AFTER 100 YEARS:
HAS THE JONES ACT SUNK THE JONES ACT AND *VICE VERSA*?

David J. Farrell, Jr.[1]

Part of the Merchant Marine Act of 1920, which declared U.S. merchant marine policy as it remains today, the Jones Act consists of two sections. First, § 27 reinstated strict cabotage protections for U.S. coastwise shipping, which had been suspended during World War I. Second, § 33 instituted a new, generous personal injury/death cause of action and jury trial for seafarers against their employers. After reviewing the history leading up to the Jones Act's enactment, this article contends that after 100 years the two sections have worked at cross-purposes, resulting in U.S. reliance on other nations' ships to carry our international imports and exports, although § 27 has benefitted certain key segments of the domestic maritime industry admirably serving the U.S. It concludes with questions on how to best maintain our coastwise successes while improving our international shipping failures.

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[1] © 2022 David J. Farrell, Jr. Farrell Smith O'Connell, Chatham, MA; President, The Maritime Law Association of the United States; Titulary Member, Comité Maritime International; B.A. Williams College; M.P.A. Columbia University; J.D. Duke University School of Law.

IV. HAS THE JONES ACT ACCOMPLISHED ITS GOALS?

A. Not When Each Jones Act Section Deflates the Other

1. Jones Act cabotage decreases Jones Act seafarers
2. Jones Act negligence/jury suits deter investment in U.S. shipping
3. And both sections have failed to sustain a foreign trade U.S. merchant fleet

B. Jones Act Beneficiaries

1. Routes to the Overseas U.S.
2. Coastal and inland towing, etc.
3. Offshore oil and gas
4. Offshore wind arises as a Jones Act industry, with a *Knickerbocker* caution

V. CONCLUSION

I. THE JONES ACT HAS TWO SECTIONS, BOTH CALLED THE JONES ACT

We gather at this Tulane Admiralty Law Institute to assess the century old Jones Act, part of the Merchant Marine Act of 1920.[2]

A. § 27 Cabotage and § 33 Negligence/Jury

The Jones Act consists of two main sections which remain in force.[3] First, § 27[4] reinstated cabotage[5] protections to promote the U.S. domestic shipping industry by allowing only

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[2] Pub. L. No. 66-261, Ch. 250, 41 Stat. 988 (1920); its § 27 and § 33 are quoted in II, *infra*.

[3] The Merchant Marine Act of 1920 had several sections which do not seem to have ever been called the Jones Act -- or at least not recently. For instance, a group of sections dealt with the creation of a new shipping board. A mutual P&I insurance program was authorized by § 29, *see* Richard Blodgett, *The American Club: A Centennial Histo*ry at 30 (2016) [hereafter Blodgett]. And § 30 was to become "known as the Ship Mortgage Act of 1920," Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 9-48 at 691 n.235 and accompanying text (2d ed. 1975) [hereafter Gilmore & Black].

[4] Now codified at 46 U.S.C. § 55102 (2006), quoted in II.B.2, *infra*.

[5] "A nautical term from the Spanish, denoting strictly navigation from cape to cape along the coast without going out into the open sea. In International Law, cabotage is identified with *coasting-trade* so that it means navigating and trading along the coast between the ports thereof," *Black's Law Dictionary* (5th ed. 1979), or from the French, "caboter," to sail along a coast, *see* https://www.merriam-webster.com/dictionary/cabotage. Jones Act § 27 was not the first U.S. law limiting trade along our coasts to domestic ships, which started in 1789, *see, e.g.*, Salvatore R. Mercogliano, *Sea History*, "A Century of the Jones Act" at 14 (Winter 2019-20) ("preference of domestic over foreign ships in our coastwise trade were a bedrock of the early national government") [hereafter Mercogliano]; Gilmore & Black at 963 and n.34 (citing statutes), "[r]ather, it was a restatement of a long-standing restriction that was temporarily suspended

U.S.-built, -owned, and -crewed ships to carry cargo between two U.S. points, excluding foreign-flag vessels from domestic, coastwise trade. Second, § 33[6] expanded remedies for U.S. flag-vessels' crewmember[7] personal injury and death by providing a negligence cause of action and jury trial against the employer, as a deterrent to unsafe acts and omissions.[8]

In common parlance each section is considered to be ***the Jones Act*** by its practitioners – basically to the exclusion of the other section. In our work as lawyers, if you specialize in one, you barely deal with the other. Maritime transaction and regulatory lawyers talk about complying with or obtaining waivers and exemptions from federal agencies' implementation[9] of ***the* Jones Act's restriction of U.S. domestic, coastwise shipping**, pursuant to § 27, to U.S. built vessels, U.S. owners, and U.S. seafarers. Admiralty casualty lawyers talk about ***the* Jones Act's**

during World War I by P.L. 65-73, enacted October 6, 1917," John Frittelli, Cong. Research Serv., R45725, *Shipping Under the Jones Act: Legislative and Regulatory Background* at 2 (Nov. 21, 2019) [hereafter Frittelli].

[6] Now codified at 46 U.S.C. § 30104 (2008), quoted in II.C.2, *infra*.

[7] The words "seamen" used in 1915 statutory language, "seaman" used in § 33, and "seaman status," used in the Supreme Court trilogy of *McDermott Int'l Inc. v. Wilander*, 498 U.S. 337 (1991), *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548 (1997), are so-called legal terms of art. The general use here of "seafarer" in more up-to-date contexts should not cause confusion.

[8] *Warner v. Goltra*, 293 U.S. 155, 156 (1934) ("the overmastering purpose of [§ 33 was] to give protection to workers injured upon ships"); *Jamison v. Encarnacion*, 281 U.S. 635, 639-40 (1930) (§ 33, by incorporating FELA "negligence," was "intended to stimulate…greater diligence for the safety of their employees….").

[9] A domestic vessel is deemed Jones Act compliant upon issuance of a Coastwise Endorsement by the United States Coast Guard which enforces U.S.-built, -owned, and -crewed requirements under 46 C.F.R. §§ 67.95-67.101, §§ 67.30-67.43, and §§ 10.221, respectively. The United States Customs and Border Protection determines whether certain maritime activity constitutes "transportation" between voyage origin and destination "points" under 19 C.F.R. §§ 4.80-4.93.

negligence cause of action with a jury trial, pursuant to § 33,[10] brought by U.S. seafarers against their U.S. employers for personal injury or death.[11]

There is no great overlap in these two specialty Jones Act practices and seldom do the twain meet -- making this Institute an excellent opportunity to examine its two component sections and their impact on our domestic maritime industries 100 plus years after enactment.

B. Thesis: The Two Sections Have Worked At Cross-Purposes

One more initial observation about the two Jones Act sections is appropriate. Both Jones Act cabotage protections and Jones Act negligence/jury actions are number one in the whole world. Two gold medals for USA! No other country has more protectionist cabotage laws[12] and no workers anywhere in the world have a more generous tort compensation package.[13] As will be discussed in IV.A below, that has a lot to do with why after 100 years the size of the U.S. merchant marine has sunk to 22nd in the world.[14]

While we eagerly await what the Institute's experts will hereafter say and write about the Jones Act, following a look at its historical basis and objectives this kickoff article contends that after a century: (1) § 27's protection of U.S. coastwise shipping and § 33's means of deterring seafarer personal injuries have worked at cross-purposes, (2) although there has been an abject failure to maintain a U.S. merchant marine carrying foreign trade imports and exports, (3) Jones Act § 27 has successfully promoted and benefitted certain robust segments of the domestic shipping industry capably serving our country.

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[10] *See, e.g.,* Frittelli at 1 and n.2 (in his article, while "[t]he Jones Act, which refers to Section 27 of the Merchant Marine Act of 1920…[a]nother section of the same law that deals with seafarers' rights is also commonly referred to as the 'Jones Act.'"); Constantine G. Papavizas, *Public Company Jones Act Citizenship*, 39 Tul. Mar. L.J. 383, 384 n.1 (2015) (in his article, "the term 'Jones Act' refers to section 27 of the Merchant Marine Act, 1920…rather than section 33 of that Act, also commonly referred to as the 'Jones Act,' which governs mariner injury compensation").

[11] *See Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959) (U.S. law inapplicable to Spanish seafarer's injury in U.S. waters aboard Spanish-flag vessel when employment contract called for Spanish law); LeRoy Lambert, *Rights of non-US seafarers under US law* ("If a non-US seafarer employed on a non-US ship is injured in a US port, it is likely that the claim will not be subject to US law").

[12] World Economic Forum, "Enabling Trade: Valuing Growth Opportunities," http://www3.weforum.org/docs/WEF_\SCT_EnablingTrade_Report_2013.pdf (2013).

[13] III.C.2 and 3, *infra.*

[14] Mercogliano at 15.

II. THE JONES ACT -- TEXT

Below is the original Jones Act 1920 text followed by the current codification, separately focusing on the two component parts -- § 27 cabotage and § 33 negligence/jury -- but first quoting the Merchant Marine Act of 1920's statutory purpose and its current codification.

A. Statutory Purpose

1. Preface, 1920 version

> **An Act To provide for the promotion and maintenance of the American merchant marine, to repeal certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder**, and for other purposes.
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it is **necessary for the national defense and** for the proper **growth** of its **foreign and domestic commerce** that the **United States shall have a merchant marine of the best** equipped and most suitable types of **vessels sufficient to carry the greater portion of its commerce and** serve as a naval or **military auxiliary** in time of war or national emergency, ultimately to be **owned and operated privately by citizens of the United States**; and it is **hereby declared to be the policy of the United States to do whatever may be necessary to develop** and encourage the maintenance of such a **merchant marine**, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.[15]

2. Current codification

Even after the United States Shipping Board mentioned above disposed of excess government ships following World War I, *see* III. A. and B. below, the other 1920 goals for the U.S. merchant marine remain codified to this day:

> 46 U.S.C. § 50101 (2009) Objectives and policy
>
> (a) Objectives. **It is necessary for the national defense and the development of the domestic and foreign commerce** of the United States **that the United States have a merchant marine**—

[15] Pub. L. No. 66-261, Ch. 250, 41 Stat. 988 (1920) (emphasis added).

(1) **sufficient to carry** the waterborne domestic commerce and a **substantial part** of the waterborne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of the **waterborne domestic and foreign commerce** at all times;

(2) capable of serving as a naval and military auxiliary in time of war or **national emergency**;

(3) **owned and operated** as vessels of the United States **by citizens of the United States**;

(4) composed of the **best-equipped, safest**, and most suitable types of **vessels constructed in the United States** and manned with a trained and efficient **citizen personnel**; and

(5) supplemented by **efficient facilities for building and repairing vessels**.

(b) Policy. It is the **policy of the United States to encourage** and aid the development and maintenance of a **merchant marine** satisfying the objectives described in subsection (a).[16]

A. Jones Act Cabotage

1. § 27, 1920 version

SEC. 27 That **no merchandise shall be transported by water, or by land and water on penalty of forfeiture thereof, between points in the United States**, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, **in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States**, **or vessels to which the privilege** of engaging in the coastwise trade **is extended** by sections 18 or 22 of the Act: *Provided*, That this section shall not apply to merchandise transported between points within the continental United States, excluding Alaska, over through routes heretofore or hereafter recognized by the Interstate Commerce Commission for which routes rate tariffs have been or shall hereafter be filed with said commission when such routes are in part over Canadian rail lines

[16] 46 U.S.C. § 50101 (2009) (emphasis added).

> and their own or other connecting water facilities: *Provided further*, That this section shall not become effective upon the Yukon river until the Alaska Railroad shall be completed and the Shipping Board shall find that proper facilities will be furnished for transportation by persons citizens of the United States for properly handling the traffic.[17]

2. Current codification

Again, some older, obsolete language was cut out but cabotage protectionism of U.S. domestic shipping remains codified.

> 46 U.S.C. § 55102 (2006) Transportation of merchandise
>
> (a) Definition. In this section, the term "merchandise" includes—
>
> (1) merchandise owned by the United States Government, a State, or a subdivision of a State; and
>
> (2) valueless material.
>
> (b) Requirements. **Except as otherwise provided** in this chapter or chapter 121 of this title, **a vessel may not provide** any part of the **transportation of merchandise** by water, or by land and water, **between points in the United States** to which the coastwise laws apply, either directly or via a foreign port, **unless the vessel**—
>
> (1) is **wholly owned by citizens of the United States** for purposes of engaging in the coastwise trade; **and**
>
> (2) has been issued a **certificate of documentation with a coastwise endorsement** under chapter 121 or is exempt from documentation but would otherwise be eligible for such a certificate and endorsement.
>
> (c) **Penalty.--**Merchandise transported in violation of subsection (b) is liable to **seizure** by **and forfeiture** to the Government. Alternatively, an amount equal to the value of the merchandise (as determined by the Secretary of Homeland Security) **or the actual cost of the transportation**, whichever is greater, may be recovered from any person transporting the merchandise or causing the merchandise to be transported.[18]

[17] § 27, 41 Stat. 1007 (1920) (emphasis added).

[18] 46 U.S.C. § 55102 (2006) (emphasis added).

C. Jones Act Negligence/Jury

1. § 33, 1920 version

> SEC. 33. That section 20 of such **Act of March 4, 1915**, be, and is **amended** to read as follows:
> "SEC. 20. That any **seaman** who shall suffer **personal injury in the course of his employment** may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the **death** of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the **right of trial by jury**, and in such action all **statutes** of the United States conferring or regulating the right of action for death in the case of **railway employees shall be applicable**. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."[19]

2. Current codification

Terser is always better:

> 46 U.S.C. § 30104 (2008) Personal injury to or death of seamen
>
> A **seaman injured** in the course of employment **or**, if the seaman **dies** from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the **right of trial by jury, against the employer**. **Laws** of the United States regulating recovery for personal injury to, or death of, a **railway employee apply** to an action under this section.[20]

[19] § 33, 41 Stat. 1007 (1920). Note that Jones Act § 33 amended § 20 of the La Follette 1915 Seamen's Act, Act of Mar. 4, 1915, Ch. 153, 38 Stat. 1185; *see, e.g.*, Martin J. Norris, 2 *The Law of Seamen*, §§ 30.2 and .3 at 325-29 (4th ed. 1985) [hereafter Norris].

[20] 46 U.S.C. § 30104 (2008) (emphasis added).

III. THE JONES ACT -- HISTORICAL NOTES

A. Preface: Statement of U.S. Maritime Policy

Prefatory to Jones Act § 27 and § 33, the statutory purpose in the unlabeled preamble of the Merchant Marine Act of 1920 merits close consideration.[21] In promoting and maintaining a private sector merchant marine, one of the first steps was the disposition of government ships to the private sector.[22] The U.S. government's objectives and declared merchant marine policy over the last century,[23] is then laid out, with goals of growing and carrying domestic and foreign commerce, also needed for our national defense.

The objectives and policy statement, as since implemented, have indeed been achieved for certain segments of domestic shipping on U.S.-built, -owned, and -crewed ships.[24]

But they have not been achieved for a commercial U.S. merchant marine fleet engaged in foreign trade, which has in essence been outsourced to foreign-flag ships, just like before World War I.[25] After 100 years, to quote my esteemed predecessor, Lizabeth L. Burrell, from an earlier Institute: "*Plus ça change, plus c'est la même chose."*[26]

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[21] II.A.1, *supra*. Rep. William Stedman Greene (R-MA) from the backwater port of Fall River is credited with first enunciating in H.R. 10378 the "Policy for development of an American merchant marine, etc.," which was carried over to Pub. L. No. 66-261, Ch. 250, 41 Stat. 988 (1920); Mercogliano at 14; Constantine G. Papavizas, *The Story of the Jones Act (Merchant Marine Act, 1920): Part II*, 45 Tul. Mar. L.J. 239, 251-53 (2021) [hereafter Papavizas, *Jones Act Story II*].

[22] *Clyde-Mallory Line v. The EGLANTINE*, 317 U.S. 395, 398-99 (1943) (throughout the 1920 Merchant Marine Act "there appears repeated manifestation of a congressional purpose to expedite transfer of government vessels into private hands.").

[23] Papavizas, *Jones Act Story II* at 286 ("The 1920 Act was a fundamental step in favor of direct U.S. Government involvement in the private U.S. merchant marine which has not, to this day, run its course"); Frittelli at 5 (an "enduring aspect of the bill is its statement of maritime policy"); Alex Roland et al, *The Way of the Ship* at 278 (2008) ("Its statement of policy remained a trope of government rhetoric through the remainder of the twentieth century") [hereafter Roland]; Benjamin W. Labaree et al, *America and the Sea: A Maritime History* at 524 (1998) ("represented the government's determination to remain a partner in the nation's shipping industry") [hereafter Labaree].

[24] IV.B, *infra*.

[25] *See* nn.98-102 and accompanying text and n.31 and accompanying text, *infra*.

[26] Lizabeth L. Burrell, *Plus ça Change*: *The Protean World of the Maritime Specialist*, 81 Tul. L.R. 1359, 1375 (2007) ("The more things change, the more they are the same").

B. Jones Act § 27 Cabotage -- History

A deep dive into Jones Act cabotage legislative history is not essential here[27] when the 1920 statutory purpose so clearly articulates promoting and doing "whatever may be necessary to develop and encourage" U.S. private sector shipping "sufficient to carry the greater portion" of U.S. "foreign and domestic commerce."[28] Purporting to further that policy, § 27 goes on to preclude[29] coastwise trade "in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States."[30]

Nevertheless, some historical context on what led up to Jones Act § 27 is instructive on the reasons cabotage protections were reinstated in 1920 and help explain why our merchant marine is where it is today.

1. World War I merchant marine build up

Just prior to our entry into World War I there were only seven ships flying the U.S flag engaged in foreign commerce, carrying only 2% of our foreign commerce. We had been recently relying instead on British and German commercial shipping for our import and export cargos,[31] leaving the U.S. very much stranded on a big island when war broke out between the two.

[27] The Jones Act's legislative history was fully covered recently in Papavizas, *Jones Act Story II.*

[28] II.A.1, *supra. Quaere* whether 46 U.S.C. § 50101's replacing the 1920 original "greater" with "substantial" and eliminating the original policy declaration "to do whatever may be necessary" indicate a dilution of the 1920 goals? Jones Act § 27 and § 33 may have made sense then; arguably less so now. *See* IV *infra*.

[29] Unless exempted or excepted, as for example, by a waiver from Congress or by the Executive Branch in the interest of national defense. Frittelli at 10-13 and app.

[30] II.B.1, *supra.* Per MARAD, § 27 as amended and implemented, "requires vessels that serve the U.S. domestic trades be: owned by a U.S. citizen or by companies controlled by individuals that are U.S. citizens with at least 75 percent of ownership; operated with crews that are all U.S. citizens in licensed positions and at least 75 percent U.S. citizens in unlicensed positions; built (or rebuilt, or seized) in the United States; and registered under the U.S. flag with a coastwise endorsement from the U.S. Coast Guard." U.S. Department of Transportation, *Goals and Objectives for a Stronger Maritime Nation: A Report to Congress* at 8 n.19 (2020) [hereafter DOT, *Maritime Goals*].

[31] Mercogliano at 13-14; Labaree at 494.

Accordingly, and in conjunction with the U.S. war effort after our April 6, 1917 declaration,[32] the Wilson administration pushed for a major expansion of the U.S. commercial fleet. With the Shipping Act of 1916,[33] the United States Shipping Board and affiliated Emergency Fleet Corporation were created with authority to subsidize building a robust merchant marine and with authority to requisition U.S. flag vessels as well as foreign flag vessels left in our ports.[34] That turned out to total 2,318 hulls, all now under the federal government's control. Also, needing flexibility during the war with the diversion of coastwise-qualified vessels into foreign service, U.S. cabotage laws were repealed.[35]

In sum, the U.S. merchant marine fleet, now greatly enlarged, which had "formerly been an enterprise virtually monopolized by the private sector was now declared a province of the federal government."[36]

2. Getting rid of the government's postwar glut of ships

But with America's (what would now be considered) short-lived, 19-month involvement in fighting the war, many of the newbuilds were still high and dry on the ways come Armistice Day, November 11, 1918.[37] What to do with them? Political and public discussions tended toward keeping shipyards and shipyard labor busy and happy by finishing off the newbuilds. They could then be sold off at low prices to private sector U.S. citizens. That would pump prime a robust U.S. merchant marine to handle our foreign trade ourselves, without reliance on foreign shipping. And it would also get the federal government out of the commercial shipping business, except to the extent needed to supplement the private sector merchant marine, with a ready fleet to serve the nation's shipping needs and in the event of another war.[38]

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[32] Following the German sinking of ten U.S. flag ships in two months. Rodney Carlisle, "The Attacks on U. S. Shipping that Precipitated American Entry into World War I," 17 *Northern Mariner* 41, 61-62 (2007).

[33] Ch. 451, 39 Stat. 728.

[34] Labaree at 496; Roland at 267.

[35] Mercogliano at 13-14; *supra* n.5.

[36] Labaree at 524.

[37] Mercogliano at 13.

[38] Frittelli at 5; Roland, Chs. 32 and 33; Mercogliano at 13-16 (the first Chief of Naval Operations, William S. Benson, took over as Chair of the U.S. Shipping Board in March 1920, advocating for a permanent U.S.-flag merchant marine adequate for peacetime commerce and as a non-combatant naval auxiliary if needed); Labaree, Ch. 13, 524, 527; Blodgett at 23-29; Gilmore & Black at 966.

With that background, the Merchant Marine Act of 1920 took shape,[39] absent any of the rancor so routine 100 years later. Starting in 1919 with Congressman Greene's H.R. 10378 setting out the policy goals,[40] the House and Senate conferenced their different versions of the bill briefly on June 2-4, 1920. Senator Wesley Jones (R-WA)[41] is credited and memorialized (including by this Institute) with steering it through Congress with minimal debate and signature by President Wilson[42] on June 5, 1920, the day before Congress started summer recess.[43]

3. Limiting coastwise trade to U.S.-built, -owned, and -crewed vessels

In sum, the United States went from having virtually no U.S.-flag international fleet, to over 20% of the world's commercial fleet subsidized by the federal government,[44] to plans for

[39] Documentary evidence indicates that while the MLA had no direct involvement in what would become Jones Act § 27, perhaps because reinstating cabotage protection was not controversial, the MLA closely monitored developing merchant marine and mortgage issues. At the MLA Spring 1918 Meeting seven Commissioners of the U.S. Shipping Board joined as MLA Associate Members (out of a total Membership of 173). MLA Hist. Doc. 81 at 6-7. Also, after enactment, the MLA Fall 1920 Meeting considered "the effect and operation of the so-called Jones Bill, which became a law June 6, 1920. The bill affects the reorganization of the United States Shipping Board and the disposition of the ships built by the Emergency Fleet Corporation as part of the war program of the country in the War against the German Government." MLA Hist. Doc. 99.

[40] *Supra,* n.21.

[41] Senator Jones' motivating constituent interest was to detour Vancouver, BC, from where foreign-flag ships were carrying cargo to Alaska, bound there after arriving from Seattle by U.S.-flag ship or rail. Thus § 27 covered shipments "by water, or by land and water" from "points in the United States" and not just ports. The Port of Seattle was the beneficiary. *See, e.g.*, Frittelli at 3.

[42] Assuming that President Wilson who after his stroke was "a wreck of his former self" actually signed it. William E. Leuchtenburg, "Woodrow Wilson," *The American President* at 108-109 (2015).

[43] Mercogliano at 14; Papavizas, *Jones Act Story II* at 258-59.

[44] Roland at 273-74.

"the disposition"[45] of the "almost 10-million ton war-built fleet" to the private sector "at extremely low prices,"[46] all in about four years.[47]

All that new tonnage, its status quickly changing, merited protection, with Jones Act § 27 providing strict cabotage rules for this large fleet of U.S.-built vessels, their U.S. owners, and their U.S. crews. As we will see in IV.B below, today there are indeed strong domestic maritime industry segments that have benefitted from § 27.

C. Jones Act § 33 Negligence/Jury -- History

We now sharply alter course, from Jones Act cabotage which re-established an old protectionist policy, to a very new Jones Act negligence lawsuit by seamen against their employers in front of a jury. Again, there will be no dive here into § 33's legislative history. There is none.

How and why did this 102-year-old cause of action really arise?

1. Law school jurisprudence

The OSCEOLA[48] explanation from law school admiralty courses and treatises[49] holds little fascination for the modern Jones Act personal injury practitioner. We were taught (and might have learned) that in response to *The OSCEOLA* propositions that seamen could not sue their master or fellow crew for negligence under the "fellow-servant" bar, Congress inserted Jones Act § 33 into the maintenance/cure/unearned wages and not fully developed unseaworthiness indemnity regime. Injured or deceased seamen now had a negligence cause of action against their employers (including master and crew *respondeat superior*), with a jury trial option, *via* § 33's incorporation of railroad employee remedies under what would later be known as the Federal Employers' Liability Act (FELA).[50]

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[45] II.A.1, *supra*.

[46] Andrew Gibson & Arthur Donovan, *The Abandoned Ocean: A History of United States Maritime Policy* at 120-121 (University of South Carolina Press, 2000).

[47] *See* Roland at 273-78.

[48] 189 U.S. 158 (1903).

[49] Gilmore & Black, §§ 6-2 and -3; Norris, § 30:1; Thomas J. Schoenbaum, 1 *Admiralty and Maritime Law* § 6-8 and § 6-20 at 454-55 (5th ed. 2011).

[50] Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; now codified at 45 U.S.C. §§ 51-60.

To cut through all this *OSCEOLA* flotsam (although regrettably it will have to be dissected later), Jones Act § 33 meant injured or deceased seamen could sue their employers for negligence before a jury.

2. Unseaworthiness claims get to the jury too

But as it evolved over the decades, the Jones Act seafarer's suit came to mean a lot more than that to practitioners. The "featherweight" causation standard -- a negligent act or omission that plays any part, "even the slightest" -- in producing injury, and thus constituting liability under the Jones Act, is one cause of action for the injured or deceased seafarer.[51] But especially since the Supreme Court's 1960 *Mitchell v. Trawler Racer* decision, which emphasized that "the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care,"[52] it developed that "the unseaworthiness doctrine is the principal vehicle for personal injury recoveries."[53]

Yet the two causes of action are not truly independent because it became routine for the unseaworthiness claim to be tried with the Jones Act claim to a jury,[54] albeit properly with separate causation jury instructions, notably that the unseaworthiness claim has a normal proximate cause element, as distinct from Jones Act featherweight causation.[55] Whether jurors keep those nuances straight is dubious.

Two 20th Century Supreme Court justices nicely summed up the difference in principle between Jones Act/FELA negligence and unseaworthiness. William O. Douglas, concurring in a railroader personal injury case, noted that FELA

> was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer the insurer. The liability which it imposed was the liability for negligence.[56]

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[51] Dale S. Cooper, 1B *Benedict on Admiralty* Ch. 3, § 21 at 3-3 (1992); Gilmore & Black at 382 n.206c.

[52] 362 U.S. 539, 549 (1960).

[53] Gilmore & Black, § 6-38 at 383; *see* John W. Sims, *The American Law of Maritime Personal Injury and Death: An Historical Review*, 55 Tul. L.R. 973, 988 (1981) [hereafter Sims]. This seems overstated since the featherweight Jones Act causation element remains a focus in litigation today.

[54] Gilmore & Black, §6-21 at 327-28.

[55] *See Phillips v. Western Co.*, 953 F.2d 923, 928 (5th Cir. 1992).

[56] *Wilkerson v. McCarthy,* 336 U.S. 53, 68 (1949).

In contrast, Felix Frankfurter, dissenting in *Trawler Racer*, noted that "vessel owners, unlike all other employers," with "absolute liability" for transitory unseaworthiness claims, are "now to be regarded as an insurer."[57]

Combined, "the Jones Act, unseaworthiness, and maintenance and cure causes of action makes the seaman the most generously treated personal injury victim in American law."[58] Throw in the wild card of a jury (with Congress arguably removing the federal judiciary's oversight of seafarers as "wards of the admiralty") and after 100 years seafarers receive no-fault maintenance and cure benefits while their featherweight causation for human negligence claims and strict liability unseaworthiness claims for vessel physical unfitness grind through court backlogs with eventual fact finding by jurors and awards that can be akin to hitting it big at the casino.

3. But why FELA rather than a workers' compensation program?

In looking back at the Jones Act after 100 years, this Institute is a good time to ponder why U.S seafarers and U.S. railroaders have a congressionally authorized jury trial for negligence against their employers under FELA when no other industries' employees have that right -- not coal miners, lumber jacks, construction workers, factory workers, or any other employees in hazardous industries?

Every other employee workplace injury in any other industry is covered under workers' compensation programs, as summed up by another of my esteemed predecessors, Patrick J. Bonner, at an earlier Institute:

> New York was the first state to pass a workers' compensation law in 1910; now these laws govern liability for employment injuries in all fifty states. When the workers' compensation laws were first introduced, there were many justifications given for them. The employer could pass costs of the injuries and the liability insurance to the consumers, and the community would not have to take care of injured workers. Another one was the savings in legal costs. Families and injured workers received money immediately, which enabled widows to keep their families together. Under these laws, the employer is strictly liable and cannot limit its liability but, in turn, it benefits from limited liability that does not include pain and

[57] 362 U.S. at 570.

[58] David W. Robertson, Stephen F. Friedell & Michael F. Sturley, *Admiralty and Maritime Law in the United States* (3d ed. 2015); *see also* Gilmore & Black at 282 ("The 'poor and friendless' seaman is thus the beneficiary of a system of accident and health insurance at shipowner's expense more comprehensive than anything yet achieved by shorebound workers").

> suffering. In addition, the employer pays benefits starting immediately after the accident.[59]

So what in the early 20th Century explains why, unlike any other industries, there is no statutory workers' compensation system for railroaders and seafarers? Yet even railroaders have nothing like no-fault maintenance and cure or strict liability unseaworthiness claims. *How did U.S. injured seafarers get this unique in all the world quiver of three arrows to aim at their employers in front of a jury?*[60] Why is it, as Professor Schoenbaum notes, that "no other worker in our society can invoke such powerful relief in the event of an industrial accident"?[61]

4. Gilmore & Black's oversimplification

Gilmore & Black's oversimplistic view, and the source for the conventional wisdom, was that the reason FELA got incorporated into Jones Act § 33 comes down to nothing more than Congressional laziness:

> Congress, when it passed the Jones Act, **apparently** did not want to waste any time on thinking about the special problems of maritime workers. As a thought-saving device, the draftsman hit on the **odd expedient** of incorporating another statute by reference.[62]

The absence of any § 33 printed Congressional record[63] documenting thoughtful deliberation no doubt played into Gilmore & Black's conclusory assertion.

However, the broader historical record suggests Gilmore & Black were too harsh; that Congress had indeed thought about "the special problems of maritime workers," albeit mistakenly; and found itself backed into a corner thanks to a Supreme Court decision that came down as a legislative deadline at summer recess loomed; so there are indeed rational explanations for § 33's FELA incorporation.

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[59] Patrick J. Bonner, *Limitation of Liability: Should It Be Jettisoned After the DEEPWATER HORIZON?*, 85 Tul. L.R. 1183, 1185-86 (2011) (footnotes omitted).

[60] U.S. Department of Labor, *Workmen's Compensation and the Protection of Seamen* at 45, H.R. Doc. No. 623, 79th Cong., 2d Sess. (1946) ("Nearly all foreign countries have enacted workmen's compensation laws which cover merchant seamen who have become ill or injured in the course of their employment or in the service of their vessels.") [hereafter Dept. of Labor 1946].

[61] Schoenbaum, 2 *Admiralty and Maritime Law* at 394.

[62] Gilmore & Black at 351 (emphasis added).

[63] Papavizas, *Jones Act Story II* at 284 and n.353 (FELA was included in § 33 "without remark").

5. The Progressive Era

It helps to appreciate that sweeping workers' compensation schemes were advancing during the late 19th and early 20th Centuries' Progressive Era.[64] But the railroad industry in particular stood out as a Progressive bull's-eye. "'[M]onopolistic' railroads controlled by 'robber barons' were not just an economic 'popular bogeyman' but also the source of hideous injuries such that the 'disregard for safety'" by the railroads was widely criticized[65] and something on which Progressives, Trust Busters, and the public could all agree.

Following the 1887 creation of the Interstate Commerce Commission to regulate onerous railroad freight rates across the U.S., Congress followed with FELA in 1908 with its jury trial and negligence cause of action for railroader injury or death. It abolished the railroaders' common law bar to recovery for injuries caused by fellow-servants, establishing instead contributory negligence.[66]

FELA was very much supported by "railroad brotherhoods" who saw themselves as "risk-taking hustlers" and "soldiers of capital," arguing that "complete prudence was a detriment in both soldiers and railroaders." They did not want workers' compensation payouts per injured body parts but instead more respect for their dangerous jobs advancing the nation's economy. They preferred subjecting interstate railroads to juries and received the support of Congress,[67] which in any event had never created a worker's compensation program on a national scale.[68]

But on the seamen's front, the fellow-servant bar -- even to a captain's unnecessary death-defying orders -- remained alive and well due to *The OSCEOLA,* even though seamen often did not. As Norris noted, "[f]orefront in the fight for the betterment of seamen's working conditions was Andrew Furuseth, President of the International Seamen's Union and often called 'the Abe Lincoln of the sea.'"[69]

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[64] Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 Colum. L. Rev. 50, 69-72, 78 (1967).

[65] *Id*. at 63.

[66] Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; 45 U.S.C. § 51, § 53.

[67] John Williams-Searle, *Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers' Liability Act,* 28 Disability Studies Quarterly, https://dsq-ds.org/article/view/113/113 (2008).

[68] The first was the Longshoremen's and Harbor Workers' Compensation Act of 1927, Pub. L. No. 69-803, 44 Stat. 1424 (1927).

[69] Norris, § 30:3 at 327 n.17.

As noted regarding *The OSCEOLA's* impact at an earlier Institute by another of my esteemed predecessors, John W. Sims:

> Dissatisfied with this limitation upon compensation, but uncertain as to what reforms would most benefit its members, the seamen's union alternately advocated a compulsory compensation system and a modified employer's liability system. Congress attempted to provide the latter in the 1915 Merchant Seamen's Act.[70]

Also known as the La Follette 1915 Seamen's Act after its sponsor, Progressive Senator Robert M. La Follette (R-WI), it was spurred by the TITANIC and forcefully lobbied by Furuseth.[71] It provided an assortment of humane legal improvements in the wretched life of a seaman, including increasing forecastle living space, abolishing imprisonment for desertion, and requiring a sufficient number of life boats. Importantly for our present purposes, its § 20 was Congress' first effort to overcome *The OSCEOLA* by abolishing the fellow-servant bar for seamen personal injury suits.[72]

Congress also hedged seamen's bets (in the same statute that removed wartime cabotage restrictions) with a 1917 substantive law amendment of the Judiciary Act of 1789, admiralty jurisdiction's familiar "savings to suitors clause," which we know as 28 U.S.C. § 1333(1).

The amendment purported to allow the application of different states' various workers' compensation remedies for injured or deceased maritime workers, "so as to save to claimants the rights and remedies under the workmen's compensation law of any state."[73] The Senate Judiciary Committee report of that bill made clear that "the injured party, or his dependents, may bring an action in admiralty or submit a claim under the compensation plan" of any state.[74]

So the historical fact is clear, although not reported in the literature, that Congress did provide a broad maritime workers' compensation scheme, invoking state law, as an alternative to the negligence suit it thought it had provided for a seaman's personal injury in § 20 of the La Follette 1915 Seamen's Act.

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[70] Sims at 987.

[71] Hyman Weintraub, *Andrew Furuseth: Emancipator of the Seamen*, 119-32 (University of California Press, 1959) [hereafter Weintraub].

[72] 38 Stat. 1164 (1915).

[73] "An act to amend sections twenty-four and two hundred and fifty-six of the Judicial Code, relating to the jurisdiction of the District Courts, so as to save to claimants the rights and remedies under the workmen's compensation law of any state," approved October 6, 1917." 40 Stat. 395, c. 97 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 991 [3], 1233).

[74] 65th Congress, 1st Sess. Senate Report No. 139.

6. Congress got it wrong, twice: *Chelentis* and *Knickerbocker*

But neither § 20 of the La Follette 1915 Seamen's Act nor the 1917 amendment of the saving to suitors clause met with success on review by the Supreme Court.

As held in 1918 by *Chelentis v. Luckenbach S.S.*,[75] even though § 20 may have abolished the fellow-servant bar, neither § 20 nor anything else in maritime law created a seaman's affirmative cause of action for negligence. Thus, the seaman's remedy hoped for under § 20 of the La Follette 1915 Seamen's Act in order to overcome *The OSCEOLA* rang hollow.[76]

But *Chelentis,* which is emphasized in the literature as the precipitating reason for FELA's incorporation into § 33,[77] is at best only half of the FELA incorporation story. The much more proximate case, two years after *Chelentis,* was the Supreme Court's 1920 *Knickerbocker Ice Co. v. Stewart*[78] decision.

Knickerbocker considered a New York State workers' compensation claim for a bargeman's falling off and drowning in the Hudson River. The Court struck down the amendment to the savings to suitors clause invoking various state workers' compensation remedies as contrary to uniformity:

> the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction, and remedies for their enforcement, arises from the Constitution…to commit direct control to the federal government, to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation, and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.
>
> …To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and uniformity which the Constitution not only contemplated, but actually established.[79]

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[75] 247 U.S. 372 (1918).

[76] Sims at 987-88.

[77] Gilmore & Black at 326 (*Chelentis* "goaded" Congress to enact Jones Act § 33).

[78] 253 U.S. 149 (1920).

[79] *Id.* at 164.

So, with *Chelentis* in 1918 having jettisoned Congress' hollow attempt to end *The OSCEOLA* fellow-servant bar for seamen, and now with *Knickerbocker* in 1920 striking down Congress' attempt at alternatively providing seamen and other maritime workers remedies under state workers' comp schemes, seamen were stuck again with the same skimpy remedies they had before World War I, during which they had bravely served our country's merchant marine.

To boot, shipowners were determined to reduce seamen wages after the war but that set off successful seamen's strikes in 1918 and a bigger one in 1919. With the ongoing "Red Scare" of socialism there was deep concern that with the seamen's international contacts they could quickly radicalize, giving the Shipping Board major labor worries and good reason to accede to union demands.[80]

7. The Deal: Jones Act ships needed Jones Act seamen

*Knickerbocker'*s timing must have rattled Senator Jones and others working on merchant marine legislation: Decided May 17, 1920, that left a scant three weeks before summer recess, 1920, just as what would be the Merchant Marine Act of 1920 was coming together for the earlier referenced, anticipated presidential signature before Congress adjourned.

With little time to come up with a solution to fill the seamen's injury compensation void, gunning for new merchant marine legislation before summer, and gun shy about what the Supreme Court might do to its next try, Congress was squarely faced with concocting either its own first ever federal workers' compensation scheme (which *Knickerbocker* clearly invited) or again dealing with § 20 of the La Follette 1915 Seamen's Act in another attempt to overcome *The OSCEOLA*.

Congress had to do something fast or risk continued seamen's union dissension, which was critical to avoid in order to sufficiently crew the war-enlarged merchant fleet the U.S. government wanted to unload to the private sector. Who would buy those ships if there were no seamen willing to crew them? With those concerns in mind, during the spring of 1920 there was a window of amiability in labor relations, with the Shipping Board and vessel interests recognizing the "cooperation of their crews was essential to the successful prosecution of the industry" and willing to make "every possible improvement in the conditions of seafaring life."[81]

Knickerbocker thus set up a classic 20th Century management-labor accommodation. According to Furuseth's biographer, in an effort "[t]o obtain the seamen's support or at least their silent consent…several sections were added to the [1920] Merchant Marine Act to strengthen and clarify the [1915] Seamen's Act," with "the most important section enabl[ing] the

[80] Labaree at 543.

[81] Joseph P. Goldberg, *The Maritime Story: A Study in Labor-Management Relations* at 90-92 (Harvard University Press, 1958) (*quoting* the shipowners' *Marine Journal)*.

seamen to sue for personal injury...under provisions similar to existing railway labor legislation."[82]

As a pragmatic solution, a seaman's injury provision quickly tacked on at the end of the merchant marine bill, incorporating another federal statute with interstate application to satisfy uniformity, and which itself had already been deemed constitutional by the Supreme Court,[83] must have been an attractive and safe plug to fill the void created by *Knickerbocker*[84] and *Chelentis* before it, so that the rest of the legislation could keep steaming ahead.

8. Railroad crossings

Thus § 33's drafters' stopping to look both ways at the railroads as another interstate transportation industry which could also supply a constitutional seamen's remedy was cautious and not just lazy as previously assumed. There were even some textual crossovers between FELA and Jones Act § 27 almost begging for the former's incorporation into § 33. Not only did FELA apply to railroaders who happened to be working on "boats, wharves, or other equipment" but § 27 itself refers to railways (and § 28, although never implemented, refers to rail rates).

Indeed, shipping and railroad close connections (we call it intermodalism today) was articulated in *The New York Times* on June 21, 1920 by none other than Senator Jones:

> …Senator Wesley Jones of Washington, Chairman of the Senate Commerce committee, today vigorously defended the Jones Shipping Bill, which was passed in the closing days of Congress and signed by President Wilson on June 5….
>
> 'Not only should our railroads and internal waterways be most closely connected,' said Mr. Jones, 'but our railroads and overseas shipping lines should be brought into the closest cooperation. Our railroads should as nearly as possible be continued across the seas to foreign markets.'[85]

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[82] Weintraub at 165-66. Unfortunately, the biographer does not explain why Furuseth opposed the entire Merchant Marine Act of 1920 "as wrong in principle."

[83] *Mondou v. NY, N.H. & H. R. Co*., 223 U.S. 1 (1912).

[84] Dept. of Labor 1946 at 51 (Following *Knickerbocker* in May 1920, "The State workmen's compensation acts were, therefore, definitely inapplicable to maritime workers. A few weeks later, Senator Jones (State of Washington) introduced a bill amending section 20 of the Seamen's Act. The bill was passed and became law on June 5 of the same year.").

[85] "Urges US to Fight for American Ships," *The New York Times*, https://timesmachine.nytimes.com/timesmachine/1920/06/21/96357812.pdf (June 21, 1920).

Finally, FELA-infused Jones Act § 33 arguably reflects a widespread realization that an industrial accident on land is bad enough but when it occurs at sea the horror can be much worse. Did flogging and other seamen indignities on top of their already dangerous exposure to the perils of the sea engender a sympathy for seamen, like the railroaders earlier? Twelve years after the Jones Act was enacted, Justice Cardoza indicates just this as a valid policy reason behind § 33:

> The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties…. 'The master's authority is quite despotic, and sometimes roughly exercised, and the conveniences of a ship out upon the ocean are necessarily narrow and limited.' Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.[86]

In sum, absent any printed legislative history one way or another, in the immediate wake of *Knickerbocker*[87] Senator Jones and other Jones Act drafters can nevertheless be seen as having politically practical reasons for incorporating FELA into § 33 to amend § 20 of the La Follette 1915 Seamen's Act. Under the above circumstances and contrary to Gilmore & Black, doing so was not just a thoughtless "odd expedient."

In any event, whether by design or not, right or wrong, § 33 seamen negligence suits against their employers before a jury were added to the same legislation as § 27 domestic shipping cabotage protections and both are now known independently as **the** Jones Act.

Neither section has done the other any favors.

IV. HAS THE JONES ACT ACCOMPLISHED ITS GOALS*?*

In launching this Institute's discourse, this article is an initial effort to compare and contrast the Jones Act's goals with its effects after 100 years. There was no preconceived *pro*-Jones Act or *con*-Jones Act economics or politics influencing this practitioner who over the

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[86] *Cortes v. Baltimore Insular Line, Inc*., 287 U.S. 367, 377 (1932) (citations omitted).

[87] The MLA had its own concerns with *Knickerbocker*, which was decided just after the MLA Spring 1920 Meeting. *See* MLA Hist. Doc. 96. At the next MLA Fall 1920 Meeting, "the so-called Jones Bill" was discussed and *Knickerbocker* was addressed as "a matter of special interest to the Association" which "[a]fter some discussion" adopted a resolution "to consider legislation designed to provide workmen's compensation…in respect of seamen, stevedores, longshoremen, workers in shipyards, and maritime laborers generally." MLA Hist. Doc. 99. But by then Jones Act § 33 had already become law. The United States Shipping Board also worked on drafting "a Federal seamen's compensation bill as a result of the decision of the Supreme Court in *Knickerbocker*." 66th Cong. H.R. Doc. 887, *Fourth Annual Report of the United States Shipping Board* at 25 (June 30, 1920). Whether that drafting was before or after Jones Act § 33 was enacted and whether the drafting was ever completed is not clear from the cited documents.

decades has taken Jones Act cabotage and Jones Act negligence/jury as givens -- deeply entrenched and likely immutable U.S. statutory maritime law.

After 100 years, some strongly like the Jones Act,[88] some strongly dislike it,[89] but the prospects of any statutory revision to either section of the Jones Act is unrealistic with our

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[88] Jones Act advocates include U.S. "seafarers, union members, shipbuilders, and pro-defense groups," Ira Breskin, *The Business of Shipping* 36 (9th ed. 2018) [hereafter Breskin]; American Waterways Operators, https://www.americanwaterways.com/issues/jones-act (last visited Feb. 20, 2022) ("The U.S. tugboat, towboat and barge industry comprises the largest segment of America's Jones Act fleet of 40,000 vessels. AWO strongly supports the Jones Act as a commercial and public policy success and as the statutory foundation of the American maritime industry. The nation's domestic maritime industry supports 650,000 American jobs and provides $154 billion in economic output."); American Maritime Partnership, https://professionalmariner.com/amp-support-in-washington-for-jones-act-never-higher/?mc_cid=0a6e0b5512&mc_eid=4864ab7375 (Feb. 24, 2022) ("support for the Jones Act in Congress and in the executive branch are at record highs, for all the usual reasons plus the American domestic industry's performance during the supply chain crisis as well as the emergence of China as a maritime superpower"); Offshore Marine Service Association, https://offshoremarine.org/page/JonesAct (last visited Feb. 20, 2022) ("OMSA works to ensure that elected and government officials understand the…[b]enefits of the Jones Act" for national security, homeland security, and economic security); https://www.defensenews.com/opinion/commentary/2020/06/05/why-the-jones-act-is-still-needed-100-years-later/ (June 5, 2020) (two Republican and two Democratic U.S. Senators: "few could have predicted how vital it would become to our national security and economic prosperity a full century later -- especially during a pandemic").

[89] Free market Jones Act § 27 protectionist critics include the late Senator John S. McCain, Michael Cavanaugh, https://www.hklaw.com/en/insights/publications/2017/08/sen-mccains-new-jones-act-repeal-effort-not-likely (Aug. 30, 2017); Peter C. Earle, American Institute for Economic Research, https://www.aier.org/article/to-fix-the-shipping-crisis-start-by-repealing-the-jones-act/ (Oct. 25, 2021) (Jones Act's "effects have included stifling competition, the creation of an oligopoly, and consequent effects on shipping prices," particularly for Hawaii and Puerto Rico); Mark J. Perry, American Enterprise Institute, https://www.aei.org/carpe-diem/the-time-is-past-due-to-end-the-outdated-protectionist-relic-known-as-the-jones-act/ (Aug. 10, 2018); Colin Grabow et al, CATO Institute, https://www.cato.org/publications/policy-analysis/jones-act-burden-america-can-no-longer-bear (June 28, 2018) (" The Jones Act has wreaked havoc on the U.S. economy. After nearly a century of enduring its burdens, it is time to repeal the law"); The Heritage Foundation, https://www.heritage.org/trade/commentary/deep-six-the-jones-act (Oct. 13, 2017) ("Far from saving our merchant marine, the Jones Act helped drive it from the seas"). There was criticism that 46 U.S.C. § 50101(a)(4)'s objective that the U.S. merchant marine have the "best-equipped, safest" ships fell short following the 2015 EL FARO sinking and 33 deaths. *See* Frittelli at 17. There is also criticism regarding Jones Act negligence/jury suits against employers. *See, e.g,* Dennis W. Nixon, "Marine Insurance and World Shipping," 215 at 228 ("There is no longer any rational basis for distinguishing between

Nation facing a raft of problems in every sphere, and a divisive Congress unable to focus on much beyond criticism of the other political party.

Nevertheless, we need to ask during this Institute, has the Jones Act been successful after 100 years?

A. Not When Each Jones Act Section Deflates the Other

This dispassionate assessment of the Jones Act's implementation as of 2022 views in retrospect that its most protectionist in the world cabotage exclusion of foreign vessels under 46 U.S.C. § 55102 and its most generous in the world seafarer tort package under 46 U.S.C. § 30104 with a jury trial have contradicted each other, contributing ironically to a decline in numbers of both U.S.-flag ships and U.S. seafarers -- the opposite intention of the management-labor deal struck by the Jones Act and its two sections' goals.

1. Jones Act cabotage decreases Jones Act seafarers

First, 100 years after the post-World War I glut of government merchant ships was unloaded to the private sector -- during the era of Jones Act cabotage protectionism -- investment in U.S. flag shipping sank[90] which concomitantly sank Jones Act seafarer employment,[91] the antithesis of seafarer protection.

As an example: In order to comply with 46 U.S.C. § 55102 cabotage requirements and obtain a USCG coastwise endorsement, a ship must be U.S.-built. But U.S. shipyards are more expensive than foreign shipyards. And that ship must be U.S.-crewed. But U.S. seafarers are

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the rights of seamen and all other workers who are compensated through a no-fault system with scheduled recoveries"), in *United States Shipping Policies and the World Market* (William A. Lovett ed., 1996) [hereafter Lovett].

[90] Jeremy Greenwood & Emily Miletello, *Op-Ed: The U.S. Needs More Merchant Ships to Counter China*, https://www.maritime-executive.com/author/jeremy-greenwood (Nov. 5, 2021) (if Jones Act coastwise endorsement is not sought, U.S. investors can save millions of dollars registering ships in another country's open registry, avoiding high U.S. building/repair/labor/ operations/tax costs, reducing U.S. commercial shipbuilding capacity and U.S.-flag merchant marine tonnage) [hereafter Greenwood & Miletello].

[91] Roland, App. C (steady decline in "Seafaring Shipboard Jobs" from 1950 (57,250) to 1999 (10,458); DOT, *Maritime Goals* at 9 ("the size of the U.S.-flag commercial fleet has fallen over time…. As large U.S.-flag commercial vessels have left the fleet…further decline of the mariner workforce increases the risk of not having a sufficient number of mariners with appropriate experience and credentials to support sustained operations of more than six months by the full U.S. Government surge sealift fleet, U.S. Government non-surge fleet, and U.S.-flag commercial fleet during a wartime emergency."); Frittelli at 20 ("The shrinking size of the U.S. mariner pool puts in doubt its ability to sufficiently crew a reserve fleet").

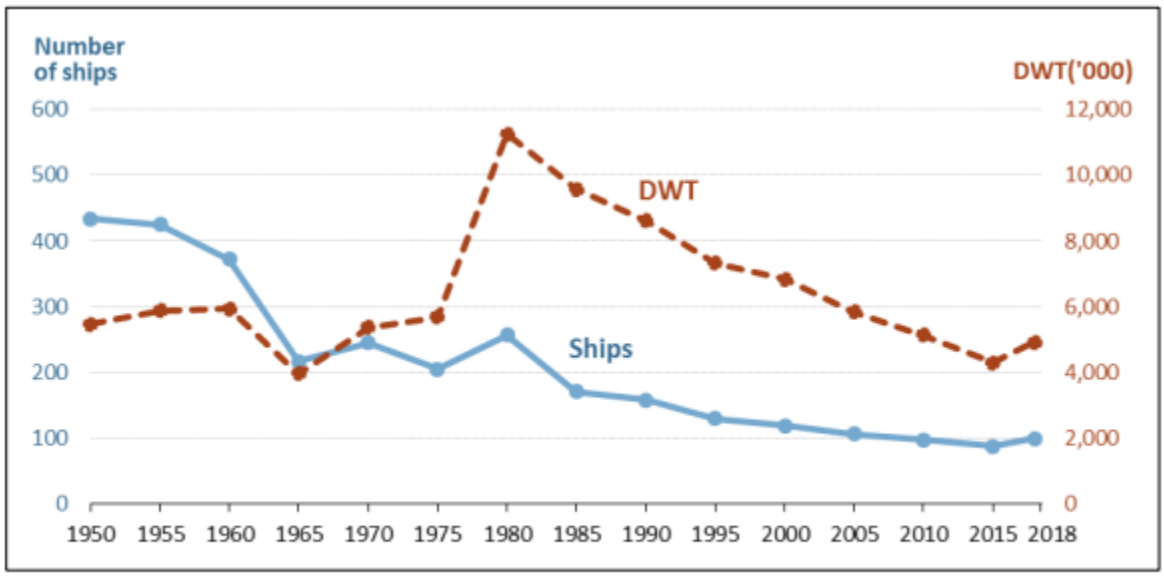
more expensive than foreign seafarers.[92] So even before that ship's first voyage those two cabotage requirements are very costly hurdles for a would-be U.S. owner. If that would-be owner decides it's not worth entering the race, a U.S.-flag vessel is not built, not operated, and U.S. seafarers are not employed.

As a graphic example, here is the decline in numbers of Jones Act oceangoing, self-propelled, cargo-carrying vessels of 1,000 gross tons or more. Actually, this decline is even more alarming than depicted since the U.S. Real Gross Domestic Product has grown tenfold over the same time:[93]

[92] *See* nn.103-104 and accompanying text, *infra*.

[93] https://fred.stlouis.org/seriesGDPC 1 (March 9, 2022).

Jones Act Oceangoing Ships
Since 1950[94]



Source: CRS using data from U.S. Maritime Administration (MARAD).
Note: DWT=deadweight tonnage, a measure of ship cargo capacity.

As a third example, today Military Sealift Command ships owned by the U.S. government are the single largest employer of Jones Act seafarers, as opposed to private sector

[94] Frittelli, Figure 1 and 13-15 ("The Jones Act oceangoing fleet, in particular, has certain shortcomings compared to the merchant fleet desired by the drafters of the 1920 act as they described it in the…statement of U.S. maritime policy…. As of March 2018, there were 99 oceangoing ships in the Jones Act-compliant fleet, employing about 3,380 mariners…. While domestic ships are carrying fewer tons of freight today than they did in the 1950s, their most direct competitors, railroads and pipelines, are carrying more. Domestic ships have lost market share to land modes even though ships have certain economic advantages. Ocean carriers do not need to acquire and maintain rights-of-way like railroads and pipelines. They can move much more cargo per trip and per gallon of fuel than trucks and railroads. Although ships are slower than truck and rail modes, many shippers are willing to sacrifice transit time for substantially lower costs, as long as delivery schedules are reliable. The oceangoing Jones Act fleet is almost entirely engaged in domestic trade routes where overland modes are not an option, serving Alaska, Hawaii, and Puerto Rico. In other words, it operates in markets where shippers have little alternative. The Jones Act appears to have preserved a nucleus of a U.S. maritime industry, but not to have fully attained its stated goal of having a U.S. merchant marine 'sufficient to carry the waterborne domestic commerce'" under to 46 U.S.C. § 50101(a)(1)) (footnotes omitted).

shipowners.[95] This is contrary to the Merchant Marine Act of 1920's intended "disposition" of the post-World War I glut of ships to private "citizens of the United States" so as to get the government largely out of the merchant marine business, only to supplement the commercial fleet as needed.

2. Jones Act negligence/jury suits deter investment in U.S. shipping

Second, and *vice versa*, the exposure to Jones Act 46 U.S.C. § 30104 personal injury or death negligence/jury suits (combined with claims for unseaworthiness and maintenance and cure) brought against seafarer employers discourages investment in U.S.-flag shipping. In protecting U.S. seafarers with this most generous quiver of remedies at a high insurance cost compared to the rest of the world's seafarers,[96] Jones Act negligence/jury causes of action have helped sink the U.S.-flag fleet over time.[97]

3. And both sections have failed to sustain a foreign U.S. merchant fleet

This destructive feedback cycle yields a third, ancillary, but very close to home negative impact for Institute registrants: While defining the ever-narrowing contours of U.S. maritime law practice over the last century, the Jones Act in the long-term has decreased the amount of work for admiralty and maritime lawyers specializing in marine casualties and regulatory compliance. As U.S.- flag tonnage has declined, so has the volume of legal matters involving vessels.

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[95] Frittelli at 20-21 (2019: U.S. Military Sealift Command owned 120 ships employing 5,576 civilian federal employee Jones Act seafarers); *see also* Roland at 278 n.6 (government merchant fleet perhaps larger than aggregate commercial fleet).

[96] Despite requests to gather recent proof from marine insurers, domestic and international, this is anecdotal only, although well-documented in 1992, *see* Robert Force, "U.S. Tort Law Problems," 191 at 207-209, in Lovett.

[97] *Id.* at 191-92 (in addition to high labor costs and lack of government subsidies "operators of United States flag vessels are also subject to operating costs imposed by a tort liability regime which are more onerous than those experienced by owners of foreign flag vessels…. [T]he costs imposed on the various United States shipping and related maritime industries for liability in cases of injury or death to seamen and other maritime workers are much greater than those incurred by comparable industries in other countries and, to the extent that these costs are borne directly or indirectly by United States shipowners, they contribute in some measure to the non-competitive position of the United States fleet"); William A. Lovett, "Realistic Maritime Renewal," 299 at 304 ("Unusually heavy personal injury tort expenses are a special burden for shipping companies using U.S. domestic labor…. These heavy tort liability burdens add to the incentives for U.S. shipping companies to adopt flags of convenience, or otherwise find less expensive registries. Thus, unusually expensive labor-tort liability protection regimes have the effect of helping to drive shipping activities into less expensive regimes.") in Lovett.

While no tears will be shed over fewer lawyers, in our field that is a function of a fourth very clear failing of the Merchant Marine Act of 1920's stated policy, as now codified under 46 U.S.C. § 50101(b) to "encourage" a U.S. merchant marine "sufficient to carry…a substantial part of the waterborne export and import foreign commerce of the United States."[98]

Jones Act § 27 and § 33 may have made sense in the 1920 world but as to U.S.-flag foreign trade, after 100 years, their time is past. As reported by MARAD in 2020, "**just 1.5 percent of U.S. waterborne imports and exports by tonnage move on oceangoing commercial vessels registered under the flag of the United States**."[99] This puts the U.S. in a similar predicament as before World War I with virtually no U.S.-flag vessels to carry our foreign export cargo, total reliance for our overseas supply chain on foreign-flag vessels who could abandon us overnight, and a shortage of U.S.-flag merchant vessels available to sustain our military during times of conflict.[100]

This graph reflects that the number of U.S.-flag oceangoing merchant vessels[101] declined 94% from 2,926 in 1960 to 169 in 2016 while the world-wide fleet increased 141% from 17,317 to 41,674 over the same time. "As a result, the U.S. share of the worldwide fleet of ships decreased from 16.9% in 1960 to only 0.4% in 2016":[102]

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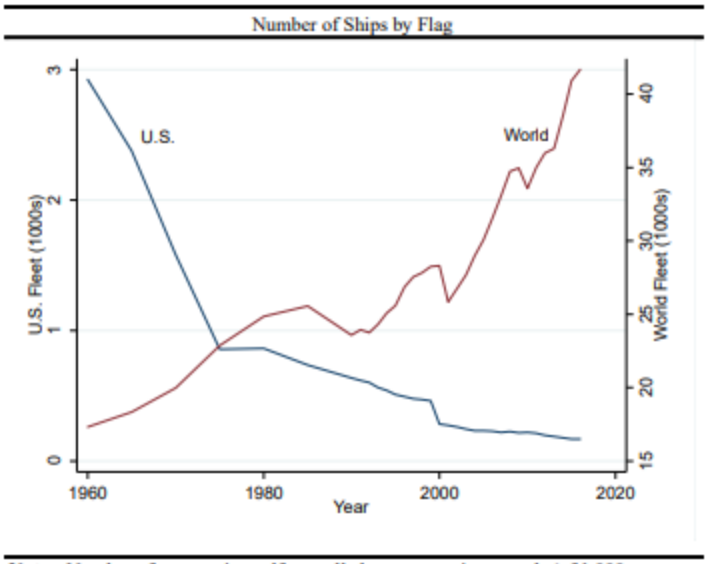
[98] As recently widely reported, our import and export trade has been so outsourced to foreign-flag ships that the Department of Justice and Federal Maritime Commission are investigating antitrust violations by foreign ocean carriers allegedly charging exorbitant freight rates contributing to inflation with Congress working on an Ocean Shipping Reform Act to deal with problems including export and import supply chain delays. *See, e.g.*, https://www.maritime-executive.com/article/biden-expands-antitrust-enforcement-and-calls-for-shipping-act-reform (Feb. 28, 2022).

[99] DOT, *Maritime Goals* at 8 (emphasis added).

[100] Greenwood & Miletello ("our reliance on foreign vessels for critical trade is a national security risk both in terms of our inability to engage in sustained conflict abroad should that become necessary, but also in terms of supply chain vulnerabilities that will continue to plague us at home.")

[101] Includes not just Jones Act 1,000 gross ton coastwise vessels but also private sector international cargo preference vessels which carry government military and food aid on U.S.-owned and -crewed U.S.-flag vessels which need not be U.S.-built. *See* Frittelli at 5 n.26; John Frittelli, Cong. Research Serv., R44254, *Cargo Preferences for U.S.-Flag Shipping* (Oct. 29, 2015).

[102] William W. Olney, *Cabotage Sabotage? The Curious Case of the Jones Act* at 10 https://web.williams.edu/Economics/wp/Olney_JonesAct.pdf (2020)) [hereafter Olney].



Notes: Number of oceangoing self-propelled cargo-carrying vessels (of 1,000 gross tons and above). Data from Table 1-24, Bureau of Transportation Statistics

Simply put, who wants to invest in a maritime venture with domestic shipyard construction costs on the order of 4 to 5 times higher than foreign yards,[103] operating costs for U.S. ships at least 2.7 times higher than foreign-flag ships,[104] including hard to predict jury verdicts and the steep insurance premiums that go with that?

The answer is only those who can take advantage of niche Jones Act markets which lack alternate routes and strong competition, whether because foreign vessels are excluded or domestic railroad, interstate highway, or pipeline options are not viable.

[103] Frittelli at 4; Olney 2-3 (with U.S. shipyard construction costs now 4-5 times higher than Asia, number of large U.S. merchant ships has declined, and requirement that domestic shipping occur on Jones Act ships is more onerous and expensive); DOT, *Maritime Goals* at 10 (2020) ("large U.S. shipyards and their skilled labor forces for building large commercial vessels have atrophied due to low-cost, highly-subsidized international shipbuilding competition, and other factors resulting in shipyard closures and reductions in the U.S. vendor base.").

[104] Frittelli at 4; *see* Olney at 7 ("higher fixed and variable costs can lead to higher domestic shipping rates and to a lack of available JA-eligible vessels, both of which may limit domestic water trade."); William E. Thoms, *Labor Relations and the U.S. Merchant Marine* 153 ("the Jones Act…means that relatively high U.S. labor costs force most U.S. owned ships in ocean commerce to fly a flag of convenience and use non-U.S. seamen to man its ships, except for heavily subsidized U.S. shipping, or U.S. cabotage shipping where foreign flag shipping is not allowed.") in Lovett.

B. Jones Act Beneficiaries

And there are indeed key segments of the U.S. maritime industry that have been buoyed, quite nicely, by Jones Act cabotage protections and admirably serve our nation's needs. These segments manage to fill that space capably and profitably despite high domestic vessel construction costs, high operating costs, and high insurance costs because only Jones Act-built, -owned, and -crewed vessels can serve that market and cheaper alternatives are lacking. Later sessions of the Institute will address these domestic maritime industry segments in more depth but below is a quick listing.

1. Routes to the Overseas U.S.

U.S. places far from the lower 48 states, which get most of their things from the lower 48, are served by Jones Act vessels. That means Alaska, Hawaii, and Puerto Rico.[105] There are maritime services to and from each, all by Jones Act-qualified vessels, for instance, Crowley,[106] TOTE,[107] and Matson,[108] as well as Polar Tankers with crude from Valdez to the West Coast.[109]

2. Coastal and inland towing, etc.

From gravel barges made up on the starboard side of a tug to pushboats with long flotillas of soybean barges ahead on the Mississippi River to articulated tug-barges with gasoline for New England, there are almost 40,000 tugs and barges serving coastal and inland waterways. These are all Jones Act vessels and constitute an important domestic maritime industry segment that staunchly defends it.[110] Interlakes Steamship Co. serving the Great Lakes[111] and America's Marine Highway[112] are further examples of this segment.

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[105] Hurricanes and other calamities can trigger Jones Act waivers for foreign-flag vessels. *See* Frittelli at 12.

[106] https://www.crowley.com/wp-content/uploads/sites/7/2021/10/Puerto-Rico-Service-min.pdf

[107] https://www.totemaritime.com/alaska/home; https://www.totemaritime.com/puerto-rico/home

[108] https://www.matson.com/matnav/services/hawaii.html

[109] https://polartankers.conocophillips.com/

[110] AWO, *supra* n.88.

[111] "Interlake Steamship Launches First New Great Lakes Freighter Since The 1980s" https://thumbwind.com/2021/10/31/new-great-lakes-freighter/ (Oct. 31, 2021).

[112] D. Farrell, "America's Marine Highway a/k/a Short Sea Shipping: A Win-Win Proposition," 5 Ben. Mar. Bul. 221 (2007).

While few of these vessels would be able to contribute directly to national security needs by supplying overseas military operations, there are homeland security benefits in excluding their routes, many deep into the heartland, from foreign vessels and crews, not to mention catastrophe response such as the 9/11 evacuation of Downtown Manhattan.

3. Offshore oil and gas

A boom or bust market, dedicated vessels serve offshore oil rigs primarily in the Gulf of Mexico but also other locales in the U.S. Exclusive Economic Zone. In a strong oil market about 1,800 Jones Act offshore supply vessels[113] are involved in the exploration, development, and production needs in these offshore U.S. waters. But sharp declines in demand due to international volatilities, onshore fracking, and alternate energy developments can result in dramatic reductions and lay ups of support vessels until another upturn.[114]

4. Offshore wind arises as a Jones Act industry, with a *Knickerbocker* caution

Clearly offshore wind is big money. Vineyard Wind has secured $2.3 billion financing to start wind farm construction south of Martha's Vineyard, MA and plans to deliver power to the grid in 2023.[115] Six tracts in the New York Bight recently drew winning bids totaling more than $4.37 billion for wind farm development, "the nation's highest-grossing competitive offshore energy lease sale in history, including oil and gas lease sales."[116] This whole area, roughly along the Nantucket to Ambrose Traffic Lane, has been called the "Saudi Arabia of Wind" due to its high prevailing winds, relatively shallow continental shelf, and proximity to large urban populations.[117]

That both Jones Act 46 U.S.C. § 55102 cabotage protections and 46 U.S.C. § 30104 negligence/jury sections will apply to U.S.-built, -owned, and -crewed vessels involved in offshore wind was made clear with the January 1, 2021 Garamendi Amendment to the Outer Continental Shelf Lands Act of 1953 (OCSLA).[118] At this writing, though, while there is a

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[113] Frittelli at 10.

[114] *See, e.g.*, Breskin at 163.

[115] https://www.vineyardwind.com/press-releases/2021/9/15/vineyard-wind-1-becomes-the-first-commercial-scale-offshore-wind-farm-in-the-us-to-achieve-financial-close

[116] https://www.doi.gov/pressreleases/biden-harris-administration-sets-offshore-energy-records-437-billion-winning-bids-wind (Feb. 25, 2022).

[117] Houston Marine Energy & Insurance Conference (Sept. 20, 2021).

[118] 43 U.S.C. § 1333(a)(1)(A)(iii) added the four highlighted words to the definition of an outer continental shelf "installation and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources, **including non-mineral energy resources;**" (*e.g.*, wind, tide, solar).

dearth of U.S.-flag vessels capable of installing wind turbines, laying cable, and providing other highly specialized construction services, newbuilds and retrofits from U.S. shipyards, owned by U.S. citizens, and to be crewed by Jones Act seafarers will be on their way.

There is one final point to be made here, and while it is not a Jones Act issue, it is reminiscent of *Knickerbocker*, the 1920 Supreme Court case that triggered § 33.[119] Specifically, as currently provided by OCSLA, it seems unlikely that LHWCA coverage is available for offshore wind non-seafarer employees absent an additional amendment. OCSLA currently provides:

> (b) Longshore and Harbor Workers' Compensation Act applicable; definitions
>
> With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of *exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the* ***subsoil and seabed*** *of the outer Continental Shelf*, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section-
>
> (1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;
>
> (2) the term "employer" means an employer any of whose employees are employed in such operations; and
>
> (3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.[120]

Wind, and the spinning turbines catching it, of course, are above the ocean's water surface and not on the "subsoil and seabed" below it. So injured/deceased non-seafarer wind farm industry employees would not get LHWCA remedies as OCLSA currently provides.

With that gap in LHWCA coverage, we are back full circle to a pre-*Knickerbocker* nonuniform application of various state workers' compensation remedies for non-seafarer

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[119] III.C.6 and 7, *supra.*

[120] 43 U.S.C. § 1333(b) (italics and emphasis added).

maritime employees engaged in offshore wind work. As we have seen, in filling the 1920 remedy gap Congress borrowed from FELA; as we have also seen, it would be a mistake for Congress to do that again or otherwise enable offshore wind non-seafarers to sue their employers.

As the U.S. offshore wind industry gets underway, Congress should amend OCSLA, 43 U.S.C. § 1333(b), to include wind above the water (and solar and tidal power too -- but not so broadly as to include sailboats) so there can be a uniform workers' compensation scheme for non-seafarer maritime workers in the offshore renewable energy industry.

V. CONCLUSION

Alarmingly, the U.S. finds itself in many ways as exposed as it was before World War I and the Merchant Marine Act of 1920's resulting efforts to encourage a U.S. merchant marine capable of serving our international trade and national security needs. Ironically, the Jones Act's strictest in the world cabotage and most generous in the world negligence/jury provisions have contributed to this.

Any Congressional resolution involving amendments to 46 U.S.C. § 55102 cabotage or 46 U.S.C. § 30104 negligence/jury provisions are unlikely, however. They are entrenched statutes with "special interest" support from important segments of the U.S. domestic maritime industry which successfully serve the transportation routes of niche markets with the support of the U.S. seafarers they employ.

Nonetheless, there needs to be a serious public discussion for the good of our Nation on how to turn the declines depicted in the cited graphs upwards. How do we incentivize investment in U.S.-flag merchant ships to carry a "substantial part of the waterborne export and import foreign commerce of the United States?" How do we maintain U.S. domestic shipping successes and take better advantage of coastwise trade opportunities? How do we make U.S. seafarers and shipyards more cost-effective?

While we remain the same big island we were before World War I, after 100 years of the Jones Act can we now develop a U.S.-flag merchant fleet to serve our domestic and foreign commerce needs commensurate with our much bigger role in the world economy, and dependence on it?