THE ADMIRALTY JURISDICTION OF TORTS AND CRIMES AND THE FAILED SEARCH FOR ITS PURPOSES

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INTRODUCTION

As the admiralty bar well knows, after two centuries, the Constitutional boundaries of our admiralty jurisdiction, are not yet uniformly recognized, either in contract or in tort. The criteria for the two, being very different, do not lend themselves to treatment together and this article is restricted to those of torts, crimes and civil offences, acts of maritime misconduct, the control of which cannot reasonably be wholly separated. Attempts to describe their limits have been numerous in the U.S. Reports and they are still being explored in recent cases, but neither in the courts nor in academic writings is there agreement about them. Because the proper law of the admiralty jurisdiction is also the proper law of maritime cases and issues heard in other courts, the uncertainties of the jurisdictional boundaries are uncertainties also about the applicable law, regardless of the court where the issue arises.

In looking for its boundaries, the Supreme Court refers to the original purposes, real or supposed, of the admiralty judicial jurisdiction, with a view to understanding its Constitutional assertion. References to its origins have frequently been erroneous or incomplete as they have receded in time, and the conclusions drawn accordingly questionable. With the courts’ attention focused on the judicial jurisdiction, that magnified part blocks out the whole, and the broader setting of admiralty jurisdiction is generally not mentioned. Its fundamental historical basis has therefore been ignored.

Two questions are to be distinguished here. The first is what was the power available to assert in the United States Constitution. The second is what was the extent of the assertion. Both questions are involved in debates by those for and against a contraction of the admiralty to exclude portions

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2 See Grubart, supra, 513 U.S. at 549, 1995 AMC at 930 (Thomas, J. concurring in judgment); Sisson, supra, 497 U.S. at 368, 1990 AMC at 1809 (Scalia, J. concurring in judgment).


of its civil jurisdiction in favor of leaving them to the State courts. Various constructions are offered to qualify the Constitutional words, “all Cases of admiralty and maritime jurisdiction,”\(^6\) and the similar words of the Congressional grant to the district courts in civil causes.\(^7\)

Some of admiralty’s historic terms and concerns have not exactly the significance they once had, particularly when used only in the context of judicial jurisdiction. For a start, consider admiralty apparently without an admiral. Then also there is something of a storybook color to the institution, suggesting pirates, smuggling and sea battles. Some have questioned whether it is a rational part of the modern state, preserved because it is a tested product of experience, or instead just a charming antique.\(^8\) No one now assails the admiralty directly on that ground, I believe, but its curious antiquity probably heightens the temptation to tinker with the system, which should be judged rather on the practical ground of whether and how well it works. While the flux in meanings and political conditions is not proposed as an explicit reason for editing the Constitutional admiralty powers, it is probably an intuitive undercurrent in the arguments.

In its broad sense, admiralty has always been an institution of sovereign government by maritime states over their territorial waters, with claims to certain police powers beyond those waters. Just as England asserted it, so did others. Our admiralty powers therefore represent a custom established by ancient practice and general acquiescence, with inevitable differences about its offshore extent.\(^9\) Whether we thought about it or not, we acquired the customary powers when we became a sovereign nation. We did not receive it from our former sovereign, with any self-restrictions that sovereign had adopted. What we received from that source were familiar formulations, or descriptions, of it by that sovereign in ages past.

In framing our Constitution, which is a domestic compact only, it remained to decide which of our entities should exercise the various powers of admiralty. The special concern of this article is the judicial jurisdiction. But the understanding of its history in this country has become unfortunately detached from that of the admiralty jurisdiction generally and the result is confusion about its purpose and scope. The grant of jurisdiction to the federal courts may be taken on its face to refer to disputes arising in the nation’s customary admiralty jurisdiction generally, whatever its particulars may be, rather than to a somewhat enlarged roster of disputes formerly decided in an English court. Consideration of what that customary admiralty jurisdiction

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\(^6\)U.S. Const. art. III, § 2.
\(^7\)Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9.
\(^8\)See, e.g., Justice Daniel in text at note 183 infra.
\(^9\)See text at note 38–42.
is and where it is found should help illuminate persistent questions about the
borders of its judicial power.

I am not concerned here with any question of legislative limits on the
jurisdiction of the courts, but only with the constitutional power. I take as
premises the doctrine stated and implied in numerous cases cited below that
our 18th Century lawyers were familiar with all the English judicial jurisdic-
tion and expected the constitutional power to comprise that and more. 10
And also the long-established view that the Saving to Suitors Clause does
not subtract anything from it. 11 My purpose is to explore what is less well-
nknown about the foundation and scope of the jurisdiction acknowledged to
have been claimed, to view its breadth in its historical footing, expose some
fallacies, and simplify the recognition of its borders.

II
THE HISTORICAL PRECEDENTS

A. In England

1. Historical Records and Terms

At the outset, a few lines about the historiography of this subject are in
order. Some of what was known in the 14th century is no doubt lost beyond
recovery. Some documents remain. The well-known contest between the
High Court of Admiralty and the King’s Bench appears to have stimulated
the excavation and recordation of most of such history as could be found,
and the writings that resulted in the 17th century have dominated the record
since. In addition to the Black Book of the Admiralty, an early compilation
of documents considered of great authority 12 and published in 1871, 13 shortly
after its rediscovery, there were the works in the 17th century by the

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10 E.g. Atkins v. Fiber Disintegrating Co., 85 U.S. (18 Wall.) 272, 304 (1874); Insurance Co. v.
Dunham, 78 U.S. (11 Wall.) 1, 24, 1997 AMC 2394, 2399 (1871); Propeller Genesee Chief v. Fitzhugh,
53 U.S. (12 How.) 443, 455, 1999 AMC 2092, 2098 (1851); New Jersey Steam Navigation Co. v.
Merchants’ Bank, 47 U.S. (6 How.) 344, 390-91 (1848); Waring v. Clarke, 46 U.S. (5 How.) 441, 454-
56, 2006 AMC 2646, 2650-53 (1847).

11 See Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 444-45, 2001 AMC 913, 917 (2001) and
cases cited; New Jersey Steam Navigation Co. v. Merchants’ Bank, supra, at 390; Waring v. Clarke, supra.

(Story, J., “The most venerable monument is the Black Book of the admiralty itself, which . . . is gener-
ally agreed to have been originally compiled in this reign [of Edw. III] . . . This book has always been
deemed of the highest authority on matters concerning the admiralty.” citing JOHN EXTON, SEA
JURISDICTION OF ENGLAND (1664) and others); 2 ARTHUR BROUN, CIVIL AND ADMIRALTY LAW 42 (2d ed.
1802) (“a book of great authority, and so acknowledged to be by Selden, Pryme, Exton . . .”).

13 1 MONUMENTA JURISDICA, THE BLACK BOOK OF THE ADMIRALTY (SIR TRAVERS TWISS, ED.) (1871)
(herinafter 1 BLACK BOOK).
learned doctors Zouch, Exton, Godolphin and Jenkins, all in turn judges of the High Court of Admiralty. They were combed by later eminent scholars, Twiss, editor of the Black Book, and Marsden and, in America, Story, Benedict and, more recently, Professor Laing. These and authors cited by them appear to have mined the subject thoroughly and there do not appear to be more recent discoveries. Theirs were not the recollections of men in the 14th century and, if they did not therefore accurately reflect the understandings of that time, they are nevertheless valid for us, and we are entitled to rely on them, because they represent the understandings current in England and America in the years before 1787.

Some principal terms in general use today, “navy,” “admiral” and “admiralty” were also used in recording or writing history about events as long as six or seven centuries ago. They have acquired different meanings since and we need to have the differences in mind in considering the history.

Navies. Before 1340 English ships were used only to carry soldiers to battles on land; evidently first in the Battle of Sluis in that year “the English naval force engaged in at-sea fighting.” Before Henry VIII, the kings’ own fleets were small; in 1322, e.g., 10 ships and one cog, and were commonly laid up or lent to merchants. The Cinque Ports maintained merchant ships that were available when called for, and the king requisitioned other private ships by the right of angaria to make up his fleet when a threat (or opportunity) arose. An ordinance in or about 1337 required the Admiral to make a roster of all the “vessels of war the king may have in his realm,

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17 Sir Leoline Jenkins, statesman and admiralty judge in the reign of Chas. II and author of numerous letters and other papers cited; see William Wynne, The Life of Sir Leoline Jenkins (London 1724) (quoting numerous papers).
18 Reginald G. Marsden, Select Pleas in the Court of Admiralty (1390-1602) (London 1894 and 1897).
19 De Lovio, supra note 12.
24 1 Id. 221.
25 1 Id. 231; Michael Oppenheim, A History of the Administration of the Royal Navy and of Merchant Shipping in Relation to the Navy from MDIX to MDCLX 2 (1896).
when he pleaseth, or need shall require and of what burthen they are, and also the names of the owners and possessors thereof.”

The Royal Navy is considered to date from the early 16th Century, when Henry VIII inherited six or seven ships from his father, added many more over the years, and created a naval administration.

Admirals. There were no doubt admirals under that name or another, to exercise power at sea when needed, long before the 14th century, when we begin to trace a continuing governmental jurisdiction beyond sporadic campaigns. They were not, however, the admirals we are now acquainted with, professional career officers trained up in active institutional navies. There was not such a navy. The early admirals, such as the Duke of Lancaster, under Edward III, were nobles with military experience, sometimes at sea, courtiers who served the kings in various state offices. Appointments were highly various. “As the Admiral of England was often employed on other duties, it was necessary to appoint Admirals or Commanders of squadrons or fleets for particular services...”

Admiralty. When we refer to admiralty here today, we ordinarily mean the maritime jurisdiction of the federal courts. In the Late Middle English of early historical references, however, it referred to the exercise of dominion at sea, represented by the jurisdiction of the admirals, defined in their commissions and ordinances from the king, which are discussed below. Of these, the judicial powers were only a part, and probably not the greatest. The word “jurisdiction” itself tends to mislead us when we are preoccupied with the powers of a court. Its much broader meaning comprising the entire powers of the state is recognized, however, in the

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26 1 BLACK BOOK, at 3, 5 (footnote omitted).
27 J. SCARISBRICK, HENRY VIII 441-42 (Folio ed. 2004) (“Henry inherited seven ships from his father, had added twenty-four more by 1514 and, by the early forties... had built up a nucleus of a powerful naval force”); OPPENHEIM, supra note 25 at 48-51.
28 10 ENCYCLOPEDIA BRITANNICA 219 (15th ed. 1990) (“Henry VIII built a fleet of fighting ships with large guns and created a naval administration”).
29 See 2 BROWNE, supra note 12, at 21-25.
30 See 1 BLACK BOOK, at 7 n. 2.
31 See, e.g., 1 NICOLAS, supra note 23 at 392-99.
32 2 id. 449.
33 See SHORTER OXFORD ENGLISH DICTIONARY, Admiralty (5th ed. 2002) (“1 The jurisdiction or office of an admiral. LME.”).
34 MERRIAM–WEBSTER’S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (1993) (“2: authority of a sovereign power to govern or legislate; power or right to exercise authority: CONTROL 3: the limits or territory within which authority may be exercised: sphere of authority”); SHORTER OXFORD ENGLISH DICTIONARY (5th ed. 2002) (“2 The extent or range of judicial or administrative power; the territory over which such power extends.”); BLACK’S LAW DICTIONARY (8th ed. 2004) (“1. A government’s general power to exercise authority over all persons and things within its territory... 3. A geographic area within which political or judicial authority may be exercised.”).
Constitution. It would be truer to say that the navy grew as an instrument of admiralty than to think of admiralty as a spin-off or adjunct of the navy.

Some other terms. Professor Sharpe has pointed out the advantage of clarity in treating the authority of admiralty generally as powers, distinguished from its judicial jurisdiction, and also of viewing our constitutional provisions as an allocation to the federal government, rather than an adoption of what somewhere we must already have had, and I use these terms. He also points out that “jurisdiction” is used in the Constitution to describe governmental authority over a territory as well the power of a court.

I do not discuss particular subjects of the jurisdiction with any view to completeness, but only to illustrate its breadth. I discuss statutory and other restrictions of it, not because they have permanently narrowed it, but because they indicate the reservations with which opinions of their eras must be considered.

2. The Practical and Political Background

From what they did in fact in the 14th Century, it appears that the kings of England, like the kings of France and in part because of them, desired to project some constant authority seaward. They were no doubt concerned with measures to protect against foreign enemies and suppress smuggling and piracy. Professor Bourguignon has written:

For half a century English kings were troubled by claims of various nations of piracy and illegal captures perpetrated by English vessels. Edward III had settled some claims of Genoese and Venetian merchants out of his own pocket. Other attempts by common law courts or by arbitrators had failed to silence the complaints.

Taken by itself this suggests a narrow view of purposes. What the records show, however, is that, for these and probably other purposes, the kings had the broader and bolder aim of extending their sovereignty, and effective government, to the kingdom’s adjacent waters and even farther.

When the kings of both England and France established their admiralties as we know them, before the modern conventions on the subject of national and international waters, there had long been differing views about the

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35 See U.S. Const. art. IV, § 2, cl. 2 (“A Person charged in any State with Treason . . . shall . . . be delivered up . . . to the State having Jurisdiction of the Crime.”); § 3, cl. 1 (“[N]o new State shall be formed or erected within the Jurisdiction of any other State.”).
37 Id. at 1152.
38 HENRY J. BOURGUIGNON, THE FIRST FEDERAL COURT 4 (1977) (citing 1 MARSDEN, supra note 18, xxxv-xxxvi (London 1897)).
imperium of the seas and broad historical assertions of it, e.g., Rome’s *mare nostrum* in the Mediterranean. The sovereignty of territorial waters has been recognized for centuries, the only uncertainty about it being its extent, and certain jurisdictions on the high seas are also customary.\(^{39}\) It appears that English kings even before the Norman Conquest had immodest and imaginative claims to the seas,\(^{40}\) and later kings were often in strife over dominance of waters not only adjacent but far offshore.\(^{41}\) Azuni, a polemical scholar who missed few opportunities to disparage the English, took satisfaction in reporting and refuting a claim of Edward I to the entire English channel as far as the coasts of France, and to have won an arbitration of the point against Philip the Fair, the award of which had, it seems, been carelessly lost.\(^{42}\) This interesting document is called by Molloy a “famous Accord between [the kings] calling [Philip] to an account for Piracies committed within the British Seas.”\(^ {43}\)

The king could not project the power of the kingdom beyond the borders of his land, and into adjacent waters, as he evidently wished, through his existing officers. In the counties, the law was enforced by the sheriffs, high officers of the king, who were both executives and presiding judges on the county courts.\(^ {44}\) The horses their deputies rode were no vehicles for enforcing the law in coastal waters, to say nothing of those beyond. For this obvious reason the admiralty jurisdiction began at the edge of the county and not within it. The vast new maritime province required a governor and the machinery of government.

In the absence of direct evidence of the purpose of the King in establishing the admiralty as an institution of government, we may reasonably rely on inference, drawn from the circumstances of the time and the authority known to have been granted to the Lord High Admirals, in preference to any assumption not supported by such inference.


\(^{42}\)Id. at 127-28.

\(^{43}\)Molloy, supra note 40, at 8-9.

\(^{44}\)See 1 Sir Frederick Pollack & Frederic William Maitland, *The History of English Law* 532-34 (2d ed. 1899); 1 William Blackstone, *Commentaries on the Laws of England* 328 (1765) (“the sheriff does all the king’s business in the county . . . the king by his letters patent committing *custodiam comitatus* to the sheriff, and him alone”).
3. Establishment and Jurisdiction of the Admiral’s Court

The Admiral was to be the governor, and the machinery would be his navy, his bureaucracy and his court. The king thus asserted control by means of a complete territorial government, as shown by the powers granted the admirals and their high political and social station. The Black Book preserves documentary evidence of the admiral’s governmental and judicial jurisdiction from the 14th century. There is no statute granting jurisdiction to the admiral and his courts in early times. The jurisdiction from the outset through the American Revolution therefore was a branch of the royal prerogative, defined by the admirals’ commissions and regulated to some degree by ordinances issued by the King in Council, and later restrained in its geographical limits by two statutes of Richard II.

The earliest assertions of the admiral’s jurisdiction were distinctly territorial. It appears that before a court of admiralty as such was established, but not before the broad powers of admiralty were recognized, Edward III set up a commission to assert the admiralty jurisdiction over all people of whatever nation passing through the (broad) English sea and to punish all crimes there and redress injuries there according to the Laws of Oleron. Lord Coke, who was no great friend of admiralty but an undoubted scholar, evidently saw its jurisdiction as one of territory, rather than discrete subjects; he wrote:

And yet altum mare is out of the jurisdiction of the common law, and within the jurisdiction of the lord admiral, whose jurisdiction is verie antient...

This great officer in the Saxon language is called Aen mere al, (i.e.) over all the sea, prefectus maris, sive classis, archithalassus: and in antient time the office of the admiraltie was called custodia marinar Angliæ.

He apparently observed a distinction between the government of the sea (prefectus maris) and command of the fleet (classis archithalassus). And “custodia marina” appears to stress the sea more than the vessels upon it.

According to Zouch, after the Ricardian statutes, the admiral’s commissions continuously commenced their grant of authority as follows (in translation):

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44 See text infra at note 56.
45 See text infra at note 56.
46 Laing, supra note 21, at 167.
47 13 Rich. II, ch. 5 (restraining the admiral from meddling with anything done on land) and 15 Rich. II, ch. 3 (defining the landward boundaries to exclude inland waters).
48 4 COKE, INSTITUTES, c. 22, p. 142 (1644); see Laing, supra note 21, at 165-66 and n. 12 (Latin text).
We give and grant to N., the office of our great Admiral of England, Ireland, and Wales, and the dominions and islands belonging to the same, also of our town of Calais and our marches thereof, Normandie, Gascoigne, and Aquitaine; and we make, appoint and ordain him our Admiral, etc., with all privileges, jurisdictions, etc., and power in civil causes.  

The reference to the marches of Calais suggests some jurisdiction ashore overseas; with or without that, this is territorial and widely so.  

These are descriptions of the office of Lord High Admiral by judges Zouch and Godolphin:

The Admiral of England (as Mr. [John] Selden observes) hath another manner of Right, and Jurisdiction, than the Admiral of France, or other ordinary Admirals; for that the Jurisdiction over the Seas of England and Ireland, and the Dominions and Isles of the same, as a Province, are committed to his Custody and Tuition, as to a President, to defend the same, as in the Dominion of the King, by whom he is authorized; the Bounds of which Jurisdiction are limited and determined in those Seas.

The Lord High Admiral is by the Prince con credited with the management of all Marine Affairs, as well in respect of Jurisdiction as Protection. He is that high Officer or Magistrate to whom is committed the Government of the Kings Navy, with power of Decision in all Causes Maritime as well Civil as Criminal.

These views of the office are supported by the specifications of its functions and powers in the terms of the commissions and then more particularly in the details of its actual administration.

The grant of judicial jurisdiction to the admirals in civil matters was (in translation):

to hold conusance of pleas, debts, bills of exchange, policies of insurance, accounts, charter parties, contractions, bills of lading, and all other contracts which any ways concern moneys due for freight of ships hired and let to hire, moneys lent to be paid beyond the seas at the hazard of the lender, and also of any cause, business, or injury whatsoever, had or done in, or upon, or through the seas, or public rivers, or fresh waters, streams, and havens and places subject to overflowing, whatsoever, within the flowing and ebbing of the sea, upon the shores or banks whatsoever adjoining to them or either of them, from any the said first bridges whatsoever, towards the sea, throughout our kingdom of England and Ireland, or our dominions aforesaid, or elsewhere beyond the seas, or in any parts beyond the seas whatsoever.

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51 Zouch, at 91-92, Ass. II.
52 Godolphin, at 26.
53 Benedict, ch. II § 23. The Admiral’s Commission; De Lovio, supra note 12, 7 F. Cas. at 436, 1997 AMC at 588 and n. 38 (original Latin quoted in footnote).
The separate commissions of the admirals’ judges’ were in Latin and lengthy. Story reviewed several, including that of Robert de Herle, appointed in 1360, and condensed their grants of jurisdiction to this:

1. Over matter of prize and its incidents. 2. Over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas. 3. Over contracts and other matters regulated and provided for by the Laws of Oleron and other special ordinances, and 4. (as the commission of Robert de Herle shows) Over maritime causes in general. 54

One of the earliest documents in the Black Book is an Ordinance issued by the King in Council in or about 1337, dealing mostly with the government of the navy. As of that time rear admirals of the north and west had been appointed and the Ordinance separated their jurisdictions at the mouth of the Thames. 55 The first and fifth items of the Ordinance address the machinery of legal enforcement and read (as translated from the French):

When one is made admiral, hee must first ordaine and substitute for his lieutenant, deputys, and other officers under him, some of the most loyall, wise, and discrete persons in the maritime law and auncient customes of the seas which hee can any where find, to the end that by the helpe of God and their good and just government the office may be executed to the honour and good of the realme. 56

Item, tis a thing necessary and needful for the admiral that hee causes, procures, and orders his whole office to be well, justly, and so discreetly execut ed and managed upon divers difficult causes and casual matters, which doo often happen and arise in the said office, to the end that every plaintiffe and every defendant may have each in his degree and particular what of right and justice belongs to him according to the law and auncient custome of the sea. 57

Admiralty’s criminal and enforcement jurisdiction speaks most forcefully to the purposes of its power. In 1376 there was held an Inquisition at Quinborough, at which a jury (a grand jury, we might say) of 18 seamen, was convened before the Admiral of the North, the Admiral of the West 58 and the Lord Warden of the Cinque Ports, to inquire into a list of 27 kinds of offences, in three categories, “Offences against the King and Kingdom,” “Offences against the Public Good of the Kingdom” and “Offences against the Admiral, the Navy, and Discipline of the Sea.” With due allowance for time and technology, they display a role analogous to that of the Coast Guard today in enforcement of the customs, criminal, fishing, obstruction

54 De Lovio, supra note 12, 7 F. Cas. at 421, 1997 AMC at 556-57.
55 1 BLACK BOOK, at 19.
56 1 BLACK BOOK, at 2 (editor’s footnotes omitted).
57 Id. at 7 (editor’s footnote omitted).
and seamen’s laws. The first category is familiarly felonious. The third comprises offenses against the navy, whether by its persons or others, and the second deals with some private grievances or grievances of the public against private persons, such as obstruction to navigation, taking fish illegally, despoiling wrecks, cheating with false weights or measures, or interfering with wholesome commerce.59

More informative still is the long charge later given by Sir Leoline Jenkins to a jury convened in London soon after the Restoration. The inquest takes its start from a commission issued by the king (with a territorial approach to authority):

to inquire of, hear, determine, and punish all crimes, offences, misdemeanors, and abuses, either against the dignity of the king, against the peace and good government of the kingdom, or against the rights and security of the subject. . . committed upon the sea or in some haven, river, creek, or place, where the admiral hath power and jurisdiction.60

Sir Leoline describes the commission as a counterpart of those issued by the king to the counties when his justices went on circuit. This judicial tour de force, of 17 pages octavo in small print, reportedly “[t]aken by a good hand,” appears to exhaust the subject, possibly also Sir Leoline, and probably at least a few of his jurors. It runs the gamut of anti-social behavior, from treason, murder and piracy through all the major crimes against the king, persons and property still known to us now (and some that aren’t) and all “the offenses and misdemeanors at common law . . . when they are committed upon the sea,” with many of their fine points. The range of subjects beyond the most familiar common offenses may be suggested by these: conventional courtesies of salute between vessels; violations of neutrality in English waters; security of strangers and their vessels in ports; humane treatment of seamen; payment of their wages; enslavement or abuse of workers generally; illegal confederation of workers on terms of work; ballast, rubbish or filth cast into navigable rivers; structures that impair navigation or destroy the “young fry of fish;” violations of fishing seasons and catches established by the admiralty; false weights and measures; export controls; and cursing and blasphemy. The views of Dr. Godolphin, concisely stated, agree on this broad scope.61 One wonders how long the admiral and his learned doctors

58“Under-admirals” assigned their territories as early as 1338. 1 BLACK BOOK 19 n. 1.
59Zouch, at 90, 96, Ass. 1 & 3, quoted in 1 BENEDICT ch. II § 31. The Inquisition at Quinborough.
60Sir Leoline Jenkins, A Charge Given at an Admiralty Sessions held at the Old-Bailey, in 1 WILLIAM WYNN, supra note 17, reprinted in GEORGE TICKNOR CURTIS, DIGEST OF CASES ADJUDGED IN THE COURTS OF ADMIRALTY OF THE UNITED STATES AND IN THE HIGH COURT OF ADMIRALTY IN ENGLAND, App. 529, 530 (Boston 1839).
61See GODOLPHIN, at 43-48, quoted in 1 BENEDICT ch. II § 47. Godolphin on the Jurisdiction.
pondered over the borderline cases. Did they slice the jurisdiction as thinly as their modern successors?

My purpose in discussing the scope of the jurisdiction at length here is not to identify particular subjects but rather to show its comprehensiveness. Rather than jurisdictions of discrete subjects or issues, it displays the territorial jurisdiction of a sovereign, a princely governor of his maritime province.

B. The Colonial Vice Admirals and their Courts

It is generally recognized that the vice admiralty judicial jurisdictions in the colonies were broader than that of the High Court of Admiralty in London. This perception has no doubt been based mainly on the observation that the Ricardian statutes did not apply in the colonies, where the jurisdictions were therefore free of some of the geographical restraints imposed by those statutes, notably the requirement that transactions be made and completed at sea, which struck out most contracts,62 and the exclusion of ports as *infra corpus comitatus*.63 Commenting on Story’s categorical opinion to that effect, Professor Lucas points out that the practice was not uniform, referring to two instances of the Ricardian statutes being applied in New York and a history of prohibitions in several colonies, but does not suggest rejection of this “part of the general lore of admiralty jurisdiction.”64 Story, J. and Marshall, C.J., had pored over the commissions, and their view, which is not seriously contested, was that they were fully as broad as the original grant to the Lord High Admirals, before it was narrowed by statute and cramped by common law prohibitions.65

This statement alone is not adequate to understand the scope of the vice admiralties. A more detailed look at the powers granted and in particular a comparison of the judicial jurisdiction to the governmental powers is needed. Among the commissions of colonial vice admirals granting broad powers, available examples issued to governors are those of Lionel Copley, Governor of Maryland,66 and Lord Cornbury, Governor and Vice Admiral of New York, Connecticut and New Jersey.67 They were similar and one may fairly assume that, if the jurisdictions in the colonies were not absolutely

62 See De Lovio, supra note 12, 7 F. Cas. at 441-42, 1997 AMC at 598-602.
63 Id., 7 F. Cas. at 426, 1997 AMC at 566-67.
67 See 1 BENEDICT, ch. V § 65. COMMISSION OF VICE ADMIRAL.
equal, these would have been well known, and that of New York will serve as a fair example here. The commissions are too long and redundant to be usefully reprinted here and excerpts will fairly serve.

In Lord Cornbury’s commission from William III in 1701, the general grant of governmental power, preceding many illustrative particulars, appears to cede him the king’s maritime powers, holding nothing back:

And we do hereby remit and grant unto you, the aforesaid Edward, Lord Cornbury, our power and authority in and throughout our provinces and colonies, aforesaid, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, and also through all and every the sea shore, public streams, ports, fresh water rivers, creeks, and arms, as well of the sea, as of the rivers and coasts whatsoever of our said provinces and colonies, and the territories depending thereon, and maritime parts whatsoever of the same and thereto adjacent, as well within liberties and franchises, as without.

The particulars of authority that follow describe all manner of maritime contracts, torts and property as well as crimes, and

all other casualties, as well in, upon, or by the sea and shores, creeks or coasts of the sea, or maritime parts, as in upon, or by all fresh waters, ports, public streams, rivers, or creeks, or places overflowed whatsoever, within the ebbing and flowing of the sea or high water, or upon the shores and banks of any of the same within our maritime jurisdiction . . .

They extend to the conduct of “masters of ships, mariners, rowers, fishermen, shipwrights, and other workmen and artificers whatsoever exercising any kind of maritime affairs.” Going well beyond vessels and cargos and transactions concerning them, the vice admiral is charged to preserve “public streams, ports, rivers, fresh waters and creeks” and “fishes increasing in the rivers and places aforesaid,” and “to reform nets too close, and other unlawful engines or instruments wheresoever, for the catching of fishes.” What is in a way most telling about the character of his power, although probably not a major function of it, was “cognizance and decision . . . of the death, drowning, and view of dead bodies of all persons . . . which shall happen to be killed, drowned, or murdered, or by any other means come to their death, in the sea, or public streams, ports, fresh waters, or creeks whatsoever,” and “the cognizance of mayhem in the aforesaid places” (emphasis supplied), without regard to any vessel or activity.

To see what is the relation of the judge’s jurisdiction to all this, we must turn to the commissions of Lewis Morris, from George II in 1738, and his son Richard, from George III, in 1762, as judges in New York.68 They begin with the king’s grant of:

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full power to take cognizance of, and proceed in all causes civil and maritime, and in complaints, contracts, offences, or suspected offences, crimes, pleas, debts, exchanges, policies of assurance, accounts, charter parties, agreements, bills of loading of ships, and all matters and contracts which in any manner whatsoever, relate to freight due for ships, hired or let out; transport money or maritime usury (otherwise bottomry), or which do any ways concern suits, trespasses, injuries, extortions, demands, and affairs civil and maritime whatsoever, between merchants or between owners and proprietors of ships, or other vessels, and merchants, or other persons whomsoever, with such owners and proprietors of ships or other vessels whatsoever, employed or used, or between any other persons howsoever had, made, began, or contracted for any matter, cause or thing, business, or injury whatsoever, done or to be done as well in, upon, or by the sea, or public streams, or fresh waters, ports, rivers, creeks, and places overflowed whatsoever, within the ebbing and flowing of the sea, or high water mark, as upon any of the shores, or banks adjoining to them or either of them, together with all and singular their incidents, emergencies, dependencies annexed and connexed causes whatsoever . . .

The directions continue “to search and enquire of and concerning . . . the bodies of persons drowned, killed, or by any other means coming to their death in the sea, or in any ports, rivers, public streams, or creeks, and places overflowed; and also concerning mayhem happening in the aforesaid places,” again without regard to vessels or activities, “and engines, toils and nets prohibited and unlawful” and “also of and concerning all casualties at sea” and all “trespasses, misdemeanors, offences, enormities and maritime crimes.” And if that were not enough, “also to proceed in all and every the causes and business above recited and in all other contracts, causes, contempts and offences whatsoever.”

The familiar restrictions to tidal waters are found in the commissions, with varying degrees of emphasis, and are somewhat difficult to reconcile with other words with which they are associated. When the time came to breach that barrier, the Supreme Court did not treat them as significant. Upholding jurisdiction of a collision 95 miles upriver from New Orleans, it referred to the commissions of the vice admirals as giving them power “throughout all and every of the sea-shores, public streams, ports, fresh-water rivers, creeks and arms, as well of the seas as of the rivers and coasts whatsoever.” The Court concluded that the “locality of jurisdiction, then, having been ascertained, it must comprehend cases of collision happening in it.” The jurisdiction was thus, at least for the moment, recognized to be territorial. The import was that, although, as in England, there may have been

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70 Id. at 464, 2006 AMC at 2661.
disputes over what were admiralty waters, the admiral’s jurisdiction was supreme in those waters. The motives might have been various but in sum they were territorial.

Comparisons of the commissions of the governors as vice admirals and those of their admiralty judges show that they were substantially congruent, which is to say that the judicial jurisdiction comprised the disputes that arose in the regulatory jurisdiction. This was the system in the colonies as they became independent States, and would be remembered as that of the vice admiralties. The lesson to be drawn from the vice admiralties is not a list of topics entertained by the courts, but the congruency of their jurisdiction with the national admiralty power.

C. French Influence?

Some of our opinions refer to the French or “continental” admiralty in connection with our own, usually contrasting it as broader. It commenced in the same era, with a grant of powers to the admiral in the broadest terms, similar to that originally in England,71 and continued, of course, without common law interference. Chief Justice Marshall wrote:

This remarkable conformity between the origin, history, and nature of the Courts of Admiralty in France and Great Britain, renders it highly probable that their jurisdiction, both civil and criminal, however it may have been shifted from its ancient foundations, was originally the same; and this supposition derives additional strength from the manner in which the history of the two countries is blended together during the middle ages, and from the circumstance of both having derived their maritime institutions from the shores of the Mediterranean.72

The French jurisdiction is a contemporaneous example of a royal grant of power to govern the nation’s province of the sea. For us, however, it is probably not of direct lineage but only of suggestive significance, although it has been consulted within the memory of man,73 and may be viewed as some of the evidence of international custom.

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71 See René-Josué Valin, Nouveau Commentaire sur l’Ordonnance de la Marine 32, Tit. 2, art. 1, commentary, pp. 105-06 (La Rochelle 1760).


73 See United States v. Matson Navigation Co., 201 F.2d 610, 615, 1953 AMC 272, 279 and n. 9 (9th Cir. 1953).
III

CONSTITUTIONAL ALLOCATION AND ADAPTATION

A. What Was Allocated?

The assertion of admiralty jurisdiction in the Constitution could have been plucked from a catalogue of customary government powers if there had been one. It was an attribute of a sovereign maritime state and must have been considered so as early as the 14th Century by England, and at early dates by other maritime states, whose admirals exercised similar jurisdictions. But it may not have been consciously approached in that way. We do not see it so recognized in the words of the framers, who perhaps quite naturally thought of the power in the practical terms in which they had seen it, as formulated in England. But if it did occur to them to think of it simply as a customary feature of sovereignty that they could re-formulate in their new circumstances, as perhaps some did, they surely would not have disposed of it differently. They would have concluded that each State, now sovereign, held customary admiralty powers, only the formulation of which was inherited along with English law, and that the power was, as it turned out in fact to be, plenary and malleable in changed circumstances.

In the event, however, it came to be recognized that the admiralty power was ours to define, within the limits of international custom, in 1845, in Waring v. Clarke, in 1845 was the landmark decision discarding the bar of admiralty jurisdiction infra corpus comitatus. This was the Supreme Court’s most thorough historical review of the knowledge and presumable understandings of the framers. In a coda to it Swayne, J., for the majority, recognized that we were cut loose from earlier formulations and held admiralty simply by right of sovereignty.

But, besides what we have already said, there is, in our opinion, an unanswerable constitutional objection to the limitation of “all cases of admiralty and maritime jurisdiction,” as it is expressed in the constitution, to the cases of admiralty and maritime jurisdiction in England when our constitution was adopted. To do so would make the latter a part and parcel of the constitution,—as much so as if those cases were written on its face. It would take away from the courts of the United States the interpretation of what were cases of admiralty and maritime jurisdiction. It would be a denial to Congress of all legislation upon the subject. It would make, for all time to come, with-

74 See I BLACK BOOK xii; Zouch, 91, Ass. 1.
75 See 1 VALIN, supra note 71, Tit. 2, art. 1, commentary, pp. 105-06 (France: first admiral 1327; courts from same time); Zouch, at 91, Ass. 1 (Spain, Denmark, Scotland: similar to France).
out an amendment of the constitution, that unalterable by any legislation of ours, which can at any time be changed by the Parliament of England,—a limitation which never could have been meant, and cannot be inferred from the words, which extend the jurisdiction of the courts of the United States “to all cases of admiralty and maritime jurisdiction.”

He considered the possibility of interpreting other constitutional powers, including the Bankruptcy Clause in that way, and concluded that none had been so interpreted and “such interpretations of any grant in the constitution, or limitations upon those grants . . . cannot be permitted.” There was a lengthy, learned and thoughtful dissent by Woodbury, J. It springs in part from the faulty premise of inheritance of the power and enlarges the history of the subject and also argues from States’ rights and the practical considerations of jury trials and local courts. With the dissent the opinions represent probably the most thorough reported debate of the subject.

The vice admiralty jurisdiction in the colonies has already been described. It has been said that “[t]he vice-admiralty courts were a minor, but persistent, cause of the American Revolution.” How minor they were is indicated by the little time lost by the maritime colonies in transforming their vice admiralty courts into State courts of admiralty after the Declaration of Independence. Although the circumstances of revolutionary warfare made it appear that they would need those courts to exercise their continuing constitutional jurisdiction in prize, several of them explicitly confirmed the courts in their civil maritime jurisdiction as well. When the Constitution was framed, therefore, the maritime States had admiralty courts, mostly exercising without interruption the jurisdictions of their former vice-admiralty courts, while State governments presumably exercised their other colonial maritime powers. In the Confederation, Congress had the exclusive power to conduct foreign affairs and maintain a navy, but with certain rights reserved to the States to maintain war vessels deemed necessary to protect them or their trades. The judicial jurisdiction was split between the States and the Confederation, the latter having the criminal jurisdiction and the

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77 Waring, 46 (5 How.) at 458-59, 2006 AMC at 2655-56.
78 Waring, 46 (5 How.) at 467-504, 2006 AMC at 2665-2704.
81 Articles of Confederation, art. IX.
82 Id., art. VI.
power to make prize rules, and to decide appeals in prize cases, leaving to
the States the rest of admiralty. 83

When the federal government, by the Constitution, assumed the remain-
ing admiralty powers of the States, nothing was thought to be created, but
only thereafter interpreted as to its content, sometimes by reference to the
colonies, although more often by reference to the mother country. The
framers, then, had no occasion to think of formulating the content of admir-
alty powers but only to take from the States whatever powers they had
except for local police powers.

Here, as in other maritime countries, the admiralty as an institution of
sovereign government has been greatly modified by division and redistribu-
tion to serve a complex modern nation. Its military function remains with the
Navy, of course, shared in part with our Coast Guard. Its police and border
and customs enforcement functions, and regulatory governance of mariners
and their contracts and shipbuilding, and its concerns with pilots, aids and
obstructions, and pollution 84 are shifted to agencies consolidated today in
our Coast Guard (which is still run by admirals). 85 Its power to define and
punish certain offences at sea is explicitly conferred on Congress; 86 further
criminal jurisdiction and other broad legislative powers are drawn by
Congress from the Admiralty Clause, 87 and the judicial powers, criminal and
civil, are shifted to our federal courts, except for the quasi-judicial regulato-
ry powers exercised by the Coast Guard. Its control of fisheries 88 is shared,
both legislatively and administratively, by the federal government and mar-
itime States. But the capacities of all its divided segments in ruling our mar-

83 Id., art. IX Articles of Confederation (“rules for deciding . . . what captures . . . shall be legal . . .
courts for the trial of piracies and felonies . . . on the high seas . . . courts for . . . appeals in all cases of
84 See, e.g., 1 BENEDICT, ch. II, § 25. The Admiral’s Commission (“matters which concern merchants
and proprietors of ships, masters, shipmen, mariners, shipwrights, fishermen, workmen, laborers, sailors,
scavengers, or any others”); § 31. Inquisition at Quinborough II, ¶ 7 (obstructions); III, ¶ 8 (pilots); Sir
Leoline Jenkins, text at note 60 supra (seamen, obstructions and pollution of waters).
85 See 1 Stat. L. 145, 175, Aug. 4, 1790 (authorizing a maritime revenue service later called Revenue
Cutter Service); Maul v. United States, 274 U.S. 501, 512, 1927 AMC 1020, 1028 (1927) (Brandeis, J.
concurring, on the history and breadth of Coast Guard police functions at sea).
86 U.S. Const. art. I, § 8, cl. 10.
87 See, e.g., Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21, 43, 1934 AMC 1417, 1428 (1934)
(Ship Mortgage Act; “The purpose was to place the entire subject, including its substantive as well as its
procedural features, under national control. From the beginning the grant was regarded as implicitly
investing legislative power for that purpose in the United States.”); Panama R.R. v. Johnson, 264 U.S.
375, 386, 1924 AMC 551, 554-55 (1924) (Jones Act; “Although containing no express grant of legisla-
tive power over the substantive law, the provision was regarded from the beginning as implicitly invest-
ing such power in the United States . . . . Practically therefore the situation is as if that view were writ-
ten into the provision.”); see also text at Part IV.F.2 infra.
88 See Sir Leoline Jenkins, text at note 60 supra.
itime province are still bounded by shorelines and limited by the depths and free flows of water, which nature and nations alter from time to time.

What is ordinarily overlooked in the civil cases is that the federal government took not only the civil but the criminal jurisdiction, which is significant in considering the breadth of the power. The Constitution separately provides authority to Congress to punish piracies and other felonies on the high seas, unquestionably a segment of the admiralty power, but limited geographically and to certain classes of offenses. The authority to deal with criminal acts in foreign waters, apart from what arises from nationality alone, has been found in the admiralty clause, which is not limited, as is 28 U.S.C. § 1333, to civil cases. We look therefore to the general admiralty power as a constitutional basis for the punishment of maritime crimes under United States statutes in certain circumstances, notably when they have not occurred on the high seas. In United States v. Rogers, the admiralty jurisdiction was held to extend across the Detroit River into Canadian territory for the purpose of punishing an assault with a dangerous weapon on board a vessel belonging to citizens of the United States. In United States v. Flores, where it was held that we could constitutionally punish murder on an American-flag vessel in the Congo River, the Court referred to the powers exercised by the admirals to punish crimes on British vessels in foreign waters, and to English court decisions, to establish the extension of the admiralty power into foreign waters.

It was not enough in those cases, as one might suppose, to point merely to the United States citizenship of the accused or the flag of the vessel, because the criminal statute expressly required (as it still does) that the crime have been committed within our admiralty and maritime jurisdiction, which in this context is clearly a territorial matter. With the jurisdiction so defined, subject to statutory limits, we can constitutionally punish acts done anywhere on navigable waters, not necessarily by vessels or their crews, as such, but by others such as passengers, visitors or casual thieves. These were not decisions merely about the jurisdiction of a particular court, but about the reach of national authority to arrest and prosecute.

What history shows, and Swayne, J. describes with some eloquence in Waring, is that the framers were well acquainted with the vice admiralty courts and their successors in the States. They must have known that the

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89See JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 331 (1840).
90150 U.S. 249 (1893).
91Supra note 83.
92See 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW, 337-42 (1826) (discussing the concurrent criminal jurisdiction as understood then).
93Waring, 46 (5 How.) at 454-57, 2006 AMC at 2650-54.
judicial jurisdiction embraced all the justiciable disputes arising in the domain of admiralty. There is no warrant for the possible view that, while the admiralty powers and maritime laws are not limited to those formerly known, the judicial power alone should be limited to cases arising within the former limitations. Surely the sensible view is that what were allocated were the jurisdictions of the States, not, however, just as they might have been formulated or limited in their exercise, or as the States might have thought of them, but in their actual capacity to embrace all disputes and offences of a maritime nature.

The greater force of the allocation remained to be discovered. When the Constitution was framed, the lawyers among the framers and early commentators saw the court as the symbol and focus of the admiralty power. This was reflected in their comments and the Constitution’s explicit reference only to the judicial jurisdiction, with no hint that the States could not make maritime law, as indeed they did for some time. The omission of legislative jurisdiction over the subject would have to be supplied by inference, a kind of reverse engineering of the legislative from the judicial. It is still the habit of admiralty lawyers and judges to think of the jurisdiction first and mainly as the powers of the court, their vocational arena. Exegesis in the schools reflects that way of thinking.

Starting from that viewpoint, it is conventional to say that where admiralty jurisdiction exists maritime law follows. “With admiralty jurisdiction comes the application of substantive admiralty law,” as Justice Stewart has written.94 This is a convenient precept, generally true. It is equally true, however, that wherever maritime law governs the case, admiralty has jurisdiction, and this truth is of much greater historical significance because it conforms to actual history, in which the law preceded the court that came into being to enforce it. The same is true of the law and the federal admiralty courts. The jurisprudence of the English and colonial courts continued unbroken except by new legislation, principally criminal.95 Later, attention turned from the court itself to the inherited law that came with it, but was not acknowledged at the time of the allocation. Acts of Congress bind the whole country and the recognition that Congress had broad power to enact maritime law had therefore portentous implications. It was unlikely that the old law would not be as widely in force as the new laws.

95See text supra at notes 89-91.
In 1875, the tension between the general maritime law and State legislative and judicial deviations culminated in *The Lottawanna*\(^96\) where the Supreme Court declared:

The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend “to all cases of admiralty and maritime jurisdiction.”

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One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Later reconfirmed against an unsuccessful challenge by Holmes, J. in *Southern Pacific Co. v. Jensen*,\(^97\) the doctrine of Uniformity was established, as against deviant State law, between private parties.

That had been only indirect conflict with the States; more direct conflict was to come. While States are protected by the Eleventh Amendment from suits in federal courts by private parties, their municipalities and many public agencies ordinarily are not.\(^98\) State laws grant many such entities the sovereign immunity of the State. But this fails them as against suit in admiralty under the general maritime law since the question arose in a case where a private vessel was struck by a city fireboat maneuvering to assist in fighting a fire. A State statute declared the immunity of the City from suit. Because the tort was clearly maritime and the city did not enjoy the protection of the Eleventh Amendment, the issue was not of jurisdiction but of maritime law. The Supreme Court asked itself, “does the local law, if in conflict with the maritime law, control a court of admiralty . . . in the administration of maritime rights and duties.” It canvassed English and American cases on the delicts of public vessels and held that “in the maritime law, the public nature of the service upon which a vessel is engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty.”\(^99\)

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\(^{96}\)88 U.S. (21 Wall.) 558, 574-75, 1996 AMC 2372, 2379-80 (1875).

\(^{97}\)244 U.S. 205, 1996 AMC 2076 (1917).


Thus was the allocation of jurisdiction found to have included the control of the general maritime law, a construct of admiralty courts, with the momentous constitutional qualities of uniformity and supremacy over positive State law.

B. The Reason for the Allocation (Original Intent)

With our characteristic focus on legal proceedings, lawyers have always concentrated narrowly on the jurisdiction and practice of the admiral’s court and largely ignored his jurisdiction of regulation and enforcement, the police power that provided much of the business of the court. The framers were close enough to the vice admiralties and their successors to be aware of the larger picture and what they first embraced was the political substance, the governing and regulating power. The inclusion of the judicial jurisdiction, important as it was, can be fairly viewed as an afterthought, albeit an important one, considering its timing, matter-of-fact acceptance and the reasons given for it.

The framers left only a scanty record of the considerations that moved them, but the most obvious and convincing assumption, if any need be made, is that it would have been impractical, and indeed disorderly, to have left the admiralty in the fragmented control of the several States, with variant jurisdictions, laws and attitudes toward the foreign parties and interests and the policing of the maritime frontiers, with which they had already determined to deal. The history of relations of the States and Congress on the subject before the adoption of the Constitution is of interest. The Continental Congress had in 1775 resolved that States ought to establish admiralty courts and that appeals from them in prize cases should be brought to a congressional Committee on Appeals. This reflected the view that the ultimate control of prize cases should lie with those charged with conducting foreign relations and maintaining a navy. With the ratification of the Articles of Confederation in 1781, the Committee, whose jurisdiction was viewed as precatory, was succeeded by the Court of Appeals, whose jurisdiction was mandatory. Through both periods there is a lively history of disputes about federal jurisdiction where States had statutes apparently forbidding appeal outside the State courts and about whether the federal jurisdiction extended beyond the issue of prize or no prize to reach subsidiary issues of damages. An enlarged snapshot of this tension can be viewed in Penhallow v. Doane, which retails the procedural contests of Congress with New Hampshire over

100 BOURGUIGNON, supra note 38, ch. VIII (1977).
101 3 U.S. (3 Dall.) 54, 1999 AMC 2652 (1795).
the captured brigantine *Susanna* and with Pennsylvania over the sloop *Active*. The framers must have been well-acquainted with this history.

There was, it appears, no detailed deliberation in the Convention. James Madison kept copious notes of the discussions and there are only two references to the admiralty in them. On July 16, 1787, James Wilson of Pennsylvania, opposing a motion on the judiciary, “said the admiralty jurisdiction ought to be given wholly to the national Government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen.”102 This reflected the awareness that the Committee had already assigned to Congress or the President the admiralty’s military and police powers in clauses ultimately adopted.103 The judicial power was an adjunct that logically followed. The drafts of the judiciary clause, up through that submitted to the Committee of Detail July 26, 1778, contained no reference to admiralty jurisdiction of the courts.104 The draft returned from Committee August 6, 1778 contained the Admiralty Clause in its present words.105 The rest is silence. The claims that could be made in admiralty were restricted by common law influence and, in that respect, somewhat analogous to the restricted forms of action in the common law that the common law was about to cast away forever. The implication is clear that the delegates were not interested finally in sifting admiralty’s “forms of action” selectively. They had embraced most of admiralty expressly or by implication in Article I and by international custom, called the “law of nations,” as it was understood in that era.106 When the Admiralty Clause was included in Article III, they had allocated all of a broad field of power without pausing to survey its metes and bounds.

Wilson’s statement explaining the reason is supported by the understandings of others. In 1790, Attorney General Edmond Randolph, who had been a delegate to the Convention, made a report to the House of Representatives on the judicial system, in which he justified a broad federal admiralty jurisdiction on grounds that may be summed up as the federal government’s Constitutional monopoly of foreign relations and the war power and powers

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102 JAMES MADISON, RECORDS OF THE DEBATES IN THE FEDERAL CONVENTION OF 1787, H. DOC. NO. 398, 158 (G.P.O 1927); see also United States v. Flores, supra note 83, 289 U.S. at 147-48, 1933 AMC at 651-52 and nn. 2 and 3 (1933).
103 See U.S. Const. art. I, § 8, cl. 1, 3, 10, 11, 13, 14, 18, and art. II, § 2.
104 MADISON, supra note 102, at 465, 469.
105 Id., at 471, 479.
106 See Const. Art. I, sec. 8, cl. 9 (punish “Offenses against the Law of Nations”); and e.g., Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 83-84, 1999 AMC 2652, 2668, 69 (1795) (“authority to decide on all matters and questions touching the law of nations . . . is vested in the sovereign supreme power of war and peace”); Mason v. Ship Blaireau, 6 U.S. (2 Cranch) 240, 258, 2002 AMC 1190, 1205 (1804) (in salvage case court sits "to decide questions upon the law of nations").
to punish crimes at sea and regulate foreign commerce.\textsuperscript{107} Joseph Story, whose professional career began in 1801,\textsuperscript{108} was not far removed from some of the framers of 1787 and the public spirit that moved them. His views agreed with those of Randolph and he concluded that “the admiralty jurisdiction naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations, and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic.”\textsuperscript{109} What was also obvious was that the United States would have a navy and the States would not. Thus a very practical political purpose was understood and there is no warrant for assumptions about conceptual niceties of the thing. Wayne, J., writing for the Supreme Court in \textit{Waring v. Clarke}, said:

> There was but one opinion concerning the grant, and that was, the necessity to give a power to the United States to relieve them from the difficulties which had arisen from the exercise of admiralty jurisdiction by the States separately. That would not have been accomplished, if it had been intended to limit the power to the few cases of which the English courts took cognizance.\textsuperscript{110}

One looking for “original intent” in the allocation will find no evidence for any intent except to take whatever was there for the taking.

\textit{C. Views of the Scope of the Federal Allocation}

Justices favoring both broad and narrow readings of the jurisdiction sat on the Supreme Court in the early years (and perhaps not long ago as well). Justice Daniel, who sat from 1841 to 1860, and seldom agreed with his colleagues,\textsuperscript{111} was described by his biographer as “one of the most extreme anti-business and pro-state’s rights men ever to sit on that Court.”\textsuperscript{112} He fought a losing campaign of vehement dissents, not always alone, to retain the English restriction to tidewater in both tort and contract cases, even seven years after the issue had been conclusively decided otherwise in \textit{The

\textsuperscript{107}H.R. 1st Cong., 3d Sess. (Dec. 31, 1790), reprinted in 1 \textit{American State Papers}, Class X: Miscellaneous 21, 22 (W. Lowrie & W. Franklin eds. 1834) quoted in relevant part in \textit{Gutoff}, at 369 n. 49.


\textsuperscript{109}Story, supra note 89 \textsection 331.

\textsuperscript{110}Waring, supra note 10, 46 U.S. (5 How.) at 457, 2006 AMC at 2654.


\textsuperscript{112}JOHN P. FRANK, \textit{JUSTICE DANIEL DISSenting}, Preface (1964).
Any supposition that the jurisdiction he objected to had been left with the States was explicitly rejected in the words of Waring quoted above. His view had been shared early on by other justices, even Story, and continued in Waring, where he joined in dissent with Woodbury and Grier, JJ. Probably as a consequence, the Court waffled for some time in the scope of its general expressions of the jurisdiction acquired, while not making its expressed limit the definite point of decision. Here are a few of its formulations in chronological order to illustrate the variance of thought or emphasis and avoidance of actual definition:

- “not confined to cases of admiralty jurisdiction in England when the constitution was adopted”, and “extend[ing] to tide waters, as far as the tide flows, though that may be infra corpus comitatus” (Wayne, J. 1847); 115
- “a vast field of admiralty jurisdiction unknown to [the admiralty] court in England” (Nelson, J. 1848); 116
- “that system . . . generally recognized by maritime countries, modified by acts of congress” (Nelson, J. 1855); 117
- “this court . . . has never claimed the full extent of admiralty power which belongs to the courts organized under, and governed altogether by, the principles of the civil law” (Taney, C.J. 1861); 118
- “doubtless . . . all such cases of a maritime character as were cognizable in the admiralty courts of the States at the time the Constitution was adopted. . . nor is it as extensive as that exercised by the continental courts” (Clifford, J. 1868); 119
- “as it existed in this and other maritime countries at the time of the adoption . . . It was then greatly larger here than in England” (Swayne, J. 1874); 120


114 See The Orleans v. Phoebus, 36 U.S. (11 Pet.) 175 (1837) (partition and sale of vessel operating only on Miss. River).


119 The Belfast, 74 U.S. (7 Wall.) 624, 636 (1868).

120 Atkins, supra note 10, 85 U.S. (18 Wall.) at 304.
• “not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction . . . [and] does not extend to all cases which would fall within such jurisdiction, according to the civil law and the practice and usages of continental Europe” (Clifford, J. 1877);[121]

• [but] “it would be a strong thing to say that Congress has no constitutional power to give the admiralty here as broad a jurisdiction as it has in England or France” (Holmes, J. 1904).[122]

The cautionary notes on continental jurisdiction in the mid-19th Century probably do not reflect an antipathy to the French view so much as deep feelings about States’ rights. They have served in practice to protect the Court’s earlier and later exclusionary holdings, with effect mainly in ship construction and sales. The exclusion of those subjects has little to do with a broad tort jurisdiction and appears to stem directly from the English geographical restrictions that we have long since renounced in other settings.[123] Whatever view we take on that question, there is no responsible opinion that the scope of the federal admiralty power is any less than all the jurisdiction ever historically asserted in England or our colonial vice admiralties.

Taken as a whole, the expressions of the Justices quoted above are cautiously imprecise. They reflect an ambivalence probably rooted in awareness of the political question of federalism and States’ rights and informed by more familiarity with admiralty’s “forms of action” than with its history of function and powers. The champions of the common law and States’-rights opponents of the admiralty, some of whom sat on the Court,[124] sought to restrict it to its late historic “forms of action,” while the common law in the same era was casting them out.

IV

ATTRIBUTIONS OF “PURPOSE” IN MODERN U.S. CASES

A. An Introduction to the Search

While the Court has hinted at content traceable to the Civil Law countries,[125] at the same time cautioning that our jurisdiction is not so broad, the

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[121] Ex Parte Easton, 95 U.S. 68, 70 (1877).
[123] See, e.g., Propeller Genesee Chief, supra note 10 (abandoning tidewater limitation); Kossick v. United Fruit Co., 365 U.S. 731, 1961 AMC 833 (1961) (contract made and to be performed on land); Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 1924 AMC 418 (1924) (same; arbitration agreement).
[124] See, e.g., note 183 infra and text.
[125] Atkins, supra note 10, 85 U.S. (18 Wall.) at 304 (“as it existed in this and other maritime countries at the time”).
comparisons have been in general terms, without referring to particular
countries, doctrines and subjects, and not usually resulting in denial of jurisdic-
tion.\textsuperscript{126} The results are pragmatic, limited and concrete, and neither those
results nor the \textit{obiter}, more conceptual generalities, tell us much about the
"purposes" of the jurisdiction as a whole.

One might posit a "historical" view of its purpose, limited to American
history. In such a view, purpose would refer only to the motives for
Constitutional allocation and the discard of most of the English geographical
restrictions. This is pretty nearly the "historical" view traditionally taken
by the Supreme Court, which should be regarded as settled, so far as it
means that the judicial jurisdiction referred to in the Constitution includes
all that was understood to exist by the admiralty bench and bar when the
Constitution was adopted.\textsuperscript{127} If the reasonable view of the "purposes" of the
allocation was to sweep the admiralty jurisdictions of the States into the con-
control of the federal government, it is not surprising that little was said about
the functional purposes that underlay their historic realization.

The historical view of a narrow purpose advanced in 1993 by Professor
Casto was that the concern was to give the federal judiciary control of cases
of prize, piracy and smuggling, called in academic lingo a "public law par-
adigm", in contrast with the "private law paradigm" of civil cases of private
law. He sought to expose a "paradigm shift" between the founding genera-
tion and the present.\textsuperscript{128} This paradigmatic approach tends to substitute an
evolved conceptual ground for the practical original ground. It garnered
some favorable interest in academia and in at least one Supreme Court jus-
tice.\textsuperscript{129} Its implied effect, if any, would have been a radical amputation. Since
Professor Gutoff's rebuttal, published six years later, there may be less talk
of the paradigms, and one hears no talk of abolishing the civil jurisdiction.

In 1973, with \textit{Executive Jet Aviation}\textsuperscript{130} however, began a modern move-
ment in the courts to limit the jurisdiction by imposing on it new, subjective
qualifications of purpose or limited interest. When the purposes of a power
can be seen clearly, they will doubtless determine its limits or help to do so.

\textsuperscript{126}See, e.g. \textit{Ex Parte Easton}, supra note 121115, 95 U.S. at 70 ("does not extend to all cases which
would fall within such jurisdiction, according to the civil law and the practice and usages of continental
Europe;") wharfage contract); \textit{The Belfast}, supra note 113, 74 U.S. (7 Wall) at 636 ("nor is it as extensive as that
exercised by the continental courts;") affreightment contract lien); 4885 Bags of Linseed,
supra note 112, 66 U.S. (1 Black) at 113 ("this court . . . has never claimed the full extent of admiralty
power which belongs to the courts organized under, and governed altogether by, the principles of the civil
law;") lien on cargo).
\textsuperscript{127}See cases cited supra note 10.
\textsuperscript{128}Casto, at 117, 122.
\textsuperscript{129}See Gutoff, at 362 n.12.
It is not surprising, therefore, that the astonishingly frequent question whether a subject near the periphery falls within or without the admiralty power leads to a search for its “purposes.” Parties opposing jurisdiction may argue from assumptions with little historical support to contract the power. Some succeed and others at least win repetition. Some of them I will now discuss.

B. The “Traditional Maritime Activity” Test

1. Limited Application and Later Metastasis

In Executive Jet Aviation, the desire to avoid jurisdiction of a domestic air crash within the territorial waters of a State led the Supreme Court to abandon the simplicity of The Plymouth, which required only consummation on navigable waters, and hold that admiralty tort “claims arising from airplane accidents” must not only occur on navigable waters but ”bear a significant relationship to traditional maritime activity.” This rather vague test, if limited to its statement in the opinion, would not have much impact outside of domestic aviation cases. The more important jurisdiction beyond territorial waters continues to be recognized under the Death on the High Seas Act, and even where the plane crashes on land on take-off for an international flight. But when the test is applied to non-aviation cases, it is not without problems.

The limitation adequate to deal with the situation need not have been so broad. The case could have been disposed of on the apparently undoubted ground that the tort occurred on land where the damage was first done, but that would not have disposed of similar air crash cases with dissimilar causes, and the Court presumably wanted to make a rule of broader application. If the lower courts had then treated the ruling as narrowly as the Court confined it, to “claims arising from airplane accidents,” much confusion would be avoided. But the lower courts found it a useful way of disposing of some non-aviation cases and, in the Sisson opinion, the Supreme Court embraced their broader application without further discussion.

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131 70 U.S. (3 Wall.) 20, 1999 AMC 2403 (1865).
134 Air Crash, supra.
2. Obscurity and Confusion in Practice

As Scalia, J., joined by White, J., said of the traditional-maritime test in a concurring opinion in Sisson:

[T]hattest does not add any new substantive requirement for vessel-related torts, but merely explains why all vessel-related torts (which ipso facto have such a “significant relationship”), but only some non-vessel-related torts, come within §1333. The Court’s description of how one goes about determining whether a vessel-related tort meets the “significant relationship” test threatens to sow confusion in what had been, except at the margins, a settled area of the law.136

The requirement of tradition is perplexing and unlikely ever to be otherwise. While the word refers to practice, it does not connote the uniform acceptance or compulsion of usage or custom, or the required longevity of the one or antiquity of the other. Tradition is a portmanteau word, with many and various sociological uses, ranging from undocumented history and old lyrics to family holiday dinners, that has almost no recognition as of evidentiary significance.137 “Traditions” may be as old as last year; there is a history of their invention for political or social purposes.138 In what histories may the qualifying tradition be found: e.g., British?, Samoan?, Biblical? And in what eras, the present only, or the colonial, or anything between or before? Courts of appeal trying to formulate an objective approach to the test have performed a tetraphylactomy resulting in a four-part riddle containing the same word “traditional.”139 In applying the test, some federal courts have shown reluctance to recognize tradition in pleasurable frivolities. But the decision is difficult and probably controversial as to which pleasure seekers are more frivolous than reveling passengers who fall over-

136Sisson supra note 1, 497 U.S. at 368, 1990 AMC at 1809 (Scalia, J. concurring).
137See C.J.S. Evidence § 284 (not sufficiently probative to warrant inference of truth, with limited exceptions).
138Eric Hobsbawn & Terence Ranger (eds.) THE INVENTION OF TRADITION (Cambridge 1992) N.B. at p. 1: “‘Invented tradition’ is taken to mean a set of practices, normally governed by overtly or tacitly accepted rules and of a ritual or symbolic nature, which seek to inculcate certain values and norms of behaviour by repetition, which automatically implies continuity with the past. In fact, where possible, they normally attempt to establish continuity with a suitable historic past.... However, insofar as there is such reference to a historic past, the peculiarity of ‘invented’ traditions is that the continuity with it is largely fictitious. In short, they are responses to novel situations which take the form of reference to old situations, or which establish their own past by quasi-obligatory repetition.”
139See Kelly v. Smith, 485 F.2d 520, 525, 1973 AMC 2478, 2486 (5th Cir. 1973) (factors to be considered: “the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law”), accord, T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855, 857, 1975 AMC 343, 345 (9th Cir. 1974), cert. denied 421 U.S. 1000 (1975); Complaint of Paradise Holdings, Inc., 795 F.2d 756, 759, 1987 AMC 104, 107-08 (9th Cir. 1986), cert. denied 479 U.S. 1008 (1987).
board from cruise ships, whose fate in the water, or rescue from it, will be readily admitted to the somber dignity of the admiralty. As it is, little that happens on the water actually fails the test, apart from swimming, and there only by someone who isn’t doing it to save his life after losing his vessel or falling overboard.\textsuperscript{140} It generates continual litigation, however, as parties seek to establish or refute tradition, and the conflicts\textsuperscript{141} and bizarre contrasts\textsuperscript{142} at the fringes reflect little credit on the test. Further examples will be found below in Part VI.C.

C. Attempts at “Commercial” Limitation

1. The Meaning of “Commerce”

It has been argued repeatedly, for its limiting effect, that the purpose of the admiralty is to serve or protect commerce. The mischief lies in the question of what commerce is. The bar and courts often take the word to refer to traffic in money and goods. While commerce is usually thought of in that way, maritime commerce is traffic in vessels. If admiralty were limited to money and goods, as it never really has been, then admiralty law could not have governed the admiral’s navy and those other many “non-commercial”


vessels, both private and public, as it always has done. We do not find in the early descriptions of the admiralty powers, or in the admiral’s commissions or other sources, any distinction as to types of vessels or their activities. There is no reason to think that such a distinction would have been reasonable or been inferred as a restraint upon the admirals’ powers.

In *Gibbons v. Ogden*, the Court had to decide whether the word “commerce” in the Constitution, is limited “to traffic, to buying and selling, or the interchange of commodities . . . [or] comprehends navigation.” The Court said that to limit it “would restrict a general term, applicable to many objects, to one of its significations,” and would not do so.

All America understands, and has uniformly understood, the word “commerce,” to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed . . . The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.¹⁴³

This is a robust categorical definition that cannot be dismissed because it appears in a case on regulation under the Commerce Clause rather than on jurisdiction. Reasonable understanding requires no assumption that the word commerce had different meanings when used in the Constitution and in relation to the admiralty jurisdiction to which the Constitution refers; Ockam’s Razor counsels against one. Later, when the Court reiterated its view expressed in *Gibbons*, it also declared the employment of pilots on vessels to be “according to the usages of modern commerce on the ocean,” using “commerce” as navigation and having, in the context, nothing to do with trade.¹⁴⁴

2. Pleasure Boating and Commerce

a. The Challenge to Pleasure Craft

The root of attempts to narrow the meaning of commerce, and by that means narrow the jurisdiction, lies no doubt in the profusion of pleasure craft and their appearance in the admiralty courts. An article published in 1963 challenged their intrusion and proposed their exclusion or expulsion, asserting that:

[t]he original purpose and the sole modern justification for federal admiralty law is the promotion and protection of what may variously be called the business of shipping, the maritime industry, or commerce by water. In other

¹⁴³22 U.S. (9 Wheat.) 189, 190 (1824).
words, there is more than a fortuitous relationship between commerce and admiralty; if there is no commercial element involved—if the people who make their living by transporting cargoes or passengers could not care less—there is no reason to apply admiralty law.145

The author sought to justify this view historically by writing that “[b]ecause pleasure boating did not exist in any meaningful sense until very recently, history cannot dictate what law should be applied to pleasure boating.”146 But here he was begging the question by assuming, contrary to any indication of history, that the admirals received their jurisdiction as to particular craft and not as to others, rather than as territorial governors. It requires no citation to remind us that we expect constitutional limitations founded on the knowledge and expectations of centuries ago to reflect later technical changes. We would not suppose that the Constitution had no application to telephonic communications because the telephone was unknown in 1787.

If admiralty exercised jurisdiction in “navigable waters” only to the extent they were usable to maritime commerce, and if commerce were restricted to trade, waters usable only to pleasure boats and the pleasure boats that used them, could be excluded. A court could then say, as one did: “Neither non-commercial fishing nor pleasure boating nor water skiing constitutes commerce. Commerce for the purpose of admiralty jurisdiction means activities related to the business of shipping.”147 That judgment did not survive the rulings discussed below; if it had prevailed, it would be interesting to see how the courts dealt with naval and Coast Guard vessels and other federal and State public vessels not in trade, and also those that move in and out of use for pleasure and profit.

b. The Pleasure Craft Dilemma

The opponents of jurisdiction of pleasure craft confront a stubborn dilemma they have never recognized. In addition to the Rules of the Road, which had always applied to them, powered pleasure boats came under explicit federal regulation beginning in 1940, by virtue of the motorboat acts, which applied without distinction to work boats and pleasure craft.148 We might assume that they were founded on the admiralty and commerce powers, but need no such assumption as to the former because the acts provided penalties for violations enforceable by suit in admiralty, without distinction of

145Stolz, at 665.
146Id., at 666.
work and pleasure. Their re-codified successor law still does. If the admiralty power alone did not suffice to support the regulation and jurisdiction of pleasure boats the commerce power would have to be relied on to support those statutes. Pleasure craft would then have to be considered commercial, and could therefore not be excluded as not engaged in commerce. Whatever view of “commerce” you might prefer to take, therefore, their exclusion could not be squared with the Congressional understanding expressed in the acts.

c. Exclusion of Pleasure Craft Finally Rejected

In the Supreme Court a controversy was emerging over federalism, which has meant the borderlines between federal and State law. In the Foremost Insurance case in 1982, the issue was drawn over a collision of two pleasure boats on what were assumed to be navigable inland waters, and admiralty jurisdiction was upheld five-to-four. The dissenters wished to exclude pleasure craft from the admiralty jurisdiction, as non-commercial. The Court had several times assumed the existence of admiralty jurisdiction in cases on pleasure craft without discussion of the question now raised. The Court conceded that “the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce,” an argument presumably made by the defendant. No foundation for it was cited by the Court, and it probably came from Professor Stolz’s article, cited for this point by the dissenters. The majority rejected “too narrow a view of the federal interest sought to be protected,” and explained the broader federal interest in “the potential effect of noncommercial maritime activity on maritime commerce.”

The Court must have had some information about the uses of so-called pleasure boats; it recognized the impracticality of the commercial distinction and rejected it as a controlling factor in admiralty jurisdiction:

Yet, under the strict commercial rule proffered by petitioners, the status of the boats as “pleasure” boats, as to “commercial” boats, would control the existence of admiralty jurisdiction. Application of this rule, however, leads to

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150 46 U.S.C. § 4311(c) (action in rem); 46 U.S.C. § 12309; see also, e.g., 46 U.S.C. § 12301 (failure of motorboat to have State number).
153 Foremost, 457 U.S. at 679-80, 1982 AMC at 2262.
154 Id., 457 U.S. at 674-75, 1982 AMC at 2258.
inconsistent findings or denials of admiralty jurisdiction similar to those found fatal to the locality rule in Executive Jet. Under the commercial rule, fortuitous circumstances such as whether the boat was, or had ever been, rented, or whether it had ever been used for commercial fishing, control the existence of federal court jurisdiction. The owner of a vessel used for both business and pleasure might be subject to radically different rules of liability depending upon whether his activity at the time of a collision is found by the court ultimately assuming jurisdiction over the controversy to have been sufficiently “commercial.” We decline to inject the uncertainty inherent in such line drawing into maritime transportation.155

The Court then observed that Congress made no such distinction in its definition of vessels as referred to in its statutes, and made none in acts that might well have been affected by the distinction, referring to the Rules of the Road and the Motorboat Act.156 The Longshore Act could also have been mentioned, as potentially no longer covering harborworkers on vessels not in trade.157

d. The End of “Commerce” Itself As Doorkeeper

Congress often specifies the type and level of commerce of the vessels to which its statutes apply, as passenger vessels, tank vessels or motor boats including pleasure craft.158 But our general jurisdictional statute for maritime crimes159 draws no distinction between the vessels involved or the purposes for which they are being used. The Supreme Court, in exercising criminal jurisdiction in reliance on the general admiralty jurisdiction, suggests no such distinction,160 and it would be absurd to think that, while we may punish a murder on an American trading vessel, we may not do so if it occurs on an American yacht.

If, for the purpose of discussion, the Court in Foremost Insurance impliedly accepted the possibility that navigation was not of itself commerce, it actually held that so narrow a definition of commerce was not imposed on the admiralty jurisdiction. That view has not lately been directly challenged. It is probably settled and there ought to be no more repetition of “commerce” as the purpose, and limitation, of jurisdiction. In Sisson, the Court, however, repeated its statement in Foremost that the “fundamental interest giving rise to maritime jurisdiction is ‘the protection of maritime

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155 Id., 457 U.S. at 675-76, 1982 AMC at 2259.
156 Id., 457 U.S. at 676-77, 1982 AMC at 2259-60.
158 See 46 U.S.C. ch. 31-45.
159 18 U.S.C. § 7; see also, e.g., 46 U.S.C. app. § 728 (duty to render assistance at sea).
160 See United States v. Rogers, supra note 90; United States v. Flores, supra note 83.
commerce.”161 And as lately as 1991, the Court again repeated it162 and the Fourth Circuit said that “admiralty developed to accommodate problems of commercial shipping”163 and the Seventh Circuit quoted the statement that “the primary focus of admiralty jurisdiction is unquestionably the protection of maritime commerce,”164 with apparent deliberative weight. It is still repeated, albeit harmlessly in most instances.165

The history of the Constitutional allocation adds nothing. There is no credible evidence cited by the courts or commentators that the framers considered commerce in a narrow sense as its purpose, or as a limitation on its power. The protection of commercial shipping as a motive in the original formulation of the English and French admiralty powers is suggested by Dr. Browne’s mention of reports that, about the time of Edward I, the “seas were extravagantly infested by pirates” as of possible relevance to the invigoration of both the English and French admiralties then.166 We do not, of course, think of pirates as strictly commercial men, from the point of view of trade, but cannot, in any case, separate their activities from their victims. What was intended was the suppression of lawless conduct against others. It is not to be assumed that, if pleasure boating had abounded, lawless boats would have been outside the pale, or the protection of lawful boats ignored.

3. Disrupted Commerce

In the Sisson case the Court recalled having said in a footnote in Foremost167 that “(n)ot every accident in navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction,” but when a “potential hazard to maritime commerce arises out of activity that bears a substantial relationship to traditional maritime activity, as does the navigation of boats in this case, admiralty jurisdiction is appropriate.”168 The unnecessary reference to potential hazard was fraught with mischief. The judgment was so manifestly sensible (and the dissent so perversely otherwise) that the notion of potential hazard was superfluous.

161 Sisson, 497 U.S. at 367, 1990 AMC at 1808.
162 Exxon Corporation, supra note 5, 500 U.S. at 608, 1991 AMC at 1821.
165 See Puerto Rico Ports Authority v. Jose Alberto Umpiere-Solares, 456 F.3d 220, 224, 2006 AMC 2261, 2264 (1st Cir. 2006); Air Crash, supra, note 133127, 2006 WL 1288298 at *10, 2006 AMC at 1354; In re Ingram Barge Company, as Owner of the ING 4727, 435 F. Supp. 2d 524, 528, 529, 2006 AMC 2626, 2631, 2633 (E.D. La. 2006) (dwelling, but not relying, on the point).
166 2 B R O W N E , supra note 12, at 24 n.6.
167 457 U.S. at 675, 1982 AMC at 2259 n. 5.
168 Sisson, supra note 1, 497 U.S. at 362, 1990 AMC at 1805.
The Court had already decided that, if commerce were required, pleasure craft could not be excluded from it. A collision of one pleasure craft with any other craft, with damage done, was therefore the realization of a hazard to maritime commerce. In a collision of two pleasure craft the hazard was realized as to them and “potential” only as to others. Thus potentiality would be significant only if a distinction were to be observed between pleasure craft and others for the purpose of jurisdiction. But the Court had already rejected such a distinction. If the potentiality of disruption was held out as a possible sop to the dissenter, it failed. The dissent included a disdainful footnote dismissing that test: “If a ‘potential disruptive effect’ on interstate traffic in fact implicated a federal interest strong enough to support federal jurisdiction, then federal courts also should hear cases in which accidents disrupt similar land traffic.”

Harmless as it was as a makeweight or sop to support jurisdiction in a case that had already been tried, the notion of potential hazard functions quite differently when turned into a condition to be applied negatively. Having been recognized to be an incompetent doorkeeper to the Admiralty Club, Commerce was reassigned as bouncer, often only to card the plaintiff and oust him after the facts have been developed and he has spent his money at the bar. And at closing time there is little practicality in declaring that he never should have been admitted.

Thus, nevertheless, was founded in Sisson the double test of traditional maritime activity and potential to disrupt maritime commerce. Fortunately, the Court had recognized that maritime commerce was not all monetary and also then stated, and later emphasized, that the test did not depend on interference with commerce in the instant case but on the potential of such an incident to do so.

In their concurrence, Scalia, J., joined by White, J., said of this new qualification, in part:

In my view the reading [of Foremost Insurance] that imputes the . . . requirement is in error. We referred to “the potential disruptive impact of a collision” merely to rebut the petitioner’s argument that jurisdiction in that particular case would not further the general purposes of admiralty jurisdiction, since navigation by pleasure craft could not affect maritime commerce. It was enough in that case to answer that it could. But that response cannot reasonably be converted into a holding that in every case such an answer must be available—that no single instance of admiralty tort jurisdiction can exist where there is no potentially disruptive impact upon maritime commerce.

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169 Foremost, 457 U.S. at 683, 1982 AMC at 2265 n. 7.
170 Grubart, supra note 1, 513 U.S. at 538-39, 1995 AMC at 921-22.
171 Sisson, supra note 1, 497 U.S. at 371, 1990 AMC at 1811.
The proliferation of this new branch of the test in the reports of the lower courts confirms its value as grist for litigation and its lack of value as a boundary. (Some relevant figures on this point appear in Part V.C below.) A recent opinion brings the point into sharp focus. A vessel had been arrested and released on security. A suit in admiralty was later brought for misrepresentations leading to the arrest and consequent loss and it fell to a court of appeals to decide whether there was admiralty jurisdiction. The maritime event was that, as a result of harmful words uttered ashore, an officer of the law boarded the vessel at her pier and arrested her. Because asking a court for the arrest of a vessel is a well-established procedure, representations in doing so are substantially related to traditional maritime activity. And it requires only a few words more to explain that the arrest, by forbidding her movement, disrupted the part of maritime commerce represented by the vessel arrested.172

What this points up is that any vessel disrupted represents disruption itself, and not just any vessel but anything in maritime commerce. These objects and actors include not just vessels but crews, cargoes, passengers and other persons to whom or which casualties may occur. The Seventh Circuit holds injury to a crewmember to be disruption itself: “without doubt an injury to one of its crew disrupts its participation in maritime commerce.”173 And more recently the Ninth Circuit has so held, elaborating on the point in the case of a fisherman assaulted and beaten by a former employer from another vessel over a wage dispute:

> Resolving a disagreement with a crewmember through physical violence could render the crewmember unable to perform his fishing duties. ... could delay or cause cancellation of scheduled fishing trips because of decreased manpower. ... [and] if the ship had to fish with less crewmembers or with the loss of a key crewmember, it could decrease the number of fish the crewmen are able to catch. ... (Citations omitted.)174

Perhaps a more surprising, although hardly illogical, example is a case in which blasting ashore cast spoil into an oyster bed, a venture in maritime commerce, which was damaged and disrupted by the spoil itself and efforts to remediate it, a traditional activity.175

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173 Weaver v Hollywood Casino-Aurora, Inc., 255 F.3d 379, 386, 2001 AMC 2563, 2571 (7th Cir. 2001); see Tagliere v. Harrah’s Illinois Corp., 445 F.3d 1012, 1015, 2006 AMC 1290, 1294 (7th Cir. 2006) (injury to passenger meets test and injury to crewmember even more likely).
174 Gruver v. Lesman Fisheries Inc., supra note 142, 489 F.3d at 983, 2007 AMC at 1563.
As it transpires, it is unnecessary to look around for someone else who might have been called to help or delayed by the casualty. The casualty is itself the disruption.\(^{176}\) Maritime commerce is varied and intricate. A conceptual phrase like “potential to disrupt” is pregnant with disputes and, after much expense, the disputants and the authors are likely to be surprised. As a bar to jurisdiction, it turns out to be impractical and ineffective.

\(D.\) The Industrial Variation

Expressing a view that has since been quoted, Haynsworth, C.J. wrote, in rejecting admiralty jurisdiction of a water-skiing case:

> The admiralty jurisdiction in England and in this country was born of a felt need to protect the domestic shipping industry in its competition with foreign shipping and to provide a uniform body of law for the governance of domestic and foreign shipping, engaged in the movement of commercial vehicles from state to state and to and from foreign states.\(^{177}\)

The dissenters in *Foremost* quoted this statement with agreement.\(^{178}\) Judge Haynsworth had cited no authority for his statement, and no wonder, for it is a wholly imaginative extrapolation of the notion of “commercial” purpose without a shred of evidence for it. Such an “industry” makes no appearance in the concerns of fourteenth-century England, except perhaps by remote inference from the reports of piracies mentioned above. But that criminal concern can hardly have been a factor in the broad grants of civil jurisdiction in both England and France. Although there may be said to have been an “industry” in America in 1787, nothing was said about it and the overriding political concerns were obviously different. The industrial “purpose” is indistinguishable from the commercial, and equally weak.

The Haynsworth dictum was quoted and rejected by the Eighth Circuit in approving jurisdiction in a pleasure boat accident case,\(^{179}\) and was cited with approval in a Ninth Circuit case now overruled,\(^{180}\) and in a law review article.\(^{181}\)


\(^{178}\) 457 U.S. at 684, 1982 AMC at 2267.

\(^{179}\) Moye v. Henderson, 496 F.2d 973, 1974 AMC 2661 (8th Cir. 1974).

\(^{180}\) Adams, supra note 1460, 528 F.2d at 439, 1978 AMC at 681 & n. 1 (“protection . . . of . . . shipping industry through . . . uniform and specialized . . . law”)

It should have been decently buried by *Foremost* in 1982, but made a ghostly visit to the Seventh Circuit 17 years later.\(^{182}\) With luck it will not be exhumed again and presented as a new historical insight.

**E. The Political Purpose**

Quite obviously the admiralty jurisdiction was established for political reasons in England, France and other countries. It was claimed here for the federal government also for political motives, as described above. Controversy arose early over the process of adapting it geographically and economically to the United States, and has arisen more recently in the conflict over federalism and State’s rights, with undertones perhaps of a desire to shift workloads to State courts, to which its advocates would presumably assign a higher public motive.

Justice Daniel’s spirited campaign to retain the English geographical restrictions is described in Part III.C above. His motive was political and he described admiralty’s invasion of the democratic and idyllic countrysides with a fervid eloquence worthy of brief notice and admiration:

Under this new regime, the hand of federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water-courses, which is not liable to be arrested on its way to the next market town by the *high admiralty power*, with all its parade of appendages, and the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles

* * *

Few, comparatively, of the attributes of sovereignty and equality, presupposed to have existed in those by whom the Federal Government was created, have remained perfectly intact and exempt from aggression by their own creature; and by no conceivable agency could they be more fearfully assailed than by this indefinite and indefinable pretension to admiralty power, which, spurning the restraints prescribed to it by the wise caution of our own ancestors, challenges, as occasion suits, the opinions and practices of all nations, people, and

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\(^{182}\) *Continental Casualty Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 519, 1999 AMC 2714, 2720 (7th Cir. 1999) (“admiralty jurisdiction is aimed at providing the shipping industry . . . with a neutral forum [and] uniform body of law”).
tongues, however diverse or incongruous with the genius of our own institutions.\textsuperscript{183}

The failure of that campaign did not forestall its modern renewal. Professor Stolz’s article in 1963 advocated State control of pleasure craft because the application of admiralty law “implicitly prohibits the exercise of state legislative power in an area in which the local legislatures have generally been thought competent and in which Congress cannot be expected either to be interested or to be responsive to local needs.”\textsuperscript{184} He was not questioning constitutional scope but making an argument of policy for a change in the law by Congress and not by a court in a case on Constitutional powers. This was the article cited by the dissenters in \textit{Foremost}, who opened with a forthright statement of political motive:

No trend of decisions by this Court has been stronger — for two decades or more — than that toward expanding federal jurisdiction at the expense of state interests and state court jurisdiction. Of course, Congress also has moved steadily and expansively to exercise its Commerce Clause and preemptive power to displace state and local authority. Often decisions of this Court and congressional enactments have been necessary in the national interest. The effect, nevertheless, has been the erosion of federalism — a basic principle of the Constitution and our federal union.\textsuperscript{185}

In that instance, the argument did not succeed. The jurisdiction actually exercised by the courts could be legitimately contracted by Congress, of course, without warping the Constitutional power, but there appears to be little interest in its doing so.

A recent decision of the Fifth Circuit, in sharp contrast to \textit{Grubart} and the general trend, appears to be a resurgence of the political motive and demonstrates what can be done by manipulating the wordings of the subjective tests. A barge with a crane as an appurtenance carried a structure to be added to an offshore platform and, in trying to place it on the platform, dropped it in the water. The court concluded that there was no admiralty jurisdiction because the barge had arrived at its destination. It immured that conclusion in a labored opinion with a strong odor of \textit{petitio principii}, to the end of remanding a contract matter for jury trial as a federal question case under the Outer Continental Shelf Lands Act.\textsuperscript{186} The court attempted to distinguish

\begin{itemize}
  \item Jackson, supra note 113, 61 U.S. (20 How.) at 320-21 (Daniel, J., dissenting); see also the lengthy, learned and spirited dissent of Woodbury, J. in Waring, supra note 11, 46 U.S. (5 How.) at 467, 2006 AMC at 2665.
  \item Stolz, at 664.
  \item 457 U.S. at 677-78, 1982 AMC at 2260-61.
  \item Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 2006 AMC 1297 (5th Cir. 2006).
\end{itemize}
Grubart on the ground that “the development of the resources of the Outer Continental Shelf,” in which the vessel was employed, is not “traditionally maritime” as was “the maintenance of a navigable waterway”\textsuperscript{187} by the pile-driver in Grubart. The court’s motive appears most plausibly to be the old political one—states rights.

V

TERRITORIAL CLARITY, AN ORIGINAL PURPOSE

A. A Plea for Pragmatism

In the Sisson case, Justice Scalia, joined by White, J., concurred in the holding of jurisdiction but disagreed with the subjectivity of the tests:

\textit{Foremost} recited as applicable to such torts [involving vessels on navigable waters] the test of “significant relationship to traditional maritime activity,” which had been devised 10 years earlier for torts not involving vessels . . . In my view that test does not add any new substantive requirement for vessel-related torts . . . The Court’s description of how one goes about determining whether a vessel-related tort meets the “significant relationship” test threatens to sow confusion in what had been, except at the margins, a settled area of the law.

This discussion in \textit{Foremost} has caused many lower courts to read the opinion as not only requiring a “significant relationship to traditional maritime activity” in all cases, i.e., even when a vessel is involved, but as requiring more specifically a particularized showing that the activity engaged in at the time of the alleged tort, if generally engaged in to some indeterminate extent, would have an actual effect on maritime commerce. . . . In my view the reading that imputes the latter requirement is in error. We referred to “the potential disruptive impact of a collision” merely to rebut the petitioner’s argument that jurisdiction in that particular case would not further the general purposes of admiralty jurisdiction, since navigation by pleasure craft could not affect maritime commerce. It was enough in that case to answer that it could. But that response cannot reasonably be converted into a holding that in every case such an answer must be available—that no single instance of admiralty tort jurisdiction can exist where there is no potentially disruptive impact upon maritime commerce. No jurisdictional rule susceptible of ready and general application (and therefore no practical jurisdictional rule) can be so precise as to pass such an “overbreadth” test. One can afford, and perhaps cannot avoid, such case-by-case analysis for the few cases lying at the margins—when, for example, a plane falls into a lake—but it is folly to apply it to the generality of cases involving vessels. . . .

\textsuperscript{187}Id. 448 F.3d at 771, 2006 AMC at 1307.
What today’s opinion achieves for admiralty torts is reminiscent of the state of the law with respect to admiralty contracts. The general test, of course, must be whether the contract “touch(es) rights and duties appertaining to commerce and navigation,” . . . But instead of adopting, for contracts as we had (until today) for torts, a general rule that matters directly related to vessels were covered, we sought to draw the line more finely, case-by-case. That body of law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by nature maritime) is needed in order to make the contract itself “maritime,” has brought ridicule upon the enterprise. As one scholar noted in 1924, “(t)he rules as to building and repairing vessels” . . . “and the results obtained therefrom, are so humorous that they deserve insertion in the laws of Gérolstein.” . . . There is perhaps more justification for this approach with respect to contracts, since in that field the “vessel” test would not be further limited by the “locality” test, as it is for torts . . . But there is no reason for expanding that approach to the tort field. . . .

The sensible rule to be drawn from our cases, including Executive Jet and Foremost, is that a tort occurring on a vessel conducting normal maritime activities in navigable waters—that is, as a practical matter, every tort occurring on a vessel in navigable waters—falls within the admiralty jurisdiction of the federal courts.

(Citations and footnotes omitted.)

The latter tests [traditional activity and disruption of commerce] produce the sort of vague boundary that is to be avoided in the area of subject matter jurisdiction wherever possible.

The boundary between judicial power and nullity should ..., if possible, be a bright line, so that very little thought is required to enable judges to keep inside it. If, on the contrary, that boundary is vague and obscure, raising “questions of penumbra, of shadowy marches,” two bad consequences will ensue similar to those on the traffic artery. Sometimes judges will be misled into trying lengthy cases and laboriously reaching decisions which do not bind anybody. At other times, judges will be so fearful of exceeding the uncertain limits of their powers that they will cautiously throw out disputes which they really have capacity to settle, and thus justice which badly needs to be done will be completely denied. Furthermore, an enormous amount of expensive legal ability will be used up on jurisdictional issues when it could be much better spent upon elucidating the merits of cases. In short, a trial judge ought to be able to tell easily and fast what belongs in his court and what has no business there.188 (Quoting Z. Chafee quoting Holmes, J.)189

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189Sisson, supra note 1, 497 U.S. at 368-73, 1990 AMC at 1809-15 (Scalia, J. concurring).
In response, Marshall, J. (who had also written for the Court in Foremost) wrote:

Justice Scalia is correct that his approach would be simpler to apply than the one embraced by Executive Jet and Foremost and that, all things being equal, simpler jurisdictional formulae are to be preferred. . . . But the demand for tidy rules can go too far, and when that demand entirely divorces the jurisdictional inquiry from the purposes that support the exercise of jurisdiction, it has gone too far. In Foremost, the Court unanimously agreed that the purpose underlying the existence of federal maritime jurisdiction is the federal interest in the protection of maritime commerce, and that a case must implicate that interest to give rise to such jurisdiction. . . . The only point of debate in Foremost was whether the Court was straying too far from that purpose by requiring no more than that the wrong have a potentially disruptive impact on maritime commerce and arise from an activity with a substantial relationship to traditional maritime activity. Justice Scalia’s view that Foremost did not go far enough is thus plainly inconsistent with the unanimous view of the Court in Foremost. (Citation omitted.) 190

That “unanimous view” in Foremost was an illusion. What the majority referred to as commerce included all of navigation, since it embraced pleasure craft, while the dissenters who held out for a requirement of trade also disagreed with the majority’s new element of potential disruption. 191 The views of Scalia, J. and White, J. in Sisson, quoted above, were substantially reiterated by Thomas, J., joined by Scalia, J. in the Grubart case. 192 Thus has the issue been joined within the Court as to purposive jurisdiction.

The plea of the justices for pragmatic simplicity is a plea to return to historic authenticity. The redundancy and verbosity of the historic commissions is daunting. When we read them with patience, however, we perceive the principle that what engages the sovereign’s authority in, on or about navigable waters, when it gives rise to a dispute or offense, engages the jurisdiction of the admiralty court.

B. Disagreement with Congressional Understandings

The courts are not the only interpreters of the Constitution. Congress states its interpretation, sometimes explicitly, in passing laws referring to the admiralty jurisdiction or dependent on it, and the Supreme Court has deferred to Congress. This was the view taken by the Court when Congress

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190 Id. 497 U.S. at 364, 1990 AMC at 1805 n.2.
191 See text at note 167 supra.
192 Grubart, Inc., supra note 1, 513 U.S. at 549, 1995 AMC at 930 (Thomas, J. concurring).
directed the exercise of the jurisdiction in inland navigable waters, \(^{193}\) and in the foreclosure of preferred ship mortgages \(^{194}\) and in subjecting damage on land to admiralty, first in limitation of liability proceedings \(^{195}\) and then in the Extension of Admiralty Jurisdiction Act, which the Court has applied several times without regarding constitutionality as a serious issue. This background was reviewed in the leading circuit case on the Extension Act, which dealt with damage by a vessel to a dike attached to a river bank. The court there also took note of evidence that both the English and French admiralties took cognizance of damage to banks and structures on them and concluded that the Act was remedial only and therefore applied to damage done before it was passed. \(^{196}\) Legislation based on the inclusion of pleasure craft has been discussed above. \(^{197}\) In light of a recent decision, the Extension Act assumes renewed importance and requires special discussion below.

A compelling expression of Congressional understanding and intention is found in the statutory definition of our "special maritime" jurisdiction and the offenses punishable under it. It is defined to include "[t]he high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State", and [US.-owned or -flagged vessels “within the admiralty and maritime jurisdiction” etc]. \(^{198}\) This definition is one of territory defined in turn by the territory of the admiralty jurisdiction and not by discrete subjects or otherwise conceptually. Numerous crimes are defined to be punished when committed within that jurisdiction; they include assault, maiming, robbery, domestic violence, stalking and sexual abuse. \(^{199}\) There is not a word about the exclusion of any type of vessel, and when the presumable purpose of these laws is considered, it would be unreasonable to expect such a restriction. Clearly, Congress considers reference to the “admiralty and maritime jurisdiction of the United States” broad enough to meet the case, and the notes of cases annotated under these sections confirm that. A cavil that these are all criminal matters cannot be entertained. There is no history to suggest, what

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\(^{193}\) The Propeller Genesee Chief, supra note 11, at 453. 1999 AMC at 2097 (“If this law . . . is constitutional, it must be supported on the ground that the lakes and rivers . . . are within the scope of admiralty and maritime jurisdiction as known . . . when the Constitution was adopted”).

\(^{194}\) Trust Co., supra note 87, 293 U.S. at 52, 1934 AMC at 1435 (“Congress . . . not limited by previous decisions as to the extent of the admiralty jurisdiction.”).

\(^{195}\) Richardson v. Harmon, 222 U.S. 96, 2001 AMC 1207 (1911).

\(^{196}\) United States v. Matson Navigation Co., supra note 73; see also Godolphin 43-48 (“All prejudice done to the Banks of Navigable Rivers, or to Docks, Wharffs, Keys, or anything whereby Shipping may be endangered, Navigation obstructed, or Trade by Sea impeded”) quoted at 1 Benedict ch. III § 47. Godolphin on the Jurisdiction.

\(^{197}\) See supra Part IV.C.2.b).


\(^{199}\) 18 U.S.C. §§ 113, 114, 2211, 2261, 2262, and 2241-48, respectively.
the words of the commissions would belie, that the admirals had criminal jurisdiction of an act but not of the civil consequences attached to it.

C. The Functional Record of Traditional Activity and Potential Disruption

In light of what I think to be the importance of the conclusions reached here, I have felt warranted in lading this section with a repellent block of footnotes to expose and, as I hope, justify the judgment used in classifying the decisions and framing the statistics that follow.

Many lawyers, judges and parties would surely be pleased with a simpler and more economical approach, as eliminating original doubt about a given claim. It is, moreover, not as though the purposive approach has led to uniformity. A total of 134 opinions are digested in American Maritime Cases head notes indexed under “Traditional Maritime Activity” and “Effect on Commerce” from 1991 (the year after Sisson) through 2006. In some, the issue was jurisdiction itself and in others, the choice of maritime or Sstate law. In reviewing them, 10 were disregarded as irrelevant or unclear. Of the 78 remaining trial court opinions, ten denied jurisdiction for lack of traditional activity alone,200 of which at least two have been reversed,201 two for lack of disruption alone,202 and two on both grounds.203 There remained 46 appellate opinions, including only Grubert from among the trial court cases listed. Four of them


201Gruver v. Lesman Fisheries Inc., supra note 142 (assault in wage dispute on vessel); In re Great Lakes Dredge & Dock Co., supra.


affirmed denials of admiralty jurisdiction,\textsuperscript{204} in addition to one since overruled;\textsuperscript{205} 11 denials were reversed\textsuperscript{206} and only three rulings in favor of admiralty reversed, none of them, curiously enough, among the more convincing denials.\textsuperscript{207} So in all the courts, 114 upheld admiralty jurisdiction and 21 finally denied it. Among the denials are several where the connection with navigable water or navigation was attenuated\textsuperscript{208} and some that are scarcely reconcilable with others, as might be expected with such subjective tests.\textsuperscript{209} These numbers and inconsistencies suggest;

\begin{itemize}
  \item \textsuperscript{204} [Code: RT=related to traditional maritime activity; PD=potential to disrupt] Delgado v. Reef Resort Limited, supra note 141 (scuba diving not RT or PD); Hasty v. Trans Atlas Boats, Inc., 389 F.3d 510, 2004 AMC 2860 (5th Cir. 2004) (claim against harbor police for lack of protection not RT); Cochran v. E.I. du Pont de Nemours, 933 F.2d 1533, 1992 AMC 2599 (11th Cir. 1991) (seaman’s injury from toxic material on vessel in port not RT); H2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914, 1997 AMC 390 (9th Cir. 1996) (asphyxiation in a houseboat while tied to shore has no PD).
  \item Compare Sinclair v. Soniform, Inc., 935 F.2d 599, 1991 AMC 2341 (3rd Cir. 1991)(recreational scuba diving; jurisdiction); with Delgado v. Reef Resort Limited, supra note 141 (recreational scuba diving; no jurisdiction) and Delta Country Ventures, Inc. v. Magana, supra note 205 (recreational non-scuba diving; no jurisdiction; compare H2O Houseboat Vacations, Inc. v. Hernandez, supra note 204 (no jurisdiction of CO poisoning on houseboat when moored to shore because no potential to disrupt) and Lewis v. Sea Ray Boats, Inc., 65 Pac.3d 245, 2003 AMC 815 ( Nev. 2003) (same) with Houseboat Starship II, Limitation Proceedings, 2006 AMC 1335 (M.D. Tenn. 2005) (distinguished on ground poisoning occurred after beginning of cruise); see also notes 141, 142 supra.
\end{itemize}
first, that there is much initial uncertainty about satisfying these subjective tests and therefore about the available jurisdiction and applicable law; and second, that their elimination would have little effect on the jurisdictional results. The decisions also reflect not only inconsistencies within themselves but inscrutable distinctions from earlier ones of great authority that are still followed in the circuits as mandatory, without reference to the newer tests.

The courts must sometimes devise new tests to sift out frivolous or inconsequential claims of jurisdiction. But these tests, which have no historic foundation in the origin of federal allocation of the constitutional power, are not justified by their impact on its exercise and their inconvenient, costly and capricious subjectivity for lawyers, parties and judges.

D. The Extension Act

The passage of the Extension of Admiralty Jurisdiction Act of 1948 was unquestionably motivated by the desire to deal with damage or injury on land from a maritime tort. That is the purpose indicated by the legislative history and has tended for more than half a century to limit our thinking about the Act. It provides that the admiralty jurisdiction "shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

In applying the Act and so approving it, the Supreme Court has declined to be drawn into the question whether it creates constitutional jurisdiction or rather interprets the Constitution and directs the exercise of it. The latter view is based on the fact that the Congressional grant was in the same words as the Constitution and the conclusion that they must have conveyed the full constitutional power. The legislative history indicates that Congress considered the Act to be within the Constitutional grant: "It merely specifically directs the
courts to exercise the admiralty and maritime jurisdiction of the United States already conferred by Article III, Section 2, of the Constitution...” 215

Whichever view one takes does not affect the conclusions here.

When the full significance of the Act is recognized, it brings us close to realizing the full breadth of the tort jurisdiction and the clarity and simplicity that Justices Scalia, White and Thomas have favored. The supposed limitation to damage or injury on land is not what it actually says. Its words of positive direction are to exercise the jurisdiction in “all cases... caused by a vessel on navigable water” with the qualification that the jurisdiction is not to be limited by the occurrence of the damage on land. As matters stood when the Act was passed, that qualification was the only extension involved; the Court had not begun to devise new tests limiting the doctrine of The Plymouth and the inclusion of all cases of damage or injury “caused by a vessel on navigable water,” as a point of departure, undoubtedly represented the congressional understanding of the state of the law in 1948. The Supreme Court has not in fact overlooked the significance of these words for the present subject; in Foremost it cited the words of the Extension Act, “caused by a vessel on navigable water” as evidence that Congress recognized no distinction among vessels for jurisdictional purposes.216

Except for the “notwithstanding” clause, the matter-of-fact words of the Extension Act attracted no attention until the agitation of the 1970s to exclude pleasure craft as non-commercial. Then in 1974, the Eighth Circuit, rejecting that argument under the historic reading of the jurisdiction, held it also contrary to the Extension Act:

The purpose of this legislation was to extend the law of admiralty to encompass claims arising out of a relationship to maritime activities, regardless of the locality of the tort. . . . However, the language of the statute is written in the broadest terms to cover all damage “caused by a vessel on navigable water.” All that is required for the Act to come into involvement is injury caused by a vessel on navigable waters. . . . As mentioned previously, statutory definitions of vessel do not limit the term to commercial boats, but cover any waterborne transportation device. (Citations omitted.) 217

This reading of the plain words was rejected by two other circuits, without citing it, in favor of limiting the Act to the purpose stated in the legislative history.218

216 Foremost, 457 U.S. at 677, 1982 AMC at 2260.
217 Moye v. Henderson, 496 F.2d 973, 979, 1974 AMC 2661, 2669 (8th Cir. 1974).
A more recent opinion from the Seventh Circuit may receive more consideration. The plaintiff was injured aboard a riverboat casino when the stool she was leaning on collapsed. She sued after being time-barred under State law but not under admiralty law. The vessel was moored indefinitely. The case was dismissed for lack of admiralty jurisdiction, without a record on which it could be decided yet whether the mooring was permanent so that the vessel might no longer be qualified as such. Posner, J. wrote the opinion reversing the dismissal, with characteristic clarity and pragmatism. He recognized that the accident “had nothing to do with the fact that the casino was on a boat afloat on a navigable stream rather than sitting on dry land” and that admiralty’s rules would be no better suited, or perhaps worse, to resolving the claim than State law, and there was, “therefore, common-sense appeal to the district court’s ruling,” and went on:

But the most important requirement of a jurisdictional rule is not that it appeal to common sense but that it be clear. (Citations omitted.) It is very unfortunate when parties are not sure which court they should be litigating their dispute in, as the case at hand illustrates. [Describing the problem of the statutes of limitations.]

He cited authorities that in questions of causation a vessel includes “the vessel’s fixtures, furniture, and other ‘appurtenances’”. It is appropriate to mention here that the vessel’s crew are also included, as a result of the “adoption by Congress of the customary legal terminology of the admiralty law which refers to the vessel as causing the harm although the actual cause is the negligence of the personnel in the operation of the ship.”

He discussed the Eighth Circuit’s opinion and the reliance of the two other circuits on the legislative history, and said:

We do not think that the legislative history should override the broad statutory language, which provides a clear and simple jurisdictional test for cases like this, in contrast to the vague “maritime nexus” (or “connection”) test (“the party seeking to invoke maritime jurisdiction must show a substantial relationship between the activity giving rise to the incident and traditional maritime activity,” (citing Sisson) that is used to determine jurisdiction under section 1333(1), which confers but does not define admiralty jurisdiction. Our case would pass that test as well; vagueness has it uses.

The main practical use of the “connection” test has been to expel from the admiralty jurisdiction freak cases. [Referring to some cited in Grubart.] Grubart itself involved the flooding of tunnels and basements in Chicago.

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219Tagliere, supra note 173.
220Id. 445 F.3d at 1013, 2006 AMC at 1291.
221Canadian Aviator, Ltd. v. United States, 324 U.S. 215, 224, 1945 AMC 265, 272 (1945).
caused by the fact that months earlier a crane sitting on a barge had driven piles too far into a riverbed above a tunnel.

Yet unusual as were the facts in Grubart, the case was about an appurtenance (the crane) of a boat (a barge) afloat on navigable waters and an accident, albeit on land, caused by the handling of the appurtenance. A passage in the Court’s opinion suggests that the Court thought the case rather simple:

This Court has not proposed any radical alteration of the traditional criteria for invoking admiralty jurisdiction in tort cases, but has simply followed the lead of the lower federal courts in rejecting a location rule so rigid as to extend admiralty to a case involving an airplane, not a vessel, engaged in activity far removed from anything traditionally maritime. 513 U.S. at 542, 1995 AMC at 925.

The “location” rule at its broadest was that any accident that occurs on navigable waters is within the admiralty jurisdiction. (Citing The Plymouth.) That would have encompassed the airplane, swimmer, and motorist cases, and the Court made clear in Grubart that it wouldn’t go that far. When a boat is involved, however, the location rule is not only thoroughly compatible with the language of the Extension of Admiralty Jurisdiction Act, but appears to have survived Grubart and thus to be the test under the general admiralty jurisdiction conferred by 28 U.S.C. § 1333(1), as well.222

Judge Posner acknowledged the distinctive features of admiralty law, some of which were not designed for this type of accident. “But to decide in each case whether admiralty law or state law would make a better fit with the particular circumstances . . . would make the determination of jurisdiction hopelessly uncertain [and be] not a price worth paying for the slightly better match of law to fact that would result.” He reviewed some of the differences between admiralty and State law and said, “Without meaning to minimize these differences, which figure importantly in some cases, an effort to determine admiralty jurisdiction case by case by estimating the relative closeness of fit of state law and admiralty law to the particular circumstances of the case would create more uncertainty than efficiency. We conclude that the district court erred in dismissing the suit . . . ”223

This decision represents a sensible way of escaping the “questions of penumbra, of shadowy marches”224 that have afflicted counsel and courts trying to predict admiralty tort jurisdiction in recent decades and at the same time move close, if not exactly, to its authentic character. It embraces anything done by a vessel or her crew, to themselves or others, or by others to them, on navigable waters, and at least anything done by passengers to one

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222 Tagliere, supra note 173, 445 F.3d at 1014-15, 2006 AMC at 1294.
223 Id. 445 F.3d at 1016, 2006 AMC at 1295.
224 Hanover Star Milling, supra note 188 (Holmes, J., concurring).
another serious enough to involve action by the vessel or crew. Libel, slander and fraud involving passengers only will come to mind as objectionable subjects for admiralty, but except for cheating at cards, are seldom likely to have their tortious effect on water, and so be consummated there.

VI
CONCLUSIONS

The admiralty power we knew as British colonies (and Spanish and French) was primarily a territorial jurisdiction of government and judicature, treating the king’s rights or pretensions to seaward territory as a province under an admiral having governmental powers, the fleet to enforce them, and the court to adjudicate disputes in his jurisdiction. That jurisdiction was expressed in its original scope in the vice admiralties of the New World, the formulations of which were continued by the States when they assumed them as sovereigns. All of what the States, or any of them, possessed of the jurisdiction was intended to be adopted by the United States in the Constitution.

The United States thereby embraced a customary admiralty power that had been primarily territorial and governmental in concept, expressing the sovereign power in the maritime area. It represented no special interests other than sovereignty and the defense of the realm. In particular, it was founded on no special purpose of supporting a commerce of goods or an industry, apart from enforcing the good order in which they could exist on water, as on land. It had, however, an unquestionable political purpose of extending the central power of the nation on the sea. The judicial jurisdiction it included was broad enough to match its governmental power and with it went a constitutional authority of Congress to refine and interpret it within reasonable relationship to maritime matters, an authority long recognized by both Congress and the Supreme Court. Congress’s express understanding of the jurisdiction, or refinement of it, if one views it that way, has been that in both civil and criminal matters it is a jurisdiction of territory rather than discrete subject matters, and as broad as the sea and all navigable waters connected with the sea or between the States. Not to recognize that has been a fallacy. Another has been not to recognize that the admiralty jurisdiction in its particular features, like other features of the Constitution, evolves in recognition of technological and governmental changes.

The Constitutional formula therefore should today have its proper territorial borders, not based on suppositions of financial “commerce” or industry or the politics of American federalism or the search for a related tradition that often cannot be pursued without a visit to that most arcane field of law,
the philosophical labyrinth of causation. History, custom, logic and practicality, indicate that the judicial jurisdiction of admiralty comprises disputes and offenses that arise in its governmental jurisdiction and comprehends at least, without further qualification, all torts and offences done by, to, or on board vessels, or in relation to them, in navigable waters.