ESSAY

Admiralty, Human Rights, and International Law

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Admiralty offers a promising analogue to modern human rights law. Rooted in longstanding traditions of judge-made law and reference to customary international law, admiralty furnishes a template for recognizing and protecting human rights. Admiralty has a recent history of expanding remedies to personal injuries and wrongful death, both dismayingly prevalent in human rights cases. This Essay explores these analogies, dating back to the prohibition of the slave trade in the early nineteenth century, and recognizes the limitations inherent in them. Both the Rehnquist and the Roberts Courts have more recently limited the remedies in admiralty, revealing the contingency of relying upon judge-made law. As the judges change, so does the law. To survive and expand, remedies in admiralty and in human rights law depend upon the support of the political branches of government, and particularly upon claims recognized and enacted by Congress.

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The Alien Tort Statute[1] (ATS) stands at the center of controversies over federal remedies for violations of human rights. It provides federal jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[2] It was enacted simultaneously with the conferral of admiralty jurisdiction on the federal courts.[3] Yet it has had, from its enactment in the eighteenth century to its interpretation in the twenty-first century, a perplexing relationship to admiralty jurisdiction. In *Sosa v. Alvarez-Machain*,[4] the first case in which the Supreme Court recognized that human rights claims could be brought under the ATS, the Court identified piracy as one of the three violations of international law that originally were the focus of the ATS.[5] References to piracy as a crime and as a tort pervade opinions seeking to expand the scope of claims invoking jurisdiction under the ATS. Subsequent, separate opinions have argued in favor of expanding the narrow interpretation of the ATS endorsed in *Sosa* by asking "who are today's pirates?"[6] These opinions analogize today's violators of human rights to pirates, who have posed a continuing threat to lives and property at sea since the beginning of maritime trade. Just as pirates are "enemies of all mankind,"[7] subject to "universal jurisdiction" in the courts of any country which apprehends them,[8] today's violators of human rights engage in activity that threatens the rights of everyone and should be subject to punishment by any nation. Expanding both the scope and the enforcement of human rights finds support in the traditional law of piracy.

Despite the urgency of the argument for universal jurisdiction, the analogy to piracy reveals the odd relationship between the ATS and admiralty. The ATS was enacted in section 9 of the Judiciary Act of 1789.[9] The very same section of the Act also granted the federal courts exclusive jurisdiction over "all civil causes of admiralty and maritime jurisdiction."[10]

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1 28 U.S.C. § 1350 (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).

2 *Id.*

3 28 U.S.C. § 1333 (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).

4 542 U.S. 692, 715 (2004).

5 *Id.* Another established violation of international law also had a maritime character, protecting the free passage of nonbelligerent vessels through territorial waters. *Id.*

6 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 127 (2013) (Breyer, J., concurring in the judgment).

7 *Id.* at 131 (Breyer, J., concurring in the judgment) (internal quotation marks omitted) (citation omitted) ("Certainly today's pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are 'fair game' where they are found. Like those pirates, they are 'common enemies of all mankind and all nations have an equal interest in their apprehension and punishment.'").

8 *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) ("Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior.").

9 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as 28 U.S.C. § 1350).

10 28 U.S.C. § 1333 (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).

Insofar as the ATS granted jurisdiction over claims for piracy as a tort "in violation of the law of nations,"[11] it was wholly redundant. Jurisdiction existed over piracy claims under the constitutional and statutory grants of admiralty jurisdiction.[12] The apparent redundancy of covering piracy under the ATS was made all the more apparent by the piracy statute, enacted just a year later, which applies to "[w]hoever, on the high seas, commits the crime of piracy as defined by the law of nations."[13] This statute has remained federal law ever since, equating piracy as a federal crime with "piracy as defined by the law of nations."[14] This definition included "robbery, or forcible depredations" upon the high seas, defined as the seas outside the maritime boundaries of any nation.[15]

Moreover, as a criminal prohibition, the piracy statute indicates that most cases of piracy would be brought as criminal prosecutions, not as private civil actions like those under the ATS.[16] Piracy triggered the actions of the political branches of government, bringing into play the traditional sources of international law and assuring that the ATS would be consistent with them. To be sure, victims of piracy could still bring civil actions in admiralty, typically by seizing the vessel or goods taken by pirates or by seizing other assets, through maritime arrest or attachment.[17] This was, for instance, the plaintiff's claim in the early Marshall Court decision *The Schooner Exchange v. McFaddon*,[18] where the plaintiff claimed that his schooner had been seized in an act of piracy.[19] This claim eventually failed because the vessel had been converted into a French warship over which France could assert the defense of sovereign immunity.[20] Nevertheless, the Court reasoned that such a claim could have been brought by one private party against another.[21] Civil actions for piracy could be, and often were, brought in federal court, but there was no need to invoke the ATS to do so.[22] Over the last century, civil actions for piracy have given way to public enforcement through criminal prosecutions,[23] but they were already

11 28 U.S.C. § 1350 (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).
12 U.S. CONST. art. III, § 2; 28 U.S.C. § 1333.
13 18 U.S.C. § 1651 (corresponds to the Crimes Act of 1790, ch. 9, § 12, 1 Stat. 113).
14 *Id.*
15 United States v. Smith, 18 U.S. (5 Wheat.) 153, 161 (1820).
16 18 U.S.C. § 1651.
17 FED. R. CIV. P. SUPP. R. FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS B, C.
18 11 U.S. 116, 117, 3 L. Ed. 287 (1812).
19 *Id.*
20 *Id.* at 146-47.
21 *Id.* at 144.
22 *E.g.*, The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40-41 (1825).
23 See United States v. Dire, 680 F.3d 446, 456-64 (4th Cir. 2012) (recounting the evolution of the international law of piracy and concluding that it eventually dropped the requirement of an intent to steal).

common enough when the ATS came into force to make it a doubtful substitute for them.

Why then does the admiralty analogy persist as a basis for human rights claims in federal court? This Essay answers this question in four parts. The first recounts the attractions of admiralty as a source of federal common law. The second examines the prominent role that admiralty has played in the reception of international law as a resource for interpreting federal law. The third notes the priority that admiralty has given to considerations of commerce, notwithstanding attention to human rights, most prominently in connection with the slave trade. And the fourth examines the inherent limits on admiralty as a source for private rights of action. Admiralty has an established tradition of recognizing such claims, exemplifying the power of federal courts to make law. For that reason, it might seem to be a promising way to avoid recent decisions of the Supreme Court casting doubt on implied rights of actions in other fields.[24] However, even in admiralty, the power to recognize private rights of action has been exercised with restraint.

I. THE ATTRACTIONS OF ADMIRALTY

Maritime claims, like those for piracy, developed within the structure established by prevailing conceptions of sovereignty. Judge-made law, on the model of admiralty, offers an attractive means for human rights advocates to get their claims into court. But once in court, they must acknowledge the decisive role of the political branches in defining and accepting international law as federal law. For instance, the Foreign Sovereign Immunities Act[25] (FSIA), recognizes the general immunity of foreign nations and their instrumentalities from suit in American courts.[26] This immunity is subject to a variety of exceptions,[27] and admiralty claims must satisfy one of them to be brought against a foreign sovereign.[28] The same is true of claims under the ATS.[29] Federal remedies for torts "in violation of the law of nations," just like claims in admiralty, fall within the federal judicial power, but still must conform to treaties and legislation approved by the political branches of government. We begin with the distinctive features of maritime law.

To this day, the grant of admiralty jurisdiction has been taken to support a federal interest sufficient for the creation of federal common law.[30] This

24 PETER W. LOW ET AL., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 149-53 (8th ed. 2014) (summarizing this development).

25 28 U.S.C. § 1604.

26 *Id.*

27 *Id.* §§ 1605A-1605B.

28 Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 438-39 (1989).

29 *Id.* at 435-38.

30 *See* Rodriguez v. F.D.I.C., 140 S. Ct. 713, 717 (2020).

practice began soon after ratification of the Constitution and became well established long before federal common law acquired its current sense as a species of federal law with the full preemptive force of a federal statute. In the early republic, judge-made admiralty law was treated as general law, equally accessible to the state courts and equivalent to other forms of transnational law, such as the law merchant governing commercial transactions.[31] At this time, the admiralty jurisdiction could not feasibly be implemented by statutes alone, which were few and far between, as Congress had only begun to fill out what is now a vast corpus of federal legislation. If federal courts could not turn to the law developed by the colonial vice-admiralty courts and the admiralty courts in England and in other countries, they would have had few, if any, rules of decision. General maritime law filled a vacuum that Congress could not immediately fill with legislation.

When general federal common law met extinction in *Erie Railroad Co. v. Tompkins*,[32] judge-made maritime law persisted as a variety of the "new federal common law."[33] It had become established by decisions of the Supreme Court in the nineteenth and early twentieth century, derived from the unique prestige of the only appellate court in the United States with nationwide jurisdiction. These decisions still had to compete with decisions of state courts in actions that could have been brought in admiralty but were not. Instead, these actions were brought in state court under the "saving clause" preserving "the right of a common law remedy, where the common law is competent to give it."[34] Strictly speaking, however, only federal courts could interpret and apply the law of admiralty. The actions in state court were based on the common law or related state law, and jurisdiction over cases in admiralty was exclusively in the federal courts.

In developing the federal law of admiralty, the federal courts invoked a body of transnational maritime law that dated back to classical Greece and Rome, and even earlier, to maritime commerce beginning in the Bronze Age. They relied upon sources in Roman law, other ancient legal systems, medieval statutes, and above all, the admiralty decisions from other countries.[35] Shipwrecks can be found in the Mediterranean Sea dating from

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31 William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 HARV. L. REV. 1513 (1984).

32 304 U.S. 64, 78 (1938) ("There is no federal general common law.").

33 Henry J. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 407 (1964).

34 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (codified as amended at 28 U.S.C. § 1333(1)).

35 Reliance upon esoteric sources was characteristic of practice in this field by "proctors," the specialists who appeared as lawyers in admiralty. As one dissent from the expansion of admiralty jurisdiction put it, "the simple, plain, homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a learned display from

the thirteenth century B.C.E.[36] The maritime law of Rhodes dates from classical times, although little is known of its contents, and codes of maritime law proliferated in the Middle Ages, from cities as diverse as Amalfi on the Italian coast, Barcelona on the Iberian peninsula, and the Hanseatic towns on the Baltic Sea.[37] The ancient lineage of maritime law has given rise to no shortage of myths,[38] but it confirms the natural inference from the growth of maritime commerce over many centuries: in the risky business of journeys over open water, rules had to be laid down to determine who would bear the loss when vessels, cargo, and lives were lost at sea. These rules grew up as city-states, monarchies, and empires came and went, but these regimes sought, whenever they could, to decide who could trade at their ports and on their trading routes. Admiralty was no stranger to sovereignty as it evolved into the system of nation states that exists today.

Admiralty followed maritime commerce, which developed alongside notions of sovereignty and the assertion of national power. As Justice Story articulated the theory of sovereignty in the nineteenth century, "every nation possesses an exclusive sovereignty and jurisdiction within its own territory."[39] Admiralty is different. The "high seas" subject to admiralty jurisdiction are waters outside the boundaries of any nation and not subject to any claim of exclusive national power.[40] Admiralty fills this gap in the regime of nation states by allowing the concurrent assertion of admiralty jurisdiction by the courts of different nations over acts upon the high seas, for instance, in the assertion of universal jurisdiction over piracy.[41] In the absence of treaties or statutes on maritime law, which became common only in the latter half of the nineteenth century, federal judges were left to determine the content of American admiralty law. Interpreting the various sources and traditions of maritime law necessarily became the province of the judiciary, and because of the grant of exclusive admiralty jurisdiction to the federal courts,[42] it was almost entirely the province of the federal judiciary.

Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles." Jackson v. Steamboat Magnolia, 61 U.S. 296, 321 (1857) (Daniel, J., dissenting).

36 DAVID ABULAFIA, THE GREAT SEA: A HUMAN HISTORY OF THE MEDITERRANEAN (2011).

37 DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES: CASES AND MATERIALS 3-4 (1st ed. 2001); ABULAFIA, *supra* note 36, at 236.

38 ROBERTSON ET AL., *supra* note 37, at 3-4.

39 JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS, AND JUDGMENTS § 18.I, at 19 (1834).

40 United Nations Convention on the Law of the Sea art. 86, 89, Dec. 10, 1982, 1833 U.N.T.S. 397 (defining "high seas" and providing that "[n]o State may validly purport to subject any part of the high seas to its sovereignty").

41 *Id.* art. 100. ("All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.").

42 28 U.S.C. § 1333 (corresponds to the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73).

In the twentieth century, by the time *Erie* was decided, a substantial body of federal maritime law, dominated by decisions of the Supreme Court, had come into being. It survived in the form of the new federal common law, binding even in common law actions brought under the saving clause.[43] Exactly where maritime law leaves off and state law applies of its own force is a vexing issue, but the decisions have settled on one overriding principle: either one source of law applies, usually maritime law, or state law on the few issues that are "maritime and local," but never both.[44] Transposed to human rights claims, this principle would make federal claims for violation of human rights binding upon state courts, allowing plaintiffs to bring such claims in either state or federal court based on judge-made federal law.

Some reason to pursue the analogy between admiralty and human rights comes from the expansion of maritime workers' remedies for injury and wrongful death in the middle of the twentieth century. Claims under the general maritime law for unseaworthiness expanded to reach the temporary condition of a vessel, in addition to its permanent features.[45] Such claims could also be brought by longshore workers injured aboard a vessel.[46] The no-fault remedy of maintenance and cure, granting members of the crew wages and medical expenses for injuries in the course of their employment, also applied to injuries incurred during shore leave.[47]

In 1920, Congress created a negligence remedy for maritime workers in the Jones Act, which incorporated by reference the Federal Employers' Liability Act (FELA).[48] Since the FELA made the employer liable for injury or death "resulting in whole or in part" from its negligence, the plaintiff had to meet only a minimal burden of proving causation,[49] in effect creating a nearly no-fault remedy with damages to be awarded by a jury.[50] This interpretation of the statute reflected and reinforced the expansion of workers' remedies. The culmination of this trend came in *Moragne v. States Marine Lines*,[51] which recognized a maritime claim for wrongful death of maritime workers occurring in state territorial waters.[52] This claim greatly expanded upon the coverage and remedies available under the Death on the

43 *See, e.g.*, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 628 (1959) (refusing to apply state law in saving clause action); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409-11 (1953).

44 Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 207-09 (1996); Ernest A. Young, *The Last Brooding Omnipresence: And the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L. J. 1349, 1361 (1999).

45 Mitchell v. Trawler Racer, 362 U.S. 539, 549-50 (1960).

46 Seas Shipping Co. v. Sieracki, 328 U.S. 85, 102-03 (1946).

47 Warren v. United States, 340 U.S. 523, 530 (1951).

48 46 U.S.C. § 30104; 45 U.S.C. § 51.

49 CSX Transp., Inc. v. McBride, 564 U.S. 685, 688 (2011).

50 45 U.S.C. § 53.

51 398 U.S. 375, 408-09 (1970).

52 *Id.*

High Seas Act,[53] reaching waters within three miles of shore and supporting the award of nonpecuniary damages.

The trend toward broad interpretation of these statutes was so pronounced that a leading admiralty treatise observed that it reduced "the relevant statutory provisions to the level of 'nonstatutory Restatements,'" which informed the Supreme Court's reasoning but did not restrict it.[54] If the new federal common law throughout much of the twentieth century could expand the scope of maritime workers for harm suffered on the job, it seemed adequate to the task of providing expanded remedies for violation of human rights. The latter, after all, are just as bad, if not far worse, than injuries suffered in the course of maritime employment. Just as the analogy to piracy could be deployed to expand the scope and effectiveness of the ATS, the analogy to maritime workers' rights could be deployed to augment human rights. Moreover, it could do so in concert with traditional international law, with its invocation of territorial sovereignty and reliance upon the actions of the political branches, rather than in opposition to them. In order to have a claim, a maritime worker had to have some connection with the United States,[55] and in statutes like the Jones Act, support in legislation enacted by the political branches.

The onward expansion of workers' rights, however, came to a halt in the last decades of the twentieth century, and on some issues, such as recovery of nonpecuniary damages for wrongful death, suffered significant reversals. Thus, the decision in *Moragne*, often celebrated as an example of judge-made law, became nearly a dead letter by 1990. The Death on the High Seas Act, covering deaths more than three nautical miles from shore, limits recovery to "a fair compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought."[56] The Court interpreted this provision to preclude recovery even for the decedent's pain and suffering before death.[57] Likewise, in *Miles v. Apex Marine Corp.*,[58] the Court interpreted the Jones Act, based on decisions contemporaneous with its passage in 1920, to bar recovery for nonpecuniary losses from the death of a crew member, whether the claim was based directly on the Jones Act or on the maritime law of unseaworthiness.[59] So, too, amendments to the Longshore and Harbor Workers' Compensation Act in 1972[60] replaced claims for unseaworthiness by longshore workers with a negligence

53 46 U.S.C. §§ 30301-30308.
54 GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 448 (2d ed. 1975).
55 *See infra* note 105.
56 46 U.S.C. § 30303.
57 Dooley v. Korean Air Lines Co., 524 U.S. 116, 121-24 (1998).
58 498 U.S. 19 (1990).
59 *Id.* at 35-36.
60 33 U.S.C. §§ 901-950.

remedy.[61] In various other ways, the Court has imposed further restrictions on the recovery of punitive damages by maritime workers.[62] Whatever liberality survives in claims for wrongful death, paradoxically, comes only in transplants from state law and only for the benefit of plaintiffs other than maritime workers.[63] In place of the open-ended interpretation of the governing federal statutes as restatements, strict textualism and originalism have taken hold.

The dominance of statutory law in personal injury and wrongful death cases mirrors longstanding trends elsewhere in maritime law, for instance, in cargo damage cases. These cases have long been governed by two statutes, the Harter Act, passed in 1893,[64] which was largely superseded by the Carriage of Goods by Sea Act[65] (COGSA), passed in 1936.[66] COGSA reflects and implements a multilateral treaty, the Hague Rules,[67] which has been superseded in international law (although not yet in American law) by the Rotterdam Rules.[68] Both the Harter Act and COGSA sought to replace a regime of judge-made law based on strict liability of the carrier, as modified by contractual waivers of liability, with a statutory regime of defined duties and exceptions subject only to limited contractual modifications in favor of the carrier.[69] Carriers were originally subject to strict liability for any damage to cargo, subject to limited exceptions, such as damage resulting from a natural disaster or "act of God." Because strict liability was anathema to carriers, they insisted upon broad waivers of liability in the bills of lading that they drafted. Both the Harter Act and COGSA reigned in the ability of carriers to obtain waivers of liability.[70] Both statutes imposed on carriers a nonwaivable duty to use due care to furnish a seaworthy vessel and to take reasonable care of cargo, with only a limited number of exceptions to carrier

61 *Id.* § 905(b).

62 *E.g.*, Dutra Group v. Batterton, 139 S. Ct. 2275 (2019) (holding that there are no punitive damages for unseaworthiness claims); Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008) (holding that a one-to-one ratio to compensatory damages is a fair upper limit on punitive damages). *But see* Atlantic Shipping Co. v. Townsend, 557 U.S. 404 (2009) (holding that punitive damages are available for willful failure to pay maintenance and cure).

63 *See* Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. at 202 (holding that state remedies are applicable in "maritime wrongful-death cases in which no federal statute specifies the appropriate relief and the decedent was not a seaman, longshore worker, or person otherwise engaged in a maritime trade.").

64 27 Stat. 445 (1893) (current version at 46 U.S.C. §§ 30701-30707).

65 49 Stat. 1207 (1936) (current version at 46 U.S.C. §§ 30701-30707).

66 *Id.*

67 International Convention for the Unification of Certain Rules Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233.

68 U.N. Comm'n On Int'l Trade Law, United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, (Dec. 11, 2008), https://uncitral.un.org/en/texts/transportgoods/conventions/rotterdam_rules.

69 GILMORE & BLACK, *supra* note 54, at 139-44.

70 46 U.S.C. § 30705 (Harter Act's restrictions on a carrier's attempt to limit liability); 46 U.S.C. app. § 1303(8) (COGSA's restrictions on a carrier's attempt to limit liability).

liability. Litigation of cargo damage claims now focuses on the scope of these duties and exceptions.[71]

The shift from the common law of common carriage waiver to statutory law did not displace the role of the judiciary. Persistent questions of statutory interpretation remain, for instance, over the arbitrability of cargo damage claims in foreign proceedings and the application of limits on damages to containerized cargo.[72] The opposition between private law made by judges and public law made by the political branches turns out not to be as sharp or as determinative as it first appears to be. The private remedies recognized in admiralty depend, like maritime commerce itself, upon the assertion of sovereign power to control and regulate, and under our Constitution, that power rests primarily in the political branches of government.

To offer a terse summary of these developments, the decisions on maritime personal injury have returned to modes of statutory interpretation familiar outside of admiralty. This is not to say the decisions are free from criticism, as made clear by an article criticizing limits on remedies for maritime workers, entitled "*The Curse of* Miles v. Apex Marine Corp.: *The Mischief of Seeking 'Uniformity' and 'Legislative Intent' in Maritime Personal Injury Cases*."[73] It is to say that maritime law as a field of innovative judicial lawmaking has lost much of its distinctiveness. Longstanding precedents continue to have force, but as in other enclaves of federal common law, they must yield to statutory amendments and the ordinary methods of statutory interpretation. The pattern of human rights decisions under the ATS, as well as the decisions on sovereign immunity under the FSIA,[74] have been similar, as we shall see.

II. THE RECEPTION OF INTERNATIONAL LAW

A surprising number of the leading cases on the reception of international law by American courts come from admiralty. Most of these are prize cases, or others involving the seizure of vessels or cargo for trading in violation of federal law. International law permeates these cases, and because they lie exclusively within the admiralty jurisdiction, as a form of in rem jurisdiction based on seizure,[75] they were rendered only by federal courts. There were no common law remedies in rem within the scope of the

71 Lekas & Drivas, Inc. v. Goulandris, 306 F.2d 426, 430-32 (2d Cir. 1962).

72 Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 534-39 (1995); Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam," 759 F. 2d 1006, 1011-17 (2d Cir. 1985).

73 Robert Force, *The Curse of* Miles v. Apex Marine Corp.: *The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Personal Injury Cases*, 55 LA. L. REV. 745 (1995).

74 28 U.S.C. §§ 1602-1611.

75 The Moses Taylor, 71 U.S. (4. Wall) 411, 427-31 (1866).

saving clause. From the perspective of recent decades, they can easily be taken to have incorporated international law into federal law. At the time they were rendered, they might have been cast as an appeal to international law as general law, not necessarily binding upon state courts. But as with other admiralty decisions of the Supreme Court, they were binding on the lower federal courts, and for all practical purposes, had the same effect as a federal statute. The decisions could be changed by legislation or by subsequent decisions of the Supreme Court, but not otherwise.

It appears to be a short step from the federal character of these decisions to the result that they adopt international law as federal law. Some scholars have forcefully made the argument for this conclusion, while others have equally forcefully resisted it.[76] Even if accepted at face value, however, the reception of international law typically has taken a very restrained form: limiting the exercise of federal judicial power so that it conforms to international law. It does not create causes of action where none had been recognized before or impose liability on foreign sovereigns in novel circumstances. In admiralty, reception of international law has taken this very traditional role, conforming to treaties and customary international law, and otherwise adopting international law only as it fits into previously recognized claims.

The prize and seizure cases, for all their celebrated dicta on recognizing international law, follow this pattern. Prize jurisdiction lies at the intersection of the public and private law of admiralty. Like the exercise of the power of eminent domain, but without the prospect of just compensation, the law of prize takes property for a public purpose. It involves private property when the owners of a seized vessel and its cargo are private individuals. They can claim the property in prize proceedings to reassert their ownership interests, but if they fail, their property is forfeited to the government.

An early prize case, *Murray v. Charming Betsy*,[77] is known for the principle "that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[78] This principle led to a narrow interpretation of the Non-Intercourse Act of 1800, which prohibited commerce between the United States and France "by persons resident within the United States, or by citizens thereof resident elsewhere."[79] The owner of the vessel in this case, Jared Shattuck, was born

76 Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561 (1984) (supporting incorporation); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 849-70 (1997) (opposing incorporation).

77 6 U.S. (2 Cranch) 64 (1804).

78 *Id.* at 118.

79 *Id.*

in the United States before the Revolution, but moved to the French island of St. Thomas and disclaimed any U.S. citizenship he might have possessed. His vessel was seized for alleged violation of the Act and he claimed ownership in the forfeiture proceedings in admiralty. He obtained restitution and damages for wrongful seizure.

The immediate consequence of the decision was to deny the power of the Navy to seize the vessel in the first place and then the power of a court to condemn it in a proceeding in admiralty. International law operated as a constraint on federal power and the action in rem. Shattuck's claim for ownership and damages was purely defensive, seeking to restore him to the position he was in before the seizure. To pursue the analogy to human rights claims, the invocation of international law served the purpose only of preventing the invocation of federal law to deny individual rights. Early prize decisions, like the *Charming Betsy*, tended "to be solicitous of the rights of neutrals" and tended "to exercise caution about the reach of the prize jurisdiction of the federal courts."[80] The extent of prize jurisdiction and the principles of prize depended largely on international law. As Justice Story wrote in a note published in U.S. Reports, a thorough treatment of prize case would include "the principles of international law respecting blockade, contraband of war, engagement in the coasting and colonial trade of an enemy, the right of search, the effect of resistance or rescue of neutral ships, and the circumstances of unneutral conduct."[81]

The limiting effect of international law extended even to enforcement of laws against the slave trade. In *The Antelope*,[82] the Supreme Court held that Spanish and Portuguese nationals did not engage in piracy in violation of the law of nations when no laws or treaties of their own nation prohibited the slave trade. The federal statutes limiting the trade were no more than municipal legislation whose scope was limited to U.S. nationals.[83] Universal jurisdiction could not be asserted against the Spanish and Portuguese slave traders as pirates because they had not acted contrary to the law of nations, as it then stood. Their actions violated natural law, but that did not override the longstanding practice of these nations, and others, permitting the slave trade. As the Court held, "[i]f it is consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it."[84] Municipal piracy did not support universal jurisdiction. On the contrary, the law of nations made the seizure of the vessels illegal.

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80 G. E. WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 905-06 (1988).
81 Slocum v. Mayberry, 15 U.S. (2 Wheat.) 1, app. at 37 (1817) (citations omitted).
82 23 U.S. (10 Wheat) 66 (1825).
83 WHITE, *supra* note 80, at 691.
84 23 U.S. at 122.

Despite setbacks such as *The Antelope*, concerted international prohibitions and enforcement efforts, principally those undertaken by the Royal Navy, eventually succeeded in abolishing the Atlantic slave trade. Unilateral efforts were not enough, and treaties, like those with Spain and Portugal, eventually changed the content of international law. It was not its reception into admiralty that seems doubtful to us now, but its previous tolerance of the slave trade. The ambivalent lessons of admiralty have less to do with viability of an independent remedy for piracy on the high seas than with its dependence on actions by the political branches and foreign governments in altering international law.

The coincidence of admiralty, international law, and slavery came together again, decades later, in the *Prize Cases*,[85] concerned with the legality of the Union blockade of the Confederacy during the Civil War. The role of the political branches was apparent at every step. In the *Prize Cases*, the President initiated the blockade, the Navy enforced it, and Congress ratified the President's actions after the fact. The only litigation initiated by private individuals involved claims for ownership based on the illegality of the blockade. Federal law insofar as it incorporated international law, made seizure of a vessel or cargo legal only if the blockade conformed to the requirements of international law.[86]

Again, the relevance of international law was taken for granted. Only its content was disputed: whether a legal blockade required a state of war against a foreign sovereign or whether it was satisfied by the acts of a belligerent engaged in a de facto war. The Confederacy, of course, was not recognized by the Union as a separate sovereign, so that only the second interpretation of international law supported the legality of the blockade. Among the issues decided by the Supreme Court, the most contentious was whether a blockade could be declared in a civil war or only in a war between states that acknowledged each other's sovereignty. The Union, of course, contended that the Confederacy had not successfully seceded and so was not a separate sovereign.

The *Prize Cases* were far from recognizing human rights claims. The result in the cases, for all but one set of cargo owners, was at the opposite extreme. Their ownership interests in the seized vessels and cargo were extinguished. The sole exception saved the interests of property owners from New York who tried, before the war broke out, to ship their cargo of tobacco out of Richmond by way of Hampton Roads.[87] The other owners had their rights subordinated to the sovereign prerogative of the Union to

85 67 U.S. (2 Black) 635 (1862).
86 *Id.* at 669-70.
87 *Id.* at 682.

invoke the laws of war in justification of a blockade established to put down an insurrection.[88]

Neither the majority opinion nor the dissent in the *Prize Cases* had any difficulty with looking to customary international law. They differed only in what they found there. The majority found sufficient justification in the laws of war for the President to act without prior authorization from Congress.[89] On this view, the President had authority to put down insurrections, and under international law, that included the power to blockade a belligerent power, whether or not it was a sovereign state. The dissent found insufficient authority in the absence of a declaration of war from Congress, which held the sole authority to invoke the laws of war under the Constitution.[90] International law framed the issue of presidential authority.

A similar issue over the scope of a blockade came up in *The Paquete Habana*,[91] concerning the blockade of Cuba during the Spanish-American War. This opinion is known for its resounding declaration that "[i]nternational law is part of our law."[92] The qualification to this statement is less frequently noted: "For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[93] The actual holding, like that in the *Charming Betsy*, is far narrower than its broad proclamation. It is only that domestic prize law countenanced the widespread acceptance of an exception for coastal fishing vessels from a properly declared blockade.[94] The dissent disputed the existence and force of this exception, but tacitly conceded that if domestic prize law allowed it to operate, it should be followed. The dissent's examination of international law led to the conclusion that "the exemption of fishing craft is essentially an act of grace, and not a matter of right, and it is extended or denied as the exigency is believed to demand."[95] According to both opinions, resort to international law operated as a default rule in the absence of contrary domestic law. It did not generate a cause of action on its own, only an exception to the existing power of federal courts to condemn a vessel as a prize of war.

Another leading decision on the reception of international law takes essentially the same approach. As noted earlier, in *The Schooner Exchange v. McFaddon*, the Supreme Court recognized the defense of foreign sovereign immunity.[96] The case concerned the ownership of a vessel allegedly seized

88 *Id.* at 674-82.
89 *Id.* at 670-72.
90 *Id.* at 686-93 (Nelson, J., dissenting).
91 175 U.S. 677 (1900).
92 *Id.* at 700.
93 *Id.*
94 *Id.* at 712.
95 *Id.* at 719 (Fuller, C.J., dissenting).
96 11 U.S. (7 Cranch) 116 (1812).

by French naval forces and then brought to an American port as a French naval vessel. The former owners brought an admiralty action in rem against the vessel and the French government asserted sovereign immunity. The Court recognized an exception to admiralty jurisdiction based on the "principle of public law, that national ships of war, entering the port of a friendly power open for the reception, are to be considered as exempted by the consent of that power from its jurisdiction."[97] Once again, the Court took the application of international law for granted, but deployed it to restrain, not to expand, the jurisdiction of the federal courts.

More than a century later, federal law gradually recognized an exception to foreign sovereign immunity for claims arising from the commercial activities of a foreign government or its instrumentalities acting in a commercial capacity. This development culminated in the passage of the FSIA, which identified a variety of exceptions to sovereign immunity. As just noted, the most important of these exceptions is for claims based upon commercial activity with a sufficient connection to the United States.[98] Tellingly, the FSIA has special provisions that substitute liability for damages for an in rem action commenced by seizure of a vessel or cargo.[99] The enactment of the FSIA demonstrated the superiority of enacted federal law over customary international law, even as the former incorporated developments in the latter. This development has continued with amendments to the FSIA that create claims for human rights violations, along with corresponding exceptions to sovereign immunity.[100] The commercial exception also exemplifies another, less clear-cut but equally fundamental, tendency: the priority of commerce in admiralty law and in international law generally, insofar as it affects the rights of private individuals and firms. This subject is taken up in the next part of this article.

III. COMMERCE AND CONSCIENCE

Almost all of maritime law concerns commerce in one way or another. The major issues in the subject fall under several conventional headings: carriage of goods, charter parties, collision, salvage, general average, maritime liens, marine insurance, government promotion of shipping, and claims by maritime workers. The commercial focus of maritime law was traditionally so intense that several prominent scholars argued that it did not cover most forms of recreational boating.[101] All of the traditional subjects of maritime law resulted in litigation because there was so much at stake in

97 *Id.* at 145-46.
98 28 U.S.C. § 1605(a)(2).
99 *Id.* §§ 1605(b)-1605(c).
100 *Id.* §§ 1605A-1605B.
101 Preble Stolz, *Pleasure Boating and Admiralty:* Erie *at Sea*, 51 CAL. L. REV. 661 (1963).

claims for ownership and damage to property or claims for personal injury and death. Maritime law presupposed rights to ownership and to avoid personal injury. These came from other sources of law based on land. With land, however, came territorial conceptions of sovereignty, which then was exercised beyond formal national boundaries to reach the high seas.

The connection between maritime law and sovereignty has existed since the beginning of maritime commerce, where trade always was allied with assertions of sovereign power. Powerful institutions in the modern era, such as the English East India Company and its Dutch counterpart, sought to establish monopolies[102] that could appropriate the gains from trade that made maritime commerce worthwhile. So, too, franchises to engage in trade date back to ancient times, as rulers sought to determine who could, and who could not, trade on their shores.[103] The law that governed this trade existed within a network of sovereign control over the terms of trade and therefore the scope and content of maritime law. The law allocated the gains from trade, determining who could share in the profits of maritime commerce and how the losses would be allocated. In contrast to the ideals of human rights, maritime litigation focused almost exclusively on money and property. These were the stakes in almost all maritime cases, from collision, to cargo damage, to salvage.

Looking to admiralty as an example of transnational private law presupposes a body of public international law. The relations among sovereigns determine the law that governs the relations among private actors. The cases discussed earlier, on sovereign immunity, the act of state doctrine, and prize jurisdiction, reflect the dominance and priority accorded to public international law. So, too, do admiralty cases on choice of law and choice of forum, which exhibit deference to foreign legal systems in the form of international comity. The major federal cases on choice of law come from admiralty,[104] as do those on enforcing forum selection clauses and foreign arbitration clauses.[105] As the Supreme Court reasoned in one of the cases on choice of law:

> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have

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102 DAVID ABULAFIA, THE BOUNDLESS SEA 691, 713 (2019) (recounting attempts by these companies to shut out independent traders).

103 *Id.* at 594-610 (describing political and trade conflicts over access to the Indian Ocean).

104 Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 381-84 (1959); Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953).

105 Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9-15 (1972); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 537-39 (1995).

> developed to define the domain which each nation will claim as its own.[106]

Public international law defines the boundaries of private maritime law. National law determines who can get the benefit of a claim in admiralty. International law determines when that law will be chosen and how far it will extend.

The nineteenth-century disputes over the slave trade and abolition generally demonstrate the priority of public law and the cautionary lessons to be drawn from it. The focus of enforcement must be on an asset or a person in international commerce. The plaintiff's claim must be easily ascertainable and consistent with prevailing notions of sovereignty. And the remedy must rely upon established mechanisms for enforcement, such as the seizure of assets.

The prohibition of the slave trade focused on vessels and slaves in maritime commerce. This prohibition came from outside maritime law, which had, since antiquity, embraced traffic in people as just another form of property and a source of profitable trade.[107] The effective abolition of the slave trade depended upon the initiative of the dominant maritime power at the time, the United Kingdom and the Royal Navy, not upon limits and compunctions inherent in maritime law.[108] The direction of influence proceeded from public law, and in particular, legislation and treaties banning the slave trade, to maritime law—not the other way around. The contribution of maritime law had to do with the means of implementation, most notably, in equating the slave trade with piracy.

The slave trade could also be easily identified and prohibited within accepted limits on sovereign power. In the American experience, initial efforts to ban the slave trade applied to trade among other nations, not with importation of slaves to the United States. The Constitution prohibited a ban on importation until 1808.[109] As noted earlier, decisions of the Marshall Court treated the initial prohibitions against the slave trade as "municipal piracy," not triggering the broad principles of universal jurisdiction and enforcement, applicable to piracy in violation of international law.[110] Pirates, as "enemies of all mankind," can be prosecuted by any nation and anyone who suffers from their depredations. Municipal piracy, on the other hand,

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106 *Lauritzen*, 345 U.S. at 582.

107 DAVID BRION DAVIS, INHUMAN BONDAGE, THE RISE AND FALL OF SLAVERY IN THE NEW WORLD 41 (2008) ("As the demand for slaves grew [in ancient Greece], merchants increasingly purchased slaves as part of long distance seaborne commerce, in other words, the trade in such commodities as ceramics and olive oil opened up distant markets for human labor.").

108 JENNY S. MARTINEZ, THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS 48 (2012) ("British naval vessels captured the vast majority of ships [in the slave trade].").

109 U.S. CONST. art. I, § 9.

110 *See supra* notes 77-79 and accompanying text.

requires a connection to the sovereign whose law is invoked, either by territory or the nationality of the victims, the pirates, or the vessels involved.[111] It requires some kind of contact based on established conceptions of sovereignty, in the absence of a prohibition founded in international law.

The implications of the limits on municipal piracy are twofold: first, admiralty cannot just be applied without qualification to new issues, even ones as compelling as the abolition of slavery and the slave trade; and second, those qualifications often come from sovereignty as defined by public international law. Judges might well have the power to recognize and expand new remedies in maritime law, but they have seldom exercised that power without regard to prevailing conceptions of national sovereignty in public international law. Courts have the power to make maritime law in the interstices of statutes and treaties, and they invariably exercise that power within those limits.

In the abolition of the slave trade, admiralty courts had little choice. Seizing a vessel on the high seas, or anywhere outside a U.S. port, is an act only the Navy or Coast Guard can perform. The inherent difficulty of seizing a vessel on the open seas requires violence and coercion legitimately available only to a sovereign government. In theory, this could be accomplished by private individuals, but they would need a commission as privateers to be distinguished themselves from pirates. Judges depended upon public enforcement to initiate litigation, and once litigation began, they deferred to the accepted principles of public international law that govern relations between sovereigns.[112]

IV. IMPLICATIONS FOR FEDERAL COMMON LAW

The inherent limits on the scope and force of maritime law are reflected in the inherent limits on private litigation as a mechanism for enforcing individual rights. As the examples of piracy and slavery attest, effective enforcement depends almost wholly on actions taken by public authorities. Moreover, most of the enforcement, then as now, came by criminal prosecutions, often accompanied by multilateral efforts by multiple governments.[113] The more the use of force is necessary, the less the resort to private enforcement alone is feasible.

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111 *See supra* notes 82-84 and accompanying text.

112 MARTINEZ, *supra* note 108, at 35-38 (summarizing British efforts to change international law to abolish the slave trade).

113 Ilan Fuchs, *Piracy in the 21st Century: A Proposed Model of International Governance*, 51 J. MAR. L. & COMM. 1, 11-12 (2020) (proposing more international cooperation based on limited success of limited initiatives so far).

This is not to deny that maritime law lacks the capacity for development. But it develops most frequently in combination with, rather than in opposition to, accepted international relations. Private litigation and judicial decisions can call attention to the need for change, but it is only with legislation and treaties that any such change can be generally effective. Take, for example, the law governing carriage of goods by seas, which took its current form through international conventions and implementing legislation, notably COGSA.[114] Judicial interpretation of that Act plays an important role in assessing liability for damage to goods, but it does so within the framework of legislation and treaties.

So, too, with claims for personal injury or death on behalf of maritime workers, which offer the closest analogy to human rights claims based on tort principles. As recounted earlier,[115] these claims were supplemented and supplanted in large part by statutes such as the Jones Act,[116] the Longshore and Harbor Workers Compensation Act,[117] and the Death on the High Seas Act.[118] Recent decisions of the Supreme Court have expressed general suspicion of claims based on judge-made law, in areas as various as securities fraud and civil rights. In *Morrison v. National Australia Bank Ltd.*,[119] the Supreme Court held that foreign plaintiffs could not bring an implied private right of action for fraud in connection with securities traded on a foreign exchange by foreign nationals and issued by a foreign corporation.[120] As Justice Scalia colorfully noted in his opinion for the Court, "[w]hile there is no reason to believe that the United States has become the Barbary Coast for those perpetrating frauds on foreign securities markets, some fear that it has become the Shangri-La of class-action litigation for lawyers representing those allegedly cheated in foreign securities markets."[121] Likewise, in *Ziglar v. Abbasi*,[122] the Court refused to extend an implied private right of action for deprivation of constitutional rights by federal officers.[123] It found a "new *Bivens* context" in the plaintiffs' claims of prisoner abuse and therefore required "special factors" to justify an extension of this implied remedy.[124]

Whether or not such limitations on implied private rights of action are justified, they illustrate an inherent feature of judge-made law. What one generation of judges has done can be undone or limited by the next

114 46 U.S.C. app. §§ 1301-1312.

115 *See supra* text accompanying notes 48-73.

116 46 U.S.C. §§ 30104-30105.

117 33 U.S.C. §§ 901-950.

118 46 U.S.C. §§ 30301-30308.

119 561 U.S. 247 (2010).

120 *Id.* at 265.

121 *Id.* at 270.

122 137 S. Ct. 1843 (2017).

123 *Id.* at 1858-65.

124 *Id.* at 1859-60. (referring to the implied private right of action recognized in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971)).

generation of judges. Often, implied rights of action find support in legislation which serves as a complement and confirmation of judge-made remedies. Yet that legislation itself remains subject to restrictive interpretations. What implied rights of action cannot do is assure that the balance between individual human rights and national sovereignty always comes out in favor of the former rather than the latter. As recent experience all too clearly reveals, such implied rights of action remain inherently susceptible to subsequent restrictive judicial decisions, not to mention subsequent legislation. They exist in a shifting landscape in which attitudes towards judge-made law, methods of statutory interpretation, and the statutes themselves can always change.

An example comes from *Jesner v. Arab Bank, PLC*,[125] which held that claims based on jurisdiction under the ATS[126] could not be brought against foreign corporations.[127] The decision might be justifiable as an attempt to limit liability based on claims of aiding and abetting, which has been imposed on implied rights of action for violation of the securities laws.[128] The defendant in *Jesner* was not accused of directly perpetrating the human rights abuses, but of indirectly participating by financing the organizations and individuals that did so. An across-the-board limit on the liability of foreign corporations could better be justified by analogy to the Torture Victim Protection Act,[129] which imposes liability only upon "individuals."[130] It therefore excludes liability of organization and any entity, like a corporation, that is not a natural person.[131] Other federal statutes create remedies for human rights violation, but only against a patchwork of defendants identified in various ways.[132] The Court would have done better to explore such analogies than to engage in the historical inquiry that led it back to the law in the eighteenth century when the ATS was enacted. Against this statutory background, excluding foreign corporations from liability does not look exceptional.

Jesner also offers its own salutary lesson in how circumscribed the judge-made law of admiralty is. In recent years, statutes and techniques of statutory interpretation have assumed priority over the power of judges to devise sensible solutions to current problems. Thus, in maritime wrongful death

125 138 S. Ct. 1386 (2018).

126 28 U.S.C. § 1350.

127 *Jesner*, 138 S. Ct. at 1407-08.

128 Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 175-91 (1994) (refusing to recognize a private right of action for aiding and abetting a violation of section 10(b) of the Securities and Exchange Act).

129 28 U.S.C. § 1350.

130 *Id.*

131 Mohamed v. Palestinian Authority, 566 U.S. 449, 453-56 (2012).

132 18 U.S.C. §§ 2334(b), 2337 (liability of "any person" for terrorism but excluding any government and anyone acting on its behalf); 28 U.S.C. § 1605A (liability of any foreign state designated as "a state sponsor of terrorism"); 28 U.S.C. § 1605B (liability of any "foreign state").

claims, the state of the law as of the enactment of the Jones Act, in 1920, determined the scope of damages for wrongful death, excluding almost all nonpecuniary losses.[133] In principle, subordination of judge-made law to enacted statutes exhibits perfect fidelity to the common law system respecting the ultimate authority of the legislature. Federal common law, after all, is not constitutional law. Doubts creep in when prevailing methods of statutory interpretation, rather than the text of the statute, assume priority over the range of considerations that should govern the development of judge-made law. In terms of wrongful death claims, does it really make sense to dial back the remedies for such claim to what they were one hundred years ago?[134] Adherents to originalist interpretation no doubt have an answer to this question, but theirs is not the only one.

V. CONCLUSION

This survey of maritime cases demonstrates that judicially recognized claims in admiralty create no exception to prevailing conceptions of sovereignty, either then when those claims were adopted as American law or now when they might be invoked to support human rights claims. Maritime law grew up with changing views of sovereignty, not in opposition to them. As the decisions reviewed in this Essay reveal, maritime law most often limited its reach to conform to those views. Nevertheless, by the same token, admiralty reveals that fears of expansion of judicially recognized claims at the expense of sovereignty have been overdrawn. Admiralty has developed and evolved in harmony with public international law, as it has been codified in treaties and legislation. Human rights law can do the same.

133 *See supra* text accompanying notes 58-59.

134 *See supra* text accompanying notes 57-73.