THE INDUSTRIAL ARBITRATION ACT: HOW THE JUDICIARY CAME TO COMPEL THEIR ABANDONED ADMIRALTY WARDS TO ARBITRATE

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I. Introduction

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"Consider the subtleness of the sea; how its most dreaded creatures glide under water, unapparent for the most part, and treacherously hidden beneath the loveliest tints of azure. For as this appalling ocean surrounds the verdant land, so in the soul of man there lies one insular Tahiti . . . . God keep thee! Push not off from that isle, thou canst never return!"[1]

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In what is perhaps a verbose manner, Herman Melville's *Moby Dick* excels at evoking one apt notion again and again: the contrast between land and sea, coherent order and ambiguous chaos. And it is specifically on the shore, the border between these two realms, where judges and justices brave the ambiguous chaos and interpret statutory texts. They are like brave map-makers who must explore the four corners of the law, establishing ordered precedents and putting lawyers' minds at ease when they navigate into statutory waters themselves. Still, chaos is not without its dangers, and judges and justices may become swallowed by misinterpretations of the law that sometimes never release them. The relationship between laws governing the rights of seamen and arbitration is one such creature that modern courts have found themselves trapped in without promise of return. The misdirection that ensued has culminated in a gaping statutory maw that Congress never enacted, the forewarned "Industrial Arbitration Act."[2] This Comment intends to muster a search party and reconsider the maps lawyers have been handed down to navigate the enforcement of arbitration on seamen.

Seafarers have long been considered a particularly vulnerable class of workers who warrant heightened legal protections.[3] This is largely due to life-threatening "perils of the sea"[4] unique to the seaman's trade, paired with the nonnegotiable nature of a typical seaman's

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[1] HERMAN MELVILLE, MOBY DICK 267 (Canterbury Classics 2014) (1851).

[2] *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4212 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 9 (1923) (statement of William H.H. Piatt) ("It is not the intention of this bill [the Federal Arbitration Act] to make an industrial arbitration in any sense.") [hereinafter 1923 Hearings]. Note that the "Industrial Arbitration Act" is not a real act, but rather a reference to this citation's quoted material. *See also infra* text accompanying note 126.

[3] Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) ("But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship.").

[4] What constitutes a "peril of the sea" is not federally codified but is a question of fact. Generally speaking, a peril of the sea refers to an unavoidable, fortuitous event whose origin is "peculiar to the sea." Dustin Wentz Batson, Comment, *Taming the Perilous Seas: Conflicting Interpretations of the "Perils of the Sea" Defense to Shipowner Liability and Signs of Reconciliation*, 6 LOY. MAR. L.J. 133, 140 (2008) (quoting R.T. Jones Lumber Co. v. Roen S.S. Co., 270 F.2d 456, 458 (2d Cir. 1959)). Despite this, a few local codes provide examples of perils, which include storms, waves, rocks, shoals, man-made objects, confinement at sea, dangerous animals at sea, and other events "peculiar to the sea" like maritime piracy. *See* CAL. HARB & NAV. CODE § 422 (West, Westlaw through Ch. 1017 2024 Reg. Sess.); *see also* 18 GUAM CODE ANN. § 63306 (Westlaw through P.L. 37-063 (Feb. 9, 2024)).

employment contract.[5] These harsh considerations were central to the judiciary's "wards of the admiralty"[6] doctrine. This doctrine set a precedent for granting seamen special solicitude[7] and manifested in Congress's 1920 Merchant Marine Act, more commonly known as the "Jones Act."[8] The Jones Act grants seamen the right to a negligence action against their employer and guarantees them a trial by jury.[9] But maritime employers—like all other prudent employers—value efficiency, cost mitigation, and discretion. Therein enters arbitration.

Arbitration is an alternative forum to a court of law in which parties submit their dispute to a neutral third party for private resolution.[10] The 1925 Federal Arbitration Act (FAA) boldly declares arbitration "valid, irrevocable, and enforceable" at law.[11] Despite an explicit exemption in the FAA for seamen,[12] courts are now more likely than ever to send a seaman's Jones Act claim to arbitration, overriding any guarantees to a trial by jury.[13] As will be demonstrated, this predicament stems from an overly literal interpretation of the exemption, born from two distinct lines of cases that severed the historical moorings of the wards of the admiralty doctrine and the

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[5] "A seaman isolated on a ship on the high seas is often vulnerable to the exploitation of his employer. Moreover, there exists a great inequality in bargaining position between large shipowners and unsophisticated seamen. Shipowners generally control the availability and terms of employment." Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1152 (9th Cir. 2008) (quoting Castillo v. Spiliada Maritime Corp., 937 F.2d 240, 243 (5th Cir. 1991)).

[6] *Harden*, 11 F. Cas. at 485 (establishing that seamen "are emphatically the wards of the admiralty").

[7] "Special solicitude" means that a court will treat the party bestowed with this protection favorably. *See* Moragne v. States Marine Lines, Inc., 398 U.S. 375, 387 (1970) (quoting The Sea Gull, 21 Fed. Cas. 909, 910 (C.C.D. Md. 1865)) (declaring that "certainly it better become[] the humane and liberal character of proceedings in admiralty to give than to withhold the remedy" to seamen).

[8] The term "Jones Act" is primarily associated with section 33 of the Merchant Marine Act, which addresses seamen rights, and owes its colloquial namesake to its original sponsor Sen. Wesley L. Jones. *See, e.g.*, C. Todd Jones, *The Practical Effects on Labor of Repealing American Cabotage Laws,* 22 TRANSP. L.J. 403, n.8 (1995). It is referred to as such hereafter.

[9] 46 U.S.C. § 30104; This statute also extends the Federal Employer's Liability Act (FELA) to seamen, which fosters a pro-plaintiff tort action. *See* discussion *infra* Part II.

[10] *See* Imre S. Szalai, *Fixing a Power Struggle in America's Civil Justice System*, 27 HARV. NEGOT. L. REV. 209, 214 (2022).

[11] 9 U.S.C. § 2.

[12] *See id.* § 1.

[13] *See, e.g.,* Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271, (5th Cir. 2007); Harrington v. Atl. Sounding Co., 602 F.3d 113 (2d Cir. 2010); Schreiber v. K-Sea Transp. Corp., 814 N.Y.S.2d 124 (N.Y. App. Div. 2006) *aff'd but criticized*, 879 N.E.2d 733 (2007); Barbieri v. K-Sea Transp. Corp., No. 1:05-cv-04950-EVN-MDG, 2006 WL 3751215 (E.D.N.Y. 2006); Garza Nunez v. Weeks Mar., Inc., No. 06-3777, 2007 WL 496855 (E.D. La. 2007); *but cf.*, Brown v. Nabors Offshore Corp., 339 F.3d 391, 393–95 (5th Cir. 2003) (using a broad interpretation of § 1 to hold that the seamen exemption applies to a pre-injury arbitration agreement) *and* Buckley v. Nabors Drilling USA, 190 F. Supp. 2d 958, 961–63, 65–66 (S.D. Texas Mar. 15, 2002) (rejecting a narrow interpretation of "engaged in . . . interstate commerce" to hold that the seamen exemption applies to a pre-injury arbitration agreement).

FAA.[14] In reality, a contextual reconsideration of the history and meaning of both the wards of the admiralty doctrine and the FAA pleads for a broader interpretation of the exemption that places the burden of proving an arbitration agreement's enforceability on the seaman's employer when the employer solicited the agreement.[15]

This Comment consists of seven parts. Part II establishes the legal significance of seamen and their rights and remedies. Part III introduces arbitration, the FAA, and the seamen exemption. Part IV outlines the history of the wards of the admiralty doctrine and the FAA and their defining case lines, which together birthed the modern literalist interpretation of the seamen exemption. Part V discusses the current enforceability of arbitration on seamen, highlighting *Terrebonne v. K-Sea* and *Harrington v. Atl. Sounding* as the most troubling instances of modern courts refusing to apply the seamen exemption. Part VI provides an alternative contextual interpretation, or "map," of the exemption, reconsiders the previous cases in light of it, and offers policy arguments in support. Part VII concludes that the historical precedents protecting seamen create a consideration, or "Tahiti,"[16] too substantial for modern courts to push off from, abandoning their wards and narrowly interpreting the seamen exemption.

II. Who is a "Seaman" and What are Their Rights and Remedies?

Establishing the seaman's[17] rights and remedies is necessary to accurately construct a statutory interpretation that is consistent with the general history and treatment of seamen. But first, the threshold question of "Who is a seaman?" must be addressed, which, albeit a simple

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[14] "Literalism" ignores "how the author wanted to use language or the audience might understand it. It holds up the text in isolation from actual usage." Amy Coney Barrett, *2019 Sumner Canary Memorial Lecture: Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 857 (2020) (quoting WILLIAM D. POPKIN, MATERIAL ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 224 (3d ed. 2001)). *See also* discussion *infra* Part IV.

[15] What I refer to as "contextualism" hereafter is a reduction of "textualism" and "originalism" insofar as these theories constrain statutory interpretation to the text's original meaning and usage at the time of its passage. I do this to avoid an extensive discussion distinguishing between varying theories and sub-theories of statutory interpretation, a discussion that would fall outside the scope of this Comment. *See* Keith E. Wittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) ("[T]he discoverable historical meaning of the . . . text has legal significance and is authoritative in most circumstances."); *see also* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PENN. J. OF CONST. L. 1, 5 (2016) ("For an originalist . . . the historical meaning of the text is a hard constraint."). *See also* discussion *infra* Part VI.A.

[16] *See supra* text accompanying note 1.

[17] Usage of the term "seaman" and "seamen" in this Comment is not intended to be exclusive but are the designated terms of art within Maritime Law when referring to maritime employees who meet the criteria for seamen status. *See* Hillary Smith Weise, Comment, *The Abandoned Wards of Admiralty: The Supreme Court's Course Change on the Availability of Punitive Damages to Seamen in Unseaworthiness Claims*, 95 WASH. L. REV. 1565, n.4 (2020). Note further that the common phrase "Jones Act seaman" is not used as it is redundant; any maritime employee who qualifies as a seaman is eligible under the Jones Act for its corresponding remedies. FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., PERSONAL INJURY IN ADMIRALTY § 5-2, at 65 (2000).

one, remains the subject of a legal debate beyond the scope of this Comment.[18] Courts have agreed that the preceding question is a factual one predominantly answered by the jury[19] based upon several, though perhaps ill-defined, factors.[20] For the purposes of this Comment, a simplification of the relevant factors will suffice; the Supreme Court requires that a seaman (1) contribute to the function or mission of a vessel in navigation and (2) have a connection to the vessel that is substantial in both duration[21] and nature.[22] Distinguishing between who is a seaman and who is not a seaman bears enormous legal significance.[23] If an injured maritime employee indeed qualifies as a seaman, then there are three avenues through which they may seek potential remedies: the ancient remedy of maintenance and cure,[24] the judicial remedy of unseaworthiness,[25] and the legislative remedy of the Jones Act negligence claim.[26]

The seaman's proverb "one hand for yourself, one for the ship" provides insight into why the trilogy of remedies available to seamen has arisen.[27] Seafaring is a dangerous profession, and it remains so for reasons both old and new. Certainly, modern technological advancements in the maritime industry have resulted in destructive capacities unseen in the age of sail.[28] Yet even the

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[18] See Thomas C. Galligan, Jr., *Revisiting Sanchez: Turning Short Round*, 24 LOY. MAR. L.J. 1 (Feb. 2025) for a comprehensive discussion about the ongoing struggle to define seaman status.
[19] If a maritime employee under consideration for seamen status clearly fails to satisfy the Supreme Court's established factors, then "the court may take the question from the jury." Chandris, Inc. v. Latsis, 515 U.S. 347, 371 (1995).
[20] *See* MARAIST & GALLIGAN, *supra* note 17, § 5-2, at 65.
[21] There is an implicit requirement within "duration." The Supreme Court, relying on the Fifth Circuit's extensive maritime experience, speculated that the alleged seaman must have spent at least thirty percent of his time working aboard the same vessel, or fleet of vessels. *Chandris*, 515 U.S. at 371.
[22] *See id.* at 376.
[23] If a maritime employee does not qualify as a seaman, then they are likely a "longshoreman," another term of art used to describe employees who work in docks and harbors, assisting in loading and unloading operations, onshore maintenance, and other land-based maritime work. Longshoremen are excluded from the seamen remedies since they are already covered under the 1927 Longshore and Harbor Worker's Compensation Act (LHWCA), which provides a single compensation remedy. *See* McDermott Int'l, Inc. v. Wilander 498 U.S. 337, 347 (1991).
[24] *See* The Osceola, 189 U.S. 158, 175 (1903).
[25] *See id.*; *see also* Mahnich v. Southern S.S. Co., 321 U.S. 96, 96–99 (1944).
[26] *See* 46 U.S.C. § 30104(a).
[27] *See generally* TRISTAN JONES, ONE HAND FOR YOURSELF, ONE FOR THE SHIP: THE ESSENTIALS OF SINGLE-HANDED SAILING (1990).
[28] The following reference maritime casualties that are unique to modern technological advancements and illustrate how modern seagoing employment presents novel and capacious potential for injury: the 1979 West Indies oil tanker collision involving the S.S. ATLANTIC EMPRESS and the AEGEAN CAPTAIN; the 1980 capsizing of the ALEXANDER L. KIELLAND oil rig; the 1988 explosion and collapse of the PIPER ALPHA oil rig; the 2010 explosion and collapse of the DEEPWATER HORIZON oil rig; the 2012 capsizing of the COSTA CONCORDIA cruise liner; the 2018 East China Sea oil tanker collision involving the SANCHI and the CF CRYSTAL; the 2019 tragedy involving LIFEBOAT 6, which fell 80 feet from its oil platform and which gave rise to *Earnest v. Palfinger Marine USA, Inc.*, 90 F.4th 804

common "small slip while carrying a heavy load" can cause "a crew member to become unfit for duty" while stranded at sea.[29] Indeed, the unique perils of the sea are numerous, uncontrollable, and at times lethal.[30] This truth has been acknowledged in the law since ancient times, with the creation of maintenance and cure, the first avenue of remedies, dating as far back as the late 12th century.[31]

Maintenance and cure continues to be an indispensable remedy to the injured seamen, acting as the barrier between subsistence and indigence. Simply put, any seaman who becomes ill or inadvertently[32] injured, while in the service of their vessel, is entitled to basic living expenses under maintenance, full compensation for their medical expenses under cure,[33] and any unearned wages they would have earned during the remainder of their voyage.[34] An employer's duty to pay maintenance and cure is incidental to the employment contract but cannot be modified or waived.[35] In line with the principles of special solicitude,[36] a seaman may also seek punitive damages against their employer for the latter's arbitrary and capricious failure to pay maintenance and cure.[37] Still, this critical remedy is limited. If the seaman's condition reaches "maximum medical cure" such that it may not be cured further, the employer may terminate maintenance and cure even if the condition has not improved.[38] Recognizing the shortsightedness

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(5th Cir. 2024) (involving a lifeboat analogous to those used on offshore oil rigs); the 2021 capsizing of the SEACOR POWER lift boat; and the 2025 North Sea vessel allision involving the MV SOLONG and the MV STENA IMMACULATE.

[29] MARISKA BUITENDIJK, ONE HAND FOR THE SHIP AND ONE FOR YOURSELF (SWZ|Maritime 2019), https://swzmaritime.nl/news/2019/08/19/one-hand-for-the-ship-and-one-for-yourself/ (last visited Mar. 14, 2025).

[30] *See* Batson, *supra* note 4, at 140.

[31] The "Rolls de Oléron," maritime rules drafted on the French island of Oléron sometime between 1190 and 1216, is the earliest set of English and French maritime rules governing the compensation of seamen who fall ill or become injured while in service of the vessel. *See* William Tetley, *Maritime Liens in the Conflict of Laws*, *in* LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN, at 440, n.7 (J.A.R. Nafziger & Symeon C. Symeonides eds., 2002). Article 7 of the codification requires a shipmaster to bring an ill or injured seaman to shore and ensure that he is cared for to the same extent as he was aboard the ship. *See* 2 THE OAK BOOK OF SOUTHAMPTON at 63, 65 (Paul Studer ed. & trans., 1911), https://archive.org/details/oakbookofsoutham11stud (choose "PDF" on the right, below "DOWNLOAD OPTIONS").

[32] "A seamen [sic] is not entitled to maintenance and cure if his injury occurs through 'willful misconduct.'" MARAIST & GALLIGAN, *supra* note 17, § 6-2(b), at 85 (quoting Matthews v. Gulf & S. Am. S.S. Co., 226 F. Supp. 555, 556 (E.D. La. 1964), *aff'd*, 339 F.2d 702 (5th Cir. 1964)).

[33] *Id.* § 6-2(b), at 84.

[34] *See, e.g.*, Farrell v. U.S., 336 U.S. 511, 519–21 (1949).

[35] Atl. Sounding Co. v. Townsend, 557 U.S. 404, 423 n.9 (2009).

[36] *See supra* notes 6–7 and accompanying text.

[37] *Townsend*, 557 U.S. at 424.

[38] *See* MARAIST & GALLIGAN, *supra* note 17, § 6-2(d) (footnotes omitted). However, if subsequent advancements produce a new curative medical treatment, then the seaman may reinstate their maintenance and cure. *See, e.g.*, Cox v. Dravo Corp., 517 F.2d 620, 626 (3d Cir. 1975).

of this method of recovery, both courts and Congress began formulating a way for seamen to recover compensatory, "make whole" damages.[39]

Moving to the second avenue of seamen's remedies, courts gradually came to acknowledge that maritime employers owe seamen an absolute, non-delegable[40] warranty of seaworthiness.[41] A breach of this warranty proximately causing injury to a seaman gives rise to a strict liability action for unseaworthiness,[42] through which that seaman may recover compensatory damages.[43] Generally, vessels are deemed unseaworthy when "*any* equipment carried aboard a vessel as well as *any* part of the vessel itself" is "found not to be reasonably fit for its intended use."[44] The unseaworthiness action became a significant way for seamen to ensure that their employers kept the vessel—to which the former would be confined for extended periods of time—in working order,[45] breathing new meaning into the sailor's phrase "shipshape." This novel remedy also gave rise to new litigation highlighting the unique and perennial nature of the seaman's position. Take, for instance, Justice Robert Jackson's befitting dissent in *Pope & Talbot v. Hawn*, which distinguished between seamen and longshoremen:

> While his lot has been ameliorated, *even under modern conditions the seagoing laborer suffers an entirely different discipline and risk than does the harbor worker*. His fate is still tied to that of the ship. His freedom is restricted. He is under an unusual discipline and is dependent for his food, medicine, care and welfare upon the supplies of the ship. Contrast the lot of this plaintiff who lived at home, was free to leave his employment, took no risks of the sea and had no different condition

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[39] Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1134 (5th Cir. 1995) ("Congress has statutorily declared that an injured Jones Act seaman is entitled to be made whole."). Hence, the judicial intent for the unseaworthiness action is, *a fortiori*, to aid the seaman in being made whole where maintenance and cure falls short.

[40] *E.g.*, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 (1960) ("[T]he decisions of this Court have undeviatingly reflected an understanding that the owner's duty to furnish a seaworthy ship is absolute and completely independent of his duty under the Jones Act to exercise reasonable care.").

[41] The warranty of seaworthiness came from the English courts to the United States in dictum via *The Osceola*. The Osceola, 189 U.S. 158, 175 (1903). Despite this, the unseaworthiness claim did not become fully effectual until its explicit affirmation in *Mahnich v. Southern S.S. Co.* Mahnich v. Southern S.S. Co., 321 U.S. 96, 99 (1944) ("[T]he admiralty rule that the vessel and owner are liable to indemnify a seaman for injury caused by unseaworthiness of the vessel . . . has been the settled law . . . .").

[42] *E.g.*, Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 207–08 (1996) ("[A] series of this Court's decisions transformed the maritime doctrine of unseaworthiness into a strict-liability rule.").

[43] In the context of a seaman's recovery, compensatory damages include "lost earnings, medical expenses, and general damages" like pain and suffering. MARAIST & GALLIGAN, *supra* note 17, § 6-3(f).

[44] 1B BENEDICT ON ADMIRALTY § 24 (2025) (emphasis in original).

[45] Seamen could also use the warranty of seaworthiness to ensure better working conditions in general. *Id.* ("The general conditions under which a seaman must live and work might also be deficient in one way or another and may render the vessel unseaworthy without regard to whether they arose from negligent conduct or not.").

> or hazard attached to his employment than would have attached to a carpentry job in a building ashore.[46]

Justice Jackson's dissent proved correct as the majority's opinion relied entirely on *Seas Shipping Co. v. Sieracki*[47] which Congress, in 1972, superseded by amending 33 U.S.C. § 905(b),[48] thereby reasserting the distinction between seamen and longshoremen.[49] But this was not the first time Congress had to correct the Supreme Court on the protected status of seamen.

Rewinding a few decades, the third and final remedy for seamen emerged from Congress's 1920 Jones Act.[50] 46 U.S.C. § 30104, the part of the Act extending seamen remedies, intended to partially overturn a Supreme Court case unfavorable to seamen: *The Osceola*.[51] Although *The Osceola* affirmed the seaman's general maritime remedies of maintenance and cure and unseaworthiness, the Court denied any such remedy for the negligence of a seaman's employer or co-employee.[52] As a result, the Jones Act responded, in relevant part: "A seaman injured in the course of employment . . . may elect to bring a civil action at law, with the right of trial by jury, against the employer."[53] Then, in the next sentence, the Act extends the Federal Employee's Liability Act (FELA),[54] originally reserved to railroad workers, to seamen.[55] In doing so, a mere sentence also furnishes seamen with favorable policies, including comparative negligence,[56] a three-year statute of limitations,[57] the elimination of the employer's

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[46] *Pope & Talbot v. Hawn*, 346 U.S. 406, 424 (1953) (Jackson, Reed, & Burton, JJ. dissenting) (emphasis added).
[47] *See generally Shipping Co. v. Sieracki*, 328 U.S. 85 (1946) (granting longshoremen an avenue to the seamen's unseaworthiness action).
[48] An amendment to the LHWCA, 33 U.S.C. § 905(b) eliminated the warranty of seaworthiness for longshoremen and instead provided them with a negligence action against a vessel owner. *See* THOMAS J. SCHOENBAUM & A.N. YIANNOPOULOS, ADMIRALTY AND MARITIME LAW: CASES AND MATERIALS 703 (1984).
[49] *See id.* at 702.
[50] 46 U.S.C. § 30104. The broader purpose of the Jones Act was to mandate a U.S.-owned fleet of vessels by "lay[ing] the foundation of a policy that will build up and maintain an adequate American merchant marine in competition with the shipping of the world." Wesley L. Jones, *The Merchant Marine Act of 1920*, *in* 9 PROCS. OF THE ACADEMY OF THE POLITICAL SCIENCE IN THE CITY OF NEW YORK 233 (1921). On Feb. 6, 1920, Sen. Jones introduced an amendment to add section 33 under the "miscellaneous" subtitle of the Act, which eventually became 46 U.S.C. § 30104. S. 3876, 66th Cong., 59 CONG. REC. 2535 (1920) (enacted).
[51] Atl. Sounding Co. v. Townsend, 557 U.S. 404, 415 (2009); *see generally* The Osceola, 189 U.S. 158 (1903).
[52] *Osceola*, 189 U.S. at 175 ("[W]e think the law may be considered as settled . . . [t]hat the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew . . . .").
[53] § 30104(a).
[54] *See generally* 45 U.S.C. §§ 51–60.
[55] 46 U.S.C. § 30104(a).
[56] Comparative negligence, unlike contributory negligence, does not bar recovery; instead, it results in a diminution of its value. *See* 45 U.S.C. § 53.
[57] *Id.* § 56.

ability to exempt itself from liability,[58] the elimination of other employer defenses,[59] a relaxed causation standard,[60] and concurrent jurisdiction at the plaintiff's sole discretion.[61] Because the Jones Act's purpose is identical to the unseaworthiness action in completing a seaman's recovery, damages under the Act are the same as those under unseaworthiness, and the seaman may only recover under one.[62]

In sum, both the unseaworthiness action and Jones Act negligence claim are intended to be the seaman's primary means of recovery, while maintenance and cure serves as an indispensable vehicle to obtaining their verdict. It becomes apparent, in light of these three remedies, that the judiciary and legislature consistently set seamen apart from other classes of workers.

III. Arbitration, the FAA, and the Seamen Exemption

Arbitration is an alternative forum for resolving a dispute between parties who have contractually consented to be bound by its outcome.[63] In other words, if litigation is a public system that resolves disputes inside a court of law, then arbitration is a private system that resolves disputes outside of one.[64] This juxtaposition permeates several aspects of arbitration. Instead of a judge presiding over legal proceedings, a neutral third-party "arbitrator"—who need not be a lawyer, much less one who specializes in the particular legal field at issue—hosts the arbitral forum.[65] In a court of law, judges either decide the matter themselves or delegate their

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[58] *Id.* § 55 ("Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any [employer] to exempt itself from any liability created by this chapter, shall to that extent be void.").
[59] *See id.* § 54 (barring employers from the assumption of risk defense).
[60] MARAIST & GALLIGAN, *supra* note 17, § 6-4(c), at 106 (citing Mayhew v. Bell S.S. Co., 917 F.2d 961 (6th Cir. 1990)) ("[T]he plaintiff may recover if he can pro-duce a 'scintilla' of evidence of employer negligence."). Jones Act causation also includes the tort principle of vicarious liability. *Id.* § 6-4(d)(1), at 107.
[61] § 56 (providing seamen, through the Jones Act, the right to choose the forum in which to bring their claims). Courts take this provision seriously, further protecting seamen in finding that, through § 55, the right to choose a forum belongs to the plaintiff alone. *See, e.g.*, Boyd v. Grand Trunk Western R.R. Co., 338 U.S. 263, 264–66 (1949). Also, a valid Jones Act claim brought in state court is one of the few nonremovable actions pursuant to 28 U.S.C. § 1445(a).
[62] *See, e.g.*, Dutra Grp. v. Batterton, 588 U.S. 358, 367–68, 376 (2019); *see also supra* note 43 (listing the seaman's compensatory damages).
[63] IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 7 (2013).
[64] *Id.*
[65] *Id.* Note that a panel of two or three such arbitrators may also be used. *Id.* However, "[the] American Arbitration Association reports that in 2019, on claims over $1 million, 49% utilized a single arbitrator even though the normal default is to [sic] a three-arbitrator panel for claims of that size." Adrian L. Bastianelli, III, *Question: A Single Arbitrator or Three-Arbitrator Panel? Answer: A Two-Arbitration Panel*, AMERICAN BAR ASSOCIATION (Dec. 11, 2020) (citations omitted), https://www.americanbar.org (click the search icon in the top right; then insert the article's title; it should be one of the first results). That is to say, there is no guarantee that the parties will seek a panel. Also, panels of three arbitrators carry greater risk for both parties

duty to resolve the dispute to a jury, typically composed of six or more members.[66] An arbitrator acts as a single juror who not only determines the dispute's outcome but also directs its proceedings and makes evidentiary rulings.[67] Moreover, parties in arbitration generally face far more limitations on the discovery process compared to the broad discovery afforded to parties in litigation.[68] Arbitral decisions are final, binding, and largely unreviewable[69] even where the arbitrator fails to properly interpret or apply the law.[70] In this way, arbitration becomes the highest court in the land.

Proponents of arbitration argue that the alternative forum is a cheaper, quicker, more customizable, and more "honorable" way to resolve disputes.[71] Instead of publicizing a potentially humiliating dispute, parties agree to settle their dispute away from prying eyes.[72] On the other hand, opponents counter that arbitration is not all-purpose. It may become more expensive than litigation if, for instance, the parties pursue litigation-style broad discovery, motion practice, prehearing orders, and other "formal trial procedures."[73] The process may also be inefficient, such as where the parties contest the validity of an arbitration agreement, or the enforceability of an otherwise valid agreement, leading to even more litigation than if the parties had simply taken their dispute to court in the first place.[74] The overwhelming trend toward limiting discovery in arbitration, coupled with disparities in the parties' bargaining power and

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because they tend to reach more extreme results than single arbitrators. *Id.* This can be difficult for those with little bargaining power and higher stakes. Panels of two arbitrators run the risk of a split, in which case a third arbitrator solely decides the matter anyway. *Id.*

[66] *See, e.g.*, FED. R. CIV. P. 48(a).

[67] *See, e.g.*, *Employment Arbitration Rules and Mediation Procedures*, AMERICAN ARBITRATION ASSOCIATION 10–28, https://www.adr.org/Rules (Scroll down; click "RULES" to the right of "Employment Arbitration Rules and Mediation Procedures").

[68] SZALAI, *supra* note 63, at 7.

[69] *See* 9 U.S.C. § 10(a) for exceptions. The four subdivisions therein outline the only circumstances where an arbitral award may be voided or "vacated." Indeed, "[c]ourts have described the judicial review of arbitrator's awards as 'one of the narrowest standards of judicial review in all of American jurisprudence.'" SZALAI, *supra* note 62, at 7.

[70] SZALAI, *supra* note 63, at 7.

[71] *See* Charles H. Barr, *Arbitration: the Pros, the Cons, and the Best Fit*, 96 WIS. LAW. 22, 24–26 (Jan. 2023).

[72] *Id.* at 24.

[73] *Id.* at 27–28 ("The traditional litigation model entails traditional litigation costs, plus the expenses, such as arbitrator compensation, unique to arbitration.").

[74] *See generally* cases cited *supra* note 13 (illustrating the inefficiency of arbitration when the parties disagree on whether they have to arbitrate their dispute to begin with). This inefficiency also causes more financial burden on parties with limited resources.

access to legal counsel, may curtail meaningful consideration[75] of a party's claim.[76] And again, the "arbitrators' errors—even clear or gross errors . . . do not authorize courts to annul [their] awards."[77]

Nevertheless, the "Aye's" have it, for in 1925 the 68th U.S. Congress passed the FAA.[78] The Act mandates:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable*.[79]

Serving as the core of the Act, this language found in § 2 is the linchpin for subsequent Supreme Court decisions holding that the FAA "establishes a 'federal policy favoring arbitration.'"[80] Despite this, the Act codifies an explicit exemption for seamen in the immediately preceding section: "[B]ut *nothing herein contained shall apply to contracts of employment of seamen*, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[81] Now, how do these two sections interact? The answer is subject to interpretation.

IV. It All Comes Down to Statutory Interpretation

Even though the language of §§ 1 and 2 of the FAA might seem coherent at first glance, ambiguity abounded, and unanticipated contextual misinterpretations made reconciling the two sections an enigma. In truth, the context afforded to a given statute's text can result in two polar opposite opinions. One court might analyze a statute's text without any consideration for its legislative or historical context, betraying the statute to its plain text; a text susceptible to the

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75 "Meaningful consideration" is not to be confused with the "effective vindication" doctrine established in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, which *blocks* arbitration. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 637 (1985) (blocking arbitration where "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). The *Mitsubishi* Court itself held that statutory claims may be properly submitted to arbitration, "unless Congress itself has evinced an intention" to the contrary "for the statutory rights at issue." *Id.* at 616, 628, 640.

76 *See also* Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted By Congress*, 34 FLA. ST. U. L. REV. 99, 139–40, 42–43 (2006) (criticizing *Mitsubishi*, 473 U.S. 614, for its underrepresentation of the policy concerns arising from the mandatory arbitration of statutory claims, including limited discovery and unequal bargaining power).

77 Widell v. Wolf, 43 F.3d 1150, 1151 (7th Cir. 1994).

78 9 U.S.C. §§ 1–16. The Act was originally named the "United States Arbitration Act." SZALAI, *supra* note 63, at n.68. *See also* discussion *infra* Part IV.C.

79 § 2.

80 Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987); *see also* discussion *infra* Part IV.D. (discussing *Southland Corp. v. Keating*, 465 U.S. 1 (1984), which set the precedent for the judiciary's strong pro-arbitration sentiment).

81 § 1.

anachronistic definitions of the newest dictionary.[82] This approach illustrates the statutory interpretation method known as "literalism," which "lead[s] to absurd results" or otherwise "thwart[s] the obvious purpose of the statute."[83] Another court, by contrast, might analyze a statute's text based solely upon its legislative and historical context and with little regard for its text, resulting in a blank check susceptible to the subjective whims of the beholder. This approach "risk[s] amending statutes outside the legislative process reserved for the people's representatives"[84] and is repudiated by the Supreme Court's recent majorities.[85]

Modern courts have applied the former approach to the FAA's seamen exemption. In applying literalism, these courts have underemphasized the historical context of both the wards of the admiralty doctrine and the FAA. However, in their defense, the proper meaning of these two legal concepts has become oversimplified and obscured. Hence, a primer on the history of both the wards of the admiralty doctrine and the FAA, as well as their relevant case lines, is appropriate before discussing the current enforceability of arbitration on seamen.

A. The Wards of the Admiralty Doctrine's Historical and Judicial Usage

As outlined in Part II, both the judiciary and legislature have endowed seamen with special solicitude, or favorability, when considering their affairs.[86] This unique deference arose when Justice Story proclaimed in his 1823 *Harden v. Gordon* opinion that seamen are "emphatically the wards of the admiralty."[87] He established the wards of the admiralty doctrine, reasoning:

> If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party.[88]

As antiquated as *Harden* might seem, Justice Story's reasoning has persisted for two hundred years. Seamen rank among the most vulnerable members of the working class to exploitation. This is because, in addition to the enduring perils of the sea,[89] seamen are so

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[82] It may well be argued from a semantic standpoint that even a word whose dictionary definition remains unchanged throughout history still connotes different meanings depending on the context. Thus, reading the plain text of a statute without additional reference to its original meaning is a dangerous practice.

[83] Helvering v. Hammel, 311 U.S. 504, 510–11 (1941) (alterations added) (citing United States v. Katz, 271 U.S. 354, 362 (1941)).

[84] Bostock v. Clayton Cnty., Georgia, 590 U.S. 644, 655 (2020) (alteration added).

[85] *See id.*; *see also* New Prime Inc. v. Oliveira, 586 U.S. 105, 113 (2019).

[86] *See* discussion *supra* Part II.

[87] Harden v. Gordon, 11 F. Cas. 480, 485 (C.C.D. Me. 1823).

[88] *Id.*

[89] Recall that in addition to the disparity in bargaining power, the fact that seamen are uniquely exposed to the perils of the sea was another necessary consideration for granting seamen this special solicitude. *See supra* note 4 and accompanying text; *see also* Mahnich v. Southern S.S. Co., 321 U.S. 96, 103 (1944) (arguing that seamen are considered the wards of the admiralty because they are "subject to the rigorous discipline of the sea, and the conditions of [their]

financially dependent upon their employers[90] that the latter assumes a fiduciary role.[91] In fact, this fiduciary relationship gave rise to a burden-shifting, two-part test that courts use to determine the enforceability of a seaman's release. In *Garrett v. Moore-McCormack Co.*, the Supreme Court held that "the burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights."[92] The Court then articulated that the "medical and legal advice available to the seaman" aids in determining the second prong.[93] As seamen continue to fall victim to disproportionate contracts at their employers' behest, subsequent circuit court cases continue to enforce this burden-shifting standard.[94]

Consideration for the wards of the admiralty doctrine is not limited to the judiciary. For instance, the Shipping Commissioners' Act of 1872[95] created federally appointed shipping commissioners who were to "superintend the shipping and discharge of seamen"[96] and ensure the fair settlement of seamen disputes.[97] Then, due in part to *The Osceola*'s rejection of the seaman's negligence action against their employer, Congress passed the 1915 Seamen's Act,[98] with section 20 specifically aimed at overturning the decision.[99] Although the Supreme Court in *Chelentis v. Luckenback S.S. Co.* explained that section 20 of the Act failed to overturn *The Osceola*,[100] Congress evidently found the seaman's woes so justifiable that it passed the previously discussed Jones Act in 1920 to correct its mistake.[101] These circumstances reveal that the uniquely vulnerable disposition of seamen was well known to members of Congress at the time of the FAA's passage.

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service constrain [them] to accept, without critical examination and without protest, working conditions and appliances as commanded by" their employers); *cf. supra* note 28.

[90] *See* Garrett v. Moore-McCormack, 317 U.S. 239 (1942); Bass v. Phoenix Seadrill/78, Ltd., 749 F.2d 1154 (5th Cir. 1985); Orsini v. O/S SEABROOKE O.N., 247 F.3d 953 (9th Cir. 2001); cases cited *supra* note 13.

[91] *Harden*, 11 F. Cas. at 485 ("[Seamen] are treated in the same manner . . . as courts of equity are accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees.").

[92] *Garrett*, 317 U.S. at 248 (alterations added).

[93] *Id.*

[94] *See Bass*, 749 F.2d at 1161; *Orsini*, 247 F.3d at 958–59.

[95] Ch. 322, 17 Stat. 262 (repealed 1946).

[96] U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 411 (1971).

[97] Sec. 25 of the Act, in particular, required that disputes between a seaman and their employer be submitted to the shipping commissioner for resolution. 17 Stat. at 267. These shipping commissioners were abolished in 1946, returning the seaman's guardianship to federal courts. *Arguelles*, 400 U.S. at 412. Regardless, Congress's consideration for seamen is what matters here.

[98] Ch. 153, 38 Stat. 1164 (current version at 46 U.S.C. § 10101–1507). The broader purpose of the Seamen's Act was to comprehensively promote the general welfare of seamen. *Id.* at 1164.

[99] *Id.* at 1185 ("Sec. 20. That in any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority.").

[100] *See* Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 380–81, 84–85 (1918).

[101] *See* discussion *supra* Part II (discussing the Jones Act seamen remedy).

B. The Dissolution of Special Solicitude for Seamen

In recent decades, the wards of the admiralty doctrine has seen significant decline in its consideration. In *Miles v. Apex Marine Corp.*, the Supreme Court limited the doctrine's invocation to issues falling outside of express federal statute.[102] The *Miles* Court was asked to extend certain remedies to seamen which Congress had already expressly limited, without exception, in the Jones Act.[103] It held that where maritime tort law falls under the statutory protection of Congress, courts "are not free to expand [seamen] remedies at will."[104] Notably, the *Miles* Court does not restrict the doctrine's relevance in determining statutory meaning, only that it will fail to persuade courts where there is an explicit statute on point.[105] Still, the Supreme Court's correct prioritization of legislation over bare policy considerations weakened the doctrine's previous potency.

In *Schreiber v. K-Sea Transp. Corp.*, the New York Court of Appeals held that the wards of the admiralty doctrine, though relevant, does not "outweigh[] the policy favoring arbitration" and therefore does not automatically preempt a seaman's post-injury arbitration agreement.[106] The *Schreiber* Court reasoned that the doctrine was antiquated and that most seamen today "are as intelligent and responsible as most others."[107] It then pointed out that Mr. Schreiber, the seaman in question, "writes lucid English, uses a computer, and has been involved in some business ventures" to justify their reasoning and conclude that the wards of the admiralty doctrine "has shown some signs of erosion."[108]

In 2019, the Supreme Court handed down an opinion that seemed to render the wards of the admiralty doctrine moot, in dicta. *Dutra Grp. v. Batterton* dealt with whether a seaman could recover punitive damages for his unseaworthiness claim.[109] The *Batterton* Court reasserted its reasoning from *Miles* to hold that punitive damages were unavailable for actions of unseaworthiness.[110] The Court relied on *Miles*'s rejection of the wards of the admiralty doctrine as a means to expand legislation,[111] but went further in using *Schreiber*-esque reasoning:

> [The wards of the admiralty doctrine] has its roots in the paternalistic approach taken toward mariners by 19th century courts. . . . [W]hile sailors today face

[102] *See* Miles v. Apex Marine Corp., 498 U.S. 19, 35–36 (1990).
[103] *See id.* at 21.
[104] *Id.* at 36.
[105] *Id.* ("We are not unmindful of [the doctrine], but [it is] insufficient in this case . . . Congress has placed limits on recovery in survival actions that we cannot exceed.").
[106] Schreiber v. K-Sea Transp. Corp., 879 N.E.2d 733, 738 (N.Y. 2007).
[107] *Id.*
[108] *Id.* (citing Brinson v. Linda Rose Joint Venture, 53 F.3d 1044, 1048 (9th Cir. 1995)). The cited Ninth Circuit decision found that the wards of the admiralty doctrine did not apply to Ms. Brinson, a seaman working as a vessel's cook, because she was "well-educated and experienced." *Brinson*, 53 F.3d at 1048. However, the contractual provision at issue in *Brinson* was not an arbitration agreement, nor a waiver of any kind, but rather a permissible stipulation for the employer's sales commission within the original employment contract. *Id.* at 1047.
[109] Dutra Grp. v. Batterton, 588 U.S. 358, 361 (2019).
[110] *See id.* at 377.
[111] *See id.* at 361.

> hardships not encountered by those who work on land, neither are they as isolated nor as dependent on the master as their predecessors from the age of sail.[112]

The *Batterton* Court then rested on its central tenet—that all maritime courts shall seek to promote "uniformity in maritime law and deference to the policies expressed in the statutes."[113]

C. The FAA's Historical and Legislative Meaning

Prior to statutory provisions requiring the enforcement of arbitration, courts were left to their own devices and, more often than not, chose to reject motions to compel arbitration.[114] These courts based their reasoning on the "ouster doctrine," which originated in the 1746 English case *Kill v. Hollister*.[115] The court in that case rationalized that arbitration "oust[ed] the jurisdiction" of the courts.[116] In a decisive rejection of this reasoning, Congress passed the FAA in 1925.[117]

The FAA was first conceptualized by cotton merchant Charles Bernheimer and drafted by New York attorney Julius Cohen as an extension of the New York Arbitration Act of 1920's coverage to federal courts.[118] The New York Act rendered all arbitration agreements fully enforceable.[119] In 1922, the pair mustered up enough support to bring their new bill before the 68th Congress, with Senator Thomas Sterling introducing Bill S. 4214.[120] Because contextual interpretation emphasizes the original meaning of a statutory text, it is necessary to include the exact quotes of the FAA's proponents. Bernheimer represented the "business" point of view[121] for the Act's central justification:

> The statement I make is backed up by 73 *commercial organizations* in this country who have . . . approved of the bill before you gentlemen. . . . *Speaking for those . . . who are engaged in business* . . . [arbitration] preserves *business* friendships. It raises *business* standards. It maintains *business* honor, prevents unnecessary litigation, and eliminates the law's delay by relieving our courts.[122]

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112 *Id.* at 376–77; *but cf. supra* note 28 (highlighting recent maritime perils that would have been technologically impossible for seafarers to face during the "age of the sail").
113 *Batterton*, 588 U.S. at 377.
114 *See, e.g.*, Tobey v. County of Bristol, 23 F. Cas. 1313, 1322 (C.C.D. Mass. 1845); Bauer v. Int'l Waste Co., 87 N.E. 637, 639 (Mass. 1909).
115 *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983, n.9 (2d Cir. 1942); *see generally* Kill v. Hollister, 1 Wils 129, 95 Eng. Rep. 532 (K.B. 1746).
116 *See Kulukundis*, 126 F.2d at 983, n.9.
117 *See, e.g.*, *id.* at 985.
118 *See* Moses, *supra* note 76, at 101.
119 *Id.*
120 Sen. Thomas Sterling introduced S. 4214, the initial draft of the FAA, on Dec. 20, 1922. IMRE S. SZALAI, AN ANNOTATED LEGISLATIVE RECORD OF THE FEDERAL ARBITRATION ACT 21 (2021).
121 *Arbitration of Interstate Commercial Disputes: Hearings on S. 1005 and H.R. 646 Before the J. Comm. of Subcomms. on the Judiciary*, 68th Cong. 5–6 (1924) (statement of Charles L. Bernheimer, New York State Chamber of Commerce) [hereinafter 1924 Hearings].
122 *Id.* at 7–8 (emphasis added).

Meanwhile, Cohen presented the legal justification for the Act, stating in relevant part:

> The statute as drawn establishes a *procedure* in the Federal courts for the enforcement of arbitration agreements. . . . This principle is so evident and so firmly established that it can not [sic] be seriously disputed. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. [*W*]*hether or not an arbitration agreement is to be enforced is a question of the law of procedure* and is determined by the law of the jurisdiction wherein the remedy is sought.[123]

It could not be clearer from the testimony of the FAA's two principal proponents that senators understood the Act to be (1) for the benefit of businessmen and commercial interests to settle disputes among themselves more efficiently and discreetly and (2) a federal procedural law that would not preempt state law.

In its original form, the FAA lacked a § 1 labor exemption.[124] However, this was quickly remedied after labor representatives became vocal about their disapproval of the Bill.[125] Senator Sterling, Bernheimer, Cohen, and William H.H. Piatt—who was the chairman of the committee of commerce, trade, and commercial law for the American Bar Association (ABA)—all agreed to add a broad labor exemption.[126] During Piatt's statement, he reassured the senators:

> [T]here has been an objection raised against [the FAA] that I think should be met here, to wit, the official head, or whatever he is, of that part of the labor union that has to do with the ocean—the seamen—[Andrew Furuseth]. . . . He has objected to it, and criticized it on the ground that the bill . . . would affect, in fact compel, arbitration of the matters of agreement between the stevedores and their employers. Now, *it was not the intention of the bill to have any such effect as that*. *<u>It was not the intention of this bill to make an industrial arbitration in any sense</u>*; and so I suggest that in as far as the committee is concerned . . . they should add to the bill the following language, "*<u>but nothing herein contained shall apply to seamen</u> or any class of workers in interstate and foreign commerce.*" *It is not intended that this shall be an act referring to labor disputes, <u>at all</u>*. It is purely an act to give the merchants the right or the privilege to sit down and agreeing with each other as to what their damages are, if they want to do it.[127]

But even after this, one senator raised reservations to Piatt about the bill's compulsion of involuntary contracts.[128] Senator Sterling interjected, "Let me suggest [Piatt] . . . that in a way and by your suggested amendment in regard to the labor associations; that they shall not be

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[123] *Id.* at 37 (emphasis added) (legal justification as presented by Julius Cohen).
[124] *See* SZALAI, *supra* note 120, at 22.
[125] C.O. Bailey, a prominent attorney representing several railroad workers, wrote to Sen. Sterling stating his objections while Andrew Furuseth, the president of the Int'l Seamen's Union, wrote an article in the New York Times criticizing the Bill. *See id.* at 55 n.47, 56 n.48 and accompanying text.
[126] *See id.* at 55 n.47, 56 n.49.
[127] 1923 Hearings, *supra* note 2, at 9 (emphasis added).
[128] Sen. Thomas J. Walsh raises the objection, while Sen. Richard P. Ernst agrees. *See id.* at 9–10.

considered."[129] Afterwards, a solicited[130] letter from then-U.S. Secretary of Commerce Herbert Hoover was introduced to emphasize Piatt's above statement.[131] It was also this letter that unwittingly added the language "contracts of employment" to Piatt's suggestion:

> If objection appears to the inclusion of *workers' contracts* in the law's scheme, it might be well amended by stating "*but nothing herein contained shall apply to* <u>*contracts of employment of*</u> *seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce.*" If the bill proves to have some defects and we know most legislative measures do, it might well . . . be passed and amended later in light of further experience.[132]

Ultimately, this is the exact language that Congress adopted.[133] Though, the proponents could not have been more explicit in the prevailing meaning of Hoover's words: "It was not the intention of this bill to make an industrial arbitration in any sense."[134] Yet, it only took a few decades to wipe the FAA's original legislative understanding from the minds of the federal judiciary.

D. Conflating a Federal Policy Favoring Arbitration

The FAA's expansion originated from a long line of cases interpreting the statute as potentially substantive rather than procedural,[135] despite Cohen's above statement to the contrary.[136] Eventually, the Supreme Court handed down *Southland Corp. v. Keating* in 1984, officially severing the FAA from its original meaning indefinitely.[137] The *Southland* Court announced that the enforceability of arbitration pursuant to the FAA is "a question of substantive federal law" and preempted conflicting state laws through the Supremacy Clause.[138] The majority rejected Justice O'Connor's dissent from a legislative history standpoint as ambiguous, reasoning that Congress would not have limited the act's application to contracts "involving

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[129] *Id.* at 10.
[130] Archival sources strongly suggest that Bernheimer asked Hoover to submit this letter. *See* SZALAI, *supra* note 120, at 61 n.51.
[131] Mr. Hoover submitted letters to both the 1923 and 1924 hearings and reiterated the sense of emergency shared among ABA members to pass the Bill and amend it later. *See* 1923 Hearings, *supra* note 2, at 14; 1924 Hearings, *supra* note 121, at 20–21.
[132] 1923 Hearings, *supra* note 2, at 14 (emphasis added).
[133] 9 U.S.C.A. § 1 (The committee merely switched the order of "foreign" and "interstate").
[134] *See supra* text accompanying note 127.
[135] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.* held that federal courts could apply the FAA to diversity cases, instead of borrowing state procedure. The Court ignored legislative history, reasoning that Congress derived its power to pass the FAA through the Commerce Clause. This, in turn, opened the door to courts interpreting the FAA's function as a substantive law rather than a procedural one. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404–05 (1967); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp., 460 U.S. 1, 24 (1983) (stating in dicta that "[t]he effect [of § 2 of the FAA] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.").
[136] *See supra* text accompanying note 123.
[137] Southland Corp. v. Keating, 465 U.S. 1 (1984).
[138] *Id.* at 12, 16; *see also* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (holding that state laws which seek to limit arbitration are preempted by the FAA).

commerce" if it were not exercising its Commerce Clause power.[139] Now that the FAA preempted any anti-arbitration state law, only § 1 of the FAA could prevent an employer from subjecting a seaman to an arbitration agreement. But this final foothold began to slip as well.

Two cases, *Gilmer v. Interstate/Johnson Lane Corp.*[140] and *Circuit City Stores, Inc. v. Adams*,[141] together delineate the extent of the Supreme Court's relevant interpretation of the § 1 exemption. The first case deals with an Age Discrimination in Employment Act (ADEA) claim.[142] Mr. Gilmer was required to register with the New York Stock Exchange (NYSE) as part of his employment with Interstate/Johnson Lane Corp.[143] The registration application for the NYSE contained an arbitration clause.[144] Reasserting its holding in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[145] that "statutory claims may be the subject of an arbitration agreement,"[146] the Supreme Court affirmed the clause's enforceability.[147] In a footnote, the *Gilmer* Court distinguished § 1 from the current case: "[I]t would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment."[148] Rather, the Court pointed out, Mr. Gilmer's arbitration clause was cabined in the "securities registration application" between him and the third party, the NYSE.[149] In *Circuit City Stores*, the Supreme Court held that the plaintiff, an electronics retailer, did not fall within the scope of § 1.[150] The Court reasoned that if § 1 applied to all employees, then "the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless."[151] In sum, *Gilmer*, in dicta, limited the § 1 exemption to arbitration agreements between an employee and their employer, while *Circuit City Stores* limited the provision to transportation workers.

The conclusion of this primer leaves the wards of the admiralty doctrine tentatively crippled and the statutory exemption limited well beyond its legislative intent, though not necessarily beyond the original meaning of its text.[152] But despite the relatively restrained

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[139] *Keating*, 465 U.S. at 14–15.
[140] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[141] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[142] An ADEA claim is a statutory claim arising from 29 U.S.C. §§ 621–34.
[143] *Gilmer*, 500 U.S. at 23.
[144] *Id.*
[145] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).
[146] *Gilmer*, 500 U.S. at 26.
[147] *Id.* at 35.
[148] *Id.* at 25 n.2.
[149] *Id.*
[150] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 119 (2001).
[151] *Id.* at 113. Notably, the scope of *Circuit City Stores* was limited to restricting the "categories set forth in § 1." *Id.* at 122.
[152] The legislative history reveals Congress's intention to avoid "industrial arbitration" altogether. *See supra* text accompanying note 127. However, the actual text adopted in § 1 does categorize exempted workers. As *Circuit City Stores* holds, this implies a distinction between interstate workers and intrastate workers, excluding the latter. *See supra* text accompanying note 151. *Gilmer*, on the other hand, limits "contracts of employment" to contracts specifically between a worker and their employer. *See supra* text accompanying notes 148–49. This argument might fall short of a contextual interpretation of § 1, since a contract between a worker

interpretations of § 1 in *Gilmer* and *Circuit City Stores*, courts were left to speculate how narrow the exemption truly was.

V. The Current Enforceability of Arbitration on Seamen

Faced with the question of whether to enforce arbitration on seamen, courts of the early 2000s appeared to believe that § 1 of the FAA automatically exempted seamen from its application.[153] For example, in the 2002 case *Buckley v. Nabors Drilling USA, Inc.*, Judge Kent rejected the defendant Nabors Offshore Corporation's argument that the language "engaged in . . . interstate commerce" also modified "seamen," and was not limited to "any other class of workers."[154] In finding the defendant's argument "a strained effort to overcome the formidable textual obstacle posed by § 1," Judge Kent proclaimed, "It is quite apparent from the plain language of § 1 that seamen are explicitly beyond the FAA's reach."[155] Likewise, in the 2003 Fifth Circuit case *Brown v. Nabors Offshore Corp.*, Judge Davis rejected an identical argument from the same defendant.[156] In support of his holding that seamen are exempt from the FAA "even if [they were] not 'engaged in . . . interstate commerce,'" Judge Davis broadly asserted that "employment contracts of the enumerated workers—seamen and railroad workers—are, without limitation, exempt from the application of FAA."[157] However, both *Buckley* and *Brown* involved a mandatory pre-injury arbitration agreement,[158] and their strict focus on § 1's text[159] was not sufficient to patch the remaining holes in the seamen exemption's tapestry.[160]

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and a third-party could nonetheless "contemplate" the worker's employment. *See* discussion *infra* Part VI.A.

153 *But see* Endriss v. Eklof Marine Corp., No. 96 Civ. 3137(KMW), 1998 WL 1085911 (S.D.N.Y. July 28, 1998).

154 Buckley v. Nabors Drilling USA, Inc., 190 F. Supp. 2d 958, 961 (S.D. Tex. 2002).

155 *Id.* at 960–61.

156 *See* Brown v. Nabors Offshore Corp., 339 F.3d 391, 393 (5th Cir. 2003).

157 *Id.* at 394.

158 *But see* Romero v. Watkins and Shepard Trucking, Inc., 9 F.4th 1097, 1101 (9th Cir. 2021) (using broad language to hold that an interstate worker's *nonmandatory* pre-injury arbitration agreement fell under § 1).

159 The core of *Buckley* and *Brown*'s reasoning was based on the text of the exemption itself, supported with jurisprudence, and not on the exemption's historical context or meaning. *See Buckley*, 190 F. Supp. 2d at 960–62; *Brown*, 339 F.3d at 393–94.

160 In addition to the one introduced in the following case, two other anomalies exist where a seaman may be compelled to arbitrate their claims: First, the New York Convention will compel a foreign seaman to arbitrate under certain circumstances. *See generally* Francisco v. Stolt Achievement MT, 293 F.3d 270 (5th Cir. 2002). Second, and far more disturbing, even though a seaman's arbitration agreement may be unenforceable under § 1 of the FAA, some courts speculate that state law may nevertheless supplement and compel the seaman to arbitrate. *See, e.g.*, Rodgers-Rouzier v. American Queen S.S. Operating Co., 104 F.4th 978, 986 (7th Cir. 2024); Palcko v. Airborne Express, Inc., 372 F.3d 588, 595–96 (3d Cir. 2004); *Romero*, 9 F.4th at 1099, 1101 (compelling arbitration anyways under a Nevada governing law clause); *see also* LeRoy Lambert & Brian McEwing, *Enforcement of Arbitration Agreements in Seafarer Employment Contracts: May State Law Arbitration Statutes Apply?*, 49 Tul. Mar. L.J. 55, 77–84

A. *Terrebonne v. K-Sea*: A Troubling Development

Terrebonne v. K-Sea Transp. Corp. marked a concerning moment for seamen's rights.[161] After five years of litigation centered on whether or not Mr. Terrebonne, a seaman, fell within the scope of the seamen exemption, the Fifth Circuit shirked its broad language in *Brown* and held that he did not.[162] In November 2000, Mr. Terrebonne was employed by K-Sea Transp. Corp. (hereinafter "K-Sea") "as a crew member aboard its tug MARYLAND."[163] On November 3, Mr. Terrebonne was injured while attempting to lift heavy machinery.[164] After undergoing surgery to repair a severe hernia, he returned to work on January 26, 2001.[165] On March 12, 2001, K-Sea approached Mr. Terrebonne with a contract titled "Partial Release and Claims Arbitration Agreement."[166] Under the agreement, K-Sea settled with Mr. Terrebonne for his previous injuries in the amount of $2,362.56 and required him to arbitrate any future claims "that may develop" from the incident.[167] Mr. Terrebonne agreed.[168] However, sometime in April 2001, his hernia redeveloped, requiring medical attention a month later.[169] At this point, Mr. Terrebonne sued K-Sea for maintenance and cure, unseaworthiness, and Jones Act negligence.[170]

The issue of arbitration arose when K-Sea moved the district court to compel arbitration pursuant to the aforementioned arbitration agreement.[171] In rebuttal, Mr. Terrebonne argued that the agreement was unenforceable under § 1 of the FAA "because it involves a seaman's employment contract."[172] In the alternative, "the Jones Act . . . by virtue of its incorporation of . . . [§§ 56 and 55 of FELA], voided the agreement."[173] While § 56 outlines venue selection,[174] § 55 prevents employers from limiting the venue provision's scope with a forum selection clause.[175] A long series of events brought Mr. Terrebonne's arguments before the Fifth Circuit: First, the district court granted K-Sea's motion; Mr. Terrebonne then attempted to file his claims in state court; Mr. Terrebonne agreed to dismiss and submit to arbitration; the arbitrator denied *all* of Mr.

(2025) (critiquing arguments against the enforcement of seamen arbitration agreements under state law where those agreements fall under § 1).
161 Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271 (5th Cir. 2007).
162 *See id.* at 274–77, 86–87.
163 *Id.* at 274.
164 *Id.*
165 *Id.*
166 *Terrebonne*, 477 F.3d at 274.
167 *Id.*
168 *Id.* The opinion makes no mention as to whether Mr. Terrebonne was aware of what he was signing, or whether he knew of his right not to sign the agreement or seek counsel.
169 *Id.*
170 *Id.*
171 *Terrebonne*, 477 F.3d at 275.
172 *Id.*
173 *Id.* (citations omitted).
174 *See supra* note 61 (noting that forum selection is reserved for the seaman).
175 *See supra* notes 58, 61; *see also* Boyd v. Grand Trunk Western R.R. Co., 338 U.S. 263, 264–66 (1949).

Terrebonne's claims; K-Sea moved to reopen the case for the district court to confirm the arbitral award, which it did; and finally, Mr. Terrebonne appealed.[176]

On appeal, the Fifth Circuit reviewed the lower court's ruling on K-Sea's original motion *de novo*.[177] Judge Garwood began by turning to Mr. Terrebonne's first argument, that because his arbitration agreement covered his maintenance and cure claims, it was "subsumed into his employment contract" and, therefore, unenforceable under § 1.[178] The judge's counter-argument bears so much weight herein that it ought to appear in its original language:

> We reject, however, Terrebonne's assertion that these maintenance and cure claims necessarily implicate his employment contract. Certainly, there is case law using generalized language connecting maintenance and cure to the seaman's employment contract . . . . Yet, we have clarified that maintenance and cure is an intrinsic part of the employment *relationship,* separate from the actual employment *contract*. . . . In other words, maintenance and cure . . . cannot be contracted away.[179]

Because the arbitration contract contemplated the employment relationship, but not the original employment contract, he argued, it does not fall within the scope of § 1.[180]

Judge Garwood then proceeded into a lengthy rebuttal of Mr. Terrebonne's second argument, that the arbitration agreement was prohibited under § 55, by virtue of § 56, of FELA;[181] although, the judge's reasoning is now evidently preempted. In brief, Judge Garwood argued that § 56 was never incorporated into the Jones Act, since at that time § 30104 furnished a subsection dedicated to venue.[182] In 2008, however, Congress amended the Jones Act to repeal its venue subsection in its entirety, presumably because § 56 rendered it unnecessary.[183] In the end, Judge Garwood's questionable distinction between the employment relationship and employment contract became key to the holding of its progeny.

B. The Confounding Case of *Harrington v. Atl. Sounding*

If *Terrebonne* ripped the seamen exemption's tapestry, then *Harrington v. Atl. Sounding, Inc.* tore it asunder, fully exposing the exemption's concealed loophole.[184] In *Harrington*, Mr. Harrington signed an employment contract to work as a seaman for Atlantic Sounding Co. (hereinafter "Atlantic Sounding").[185] In April 2005, Mr. Harrington suffered a back injury aboard

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176 *See Terrebonne*, 477 F.3d at 275–76.
177 *Id.* at 277; *See, e.g.*, Freudensprung v. Offshore Tech. Servs., Inc., 379 F.3d 327, 337 (5th Cir. 2004).
178 *Terrebonne*, 477 F.3d at 278–79.
179 *Id.* at 279 (citations omitted).
180 *See id.* at 280.
181 *Id.* at 280–84.
182 *See id.* at 281.
183 National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 3521, 122 Stat. 3, 596 (amending 46 U.S.C. § 30104 (2006) to strike "(b.) Venue.--An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located.").
184 Harrington v. Atl. Sounding, Inc., 602 F.3d 113 (2d Cir. 2010).
185 *Id.* at 115.

Atlantic Sounding's vessel CANDACE.[186] Atlantic Sounding promptly began sending Mr. Harrington maintenance and cure payments of $20 per day and covered his medical expenses.[187] Mr. Harrington testified that during his treatment, his doctor prescribed painkillers and cortisone to him, and that he began drinking an excessive amount of vodka every day.[188] In early July 2005, after his diagnosis of multiple herniated discs requiring lumbar surgery, Mr. Harrington requested additional financial support from Atlantic Sounding.[189] Only a few days later, Mr. Harrington received a document entitled "Claim Arbitration Agreement" from Atlantic Sounding.[190] The agreement stated in relevant part:

> Although [Atlantic Sounding is] obligated to pay maintenance and cure, [they] are not currently responsible or liable for any other damages under general maritime law, the Jones Act or any other applicable law. Nonetheless, [Atlantic Sounding is] prepared to make voluntary advances against settlement of any claim that could arise out of the personal injury/illness claim [Mr. Harrington has] made . . . , provided [Mr. Harrington agrees] to arbitrate any such claim under the American Arbitration Association (AAA) Rules.[191]

The agreement's cover letter alleged that "[a]lthough we are under no legal obligation to advance funds in this type of situation, [we have] approved such voluntary payment in your case, so long as you are willing to agree to arbitrate any disputes that arise from this claim."[192] Mr. Harrington testified that at no point did Atlantic Sounding "tell [him] that [he] was giving up any rights" or inform him of his right to an attorney.[193] In need of funds, Mr. Harrington underwent surgery and immediately took the agreement to a bank shortly thereafter to have it signed and notarized.[194] He continued to take his prescribed medication and to drink heavily during this time.[195] Upon his assent to the agreement, Atlantic Sounding continued to send Mr. Harrington "support checks" until January 10, 2006, and terminated his employment on January 27, 2006.[196] Mr. Harrington sued Atlantic Sounding under the Jones Act, while the latter moved to dismiss or, alternatively, to enforce arbitration.[197]

The district court denied Atlantic Sounding's motion to dismiss and turned to the question of whether the arbitration agreement was enforceable.[198] Ignoring the threshold question

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[186] *Id.*
[187] *Id.*
[188] *Id.* at 115–16.
[189] *Harrington*, 602 F.3d at 116.
[190] *Id.*
[191] *Id.* (alterations added) (omission in original).
[192] *Id.* (alterations added).
[193] *Id.* at 116, 118 (alterations in original). Mr. Harrington's affidavit said that Atlantic Sounding only told him "that they 'wanted to help [him] out because of [his] situation.'" *Id.* at 116.
[194] *Harrington*, 602 F.3d at 116–17.
[195] *Id.* at 117.
[196] *Id.*
[197] *Id.* at 113.
[198] *Id.* at 117–18.

of whether Mr. Harrington qualified for the FAA's § 1 exemption without explanation,[199] the court engaged in an unconscionability analysis under state contract law;[200] this defense renders an agreement invalid if it is found to be both procedurally and substantively "unconscionable."[201] After concluding that the agreement was indeed unconscionable, the district court held it unenforceable.[202] Atlantic Sounding appealed.[203]

On appeal and with assistance from amicus curiae, Mr. Harrington argued that under *Boyd v. Grand Trunk Western R.R. Co.*[204] the agreement was invalid as a matter of law because it violated §§ 55 and 56 of FELA, which are incorporated into his Jones Act rights.[205] Unable to rely on *Terrebonne*'s outdated argument against FELA's incorporation, Judge Walker instead distinguished *Boyd* from the instant case.[206] He reasoned that although *Boyd* concluded that forum selection clauses in post-injury agreements between seamen and their employers are unenforceable,[207] the post-injury agreement here was an agreement to arbitrate, which is distinct from a forum selection clause.[208]

Though Mr. Harrington did not raise the issue, Judge Walker then proceeded to lay out his map as to why the seamen exemption should be strictly interpreted so as not to include post-injury arbitration agreements.[209] As a preliminary matter, he recited that the FAA "reflects a liberal federal policy favoring arbitration agreements."[210] His first contention was that according to *Gilmer*, "arbitration agreements such as the one at issue in this case do not constitute

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[199] *See Harrington*, 602 F.3d at 118; *see also* § 1 (exempting from the FAA's coverage "contracts of employment of seamen").
[200] *See Harrington*, 602 F.3d at 118–19. The district court's unconscionability analysis is omitted to maintain this Comment's focus on the interpretation of the seamen exemption. After all, state unconscionability law should not come into play if the exemption applies to all solicited seamen arbitration contracts at the outset.
[201] "Unconscionability" is a common state contract defense. Procedural unconscionability occurs where the evidence suggests "unfairness in the formation of the contract." Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002). Substantive unconscionability occurs where the evidence also suggests "excessively disproportionate terms." *Id.*
[202] *Harrington*, 602 F.3d at 118–19.
[203] *Id.* at 119.
[204] Boyd v. Grand Trunk Western R.R. Co, 338 U.S. 263 (1949).
[205] *See Harrington*, 602 F.3d at 119–20; *see also supra* note 61.
[206] *Harrington*, 602 F.3d at 121.
[207] *See Boyd*, 338 U.S. at 264–66.
[208] *Harrington*, 602 F.3d at 121. Judge Calabresi based his dissent on rebutting this supposition: "The Agreement that [Atlantic Sounding] entered into with Harrington is a contract or 'device' *whose purpose is to deprive Harrington of the substantial right to choose the forum in which to bring his claim.*" *Id.* at 134. Although the author of this Comment agrees, this argument depends solely upon the weight of the wards of the admiralty doctrine, which courts have found unpersuasive by itself when pitted against the federal policy favoring arbitration. *See, e.g.*, Schreiber v. K-Sea Transp. Corp., 879 N.E.2d 733, 738 (N.Y. 2007). Hence, an argument from § 1's text, based upon its historical meaning in light of the wards of the admiralty doctrine, carries more weight.
[209] *See Harrington*, 602 F.3d at 121.
[210] *Id.*

‘contracts of employment’ where the arbitration agreement is ‘not contained’ in a broader employment agreement between the parties.”[211] Next, Judge Walker reasserted *Terrebonne*’s distinction between the employment relationship and the employment contract.[212] Last, he averred that the Supreme Court in *Circuit City Stores* “recognized that if the term ‘contracts of employment’ was read so broadly as to include independent arbitration agreements, then *every* seamen contract would be exempt from the FAA, thereby rendering ‘the separate exemption for “contracts of employment of seamen . . . ” pointless.’”[213] After partially rejecting Mr. Harrington’s unconscionability defenses, the Second Circuit’s majority remanded the case to determine the merits of his remaining arguments.[214]

VI. A New Map of the Seamen Exemption

The two case lines that obscured the historical meaning of both the wards of the admiralty doctrine and the FAA have culminated in a concerning illustration of literalism in *Terrebonne* and *Harrington*.[215] Again, interpreting a statutory text while ignoring, or misunderstanding, its original meaning leads to absurd results and “thwart[s] the obvious purpose of the statute.”[216] In opposition to the Fifth and Second Circuits, a contextual reconsideration of § 1 pleads for a broader interpretation of the seamen exemption, proves that *Terrebonne* and *Harrington* are unpersuasive, and reveals that the policies concerning the law of seamen strongly discourage the enforcement of post-injury arbitration agreements.

A. Context Pleads for a Broad Interpretation of the Seamen Exemption

Literalism results in anachronistic assumptions, reflexive only of the reviewing judge’s preferences for the statutory text’s meaning. Contextualism, as it is used in this Comment, seeks to initiate a more objective inquiry to interpret the statutory text’s meaning by attributing evidentiary significance to its original usage.[217] In the words of the Supreme Court: “[t]o defeat application of the Arbitration Act . . . the [plaintiff] must demonstrate that Congress intended to make an exception to the Arbitration Act . . . an intention discernible from the text, history, or purposes of the statute.”[218] Therefore, it becomes necessary to approach the seamen exemption’s

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[211] *Id.* (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991)). Judge Walker was noticeably selective of his quoted language.
[212] *Id.* (citing Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271, 279 (5th Cir. 2007)) (arguing that maintenance and cure, though intrinsic to the employment relationship, is separate from the actual employment contract); *see also supra* text accompanying note 179.
[213] *Harrington*, 602 F.3d at 121 (citing Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 113 (2001)). This is a misreading of *Circuit City Stores*. As discussed in Part IV.D. above, the Supreme Court in that case limited the interpretation of “seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce” and was silent on the isolated phrase “contracts of employment.” *See supra* note 151 and accompanying text.
[214] *Harrington*, 602 F.3d at 127.
[215] *See* discussion *supra* Part V.
[216] Helvering v. Hammel, 311 U.S. 504, 510–11 (1941) (alterations added) (citing United States v. Katz, 271 U.S. 354, 362 (1941)); *see also* discussion *supra* Part IV.
[217] *See supra* note 15 (defining contextualism).
[218] Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220, 227 (1987). Although this case related to the arbitrability of the RICO and Exchange Act, *id.*, this language applies equally to the arbitrability of seamen claims.

text with its historical and legislative context in mind; context that pleads for a broad interpretation of the seamen exemption.

Contrary to the *Batterton* Court, which mischaracterizes the wards of the admiralty doctrine as an outdated and derogatory judicial crutch, the doctrine's true purpose is to account for the unique conditions that seamen face. Seamen are permanently and unilaterally exposed to the perils of the sea[219] and vulnerable to the unfair bargaining practices of their fiduciary-like employers.[220] Granted, the doctrine has been used to denigrate seamen as an incapable class of laborers requiring "paternalistic" support,[221] but this argument is merely a red herring, and it is insufficient to eclipse the long history of the seaman's struggle.[222] In fact, just three months prior to *Batterton*, the Supreme Court in *Air and Liquid Sys. Corp. v. DeVries* invoked the wards of the admiralty doctrine to support its holding.[223] Not only is the doctrine still relevant for today's courts to consider, but, as exhibited earlier in this Comment, Congress also recognized the wards of the admiralty doctrine at the time it passed the FAA.[224] This, in turn, lends itself to Congress's original broad understanding and usage of the seamen exemption. The Supreme Court recognizes this point readily in *Circuit City Stores*.[225]

As to the textual meaning of the exemption itself, it is imperative to turn to the discussion of the FAA's establishment in Part IV.C. There, senators of the 68th Congress were introduced to a new federal law of procedure which intended to "preserve[] business friendships," "raise[] business standards," and "maintain[] business honor."[226] To effect this exclusive application to businessmen, proponents amended § 1 of the Act to include a broad labor exemption that sought to quell rising concerns about labor, or "industrial," applications of arbitration.[227] It is clear from the historical meaning of the wards of the admiralty doctrine and the legislative record of the

[219] *See generally supra* note 4.
[220] *See* discussion *supra* Part IV.A.
[221] *See, e.g.*, Brown v. Lull, 4 F. Cas. 401 (C.C.D. Mass. 1836) (reasoning that "[s]eamen are a class of persons remarkable for their rashness, thoughtlessness and improvidence" in granting special solicitude to the plaintiff-seaman).
[222] *See* discussion *supra* Part II (discussing the history of maintenance and cure as well as the other seamen remedies).
[223] *See* Air and Liquid Sys. Corp. v. DeVries, 586 U.S. 446, 456 (2019). Interestingly, these two cases loosely followed political lines. Alito, J., delivered the opinion in *Batterton* joined by Roberts, C.J., Thomas, Kagan, Gorsuch, and Kavanaugh, JJ., to which Ginsburg, J., filed a dissenting opinion joined by Breyer and Sotomayor, JJ. In *DeVries*, Kavanaugh, J., delivered the opinion and was joined by Roberts, C.J., Ginsburg, Breyer, Sotomayor, and Kagan, JJ. Gorsuch, J., filed a dissenting opinion joined by Thomas and Alito, JJ.
[224] *See* discussion *supra* Part IV.A. (discussing the 1872 Shipping Commissioners' Act, 1915 Seamen's Act, and 1920 Jones Act).
[225] *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120–21 (2001) (pointing to the Shipping Commissioners' Act as implying a broad exemption for seamen under § 1); *see also* New Prime Inc. v. Oliveira, 586 U.S. 105, 110 (2019).
[226] *See supra* text accompanying note 122.
[227] *See* discussion *supra* Part IV.C (discussing the historical meaning of § 1); *see also supra* text accompanying note 127.

FAA that the average senator understood § 1's phrase "contracts of employment" as exempting seamen from any arbitration agreement solicited by their employers.

Although the Supreme Court has limited § 1 as applying only to contracts between transportation employees and their employers, these limitations are not mutually exclusive with a broad interpretation of "contracts of employment."[228] Indeed, a recent Supreme Court decision broadly interpreted the term "employment" in this exact phrase, reasoning:

> [I]n 1925 the term 'contract of employment' wasn't defined in any of the (many) popular or legal dictionaries the parties cite to us. And surely that's a first hint the phrase wasn't then a term of art bearing some specialized meaning. . . . Congress used the term "contracts of employment" in a broad sense to capture *any* contract for the performance of *work* by *workers*.[229]

As such, there seems to be no discernible reason for courts to interpret the generalized term "contracts of employment" so strictly as to bind the exemption to contracts literally labeled "employment contract" rather than to the broader notion of "contracts contemplating employment." Otherwise, courts would be "playing ostrich to the substantial history behind the amendment" and rendering any future contract arising from the original employment contract immune to § 1's coverage.[230]

Based on the text, history, and original meaning of § 1, the seamen exemption establishes a broad exemption from the FAA, designating all seaman arbitration agreements solicited by their employers as prima facie unenforceable, akin to *Garrett*'s burden-shifting rule for a seaman's release.[231] To restrict the exemption to the original employment contract alone would thwart the obvious purpose of the statute.

B. Circuit Courts that Compel Seamen to Arbitrate are Unpersuasive

Both *Terrebonne* and *Harrington* are unpersuasive in their reasoning to compel a seaman's post-injury arbitration agreement. Since *Harrington* reasserts the § 1 argument laid out in *Terrebonne*, and attempts to buttress it with Supreme Court cases, only Judge Walker's opinion requires reconsideration here. As the contextual interpretation established in the previous subpart proves, the author of *Harrington* read § 1 far too literally.

To expose the true core of Judge Walker's reasoning, his supporting authorities must first be peeled back. First, the circuit judge disregarded *Gilmer*'s context. The language from *Gilmer*, which he carefully selected, is only a small portion of a lengthier footnote concluding that the plaintiff's arbitration agreement did not qualify as a "contract of employment" under § 1 simply

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[228] *See* discussion *supra* Part IV.D. (discussing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and *Circuit City Stores*, 532 U.S. 105).
[229] *See New Prime*, 586 U.S. at 114 (first emphasis added).
[230] *Circuit City Stores*, 532 U.S. at 128 (Stevens, J., dissenting). The ancient myth that ostriches stick their heads in sand is a common metaphor used to describe someone who knowingly ignores a problem. Ada McVean, *Ostriches Do Not Really Stick Their Heads in the Sand*, OFFICE FOR SCIENCE AND SOCIETY (Aug. 20, 2017), https://www.mcgill.ca/oss/ (click the search icon in the top right; then insert the article's title; it should be the first result).
[231] *See* discussion *supra* Part IV.A. (discussing *Garrett v. Moore-McCormack*, 317 U.S. 239 (1942)).

because it was executed between him and a third party, not him and his employer.[232] Moreover, "[s]everal *amici curiae* in support of Gilmer argue[d] that [§ 1] excludes from the coverage of the FAA *all* 'contracts of employment.'"[233] And since Mr. Gilmer never raised the issue in the lower courts, the *Gilmer* Court decided to "leave for another day the issue raised by *amici curiae*."[234] Hence, Judge Walker cannot rely on *Gilmer* as having settled the interpretation of "contracts of employment." Second, the circuit judge blatantly misread *Circuit City Stores*. While the Supreme Court in *Circuit City Stores* clarified that its holding was limited to restricting the "categories set forth in § 1" to interstate workers,[235] Judge Walker assumed that it strictly interpreted the phrase "contracts of employment."[236] To the contrary, the *Circuit City Stores* Court defended a broad meaning of that precise phrase in proposing that Congress exempted interstate workers because they were already covered under "statutes specific to them."[237] In struggling to support his reasoning with authoritative sources, the author of *Harrington* reads his own meaning into the words of *Gilmer* and *Circuit City Stores*, serving as a prime example of the Second Circuit's devolution into literalism.

This simplifies *Harrington* to its sole argument: *Terrebonne*. As established in Part V.A., Judge Garwood, the author of *Terrebonne*, reasoned that an arbitration agreement for maintenance and cure claims does not "necessarily implicate [the seaman's] employment contract."[238] This is because "maintenance and cure is an intrinsic part of the employment *relationship*, separate from the actual employment *contract*."[239] What appears to be a sound argument is actually nothing more than a sophistically false distinction. The employment contract is the but-for cause of the employment relationship and all the claims that arise therefrom. In this way, the employment relationship is inseparable from the employment contract, as the former can never exist in isolation. In other words, "[t]he contractual relationship between the parties is a but-for cause of [the] justiciable legal controversy between the parties."[240] The Supreme Court itself argues that since Congress's authority to govern § 2 flows from the Commerce Clause, "it is a permissible inference that the employment contracts of [interstate] workers in § 1 were excluded from the FAA precisely because of Congress' . . . authority to govern the *employment relationships* at issue."[241] Hence, because seamen's claims necessarily arise from their contractual relationship with their employer,[242] any agreement

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[232] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 n.2 (1991).
[233] *Id.* (emphasis in original).
[234] *Id.*
[235] *See supra* note 151 and accompanying text.
[236] *See supra* text accompanying note 213.
[237] Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 120–21 (2001) (citing the Shipping Commissioners' Act of 1872, which served as an alternative grievance procedure for seamen).
[238] *See supra* text accompanying note 179.
[239] *See supra* text accompanying note 179.
[240] Viking River Cruises, Inc. v. Moriana, 596 U.S. 639, 652 n.4 (2022).
[241] *Circuit City Stores*, 532 U.S. at 120. Note also that the Supreme Court in this case consistently refers to § 1 as covering "employment relationships." *Id.* at 116, 120, 122–23, 136.
[242] "Maintenance and cure is a contractual form of compensation given by general maritime law to a seaman who falls ill while in the service of his vessel. The shipowner's obligation is deep-rooted in maritime law and is an incident or *implied term of a contract for maritime*

requiring arbitration of such claims modifies the original employment contract and falls squarely within the FAA's § 1 exemption.

Leaving *Terrebonne* and *Harrington* without any further reasoning, the judicial authors of these opinions are reduced to misrepresenting § 1's text, historical jurisprudence, and governing law by imputing their own meaning to each. Put another way, both judges exercised fallacious literalism.

C. Policy Arguments: Reframing *Schreiber v. K*-Sea's Balancing Test

Before *Terrebonne*, when courts found the question of "[w]hether the exclusion of [§ 1] extends to an ad hoc, post-injury agreement . . . far from clear," one New York court engaged in a balancing test to determine the answer.[243] In *Schreiber v. K-Sea Transp. Corp.*, the New York Court of Appeals weighed the wards of the admiralty doctrine against the federal policy favoring arbitration.[244] *Schreiber* contrasted with other pre-*Terrebonne* courts, which adopted a more direct approach, interpreting the seamen exemption narrowly and without any consideration of the doctrine.[245] No doubt pressured by the choir of lower courts, the *Schreiber* Court concluded that § 1's narrow construction together with the wards of the admiralty doctrine did not "outweigh[] the policy favoring arbitration."[246] Despite this, *Schreiber*'s balancing test invites further examination of the policy considerations underlying the seamen exemption. Yet again, context reveals that the policies concerning the law of seamen strongly discourage the enforcement of post-injury arbitration agreements.

While the above arguments dispose of the *Schreiber* Court's narrow construction of § 1, the court's consideration of the wards of the admiralty doctrine was equally inadequate.[247] As previously noted, *Schreiber*'s mischaracterization of the wards of the admiralty doctrine undergirded *Batterton*'s treatment of it, reducing the doctrine to an outdated trope based on paternalistic stereotypes about seamen.[248] In truth, the doctrine is rooted in the unique and dangerous circumstances of the seaman's employment and constitutes a significant policy consideration[249] capable of shifting burdens of proof.[250] These justifying circumstances persist today, as new technology brings with it new ways to imperil and isolate seamen.[251] And even though courts have not formally recognized the wards of the admiralty doctrine's burden-shifting

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employment." ROBERT FORCE & MARTIN J. NORRIS, 1 THE LAW OF SEAMEN § 26:1 (5th ed. 2024) (emphasis added).

[243] Schreiber v. K-Sea Transp. Corp., 814 N.Y.S.2d 124, 130 (N.Y. App. Div. 2006) *aff'd but criticized by* 879 N.E.2d 733 (N.Y. 2007).

[244] *See* Schreiber v. K-Sea Transp. Corp., 879 N.E.2d 733, 738 (N.Y. 2007).

[245] *See* Garza Nunez v. Weeks Marine, Inc., No. 06-3777, 2007 WL 496855, at *5 (E.D. La. Feb. 13, 2007); Barbieri v. K-Sea Transp. Corp., No. 1:05-cv-04950-EVN-MDG, 2006 WL 3751215, at *7 (E.D.N.Y. Dec. 19, 2006); Endriss v. Eklof Marine Corp., No. 96 Civ. 3137(KMW), 1998 WL 1085911, at *4 (S.D.N.Y. July 28, 1998).

[246] *See Schreiber*, 879 N.E.2d at 736–38.

[247] *See generally supra* text accompanying notes 106–08.

[248] *See* discussion *supra* Part IV.B.

[249] See Part IV.A. for a discussion on the doctrine's justifications.

[250] *See supra* text accompanying note 92–94.

[251] *See supra* note 28.

ability in proving the enforceability of arbitration agreements, the doctrine nevertheless demands strong deference for seamen in those cases.[252]

As discussed in Part II, courts protect the seaman's right to select the forum in which to bring their claims.[253] Furthermore, when analyzing a forum's ability to adequately settle the dispute in question, courts will consider the private interest of the parties as well as the public interest.[254] In light of this, arbitration is clearly not an appropriate forum for the seaman, whose claims bear an existential risk as opposed to their employer's mere financial risk. Arbitration's limitations on discovery, tendency to encourage more litigation arising from issues of enforceability and unconscionability in employment settings, inability to account for disparities in bargaining power, additional costs, lack of a guarantee for a qualified magistrate, lack of oversight, and lack of appealability all result in a grossly inadequate forum for the seaman to resolve his claims.[255] Additionally, soliciting a seaman to arbitrate his future claims shortly after he is injured, without his usual wage, and while he desperately depends upon his maintenance and cure payments, resembles a prima facie case of financial duress. As such, courts should presume, under the wards of the admiralty doctrine, the Jones Act's incorporation of FELA, and § 1 that seamen reserve their right to choose their forum.

With the correct interpretation of § 1 and a revived wards of the admiralty doctrine, courts like *Schreiber* would always find the policy favoring arbitration outweighed when a seaman has been subjected to an arbitration agreement, *whether pre- or post-injury*. And to *Batterton*'s delight, this reframing would serve the double effect of promoting "Congress's persistent pursuit of 'uniformity in the exercise of admiralty jurisdiction.'"[256]

VII. Rediscovering the Seaman's "Tahiti"

Unlike the metaphor to a distant text in the introduction, the topic of this Comment is anything but. As demonstrated above, the unique dangers that seamen continue to confront and their financial dependence on employers gave rise to rights and remedies tailored to resolution in a court of law. Pursuant to this, the historical policies protecting seamen, found in judicial opinions and legislative records alike, secure a special place of solace for the seagoing worker. It is thus the duty of the courts, who act as the guardians of this special solicitude, to protect seamen from exploitation and uphold the wards of the admiralty doctrine. But as a federal pro-arbitration mood has arisen from the FAA, modern courts have circumvented the Act's exemption for seamen. Today, courts find motions to compel arbitration on seamen more palatable than ever before, all while ignoring the seamen exemption's implications to the contrary.[257] Given its due, a contextual reconsideration of the exemption's text, history, and purpose pleads for an exemption that preempts an employer from soliciting any arbitration

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[252] *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991) (declaring that a plaintiff shall not be forced to arbitrate if "Congress intended to preclude a waiver of a judicial forum for [their] claims," an intention "discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes").
[253] *See supra* note 61.
[254] *See, e.g.*, Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981) (referring to this determination as "*forum non conveniens*").
[255] *See* discussion *supra* Part III.
[256] Dutra Grp. v. Batterton, 588 U.S. 358, 361 (2019).
[257] *See* cases cited *supra* note 13 (all of which reject § 1's application).

agreement from a seaman; proves that modern courts are unpersuasive in rejecting this interpretation; and reveals policy concerns supporting these conclusions.[258] This historical context, or "Tahiti,"[259] is what modern courts have unjustifiably abandoned in favor of unabashed literalism.

There remains one case, however, that strikes a final hopeful tone: *Hill v. Jackson Offshore Holdings, LLC*.[260] In *Hill*, Judge Zaney reasoned that Mr. Hill, a seaman who asserted fraud and duress in signing a post-injury arbitration agreement,[261] had successfully challenged both the agreement and its delegation clause.[262] As such, the unconscionability determination fell to the court.[263] In holding that fraud and duress were "certainly . . . plausible" in this case, Judge Zaney denied the defendant's motion to compel arbitration and ordered depositions from the parties to discover additional facts.[264] Mr. Hill's employer, Jackson Offshore Holdings, LLC, appealed to the Fifth Circuit.[265] At the time of this Comment's writing, oral argument took place before the circuit court on February 26, 2025, and the panel's opinion remains unknown.[266] Thus, the chance to correct *Terrebonne* and *Harrington*'s mistakes falls to the Fifth Circuit in *Hill*.

This Comment urges the circuit court to apply the seamen exemption to this case. A proper consideration of the wards of the admiralty doctrine and the legislative meaning of the FAA engenders a § 1 interpretation that demands it. To borrow Melvillian language: reconsider the maps handed down that require flippant reluctance in the application of the FAA's seamen exemption. Take not their gilded assurances as granted, for here dreaded creatures lurk—creatures of misinterpretation who will swallow you just as well. God keep thee! Push not off from the words of Mr. Furuseth:

> [T]his bill provides for reintroduction of forced or involuntary labor, if the freeman through his necessities shall be induced to sign. Will such contracts be signed? Esau agreed, because he was hungry. . . . The personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign, and so with sundry other workers in "Interstate and Foreign Commerce."[267]

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[258] *See* discussion *supra* Part VI.
[259] *See supra* text accompanying note 1.
[260] Hill v. Jackson Offshore Holdings, LLC, No. 24-994, 2024 WL 3845976 (E.D. La. Aug. 15, 2024).
[261] *Id.* at *2–3.
[262] *Id.* at *4. Where the plaintiff fails to challenge an arbitration agreement's delegation clause, an arbitrator must decide the issue, including whether the agreement itself is enforceable. *See* Rent-A-Ctr., W., Inc. v. Jackson, 561 U.S. 63, 71 (2010).
[263] *Hill*, 2024 WL 3845976 at *4.
[264] *Id.*
[265] *See* Notice of Appeal, Hill v. Jackson Offshore Holdings, LLC, (E.D. La. Aug. 15, 2024), No. 2:24-CV-00994 (docket proceeding no. 1).
[266] *See* Hill v. Jackson Offshore Holdings, LLC, (E.D. La. Aug. 15, 2024), No. 2:24-CV-00994 (docket proceeding no. 49).
[267] INT'L SEAMEN'S UNION OF AM., PROCEEDINGS OF THE TWENTY-SIXTH ANNUAL CONVENTION OF THE INTERNATIONAL SEAMEN'S UNION OF AMERICA 203–04 (1923).