

OFFSHORE WORKERS ON ARTIFICIAL ISLANDS

This chapter will deal with remedies for workers on fixed rigs/artificial islands, as contrasted with remedies of workers on mobile rigs (workers on mobile structures are generally considered to be seamen and are entitled to the remedies discussed earlier in this book). With the growth of offshore oil exploration and production off the U.S. coast, an increasing number of personal injury and death claims have been brought in both state and federal courts. The appropriate route for, and amount of, recovery depends not only upon the location of the tort, but also upon the type of structure on which it occurs. The focus of this section is upon the coastal waters of the United States, an area covered by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*

The territorial waters of each coastal state generally extend three miles from shore, although the seaward limit for Texas and Florida is 10.4 miles. *United States v. Louisiana*, 363 U.S. 1 (1960). Workers injured on fixed structures within the U.S. territorial waters who are not "seamen" must seek benefits from their employers under the adjoining state's compensation scheme or under the LHWCA. *See, Herb's Welding v. Gray*, 470 U.S. 414 (1985). Generally speaking, the only cause of action for compensation of a worker assigned to a fixed structure within the territorial waters of an adjoining state is compensation pursuant to that state's law. This statement assumes that the employee is not a seaman and does not come within the status test of the Longshore Act. Workers injured on a fixed structure on the Shelf outside state territorial waters have an action for compensation against their employer pursuant to the LHWCA. Third party negligence actions for injuries on fixed structures are also subject to the laws and limits of the adjoining state irrespective of the structure's location on the Shelf. A 905(b) negligence action is available to a worker injured on a vessel and covered by the Longshore Act; the location of the vessel on the Shelf is of no consequence; however, even though a worker is covered by the Longshore Act's compensation benefits for any injury on a fixed structure outside of state territorial waters, the worker's third-party action is governed by the law of the adjoining state.

Employees injured on fixed structures outside a state's territorial waters can seek compensation from their employer only through the LHWCA, which is made applicable to platform injuries occurring outside state territorial waters on the Outer Continental Shelf of the United States by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S. C. S 1333(b). *Barger v. Petroleum Helicopters, Inc.*, 692 F. 2d (5th Cir. 1982); *Gaudet v. Exxon Corp.*, 562 F. 2d 353 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Third party actions arising within or beyond state's territorial

waters on fixed structures are governed by the adjoining state's laws and limitations, OCSLA, 43 U.S.C. § 1333 (a)(2)(A) (See the text in the footnote below.) *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Such surrogate law must not be inconsistent with federal law; in the event of an inconsistency, federal law will apply instead. Artificial islands situated within or beyond state territorial waters are not within maritime jurisdiction. Hence neither the general maritime law nor the Death on the High Seas Act (DOHSA) is applicable. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969).

There are problems in applying the state law in an indiscriminate manner to third party actions falling within the purview of the OCSLA. If the state's cause of action is not inconsistent with federal law, the cause of action is borrowed in its entirety. *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981). If an offshore worker assigned to an artificial island is injured while on a vessel, Jones Act jurisdiction does not apply unless the worker is a "seaman." The situs of the accident aboard a vessel on the Shelf is of no consequence; the injured worker assuming no Jones Act coverage, may receive compensation under the LHWCA from his employer and pursue third party negligence claims pursuant to 905(b) against the vessel owner. An injury on a fixed structure within a state's territorial waters does not automatically preclude an action for compensation under the LHWCA provided the "status" and "situs" requirements of the LHWCA are met. See *Herb's Welding, supra*.

The OCSLA does not pertain to the rights of a "seaman," since this category of worker can claim the Jones Act recovery against his employer irrespective of the vessel's location or location of the accident.

Attention is directed to 43 U.S.C. § 1333(a)(1) (the OCSLA), which applies to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon . . . , or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources. . . . " (emphasis supplied).

43 § SUBMERGED LANDS

§ 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State. *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) to the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section -

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

§ 1349. Citizens suits, jurisdiction and judicial review.

(b) Jurisdiction and venue of actions.

(1) Except as provided in subsection (c) of this section, the district courts of the United States shall have jurisdiction of cases and controversies arising out of, or in connection with, (A) any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals of the subsoil and seabed of the outer Continental Shelf, or which involves rights to such minerals, or (B) the cancellation, suspension, or termination of a lease or permit under this subchapter. Proceedings with respect to any such case or controversy may be instituted in the judicial district in which any defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose.

(2) Any resident of the United States who is injured in any manner through the failure of any operator to comply with any rule, regulation, order, or permit issued pursuant to this subchapter may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district having jurisdiction under paragraph (1) of this subsection.

[404 US 97]
CHEVRON OIL COMPANY, Petitioner,

v
GAINES TED HUSON

404 US 97, 30 L Ed 2d 296, 92 S Ct 349

[No. 70-11]

Argued October 20, 1971. Decided December 6, 1971.

OPINION OF THE COURT

[404 US 98]
Mr. Justice Stewart delivered the opinion of the Court.

The respondent, Gaines Ted Huson, suffered a back injury while working on an artificial island drilling rig owned and operated by the petitioner, Chevron Oil Co., and located on the Outer Continental Shelf off the Gulf Coast of Louisiana. The injury occurred in December 1965. Allegedly, it was not until many months later that the injury was discovered to be a serious one. In January 1968 the respondent brought suit for damages against the petitioner in federal district court. The respondent's delay in suing the petitioner ultimately brought his case to this Court.

The issue presented is whether the respondent's action is time barred and, more particularly, whether state or federal law determines the timeliness of the action. That issue must be resolved under the Outer Continental Shelf Lands Act, 67 Stat 462, 43 USC § 1331 et seq. (hereinafter "Lands Act"), which governs injuries occurring

[404 US 99]

on fixed structures on the Outer Continental Shelf. When this lawsuit was initiated, there was a line of federal court decisions interpreting the Lands Act to make general admiralty law, including the equitable

doctrine of laches, applicable to personal injury suits such as the respondent's. The petitioner did not question the timeliness of the action as a matter of laches. While pretrial discovery proceedings were still under way, however, this Court announced its decision in *Rodrigue v Aetna Casualty & Surety Co.*, 395 US 352, 23 L Ed 2d 360, 89 S Ct 1835. That decision entirely changed the complexion of this case. For it established that the Lands Act does not make admiralty law applicable to actions such as this one. Relying on *Rodrigue*, the District Court held that Louisiana's one-year limitation on personal injury actions, rather than the admiralty doctrine of laches, must govern this case. It concluded, therefore, that the respondent's action was time barred and granted summary judgment for the petitioner.

[1, 2] On appeal, the respondent argued that *Rodrigue* should not be applied retroactively to bar actions filed before the date of its announcement. But the Court of Appeals declined to reach that question. Instead, it held that the interpretation of the Lands Act in *Rodrigue* does not compel application of the state statute of limitations or prevent application of the admiralty doctrine of laches. It concluded that the doctrine of laches should have

U. S. SUPREME COURT REPORTS

been applied by the District Court and, therefore, reversed that court's judgment and remanded the case for trial. 430 F2d 27. We granted certiorari to consider the Court of Appeals' construction of the Lands

[404 US 100]

Act and of *Rodrigue*. 402 US 942, 29 L Ed 2d 109, 91 S Ct 1608. We hold that the Lands Act, as interpreted in *Rodrigue*, requires that the state statute of limitations be applied to personal injury actions. We affirm the judgment of the Court of Appeals, however, on the ground that *Rodrigue* should not be invoked to require application of the Louisiana time limitation retroactively to this case.

I

[3] The Lands Act makes the Outer Continental Shelf, including fixed structures thereon, an area of exclusive federal jurisdiction, 43 USC § 1333(a)(1). The Act extends the laws of the United States to this area, 43 USC § 1333(a)(1), and provides that the laws of the adjacent State shall also apply "[t]o the extent that they are applicable and not inconsistent" with applicable federal laws, 43 USC § 1333(a)(2).⁴ To the extent

[404 US 101]

that a comprehensive body of

federal law is applicable under § 1333(a)(1), state law "inconsistent" with that law would be inapplicable under § 1333(a)(2).

In *Rodrigue*, we clarified the scope of application of federal law and state law under § 1333(a)(1) and § 1333(a)(2). By rejecting the view that comprehensive admiralty law remedies apply under § 1333(a)(1), we recognized that there exists a substantial "gap" in federal law. Thus, state law remedies are not "inconsistent" with applicable federal law. Accordingly, we held that, in order to provide a remedy for wrongful death, the "gap" must be filled with the applicable body of state law under § 1333(a)(2).

The Court of Appeals acknowledged that *Rodrigue* clearly establishes that the remedy for personal injury, as for wrongful death, cannot be derived from admiralty law but must be governed by the law of the adjacent State, Louisiana. But the court held that Louisiana's time limitation on personal injury actions need not be applied with the substantive remedy. It supported this holding by reference to the terms of § 1333(a)(2) that limit the applica-

4. The full text of § 1333(a)(1) and § 1333(a)(2) reads:

"(a) (1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands and fixed structures which may be erected thereon for the purpose of exploring for, developing, removing, and transporting resources therefrom, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

"(2) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and

regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State as of August 7, 1953 are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf."

tion of state law under the Lands Act. The Louisiana time limitation, the Court of Appeals reasoned, is not "applicable" of its own force and is "inconsistent" with the admiralty doctrine of laches. The court held that, despite the holding in *Rodrigue*, the laches doctrine is applicable as a matter of federal common law. We must disagree.

[4] The Court of Appeals did not suggest that state statutes of limitations are per se inapplicable under § 1333(a)(2). Rather, it focused on the peculiar nature of
[404 US 102]

the Louisiana time limitation on personal injury actions found in Art 3536, La. Civ. Code Ann. Article 3536 provides that personal injury actions shall be "prescribed" by one year. The Court of Appeals attached much significance to the fact that Art 3536 "prescribes," rather than "perempts," such actions. Under Louisiana law, "prescription," unlike "peremption," bars the remedy but does not formally extinguish the right to recovery. See *Page v Cameron Iron Works*, 259 F2d 420, 422-424; *Istre v Diamond M. Drilling Co.* 226 So 2d 779, 794-795 (La App); *Succession of Pizzillo*, 223 La 328, 335, 65 So 2d 783, 786. This characterization has importance under principles of the conflict of laws. It has been held, as a matter of Louisiana conflicts law, that mere "prescriptive" time limitations are not binding outside their own forum. See *Fidelity & Casualty Co. v C/B Mr. Kim*, 345 F2d 45, 50; *Kozan v Comstock*, 270 F2d 839, 841; *Istre v Diamond M. Drilling Co.*, supra, at 795. Reasoning from this principle

of conflicts law, the Court of Appeals concluded that the "prescriptive" limitation is not "applicable" in a federal court adjudicating a claim under the Lands Act.

[1. 5] We hold, however, that the "prescriptive" nature of Art 3536 does not undercut its applicability under the Lands Act. Under § 1333(a)(2) of the Act, "[s]tate law bec[omes] federal law federally enforced." *Rodrigue v Aetna Casualty & Surety Co.*, supra, at 365, 23 L Ed 2d at 370. It was the intent of Congress, expressed in the Senate Committee Report, in the Conference Report, and on the floor of the Senate, that state laws be "adopted" or "enacted" as federal law. See id., at 357-358, 23 L Ed 2d at 365. Thus a federal court applying Louisiana law under § 1333(a)(2) of the Lands Act is applying it as federal law—as the law of the federal forum. Since the federal court is not, then, applying the law of another forum in

[404 US 103]
the usual sense, ordinary conflict of laws principles have no relevance. Article 3536 is "applicable" in federal court under the Lands Act just as it would be applicable in a Louisiana court.⁵

The policies underlying the federal absorption of state law in the Lands Act make this result particularly obvious. As we pointed out in *Rodrigue*, Congress recognized that "the Federal Code was never designed to be a complete body of law in and of itself" and thus that a comprehensive body of state law was needed. Id., at 358, 361, 23 L Ed 2d at 365, 367. Congress also

[1] 5. This is not to imply that a federal court adjudicating a claim under state law as absorbed in the Lands Act must function as it would in a diversity case. See *Erie R. Co. v Tompkins*, 304 US 64, 82 L Ed 1188, 58 S Ct 817, 114 ALR 1487; *Guaranty Trust Co. v York*, 326 US

99, 89 L Ed 2079, 65 S Ct 1464, 160 ALR 1231; *Levinson v Deupree*, 345 US 648, 651, 97 L Ed 1319, 1323, 73 S Ct 914. We hold only that the state statute of limitations is part of the law to be applied in federal court as it would be part of the law to be applied in a state court.

U. S. SUPREME COURT REPORTS

recognized that the "special relationship between the men working on these artificial islands and the adjacent shore to which they commute" favored application of state law with which these men and their attorneys would be familiar. *Id.*, at 365, 23 L Ed 2d at 369; see *id.*, at 363, 23 L Ed 2d at 363. If Congress' goal was to provide a comprehensive and familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation upon a remedy is coordinated with the substance of the remedy and is no less applicable under the Lands Act.⁶

[6] The application of Louisiana's Art 3536 is, of course, subject to the absence of "inconsistent" and applicable federal law. The Court of Appeals acknowledged that Rodrigue forecloses direct applicability of the "inconsistent" laches doctrine through admiralty law. But, by applying laches as a matter of federal common law, it

[404 US 104]

sought to re-introduce the doctrine through a back door.⁷ This approach subverts the congressional intent documented in Rodrigue, *id.*, at 359-366, 23 L Ed 2d 366-370, that admiralty doctrines should not apply under the Lands Act.

[7-9] Moreover, the Court of Appeals' approach amounts to an inappropriate creation of federal common law. Even when a federal statute creates a wholly federal right

but specifies no particular statute of limitations to govern actions under the right, the general rule is to apply the state statute of limitations for analogous types of actions. See *Auto Workers v Hoosier Corp.*, 383 US 696, 16 L Ed 2d 192, 86 S Ct 1107; *Cope v Anderson*, 331 US 461, 91 L Ed 1602, 67 S Ct 1340; *Campbell v Haverhill*, 155 US 610, 39 L Ed 280, 15 S Ct 217; Note, *Federal Statutes Without Limitations Provisions*, 53 Col L Rev 68 (1953). A special federal statute of limitations is created, as a matter of federal common law, only when the need for uniformity is particularly great or when the nature of the federal right demands a particular sort of statute of limitations. See *Holmberg v Armbricht*, 327 US 392, 90 L Ed 743, 66 S Ct 582, 162 ALR 719; *McAllister v Magnolia Petroleum Co.*, 357 US 221, 2 L Ed 2d 1272, 78 S Ct 1201. But, under the Lands Act, there is not even such limited freedom to create a federal statute of limitations, for Congress specified that a comprehensive body of state law should be adopted by the federal courts in the absence of existing federal law. Congress specifically rejected national uniformity and specifically provided for the application of state remedies which demand state, not federal, statutes of limitation. Thus, Congress made clear provision for filling in the "gaps" in federal law; it did not intend that federal

6. Here we are not dealing with mere "housekeeping rules" embodied in state law. Cf. *Hanna v Plumer*, 380 US 460, 473, 14 L Ed 2d 8, 17, 85 S Ct 1136.

7. The Court of Appeals justified its creation of federal common law in this

instance by suggesting that personal injury actions under the Lands Act are in a "quasi maritime area which is traditionally imbued with the laches doctrine and which presents a strong federal urge toward uniformity." 430 F2d, at 32.

[404 US 105]
courts fill in those "gaps"
themselves by creating new federal
common law.⁸

II

Although we hold that Louisiana's one-year statute of limitations must be applied under the Lands Act as interpreted in *Rodrigue*, we do not blind ourselves to the fact that this is, in relevant respect, a pre-*Rodrigue* case. The respondent's injury occurred more than three years before the announcement of our decision in *Rodrigue*. He instituted the present lawsuit more than one year before *Rodrigue*. Yet, if the Louisiana statute of limitations controls in this case, his action was time barred more than two years before *Rodrigue*. In these circumstances, we must consider the respondent's argument that the state statute of limitations should be given nonretroactive application under *Rodrigue*.

[11-13] In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, see, e. g., *Hanover Shoe v. United Shoe Machinery Corp.*, supra, at 496, 20 L Ed 2d at 1243, or by deciding an issue of first im-

8. Contrary to the suggestion by Mr. Justice Douglas, our holding today is consonant with *Levinson v. Deupree*, supra, n. 5. Since *Levinson* involved a federal court's obligation to adopt state procedural rules in an admiralty action, it has very limited relevance to the instant case, which involves an action under a statute which ousts admiralty law and specifically directs that state law shall be adopted as federal law. Moreover, *Levinson* held only that state "procedural niceties relating to amendments of pleadings" need not be applied by federal admiralty courts, and the opinion emphasized that it was not dealing with an important part of the state action, such as a statute of limitations. 345 US,

pression whose resolution was not clearly foreshadowed, see, e. g., *Allen v. State Board of Elections*, supra, at 572, 22 L Ed 2d at 20. Second, it has been stressed that "we must . . . weigh the merits

[404 US 107]

and demerits, in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Linkletter v. Walker*, supra, at 629, 14 L Ed 2d at 608. Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of non-retroactivity." *Cipriano v. City of Houma*, supra, at 706, 23 L Ed 2d at 652.

[2, 14] Upon consideration of each of these factors, we conclude that the Louisiana one-year statute of limitations should not be applied retroactively in the present case. *Rodrigue* was not only a case of first impression in this Court under the Lands Act, but it also effectively overruled a long line of decisions by the Court of Appeals for the Fifth Circuit holding that admiralty law, including the doctrine of laches, applies through the Lands Act. See, e. g., *Pure Oil Co. v. Snipes*, 293 F2d

at 651-652, 97 L Ed at 1323, 1324. As pointed out above, our holding today does not extend to such state "housekeeping rules." See n. 6, supra.

[9] *Richards v. United States*, 369 US 1, 7 L Ed 2d 492, 82 S Ct 585, also referred to by Mr. Justice Douglas, held that, under the Federal Tort Claims Act, a federal court must apply "the whole law of the State where the act or omission occurred." *Id.*, at 11, 7 L Ed 2d at 499. Insofar as *Richards* bears on the present case, it supports our holding that federal courts should not create interstitial federal common law when the Congress has directed that a whole body of state law shall apply.

U. S. SUPREME COURT REPORTS

60; *Movable Offshore Co. v Qusley*, 346 F2d 870; *Loffland Bros. Co. v Roberts*, 386 F2d 540. When the respondent was injured, for the next two years until he instituted his lawsuit, and for the ensuing year of pretrial proceedings, these Court of Appeals decisions represented the law governing his case. It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was to rely on the law as it then was. "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." *Griffin v Illinois*, 351 US 12, 26, 100 L Ed 891, 903, 76 S Ct 585, 55 ALR 2d 1055 (Frankfurter, J., concurring in judgment).

[15] To hold that the respondent's lawsuit is retroactively time barred would be anomalous indeed. A primary purpose underlying the absorption of state law as federal

[404 US 1081]

law in the Lands Act was to aid injured employees by affording them comprehensive and familiar remedies. *Rodrigue v Aetna Casualty & Surety Co.*, supra, at 361, 365, 23 L Ed 2d at 367, 369. Yet retroactive application of the Louisiana statute of limitations to this case would deprive the respondent of any remedy whatsoever on the basis of superseding legal doctrine that was quite unforeseeable. To abruptly terminate this lawsuit that has proceeded through lengthy and, no doubt, costly discovery stages for a

10. We do not hold here that *Rodrigue*, in its entirety, must be applied nonretroactively. Rather, we hold only that state statutes of limitations, applicable under *Rodrigue's* interpretation of the Lands Act, should not be applied retroactively.

year would surely be inimical to the beneficent purpose of the Congress.

It would also produce the most "substantial inequitable results," *Cipriano v City of Houma*, supra, at 706, 23 L Ed 2d at 652, to hold that the respondent "slept on his rights" at a time when he could not have known the time limitation that the law imposed upon him. In *Cipriano v City of Houma*, supra, we invoked the doctrine of nonretroactive application to protect property interests of "cities, bondholders, and others connected with municipal utilities"; and, in *Allen v State Board of Elections*, supra, we invoked the doctrine to protect elections held under possibly discriminatory voting laws. Certainly, the respondent's potential redress for his allegedly serious injury—an injury that may significantly undercut his future earning power—is entitled to similar protection. As in *England v State Board of Medical Examiners*, supra, nonretroactive application here simply preserves his right to a day in court.¹⁰

[404 US 1091]

Both a devotion to the underlying purpose of the Lands Act's absorption of state law and a weighing of the equities requires nonretroactive application of the state statute of limitations here. Accordingly, although holding that the opinion of the Court of Appeals reflects a misapprehension of *Rodrigue*, we affirm its judgment remanding this case to the trial court.

It is so ordered.

STOP

Retroactive application of all state substantive remedies under *Rodrigue* would not work a comparable hardship or be so inconsistent with the purpose of the Lands Act.

Mary E. BARGER, Plaintiff-Appellee,
Cross-Appellant,

v.

PETROLEUM HELICOPTERS, INC.,
Defendant-Appellant, Cross-Appellee.

No. 81-2262.

United States Court of Appeals,
Fifth Circuit.

Nov. 10, 1982.

Rehearing and Rehearing En Banc
Denied Jan. 6, 1983.

Rehearing Opinion Amended
Jan. 13, 1983.

Before BROWN, RUBIN and REAV-
LEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

This case raises many of the issues we decided in *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5th Cir.1982). We, therefore, address in detail only one issue that distinguishes this case: as to claims against a helicopter pilot's employer for the death of the pilot while transporting passengers to work on the outer Continental Shelf, is the Longshoremen's and Harbor Workers' Compensation Act the exclusive remedy? We conclude that such a pilot is not covered by the Jones Act because an aircraft is not a vessel, that the Outer Continental Shelf Lands Act applies to the pilot, and that the LHWCA is the exclusive remedy for those who have claims resulting from his death.

Walter Barger, like Walter Kolb, one of the decedents in *Smith*, was a helicopter pilot regularly engaged in transporting oil field workers and equipment from Louisi-

ana to platforms located in the Gulf of Mexico on the outer Continental Shelf. While he was flying a helicopter carrying eleven passengers, the helicopter crashed into the Gulf forty miles offshore, killing all aboard. Barger's widow and children seek damages in admiralty for his death from his employer, Petroleum Helicopters,¹ contending that Barger was a Jones Act seaman and also asserting maritime tort claims for the alleged unseaworthiness of the helicopter. After trial on the merits, the district court sustained both claims and awarded damages.

We held in *Smith* that the wrongful death claim of Kolb's beneficiaries against a third party, not the decedent's employer, arising from the crash of an aircraft into the high seas, is properly within admiralty jurisdiction by virtue of decisions so interpreting the Death on the High Seas Act, 46 U.S.C.A. §§ 761-768 (West 1975 & Supp. 1982) (DOHSA). *Smith*, 684 F.2d at 1108-12. The accident involved in *Smith* occurred on the outer Continental Shelf, but we decided that § 4(a) of the OCSLA, 43 U.S.C. § 1333(a) (Supp. IV 1980), making state law applicable as surrogate federal law to accidents occurring on fixed platforms, does not supersede the DOHSA so as to oust admiralty jurisdiction over the plaintiff's claim.²

The wrongful death claim in this case, unlike the Kolb claim in *Smith*, is asserted against the decedent's employer, Petroleum Helicopters. Section 4(b) of the OCSLA provides, "[w]ith respect to ... death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting ... the natural resources

1. Suit was also filed against Bell Helicopter Textron, a division of Textron, Inc., the manufacturer of the helicopter. Bell and the plaintiff agreed that, if Bell were cast in judgment, Bell would pay the plaintiff \$225,000 and waive any right to appeal. The district judge found Bell also liable and apportioned liability 20% to Bell and 80% to Petroleum Helicopters, 514 F.Supp.

1199. Thus, no issues relating to the plaintiffs' claims against Bell are before us.

2. See *Smith*, 684 F.2d at 1109-11. For similar reasons, we held that Petroleum Helicopters' claim for property damage arising from the same accident was likewise not ousted from admiralty jurisdiction by the OCSLA. See *id.* at 1112.

... of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [33 U.S.C.A. §§ 901-950 (West 1978 & Supp.1982) (LHWCA)]." 43 U.S.C.A. § 133(b).³ Section 933(i) of the LHWCA provides that this compensation is the exclusive remedy of an injured employee against his employer. 33 U.S.C.A. § 933(i). Therefore, if Barger was covered by 43 U.S.C. § 1333(b), there can be no recovery against his employer under general maritime law. Even if admiralty jurisdiction existed because Barger's death resulted from an aircraft crash on the high seas, see *Smith*, 684 F.2d at 1109, recovery would be barred by § 933(i) and the claim would fail on the merits.

[1] The Barger plaintiffs argue that Barger was a Jones Act seaman, and therefore excluded from coverage under 43 U.S.C. § 1333(b). That section provides that the term "employee" does not include "a master or member of a crew of any vessel." 43 U.S.C. § 1333(b)(1). For the same reasons discussed in *Smith*, 684 F.2d at 1112-14, we conclude that a helicopter cannot be considered a "vessel," and, therefore, that this exclusion from LHWCA coverage does not extend to Barger.

[2] *Smith* involved several claims. Jordan, whose claim was asserted by his beneficiary (Smith), was flying a plane. Kolb and Barger were both piloting helicopters. Jordan's aircraft, like Barger's, had attachments enabling it to land on and take off from water. Kolb's helicopter apparently had no such attachment. But each of these aircraft, whether or not fitted with pontoons, was designed primarily to fly through the air not to travel on water. The dissent of our respected colleague apparently assumes that a helicopter sans pontoons used for the self-same purpose, to transport

personnel to and from offshore platforms, is not a vessel. Neither a plane nor a helicopter undergoes a miraculous transformation from aircraft into vessel when pontoons are attached to it, and their pilots do not by this act become members of a "vessel's" crew. The helicopter's amphibian adaptations were designed solely to permit it to take off from and land on water and to taxi on water in order to position itself for loading and unloading with a view to travel through the air. It was an aircraft that might use the surface of the water for a time to facilitate airborne commerce. An airplane does not become an automobile because it has wheels attached and can taxi on runways. The wheels no more change aircraft into land vehicles than pontoons change aircraft into vessels. Just as a vessel does not lose its nautical quality merely because it is anchored for a time to serve as a drilling platform, an aircraft does not become a vessel because it is adapted to float and taxi on the water for brief periods in order to perform incidental functions that aid in its primary mission. The Jones Act was designed to aid those who face the hazards of the sea, not the perils of the air. Barger did not meet death from a collision at sea or the action of the waves but as a result of an aircraft disaster. See Symposium, *Aircraft as Vessels Under the Jones Act and General Maritime Law*, 22 S. Tex. L.J. 595, 600-03 (1982).

[3] It remains only to be determined, then, whether the claim against Barger's employer is covered by the OCSLA. This depends on (1) whether Barger's death was the "result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting ... the natural resources ... of the outer Continental Shelf," and (2) whether Barger's employer, Petroleum Helicopters, was an "employer" within the intentment of 43 U.S.C. § 1333(b)(2).

3. The section continues:

For the purposes of the extension of the provisions of the Longshoremen's and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel

(2) the term "employer" means an employer any of whose employees are employed in [exploring for, developing, removing, or transporting by pipeline the natural resources ... of the subsoil and seabed of the outer Continental Shelf].

43 U.S.C.A. § 1333(b) (West Supp.1982).

The first of these conditions is clearly met. In *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.1982), a Chevron Oil Company employee was killed when the Chevron-owned helicopter in which he was a passenger crashed on the high seas over the Shelf. We held that the compensation act provided Stansbury's sole remedy against his employer, Chevron, because Stansbury had been inspecting work done under his supervision on a fixed rig located on the Shelf. "His work furthered the rig's operations and was in the regular course of the extractive operations on the [Shelf]. But for those operations, he would not have been in the helicopter. His death, therefore, occurred 'as a result of operations' as required by the OCSLA." *Id.* at 951 (emphasis added). Barger likewise would not have been killed in a helicopter crash in the Gulf of Mexico "but for" the fact that he was employed to transport eleven workers to a fixed platform on the Shelf. His work furthered mineral exploration and development activities and was in the regular course of such activities.

With respect to the second condition for OCSLA coverage, the term "employer" means "an employer any of whose employees are employed in [operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting ... the natural resources ... of the outer Continental Shelf]." 43 U.S.C. § 1333(b)(2). Unlike the employer in *Stansbury*, Barger's employer, Petroleum Helicopters, was not itself engaged in mineral operations. However, helicopter transportation of men and equipment from the mainland to the offshore rigs and back plays an important role in "developing" the Shelf. This transportation is an "operation

conducted ... for the purpose of" natural resource development. Helicopter pilots involved in these operations perform the same function with respect to resource development whether employed directly by a producer or by a separate contractor, and should not be treated differently on the basis of who their immediate employer is. We decline to inject another element of inconsistency into an area already beset by more than its fair share of incongruous results.⁴

Aside from the fact that this case involves an employer and employee, the only kind of claim to which the compensation remedy applies, there is another important distinction between Barger's claim and the claim in *Smith*. The OCSLA compensation coverage provision already quoted is expansive. It extends to every injury or death "occurring as a result of operations ... for the purpose of exploring for, developing, removing, or transporting ... natural resources." 43 U.S.C.A. § 1333(b). The state law extension clause, however, is considerably narrower, providing only for the application of state law to "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a). Thus state law is made applicable only to workers in certain areas and not to all employees engaged in mineral development, while the compensation statute reaches any employee killed or injured while exploiting the Shelf's resources.

We, therefore, hold that Barger's exclusive remedy against his employer was LHWCA compensation.⁵ The district court's judgment is REVERSED and the case is REMANDED for further proceedings not inconsistent with this opinion.

4. See generally Robertson, *Injuries to Marine Petroleum Workers: A Plea for Radical Simplification*, 55 Tex.L.Rev. 973, 973 (1977) ("Since the oil industry went offshore, the legal system has struggled to produce a body of injury law that is rational, fair, internally consistent, and acceptably productive of safety incentives. The result has been chaos.") (footnote omitted).

5. The district court held in the alternative that, even if Barger were covered by the LHWCA, section 905(b) of that act gives a covered em-

ployee the right to bring an action against the "vessel owner" for negligence. Citing *Smith v. M/V Captain Fred*, 546 F.2d 119 (5th Cir.1977), the court noted that the "circumstances that the vessel owner and the employer are the same entity does not preclude such an action." However, section 905(b) is simply irrelevant here unless a helicopter is a "vessel." We have concluded that it is not. See text *supra* and *Smith*, 684 F.2d at 1112-13. Therefore, workers' compensation remains Barger's sole remedy against his employer.

STOI

JOHN R. BROWN, Circuit Judge, dissenting:

To the dual holding¹ that the helicopter was not a "vessel" and Barger, its pilot, was not a "seaman", I must respectfully dissent.

To narrow the point of difference, I wish to make clear the extensive areas in which I am in full agreement with Judge Rubin's scholarly analysis. Without a doubt, 43 U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act (OCSLA) brings into play § 933(i) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) which prescribes the exclusive remedy for injury and death cases by the Act. I quite agree that Barger's death was the "result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting . . . the natural resources . . . of the Outer Continental Shelf . . .", 43 U.S.C. § 1333(b); and that his employer, Petroleum Helicopters, Inc., was engaged in such operations in performing the essential service of transporting men and equipment from the mainland to the offshore rigs.

At the same time, I agree the case is not controlled by the local law of the adjacent state (Louisiana) as "surrogate" federal law under the OCSLA, 43 U.S.C. § 1333(a)(2)(A). See text accompanying n. 25, 684 F.2d at 1109. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969).² I also agree that the Kolb claim against the third party in *Smith* for the death of a helicopter pilot in waters off the Outer Continental Shelf was a maritime claim within the jurisdiction of the admiralty. 684 F.2d 1111-12.

And I embrace wholeheartedly the Court's conclusion that the suit by the helicopter owner in the Kolb claim of *Smith* for loss of a helicopter was within the admiralty jurisdiction. *Id.* at 1112. All of this means that for the death of Barger the Longshoremen's Act is the exclusive remedy against the employer, Petroleum Helicopters, Inc., unless he was "... a master or member of the crew of [a] vessel" 43 U.S.C. § 1333(b)(1).

This dramatizes the narrow, but significant, difference in our views. The Court having held (i) in the Kolb third party death action that the claim under DOHSA was within the admiralty and it was so maritime as to be beyond the reach of adjacent surrogate law, 43 U.S.C. § 1333(a)(2)(A); and having held (ii) in the claim for the owner's loss of the helicopter that the helicopter was engaged "in a maritime-type function, transporting persons over the sea", 684 F.2d at 1111, because the aircraft was "being used in place of a vessel to ferry personnel and supplies to and from offshore drilling structures, ..." and this bore "... the type of significant relationship to traditional maritime activity ... necessary to invoke admiralty jurisdiction ...", *Id.* at 1112, the case suddenly loses its admiralty character by the interposition of the Longshoremen's Act.

It is no answer that this is what Congress has prescribed since the LHWCA provides itself that seamen are excluded. The helicopter is doing what a vessel would ordinarily do—transport persons and property to and from the mainland and the offshore structure. The pilot is doing what the master and crew of a vessel would do, namely, operate the craft. Each activity is maritime and maritime related. Each meets the exclusions and principles set forth in *Executive Jet Aviation, Inc. v. City of Cleveland*,

1. The dual determination was based, in effect, on the almost contemporaneous holding of the Court as to the *Smith* claim in *Smith v. Pan Air Corporation*, 684 F.2d 1102, 1112, n. 39 (5th Cir.1982). Of necessity, this dissent attacks that determination. Instead of concurring specially because of a decision binding on me until altered by the Court en banc, I am dissenting, since with the filing of this dissent I will seek formally rehearing en banc, F.R.A.P. Rule 35, of the instant case which will inevitably bring into question the correctness of the *Smith* decision.

2. The Court states:

Unlike both *Monk* and the workers considered in *Rodrigue*, the helicopter pilot was engaged in a maritime-type function, transporting persons over the seas.

We hold, therefore, that admiralty jurisdiction over Kolb's claim against nonemployer third parties is not ousted by section 1333(a) of the OCSLA.

684 F.2d at 1111-12 (note omitted).

HERB'S WELDING, INC. v GRAY
470 US 414, 84 L Ed 2d 406, 105 S Ct 1421

[470 US 414]
HERB'S WELDING, INC., et al., Petitioners

v.
ROBERT H. GRAY, Jr., et al.

470 US 414, 84 L Ed 2d 406, 105 S Ct 1421

[No. 83-728]

Argued October 3, 1984. Decided March 18, 1985.

OPINION OF THE COURT

[470 US 415]

Justice White delivered the opinion of the Court.

[1a] The Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], provides compensation for the death or disability of any person engaged in "maritime employment," § 902(3), if the disability or death results from an injury incurred upon the navigable waters of the United States or any adjoining pier or other area customarily used by an employer in loading, unloading, repairing, or building a vessel, § 903(a). Thus, a worker claiming under the Act must satisfy

[470 US 416]

both a "status" and a "situation" test. The court below held that respondent Robert Gray, a welder working on a fixed offshore oil-drilling platform in state territorial waters, was entitled to benefits under the Act. We reverse for the reason that Gray was not engaged in maritime employment.

I

Respondent Gray worked for Herb's Welding, Inc., in the Bay

Marchand oil and gas field off the Louisiana coast. Herb's Welding provided welding services to the owners of drilling platforms. The field was located partly in Louisiana territorial waters, i. e., within three miles of the shore, and partly on the Outer Continental Shelf. Gray ate and slept on a platform situated in Louisiana waters. He spent roughly three-quarters of his working time on platforms in state waters and the rest on platforms on the Outer Continental Shelf. He worked exclusively as a welder, building and replacing pipelines and doing general maintenance work on the platforms.

[2a, 3a] On July 11, 1975, Gray was welding a gas flow line on a fixed platform located in Louisiana waters. He burnt

[470 US 417]

through the bottom of the line and an explosion occurred. Gray ran from the area, and in doing so hurt his knee. He sought benefits under the LHWCA for lost wages, disability, and medical expenses. When petitioner United States Fidelity & Guaranty Co., the workers' compensation carrier for Herb's Welding, denied LHWCA benefits, Gray filed a complaint with the Department of Labor. The Administrative Law Judge (ALJ), relying on our decision in *Rodrigue v Aetna Casualty & Surety Co.* 395 US 352, 23 L Ed 2d 360, 89 S Ct 1835 (1969), ruled that because Gray's work was totally involved in the exploration for, and development and transmission of, oil and gas from submerged lands, it was not relevant to traditional maritime law and lacked any significant maritime connection. Gray therefore did not satisfy the LHWCA's status requirement.

The Benefits Review Board re-

U.S. SUPREME COURT REPORTS

versed on other grounds. 12 BRBS 752 (1980). By a vote of 2-1, it concluded that, irrespective of the nature of his employment, Gray could recover by virtue of a provision of the Outer Continental Shelf Lands Act, 67 Stat 462, 43 USC § 1331 et seq. [43 USCS §§ 1331 et seq.] (Lands Act), that

[470 US 418]

grants LHWCA benefits to offshore oil workers injured on the Outer Continental Shelf.⁴ Although Gray had been injured in state waters, the Board felt that his injury nonetheless could be said to have occurred, in the words of the statute, "as a result of" operations on the outer shelf. It considered his work "integrally related" to such operations. 12 BRBS, at 757. The dissenting Board member argued that the Lands Act provides LHWCA benefits only for injuries actually occurring in the geographic area of the outer shelf. *Id.*, at 761-763.

The Board reaffirmed its position after the case was remanded to the ALJ for entry of judgment and calculation of benefits, and petitioners sought review in the Court of Appeals for the Fifth Circuit. That court affirmed, relying directly on the LHWCA rather than on the Lands Act. 703 F2d 176 (1983). With regard to the Act's situs requirement, it noted that this Court had compared drilling platforms to wharves in *Rodrigue v Aetna Casualty & Surety Co.*, *supra*. Given that the 1972 Amendments to the LHWCA extended coverage to accidents occurring on wharves, it would be incongruous if they did not also

reach accidents occurring on drilling platforms. Also, since workers injured on movable barges, on fixed platforms on the Outer Continental Shelf, or en route to fixed platforms, are all covered, there would be a "curious hole" in coverage if someone in Gray's position was not. 703 F2d, at 177-178. As for Gray's status, the Court of Appeals, differing with the ALJ, held that Gray's work bore "a realistically significant

[470 US 419]

relationship to traditional maritime activity involving navigation and commerce on navigable waters," *id.*, at 179-180, because it was an integral part of the offshore drilling process, which, the court had held in *Pippen v Shell Oil Co.* 661 F2d 378 (1981), was itself maritime commerce. We granted certiorari. 465 US 1098, 80 L Ed 2d 122, 104 S Ct 1589 (1984).

II

A

When extractive operations first moved offshore, all claims for injuries on fixed platforms proceeded under state workers' compensation schemes. See *Hearings*, at 396, 409, 411. See also *Robertson* 998. With the 1953 passage of the Lands Act, Congress extended LHWCA coverage to oil workers more than three miles offshore. 43 USC § 1333(b) [43 USCS § 1333(b)]. Because until 1972 the LHWCA itself extended coverage only to accidents occurring on navigable waters, 33 USC § 903 (1970 ed) [33 USCS § 903], and because stationary rigs were considered to be

4. The relevant section provides:

"With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline the natural resources, or

involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshoremen's and Harbor Workers' Compensation Act." 67 Stat 463, as amended, 43 USC § 1333(b) [43 USCS § 1333(b)].

HERB'S WELDING, INC. v GRAY
470 US 414, 84 L Ed 2d 406, 105 S Ct 1421

islands, *Rodrigue v Aetna Casualty & Surety Co.*, supra, oil rig workers inside the 3-mile limit were left to recover under state schemes. See, e. g., *Freeman v Chevron Oil Co.* 517 F2d 201 (CA5 1975); *Gifford v Aurand Mfg. Co.* 207 So2d 160 (La App 1968). Any worker, inside or outside the 3-mile limit, who qualified as a seaman was not covered by the LHWCA, but could sue under the Jones Act, 46 USC § 688 [46 USCS § 688], the Death on the High Seas Act, 46 USC § 761 et seq. [46 USCS §§ 761 et seq.], and the general maritime law. Hearings, at 411-414, 450-459, 487; see n 1, supra. See also *Wright, Jurisdiction in the Tidelands*, 32 Tulane L Rev 175, 186 (1958).

So matters stood when Congress amended the LHWCA in 1972. What is known about the congressional intent behind that legislation has been amply described in our prior opinions. See, e. g., *Director, OWCP v Perini North River Associates*, 459 US 297, 74 L Ed 2d 465, 103 S Ct 634 (1983); *Sun Ship, Inc. v Pennsylvania*, 447 US 715, 717-722, 65 L Ed 2d 458, 100 S Ct 2432 (1980); *North-east Marine*

[470 US 420]

Terminal Co. v Caputo, 432 US 249, 256-265, 53 L Ed 2d 320, 97 S Ct 2348 (1977). The most important of Congress' concerns, for present purposes, was the desire to extend coverage to longshoremen, harborworkers, and others who were injured while on piers, docks, and other areas customarily used to load

and unload ships or to repair or build ships, rather than while actually afloat. Whereas prior to 1972 the Act reached only accidents occurring on navigable waters, the amended 33 USC § 903 [33 USCS § 903] expressly extended coverage to "adjoining area[s]." At the same time, the amended definition of an "employee" limited coverage to employees engaged in "maritime employment."

The Act, as amended, does not mention offshore drilling rigs or the workers thereon. The legislative history of the amendments is also silent, although early in the legislative process, a bill was introduced to extend the Act to all offshore oil workers. The bill died in Committee. While hardly dispositive, it is worth noting that the same Committee considered the 1972 Amendments to the LHWCA, and the possible extension of the Lands Act's application of the LHWCA to drilling platforms, apparently without it ever occurring to anyone that the two might have been duplicative. The concurrent but independent reconsideration of both the Lands Act and the LHWCA, the congressional view that the amendments to the latter involved the "[e]xtension of [c]overage to [s]hore-side [a]reas," HR Rep No 92-1441, p 10 (1972), and the absence of any mention of drilling platforms in the discussion of the LHWCA, combine to suggest that the 1972 Congress at least did not intentionally extend the LHWCA to workers such as Gray.⁵

5. Petitioners view Congress' failure to extend LHWCA coverage to all offshore oil workers as an explicit rejection of the position adopted by the court below. However, it appears that the bill, S 1547, was designed not so much to increase the benefits of those not covered, as to limit the remedies of those workers who could qualify as seamen and so were not confined to the workers' compensa-

tion scheme. See 117 Cong Rec 10490-10491 (1971) (statement of Sen. Tower); Hearings, at 396-403, 418-419, 602. The bill was opposed because it would limit recoveries by those who did better without LHWCA coverage. Id., at 589-590, 602. See generally *Boudreaux v American Workover, Inc.* 680 F2d 1034, 1053 (CA5 1982).

U.S. SUPREME COURT REPORTS

[470 US 421]

B

[1b] The rationale of the Court of Appeals was that offshore drilling is maritime commerce and that anyone performing any task that is part and parcel of that activity is in maritime employment for LHWCA purposes. Since it is doubtful that an offshore driller will pay and maintain a worker on an offshore rig whose job is unnecessary to the venture, this approach would extend coverage to virtually everyone on the stationary platform. We think this construction of the Act is untenable.

[1c] The Act does not define the term "maritime employment," but our cases and the legislative history of the amendments foreclose the Court of Appeals' reading. Rodrigue involved two men killed while working on an offshore drilling rig on the Outer Continental Shelf. Their families brought third-party negligence suits in federal court, claiming recovery under both the Death on the High Seas Act and the state law of Louisiana. The District Court ruled that resort could not be had to state law and that the High Seas Act provided the exclusive remedy. The Court of Appeals for the Fifth Circuit affirmed, holding that the men had been engaged in maritime activity on the high seas and that maritime law was the exclusive source of relief. We reversed. First, the platforms involved were artificial islands and were to be treated as though they were federal enclaves in an

upland State. Federal law was to govern accidents occurring on these islands; but, contrary to the Court of Appeals, we held that the Lands Act and borrowed state law, not the maritime law, constituted the controlling federal law. The platforms "were islands, albeit artificial ones, and the accidents had no more connection with the ordinary stuff of admiralty than do

[470 US 422]

accidents on piers." 395 US, at 360, 23 L Ed 2d 360, 89 S Ct 1835. Indeed, observing that the Court had previously "held that drilling platforms are not within admiralty jurisdiction," we indicated that drilling platforms were not even suggestive of traditional maritime affairs. *Id.*, at 360-361, 23 L Ed 2d 360, 89 S Ct 1835.

We also went on to examine the legislative history of the Lands Act and noted (1) that Congress was of the view that maritime law would not apply to fixed platforms unless a statute expressly so provided; and (2) that Congress had seriously considered applying maritime law to these platforms but had rejected that approach because it considered maritime law to be inapposite, a view that would be untenable if drilling from a fixed platform is a maritime operation. The history of the Lands Act at the very least forecloses the Court of Appeals' holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes.⁷

6. The dissent finds "substantial irony" in this analogy in light of the 1972 LHWCA Amendments, which extended coverage landward to piers. *Post*, at 433-434, 84 L Ed 2d, at 420-421. The irony dissipates in light of the fact that while Rodrigue did observe that offshore platforms are like piers, its holding was that they are islands. 395 US, at 360, 23 L Ed 2d 360, 89 S Ct 1835. It has not been suggested that workers on islands are covered by the amended LHWCA.

7. The dissent considers the Lands Act's

extension of the LHWCA to platforms on the Outer Continental Shelf an indication that work thereon is maritime employment. *Post*, at 437-438, 84 L Ed 2d 423-424. However, as the dissent acknowledges, the LHWCA has been extended to several emphatically non-maritime locales. Undeterred, the dissent points out that Congress left regulation of offshore platforms to the Coast Guard. Yet one would not have expected otherwise, since geographically the platforms fall within the Coast Guard's jurisdiction. No one contends that offshore platforms are not offshore.

We cannot assume that Congress was unfamiliar with Rodrigue and the Lands Act when it referred to "maritime employment" in defining the term "employee" in 1972.⁸ It [470 US 423]

would have been a significant departure from prior understanding to use that phrase to reach stationary drilling rigs generally.

[1d] The Fifth Circuit's expansive view of maritime employment is also inconsistent with our prior cases under the 1972 Amendments to the LHWCA. The expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement. But Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is "clear that persons

who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." *Northeast Marine Terminal Co. v Caputo*, 432 US, at 267, 53 L Ed 2d 320, 97 S Ct 2348. While "maritime employment" is not limited to the occupations specifically mentioned in § 2(3),⁹ neither can it be read to eliminate any requirement [470 US 424]

of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." *P. C. Pfeiffer Co. v Ford*, 444 US 69, 80, 62 L Ed 2d 225, 100 S Ct 328 (1979). The Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." HR Rep No. 92-1441, p 11 (1972); S Rep No. 92-1125, p 13 (1972). We have never read "maritime employment" to extend so far

8. We note also that the LHWCA covered an employee injured on navigable waters if his employer had at least one employee engaged in "maritime employment." In contrast, in providing for LHWCA coverage of employees working in offshore oil fields, the Lands Act defined the term "employer" as "an employer any of whose employees are employed in such operations," i. e., "exploring for, developing, removing, or transporting by pipeline the natural resources . . . of the subsoil and seabed of the outer Continental Shelf . . ." 43 USC § 1333(b) [43 USCS § 1333(b)].

9. The LHWCA covers "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker." By the use of the term "including," Congress indicated that the specifically mentioned occupations are not exclusive. See *P. C. Pfeiffer Co. v Ford*, 444 US 69, 77-78, n

7, 62 L Ed 2d 225, 100 S Ct 328 (1979); HR Rep No. 92-1441, p 11 (1972).

There have been occasional legislative efforts to limit the definition of "maritime employment" to enumerated tasks. For example, in 1980 Representative Erlenborn proposed deleting the "maritime employment" language and limiting coverage to "a longshoreman, ship repairman, ship builder, ship breaker, or harbor worker" who "was directly engaged in activities relating to such employment" when injured. HR 7610, 96th Cong, 2d Sess, § 2(a) (1980). His bill specifically excluded "any person who, at the time of injury, was engaged in administration, clerical, custodial, delivery, maintenance, or repair of gear or equipment . . . or any other employments not direct and integral parts of vessel loading, unloading, repairing, building, or breaking." *Ibid.* The bill was referred to Committee, 126 Cong Rec 15417 (1980), and was never reported by the Committee.

U.S. SUPREME COURT REPORTS

beyond those actually involved in moving cargo between ship and land transportation. Both Caputo and P. C. Pfeiffer Co. make this clear and lead us to the conclusion that Gray was not engaged in maritime employment for purposes of the LHWCA.¹⁰

[470 US 425]

[1e] Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication that he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at a platform by boat. Tr of Oral Arg 56. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by

the marine environment," particularly since exploration and development of the Continental Shelf are not themselves maritime commerce.

The dissent emphasizes that Gray was generally on or near the water and faced maritime hazards. Post, at 445-449, 84 L Ed 2d, at 428-430. To the extent this is so, it is relevant to "situs," not "status." To hold that Gray was necessarily engaged in maritime employment because he was on a drilling platform would ignore Congress' admonition that not everyone on a covered situs automatically satisfies the status test. See S Rep No. 92-1125, p. 13 (1972). The dissent considers "[t]he maritime nature of the occupation . . . apparent from examining

[470 US 426]

its location in terms of the expanded situs coverage of the 1972 Amendments." Post, at 446, 84 L Ed 2d, at 429. We

10. This view of "maritime employment" does not preclude benefits for those whose injury would have been covered before 1972 because it occurred "on navigable waters." Director, OWCP v Perini North River Associates, 459 US 297, 74 L Ed 2d 465, 103 S Ct 634 (1983). No claim is made that Gray was injured "on navigable waters." Indeed, it was agreed by all counsel at oral argument that prior to 1972 Gray would not have been covered, except arguably by operation of the Lands Act. See Tr of Oral Arg 11, 46, 52-54. See also 703 F2d, at 179.

In light of the dissent's reliance on Perini post, at 442-443, 84 L Ed 2d, at 426-427, we point out that that decision was carefully limited to coverage of an employee "injured while performing his job upon actual navigable waters." 459 US, at 299, 74 L Ed 2d 465, 103 S Ct 634; see id., at 305, 311-312, 315, 324, 74 L Ed 2d 465, 103 S Ct 634. The Court's rationale was that, first, any employee injured on navigable waters would have been covered prior to 1972, and, second, Congress did not intend to restrict coverage in adopting its "maritime employment" test. The holding was, "of course," limited to workers covered prior to 1972, id., at 324, n. 34, 74 L Ed 2d

465, 103 S Ct 634, a group to which Gray does not belong. The opinion says nothing about the contours of the status requirement as applied to a worker, like Gray, who was not injured on navigable waters. To hold that enactment of the status requirement did not constrict prior coverage is wholly different from refusing to view that requirement as a meaningful limit on the Act's extended coverage.

11. The general counsel to the International Association of Drilling Contractors stated to the Senate Subcommittee in 1972:

"Irrespective of design, bottom resting, semi-submersible, or full floating, these structures [drilling platforms] perform only as a base from which the drilling industry conducts its operations. The operations, once the structure is in place, are no different from that which takes place on dry land. All of the equipment and methods utilized in the drilling operations are identical to our land based operations. The exposure to employee injuries are the same. Accident frequency rates and severity of injury are no greater, in fact less, because of crew selection and confinement to an area permits concentrated training and safety programs." Hearings, at 410-411.

recognize that the nature of a particular job is defined in part by its location. But to classify Gray's employment as maritime because he was on a covered situs, post, at 448, 84 L Ed 2d, at 430, or in a "maritime environment," post, at 450, 84 L Ed 2d, at 431, would blur together requirements Congress intended to be distinct. We cannot thus read the status requirement out of the statute.¹²

III

Respondents, and the dissenters, object that denying coverage to someone in Gray's position will result in exactly the sort of inconsistent, checkered coverage that Congress sought to eliminate in 1972. In the words of the court below, it creates a "curious hole" in coverage, 703 F2d, at 178, because Gray would have been covered had he been injured on navigable waters or on the outer shelf.

We do not find the argument compelling. First, this submission goes far beyond Congress' undoubted desire to treat equally all workers en-

gaged in loading or unloading a ship, whether they were injured on the ship or on an adjoining pier or dock. The former were covered prior to 1972; the latter were not. Both are covered under the 1972 Amendments. Second, there will always be a boundary to coverage, and there will always be people who cross it during their employment. *Nacirema Operating Co. v Johnson*, 396 US 212, 223-224, 24 L Ed 2d 371, 90 S Ct 347 (1969). If that phenomenon was enough to require coverage, the Act would have to reach much further than

[470 US 427]

anyone argues that it does or should. Third, the inconsistent coverage here results primarily from the explicit geographic limitation to the Lands Act's incorporation of the LHWCA. Gray would indeed have been covered for a significant portion of his work-time, but because of the Lands Act, not because he fell within the terms of the LHWCA.¹³ Congress' desire to make LHWCA coverage uniform reveals little about the position of those for whom partial coverage results from a separate statute. This is especially true because that statute draws a clear geo-

12. Throughout these proceedings, Gray has argued that he need not satisfy the status/situs test because he falls within the Lands Act's incorporation of LHWCA benefits. See 43 USC § 1333(b) [43 USCS § 1333(b)]. The Benefits Review Board so held. He repeats that argument in this Court, as he is free to do. *United States v New York Telephone Co.* 434 US 169, 186, n 8, 54 L Ed 2d 376, 98 S Ct 364 (1977). However, it has not been fully briefed and argued here and was not discussed by the Court of Appeals. We therefore decline to consider it. See *Dandridge v Williams*, 397 US 471, 475-476, n 6, 25 L Ed 2d 491, 90 S Ct 1153 (1970). It is open to the Court of Appeals on remand.

13. Gray traveled between platforms by boat and might have been covered, before or after 1972, had he been injured while in

transit. See *Director, OWCP v Perini North River Associates*, 459 US, at 324, 74 L Ed 2d 465, 103 S Ct 634. But see *id.*, at 324, n 34, 74 L Ed 2d 465, 103 S Ct 634 ("We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters"). Even if he would have been covered for some small fraction of his time independent of the Lands Act, however, he is a far cry from the paradigmatic longshoreman who walked in and out of coverage during his workday and spent substantial amounts of his time "on navigable waters." Any coverage attributable to the LHWCA itself was de minimis. We also note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.

U.S. SUPREME COURT REPORTS

graphical boundary that will predictably result in workers moving in and out of coverage.

As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them. See *Victory Carriers, Inc. v Law*, 404 US 202, 216, 30 L Ed 2d 383, 92 S Ct 418 (1971).

IV

[17] Because Gray's employment

SEPARATE OPINION

Justice Marshall, with whom Justice Brennan, Justice Blackmun, and Justice O'Connor join, dissenting.

Today the Court holds that a marine petroleum worker is not covered by the Longshoremen's and Harbor Workers' Compensation Act (LHWCA or Act), 44 Stat 1424, as amended, 33 USC § 901 et seq. [33 USCS §§ 901 et seq.], when pursuing his occupation on a fixed offshore rig within the 3-mile limit of a State's territorial waters. Although such an individual routinely travels over water as an essential part of his job and performs the rest of his job adjacent to and surrounded by water, he is not covered because, in the Court's view, his occupation is not "maritime employment." See § 2(3),

was not "maritime," he does not qualify for benefits under the LHWCA. We need not determine whether he satisfied the Act's situs requirement. We express no opinion on his argument that he is covered by 43 USC § 1333(b). [43 USCS § 1333(b)]. The judgment is reversed, and the

[470 US 428]

case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

33 USC § 902(3) [33 USCS § 902(3)]. The Court reaches this conclusion even though a worker of the same occupation, working in the same industry, and performing the same tasks on a rig located in the same place, would be covered if that rig were one that was capable of floating. Neither the Court, nor any of the parties have identified any reason why Congress might have

[470 US 429]

desired this distinction. To the contrary, a principal congressional goal behind the 1972 Amendments was to rid the Act of just such arbitrary distinctions derived from traditional admiralty jurisprudence. Because the coverage pattern that the Court adopts is at odds with the Act's 1972 Amendments, and because the accident here meets the Amendments'

1. "Floating" petroleum rigs are classified as vessels in admiralty jurisprudence, see *Producers Drilling Co. v Gray*, 361 F2d 432, 437 (CA5 1966), and as such have long been within the Act's coverage. Ante, at 416-417, n 2, 84 L Ed 2d, at 410. It must be emphasized, however, that in admiralty law, the classification of a structure as "floating" turns only on its capacity to float, and not on the relevance of buoyancy to its typical use or its state at the time of an injury. Many "floating" offshore petroleum rigs are so classified because

they are floated to their drilling sites; but once there, they are elevated above the water and supported by legs that rest on the ocean bottom. See *Producers Drilling Co.*, supra, at 437 (classification includes "almost any structure that once floated or is capable of floating on navigable waters . . ." and . . . includes 'special purpose structures not usually employed as a means of transport by water but designed to float on water'") (quoting *Offshore Co. v Robison*, 266 F2d 769, 771 (CA5 1959). See also n 14, *infra*.

HERB'S WELDING, INC. v GRAY
470 US 414, 84 L Ed 2d 406, 105 S Ct 1421

status and situs tests, I respectfully
dissent.

U.S. SUPREME COURT REPORTS

[453 US 473]

GULF OFFSHORE COMPANY, A DIVISION OF THE POOL COMPANY,
Petitioner,

v

MOBIL OIL CORPORATION et al.

453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

[No. 80-590]

Argued March 31, 1981. Decided July 1, 1981.

OPINION OF THE COURT

[453 US 475]

Justice Powell delivered the opinion of the Court.

[1a, 2a] This case requires us to determine whether federal courts have exclusive jurisdiction over personal injury and indemnity cases arising under the Outer Continental Shelf Lands Act, 67 Stat 462, as amended, 43 USC § 1331 et seq. (1976 ed and Supp III) [43 USCS §§ 1331 et seq.]. We also consider whether the rule of *Norfolk & Western R. Co. v Liepelt*, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980), that the jury be instructed that personal injury damages awards are not subject to federal income taxation, is applicable to such a case.

I

Respondent, Mobil Oil Corp., contracted with petitioner, Gulf Offshore Co., for the latter to perform certain completion operations on oil drilling platforms offshore of Louisiana. As part of the agreement, petitioner promised to indemnify Mobil for all claims resulting directly or indirectly from the work. While the work was in progress in September 1975, the advent of Hurricane Eloise

required that workers be evacuated from oil platforms in the Gulf of Mexico.

Steven Gaedecke was an employee of petitioner working on an oil drilling platform above the seabed of the Outer Continental Shelf. As the storm approached, a boat chartered [453 US 476]

by Mobil took him safely aboard. Shortly thereafter, while assisting crewmen attempting to evacuate other workers from the platforms in turbulent sea, he was washed across the deck of the vessel by a wave. He suffered injuries primarily to his back.

Gaedecke brought this suit for damages in the District Court of Harris County, a Texas state court, alleging negligence by Mobil and the boatowner. Mobil filed a third-party complaint for indemnification against petitioner.¹ In its third-party answer, petitioner denied that the state court had subject-matter jurisdiction over the third-party complaint. Petitioner argued that Mobil's cause of action arose under the Outer Continental Shelf Lands Act (OCSLA), and that OCSLA vested exclusive subject-matter jurisdiction

1. Mobil claimed indemnification on the grounds of both its contract with petitioner and the allegation that petitioner's negligence caused the accident. Prior to trial Gaedecke entered into a conditional settlement agreement with Mobil, which limited his potential

recovery against Mobil to \$200,000; in return Mobil agreed to proceed against petitioner for indemnification only on the basis of the contract. Gaedecke also settled his claim with the boatowner.

U.S. SUPREME COURT REPORTS

in a United States district court. The Texas trial court rejected this contention, and the case went to trial before a jury.

In submitting the case to the jury, the trial court denied a request by petitioner to instruct them that personal injury damages awards are not subject to federal income taxation and that they should not increase or decrease an award in contemplation of tax consequences. The jury found Mobil negligent and awarded Gaedecke \$900,000 for his injuries. The jury also found, however, that Gaedecke sustained his injuries while performing work subject to the contract of indemnification. Based on the two verdicts, the trial judge entered judgment against petitioner in the amount of \$900,000.

The Texas Court of Civil Appeals affirmed. 594 SW2d. 496. (1979). It held that the Texas state courts had subject-matter

[453 US 477]

jurisdiction over the causes of action.² It acknowledged that OCSLA governed the case, but found no explicit command in the Act that federal-court jurisdiction be exclusive. The court also observed that exclusive federal-court jurisdiction was unnecessary because the Act incorporates as federal law in personal injury actions the laws of the State adjacent to the scene of the events, when not inconsistent with other federal laws. 43 USC § 1333(a)(2) [43 USCS § 1333(a)(2)]. Thus, the court reasoned, "[t]he end result would be an application of the same laws no matter where the forum was located, whether state or federal." 594 SW2d, at 502. The court also held that the trial court did not err in refusing to instruct

the jury that damages awards are not subject to federal income taxation. The Texas Supreme Court denied review.

We granted certiorari to resolve a conflict over whether federal courts have exclusive subject-matter jurisdiction over suits arising under OCSLA and to consider whether an instruction that damages are not taxable is appropriate in such a case. 449 US 1033, 66 L Ed 2d 494, 101 S Ct 607 (1980).

II

A

[3, 4] The general principle of state-court jurisdiction over cases arising under federal laws is straightforward: state courts may assume subject-matter jurisdiction over a federal cause of action absent provision by Congress to the contrary or disabling incompatibility between the federal claim and state-court

[453 US 478]

adjudication. *Dowd Box Co. v Courtney*, 368 US 502, 507-508, 7 L Ed 2d 483, 82 S Ct 519 (1962); *Claffin v Houseman*, 93 US 130, 136, 23 L Ed 833 (1876). This rule is premised on the relation between the States and the National Government within our federal system. See *The Federalist* No. 82 (Hamilton). The two exercise concurrent sovereignty, although the Constitution limits the powers of each and requires the States to recognize federal law as paramount. Federal law confers rights binding on state courts, the subject-matter jurisdiction of which is governed in the first instance by state laws.

2. Texas had in personam jurisdiction over Mobil and petitioner, each of whom does business in Texas. Gaedecke was a resident of Harris County, Tex.

GULF OFFSHORE CO. v. MOBIL OIL CORP.
453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

[5] In considering the propriety of state-court jurisdiction over any particular federal claim, the Court begins with the presumption that state courts enjoy concurrent jurisdiction. See *California v Arizona*, 440 US 59, 66-67, 59 L Ed 2d 144, 99 S Ct 919 (1979). *Dowd Box Co. v Courtney*, 368 US, at 507-508, 7 L Ed 2d 483, 82 S Ct 519. Congress, however, may confine jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests. See *ibid.*; *Claffin*, *supra*, at 137, 23 L Ed 833. See also *Garner v Teamsters*, 346 US 485, 98 L Ed 228, 74 S Ct 161 (1953) (grievance within jurisdiction of National Labor Relations Board to prevent unfair labor practice not subject to relief by injunction in state court).

5. Congress amended and recodified the jurisdictional provisions of OCSLA in 1978, without effecting any change that casts light on the issue of exclusive federal-court jurisdiction before us today. Pub L 95-372, Title II, § 208(b), 92 Stat 657. See S Conf Rep No. 95-1091, p 114 (1978). But cf. Pub L 95-372, Title II, § 208(a)(2)(B), 92 Stat 657 (contemplating suit by the Attorney General in state court to remedy violations of the Act). The grant of jurisdiction to a federal district court is now codified at 43 USC § 1349(b)(1) (1976 ed, Supp III) [43 USCS § 1349(b)(1)]. In this opinion, we employ the Code citations prior to the recodification.

B

[1b, 6, 7a] No one argues that Congress explicitly granted federal courts exclusive jurisdiction over cases arising under OCSLA.
[453 US 479]

Congress did grant United States district courts "original jurisdiction of cases and controversies arising out of or in connection with any operations conducted on the outer Continental Shelf" 43 USC § 1333(b) [43 USCS § 1333(b)]. It is black-letter law, however, that the mere grant of jurisdiction to a federal court does not operate to oust a state court from concurrent jurisdiction over the cause of action.⁶ *United States v Bank of New York Co.*, 296 US 463, 479, 80 L Ed 331, 56 S Ct 343 (1936).

OCSLA declares the Outer Continental Shelf to be an area of "exclusive federal jurisdiction." 43 USC § 1333(a)(1) [43 USCS § 1333(a)(1)].

6. [7b] This principle defeats petitioner's reliance on the provision in § 1333(a)(2): "All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States." The phrase "such applicable laws" refers to the laws of the adjacent States, which § 1333(a)(2) incorporates as federal law for the Outer Continental Shelf. See *infra*, at 480-481, 69 L Ed 2d, at 793. The language relied upon merely makes clear that these borrowed state laws are to be enforced like other federal laws, and nothing indicates an intent to exclude state courts from the subject-matter jurisdiction they exercise generally over federal claims.

Chevron Oil Co. v Huson, 404 US 97, 100, 30 L Ed 2d 296, 92 S Ct 349 (1971).⁷

[453 US 480]

Petitioner does contend that the assertion of exclusive political jurisdiction over the Shelf evinces a congressional intent that federal courts exercise exclusive jurisdiction over controversies arising from operations on the Shelf.

See *Fluor Ocean Services, Inc. v Rucker Co.* 341 F Supp 757, 760 (ED La 1972). This argument is premised on a perceived incompatibility between exclusive federal sovereignty over the Outer Continental Shelf and state-court jurisdiction over controversies relating to the Shelf. We think petitioner mistakes the purpose of OCSLA and the policies necessitating exclusive federal-court jurisdiction.

[8] OCSLA extends the "Constitution and laws and civil and political jurisdiction of the United States" to the subsoil and seabed of the Outer Continental Shelf and to "artificial islands and fixed structures" built for discovery, extraction, and transportation of minerals. 43 USC § 1333(a)(1) [43 USCS § 1333(a)(1)].

7. The legislative history confirms that the purpose of OCSLA was "to assert the exclusive jurisdiction and control of the Federal Government of the United States over the seabed and subsoil of the outer Continental Shelf, and to provide for the development of its vast mineral resources." S Rep No. 411, 83d Cong, 1st Sess, 2 (1953) (hereinafter 1953 S Rep). Congress enacted OCSLA in the wake of decisions by this Court that the Federal Government enjoyed sovereignty and ownership of the seabed and subsoil of the Outer Continental Shelf to the exclusion of adjacent States. See *United States v Texas*, 339 US 707, 94 L Ed 1221, 70 S Ct 918 (1950); *United States v Louisiana*, 339 US 699, 94 L Ed 1216, 70 S Ct 914 (1950). See also *United States v California*, 332 US 19, 91 L Ed 1889, 67 S Ct 1658 (1947). See generally *Maryland v Louisiana*, 451 US 725, 730, 68 L Ed 2d 576, 101 S Ct 2114 (1981). Congress chose to retain exclusive federal control of the administration of

All law applicable to the Outer Continental Shelf is federal law, but to fill the substantial "gaps" in the coverage of federal law, OCSLA borrows the "applicable and not inconsistent" laws of the adjacent States as surrogate federal law.

[453 US 481]

§ 1333(a)(2); *Rodrigue v Aetna Casualty Co.* 395 US 352, 355-359, 23 L Ed 2d 360, 89 S Ct 1835 (1969). Thus, a personal injury action involving events occurring on the Shelf is governed by federal law, the content of which is borrowed from the law of the adjacent State, here Louisiana. See *id.*, at 362-365, 23 L Ed 2d 360, 89 S Ct 1835. Cf. *United States v Kimbell Foods, Inc.*, 440 US 715, 59 L Ed 2d 711, 99 S Ct 1448 (1979) (state law incorporated as federal common law concerning priority of liens created by federal law).

[9] The OCSLA plan is not inimical to state-court jurisdiction over personal injury actions. Nothing inherent in exclusive federal sovereignty over a territory precludes a state court from entertaining a personal injury suit concerning events occurring in the territory and governed by federal law. *Ohio River*

the Shelf because it underlay the high seas and the assertion of sovereignty there implicated the foreign policies of the Nation. See 1953 S Rep, at 6. Much of OCSLA provides a federal framework for the granting of leases for exploration and extraction of minerals from the submerged lands of the Shelf. See 43 USC §§ 1334-1343 [43 USCS §§ 1334-1343].

Congress was not unaware, however, of the close, longstanding relationship between the Shelf and the adjacent States. See 1953 S Rep, at 6. This concern manifested itself primarily in the incorporation of the law of adjacent States to fill gaps in federal law. See *Rodrigue v Aetna Casualty Co.*, 395 US 352, 365, 23 L Ed 2d 360, 89 S Ct 1835 (1969). It should be emphasized that this case only involves state-court jurisdiction over actions based on incorporated state law. We express no opinion on whether state courts enjoy concurrent jurisdiction over actions based on the substantive provisions of OCSLA.

GULF OFFSHORE CO. v MOBIL OIL CORP.
453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

Contract Co. v Gordon, 244 US 68, 61 L Ed 997, 37 S Ct 599 (1917). See 16 USC § 457 [16 USCS § 457] (personal injury and wrongful-death actions involving events occurring "within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State" shall be maintained as if the place were under the jurisdiction of the State). Cf. Evans v Cornman, 398 US 419, 424, 26 L Ed 2d 370, 90 S Ct 1752 (1970) (residents of an area of exclusive federal jurisdiction within a State are "subject to the process and jurisdiction of state courts"). "The judiciary power of every government looks beyond its own local or municipal laws, and in civil cases lays hold of all subjects of litigation between parties within its jurisdiction, though the causes of dispute are relative to the laws of the most distant part of the globe." The Federalist No. 82, p 514 (H Lodge ed 1908) (Hamilton), quoted in Claffin v Houseman, 93 US, at 138, 23 L Ed 833. State courts routinely exercise subject-matter jurisdiction over civil cases arising from events in other States and governed by the other States' laws. See, e.g., Dennick v Railroad Co., 103 US 11, 26 L Ed 439 (1881). Cf. Allstate Ins. Co. v Hague, 449 US 302, 66 L Ed 2d 521, 101 S Ct 633 (1981). That the location of the event giving rise to the suit is an area of exclusive federal jurisdiction rather than another State, does not introduce any new limitation on the forum State's subject-matter

[453 US 482]

jurisdiction.⁸ Ohio River

Contract Co. v Gordon, supra, at 72, 61 L Ed 997, 37 S Ct 599.

8. OCSLA does supersede the normal choice-of-law rules that the forum would apply. See Chevron Oil Co. v Huson, 404 US 97, 102-103, 30 L Ed 2d 296, 92 S Ct 349 (1971). It also provides where proper venue will be found: "in the judicial district in which any

Section 1333(a)(3) provides that "adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom." Petitioner argues that state-court jurisdiction over this personal injury case would contravene this provision. This argument again confuses the political jurisdiction of a State with its judicial jurisdiction. Section 1333(a)(3) speaks to the geographic boundaries of state sovereignty, because Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources. See n 7, supra. The language of the provision refers to "any interest in or jurisdiction over" real property, minerals, and revenues, not over causes of action. Indeed, opponents of OCSLA urged Congress to extend the political boundaries of the States seaward over the Shelf, at least for some purposes. See 99 Cong Rec 7230 (remarks of Sen. Ellender), 7232 (remarks of Sen. Long) (1953). The Senate Report explains that § 1333(a)(3) was intended to make plain that the adoption of state law as federal law cannot be the basis for a claim by the State "for participation in the administration of or revenues from the areas outside of State boundaries." 1953 S Rep, at 23.

[10] We do not think the legislative history of OCSLA can be read to rebut the presumption of concurrent state-court jurisdiction, given Congress' silence on the subject in the statute

defendant resides or may be found, or in the judicial district of the State nearest the place the cause of action arose." 43 USC § 1349(b)(1)(1976 ed, Supp III) [43 USCS § 1349(b)(1)].

itself. Petitioner relies principally on criticisms by the two Senators from Louisiana. Ellender and Long, who opposed the bill that eventually became OCSLA.⁹ Yet "[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros. v Calvert Corp.* 341 US 384, 394, 95 L Ed 1035, 71 S Ct 745, 44 Ohio Ops 395, 60 Ohio L Abs 81, 19 ALR2d 1119 (1951).¹⁰ Moreover, the amendments offered by the Senators sought to confer political control over the Shelf and its mineral wealth on the States, not jurisdiction on the state courts over OCSLA cases. See 99 Cong Rec 7230 (Sen. Ellender), 7232 (Sen. Long) (1953).¹¹

C

[1c] The operation of OCSLA will not be frustrated by state-court jurisdiction over personal injury actions. The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include¹² the desirability of uniform

9. Petitioner also relies on a report made to the Senate Committee by the Department of Justice, which argued that the Federal Government should "have the exclusive control of lawmaking and law enforcement" on the Shelf. 1953 S Rep, at 6. But Congress rejected the Department's premise that the Shelf is "not comparable to . . . federally owned areas within a State." *Ibid.* See *Rodrigue v Aetna Casualty Co.*, 395 US, at 365, 23 L Ed 2d 360, 89 S Ct 1835. Section 1333(a)(1) rather provides that the federal laws apply to the Shelf "to the same extent as if the Outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

10. Senator Long did express the fear that OCSLA placed exclusive jurisdiction over all civil suits in federal district courts. 1953 S Rep, at 66 (minority report); 99 Cong Rec 7233 (1953).

11. Most of the Senators' statements regarding OCSLA's effect on state-court jurisdiction criticize placing exclusive criminal jurisdiction in federal courts. See, e. g., *id.*, at 7231-

interpretation, the expertise of federal judges in federal law, and the assumed greater hospitality of federal courts to peculiarly federal claims.¹³ These factors cannot support exclusive federal jurisdiction over claims whose governing rules are borrowed from state law. There is no need for uniform interpretation of laws that vary from State to State. State judges have greater expertise in applying these laws and certainly cannot be thought unsympathetic to a claim only because it is labeled federal rather than state law.

Allowing personal injury and contract actions in state courts will advance interests identified by Congress in enacting OCSLA. A recurring consideration in the deliberations leading to enactment was "the special relationship between the men working on these [platforms] and the adjacent shore to which they commute to visit their families." *Rodrigue v Aetna Casualty Co.*, 395 US, at 365, 23 L Ed 2d 360, 89 S Ct 1835. Allowing state-court jurisdiction over these cases will allow

7232 (Sen. Ellender). But the statute that gives federal courts exclusive jurisdiction over federal crimes, 18 USC § 3231 [18 USCS § 3231], has no relevance to this case.

12. Exclusive federal-court jurisdiction over a cause of action generally is unnecessary to protect the parties. The plaintiff may choose the available forum he prefers, and the defendant may remove the case if it could have been brought originally in a federal court. 28 USC § 1441(b) [28 USCS § 1441(b)]. Also, exclusive federal jurisdiction will not prevent a state court from deciding a federal question collaterally even if it would not have subject-matter jurisdiction over a case raising the question directly. See Note, *Exclusive Jurisdiction of Federal Courts in Private Civil Actions*, 70 Harv L Rev 509, 510 (1957).

13. See Redish & Muench, *Adjudication of Federal Causes of Action in State Court*, 75 Mich L Rev 311, 329-335 (1976); Note, 70 Harv L Rev, *supra* n 12, at 511-515.

GULF OFFSHORE CO. v MOBIL OIL CORP.
453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

these workers, and their lawyers, to pursue individual claims in familiar, convenient, and possibly less expensive fora. See *Chevron Oil Co. v Huson*, 404 US, at 103, 30 L Ed 2d 296, 92 S Ct 349 (state statute of limitations applies to personal injury actions arising under OCSLA).

In summary, nothing in the language, structure, legislative history, or underlying policies of OCSLA suggests that Congress intended federal courts to exercise exclusive jurisdiction over personal injury actions arising under OCSLA. The Texas courts had jurisdiction over this case.

III

[2b] The Court of Civil Appeals held that petitioner was not entitled to an instruction cautioning the jury that personal

[453 US 485]

injury damages awards are not subject to federal income taxation, §104(a)(2) of the Internal Revenue Code of 1954, 26 USC § 104(a)(2) [26 USCS § 104(a)(2)]. In so ruling the court relied on *Johnson v Penrod Drilling Co.* 510 F2d 234, 236-237 (CA5) (en banc) (per curiam), cert denied, 423 US 839, 46 L Ed 2d 58, 96 S Ct 68 (1975), a Jones Act case where the Court of Appeals prohibited presenting evidence or instructing the jury as to the impact of taxes on damages awards based on lost wages. This Court subsequently held that a defendant in a suit brought under the

14. Liepelt also found error in the trial court's refusal to allow the defendant to introduce evidence showing the effect of income taxes on the plaintiff's future earnings. 444 US, at 493-496, 62 L Ed 2d 689, 100 S Ct 755. This case does not present the question whether this second holding is applicable to OCSLA cases.

15. Respondents argue that we cannot address the necessity of giving the requested instruction because petitioner did not preserve its objection in the trial court in the

Federal Employers' Liability Act (FELA), 45 USC § 51 et seq. [45 USCS §§ 51 et seq.], is entitled to an instruction that damages for lost future wages are not subject to federal income taxation. *Norfolk & Western R. Co. v Liepelt*, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980).¹⁴ Petitioner now argues that Liepelt applies to an OCSLA personal injury action and that this case should be remanded for a new trial on damages before a properly instructed jury.¹⁵

Our first task is to determine the source of law that will govern whether such an instruction must be available in an OCSLA case. OCSLA, as discussed above, mandates that state laws apply as federal laws "[t]o the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws." 43 USC § 1333(a)(2). [43 USCS § 1333(a)(2)]. In any particular case, the adjacent State's law applies to those

[453 US 486]

areas "which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf" Ibid. The statute thus contains an explicit choice-of-law provision. See n. 8, supra. The parties agree that the substantive law of Louisiana applies to this case, unless it is inconsistent with federal law.

[11a, 12a] To apply the statutory directive a court must consider the content of both potentially applicable federal and state law. Subse-

manner required by Texas law. This argument is incorrect. The Texas Court of Civil Appeals held on the merits that petitioner was not entitled to the instruction.

We also reject respondents' contention that we are foreclosed from deciding the issue because petitioner did not introduce any evidence about the effect of taxation on Gaecke's future earnings. No evidentiary predicate is required to instruct a jury not to consider taxes.

quent to the decision of the Texas court, as noted above, we held in *Liepert*, supra, that a defendant in an FELA case is entitled to an instruction that damages awards are not subject to federal income taxation.¹⁶ As FELA afforded no guidance on this issue, the holding articulated a federal common-law rule. The purpose was to eliminate from the deliberations

[453 US 487]

of juries "an area of doubt or speculation that might have an improper impact on the computation of the amount of damages." 444 US, at 498, 62 L Ed 2d 689, 100 S Ct 755.¹⁷ Thus, the instruction furthers strong federal policies of fairness and efficiency in litigation of federal claims. If Congress had been silent about the source of federal law in an OCSLA personal injury case, *Liepert* would

16. [11b, 12b] Respondents' argument that *Liepert* should apply prospectively only is insubstantial. Here, we address a change in the law occurring while the case is on direct appeal. "[A]n appellate court must apply the law in effect at the time it renders its decision." *Thorpe v Housing Authority of City of Durham*, 393 US 268, 281, 21 L Ed 2d 474, 89 S Ct 518, 49 Ohio Ops 2d 374 (1969); see *United States v Schooner Peggy*, 1 Cranch 103, 2 L Ed 49 (1801). While there well might be an exception to the rule to prevent "manifest injustice," *Bradley v Richmond School Board*, 416 US 696, 717, 40 L Ed 2d 476, 94 S Ct 2006 (1974), this equitable exception does not reach a private civil suit where the change does not extinguish a cause of action but merely requires a retrial on damages before a properly instructed jury. *Lang v Texas & Pacific R. Co.* 624 F2d 1275, 1279-1280, and n 9 (CA5 1980). Indeed, considerations of fairness support retroactive application: failure to give the instruction may lead to the plaintiff recovering a windfall award. *Norfolk & Western R. Co. v Liepert*, supra, at 497-498, 62 L Ed 2d 689, 100 S Ct 755.

The overwhelming weight of authority supports retroactive application of this decision. See *O'Byrne v St. Louis Southwestern R. Co.* 632 F2d 1285 (CA5 1980); *Flanigan v Burlington Northern Inc.* 632 F2d 880 (CA8 1980); *Lang v Texas & Pacific R. Co.*, supra; *Crabtree v St. Louis-San Francisco R. Co.*, 89 Ill App 3d 35, 411 NE2d 19 (1980). Other cases have applied *Liepert* retroactively without com-

require that the instruction be given:

But Congress was not silent. It incorporated for this case the applicable law of Louisiana, but only "[t]o the extent. [it is] not inconsistent" with federal law. The statute does not distinguish between federal statutory and judge-made law. It would seem then that if Louisiana law is "inconsistent," *Liepert* controls. Doubt arises, however, because in OCSLA Congress borrowed a remedy provided by state law and thereby "specifically rejected national uniformity" as a paramount goal. *Chevron Oil v Huson*, 404 US, at 104, 30 L Ed 2d 296, 92 S Ct 349. In *Chevron*, we held that Louisiana rather than federal common law provided the federal statute of limitations for personal injury damages actions under OCSLA. We recognized that

ment. Cazad v. Chesapeake & Ohio R. Co., 622 F2d 72 (CA4 1980); *Seaboard Coast Line R. Co. v Yow*, 384 So 2d 13 (Ala 1980). But see *Ingle v Illinois Central Gulf R. Co.* 608 SW2d 76 (Mo App 1980), cert denied, 450 US 916, 67 L Ed 2d 341, 101 S Ct 1359 (1981).

17. The general applicability of *Liepert* is indicated by the Court's quotation with approval of the explanation of need for the instruction in *Domeracki v Humble Oil & Refining Co.* 443 F2d 1245, 1251 (CA3), cert denied, 404 US 883, 30 L Ed 2d 165, 92 S Ct 212 (1971), a longshoreman's action based on the unseaworthiness of a vessel.

"We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in *Dempsey v Thompson*, 363 Mo 339, 251 SW2d 42 (1952), that few members of the general public are aware of the special statutory exemption for personal injury awards contained in the Internal Revenue Code.

"[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it."

"II Harper & James, *The Law of Torts* § 25.12, at 1327-1328 (1956)." *Liepert*, supra, at 497, 62 L Ed 2d 689, 100 S Ct 755. None of the Court's reasoning was directed particularly at FELA.

GULF OFFSHORE CO. v MOBIL OIL CORP.

453 US 473, 69 L Ed 2d 784, 101 S Ct 2870

"Congress made clear provision for filling the 'gaps' in
[453 US 488]

federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law." *Id.*, at 104-105, 90 L Ed 2d 296, 92 S Ct 349. In this case, we face an analogous question: does the incorporation of state law preclude a court from finding that state law is "inconsistent" with a federal common-law rule generally applicable to federal damages actions?

We need answer this question only if Louisiana law would not require that the instruction be given upon timely request. The court below never addressed this question¹⁸ but relied solely on federal case law now superseded. Under these circumstances it is the better practice to remand this case to the Texas Court of Civil Appeals for a determination of whether Louisiana law requires the instruction and, if it does not, whether *Liepelt* displaces the state rule in an OCSLA case. If the court decides that it was error to refuse the instruction, it may then address respondents' argument that petitioner was not prejudiced by the error.

Affirmed in part, vacated in part, and remanded.

Justice Stewart took no part in the consideration or decision of this case.

18. The Louisiana cases that have come to our attention do not provide conclusive guidance. Compare the earlier case of *Guerra v. Young Construction Corp.* 165 So 2d 882 (La App 1964) (not error to deny the instruction), with the later cases of *DeBose v. Trapani*, 295 So 2d 72 (La App 1974), and *Francis v. Government Employers' Ins. Co.* 376 So 2d 609

SEPARATE OPINION

Justice Blackmun, with whom Justice Brennan and Justice Marshall join, concurring in part and concurring in the result.

I join the Court's opinion as to Parts I and II, and I concur in the decision to remand this case for further proceedings as
[453 US 489]

to the applicability of the rule adopted in *Norfolk & Western R. Co. v. Liepelt*, 444 US 490, 62 L Ed 2d 689, 100 S Ct 755 (1980). I write separately because I have reservations about the Court's expressed intention to apply the *Liepelt* rule expansively, a ruling I consider unwise and unnecessary to this case in its present posture.

As the Court makes clear, *ante*, at 488, 69 L Ed 2d, at 797-798 the Texas Court of Civil Appeals on remand must determine, first, what Louisiana law requires as to this form of instruction, and, second, whether that state rule is "inconsistent" with OCSLA or "other federal law." 43 USC § 1333(a)(2) [43 USCS § 1333(a)(2)]. The Court acknowledges, and I agree, that the choice-of-law provision contained in OCSLA creates "[d]oubt," *ante*, at 487, 69 L Ed 2d, at 797, as to whether Congress intended state law or federal law to govern the grant of this instruction. As I understand OCSLA, the purpose of incorporating state law was to permit actions arising on

(La App 1979) (proper to give the instruction). These Louisiana cases were considered by the Court of Appeals for the Fifth Circuit in a diversity case, *Croce v. Bromley Corp.* 623 F2d 1084 (1980), cert denied sub nom *Bromley Corp. v. Cortese*, 450 US 981, 67 L Ed 2d 816, 101 S Ct 1516 (1981), and it followed the holding in *Guerra*.

these federal lands to be determined by rules essentially the same as those applicable to actions arising on the bordering state lands. Congress apparently intended to provide a kind of local uniformity of result, regardless of whether the action arose on shelf lands or on neighboring state lands. I would read the statute, thus, to encourage use of state law, and I would permit the state court to weigh, as an initial matter and only if the Louisiana rule differs from the Liepelt rule, whether Congress' desire for local uniformity outweighs any perceived need, as a matter of federal common law, for the instruction. I do not find it self-evident that Liepelt created a general "federal common-law rule," that so greatly "furthers strong federal policies of fairness and efficiency in litigation of federal claims," ante, at 486, 487, 69 L Ed 2d, at 796, 797, as to require its application in cases governed by the Outer Continental Shelf Lands Act. In my view, this question was not settled in Liepelt, and it remains open for future adjudication.

**CARL BIENVENU, Petitioner, versus, TEXACO, INC; DIRECTOR, OFFICE OF
WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR;
INSURANCE COMPANY OF NORTH AMERICA, Respondents.**

No. 96-60625

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

164 F.3d 901; 1999 U.S. App. LEXIS 249; 1999 AMC 1255

January 11, 1999, Decided

SUBSEQUENT HISTORY: February 17, 1999.

[**1] As Revised

PRIOR HISTORY: Petition for Review of an Order of the Benefits Review Board. 94-0565.

DISPOSITION: REVERSED and REMANDED.

COUNSEL: For CARL BIENVENU, Petitioner: David Bruce Allen, Stephen M. LaRussa & Associates, Houma, LA.

For TEXACO, INC., INSURANCE COMPANY OF NORTH AMERICA, Respondents: Elizabeth Slatten Healy, Jones, Walker, Weachter, Poitevent, Carrere & Denegre, New Orleans, LA. John D. Fitzmorris, Jr., Courtenay, Forstall, Hunter & Fontana, New Orleans, LA. Wayne G. Zeringue, Jr., Jones, Walker, Weachter, Poitevent, Carrere & Denegre, New Orleans, LA.

For DIRECTOR, OFFICE OF WORKER'S COMPENSATION PROGRAMS, U.S. DEPARTMENT OF LABOR, Repondent: Michael Scott Hertzog, Washington, DC. Thomas O. Shepherd, Jr., Clerk, Benefit Review Board, Washington, DC. Carol A. De Deo, US Department of Labor, Dir, Office of Workers Comp. Programs, Washington, DC. Joshua T. Gillelan, II, Office of the Solicitor of Labor, Washington, DC.

JUDGES: Before POLITZ, Chief Judge, and JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER,

BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, and DENNIS, Circuit Judges. * EDITH H. JONES, Circuit Judge, dissenting. DeMOSS, Circuit Judge, with whom SMITH, Circuit Judge, joins dissenting.

* Judges King and Duhe are recused.

OPINION BY: HIGGINBOTHAM; DAVIS

OPINION

[*902] HIGGINBOTHAM and DAVIS, Circuit Judges:

Carl Bienvenu seeks benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA) for injuries sustained on navigable waters during the course of his employment. His petition requires us to enter the unsettled waters of our LHWCA jurisprudence. In deciding that Bienvenu is entitled to LHWCA benefits, we right our wayward precedent and chart a smoother course for future panels to follow.

I.

Bienvenu worked for Texaco, Inc., in the Caillou Island production field as a pumper specialist. By 1987 he had been employed by [*903] Texaco in this field for about twenty-two years. The Caillou Island production field is a five-mile by twelve-mile area located within three miles of the Louisiana coast and contains

approximately 150 to 175 active fixed production platforms. Bienvenu and his fellow employees lived in a base camp on pilings over the water. Bienvenu worked seven days on and seven days off, and on his work days he worked a twelve-hour shift. Bienvenu [*3] was responsible for maintaining and calibrating automated equipment located on fixed production platforms. Bienvenu had the almost exclusive use of a vessel, the MISS JACKIE, along with a skipper to transport him around the field to the platforms where he worked. The ALJ found that during an average twelve-hour work day, Bienvenu spent approximately 75% of his time performing his duties while physically located on a fixed production platform; 16.7% of his time in transit as a passenger on the MISS JACKIE; and 8.3% of his time working on equipment on the back of the MISS JACKIE.

Bienvenu was injured twice during the course of his employment while on board the MISS JACKIE in navigable waters. The first time was while moving his tool box from the dock to the boat, and the second time was while tying the MISS JACKIE to the dock. These injuries forced him to stop working.

Bienvenu claimed benefits under the LHWCA. An ALJ denied Bienvenu relief on the grounds that the LHWCA did not apply to him since he was not engaged in "maritime employment." The ALJ read this Court's prior decisions to mean that coverage under the Act was dictated by the "amount of time devoted to specific work activity" [*4] by a Claimant.¹ The ALJ ruled that Bienvenu was not a "maritime employee" because he spent the vast majority of his working hours on fixed platforms and was only fortuitously on navigable waters when injured. The extension of the LHWCA to land-based activities did not apply to Bienvenu since his work was not an integral or essential part of loading or unloading a vessel.

Bienvenu timely appealed the ALJ's decision to the Benefits Review Board ("BRB"). The BRB failed to render a timely decision and was deemed to have affirmed the ALJ's ruling. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321-219. Bienvenu petitioned us for review. A panel of this Court reversed the ALJ's decision because Fifth Circuit precedent compelled a conclusion that Bienvenu passed the status test since he was on navigable waters when injured. *Bienvenu v. Texaco, Inc.*, 124 F.3d 692, 692-93 (5th Cir.), reh'g en banc granted,

131 F.3d 1135 (5th Cir. 1997).

II

In 1917, the Supreme Court held that state workers' compensation systems could not reach longshoremen injured seaward of the water's edge. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 61 L. Ed. 1086, 37 S. Ct. 524 (1917). [*5] In response, Congress passed the LHWCA in 1927. See Pub. L. No. 803, 44 Stat. 1429. Technically, there were five requirements for coverage under the LHWCA as originally enacted, as later detailed by the Supreme Court in *Director v. Perini North River Associates*, 459 U.S. 297, 306-07, 103 S. Ct. 634, 641-42, 74 L. Ed. 2d 463 (1983):

(1) The employee could not be a "master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under 18 tons net."

(2) The employee must suffer injury during the course of employment.

(3) The employee had to be employed by a statutory "employer," defined to be "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

(4) The employee had to meet a situs requirement that injury occurred upon navigable waters.

(5) No federal coverage unless compensation may not validly be provided by state law.¹

¹ "Congress used [this phrase] . . . in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters." 459 U.S. at 309; 103 S. Ct. at 643 (quoting *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126, 8 L. Ed. 2d 368, 82 S. Ct. 1196, 1203 (1962)). The phrase was deleted in 1972. See 459 U.S. at 313-14, 103 S. Ct. at 645.

[**6] [*904] In 1969, the Supreme Court, while

recognizing the harshness of the Jensen line, held that the LHWCA did not extend to injuries occurring on a pier attached to land. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 218-20, 24 L. Ed. 2d 371, 90 S. Ct. 347, 351-52 (1969). The Court stated that the "invitation to move that line landward must be addressed to Congress, not to this Court." *Id.* at 224, 90 S. Ct. at 354. Congress acted on this invitation in 1972 when it amended the LHWCA. See LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1251. The 1972 Amendments extended "coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard." *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 73, 62 L. Ed. 2d 225, 100 S. Ct. 328, 332 (1979). The situs test now reached shoreward to reach injuries "occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903 [**7] (a). The status test defined an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker." *Id.* § 902(3).

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L. Ed. 2d 320, 97 S. Ct. 2348 (1977), the Supreme Court first expounded on the status test. The workers in that case were Blundo and Caputo. Blundo was injured when he fell while checking cargo as it was removed from a container. Caputo moved cargo from the hold of the vessel onto shore and was hurt when rolling a dolly into a truck. Though the 1972 Act did not expressly state that workers in their positions were covered, the Court held that both Blundo and Caputo were entitled to benefits. Blundo was covered because "one of the reasons Congress expanded coverage in 1972 was 'that containerization permits loading and unloading tasks traditionally conducted aboard ship to be performed on the land.'" *Pfeiffer*, 444 U.S. at 74, 100 S. Ct. at 333. Caputo fell under the LHWCA because he spent some of his time in "indisputably longshoring [**8] operations," *Caputo*, 432 U.S. at 273, 97 S. Ct. at 2362 and Congress had intended "to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act." *Pfeiffer*, 444 U.S. at 75, 100 S. Ct. at 333.

In *Pfeiffer*, the Supreme Court further elaborated on

the difference between the situs and status tests by noting that the situs test limits the geographic coverage of the LHWCA, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Id.* at 78, 100 S. Ct. at 334-35. The "crucial factor" in determining the scope of maritime employment "is the nature of the activity to which a worker may be assigned." *Id.* at 82, 100 S. Ct. at 337. Though the 1972 Amendments extend coverage, they do not provide benefits to all workers in the situs area, such as truck drivers who pick up goods for further trans-shipment. *Id.* at 83, 100 S. Ct. at 337.

Four years after *Pfeiffer*, the Supreme Court returned to this issue in *Perini*. In that case, a workman, Churchill, was employed in the construction [**9] of a sewage treatment plant that extended over the Hudson River. He was injured on the deck of a cargo barge where he was supervising operations. The Court found no congressional intent in the 1972 Amendments to withdraw LHWCA coverage from workmen covered by the Act before 1972. The Court held that when a worker is injured on the actual navigable waters in the course of his employment on these waters, he satisfies the status requirement, assuming that the other requirements of the LHWCA are met. 459 U.S. at 324 & n.33, 103 S. Ct. at 651. The Court expressed no opinion on whether LHWCA coverage extends to a worker "injured while transiently or fortuitously upon actual navigable waters or to a land-based worker injured on land who then falls into [**905] actual navigable waters." *Id.* at 324 n.34, 103 S. Ct. at 651.

The *Perini* Court discussed three of its pre-1972 cases to illustrate the scope of the Act's coverage before the amendments were adopted. See 459 U.S. at 307-12, 103 S. Ct. at 642-45 (discussing *Davis v. Department of Labor*, 317 U.S. 249, 87 L. Ed. 246, 63 S. Ct. 225 (1942); *Parker v. Motor Boat Sales*, 314 U.S. 244, 86 L. Ed. 184, 62 S. Ct. 221 (1941); [**10] and *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 8 L. Ed. 2d 368, 82 S. Ct. 1196 (1962)). *Parker* is the case most relevant to our decision.

2 The employee in *Davis* was injured while standing on a barge and dismantling a bridge. In *Calbeck*, the employee was completing construction of a vessel afloat on navigable waters. Thus, the job responsibilities of the employees in those cases required more frequent

work on navigable waters than those of the employee in Parker.

In Parker, Mr. Armistead, a janitor employed by a retailer of pleasure craft, was directed to assist a salesman place outboard motors on a boat. Mr. Cooper, the salesman, then allowed Mr. Armistead to accompany him as he demonstrated the motor on the customer's boat. During the demonstration run, the vessel capsized and Armistead was killed. The Court first reviewed the evidence to determine whether the evidence was sufficient to support the deputy commissioner's finding that Armistead was acting within the [**11] course of his employment. The Court found the following portions of the record pertinent to this inquiry:

that on the morning of the accident Armistead was sent to the river with specific instructions to help Cooper in placing the outboard motors on the boat; that there were no specific instructions as to whether or not Armistead was to stay out of the boat; that either Armistead or Cooper was told that Armistead was to go and help Cooper; that Cooper, the superior of the two employees, at least acquiesced in Armistead's remaining in the boat to 'keep a lookout' for hidden objects in the muddy water; that Cooper regarded Armistead's acting as look out as 'helpful'; that employees of the respondent would sometimes make trips in boats for testing purposes, in furtherance of respondent's business; and that in one such instance an employee had taken a boat on a trip of at least fifty miles in respondent's behalf.

314 U.S. at 246, 62 S. Ct. at 223.

3 According to the Court of Appeals' opinion in Parker, the day of Armistead's accident, as far as the record discloses, was the only instance when his duties ever brought him into contact with navigable waters. *Motor Boat Sales, Inc. v. Parker*, 116 F.2d 789, 792 (4th Cir.), rev'd, 314 U.S. 244, 86 L. Ed. 184, 62 S. Ct. 221 (1941). Unlike the worker in *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998), Bienvenu was not engaged in traditional longshoreman duties aboard the vessel when the injuries occurred.

[**12] The Court concluded that, based on the above evidence, the deputy commissioner and the district court correctly found that Armistead was covered under the LHWCA. The Court stated that coverage would not be denied because

habitual performance of other and different duties on land cannot alter the fact that at the time of the accident he was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award was here made. Moreover, § 2(4) of the Act, 33 U.S.C.A. § 902(4), expressly provides for its application to employees (who) are employed . . . in whole or in part upon the navigable waters of the United States.

314 U.S. at 247, 62 S. Ct. at 223 (footnote and citations omitted) (alterations in original).

The Perini Court cited with approval *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953), which considered whether a railroad worker injured on navigable water was covered by the LHWCA. The claimant's five-man train crew had duties that included work on the railroad company's car floats, which moved freight and passengers [**13] to and from the yard by water. At the time of the accident, the crew was removing boxcars from floats. O'Rourke climbed up on a boxcar to release a brake and fell. The question presented was whether O'Rourke could bring a damage action under the Federal Employers' Liability Act (FELA) or was relegated to a compensation remedy under the LHWCA. The Court [**906] of Appeals held that the claimant was not covered under the LHWCA because he was a railroad worker and was not engaged in maritime employment. *O'Rourke v. Pennsylvania R. Co.*, 194 F.2d 612, 615 (2d Cir. 1952), rev'd, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953).

In reversing the Court of Appeals, the Supreme Court stated:

We are clear, however, that the emphasis on the nature of respondent's duties here misses the mark. The statute applies, by its own terms, to accidents on navigable waters when the employer has any employees engaged in maritime service . . .

The Court of Appeals, we think, is in error in holding that the statute requires as to the employee, both injury on navigable water and maritime employment as a ground for coverage by the Compensation Act. An injured [**14] worker's particular activity at the time of injury determines of course whether he was injured in the course of his employment within § 902(2), and whether he was a member of the crew of the vessel within the exceptions of §§ 902(3) and 903(a)(1). This explains the emphasis on the factor of the individual's job in *Parker v. Motor Boat Sales, Inc.* . . .

344 U.S. at 339-40, 73 S. Ct. at 305.

The Court had the following to say about *Parker*.

The result in *Parker*, as well, is totally inconsistent with any 'duties test.' *Armistead*, the employee there, was a janitor with the motor boat company. He had been ordered to ride in one of the boats during a test trip in order to keep a lookout for hidden objects. Compensation under the Harbor Workers Act could not have been paid in connection with his death if we were to test its applicability by the nature of his regular work.

Id. at 341, 73 S. Ct. at 306 (citation omitted).

In 1985, the Supreme Court considered whether a welder employed on a platform in Louisiana waters was covered under the LHWCA. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 84 L. Ed. 2d 406, 105 S. Ct. 1421 (1985). [**15] The Court held that because Gray, the welder, was not injured on navigable waters he could attain coverage only by qualifying for the 1972 Amendments' expanded coverage for shore side workers. The court concluded that Gray did not qualify for this expanded coverage because he was not engaged in "maritime employment." This employment was limited to longshoring, shipbuilding and ship repairing. Gray's welding work on stationary platforms did not fit within this definition. See *id.* at 424-26, 105 S. Ct. at 1427-29.

The Court made clear, however, that this definition

of maritime employment did not apply to workers injured on navigable waters: "This view of 'maritime employment' does not preclude benefits for those whose injury would have been covered before 1972 because it occurred 'on navigable waters.'" *Id.* at 424 n.10, 105 S. Ct. at 1428 n.10.

The Court also discussed the Court of Appeals' position that because Gray would be covered while traveling by boat to work on the platform, a finding of no coverage while Gray was on the platform created a "curious hole" in coverage.

Gray traveled between platforms by boat and might have been covered, [**16] before or after 1972, had he been injured while in transit. See *Director, OWCP v. Perini North River Assoc.*, 459 U.S. at 324, 103 S. Ct. at 651. But see *id.* at 324, n. 34, 103 S. Ct. at 651, n. 34. ("We express no opinion whether such coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters."). . . . Any coverage attributable to the LHWCA itself was de minimis. We also note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.

Id. at 427 n.13, 105 S. Ct. at 1429 n.13.

With this general background, we now turn to the arguments of the parties in this case.

III.

A.

In light of *Bienvenu's* injury on navigable waters, *Texaco* acknowledges, as it [**907] must, that *Bienvenu* need not establish that he was engaged in maritime employment as that term is used in § 2(3) of the Act. The Supreme Court's decisions in *Perini* and *Herb's Welding* foreclose this argument. Those cases recognize that the 1972 Amendments were not intended to alter [**17] the scope of coverage for workmen injured on navigable waters. As our discussion above demonstrates, before 1972, any workman injured in the course of his

employment actually engaged in the performance of his assigned duties on navigable waters enjoyed coverage under the LHWCA. He was not required to perform the traditional maritime work described in § 2(3) of the Act.

Relying on language in *Perini*, Texaco argues that workers like *Bienvenu* who are injured on navigable waters must establish that they were "required to perform their employment duties on navigable waters."

Texaco argues that the one hour per day *Bienvenu* spent on the deck of the *MISS JACKIE*, working on compressors and other platform equipment, could have been performed on the platform had *Bienvenu* chosen to do so and therefore that this work does not bring him within the LHWCA coverage. We disagree with this reading of *Perini*. The *Perini* Court, in discussing the pre-1972 law relative to coverage under the Act, stated: "It becomes clear from this discussion that the 1927 Act, as interpreted by Parker, Davis, and Calbeck, provided coverage to those employees of statutory 'employers,' injured [**18] while working upon navigable waters in the course of their employment." 459 U.S. at 311, 103 S. Ct. at 644. In the very same paragraph the Court cites with approval the following quote from *Gilmore and Black*: "Any worker injured upon navigable waters in the course of employment was 'covered' . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." *Id.* at 311, 103 S. Ct. at 644 (citation omitted) (alteration in original).

Immediately following this discussion the Court uses the language upon which Texaco relies: "As a marine construction worker required to work upon navigable waters, and injured while performing his duties on navigable waters, there can be no doubt that Churchill would have been covered under the 1927 LHWCA." *Id.* at 311-12, 103 S. Ct. at 644-45.

We cannot read the above sentence as demanding that a worker demonstrate that the duties he was performing aboard the vessel were in response to a direct order from his superior. We believe that all *Perini* requires is that the claimant show that he was injured on navigable waters while in the course of his employment.

4 Two other passages from *Perini* buttress this conclusion:

We are unable to find any

congressional intent to withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment and who would have been covered by the Act before 1972.

Id. at 315, 103 S. Ct. at 646.

There is nothing in these comments or anywhere else in the legislative reports, to suggest, as *Perini* claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered.

Id. at 318-19, 103 S. Ct. at 648.

[**19] In this case, the ALJ found that *Bienvenu* spent one hour out of a twelve-hour workday, or approximately 8.3% of his work time, actually performing job responsibilities on navigable waters. From the record, it is clear that *Bienvenu* had been performing the same work from the *MISS JACKIE* for about eleven years. Surely if Texaco had some objections to *Bienvenu*'s working on platform equipment aboard the *MISS JACKIE* over this extended period of time it would have made them known. Under these circumstances, *Bienvenu* was entitled to assume that he had the discretion to perform his repair and maintenance work on production equipment at the location he deemed most efficient, including on the vessel. *Bienvenu* was in the course of his employment when he performed the above-described work on the *MISS JACKIE* and *Bienvenu* is covered under the LHWCA unless Texaco prevails on its argument that *Bienvenu* was aboard the *MISS JACKIE* fortuitously or transiently [*908] and for that reason has no coverage. We now turn to this argument.

B.

As we discussed above, the Supreme Court in *Perini* reserved the question of whether a workman aboard a

vessel "transiently or fortuitously" enjoyed coverage [**20] under the LHWCA. The Court in *Herb's Welding* reiterated this reservation. 470 U.S. at 427 n.13, 105 S. Ct. at 1429 n.13.

The Director argues that while the Supreme Court reserved this question in *Perini*, the cases it cited as representative of the pre-1972 law on coverage indicate that the Court would reject any such hole in coverage. While it is not free from doubt, we believe that the signals from the Supreme Court in *Perini* and again in *Herb's Welding* indicate that the Supreme Court would hold that a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA. We join the Eleventh Circuit in reaching this conclusion. See *Brookington v. Certified Elec. Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990); see also *Zapata-Haynie Corp. v. Barnard*, 933 F.2d 256; 260 (4th Cir. 1991) (noting that the plaintiff was "not merely fortuitously over water when his injury occurred").

We therefore hold that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test [**21] 5 only if his presence on the water at the time of injury was neither transient or fortuitous. The presence, however, of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous. Though we decline to set today the exact amount of work performance on navigable waters sufficient to trigger LHWCA coverage, instead leaving that task to the case-by-case development for which the common law is so well-suited, see *Barratt v. Chevron U.S.A., Inc.*, 781 F.2d 1067, 1073 (5th Cir. 1986) (en banc) (adopting case-by-case review to determine coverage under the Jones Act), we will provide some guiding thoughts on the matter.

5 See *Perini*, 459 U.S. at 324, 103 S. Ct. at 650 ("When a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement").

First, the threshold amount must be greater than a modicum of activity in order [**22] to preclude coverage to those employees who are merely commuting from shore to work by boat. Also, the routine activity of assisting in tying the vessel to the dock and loading or unloading one's tools and personal gear onto the vessel do

not count as meaningful job responsibilities. Moreover, we agree with the Supreme Court in *Herb's Welding* that there is a substantial difference between a worker "performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land based but who takes a boat to work." 470 U.S. at 427 n.13, 105 S. Ct. at 1429 n.13. The time *Bienvenu* actually worked on production equipment aboard the *MISS JACKIE* constituted 8.3% of his time at work. This is not an insubstantial amount of *Bienvenu's* work time and is sufficient to trigger LHWCA coverage. 6

6 Because *Bienvenu's* work on the production equipment aboard the *MISS JACKIE* is sufficient to trigger LHWCA coverage, we do not consider whether his time aboard the *MISS JACKIE* being shuttled from platform to platform should be included in determining whether he spent more than a modicum of his work time on navigable waters.

[**23] Our conclusion today that the Supreme Court would deny LHWCA coverage to a worker injured on a vessel that he is aboard transiently or fortuitously permits us to clarify our case law on this subject. 7

7 Our decisions in *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir. 1978); and *Boudreaux v. American Workover, Inc.*, 680 F.2d 1034 (5th Cir. Unit A 1982) (en banc), were decided before the Supreme Court announced its decision in *Director v. Perini* and answered most of the questions confronting us at that time.

In *Fontenot v. AWT, Inc.*, 923 F.2d 1127 (5th Cir. 1991), we held that a worker who spent 40% of his worktime on shore, 30% on fixed platforms and 30% on oil exploration [**909] and production vessels, was engaged in maritime employment because he "was injured while on actual navigable waters, in the course of his employment." *Id.* at 1130. Our holding today is entirely consistent with our holding in *Fontenot* given [**24] the substantial duties *Fontenot* had on navigable waters.

In *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888 (5th Cir. 1994), the petitioner's husband was killed while attempting to transfer by swing rope from a fixed platform to a vessel. Mr. Randall was a mechanic who performed all of his work duties on a fixed platform and had no assigned duties on navigable waters. He was

simply transported to and from his workstation--a stationary platform--by boat.

The Randall panel read Fontenot to base coverage under the LHWCA solely upon Fontenot's injury on navigable waters without regard to the extent of his duties on navigable waters. It therefore concluded that Fontenot had decided that workers injured while transiently or fortuitously upon navigable waters are covered by the LHWCA. See *id.* at 897. Because the Randall panel found itself bound by what it perceived as this holding in Fontenot, the Randall panel concluded that the claimant was covered by the LHWCA. This court, sitting en banc, of course is not bound by either Fontenot or Randall. As our discussion above indicates, our conclusion that workmen who are [*25] aboard vessels transiently or fortuitously when they sustain injury are not covered by the LHWCA is inconsistent with Randall's holding. Randall is therefore overruled.

IV.

Judge DeMoss, in his dissent, argues that we ignored the 1984 Amendments to the LHWCA. We did not deal with the amendments, codified at 33 U.S.C. § 902(3)(A)-(F), for a reason: They have nothing to do with this case. The amendments exclude from coverage under the Act persons engaged in six separate, narrowly defined types of employment. These include: clerical workers (Section 902(3)(A)); workers at camps, restaurants, or retail outlets (Section 902(3)(B)); marina workers (Section 902(3)(C)); workers employed by vendors or suppliers (Section 902(3)(D)); aquaculture workers (Section 902(3)(E)); and builders or repairers of recreational vessels (Section 902(3)(F)). If a person who would otherwise be covered under the LHWCA does the type of work enumerated by one of these amendments and is covered by a state workman's compensation act, he is not covered by the LHWCA. But Bienvenu's employment as a pumper/gauger does not fit within any of the job descriptions listed in the amendments.

[**26] Both Judge Jones and Judge DeMoss argue, in dissent that unless a worker devotes substantial time to longshore duties (Judge DeMoss suggests 30%), he should not be covered under the LHWCA. Adoption of such a rule would create serious problems. First, such a rule is plainly inconsistent with Perini (worker injured on the navigable water in the course of his employment satisfies the status requirement). Indeed, Judge Jones's main point is that Perini was wrongly decided. Second,

imposing such a blanket requirement would overrun the detailed provisions of the 1984 amendments. The very detailing of specific job descriptions by Congress belies any speculation that Congress intended by the amendments any such wholesale withdrawal of compensation coverage -- recall that the exclusions under the amendments demand coverage under state workers' compensation. The dissent is silent about workers beyond state territorial waters. Such workers to whom coverage under the LHWCA is not expressly extended by statute (such as the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*) presumably will be left without compensation.

Relatedly, Judge DeMoss [*27] argues that our opinion in this case conflicts with this Court's recent opinion in *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998). In *Green*, we held that a worker in a hunting camp was not covered under the LHWCA. The distinction between the two cases is patent; *Green* was a "camp" worker expressly excluded from coverage by Section 902 (3)(B); *Bienvenu* does not fall within any of Section 902's narrowly defined exclusions.

[*910] Judge DeMoss next takes the position that the Supreme Court's conclusion in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S. Ct. 1421, 84 L. Ed. 2d 406 (1985), that the oil field welder in that case was not engaged in maritime employment precludes *Bienvenu*'s recovery under the LHWCA. He refuses to acknowledge the distinction between a worker injured on land and a worker injured on navigable water. The Court made it crystal clear that its denial of coverage to *Gray* was because he fell outside of the 1972 Amendments' expanded coverage for shore side workers. The Court expressly held: "This view of 'maritime employment' does not preclude benefits for those whose injury would have been covered before 1972 because [*28] it occurred 'on navigable waters.'" 470 U.S. at 424 n. 10, 105 S.Ct. at 1428 n. 10.

By arguing that workers injured on navigable water only qualify for LHWCA coverage if they perform longshore duties, Judges Jones and DeMoss fail to recognize the long established principle that persons engaged in work aboard vessels are engaged in maritime employment. See *Gilmore & Black, The Law of Admiralty* at 429-30. That principle underlies the Perini Court's conclusion that workers engaged in the course of their employment satisfy the "status" requirement. 459

U.S. at 311, 103 S. Ct. at 644. Imposing such a duties test also directly conflicts with the Supreme Court's holding in *Penn. R. Co. v. O'Rourke*, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302 (1953) (see discussion in text, *supra*), which the Court relied on in *Perini*. Also, the Dissents' proposed holding that oilfield work aboard a vessel is not maritime employment would mean that the hundreds of oilfield workers working on drilling barges are not maritime employees. In *The Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959), and the hundreds of cases that [**29] followed, we held that such workers qualify as seamen and can recover under the Jones Act and the General Maritime law. The Dissenters' reasoning would lead to the anomalous holding that oilfield work aboard a vessel is not maritime work if the employee spends less than 30% of his time performing that work; yet a worker who performs more than 30% of his work aboard a vessel is a seaman, the highest form of maritime worker. See *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) (stevedore elevated to status of seaman for purposes of suing shipowner for unseaworthiness).

The assertion that adopting an inquiry for longshoreman coverage similar to that for seaman status affords a more clear and litigation-dampening standard is both stunning and perverse. It is stunning to those familiar with the huge number of cases spawned in our struggle with that test. It is perverse to place the same hurdle before an injured worker who claims to be a seaman, with the uncapped liability system they enjoy, and an injured worker seeking workers' compensation as a longshoreman. The "logic" of the Dissents' equating what is essentially a tort system [**30] with a workers' compensation scheme turns the fundamental purpose of a no-liability, limited-damage compensation scheme upside down. Finally, an en banc court is not the Congress.

For the reasons stated above, the judgments of the BRB and ALJ are REVERSED and the case is REMANDED to the ALJ for further proceedings.

STOP
DISSENT BY: EDITH H. JONES; DeMOSS

DISSENT

EDITH H. JONES, Circuit Judge, dissenting:

Even though I must agree with the majority opinion that we are bound by *Perini's* general interpretation of the 1972 amendments to the LHWCA, I disagree with their

conclusion that *Bienvenu*, an oil pumper who spent his entire career maintaining oil and gas equipment on production platforms within Louisiana's three-mile limit, was not "transiently" injured on board the *Miss Jackie*. The majority's decision to the contrary sets such a low threshold for LHWCA coverage that it is easy to envision increased litigation over LHWCA coverage for other land-based workers who are maritime commuters. Of course, as the Supreme Court said, "there will always be a boundary to coverage, and there will always be people who cross it during their employment." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 428, 105 S. Ct. 1421, 1429, 84 L. Ed. 2d 406 (1985) [**31] (citation omitted). The true boundary, in my view, should not lie at the nethermost conceivable [**911] description of maritime commuter-workers, but at the line drawn by Congress's adoption of a maritime employment status test in the 1972 amendments to the LHWCA.⁸ This leads me respectfully to disagree with the interpretation of the LHWCA adopted in *Perini*. Although our lower court may not defy the High Court's ruling, it is useful to observe how interpretation of the statute could be brought more in line with its plain meaning:

8. See Longshoremen's and Harbor Workers' Compensation Act § 2(3), 33 U.S.C. § 902(3) ("The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .").

Because much light has been shed on this debate by both the majority and dissenting opinions, I will frame my views succinctly. [**32] First, I accept that *Perini* insists upon continued LHWCA coverage, irrespective of the 1972 amendment's definition of maritime employment, for any worker "injured while performing his job upon actual navigable waters." *Perini*, 459 U.S. at 299, 103 S. Ct. at 638.⁹ Although it is a close call, I disagree with the majority's conclusion that because *Bienvenu* voluntarily performed as much as 8.3% of his work duties on the vessel, i.e. repairing or maintaining equipment and tools, he was not merely "transiently" aboard and thus excluded from LHWCA coverage. *Perini's* significant footnote disclaims any intent to rule on whether LHWCA "coverage extends to a worker injured while transiently or fortuitously upon actual navigable waters . . ." 459 U.S. 297, 326 n.34, 103 S. Ct.