meaning and importance of the term “high seas,” particularly at the time of DOHSA’s drafting. The court also sought to

service, care, nurture, guidance, and training. See id. Recovery for grief, mental anguish, love, affection, consortium, society, or companionship is not permitted. See id.; supra Part I.A.2.

142. See Convention on the High Seas, art. 1, Apr. 29, 1958, 450 U.N.T.S. 82 (“The term ‘high seas’ means all parts of the sea that are not included in the territorial sea or in the internal waters of a State.”); see also supra note 11 and accompanying text. A more thorough discussion of the “high seas” follows in Part II.A.1.
143. See TWA Flight 800, 209 F.3d 200, 201 (2d Cir. 2000).
144. Id.
146. See TWA Flight 800, 209 F.3d at 201.
149. See TWA Flight 800, 209 F.3d at 202.
150. See id. at 215.
151. See id. at 205–07.
accord with what it believed was DOHSA’s legislative history and purpose.  

1. The High Seas

The court found the term “high seas” to be ambiguous in the statute. The plaintiffs submitted that “high seas” meant all waters beyond the territorial sea, while the defendants argued that the term meant all waters beyond the low-water mark.

The court first looked at what the Supreme Court’s understanding of “high seas” was at the time of DOHSA’s enactment. It concluded that the term was “generally interpreted” by the Court in 1920 to mean non-sovereign waters. More important, however, was that the Supreme Court’s understanding of the term was relied upon in, and thus shaped, the congressional debates over DOHSA. The Second Circuit reasoned that this reliance indicated Congress’s understanding that the term meant international waters.

The court then looked to how Congress and courts used the term after DOHSA’s enactment. In 1969, the Supreme Court, addressing the Submerged Land Act, noted that “[o]utside the territorial sea are the high seas, which are international waters not subject to the dominion of any single nation.” The court cited some of its own cases in harmony with the Supreme Court’s usage of the term since 1920.

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152. See id. at 207–09.
153. See id. at 202 (“Where the statutory language is ambiguous, as the phrase ‘high seas’ is in this case, our inquiry must range further [than simply looking to the language of the statute].”).
154. See id. at 205.
155. See id. The low-water mark is “[t]he shoreline of a sea marking the edge of the water at the lowest point of the ordinary ebb tide.” BLACK’S LAW DICTIONARY, supra note 18, at 1730. The court also noted that Judge Sonia Sotomayor, in her dissent, had even advocated a third definition of “high seas”: those waters that are beyond three nautical miles from shore. TWA Flight 800, 209 F.3d at 202 (mentioning the dissent).
156. See TWA Flight 800, 209 F.3d at 205–07.
158. See TWA Flight 800, 209 F.3d at 206. But see Engerrand, supra note 47, at 10–11 (discussing a 1914 letter sent from an Assistant Attorney General of the United States to a Representative which claimed that, in the American view, “the high seas begins . . . at [the] low-water mark”)
159. See TWA Flight 800, 209 F.3d at 205.
160. See id. at 209–11.
161. See id. at 210 (emphasis omitted) (quoting United States v. Louisiana, 394 U.S. 11, 23 (1969)).
162. See id. at 211 (citing Cove Tankers Corp. v. United Ship Repair, Inc., 683 F.2d 38, 40 n.1 (2d Cir. 1982); D’Aleman v. Pan Am. World Airways, 259 F.2d 493, 495 (2d Cir. 1958); The Buenos Aires, 5 F.2d 425, 436 (2d Cir. 1924)).
2. Avoiding Redundancy

Following the basic canon of statutory construction that a court should “avoid a reading which renders some words altogether redundant,” the Second Circuit sought an interpretation giving “high seas” and “beyond a marine league” two distinct meanings. The court found that the defendants’ reading of “high seas” as any waters beyond the low-water mark would render “high seas” superfluous because the low-water mark is always within three miles from shore. In other words, “high seas” would not be useful to the statute because the only way it differs from “beyond 3 nautical miles” is that it includes waters between the low-water mark and three nautical miles from shore—waters expressly excluded by the “beyond 3 nautical miles” language. The court was unwilling to believe that Congress put two geographical boundaries into the statute where one subsumed the other. The plaintiffs’ position, which put forth a definition of “high seas” as a political boundary subject to change, avoided the redundancy.

3. The Addition of “Beyond a Marine League”

Looking to the legislative history of DOHSA, the court found that “high seas” was always a part of the statutory language, while “beyond a marine league” was only added later “to preserve state remedies.” The new phrase was added at the same time the MLA abandoned its position of uniformity and removed those deaths occurring on “any navigable waters of the United States” from the bill’s reach. The court reasoned that if “high seas” really meant waters beyond the low-water mark, then the term was subsumed by the “beyond a marine league” addition, and Congress would have had no reason to retain it. Therefore, Congress’s retention of “high seas” indicated that Congress believed it to have a meaning independent from “beyond a marine league.”

164. See id.
165. See supra note 155 and accompanying text.
166. See TWA Flight 800, 209 F.3d at 207 (“Defendants provide no examples in which the low-water mark is not well within . . . three nautical miles of the coast.”).
167. See id. Simple substitution reveals the superfluity: DOHSA would apply to deaths occurring both on waters beyond zero miles from shore (functionally the low-water mark) and beyond three miles from shore. Clearly, if both conjunctions must be satisfied, then only the second conjunction carries meaning because it is more restrictive.
168. See id.
169. See id. (noting that the plaintiffs defined “beyond a marine league” as a geographical boundary and “high seas” as a political boundary).
170. See id. at 208.
171. See id.; see also supra notes 62–65 and accompanying text.
172. See TWA Flight 800, 209 F.3d at 208; see also supra notes 166–67.
173. See TWA Flight 800, 209 F.3d at 208.
4. DOHSA’s Non-application Provision, *Yamaha*, and State Law Preemption

The majority reviewed the case law that dealt with issues of preemption that arose after *Moragne*. Only *Yamaha Motor Corp., U.S.A. v. Calhoun*, a 1999 Supreme Court case, addressed “the application of DOHSA to federal territorial waters.” The *Yamaha* Court found that the non-application provision of DOHSA proscribed “DOHSA from displacing state law in territorial waters.” Because the death occurred in the waters of Puerto Rico, the territorial waters at issue were federal rather than state. *Yamaha*’s holding that DOHSA did not preempt state death statutes within territorial waters suggested to the Second Circuit that DOHSA would not apply in the federal waters presently at issue, or at least would not preempt a state statute that could also apply to such federal waters.

5. Subversion of a Preexisting Remedy

The court, looking to legislative history once again, found that the purpose of DOHSA was to create a remedy where one had not previously existed. With alternative remedies available to the plaintiffs, namely a *Moragne*-type action or a state statutory action, the court thought it was “particularly inappropriate” to apply DOHSA, especially when the preexisting remedy would likely be more generous. The court cited and echoed Justice Salmon Chase’s support of generosity in admiralty proceedings to justify its position. Indeed, the court believed that “[t]he remedies available to plaintiffs for wrongful death in the federal territorial waters in which the crash occurred may prove better suited to this case than DOHSA’s statutory requirements.”

6. The Extension of the Territorial Sea and Legislative Intent

The defendants pointed to the disavowal clause in Proclamation 5928, which expressly states that it does not “extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived therefrom.” They contended that if the Proclamation had the effect of extending the geographical starting point of DOHSA, it would have altered a federal law—something that the Proclamation rejects by its

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174. See id. at 210–11; see also supra Part I.C.2.
176. See *TWA Flight 800*, 209 F.3d at 211.
177. See supra note 70.
178. *Yamaha*, 516 U.S. at 216.
179. See id. at 201.
180. See *TWA Flight 800*, 209 F.3d at 209.
181. See id.
182. *Id.*; see supra note 96 and accompanying text.
184. See id. at 213.
185. See supra note 133 and accompanying text.
In assessing the effect of the Proclamation on the extension of DOHSA, the Second Circuit heeded the advice of the Office of Legal Counsel (OLC), which recommended that “in determining the effect of the proclamation on domestic law,” the consideration is “whether Congress intended for the jurisdiction of any existing statute to include an expanded territorial sea.” Therefore, the question was: did DOHSA’s territorial starting point (1) simply coincide with, or did it (2) purposely attach to “the existing territorial sea”? If DOHSA’s and the territorial sea’s coterminous boundary appeared coincidental, Congress likely had not intended for the Proclamation to affect the statute. The opposite was true, too, in that if their coterminous boundary appeared intentional, then Congress had intended such an effect.

The Second Circuit concluded that the latter (a purposely coterminous boundary) most fittingly correlated to legislative history and congressional intent, and therefore the Proclamation did affect DOHSA. The court believed that Congress originally placed DOHSA’s starting point at three miles because it had sought to exclude all state and federal waters from the Act’s scope, and because the three mile limit “was the extent of the problem” at the time. This justified the three-mile starting point from a 1920 perspective, but the court reasoned that there was no “persuasive reason to fix immutably the scope of the statute to the boundary between United States territorial waters and nonterritorial waters as it existed in 1920.” Accordingly, the Second Circuit held that DOHSA can only be applied beyond twelve miles.

B. Judge Sotomayor’s Dissent in TWA Flight 800

Then-Judge Sonia Sotomayor wrote an impassioned dissent, focusing on the international bent of Proclamation 5928, legislative intent, and policy considerations that the majority seemingly disregarded.

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186. TWA Flight 800, 209 F.3d at 213.
187. See Kmiec, supra note 125, at 22. Judge Robert W. Sweet of the Southern District of New York took a different approach. See TWA Flight 800, No. 96-Civ. 7986, 1998 WL 292333, at *10 (S.D.N.Y. June 2, 1998); see also infra note 287. He reasoned that, if it was Congress’s intent to attach DOHSA’s starting point to the beginning of the high seas (defined as non-sovereign waters), then the President would not be able to expand the territorial sea and also exclude an effect on a federal law. Id. In so doing, the President would be amending the statute by affixing DOHSA’s starting point to three miles when Congress would have intended it to move to twelve. Id. Such an amendment, Judge Sweet noted, “can only be accomplished by Congress.” Id.
188. See Kmiec, supra note 125, at 22–23.
189. See id. If the similar boundaries were due to mere coincidence, there would be no reason for one boundary to change with the other.
190. See id.
191. See TWA Flight 800, 209 F.3d at 213.
192. See id.
194. See id. at 213.
195. See id. at 215.
1. Proclamation 5928’s Extension Was for International Purposes Only

Judge Sotomayor’s dissent focused on Proclamation 5298’s international nature. Finding that the Proclamation was inextricably linked to international law and foreign policy, and that DOHSA was not, she concluded that the Proclamation should not affect DOHSA. Judge Sotomayor’s authority supporting her international law conclusion included a Supreme Court opinion, which found that the expansion of the territorial sea was “for international law purposes,” and an admiralty treatise, which noted that the Proclamation “is effective . . . only for foreign policy purposes.” Judge Sotomayor reasoned that, because the disavowal clause repudiated any alterations of federal law, an expansion of the territorial sea for international purposes should not apply for domestic law purposes.

Judge Sotomayor provided a few illuminating examples. Only a year prior, the Second Circuit had dealt with a statute forbidding gambling on boats within the territorial waters of the United States in *United States v. One Big Six Wheel*. As a result of the statute, gambling ships would travel beyond the three-mile boundary to avoid criminal prosecution. The government had contended that, because of the extension of the territorial sea to twelve miles, a gambling boat that travelled beyond three miles, but within twelve, was still within the territorial sea, and therefore violating the Gambling Ship Act. The Second Circuit had held, though, that the Gambling Ship Act’s usage of “territorial waters” only referred to waters within three miles from shore “because Congress had not stated otherwise.” Important to the court’s holding was that the Gambling Ship Act dealt with domestic, rather than international law.

Judge Sotomayor similarly relied on decisions of the Federal Aviation Administration, Environmental Protection Agency, and United States Coast Guard, all of which “recognized the distinction between the meaning of the

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196. See id. at 216–20 (Sotomayor, J., dissenting).
197. See id.
198. See id. at 217 (quoting United States v. Alaska, 503 U.S. 569, 589 n.11 (1992)).
199. See id. (quoting 1 SCHOENBAUM, supra note 11, §§ 2–14 & n.7 (2d ed. 1994)).
200. See id.
202. 166 F.3d 498, 500 (2d Cir. 1999).
203. See id.
204. In reality, it was not simply Proclamation 5928 at issue, but rather Section 901(a) of the Antiterrorism and Effective Death Penalty Act (AEDPA) that the government claimed the gambling ship had violated. See id. at 501. AEDPA § 901(a) declared that the entire extent of the twelve-mile territorial sea was subject to U.S. sovereignty for federal criminal jurisdiction purposes. See AEDPA, Pub. L. No. 104-132, § 901(a), 110 Stat. 1317 (1996) (codified at 18 U.S.C. § 7 (2006)); see also *One Big Six Wheel*, 166 F.3d at 501.
205. See *One Big Six Wheel*, 166 F.3d at 501. The government would have had a gambling ship travel to beyond twelve miles from shore in order to avoid prosecution. See id. at 499.
207. See id. (citing *One Big Six Wheel*, 166 F.3d at 499 & n.1, 501).
U.S. territorial sea for the purposes of domestic law, on the one hand, and international law, on the other.”208 The Coast Guard, for example, dealt with a requirement for uninspected vessels to carry certain emergency equipment on the “high seas.”209 The Coast Guard had previously defined “high seas” as “waters which are neither territorial seas nor internal waters of the U.S. or of another country.”210 Yet the ruling held that uninspected vessels still must carry the emergency equipment anywhere beyond three miles from shore simply because the “proclamation did not affect domestic law.”211

Judge Sotomayor was convinced that interpretations of domestic statutes such as DOHSA should not incorporate international concepts of “high seas” and “territorial waters” unless Congress specifically intended for them to be part of the statute.212 *One Big Six Wheel* demonstrated just that, ruling that Proclamation 5928 had no effect on a federal domestic statute if the statute had no relation to international law.213

2. DOHSA Has Been Applied to Foreign Territorial Waters

To determine whether the “high seas” was intended to mean non-sovereign waters, Judge Sotomayor looked at prior decisional law on the application of DOHSA in foreign territorial waters.214 After all, if DOHSA were applied in foreign territorial waters, this would be inconsistent with the “high seas” definition the majority accepted of non-territorial waters.215 Judge Sotomayor cited multiple cases from sister circuits holding that DOHSA can be applied to foreign territorial waters:216 the Ninth Circuit permitted a DOHSA action for a death occurring within the territorial waters of Mexico,217 and the Fifth Circuit allowed a DOHSA claim for a death occurring in the English Channel.218 These cases, and others from the Third and Fourth Circuits,219 have been cited as definitive authority by
admiralty treatises. Judge Sotomayor thought this strongly indicated that Congress did not intend “high seas” to necessarily comport to the international law concept of non-sovereign waters.

3. The Drafters’ Sole Concern Was Providing a Remedy Where One Had Not Previously Existed

The dissent surmised that the concept of the states’ territorial seas was of sole import to the DOHSA drafters. Judge Sotomayor believed that there was no justification for creating a three-mile starting point for DOHSA other than to preserve state remedies. She posited “that if the U.S. territorial sea had exceeded three nautical miles in 1920, Congress would still have set DOHSA’s boundary line beyond a marine league . . . because the decision in The Harrisburg left no remedy for death in any area outside state territorial waters.” Because Congress would have placed the DOHSA starting point at three miles irrespective of the edge of the territorial sea, Congress intended “high seas beyond a marine league” to be solely geographical and not connected to an international legal concept of sovereignty.

4. Justifiable Surplusage

Judge Sotomayor did not simply reject the majority’s redundancy argument; she turned it on its head. Acknowledging that including both “beyond [a] marine league” and “high seas” in the statutory language created surplusage, she argued that such surplusage was inserted in the interest of unmistakable clarity. Speaking on this very subject at a DOHSA congressional debate eighty years earlier, Representative Wells Goodykoontz of West Virginia had eloquently noted that treating one of the terms as surplusage “can do no harm, for the reason that that which is useless does not vitiate the useful.”

220. TWA Flight 800, 209 F.3d at 221 (Sotomayor, J., dissenting) (“It appears to be settled that the term ‘high seas’ within the meaning of DOHSA . . . includes the territorial waters of a foreign nation as long as they are more than a marine league away from any United States shore.” (quoting 2 BENEDICT ET AL., supra note 16, § 81(b) n.21 (1999))).
221. See id.
222. See id. at 222–23.
223. Id.
224. Id. at 223 (internal quotations omitted). Judge Sotomayor went on to find that, because of this, the Moragne holding does not affect the present analysis. See id. After all, the DOHSA Congress could not have anticipated the rejection of The Harrisburg half a century before it occurred, so the legislative intent in the drafting process reflects a time when no federal common law remedies for death at sea existed. See id.
225. See id.
226. See supra Part II.A.2.
227. See TWA Flight 800, 209 F.3d at 223–24 (Sotomayor, J., dissenting).
228. See id. at 224. It is perhaps ironic, then, that the present dispute concerns language inserted for the sake of clarity.
Further, DOHSA is no stranger to redundant language retained for the sake of clarity. DOHSA’s non-application provision affirms that state laws governing wrongful deaths remain unaffected by the Act. But the preservation of state remedies is elementary to DOHSA’s operative provision, which disallows a claim under DOHSA within state waters by excluding deaths within three miles from shore. This redundancy—and therefore superfluity—was “retained ‘out of abundant caution, to calm the minds’ of those who feared that DOHSA would oust state remedies.” Judge Sotomayor concluded that “beyond [a] marine league” and “high seas” were both included in the statutory language to ensure that no confusion would arise over DOHSA’s starting point.

5. Generosity, Uniformity, and Certainty

Judge Sotomayor’s dissent began by criticizing the majority for favoring generosity over an accurate interpretation of the statute. Judge Sotomayor remarked that Congress purposely acted to limit the relief in these actions to pecuniary damages. Furthermore, the dissent argued, “[i]f Congress had wished to make that remedy more generous, it certainly had the opportunity to reflect that in the statute.”

Sotomayor also addressed the policy concern of uniformity that was left unaccounted for by the majority’s holding, which had the effect of creating four zones of applicable law. State law and general maritime law would apply between zero and three miles. Between three and twelve miles, general maritime law would apply. Beyond twelve miles, DOHSA would apply. The majority did not address what law would apply in foreign territorial waters.

In Judge Sotomayor’s view, uniformity is better achieved through its position: between zero and three miles, state law and general maritime law

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230. TWA Flight 800, 209 F.3d at 224 (Sotomayor, J., dissenting).
231. See supra note 70 and accompanying text.
232. See supra note 70 and accompanying text.
233. TWA Flight 800, 209 F.3d at 224 (Sotomayor, J., dissenting) (quoting 59 CONG. REC. at 4483 (statement of Rep. Montague)).
234. Id.
235. See id. at 215–16 (“In an understandable desire to provide the relatives and estate representatives of the [victims] . . . with a ‘more generous’ recovery, the majority fails to give proper effect to [various aspects of legislative history and intent, and case law].” (citation omitted) (quoting majority opinion)).
236. See id. at 224–25.
237. See id.
238. See id. at 225. The Supreme Court has addressed the importance of uniformity of admiralty law when confronted with interpreting DOHSA. See Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 221 (1986) (noting that an interpretation of DOHSA must consider, among other things, “the importance of uniformity of admiralty law”); see also supra note 52.
239. TWA Flight 800, 209 F.3d at 225 (Sotomayor, J., dissenting).
240. Id.
241. Id.
242. Id.
243. Id.
would apply; beyond three miles, DOHSA would apply. This position also promotes certainty because DOHSA’s starting point is not affixed to the ever-changing boundary of the high seas.

C. Helman and the Ninth Circuit

On January 26, 2007, a Navy helicopter crashed into the Pacific Ocean off the coast of California’s Catalina Island. While completing a training exercise, the helicopter crew lost control and crashed approximately 9.5 miles from shore. The crash killed all four crew members on board. The personal representatives and successors-in-interest to three of the Navy crewmen brought suit, asserting six causes of action for “strict products liability, negligence, failure to warn, breach of warranty, and wrongful death and survival.” These actions were brought under California and general maritime law. All but one defendant moved to dismiss for a failure to state a claim based on DOHSA preemption. The district court granted the defendants’ motion and certified the case for immediate appeal. The Ninth Circuit affirmed, creating a split with the Second Circuit. In a concise opinion, the court reviewed legislative history and intent, and important developments in maritime law.

1. The High Seas and a Plain Reading of the Statute

The plaintiffs and defendants in Helman took identical positions as to the definition of “high seas” as had their counterparts in the TWA Flight 800 case. The Helman court was more reluctant to accept the plaintiffs’
definition than was the Second Circuit. The court concluded, though, that it was not necessary to assign a meaning to “high seas” to determine DOHSA’s applicability, as a plain reading of the statute was sufficient.

The Ninth Circuit held that DOHSA has a clearly stated starting point: “beyond 3 nautical miles.” Under a plain reading, the injection of the term “high seas” simply describes the scope of the remedial scheme, with “no indication that this term was meant to incorporate . . . the independent and fluid political concept of U.S. territorial waters.” The plain language of the statute defines “high seas” as “beyond 3 nautical miles.”

Like their TWA Flight 800 counterparts, the plaintiffs also contended that the statute must be read in a way to render no words superfluous. The Ninth Circuit was not persuaded. First, the court reasoned that the DOHSA Congress understood both “high seas” and “beyond a marine league” to be “functionally equivalent.” It would therefore be unsound to impute two different meanings to the terms. Second, adopting the definition of “high seas” that the plaintiffs advocated, namely non-sovereign waters, would render the term “beyond 3 nautical miles” meaningless because it would have no “independent meaning.”

2. Recent Congressional Action Supports a Three-Mile Starting Point

Congress aided the Ninth Circuit in its decision by acting in three significant ways. The first two actions were recent amendments to DOHSA. In 2006, Congress changed the phrase “beyond a marine

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255. See Helman, 637 F.3d at 990 (“[B]oth sides find support for their proffered definition in the relevant, pre-enactment case law.”).
256. See id.
258. See Helman, 637 F.3d at 990.
259. See id. at 990–91.
260. See id. at 991 (“[N]o clause, sentence, or word shall be superfluous, void, or insignificant.” (internal quotation marks omitted) (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)); see also supra note 164 and accompanying text.
261. See id. at 991–92.
262. See id. This is because the two terms’ starting points coincided at the time. See TWA Flight 800, 209 F.3d 200, 207 (2d Cir. 2000).
263. See Helman, 637 F.3d at 991–92.
264. See id. at 992. Although the court did not expound on this point, the reasoning most likely intended was that if “high seas” meant non-sovereign waters, then “high seas” always subsumes the term “beyond 3 nautical miles” because no waters within three nautical miles are ever non-sovereign. Perhaps, then, the court should have said that the plaintiffs’ definition of “high seas” leaves “3 nautical miles” with no useful meaning, rather than no independent meaning.
265. See id. at 991, 993.
266. Id. at 991. The court noted that “the clarity that these amendments brought to our interpretation of the statute” could not inform the Second Circuit because the 2000 and 2006 amendments were enacted after the Second Circuit handed down its decision. Id. at 992. The Ninth Circuit essentially explained away the circuit split it created by reasoning that the Second Circuit did not have the “benefit” of the enactments in reaching its decision. Id. The Second Circuit was aware of possible legislation at the time of its ruling, though. TWA Flight
league” to “beyond 3 nautical miles.” In so doing, Congress “reaffirmed” the three mile starting point of DOHSA, because if Congress believed that Proclamation 5928 extended DOHSA’s starting point, they could have, and likely would have, amended the statute to reflect such a change.

The second amendment was the addition of the commercial aviation exception. This amendment provided that deaths occurring from commercial aviation accidents “on the high seas 12 nautical miles or less from the shore” were exempted from DOHSA. For two distinct reasons, the Ninth Circuit found DOHSA’s commercial aviation exception to be particularly compelling support for its holding. First, the use of “high seas” in the exception necessarily indicated that some portion of the high seas lies within the twelve-mile boundary. Otherwise, a reading of the statute is “non-sensical.” Second, if Congress really believed DOHSA began at twelve miles, as the Second Circuit held it did, then there would have been no purpose in amending the statute. Commercial aviation accidents, and all other accidents, would already be exempted from DOHSA’s reach within the twelve mile territorial sea, rendering an exception “wholly unnecessary.” Congressional action of this sort is “highly persuasive” evidence that DOHSA should regularly apply between three and twelve miles from shore.

Third, the Ninth Circuit was influenced by Congress’s decision to leave DOHSA intact following Proclamation 5928. In response to that proclamation, Congress “specifically chose to amend certain maritime statutes to incorporate the extension of U.S. territorial waters . . . .” The court reasoned that if Congress had thought DOHSA ought to be amended to reflect the extension of the territorial sea, it would have done so.

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267. See supra notes 134–35 and accompanying text.
268. See Helman, 637 F.3d at 991.
269. See id.; see also supra notes 136–40 and accompanying text.
270. 46 U.S.C. § 30307(c); see also supra Part I.D.2.
271. See Helman, 637 F.3d at 991.
272. Id.
273. See id. Adopting the plaintiffs’ definition of “high seas” as non-sovereign waters makes this clear. The amendment would only exclude deaths that occur both on the high seas and within twelve miles from shore. Because the high seas would never be within twelve miles from shore, the amendment would have the effect of excepting no deaths.
274. See id.
275. See id.
276. See id.
278. See id.
3. Proclamation 5928 Was Not Intended to Alter DOHSA’s Boundary

The Ninth Circuit was not persuaded that Proclamation 5928 was intended to alter DOHSA’s three-mile starting point. The first reason was based on the disavowal clause and the OLC’s subsequent advice on interpreting whether it affected a statute. The OLC report noted that if “a statute . . . uses the term ‘territorial sea’ but then defines it as ‘three miles seaward from the coast of the United States,’” the Proclamation would not affect the statute. The Ninth Circuit then asserted that, because DOHSA’s “high seas” boundary is defined as “three nautical miles,” there is “a presumption that Proclamation 5928 did nothing to alter it.”

The court also gave cursory consideration to its doubts that the President has the ability to alter DOHSA’s remedial scheme through a proclamation. The Ninth Circuit, affirming Judge Robert Sweet’s reasoning concerning the Proclamation and presidential power, found that “[t]he power to create and alter the scope of federally-created remedies for victims of wrongful acts . . . remains squarely within Congress.” If the Proclamation extended DOHSA’s starting point to twelve miles, the President would effectively be altering a federal remedial scheme. Therefore, the Proclamation could not extend DOHSA’s starting point.

III. THE SECOND CIRCUIT’S HOLDING IS SUNK BY CONTRADICTION, INCONSISTENCY, AND THE COMMERCIAL AVIATION EXCEPTION

This part offers objections to, and arguments against, the Second Circuit’s reasoning, which is, at times, highly problematic. The Second Circuit looked into the background and drafting process of DOHSA, and then plunged into an extensive analysis of the usage of “high seas.”

279. See id. at 992.
280. See id.; see also supra notes 187–90 and accompanying text.
281. See Kmiec, supra note 125, at 23.
282. See Helman, 637 F.3d at 992. Although DOHSA uses “high seas” and the OLC report uses “territorial sea,” defining the former term as having a three-mile starting point has the same practical effect on the OLC’s reasoning. Of primary import is whether a geographical boundary of a fixed distance (such as three miles) is attached to the political boundary, be it “high seas” or “territorial sea.”
283. See id. at 993; see also supra note 187.
284. See supra note 187.
285. See Helman, 637 F.3d at 993; supra note 187.
286. See Helman, 637 F.3d at 993.
287. See id. Interestingly, Judge Sweet came to a different conclusion using the same analysis. TWA Flight 800, No. 96-Civ. 7986, 1998 WL 292333, at *10 (S.D.N.Y. June 2, 1998). He reasoned that “if it was Congress’ intent that DOHSA’s sweep be dependent on where United States territory ended and international waters . . . began then the President cannot both expand the territory yet exclude that effect on DOHSA.” Id. Thus, beginning with the same proposition that “the President cannot alter a federal remedial scheme,” rather than conclude that the Proclamation cannot alter DOHSA’s starting point, as the Ninth Circuit did, Judge Sweet concluded that the disavowal clause could not impede Congress’s intent to move DOHSA’s starting point to twelve miles. Id. The different conclusions relate back to the courts’ different findings of legislative intent: Judge Sweet found that DOHSA was meant to be affixed to the territorial boundary, whereas the Ninth Circuit found that DOHSA was meant to be affixed to a three-mile boundary. See infra Part III.C.
However, the court succumbed to contradiction and inconsistency on multiple occasions, severely undermining its own arguments.

A. Significant Problems with the Second Circuit’s Arguments

1. The Troubling Conclusion that Congress Both Foresaw and Excluded Any Later-Created Federal Waters

The Second Circuit sought to avoid redundancy in interpreting DOHSA’s statutory language of “high seas beyond a marine league.” The court found the defendants’ meaning of “high seas” (all waters beyond the low-water mark) to be superfluous because it was subsumed by the requirement of “beyond a marine league.” The court found the plaintiffs’ construction of “high seas” (non-sovereign waters) to be neither superfluous nor redundant because “high seas” is a political boundary while “beyond a marine league” is a geographical boundary. While the two terms may have appeared redundant in 1920 because both boundaries were “coterminous . . . , there was no reason to think that would always be the case.” Therefore, it made sense for the two terms to define the boundary.

If “there was no reason to think” that the boundary of the territorial sea would remain the same, why would Congress have enacted a statute that would expressly exclude the extended territorial sea? Indeed, an extended territorial sea consisting of federal waters would be devoid of a wrongful death remedy. If the DOHSA Congress foresaw the extension of the territorial sea, surely it would not have drafted a statute for the purpose of providing a wrongful death remedy where none existed before, and then excluded waters where no wrongful death remedies existed. The Second Circuit often unwittingly returns to this theme of purposeful exclusion of federal territorial waters, even though the court acknowledges both that DOHSA “provided a remedy for wrongful death at sea where none had clearly existed before” and that up until 1920, there was an “absence of any remedy for wrongful death on the high seas.” This intentional exclusion, frequently reiterated by the court, clashes squarely with the latter two premises.

2. The Implication that “High Seas” Was Insufficient to Preserve State Remedies

The majority observed that “high seas” was always part of the statutory language during DOHSA’s drafting, whereas “beyond a marine league” was

288. See supra Part II.A.2.
289. See supra notes 165–66 and accompanying text.
290. See supra note 169 and accompanying text.
291. TWA Flight 800, 209 F.3d 200, 207 (2d Cir. 2000).
292. Id.
293. See supra notes 44–45 and accompanying text.
294. TWA Flight 800, 209 F.3d at 203.
295. Id. at 208 (quoting Moragne v. States Marine Lines, 398 U.S. 375, 398 (1970)).
only added later “to preserve state remedies.”

Recall that the new phrase was added at the same time the MLA abandoned its position of uniformity and excluded those deaths occurring on “any navigable waters of the United States” from the bill’s reach. The court argued that “‘beyond a marine league’ . . . by itself exclude[s] state territorial waters,” so even accepting the defendants’ definition of “high seas” as those waters beyond the low-water mark, “‘high seas’” is subsumed and rendered redundant—or better yet, unnecessary—by “beyond a marine league.” The court then concluded that “high seas” must have had a meaning distinct from “beyond a marine league,” or else Congress would not have retained it.

But under this analysis, the court calls its interpretation of “high seas” into question. By acknowledging that “beyond a marine league” was added to preserve state remedies, the court implicitly acknowledged that the use of “high seas” on its own did not preserve state remedies. If the accepted definition of “high seas” at the time was non-sovereign waters, as the court asserted it was, then limiting recovery to deaths occurring on the high seas would have by itself preserved state remedies, and “beyond a marine league” need not have been added. In other words, the court actually gave credibility to the defendants’ position that “high seas” refers to all water beyond the low-water mark, because only under this meaning would the phrase “beyond a marine league” need to be added to preserve state remedies.

3. The Avoidance of Preempting an Unclear or Non-existent Remedy

The court held that applying DOHSA in federal territorial waters would violate the Act’s intent, which was to “creat[e] a remedy where none existed before.” Puzzlingly, the court also asserted that “Congress intended to exclude federal territorial waters from the scope of DOHSA because federal and state common-law remedies already existed for deaths in those waters.” Judge Sotomayor objected, contending that such federal remedies did not clearly exist. The majority responded that this contention ignored the many instances of courts sidestepping the ruling of The Harrisburg. But such sidestepping did not produce a clear, reliable, or uniform remedy for wrongful deaths occurring outside state territorial

296. See supra notes 170–71 and accompanying text.
297. See supra note 171 and accompanying text.
298. See TWA Flight 800, 209 F.3d at 208. This is true because “beyond a marine league” certainly excluded all waters within three miles from shore, the only additional waters to which “beyond the low-water mark” refers. See supra notes 166–67 and accompanying text.
299. See supra note 171 and accompanying text.
300. Id. at 209.
301. Id.
302. Id. at 224 (Sotomayor, J., dissenting) (“No clear remedies existed for wrongful death beyond state territorial waters after The Harrisburg, a gap in the law that DOHSA was designed expressly to fill.”).
303. Id. at 209 n.6 (majority opinion).
Holding that Congress wished to exclude federal territorial waters from DOHSA’s reach in order to preserve such malformed remedies is inconsistent with the very intent that the Second Circuit attributed to the DOHSA Congress.\footnote{supra notes 44–45 and accompanying text.}

It takes little abstraction to find contradiction in the majority’s opinion. If the panel believed that courts “provided remedies in an effort to ameliorate the harsh rule of \textit{The Harrisburg},” and that those remedies were enough to justify Congress’s purposeful exclusion of federal waters from DOHSA’s reach,\footnote{supra note 192 and accompanying text.} then how could the court justify DOHSA’s application to any waters at all? After all, the Supreme Court had permitted a judicial remedy for a death on the high seas in \textit{The Hamilton}.\footnote{TWA Flight 800, 209 F.3d at 209 n.14.} Would not DOHSA also unlawfully preempt these preexisting remedies for deaths on the high seas? Troublingly, the Second Circuit acknowledged that “[t]he tension between the logic of \textit{The Harrisburg} and \textit{The Hamilton} ‘created jurisdictional fictions and serious problems in choice of law that sometimes denied recovery altogether.’”\footnote{TWA Flight 800, 209 F.3d at 204 (quoting Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 235 (1986) (Powell, J., concurring in part and dissenting in part)).} It would then be peculiar to hold, as the court did, that remedies existed for these waters and that these were sufficient to justify exclusion from DOHSA, after acknowledging that these remedies would often be denied. Perhaps the most interesting note on this point is related to these remedies: the majority, although eager to provide a generous remedy,\footnote{supra Part II.A.5.} actually suggests that the DOHSA Congress specifically excluded certain waters from coverage, preferring recovery to be had through the precarious gaming of state death statutes.

4. The Aversion to Ousting a Preexisting, More Generous Remedy

The Second Circuit was loath to apply DOHSA where it would oust a preexisting—and more generous—remedy.\footnote{id.} Holding that “Congress prioritized the preservation of preexisting remedies over securing uniformity,” the court noted that it would be “particularly inappropriate” to oust a preexisting state or federal remedy in favor of DOHSA’s scant remedial scheme of pecuniary damages.\footnote{TWA Flight 800, 209 F.3d at 209; see also supra note 181 and accompanying text.} The court’s argument overlooked and oversimplified the reality of DOHSA’s application and wrongful death recovery schemes.

\textit{a. DOHSA Does Not Displace a Preexisting Remedy}

First, the court’s assertion that the DOHSA Congress intended to preserve all preexisting remedies is overly broad. At the time of DOHSA’s
drafting, only state remedies existed. 312 The DOHSA Congress therefore only considered the question of state law preemption. 313 This is made clear in the legislative history. 314

Further, the preexisting remedy at issue here is a judge-made, federal common law remedy. Members of Congress, seeking to preserve their own state remedies, vehemently opposed DOHSA’s initial drafts, which provided for uniformity by superseding state wrongful death statutes. 315 But displacing a legislative remedy is intuitively more drastic than a judge-made, interstitial one. Because Moragne provided a wrongful death cause of action under general maritime law only where neither DOHSA nor state law could, this Note contends that a Moragne-type recovery was created only to fill in the existing interstices of maritime wrongful death actions. 316 The fact that a DOHSA cause of action has been held by the Supreme Court to supersede the general maritime law cause of action, best evinced by Higginbotham and Dooley, further supports this point. 317 As a result, ousting the Moragne-type remedy should not be seen as ousting a preexisting remedy at all.

The Second Circuit’s aversion to DOHSA preemption can be objected to on logical grounds: for one remedy to displace another, both must, as a practical matter, be able to apply to the same area. But Moragne only applies if DOHSA does not. 318 Therefore, DOHSA cannot oust a Moragne-type remedy because the two cannot apply to the same area. This argument challenges the characterization of a Moragne-type remedy as “preexisting.” Under this framework, Moragne only applies when DOHSA does not, and is therefore never preexisting. It only arises after a DOHSA cause of action is ruled out.

But what of state law, rather than federal common law, preemption? State law preemption is based on the non-application provision of DOHSA, which states that DOHSA “does not affect the law of a State regulating the right to recover for death.” 319 The Second Circuit reviewed Yamaha and concluded that DOHSA does not oust state remedies if the death occurs in territorial waters. 320 The death in Yamaha occurred in Puerto Rican waters, which are federal, rather than state, territorial waters. Therefore,

312. See supra Part I.A.3.
313. See Engerrand, supra note 47, at 42 (“Congress’ intent was always expressed in terms of state territorial waters, not federal waters.”).
314. See supra notes 62–63 and accompanying text.
315. See supra Part I.B; see also, e.g., 51 Cong. Rec. 1929 (1914) (statement of Rep. Bryan) (objecting to an early draft of the bill if it were to transfer jurisdiction from state to federal courts).
318. See supra Part I.C.2.
319. See supra note 70 and accompanying text.
320. See supra Part II.A.4.
321. See supra note 179 and accompanying text.
if DOHSA could not preempt a state statute from applying in federal territorial waters, then applying DOHSA here would be contrary to *Yamaha*’s holding of state statute preemption in federal territorial waters.322

In discussing DOHSA’s drafting, though, the Second Circuit was noticeably more restrictive, observing that the non-application provision was added so that “the act would not affect state wrongful death remedies for deaths in state territorial waters.”323 It is therefore curious that the court later extended, without hesitation, the provision to preserve state remedies in federal territorial waters.

It is also unlikely that states possess the power to legislate remedies for deaths occurring beyond their waters in the first place. In the final DOHSA House Report, Judge Harrington Putnam noted that “the States can not properly legislate for the high seas.”324

In a case decided only months after the Second Circuit’s ruling, the U.S. District Court for the District of Hawaii found that “[s]tates had jurisdiction over acts committed within their territorial waters of three miles.”325 Therefore, the remedial scheme “permitted state law to apply to wrongful deaths that occurred within their jurisdiction; deaths beyond their jurisdiction were covered by DOHSA.”326 This supports the proposition that, under DOHSA, a state wrongful death statute only applies within state waters. Moreover, the court eloquently stated that “[a] finding that Congress did not intend DOHSA to apply to the waters surrounding territories with no substantive law327 would ignore the fact that Congress only intended to except DOHSA’s application from state territorial waters out of respect for federal-state comity.”328 The same reasoning can be ably extended to federal territorial waters with no substantive law, as was the case when DOHSA was passed. Federal-state comity justifies DOHSA’s exclusion of state territorial waters, but not federal territorial waters.

b. Safety of Air Travel and DOHSA’s Remedial Scheme Undercut the Rationale for Favoring Generosity

The Second Circuit’s goal of favoring generosity also raises problems. The court noted the Supreme Court’s history of favoring generosity in

322. See supra Part II.A.4.
323. *TWA Flight 800*, 209 F.3d 200, 204 (2d Cir. 2000). The Court even reiterated this point later in the opinion: “Section 7 [the non-application provision] was inserted to clarify that state waters were not subject to DOHSA.” *Id.* at 208 (citing Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 231–32 (1986)).
324. Harrington Putnam Letter, supra note 59. Judge Putnam’s letter, written some years prior, was also cited in DOHSA’s final Senate report. See S. REP. NO. 66-216, at 2–4 (1919). During a congressional debate, Representative Walter I. McCoy said of Judge Putnam that “there is no higher authority in admiralty law in this country.” 51 CONG. REC. 1929 (1914) (statement of Rep. McCoy).
326. *Id.*
327. *Jacobson* involved a death occurring in the waters surrounding Johnston Atoll, a U.S. territory. See *id.* at 645.
328. See *Jacobson*, 128 F. Supp. 2d at 650.
recovery\textsuperscript{329} and found justification for disallowing DOHSA preemption on these grounds.\textsuperscript{330} The \textit{Moragne} Court attributed admiralty generosity to “a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages.”\textsuperscript{331} This “[s]pecial solicitude embodies the equitable and humanitarian side of the general maritime law and has long served as the policy vehicle for extending rights and remedies to maritime plaintiffs.”\textsuperscript{332}

Yet the question of whether this special solicitude should be extended to victims of commercial aviation accidents must be raised. After all, “[a]irline travel is remarkably safe.”\textsuperscript{333} In 2010, the worldwide accident rate was “equal to one accident for every 1.6 million flights.”\textsuperscript{334} Thus, it is nonsensical to adhere to a policy of generosity, if that policy is based on solicitude for those who take to the unpredictable hazards of the sea, when commercial aviation is overwhelmingly safe.\textsuperscript{335}

\textbf{B. The Commercial Aviation Exception: A Fatal Blow to the Second Circuit}

The commercial aviation exception, added to DOHSA in 2000, provided that deaths occurring from commercial aviation accidents “on the high seas 12 nautical miles or less from the shore” are exempt from DOHSA.\textsuperscript{336} The Ninth Circuit identified two elements of this amendment that conflicted with the Second Circuit’s holding. The first is that the amendment retains the use of the “high seas,” but qualifies it with “12 nautical miles or less.”\textsuperscript{337} Because “high seas” is conjoined to a limitation within the

\textsuperscript{329} See \textit{TWA Flight 800}, 209 F.3d 200, 209 (2d Cir. 2000) (noting that the Supreme Court has often reiterated Justice Chase’s sentiment that admiralty proceedings “favor . . . [a] more generous recovery” (quoting \textit{The Sea Gull}, 21 F. Cas. 909, 910 (C.C.D. Md. 1865) (No. 12,578))).
\textsuperscript{330} See \textit{supra} Part II.A.5.
\textsuperscript{331} See \textit{supra} note 96 and accompanying text.
\textsuperscript{333} To \textit{Clarify the Application of the Act Popul arly Known as the “Death on the High Seas Act” to Aviation Incidents}, H.R. REP. NO. 106-32, at 1 (1999) (noting that there were no passenger deaths on U.S. commercial airlines in 1998).
\textsuperscript{335} Judge Sotomayor’s argument against generosity is also relevant to this issue. Puzzled by the court’s reasoning, she noted that DOHSA provides “a remedy, not the most generous remedy . . . . If Congress had wished to make that remedy more generous, it certainly had the opportunity” to do so. \textit{TWA Flight 800}, 209 F.3d 200, 224–25 (2d Cir. 2000) (Sotomayor, J., dissenting). Judge Sotomayor’s argument was later weakened by the commercial aviation exception, though, which incorporated a more generous recovery into the statute for deaths arising from commercial aviation accidents. Judge Sotomayor’s reasoning is now functionally outdated, but only with respect to commercial aviation accidents. The amendment did little to mitigate the harsh remedial scheme applicable in most situations, such as \textit{Helman}. Thus, DOHSA can hardly be considered a statute that favors generosity.
\textsuperscript{336} 46 U.S.C. § 30307(c) (2006); see \textit{supra} notes 137–39 and accompanying text.
\textsuperscript{337} 46 U.S.C. § 30307(c).
territorial sea, the clear result is that the “high seas” must include waters within twelve miles from shore. The amendment’s use of “high seas” is irreconcilable with the Second Circuit’s interpretation of the term as non-sovereign waters.

A further argument arising out of the amendment need not flow from the technicalities and implications of statutory language. It is based simply on congressional action to specifically exempt a class of deaths from DOHSA’s reach within twelve miles. This strongly suggests that DOHSA applies to all other deaths within twelve miles. After all, why would Congress amend DOHSA to exempt commercial aviation accidents within twelve miles from shore if DOHSA did not apply to those waters in the first place? This intuitive reasoning finds support in a well-known canon of construction: “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”

Here, Congress has provided an exception to the general application of DOHSA in these waters, which strongly suggests that (1) Congress did not believe any other death should be similarly exempted, and thus, (2) DOHSA applies to all other deaths in the federal territorial sea.

The Second Circuit obviously did not have the benefit of such legislation, as it was passed after the decision came down. The Ninth Circuit, so confident in the repercussions of the amendment, acknowledged that their decision created a circuit split, but asserted that the split would not have occurred had the Second Circuit possessed the clarity provided by the amendments. So clear were the amendments that wading through “legislative history and Congressional purpose” was rendered “unnecessary.” The Ninth Circuit believed the amendments now made DOHSA unambiguous. Indeed, it was an ambiguity in the statute that incited the Second Circuit to retreat into the depths of legislative history and intent.

339. Note that this conclusion is distinct from the earlier conclusion that, by excepting commercial aviation accidents from DOHSA within twelve miles, Congress must have believed DOHSA to ordinarily apply within twelve miles. One conclusion indicates that DOHSA applies within the territorial sea because Congress made no other exceptions to its application, while the other indicates that DOHSA ordinarily applies within the territorial sea because otherwise Congress would not have passed the exception in the first place. The two are distinct conclusions, each independently suggesting that DOHSA should apply within twelve miles from shore.
340. But see supra note 266 (noting that the Second Circuit was aware of the content of proposed legislation at the time of its decision).
341. See supra note 266 and accompanying text. The Ninth Circuit also relied on the replacement of “beyond a marine league” with “3 nautical miles,” and held that Congress reaffirmed DOHSA’s starting point by doing so. See supra notes 267–68 and accompanying text.
343. Id.
344. See supra note 153 and accompanying text.
C. The Second and Ninth Circuits Question the Legality of Proclamation 5928’s Extension of DOHSA’s Starting Point

The Second Circuit reasoned, as it had many times before, that because Congress sought to exclude both state and federal territorial waters from DOHSA, the extension of the territorial sea must have the effect of extending the starting point of DOHSA.345 If DOHSA’s starting point were to remain constant because of the disavowal clause, then the Proclamation would have the effect of amending DOHSA by adding new federal waters to its reach.346 The President cannot so amend a federal statute.347

In contrast, the Ninth Circuit reasoned that because DOHSA’s starting point was intended to be immutably fixed to the three mile boundary, the extension of the territorial sea could not affect DOHSA’s starting point.348 Otherwise, certain federal waters that Congress intended to be covered would be excluded from DOHSA, and the Proclamation would have the effect of amending DOHSA’s remedial scheme.349 Again, this exceeds the President’s authority.350

Therefore, the Second Circuit concluded that the disavowal clause is ultra vires; the Ninth Circuit concluded that the Proclamation would be ultra vires if DOHSA’s starting point were moved. These opposing arguments of legality are only successful if the courts’ findings of legislative intent are correct. As the Second Circuit’s legislative intent is clearly more problematic (because it seems likely that Congress would have wanted to cover federal waters), the Second Circuit’s position is far harder to maintain. The preferable conclusion on the legality of the Proclamation, therefore, is that it would be ultra vires only if it had the result of moving DOHSA’s starting point, and that the disavowal clause is not ultra vires.

D. DOHSA’s Statutory Language Is Inconsistent with Its Purpose

Although the Second Circuit got it wrong, its interpretation of “high seas” was actually right.351 But because the DOHSA Congress used the term in a way that was contrary to the Act’s purpose, the Second Circuit ran into trouble defending the term’s use in the Act. In other words, the fault rests primarily with Congress’s use of “high seas,” rather than any court’s subsequent interpretation of it.

Congress intended to provide a remedy where none previously existed. It likely would have intended DOHSA to apply to later-created federal territorial waters where remedies did not otherwise exist. Congress therefore simply did not realize the implications of fixing the boundary of DOHSA to the “high seas” because at DOHSA’s enactment, and for

346. Id.
348. See supra note 286 and accompanying text.
349. See supra note 286 and accompanying text.
350. See supra note 285 and accompanying text.
351. See supra notes 11, 142.
approximately 150 years prior, “high seas” and “beyond a marine league” were coterminous. The two terms would remain coterminous for another sixty-eight years.

Congress’s use of “high seas” in the commercial aviation exception demonstrates and reaffirms the misuse. The amendment provides that deaths occurring “on the high seas 12 nautical miles or less from shore” are exempt from DOHSA, and, as seen, this necessarily indicates that some portion of the high seas lies within the territorial sea. Plainly stated, Congress’s usage of “high seas” is irreconcilable with the presently accepted meaning of the term.

This premise has already been explicitly and implicitly noted in multiple treatises. Professor Thomas J. Schoenbaum notes that “both original and amended DOHSA use the term ‘high seas’ in a way that contradicts the accepted technical meaning of this term under international law.” After finding three other incoherencies in DOHSA, he concludes that “Congress should revisit the scope and application of DOHSA.”

Another treatise, addressing cases where DOHSA was applied to foreign territorial waters, notes that “the term ‘high seas’ within the meaning of DOHSA is not limited to international waters.” The limiting and qualifying language of “within the meaning of DOHSA” suggests that DOHSA’s use of “high seas” is not consistent with its ordinary use.

CONCLUSION

The history of wrongful death actions at sea has been chaotic. DOHSA reflects Congress’s wish to provide a wrongful death cause of action where one had previously gone wanting. The Second Circuit’s decision imputes to the DOHSA Congress an intent to preclude all federal waters from coverage, even though this frustrates DOHSA’s accepted purpose. States cannot properly legislate for deaths occurring beyond their borders, and so relying on state law preemption for a remedy is baseless, while relying on the interstitial Moragne remedy violates years of case law. These arguments indicate that the Second Circuit’s holding is specious. Subsequent congressional action further supports the necessity of reconsideration and reversal.

352. See supra notes 138, 270 and accompanying text.
353. 1 SCHOENBAUM, supra note 11, at 668–69.
354. Id. at 669. Although this Note agrees with Professor Schoenbaum’s conclusion, perhaps a more modest solution would be reconsideration when the Second Circuit next hears the issue.
355. 2 BENEDICT ET AL., supra note 16, § 81b n.18; see also supra note 220.