

## OUR HIGH COURT OF ADMIRALTY AND ITS SOMETIMES PECULIAR RELATIONSHIP WITH CONGRESS\*

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### INTRODUCTION

Two of my favorite experiences as a student were a 7th grade course in civics—in which I was introduced to (and believed I fully understood) the concepts of separation of powers and federalism—and a law school course in admiralty law, which was taught in a blinding hurry for two hours every Friday afternoon by a frantically busy practitioner who used no casebook, prepared no course materials, and took his teaching job to consist mainly in citing as many Supreme Court maritime decisions and talking as fast as he could. Probably neither of these descriptions sound like as much fun as these two courses actually were. You will have to take my word for it, and further, that I love to try to teach my admiralty students 7th grade civics and how to litigate admiralty cases, and that this ongoing experiment works best when everything happens all at once.

This Article is part of that experiment. It tries to survey and critique the relationship that our High Court of Admiralty—the United States Supreme Court—has had with our Supreme Maritime Legislature—the United States Congress—over this nation’s entire history. Right away, you can see why I am careful to call all of this an experiment.

Let’s get a couple of preliminaries out of the way first. Lawyers who specialize in a field of law that gets only sporadic attention from the United States Supreme Court often seem inclined, perhaps as a matter of professional habit, to deplore the Court’s evident lack of expertise and to disparage the Court’s contributions to the field. Sometimes we actually pout about this, complaining that the Court does not even seem to care about our field. For example, a leading patent lawyer recently wrote that “the Justices seem to treat patent cases as second class citizens and write opinions that read as though

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\* An earlier version of this Article formed the basis for a presentation to the Louisiana Association for Justice, at a conference titled *High Stakes on the High Seas*, in New Orleans on August 13, 2010.

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they were dictated while standing waiting for the elevator.”<sup>1</sup> Speaking as the leading admiralty jurist in the land, Judge John R. Brown wrote shortly before his death in 1993 that “[i]n the past fifteen years the justices of the Supreme Court have abandoned their [constitutional] role as admiralty judges.”<sup>2</sup> And a few years ago, I was probably inappropriately blunt in expressing my fear “that the modern Court neither understands admiralty nor regards it as important.”<sup>3</sup>

This Article is not more whining about the Court’s general performance, although sharp criticism of some of the Court’s decisions is entailed. Instead, here I offer a critique of the Court’s approach to integrating the admiralty and maritime enactments of Congress into the larger field of federal maritime law. Integrating statutes into a field of judge-made law<sup>4</sup> is an intrinsically problematic process. In our nation and in all of the states, constitutional statutes are superior authority: courts must yield.<sup>5</sup> At the same time, a high

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1. Donald S. Chisum, *The Supreme Court and Patent Law: Does Shallow Reasoning Lead to Thin Law?*, Lecture at Marquette Intellectual Property Law Review Annual Nies Memorial Lecture in Intellectual Property (Mar. 16, 1999), in 3 MARQ. INTELL. PROP. L. REV. 1, 16 (1999). See also John M. Golden, *The Supreme Court as “Prime Percolator”: A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. REV. 657, 686 (2009) (“[Supreme] Court review of any particular question in patent law has typically been rare in occurrence and spotty in performance.”).

2. Hon. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 283 (1993).

3. David W. Robertson, *Summertime Sailing and the U.S. Supreme Court: The Need for a National Admiralty Court*, 29 J. MAR. L. & COM. 275, 295 (1998). See also David W. Robertson, *The Supreme Court’s Approach to Determining Seaman Status: Discerning the Law Amid Loose Language and Catchphrases*, 34 J. MAR. L. & COM. 547, 555, 556 (2003) (describing early seaman status decisions by the Supreme Court as “inconsistent” and filled with meaningless “catchphrases”) (citations omitted).

4. “No area of federal law is judge-made at its source to such an extent as is the law of admiralty.” *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960) (Frankfurter, J., dissenting). See also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 489–90 (2008) (“[M]aritime law, . . . falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”); *McDermott, Inc. v. AmClyde*, 511 U.S. 202, 207 (1994) (quoting *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975)) (“[T]he Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime.”); *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) (“Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.”); *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310, 323 (1955) (Frankfurter, J., concurring) (“It is appropriate to recall that the preponderant body of maritime law comes from this Court and not from Congress.”).

5. This is of course the thrust of the Constitution’s Supremacy Clause, U.S. CONST. art. VI, cl. 2, which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound

court in charge of a field of common law will need to realize that a statutory enactment in that field sits atop a venerable edifice of common law. The statute must be fully respected while at the same time confined to its natural and appropriate sphere of operation. One way to say this is that the high court should generally presume that the statute does not change any features of the pre-existing common law that are not explicitly altered or altered by necessary implication. State courts sometimes introduce this idea by characterizing statutes changing common law rules as being “in derogation” of the common law.<sup>6</sup>

The critique of the Court’s treatment of maritime statutes begins in Part I with a sketch of the constitutional structure of admiralty that delimits the respective roles of the Court and Congress. Parts II and III then briefly summarize nineteenth century theory and practice respecting the role of maritime statutes. These sections suggest that, while nineteenth century theory included limits on Congress that have disappeared from modern admiralty theory, in practice the nineteenth century Court was probably more respectful of congressional input into maritime law than the modern Court has sometimes been.

Parts IV and V treat twentieth century theory and practice respecting the Court’s treatment of maritime statutes. Part V shows the modern Court typically giving full and careful respect to congressional input into the federal maritime law, but we also see the Court veering at times between overt resistance and a kind of exaggerated or mock deference to Congress. Part VI concludes the article with some observations about the potential practical effects of this Article’s historical and conceptual conclusions.

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thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

6. See, e.g., *State v. Courchesne*, 998 A.2d 1, 38 (Conn. 2010) (quoting *State v. Floyd*, 584 A.2d 1157, 1168 (Conn. 1991)) (“[S]tatutes in derogation of the common law should not be construed to alter the common law further than their words demand.”); *Miller v. Lammico*, 973 So.2d 693, 704 (La. 2008) (citing *Dumas v. State ex rel. Dep’t of Culture, Recreation & Tourism*, 828 So.2d 530, 537–38 (La. 2002)) (“[S]tatutes in derogation of established rights should be strictly construed.”); *Energy Serv. Co. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 194 n.17 (Tex. 2007) (quoting *Satterfield v. Satterfield*, 448 S.W.2d 456, 459 (Tex. 1969)) (“While Texas follows the rule that statutes in derogation of the common law are not to be strictly construed, it is recognized that if a statute creates a liability unknown to the common law, or deprives a person of a common law right, the statute will be strictly construed in the sense that it will not be extended beyond its plain meaning or applied to cases not clearly within its purview.”).

# I. CONGRESS AND THE HIGH ADMIRALTY COURT: THE FORMAL RELATIONSHIP

In its 1924 decision in *Panama Railroad Co. v. Johnson*,<sup>7</sup> the Supreme Court gave a good summary of the constitutional structure of admiralty and maritime law:

## [National Maritime Law]

[S]ection 2 of article 3 of the Constitution, . . . extends the judicial power of the United States to “all cases of admiralty and maritime jurisdiction.”

As there could be no cases of “admiralty and maritime jurisdiction,” in the absence of some maritime law under which they could arise, the provision presupposes the existence in the United States of a law of that character. Such a law or system of law existed in colonial times and during the Confederation, and commonly was applied in the adjudication of admiralty and maritime cases. It embodied the principles of the general maritime law, sometimes called the law of the sea, with modifications and supplements adjusting it to conditions and needs on this side of the Atlantic. The framers of the Constitution were familiar with that system and proceeded with it in mind. Their purpose was not to strike down or abrogate the system, but to place the entire subject—its substantive as well as its procedural features—under national control, because of its intimate relation to navigation and to interstate and foreign commerce. In pursuance of that purpose, the constitutional provision was framed and adopted.

## [Congress’s Role]

Although containing no express grant of legislative power over the substantive law, the [constitutional] provision was regarded from the beginning as implicitly investing such power in the United States. Commentators took that view. Congress acted on it, and the courts, including this court, gave effect to it. Practically therefore the situation is as if that view were written into the provision. [Moreover, Article 1, Section 8, Clause 18 of the Constitution empowers the Congress to make all laws which shall be necessary and proper for carrying into execution the several powers vested in the government of the United States.] After the Constitution went into effect, the substantive [admiralty and maritime] law theretofore in force was not regarded as superseded or as being only the law of the several states, but as having become the law of the United States—subject to power in Congress to alter, qualify or supplement it as experience or changing conditions might require. When all is considered, therefore, there is no room to doubt that the power of Congress extends to the entire subject and permits of the exercise of a wide discretion.<sup>8</sup>

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7. 264 U.S. 375 (1924).

8. *Id.* at 385–86. To lend clarity to the Court’s summary, the subtitles were added to the quotation in the text.

Translated into modern idiom, the 1924 Court was saying this: The federal courts, led by the Supreme Court, are in charge of the field of admiralty and maritime law. Congress is expected to chime in, and when it does, its contribution will be honored and its commands heeded.

As a matter of form, nothing has changed since 1924. In 2008, the Court wrote that “maritime law . . . falls within a federal court’s jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result.”<sup>9</sup> And the Court frequently states: “We have always recognized that federal common law [of which court-made admiralty and maritime law is the most important example]<sup>10</sup> is ‘subject to the paramount authority of Congress.’”<sup>11</sup>

## II. NINETEENTH CENTURY THEORY: TWO PRECEPTS RE CONGRESS’S ADMIRALTY AUTHORITY

The Supreme Court did not pay much explicit attention to the legislative-judicial balance in the admiralty field until the early twentieth century. But two nineteenth century precepts about congressional admiralty authority are demonstrable. First, it was generally assumed that Congress got its authority to enact substantive maritime rules from the Constitution’s Commerce Clause.<sup>12</sup> This assumption entailed a limitation upon Congress. While the federal courts had admiralty jurisdiction over purely intrastate voyages on navigable water,<sup>13</sup> which meant that these courts had the authority to create (they would have said declare) the substantive law applicable, the nineteenth century view of the Commerce Clause probably precluded Congress from legislating respecting such voyages.<sup>14</sup> Therefore, the view that congressional

9. *Exxon*, 554 U.S. at 489.

10. See sources cited *supra* note 4.

11. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313–14 (1981) (quoting *New Jersey v. New York*, 283 U.S. 336, 348 (1931)).

12. U.S. CONST. art. I, § 8, cl. 3. Cases reflecting this assumption include *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578, 589 (1883); *Lord v. Steamship Co.*, 102 U.S. 541, 544 (1880); *The Lottawanna*, 88 U.S. 558, 577 (1875); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1871); *White’s Bank v. Smith*, 74 U.S. (7 Wall.) 646, 655–56 (1868); *Moore v. American Transportation Co.*, 65 U.S. (24 How.) 1, 39 (1861); *The Lexington*, 47 U.S. (6 How.) 344, 392 (1848).

As we will see *infra* in Part IV, the twentieth century view of the source of congressional authority in admiralty shifted from the Commerce Clause to a combination of Article III, Section 2 and the Necessary and Proper Clause (Article I, Section 8, Clause 18). Arguably, hints of the modern view can be seen in some of the nineteenth century cases, including *Providence & New York Steamship Co.*, 109 U.S. at 589; *Lord*, 102 U.S. at 544; *The Lottawanna*, 88 U.S. at 577; *The Belfast*, 74 U.S. (7 Wall.) 624, 640–41 (1868); *The Propeller Genesee Chief v. Fitzhugh (The Genesee Chief)*, 53 U.S. (12 How.) 443, 453 (1852).

13. *The Belfast*, 74 U.S. (7 Wall.) at 641.

14. See *Moore*, 65 U.S. (24 How.) at 39; *The Lexington*, 47 U.S. (6 How.) at 392.

maritime authority came from the Commerce Clause meant that the judicial branch could govern some admiralty and maritime matters that Congress could not touch.

Second, the Court took the view that “the true limits of maritime law and admiralty jurisdiction is undoubtedly . . . exclusively a judicial question, and no . . . act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be.”<sup>15</sup> This view had an uncertain conceptual pedigree.<sup>16</sup> It also had important and tricky limiting implications, and it takes a while to spell these out.<sup>17</sup> For present purposes, we can summarize by saying that nineteenth century admiralty jurists took the

15. *The Lottawanna*, 88 U.S. at 576. See also *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1862).

16. It probably rested on one or the other of the following assumptions. First, the Court often assumed (seemingly without thinking much about it) that the grant of admiralty jurisdiction to the federal courts in § 9 of the 1789 Judiciary Act—“all civil causes of admiralty and maritime jurisdiction”—went to the full extent (at least regarding “civil causes”) of the constitutional assignment of “all cases of admiralty and maritime jurisdiction” to the judicial branch of government in Article III, Section 2 of the Constitution. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73. See, e.g., *The Belfast*, 74 U.S. (7 Wall.) at 640 (“[J]udicial power in all cases of admiralty and maritime jurisdiction was conferred by the Constitution.”); *People’s Ferry Co. v. Beers*, 61 U.S. (20 How.) 393, 401 (1857) (stating that the Constitution and the Judiciary Act of 1789 conferred judicial power over cases of admiralty and maritime jurisdiction to United States District Courts); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 463 (1847) (stating that the framers of the United States Constitution granted the courts admiralty and maritime jurisdiction). On this view, all of the Court’s jurisdiction-limiting pronouncements would *ipso facto* have been constitutional rulings that obviously no mere statute could change. Second, it sometimes seems to have been thought that—even accepting the possibility that the statutory grant of admiralty jurisdiction to the federal courts might be narrower in scope than the constitutionally empowered grant—whenever the Court was asked to rule on whether a matter was within admiralty jurisdiction, it presumptively chose to deal with the constitutional limits on admiralty rather than the limits of the statutory grant. See, e.g., *The Plymouth*, 70 U.S. (3 Wall.) 20, 33–36 (1865) (holding that the jurisdiction of admiralty depends on the location where the injury occurred); *The St. Lawrence*, 66 U.S. (1 Black) at 526–28 (stating that Congress cannot broaden the limits of admiralty and maritime jurisdiction). On either of both of these assumptions, setting and maintaining the boundaries of the admiralty jurisdiction was the Court’s business and none of Congress’s.

17. The functional view that Congress had no authority to speak directly to admiralty’s jurisdictional boundaries, and the entailed assumption(s) that all judicial jurisdictional pronouncements presumptively referred to the constitutional boundary, not to any “mere” statutory boundary, are alien to modern thought, see *infra* Part IV, and thus difficult to credit or grasp. For a fuller discussion of the nineteenth century view, see David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209, 243–64 (2003).

The perceived limitation concerned statutes that addressed jurisdictional matters directly. It was thought that Congress could probably indirectly effect the extension of federal-court jurisdiction over new matters (as the necessity for admiralty governance arose) by enacting substantive legislation. See DAVID W. ROBERTSON, *ADMIRALTY AND FEDERALISM: HISTORY AND ANALYSIS OF FEDERAL-STATE RELATIONS IN THE MARITIME LAW OF THE UNITED STATES* 111–18 (Univ. Textbook Ser., 1970).

view that once the judiciary had established an admiralty jurisdictional boundary, Congress was powerless to change the boundary directly; the boundary “could only be extended indirectly, by ‘alter[ing] or supplement[ing] the [substantive] maritime law’”<sup>18</sup> in such a way as to functionally expand admiralty’s boundaries.

### III. NINETEENTH CENTURY PRACTICE: PRAGMATIC RESPECT FOR CONGRESS

Here we begin to confront a paradox: Whereas nineteenth century theory on the scope of Congress’s admiralty authority was more limiting than modern theory, the actual practice of the nineteenth century Court seems to have been more respectful of congressional authority than some modern decisions have been.

The indicia of the nineteenth century Court’s respect for Congress are multiple. First is the apparent absence of any nineteenth century Supreme Court decision declaring an admiralty act of Congress unconstitutional. Second is the effort the Court made in its decision in *The Genesee Chief* to sustain an 1845 statute effecting the extension of admiralty jurisdiction over specified cases arising on the Great Lakes.<sup>19</sup> The wording and legislative history of the 1845 statute suggest that Congress was trying to effect the extension of jurisdiction indirectly, by creating a new category of Commerce Clause-based federal jurisdiction.<sup>20</sup> The *Genesee Chief* Court went further, insisting that Congress had accomplished the extension of federal admiralty jurisdiction directly.<sup>21</sup> In order to reach this conclusion, the Court overruled two of its own cases holding that admiralty jurisdiction did not extend over cases involving occurrences on navigable but non-tidal water.<sup>22</sup> The *Genesee Chief* opinion shows the Court’s enthusiastic agreement with the purposes of the statute,<sup>23</sup> but this does not destroy the weight of the decision as evidence of the Court’s respect for congressional input.

18. Robertson & Sturley, *supra* note 17, at 254 (quoting *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 48 (1934)).

19. *The Propeller Genesee Chief v. Fitzhugh (The Genesee Chief)*, 53 U.S. (12 How.) 443 (1851).

20. Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 726–27 (1845); ROBERTSON, *supra* note 17, at 111–12 (discussing the legislative history).

21. *The Genesee Chief*, 53 U.S. (12 How.) at 457–58.

22. *Id.* at 455–59 (holding that jurisdiction depends on the navigability of the water, and not upon the ebb and flow of the tide). In so holding, the Court overruled its prior decisions in *The Steamboat Orleans v. Phoebus*, 36 U.S. (11 Pet.) 175, 183 (1837) (stating that the court did not have jurisdiction where the vessel engaged in interior navigation and not on tide waters) and *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428, 429 (1825) (holding that admiralty jurisdiction is limited to waters within the ebb and flow of the tide).

23. *The Genesee Chief*, 53 U.S. (12 How.) at 453–54.

The third indication of the nineteenth century Court's respectful approach toward legislation is its decision in 1870 in *The Daniel Ball*, where the Court articulated a somewhat expansive version of interstate commerce in order to uphold the validity of an act of Congress requiring steam vessels operating on navigable waters to be federally licensed.<sup>24</sup>

The indicia of the nineteenth century Court's pragmatism toward maritime legislation are also multiple. As was noted above, the Court was willing to work as hard as it did in *Genesee Chief* on behalf of the statute's validity in significant part because of its whole-hearted agreement with the statute's aims.<sup>25</sup> Other indicia of pragmatism include a series of decisions in which the Court repeatedly struggled with the meaning, coverage, and validity of the hopelessly ill-drafted 1851 Limitation of Liability Act<sup>26</sup> in order to uphold the Act and give it the meaning the Court believed Congress had intended.<sup>27</sup>

Probably the most informative exhibition of pragmatic but still respectful treatment of an Act of Congress comes from Justice Joseph Story's decision while riding circuit in *Harden v. Gordon*.<sup>28</sup> At a time when long-standing and virtually world-wide maritime law obliged vessel operators to provide free medical care (called "cure") to sick and injured seamen,<sup>29</sup> Congress enacted a statute requiring certain vessels to carry a medicine chest and stated that "in default of having such medicine chest . . . the master or commander of such ship or vessel shall provide for and pay for" medical care.<sup>30</sup> Justice Story acknowledged that the statute carried "a strong implication" that a vessel's compliance with the medicine chest requirement would supplant the ancient obligation to provide free medical treatment.<sup>31</sup> But he refused to go along with the strong implication. As was his wont, Justice Story provided a copious account of his thinking. Calling the ancient obligation to provide free medical care to sick seamen "a charge upon the ship,"<sup>32</sup> Justice Story wrote:

It is observable, in the first place, that the [statute's medicine-chest requirement] is merely in the affirmative, and contains no words abolishing the [medical-care] charge generally, or repealing it in the special cases within the purview of the [statute]. The most that can be urged, is, that [the statute]

24. 77 U.S. (10 Wall.) 557, 565–66 (1870).

25. *The Genesee Chief*, 53 U.S. (12 How.) at 453–58.

26. 46 U.S.C. §§ 30501–30512 (2006) (original version at ch. 43, 9 Stat. 635 (1851)).

27. See *Ex parte Garnett*, 141 U.S. 1, 12–15 (1891); *Butler v. Bos. & Savannah S.S. Co.*, 130 U.S. 527, 555–57 (1889); *Providence & N.Y. S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 593–95 (1883); *Lord v. S.S. Co.*, 102 U.S. 541 (1880); *Norwich Co. v. Wright*, 80 U.S. (13 Wall.) 104, 116–24 (1871).

28. 11 F. Cas. 480 (C.C.D. Me. 1823) (No. 6047).

29. *Id.* at 482.

30. *Id.* at 483–84 (quoting Act of July 20, 1790, ch. 29, § 9, 1 Stat. 131, 135).

31. *Id.* at 484.

32. *Id.* at 482.



carries a strong implication against the allowance of the [medical-care] charge, when the medicine chest is properly supplied. In the construction of statutes, it is a general rule, that merely affirmative words do not vary the antecedent laws or rights of parties.<sup>33</sup> There must be something [in the statute] inconsistent with or repugnant to [these antecedent laws or rights], to draw after a statute an implied repeal, either in whole or pro tanto of former laws; otherwise the statute is [deemed] to be merely declarative or cumulative.

The [statute] under consideration [does] indeed make a new provision; for independently of [it], there does not seem to exist any obligation on the part of [vessels] to provide a medicine chest . . . . In this view the [statute] is auxiliary to . . . the [pre-existing] maritime law; and [it provides] a substantial benefit to seamen by enlarging the means of [medical] recovery. In any other view [the statute would be] a serious diminution of [seamen's] antecedent rights.

It cannot readily be believed, that congress, which has on so many occasions manifested a solicitude to guard the interests and secure the safety of [seamen], can have intended to increase their burdens, narrow their privileges, or expose them to the danger of still harder sufferings. If indeed, to avoid such a conclusion, one were driven to the indulgence of conjecture, it might not be too rash to suppose, that the legislature was doubtful, or not aware of the doctrine of the maritime law; and had provided, however inadequately, for the relief of seamen by a measure of precaution, which might mitigate the evils of sudden calamity.<sup>34</sup>

Justice Story went on at some further length, but the foregoing quotation gets the gist of his reasoning. The passage is worth close study. It exemplifies respectful rejection of an unwise and just barely avoidable implication in an otherwise beneficial statute. It is closely akin to the “statutes in derogation” attitude<sup>35</sup> sometimes taken by modern state courts toward legislative incursions into a well-developed common law field.

#### IV. TWENTIETH CENTURY THEORY: ALTERATION OF THE TWO NINETEENTH CENTURY PRECEPTS

By the time the Court composed its 1924 summary of admiralty's constitutional structure in *Panama Railroad Co.*,<sup>36</sup> it had become clear that the constitutional source of congressional authority in the admiralty and maritime field is not the Commerce Clause, as had been thought, but rather the combination of Article III, Section 2 (the grant of admiralty and maritime

33. Justice Story cited nothing in support of this general rule of construction. It seems to be his version of the “statutes in derogation” idea. See sources cited *supra* note 6 and accompanying text.

34. *Harden*, 11 F. Cas. at 484. To lend clarity to Justice Story's argument, some minor, unsigned alterations in paragraphing were made to the quotation in the text.

35. See sources cited *supra* note 6 and accompanying text.

36. *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 385–86 (1924); see *supra* Part I.

authority to the federal judicial power) and Article I, Section 8, Clause 18 (the Necessary and Proper Clause).<sup>37</sup> The thrust of this change was to increase the power of Congress, because it meant that congressional authority would automatically swim alongside judicial authority in all cases in which the Constitution authorizes the federal government to impose admiralty and maritime governance.<sup>38</sup> As we saw in Part II, the Commerce Clause was sometimes deficient in this respect.<sup>39</sup>

The jettisoning of the nineteenth century view that Congress cannot directly address admiralty's jurisdictional boundaries occurred somewhat later,<sup>40</sup> but the matter has become settled. The modern viewpoint is quite clear: Constitutional language may—indeed presumptively probably does—have potentially broader coverage than identical statutory language.<sup>41</sup> So when the

37. Pre-*Panama Railroad* cases expressing the new theory include *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 214 (1917) (“In consequence of [Article III, Section 2 and the Necessary and Proper Clause], Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country”); *Ex parte Garnett*, 141 U.S. 1, 15 (1891) (stating that the limits of admiralty jurisdiction do not come from the commerce power but from a separate and distinct grant by the Constitution); *Butler v. Boston & Savannah Steamship Co.*, 130 U.S. 527, 557 (1889) (arguing that the Constitution’s “exclusive” jurisdictional grant of admiralty to the federal courts implies a corresponding grant to the national legislature). See also *supra* note 12 and accompanying text.

38. *Panama R.R. Co.*, 264 U.S. at 385–86 (relating the early history of admiralty jurisdiction at the time of the founding and concluding that “there is no room to doubt that the power of Congress extends to the entire subject and permits the exercise of a wide discretion”).

39. In a well-known law review article, Judge John R. Brown repeatedly indicated that the federal courts’ admiralty authority should be regarded as stronger than Congress’s because the courts have a direct constitutional grant of authority in Article III, whereas Congress lacks such a grant in Article I. Brown, *supra* note 2, at 251, 263, 269, 282. This strikes me as a somewhat formalistic argument. For me, the importance of the modern theory of congressional authority—the theory that congressional authority comes from Article III and is hence coterminous in scope with judicial authority—is that it strengthened rather than weakened Congress’s position.

40. The emergency of the modern view is difficult to pinpoint. The authors of *AEA Solution* argue that it had not yet occurred at the time of *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934). Robertson & Sturley, *supra* note 17, at 252–62. This argument finds some support in *United States v. Flores*, 289 U.S. 137, 155 (1933) (“Congress, by incorporating in the statute the very language of the constitutional grant of power, has made its exercise of the power co-extensive with the grant.”). The supposition that the modern view had not yet emerged in the 1930s is also supported by the fact that an excellent article by a prominent scholar—Stanley Morrison, *The Constitutionality of the Ship Mortgage Act of 1920*, 44 YALE L.J. 1, 3–4 (1934)—wholly fails to see it. But see Clarence A. Miller, *The Foreclosure of Vessel Mortgages in Admiralty*, 70 U. PENN. L. REV. 22, 25–26 (1921) (footnotes omitted) (“The [constitutional] grant of admiralty jurisdiction to the federal district courts is not self-executing. Not only must the Constitution give the court capacity to receive jurisdictional powers, but an Act of Congress must supply them. The Congress may distribute all the jurisdiction made available to the court by the Constitutional grant, or to such extent as it pleases, fall short of complete distribution.”).

41. See Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259, 274 (1950) (footnote omitted) (“[The] assumption that the same verbal form means

Court says “no admiralty jurisdiction,” it presumptively means that the matter is not within the statutory grant of admiralty jurisdiction to the federal courts and is not expressing a constitutional doctrine.<sup>42</sup> Therefore, Congress is probably free to amend the statutory grant so as to directly expand (or, conceivably, to contract) the federal courts’ admiralty jurisdiction.<sup>43</sup>

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the same thing wherever it is used . . . [is] false to everyday life, as it is false to the underlying spirit of constitutional law. It is entirely reasonable, on the contrary, to assume that [constitutional] language setting permanent bounds to federal power over a given subject-matter may bear a wider meaning than language, verbally identical, used in the context of an easily amendable statute.”).

42. Cf. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 681 n.5 (1982) (Powell, J., dissenting) (“The [admiralty] jurisdictional issue has both a constitutional and a statutory element, since both Art. III and 28 U.S.C. § 1333 must support the exercise of jurisdiction in this case. [In order to uphold the district court’s jurisdiction, the] Court necessarily must find that both provisions are satisfied. Because construction of the statute is sufficient to support the result I would reach [no jurisdiction], I intimate no views on the constitutional extent of Art. III admiralty jurisdiction.”).

43. In upholding the constitutionality of the 1948 Admiralty Extension Act, the court in *Fematt v. City of Los Angeles* gave an excellent statement of the modern viewpoint on Congress’s authority to alter admiralty jurisdictional boundaries. 196 F. Supp. 89, 91 (S.D. Cal. 1961); see also Admiralty Extension Act, ch. 526, 62 Stat. 496 (1948) (current version at 46 U.S.C. § 30101 (2006)). The court first noted: “Ever since *The Plymouth*, the courts in the United States have held that ship-to-shore torts were not maritime in nature and consequently [were] without the admiralty jurisdiction of the [federal] district courts.” *Fematt*, 196 F. Supp. at 90 (emphasis added) (citation omitted). The Admiralty Extension Act purported to change that rule. The *Fematt* Court continued:

If the Supreme Court in *The Plymouth* held that ship-to-shore torts are not maritime in nature and thus not within the admiralty jurisdictional grant of Art. III, § 2 of the Constitution, nothing that Congress does can change that. If, on the other hand, that which is the more likely occurred in *The Plymouth*, that ship-to-shore torts were only held to be without the scope of the Judiciary Acts, Congress can surely remedy that. This, after all, is a familiar theory expounded in dealing with the language used in the Constitution and identically in the Judiciary Acts with respect to jurisdiction of the district courts over cases arising under the Constitution and laws of the United States.

*Id.* at 91 (emphasis added).

The *Fematt* Court did not cite anything supporting its “familiar theory” claim, but it may have been referring to Charles Black’s article, *supra* note 41, or to Herbert Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 224–25 (1948) (“It is unfortunate [that the statutory grant of federal question jurisdiction uses] the very language that the Constitution gives to measure the authority of Congress to vest such jurisdiction in a federal court. . . . Needless to say, Congress has not meant to grant the district courts a general jurisdiction in every case . . . in which it could confer judicial power . . . . The courts have been obliged, therefore, to draw a line between the [constitutional] power and the [statutory grant], even though their verbal measure is the same.”).

## V. TWENTIETH CENTURY PRACTICE: INCONSISTENT ATTITUDES

In the subsections below, we will look at three clusters of twentieth (and twenty-first) century cases. This presentation is not chronological; as we will see, no one can know where we are at the moment or where we might be headed.

A. *Normal Treatment of Statutes: Pragmatic Respect for Congress*

Probably at least half of the modern Court's maritime work involves statutory issues. For the most part, the Court shows a normal—cautiously respectful—attitude toward congressional contributions to the field. The examples in this section are just some of the many instances that could be cited.

It makes sense to look first—let's call it Exhibit A—at the Court's Constitution-based decisions upholding the authority of Congress to bring mortgages on ships under the admiralty jurisdiction of the federal courts and into federal maritime law,<sup>44</sup> to enact a workers' compensation system for maritime workers,<sup>45</sup> and to provide for the punishment of crimes committed on United States vessels in foreign waters.<sup>46</sup> In all of these decisions, the Court was unanimous as to the existence of congressional authority. A closely related group of decisions are those in which the Court has seemingly assumed with full confidence that the 1948 Admiralty Extension Act,<sup>47</sup> expanding admiralty jurisdiction to include ship-to-shore torts, is constitutional.<sup>48</sup>

Exhibit B in this “normal treatment” presentation comprises a group of cases in which the Court grappled with the coverage and meaning of maritime legislation without provoking any member of the Court to dissent. Here I group four decisions interpreting the 1972 amendments to the Longshore and

44. *See* *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 52 (1934) (upholding the 1920 Ship Mortgage Act, ch. 250, 41 Stat. 1000–06 (current version codified (with the Federal Maritime Lien Act) at 46 U.S.C. §§ 31301–31343 (2006))).

45. *See* *Crowell v. Benson*, 285 U.S. 22, 54 (1932) (upholding the Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (current version, titled the Longshore and Harbor Workers' Compensation Act, codified at 33 U.S.C. §§ 901–950 (2006))).

46. *See* *United States v. Flores*, 289 U.S. 137, 159 (1933) (upholding jurisdiction under 18 U.S.C. § 272 (1925–1926) (codified as amended at 18 U.S.C. § 7 (2006)) and 28 U.S.C. § 102 (1925–1926) (codified as amended at 18 U.S.C. § 3238 (2006))).

47. Admiralty Extension Act, ch. 526, 62 Stat. 496 (1948) (current version at 46 U.S.C. § 30101 (2006)).

48. *See* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532–34 (1995); *Sisson v. Ruby*, 497 U.S. 358, 359–60 n.1 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 676–77, 677 n.7 (1982); *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209–10 (1971); *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 209–10 (1963).

Harbor Workers' Compensation Act (LHWCA)<sup>49</sup> and three decisions taking a robust view of the coverage of the 1920 Jones Act.<sup>50</sup>

Exhibit C is a group of decisions in which the Court was sharply divided over statutory treatment issues. Such disagreements are obviously far from unusual. When such disagreements arise, typically both sides of the debate will have principled and plausible reasons for the statutory views espoused. For example, the Court in *Herb's Welding, Inc. v. Gray* split 5-4 over whether an offshore oil and gas worker—injured on a fixed platform in Louisiana waters while welding a gas flow line—was engaged in “maritime employment” so as to come within the coverage of the LHWCA under 33 U.S.C. § 902(3).<sup>51</sup> Justice White wrote the majority opinion, which concluded no (leaving the worker with presumptively inferior state workers' compensation benefits).<sup>52</sup> I have long thought that Justice Marshall's dissenting opinion, which would have upheld LHWCA coverage,<sup>53</sup> expresses a wiser view of the statute than the majority's. But I do not believe anyone would say that Justice White's views cannot be found in the statutory framework. Several other decisions are like *Herb's Welding* in that they show

49. Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251 (amending 33 U.S.C. §§ 901–950 (1970)). See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 530–31 (1983) (holding that 33 U.S.C. § 905(b) enables workers covered by the LHWCA to sue their employers for negligence respecting the condition and use of vessels operated by the employers); *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 716–17 (1980) (holding that the landward expansion of the LHWCA that occurred in 1972, see 33 U.S.C. § 903(a), does not operate to preempt state laws that provide workers' compensation benefits for accidents within LHWCA coverage); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82–83 (1979) (giving a broad interpretation to the term “longshoring operations” in 33 U.S.C. § 902(3)); *Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 265–68 (1977) (giving a similarly broad interpretation).

50. The Jones Act was enacted in 1920 to give seamen injured in the course of their employment a negligence cause of action against their employers. See ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104 (2006)). The unanimous decisions taking a broad view of the Act's coverage are *Stewart v. Dutra Construction Co.*, 543 U.S. 481, 491, 494–95 (2005) (holding that all vessel crew members are Jones Act seamen and that all apparatus capable of moving goods or people across water are vessels for Jones Act—and most other—purposes); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 353–54 (1991) (rejecting an argument that a worker must aid in the navigation of a vessel in order to be a Jones Act seaman); and *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 37, 39 (1943) (holding that a seaman can be in the course of employment for Jones Act purposes even when injured ashore).

51. 470 U.S. 414, 415–16 (1985); Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3) (Supp. II 1984) (amending 33 U.S.C. § 902(3) (1982)).

52. *Herb's Welding, Inc.*, 470 U.S. at 427.

53. *Id.* at 450 (Marshall, J., dissenting).

the Court in principled disagreement over LHWCA issues without exhibiting any remarkable attitudes toward congressional input into admiralty.<sup>54</sup>

Exhibit D—the most important and controversial exhibit in this normal-treatment section—is the much-discussed decision in *Mobil Oil Corp. v. Higginbotham*, where the Court split 6-2 on whether general maritime law (federal maritime common law) allows the families of persons killed on the high seas to recover nonpecuniary damages for loss of society (companionship).<sup>55</sup> Justice Stevens wrote the majority opinion, concluding that the Death on the High Seas Act (DOHSA)<sup>56</sup> includes a congressional directive against the availability of such damages.<sup>57</sup> Justices Marshall and Blackmun strongly disagreed, asserting that “there is no congressional directive.”<sup>58</sup> Because Judge John R. Brown concluded his great career as the country’s leading admiralty jurist by proclaiming (in a posthumously published article) the dissenters correct and the majority egregiously wrong—Judge Brown said, the majority justices “abandoned their [constitutional] role as admiralty judges”<sup>59</sup>—I have put *Higginbotham* in the normal-treatment category only with great diffidence. In the five paragraphs below, I defend my choice.

The bare essentials for understanding the *Higginbotham* issue are these. In 1886 the Court held in *The Harrisburg* that admiralty afforded no remedy for wrongful death in the absence of an applicable statute.<sup>60</sup> In 1920 Congress enacted DOHSA to create “a remedy in admiralty for wrongful deaths more

54. See *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 158, 172, 175, 179 (1981) (3-3 split over the meaning of the term “negligence” in 33 U.S.C. § 905(b)); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 271–73, 274–75 (1979) (5-3 split on whether LHWCA workers who succeed in establishing “vessel” negligence in actions under 33 U.S.C. § 905(b) should have their recovery reduced in proportion to a percentage of fault assigned to their employers); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214, 224–25 (1969) (6-3 split over the operation of the “navigable waters” limit on LHWCA coverage in the pre-1972 version of 33 U.S.C. § 903 (1970)); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 124, 132 (1962) (6-2 split over the meaning of a LHWCA coverage-limiting provision that Congress deleted in the Longshoremen’s and Harbor Worker’s Compensation Act Amendments of 1972, Pub. L. No. 92-576, §§ 2(c), 21, 86 Stat. 1251, 1265).

*Calbeck* merits special mention, in that Justice Stewart’s dissent accused the majority of “judicial legerdemain,” which implies mistreatment of the statute. *Id.* at 132. Four decades ago I argued—at what now seems to me inordinate length—that the “judicial legerdemain” charge was false. See ROBERTSON, *supra* note 17, at 304–18. I still believe this.

55. 436 U.S. 618, 618–19 (1978).

56. Death on the High Seas Act, 46 U.S.C. §§ 30301–30308 (originally enacted as Act of Mar. 30, 1920, ch. 111, 41 Stat. 537).

57. *Higginbotham*, 436 U.S. at 618, 625.

58. *Id.* at 626, 629 (Marshall, J., dissenting).

59. Brown, *supra* note 2, at 283.

60. *The Harrisburg*, 119 U.S. 199, 212–13 (1886).

than three miles from shore.”<sup>61</sup> The relevant DOHSA provision is 46 U.S.C. § 30303, which provides:

The recovery in an action under this [Act] shall be a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought. . . .<sup>62</sup>

In its *Moragne* and *Gaudet* decisions in 1970 and 1974, the Court overruled *The Harrisburg*, created a non-statutory wrongful death remedy for maritime deaths—it will be convenient to call this “the *Moragne* remedy”—and held that the *Moragne* remedy includes nonpecuniary damages for loss of society.<sup>63</sup> The stage was thus set for *Higginbotham*, a high seas fatal accident case, where the Court had to deal with the conflict between the *Moragne* remedy’s provision of nonpecuniary loss of society damages and DOHSA’s restriction to “pecuniary loss.”<sup>64</sup> (No such question had arisen in *Moragne* and *Gaudet*, both of which involved fatal accidents in territorial waters and hence outside DOHSA’s coverage.)

In concluding that the *Moragne*-DOHSA conflict was fatal to the applicability of the *Moragne* remedy to a high-seas accident, Justice Stevens said the following about DOHSA:

[Respecting deaths beyond three miles from shore, DOHSA] has limited survivors to recovery of their pecuniary losses. . . . DOHSA should be the courts’ primary guide as they refine the [*Moragne*] remedy, both because of the interest in uniformity and because Congress’ considered judgment has great force in its own right. . . . [DOHSA] announces Congress’ considered judgment on . . . damages . . . . The Act does not address every issue of wrongful-death law . . . but when it does speak directly to a question, the courts are not free to “supplement” Congress’ answer so thoroughly that the Act becomes meaningless.<sup>65</sup>

61. *Higginbotham*, 436 U.S. at 620 (citing Death on the High Seas Act, 46 U.S.C. §§ 761–768 (1976) (current version at 46 U.S.C. §§ 30301–30308 (2006))).

62. Death on the High Seas Act, 46 U.S.C. § 762 (1976) (current version at 46 U.S.C. § 30303 (2006)).

63. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970) (unanimously overruling *The Harrisburg* and creating a new non-statutory maritime-death remedy); *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 573–74, 587–89 (1974) (5-4 decision holding that the *Moragne* remedy includes nonpecuniary damages for loss of society).

64. See 46 U.S.C. § 762 (1976) (current version at 46 U.S.C. § 30303 (2006)); *Higginbotham*, 436 U.S. at 623.

65. *Higginbotham*, 436 U.S. at 623–25 (citations omitted). Justice Stevens’s last-quoted sentence must have rankled Judge Brown considerably. In *Law v. Sea Drilling Corp.*, Judge Brown had written that *Moragne* effectively consigned DOHSA to “the briney deep.” 523 F.2d 793, 798 (5th Cir. 1975).

For the dissenters, Justice Marshall countered:

[The majority would be right] if Congress could be said to have made a determination to disallow any recovery except pecuniary loss with regard to deaths arising on the high seas. But Congress made no such determination when it passed DOHSA. Congress was writing in 1920 against the background of *The Harrisburg*, under which a remedy for death on the high seas depended entirely on the existence of a statute allowing recovery. This rule left many dependents without any remedy and was viewed as “a disgrace to civilized people.” By enacting DOHSA, Congress sought to “bring our maritime law into line with the laws of those enlightened nations which confer a right of action for death at sea.”

The Court today uses this ameliorative, remedial statute as the foundation of a decision denying a remedy. It purports to find, [in DOHSA’s pecuniary-loss provision], a “considered judgment” by Congress that recovery must be limited to pecuniary loss. . . . Nothing in this [provision], however, states that recovery must be so limited; certainly Congress was principally concerned, not with limiting recovery, but with ensuring that those suing under DOHSA were able to recover *at least* their pecuniary loss.

Although recognizing that DOHSA was a response to *The Harrisburg*, the majority opinion otherwise ignores the legislative history of the Act. The fundamental premise of the opinion—that Congress meant to “limi[t] survivors to recovery of their pecuniary losses,”—is simply assumed.

Because there is no congressional directive to foreclose nonstatutory remedies, I believe that maritime law principles require us to uphold the remedy for loss of society at issue here.<sup>66</sup>

Justice Marshall’s treatment of DOHSA bears a close resemblance to Justice Story’s long-ago treatment of the medicine-chest statute in *Harden v. Gordon*.<sup>67</sup> Both justices were confronted with a strong statutory implication that seemed inimical to the purposes and spirit of maritime law. In deciding whether the implication could be resisted, each justice looked at whatever legislative history was available, and each examined the maritime law context into which Congress had inserted the statute. Both concluded that no disrespect for Congress would be entailed in resisting the implication.

Judge Brown criticized the *Higginbotham* majority for not following Justice Story’s *Harden v. Gordon* lead.<sup>68</sup> I do not disagree with that criticism. But I do (again, with much diffidence) disagree with Judge Brown’s further

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66. *Higginbotham*, 436 U.S. at 628–29 (Marshall, J., dissenting) (emphasis added) (quoting *Moragne*, 398 U.S. at 397, 400). The internal quotations that are not obviously from Justice Stevens’s opinion are from Senate and House Committee reports.

67. 11 F. Cas. 480, 484 (C.C.D. Me. 1823) (No. 6047). See *supra* notes 28–34 and accompanying text.

68. See Brown, *supra* note 2, at 278–79.



conclusion that *Higginbotham*'s treatment of DOHSA was unusual, untoward, and wholly out of line.<sup>69</sup> If Justice Stevens had been confronted with *Harden* as a binding precedent,<sup>70</sup> he could have plausibly distinguished it along the following lines: When DOHSA created an admiralty action for wrongful death at sea and stated that the recovery in such an action "shall be a fair compensation for . . . pecuniary loss,"<sup>71</sup> it so directly implied "pecuniary only" as to be regarded as so commanding. In contrast, the implication at stake in *Harden* was less direct: When Congress said that vessels failing to meet the medicine-chest requirement must provide free medical care, it was not necessarily commanding that no free medical care was otherwise due. Moreover, the area of pre-existing maritime law to which the medicine-chest statute was an addition powerfully and clearly called for free medical care for sick and hurt seamen, whereas there was no maritime law provision at all for loss of society damages when DOHSA was enacted.

As a member of the *Higginbotham* Court, I would have voted with Justice Marshall. But I cannot conclude that Justice Stevens was wrong to find a congressional command where I would not. I think both segments of the Court performed within the tradition of careful, respectful attention to congressional input into maritime law. Their disagreement as to what DOHSA presently should mean was a principled one, and neither side's view lacked plausibility.

#### B. *Inappropriate Resistance to Congressional Directives*

Justice Frankfurter once suggested that Justice James McReynolds (who sat on the Supreme Court from 1914 to 1941) should be remembered as "the Justice under whose lead the most unhappy admiralty doctrines were promulgated."<sup>72</sup> However that may be, Justice McReynolds clearly displayed an unacceptable degree of contempt for Congress in three decisions he authored for the Court.

In *Chelentis v. Luckenbach Steamship Co.*, the McReynolds-led Court confronted a statute in which Congress had unmistakably tried to provide that seamen injured on the job could sue their employers for negligence.<sup>73</sup> The Court's decision (in *The Osceola*) denying seamen that right was couched, in major part, in terms of the fellow servant doctrine,<sup>74</sup> so Congress tried to create

69. *See id.* at 283.

70. Remember that *Harden* was not a Supreme Court decision; it was decided by Justice Story while sitting as circuit justice for Maine.

71. 46 U.S.C. § 762 (1976) (current version at 46 U.S.C. § 30303 (2006)).

72. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 563 n.6 (1960) (Frankfurter, J., dissenting) (citing *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917); *Kickerbocker Ice Co. v. Stewart*, 263 U.S. 149 (1923)).

73. 247 U.S. 372, 382–83 (1918).

74. 189 U.S. 158, 175 (1903).

the negligence cause of action by enacting a *pro tanto* repeal of the fellow servant doctrine.<sup>75</sup> Justice McReynolds's *Chelentis* opinion pointed to other language in *The Osceola* (aside from the fellow-servant pronouncements) speaking against the negligence cause of action and blithely dismissed the statute as "irrelevant."<sup>76</sup> The Gilmore and Black treatise describes *Chelentis* as the Court's "giv[ing] Congress a lesson on 'How to read a case' of a type familiar to any first term law student."<sup>77</sup>

Justice McReynolds also managed to thwart repeated efforts by Congress to enable longshoremen injured on navigable waters to seek relief under state workers' compensation statutes. In 1917, the Court held that general maritime law precluded longshoremen from such relief.<sup>78</sup> Later that same year, and again in 1922, Congress enacted statutes aimed at reversing the Court's declared prohibition.<sup>79</sup> In *Knickerbocker Ice Co. v. Stewart*<sup>80</sup> and *Washington v. W.C. Dawson & Co.*,<sup>81</sup> the McReynolds-led Court declared these statutes unconstitutional<sup>82</sup> on the (highly implausible to modern thought) ground that injuries to maritime workers on navigable waters fell within a monolithic corpus of federal maritime law (much of it yet-undiscovered and undeclared), where state legislatures were forbidden (by Article 3, Section 2) to tread.

75. *Chelentis*, 247 U.S. at 376.

76. *Id.* at 384.

77. GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 325 (2d ed. 1975). In 1920, Congress responded to the *Chelentis* Court's rejection of its attempt to create a maritime-law cause of action for seamen by enacting the Jones Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104 (2006)), which achieved the goal by making the Federal Employers' Liability Act, ch. 149, 35 Stat. 65, 65–66 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2006)), applicable in seamen's injury cases. In *Panama Railroad Co. v. Johnson*, the Court upheld the constitutionality of the Jones Act, but only after effectively rewriting the statute so as to avoid perceived constitutional problems. 264 U.S. 375, 390–91 (1924). For a full account, see David W. Robertson & Michael F. Sturley, *Understanding Panama Railroad Co. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections under the Jones Act*, 14 U.S.F. MAR. L.J. 229 (2001–2002); see also David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. MAR. L. & COM. 649, 656–59 (1999).

78. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 212 (1917).

79. See Act of Oct. 6, 1917, ch. 97, 40 Stat. 395, *declared unconstitutional* by *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); Act of June 10, 1922, ch. 216, 42 Stat. 634, 634–35, *declared unconstitutional* by *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

80. 253 U.S. at 160, 163–64.

81. 264 U.S. at 222, 227–28.

82. When Professors Gilmore and Black wrote in 1975 that "apparently [no maritime Act of Congress] has ever been declared unconstitutional," they were apparently forgetting momentarily about *Knickerbocker* and *Dawson*. GILMORE & BLACK, *supra* note 77, at 47. A later section of the treatise recounts the constitutional holdings in the two cases. *Id.* at 407–08.

We have seen nothing like Justice McReynolds's three slaps at Congress since his era. But there is at least one modern decision<sup>83</sup> that seems to belong in the category of inappropriate judicial resistance to Congress. At the time of the Court's 5-4 decision in *Offshore Logistics, Inc. v. Tallentire*,<sup>84</sup> Section 7 of the Death on the High Seas Act (DOHSA) read as follows:

The provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter. Nor shall this chapter apply to the Great Lakes or to any waters within the territorial limits of any State, or to any navigable waters in the Panama Canal Zone.<sup>85</sup>

Does this provision's first sentence allow state death statutes to apply to fatal accidents on the high seas? On its face, it plainly does. But the five-member majority (in an opinion by Justice O'Connor) thought Section 7 expressed a very bad idea, so they wove a complex argument purportedly based on legislative history to conclude otherwise, stating:

[T]he first sentence of [Section] 7 was intended only to serve as a jurisdictional saving clause, ensuring that state courts enjoyed the right to entertain causes of action and provide wrongful death remedies both for accidents arising on territorial waters and, under DOHSA, for accidents occurring more than one marine league from shore.<sup>86</sup>

The Court went so far as to call this torturing of the statute's language "a natural reading."<sup>87</sup> Writing for the four dissenters, Justice Powell gave a completely convincing demonstration "that the Court's reading of [Section] 7 is at odds with the language of the statute and its legislative history."<sup>88</sup> Justice Powell concluded his demonstration by scolding the majority, stating:

The Court argues that preserving state rights of action for death on the high seas, in accordance with the plain language of [Section] 7, would undermine a uniform federal remedy and conflict with the exclusive, federal character of most aspects of admiralty law. I agree that such a result undercuts a federal

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83. I think some analysts might say "at least two." Justice O'Connor's opinion for the Court in *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, 323-24 (1983) (holding that workers who are neither longshoremen nor harbor workers can satisfy the LHWCA's "maritime employment" requirement, 33 U.S.C. § 902(3) (2006), merely by being hurt on navigable water in the course of their employment) seems to take great liberties with congressional language; the Act seems to tie its "maritime employment" requirement tightly to longshoremen and harbor workers. See Justice Stevens's persuasive dissent, *Perini*, 459 U.S. at 325-43 (Stevens, J., dissenting). It is a close call whether Justice O'Connor took the *Perini* majority too far from the statute. For present purposes, I am saying, "almost."

84. 477 U.S. 207 (1986).

85. 46 U.S.C. § 767 (1982) (current version codified with some minor differences in language at 46 U.S.C. § 30308 (2006)).

86. *Offshore Logistics*, 477 U.S. at 221.

87. *Id.* at 223.

88. *Id.* at 233 (Powell, J., dissenting).

uniformity that seems desirable here, but it is not the role of this Court to reconsider the wisdom of a policy choice that Congress has already made. . . . We should respect the outcome of the legislative process and preserve State rights of action for wrongful death on the high seas until Congress legislates otherwise.<sup>89</sup>

### C. *Ersatz Deference*

Obviously the principle of separation of powers is offended when the Court ignores a clear congressional command. It seems to me equally offensive for the Court to cloak its own determinations in the guise of imaginary congressional commands. The exhibit here is the much criticized<sup>90</sup> 1990 decision in *Miles v. Apex Marine Corp.*, where the Court purported to find two commands in the Jones Act—an unstated command and a penumbral implication—that are realistically impossible to attribute to Congress.<sup>91</sup> As we saw in Part VA, Judge Brown’s career-capping diatribe against “the justices of the Supreme Court [who] have abandoned their role as admiralty judges”<sup>92</sup> included the *Higginbotham* majority as well as the *Miles* Court. But I believe *Miles*—a unanimous decision, and a very dramatic one—was a uniquely abrupt departure from anything the Court had theretofore done or said.

Our examination of *Miles* will be facilitated by looking first at *The Arizona v. Anelich*, which went unmentioned in *Miles* despite having involved the identical statutory-treatment problem.<sup>93</sup> Remember<sup>94</sup> that the 1920 Jones Act,<sup>95</sup> which changed maritime law by providing that seamen’s employers are liable for negligently injuring them, effected this change by adopting by reference the provisions of the 1908 Federal Employers’ Liability Act (FELA).<sup>96</sup> The issue in *The Arizona* was whether a seaman bringing a Jones Act negligence action against his employer was subject to the affirmative defense of assumption of risk.<sup>97</sup> The Court began its analysis by noting: “[I]t has been settled by numerous [pre-Jones Act] decisions of this court that assumption of risk is a defense . . .” in a FELA action.<sup>98</sup> FELA did not

89. *Id.* at 240–41 (Powell, J., dissenting).

90. See, e.g., Brown, *supra* note 2, at 279, 283–84; Robert Force, *The Curse of Miles v. Apex Marine Corp: The Mischief of Seeking “Uniformity” and “Legislative Intent” in Maritime Personal Injury Cases*, 55 LA. L. REV. 745, 752, 784–85, 796–98 (1995).

91. 498 U.S. 19, 27, 37 (1990).

92. Brown, *supra* note 2, at 283.

93. 298 U.S. 110, 115 (1936).

94. See *supra* note 77 and accompanying text.

95. Ch. 250, § 33, 41 Stat. 988, 1007 (1920) (codified as amended at 46 U.S.C. § 30104 (2006)).

96. Ch. 149, 35 Stat. 65, 65–66 (1908) (codified as amended at 45 U.S.C. §§ 51–60 (2006)).

97. *The Arizona*, 298 U.S. at 115.

98. *Id.* at 119 (citing *Boldt v. Pa. R.R. Co.*, 245 U.S. 441, 445 (1918)); *Jacobs v. S. Ry. Co.*, 241 U.S. 229, 235 (1916); *Seaboard Air Line Ry. v. Horton*, 233 U.S. 492, 503 (1914)).

expressly so provide, but the Court had repeatedly held that the assumption of risk defense was “impliedly authorized” by FELA.<sup>99</sup>

The *Arizona* Court adamantly refused to read the Jones Act’s incorporation of FELA as having brought into seamen’s jurisprudence the assumed risk defense that the Court (in pre-Jones Act cases) had read into FELA, explaining:

[T]he Jones Act does not, by its own terms, or by those adopted by reference from [FELA], prescribe that assumption of risk shall be a defense to the liability imposed for injuries to seamen . . . . In the absence of such a definite command the scope of the new [Jones Act] rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system.<sup>100</sup>

. . . .

Before the Jones Act . . . . no American case appears to have recognized assumption of risk as a defense [in a seaman’s] suit. . . .<sup>101</sup>

. . . .

[Maritime law’s policies] require a like conclusion with respect to the modified and in some respects enlarged liability imported into the maritime law by the Jones Act. The legislation was remedial, for the benefit and protection of seamen who are peculiarly the wards of admiralty. Its purpose was to enlarge that protection, not to narrow it. Its provisions . . . are to be liberally construed to attain that end, and are to be interpreted in harmony with the established doctrine of maritime law of which it is an integral part. . . . No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication.<sup>102</sup>

Note carefully what the *Arizona* Court is saying: A defensive doctrine that is not *expressly* provided for by the Jones Act or FELA—but that has been read into FELA by judicial implication—cannot properly apply in seamen’s jurisprudence unless it fully matches the content and purposes of pre-existing maritime law.

The *Miles* Court did *exactly* what the *Arizona* Court so eloquently condemned and then compounded the error by taking it a step further. Among the FELA provisions incorporated into the Jones Act was 45 U.S.C. § 51, which gives the families of fatally injured workers a wrongful death remedy

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99. *Id.* at 119–20.

100. *Id.* at 120.

101. *Id.* at 122.

102. *The Arizona*, 298 U.S. at 123 (citations omitted).

without spelling out the categories of damages available.<sup>103</sup> In a pre-Jones Act case called *Vreeland*, the Supreme Court read into FELA's wrongful death provision a pecuniary loss limit that precluded recovery for loss of society.<sup>104</sup> In *Miles*, the Court held as follows:

When Congress passed the Jones Act, the *Vreeland* gloss on FELA . . . [was] well established. Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well. We assume that Congress is aware of existing law when it passes legislation. There is no recovery for loss of society in a Jones Act wrongful death action.<sup>105</sup>

In affecting to believe that by incorporating FELA the Jones Act Congress intended to bring a into seamen's jurisprudence a defensive doctrine that had been judicially implied into FELA, the *Miles* Court directly contravened the holding of *The Arizona*.

The *Miles* Court then went a remarkable step further by extending the Jones Act defensive doctrine (a doctrine that it had only just discovered or invented) into maritime common law.<sup>106</sup> The *Miles* plaintiff (the deceased seaman's mother) was seeking loss of society damages in an action based on unseaworthiness, a non-statutory doctrine.<sup>107</sup> Under the Court's *Moragne* and *Gaudet* decisions,<sup>108</sup> she was entitled to such damages. But the *Miles* Court held that the *Moragne-Gaudet* maritime common law remedy was trumped by the defensive doctrine it had just implied into the Jones Act, stating:

The Jones Act [upon which the plaintiff was not relying] also precludes recovery for loss of society in this case. The Jones Act applies when a seaman has been killed as a result of negligence, and [as we have just announced] it limits recovery to pecuniary loss. The general [common law] maritime claim here alleged that Torregano had been killed as a result of the unseaworthiness of the vessel. It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of deaths resulting from negligence. We must conclude that there is no

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103. 46 U.S.C. § 30104 (2006) (original version at ch. 250, 41 Stat. 988, 1007 (1920)); 45 U.S.C. § 51 (2006) (original version at ch. 149, 35 Stat. 65, 65–66 (1908)).

104. *See* Mich. Cent. R.R. v. *Vreeland*, 227 U.S. 59, 74 (1913).

105. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (citation omitted).

106. *Id.* at 36.

107. *Id.* at 21–22.

108. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970) (unanimously overruling *Harrisburg* and creating a new non-statutory maritime-death remedy); *See* *Sea-Land Servs., Inc. v. Gaudet*, 414 U.S. 573, 573–74, 587–88, (1974) (5-4 decision holding that the *Moragne* remedy includes nonpecuniary damages for loss of society).

recovery for loss of society in a general [common law] maritime action for the wrongful death of a Jones Act seaman.<sup>109</sup>

I cannot improve upon Judge Brown's concluding characterization of this last-quoted bit of *Miles* reasoning: "I believe I express a general, if not universal opinion of the legal profession in saying that the judgment was erroneous."<sup>110</sup>

#### D. *What's Next?*

The two *Miles* rulings recounted above in Section VC<sup>111</sup> are dramatic departures from the long judicial tradition of carefully integrating statutes into the general maritime law.<sup>112</sup> And the Court accompanied its dramatic rulings with some equally dramatic language. Here are the two most startling examples:

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.<sup>113</sup>

....

109. *Miles*, 498 U.S. at 32–33.

110. Brown, *supra* note 2, at 285 (quoting *Jackson v. The Magnolia*, 61 U.S. (20 How.) 296, 336 (1857)).

111. In a third ruling, the *Miles* Court held that the Jones Act precludes plaintiffs in general maritime survival actions from recovering for the decedent's lost future earnings. See *Miles*, 498 U.S. at 33–36.

112. Judge Brown's thumbnail sketch of that tradition was as follows:

The mere fact that Congress has legislated in an area is insufficient to preempt maritime remedies in the absence of Congressional purpose to do so. The affirmative intervention of Congress in the maritime field should be interpreted in a positive and supportive fashion and should not be used to emasculate the power of admiralty judges to declare admiralty law. As Justice Story concluded, [in *Harden v. Gordon*, 11 F. Cas. 480 (C.C.D. Me. 1823) (Case No. 6047)], even a strong implication by Congress is insufficient to deprive admiralty judges of their duty to enunciate the law in conformity with governing maritime principles. Only an express prohibition by Congress can serve to deny admiralty judges the power to declare admiralty law which was delegated to them by the Constitution.

Brown, *supra* note 2, at 284. This manifesto might be seen as Judge Brown's version of the "statutes in derogation" attitude; see sources cited *supra* note 6 and accompanying text.

113. *Miles*, 498 U.S. at 27.

We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them.<sup>114</sup>

The Court provided no citations in support of any of these claims and pronouncements. When the *Miles* Court uttered them in 1990, they were brand new.<sup>115</sup> They show that Judge Brown was right to say that *Miles* “represent[s] a complete reversal of the roles of admiralty judges and Congress.”<sup>116</sup> We need to try to figure out whether this reversal is going to be a lasting change—if so, it is a true sea change in the spirit of that metaphor—or something like a temporary aberration.

### 1. Pro-Miles Signals.

Since *Miles*, the Court has presented at least two additional demonstrations of the *Miles* role-reversal technique. Probably the more important of the two is *Dooley v. Korean Air Lines Co.*<sup>117</sup> The question in *Dooley* was whether general maritime law (maritime common law) includes a survival remedy enabling the estate or survivors of persons killed on the high seas to recover for the decedents’ pre-death pain and suffering.<sup>118</sup> As the *Miles* Court had correctly noted, “DOHSA contains no survival provision.”<sup>119</sup> The nearest thing to a survival provision in DOHSA is a non-abatement provision, which provides in pertinent part:

If a civil action in admiralty is pending in a court of the United States to recover for personal injury caused by wrongful act, neglect, or default [occurring on the high seas beyond 3 nautical miles from the shore of the United States], and the individual dies during the action as a result of the wrongful act, neglect, or default, the personal representative of the decedent

114. *Id.* at 36.

115. *But see* Brown, *supra* note 2, at 277–79 (arguing that the 1978 decision in *Higginbotham* strongly foreshadowed *Miles*).

116. *Id.* at 283.

117. 524 U.S. 116 (1998).

118. *Id.* at 118. The Court’s *Moragne* decision created a general maritime wrongful death remedy to redress the losses sustained by the families of the victims of maritime fatal accidents. *See, e.g.,* Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 621 (1977). The existence of a general maritime survival remedy—to redress the fatal-accident victim’s own losses sustained in the interval between injury and death, such as conscious pain and suffering—was not addressed but seemed implicit in *Moragne*. *E.g.,* Evich v. Connelly, 759 F.2d 1432, 1434 (9th Cir. 1985); Law v. Sea Drilling Corp., 523 F.2d 793, 795 (5th Cir. 1975); Barbe v. Drummond, 507 F.2d 794, 799–800 (1st Cir. 1974); Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc., 466 F.2d 903, 909 (8th Cir. 1972). *But see Miles*, 498 U.S. at 34 (“declin[ing] to address the issue” whether general maritime law includes a survival remedy but going on to hold that if such a remedy exists, it does not allow for recovery of the decedent’s lost future earnings).

119. *Miles*, 498 U.S. at 35.



may be substituted as the plaintiff and the action may proceed [as a wrongful death action] under this chapter . . . .<sup>120</sup>

On its face, this provision has nothing to do with whether the estate or survivors of the victim of a fatal accident on the high seas can recover for the victim's own pain and suffering. Yet the *Dooley* Court (in a unanimous decision written by Justice Thomas) termed the provision a "limited survival provision," and held that it signaled Congress's "considered judgment" that the survival damages at issue in the case could not be recovered.<sup>121</sup> Without mentioning *Miles*, the *Dooley* opinion echoed the *Miles* reasoning, stating:

Even in the exercise of our admiralty jurisdiction, we will not upset the balance struck by Congress by authorizing a cause of action [i.e., the pre-death pain and suffering remedy] with which Congress was certainly familiar but nonetheless declined to adopt. . . . Because Congress has chosen not to authorize a survival action for a decedent's pre-death pain and suffering, there can be no general maritime survival action for such damages.<sup>122</sup>

The Court then added a stern, *Miles*-like footnote: "Accordingly, we need not decide whether general maritime law *ever* provides a survival action."<sup>123</sup>

The other post-*Miles* role-reversal demonstration came in *Norfolk Shipbuilding & Drydock Corp. v. Garris*.<sup>124</sup> By the very terms of the Court's 1970 decision in *Moragne*,<sup>125</sup> the general maritime wrongful-death remedy created in that case—which happened to involve a death caused by a vessel's unseaworthiness—applied to all "death[s] caused by violation of maritime duties."<sup>126</sup> The fatal accident victim in *Garris*—a shipyard worker killed by the negligence of one of the contractors on the job where the victim was working—was indisputably killed by the violation of the general maritime duty to avoid negligence.<sup>127</sup> Yet for reasons that are virtually inexplicable, the *Garris* Court took it as unsettled whether the *Moragne* remedy applied. The Court's opinion (written by Justice Scalia) eventually reached the only possible

120. 46 U.S.C. § 30305 (2006).

121. *Dooley*, 524 U.S. at 118, 124 (citation omitted).

122. *Id.* at 124. The Court thought that the Congress that enacted DOHSA in 1920 had to be familiar with the pre-death pain and suffering remedy because the Jones Act, enacted that same year, had authorized a survival remedy in seamen's families' fatal-injury actions by incorporating FELA, 45 U.S.C. § 59. *Id.*

123. *Id.* at 124 n.2 (emphasis in original).

124. 532 U.S. 811 (2001).

125. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 409 (1970).

126. *Id.* at 376, 409.

127. *Garris*, 532 U.S. at 812–13. The countless judicial recognitions of this maritime duty include *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959) and *Brotherhood Shipping Co. v. St. Paul Fire & Marine Insurance Co.*, 985 F.2d 323, 327 (7th Cir. 1993).

answer—of course. But Justice Scalia was inspired to conclude with a *Miles*-like flourish:

Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes [*viz.*, the Jones Act and the LHWCA] have seen fit to allow, to leave further development to Congress. The cause of action [*viz.*, the wrongful-death remedy] we recognize today, however, is new only in the most technical sense. The general maritime law has recognized the tort of negligence for more than a century, and it has been clear since *Moragne* that breaches of a maritime duty are actionable when they cause death, as when they cause injury. Congress's occupation of this field is not yet so extensive as to preclude us from recognizing what is already logically compelled by our precedents.<sup>128</sup>

## 2. Arguable (and Fairly Weak) Anti-*Miles* Signals.

There are recent judicial dicta offering a bit of comfort. Justice Ginsburg (joined by Justices Souter and Breyer) wrote separately in *Garris* to express disagreement with Justice Scalia's concluding *Miles*-inspired flourish, stating:

I agree with the Court's clear opinion with one reservation. In Part II-B-2, the Court counsels: "Because of Congress's extensive involvement in legislating causes of action for maritime personal injuries, it will be the better course, in many cases that assert new claims beyond what those statutes . . . allow, to leave further development to Congress." *Moragne* itself, however, tugs in the opposite direction. Inspecting the relevant legislation, the Court in *Moragne* found no measures counseling against the judicial elaboration of general maritime law there advanced. In accord with *Moragne*, I see development of the law in admiralty as a shared venture in which "federal common lawmaking" does not stand still, but "harmonize[s] with the enactments of Congress in the field." I therefore do not join in the Court's dictum.<sup>129</sup>

In a similar vein, Justice Souter wrote for the Court in its 2008 decision in *Exxon Shipping Co. v. Baker* that "maritime law . . . falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."<sup>130</sup>

And there is one important holding, the Court's closely divided (5–4) decision in 2009 in *Atlantic Sounding Co. v. Townsend*, holding that neither the Jones Act nor *Miles* stands in the way of actions seeking punitive damages against employers who flout the obligation to provide maintenance (food and

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128. *Garris*, 532 U.S. at 820.

129. *Id.* at 821 (Ginsburg, J., concurring) (citations and internal quotations omitted).

130. 554 U.S. 471, 489–90 (2008).

lodging) and cure (medical care) to sick and injured seamen.<sup>131</sup> To evaluate the *Townsend* Court's treatment of *Miles*, we need to remember the two-step process in *Miles*: The *Miles* Court first discovered a prohibition in the Jones Act (against loss-of-society damages) and then extended that prohibition into the maritime common law field of unseaworthiness.<sup>132</sup> Similarly, the employer in *Townsend*—contending that punitive damages were unavailable—made a two-step argument, contending: a) that punitive damages are not awardable in Jones Act actions; and b) that this prohibition should extend into the maritime common law field of maintenance and cure.<sup>133</sup>

Writing for the *Townsend* majority, Justice Thomas said it was unnecessary to decide whether punitive damages are recoverable in Jones Act actions because, even if such a prohibition did exist, taking it into the maintenance-and-cure field would be an unwarranted stretch of the *Miles* approach.<sup>134</sup> “The reasoning of *Miles* remains sound,”<sup>135</sup> Justice Thomas said, but the employer’s “reading of *Miles* is far too broad.”<sup>136</sup> The *Miles* and *Townsend* situations were crucially different in the following respect: Whereas the damages sought in *Miles* (wrongful death damages for loss of society resulting from an unseaworthiness-caused death) would not have been available under maritime law prior to the enactment of the Jones Act and DOHSA in 1920, the rights asserted in *Townsend* were in no sense dependent on congressional action: “[B]oth the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act.”<sup>137</sup>

That is a fairly nuanced distinction of *Miles*, and it seems far from anything a careful observer would call repudiation or even significant weakening of *Miles*. Moreover, it must be remembered that four dissenters (led by Justice Alito) would have cheerfully extended the *Miles* approach to wipe out punitive damages in maintenance and cure cases.<sup>138</sup> Still, those of us who think that the *Miles* role-reversal announcements were deeply unfortunate need to look for comfort where we can find it, and *Townsend* is at least a somewhat hopeful sign.

131. 129 S. Ct. 2561, 2565 (2009). For a full discussion of *Townsend*, see David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 LA. L. REV. 463, 497–99 (2010).

132. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990).

133. *Townsend*, 129 S. Ct. at 2571–73.

134. *Id.* at 2575 n.12.

135. *Id.* at 2572.

136. *Id.*

137. *Id.*

138. *Townsend*, 129 S. Ct. at 2577 (Alito, J., dissenting).

## VI. CONCLUDING THOUGHTS ON PRACTICALITIES OF FUTURE LITIGATION

It is sometimes doubted whether historical-analytical treatments of an area of the law are of much benefit to practically-oriented litigators. But I believe it is always helpful to know as much about the historical and conceptual background of working doctrine as possible. In addition, I think there are some clear practical pointers to be gained.

A. *Rely Heavily on Statutes Whenever Possible*

This first practical pointer is completely obvious. Regardless of how the statutory-common law balance in admiralty and maritime law eventually plays out in the post-*Miles* era, a litigator is obviously well advised to wrap his client's position in a statute if this is in any way possible. I offer two illustrations of this truth. The first is the Supreme Court's decision in *Stewart v. Dutra Construction Co.*, which expanded the coverage of the Jones Act by holding that Section 3 of the Rules of Construction Act defined the term "vessel" for LHWCA and Jones Act purposes as any "description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."<sup>139</sup> The unanimous *Stewart* Court—a Court not predisposed to the expansion of seamen's rights—acknowledged that its expansion of Jones Act coverage "sweeps broadly,"<sup>140</sup> but the Court seemed completely cheerful about that, because it was able to attribute the result entirely to Congress.

The second illustration of the special potency of statutory arguments is the Fifth Circuit's pair of opinions in *Holmes v. Atlantic Sounding Co.*<sup>141</sup> This was a post-*Stewart* case in which the question was "whether an unpowered floatable . . . quarterbarge"—"in effect, a floating dormitory"—that had been "moored in a private boat slip at Holly Beach in Cameron Parish" for about a month, at the time of the plaintiff's accident, was a Jones Act vessel.<sup>142</sup> In its first opinion, the Fifth Circuit panel (over Judge DeMoss's dissent) relied on the Fifth Circuit's copious pre-*Stewart* vessel-status jurisprudence to "find *inescapable* the conclusion that the [quarterbarge] is not a 'vessel.'"<sup>143</sup> Turning to the Supreme Court's brand-new *Stewart* decision, the Fifth Circuit said that *Stewart* did "not fundamentally alter [the Fifth Circuit's] 'vessel'

139. 543 U.S. 481, 489 (2005) (quoting 1 Rev. Stat. of 1873 §§ 1, 3 (1875) (codified as amended at 1 U.S.C. § 3 (2006)).

140. *Id.* at 494.

141. *Holmes v. Atl. Sounding Co.* (Holmes II), 437 F.3d 441 (5th Cir. 2006); *Holmes v. Atl. Sounding Co.* (Holmes I), 2005 AMC 2612 (previously published at 429 F.3d 174 (5th Cir. 2005) and subsequently withdrawn).

142. *Holmes I*, 2005 AMC at 2613–14.

143. *Id.* at 2624.

jurisprudence”<sup>144</sup> and that *Stewart* made Section 3 of the Rules of Construction Act “merely the *starting point* for a determination whether an unconventional watercraft is a vessel for Jones Act . . . purposes.”<sup>145</sup>

When the *Holmes* plaintiff moved for a rehearing, the application was supported by an *amicus* brief of two admiralty law professors, who summarized the holding of *Stewart* as follows:

1 U.S.C. § 3—which states in its entirety that “[t]he word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water”—supplies the definition of the LHWCA term *vessel* and thus defines the term for purposes of determining Jones Act seaman status. This is true, the *Stewart* Court plainly says, *because Congress has said so*. There is no suggestion in the Court’s treatment that § 3 is a mere starting point; on the contrary, it is Congress’s controlling definition of the term.<sup>146</sup>

The Fifth Circuit then granted a panel rehearing, withdrew its earlier opinion, and issued a new opinion stating: “Consistent with *Stewart*’s expanded definition of [the] term [‘vessel’], we *have no trouble* concluding that the [quarterbarge] is a vessel.”<sup>147</sup>

Counsel for the *Holmes* plaintiff and for the plaintiff’s professorial *amici* might enjoy attributing the distance traveled by the *Holmes* Court in its characterizations of the quarterbarge—all the way from “inescapable” non-vessel status to “no trouble” vessel status—to counsel’s remarkable eloquence. But there is little doubt that the shift resulted almost entirely from the potency of the statutory argument. The Fifth Circuit might at times be a bit hostile to the Supreme Court’s sporadic incursions into the Circuit’s own familiar jurisprudential territory; but it is far less likely to resist a congressional command.

#### B. Other Practical Tips

*Miles* has opened up a potential panoply of arguments about “the penumbras of legislation that might apply to some related area.”<sup>148</sup> Obviously counsel should be alert for opportunities to exploit such arguments.

I am more comfortable thinking about ways of resisting them. One mode of resistance might entail attacks (subtle ones, of course) on *Miles* itself. In the

144. *Id.* at 2620.

145. *Id.* at 2622 (emphasis in original).

146. Brief of Admiralty Professors David W. Robertson & Michael F. Sturley as Amicus Curiae Supporting Plaintiff-Appellant’s Petitions for Panel or En Banc Rehearing at 6, *Holmes v. Atl. Sounding Co. (Holmes II)*, 437 F.3d 441 (5th Cir. 2006) (Nos. 04-30732, 05-30750) (emphasis in original).

147. *Holmes II*, 437 F.3d at 448 (emphasis added).

148. Brown, *supra* note 2, at 284.

foregoing sections, this Article provides citations to criticisms of *Miles*,<sup>149</sup> demonstrates that *Miles* is flatly contrary to *The Arizona v. Anelich*,<sup>150</sup> and offers references to post-*Miles* Supreme Court decisions that might be used to work some kind of shrinkage on the *Miles* approach.<sup>151</sup>

This Article also shows that Justice O'Connor—the author of *Miles*—has at least once (and maybe twice) shown that she is capable of running roughshod over congressional language.<sup>152</sup> This Article's suggestion that *Miles* constitutes a form of disguised disrespect for Congress<sup>153</sup> seems to me to generate a respectable argument that might be useful in litigation if carefully and respectfully advanced.

Finally, as a way of resisting statutory (and especially statutory-penumbra) arguments, I recommend close study of the techniques used by Justice Story to avoid the unwanted statutory implication in *Harden v. Gordon*.<sup>154</sup> This study could well be augmented by research into the state law jurisprudence centering on “statutes in derogation of the common law.”<sup>155</sup> The message that might be gleaned from such study: A common law judge must do what the legislature *says*, but the judge is not always required to do what the legislature implies, at least not unless it is entirely clear that the legislature meant to require it.

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149. See *supra* Part VC (discussing the *Miles* decision and its subsequent effects on statutory interpretation).

150. See *supra* Part VC (discussing and contrasting the Court's decision in *Miles* with that of *The Arizona v. Anelich*).

151. See *supra* part VD2. (discussing the treatment of *Miles* in two subsequent Court decisions).

152. See *supra* notes 83–88 and accompanying text.

153. See *supra* Part VC (suggesting that *Miles* overstepped Congress's boundaries regarding statutory interpretation).

154. *Harden v. Gordon*, 11 F. Cas. 480, 483–84 (C.C.D. Me. 1823) (No. 6047). See *supra* notes 28–34 and accompanying text.

155. See *supra* text accompanying note 6.